

IN THE ADMINISTRATIVE REVIEW TRIBUNAL
MELBOURNE REGISTRY
INTELLIGENCE AND SECURITY JURISDICTIONAL AREA

ART 2025/4916

FRASER TWEEDALE
Applicant

CEO, SERVICES AUSTRALIA
Respondent

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Lodged on behalf of the Respondent

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8.	<i>Re Maher and Attorney-General's Department</i> [1985] AATA 180	[41]	532 – 549
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Freedom of Information Act 1982

No. 3, 1982

Compilation No. 121

Compilation date: 1 January 2026

Includes amendments: Act No. 62, 2025

Prepared by the Office of Parliamentary Counsel, Canberra

Part III—Access to documents

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Section 11A

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:

- (a) a conditionally exempt document; and
- (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of ***exempt document*** in subsection 4(1).

Section 11B

11B Public interest exemptions—factors*Scope*

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Section 11C

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

11C Publication of information in accessed documents

Scope

- (1) This section applies to information if an agency or Minister gives a person access to a document under section 11A containing the information, except in the case of any of the following:
- (a) personal information about any person, if it would be unreasonable to publish the information;
 - (b) information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information;
 - (c) other information of a kind determined by the Information Commissioner under subsection (2), if it would be unreasonable to publish the information;
 - (d) any information, if it is not reasonably practicable to publish the information under this section because of the extent of any modifications to a document (or documents) necessary to delete information mentioned in paragraphs (a) to (c).
- (2) The Information Commissioner may, by legislative instrument, make a determination for the purposes of paragraph (1)(c).

Publication

- (3) The agency, or the Minister, must publish the information to members of the public generally on a website by:
- (a) making the information available for downloading from the website; or
 - (b) publishing on the website a link to another website, from which the information can be downloaded; or

Division 2—Exemptions

33 Documents affecting national security, defence or international relations

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:
 - (i) the security of the Commonwealth;
 - (ii) the defence of the Commonwealth; or
 - (iii) the international relations of the Commonwealth; or
- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

Note: See also subsection 4(10).

34 Cabinet documents

General rules

- (1) A document is an exempt document if:
 - (a) both of the following are satisfied:
 - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
 - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
 - (b) it is an official record of the Cabinet; or
 - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or

47E Public interest conditional exemptions—certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47F Public interest conditional exemptions—personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;

Section 61

professional privilege that anyone may make in relation to that document.

61 Onus

- (1) In proceedings under this Part for review of a decision in relation to a request, or in relation to an application under section 48 (a *personal records application*):
 - (a) if an agency or a Minister applied for the review—the agency or Minister has the onus of establishing that the decision is not justified, or that the Tribunal should give a decision adverse to the applicant in relation to the request or the personal records application; or
 - (b) if the applicant in relation to the request or the personal records application applied for the review—the agency to which, or the Minister to whom, the request or personal records application was made has the onus of establishing that the decision is justified, or that the Tribunal should give a decision adverse to the applicant.
- (2) However, in proceedings under this Part that relate to a decision to give access to a document to which a consultation requirement applies under section 26A, 27 or 27A, an affected third party for the document in relation to which the decision was made has, if the affected third party is a party to the proceeding, the onus of establishing that:
 - (a) a decision refusing to give access to the document is justified; or
 - (b) the Tribunal should give a decision adverse to the person who made the relevant request.

Note: For *affected third party*, see section 53C.

61A Modification of the *Administrative Review Tribunal Act 2024*

- (1) The *Administrative Review Tribunal Act 2024* applies to proceedings under this Part as if a reference to the decision-maker in the following provisions of that Act were a reference to the agency or Minister who made the IC reviewable decision:



Administrative Review Tribunal Act 2024

No. 40, 2024

Compilation No. 5

Compilation date: 18 May 2026

Includes amendments: Act No. 3, 2026

Prepared by the Office of Parliamentary Counsel, Canberra

Section 103

- (6) If a party applies under subsection (5) and the Tribunal considers that the application was dismissed in error, the Tribunal may reinstate the application and make such orders as appear to the Tribunal to be appropriate in the circumstances.

Parties can apply for reinstatement in other specified circumstances

- (7) If the application is dismissed under:
- (a) section 95 (applicant may withdraw application); or
 - (b) section 99 (Tribunal may dismiss application if applicant does not appear); or
 - (c) section 100 (Tribunal may dismiss application if applicant fails to comply with order etc.);
- a party to the proceeding in relation to the application may apply to the Tribunal for reinstatement of the application within 28 days after the party receives notice that the application is dismissed (or such longer period as the Tribunal, in special circumstances, allows).
- (8) However, the applicant cannot apply if the application is dismissed under section 95 (applicant may withdraw application).
- (9) If a party applies under subsection (7) and the Tribunal considers it appropriate to reinstate the application, the Tribunal may reinstate the application and make such orders as appear to the Tribunal to be appropriate in the circumstances.

Subdivision B—Decisions agreed by parties

103 If parties reach agreement—review of decisions only

Tribunal may make decision agreed by parties

- (1) If, at any time:
- (a) the parties to a proceeding for review of a decision agree on the terms of a decision of the Tribunal:
 - (i) in the proceeding; or

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- (ii) in relation to a part of the proceeding; or
 - (iii) in relation to a matter arising out of the proceeding; that would be acceptable to the parties; and
 - (b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and given to the Tribunal; and
 - (c) if the terms of the agreement are signed in a dispute resolution process under Subdivision C of Division 6—7 days pass after the terms of the agreement are given to the Tribunal and none of the parties has notified the Tribunal in writing that the party wishes to withdraw from the agreement; and
 - (d) the Tribunal is satisfied that a decision in the terms of the agreement or consistent with those terms would be within the powers of the Tribunal;
- the Tribunal may act in accordance with subsection (2) or (3).

Decision agreed by parties

- (2) If the agreement reached is an agreement on the terms of a decision of the Tribunal in the proceeding, the Tribunal may, without holding or completing the hearing of the proceeding, make a decision in accordance with those terms.

Tribunal does not need to deal with agreed part or matter

- (3) If the agreement relates to:
 - (a) a part of the proceeding; or
 - (b) a matter arising out of the proceeding;the Tribunal may, in its decision in the proceeding, give effect to the terms of the agreement without dealing (or further dealing) with that part or that matter at the hearing of the proceeding.

Variation or revocation of decision

- (4) The Tribunal may vary or revoke a decision in relation to a proceeding, to the extent the decision is made in accordance with subsection (2) or (3), if:

- (a) the parties to the proceeding reach agreement on the variation or revocation; and
- (b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and given to the Tribunal; and
- (c) in the case of a variation—the Tribunal is satisfied that it would have been within the powers of the Tribunal to have made the decision as varied.

Subdivision C—Decision on review of reviewable decision

104 When this Subdivision applies

This Subdivision applies in relation to an application for review of a reviewable decision.

105 Tribunal decision on review of reviewable decision

In relation to the reviewable decision, the Tribunal must make a decision:

- (a) affirming the reviewable decision; or
- (b) varying the reviewable decision; or
- (c) setting aside the reviewable decision and:
 - (i) making a decision in substitution for the reviewable decision; or
 - (ii) remitting the matter to the decision-maker for reconsideration in accordance with any orders or recommendations of the Tribunal.

106 Circumstances in which Tribunal may reach decision without hearing—review of decisions only

Tribunal may make decision without hearing in certain circumstances

- (1) The Tribunal may make its decision in the proceeding in relation to the application after considering the documents and things given to

ATTORNEY-GENERAL'S DEPARTMENT and AUSTRALIAN IRON
AND STEEL PTY LTD v COCKCROFT

General Division: Bowen CJ, Sheppard and Beaumont JJ

New South Wales District Registry

16-17 December 1985; 21 February 1986

Crown — Freedom of information — Exempt documents — Information given in confidence by an employer to and documents generated by the National Committee on Discrimination in Employment and Occupation — Meaning of "Could reasonably be expected to prejudice the future supply of information" — Whether expectation reasonably based — "Breach of confidence" — Whether exemption still available despite limited access to others — Freedom of Information Act 1982 (Cth), ss 43(1)(c)(ii), 45(1) — Administrative Appeals Tribunal Act 1975 (Cth), s 44.

Words, Phrases and Maxims — "Could reasonably be expected" — Freedom of Information Act 1982 (Cth), s 43(1)(c)(ii).

Exemption had been claimed under s 43(1)(c)(ii) and in some cases, under s 45(1) of the *Freedom of Information Act* 1982 as to documents generated by a company, the second appellant, and the National Committee on Discrimination in Employment and Occupation. The Committee had sought to conciliate in relation to a complaint made by an applicant for employment, the respondent, against the company. The Committee, having no statutory powers to compel complainants and respondents to appear before it or to give evidence, offered strict confidentiality to encourage participation in its processes. Evidence established that on this basis the company had given information to the Committee including its reasons for refusing employment to the respondent. In an appeal against a decision of the Administrative Appeals Tribunal denying the exemptions claimed,

Held (per curiam): (1) The Tribunal erred in construing s 43(1)(c)(ii) of the Act and particularly the words therein, "could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency", to require those seeking the exemption to establish a case on the balance of probabilities. Further the paragraph should not be construed as depending on its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability. Rather the inquiry should be confined (per Bowen CJ and Beaumont J) as to whether the expectation claimed was reasonably based or (per Sheppard J) as to whether the decision-maker had real and substantial grounds for thinking that the production of the relevant documents could prejudice supply.

News Corporation Ltd v National Companies and Securities Commission (1984) 5 FCR 88; *Kioa v West* (1985) 60 ALJR 113; *Ex parte White*; *In re White* (1885) 14 QBD 600; *Orr v The State* (1958) 111 So 2d 627; *Crown Bedding Co Ltd v Inland Revenue Commissioners* [1946] 1 All ER 452; *Western Natural Gas Co v Cities Natural Gas Co* (1966) 223 A 2d 379; *Koufos v Czarndikow Ltd* [1969] 1 AC 350, referred to.

(2) Particularly as it had been clearly established that there was an understanding between the appellants that the supply of information by the company to the Committee would be in confidence, the Tribunal erred in concluding that the evidence of an officer of the company that information still flowed from the

company to the Committee in employment matters despite the request for the release of documents was strong evidence as to what could "reasonably be expected" to happen upon disclosure within the meaning of s 43(1)(c)(ii) of the Act.

(3) As in an action for breach of confidence, the publication of information to a limited number of persons, here the appropriate union and cabinet ministers, will not of itself destroy the confidential nature of that information so as to preclude a claim for exemption under s 45(1) of the Act. Provided relative secrecy remains, an applicant for exemption can still succeed, it being necessary to examine the relevant documents in their own context. Accordingly the Tribunal erred in concluding that the company's divulgence to the Minister and the Union characterised the subsequent dealings between the parties as lacking the necessary quality of confidence.

Re Witheford and Department of Foreign Affairs (1983) 5 ALD 534; *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1985) 59 ALJR 77; *Franchi v Franchi* (1967) RPC 149, referred to.

APPEALS

Appeals from decisions of the Administrative Appeals Tribunal made under Pt IV of the *Freedom of Information Act* 1982.

A Robertson, for the first applicant: In construing s 43(1)(c)(ii) of the Act the Tribunal incorrectly posed the question whether the threat of disclosure had already had an effect on the supply of information. Whether a result or effect could reasonably be expected by disclosure does not mean whether disclosure has had or will have or more probably than not will have that result or effect: *Re Actors' Equity Association of Australia and Australian Broadcasting Tribunal (No 2)* (1985) 3 AAR 1. The use of "could reasonably" rather than "would" or "would reasonably" makes the test one of the expectation being open as a matter of reasonable possibility. It was irrelevant that after the making of the request for disclosure by the respondent up till the hearing the company did not change its procedures in the supply by it of information to the Commonwealth or an agency. In any event the evidence was that disclosure would prejudice the future supply of information.

J J Spigelman, for the second applicant: The Tribunal misconstrued s 43(1)(c)(ii) of the Act. "Could expect" does not mean "would occur": *News Corporation Ltd v NCSC* (supra), at 101-102 and 95. An "even chance" is enough. Further a significant probability even if less than an even chance is enough. The Tribunal erred in taking into account the fact that the company continued to supply information to government agencies up to the hearing, that factor being irrelevant or of no probative value particularly as the Committee was at all times resisting disclosure. (He referred to *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 at 488; *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Sullivan v Department of Transport* (1978) 20 ALR 323.) Section 43(1)(c)(ii) is not only concerned with prejudicing supply by the person whose documents are in issue. The test would be satisfied if supply of information by other employers could be prejudiced. The Tribunal failed to consider any such prejudice. By reason of the absence of any power in the Committee to compel disclosure and its practice with regard to confidentiality, release of documents in this case could be expected to prejudice supply. The Committee assures employers

and did assure the company that information given would be confidential. Disclosure would erode the openness and frankness existing between the company and Commonwealth agencies resulting in the company's reassessing its attitude and changing its practices. Passing background minutes between ministers did not provide a basis for inferring that those minutes would not be jealously guarded and kept strictly between the parties to that correspondence.

K G Horler, for the respondent: In relying on the exemptions under ss 43(1)(c)(ii) and 45 each applicant bore the onus of proof under s 61 of the Act which they failed to discharge. The failure of the Committee to rely on s 45 means that the company has no locus standi on the s 45 point as breach of confidentiality imports the notions of mutuality and reciprocity. The Committee has a greater interest in the receipt of knowledge yet disclaims the s 45 point. The evidence of the company's personnel manager is conclusive in negating any claim for exemption, neither applicant cross-examining him nor seeking to adduce further evidence to diminish or rebut his evidence. Such evidence assisted the Tribunal in its predictive role under the section. It was not in itself conclusive, but probative and therefore relevant to an issue that had to be decided. Even adopting the construction of s 43(1)(c)(ii) of *Woodward J in News Corporation Ltd v NCSC* (supra) there was no conclusion of fact open to the Tribunal that there was "about an even chance" of future prejudice. It would be absurd for the Tribunal to exclude or ignore "post-refusal" conduct of the company and to merely consider reasonable expectation of prejudice as at the time of refusal by the Committee to supply the relevant documents.

Cur adv vult

21 February 1986

BOWEN CJ AND BEAUMONT J. These appeals from the Administrative Appeals Tribunal are brought pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) on a number of questions of law. The first applicant, the Department of the Attorney-General, and the second applicant, Australian Iron and Steel Pty Ltd (AI & S), challenge the decisions of the majority of the Administrative Appeals Tribunal, first, refusing to uphold claims by the applicants that certain documents and parts of certain other documents were exempt from disclosure for the purposes of Pt IV of the *Freedom of Information Act 1982* (Cth) (the Act) and secondly, directing that access be granted to such documents.

Exemption was claimed on two grounds. In respect of certain documents, s 43(1)(c)(ii) of the Act was relied upon by both applicants. It provides:

"43.(1) A document is an exempt document if its disclosure under this Act would disclose—

...
(c) information ... concerning the business, commercial or financial affairs of an organization or undertaking, being information—

...
(ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the

administration of a law of the Commonwealth . . . or the administration of matters administered by an agency."

In respect of the remaining documents in question, AI & S relied on s 45(1) of the Act:

"45.(1) A document is an exempt document if its disclosure under this Act would constitute a breach of confidence."

The claims for exemption arose in the following circumstances. In August 1980, the respondent, Mr Peter Cockcroft, complained to the New South Wales Committee on Discrimination in Employment and Occupation (the Committee) of what he alleged to be "political" discrimination in employment on the part of AI & S. The burden of Mr Cockcroft's complaint was that AI & S had refused to employ him at its Port Kembla steelworks because he was an officer of the South Coast branch of the Communist Party of Australia.

In order to understand the respective contentions of the parties, some explanation of the constitution and administration of the Committee is necessary. In June 1973 Australia ratified the International Labour Organisation (ILO) Convention III — Discrimination (Employment and Occupation) 1958. To implement the obligations it assumed under the Convention, the Commonwealth government established national and State committees on discrimination in employment and occupation. The broad functional objectives of the committees are to promote equality of opportunity and treatment in employment and occupation and to receive, investigate and endeavour to resolve complaints alleging discrimination in employment and occupation. To enable the committees to perform these functions, the Federal Parliament appropriates an annual allocation of funds. These funds were originally administered by the Department of Employment and Industrial Relations, on the advice of the National Committee. Funding is now administered by the Attorney-General's Department. The National Committee consists of an independent chairman/convenor and representatives of, inter alia, the Commonwealth government, employer organisations and trade unions. The State and Territory committees consist of an independent chairman/convenor, a Commonwealth government representative (the regional director of the Department of Employment and Industrial Relations) and one representative each of the State or Territory government, employer organisations and trade unions.

The National Committee is serviced by officers located in the Central Office of the Department of Employment and Industrial Relations and the State/Territory Committees by officers located within the Department's regional offices. The Department of Employment and Industrial Relations, originally, and now the Attorney-General's Department, has the functional responsibility of servicing the committees on discrimination in employment and occupation and allocates staff for this purpose. Since staff so provided have the responsibility of maintaining control over the records and documents of the committees, it is common ground that the Attorney-General's Department is the appropriate party to represent the Committee in these proceedings.

As there is no Federal legislation providing for the establishment of the committees, they have no power to compel complainants and respondents to appear before them or to give evidence. In most cases, the executive officer conducts the investigation of a complaint, inviting the parties to submit

written evidence or attend for interviews. The committees do not conduct public hearings and do not direct their activities to publicly identifying cases of discrimination or apportioning blame between complainants and respondents. They endeavour to conciliate between the parties with a view to arriving at a resolution of the complaint which is, wherever possible, satisfactory to both parties.

In the field of discrimination, complainants may take legal action pursuant to State or Federal legislation. However, complainants who resort to the committees enjoy the advantage of privacy and a similar advantage is available to respondents. In a document entitled "Procedural Guidelines for Committees on Discrimination in Employment and Occupation" (published in 1983) the following guideline paragraph appears:

"4.18 Lacking Statutory powers to compel information, the Committees must rely on co-operation. The guarantee of strict confidentiality is the best way to encourage complainants, respondents and interested parties to provide information for a Committee's investigation."

To revert to the history of the matter, in August and September 1980, the Committee sought the views of AI & S on Mr Cockcroft's complaint. AI & S responded by letter dated 10 September 1980 as follows:

"... This Company had decided not to offer employment to Mr Cockcroft. Mr Cockcroft has never been employed by this Company. We understand that Mr Cockcroft arrived in Australia from Britain about five years ago; that in Britain he worked as a welfare officer, teacher and a student union official at a University and that in Australia he has been employed in a warehouse and handicraft shop and in a bookshop. (Our understanding as to the above comes from reports in 'Tribune — Australia's Communist Weekly'). We also note from a newspaper item we refer to later that Mr Cockcroft is said to have been employed by the NSW Government Railways. We are, of course, aware that Mr Cockcroft is the South Coast District Secretary of the Communist Party of Australia, but we do not know whether this is a paid or an honorary position.

Mr Cockcroft's application for employment with this Company has been the subject of some media publicity — see, for instance, the 'Illawarra Mercury' item of 6 August 1980 headed 'AIS accused of Bias — Commo Leader Refused a Job'.

Having regard to all these circumstances we would like to be assured, before the matter is taken further, that the Committee is satisfied that Mr Cockcroft's application for employment with this Company is a genuine application. On this aspect we would like to know whether Mr Cockcroft has sought employment with this Company only or with other employers as well. If his application has been to this Company only, why is this so? If he has applied to other employers, have his applications been rejected, and, if so, has Mr Cockcroft made complaints to your Committee in respect to these rejections? (We are not seeking the names of such other employers but would like to know how many, if any, there were.)

We should mention that, as Mr Cockcroft's complaint refers to the Federated Ironworkers' Association, we have sent a copy of your letter

of 18 August and a copy of this reply to the State Secretary of that union." [Emphasis added.]

On 18 September 1980, AI & S provided the Commonwealth Minister for Industrial Relations at the time, Mr Street, with three documents which were claimed to be exempt under the Act. Objection was taken by counsel for Mr Cockcroft to our inspecting any of the documents for which exemption was claimed. However, the three documents handed to Mr Street are described as follows in a schedule prepared by the Attorney-General's Department for the purposes of these proceedings:

"AG9" Copy — AIS document handed to Mr Street — 17 September 1980 — brief statement of reason for refusing employment."

"AG10" Copy — AIS document handed to Mr Street — 18 September 1980 — contains background material relied on by AIS in refusing employment."

"AG11" Copy — AIS document handed to Mr Street — 17 September 1980 — chronology of Cockcroft's employment application."

(Exemption was claimed under both s 43(1)(c)(ii) and s 45(1) for each of these documents.)

Copies of these documents were forwarded by Mr Street to Mr Viner, then Commonwealth Minister for Employment and Industrial Relations, under cover of a letter dated 16 October 1980:

"[During my] visit to Port Kembla I was approached by the General Manager of Australian Iron and Steel, [Mr Hall], regarding a problem with an application for employment of a Mr P Cockcroft which has been brought to the attention of the New South Wales Committee on Discrimination [in Employment] and Occupation.

I advised Mr Hall that as the matter was within your area of responsibility I would bring it to your attention. I am forwarding copies of background information [i.e. 'AG9', 'AG10' and 'AG11'] and would appreciate any advice that you may be able to offer."

By letter dated 3 November 1980, the Committee informed AI & S that Mr Cockcroft had advised it that he was registered with the Commonwealth Employment Service at Wollongong and that he had been referred to a number of prospective employers. By letter dated 19 November 1980, the Committee asked AI & S to respond to Mr Cockcroft's complaint. On 1 December 1980, AI & S wrote to the Committee:

"... With respect, it does not appear to us that your letter of 3 November 1980 answers the matters raised by us in the extract quoted from our letter of 10 September.

In particular, your letter of 3 November does not indicate:—

- (a) Whether the Committee is satisfied that Mr Cockcroft's application for employment with this Company is a genuine application;
- (b) Whether Mr Cockcroft has sought employment with the 'various employers' to which he has been referred by the Commonwealth Employment Service at Wollongong;
- (c) If Mr Cockcroft has sought employment with such employers, the result of such applications;
- (d) If any application has been rejected, whether Mr Cockcroft has made a complaint to your Committee in respect of such rejection;

- (e) How many employers, if any, Mr Cockcroft has sought employment with.

It seems to us that the above points are ones of real importance in considering whether or not Mr Cockcroft's application for employment with this Company is genuine and, accordingly, we await your further advices."

By letter dated 15 December 1980, the Committee informed Mr Cockcroft that a meeting was to be held on 9 January 1981 between a representative of the Committee and Mr Hall as general manager of AI & S. The evidence before the Tribunal was that at the meeting Mr B J Hodggett, representing the Committee, informed Mr Hall that "any documentation that you supply to the New South Wales Committee regardless of its content would be treated on a confidential basis".

By letter dated 19 January 1981, the Committee's executive officer pressed AI & S for a response to Mr Cockcroft's complaint. He invited AI & S to state whether there were "any other pertinent factors, as distinct from Mr Cockcroft's political opinions as a member of the Communist Party of Australia which could have led your company to decide not to engage him as an employee". The executive officer indicated that he would pass on any information thus supplied to the members of the Committee.

On 20 February 1981, AI & S wrote to the Committee. Exemption was also claimed under both s 43(1)(c)(ii) and s 45(1) in respect of this document, which is described in the Attorney-General's Department schedule in these terms:

"AG3' Original — letter and attachments — 20 February 1981 — AIS to NSW CDEO detailing reasons for refusing employment of Cockcroft."

The Committee met on 21 February 1981 and considered Mr Cockcroft's complaint. It formed the opinion that no discrimination within the meaning of the International Labour Organisation (ILO) Convention III — Discrimination (Employment and Occupation) 1958 had occurred. It communicated that opinion to Mr Cockcroft and AI & S by letters dated 27 February 1981. A claim for exemption was made under s 43(1)(c)(ii) in respect of the relevant part of the minutes of this meeting. The following description appears in the Attorney-General's Department schedule:

"AG18' Copy — extract of minutes of 67th meeting of NSW CDEO — 21 February 1981 — records complaint and summarises AIS position."

Claims for exemption were also made under s 43(1)(c)(ii) in respect of portions of a number of documents generated by the Committee for its own internal purposes at this time. They are described as follows in the Attorney-General's Department schedule:

"AG6' File note — 15 December 1980 — Assistant Secretary, External Programmes Branch — containing deleted exempt matter concerning the position of AIS in relation to employment of Cockcroft."

"AG7' File note — 9 January 1981 — Assistant Secretary, External Programmes Branch — containing deleted exempt matter concerning the position of AIS in relation to employment of Cockcroft."

"AG8' Minute — Assistant Secretary, External Programmes Branch

to Mr Jefferies — 13 January 1981 — containing deleted exempt matter outlining the position of AIS in relation to employment of Cockcroft.”

By letter dated 14 August 1981, the Committee wrote to AI & S. After referring to its earlier finding that no discrimination had occurred, the Committee said:

“... The procedure normally adopted by Employment Discrimination Committees is to communicate to the complainant, where appropriate, the text or substance of the reply to the allegations of the person complained against. The New South Wales Committee did not, however, supply Mr Cockcroft with the substance of your reply of 20 February 1981. [That is, ‘AG3’.] Mr Cockcroft has subsequently approached the NSW Privacy Committee seeking the reasons given by you for not employing him.

Would you please advise me as soon as possible as to whether you have any objections to the text of your letter of 20 February being made available to Mr Cockcroft.”

In its reply dated 8 September 1981, AI & S said:

“... In our view this is not a case where it is appropriate for such a disclosure. At the time of our earlier discussions with officers of your organisation we were advised that the contents of our response to Mr Cockcroft’s allegations would remain confidential between our Company and your organisation.

We expected that the issue relating to Mr Cockcroft would have ended when the Employment Discrimination Committee concluded in February 1981 that no discrimination had occurred on the basis of Mr Cockcroft’s political convictions. However, since then, the issue has been taken up further by the NSW Anti-Discrimination Board and the relevant correspondence involving this Board was sent to your organisation via Mr J Spencer on 16 July 1981. Now, a third body, the NSW Privacy Committee, has become involved in the issue.

In all the circumstances as they presently exist we are of the view that the text of our letter of 20 February 1981 should not be made available to Mr Cockcroft.”

This question was, apparently, discussed by the Committee on at least two occasions. The Attorney-General’s Department schedule claims exemption by virtue of s 43(1)(c)(ii) in respect of the following:

“‘AG19’ Original — agenda item of 70th meeting of National CDEO — 22 July 1981 — concerning procedures for investigating complaints and release of information to NSW Privacy Committee.”

“‘AG26’ Copy — agenda item of 81st meeting of National CDEO — 19 November 1982 — concerning complaint, AIS position and request for access to documents by NSW Privacy Committee.”

We will deal first with the claims for exemption made under s 43(1)(c)(ii). A considerable body of evidence was tendered to the Tribunal by the applicants in support of these claims for exemption. To some extent, the evidence overlapped with evidence adduced in support of claims for exemption under s 45(1) made by AI & S. In his evidence, Mr Smith, a senior industrial relations adviser to the Confederation of Australian

Industry and an alternate member of the Committee, expressed the following opinion:

“Have you formed any conclusions as to the significance of the ability of the committee to elicit information from employers as part of its operations? — Well, the committee, being one of a conciliatory role and one which was established on a tripartite basis so that you could enlist the expertise of trade unions and employers and government, could not effectively operate unless it had the goodwill and trust of the people with which it deals. The committees deal in the very difficult area of employment discrimination and what we try and do is ensure that parties can work happily together and in that way it requires a great deal of skill on the part of the conciliators to bring about the resolution of a complaint that can be ongoing. We seek to change attitudes in relation to discrimination; we do not want to overtly modify behaviour, we want to get to the root cause and seek to change attitudes.”

He also explained how, in his view, confidentiality was important to those who approached the Committee:

“There are other agencies in the various states and often people would prefer to go to the legislative agency. But we still get a lot of customers, if I could call them that, that because of the nature in which our committee deals with matters, that it is in confidence, there is no public airing of the complaints and we resolve issues between the parties.”

Mr Hodgett, a special projects officer of the Department of Employment and Industrial Relations, gave evidence of a conversation he had at the meeting with senior executives of AI & S, including Mr Hall, held on 9 January 1981:

“Can you remember what Mr Hall said to that question from you? — That — Mr Hall said — that the content of some of this material was of such a nature that if it became public it could be regarded as defamatory and he or his company were loath to pass it on to the committee in view of what could conceivably happen. I then said to him that ‘Any documentation that you supply to the New South Wales committee regardless of its content would be treated on a confidential basis’.”

However, in holding that no exemption under s 43(1)(c)(ii) had been made out, particular reliance was placed by the majority of the Tribunal upon the following evidence of Mr Thirlwell, the personnel officer of AI & S:

“MR MCMAHON: Mr Thirlwell, these proceedings have been pending for some time now? — Yes.

Have they had any effect at all on the company’s response for information from any agency of the Commonwealth? — No. Quite deliberately I discussed this situation with the personnel officers who receive a lot of the particular requests for information that I referred to back in evidence last August, to ensure that in the interim period nothing like that should in fact take place.

and in the interim period which, as I say, has been for some years now? — Yes.

Are you telling us that no change has been made in the company’s procedures for responding to requests, for example, from CES or Social Security? — Certainly not from AIS Port Kembla, no. In fact . . .

It has been as frank in dealing with the departments in that interim period as you have been prior to the institution of these proceedings? — I would certainly like to think so but, taking further than that, I have a number of discussions with the senior officers, for example, of the Wollongong branch of the CES and I believe if they were finding any difficulty in obtaining information they would have ample opportunity of raising it with me, and they have not done so. Rather, I took the point of confirming with my subordinates that we should try and be of as much assistance as we can, without formalizing the situation.

You have not issued any instructions to your staff about heading letters 'confidential' or 'private'? — No, but I would have to stress to you far and away the bulk of contact that I am talking about is of a verbal nature rather than finding its way into correspondence; and I would also have to say to you that having regard to the state of employment, for example, in the Wollongong area in the last four years the level of contact, say, from the CES to the steel works about employees and the like has been drastically reduced over that period from what it was in 1979/80 when there were many many more people not simply seeking employment but gaining it.

But you receive lots of written requests, do you not, from government agencies? — Quite, quite.

And you respond to those in writing? — Yes, we do, we do, but the main ones that I was looking at here in terms of this was my practical experience in the personnel department, which of course was largely perhaps Social Security and CES, things of that nature — but also these days in terms of the Federal government, involving the Steel Industry Authority and groups like that.

Have you been asked for any information by the New South Wales committee on what is referred to as CDEO? — Equal opportunity, that is the equal opportunity side?

Yes? — Well, we have had a rather contentious issue on it at the moment in terms of the New South Wales jurisdiction itself, but I am not aware of any other request from the New South Wales committee to AIS than in what I call the Cockcroft case."

The majority of the Tribunal held that the "overwhelming" conclusion to be drawn from this evidence was that disclosure of the documents or the threat of such disclosure has had and will have no effect on the supply of the information in question: "The past in this case must be an infallible guide to the future. There could hardly be stronger evidence for guidance as to what could 'reasonably be expected' to happen."

Earlier, the majority had expressed the test to be applied in order to activate the operation of s 43(1)(c)(ii) as follows:

"The next question to be asked is whether the disclosure of the information could reasonably be expected to produce certain consequences. This does not mean that those consequences must be regarded as reasonable from a public interest point of view. It means whether it is more probable than not, looked at from an objective point of view, that the consequences will flow. This approach was broadly adopted by the Tribunal in *Re Actors' Equity Association of Australia and Australian Broadcasting Tribunal* (1985) 3 AAR 1."

It was submitted on behalf of the applicants that the majority of the Tribunal erred both in the construction of s 43(1)(c)(ii) and in the failure to hold that provision to be applicable in the present circumstances. In aid of the submission, reference was made to some observations of Woodward J as to the meaning of a similar provision, s 37(1) of the Act, in *News Corporation Ltd v National Companies and Securities Commission* (1984) 5 FCR 88 at 101-102:

“I think that the words ‘would, or could reasonably be expected to . . . prejudice’ mean more than ‘would or might prejudice’. A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring. On the other hand, if the legislature had required a probability of prejudice it could easily have said so. In my view it is reasonable to expect an event to occur if there is about an even chance of its happening and, without attempting to suggest words alternative to those chosen by the draftsman, it is in that general sense that the phrase should be read.”

In our opinion, in the present context, the words “could reasonably be expected to prejudice the future supply of information” were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based: see *Kioa v West* (1985) 60 ALJR 113 per Mason J and per Gibbs CJ.

The majority of the Tribunal thought that an assessment of what was more probable than than not was called for. As Woodward J has pointed out, there are difficulties in this approach for the legislature has chosen not to introduce the notion of a “probable” result: cf *Ex parte White; In re White* (1885) 14 QBD 600. It is also unnecessary to consider whether an “even chance” or something of that kind is needed. It is preferable to confine oneself to the language of the provision itself and to attempt to form an opinion, on the evidence, as to what can reasonably be expected to happen if disclosure occurs. In our opinion, in departing from the terms of s 43(1)(c)(ii) and requiring the applicants to establish a case on the balance of probabilities, the majority of the Tribunal fell into error in their construction of the provision.

Further, in our view, the majority of the Tribunal fell into error in the significance it sought to attribute to the conduct of AI & S in its dealings with the Committee during the pendency of the proceedings for review. The Committee, having indicated to AI & S that it proposed to decline to disclose the documents to which access was claimed, no inference of the kind drawn by the majority was open. AI & S was entitled to assume that, if it continued to provide information of the kind now in question, the

Committee would decline to disclose it. That being so, it was wrong for the majority to use the evidence of Mr Thirlwell to ground the inference sought to be drawn that AI & S would continue to co-operate with the Committee in the future if the material now in dispute were disclosed to Mr Cockcroft.

In the result, we would allow the appeal so far as concerns the exemptions claimed under s 43(1)(c)(ii). The question arises as to what other orders should now be made in this connection. Not having seen the documents in question we cannot attempt a judgment of the kind called for by s 43(10)(c)(ii). It must follow that we would order that this part of the case be remitted to the Tribunal to be heard and decided again with the hearing of further evidence.

There remain the claims for exemption based on s 45(1). As has been said, these claims, made only by AI & S were pursued in respect of the following documents:

- “‘AG3’ Original — letter and attachments — 20 February 1981 — AIS to NSW CDEO detailing reasons for refusing employment of Cockcroft.”
- “‘AG9’ Copy — AIS document handed to Mr Street — 17 September 1980 — brief statement of reason for refusing employment.”
- “‘AG10’ Copy — AIS document handed to Mr Street — 18 September 1980 — contains background material relied on by AIS in refusing employment.”
- “‘AG11’ Copy — AIS document handed to Mr Street — 17 September 1980 — chronology of Cockcroft’s employment application.”

The majority of the Tribunal, in holding that no case had been made out under s 45, acknowledged that the provision was wide enough to afford protection from disclosure in circumstances where an action for breach of confidence may not succeed: see *Re Witheford and Department of Foreign Affairs* (1983) 5 ALD 534 at 542; and as to the general equitable jurisdiction to grant relief against abuse of confidential information independently of other causes of action, see *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1985) 59 ALJR 77 at 85; Kearney, *The Action for Breach of Confidence in Australia*, at p 41. However, the majority was much impressed with the fact that AI & S sent a copy of its letter dated 10 September 1980 to the Federated Ironworkers’ Association. It was thought that “this set the tone for subsequent correspondence, Minutes and interviews.” The majority of the Tribunal was also much influenced by the fact that information was given by AI & S to Mr Street in the knowledge that he would pass it on to Mr Viner. The majority concluded that these circumstances deprived the communications from AI & S in question of the degree of secrecy required to justify the protection of s 45(1).

In our opinion, the majority of the Tribunal fell into error in holding that the conduct of AI & S in forwarding a copy of its letter dated 10 September 1980 to the Federated Ironworkers’ Association was capable of characterising the subsequent dealings between the parties as lacking the necessary quality of confidence. The fact that, in one particular instance, AI & S intended that the Union be made aware of the contents of its communication to the Committee cannot be determinative of the character of the subsequent dealings between AI & S and the Committee in terms of their confidentiality or otherwise. The subsequent dealings must be assessed in their own context. The passage emphasised in the letter of 10 September

1980, a matter raised again by AI & S in its letter dated 1 December 1980, shows that its concern at that stage was to resolve what it saw to be a preliminary question whether Mr Cockcroft's application for employment was genuine, as it said in the emphasised passage, "before the matter is taken further". The correspondence indicated that AI & S saw its dealings with the Committee as proceeding or possibly proceeding in a number of stages. It does not necessarily follow from that fact that AI & S was prepared to make the Union aware of its query on a preliminary aspect of the matter that AI & S was prepared to waive any confidentiality it might wish to protect in its communications with the Committee on the merits of the matter. That may well have involved very different considerations.

Further, in our view, the majority of the Tribunal erred in thinking that the intention of AI & S that the contents of their communication to Mr Street would be transmitted to Mr Viner destroyed any confidentiality which might otherwise have attached to the information thus conveyed. Information may remain confidential in such circumstances: "The law does not require information to be absolutely inaccessible before it can be characterised as confidential. . . . Publication of information to a limited number of persons will not destroy the confidential nature of information." (Gurry, *Breach of Confidence*, at p 73.)

In *Franchi v Franchi* (1967) RPC 149, Cross J said (at 152-153):

"Clearly a claim that the disclosure of some information would be a breach of confidence is not to be defeated simply by proving that there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them.

...

It must be a question of degree depending on the particular case, but if relative secrecy remains, the plaintiff can still succeed."

It follows, in our opinion, that the majority of the Tribunal fell into error in assuming that because Mr Street would pass on to Mr Viner the information in the documents "AG9", "AG10" and "AG11" the claim for their confidentiality was destroyed.

It is true that no assertion of confidentiality of the material now in question was made on behalf of the Attorney-General's Department. However, it was clearly open to AI & S as the party with the primary interest in maintaining its alleged secrecy, to seek to uphold a claim for exemption on this ground.

We would allow the appeal in respect of the claims made under s 45(1). The question arises as to what further orders should be made in this connection. Whether the communications in question attracted confidentiality is principally a question of fact. The preferable course is to remit this part of the case to the Tribunal to be heard again, with the hearing of further evidence.

Mr Cockcroft must pay the costs of the appeals. If he applies, he should be granted a costs certificate in respect of the appeals pursuant to s 6(1) of the *Federal Proceedings (Costs) Act* 1981 (Cth).

We would make the following orders:

1. Appeals allowed.
2. Set aside the decisions of the Administrative Appeals Tribunal.

3. Remit the matter to be heard and decided again, with the hearing of further evidence.

4. Order that the respondent pay the costs of the applicants of the appeals.

SHEPPARD J. In this matter I have had the advantage of reading the judgment to be delivered by Bowen CJ and Beaumont J. I agree in their conclusions, with the orders they propose. So far as the case made by the applicant, Australian Iron and Steel Pty Ltd, based on s 45 of the *Freedom of Information Act* 1982 (Cth) (the Act) is concerned, I agree in the reasons expressed by the other members of the Court and have nothing to add. In relation to the case made by both applicants based on the provisions of s 43 of the Act I wish to state my own reasons for concluding that the appeal should be allowed.

In my opinion the only question of law which arises for determination is the meaning and effect of the words "could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency . . .": s 43(1)(c)(ii) of the Act. The difficulty is to state the degree of certainty which is required before it can be said that the document in question will be an exempt document for the purposes of the section. The application of the words to a given case will usually involve an exercise of judgment and not give rise to a question of law. In most cases no appeal from a decision of the Administrative Appeals Tribunal will lie to this Court. But in the present case the applicants challenge the meaning given the words by the Tribunal. Essentially its conclusion was that documents are not exempt unless their disclosure will "more probabl[y] than not, looked at from an objective point of view", prejudice the future supply of information to the Commonwealth or one of its agencies.

References to *Roget's Thesaurus* and the *Macquarie Thesaurus* and to dictionary definitions of the word "expect" disclose that it has various shades of meaning. For instance, the *Shorter Oxford English Dictionary* defines it to mean:

1. To wait.
2. To wait for, await.
3. To look for mentally; to look forward, regard as about to happen; to anticipate the occurrence or the coming of.
- 4.(a) With "can" to look for with likelihood.
- (b) To look for as due from another.
5. To suppose, surmise that.

The *Oxford English Dictionary* itself defines the word "expected" to mean looked for or anticipated. The *Macquarie Dictionary* defines the word "expect" to mean, inter alia, to look forward to, to regard as likely to happen, to anticipate the occurrence or the coming of in the sense of "I expect to do it, I expect him to come", to look for with reason or justification or to surmise or suppose. The second edition of *Webster's Dictionary* says of the words "expect", "anticipate" and "hope", that they agree in regarding some future event as about to take place. Of these "expect" is said to be the strongest and implies some ground or reason in the mind for construing the event as likely to happen. It was after referring to this statement in *Webster* that the Court of Appeals of the State of Alabama in *Orr v The State* (1958) 111 So 2d 627 said (at 635) that

Nelson's order of the day at Trafalgar, "England *expects* every man to do his duty", would have been "reduced to pusillanimous pap" had the Admiral said, "England *hopes*"

The word "expect" has been the subject of judicial attention in a variety of contexts both in the United Kingdom and the United States. In the United States the expression "reasonably expected" has been discussed on a number of occasions. Much depends on the context in which the word is used.

In *Crown Bedding Co Ltd v Inland Revenue Commissioners* [1946] 1 All ER 452 the Court of Appeal was concerned with a provision of the *Finance Act 1944* (Imp) which used the expression, "the main benefit which might have been expected to accrue from the transaction or transactions during the currency of excess profits tax". Lord Greene MR said (at 456-457):

"Counsel for the appellants attacks that finding by going straight to the construction of the section, and he says that under the section it is not open to the Special Commissioners to find that the main benefit which might be expected to accrue was avoidance or reduction of tax where avoidance or reduction of tax was not a probability but only a possibility . . . the ground being that in order to bring the section into operation there must be expectation of a benefit by way of avoidance or reduction of tax in the sense that a reasonable man would expect such avoidance or reduction to accrue, not that he would think that it might, in certain unlikely events, accrue but that it would, in fact, in his opinion, be likely to accrue.

In my opinion, that is much too narrow a construction to put upon these words. After all, the question of probability or possibility is a matter really which can be considered as resembling a scale. At the top of the scale is certainty. At the bottom of the scale is improbability so extreme that no sensible person would ever take it into account. But, subject to that, the precise point on the scale at which you can say that a thing is probable rather than possible and the precise point at which you say that a probability falls to the level of a mere possibility depends on the view taken by a hypothetical observer. It seems to me that it is quite impossible to put on the word 'expected' the sense that a hypothetical observer must have had that degree of confidence in the future as to expect that the benefit would materialise."

It is to be observed that the expression in question was "might have been expected". The expression with which we are concerned in s 43 of the Act is "*could* reasonably be expected".

The word "expectation" is defined in the *Corpus Juris Secundum*, Vol 35, p 230 as being the act or state of waiting or awaiting with confident anticipation. An "expectation" is said to be more than a bare hope; it is said to imply a high degree of certainty that a future event will occur. That meaning was applied in *Western Natural Gas Co v Cities Natural Gas Co* (1966) 223 A 2d 379 at 383. The word "expect" was there used in a contractual, not a statutory context.

In the end the problem we have involves us in construing the relevant provision in the Act in its context. I agree that it is unwise to endeavour to analyse a provision of this kind overmuch and that there are dangers in attempting to gloss ordinary English words. On the other hand, it is necessary to have an appreciation of what the words usually mean in every-

day language. I think it is clear that a higher degree of certainty is involved in the exercise than would be the case if the words used were, for instance, "a risk" of prejudice. But how much more certain must one be that prejudice might be the result of disclosure before one can say that it "could reasonably be expected"? The question is whether the Tribunal's test of disclosure more probably than not prejudicing the future supply of information is too strict. I think the better view is that it is but I have not found the problem without difficulty and I think that in resolving it, it should be remembered that the provision is contained in an Act which was intended to make available to members of the public a great deal of material which might otherwise have been regarded as confidential. We ought not be too ready to afford exemption unless the words of the statute are clear.

The difficulty of ascribing a meaning to the word "expect" has not only troubled me. It appears to have troubled other judges including Lord Greene MR in the *Crown Bedding* case and also Woodward J in *News Corporation Ltd v National Companies and Securities Commission* (1984) 5 FCR 88 who said (at 101-102) that a reasonable expectation of an event required more than a possibility, risk or chance of the event occurring. So much is, I think, clear. But the problem he then faced, as do we, was to endeavour to indicate the degree of certainty that is required before the relevant event "could reasonably be expected". He said that it was reasonable to expect an event to occur if there were about an even chance of its happening and, by inference, not unless that were so. In my respectful opinion that statement goes too far and restricts the meaning of the provision in a way which was not intended. I would prefer the less certain, albeit somewhat negative, approach adopted by Lord Greene MR in the *Crown Bedding* case (*supra*). It is true that the word was there used in conjunction with the word "might". But I do not believe that the word "could" which is the word used here is used in any different context.

In the course of my consideration of the matter I have considered whether or not the words in question do import, at least to a degree, the notion of likelihood or probability. Although at one stage I thought this was not the correct approach, a consideration of the dictionary definitions, to some of which I have referred, and, of what has been said in a number of authorities, has led me to the conclusion that some aspects of the concept of probability or likelihood, but short of a preponderance of probabilities, are imported. Unless they are, it is impossible to come to terms with the degree of certainty which the section requires before a document will be exempt from production. I think, however, that one has to be careful that one does not transfer the problem into another universe of discourse and move too far away from the words which the legislature has chosen to use; cf *Koufos v Czarndnikow Ltd* [1969] 1 AC 350, per Lord Reid at 390.

I do not myself feel able to derive from the presence of the word "reasonably" in the relevant expression a great deal of assistance. The difficulty is to give full weight to the meaning of the word "expected". It is only then that one can turn one's mind to the question of the significance of the qualification of it by the word "reasonably". The words are expressed in the passive voice — "could reasonably be expected". What is required is that the decision-maker act reasonably. For the document to be exempt his conduct must be taken to be that of the reasonable man. But then comes the difficulty. So acting, the decision-maker must expect that disclosure of

the document could prejudice the future supply of information. In my opinion he will not be justified in claiming exemption unless, at the time the decision is made, he has real and substantial grounds for thinking that the production of the document could prejudice that supply. But, stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.

I said earlier that, in my opinion, there was only one question of law which arose for decision in connection with the claim for exemption based on s 43. That question was whether the Tribunal erred in the statement of principle which it made in connection with the application of the provision to the facts before it. For reasons which I have given, I have reached the conclusion that it did fall into error. But if I had not, I would not have felt able to disturb its findings otherwise. If its statement of principle were correct, its other findings, being findings of fact, would not have been open to review by this Court.

Appeals allowed with costs.

Decision of the Administrative Appeals Tribunal set aside.

Matter remitted for rehearing.

Solicitors for the first applicant: Australian Government Solicitor.

Solicitors for the second applicant: *Dawson Waldron*.

Solicitors for the respondent: *Maurice May & Co.*

CMH

[HIGH COURT OF AUSTRALIA.]

THE CHURCH OF SCIENTOLOGY INC.
AND ANOTHER PLAINTIFFS;

AND

WOODWARD AND OTHERS DEFENDANTS.

Courts — Powers — National security — Statutory security intelligence organization — Obtaining intelligence relevant to security — Communication of such intelligence — Scope of permissible activities — Whether acts of organization within judicial cognizance — Australian Security Intelligence Organization Act 1979 (Cth), ss. 4, 5, 8, 17, 18, 20, 21.

An incorporated association and one of its members sued the Director-General of the Australian Security Intelligence Organization, the Attorney-General for the Commonwealth and the Commonwealth seeking declarations that they were not security risks and that the Director-General was acting beyond his powers under the *Australian Security Intelligence Organization Act 1979 (Cth)* in gathering information about them and communicating it to other persons and characterizing them as security risks.

Held, (1) by Mason, Murphy and Brennan JJ. that questions whether intelligence is relevant to security and whether a communication of intelligence is for purposes relevant to security may be determined by the court.

Per Gibbs C.J., *contra*. Such questions are not justiciable where neither bad faith nor the infringement of a private right is alleged.

(2) By Gibbs C.J., Mason and Brennan JJ., that the fact that initial intelligence may establish that a person is not a security risk does not preclude the Australian Security Intelligence Organization from collecting further intelligence about that person under the terms of the *Australian Security Intelligence Organization Act 1979*.

Decision of Wilson J. varied.

APPEAL from Wilson J.

The Church of Scientology Inc. and Peter James Fowler (on his own behalf and on behalf of all the other members of the Church of Scientology Inc. as at the date of issue of the writ) sued the Honourable Albert Edward Woodward (who was at the date of the delivery of the statement of claim the Director-General of the Australian Security Intelligence Organization ("ASIO")), the Attorney-General for the Commonwealth and the Commonwealth of Australia by writ issued out of the High Court of Australia. The

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1980,

CANBERRA,
Sept. 10.PERTH,
Oct. 2.

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CANBERRA,
1981,
March 10, 11.1982,
Nov. 19.Gibbs C.J.,
Mason,
Murphy,
Aickin and
Brennan JJ.

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plaintiffs' amended statement of claim alleged that the Director-General of ASIO, before and after 1 June 1980, (a) caused ASIO to obtain, correlate, and evaluate initial intelligence concerning the plaintiffs and to communicate such initial intelligence to other persons; (b) caused ASIO to continue such activity, notwithstanding that the initial intelligence established, or should have established, that it was not relevant to security; and (c) caused ASIO to characterize the plaintiffs as security risks and communicated that characterization to other persons. The amended statement of claim further alleged that the plaintiffs did not satisfy the characterization of security risks and that, by reason of the provisions of the *Australian Security Intelligence Organization Act* 1956 (Cth), the *Australian Security Intelligence Organization Act* 1979 (Cth) and s. 70 of the *Crimes Act* 1914 (Cth), ASIO was prohibited from continuing to obtain, correlate, evaluate and communicate such intelligence unless the characterization was true. An additional or alternative claim was that, in causing ASIO to undertake such conduct, the Director-General or, alternatively, the Attorney-General, purported to exercise the executive power of the Commonwealth pursuant to s. 61 of the Constitution, and that the executive power does not authorize such conduct. The plaintiffs also alleged that the Director-General had failed to comply with the terms of s. 20 of the *Australian Security Intelligence Organization Act* 1979. A final further and alternative allegation was that if, and in so far as, either Act authorized the alleged conduct, then in either case the Act was a law prohibiting the free exercise of any religion and was therefore invalid by s. 116 of the Constitution. The plaintiffs claimed declarations (inter alia) that the defendants' actions were unlawful and an injunction restraining the defendants from continuing such actions.

The defendants applied for an order pursuant to O. 26, r. 18 of the High Court Rules or otherwise that the plaintiffs' amended statement of claim be struck out, on the ground that it did not disclose a reasonable cause of action and further or alternatively was frivolous or vexatious and for an order that the action be dismissed and judgment entered for the defendants. Alternatively, the defendants sought a stay of proceedings pursuant to O. 63, r. 2 or otherwise. The relevant provisions of the *Australian Security Intelligence Organization Act* 1979 are set out in the judgment of Gibbs C.J. The application was heard by Wilson J. in chambers.

M. H. Byers Q.C., Solicitor-General for the Commonwealth, and
G. Griffith, for the defendants.

A. R. Castan Q.C. and J. I. Fajgenbaum, for the plaintiffs.

Cur. adv. vult.

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WILSON J. delivered the following written judgment in open court:—

This is an application on the part of the defendants for an order pursuant to O. 26, r. 18 of the High Court Rules or otherwise that the plaintiffs' statement of claim as amended ("the statement of claim") be struck out on the ground that it does not disclose a reasonable cause of action and further or alternatively is frivolous or vexatious and for an order that the action be dismissed and judgment entered for the defendants. Alternatively, the defendants seek a stay of proceedings pursuant to O. 63, r. 2 or otherwise.

Paragraphs 1 to 5 inclusive of the statement of claim identify the parties. The first-named plaintiff is an association duly incorporated under the laws of South Australia in 1969. It is and at all material times has been a religious organization engaged in the practice, promotion, propagation, teaching and application of the Scientology religion. The second-named plaintiff is a member of the first-named plaintiff and a practising adherent of the Scientology religion, and he sues on his own behalf and on behalf of all of the other members of the first-named plaintiff.

The defendants are the Director-General of Security, who has the control of the Australian Security Intelligence Organization ("ASIO"); the Attorney-General, who is the Minister of State responsible for ASIO; and the Commonwealth of Australia.

Two enactments of the Parliament of the Commonwealth are material to the allegations of the plaintiffs. The *Australian Security Intelligence Organization Act* 1956 ("the 1956 Act") continued in existence "the Australian Security Intelligence Organisation", being "the Organisation established in pursuance of a directive given by the Prime Minister" on 16 March 1949 (s. 4(1)), and provided for its operation. This Act was repealed as from 1 June 1980 by the *Australian Security Intelligence Organization Act* 1979 ("the 1979 Act"), which again continued ASIO in existence, and made rather more elaborate provisions for its operation.

I think it will be sufficient for the purpose of understanding these reasons if I indicate in summary form the substance of the allegations in the statement of claim. Having in pars. 6, 6A and 6B described the functions of ASIO and the Director-General by reference to the two statutes which I have mentioned, the plaintiffs in effect allege (in pars. 7 and 7A) that the Director-General, both prior to and subsequent to 1 June 1980, (a) caused ASIO to obtain correlate and evaluate initial intelligence concerning the plaintiffs

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and to communicate such initial intelligence to other persons; (b) caused ASIO to continue in such activity notwithstanding that the initial intelligence established or should have established that it was not relevant to security; and (c) caused ASIO to characterize the plaintiffs as security risks and communicated that characterization to other persons. Paragraphs 8 and 8A deny that either of the plaintiffs satisfied the characterization to which I have referred, and in pars. 9 and 9A it is asserted that by reason of the provisions of the 1956 Act and the 1979 Act respectively and of s. 70 of the *Crimes Act* 1914, ASIO is prohibited from continuing to obtain, correlate evaluate and communicate such intelligence unless the characterization is true. Paragraph 10 advances an additional or alternative ground of claim, namely, that in causing ASIO to undertake the conduct referred to the Director-General or alternatively the Attorney-General purported to exercise the executive power of the Commonwealth pursuant to s. 61 of the Constitution, and that the executive power does not authorize such conduct.

It is alleged in par. 11 that the conduct of continuing to gather intelligence concerning the plaintiffs and of communicating it to other persons was and is unlawful, and in par. 11A that the Director-General has failed to comply with the terms of s. 20 of the 1979 Act, a section which I shall set out in full later in these reasons.

It is also alleged, further or alternatively, that if and in so far as the 1956 Act and the 1979 Act did authorize the alleged conduct then in each case the Act was a law for prohibiting the free exercise of any religion and was therefore invalid by reason of s. 116 of the Constitution (pars. 12, 12A). Paragraph 13 asserts that the plaintiffs have locus standi to bring the action as they have suffered special damage peculiar to themselves as a result of the conduct alleged. The damage is not particularized. Paragraph 14 is directed to establishing that the matter is one in which the Court has original jurisdiction.

It will be convenient to conclude this review of the statement of claim by setting out in full the relief that is claimed by the plaintiffs. It is as follows:

"AND THE PLAINTIFFS CLAIM:

- A. (i) A Declaration that prior to 1st June 1980 ASIO was prohibited from continuing to obtain, correlate and evaluate intelligence other than intelligence relevant to security within the meaning of the 1956 Act, after initial enquiries established or ought to have established that such intelligence was not relevant to security within the meaning of the 1956 Act.
- (ii) A Declaration that prior to 1st June 1980 ASIO was

prohibited from communicating any intelligence to any person other than intelligence relevant to security within the meaning of the 1956 Act;

(iii) A Declaration that prior to 1st June 1980 ASIO was prohibited from communicating the fact that ASIO had characterised persons as persons in respect of whom the Commonwealth and the Territories needed protection from acts of espionage, sabotage or subversion unless such characterisation was true;

(iv) A Declaration that prior to 1st June 1980 after initial enquiries established or ought to have established that such intelligence was not relevant to security within the meaning of the 1956 Act, the continued obtaining, correlating and evaluating of intelligence by ASIO concerning the plaintiffs and the other members of the firstnamed plaintiff was unlawful;

(v) A Declaration that prior to 1st June 1980 intelligence concerning the plaintiffs and the other members of the firstnamed plaintiff other than intelligence that they were not persons in respect of whom the Commonwealth and the Territories need protection from acts of espionage, sabotage, or subversion could not be communicated to any person;

(vi) A Declaration that prior to 1st June 1980 the communication of information by ASIO to the effect that the plaintiffs and the members of the firstnamed plaintiff were persons in respect of whom the Commonwealth and the Territories needed protection from acts of espionage, sabotage or subversion was unlawful;

(vii) A Declaration that prior to 1st June 1980 the executive power of the Commonwealth did not authorise the acts alleged in paragraph 7(b) and (c) hereof.

B. (i) A Declaration that ASIO is prohibited from continuing to obtain, correlate and evaluate intelligence other than intelligence relevant to security within the meaning of the 1979 Act, after initial enquiries have established or ought to have established that such intelligence is not relevant to security within the meaning of the 1979 Act.

(ii) A Declaration that ASIO is prohibited from communicating any intelligence to any person other than intelligence relevant to security within the meaning of the 1979 Act, and information relating to the offences and matters specified in section 18(3) of the 1979 Act.

(iii) A Declaration that ASIO is prohibited from communicating the fact that ASIO has characterised persons as persons in respect of whom the Commonwealth and the several States and Territories and their people need protection from espionage, sabotage, subversion, active measures of foreign intervention and terrorism or who have committed or intend to commit the said offences unless such characterisation is true;

(iv) A Declaration that after initial enquiries have established or ought to have established that such intelligence is

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not relevant to security within the meaning of the 1979 Act, the continued obtaining correlating and evaluating of intelligence by ASIO concerning the plaintiffs and the other members of the firstnamed plaintiff is unlawful;

(v) A Declaration that intelligence concerning the plaintiffs and the other members of the firstnamed plaintiff other than intelligence that they are not persons in respect of whom the Commonwealth and the several States and Territories and their people need protection from espionage, sabotage, subversion, active measures of foreign intervention or terrorism may not be communicated to any person;

(vi) A Declaration that the communication of information by ASIO to the effect that the plaintiffs and the members of the firstnamed plaintiff are persons in respect of whom the Commonwealth and the several States and Territories and their people need protection from espionage, sabotage, subversion, active measures of foreign intervention or terrorism, or who have committed or intend to commit the said offences, is unlawful;

(vii) A Declaration that the executive power of the Commonwealth does not authorise the acts alleged in paragraph 7A(b) and (c) hereof.

- C. An injunction restraining the defendants from causing or permitting ASIO from continuing to act as alleged in paragraph 7A(b) and (c) hereof.
- D. An order commanding the firstnamed defendant to perform his duty under section 20 of the 1979 Act by taking all reasonable steps to ensure that the work of ASIO is limited to what is necessary for the purposes of the discharge of its functions and that ASIO is kept free from any influences or considerations not relevant to its functions and that nothing is done that might lend colour to any suggestion that ASIO is concerned to further or protect the interests of any particular section of the community or with any matters other than the discharge of its function.
- E. A Declaration that if and insofar as the 1956 Act did empower the firstnamed defendant to act as alleged in paragraph 7(b) and (c) hereof, the said Act was a law for prohibiting the free exercise of any religion and was beyond the powers of the Commonwealth by reason of the provisions of section 116 of the Constitution.
- F. A Declaration that if and insofar as the 1979 Act does empower the firstnamed defendant to act as alleged in paragraph 7A(b) and (c) hereof, the said Act is a law for prohibiting the free exercise of any religion and is beyond the powers of the Commonwealth by reason of the provisions of section 116 of the Constitution.
- G. Such further or other relief as to the Court seems meet."

The primary contention of the defendants on this application is that the statement of claim does not disclose a reasonable cause of

action for the reason that on their proper construction each of the Acts in question evinces a legislative intent to shield the conduct of ASIO from judicial review.

I am fully conscious, as I embark on a consideration of the application, of the principles governing the jurisdiction summarily to terminate an action. Those principles are well established. It is sufficient to refer to the observations of Barwick C.J. in *General Steel Industries Inc. v. Commissioner for Railways (N.S.W.)* (1) and to those of Dixon J. in *Dey v. Victorian Railways Commissioners* (2). Mr. Castan, counsel for the plaintiffs, argues that the case involves difficult and real issues of law which ought not to be determined summarily. I agree that "great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal" but recognize also that "the exercise of the jurisdiction should" (not) "be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed": *General Steel Industries* (3).

With these considerations in mind, then, I turn to the primary submission advanced for the defendants by Mr. Byers, the Solicitor-General for the Commonwealth. Its understanding and evaluation may conveniently begin with an examination of the material provisions of the 1979 Act, which I now set out:

"4. In this Act, unless the contrary intention appears —

...

'domestic subversion' means activities of the kind to which sub-section 5(1) applies;

...

'security' means —

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from —

(i) espionage;

(ii) sabotage;

(iii) subversion;

(iv) active measures of foreign intervention; or

(v) terrorism,

whether directed from, or committed within, Australia or not; and

(b) the carrying out of Australia's responsibilities to any

(1) (1964) 112 C.L.R. 125, at pp. 129-130, 137-138.

(2) (1949) 78 C.L.R. 62, at pp. 91-92.

(3) (1964) 112 C.L.R., at p. 130.

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foreign country in relation to a matter mentioned in any of the sub-paragraphs of paragraph (a);

'terrorism' includes —

- (a) acts of violence for the purpose of achieving a political objective in Australia or in a foreign country (including acts of violence for the purpose of influencing the policy or acts of a government in Australia or in a foreign country);
 - (b) training, planning, preparations or other activities for the purposes of violent subversion in a foreign country or for the purposes of the commission in a foreign country of other acts of violence of a kind referred to in paragraph (a);
 - (c) acts that are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*; or
 - (d) acts that are offences punishable under the *Crimes (Hijacking of Aircraft) Act 1972* or the *Crimes (Protection of Aircraft) Act 1973*.
5. (1) For the purposes of this Act, the activities of persons, other than activities of foreign origin or activities directed against a foreign government, that are to be regarded as subversion are —
- (a) activities that involve, will involve or lead to, or are intended or likely ultimately to involve or lead to, the use of force or violence or other unlawful acts (whether by those persons or by others) for the purpose of overthrowing or destroying the constitutional government of the Commonwealth or of a State or Territory;
 - (b) activities directed to obstructing, hindering or interfering with the performance by the Defence Force of its functions or the carrying out of other activities by or for the Commonwealth for the purposes of security or the defence of the Commonwealth; or
 - (c) activities directed to promoting violence or hatred between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth.

...

PART II — THE ORGANIZATION AND THE DIRECTOR-GENERAL

6. The Australian Security Intelligence Organization, being the Organization that was continued in existence by the Acts repealed by this Act, is continued in existence.
7. (1) There shall be a Director-General of Security, who shall be appointed by the Governor-General and shall hold office, subject to this Act, on such terms and conditions as the Governor-General determines.
- (2) Before a recommendation is made to the Governor-General for the appointment of a person as Director-General, the Prime Minister shall consult with the

Leader of the Opposition in the House of Representatives.

8. (1) The Organization shall be under the control of the Director-General.
- (2) In the performance of his functions under this Act, the Director-General is subject to the general directions of the Minister, but the Minister is not empowered to override the opinion of the Director-General —
 - (a) on the question whether the collection of intelligence by the Organization concerning a particular individual would, or would not, be justified by reason of its relevance to security;
 - (b) on the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security; or
 - (c) concerning the nature of the advice that should be given by the Organization to a Minister, Department or authority of the Commonwealth.

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PART III — FUNCTIONS AND POWERS OF ORGANIZATION

DIVISION 1 — GENERAL

17. (1) The functions of the Organization are —
 - (a) to obtain, correlate and evaluate intelligence relevant to security;
 - (b) for purposes relevant to security and not otherwise, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes; and
 - (c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.
- (2) It is not a function of the Organization to carry out or enforce measures for security within an authority of the Commonwealth.
18. (1) The communication of intelligence on behalf of the Organization shall be made only by the Director-General or by an officer of the Organization acting within the limits of authority conferred on him by the Director-General.
- (2) If a person makes a communication of any information or matter that has come to his knowledge or into his possession by reason of his being, or having been, an officer or employee of the Organization or his having entered into any contract, agreement or arrangement with the Organization, being information or matter that was acquired or prepared by or on behalf of the Organization in connection with its functions or relates to the performance by the Organization of its functions, other than a communication made —
 - (a) to the Director-General or an officer or employee of the Organization —

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- (i) by an officer or employee of the Organization — in the course of his duties; or
 - (ii) by a person who has entered into any such contract, agreement or arrangement — in accordance with the contract, agreement or arrangement;
- (b) by an officer of the Organization, within the limits of authority conferred on him by the Director-General; or
- (c) with the approval of the Director-General or of an officer of the Organization having the authority of the Director-General to give such an approval, he is guilty of an offence.
- (3) Notwithstanding paragraph 17(1)(b), the Director-General may, in accordance with the following paragraphs, by himself or by an officer authorized by him, communicate information that has come into the possession of the Organization in the course of performing its functions under section 17:
 - (a) where the information relates, or appears to relate, to the commission, or intended commission, of an offence against the law of the Commonwealth or of a State or Territory, being an offence punishable by imprisonment for life or for a period, or maximum period, of not less than 3 years — the information may be communicated to an officer of the Police Force of a State or Territory or of the Commonwealth Police Force;
 - (b) where the information relates, or appears to relate, to the commission, or intended commission, of an offence punishable as provided by section 235 of the Customs Act 1901 — the information may be communicated to a person who is an officer of Customs for the purposes of the Customs Act 1901; or
 - (c) where the information has come into the possession of the Organization outside Australia or concerns matters outside Australia and the Director-General is satisfied that the national interest requires the communication — the information may be communicated to a Minister or Department or to the Office of National Assessments.
- (4) An offence against sub-section (2) may be prosecuted either summarily or on indictment and the penalty for such an offence is —
 - (a) upon summary conviction — a fine not exceeding \$1,000 or imprisonment for a term not exceeding 1 year; or
 - (b) upon conviction on indictment — imprisonment for a term not exceeding 2 years.
- (5) A prosecution for an offence against sub-section (2) shall

be instituted only by or with the consent of the Attorney-General.

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20. The Director-General shall take all reasonable steps to ensure that —

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(a) the work of the Organization is limited to what is necessary for the purposes of the discharge of its functions; and

(b) the Organization is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

21. The Director-General shall consult regularly with the Leader of the Opposition in the House of Representatives for the purpose of keeping him informed on matters relating to security.”

Division 2 of Pt III is headed “Special Powers”, and covers ss. 22 to 34 inclusive. It authorizes under stringent conditions the exercise on behalf of ASIO by the Director-General and persons approved by him of special powers under warrants issued by the Minister or in case of emergency by the Director-General himself. The special powers extend to the search of premises and inspection and removal of records, the use of listening devices whether in relation to a particular person or particular premises, and the inspection of postal articles, whether in relation to a particular person or particular premises. The conditions precedent to the exercise by the Minister of the power to issue a warrant include the following: (a) a request by the Director-General for the issue of a warrant; (b) the satisfaction of the Minister, (i) in the case of a search warrant, that there are reasonable grounds for believing that there are in any premises any records without access to which the collection of intelligence by ASIO in respect of a matter that is of importance in relation to security would be seriously impaired; (ii) in the case of a listening device in relation to a particular person, that the person is engaged in, or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security, and that the use by ASIO of a listening device in relation to that person will, or is likely to, assist ASIO in carrying out its function of obtaining intelligence relevant to security; (iii) in the case of a listening device in relation to particular premises that the premises are used, likely to be used or frequented by a person engaged in, or reasonably suspected by the Director-General of being engaged in or of being likely to engage in, activities prejudicial to security, and that the use of a listening device in such premises

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will, or is likely to assist ASIO in carrying out its function of obtaining intelligence relevant to security; and (iv) in the case of postal articles, of considerations similar to those applicable to the case of listening devices. Section 26(1), in relation to listening devices, and s. 27(1) in relation to the inspection of postal articles declare it to be unlawful for ASIO to use a listening device or to seek or be provided with access to a postal article, as the case may be, otherwise than in accordance with a warrant, and it is declared to be the duty of the Director-General to take all reasonable steps to ensure that the provision is not contravened. Division 2 includes also the following provisions:

“28. A request by the Director-General for the issue of a warrant under this Division shall specify the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued and (where appropriate) the grounds on which the Director-General suspects a person of being engaged in, or of being likely to engage in, activities prejudicial to security.”

“34. The Director-General shall furnish to the Minister in respect of each warrant issued under this Division a report in writing on the extent to which the action taken under the warrant has assisted the Organization in carrying out its function of obtaining intelligence relevant to security.”

Part IV deals with security assessments, and its salient features may be summarized as follows: (a) The functions of ASIO referred to in s. 17(1)(c) include the furnishing to Commonwealth agencies of security assessments relevant to their functions and responsibilities (s. 37(1)). (b) A security assessment is a statement in writing furnished by ASIO expressing any recommendation, opinion or advice on the question whether it would be consistent with the requirements of security for “prescribed administrative action” to be taken in respect of a person, or whether it was necessary or desirable for such action to be taken (s. 35). (c) “Prescribed administrative action” means action which relates to or affects access by a person to any information or place, access to which is controlled or limited on security grounds, including action affecting the occupancy of any office under the Commonwealth or under a State or in the service of a Commonwealth contractor the occupant of which has or may have any such access. It also embraces the exercise of a power or performance of a function in relation to a person under the *Migration Act* 1958, the *Australian Citizenship Act* 1948, the *Passports Act* 1938, or the regulations thereunder (s. 35). (d) Whenever an adverse or qualified security assessment in respect of a person is furnished by ASIO to a Commonwealth agency, the agency shall within fourteen days inform that person by notice in

writing of the making of the assessment and enclose a copy of the assessment. The assessment is accompanied by a statement which includes all the information that has been relied on by ASIO in making the assessment, other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security. Furthermore, the Attorney-General may certify that he is satisfied either that — (i) it is essential to the security of the nation that notice to a person of the making of a security assessment be withheld; or (ii) the disclosure to the subject of the accompanying statement or part thereof would be prejudicial to the interests of security, and in either case effect is to be given to the certificate (ss. 37, 38). (e) A person who has been given notice of an adverse or qualified security assessment may apply to the Security Appeals Tribunal (established by Div. 3 of Pt IV) for a review of the assessment (s. 54). The proceedings shall be in private; neither the applicant nor his representative shall be present when the Tribunal is hearing submissions or evidence from the Director-General or Commonwealth agency concerned, and the same rule applies to the Director-General and Commonwealth agency when the Tribunal is hearing submissions or evidence from the applicant (s. 58(6) and (7)). For the purpose of giving the applicant an opportunity of adducing further evidence, the Tribunal may give him such particulars of evidence adduced or submissions made by the Director-General as it considers can be so given consistently with the requirements of security, and before doing so it shall consult with the Director-General as to those requirements (s. 58(12) and (13)). (f) Other than an application to the Tribunal, no proceedings shall be brought in any court or tribunal in respect of the making of an assessment or anything done in respect of an assessment in accordance with this Act (s. 37(5)), and subject to the Constitution a decision of the Tribunal is not subject to review by any court or other tribunal (s. 62). (g) Section 81 provides as follows:

“(1) A person who is or has been a member or an officer of the Tribunal shall not, either directly or indirectly, except for the purposes of this Act —

- (a) make a record of, or divulge or communicate to any person, any information acquired by him by reason of his office or employment under or for the purposes of this Act; or
- (b) produce to any person a document furnished for the purposes of this Act.

Penalty: \$2,000 or imprisonment for 2 years.

(2) A person who is or has been a member or an officer of the Tribunal shall not be required to produce in a court any document of which he has custody, or to which he has access, by virtue of his office or employment under or for the

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purposes of this Act, or to divulge or to communicate to a court any information obtained by him by reason of such an office or employment, except when it is necessary to do so for the purposes of this Act.”

Section 91 provides that the Director-General and officers and employees of ASIO shall be deemed to be Commonwealth officers for the purposes of the *Crimes Act* 1914. The only material provision of the *Crimes Act* which is brought into operation by s. 91 is s. 70, which reads:

“(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which it is his duty not to disclose, shall be guilty of an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of his office, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose shall be guilty of an offence.

Penalty: Imprisonment for two years.”

As I have said, the Solicitor-General argues that the discretions implicit in s. 17(1) are not reviewable by a court. It will be noted, as Mr. Castan observes, that the sub-section is not expressly conditioned by any reference to the opinion of the Director-General. Nevertheless, Mr. Byers puts the case against justiciability by taking a broad view of the statute. He relies on the fact that ASIO is a non-statutory organization which is placed under the control of the Director-General with a view to the performance of the functions set out in s. 17(1). The kind of decisions by which that performance is directed and controlled are necessarily matters of opinion and judgment, and this is emphasized by s. 8 which places the opinions of the Director-General relating to the collection and communication of intelligence by ASIO beyond ministerial control. The Act recognizes that the Director-General may make errors of judgment in controlling the course of an investigation or the communication of information, but it is only when the communication comes within the concept of an adverse or qualified security assessment that the subject matter is open to any kind of judicial review, and then by a special tribunal under the most stringent procedural restraints, obviously imposed with a view to protecting security. In the context of this broad view, s. 20 is to be seen as a direction for the guidance of the Director-General, and not as a prescription of a legal right of

the subject which is capable of protection by declaration or injunction.

In the second place, the Solicitor-General attacks the particular allegations that lie at the heart of the action, namely, the continuing to gather information, and the communication of that intelligence. With respect to the former, it is said that even if it be possible to characterize such an operation of ASIO as outside its proper function, that does not make the conduct unlawful. Similarly with the alleged improper communication of information, neither statute or common law provides a remedy unless the published statement be defamatory and not protected by privilege.

For the plaintiffs, Mr. Castan joins issue with the defendants' arguments. He argues that the omission from s. 17 of any reference to the opinion of the Director-General is significant, particularly when compared with provisions such as are found in ss. 26(2), 27(2) and 38(2). It follows that the operations of ASIO are controlled by criteria which are capable of objective determination, and are therefore subject to review by the Court. With respect to the second argument, he concedes that it is undoubtedly relevant to security and therefore lawful for ASIO to make an initial collection of information concerning a person but if the evaluation of that initial intelligence leads or ought to lead to a conclusion that the person is not a security risk then ASIO has no authority to continue to gather information on that person or to communicate any such information. He points to the phrase "for purposes relevant to security *and not otherwise*" (my emphasis) in s. 17(1)(b), and argues that on their proper construction ss. 17 and 20 lead to the conclusion that the lawful operations of ASIO are delimited by reference to its functions.

I may say at once that whatever may be the lawfulness of ASIO continuing to communicate intelligence in circumstances which fail to come within the phrase "for purposes relevant to security and not otherwise" in s. 17(1)(b) I find it difficult to deny to ASIO a statutory function pursuant to s. 17(1)(a) of continuing to "obtain, correlate and evaluate intelligence relevant to security" merely because initial intelligence may have established that a person or body was not *then* a security risk. It is always possible that circumstances will change and I cannot accept that an initial clearance must thenceforth protect a person or body from further scrutiny.

The features of the 1979 Act which impress me as being of importance to the resolution of the issues that have been raised include the following: (a) Section 17 must be read in the light of s. 8, with the result that ASIO's pursuit of its functions is surrounded at

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every point by the controlling opinion of the Director-General. (b) Section 20 exhibits the character of a political exhortation rather than a legal command. I cannot conceive of a court being required to adjudicate on allegations touching "influences or considerations not relevant to its functions" or on conduct which "might lend colour to any suggestion that it (ASIO) is concerned to further or protect the interests of any particular section of the community". (c) The existence of grounds supporting the issue of a warrant authorizing the exercise by ASIO of special powers would not seem to be open to judicial review. I draw this conclusion from the emphasis, (i) in s. 25, upon the satisfaction of the Minister as a condition precedent to the issue of the warrant; and (ii) in ss. 26 and 27, upon the satisfaction of the Minister of, *inter alia*, a reasonable suspicion of the Director-General. (d) The provision of a specific form of judicial review of one aspect only of the operations of ASIO, namely, the furnishing to a Commonwealth agency of an adverse or qualified security assessment. Three things may be noted about this provision: the first is that it is directed to that part of the operations of ASIO that is most likely to be attended with immediate adverse consequences to the individual; the second is that the procedure bears no comparison to customary court procedures, and is clearly dominated by a concern to protect security; the third is that, save for such a review, no proceedings shall be brought in any court or tribunal in respect of the making of an assessment or anything done in respect of an assessment in accordance with this Act. (e) The legislature makes clear its reliance upon the integrity and competence of the Director-General to ensure that ASIO conforms to its charter, and it pays some attention to political processes in relation to the office: see ss. 7(2), 8, 20, 21, 26(1), 27(1), 34 and 94.

It is against this background that I now examine the relief sought by the plaintiffs in relation to the 1979 Act. Under par. B of the claim, seven declarations are sought, the grant of which would require the Court to entertain and adjudicate, *inter alia*, upon the following issues: (a) that initial inquiries respecting the plaintiffs established or ought to have established that such intelligence is not relevant to security within the meaning of the 1979 Act (B(iv)); (b) that the continued obtaining, correlating and evaluating of intelligence by ASIO concerning the plaintiffs and the other members of the firstnamed plaintiff is unlawful (B(iv)); (c) that the communication of information by ASIO to the effect that the plaintiffs and the members of the firstnamed plaintiff are persons in respect of whom the Commonwealth and the several States and Territories and their people need protection from espionage, sabotage, subversion, active measures of foreign intervention or terrorism, or who have committed or intend to commit the said

offences, is unlawful for the reasons that the information is not true (B(iii) and (vi)); (d) whether or not the executive power of the Commonwealth authorizes the continued obtaining, correlating and evaluating of intelligence and the communication of the same as alleged in the statement of claim (B(vii)).

One may put aside the question whether the communication by ASIO of intelligence for purposes which are not relevant to security is unlawful because even if, for the purposes of the argument, Mr. Castan's point in this regard is conceded, there remains what to my mind is an insuperable objection extending to all the issues I have mentioned. It is the notion that the Court can examine the intelligence in question and receive evidence, presumably in the presence of the plaintiffs if not in open court, concerning the Director-General's reasons for believing the communication to be for "purposes relevant to security and not otherwise", and then decide for itself the purpose of the communication and the truth of its subject matter. The likelihood is that a hearing on such issues would be aborted at the outset by reason of problems of privilege and secrecy, but in any event I cannot discern any legislative intent to have questions of security ventilated in a court proceeding surrounded with none of the safeguards that are provided for the review of adverse security assessments. I find the inference in favour of the defendants' submission on justiciability to be irresistible.

It follows that the relief by way of injunction claimed in par. C can have no basis in law, and a similar conclusion follows in the case of the order in the nature of a mandamus directed to the Director-General claimed in par. D.

The relief claimed in par. A purports to be grounded on the 1956 Act, but nevertheless follows the same pattern and raises the same issues as those that I have discussed in relation to par. B. It is unnecessary to examine the 1956 Act in detail. It suffices to say that s. 5(1) of that Act expressly conditions the communication of intelligence on "the discretion of the Director-General". This fact, together with the strong correspondence in subject matter linking the two statutes, notwithstanding the greater detail of the 1979 Act, leads me to construe the 1956 Act also as not exposing the functions of ASIO to judicial review. I am fortified in this conclusion by the further considerations that both the continued gathering of intelligence and its communication prior to 1 June 1980 would not appear to have been unlawful, for the reasons given by Aickin J. in an action *Church of Scientology Inc. v. Woodward*.^{*} With respect, I agree with those reasons.

^{*}The judgment of Aickin J. in a previous case of *Church of Scientology v. Woodward*, delivered 9 November 1979, is reproduced at p. 79.

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In pars. E and F of the claim the plaintiffs seek declarations that the 1956 Act was, and the 1979 Act is, a law for prohibiting the free exercise of any religion and beyond the powers of the Commonwealth by reason of s. 116 of the Constitution. Mr. Castan made it clear that the plaintiffs do not challenge the decision of this Court in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (4), and that the only basis on which allegations were advanced concerning s. 116 was in anticipation of a possible defence by the defendants. The Solicitor-General responded to this with the submission that the pleading should have been held in reserve for use in reply if necessary, and that as the matter stands this part of the statement of claim is embarrassing. I agree with the submission.

My consideration of the submissions of the parties on this application has led me to a firm conclusion that the plaintiffs cannot possibly succeed in the action. In the circumstances, while acknowledging the caution with which an action should ever be summarily terminated, I think it proper to accede to the defendants' application.

Pursuant to O. 26, r. 18, the statement of claim is struck out, and the action dismissed with costs.

The plaintiffs appealed to the Full Court from the orders of Wilson J.

A. R. Castan Q.C. (with him *J. I. Fajgenbaum*), for the appellants. ASIO is limited by its legislative charter which reflects the constitutional limits. Nothing in the current or earlier legislation prevents supervision by the courts of its actions that go beyond the statutory limits. Actions taken by Commonwealth officers beyond constitutional limits of legislative and executive power can never be removed from the supervision of the High Court. While a person or a State with plenary powers may gather and communicate intelligence, the Commonwealth may do so only within the limits of constitutional powers or purposes. The plaintiffs have standing because a public wrong is alleged. There must be a point at which the Director-General is satisfied or should properly be satisfied that a person is not a security risk.

The courts have practical procedures for regulating any questions of Crown privilege or confidentiality: *Krew v. Federal Commissioner of Taxation* (5); *The Commonwealth v. John Fairfax &*

(4) (1943) 67 C.L.R. 116.

(5) (1971) 45 A.L.J.R. 249; 2 A.T.R. 230; 71 A.T.C. 4091.

Sons Ltd (6); *Sankey v. Whitlam* (7). Facts or documents relating to the affairs of the appellants should not be disclosed to other persons under the cover or guise of legislative authority when, in fact, those matters are not properly the subject of the Act. The Court has a role to play in relation to the Act, e.g., in relation to the validity of search warrants and wrongful transmission of security assessments. Where there is to be no access to the courts, the legislature has said so, e.g. in ss. 62 and 81. The existence of a private right of action does not affect or negative in any way the existence of the right to complain of the public wrong. Officers of the Commonwealth authorized by statute to exercise the executive power of the Commonwealth are limited, when acting in the exercise of that capacity, to the functions so authorized by the relevant statute. Once it is established that a person is not a security risk, he cannot be the subject of continuing or permanent surveillance in the obtaining of intelligence. Where the matter governing the exercise of a statutory power is objective rather than being a matter of the opinion of an officer, then that matter can be reviewed by a court. All actions of the executive must be for constitutional purposes of the Commonwealth and the power of inquiry also is subject to that limit: *Colonial Sugar Refining Co. Ltd. v. Attorney-General (Cth)* (8); *Victoria v. The Commonwealth* (9); *Australian Communist Party v. The Commonwealth* (10). The constitutional limits inevitably mean that these issues are justiciable.

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M. H. Byers Q.C., Solicitor-General for the Commonwealth, (with him *G. Griffith*), for the respondents. Section 17 sets out the activities or functions ASIO is to pursue. It obtains, correlates and evaluates intelligence that is relevant to security and, in so doing, must, from time to time, exercise judgment as to whether the intelligence is relevant to security. It is not confined to making this assessment on only one occasion, and there is nothing unlawful in making a mistake in the course of making such an assessment in good faith. The exercise of that judgment should not be called in question in the courts. The Act provides a method by which the security assessment may be called in question and under circumstances which envisage that there may have been a mistake on the part of the person concerned, but nonetheless that is contemplated as being within the pursuit of the power. Section 18(2) prohibits the

(6) (1981) 147 C.L.R. 39, at pp. 50-54.

(7) (1978) 142 C.L.R. 1.

(8) (1912) 15 C.L.R. 182, at pp. 194, 205-206.

(9) (1975) 134 C.L.R. 338, at pp. 362, 377-378, 380, 396-397.

(10) (1951) 83 C.L.R. 1, at pp. 183, 187.

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communication of any information or matter that comes to the knowledge of an officer or employee of ASIO except for the stated purposes, and s. 81(2) prohibits disclosure by members of the Tribunal in a court. There is no judicial review apart from questions of corruption or mala fides. [He referred to *Marcus Clark & Co. Ltd. v. The Commonwealth* (11).] It is futile to embark on any question relating to the 1956 Act, because it was repealed from 1 June 1980. There can be no question of constitutional power in any relevant sense because the Act gives no right to do anything except to collect information and communicate that information under stated conditions. It confers no immunity for error. [He also referred to *Church of Scientology Inc. v. Woodward* (12); *Lockwood v. The Commonwealth* (13); and *Clough v. Leahy* (14).]

A. R. Castan Q.C., in reply.

Cur. adv. vult.

1982, Nov. 19. The following written judgments were delivered:—

GIBBS C.J. This is an appeal from a judgment of Wilson J. ordering that the amended statement of claim delivered in this action be struck out and that the action be dismissed.

The action is brought by the Church of Scientology Inc. and by Peter James Fowler (who sues on his own behalf and on behalf of all the other members of the Church of Scientology Inc. as at the date of the issue of the writ) against the Honourable Mr. Justice Woodward (who was at the date of delivery of the statement of claim the Director-General of the Australian Security Intelligence Organization ("ASIO")), the Attorney-General and the Commonwealth. Full details of the amended statement of claim appear in the judgment of Wilson J., and it is unnecessary to repeat them. Until 1 June 1980, the legislation governing the activities of ASIO was the *Australian Security Intelligence Organization Act* 1956 (Cth), as amended ("the Act of 1956"), which was repealed and replaced by the *Australian Security Intelligence Organization Act* 1979 ("the Act of 1979") which came into operation on that date. The amended statement of claim alleges that both before and since 1 June 1980 the Director-General (on his own initiative or acting under instructions from and in concert with the Attorney-General, or acting in consequence of policies and directions determined by various

(11) (1952) 87 C.L.R. 177, at pp.
215-216, 252-253.
(12) *Post*, p. 79.

(13) (1954) 90 C.L.R. 177.
(14) (1904) 2 C.L.R. 139.

Ministers of the Commonwealth) has caused or permitted ASIO to obtain, correlate and evaluate intelligence concerning the plaintiffs and the members of the first plaintiff and to communicate such intelligence to other persons and to characterize the plaintiffs and other members of the first plaintiff as security risks and to communicate to other persons the fact that ASIO has made that characterization, in circumstances in which it was unlawful for ASIO to do any of these things. The plaintiffs seek declarations that these activities of ASIO were prohibited both before and after 1 June 1980 and seek an injunction restraining the defendants from causing or permitting ASIO to act in the manner alleged and an order commanding the Director-General to perform his duty under s. 20 of the Act of 1979, to whose provisions I shall shortly refer. Declarations were sought that if the Acts of 1956 and 1979 did empower the Director-General to act in the manner alleged they were beyond power by reason of the provisions of s. 116 of the Constitution, but those claims were abandoned in argument before us. In the circumstances, it is unnecessary to deal separately with the effect of the Act of 1956, since the real concern of the plaintiffs is with the continued activities of ASIO in the future, and the question whether ASIO was prohibited from doing what it did in the past is now only of theoretical interest. There is however, no reason to suppose that any different conclusion would be reached in relation to the Act of 1956 from that which will be reached in relation to the Act of 1979.

The functions of ASIO are described in s. 17 of the Act of 1979 as follows:

“(1) The functions of the Organization are —

- (a) to obtain, correlate and evaluate intelligence relevant to security;
- (b) for purposes relevant to security and not otherwise, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes; and
- (c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.

(2) It is not a function of the Organization to carry out or enforce measures for security within an authority of the Commonwealth.”

“Security” is defined in s. 4 to mean —

- “(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from —
 - (i) espionage;
 - (ii) sabotage;

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- (iii) subversion;
 - (iv) active measures of foreign intervention; or
 - (v) terrorism,
- whether directed from, or committed within, Australia or not; and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the sub-paragraphs of paragraph (a);".

The expressions "espionage" and "sabotage" are not defined. However, s. 4 contains definitions of "active measures of foreign intervention" and "terrorism" as follows:

"'active measures of foreign intervention' means clandestine or deceptive action taken by or on behalf of a foreign power to promote the interests of that power;"

"'terrorism' includes —

- (a) acts of violence for the purpose of achieving a political objective in Australia or in a foreign country (including acts of violence for the purpose of influencing the policy or acts of a government in Australia or in a foreign country);
- (b) training, planning, preparations or other activities for the purposes of violent subversion in a foreign country or for the purposes of the commission in a foreign country of other acts of violence of a kind referred to in paragraph (a);
- (c) acts that are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*; or
- (d) acts that are offences punishable under the *Crimes (Hijacking of Aircraft) Act 1972* or the *Crimes (Protection of Aircraft) Act 1973*."

Section 5 defines "subversion" in relation to activities which are not of foreign origin and are not directed against a foreign government. That section reads as follows:

"(1) For the purposes of this Act, the activities of persons, other than activities of foreign origin or activities directed against a foreign government, that are to be regarded as subversion are —

- (a) activities that involve, will involve or lead to, or are intended or likely ultimately to involve or lead to, the use of force or violence or other unlawful acts (whether by those persons or by others) for the purpose of overthrowing or destroying the constitutional government of the Commonwealth or of a State or Territory;
- (b) activities directed to obstructing, hindering or interfering with the performance by the Defence Force of its functions or the carrying out of other activities by or for the Commonwealth for the purposes of security or the defence of the Commonwealth; or
- (c) activities directed to promoting violence or hatred be-

tween different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth.

(2) For the purposes of this section, 'activities of foreign origin' means activities of, directed or subsidized by, or undertaken in active collaboration with, a foreign power or foreign political organization, whether carried on or to be carried on in Australia or outside Australia.

(3) Nothing in this section affects the meaning of the expression 'subversion' in relation to activities of foreign origin or activities directed against a foreign government."

Section 8 provides as follows:

"(1) The Organization shall be under the control of the Director-General.

(2) In the performance of his functions under this Act, the Director-General is subject to the general directions of the Minister, but the Minister is not empowered to override the opinion of the Director-General —

- (a) on the question whether the collection of intelligence by the Organization concerning a particular individual would, or would not, be justified by reason of its relevance to security;
- (b) on the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security; or
- (c) concerning the nature of the advice that should be given by the Organization to a Minister, Department or authority of the Commonwealth."

Section 18 provides as follows:

"(1) The communication of intelligence on behalf of the Organization shall be made only by the Director-General or by an officer of the Organization acting within the limits of authority conferred on him by the Director-General.

(2) If a person makes a communication of any information or matter that has come to his knowledge or into his possession by reason of his being, or having been, an officer or employee of the Organization or his having entered into any contract, agreement or arrangement with the Organization, being information or matter that was acquired or prepared by or on behalf of the Organization in connection with its functions or relates to the performance by the Organization of its functions, other than a communication made —

- (a) to the Director-General or an officer or employee of the Organization —
 - (i) by an officer or employee of the Organization — in the course of his duties; or
 - (ii) by a person who has entered into any such contract, agreement or arrangement — in accordance with the contract, agreement or arrangement;
- (b) by an officer of the Organization, within the limits of authority conferred on him by the Director-General; or

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(c) with the approval of the Director-General or of an officer of the Organization having the authority of the Director-General to give such an approval, he is guilty of an offence.

(3) Notwithstanding paragraph 17(1)(b), the Director-General may, in accordance with the following paragraphs, by himself or by an officer authorized by him, communicate information that has come into the possession of the Organization in the course of performing its functions under section 17:

- (a) where the information relates, or appears to relate, to the commission, or intended commission, of an offence against the law of the Commonwealth or of a State or Territory, being an offence punishable by imprisonment for life or for a period, or maximum period, of not less than 3 years — the information may be communicated to an officer of the Police Force of a State or Territory or of the Commonwealth Police Force;
 - (b) where the information relates, or appears to relate, to the commission, or intended commission, of an offence punishable as provided by section 235 of the *Customs Act* 1901 — the information may be communicated to a person who is an officer of Customs for the purposes of the *Customs Act* 1901; or
 - (c) where the information has come into the possession of the Organization outside Australia or concerns matters outside Australia and the Director-General is satisfied that the national interest requires the communication — the information may be communicated to a Minister or Department or to the Office of National Assessments.
- (4) An offence against sub-section (2) may be prosecuted either summarily or on indictment and the penalty for such an offence is —
- (a) upon summary conviction — a fine not exceeding \$1,000 or imprisonment for a term not exceeding 1 year; or
 - (b) upon conviction on indictment — imprisonment for a term not exceeding 2 years.
- (5) A prosecution for an offence against sub-section (2) shall be instituted only by or with the consent of the Attorney-General.”

Sections 20 and 21 provide as follows:

“20. The Director-General shall take all reasonable steps to ensure that —

- (a) the work of the Organization is limited to what is necessary for the purposes of the discharge of its functions; and
- (b) the Organization is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

21. The Director-General shall consult regularly with the

Leader of the Opposition in the House of Representatives for the purpose of keeping him informed on matters relating to security."

Mention will be made of certain other sections which deal with some of the powers of ASIO which are not in question in the present case, but it is unnecessary to set them out in full.

The principal allegations of fact made in the amended statement of claim are those contained in pars. 7A and 8A which are as follows:

"7A. Since the 1st day of June 1980 the firstnamed defendant on his own initiative or alternatively acting under instructions from and in concert with the secondnamed defendant, or in the further alternative, acting as a consequence of policies and directions determined by various Ministers of State of the thirdnamed defendant —

(a) has caused or permitted ASIO to obtain correlate and evaluate initial intelligence concerning the plaintiffs and other members of the firstnamed plaintiff and to communicate such initial intelligence to other persons;

(b) has further caused or permitted ASIO to continue to obtain, correlate and evaluate further intelligence concerning the plaintiffs and the other members of the firstnamed plaintiff and to continue to communicate such further intelligence to other persons notwithstanding that the initial obtaining, correlating and evaluating of intelligence established or ought to have established that such intelligence —

(i) is not relevant to the protection of the Commonwealth and the several States and Territories and of their people from espionage, sabotage, subversion, active measures of foreign intervention or terrorism;

(ii) does not relate or appear to relate to the commission or intended commission of an offence against the law of the Commonwealth or of a State or Territory being an offence punishable by imprisonment for not less than 3 years or an offence punishable as provided by section 235 of the *Customs Act* 1901;

(iii) did not come into the possession of ASIO outside Australia and does not concern matters outside Australia and is not information which the firstnamed defendant is satisfied must be communicated in the national interest;

(c) has caused or permitted ASIO to characterise the plaintiffs and other members of the firstnamed plaintiff as persons in respect of whom the Commonwealth and the several States and Territories and their people need protection from espionage, sabotage, subversion, active measures of foreign intervention or terrorism or who have committed or intend to commit the said offences and has caused or permitted the fact that ASIO has made such characterisation to be communicated to other persons.

8A. (a) The firstnamed plaintiff is not now and has not been at

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any material time since the 1st day of June 1980 a person or organisation in respect of whom the Commonwealth and the several States and Territories and their people need protection from espionage, sabotage, subversion, active measures of foreign intervention or terrorism, or who have committed or intend to commit the said offences.

(b) The secondnamed plaintiff and the members of the firstnamed plaintiff are not now and have not been at any material time since the 1st day of June 1980 persons in respect of whom, by reason of their membership of the firstnamed plaintiff or by reason of their being practising adherents of the Scientology religion, the Commonwealth and the several States and Territories and their people need protection from espionage, sabotage, subversion, active measures of foreign intervention or terrorism, or who have committed or intend to commit the said offences.

(c) Intelligence concerning the plaintiffs and the members of the firstnamed plaintiff is not now and has not been at any material time since the 1st day of June 1980 —

- (i) intelligence relevant to security within the meaning of the 1979 Act;
- (ii) intelligence or information which relates or appears to relate to the commission or intended commission of the said offences;
- (iii) intelligence or information which came into the possession of ASIO outside Australia or which concerns matters outside Australia or which the firstnamed defendant is satisfied must be communicated in the national interest.”

The plaintiffs do not challenge the validity of the Act of 1979. Their argument is that, properly construed, that Act prohibits ASIO from obtaining, correlating or evaluating intelligence unless the intelligence is relevant to security within the meaning of the Act, and that intelligence is not relevant to security if it relates to a person who is not a security risk. It is conceded that ASIO may make initial inquiries, but it is said that once those inquiries have established, or ought to have established, that the intelligence is not relevant to security, in that sense, ASIO may not proceed to obtain further intelligence — unless the further intelligence is relevant to security. Similarly, it is submitted, ASIO is prohibited from communicating to any person intelligence which is not in truth intelligence relevant to security or evidence relating to the matters specified in s. 18(3). It is further submitted that ASIO may not communicate the fact that it has characterized a person as one in respect of whom the Commonwealth and the several States and Territories and their people need protection from espionage, sab-

otage, subversion, active measures of foreign intervention or terrorism, (i.e., as a security risk) or as one who has committed or intends to commit the offences mentioned in s. 18(3), unless such characterization is true. If the action proceeds, the plaintiffs will seek to prove that they are not security risks, and that information concerning them is not information relevant to security, or to the matters mentioned in s. 18(3), and that the initial inquiries of ASIO established or should have established these things.

The argument for the plaintiffs requires the words of s. 17(1) of the Act of 1979 to be given a very narrow meaning. Section 17(1)(a), it is said, enables ASIO to obtain intelligence only if it is "relevant to security", and s. 17(1)(b) enables ASIO to communicate only "such intelligence", i.e., intelligence "relevant to security"; s. 18(3) enables ASIO also to communicate information of the kind to which that sub-section refers, but for convenience that exception may be temporarily ignored, and it will be convenient in general to speak only of intelligence relevant to security. If the Court decides that the intelligence in question is not relevant to security, the result, it is submitted, is that ASIO is prohibited from obtaining, correlating, evaluating or communicating it, and that it would be unlawful to do so. Support for this contention was sought to be found in the contrast between the words of s. 17, which it is said provide for an objective test, and those of other sections which refer to the satisfaction of the Director-General or the Minister — see ss. 18(3)(c), 25(1) and (2), 26(3) and (4), 27(2), 30 and 38(2).

The construction which the plaintiffs seek to place on s. 17(1) would give that section an effect which would be absurd and unworkable. It is obvious that intelligence which falls far short of establishing that a person is a risk to security may nevertheless be relevant to security. A scrap of information which, in itself, may seem to have no bearing on security may, when put together with other information, assume a vital significance. An officer seeking intelligence will not always start with a hot trail but may need to begin by collecting information in the hope that it may ultimately prove to be of importance. The necessary concession that ASIO is entitled to make initial inquiries reveals the difficulty in the suggested construction. It is impossible to suggest any rational test by which one could determine the point of time at which one should ask the question whether the inquiries so far made have established that the intelligence is relevant to security. Today's intelligence may seem to establish that a suspected person is a loyal citizen; further information obtained tomorrow may show that he is engaged in espionage or subversion. There is nothing in the Act of 1979 that leads to the unlikely conclusion that ASIO must cease to obtain

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intelligence about a particular person unless its initial investigations are successful in establishing that he is a security risk. Moreover, intelligence gathered in the honest belief, or in the hope, that it will be relevant to security may, in the light of further information, prove to be valueless. Finally, it should be remembered that it may be relevant to security to establish that a particular person is not a security risk.

These considerations lead to the conclusion that it was not intended that a court should have power to decide whether ASIO has exceeded its proper function, and obtained intelligence which is not relevant to security, in a case where bad faith is not alleged, and it is not suggested that any private right has been infringed. It is important to recognize that the provisions of s. 17 of the Act of 1979 neither confer powers nor impose duties on ASIO — they simply define its functions. The present case is therefore not one in which it can be suggested that there has been an abuse of statutory power or a breach of statutory duty. In particular, s. 17 does not authorize ASIO to invade private rights — ASIO is given no power to affect the liberty or interfere with the person or property of a private citizen and its officers are given no privilege to make defamatory statements additional to that which is available under the general law. Where it is intended that ASIO should have special powers (for example to search, to use listening devices and to inspect postal articles) express provision is made to that effect: see Div. 2 of Pt III. The argument for the plaintiffs in essence is that the courts have power to control ASIO in the exercise of its functions of collecting and assessing intelligence, even though no private right is affected and bad faith is not alleged. However, it seems to me impossible for a court to say that any intelligence collected in good faith — i.e., for purposes believed to be relevant to security, and not for some ulterior purpose — is not relevant to security, since it may, in the light of other material, bear on the question whether a person is or is not a security risk. For all these reasons I consider that the legislation does not entrust to the courts the power to decide that ASIO may not obtain particular intelligence on the ground that it is not relevant to security. By s. 20 the Parliament requires the Director-General to take all reasonable steps to ensure that the work of ASIO is limited to what is necessary for the discharge of its functions. The Director-General is placed in a special position. By s. 8(2) the Minister cannot override his opinion on the question whether the collection or communication of intelligence concerning a particular individual would be justified. Sections 21 and 94 require the Leader of the Opposition to be consulted and informed, but oblige him to treat as secret the Director-General's reports on the

activities of the Organization. These provisions show that the Director-General is not in the ordinary position of the head of a government department. And when it is intended that the work of ASIO should be reviewed, express provision is made: see Pt IV which provides for a review of security assessments by a special tribunal which sits in private and hears evidence from one party in the absence of the other. It would indeed be anomalous if, although an individual affected — and perhaps seriously affected — by a security assessment is given only a limited right of recourse to a special tribunal, a person who is merely the subject of inquiry has the right to have the exercise by ASIO of its functions reviewed in the ordinary courts. In my opinion, the Parliament intended that the performance of the functions of ASIO, which necessarily require secrecy, should be controlled by the Director-General and not by the courts — i.e., as I have said, in a case where individual rights are not involved and there is no bad faith.

The provisions of the Act of 1979 with regard to the communication of intelligence are rather more detailed than those which relate to the collection of intelligence. The offence created by s. 18(2) is not committed when information is communicated by an officer of ASIO, within the limits of the authority conferred on him by the Director-General, or with the approval of the Director-General or of an officer of ASIO having the authority of the Director-General to give such an approval. Obviously, this subsection does not prevent the Director-General or an officer authorized by him from making a communication of whatever information the Director-General authorizes to be communicated. Section 18(3), although placed in the Act between s. 18(2) and s. 18(4) which provides the penalty for offences against s. 18(2), does not appear in any way to qualify s. 18(2). Its purpose appears to be to permit the Director-General or an authorized officer to communicate, for certain purposes not relevant to security, information that has come into the possession of ASIO in the course of performing its functions. This suggests that the intention of the Parliament is that the Director-General should not authorize the communication of any intelligence except for purposes relevant to security or in the circumstances mentioned in s. 18(3), but it does not follow that the information which is communicated must be itself relevant to security in the way in which that expression is interpreted by the plaintiffs. Reference was made to s. 70 of the *Crimes Act* 1914 (Cth), as amended, but that section applies only to the disclosure by an officer of information which it was his duty not to disclose. And neither the Act of 1979, nor the *Crimes Act*, places an officer of ASIO under a duty not to disclose information simply because, in

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the opinion of the Court, it was not relevant to security or related to a person who was not a security risk.

The further argument that ASIO may not characterize a person as a security risk unless he is in fact a risk finds no support in the provisions of the Act of 1979, and if accepted would, in effect, give a right of appeal from conclusions formed by officers of ASIO.

Counsel for the plaintiffs submitted that if the Act of 1979 was not read down in the way that was suggested, it would go beyond the power of the Commonwealth Parliament. The power to enact the statute is to be found in some of the paragraphs of s. 51 of the Constitution (including pars. (vi), (xxix) and (xxxix)) and in the implied power to legislate for the protection of the Commonwealth against subversive action and preparation: cf. *Australian Communist Party v. The Commonwealth* (15). The present appeal does not raise any question, such as that which arose in *Australian Communist Party v. The Commonwealth*, as to whether the powers of the Parliament extend to the enactment of a law under which in certain circumstances, vaguely and uncertainly described, adverse consequences affecting the rights of organizations and individuals would ensue. The question in the present case is whether it is within the power of the Parliament to enact a law which sets up a security agency of the government and empowers it to obtain, correlate and evaluate intelligence relevant to security and to communicate that intelligence for purposes relevant to security and for the purposes mentioned in s. 18(3), even though a particular item of intelligence obtained or communicated might not in itself appear to a court to be relevant to security and even though the intelligence available at a particular time, considered alone, would establish that the person to whom the information relates is not a security risk. For the reasons I have given if the Constitution did not empower the Parliament to enact legislation of that kind, it would not empower the Parliament to authorize the effective gathering of intelligence at all.

On behalf of the plaintiffs it was submitted that the actions alleged to have been done by ASIO fell outside the executive power conferred by s. 61 of the Constitution. The scope of the executive power does not in my opinion arise in the present case, because the powers allegedly exercised by ASIO were conferred by legislation made by the Parliament. The Act of 1979 construed according to its natural meaning authorized ASIO to do what it is alleged to have done in the present case and no necessity exists to read down the legislation to bring it within constitutional limits. In a democratic society, it is sometimes difficult to strike the proper balance between

(15) (1951) 83 C.L.R. 1, at p. 184.

the maintenance of national security and the protection of individual liberties. The legislation in question — so far as this case is concerned with it — does not raise that difficulty, for it does not entrench on private rights.

I entirely agree with the conclusion of Wilson J. that the plaintiffs cannot possibly succeed in the action. I would dismiss the appeal.

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MASON J. The appellants appeal against an order made by Wilson J. striking out their amended statement of claim under O. 26, r. 18 of the High Court Rules and dismissing their action. The order was made on the ground that the amended statement of claim did not disclose a reasonable cause of action. The pleading and the relevant statutory provisions, particularly the *Australian Security Intelligence Organization Acts* of 1956 and 1979 are set out in his Honour's judgment. I need not repeat them.

In deciding that there was no reasonable cause of action disclosed by the appellants' amended pleading, Wilson J. accepted a submission made by the Solicitor-General for the Commonwealth that each of the two Acts "evinces a legislative intent to shield the conduct of ASIO from judicial review". Before us the proposition submitted by the Solicitor-General was less ambitious. It was evidently tailored to meet the particular case pleaded and argued by the appellants. The Solicitor-General disavowed any claim that the Acts completely excluded the operations of ASIO from judicial review and conceded that decisions made and acts done corruptly or mala fides were open to such review. Otherwise, he submitted, the actions of ASIO were not open to review.

It would be too much to say that the supervisory jurisdiction of the courts cannot be impliedly excluded by statute, though no case of implied exclusion was cited to us in argument. But it is not too much to say that any suggestion that Parliament has impliedly excluded judicial review, especially for ultra vires, should be viewed with extreme caution, indeed with healthy scepticism. If Parliament intends to take the radical step of ousting judicial review then it is reasonable to suppose that it will express its intention with directness and clarity upon the topic, thereby taking the responsibility upon its own shoulders for that result rather than leaving the Court to spell it out from a series of provisions not specifically addressed to that question.

The approach of the courts to the construction and application of privative clauses is instructive. The privative clause is the conventional expression of the legislative intention that a decision shall not be challenged in the courts. Yet, notwithstanding the wide and strong language in which these clauses have been expressed, the

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courts have traditionally refused to recognize that they protect manifest jurisdictional errors or ultra vires acts. It would be ironical in the extreme if we were now to hold that what for so long Parliament has failed to achieve by express provision, it has now achieved without any provision at all, and this in a case in which, as we shall see, Parliament has been insistent that ASIO's activities should be confined to security.

What I have said has special force in its application to the jurisdiction of this Court to grant relief under s. 75(v) of the Constitution when the plaintiff seeks relief by way of mandamus, prohibition or injunction: see *R. v. Hickman; Ex parte Fox and Clinton* (16); *Reg. v. Watson; Ex parte Australian Workers' Union* (17). And, it goes almost without saying, that no legislative provision can protect ASIO, from relief by way of injunction restraining it from engaging in activities which are ultra vires the Commonwealth under the Constitution.

It is with these comments in mind that I look to the Act of 1979. The Act does not expressly incorporate ASIO. Section 6 refers to ASIO as "the Organization that was continued in existence" by the repealed statutes and goes on to continue it in existence. Section 4 of the Act of 1956, as amended, up to 1973 had referred to ASIO as "the Organization established in pursuance of a directive given by the Prime Minister" on 16 March 1949 and had continued it in existence.

However, the authorities suggest that it is possible to incorporate a statutory body by implication or to endow it with an artificial legal personality falling short of incorporation. This may be achieved by providing that it is to own property, employ its own staff, enter into transactions, sue and be sued in its collective or corporate name. In *Chaff and Hay Acquisition Committee v. J. A. Hemphill and Sons Pty. Ltd.* (18) this Court held that the Committee, which did not have perpetual succession or a common seal, was not incorporated, but was nevertheless a legal entity distinct from the natural persons who composed it.

In the case of ASIO there is not only an absence of provisions relating to incorporation, perpetual succession and common seal, there is also an absence of provisions relating to the ownership of property, entry into transactions, employment of staff on its own behalf and capacity to sue and be sued. Indeed, s. 84 empowers the Director-General to employ officers of ASIO "on behalf of the

(16) (1945) 70 C.L.R. 598, at pp. 614-617.

(17) (1972) 128 C.L.R. 77, at pp. 96-97.

(18) (1947) 74 C.L.R. 375.

Commonwealth". There is therefore no firm basis for saying that ASIO is a corporation.

Instead, it seems, ASIO is a department of the executive government, placed under the control of the Director-General and staffed by Crown servants. Unlike other government departments the Minister's control of it is qualified by s. 8(2). If this were all there would be nothing to be said for the view that ASIO is a legal entity distinct in any way from the executive government.

However, ASIO is a government department with a difference. The statute gives it a collective name, continues it in existence and goes to some pains to confine its functions (see s. 17(2)). But these characteristics are not sufficient to sustain the conclusion that ASIO is a legal entity independent of the executive government or that it is a legal entity capable of suing or being sued in its corporate name.

The question then is whether the doctrine of ultra vires can apply to ASIO's activities. It is beyond question that the doctrine will apply to the extent to which ASIO's activities exceed the executive power of the Commonwealth, as to which see *Australian Communist Party v. The Commonwealth* (19) and *Victoria v. The Commonwealth and Hayden* (20). But does the doctrine apply to activities of ASIO which exceed its statutory functions but fall within the executive power of the Commonwealth unaffected by statute? It has frequently been said that the doctrine of ultra vires relates to the capacity of corporations. So it does. But this is by no means its only sphere of operation. It applies to questions of authority, as well as to questions of capacity, especially to acts done in excess of statutory authority.

If the effect of the Act is to confine ASIO's authorized activities to something less than the full ambit of activities which might otherwise be permitted to the Commonwealth in execution of its executive power, then I see no reason for thinking that a person adversely affected by activities which are unauthorized cannot obtain relief by way of declaration and injunction. There is a clear distinction to be drawn between acts which are unauthorized and those which are illegal. Section 17 is not a prohibition against the carrying on of activities which stand outside the functions described in s. 17(1). The section is expressed in terms of functions, authorized and unauthorized. It constitutes the exclusive and comprehensive charter of ASIO's activities. It therefore effectively limits the activities in which ASIO as a government department is authorized to engage. So long as its enactment is within the field of legislative

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(19) (1951) 83 C.L.R. 1, at p. 185 et seq.

(20) (1975) 134 C.L.R. 338, at p. 396.

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power Parliament can deprive corporations, authorities or government departments of capacity or authority which they might otherwise possess.

The question here is not whether the individuals who are employed in ASIO have the capacity as individuals to engage in the activities complained of; the question is whether ASIO as a government department has the authority to do so. No doubt individuals ask questions, form opinions and make statements about matters relating to security, but as individuals they cannot exercise the powers conferred by the Act.

The features of the Act chiefly relied upon to sustain the weight of the argument in favour of exclusion of review are ss. 8(2), 20(a) and Pt IV dealing with security assessments. Section 20(a) imposes on the Director-General of ASIO, who is not required to be a judge to be eligible for appointment, the obligation of taking all reasonable steps to ensure that the work of the Organization is limited to what is necessary for the discharge of its functions. I should have thought that this would have been the responsibility of the Director-General even if the statute had been silent upon the point. Why the express enactment of it, readily understandable in the case of ASIO with its investigatory functions and its history of political controversy, should be thought to be a pointer to ousting the jurisdiction of the courts, I am at a loss to appreciate. The considerations to which I have just referred underlie the purpose which s. 8(2) serves. The provision that the Minister cannot override the opinion of the Director-General on the matters set out in pars. (a), (b) and (c) — whether the collection of intelligence concerning an individual is relevant to security; whether communication of intelligence concerning an individual is for a purpose relevant to security; and the advice to be given to the Commonwealth and its agencies — is plainly designed to make ASIO in these functions at least independent from ministerial direction and free from political interference. It says nothing about the availability of judicial review.

Part IV provides for an appeal by a person who has been given notice of an adverse or qualified security assessment to the Security Appeals Tribunal. Section 37(5) provides that, other than an appeal to the Tribunal, no proceedings shall be brought in any court or tribunal in respect of a making of an assessment or anything done in respect of an assessment. Section 62 then provides that a decision of the Tribunal is not subject to review by any court or other tribunal. There is no doubt that the provisions in Pt IV reflect a paramount concern with security and with the need to protect the confidentiality of security intelligence and information. But again I do not think that this or the desire to protect security assessments

and the Tribunal's decision from judicial review evidences a more general intent to protect all the activities of ASIO from judicial review. Indeed, the very presence of s. 37(5) and s. 62 contrasts with the absence of provisions having a general operation outside the ambit of s. 37(5) and s. 62. This contrast is of telling significance.

It is to s. 17 that we must look for the statutory statement of ASIO's functions. The importance of this description is that it confines these functions by reference to matters relevant to security and it gives very much emphasis to so confining them. Thus, the intelligence which ASIO is to obtain, correlate and evaluate is "intelligence relevant to security" (par. (a)); it is authorized to communicate that intelligence "for purposes relevant to security and not otherwise" (par. (b)); and it is to advise Ministers and the Commonwealth in respect of matters relating to security, but only "in so far as those matters are relevant to their functions and responsibilities" (par. (c)). The pervasive intention to confine ASIO's activities and to confine them to matters relevant to security destroys the suggestion that ASIO's activities should be completely immune from judicial review for ultra vires. And there are very powerful reasons why Parliament would wish to restrict ASIO's activities in this way. Surveillance in association with the obtaining, storage and dissemination by a government organization of information relating to private citizens can only be justified in a democratic society by the need to protect that society, i.e., on security grounds.

It is an abuse of s. 17(1) to read it, as the Solicitor-General asks us to do, as if s. 8(2) is somehow to be incorporated into it, so that the functions of ASIO are transformed into the pursuit of activities which in the opinion of the Director-General are relevant to security. It is not the office of s. 8(2) to delimit ASIO's functions; its purpose is to deal with the relationship between the Minister and the Director-General and, as I have said, to protect ASIO from political interference.

No-one could doubt that the revelation of security intelligence in legal proceedings would be detrimental to national security. But it does not follow that ASIO's activities should be completely free from judicial review. To so conclude would be to ignore the protection which is given by the doctrine of Crown privilege to information the disclosure of which is prejudicial to national security.

It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence

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is “for purposes relevant to security”. Courts constantly determine issues of relevance. As an issue, relevance to security involves several unusual complications. The first is that the expanded definition of “security” in s. 4 and the associated definition of “subversion” in s. 5 extend to a wide variety of matters, including the carrying out of Australia’s responsibilities to any foreign country in relation to any of the matters referred to in par. (a) of the definition of “security”. The second is that security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time; it is similar to the constitutional concept of defence. The third is a problem which arises in relation to s. 17(1)(a), a problem of determining the relevance to security of intelligence concerning a particular person or organization. Is the question of relevance to security to be determined: (a) in the light of what is known to ASIO; or (b) in the light of all the circumstances touching the particular person or organization, whether known to ASIO or not? I set this point aside for later discussion, merely noting at this stage that I would answer question (a) in the affirmative. The final point is that Crown privilege will almost certainly exclude from consideration some evidence that is material and would otherwise assist the Court in deciding whether particular intelligence is “relevant to security”.

I return now to the second of the points mentioned above. As a matter of expression s. 17(1)(a) is drawn more narrowly than s. 17(1)(b) — in (a) the intelligence obtained, correlated and evaluated must be relevant to security; in (b) the communication of intelligence must be “for purposes relevant to security”. However, little, if anything, turns on this difference because it would be absurd to suppose that Parliament intended by s. 17(1)(a) to confine ASIO to the obtaining of intelligence which on ultimate analysis in the light of all established facts, whether known to ASIO or not, related to a person who is a security risk. In the very nature of things a security intelligence organization from time to time receives information, not always reliable, tending to suggest that an individual is a security risk. The information has to be checked out and followed up. This may, and probably will, involve the obtaining of intelligence relating to the alleged suspect. The end result of the inquiries may establish to the satisfaction of ASIO, or even objectively, that the suspect is not and never was a security risk. But this does not mean that the intelligence which ASIO obtained was not relevant to security. Intelligence is relevant to security if it establishes or tends to establish that a person suspected of being a security risk is, or is not such a risk. Moreover, it may well be that intelligence is relevant to security, so long as it is obtained for the purpose of determining

whether a person alleged or thought to be a security risk, is such a risk. Despite this, in some cases it may be possible to infer from the character and reputation of the plaintiff that ASIO could have no information in its possession suggesting that he is a security risk or that if it has, that information could not be credible, simply because the suggestion that the particular plaintiff is a security risk must be regarded as fanciful.

The first three matters to which I have referred do not make the issue of relevance to security insusceptible of judicial determination. Intelligence is relevant to security if it can reasonably be considered to have a real connexion with that topic, judged in the light of what is known to ASIO at the relevant time. This is a test which the courts are quite capable of applying. It is a test which presents a formidable hurdle to a plaintiff and not only because a successful claim for Crown privilege may exclude from consideration the very material on which the plaintiff hopes to base his argument — that there is no real connexion between the intelligence sought and the topic. The fact that a successful claim for privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials.

Although the statutory statement of ASIO's functions does not define them in terms of the Director-General's opinion of what is relevant to security, it is obvious that the Director-General's opinion of what is relevant to security would, if given, constitute important evidence in the decision of the question whether ASIO is acting *ultra vires*. The practical consequence of this is that a person seeking to establish that actions taken by ASIO are *ultra vires* may need to show that the Director-General's opinion, based as it inevitably will be on information in ASIO's possession, is wrong, as an element in demonstrating that the intelligence cannot reasonably be considered to have a real connexion with security. But this does not mean, as seems to have been thought in argument, that the plaintiff is challenging the exercise of a statutory discretion by the Director-General and that he must therefore show that the Director-General did not form a genuine opinion that the actions were relevant to security or that his opinion was not *bona fide* or was formed with some ulterior purpose in mind. It means no more and no less than that a plaintiff bears the onus of showing that there is no reasonable basis for concluding that the actions in question have a real connexion with security. Although this task is rather different from that suggested by the Solicitor-General it will none the less be a formidable task.

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It is not suggested that the two Acts exceed the legislative powers of the Commonwealth Parliament. However, it is suggested that by making inquiries not related to security ASIO exceeds the executive power of the Commonwealth. The suggestion is not only misconceived, it is also irrelevant. *Attorney-General (Cth) v. Colonial Sugar Refining Co. Ltd.* (21) decided only that “the Commonwealth cannot constitutionally confer compulsive powers” on a body set up to make an inquiry into a subject matter outside the powers of the Commonwealth (*Lockwood v. The Commonwealth* (22)). As Fullagar J. says in *Lockwood* the only possible objection to an inquiry of a non-compulsive kind by the Commonwealth as to any subject of its own choosing is as to the application or, as I would prefer to express it, the expenditure of moneys on matters outside Commonwealth power. But this is by the way. In the present case we are concerned with excess of statutory powers. As I have already said, if ASIO exceeds its statutory functions it can be no answer to say that what it is doing is within the executive power of the Commonwealth. The Parliament has limited ASIO’s functions. If the limitation is as I think it is, to something less than the full scope of the Commonwealth’s executive powers, then the consequence is that ASIO cannot exceed that statutory limitation, though the Commonwealth in its other capacities may act free from that limitation.

At this point it is necessary to examine the case pleaded by the appellant. In part some of the misconceptions which have arisen in argument are attributable to the way in which the appellants’ case has been pleaded. In my comments on the amended statement of claim I shall omit all references to the 1956 Act. It was replaced by the 1979 Act. The appellants’ claim for relief on the footing that ASIO exceeded its powers under the 1956 Act is confined to declaratory relief; there is no claim for consequential relief by way of damages. It is inconceivable that the Court would exercise its discretion so as to grant declaratory relief in respect of past acts long since completed under a statute which has since been repealed. The manifest inutility of making such a declaration makes the claim for relief academic. I shall therefore focus my attention on the case for relief in respect of what is alleged to have occurred under the 1979 Act.

The essence of the appellants’ case consists of two allegations in par. 7A of the amended statement of claim. The first allegation is that the first respondent has caused or permitted ASIO to continue

(21) (1913) 17 C.L.R. 644.

(22) (1954) 90 C.L.R. 177, at p. 182.

to obtain, correlate and evaluate further intelligence concerning the appellants and to continue to communicate such further intelligence to other persons, notwithstanding that the initial obtaining, correlating and evaluating of intelligence concerning the appellants "established or ought to have established that such intelligence" (1) is not relevant to security; (2) does not relate or appear to relate to the matters mentioned in s. 18(3)(a) and (b); and (3) does not come within s. 18(3)(c). The second allegation is that the first respondent has caused or permitted ASIO to characterize the appellants as persons who, broadly speaking, are a security risk and has caused or permitted ASIO to communicate such characterization to other persons.

The appellants also allege that neither of the appellants are or have been at any material time, a security risk, that they are not persons who have committed or intend to commit the offences referred to in s. 18(3)(a) and (b) (see pars. 8A(a) and (b)). They further allege that intelligence concerning the appellants is not now, and has not been at any material time, intelligence which is relevant to security, or which relates to the commission or intended commission of the offences referred to in s. 18(3)(a) and (b) or which comes within s. 18(3)(c): see par. 8A(c).

Two matters at least are left obscure by the amended statement of claim. The allegation in par. 7A(b) that the initial obtaining etc. of intelligence "established or ought to have established that such intelligence" is not relevant to security should evidently be understood as referring to "such further intelligence". The second matter is whether pars. 7A and 8A of the amended statement of claim are alternative and independent allegations. In this respect Mr. Castan for the appellants conceded that the allegations in par. 8A are linked to the allegations in par. 7A. It is essential to the appellants' case, as pleaded and argued, that the initial obtaining etc. of intelligence concerning the appellants established or ought to have established that they were not persons who presented a security risk.

Even if it be assumed that the initial intelligence established or ought to have established that the appellants were not a security risk, this does not exclude the hypothesis that subsequent information provided a fresh basis for suspecting that the appellants were a possible security risk. And the further allegations in par. 8A that the appellants are not and have not been at any material time a security risk does not answer the problem. I have already pointed out that, although a person is not in fact a security risk, ASIO may well have reasonable grounds, based on information it receives, for believing or suspecting that he is. Likewise, subsequent information may provide a fresh basis for viewing the appellants as persons who

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may have committed or intend to commit offences mentioned in s. 18(3)(a) and (b), notwithstanding that earlier intelligence may have shown that they were not implicated.

Because the allegation in par. 8A(c) is linked to the allegations in par. 7A it provides no independent ground for relief. The appellants' case is that intelligence concerning the appellants has not been at any material time relevant to security, because intelligence initially obtained showed that the appellants were not a security risk. It is not surprising that the case should be presented in this way. Unless the appellants can show that intelligence initially obtained established that they were not a security risk and that intelligence concerning them was not relevant to security, how do they begin to construct a *prima facie* case that intelligence concerning them has not been at any material time relevant to security? The matters alleged in par. 7A are material to the matters alleged in par. 8A. Indeed, their materiality and connexion might have been made clear by the inclusion in par. 8A of some such words as "by reason of the matters alleged in par. 7A".

I would dismiss the appeal.

MURPHY J. The appellant plaintiffs claim relief on the ground that the Australian Security Intelligence Organization (ASIO) is breaking the *Australian Security Intelligence Organization Act 1979* ("the Act") by improperly using its powers in relation to the plaintiffs. The plaintiffs also claim a declaration (without any consequential claim for damages) that ASIO exceeded its powers under the repealed *Australian Security Intelligence Organization Act 1956-1976*; this seeks judicial opinion on a dead issue, and may be disregarded. By demurring, the respondents, the Director-General of ASIO and the Commonwealth, raise the question whether the plaintiffs can bring such a claim to court. The plaintiffs' appeal is from Wilson J.'s decision to uphold the demurrer. The plaintiffs' standing is not challenged and no question has been raised about the constitutional validity of any part of the Act. The question is whether such a claim or cause of action is judicially recognized.

ASIO is authorized by the Act; its functions are set out in s. 17(1). As part of the executive government, ASIO and its members are subject to the administrative control of the Executive Council and Ministers envisaged by the Constitution: ss. 61, 64. The Constitution vests the executive power in the Governor-General and Ministers who (except for a three months' period of grace) must be members of the Senate or the House of Representatives. This is the mechanism by which responsible government is secured. Responsible government is also a feature of State Constitutions, although

sometimes it has been erroneously suggested that Commissioners of Police are outside the control of the government and have some mystical relationship with "the Crown".

ASIO and its officers are also subject to the judicial constraints which apply to every other branch of the executive government. Parliament has not purported to immunize ASIO from judicial process and could not constitutionally do so. The Constitution provides that the Commonwealth and its officers are amenable to judicial process. If they violate the law, redress is achievable in this Court at least by any person with sufficient interest to meet the requirements of standing. Section 75(iii) of the Constitution gives this Court original jurisdiction in actions against the Commonwealth and persons sued on behalf of the Commonwealth. Section 75(v) of the Constitution authorizes this Court to issue writs of mandamus, prohibition and injunction against officers of the Commonwealth. The Prime Minister, Ministers, justices of federal courts, officers of statutory bodies and federal public servants are officers of the Commonwealth and so are the Director-General, the officers and employees of ASIO. The Solicitor-General correctly did not assert that the actions of ASIO, its officers and employees were unconstrained by law and immune from legal redress.

The necessity for such controls is demonstrated by the history of such organizations here and overseas. Characteristically from time to time they exceed, and misuse, their powers. The expectation that they will do so, creates a climate of apprehension and an inhibition of lawful political activity even at the highest levels of government. There are many references to these tendencies and I will mention a few.

Royal Commissioner Mr. Justice Hope found that there have at times been departures by ASIO from principles of legality, propriety and staying within its charter (*Royal Commission on Intelligence and Security Fourth Report*, vol. 1, 1977, pp. 70-71). Mr. Acting Justice White in his initial report on the South Australian inquiry into the operation of the Special Branch of the South Australian Police Force, said "principal concern about Special Branch records was with the width of its interpretation of 'domestic subversion', an interpretation obviously influenced by ASIO and by the Federal Bureau of Investigation of the United States. An exaggerated interpretation of the concept by security forces in various countries over recent decades has resulted in many innocent persons being suspected of subversion. Special Branch records reflect this kind of groundless suspicion." See also *Royal Commission Report on the Dismissal of H. H. Salisbury*, 1978, p. 36. The Australian experience is not exceptional.

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In Canada the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Parliament and Security Matters stated in 1979 that the danger to civil liberties in police surveillance of political activities and organizations are obvious and "include the possibility of the intimidation of persons simply by the citizen's awareness of surveillance, the inhibition of freedom of expression, the potential for abuse and misuse of information on individuals and organizations; infiltration of and consequent influencing of organizations; the use of discretionary police powers to inhibit individuals from political activities, and so on . . ." (Study by C. E. S. Franks, p. 7. See also W. H. McConnell, "Unreasonable Searches and Seizures: A 'Fourth Amendment' for Canada?" *Revue de Droit*, vol. 11 (1980-81), 155, at pp. 159-160.)

In England during the debates in the House of Lords in 1979 on the British Telecommunications Bill, a number of members expressed concern at the disquiet in the general community, and amongst themselves, about telephone tapping by British security services (House of Lords: Parliamentary Debates, 19 May 1981, pp. 858-863). Lord Gardiner informed the House of the difficulties during his period of office as Lord Chancellor (1964-1970) in having strictly private conversations with the then Attorney-General and said that he believed that his telephone calls were intercepted by a British intelligence organization (p. 858).

In the United States in 1970 Congress, concerned with the scope of the United States' Army's domestic surveillance system, conducted hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. In 1975 the Hearings before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, held before the United States' Senate, disclosed an extraordinary range of activities on the part of the Central Intelligence Agency (C.I.A.), Federal Bureau of Investigation (F.B.I.) and National Security Agency (N.S.A.). Concern was noted at the "sophisticated vigilante operation (of the F.B.I.) aimed squarely at preventing the exercise of First Amendment rights of speech and association", misinformation being given to "many senior Government officials" by the intelligence bodies about "intelligence" activities, "violation of laws of the land" and "acknowledgment by (the agents and agencies) of the illegality of (their) . . . actions". (See *Final Report*, Books 1-6 and *Hearings*, vols. 1-7; see also "Abscam Scandal Clouded Congress' Image" in *Congress and Government*, 1980 C.Q. Almanac 513; "Senate Abscam Committee Broadens Scope" in C.Q. — *Inside Congress*, 22

May 1982, p. 1215; see also *Laird v. Tatum* (23) and Morton H. Halperin and Daniel Hoffman, *Freedom vs. National Security — Secrecy and Surveillance*, New York, 1977.) Chief Justice Warren referred to a surreptitious attempt in 1969 to influence the Supreme Court on pending cases about illegal surveillance (*Memoirs*, pp. 338-342).

A wealth of memoirs and other literature demonstrates that the socialist and communist countries have also experienced secret intelligence organizations engaging in surveillance and other behaviour beyond what could reasonably be regarded as legitimate actions in the interests of national security, and widespread community apprehension over the behaviour.

Experience thus shows that for a free society to exist intelligence organizations must be subject to administrative supervision and amenable to legal process. The Act contains some express safeguards against misuse by officers:

“20. The Director-General shall take all reasonable steps to ensure that —

- (a) the work of the Organization is limited to what is necessary for the purposes of the discharge of its functions; and
- (b) the Organization is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.”

That duty is enforceable by appropriate writs.

United States Senator Sam Ervin said any “claim of an inherent executive branch power of investigation and surveillance on the basis of people’s beliefs and attitudes may be more of a threat to our internal security than any enemies beyond our borders” (“Privacy and Government Investigations”, *University of Illinois Law Forum* (1971), 137, at p. 153). So would a statutory power on the same basis, but the Act does not purport to grant such a power, and s. 20 makes this clear. It would be a misuse of power and office if ASIO (or any other government organization) were to infiltrate trade unions, political or other organizations, or use their members to influence the course of activities, or directly or indirectly inhibit or adversely affect radicals, non-conformists or other dissenters. The Act does not purport to authorize any system of thought control or of inhibition, directly or indirectly, of those who advocate or strive by lawful means for changes, even fundamental ones, in our society.

(23) (1972) 408 U.S. 1 [33 Law. Ed. (2d) 154].

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Australians are entitled to advocate and strive for a republic, a socialist society, a theocratic one, as long as they do so by lawful means. Advocacy of, or working for, socialism, republicanism or theocracy are not subversion; it would be an abuse of authority if ASIO carried out its functions on the basis that they were.

ASIO has not been authorized (and it could not constitutionally be authorized) to do what any natural person could do — i.e., to investigate and disseminate information about anyone he or she chooses for any purpose at all provided that this did not involve breach of any law. Nor has ASIO been authorized to exercise all possible power with which the executive government could be vested by way of investigation or dissemination of information.

Any powers granted to ASIO and exercisable by its Director-General or other officers must like other powers be used in good faith, for the purposes for which they are conferred and with due regard to those affected. That is the general rule (see *British Equitable Assurance Company Ltd. v. Baily* (24); *Isles v. Daily Mail Newspaper Ltd.* (25); *Heatley v. Tasmanian Racing and Gaming Commission* (26); *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd* (27)). These implied conditions are not to be taken as excluded except by unmistakable language. If any of its officers acts in bad faith, uses his or her office or powers for extraneous purposes (for example private, domestic, or partly political) or acts without due regard to those affected, then the officer is liable for misuse of office or power. Remedies may be in the traditional tort claims such as assault, trespass and defamation and the developing torts such as unjustified invasion of privacy, and outrage, or statutory remedies.

Therefore, if a violation of the law by ASIO is proved, ASIO and its officers are amenable to legal process and to remedies available at least under the Constitution. The difficulty the plaintiffs face is that assertion of violation of the law is one thing, proof is another. If a case comes before the courts where it is claimed on what appear to be reasonable grounds that ASIO has misused its powers, it is to be expected that the courts will be astute to ensure that misuse of power is not cloaked by claims of national security. Because of the experience that secret organizations of this kind from time to time misuse their powers in relation to individuals and institutions, it is essential that the judicial process be exerted, no doubt with caution, but if occasion warrants it, firmly, to keep the organization and

(24) [1906] A.C. 35, at p. 42.

(25) (1912) 14 C.L.R. 193, at p. 202.

(26) (1977) 137 C.L.R. 487.

(27) (1979) 143 C.L.R. 499.

officers within the law. At this stage we are dealing with a case on demurrer, a procedure in which the assertions of fact by the plaintiffs are assumed to be correct. The Court therefore decides the demurrer on the assumption, which may be incorrect, that the organization has misused its powers in relation to the plaintiffs. To the question: if the assumed facts are proved, is there a legal remedy, the answer should be yes.

One of the plaintiffs' claims was that if initial investigation of a person or group proved negative then ASIO would exceed its powers if it continued investigation. That is obviously incorrect.

The demurrer should be overruled and the plaintiffs should be directed to amend the statement of claim by deleting the statements in pars. 7A and 9A concerning initial intelligence and initial inquiry.

The appeal should be allowed.

BRENNAN J. The Australian Security Intelligence Organization ("the Organization") was established in pursuance of a directive given by the Prime Minister of the day on 16 March 1949. The Organization was recognized by s. 4 of the *Australian Security Intelligence Organization Act* 1956 (Cth), which continued it in existence. The 1956 Act was repealed by the *Australian Security Intelligence Organization Act* 1979 (the Act), s. 6 of which provides that the Organization, "being the Organization that was continued in existence by the Acts repealed by this Act, is continued in existence". Its staff is employed by the Director-General on behalf of the Commonwealth (s. 84), and it is under the control of the Director-General (s. 8(1)). It is not incorporated, and it is otiose to inquire as to corporate powers.

It is an organization — a group of persons centrally controlled and acting in concert to perform particular functions. No doubt the efficiency with which those functions are performed owes much to the internal control and direction of its staff, to the facilities furnished for their use by the Commonwealth and to the exercise on occasions of the special powers for which Div. 2 of Pt III of the Act provides. The discipline of the Organization and the facilities and powers available to the Director-General and the staff enable them to do collectively more than they could do severally, and to do it more effectively.

The functions of the Organization are not left at large. Parliament defined its functions in s. 17 of the Act. That provision is not merely facultative: it marks the limits of legitimate organizational activity, which might otherwise have a "chilling effect" (to borrow the phrase

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used in *Laird v. Tatum* (28) upon the enjoyment of those freedoms or immunities which are sometimes described as civil rights. Parliament clearly intended that the statutory charter of the Organization's functions should define both what the members of the Organization are to do and what they are not to do. The Director-General is charged expressly with the administrative responsibility of ensuring that the Organization does not exceed the functions assigned to it by statute (s. 20). The limitation implies a prohibition upon the Director-General and upon the staff of the Organization from acting in concert, from using the facilities furnished by the Commonwealth and from exercising special powers as members of the Organization in the performance of functions which the Parliament has not assigned to it.

The prohibition not only binds the Director-General and the staff of the Organization but it also limits the directions which might be given by the Minister to the Director-General under s. 8(2). It is not necessary to consider now whether a contravention of the prohibition is a tort actionable at the suit of a person adversely affected thereby; it is sufficient to observe that the prohibition can be enforced at the suit of a person having a special interest in enforcing it (*Onus v. Alcoa of Australia Ltd.* (29)). If need be, the prohibition can be enforced by injunction, restraining either the performance of an unauthorized function, or acting as a member of the Organization while performing an unauthorized function, or both, according to the exigencies of the case. The law expressed by the Parliament is that the strengths and resources of the Organization should be employed only in the performance of the functions assigned to it, and the remedies of the law can be moulded to enforce the law so expressed.

The jurisdiction of this Court to give relief compelling compliance with the Act is not in question. It was conceded that the activities of the Organization were subject to judicial review, and the concession was rightly made. As the law which sustains the Organization in existence limits its functions, it would mock the will of Parliament to deny that the functions which it has defined may be exceeded without restraint by the courts. Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly (cf. L. F. Jaffe and E. G. Henderson, "Judicial Review and the Rule of Law:

(28) (1972) 408 U.S. 1 [33 Law. Ed. (2d) 154].

(29) (1981) 149 C.L.R. 27.

Historical Origins", *Law Quarterly Review*, vol. 72 (1956), p. 345; *Legal Control of Government: Administrative Law in Britain and the United States* (1972), ch. 9, by Professors Schwartz and Wade). The remedy of declaration is available to define the limit of executive powers or functions in a particular case. In *Dyson v. Attorney-General* (30), Farwell L.J. pointed out the convenience in the public interest of giving speedy and easy access to the courts to those "who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials". In *Crouch v. The Commonwealth* (31) Williams J. referred to this dictum and added:

"This case and *Burghes v. Attorney-General* (32) indicate the particular benefits that flow from making declaratory decrees where such departments and officials are not acting in accordance with their statutory powers."

In the present action, where it is pleaded that the acts complained of were not done in performance of a function assigned to the Organization by the Act, declaratory relief will be appropriate if the plaintiff makes out a case. A declaration would be appropriate not because the Organization is to be regarded as a quasi-corporation bound by a declaration as to its powers, but because the binding of the defendants by a declaration would require the Director-General, in controlling the Organization, and the Attorney-General in giving general directions to the Director-General (see s. 8(1) and (2)), to act in conformity with the declaration.

It is submitted, however, that the Act commits to the Organization the determination of what activities it will undertake within its charter, and that a decision to engage in a particular activity is not open to review merely because a mistake is made as to whether that activity is within its charter. Bad faith apart, it is said, mistakes in making decisions are necessarily incidental to or part of the Organization's function of deciding whether to undertake a particular activity and mistaken decisions, honestly made, are not amenable to judicial review.

The submission cannot be accepted. The Organization's functions are not defined in terms of what the Organization believes them to be. The provisions of the Act, not the Organization's opinion, furnish the measure of its legitimate functions. No doubt it is necessary for the Organization to decide whether a particular activity is within its functions but such a decision is merely the

(30) [1911] 1 K.B. 410, at p. 423.

(32) [1912] 1 Ch. 173.

(31) (1948) 77 C.L.R. 339, at p. 359.

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administrative step taken to ensure compliance with the Act. What Fullagar J. said with respect to the constitutional validity of administrative acts in *Australian Communist Party v. The Commonwealth* (33) applies equally to the statutory validity of an executive act undertaken in reliance upon a statutory power:

“The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity.”

Though it is for the Court to determine whether a particular activity is within the functions assigned by the Act to the Organization, a plaintiff in an action to enforce the statutory limitations on the Organization’s activities encounters formidable difficulties. Some of those difficulties stem from the inevitable imprecision in the terms used to define the Organization’s functions; some of the difficulties stem from the secrecy which necessarily shrouds the activities and plans of such an organization.

Section 17 of the Act, the leading provision defining the Organization’s functions, reads as follows:

“(1) The functions of the Organization are —

- (a) to obtain, correlate and evaluate intelligence relevant to security;
- (b) for purposes relevant to security and not otherwise, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes; and
- (c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.

(2) It is not a function of the Organization to carry out or enforce measures for security within an authority of the Commonwealth.”

The means by which these functions are to be performed are not specified, save that certain special powers for which Div. 2 of Pt III provides (searching premises, seizing documents, using listening devices or intercepting mails) may be authorized by warrant. Any lawful means may be used or adopted by the members of the Organization to assemble “intelligence relevant to security” or to communicate such intelligence to others “for purposes relevant to security”.

A plaintiff who seeks to prove that members of the Organization, who are otherwise acting lawfully, are engaged in doing in respect of

(33) (1951) 83 C.L.R. 1, at p. 258.

him what they are prohibited from doing as members of the Organization, must show that its members are assembling intelligence in respect of him which is not relevant to security, or are communicating intelligence in respect of him for a purpose which is not relevant to security. To prove that proposition, a plaintiff must be able to show at least the relevant boundary of the concept of "security", else he cannot show that the intelligence or purpose in question is not relevant to it.

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"Security" is defined by s. 4 to mean —

- "(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from —
 - (i) espionage;
 - (ii) sabotage;
 - (iii) subversion;
 - (iv) active measures of foreign intervention; or
 - (v) terrorism;
 whether directed from, or committed within, Australia or not; and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the sub-paragraphs of paragraph (a);"

Paragraph (a) of the definition specifies the persons or polities to be protected from conduct of the kinds mentioned in sub-pars. (i) to (v). The adverse affection or risk of adverse affection of any of their interests from conduct of those kinds is a matter of security. That part of the definition is in the widest of terms, and it is supplemented by par. (b) which encompasses Australia's responsibilities to foreign countries in relation to the conduct mentioned in sub-pars. (i) to (v) of par. (a).

The restrictive elements in the definition of "security" are to be found in pars. (i) to (v) of par. (a). Unless there be a risk of espionage, sabotage, etc. there is nothing from which protection may be required. The function of the Organization in assembling and disseminating intelligence is to counter espionage, sabotage, subversion, active measures of foreign intervention and terrorism so far as any conduct of those kinds may either threaten the Commonwealth, the several States and Territories and the people thereof or be the subject of Australia's international responsibilities. The functions of the Organization are thus defined in terms of the purpose to be served by the intelligence activity in question.

Parliament confined the relevant purposes by enacting definitions of "subversion" (s. 5) and "active measures of foreign intervention" (s. 4). "Terrorism" was defined to include particular classes of conduct (s. 4). "Espionage" and "sabotage" were not defined, but perhaps their meaning in the Act is to be gleaned from the *Crimes*

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Act 1914 (Cth) (see ss. 24AB and 78). Protection from the several kinds of conduct mentioned in par. (a) or the carrying out of Australia's international responsibilities in relation to such conduct are the purposes for which the members of the Organization may assemble and disseminate intelligence. Unless intelligence is relevant to a risk that such conduct may be engaged in, or to an apprehension that it is being engaged in, the assembly and dissemination of that intelligence is not within the legitimate functions of the Organization. But for all the statutory endeavour to give some precision to the definition of the Organization's functions, there is an inherent elasticity in the term "relevant". The requisite degree of relevance must surely depend upon the gravity of the conduct from which the assembly and dissemination of intelligence is intended to provide protection. The gravity of the risk against which protection is needed affects the scope of the inquiries which it is prudent to make, and thus the degree of relevance between the intelligence which the Organization might legitimately assemble and the conduct which is apprehended. But, it may be said, how can the gravity of a security risk be evaluated by a court? It may be necessary to evaluate Australia's relationships with foreign countries, the stability of international affairs, the passion inspired by a particular cause or the likelihood of adherents to the cause taking violent steps in support of it; it may be necessary to evaluate rumour or suspicion as well as proof. It may be reasonable, even necessary, to determine the gravity of a risk by intuition rather than deduction. It may be truly said that the skills and procedures of a court do not fit it to find the point on the scale of gravity of every risk which may be thought to pose a threat to the Commonwealth, the States and Territories and the people thereof, and it may be accepted that a court will not necessarily have or be able to obtain all the evidence needed to allow it to quantify a risk precisely. However, it does not follow that judicial review is excluded.

The issue for curial determination is whether the activity of which a plaintiff complains is either an assembly of intelligence which is not relevant to security, or a dissemination of intelligence for a purpose which is not relevant to security or, perhaps, some other activity which falls outside s. 17. To prove either of the first two propositions, the plaintiff must be able to show that, allowing for any deficiency in the court's ability to quantify the security risk precisely, the intelligence or purpose in question is not relevant to security. Although it is not essential that the court be able to quantify the security risk, its inability to do so will affect its finding as to whether the limit upon the functions of the Organization has been exceeded. The evidentiary burden may be difficult to discharge,

but the issue of excess of function is nevertheless justiciable. In particular, it is for the court at the end of the day to say whether, after allowing for any deficiency in its ability to quantify the security risk, it is satisfied that the requisite degree of relevance to security is absent.

The court is not bound by the Organization's opinion as to what constitutes security or what is relevant to it. As Lord Devlin said in *Chandler v. Director of Public Prosecutions* (34):

"There is no rule of common law that whenever questions of national security are being considered by any court for any purposes, it is what the Crown thinks to be necessary or expedient that counts, and not what is necessary or expedient in fact."

This Court has of necessity formed a view as to matters of national security in determining the connexion between challenged legislation and the defence power relied on to support it: see, e.g., *Marcus Clark & Co. Ltd. v. The Commonwealth* (35). If the issues under s. 17 were not justiciable, the limitation of function spelt out by s. 17 would be determined not by the section, but by the unreviewable belief of the Director-General as to what is within the ambit of the section. It is not necessary to consider whether the Act, so construed, would withstand a challenge to its validity. It is sufficient to say that the difficulties inherent in questions of national security do not affect the justiciability of the issues, though they are of major importance in determining the sufficiency of evidence bearing on those issues.

The burden of proof resting on a plaintiff is not necessarily discharged by showing that an activity of which he complains does not appear at first sight to be a function referred to in s. 17, or by showing that the Director-General made an error of law or fact in forming an opinion that the activity was legitimate. The appearance at first sight of the activity or the opinion of the Director-General are not the issues for determination under s. 17, though each of those factors may be material to those issues. It is futile, of course, to attempt an exhaustive statement of what evidence will suffice to discharge the burden of proof in every case. It would be an unusual case, however, if a plaintiff without discovery against the Director-General could discharge the burden of proving that the Organization had engaged in the particular activity of which he complains and that that activity fell outside s. 17. The negative propositions involved in the latter question would ordinarily require proof of matters peculiarly within the knowledge of the Director-

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(34) [1964] A.C. 763, at p. 811.

(35) (1952) 87 C.L.R. 177.

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General. The matters within his knowledge would be likely to show what is relevant to the protection of the Commonwealth, the States or Territories or of the people thereof from any conduct mentioned in sub-pars. (i) to (v) of the definition of "security", or to show what is relevant to Australia's international obligations in respect of such conduct, and those matters would be oftentimes of great assistance in determining the issues.

Yet discovery would not be given against the Director-General save in a most exceptional case. The secrecy of the work of an intelligence organization which is to counter espionage, sabotage, etc. is essential to national security, and the public interest in national security will seldom yield to the public interest in the administration of civil justice (*Reg. v. Lewes Justices; Ex parte Home Secretary* (36)). Indeed, even if the plaintiff were in possession of evidence relevant to the activities of the Organization and the matters in respect of which those activities were being pursued, the evidence might be inadmissible. In *D. v. National Society for the Prevention of Cruelty to Children* (37), Lord Simon of Glaisdale observed:

"So the law says that, important as it is to the administration of justice that all relevant evidence should be adduced to the court, such evidence must be withheld if, on the balance of public interest, the peril of its adduction to national security outweighs its benefit to the forensic process . . ."

Nevertheless, the veil of secrecy is not absolutely impenetrable, for the public interest in litigation to enforce the limitation of function prescribed by s. 17 is never entirely excluded from consideration (*Sankey v. Whitlam* (38)). But the veil is not penetrated merely by a plaintiff's deposition that he is not a security risk. That, after all, may be the very matter which is under investigation. Nor is the veil penetrated by showing that initial investigation has failed to reveal that he is a security risk, for one who turns out to be a security risk will often be found to have some depth of cover.

There are thus large obstacles in the path of a plaintiff who seeks to restrain an alleged activity of the Organization on the ground that it does not lie within the functions assigned to it by s. 17. They do not arise because the Court's jurisdiction has been ousted, nor because the issues upon which a right to relief might turn are not justiciable. They arise first because of the difficulty of proving the negative proposition that, whatever the content of the notion of "security" in the instant case, the intelligence being assembled is not

(36) [1973] A.C. 388, at p. 407.

(38) (1978) 142 C.L.R. 1.

(37) [1978] A.C. 171, at p. 233.

relevant to it, or the purpose of its dissemination is not relevant to it. They arise secondly because of the restrictions imposed upon discovery in aid of proving, and upon the admission of evidence in proof of, what is and what is not relevant to security.

The extremely narrow confines within which the activities of the Organization are likely to be judicially reviewed are recognized by the statutory direction given by s. 20 to the Director-General to do administratively what a court could be moved to do if it were put in possession of all the facts known to the Director-General. The Director-General (who may be a judge: s. 15) is removed from Ministerial direction in reaching his decision on either of the questions specified in s. 8(2):

- “(a) on the question whether the collection of intelligence by the Organization concerning a particular individual would, or would not, be justified by reason of its relevance to security;
- (b) on the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security;”

Though Parliament has placed manifest reliance upon the integrity and independence of the Director-General, the jurisdiction of the Court remains intact; it is not ousted by s. 20.

In the light of these general observations, I turn to the amended statement of claim. The allegations therein contained relating to the activities of the Organization prior to 1 June 1980 (the day on which the 1979 Act came into operation) may be put aside, for declaratory relief should not be granted in respect to the operation of the 1956 Act after its repeal when no consequential relief depends upon it. Allegations relating to the activities of the Organization after 1 June 1980 are to be found in amendments made to the statement of claim on 14 August 1980. The amendments were framed in faithful repetition of the statutory phrases. It is alleged by par. 7A(a) and (b) that intelligence concerning the plaintiffs and other members of the first-named plaintiff has been obtained correlated and evaluated by the Organization (cf. s. 17(1)(a)), and that such intelligence has been communicated to other persons (cf. s. 17(1)(b)). It is further alleged (by par. 8A(c)) that such intelligence is not and has not been at any material time since 1 June 1980 “relevant to security within the meaning of the 1979 Act”, and (by par. 9A(b)) that the Organization is prohibited “from communicating such intelligence to any other person”.

The amended statement of claim also contains allegations in terms drawn from the definition of “security”, the provisions of s. 20, and the provisions of s. 17(3) — a provision which authorizes the

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communication of information in certain classes of case which do not fall within s. 17(1)(b). The case was argued, however, on the footing of issues raised under s. 17(1) and it is not necessary to consider either the more detailed allegations or the supplementary allegations contained in the amended pleading.

In argument on the appeal, some emphasis was placed upon what the pleader described as "initial intelligence" (par. 7A(a) and (b)) or "initial enquiries" (par. 9A(a)). It was submitted in argument (conformably to an allegation in the pleadings) that if the Organization properly initiates an inquiry but a stage is reached where the information gathered ought to satisfy the Organization that there is nothing further into which legitimate inquiry can be made and the Organization nevertheless persists in making further inquiry, a person in respect of whom the further inquiry is being made may then seek judicial review to restrain the further inquiry. The argument is unconvincing in fact, but it is immaterial to the sufficiency of the pleading. To say that an initial inquiry in respect of a person or group ought to satisfy the Organization that that person or group is not a security risk cannot be a proposition of universal truth however clear the results of the initial inquiry may seem to be. On the other hand, what the initial inquiry reveals at first sight, or what state of mind it produces or ought to produce in the Director-General or other officer of the Organization is not the issue upon which the grant of relief depends. If the information gathered in the initial inquiry were admissible and proved in evidence, it may be of assistance to the Court in determining whether a proposed further inquiry falls within s. 17. That is a matter of evidence. The reference in the amended statement of claim to an initial investigation and what it is alleged to have established is a mere pleading of evidence.

The sufficiency of the statement of claim depends on whether it is therein alleged that the Organization has undertaken activities which do not fall within s. 17. That allegation is made; it is justiciable; it is within the original jurisdiction of the Court. The pleading cannot be struck out. It may be that the plaintiffs will fail for want of admissible evidence, but that is not the matter for present consideration, nor does it appear from the pleading.

In my judgment, those parts of pars. 7A and 9A referring to initial investigation should be struck out as pleading evidence only. Though importance was placed by the plaintiffs upon those parts, I did not understand counsel to argue that the whole pleading was dependent upon those parts, or to concede that the whole pleading should fall if those parts were struck out. Rather I understood him to submit that the statement of claim raised the broad question of

principle whether the relevance of intelligence to security for the purposes of s. 17(1)(a) and (b) was a justiciable issue. Within the limits I have stated, I would hold that the plaintiffs succeed on that issue. The appeal should be allowed, but I would order that the appellants bring in minutes of an order to amend the amended statement of claim by deleting the allegations as to initial intelligence and initial inquiry in pars. 7A and 9A.

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Appeal dismissed with costs.

Grant leave to the plaintiffs to file and serve a further amended statement of claim within twenty-one days. In the event of the plaintiffs not filing and serving a further amended statement of claim within that time action dismissed with costs.

Solicitors for the appellants, *Phillips, Fox and Masel*.

Solicitor for the respondent, *B. J. O'Donovan*, Crown Solicitor for the Commonwealth.

C.J.C.

[THE HONOURABLE MR. JUSTICE AICKIN died before judgment was delivered in this case.]

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(9 November 1979)

AICKIN J. This is a summons taken out on behalf of the defendant asking that the statement of claim be struck out pursuant to O. 26, r. 18 on the ground that it does not disclose a reasonable cause of action or alternatively that the proceedings should be stayed under O. 63, r. 2 on the ground that there is not a reasonable or probable cause of action disclosed or that the proceedings are vexatious and oppressive. In the course of the proceedings counsel for the plaintiffs indicated that he did not seek to support pars. 17 and 18 and accordingly those paragraphs may be struck out by consent.

Paragraphs 1-5 of the statement of claim are concerned only with the identification of the parties but when combined with other paragraphs in the statement of claim form part of each of the three causes of action which are asserted. Paragraph 1 states that the first plaintiff was incorporated under the laws of the State of South Australia in 1969. Paragraph 2 states that it is a "religious organization engaged in the practice promotion propagation, teaching and application of the Scientology Religion". Paragraph 3 states that the second plaintiff has at all material times been a member of the first plaintiff and a practising adherent of the Scientology religion, and that he brings the action on his own behalf and on behalf of all of the other members of the first plaintiff as at the date of the issue of the writ, who are said to be numerous and all of whom are said to be practising adherents of the Scientology religion. Paragraph 4 asserts that the defendant is the Director-General of Security holding office

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under the *Australian Security Intelligence Organization Act 1956* (as amended) ("the Act"). Paragraph 5 summarizes the material functions of the Australian Security Intelligence Organization (ASIO).

It is convenient to set out in full ss. 4(1) and 5 of the Act which are as follows:

"4.(1) The Australian Security Intelligence Organization, being the Organization established in pursuance of a directive given by the Prime Minister on the sixteenth day of March, One thousand nine hundred and forty-nine, is, subject to this Act, continued in existence.

5.(1) The functions of the Organization are—

(a) to obtain, correlate and evaluate intelligence relevant to security and, at the discretion of the Director-General, to communicate any such intelligence to such persons, and in such manner, as the Director-General considers to be in the interests of security;

(b) to advise Ministers, where the Director-General is satisfied that it is necessary or desirable to do so, in respect of matters relevant to security, in so far as those matters relate to Departments of State administered by them or to authorities of the Commonwealth established by or under Acts administered by them; and

(c) to co-operate with such Departments of State and authorities of the Commonwealth and, so far as is practicable, with such Departments and authorities of the States and of other countries as are capable of assisting the Organization in the performance of its functions.

(2) It is not a function of the Organization to carry out or enforce measures for security within a Department of State or authority of the Commonwealth."

Section 6 provides that there is to be a Director-General of Security and s. 7 that he may employ such officers of the Organization as he thinks necessary. Section 15 provides that the Director-General and officers and employees of the Organization shall be deemed to be Commonwealth officers for the purposes of the *Crimes Act 1914-1955* (Cth). The only material provision of the *Crimes Act* which is brought into operation by that provision is s. 70 which is as follows:

"(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which it is his duty not to disclose, shall be guilty of an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of his office, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for two years."

What was conveniently called in argument the "first cause of action" depends upon pars. 1-5, pars. 6-15 and par. 22. Paragraph 22 states that the action is brought against the defendant in his capacity as Director-General of Security under the Act and is a matter in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party or is a matter in which an injunction is sought against an officer of the Commonwealth, so as to found original jurisdiction in the Court. Paragraphs 1-5 and 22 are common to each of the three causes of action.

The relief sought under the first cause of action is set out in par. B of the relief claimed and it is convenient to quote that in full:

"B. Pursuant to paragraphs 1 to 15 and 22 above:

(i) A Declaration that the functions of ASIO do not include the obtaining, correlating and evaluating of information concerning the Plaintiffs or either of them or concerning the members of the firstnamed Plaintiff.

(ii) A Declaration that the functions of ASIO do not include the

communicating of any such information to such persons in such manner as the Defendant considers to be in the interests of security.

(iii) A Declaration that the operations of ASIO in obtaining correlating and evaluating information concerning the Plaintiffs and the members of the firstnamed Plaintiff and the communicating of the same to other persons are and have at all times been beyond the power of ASIO and of the Defendant and are unlawful.

(iv) A Declaration that information concerning the Plaintiffs is not 'intelligence relevant to the protection of the Commonwealth and Territories from acts of espionage, sabotage or subversion' within the meaning of the Australian Security Intelligence Organisation Act 1956.

(v) A Declaration that the firstnamed Plaintiff is not a person or organisation from whom the Commonwealth and the Territories require protection from acts of espionage, sabotage or subversion.

(vi) A Declaration that the secondnamed Plaintiff and the members of the firstnamed Plaintiff are not persons who, by reason of their membership of the firstnamed Plaintiff or by reason of being practising adherents of the Scientology Religion, are persons from whom the Commonwealth and the Territories require protection from acts of espionage, sabotage or subversion.

(vii) A Declaration that the communication of information by the Defendant or by ASIO to the effect that the Plaintiffs and the members of the firstnamed Plaintiff are persons from whom the Commonwealth and Territories require protection from acts of espionage, sabotage or subversion is beyond the powers of ASIO and is unlawful.

(viii) A Declaration that in characterising the secondnamed Plaintiff and members of the firstnamed Plaintiff who are practising adherents of the Scientology Religion as 'security risks' by reason of their membership of the firstnamed Plaintiff and by reason of them being practising adherents of the Scientology Religion, for the purpose of security assessments, and in communicating the same to Ministers concerning persons employed or proposed to be employed in offices under the Commonwealth or under authorities of the Commonwealth the Defendant has caused or permitted ASIO to require a religious test as a qualification for an office of public trust under the Commonwealth and has thereby contravened Section 116 of the Constitution.

(ix) An injunction restraining the Defendant from causing or permitting ASIO from continuing to obtain, correlate or evaluate information concerning the Plaintiffs or members of the firstnamed Plaintiff or from communicating any such information to any person.

(x) Alternatively an injunction restraining the Defendant from causing or permitting ASIO from continuing to communicate information to the effect that the Plaintiffs and members of the firstnamed Plaintiff are persons from whom the Commonwealth and Territories require protection from acts of espionage, sabotage or subversion.

(xi) an injunction restraining the Defendant from causing or permitting ASIO to communicate security assessments to Ministers concerning persons employed or proposed to be employed in offices under the Commonwealth or under authorities of the Commonwealth to the effect that such persons as are members of the firstnamed Plaintiff and are practising adherents of the Scientology Religion are 'security risks' by reason of their membership of the firstnamed Plaintiff and by reason of them being practising adherents of the Scientology Religion.

(xii) Damages."

Paragraph 6 alleges that "the Defendant has wrongfully caused or permitted ASIO to obtain, correlate and evaluate information concerning the Plaintiffs and has communicated that information to other persons". Particulars are given under that paragraph which state that ASIO has characterized the first plaintiff

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as a "target organization" and as an organization that is a "security risk". The particulars further assert that ASIO has undertaken the continuous assembling of information concerning the first plaintiff, and that it has characterized the second plaintiff and "other members" (not identified) as security risks by reason of their membership of the first plaintiff and their adherence to the Scientology religion. Paragraphs 8 and 9 then set out the basis for the contention that the conduct specified in par. 6 is wrongful or unlawful. Paragraph 7 alleges that information concerning the plaintiffs is not "intelligence relevant to the protection of the Commonwealth and Territories from acts of espionage, sabotage and subversion" within the meaning of the Act. Paragraph 8 alleges that the first plaintiff is not a person or organization in respect of which the Commonwealth and the Territories "require (i.e. need) protection from acts of espionage, sabotage or subversion" and that the second plaintiff and "the members" (presumably all the members) are not, by reason of their membership or by reason of being practising adherents of the Scientology religion, persons from whom the Commonwealth and the Territories require protection from acts of espionage, sabotage or subversion. Paragraph 9 alleges that the obtaining, correlating and evaluation of information concerning the plaintiffs and members of the first plaintiff and the communication of the same to other persons is beyond the powers of ASIO and is unlawful.

Paragraph 10 alleges that the communication of information by the defendant to the effect that the plaintiffs and the members of the first plaintiff are persons from whom the Commonwealth requires protection is beyond the powers of ASIO and of the defendant and is unlawful. Paragraphs 11 and 12 allege that the defendant threatens and intends to cause or permit ASIO to continue to obtain, correlate and evaluate information concerning the plaintiffs and the members of the first plaintiff and to communicate the same to other persons, and threatens and intends to communicate information to the effect that the plaintiffs and the members of the first plaintiff are persons from whom the Commonwealth requires protection.

Paragraph 13 alleges that the plaintiffs have suffered loss and damage as a result of the said acts of ASIO. It was said in argument that pars. 13, 14 and 15 and the particulars thereunder were designed solely to demonstrate that the plaintiffs had the relevant standing to assert a claim against a public authority by reason of having suffered the special damage asserted in accordance with the requirements defined in *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109. The particulars set out under par. 13 assert that ASIO has assembled material purportedly concerning the first plaintiff which is false and which is defamatory and has communicated it to other persons, that persons who might otherwise have become members and adherents to the religion have been dissuaded from doing so, that sales of publications have diminished and that the growth and development of the first plaintiff and the spread of its teachings have been inhibited. Finally, the particulars assert that the second plaintiff has suffered loss by reason of his being transferred from one R.A.A.F. base to another with consequent loss as a result of a report from ASIO concerning his adherence to Scientology.

Paragraph 15 alleges that by causing and permitting ASIO to act as aforesaid the defendant has caused or permitted ASIO to require a religious test as a qualification for an office or public trust of the Commonwealth contrary to s. 116 of the Constitution. Particulars under that paragraph state that in making security assessments for the purpose of advising Ministers as to the requirements of security with respect to persons employed or proposed to be employed by the Commonwealth and in communicating such assessments ASIO has characterized the second plaintiff and other members of the first plaintiff as "security risks" by reason of their membership and by reason of their being practising adherents of Scientology religion.

Counsel for the defendant attacked the first cause of action upon the basis that it applied to the defendant and to officers of ASIO conceptions applicable

only to statutory corporations in asserting that the collection and communication of information was beyond the powers of ASIO. It was argued that the underlying assumption was that ASIO was in the same position as a statutory corporation and that its function as specified set a limit to its powers and those of the defendant. It was argued for the defendant that officers of ASIO were in the same position as any private individual who might wish to obtain information and correlate and evaluate it in relation to security or indeed any topic and to communicate it to other persons. If the material communicated was defamatory, then the ordinary consequences would follow in the case of private citizens, and so also in the case of the Director-General and the employees of ASIO, subject however to any questions of privilege which might arise. It was thus argued that the allegation that the gathering and communication of information was beyond the power of ASIO or unlawful had no justification.

It was submitted that pars. 11 and 12 carried the matter no further and involved no separate cause of action. I am satisfied that this submission is correct. Those paragraphs were no doubt inserted to support the claim for injunctive relief but they do not assert a separate cause of action. Paragraph 13 is, as I have said, directed solely to locus standi.

Counsel for the plaintiffs said that there were certain paragraphs of the statement of claim which it would be necessary to amend, in addition to the abandonment of pars. 17 and 18, but the amendments had not been formulated. It is clear that in the present state of the litigation the plaintiffs may amend without leave if they so desire. However, the matter was argued upon the basis of the statement of claim as it stands, save for the deletion of pars. 17 and 18.

Paragraph 14 was attacked as clearly demurrable upon the ground that there is no such right as there asserted, because s. 116 does not bind the States and there was no allegation that any law of the Commonwealth was involved. Paragraph 15 stands on a different basis in its express reliance upon s. 116 but the allegation, so it was argued for the defendant, is not one that ASIO itself applied a religious test in relation to appointment of its own officers or that the defendant as the Director-General did so. The allegation, as spelt out in the particulars, seems really to be that the Commonwealth itself required a religious test, but that does not particularize the allegation in par. 15 itself. The plaintiffs' argument in par. 15 appears untenable on its face. The provision of information to a prospective employer cannot be regarded as the imposition of a religious test by the provider of the information.

The plaintiffs' counsel sought to uphold the first cause of action by saying that the argument that there was a statutory limit on the communication of information was supported by s. 5 of the Act and by s. 70 of the *Crimes Act* in that the joint operation of those provisions was such as to make it beyond the power of the officers to communicate information. He said that the argument for the defendant suggested that the words "relevant to security" in s. 5 meant that ASIO could collect and evaluate and pass on information about anybody at any time regardless of whether the information had anything to do with espionage, sabotage or subversion. It was conceded, however, that an inquiry concerning a person in order to ascertain whether or not he was a security risk would be authorized but that the question sought to be raised was whether ASIO could continue to collect and collate information and communicate it after it had formed, or should have formed, a view that a person either was or was not a security risk. It was suggested that, if ASIO concluded that no information from or about a person or a body was likely to be relevant to security, it could not continue to obtain and collate and communicate further information and that to do so would be a breach of s. 5.

This argument appears to me to confuse lawfulness with lack of power. Section 5 authorizes officers of ASIO to communicate information in certain circumstances and s. 70 of the *Crimes Act* makes it a criminal offence to do so without such authority. Actual communication, however, is not beyond power in any relevant sense of that expression and could not be regarded as a nullity.

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The fact that it is a criminal offence is enough to demonstrate that it is not a nullity. The fact that an act constitutes a criminal offence does not mean that the individual does not effectively perform the act. The question of power or lack of power to do an act is one which can only be asked in relation to bodies corporate and to the power, or more properly, authority of one person to bind another or act so as to impose liability on another. The latter sense is not presently relevant.

Here we are concerned with acts of individual public servants (in a wide sense of that term), employed in a non-corporate organization. ASIO is properly to be regarded as part of the executive government. Here there can be no question of lack of statutory authority to communicate information to such persons as the Director-General directs or approves. Nor can there be any lack of executive authority to make inquiries on any matter in the light of the observation of Griffith C.J. in *Clough v. Leahy* (1904) 2 C.L.R. 139, at p. 157, though power to compel answers is another question. No doubt the executive power of the Commonwealth is not unlimited (see the observation of Dixon J. in *Australian Communist Party v. The Commonwealth* (1950) 83 C.L.R. 2, at p. 185 et seq. and of Mason J. in *Victoria v. The Commonwealth and Hayden* (1975) 134 C.L.R. 338, at p. 396) but the observations of Griffith C.J. to which I have just referred, in which Barton and O'Connor JJ. joined, demonstrate there is no limitation relevant to the present case. It is not necessary for the purposes of the present summons to attempt to define the limits of the executive power nor the extent to which executive, as distinct from statutory powers, are capable of review by the Court.

The Solicitor-General submitted that when s. 5 of the Act is read with s. 70 of the *Crimes Act* the staff of ASIO would only have authority to make such disclosure as was authorized by the defendant under the Act, because otherwise they would be committing a crime under s. 70. He submitted that the prohibition would extend to disclosure to a court and referred to *Miller v. Miller* (1978) 22 A.L.R. 119, at p. 125 per Gibbs J. and to *Canadian Pacific Tobacco Co. Ltd. v. Stapleton* (1952) 86 C.L.R. 1, at p. 6, where it was said that the word "person", did not include a court. Thus the result would be that the staff of ASIO could not disclose any of the relevant matters even to the Court. The Solicitor-General said that the argument for the plaintiffs was that all matters as to who was a security risk were capable of being tested in the Court, including whether a ruling or decision by the Director-General was "correct". This is illustrated by the declarations sought that information concerning the plaintiffs is not intelligence relevant to the protection of the Commonwealth etc. and that the first plaintiff, the second plaintiff and all members of the first plaintiff are not persons from whom the Commonwealth requires protection. Even if this can be regarded as a judicial function, it is difficult to see how it can be performed when the officers of ASIO are prohibited from revealing to the Court any information they may have used. As a matter of construction it seems reasonably clear that review by the Court was not intended. However it is not necessary to decide these questions at present.

The second cause of action is based on pars. 1-5, 16, and 22 of the statement of claim. Paragraph 16 is as follows: "Further, the Defendant threatens and intends to cause or permit ASIO unlawfully to harass and persecute the Plaintiffs and members of the firstnamed Plaintiff." The relief claimed is set out in par. C and comprises a declaration that, "... any harassment and persecution of the Plaintiffs and of the members of the firstnamed Plaintiff is unlawful" and "an injunction restraining the Defendant from causing or permitting ASIO to harass or persecute the Plaintiffs or any of the members of the firstnamed Plaintiff".

The mere assertion that action is not lawful is not sufficient to found a cause of action unless the acts alleged to have been done are themselves sufficient to demonstrate their unlawful character. Counsel for the plaintiffs said that the particulars under par. 16 were to be found in the affidavits in support of the

application for an interlocutory injunction and that the statement for claim would require amendment, and that reliance was placed upon what were alleged in the affidavits to be tortious and criminal acts. It was submitted that it was really a question of the lack of particulars and that particulars could be provided.

Counsel for the defendant cited *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479 as authority for the proposition that the erection of a building tower adjacent to a racetrack and watching, and broadcasting an account of, the activities going on there was not unlawful action. Megarry V.C.'s judgment in *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344 was cited as demonstrating that there was no cause of action for breach of privacy in English law. However, counsel for the plaintiffs disclaimed any reliance on an invasion of privacy.

In think that par. 16 in its present form is embarrassing and oppressive. In my opinion, it should be struck out irrespective of the fate of other parts of the statement of claim, but in the light of the intention of the plaintiffs to amend an opportunity to remedy its defects should be given to them.

The third cause of action depends on pars. 19-21 and the substantive allegation is that in so far as the provisions of the Act authorize or permit ASIO to obtain, correlate and evaluate intelligence concerning the plaintiffs and at the direction of the defendant to communicate such intelligence to others, it is a law prohibiting the free exercise of a religion and contravenes s. 116. For the defendant it was said in the first place that a corporation could not have a religious belief and reliance was placed on the *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, at p. 147, per Latham C.J. But in any event there is an individual plaintiff who alleges that he had religious beliefs and practises a religion. It was argued for the defendant that the allegation must extend to saying that subversion is protected under s. 116 if it has a religious element or motive and that this was inconsistent with the decision in the *Jehovah's Witnesses' Case*, and reliance was placed on the following passages: per Latham C.J., at pp. 146-147; per Rich J., at p. 149; per Starke J., at pp. 154-155; and per Williams J., at pp. 159-161. Counsel for the plaintiffs said that there was no challenge being made to the *Jehovah's Witnesses' Case* and that the allegations arose only upon one view of the meaning of the Act, but that such meaning was not one for which the plaintiffs contended. He said that the narrow point was the meaning of "subversion". The argument was that the defendant must be wrong if he treated the first plaintiff and all its members as subversive by reason of their adherence to the religion of Scientology. He said that such a characterization of all members would be wrong because it was not possible to obtain any useful information from or about any member. He said that subversion meant an attempt at overturning a system of government and that if it was alleged that the promulgation of the religion of Scientology was subversion in itself, i.e. that the mere fact of having and promulgating the views of Scientology, whether or not directed to the overthrow of government, could not be subversion. If that was the meaning of the word subversion it would be contrary to s. 116.

The Solicitor-General in reply said that what had been said had little to do with the pleading and that must mean that not only was the pleading defective, but apparently it did not represent the pleader's intention, and in the result it gave no clue as to the cause of action intended to be set up and in that respect was clearly embarrassing.

In view of the plaintiff's wish to amend par. 16 and to make other unspecified amendments I think that it would be premature to dismiss the action.

I am, however, satisfied that the pleading in its present form does not disclose a reasonable cause of action, and is in a number of respects vexatious and oppressive. However it may be that one or more of the alleged causes of action can be reframed in a manner which will satisfy the rules and I think that the

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I therefore order that the statement of claim be struck out with costs, the
plaintiffs to be at liberty to replead. I certify for counsel.

DECISION AND
REASONS FOR DECISION

**Farrell; Secretary, Department of Immigration and Border Protection
(Freedom of information) [2017] AATA 409 (31 March 2017)**

Division FREEDOM OF INFORMATION DIVISION

File Number(s) **2015/4174**

Re **Secretary, Department of Immigration and Border Protection**
 APPLICANT

And **Paul Farrell**
 RESPONDENT

DECISION

Tribunal: **The Hon. Dennis Cowdroy OAM QC, Deputy President**

Date: **31 March 2017**

Place: **Sydney**

- (a) In relation to Documents 1-14, the decision of the Australian Information Commissioner dated 7 July 2015, as amended by Order of the Tribunal made under s 26 of the *Administrative Appeals Tribunal Act 1975* on 14 April 2016, is affirmed.
- (b) In relation to Document 15, the decision of the Australian Information Commissioner dated 7 July 2015, as amended by Order of the Tribunal made under s 26 of the *Administrative Appeals Tribunal Act 1975* on 14 April 2016, is varied. The Tribunal finds that the whole of the document is exempt under ss 33 and 47E of the *Freedom of Information Act 1982*, subject to the abovementioned Order dated 14 April 2016.

.....[sgd].....

The Hon. Dennis Cowdroy OAM QC, Deputy President

Catchwords

FREEDOM OF INFORMATION – access to documents – whether exempt – ‘public interest’ – ‘security of the Commonwealth’ – power of the Commonwealth – watch officer logs from vessels involved in turnback activities – decision affirmed

Legislation

Administrative Appeals Tribunal Act 1975, ss 35(2)

Australian Security Intelligence Organisation Act 1979, ss 4(a), (aa)

Commonwealth Constitution, ss 51(vi), (xxix)

Criminal Code Act 1995 (Cth), Division 73

Customs Act 1901, ss 185(3AB) - check

Freedom of Information Act 1982, ss 3(2)-(4), 4(5), 11, 11A(5), 11B, 31B, 33(a)(i), (iii), 34, 37(2)(b), 43(1)(c), 45A, 47B(a), 47E(d), 58E, 60A, 93A

Judiciary Act 1903, s 78B

Maritime Powers Act 2013, ss 7, 4(2), 16(1), 17(1), 52(1), 54(1), 72(4), 75, 107, 229, 233A

Migration Act 1958, ss 42, 229, 233A 245B(9A)-(9B), 245F

Cases

Adams and Tax Agents Board (1976) 1 ALD 251

AG Australia Holdings Ltd v Burton (2002) 58 NSWLR 464

Andrews v Howell (1941) 65 CLR 255

Attorney-General (Canada) v Cain [1906] AC 542

Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180

Church of Scientology Inc v Woodward (1982) 154 CLR 25

Collector of Customs (NSW) v Brian Lawlor Automotives Pty Ltd [1979] FCA 37; (1979) 41 FLR 338

CPCF v Minister for Immigration and Border Protection (2015) 255 CLR 514

David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294

Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority [2014] AATA 707

Director of Public Prosecutions v Smith [1991] Vic Rep 6; (1991) 1 VR 63

Ferdinands v Commissioner for Public Employment (2006) 225 CLR 130
Jaffarie v Director- General of Security (2014) 226 FCR 505
McKie and Minister for Immigration, Local Government and Ethnic Affairs (1988) 8 AAR 90
Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors [2012] HCA 36; (2012) 246 CLR 379
Plaintiff M47/2012 v Director General of Security (2012) 251 CLR 1
Purvis and Dairy Adjustment Authority [2005] AATA 233; (2005) 86 ALD 713
Ruddock v Vadarlis (2001) 110 FCR 491
Sarina and Secretary, Department of Social Security (1988) 14 ALD 437
Sawmillers Exports Pty Ltd and Minister for Education and Training, AAT No 9359 9 March 1994, unreported
Staats and National Archives of Australia [2010] AATA 531
Thomas v Mowbray (2007) 233 CLR 307
Tillman's Butcheries Pty Ltd v Australasian Meat Industry's Employees Union (1979) 42 FLR 331
Wake v John Fairfax & Sons Ltd [1973] 1 NSWLR 43
White v Director of Military Prosecutions (2007) 231 CLR 570

Secondary Materials

Concise Oxford Dictionary
Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982
Macquarie Dictionary
Oxford Online Dictionary

REASONS FOR DECISION

The Hon. Dennis Cowdroy OAM QC, Deputy President

31 March 2017

1. On 14 August 2015, the Secretary, Department of Immigration and Border Protection ("the **Secretary**") applied to this Tribunal for review of a decision of the Australian Information Commissioner ("the **Commissioner**"), claiming that the Commissioner had erred in his

assessment of an application made under the *Freedom of Information Act 1982* (Cth) (“the **FOI Act**”) on 17 January 2014 by Paul Farrell (“**Farrell**”).

2. Farrell had applied under the FOI Act to the Department of Defence for certain documents concerning “turnback” operations conducted as part of Operation Sovereign Borders (“**OSB**”). Such request was referred to the then Australian Customs and Border Protection Service (“**ACBPS**”). On 7 February 2014 Farrell expanded his request to include copies of watch officer logs from any vessels involved in turnback operations; and requests for final confirmation, approval or orders to conduct turnback operations since November 2013.
3. By decision dated 14 March 2014 ACBPS refused access to each of the 15 documents identified as relevant to the request, on the basis of s 47E(d) of the FOI Act. Accordingly Farrell applied to the Commissioner for review of such decision. On 17 July 2015 the Commissioner varied the ACBPS decision by granting access to part of document 15, but otherwise upholding the decision with respect to documents number 1 to 14 inclusive and part of document 15 pursuant to ss 47E(d) and s 11A(5) of the FOI Act.
4. The reasons for the Secretary’s application to the Tribunal are stated as follows:

The Information Commissioner mistook the submissions of the [Secretary] with respect to document 15. The [Secretary] claimed the whole of document 15 was exempt under ss 33 and 47E of the Freedom of Information Act 1982 (Cth). Having claimed s 33 over the whole of document 15 it was not open to the information Commissioner to determine any part of it should be released without first consulting the Inspector-General of Intelligence and Security – Part VII Div 9 FOI Act refers.
5. When the application came on for hearing on 8 August 2016, the parties agreed that the Tribunal was requested to consider not only the application of the Secretary in respect of the one document, namely document 15, but, in addition and at the request of Farrell, the decision with respect to the remaining documents. It follows that the decision of the Commissioner is to be reviewed in its entirety in respect of the 15 documents in issue (“the **documents**”).
6. The issues arising in this application are several. They are:
 - (a) in respect of documents 1 to 15 for which exemption has been claimed by the Secretary, are they exempt from release pursuant to s 33(a)(i) of the FOI Act on the ground that

disclosure would reasonably be expected to cause damage to the security the Commonwealth?

(b) Alternatively are parts of documents 1 to 15:

(i) conditionally exempt from release pursuant to s 47E(d) of the FOI Act on the basis that their disclosure could reasonably be expected to have a substantial adverse effect upon the operations of the ACBPS; and

(ii) contrary to the public interest to disclose, as provided by s 11A(5)?

(c) Alternatively;

(i) could the release of parts of documents 7 and 15 reasonably be expected to cause damage to the international relations of the Commonwealth: see s 33(a)(iii)?

(ii) Could release of parts of documents 3, 6, 7, and 15, reasonably be expected to reveal procedures for dealing with evasions of the law in a manner which is reasonably likely to prejudice their effectiveness: see s 37(2)(b)?

Statutory Provisions

7. The objects of the FOI Act, as stated in s 3(1), are to give the Australian community access to information held by the Government of the Commonwealth by requiring agencies to publish the information and to provide for a right of access to documents (see (a) and (b) thereof). The intention of Parliament in the furtherance of such objects are contained in sub-s 3(2), (3) and (4).

8. The furtherance of the right of access is provided by s 11, which relevantly provides that:

...every person has a legally enforceable right to obtain access in accordance with this Act to:

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document.

9. Section 31B relevantly provides:

*A document is **exempt** for the purposes of this Part if:*

(a) it is an exempt document under Division 2; or

- (b) *it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).*

*Note 1: a document is an **exempt document** for the purposes of this Act (see subsection 4(1)) if:*

- (a) *it is exempt under this section; or*
- (b) *it is exempt because of section 7 (exemption of certain persons and bodies); or*
- (c) *it is an official document of a Minister that contains matters not relating to the affairs of an agency or a Department of State.*

Note 2: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A)

10. "Exempt document" is defined in s 4 as follows:

- (a) *a document that is exempt for the purposes of Part IV (exempt documents) (see section 31B); or*
- (b) *a document in respect of which, by virtue of section 7, an agency, person or body is exempt from the operation of this Act; or*
- (c) *an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department of State.*

11. Section 33 provides:

A document is an exempt document if disclosure of the document under this Act:

- (a) *would, or could reasonably be expected to, cause damage to:*
 - (i) *the security of the Commonwealth;*
 - (ii) *the defence of the Commonwealth; or*
 - (iii) *the international relations of the Commonwealth; or*
- (b) *would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.*

12. Documents affecting enforcement of law and protection of public safety are referred to in s 37(2) and include exemption if the document would or could reasonably be expected to:

- (b) *disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.*

13. Legal professional privilege is provided for in s 42 of the FOI Act.

The Evidence

14. The Secretary relies upon an affidavit of Major General Andrew William Bottrell sworn on 26 May 2016. Major General Bottrell is the Commander of OSB, and provided the affidavit on behalf of the Joint Agency Task Force (“**JATF**”) for OSB. His affidavit referred to a statement of Ms Bradshaw dated 20 February 2015 relating to the establishment and nature of Border Protection Command, now known as Maritime Border Command (“**MBC**”), and the role of that organisation in border protection. The affidavit refers to the operations of JATF in respect to combatting people smuggling, and particularly the procedures undertaken to deter such activity, including the withholding relevant operational material which could otherwise be exploited to render the tactics, techniques and procedures less effective or ineffective. The evidence also refers to threats to Australia's border security, and confirms that such threats have not disappeared or diminished and remain an ongoing concern for Australia's security.
15. Major General Bottrell's affidavit states that the release of the documents would pose a serious risk to the ongoing effectiveness of border control operations, since the methods by which MBC undertakes its functions in national security operations in deterring people smuggling ventures would be exposed. His affidavit states that the release of details describing turnback operations would allow persons who participate in people smuggling to predict, and render less effective, turnback operations because of the knowledge gained from the documents. Release of the documents would show how such operations are planned and executed, including tactics involved, techniques and procedures. Further, the affidavit states that such knowledge could be used to encourage passengers or crew to participate in such ventures, on the basis that they would obtain the confidence that such activities could be carried out successfully.
16. The affidavit states that if the information were released, it could be used in such a way that, having obtained knowledge of the operations of the vessels involved on behalf of the Commonwealth, and the capabilities of such vessels, a risk to personnel on such vessels could be created.
17. The affidavit further states that MBC would be required to revise its current operation methodology to reduce the risk of harm; that such procedures would take a considerable

time to develop. During the interim, the opportunity would be created for the people smuggling trade to increase. Further, release of the documents would reduce the effectiveness of the vessels and infrastructure used in a wide range of other activities including illegal fishing, narcotic importation, biosecurity threats, including maritime piracy and security for oil and gas platforms.

18. Major General Bottrell states that should OSB be compromised, a real threat to Australia's national security would result. The tactics, techniques and procedures comprised in the current operations and referred to in the documents have been developed over a decade and the release of the level of detail referred to in the documents would put lives at risk. Such procedures have been developed only in consequence of improvement and refinement, and to release the documentation would result in the undermining of such processes.
19. Major General Bottrell also states that he has considered whether any further information could be released from the documents which are sought on this application. He concluded that no portion of the documents could be released which would in any way be intelligible without running the risk of the harm he has referred to.
20. Major General Bottrell was extensively cross-examined on the content of his affidavit by Counsel for Mr Farrell. Due to national security issues, as referred to hereunder, he declined to answer during the public portion of the hearing, some of the questions asked of him concerning the content of the documents.

Observations

21. The Tribunal now refers to the specific matters relied upon by Farrell.
22. Farrell makes no admissions concerning the claims of the Secretary, and relies upon the fact that the onus of establishing that the documents qualify for exemption from access lies on the party claiming that exemption.

Issues

Power of the Commonwealth

23. Farrell has made two submissions that the power of the Commonwealth does not extend to legislating with regard to “turnback activities”. Such submission raises the issue whether the current legislation relied upon to support turnback operations is constitutional.
24. The Tribunal observes that such issues should be brought before a court, rather than in proceedings brought under the FOI Act. This Tribunal is not the appropriate forum for the determination of constitutional issues. Questions of this nature are usually determined only after extensive submissions have been provided by the Attorneys-General of all States and Territories, following the issue of notices under s 78B of the *Judiciary Act 1903* (Cth), let alone being assisted by detailed submissions of the parties. In the absence of any finding by a competent Federal Court which resolves such issue, the Tribunal must proceed on the basis that the various legislation used to support the turnback operations are valid; see *Adams and Tax Agents Board* (1976) 1 ALD 251; *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 37; (1979) 41 FLR 338; *McKie and Minister for Immigration, Local Government and Ethnic Affairs* (1988) 8 AAR 90 at 96; *Sarina and Secretary, Department of Social Security* (1988) 14 ALD 437; *Sawmillers Exports Pty Ltd and Minister for Education and Training*, AAT No 9359, 9 March 1994, unreported; *Purvis and Dairy Adjustment Authority* [2005] AATA 233; (2005) 86 ALD 713.
25. Farrell relies upon an extract from the dissenting decision of the joint judgement by Hayne and Bell JJ in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [143] in support of the proposition that the Commonwealth must be able to demonstrate a power to carry out its turnback activities; that the mere assertions of power are insufficient; that there was no power to conduct any operations in Indonesian territorial waters and that operations against people smugglers are illegal, with the consequence that the documents do not qualify for exemption since exemption is only applicable to documents relating to lawful activities.
26. The High Court in *CPCF* determined whether s 72(4) of the *Maritime Powers Act 2013* (Cth) authorised detention of persons who enter the migration zone or a place outside such a zone where that person did not hold a current visa. The High Court held that s 72(4) was a valid exercise of power.
27. It is necessary to consider authorities. In *Ruddock v Vadarlis* (2001) 110 FCR 491, French J (as his Honour then was) said with reference to provisions of the *Migration Act 1958* (Cth) which restricted entry into Australia of non-citizen, at [192]:

Australia's status as a sovereign nation is reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not. That power may also be linked to the foundation of the Constitution in popular sovereignty implied in the agreement of the "people" of the pre-Federation colonies "to unite in one indissoluble federal Commonwealth". It may be said that the people, through the structures of representative democracy for which the Constitution provides, including an Executive responsible to the Parliament, may determine who will or will not enter Australia. These powers may be exercised for good reasons or bad. That debate, however, is not one for this Court to enter.

28. At [193] his Honour said:

In my opinion, the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion...

29. French J referred at [114] of his decision to the observations of Lord Atkinson writing for the Privy Council in *Attorney-General (Canada) v Cain* [1906] AC 542 at 546 as follows:

One of the rights possessed by the supreme power in every State is a right to refuse to permit an alien to enter that State...¹

30. The Commonwealth is entitled to rely upon several powers in support of its activities in turnback operations, as were discussed in *CPCF*. The Maritime Powers Act authorises enforcement powers to be undertaken in maritime areas: see s 7. Further, operations to prevent persons entering Australia without a visa has been found to be consistent with the permitted purpose of ensuring compliance with s 42(1) of the Migration Act. Such power can be exercised to prevent an intended contravention of such act, the contravention being that "a noncitizen must not travel to Australia without a visa that is in effect". Such act was enacted "to provide a single comprehensive framework for enforcing Australian law at sea", see Gageler J in *CPCF* at [338].

31. In addition to the statutory powers of the Commonwealth, the decision of the High Court in *CPCF* refers at [20] to the operation of the United Nations Convention on the Law of the Sea ("UNCLOS"). French CJ referred to the fact that UNCLOS provided that, subject to the Convention:

...ships of all States enjoy the right of innocent passage through the territorial sea of a coastal State. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State, but shall be considered to be prejudicial

¹ Vattel, *Law of Nations*, book 1, s 231; book 2, s 125.

if, in the territorial sea, the foreign ship engages in the loading or unloading of any person contrary to the immigration laws and regulations of the coastal State. (Footnotes omitted).

32. The above authorities are useful in that they provide the basis for the exercise by the Commonwealth of its legislative powers. The Tribunal concludes that there is ample legislative power arising from the operation of the Maritime Powers Act and the Migration Act to conduct the activities of turnback operations. Further, the powers extend geographically to the contiguous zone of Australia (see [29] of *CPCF*) and to places outside Australia (see s 4(2) of the Maritime Powers Act). In so far as any incursions may have taken place in the waters of a foreign country, then such an incursion, in the absence of any activities of loading or unloading refugees, would not constitute a breach of the UNCLOS. Even if further reserve powers were required, it is arguable that the sovereign powers of Australia, which are unspecified but are described in *CPCF* as "the common law in Australia as modified by the Constitution" (see [145], [270] of *CPCF*) would provide the necessary powers to defend the integrity of Australia's borders. The High Court in *Thomas v Mowbray* (2007) 233 CLR 307 has also confirmed that the external affairs power contained in s 51(xxix) of the *Commonwealth Constitution* may be relied upon to counter threats to Australia's borders, in addition to the defence power contained in s 51(vi) of the Constitution.
33. In so far as Farrell relies upon the dissenting decision of Hayne and Bell JJ as providing some basis for supporting its proposition that the Commonwealth lacks the necessary power to undertake the turnback operations, it should be noted that the decision of the High Court did not concern the question of power, but rather the scope of that power. That is not in question in the present circumstances.

Consideration of submissions relevant to section 33 of the FOI Act

34. Where a document is claimed to be exempt by virtue of s 33 of the FOI Act, the Tribunal before determining that the document is not an exempt document under s 33, must, inter alia, request the Inspector-General to appear personally and provide evidence concerning the damage that could be caused to the security of the Commonwealth, its defence and its international relations if access to the document were provided in accordance with the request.

35. Farrell submits that ss 58E (production of documents to the Tribunal) and 60A (which makes provision for the Inspector-General to give evidence in certain proceedings) only operate when the documents in issue are exempt documents, and that the 15 documents do not qualify for exemption, for the reasons hereunder.
36. Farrell submits that:
- (a) the phrase "security of the Commonwealth" in s 33(a)(i) has a meaning to be determined by the ordinary meaning of the words extended by the inclusive definition in s 4(5) of the FOI Act: that "security" means protection from all measures taken against espionage theft, infiltration, sabotage or the like (see the definition contained in the *Macquarie Dictionary*) or the safeguarding or safety of a state against some internal or external threat, for example terrorism, espionage and the like: that it is impermissible, in determining the meaning of the phrase "security of the Commonwealth" in the FOI Act to rely upon the definition of "security" in the ASIO Act (see s 4(aa)) where s 4(aa) was inserted by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) and there was nothing to indicate that the amendment was to impact upon the definition of "security of the Commonwealth" in the FOI Act;
 - (b) that the term "the Commonwealth" means the polity, or body politic of the Commonwealth constituted by the Constitution and is not synonymous with the territory of Australia; that no support can be found in the term "security" contained in the *Australian Security Intelligence Organisation Act 1979* (Cth) ("**ASIO Act**"), as referred to in the submissions of the Secretary, in aid of the definition of "security of the Commonwealth" contained in the FOI Act; that it is impermissible, in determining the meaning of the phrase "security of the Commonwealth" in the FOI Act to rely upon the definition of "security" in the ASIO Act (see s 4(aa)) where s 4(aa) was inserted by the *Anti-People Smuggling and Other Measures Act 2010* (Cth) and there was nothing to indicate that the amendment was to impact upon the definition of "security of the Commonwealth" in the FOI Act; and
 - (c) that the concept of security, whilst it can vary over time, and includes protection from war, sabotage and violent interference, it does not extend to people smuggling. It must be so, it was submitted because persons who have engaged in people smuggling are all detained and assessed before their release and accordingly, the security of the Commonwealth cannot become an issue.

Consideration: "Security of the Commonwealth"

37. The definition of "security of the Commonwealth" contained in s 4(5) of the FOI Act is broad. It relevantly provides: -

*Without limiting the generality of the expression **security of the Commonwealth**, that expression should be taken to extend to:*

- (a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth,..*

38. The word "security" is defined in the *Oxford Online Dictionary* to include: "freedom: from danger or threat". The High Court of Australia in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 considered the meaning of such word. At 60 Mason J said, when interpreting provisions of the ASIO Act:

...Security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time; it is similar to the constitutional concept of defence.

39. As to the definition of "security of the Commonwealth", the definition in s 4(5) is expansive when it refers, in its opening words "without limiting the generality of the expression security of the Commonwealth". The words make it plain in s 4(5)(a) that it extends to prevention or suppression of activities inside or outside Australia subversive to the interests of the Commonwealth or any associated or allied country. The *Concise Oxford Dictionary* includes in the definition of "subvert" the words "overturn", "upset", "effect destruction or overthrow of". The same dictionary defines "hostile" as having the following meanings: "of an enemy; unfriendly; opposed".

40. Applying such terms, the definition contained in s 4(5) extend to the detection, prevention or suppression of activities which could be regarded as having the effect of overturning or upsetting the integrity of Australia's borders or actions opposed to such operations. Accordingly the definition contained in s 4(5) includes these concepts in defining "security of the Commonwealth". Added to this is the definition referred to previously by Farrell contained in the *Oxford Online Dictionary* that security includes "freedom from danger or threat, safety and safeguarding".

41. Farrell refers to the observation of French CJ in *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 at [60], in which his Honour referred to the broadening of the

definition of security in the regulations to the Migration Act so that the concept of security contained in s 4 of the ASIO Act became the criteria for consideration instead of the concept of "Australian national security". Reference is also made to Bell J at [459] where her Honour referred to the "wider notions of security" arising from the definition of "security" contained in the ASIO Act. As was observed in *Church of Scientology*, security is a concept "with a fluctuating content".

42. This illustration however does not detract from the Tribunal's finding that the FOI Act is sufficiently comprehensive to include border patrol operations where those operations are designed to protect the integrity of Australia's borders, which necessarily includes the activities of people smugglers. So considered, the submissions concerning provisions in the *Migration Regulations 1994* are remote from the issue now before the Tribunal. Farrell's submissions suggest that security should be confined only to activities of a warlike nature. However, such a narrow interpretation is unwarranted and has no application.
43. In *Jaffarie v Director-General of Security* (2014) 226 FCR 505 the full Federal Court considered whether the definition of "security" contained in the ASIO Act extended to the protection of Australia's territorial and border integrity from serious threats. The Full Court concluded that the definition included such operations.
44. At [59] in *Jaffarie* the Full Court, having referred to the wide ambit of the defence power conferred by s 51(vi) of the Constitution, referred to the fact that such power was not to be narrowly construed and that there was no basis for constraining the Commonwealth's power with respect to the word "'security' ... in a manner consistent with a confined interpretation sought to be distilled from international law". The Full Court referred to the discussion of the broad power invested in the Commonwealth in *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [106] per Kirby J, and to the decision in *Andrews v Howell* (1941) 65 CLR 255 at 278 per Dixon J. Significantly, their Honours referred to the following extract from *Thomas v Mowbray* at [7] where Gleeson CJ said in respect of the defence power:

...is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.

45. In addition to the observations of Gleeson CJ referred to above, which, by analogy, can be used in support of the border surveillance power as an aspect of security of the Commonwealth, there is always the "supreme power" in every State to refuse to permit an alien to enter that State, as discussed in *Attorney-General (Canada) v Cain*.
46. Contrary to Farrell's submissions, there is no basis for the submission that "the Commonwealth" when used in the definition is to be confined to the body politic, since the definition refers to "within Australia or outside Australia". The inference can readily be drawn that these words must be construed as the geographic borders of Australia, rather than as a reference to the body politic.
47. Whilst the Secretary, in its submissions, has called in aid of the interpretation of 'security' as contained in s 4 of the ASIO Act, which defines 'security' as the protection of, and of the people of, the Commonwealth and the several States and Territories from, inter alia various enumerated threats (see (a)), and includes the protection of Australia's territorial and border integrity from serious threats; (see (aa)), the Tribunal concludes that the definition of "security of the Commonwealth" contained in the FOI Act is adequate to include the operations of the border force in protecting Australia's borders from unauthorised persons entering Australia, without having to rely upon or refer to the definition contained in the ASIO Act. The definition contained in the ASIO Act has not been incorporated into the FOI Act. The fact that the definition of 'security' contained in the ASIO Act specifically encompasses the protection of Australia's territorial and border integrity from serious threats does not result in the conclusion that such activities do not readily fall within the definition of "security of the Commonwealth" contained in the FOI Act. Each act is directed to a different subject matter.
48. The security of the Commonwealth is not confined to external threats: such security also arises from internal threats and for many measures taken to subvert Australia's national interest. The fact the definition contained in the ASIO Act of 'security' specifically refers to the protection of Australia's territorial and border integrity from serious threats does not result in the conclusion that such activities do not readily fall within the definition of "security of the Commonwealth" contained in the FOI Act. Having reached such conclusion, submissions by Farrell concerning the applicability of the definition in the ASIO Act as discussed in *Staats and National Archives of Australia* [2010] AATA 531, do not arise for consideration.

49. In summary, the Tribunal finds that the definition of "security of the Commonwealth" contained in the FOI Act is sufficiently comprehensive to include border patrol operations where those operations are designed to protect the integrity of Australia's borders. As has been referred to in *Church of Scientology*, "security" is a concept "with fluctuating content". The submissions of Farrell suggest that security should be confined only to activities of a warlike nature: such a limited interpretation cannot be sustained.

Would disclosure reasonably be expected to cause damage to the Commonwealth?

Operation of section 47E of the FOI Act

50. Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have certain consequences as listed therein.
51. Farrell submits that disclosure of any document to which access is sought could not reasonably be expected to damage any of the matters mentioned in s 4(5)(a) of the FOI Act. In support of that submission Farrell refers to the fact that the watch officer logs relate to vessels of Australian Customs and not Defence vessels. Further, the vessels to which the logs relate to are no longer in service with Australian Customs. The disclosure would not compromise any function shown to be performed by Customs vessels which are relevant to the "security of the Commonwealth".
52. The test whether such requirement is satisfied has been established In the decision of the Full Court of the Federal Court of Australia in *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180 at 190, a matter involving the interpretation of s 43(1)(c)(ii), where their Honours said: -

In our opinion, in the present context, the words "could reasonably be expected to prejudice the future supply of information" were intended to receive their ordinary meaning. That is to say, they require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like.... It is preferable to confine oneself to the language of the provision itself and to attempt to form an opinion, on the evidence, as to what can reasonably be expected to happen if disclosure occurs.

53. There is no reason not to apply such definition in the present circumstances. It requires the Tribunal to form an opinion whether disclosure would, in the present circumstances, undermine the security of the Commonwealth. This is the approach which the Tribunal will adopt when it comes to consider the documents for which exemption is sought. To make a finding, as Farrell seeks, without doing so would be contrary to principle.

Operation of section 47E(d)

54. The FOI Act contains a provision that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have certain consequences one of which is set out in s 47E(d):

have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

55. Farrell submits that disclosure of the documents, particularly of incursions into Indonesian waters during turnback operations, will "significantly enhance the public accountability of Operation Sovereign Borders on a matter of public interest without any prospect of affecting current operations which would not occur in Indonesian waters". Farrell also submits that the Tribunal, in assessing the impact on operations, will consider the legal requirement in respect of the conduct of turnback operations had regard to Division 73 of the *Criminal Code Act 1995* (Cth) and the sovereignty of Indonesia over its territorial waters and the limitations on rights of innocent passage under UNCLOS. Should the documents disclose or tend to disclose breaches of domestic international law, it is submitted that "in the conduct of turnback operations, their disclosure is likely to have a chilling effect on the continuation of unlawful operations", and that such effect would not damage but enhance the proper operations of the agency.
56. The guiding principle must be that referred to in *Australian Iron and Steel*. Such principle has been followed in this Tribunal: see *Staats* at [99]. The question therefore is whether it is satisfied that the disclosure of the records sought by Farrell "could reasonably be expected to cause damage to the security of the Commonwealth" by reason of the fact that it discloses information that could be used by people smugglers in the future. Even though the information may relate to matters that have now passed, the question is whether the detail provided therein could be employed to the detriment of Australia's security.

57. The evidence of Major General Bottrell states that the information would provide vital information for use by those engaged in people smuggling in their planning of operations, because it would reveal aspects of operations designed to deter or prevent those operations, or otherwise compromise the operations in some way. This would be achieved by describing locations, identifying the vessels engaged in those operations, irrespective of whether they are Defence vessels or vessels of an Australian agency undertaking border patrols. Ultimately it will be necessary for the Tribunal to provide its ruling on those issues.

Public Interest

58. Farrell submits that the Secretary cannot establish the requisite damage if the documents are disclosed. Section 11B of the FOI act relevantly provides: –

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

...

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection 93A.

59. In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors* [2012] HCA 36; (2012) 246 CLR 379, the court said at [42]:

*It is well-established that, when used in a statute, the expression “public interest” imports a discretionary value judgement to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is “neither arbitrary nor completely unlimited” but is “unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view.*

60. In *Director of Public Prosecutions v Smith* [1991] Vic Rep 6; (1991) 1 VR 63, the Court held:

The “public interest” is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interests of an individual or individuals.

61. See also *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294; *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43.
62. In determining whether access to the documents or some of them should be permitted, the Tribunal will determine whether, having considered the above principles, in its discretion it should allow access to Farrell. The Tribunal will also be mindful of the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* ("the **Guidelines**") as contained in Part 6 – Conditional Exemptions.

Damage to the International Relations of the Commonwealth

63. Farrell submits there is no evidence to support the Secretary's submissions that disclosure of the documents would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth as referred to in s 47B(a) of the FOI Act.
64. The Secretary refers to 5.30 of the Guidelines, which provide:
- The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between governments and agencies. (Footnotes omitted).*
65. Farrell submits that the Indonesian government disapproves of the turnback policy, and relies upon an extract from *The Age* newspaper dated 27 September 2013 in support of such contention. The Secretary acknowledges that the Tribunal may be informed by such article and that the claim for exemption under s 33 of the FOI Act should be considered accordingly.
66. The Tribunal will consider the documents mindful of the submissions of the parties. But from Farrell's own article, the disapproval of Indonesia with respect to turnback operations appears undisputed.

Were the methods involved lawful?

67. Farrell submits that the Secretary must prove that the methods or procedures involved in the turnbacks disclosed by documents were lawful; and that the turnbacks prevented breaches or evasions of Australian domestic law which would otherwise have occurred. Such submission is predicated upon the text of s 37(2) of the FOI Act, which relevantly provides:

A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

...

- (b) *disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosures of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;...*

68. Mr Farrell relies upon an affidavit of his solicitor, Mr Thomas Pilseniks sworn on 8 August 2016. Mr Pilseniks states that he accessed a website with respect to the tracking of vessels known as "FleetMon". He has also annexed photographs of patrol vessels and their accompanying specifications.

69. Mr Farrell also relies upon extracts from various newspapers, including:

- that of *The Guardian*, dated 17 April 2014 (written by Mr Farrell) which refers to incursions into Indonesian waters by a vessel known as the *Ocean Protector* in December 2013 and January 2014;
- an article of the Andrew & Renata Kaldor Centre for International Refugee Law, 'Fact Sheet – Turning Back Boats', published by the University of New South Wales, which refers to the purchase of lifeboats used for the purpose of transporting asylum seekers to a tow back place located just outside Indonesian waters;
- a compilation entitled "Historical Search and Rescue Incidents in Operation Sovereign Borders", available from the Department of Immigration and Border Protection's website;
- a compilation entitled "Illegal Entry Vessel Arrivals – 19 September to 17 October 2014", available from the Department of Immigration and Border Protection's website;
- fact sheets relating to ACB vessels;

- a redacted publication of the Department of Defence entitled “Joint Review of Operation Sovereign Borders Vessel Positioning”; and
- a media release concerning the rescue of six endangered turtles by an ACB vessel and a media release dated 1 March 2016 concerning the placement of the *MV Ocean Protector*.

70. Also included in the exhibit tendered by Mr Farrell is an opening statement by Mr Michael Pezzullo, Chief Executive Officer of Australian Customs and Border Protection Service dated 21 March 2014. It appears that such statement was provided to a Senate Standing Committee which was conducting an enquiry into a breach of Indonesian territorial waters. It is not apparent from such document that any admission was made that there was a deliberate incursion into Indonesian waters. In fact, the statement refers to the fact that there were inadvertent incursions resulting from an incorrect calculation of the boundaries of Indonesian waters rather than as a deliberate action or navigational error.
71. Mr Farrell has provided the Tribunal with various documents to assist in the interpretation of the FOI Act, including a Report of the Senate Standing Committee on Legal and Constitutional Affairs on the *Freedom of Information Bill 1978*, Chapter 27; the Explanatory Memorandum to the *Freedom of Information Bill 1981*, a decision of the High Court of Australia in *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 and a compilation of the *Criminal Code Act 1995* (Cth).
72. Upon the basis of the material provided, Mr Farrell seeks a finding that the conduct of ACBPS in its incursions into Indonesian waters was unlawful. Specifically, it is claimed that there has been “an offence of organising entry into the land mass of Indonesia, and that accordingly, the exemption provided under s 37(2) of the FOI Act is not available to the Secretary”. At hearing, this submission was put as follows:

DEPUTY PRESIDENT: Well, let’s just think about it a minute. What you’re asking the tribunal to do is to make a finding of fact that the Commonwealth has engaged in unlawful conduct.

MR BRENNAN: Yes.

DEPUTY PRESIDENT: Is that so?

MR BRENNAN: Yes.

DEPUTY PRESIDENT: Right. Now, what makes it unlawful?

MR BRENNAN: That the evidence shows that there is an organised system whereby lifeboats are put on some Australian vessel.

Finding: Allegation of unlawfulness

73. Section 37(2) of the FOI Act does not refer to unlawful conduct generally: it is confined to the question of whether the document relates to “lawful methods” involved in the prevention, detection, investigation or dealing with matters relating to breaches of the law. The documents sought indirectly relate to the prevention of breaches of the law in that the vessels concerned were involved in attempts to prevent illegal entry into Australia. However they do not directly deal with the subject matter to which s 37(2) is directed, namely the disclosure of lawful methods or procedures for preventing or detecting or investigating the detection, or prevention or investigation of such breaches. Rather, the records relate to ship movements.
74. But there are further reasons why this Tribunal cannot make a finding of unlawfulness. Firstly, there is no material from which the Tribunal could safely conclude that the operations were unlawful because incursions took place in Indonesian waters. At the highest, the evidence establishes inadvertent incursions due to errors unrelated to the navigation of the vessel or vessels concerned. Such conclusion falls well short of a finding that because of such incursions, the conduct of such vessels was unlawful. Secondly, to make a finding of fact, as sought by Mr Farrell, of unlawfulness would require the Tribunal to embark upon a major enquiry necessitating the testimony of oral witnesses, cross examination of those witnesses and submissions. The extracts from articles from various sources and groups is clearly insufficient to make a finding of the kind sought, which could have far reaching consequences, and could even be used in findings of criminal conduct.
75. That is not the purpose for which the FOI Act was enacted. The objects of such act are to facilitate access to documentation held by the Commonwealth and its agencies: it is not the intent of the FOI Act that it should operate so as to provide a forum of fact-finding more appropriate to a court of law. If Mr Farrell seeks a declaration of invalidity by the Secretary or of his Department, he is at liberty to seek declaratory relief to that effect in a court; see *Brian Lawlor Automotive Pty Ltd*.
76. Further, the Maritime Powers Act, s 16(1), authorises operations, including turnback operations. An authorising officer may authorise the use of maritime powers with regard to a vessel (or installation, protected land area or isolated person) if such officer suspects, on reasonable grounds, that the vessel bracket or other facility is involved in a contravention of an Australian law: see s 17(1). Such actions would include a

contravention of the Migration Act including a non-citizen who travels to Australia without a current visa (see s 42); and carriage of non-citizens to Australia without documentation (s 229); and of s 233A (offence of people smuggling). The exercise of powers under the Maritime Powers Act includes the boarding of a vessel (s 52(1)); requiring a vessel to stop or manoeuvre or to adopt a specified course or speed or to maintain a specified course or speed (s 54(1)); to detain a vessel (s 69(1)); to detain a person on a detained vessel: see s 72(4), including to a place outside Australia: s 72(4). Further, s 75 excludes any action for civil or criminal liability in respect of the detention or restraint of a person resulting from the operation of Division 8 of the Act.

77. It should also be observed that s 107 of the Maritime Powers Act absolves any authorising officer, maritime officer, person assisting or other person acting under the direction authority of the maritime officer from liability, whether civil or criminal.
78. Mr Farrell submits that such powers do not absolve conduct which occurred prior to the introduction of the Maritime Powers Act. This submission overlooks the immunities provided to officers undertaking operations under the Migration Act, as contained in the (then) ss 245B and 245F. Section 245F(9B) provided that no proceedings, whether civil or criminal, could be instituted in respect of the operations conducted under sub-s (9A) against the Commonwealth, or an officer where the operations were conducted in good faith and no greater force was used than was authorised under sub-s (10).
79. Subsections 245F(9A) and (9B) together with similar amendments to the *Customs Act 1901* (Cth) (see s 185(3AB)) were introduced by the *Border Protection (Validation and Enforcement Powers) Act 2001*. The Explanatory Memorandum relating to such amendment makes it plain that the provisions were enacted in response to increasing threats to Australian borders by people smugglers.
80. It can therefore be concluded that immunities existed prior to the Maritime Powers Act which had the effect of absolving any conduct by officials carried out in relation to people smuggling operations. Such immunities applied irrespective of whether such persons were members of the Defence Force, or civilians engaged by a Government agency.
81. The application before the Tribunal concerns the current impact upon an agency if disclosed. This is clear from the words of s 37(2)(b) which refers to the disclosure which “would, or could reasonably be expected to... disclose lawful methods...” Similar wording

is used in s 47E(d). The section addresses the current and future effect, not the past effect, of any access or disclosure. Since there is no question that the Maritime Powers Act authorises such conduct (this issue having been determined by the High Court in *CPFC*), the operations are, for the purpose of considering the application of the FOI Act, to be treated as lawful, even if, contrary to the Tribunal's findings, the actions preceding the introduction of the Act, were unlawful. It follows that the submissions of Farrell that the Criminal Code has operation, must be rejected.

Inspection of documents for which exemption is claimed

82. In view of the claims made by the Secretary relating to the exemptions, an application was made by the Secretary that the Tribunal order, pursuant to s 35(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) that part of the hearing take place in private. Because of the sensitive nature claimed as justifying the exemptions, the Tribunal considered it appropriate to make such order and to direct that the private session occur following the cross examination by Counsel for Mr Farrell of Major General Bottrell.
83. Following the completion of the public examination of Major General Bottrell, the Tribunal commenced the closed session. During the course of the closed session, Major General Bottrell produced the documents for which exemption is claimed and explained, document by document, the reason for the exemption.

Tribunal's finding

84. As a result of the Tribunal's inspection and analysis of the 15 documents, and of the reasons provided by the Secretary in support of the claim for exemption, the Tribunal is satisfied of the following:
 - (i) that the documents, if disclosed, would, or could reasonably be expected to, cause damage to the security of the Commonwealth as referred to in s 33(a)(i) of the FOI Act; and further concludes that access to such documents would, or could reasonably be expected to cause damage to the international relations of the Commonwealth as provided by s 33(a)(iii) of the FOI Act. Such conclusion is reached upon the material which could be used by people smugglers to subvert or otherwise render useless the methods adopted by ACBPS to prevent people smuggling operations and thereby render vulnerable the integrity of the Australian

Borders against the influx of illegal entrants. Insofar as Australia's international relations are concerned, there is material which shows that Indonesia does not approve of turnback operations. The disclosure of material could prejudice such relations by revealing the places at which turnback operations occur and the methods used in such operations. Because some facts contained in the documents may have become public knowledge does not justify release of the whole document. Nor is it relevant that the documents relate to the operations of a Commonwealth agency, rather than the Defence Force.

- (ii) that certain of those documents, if disclosed, could reasonably be expected to disclose lawful methods or procedures for preventing, detecting breaches or evasions of the law, the disclosure of which would be reasonably likely to prejudice the effectiveness of those methods or procedures, thereby compromising the integrity of Australia's borders, and are exempt from production pursuant to s 37(2)(b);
- (iii) that in addition to the foregoing, all documents are conditionally exempt on the basis that they could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of a Commonwealth agency and that disclosure of the documents would have that effect: see s 47E(d) of the FOI Act. The phrase "substantial adverse effect on the proper and efficient conduct of the operations of an agency" has been the subject of consideration in *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 at [114]–[120]. It is not in the public interest that access be granted to documents 1 to 14, as referred to in s 11A of the FOI Act. The documents comprise sensitive documents relating to maritime operations for the protection of Australia's national borders, and thereby, the interests of the security of the Commonwealth, which is the public interest. As referred to, *Director of Public Prosecutions v Smith*, the public interest must be contrasted with the interest of an individual, or individuals, which are separate to the public interest. The public interest in this instance is to be recognised, and the private interest subverted to it. Further, the word "substantial" means more than trivial or minimal: see *Tillman's Butcheries Pty Ltd v Australasian Meat Industry's Employees Union* (1979) 42 FLR 331. Further, some of the documents, if disclosed, could reasonably be expected to cause damage to the international relations between

the Commonwealth and another State, namely Indonesia: see s 33(a)(iii) of the FOI Act.

CONCLUSION

85. The Tribunal finds that:

- (a) In relation to Documents 1-14, the decision of the Australian Information Commissioner dated 7 July 2015, as amended by Order of the Tribunal made under s 26 of the *Administrative Appeals Tribunal Act 1975* on 14 April 2016, is affirmed.
- (b) In relation to Document 15, the decision of the Australian Information Commissioner dated 7 July 2015, as amended by Order of the Tribunal made under s 26 of the *Administrative Appeals Tribunal Act 1975* on 14 April 2016, is varied. The Tribunal finds that the whole of the document is exempt under ss 33 and 47E of the FOI Act, subject to the abovementioned Order dated 14 April 2016.

I certify that the preceding 85 (eighty-five) paragraphs are a true copy of the reasons for the decision herein of The Hon. Dennis Cowdroy OAM QC, Deputy President

.....[sgd].....

Associate

Dated 31 March 2017

Date(s) of hearing	8 & 9 August, 29 November 2016
Date final submissions received	19 December 2016
Counsel for the Applicant	Mr J Davidson
Solicitors for the Applicant	Australian Government Solicitor
Counsel for the Respondent	Mr T Brennan
Solicitors for the Respondent	SBA Lawyers



**McGrath and Director-General, National Archives of Australia [2020] AATA
1790 (9 June 2020)**

Division: **FREEDOM OF INFORMATION DIVISION**

File Numbers: 2014/1330-1335; 2014/1337; 2014/1342; 2014/5348-5358;
2014/5360; 2014/5362-5364; 2017/2115

Re: **Kim McGrath**
APPLICANT

And **Director-General, National Archives of Australia**
RESPONDENT

DECISION

Tribunal: **Deputy President S A Forgie**

Date of decision: **9 June 2020**

Place: **Melbourne**

The Tribunal decides:

1. to affirm the 24 decisions of the respondent on the following bases:
 - (1) With the exception of A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291, 294-313 the records are exempt records under s 33(1)(a) of the *Archives Act 1983* (Archives Act) because they contain information or matter the disclosure of which under the Archives Act could reasonably be expected to cause damage to the security or international relations of the Commonwealth;
 - (2) A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291. 294-313 are subject to parliamentary privilege and not subject to the Archives Act provided that:
 - (a) if A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291, 294-313 were subject to the Archives Act, the Tribunal would have to have the opportunity to examine the content of the documents in order to consider whether they are exempt under either or both of ss 33(1)(a) or 33(1)(d) of the Archives Act;

- (3) A1838 1733/3/2 Part 6; Folios 183-210 and A1838 1733/3/2 Part 7; Folios 5-32 are not exempt under s 33(2) of the Archives Act but are exempt under s 33(1)(a); and
- (4) In accordance with s 38 of the Archives Act, it is reasonably practicable for the respondent to make arrangements for access to be given to a part of, or a copy of part of, each record without disclosing the information or matter by reason of which each record is an exempt record.

.....[sgd].....
Deputy President S A Forgie

Catchwords – Archives – access to records – claim that certain records subject to parliamentary privilege and not subject to access under the Archives Act 1983 – claim that all records exempt under s 33(1)(a) – claim that certain records exempt records as subject to legal professional privilege – claim that disclosure of certain records would be a breach of confidence – decisions affirmed.

Legislation

Acts Interpretation Act 1901; s 17(a); s 34AB(1)(c)
Archives Act 1983; s 3; s 20; s 27; s 31; s 33; s 43; s 50; s 57
Archives Bill 1978
Archives (Records of the Parliament) Regulations 1995
Archives (Records of the Parliament) Regulations 2019
Bill of Rights 1688 (UK) 1 Will & Mary, sess 2, c 2
Crimes Act 1914
Freedom of Information Act 1982
Freedom of Information Amendment Act 1991
Freedom of Information Bill 1978
Office of National Assessments Act 1977
Parliamentary Privileges Act 1987; s 13; s 14
Petroleum (Submerged Lands) Act 1967
Petroleum (Submerged Lands) Act 1967 (Vic)

Cases

Aboriginal Legal Service of Western Australia (Inc) v State of Western Australia (1993) 9 WAR 297
Amann Aviation Pty Ltd v Commonwealth of Australia [1988] FCA 24; (1988) 19 FCR 223; 81 ALR 710
Alister v R (1984) 154 CLR 404
AM & S Europe Ltd v Commission of the European Communities [1983] QB 878; 1 All ER 705
Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013] QSC 82
Archer Capital 4A and Sage Group plc (No 2) [2013] FCA 1098; [2013] 306 ALR 384
Arnold (on behalf of Australians for Animals) v Queensland (1987) 73 ALR 607; 13 ALD 195

Attorney-General's Department and Another v Cockcroft [1986] FCA 35; (1986) 10 FCR 180; 64 ALR 97; 12 ALD 468
Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475; 69 ALR 31; 61 ALJR 92
Australian Hospital Care (Pindara) Pty Ltd v Duggan [1999] VSC 131
Australian Wheat Board v Cole (No 5) [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651
AWB Ltd v Cole (No 5) [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651 at
AWB Limited v Honourable Terence Rhoderic Hudson Cole [2006] FCA 571; (2006) 152 FCR 382; 232 ALR 743; 91 ALD 46
Baker v Campbell [1983] HCA 39; (1983) 153 CLR 52; 49 ALR 385; 83 ATC 4606; 14 ATR 713
Barton v The Commonwealth (1974) 131 CLR 477
Bradford and Australian Federal Police [2016] AATA 775
Brennan v Comcare [1994] FCA 1147; (1994) 50 FCR 555; 122 ALR 615; 19 AAR 542
Cadbury Schweppes Pty Ltd v Amcor Limited [2008] FCA 88; (2008) 246 ALR 137
Central Intelligence Agency v Sims 471 US 159 (1985)
Church of Scientology v Woodward [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587
Commissioner of the Australian Federal Police v Propend Finance Pty Ltd [1997] HCA 3; (1997) 188 CLR 501; 141 ALR 545; 71 ALJR 327; 35 ATR 130
Commission of Taxation v Donoghue [2015] FCAFC 183
Commissioner of Taxation v Pratt Holdings Pty Ltd [2005] FCA 1247; (2005) 225 ALR 266; 2005 ATC 4903; 60 ATR 466
Commonwealth v John Fairfax & Sons Ltd [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485
Commonwealth v Vance [2005] ACTCA 35; (2005) 158 ACTR 47; 224 FLR 243
Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254
Criminal Justice Commission v Parliamentary Justice Commissioner [2001] QCA 218; [2002] 2 Qd R 8
Crown Resorts Limited v Zantran Pty Limited [2020] FCAFC 1
Davis v The Commonwealth [1988] HCA 63; (1988) 166 CLR 79
Damjanovic & Sons Pty Ltd v The Commonwealth [1968] HCA 42; (1968) 117 CLR 390
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49; (2002) 213 CLR 543; 192 ALR 561; 77 ALJR 40
Duke of Newcastle v Morris (1870) LR 4 HL 661
Director-General, Australian Archives [1988] AATA 110; (1988) 15 ALD 2; 8 AAR 403
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Dye v Commonwealth Securities [2010] FCA 950
Esso Australia Resources v Commissioner of Taxation [1999] HCA 67; (1999) 201 CLR 49; 168 ALR 123; 43 ATR 506; (1999) 2000 ATC 4042
Esso Australia Resources Ltd v Sir Daryl Dawson [1999] FCA 363; (1999) 87 FCR 588; 162 ALR 79
Grofam Pty Ltd v ANZ Banking Group [1993] FCA 374; (1993) 43 FCR 408; 116 ALR 535; 26 ATR 174; 93 ATC 4672; 31 ALD 323
Kennedy v Wallace (2004) 142 FCR 185
Harrison v Melhem [2008] NSWCA 67; 72 NSWLR 380; 26 ACLC 484
Hartogen Energy (in liq) v Australian Gas Light Co [1992] FCA 322; (1992) 36 FCR 557; 109 ALR 177
Hillpalm Pty Ltd v Heaven's Dear Pty Ltd [2002] NSWCA 301; (2002) 55 NSWLR 446
Hearne v Street [2008] HCA 36; (2008) 235 CLR 125; 248 ALR 609

Lennon v Gibson & Howes Ltd (1919) 26 CLR 285
Mann v Carnell [1999] HCA 66; (1999) 201 CLR 1; 168 ALR 86; 74 ALJR 378
McKinnon v Secretary, Department of Treasury [2005] FCAFC 142; (2005) 145 FCR 70; 220 ALR 587; 41 AAR 23; 88 ALD 12; 80 ALJR 1549; 63 ATR 409
McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 43 AAR 151; 91 ALD 516; 63 ATR 409
Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) [1984] HCA 73; (1984) 156 CLR 414; 56 ALR 193
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Ogden Industries Pty Ltd v Lucas [1970] AC 113; [1969] 1 All ER 121
Osland v Secretary, Department of Justice [2008] HCA 37; (2008) 234 CLR 275; 249 ALR 1; 82 ALJR 1288
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Plaintiff B60 of 2012 v Minister for Foreign Affairs and Trade [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490
R v Burgess; Ex parte Henry (1936) 55 CLR 608
R v Joyce [2002] NTSC 70; (2002) 173 FLR
R v Lodhi [2006] NSWSC 596; (1999) 199 FLR 270
R v Smith ex parte Cooper (1992) 1 Qd R 423
Re Chemical Trustee Limited and Commission of Taxation an Anor [2013] AATA 623
Re Ewer and Australian Archives (1995) 38 ALD 789
Re Fernandes and National Archives of Australia [2014] AATA 180
Re Farrell and Secretary, Department of Immigration and Border Protection [2017] AATA 409
Re Hocking and Department of Defence [1987] AATA 602
Re Maher and Attorney-General's Department (1985) 7 ALD 731
Re Millis and Australian Archives (1997) 47 ALD 427
Re Nitas and Minister for Immigration and Multicultural Affairs [2001] AATA 392
Re Petroulias and Commissioner of Taxation [2006] AATA 333; (2006) 62 ATR 1175
Re Philip Morris Pty Ltd and Prime Minister [2011] AATA 556; (2011) 122 ALD 619
Re Prinn and Department of Defence [2016] AATA 445
Re Slater and Cox, Director-General of Australian Archives [1988] AATA 110; (1988) 15 ALD 20; 8 AAR 403
Re Staats and National Archives of Australia [2010] AATA 531
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Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health [1995] FCA 1060; (1995) 56 FCR 50; (1995) 128 ALR 238; 37 ALD 357
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Secondary materials

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Macquarie Dictionary, revised 3rd edition, 2001, The Macquarie Library Pty Ltd
Shorter Oxford English Dictionary, 5th edition, 2002, Oxford University Press
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Hansard: The Senate, 11 September 1980
United Nations Convention on the Law of the Sea; Article 55; Article 76.2; Article 76.3

REASONS FOR DECISION

Deputy President S A Forgie

1. In 1971 and 1972, the Commonwealth of Australia and the Republic of Indonesia (Indonesia) reached two agreements through which they permanently delimited a large segment of their seabed boundaries to the north of Australia. The 1972 agreement led left a gap for the then Portuguese colony of Timor-Leste. That gap became known as the “*Timor Gap*”. In 1978, Australia and Indonesia commenced negotiations regarding a permanent maritime boundary in the Timor Gap but agreement could not be reached. In 2013, 2014 and 2016, Ms Kim McGrath made 30 applications to the National Archives of Australia (Archives) under the *Archives Act 1983* (Archives Act) for access to records¹ relating to the negotiations between Australia and Indonesia first in 1971 and 1972 and then in 1978 and 1979.
2. Archives did not make a decision regarding the first 12 of Ms McGrath’s applications within the consideration period prescribed by s 40A of the Archives Act.² That meant that, for the purposes of enabling her to make an application to the Tribunal, Archives was deemed to have made a decision refusing to grant access to each record on the ground that the record is an exempt record.³ She lodged 12 applications in the Tribunal in respect of each

¹ The Archives Act refers to a “*record*” but defines it in terms that include a “*document*”. I have used both terms for I am dealing with documents. The evidence was also couched in terms of either or both.

² Archives Act; s 40(3)

deemed refusal in relation to the applications she had lodged with Archives in 2013. Subsequently, Archives claimed exemptions in respect of the records under s 33 of the Archives Act. Ms McGrath withdrew four of her applications leaving eight relating to her 2013 applications.⁴ Ms McGrath lodged a further 17 applications to the Tribunal for review of decisions Archives was deemed to have made in relation to 15 of her applications made in 2014 and two decisions it had made claiming exemptions under s 33. Archives subsequently gave Ms McGrath access in full to the records that were the subject of two of her 2014 applications.⁵ Archives claimed exemptions under s 33 in respect of the remaining 15 applications for access leading to 15 applications to the Tribunal. Ms McGrath lodged a further application for access in 2016. Archives refused it claiming exemptions under s 33. That led to her final application to the Tribunal. In all, 24 applications remain in the Tribunal.

3. The Director-General has claimed that the material, to which he has refused Ms McGrath access under the Archives Act, is exempt by reason of one or more of the following exemptions:
 - (1) section 33(1)(a): its disclosure could be reasonably expected to cause damage to the security, defence or international relations of the Commonwealth;
 - (2) section 33(1)(d): its disclosure could constitute a breach of confidence; and/or
 - (3) section 33(2): it would be privileged from production in legal proceedings on the grounds of legal professional privilege and disclosure of the record would be contrary to the public interest.
4. In addition, the Director-General has submitted that a transcript of oral evidence given in-camera before the Parliamentary Joint Committee on Foreign Affairs and Defence, Sub-Committee on Territorial Boundaries (Joint Committee) on 12 and 19 September 1979 is subject to the *Parliamentary Privileges Act 1987* (PP Act) and cannot be disclosed under s 31 of the Archives Act.⁶
5. My reasons for making the following decisions are contained in these open reasons as well as in closed reasons, to which access is restricted to Archives, their legal representatives and to members and staff of the Tribunal. The closed reasons set out my consideration of

³ Archives Act; s 40(8)

⁴ AAT Nos. 2014/1296 withdrawn 25 June 2014 (Archives Documents A1838 3038/9/1 Part 17); 2014/1328 withdrawn 4 December 2014 (Archive Documents A1838 3038/10/1 Part 57); 2014/1329 withdrawn 4 December 2014 (Archive Documents A1838m 3038/11/64 Part 3) and 2014/1336 withdrawn 4 December 2014 (Archive Documents A1838 1733/3/2 Part 14)

⁵ AAT Nos. 2015/5359 (Archives Document A1838 1506/34 Part 1) and 2014/5361 (Archives Document A1209, 970/6400 Part 1)

⁶ Application No. 2014/1335 relating to the review of documents numbered A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291 and 294-313.

the applicability of the exemptions to each of the documents for which they have been claimed. I have decided that:

- (1) the transcript of the oral evidence given before the Joint Committee on 12 and 19 September 1979 is subject to the PP Act and cannot be disclosed in response to a request under the Archives Act regardless of whether it comes within the terms of an exemption in that legislation or not.
 - (a) As an alternative, Archives claimed that the transcript is exempt under:
 - (i) s 33(1)(a) on the basis that its disclosure under the Archives Act could reasonably be expected to cause damage to the security or international relations of the Commonwealth; and
 - (ii) under s 33(1)(d) on the basis that its disclosure would constitute a breach of confidence;but, as I have not seen the transcripts, I am unable to decide whether I would be satisfied that they would be exempt under either provision.
- (2) that the records identified as A1838 1733/3/2 Part 6; Folios: 183-210, or parts of them, are not exempt from access under s 33(2) of the Archives Act on the basis that they are subject to legal professional privilege.
 - (a) They are, however, exempt under s 33(1)(a) as are the other records, or parts of them, for which exemption has been claimed under that provision.
- (3) In the case of each record, which is an exempt record by reason of part of the information or material that it contains, I am satisfied that:
 - (a) it is reasonably practicable to make arrangements for access to be given to a part of, or a copy of part of, that record without disclosing the information or material by reason of which it is an exempt record; and
 - (b) that access be given to Ms McGrath to a copy of the records made in accordance with those arrangements.

BACKGROUND

6. The background to Ms McGrath's applications for access to records lies in the negotiations between Australia and Indonesia relating to the maritime boundaries of each in relation to the seabed that later became of concern to Timor-Leste when it separated from Indonesia. Those negotiations led to various treaties that I have referred to below. Following the establishment of Timor-Leste as a sovereign state separate from Indonesia, further negotiations took place between it and Australia regarding similar issues. The most recent, the Maritime Boundaries Treaty, was signed on 6 March 2018 in New York making clear where the boundaries lie between the two countries. Australia ratified that treaty on 30 August 2019.

7. In the course of the discussions between them, Archives granted access to various records to Ms McGrath. The table at Attachment C sets out the records, or parts of records, that remain in issue.

Summary of Bilateral Treaties between Australia and Indonesia in the 20th Century

8. The findings that I have made are based on the evidence of Dr Greg French, whose experience I have set out at [46]-[54] below. Dr French was not involved in the negotiation of either treaty but I accept that he has read about them extensively and has lectured on them. He has reviewed the records kept by DFAT relating to the negotiations. The negotiations led to the following agreements and treaties:
- (1) **18 May 1971:**
Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries (1971 Agreement).
 - (2) **9 October 1972:**
Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas (1972 Agreement).
 - (a) This agreement was supplementary to the 1971 Agreement.
 - (3) **December 1989:**
Australia-Indonesia Timor Gap Treaty signed in December 1989 (1989 Treaty).
 - (a) In 1978, Australia and Indonesia commenced negotiations on a permanent maritime boundary in the Timor Gap but did not reach agreement. Instead, they agreed on a provisional arrangement.
 - (b) This arrangement came to an end when Timor-Leste gained independence from Indonesia in 2002 and became the Democratic Republic of Timor-Leste.
 - (4) **14 March 1997:**
Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries (Perth Treaty).
 - (a) Delimited Australia and Indonesia's outstanding maritime boundaries not previously delimited by the 1971 and 1972 Agreements i.e. all of the Exclusive Economic Zone (EEZ) and the seabed west of the 1972 seabed boundary.
 - (b) The Perth Treaty has not yet come into force.

Summary of Bilateral Treaties between Australia and Timor-Leste in the 21st Century

9. The findings I have made in this section are drawn from the evidence of Mr Justin Whyatt. He is the Assistant Secretary of the Transnational and Sea Law Branch in the Legal Division of DFAT. When Timor-Leste gained independence, it and Australia did not establish permanent maritime boundaries. Instead, they entered three bilateral treaties establishing provisional maritime arrangements for the Timor Sea. They were:

(1) **2002:**

Timor Sea Treaty between the Government of East Timor and the Government of Australia (TST)

The TST established the Joint Petroleum Development Area (JPDA). Under it, Australia and Timor-Leste were to control jointly the exploration and exploitation of oil and gas resources in the JPDA.

The title to any petroleum produced was to be shared between them with 90% attributable to Timor-Leste and 10% to Australia.

(2) **2003:**

Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise Troubadour Fields (IUA)

The IUA created the governance framework for the Greater Sunrise fields, which are partly in the JPDA and partly in an area of exclusive Australian jurisdiction.

The IUA apportions the Greater Sunrise fields between Australia (79.9%) and the JPDA (20.1%).

The title to any petroleum produced was to be shared between them with 90% attributable to Timor-Leste and 10% to Australia as set out in the TST.

(3) **2006:**

Treaty between the Government of Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty)

The CMATS Treaty changed the revenue arrangement in the IUA by providing for an equal sharing of upstream revenue between Australia and Timor-Leste from the Greater Sunrise fields.

The CMATS Treaty placed a moratorium on maritime boundary claims for its duration.

It extended the duration of the TST to the same duration of the CMATS Treaty i.e. from 30 years to 50 years but either party was permitted to terminate it at an earlier time if certain circumstances prevailed. Among those circumstances was there being no approval for a development plan for the Greater Sunrise fields within six years of the CMAT Treaty's entry into force i.e. by 23 February 2013.

Timor-Leste terminated the CMATS Treaty on 10 April 2017.⁷

⁷ See [13] below

10. On 23 April 2013, Timor-Leste initiated arbitration against Australia under the TST regarding the validity of the CMATS Treaty and the duration of the TST (arbitration case). It followed this a few months later with an action it instituted in the International Court of Justice (ICJ) for the return of materials removed by the Australian Security and Intelligence Organisation (ASIO) from the offices of Timor-Leste's legal representative on 3 December 2013 (ICJ case). In September 2014, both the arbitration case and the ICJ case were suspended for consultations aimed at settling Australia's and Timor-Leste's differences. The consultations were not successful. On 11 June 2015, Australia returned the materials taken by ASIO. That led to Timor-Leste's discontinuing its ICJ case on 11 June 2015.
11. On 24 September 2015, Timor-Leste instituted a further arbitration disputing Australia's exclusive jurisdiction over the pipeline from the Bayu-Undan gas field to Darwin.
12. Timor-Leste then initiated, on 11 April 2016, compulsory conciliation under the United Nations Convention on the Law of the Sea (UNCLOS) intending to conclude an agreement on permanent maritime boundaries with Australia. Australia challenged the competence of the Conciliation Commission to proceed with the conciliation when the CMATS Treaty had placed a moratorium on maritime boundary claims for its duration. The Conciliation Commission decided on 26 September 2016 that the moratorium did not preclude boundary negotiations. Therefore, it was competent to proceed with the conciliation.
13. The conciliation proceeded with both parties participating fully in the process. As part of the facilitation of the process, Timor-Leste agreed to give Australia written notification of its intention to terminate the CMATS Treaty and to negotiate permanent maritime boundaries with Australia. On 10 January 2017, Timor-Leste delivered notice of its intention to do so. That meant that, on 10 April 2017, the CMATS Treaty ceased to be in force. As a further step in facilitating the process, Timor-Leste withdrew the two arbitrations that it had initiated against Australia. Both parties and the Conciliation Commission advised that was the case in a statement issued on 24 January 2017.
14. Negotiations between the two countries continued throughout 2017 with five meetings held between January and December 2017. At the August/September 2017 meeting, Australia and Timor-Leste reached a comprehensive package of agreements that included a maritime boundary and also addressed the legal status and development of the Greater Sunrise gas field. In October 2017, they reached agreement on the text of a treaty delimiting the maritime boundary and addressing the legal status of the Greater Sunrise gas field. Further meetings with Conciliation Commission were planned and held to address the development of the Greater Sunrise gas field.

15. Further meetings with the Conciliation Commission were scheduled for early 2018 and agreement was reached in March with Australia and Timor-Leste signing the Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea on 6 March 2018 (Maritime Boundaries Treaty).

LEGISLATIVE FRAMEWORK

Archives Act: Commonwealth records available for public access

A. Regulating dealings with Commonwealth records

16. Making the Commonwealth's archival resources publicly available is one of the objects of the Archives Act.⁸ Division 2 of Part V is concerned with regulating dealings with Commonwealth records. The expression "*Commonwealth record*" is defined in s 3(1) of the Archives Act to mean:

- "(a) *a record that is the property of the Commonwealth or of a Commonwealth institution; or*
- (b) *a record that is deemed to be a Commonwealth record by virtue of a regulation under subsection (6) or by virtue of section 22;*
- but does not include a record that is exempt material."*

17. A "*Commonwealth institution*" is defined in s 3(1) and includes, among others, the Senate, the House of Representatives and a Department.⁹ A "*Department*" means a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth¹⁰ or a Parliamentary Department.¹¹ A "*Parliamentary Department*" means a Department of the Parliament established under the *Parliamentary Service Act 1999* (PSA).

18. The word "*record*" is itself defined in s 3(1) to mean:

- "... a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of:*
- (a) *any information or matter that it contains or that can be obtained from it; or*
- (b) *its connection with any event, person, circumstance or thing.*

*Note: For the definition of document, see section 2B of the Acts Interpretation Act 1901."*¹²

⁸ Archives Act; s 2A(a)(ii)

⁹ Paragraphs (c), (d) and (e) of the definition of "*Commonwealth institution*"

¹⁰ In summary, s 63 of the Constitution of the Commonwealth provides that the Governor-General may appoint Ministers to administer the Departments of State he or she may establish. Traditionally the Governor-General exercises that power by making Administrative Arrangements Orders (AAO) from time to time. Each AAO begins with a statement that the matters dealt with by a Department of State include the matters referred to in the Part of the Schedule to the AAO relating to that Department together with matters arising under the legislation administered by a Minister of State administering the Department" AAO; [1]. Section 7 of the *Public Service Act* defines "*Department*" to mean "... a Department of State, excluding any part that is of itself an Executive Agency or Statutory Agency."

¹¹ Archives Act; s 3(1)

¹² Section 2B of the *Acts Interpretation Act 1901* defines a document to mean "... any record of information, and

19. Section 24 regulates the disposal and destruction of Commonwealth records, damaging or altering Commonwealth records or transferring their custody or ownership. Section 26 prohibits additions to, or alteration of, Commonwealth records that have been in existence for more than 15 years. Section 27 provides for the transfer of Commonwealth records in the custody of a Commonwealth institution other than Archives and that has been determined under s 3C to be part of the archival resources of the Commonwealth, to the care of Archives in accordance with arrangements approved by Archives.¹³ A Commonwealth record that is part of the archival resources of the Commonwealth must be transferred to Archives as soon as practicable after it ceases to be a current Commonwealth record¹⁴ i.e. after it ceases to be a Commonwealth record that is required to be readily available for the purposes of a Commonwealth institution other than for purposes under the Archives Act.¹⁵
20. Subject to Part V, Archives is entitled, for the purposes of the Archives Act, to have full and free access, at all reasonable times, to all Commonwealth records in the custody of a Commonwealth institution.¹⁶
21. With the concurrence of the Director-General, a Commonwealth institution may determine that a Commonwealth record, or each record in a class of Commonwealth records in the possession of the Commonwealth institution or relating to its functions is a record that is not required to be transferred to Archives under s 27 or a record to which Archives is entitled to have access under s 28.¹⁷ Notwithstanding that, the responsible Minister may determine that a Commonwealth record, or each record in a class of Commonwealth records, is a record that is not required to be transferred to the care of Archives under s 27 or a record to which Archives is not entitled to have access under s 28 otherwise than on specified conditions to be observed by Archives.¹⁸

B. Access to Commonwealth records

22. A person may make an application to Archives for access to a Commonwealth record that is in the open access period, in the care of Archives or in the custody of a Commonwealth institution and is not an exempt record. The application is made under s 40(1) and must

includes: (a) anything on which there is writing; and (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and (d) a map, plan, drawing or photograph."

¹³ Archives Act; s 27(1)

¹⁴ Archives Act; s 27(3)

¹⁵ Archives Act; s 3(1)

¹⁶ Archives Act; s 28

¹⁷ Archives Act; s 29(1)

¹⁸ Archives Act; s 29(2)

comply with its provisions. There is no question that Ms McGrath has made her applications in the appropriate form. Archives has made its decisions on her applications. It has reviewed its decisions under s 42 of the Archives Act and made decisions.

23. Access to Commonwealth records is the subject of Division 3 of Part V. Subject to the provisions of that Part, s 31 imposes an obligation on Archives to cause certain records to be made available for public access.¹⁹ If the record is in the custody of a Commonwealth institution, the institution must make such arrangements with Archives as will enable Archives to meet its obligation under s 31(1) to cause the record to be made available for public access.²⁰
24. The records that Archives is obliged to make available are those that come within the following description. It is:
- “... a Commonwealth record that:
- (a) is in the open access period;
- (b) is in the care of the Archives or in the custody of a Commonwealth institution; and
- (c) is not an exempt record.”²¹
25. What is meant by the “open access period” depends on whether the records are a Cabinet notebook or a record containing Census information or any other record. In the case of the first two, the open access periods are determined by ss 22A and 22B respectively.²² The open access period for other records is determined by s 3(7). If the record came into existence in a year before 1980, the record is in the open access period on and after 1 January in the year that is 31 years after the year in which it was created. A record that came into existence in 1979 was in the open access period on and after 1 January 2010. Specific dates are given for the years following 1980 although the period is calculated on the basis of 20 or 21 years for those records created after 2000. Those records are in the open access period in the year that is 21 years after the creation year.
26. A record is in the “care of Archives” if it is in the “custody of Archives” or “the record is in the custody of a person in accordance with arrangements referred to in section 64”.²³ The word “custody” is not defined but its ordinary meanings include that of “protective care”. Arrangements of that sort have been made between Archives and DFAT over the years. The most recent is Records Authority 2016/00094616 dated 2016, which superseded the

¹⁹ Archives Act; s 31(1)

²⁰ Archives Act; s 31(1)

²¹ Archives Act; s 31(1A)

²² Archives Act; s 3(1)

²³ Archives Act; s 3(1)

Records Disposal Authority Job no 2003/00622439 dated 2 December 2002. Both describe records, or classes of records, that might be destroyed in accordance with the requirements set out in the relevant authority. Both describe records to be retained as national archives.

27. Section 3(1) also defines the term “*exempt material*”. “*Material*” means records and other objects. The term “*exempt material*” includes, for example, material included in the collection of library material maintained by the National Library and in the historical material in the possession of the National Museum of Australia. There is no exempt material in issue in this case.
28. What is in issue is whether Ms McGrath has applied for records that are exempt records. Section 33 is concerned with exempt records. Section 33(1) identifies exempt records by reference to the kinds of information or matter they contain. It identifies nine kinds. If a Commonwealth record comes within one of those kinds it is an exempt record. Two of the kinds being those identified in ss 33(1)(a) and (d) are relevant in this case and I set them out below. Section 33(3) also provides that Commonwealth records are exempt records on the basis of the kind of information or matter they contain. That is not relevant in this case. The final exemption is relevant in this case. It is set out in s 33(2) and its parameters are determined by how it would be treated in legal proceedings. I come to that exemption later.
29. In consultation with the responsible Minister or a person authorised by the responsible Minister, the Director-General must make arrangements for determining the Commonwealth records that are in the open access period and that are to be treated by Archives as being exempt records. The Director-General may also make arrangements determining the extent to which access to those exempt records may be given without disclosing the information or matter by reason of which the records are exempt records.²⁴ The “*responsible Minister*” in relation to a Commonwealth record is the Minister to whose ministerial responsibilities the record is most closely related.²⁵
30. The Director-General takes the position, and I think correctly, that each of the records in issue in this case is a document and that each document is a “*Commonwealth record*” as those terms are defined in s 3(1). If a Commonwealth record contains information of the sort described in ss 33(1) or (2), the whole of the record is an exempt record. Archives must have regard to s 38 before it declines to make a Commonwealth record available for public access. It provides:

“Where a record that would otherwise be required to be made available for public access under this Part is an exempt record, the Archives may, where it is

²⁴ Archives Act; s 35(1)

²⁵ Archives Act; s 3(1)

reasonably practicable to do so, make arrangements for part of, or a copy of part of, that record to which access could be given without disclosing information or matter by reason of which the record is an exempt record to be made available for public access in accordance with this Part.”

31. Circumstances arise in which Archives may take the view that, if a Commonwealth record were to include information regarding the existence or non-existence of a record, that Commonwealth record would be an exempt record by virtue of ss 33(1)(a), (b) or (e). If it does so, s 39(1) provides that nothing in the Archives Act is to be taken to require Archives to give that information.²⁶ It must, however, follow the process set out in s 39(2):

“Where an application to the Archives for access to a record relates to a record that is, or if it existed would be, of a kind referred to in subsection (1), the Archives may give notice in writing to the applicant that the Archives neither confirms nor denies the existence, as a Commonwealth record, of such a record but that, assuming the existence of such a record, it would be an exempt record, and, where such a notice is given:

- (a) section 40 applies as if the decision to give such a notice were a decision referred to in that section; and*
- (b) the decision to give the notice shall, for the purposes of Division 4, be deemed to be a decision of the Archives refusing to grant the applicant access to the record on the ground that the record is an exempt record under paragraph 33(1)(a), (b) or (e), as the case may be.”*

C. Protection against certain actions

32. Section 57(1) of the Archives Act provides protection to those who are authorised to give access and certain protections to the author of the record or those who supplied it to Archives.

Application for review of Archives’ decision to the Tribunal

A. Making an application to the Tribunal and the limits of its powers on review

33. Division 4 provides for the review of decisions made by Archives. In summary, s 43 provides that, if a decision has been reconsidered by Archives under s 42, an application may be made to the Tribunal for review of a decision made on reconsideration²⁷ in respect of a Commonwealth record that is a decision that comes within one or other of six descriptions of decision set out in ss 43(1)(a) to (f). The description relevant in his case is:

*“a decision refusing to grant to the applicant access to the record on the ground that the record is an exempt record ...”*²⁸

²⁶ Archives Act; s 39(1)

²⁷ For the purposes of Part V of the Archives Act and proceedings in the Tribunal for review of a decision, a decision given by Archives is taken to have been given by the Director-General: Archives Act; s 50

²⁸ Archives Act; s 43(1)(a)

34. Generally, when an application for review has been made to the Tribunal, it may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision under review.²⁹ Those powers may be modified by the enactment providing for applications to be made to the Tribunal.³⁰ That is what Parliament has done when enacting the Archives Act. Section 44(1) provides:

“Subject to this section, in proceedings under this Division, the Tribunal has, in addition to any other power, the power to review any decision of the Archives upon application for access to a record and to decide any matter in relation to that application that, under this Act, could have been or could be decided by the Archives, and any decision of the Tribunal under this section has the same effect as a decision of the Archives.”

35. Parliament has limited the Tribunal's powers when it is established that a record is an exempt record. Except as provided by s 44(7), the Tribunal does not have power to decide that access is to be granted to a record that is an exempt record. The qualification to that restriction on its power is set out in s 44(7) is:

“On a review in pursuance of an application to the Tribunal under section 43, the Tribunal may, if it is satisfied that it would be practicable to give access to, or a copy of, part of an exempt record in a form that would not disclose information or matter by reason of which the record is an exempt record, direct that access be given accordingly.”

36. The power exercised under s 44(7) can only be exercised after meeting the requirements of s 50A if the record has been claimed to be an exempt record by reason of its containing information or matter of a kind referred to in ss 33(1)(a) or (b).

B. Procedural steps required of Tribunal before it may determine certain records not exempt records

37. Section 50A of the Archives Act applies in a case, such as this, where a record has been claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in, with one other, s 33(1)(a). In so far as it is relevant in this case, s 50A(2) provides:

“Before determining that the record is not an exempt record, the Tribunal must request the Inspector-General of Intelligence and Security to appear personally and give evidence on:

- (a) The damage that could reasonably be expected to be caused to the security, defence or international relations of the Commonwealth if the record were made available for public access; ...*
- (b) ...”*

²⁹ Administrative Appeals Tribunal Act 1975 (AAT Act); s 43(1)

³⁰ AAT Act; s 25(6)

38. If the Tribunal is considering whether, under s 38, it is reasonably practicable to make arrangements for part of, or a copy of part of, a record to which access could be given without disclosing information or matter by reason of which the record is an exempt record, it must follow the procedure set out in s 50A(3). That procedure requires the Tribunal in the context of this case to:

“... request the Inspector-General to appear personally and give evidence on:

- (a) whether making that part, or copy of that part, of the record available for public access could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth; ...*
- (b) ...”*

39. Unless the Inspector-General is of the opinion that he or she is not appropriately qualified to give evidence on the matters in relation to which he or she has been requested to give evidence, he or she must comply with the request.³¹ Before hearing the evidence of the Inspector-General of Intelligence and Security (Inspector-General), the Tribunal must hear any evidence to be given or submissions to be made by or on behalf of the Archives or the Commonwealth institution of which the record is property.³²

C. Onus of proof

40. In proceedings in the Tribunal, Archives has the onus of establishing that a decision it has given was justified or that the Tribunal should give a decision adverse to the applicant.³³ Under s 35(1) of the Archives Act, the Director-General must make arrangements for determining the Commonwealth records in the open access period that are to be treated by it as exempt records. The Tribunal is not restricted by any determination the Director-General might make under s 35.³⁴

D. Certificate of the Attorney-General

41. On 19 April 2018, the then Acting Attorney-General issued a certificate under s 36 of the AAT Act that:

“... disclosure of:

- 1. the matters contained in the confidential affidavit affirmed by Dr Greg French, Australian Ambassador to Italy, together with a schedule categorising into subject matter the documents over which exemptions are claimed by the respondent*
- 2. the documents contained in the confidential affidavit affirmed by Justin Whyatt, Assistant Secretary, Sanctions, Treaties and Transnational Crime Legal Branch, Legal Division of the Department of Foreign Affairs and Trade*

³¹ Archives Act; s 50A(5)

³² Archives Act; s 50A(4)

³³ Archives Act; s 51(a)

³⁴ Archives Act; s 51(b)

3. *the matters contained in the confidential affidavit affirmed by Michelle Chan, Acting Deputy Director-General of the Office of National Assessments, on 20 March 2018*
 4. *the matters contained in the confidential affidavit described in the schedule of this certificate, together with the schedule itself*
 5. *any evidence adduced or submissions made by or on behalf of the respondent concerning or directly or indirectly disclosing any of the matters contained in those confidential affidavits or parts thereof*
- would be contrary to the public interest because the disclosure would prejudice the security, defence or international relations of Australia.”*

42. The certificate does not excuse those named or described in it from giving evidence to the Tribunal. What it does is place an obligation on the Tribunal. It is an obligation that:

“... the Tribunal shall, subject to subsection (3) and to section 46, do all things necessary to ensure that the information or the matter contained in the document is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the proceeding, and, in the case of a document produced to or lodged with the Tribunal, to ensure the return of the document to the person by whom it was produced or lodged.”³⁵

43. The qualification referred to in s 36(3) does not arise here because it only arises if the certificate does not specify a reason referred to in ss 36(1)(a) or (b). In this case, the reason specified is referred to in s 36(1)(a) i.e. “... *disclosure of the information ... [described in the certificate] would be contrary to the public interest: (a) by reason that it would prejudice the security, defence or international relations of Australia.*” Therefore, the Tribunal does not have any discretion under s 36(3) to decide whether the information described in the certificate should be disclosed to Ms McGrath either by making it available to her or permitting her to inspect a the part of a document containing it. The qualification in s 46 relates to disclosure to the Federal Court or Federal Circuit Court should an appeal be lodged against a decision of the Tribunal in a matter.

THE WITNESSES

Ms Chan

44. At the time of the hearing, Ms Michelle Chan was Acting Deputy-Director General of the Office of National Assessments (ONA), which was then in the process of becoming the Office of National Intelligence (ONI). She is part of the executive team setting strategic direction for the ONA, identifying assessment priorities and monitoring the implementation of corporate policy and relations with other organisations. In addition to the oversight of foreign intelligence coordination and corporate functions in the ONA, Ms Chan has been responsible for the identification of topics that will be the subject of assessments by the

³⁵ AAT Act; s 36(2)

ONA, the judgments reached in those assessments and for making decisions about the advice offered to the Prime Minister in those assessments. Her particular responsibilities include assessments that cover countries in the Pacific and North Asia, as well as the strategic analysis of power relations between the states, military-political affairs and the implications of science and technology.

45. Ms Chan's previous experience in the Australian Public Service commenced in 1993 and she has held various positions including Assistant Secretary in DFAT covering Indonesia, Timor-Leste and ASEAN issues in 2006 and 2007. She was the Australian Ambassador to Myanmar from 2008 to 2011 and has also served in Australian embassies in Phnom Penh (1996-1998), Hanoi (1998) and Jakarta (2002-2005 and 2013-2014). She holds a BA (Juris) and LLB from the University of Adelaide and an MA and LLM (International Law) from the Australian National University.

Dr French

46. Dr French was called to give evidence on behalf of Archives. I will set out his qualifications and experience as he presented them in his Affidavit affirmed on 13 February 2018:

- "1. Since May 2016, I have been Australia's Ambassador to Italy.
2. From 2009 until immediately before my appointment as Ambassador to Italy, I was the Legal Adviser (International) and Head of the Department of Foreign Affairs and Trade (DFAT) International Law Branch. In that role, I had responsibility for the International Law and Sea Law, Environment Law and Antarctic sections. A constant focus in this role was the protection and advancement of Australia's interests, including its security interests. This included: delimitation of, and control over, our maritime boundaries; negotiation of various treaties; advancing our strategic interests in Antarctica; and advising our military on many issues including navigation rights, the use of force and self-defence.
3. I hold a Bachelor of Arts and a Bachelor of Laws Degree from Macquarie University and a Master of Laws and doctorate (magna cum laude) in international law from the Westfälische Wilhelms-Universität Münster, Germany. I have published widely on the international law of the sea, including a book entitled 'Der Tiefseebergbau – eine interdisziplinäre Untersuchung der völkerrechtlichen Problematik' (Deep seabed mining – an interdisciplinary analysis of the international legal issues), a 125 page chapter entitled 'The Law of the Sea' in Australian International Law, Sydney, 1995, and numerous academic articles.
4. I have led Australian delegations to several international legal meetings including negotiations on the United States to several international legal meetings including negotiations on the United Nations Convention on the Law of the Sea (UNCLOS) and marine biodiversity beyond national jurisdiction. I chaired a United Nations Commission on seabed mining and was rapporteur for the negotiation of the 1994 Implementing Agreement to UNCLOS. I led the Australian delegation that negotiated the Australia-New Zealand maritime boundary agreement (1999-2004).

5. *I have considerable experience in issues between Australia and Timor-Leste in relation to the Timor Sea and maritime boundaries. From 2000 to 2001 I was actively involved in the negotiations for the Timor Sea arrangement between Australia and the United Nations Transnational Administration in East Timor (which acted on behalf of Timor-Leste prior to its independence in 2002), which became the Timor Sea Treaty between Australia and Timor-Leste upon Timor-Leste's independence. I was also actively involved in the negotiations for the 2003 International Unitisation Agreement between Australia and Timor-Leste (2002-2003)."*³⁶

47. In cross-examination, Dr French added that his doctorate was in Public International Law, specialising in International Law of Sea, particularly with respect to non-living marine resources of the international seabed area within and beyond national jurisdiction. His thesis dealt with many of the specificities of maritime jurisdiction. After completing his doctorate, Dr French joined the Law of the Sea Section of DFAT in 1990. While in that section, he was involved in the multilateral negotiation of what became amendments to UNCLOS relating to non-living marine resources of the international seabed. His work required him to work with the definitions of the boundary areas under national jurisdiction i.e. the continental shelf and the international seabed area beyond national jurisdiction. Those negotiations extended from 1990 until 1994.
48. In addition, Dr French was also chair of one of the special commissions of the United Nations Preparatory Commission for the Law of the Sea Convention from 1991 until 1995. One of his co-chairs was Dr Haseem Jalal, who represented Indonesia. Dr Jalal had also been a negotiator in the negotiations that took place between Australia and Indonesia in 1971 and 1972. At the time that he was co-chair with Dr French, Dr Jalal was also chair of another commission of the United Nations Preparatory Commission for the Law of the Sea Convention. Together with another two chairs, Dr French and Dr Jalal were, in effect, the board of the United Nations Preparatory Commission for the Law of the Sea Convention. At the same time each of them was the representative for his country in the other's commission. In Dr French's opinion, Dr Jalal remains a highly respected personage with respect to the International Law of the Sea.
49. After being posted to Germany for several years, Dr French returned to the central office of DFAT in 1999. He worked again in DFAT's International Legal area and focused particularly on the law of the sea. Immediately, Dr French began to work on the transition from the Timor Gap Treaty to the Timor Sea Arrangement, or TST, between the United Nations Transnational Authority in East Timor and the Australian Government during the period of separation of Timor-Leste from Indonesia. The transition required arrangements to be made to enable the terms of the Timor Gap Treaty to continue before negotiations for

³⁶ Exhibit 4

the TST commenced. Dr French was not a member of the negotiating team for the TST and was not involved in the negotiations directly. At the same time, Dr French said that he was in the relevant area at the time and was aware of, and involved in the terms of the discussions on what was to become the TST. From 2001 onwards, those who were responsible for the negotiations reported to him.

50. In approximately 2002 or 2003, Dr French was a member of the delegation negotiating the International Utilisation Agreement between Australia and Timor-Leste. The purpose of that agreement would be to work out the practical arrangements for sharing resources of the Greater Sunrise unitised area which, at the time, lay approximately 80% within the Australian continental shelf and so 80% within its jurisdiction. Approximately 20% lay within the joint petroleum development area under the TST.
51. Between 1999 or 2000 and 2004, Dr French was the leader of the Australian delegation negotiating the Australia/New Zealand maritime boundary. Being head of a delegation in those circumstances required him to manage the negotiating scene from a range of government departments, elaborating and implementing a strategy and ensuring that the delegation had all relevant materials, advice, assessments, both legal and technical, with respect to the relevant boundary areas.
52. Between 2004 and 2008, Dr French was stationed in Colombo. On his return, he became the special representative for international environmental issues in DFAT. He was engaged in negotiations on various environmental agreements as well as leading the delegation relating to the Bio-Safety Protocol under the Convention on Biological Diversity. In carrying out those duties, Dr French was involved in multilateral negotiations with Indonesia, Timor-Leste, Papua New Guinea, Vanuatu, Solomon Islands, France and New Zealand. Environmental issues and maritime boundaries overlap significantly. There is, for example, a significant overlap between issues relating to maritime jurisdiction under UNCLOS and the regulation of genetic and living marine resources under the Convention on Biological Diversity. There was also a professional overlap for him, Dr French said, because he was head of delegation for the negotiation of an implementing agreement under the UNCLOS relating to the conservation and sustainable use of marine living resources beyond national jurisdiction. That requires, he said, an understanding of the spatial framework within which international law determines the jurisdiction of coastal states vis-à-vis the international areas beyond national jurisdiction.
53. Between 2009 and 2016 when he was head of DFAT's International Legal Branch, Dr French was head of delegation for a number of delegations including those involved in the negotiation of the Arms Trade Treaty and the International Criminal Court.

54. Dr French said that he was head of delegation in relation to the International Court of Justice and to the arbitral tribunal held under the auspices of the Permanent Court of Arbitration relating to Timor-Leste. He did not have any direct role in any of the negotiations leading to the making of the Maritime Boundaries Treaty in 2018. He was involved in supervising colleagues who were involved in matters preliminary to the negotiations, but he was not involved in supervising those who were directly involved. The reason for his not doing so was that he had left the relevant position in 2016.

Mr Whyatt

55. Mr Whyatt holds a Bachelor of Arts and Bachelor of Laws (Hons) from the University of Queensland. He has been employed by DFAT since 2000 in various roles including Counsellor (Political) Washington DC, Director, Middle East Section; Executive Officer International Law and Transnational Crime Section and Third Secretary and Austrade Country Manager in Phnom Penh, Cambodia. He has also held positions in the Sanctions, Treaties and Transnational Crime Branch, which is now called the Transnational and Sea Law Branch, in DFAT. Since July 2017, he has been the Assistant Secretary of that Branch. His predecessors in the position were Ms Sarah De Zoeten, Mr Michael Bliss and Dr French.
56. His previous position was that of Director of the Sea Law, Environment Law and Antarctic Section. In that role, he oversaw negotiations and legal issues related to the law of the sea, freedom of navigation, maritime boundaries, fisheries, international environmental law and Antarctic law and policy. From May 2017, he served as the Head of the Timor Sea Taskforce responsible for DFAT's participation in the conciliation initiated by the Government of Timor-Leste under the UNCLOS. He has continued to be involved in the conciliation.

OFFICE OF NATIONAL ASSESSMENTS

57. On the basis of the evidence of Ms Michelle Chan, I find that the Office of National Assessments (ONA) has since become the Office of National Intelligence (ONI). The ONA remains relevant. It was a statutory body established by the *Office of National Assessments Act 1977* (ONA Act) and is directly accountable to the Prime Minister. Under s 5 of the ONA Act, the ONA was given responsibility for what might be broadly described as assembling, correlating, evaluating and reporting on information relating to international matters that are of political, strategic or economic significance to Australia as well as responsibility for coordination and evaluation functions. ONA must prepare reports in relation to those matters that are of current significance and, as circumstances require,

those that are of national importance. It must ensure that international developments of major importance to Australia are assessed on a continuing basis. Reports are provided to the Prime Minister, members of the National Security of Cabinet, other Ministers as appropriate, senior Government officials and other appropriate persons.

58. ONA's coordination functions are concerned with foreign intelligence activities engaged in by Australia and include those that relate to Australia's foreign intelligence priorities. That coordination included making recommendations on the appropriateness of resourcing of the intelligence agencies to undertake their missions, coordinating the focus of the intelligence community in line with Government priorities and evaluating the performance of intelligence agencies against those protection priorities. Coordination also extended to policy in relation to foreign intelligence, providing long term and cross-agency planning and liaison with international partners to develop relationships with counterparts in other countries.

59. Ms Chan elaborated on the basis on which ONA made its assessments:

"... ONA assesses and analyses international political, strategic and economic developments for the Prime Minister and senior ministers in the National Security Committee of Cabinet. ONA bases its assessments on information available to the Australian Government from all sources, both classified and unclassified. ONA also consults broadly within government and with experts in other sectors. Information used to form judgements in ONA assessments includes open source reporting, diplomatic reporting, intelligence obtained by covert means and the assessments formed by other agencies.

*Liaison with international parties is an important source of information for ONA. ONA has responsibility to coordinate, manage and maintain these international relationships on behalf of all agencies within the Australian Intelligence Community, to foster a shared understanding of the world and to facilitate and enhance the flow of information to ONA so that sound judgements can be made. The continued flow of information from international partners depends on an understanding of confidentiality in relation to all aspects of the relationship."*³⁷

RELEVANCE OF PARLIAMENTARY PRIVILEGE: transcript of oral evidence given before Joint Committee

60. On 23 April 2018, a certificate was issued under s 17 of the PP Act in relation to transcripts of oral evidence given in-camera before the Parliamentary Joint Committee on Foreign Affairs and Defence, Sub-Committee on Territorial Boundaries (Timor Boundary) on 12 and 19 September 1979 (Joint Committee). These are Folios 49-65, 77-83, 274-291 and 294-313 of A1838 1733/3/2 Part 12.³⁸ The certificated stated:

"We, David Elder, Clerk of the House of Representatives on behalf of the Speaker of the House of Representatives and Richard Pye, Clerk of the Senate on behalf of

³⁷ Exhibit 2 at [7]-[8]

³⁸ Tribunal No. 2014/1335

the President of the Senate certify, in accordance with sub-sections 17(c) and (d) of the Parliamentary Privileges Act 1987, that:

- *Oral evidence was given in-camera to the Parliamentary Joint Committee on Foreign Affairs and Defence, Sub-Committee on Territorial Boundaries (Timor Boundary) in Canberra on Wednesday 12 September 1979 and the transcript of the evidence has not been published or authorised by a House or a committee; and*
- *Oral evidence was given in-camera to the Parliamentary Joint Committee on Foreign Affairs and Defence, Sub-Committee on Territorial Boundaries (Timor Boundary) in Canberra on Wednesday 19 September 1979 and the transcript of the evidence has not been published or authorised by a House or a committee.”*

61. Under ss 17(c) and (d) of the PP Act, the effect of the certificate is that it is evidence of two matters: that oral evidence was taken as stated in the certificate and that the transcript of it has not been published nor authorised to be published. This brings the evidence within the terms of s 13(1)(b) of the PP Act when it provides:

“A person shall not, without the authority of a House or a committee, publish or disclose:

- (a) ...*
- (b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence;*

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.”

A penalty of six months' imprisonment or 50 penalty units is imposed in the case of a natural person or 250 penalty units in the case of a corporation.

The submissions

62. On behalf of Archives, Ms Stern submitted that s 13 of the PP Act is clear in its terms and absolute in precluding the disclosure of the transcripts. The terms of the access obligation in s 31 and the Archives Act generally contain no express abrogation of parliamentary privilege. While s 57 of the Archives Act provides protection against certain civil and criminal actions when access is given to a record as a record required by Part V to be made available for public access, it does not abrogate the prohibition in s 13 of the PPA. Ms Stern relied on the following cases: *Duke of Newcastle v Morris*³⁹ (*Duke of Newcastle*), *Criminal Justice Commission v Parliamentary Justice Commissioner*⁴⁰ (*CJC v PJC*), *Aboriginal Legal Service of Western Australia (Inc) v State of Western Australia*⁴¹ (*ALWSA*), *R v Smith ex parte Cooper*⁴² (*Cooper*) and *Baker v Campbell*.⁴³

³⁹ (1870) LR 4 HL 661; Lord Hatherley, Lord Chancellor, Lord Westbury and Lord Colonsay

⁴⁰ [2001] QCA 218; [2002] 2 Qd R 8; McPherson and Williams JJA and Chesterman J

⁴¹ (1993) 9 WAR 297 at 304

⁴² (1992) 1 Qd R 423 at 430 per

63. Ms Stern also noted that the document in question is a document in the possession of the Department of Foreign Affairs and Trade (DFAT) and not of Archives. That means that regulations made under s 20 of the Archives Act in relation to records in the possession of the Houses of Parliament or of a Parliamentary Department do not apply. Section 31(3) of the Archives Act provides that, subject to any regulations made under s 20, the obligations imposed by s 31(2) to make arrangements with Archives to enable it to meet its obligations under s 31(1) in relation to the record do not apply. That took the transcript outside the scope of s 31(2) of the Archives Act and so outside the scope of the transcript's being in the open access period to be publicly available.
64. On behalf of Ms McGrath, Dr McBeth said that parliamentary privilege does not apply to the documents in the possession of DFAT rather than in the possession of a Parliamentary body. The regime provided for under the Archives Act as modified by the *Archives (Records of the Parliament) Regulations 1995* does not apply to a document that is not in the possession of a Parliamentary body. Parliament clearly intended to implement a scheme to protect interests that were, at common law, protected by parliamentary privilege. That included the protection of *in camera* evidence to parliamentary committees. The regime that has been provided clearly shows that parliamentary privilege was not intended to apply to records that were old enough to be in the open access period under the Archives Act. Even if the regime that has been provided under these regulations does not apply, the reference in s 33(2) to legal professional privilege makes clear that parliamentary privilege was not intended to operate as a further exemption. Had Parliament intended that to be so, it would have provided that a record is an exempt record just as it did in s 33(2) in relation to legal professional privilege.

Consideration

65. I have decided that disclosure of the transcript would be in breach of parliamentary privilege. My conclusion is based on the fact that the transcript, which was not included in the DFAT files held in Archives, came into DFAT's possession. It was not a record in the possession of the Senate, House of Representatives or a Parliamentary record that was transferred into the custody of Archives in accordance with the *Archives (Records of the Parliament) Regulations 1995* made under s 20 of the Archives Act and in the open access period. Where a record is transferred into the custody of Archives under those regulations, I have concluded that parliamentary privilege no longer applies to them and access to them is determined in accordance with the Archives Act. The copy of the transcript in DFAT's

⁴³ [1983] HCA 39; (1983) 153 CLR 52; 49 ALR 385; 83 ATC 4,606; 14 ATR 713; Murphy, Wilson, Deane and Dawson JJ; Gibbs CJ, Mason and Brennan JJ dissenting

file, however, is not a Parliamentary record that comes within the scope of those regulations. For the reasons I give below, it remains subject to parliamentary privilege.

A. General principles relating to parliamentary privilege

66. The general principle is that to which Dawson J referred in *Baker v Campbell*:

“ *In the interpretation of statutes there is a presumption that there is no intention to interfere with basic common law doctrines unless the words of the statute expressly or necessarily required that result. ...*”⁴⁴

67. Parliamentary privilege has its roots in those common law doctrines. As was explained by Gleeson CJ in *Hearne v Street*:⁴⁵

“ *The privileges of Parliament, including of a State Parliament in the Commonwealth of Australia, do not exist for the benefit of parliamentarians and their staff and officials alone, or even primarily. In this respect they resemble what the common law called ‘legal professional privilege’ and which the Uniform Evidence Acts (Pt 3.10, Div 1) more accurately describe as ‘client legal privilege’. Parliamentary privilege exists for the benefit of the people who are governed by laws made by the Parliament concerned. Indeed, the privileges of a Parliament are closely inter-connected with the historical privileges of the people. ...*”⁴⁶

68. *Baker v Campbell* was a case concerned with the operation of legal professional privilege but it and parliamentary privilege have much in common. It was concerned with whether documents to which legal professional privilege attached could be seized from a firm of solicitors under a warrant issued under s 10 of the *Crimes Act 1914*. Section 10 made no mention of privileges such as legal professional privilege and his Honour said:

“ *... If that privilege has application outside judicial or quasi-judicial proceedings, there can be no real doubt that the general words of s. 10 are not sufficient to curtail the privilege. Of course, if the legislature were to see the need to achieve that result it could do so by express words, but the Court should not assist that result by reading that intention into the general words of the statute. ...*”⁴⁷

69. One of the authorities, to which Dawson J referred was *Duke of Newcastle v Morris*. It was concerned with the “*privilege of Parliament*” that existed at common law. Before the *Bankruptcy Act 1861* (UK), traders having privilege of Parliament could not be compelled to become bankrupts.⁴⁸ Over time, they began to be subject to an increasing number of the consequences of being a bankrupt. That was achieved through amendments to the bankruptcy legislation. The issue was whether those who were entitled to privilege of Parliament and bankrupt were free from personal arrest. No mention was made in the

⁴⁴ [1983] HCA 39; (1983) 153 CLR 52; 49 ALR 385; 83 ATC 4,606; 14 ATR 713 at 123; 439; 761

⁴⁵ [2008] HCA 36; (2008) 235 CLR 125; 248 ALR 609; Gleeson CJ, Kirby, Hayne, Heydon and Crennan JJ

⁴⁶ [2008] HCA 36; (2008) 235 CLR 125; 248 ALR 609 at 139-140; 619-620

⁴⁷ [1983] HCA 39; (1983) 153 CLR 52; 49 ALR 385; 83 ATC 4,606; 14 ATR 713 at 123; 439; 761

⁴⁸ (1870) LR 4 HL 661 at 667-668

Bankruptcy Act 1861 to reserve their privilege to them. The Lord Chancellor, Lord Hatherley, said that those having privilege of Parliament were included in the phrase “all debtors” “... but that the privilege is not gone because it is not specially struck at.... [T]hat privilege will not be annihilated because it is not specially dealt with in this Act of Parliament. ...”.⁴⁹

70. There is no question that the principles relating to parliamentary privilege and referred to by Dawson J are equally applicable to Parliamentary Privilege for s 49 of the Constitution identifies the powers, privileges and immunities in their terms:

“The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of the Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.”

71. In the United Kingdom, Article 9 of the *Bill of Rights 1688* (UK)⁵⁰ had stated:

“That the freedom of speech and debates on proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.”

72. The PP Act was enacted to declare the powers, privileges and immunities of each House of the Parliament and of their members and committees.⁵¹ Section 14, for example, confers immunities from arrest and attendance before courts in certain circumstances but not otherwise. I have referred already to s 13 of the PPA, which deals with unauthorised disclosure of evidence taken by a House or a committee in camera or a report of any such oral evidence.

73. Section 16 is concerned with parliamentary privilege as it applies in court proceedings. It provides that Article 9 of the Bill of Rights continues to apply in relation to the Commonwealth Parliament and, in addition to any other operation, the effect of ss 16(2) to (7). Section 16(3) provides that, in proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament by way of, or for the purpose of:

- “(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;*
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or*
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.”*

⁴⁹ (1870) LR 4 HL 661 at 671-672

⁵⁰ 1 Will & Mary, sess 2, c 2

⁵¹ PPA; Long Title

74. Section 16(1) provides what is meant by “*proceedings in Parliament*”. Section 16(4) provides:

“A court or tribunal shall not:

- (a) *require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or*
- (b) *admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;*

unless a House or committee has published, or authorised the publication of, that document or a report of that oral evidence.”

75. I have referred to ss 13 and 16 in particular because they illustrate that the privilege that has been expressed in legislative terms is concerned about form and not substance. Section 13(1)(b), for example, is focused on the fact that oral evidence has been taken by a House or a committee in camera. It is not concerned with whether the evidence given is of a sensitive or prejudicial nature or is confidential information. The same is true of s 16(4). In so far as s 16(3) is concerned, information about what is said in Parliament may be reported in the media and widely known but may not be received in any court or tribunal for the purposes set out in the provision. In *Amann Aviation Pty Ltd v Commonwealth of Australia*,⁵² for example, the applicant had tendered evidence of a question put and answered in the Senate. It wanted to do that to establish that the Commonwealth had not been entitled to terminate a contract because it had not been ready and willing to perform the work of the contract. Reception of the material would infringe the provisions of s 16(3) of the PPA.

76. Even though reference is still had to Article 9 of the Bill of Rights, the privileges and immunities of Parliament have been taken from the common law and regulated by the PPA. I am not concerned with Articles 9 and s 16 but with s 13. How does that provision, or the PP Act generally, sit with the Archives Act?

B. Scheme of the Archives Act in relation to Parliamentary records

77. At Attachment A, I have set out the way in which the regulations made under s 20 of the Archives Act provide for access to documents in the possession of the Senate, House of Representatives or a Parliamentary Department (parliamentary body) and arrangements that have been made for the custody of those records. The particular copy of the transcript

⁵² [1988] FCA 24; (1988) 19 FCR 223; 81 ALR 710; Beaumont J

in issue in this case is not in the possession of a parliamentary body. It is in the possession of DFAT and I find on the basis of correspondence at A1838 1733/3/2 Part 12; Folios 292 and 293 that the Secretary of the Joint Committee sent proof copies of the transcript to correct inaccuracies and errors in the transcription. Possession is also apparent from Ms McGrath's Application for Access to Archives. It described the "*Agency controlling*" as "CA 5987", which is a descriptor of DFAT used by Archives. Ms McGrath applied for access to:

Item Details

Series: A1838

Control Symbol: 1733/3/2 PART 12

Barcode: 1872073

Title: Law of the sea – Delimitation – Australia – Indonesia [Timor]

Access status: CLOSED

Date of decision: 05-Dec-2013⁵³

78. I do not have any evidence regarding whether it is also in the possession of a Parliamentary body. While it is true that s 18 of the Archives Act provides that Divisions 2 (dealings with Commonwealth records) and 3 (access to Commonwealth records) of Part 5 do not apply to records in the possession of Archives, that exclusion is subject to ss 20 and 21. In Attachment A, I set out the regulations that are made under the authority of ss 20 and 21. For reasons that I have set out in that attachment, arrangements made consistently with any regulations made under s 20 of the Archives Act may lead persons' having access to parliamentary records that are classified as "*Class B records*". It is arguable that a copy of the transcript in the possession of a parliamentary body would be characterised as a Class B record. As a Class B record, the provisions of the Archives Act as amended by the regulations made under ss 20 and 21 would apply to it. As such it would be in the care of Archives and in the open access period. Again for the reasons I set out in Attachment A, the copy of the transcript would not be subject to a claim for parliamentary privilege for Parliament has made it clear that, in relation to Class B documents, they are to be dealt with in terms of the Archives Act. Parliamentary privilege is inconsistent with the Archives Act. Archives would be required to make it available for access under s 31(1) but only if it were not an exempt Class B record under s 33 as amended by the regulations made under ss 20 and 21.
79. The particular document with which I am concerned is, however, in the custody of DFAT. I do not have any evidence that this particular copy of the document was in the possession of a parliamentary body at the time that s 27 would have required it to be transferred to the care of Archives. In other words, I do not have any evidence that the particular copy of the transcript was ever a Class B record for the purposes of the Archives Act. Like legal

⁵³ T documents; T9 at 39

professional privilege, one copy of a document may be subject to the privilege and another copy of the same document may not be.

80. The fact that Parliament first excluded records in the possession of a Parliamentary body in s 18 and then made specific provision in s 20 for a regulatory regime to be made at some time in the future in relation to them indicates its recognition that common law principles relating to parliamentary privilege would continue to apply until that regulatory regime was put in place. Since the regulatory regime has been put in place in 1995, the Archives Act has applied to certain records held by a Parliamentary body. It is clear that a claim for parliamentary privilege cannot be made in respect of a document in the possession of a Parliamentary body transferred to Archives in accordance with that regulatory regime.
81. What is also clear is that the PP Act was enacted after the Archives Act. It applied to very specific issues. It no longer left the powers, privileges and immunities of each House of Parliament, their members and committees to the common law but expressly stated them. Those specific provisions do not leave room for the more generally and broadly based provisions of the Archives Act. It is not that the records are exempt under the Archives Act as might documents which are found to be exempt on the ground of legal professional privilege. It is that documents that are subject to the provisions of the PP Act and are not the subject of the regulatory regime provided for in s 20 of the Archives Act do not come within the ambit of the Archives Act at all.⁵⁴

C. Decision regarding the transcript of the oral evidence given to the Joint Committee

82. Archives has excised the transcript from the copies of the 24 files that it has given me. The gaps in those files match the documents said to be subject to parliamentary privilege: A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291 and 294-313. What I do have is a certificate of the Clerk of the House of Representatives and the Clerk of the Senate relating to the transcript. On that basis, I am satisfied that the documents at A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291 and 294-313 are a copy of the transcript of the oral evidence before the Joint Committee would “*disclose ... any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence*”.⁵⁵ Also on the basis of the certificate, I am satisfied that, not only have the Clerk of the House of Representatives and the Clerk of the Senate not authorised it to be published, they have certified in accordance with ss 17(c) and (d) of the PP Act that the transcript has neither been published nor authorised to be published.

⁵⁴ *Hillpalm Pty Ltd v Heaven's Dear Pty Ltd* [2002] NSWCA 301; (2002) 55 NSWLR 446 at [14]; 449; Meagher P with whom Handley and Hodgson JJA agreed

⁵⁵ *Parliamentary Privileges Act 1987*; s 13(b)

83. In light of those findings, I have decided that the documents at A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291 and 294-313 are subject to the provisions of the PP Act and are not the subject of the regulatory regime provided for in s 20 of the Archives Act. That would mean that the transcript of the oral evidence given before the Joint Committee on 12 and 19 September 1979 is subject to the PP Act and cannot be disclosed in response to a request under the Archives Act regardless of whether it comes within the terms of an exemption in that legislation or not.
84. I note that it is arguable that my conclusion would not affect another copy of the transcript if it had been transferred to Archives by a Parliamentary body under the regulatory regime. It is arguably a Class B record. If that is correct, it would make no difference that another copy is held in the possession of DFAT. If requested, Archives would be obliged to make a Class B record available for access in the open period unless it is an exempt record within the meaning of the Archives Act. Determination of that would require examination of the transcript.

THE EXEMPTIONS

85. Both Ms Costello and Ms Stern agree that the task of determining whether a record is an exempt record or not is a matter of undertaking a line by line analysis of the documents. I also agree and have read not only those documents, in the sense of folios, or parts of documents for which exemption has been claimed but have read the larger document of which they are a part. In locating the documents in the 24 files that I have been given, I have either read or scanned with some care the whole of the files. It is also common ground that the Archives Act is focused on the preservation of Commonwealth records and making the archival resources of the Commonwealth available to the public. Its provisions put in place the means by which those Commonwealth records are maintained, collected and preserved and the extent to which those archival resources are made available to the public.
86. Ms Costello submitted that the material on which Archives relies is out of date. The government has changed and Archives seeks to support its position with historical evidence from a person who no longer holds a position in DFAT with involvement in the issues. The evidence has not been given by someone in the “*driver’s seat*” in relation to any current or recent negotiations with Timor-Leste. The material, which Archives is seeking to protect, has already been made public. Ms McGrath does not need to establish public interest in access to the records. That is the starting point of the Archives Act. For all that, the records are of important historical interest to her in her research and to Australia as we

seek to learn the lessons of history. Ms McGrath has a particular interest in the document described in row 24 of the Schedule.⁵⁶ She asked that particular attention be paid to the material that had been claimed as exempt and redacted.

EXEMPTION: section 33(1)(a) – security, defence or international relations

Section 33(1)(a)

87. Section 33(1)(a) provides:

For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kind:

- (a) *information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth;*

...

The submissions

88. Both parties agree that the word “security” is not defined in the Archives Act. On behalf of Archives, Ms Stern submitted that it should be given its natural meaning. At the same time, the subject matter of s 33(1)(a) is such that significant weight and respect should be given to the views of experienced/expert witnesses. That is so because the courts have recognised that the subject matter in issue in s 33(1)(a) is often not wholly within their competence. She referred to the judgments of Gibbs ACJ and Stephen J in *Sankey v Whitlam*⁵⁷ and that of Wilson and Dawson JJ in *Alister v R*.⁵⁸ A more recent consideration of the word “security” was undertaken by Kerr J in *Re Fernandes and National Archives of Australia*⁵⁹ (*Fernandes*). She referred also to my decision in *Re Prinn and Department of Defence*⁶⁰ where I considered the comments made by Mason J in *Church of Scientology v Woodward*⁶¹ that:

*“... security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time; it is similar to the constitutional concept of defence.”*⁶²

89. More recently, Deputy President Cowdroy said in *Re Farrell and Secretary, Department of Immigration and Border Protection*:⁶³

⁵⁶ A1209 1865 8911897; Folios 2, 3, 13

⁵⁷ (1978) 142 CLR 1 at 43-44 per Gibbs ACJ and at 59-60 per Stephen J

⁵⁸ (1984) 154 CLR 404 at 435

⁵⁹ [2014] AATA 180; President Kerr

⁶⁰ [2016] AATA 445 at [74]

⁶¹ [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587; Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ

⁶² [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587 at 60; 602

⁶³ [2017] AATA 409

“ The security of the Commonwealth is not confined to external threats: such security also arises from internal threats and for many measures taken to subvert Australia’s national interest. The fact the definition contained in the ASIO Act of ‘security’ specifically refers to the protection of Australia’s territorial and border integrity from serious threats does not result in the conclusion that such activities do not readily fall within the definition of ‘security of the Commonwealth’ contained in the FOI Act. ...”⁶⁴

90. Ms Stern submitted that it has been clearly established that the application of s 33(1)(a) does not require the balancing of competing public interests.⁶⁵ While noting that s 33(1)(a) uses the expression “*could reasonably be expected to*” and not “*would, or could reasonably be expected to*” as in similar exemptions in the *Freedom of Information Act 1982* (FOI Act), she referred to authorities relevant to the former. They establish, Ms Stern submitted that the phrase requires consideration of what is reasonable to expect. That result is that disclosure “*could*”, and not “*would*”, reasonably be expected to cause damage to the security or international relations of the Commonwealth. A mere possibility is not enough to enliven the exemption in s 33(1)(a) but neither does it require a decision-maker to be satisfied on the balance of probabilities that damage of the relevant kind could be caused. What is required is a possibility, and not a probability, of damage that is reasonably based and supported not only by assertion but by evidence of probative value.
91. Damage to international relations is not limited to lessening the confidence that another country may have in Australia but may include damages to intangibles such as personal relationships between high level officials or politicians.⁶⁶
92. In coming to a decision under s 33(1)(a) of the Archives Act, it is permissible to have regard to the mosaic theory. In other words regard may be had not only to an individual piece of information that is devoid of sensitivity in itself but that may become quite sensitive when viewed with other information that may, or may not, be publicly known. This is known as the “*mosaic theory*” and has gained widespread support in Australia and overseas. Ms Stern cited authorities, to which I will refer.
93. Ms Costello submitted on Ms McGrath’s behalf that the Full Court of the Federal Court had emphasised that the Tribunal’s approach in *Fernandes* had been in error and a large part of that error had been caused by the parties’ having agreed between them as to the correct interpretation of “*security*”. She referred to my own decisions in *Re Staats and National Archives of Australia*⁶⁷ and *Re Prinn and Department of Defence*.⁶⁸ In both, I was guided

⁶⁴ [2017] AATA 409 at [48]

⁶⁵ *Re Staats and National Archives of Australia* [2010] AATA 531 at [106]; *Re Throssel and Australian Archives* (1986) 10 ALD 403 at 406; *Re Slater and Cox, Director-General, Australian Archives* [1988] AATA 110; (1988) 15 ALD 2; 8 AAR 403; Deputy President Todd

⁶⁶ *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15 at [17]; 19 for a discussion of s 33 in the FOI Act.

by the definition of “security” in the *Australian Security and Intelligence Organisation Act 1979* (ASIO Act). Ms Costello submitted that matters that fall within the descriptors in the ASIO Act will not automatically be relevant to the security of the Commonwealth but regard may be had to them in the context of the analysis of the word in previous authorities. That assessment must be made on a case by case basis and, as Brennan J observed in *Church of Scientology v Woodward*,⁶⁹ the Tribunal is not bound by the Commonwealth’s opinion as to what constitutes security.⁷⁰

94. As to the meaning of the expression “*international relations*” used in s 33(1)(a), Ms Costello submitted that, if there is to be damage to Australia’s international relations, there will be impediment to its capacity to conduct relations with a given country. The matter must be considered in its temporal context. The documents were created more than 40 years ago. The personal relationships of the individuals involved and their professional and international relationships would be exceedingly unlikely to be affected by the release of the information now. The same applies to relationships between governments, which have changed many times in the intervening years. Timor-Leste itself has become a new state in that time. These considerations are reflected in the scheme of the Archives Act, which provides for presumptive release of Commonwealth records once they enter the open access period, even though contemporaneous release of those records would be more likely to have caused harm.
95. In *Secretary, Department of Foreign Affairs and Trade v Whittaker*⁷¹ (*Whittaker*) the Full Court of the Federal Court accepted “*the Tribunal’s statement of the test that the damage must be ‘actual and significant’ damage*”.⁷² It follows that there must be an actual and significant impairment to Australia’s security or to Australia’s international relations. The risk of mere embarrassment or risk of exposure to public discussion and/or criticism of Australia and its agencies are not of themselves sufficient to justify a conclusion that a document is an exempt document.⁷³
96. Both parties agree that a mere possibility of the relevant consequence is not sufficient to enliven the statutory exemption as found by the Tribunal in *Re Chemical Trustee*.⁷⁴ The requirement that disclosure “*could reasonably be expected to cause damage*” embodies a

⁶⁷ [2010] AATA 531 at [90]-[99]

⁶⁸ [2016] AATA 445 at [61]-[96]

⁶⁹ [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587; Gibbs CJ, Mason, Murphy and Brennan JJ

⁷⁰ [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587 at 61; 614

⁷¹ [2005] FCAFC 15; (2005) 143 FCR 15; 214 ALR 696; 84 ALD 412; Black CJ, Kiefel and Emmett JJ

⁷² Applicant’s SFIC at [34] citing *Whittaker* [2005] FCAFC 15; (2005) 143 FCR 15; 214 ALR 696; 84 ALD 412 at [17]; 19; 700; 415

⁷³ *Re Chemical Trustee Limited and Commission of Taxation an Anor* [2013] AATA 623 at [78]; Deputy Presidents, Tamberlin QC, Frost DP and Alpines DP

⁷⁴ [2013] AATA 623 at [78]

requirement of reasonable expectation. Such an expectation must be based on rationally probative evidence and must be reasonable in all of the circumstances, having regard to the nature of the information, the circumstances in which it was communicated, and the nature and extent of the relationship that could be damaged.⁷⁵

97. These issues must be considered in the current time. Of particular relevance is the Maritime Boundaries Treaty, which was concluded on 6 March 2018 and which Australia has since ratified. There is no suggestion that either Australia or Timor-Leste will withdraw from the treaty. If the disclosure of any of the documents could have potentially affected the conclusion of the maritime boundary between Australia and Timor-Leste in the past, that time has passed. In relation to the earlier treaties, various proposals put forward are now redundant in terms of their real impact on Australia's future security and international relations. All of the matters that were ventilated in the ICJ are matters of public record. Notwithstanding the serious allegations made by Timor-Leste against Australian agents in the ICJ and the long history of negotiations and treaties regarding their boundaries, the two have managed to reach agreement culminating in the Maritime Boundaries Treaty.

The evidence

98. Ms Chan said in her open affidavit that, in accordance with arrangements made between ONA and Archives, ONA had been asked to review the documents relevant to Ms McGrath's application to the Tribunal regarding access to certain documents in Archives' custody. She said that she had examined the documents personally and had identified only a small amount of text in only two folios which should not, in her opinion, be disclosed. The two folios are found in two documents: A/1838 752/1/23 Pt 10; Folios 163 and 164 and A1838 752/1/23 Pt 12; Folios 80 and 81. Her reason for her conclusion was that disclosure could reasonably be expected to cause damage to the security and international relations of the Commonwealth. Ms Chan expanded on her reasons in her closed affidavit and evidence. In her open affidavit she said:

*"... I consider the public disclosure of this information would damage ONA's relationships with international partner agencies. ONA's coordination functions under the ONA Act require ONA to manage the ongoing liaison relationships with international partners for all agencies of the Australian Intelligence Community. If ONA's relations with an international partner is damaged, this could in turn damage relations between that international partner and the Australian Intelligence Community, and between the foreign and Australian government more generally. For the reasons I will outline in my classified affidavit, I consider disclosure of this information would also damage the security of the Commonwealth."*⁷⁶

⁷⁵ *Re Slater and Cox, Director-General of Australian Archives* [1988] AATA 110; (1988) 15 ALD 20; 8 AAR 403 at [55]; 31; 414; Deputy President Todd

⁷⁶ Exhibit 2 at [10]

99. In giving open evidence, Ms Chan said that she did not know whether she had been asked to examine all of the documents covered by Ms McGrath's request for access. She had looked at a folder of documents and not merely those two in which she had identified two folios containing text that should not be disclosed. During cross-examination, Ms Costello called for the folder of documents that Ms Chan had examined. I did not think that their production of the folder would assist me. Ms Chan's evidence related to two particular folios from the folder. Even though the content of that folder is not known, it can be assumed that, from Ms Chan's perspective, no harm would result from their disclosure.
100. Dr French said that he did not believe that anybody else in DFAT had his background and experience in negotiations in relation to maritime boundaries. His work required him to become familiar with negotiations between Australia and Indonesia in the 1970s. A clear understanding of the 1971, and particularly the 1972, permanent maritime boundary with respect to the continental shelf between Australia and Indonesia is fundamental to understanding the context within which other negotiations subsequently occurred.
101. In cross-examination by Dr McBeth, Dr French agreed with the proposition that, in the 1970s, advocating for a maritime boundary based on a geological continental shelf was an orthodox position in international law. International law is always developing but Dr French did not agree that natural prolongation is no longer a relevant factor in determining an equitable solution for a maritime boundary relating to the seabed. In relation to countries whose coastlines are less than 400 nautical miles apart, the relative weighting of distance as opposed to geomorphology has changed. Dr French agreed with Dr McBeth that, where the 200 nautical mile zones of two countries overlap, it is standard practice to take the median line as the starting point for negotiations. Those involved in maritime boundary negotiations understand that the principles have developed since the 1970s. The Maritime Boundaries Treaty was negotiated in the environment of the modern approach.
102. Although he is no longer actively involved in the area, Dr French said that he was qualified to express an opinion as to whether disclosure would damage relations with Timor-Leste or with Indonesia. He has experience in direct negotiation over several decades or supervision of those who are with both countries. Dr French considered that he had developed a level of expertise in terms of assessing what impact various activities or actions could have or would have, on the bilateral relationship. It is important that he remain abreast of developments with respect to Australia's foreign relations whether he is posted to Rome, Colombo, Canberra or so on. DFAT provides a cable network that provides a wide range of information wherever one of its officers is based in the world.

103. Dr French said that he was responsible for making recommendations to DFAT and finalising its recommendation to Archives. He had, for example, been responsible for recommending the release of a number of documents on the first day of the hearing. He had made that recommendation on becoming aware that they had, at some previous time, been released and in the public domain. Their release did not change his mind regarding the consequences of giving access to the remainder in terms of damage to Australia's international relations. There had been no option available other than to release the documents but that did not change his mind regarding the release of the remaining material claimed to be exempt. Their release would lead to adverse consequences for Australia or damage to international relations.
104. Dr French said that, for the purposes of Ms McGrath's applications for access, he had reviewed 6,600 pages of documents during approximately 2013 to 2015. He had reviewed them again very recently before the hearing and recommended the release of some additional text. He had also been reviewing the documents more generally and in preparation for the hearing in the Tribunal.
105. Dr French's attention was drawn to Ms McGrath's position regarding the relevance of UNCLOS, which entered into force for Australia in October 1994. Timor-Leste and Indonesia are also parties to that Convention. The Preamble to UNCLOS sets out the motivations for the States Parties to the convention reaching agreement. Among those motivations was their belief that:
- "... the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples in the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter."*
106. Ms McGrath's position is that UNCLOS's codification of the law of the sea also codifies the international law relating to the delineation of maritime boundaries and the treatment of the continental shelf. There can be no realistic prospect that revealing positions taken by Australia or legal advice given to it regarding the delineation of maritime boundaries before UNCLOS came into force would have any impact on Australia's capacity to conclude maritime boundary negotiations in a post-UNCLOS environment, since the governing law has changed considerably.⁷⁷
107. Dr French agreed that UNCLOS is a codification of international law relating to the delineation of maritime zones. What it codifies at the most generic level are the principles

⁷⁷ Applicant's SFC at [49]

of negotiation for maritime boundaries as opposed to maritime zones. The actual principles by which maritime boundaries are delineated is to be found primarily in the jurisprudence of the ICJ and other international tribunals. Those principles are not actually codified in UNCLOS. He used as an example Art 83 of UNCLOS, which provides in relation to the continental shelf:

“ 1. *The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.*

2. *If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.*

3. *Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.*

4. *Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.”*

108. UNCLOS does not specifically provide for determination of a maritime boundary as opposed to the delimitation of the continental shelf. That is so because Art 83 is the critical article with respect to determining maritime boundaries with respect to continental shelf boundaries. In his evidence, Mr Whyatt was of a similar view. UNCLOS, he said, does not prescribe a method by which agreement is to be reached between the parties or the precise outcome of any dispute regarding delimitation. What it does is to provide the parties with their goal i.e. to reach an equitable solution. That is so whether the parties are in dispute in relation to territorial sea delimitation or the EEZ delimitation. Article 83 deals with the former and Article 74 with the latter. The general process for settlement or conciliation of disputes is outlined in Part XV of UNCLOS and provision is also made for obtaining a binding decision.
109. Both Dr French and Mr Whyatt were asked to read the following three paragraphs from Ms McGrath's Statement of Facts and Contentions (SFC):

“44. The process of negotiating the maritime boundary treaty with Timor-Leste was notoriously fraught. In proceedings with the International Court of Justice brought by Timor-Leste against Australia in December 2013, concluding in June 2015, instances of espionage by Australia, including covert spying and the placement of listening devices by Australian personnel in Timor-Leste government offices, were ventilated, as was the seizure by Australian officers of documents and other material relevant to the maritime boundary negotiations from Timor-Leste's legal advisers. ... All of these events, and other similar matters, are a matter of public record.

45. *Notwithstanding those very serious allegations of conduct by Australian agents in the course of maritime boundary negotiation being publicly ventilated, Australia and Timor-Leste were able to conclude a treaty described by the Australian Department of Foreign Affairs and Trade as ‘balanced, equitable and consistent with international law.’ ...*

46. *It follows that any revelations capable of diminishing the confidence of foreign governments in Australia, in the context of maritime boundary negotiations with Timor-Leste and/or Indonesia, to the point that there is a genuine threat to Australia’s security or international relations, must be much more significant than those that were publicly aired in the International Court of Justice proceeding and did not prevent the conclusion of the maritime boundary treaty between Australia and Timor-Leste. That is all the more so where the records in question relate to historical conduct occurring in the 1970s.”⁷⁸*

110. Dr French maintained his opinion that disclosure of the relevant documents can reasonably be expected to damage international relations of Australia and/or its security. Ms Stern asked Mr Whyatt whether he agreed or disagreed with the point made in [46] to the effect that the threat to Australia’s security must be much more significant than those aired in the International Court of Justice. Mr Whyatt replied that he did not agree saying that, whether or not something causes damage is not measured by whether a maritime treaty can be concluded. In cross-examination, Mr Whyatt explained that regard must be had to the context as to whether something causes damage to Australia. To decide whether disclosure of the material in the records would cause damage, that material would need to be seen in context that prevails at the time. In this case, that would be the context of affairs between Australia and Timor-Leste as they are both currently and historically and circumstances in which the documents were written. That is a context that would include the recent signing of the Maritime Boundaries Treaty on 6 March 2018. Mr Whyatt said that he had not studied all the documents sought by Ms McGrath but had seen a couple of them.
111. In his first affidavit, Dr French noted that the text claimed to be exempt is located in records relating to two phases of negotiations between Australia and Indonesia over maritime boundaries in 1971/1972 and then in 1978/1979. He said that there is a “*real risk that disclosure of the exempt text could damage Australia’s relations with Timor-Leste. ...*”.⁷⁹ He also believed that disclosure at this time is very likely to damage Australia’s relations with Indonesia.
112. During cross-examination, Dr McBeth showed Dr French several documents and sought to elicit from him whether the same material had been redacted from each. I will refer to some of them as examples. One was a document that he described as Folio 29 from which the

⁷⁸ Applicant’s Statement of Facts and Contentions at [44]-[46] (citations omitted)

⁷⁹ Exhibit 4 at [18]

text at paragraph (e) has been redacted. The document has a handwritten “29” at its top right hand corner and is page 2 of a larger document. Dr McBeth referred also to the Access Decision made by Archives on 11 November 2015 in relation to Record Series A1838 Control Symbol 752/1/23 Part 10.⁸⁰ Its title is “*Indonesia – Australia – Indonesia Continental Shelf Boundaries (Agreement) Negotiations*”. There are 372 folios in the record. No reference is made in the list of partially or wholly exempted documents or of those withheld pending agency examination and advice to folio 29. Assuming the document was included in those he examined, Dr McBeth asked Dr French whether disclosure of the redacted material would reasonably be likely to cause harm to Australia’s international relations or security. It was a test of Dr French’s memory and left to the closed session when he had access to the documents.

113. Dr McBeth also showed Dr French the document at T63 of the T documents. It is a decision made by Archives on 14 September 2016 in relation to Record Series 1838 752/1/23 Part 8 entitled “*Law of the Sea Delimitation, Australia – Indonesia [Timor]*”. Under the heading of “*Material Withheld*” appears a reference to folio 83. Dr McBeth showed Dr French a document with a handwritten “83” at the top and a redacted passage. Given the date of the decision, Dr French said that he was not in Canberra at that time. Although he was not aware that any other DFAT officer gave Archives advice, he could not be 100% sure that was the case. On the assumption that the decision had been made on the basis of his recommendation, Dr French agreed that his reasons for recommending exemption of the passage would have been consistent with the reasons that Archives had given for claiming the exemption. The reason was:

*“Disclosure of the exempt information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth, under section 33(1)(a) of the Archives Act.”*⁸¹

114. The document at T51 of the T documents is a decision by Archives dated 11 November 2015. It relates to Record Series A1209 and Control Symbol 1970/6400 Part 2. Its title is “*Discussions between Indonesia and Australia regarding continental shelf boundary*”. Among those folios claimed to be partially exempt is folio 96. It is described as containing information relating to Australia/Indonesia maritime boundary delimitation negotiations. The reason for the decision is stated in terms of s 33(1)(a) as set out in the previous paragraph. Again, it was a decision made after Dr French had left Australia but he would assume that it was his recommendation to redact the passage on the copy of the document marked “83” and to which Ms McGrath was given access by Archives.

⁸⁰ T documents; T45 at 105-106

⁸¹ Transcript at 72

115. Archives decision dated 11 November 2015 at T51 lists folios 95 and 96 as among the folios in record A1209 1970/6400 Part 2, for which exemption is claimed under s 33(1)(a) on the basis disclosure could reasonably be expected to cause damage to the security and international relations of the Commonwealth. Dr McBeth showed Dr French a copy of a document marked “96” and appearing to be a redacted copy of the first page of a memorandum sent on 1 February 1972 by the Minister for Foreign Affairs to the Prime Minister. He asked Dr French whether that was the same document as folio 96 for which exemption was claimed in T51.
116. The decision dated 14 September 2016 referred to at T55 of the T documents raised a similar issue, Dr McBeth put to Dr French in relation to A1838 1733/3/2 Part 6; Folio 134. Dr McBeth showed Dr French a document with that number in its top right hand corner. I do not need to consider that matter further for this was a document released on the first day of the hearing with a redaction of the paragraph following paragraph (e) at the foot of the page.
117. Dr McBeth took Dr French through other folios. One was folio 253 referred to in a decision dated 14 September 2016 at T57. Dr McBeth took Dr French to the decision to withhold material from folio 253. He was shown a document that had a handwritten “253” and the redaction of the whole of paragraph (F). Dr French confirmed that he would have recommended that the document not be disclosed on the basis of s 33(1)(a). Dr McBeth then drew Dr French’s attention to folio 29 referred to in the decision at T45 with a document, to which Ms McGrath had been granted access, suggesting that the text redacted on each would have been the same on each.
118. Folio 111 was referred to in Archives’ decision dated 14 September 2016 at T66. Dr French expressed the same view in relation to folio 111 from which it had been decided to redact material on the same basis. He remained of the view that the material that had been redacted in these and the other folios I have referred to could reasonably be expected to damage the international relations of Australia and/or its security in a number of different ways.
119. Dr McBeth showed Dr French a document that had been released by Archives as part of its decision dated 16 November 2015 that was the subject of AAT No. 2014/5361. Ms McGrath’s application in relation to it has been closed as she had been given access in full. There are two copies of the letter with Exhibit E showing only the first page and Exhibit G the second page as well. The document is a memorandum dated 16 December

1970 from the Deputy Secretary of DFAT to the Secretary of the Prime Minister's Department. It is an unredacted copy.

120. Dr McBeth wanted to compare folio 96, from which redactions had been made before it was disclosed to Ms McGrath, and the document I have set out in the previous paragraph. Paragraph (a) is redacted in folio 96 but not from Exhibit E or G. Most of the last paragraph on the first page of folio 96 is redacted but the memorandum does not have room for a paragraph of the length of that which has been largely redacted in folio 96. Dr McBeth did not take me to the second page of the copy of folio 96, to which Ms McGrath had been given access, and so I do not know whether it had room for paragraphs 4 and 5 that appear in the full version in Exhibit G.
121. Identification of folio 96 was given by reference to the date of the decision made in respect of it: 14 September 2016 and referred to in T51. That decision relates to the documents in A1209, 1970/6400 Part 2. On the assumption that the document he had been shown by Dr McBeth was the same as the document for which exemption had been claimed, Dr French said that he would maintain his view that disclosure would compromise Australian foreign policy and thus be expected to cause damage to the security and international relations of the Commonwealth.
122. Dr McBeth then took Dr French to a folio marked "253". A document with that folio number is included in the decision at T57 and relating to file A452, 1972/1726. Assuming they were the same document, Dr French said that he continued to hold the same view as to the damages its release would be expected to bring.
123. He compared that with that of a document marked "8" in a bundle prepared on behalf of Ms McGrath and A1838 1733/3/2 Part 6; Folio 94 that had been released to Ms McGrath with redactions. The comparisons Dr McBeth wished to make were:

Document 8	Folio 94
<i>"... To prepare for negotiations, officials should contact, when appropriate, their counterparts in Indonesia to establish the co-ordinates of base-points to be used in delimitation. The Timor gap should be closed.</i>	<i>"(c) To prepare for negotiations, officials should contact, when appropriate, their counterparts in Indonesia to establish the co-ordinates of base-points to be used in delimitation.</i> <i>(d) The Timor Gap should be closed.</i> <i>(e) The median line might be used for fishing zone delimitation if it did not prove feasible to secure the same boundary for the seabed and fishing zone delimitations.</i>
[Redaction]	[Redaction]

Document 8	Folio 94
<i>Cabinet Decision 7157 directed that negotiations be commenced to finalise delimitation of the Australian/Indonesian sea and seabed boundaries, and that, on commencing such negotiations in relation to East Timor, the Government was prepared to acknowledge, under questioning, that this amounted to <u>de jure</u> recognition of the incorporation of East Timor into Indonesia.</i>	<i>Cabinet Decision 7157 directed that negotiations be commenced to finalise delimitation of the Australian/Indonesian sea and seabed boundaries, and that, on commencing such negotiations in relation to East Timor, the Government was prepared to acknowledge, under questioning, that this amounted to <u>de jure</u> recognition of the incorporation of East Timor into Indonesia.</i>
... ”	... ”

124. Dr McBeth put to Dr French that the redacted passage in document 8 is the same as the text in paragraph (e) of folio 94. He did not have the documents to compare and this question was deferred to the closed session.
125. Dr McBeth undertook the same course in relation to a document released in full to Ms McGrath at some time following her lodging an application for review of Archives’ decision in relation to it. He compared it with two other folios claimed to be exempt. Folio 134 and a document taken from those released to Ms McGrath would seem to be copies of the same document. Paragraph (f) was redacted from folio 134 but not from the other document. Dr McBeth sought to compare folio 134 with folio 213 in which paragraph (F) was redacted. It was preceded by the same substance in paragraph (E) of folio 213 as in paragraph (e) of folio 134. I have no preceding folios for either document. Folio 213 would appear to be the final folio for it ends with an expression of when the author would like the relevant authority and is followed by the word “*Ellicott*”. Folio 134 would seem to be missing final folios. Therefore, I do not know whether any more paragraphs followed paragraph (f) in the case of folio 134 or, in either case, what preceded the paragraphs which were compared.
126. In light of the comparison of the documents, Dr McBeth put to Dr French that his assessment of whether particular information would be likely to harm Australia’s international relations had been somewhat arbitrary. Dr French responded to the effect that he had been diligent in carrying out the task. A range of factors can be relevant in determining whether a particular text does meet the exemption criterion under s 33. There are some factors that he did not believe that he could raise in an open hearing. Text may appear more or less identical but there can be factors that differentiate them. One criterion to which he could refer was that documents had been released. That had happened at the beginning of the hearing when Ms McGrath’s affidavit had drawn attention to previously

released documents. He had not had time to go back and check all 6,600 folios to see whether his assessment had changed in relation to other documents.

Consideration

A. Section 33(1)(a): “could reasonably be expected to cause”

127. Except in one important respect, s 33(1)(a) of the Archives Act mirrors the substance of s 33(1)(a) of the FOI Act. The one difference is that s 33(1)(a) of the FOI Act frames the exemption in terms of the damage that disclosure “*would, or could reasonably be expected to,*” cause. Section 33(1)(a) of the Archives Act frames the exemption in terms of the damage that disclosure “*could reasonably be expected to,*” cause damage to. In its ordinary meaning the word “*would*” has a number of meanings depending on the context. In the context of both sections, the following meaning would seem to be most apposite:

“... **5** to imply that some happening is predictable or unsurprising □ ‘She refused, but I suppose she would.’ ... **8** to express the probable outcome of a particular condition □ In your place, I would have told her. ...”⁸²

The word “*could*” has fewer ordinary meanings but that which seems relevant in the context of both sections is:

“... **2** used to express a possibility □ He could be exactly what we were looking for! □ You could be right. ...”⁸³

128. Given the common history, to which I refer in Attachment B in the context of s 33(1)(d) of the Archives Act, it seems to me that Parliament has been very careful and deliberate in its choice of words. The Archives Act is concerned with records that have been transferred to its custody and relate to matters of Commonwealth public policy and administration at least 20 years old, in the case of more recent Archival records, and more than 40 years in the case of the records of concern in this case. Omission of the word “*would*” is an acknowledgement that the probability of the outcome of disclosure is more difficult to ascertain when documents relate to matters that occurred long in the past.
129. Putting the issues raised by s 30(1)(a) in the context of personal relationships for the moment, it may be thought that time heals all wounds and slights and that current good relations, even marriage or a business partnership, between two people is an indication that all is forgiven if not forgotten in the bonds forged by the relationship that grew between them after the slights and wounds were inflicted and long past. Personal relationships can, however, be torn asunder by revelations about those past times that are known by one but

⁸² Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers (Chambers)

⁸³ Chambers

not by the other. Even a stable relationship can be thrown into turmoil. Countries and their relationships and those of their politicians and officers, who deal with one another, are no different. They have relationships that are conducted in an environment of diplomacy but are no less relationships as recognised in the reference to “*international relations*” in s 33(1)(a). These observations are merely to provide a canvas on which the evidence is displayed. Whether disclosure of particular information or matter in a document could reasonably be expected to cause damage to international relations, or security or defence, is a matter to be determined on the basis of that evidence. I will now turn to the words used by Parliament.

130. The expression used in s 30(1)(a) is not that disclosure “*could*” have the relevant damage but that it “*could reasonably be expected to*” cause that damage. The word “*could*” expresses possibility but the addition of the words “*reasonably be expected to*” adds an additional quality requiring more than a possibility. There are past cases in which decisions have been made as to whether or not the relevant damage would, or could reasonably be expected to follow from disclosure under the FOI Act and the Archives Act. They include: *Attorney-General’s Department and Another v Cockcroft*⁸⁴ (*Cockcroft*), *Re Maher and Attorney-General’s Department*,⁸⁵ *Searle Australia Pty Ltd v Public Interest Advocacy Centre*,⁸⁶ *Re Ewer and Australian Archives*,⁸⁷ *McKinnon v Secretary, Department of Treasury*,⁸⁸ *Bradford and Australian Federal Police*,⁸⁹ and more recently *Xenophon and Secretary, Department of Defence*.⁹⁰
131. What is more difficult to ascertain are the factors that point to when the relevant damage “*could reasonably be expected to*” follow from disclosure. Efforts have been made in the past. In 1986 in *Cockcroft*, Bowen CJ and Beaumont J expressed the following opinion regarding the same wording used in then s 43(1)(c)(ii) relating to the future supply of information of a prescribed kind if certain information were disclosed under the FOI Act:

“ In our opinion, in the present context, the words ‘*could reasonably be expected to prejudice the future supply of information*’ were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is

⁸⁴ [1986] FCA 35; (1986) 10 FCR 180; 64 ALR 97; 12 ALD 468 Bowen CJ, Sheppard and Beaumont JJ agreeing

⁸⁵ (1985) 7 ALD 731

⁸⁶ (1992) 36 FCR 111; 108 ALR 163; 36 FLR 111; 16 AAR 28

⁸⁷ (1995) 38 ALD 789

⁸⁸ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 43 AAR 151; 91 ALD 516; 63 ATR 409; Hayne, Callinan and Heydon JJ; Gleeson CJ and Kirby J

⁸⁹ [2016] AATA 775

⁹⁰ [2019] AATA 3667

*undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see Kioa v West (1985) 60 ALJR 113 per Mason J and Gibbs CJ)."*⁹¹

132. These words have, at times, been used to provide some understand of what is meant by the words "*could reasonably be expected*" and, perhaps, almost as an alternative way of expressing what Parliament intended. In *McKinnon v Secretary, Department of Treasury*,⁹² Hayne J explained that the two expressions are not synonymous and that *Cockcroft* should not be understood in that way. He said:

"The expression 'not irrational, absurd or ridiculous' is not synonymous with 'reasonable grounds'. Of course, absurd, 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.

*In Attorney-General's Department v Cockcroft ... the Full Court of the Federal Court considered the operation of s 43(1)(c)(ii) of the Act - a provision which contained the words 'could reasonably be expected to prejudice the future supply of information'. In their joint reasons, Bowen CJ and Beaumont J rightly pointed out[54] that it was undesirable to attempt any paraphrase of these words. Thus when their Honours said, as they did[55], that the words required a 'judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous,' to expect certain consequences, they are not to be understood as having used the latter expression as a paraphrase of the former. Rather, they are to be understood, and have since been understood ..., as doing no more than drawing an emphatic comparison. To do more would have been, as their Honours correctly said, 'to place an unwarranted gloss upon the relatively plain words of the Act' And the same approach should be taken to the expression 'reasonable grounds' when it is used in s 58(5) of the Act."*⁹³

133. His Honour went on to say that:

"In deciding whether reasonable grounds exist for a claim, the Tribunal must take account of any relevant evidence that has been adduced and of any relevant arguments that have been advanced. It must consider the particular claim that has been made and that will require consideration (and commonly the examination) of the particular documents in question."

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⁹¹ [1986] FCA 35; (1986) 10 FCR 180; 64 ALR 97; 12 ALD 468 at [29]; 190; 106; 470 per Bowen CJ and Beaumont J; Sheppard J agreeing

⁹² [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 43 AAR 151; 91 ALD 516; 63 ATR 409; Hayne, Callinan and Heydon JJ; Gleeson CJ and Kirby J

⁹³ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 43 AAR 151; 91 ALD 516; 63 ATR 409 at [60]-[61]; 445-446; 204; 168-169; 533; 426

⁹⁴ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 43 AAR 151; 91 ALD 516; 63 ATR 409 at [63]; 446; 204; 168-169; 533; 426

134. Although in dissent, Gleeson CJ and Kirby J expressed a similar view on a related issue arising from a conclusive certificate issued by the Minister that it would be contrary to the public interest to disclose a particular internal working document of an agency under the FOI Act. On review, the Tribunal had to ask itself under s 58(5) of the FOI Act “... *whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest*”:

“ Where a claim, or an argument, or a conclusion or some other state of mind (such as suspicion, or belief, or satisfaction) involves an interplay of observation (of objective facts and circumstances), opinion, and judgment (which may involve an evaluation of matters such as reasonableness of conduct, or of the public interest), the question whether there are reasonable grounds for such a claim, or argument, or state of mind requires a consideration of all relevant matters and an assessment of the reasonableness of the claim, or argument, or state of mind having regard to all relevant considerations. ... Until all relevant considerations, that is, all (known) considerations that could have a rational bearing upon the claim, or state of mind, or decision under review, are taken into account, it is impossible to form a just and fair judgment whether, objectively considered, there are reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest. It is not enough for the Tribunal to ask whether there are facts, or opinions, or arguments that rationally bear upon that topic. All relevant matters must be taken into account; not for the purpose of deciding whether the Tribunal agrees with the Minister, but for the more limited purpose of deciding whether there are reasonable grounds for the claim which the Minister accepted.”⁹⁵

135. Putting the issue another way, in deciding whether an outcome would, or could reasonably be expected to follow from disclosure under the FOI Act, “... *there would ordinarily be material before the decision-maker which would show whether or not the ... [outcome could be expected to follow] if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable.*”⁹⁶ As Deputy President McMahon said in *Re Ewer and Australian Archives*:⁹⁷

“ The evidence in the present case, on this aspect of the claim, consists almost entirely of the opinion of Mr Brown. He has been employed for 15 years with ASIO and has had responsibility for the development and management of human source operations and other operations under ASIO’s special powers during that time. In his affidavit, he said that he had recruited and run human sources and managed human source operations in the range of subject areas and had been responsible for the resettlement of human sources whose lives had been put at risk as a result of people becoming aware of their work with ASIO. I accept that from this experience, he is entitled to express certain opinions. ...

...

⁹⁵ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 43 AAR 151; 91 ALD 516; 63 ATR 409 at [12]; 430; 191; 155; 520; 413

⁹⁶ *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 36 FCR 111; 108 ALR 163 at 123; 176 per Davies, Wilcox and Einfeld JJ

⁹⁷ (1995) 38 ALD 789

His opinion, however, is simply that. The assertion that disclosure would damage the security of the Commonwealth, in absence of any evidence to support it other than opinion evidence, is self serving. It is not the type of evidence referred to by Neaves J which would be required to sustain a claim for exemption on this ground. It is true, as was observed in Re Slater (at ALD 29), that security is a particularly sensitive area and particularly dependent for its effectiveness upon an adequate flow of information. I accept this as a notorious fact, and as one which was judicially approved by Davies J in Throssell No 1 at 406 [Re Throssell and Australian Archives [1987] AATA 453]. Nevertheless, there must be more information or evidence of some probative value rather than a mere bald opinion to satisfy the onus which the respondent bears, that the expected diminution of the flow of information would occur.”⁹⁸

136. It is equally clear that:

“... stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.”⁹⁹

137. There may, however, be occasions on which no evidence is required. Gummow J considered this in *Zarro v Australian Securities Commission*:¹⁰⁰

“... [C]ases of defence secrets, matters of diplomacy or affairs of government at the highest level are in a special position. It may so readily appear that the balance of public interest is against disclosure that even in the absence before the court of any claim to Crown privilege (perhaps because the Crown is not a party and is unaware of what is afoot) the court of its own motion should enjoin disclosure: see Sankey v Whitlam (at 44, 58-59). ...”¹⁰¹

B. Section 33(1)(a): “cause damage to the security ... of the Commonwealth”

138. The relevant meanings given in various dictionaries to the word “damage” and relevant in the context of this case include “harm or injury”,¹⁰² “injury or harm that impairs value or usefulness”¹⁰³ and “injure (a thing) so as to diminish its value or usefulness”.¹⁰⁴ Those for the word “security” include:

“... 1 free from danger; providing safety. 2 protection from the possibility of future financial difficulty. 3 protection from theft □ Our house has good security. 5 the staff providing such protection against attack or theft. 6 freedom from vulnerability to political or military takeover □ national security. ...”¹⁰⁵

“... 1. freedom from danger, risk, etc.; safety. 2. freedom from care, apprehension, or doubt; confidence. 3. something that secures or makes safe; a protection; a defence. 4. Protection from or measures taken against espionage, theft, infiltration, sabotage, or the like. ...”¹⁰⁶

⁹⁸ (1995) 38 ALD 789 at [18]-[19]

⁹⁹ *Cockcroft* (1986) 10 FCR 180; 64 ALR 97 at 196; 112 per Sheppard J

¹⁰⁰ [1992] FCA 233; (1992) 36 FCR 40; Lockhart, Ryan and Gummow JJ

¹⁰¹ [1992] FCA 233; (1992) 36 FCR 40 at 60

¹⁰² Chambers

¹⁰³ Macquarie Dictionary, revised 3rd edition, 2001, The Macquarie Library Pty Ltd (Macquarie)

¹⁰⁴ Shorter Oxford English Dictionary, 5th edition, 2002, Oxford University Press (Oxford)

¹⁰⁵ Chambers

¹⁰⁶ Macquarie

“... **1** *The condition of being protected from or not exposed to danger, safety; spec. the condition of being protected from espionage, attack, or theft. ...*
▸b *The provision or exercise of measures to ensure such safety. Also (S-), a government department or other organization responsible for ensuring security. ...*”¹⁰⁷

139. These meanings have three aspects. One is that of safety, protection or defence from something that is regarded as a danger. Financial difficulty, attack, theft and political or military takeover are given as examples. A second aspect refers to the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage. The organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect found in the definitions.

140. Ms Costello submitted that the case of *Whittaker* accepted the Tribunal’s statement of the test that damage must be “*actual and significant damage*”. What the Full Court of the Federal Court set out at [17] of its reasons for judgment were the propositions that the Tribunal had accepted and whose correctness the Secretary had not disputed. They were:

- “ · *Damage to international relations might reasonably be expected where the disclosure of a document may disclose sensitive information so as to cause, or reasonably be expected to cause, actual or significant damage.*
- *The concept of damage is not to be confined and may include damage to intangibles, such as personal relationships between high level officials and politicians.*
- *There is no public interest test criterion extending beyond the terms of the exemption provision, in that the document is either within that provision or it is not.*
- *The test is not whether there is a risk of damage to international relations: the test requires a higher degree of certainty of damage.*
- *The test to be applied to the documents at the time of decision and not at the time of creation of the documents.”*

141. The Full Court made no comment on the propositions that it had set out. Instead, it moved immediately to the fact that, having stated the propositions, the Tribunal had then concluded, without any reasons, that the exemption under s 33(1)(a)(ii) was not applicable. It noted that the Tribunal had not addressed the question whether disclosure of the documents “*would, or could reasonably be expected to*”, cause damage to Australia’s international relations with Canada. There had been no findings about the particular documents in issue. The Full Court’s references were to “*damage*” in analysing the Tribunal’s reasons and it made no comment on the propositions set out by the Tribunal. It

¹⁰⁷ Oxford

had no reason to make comment given that the Tribunal had made an error of law by not giving reasons.

142. That is not to say that I think that the first dot point of the propositions is incorrect. It would seem to be an accurate statement of the law where the evidence supported a finding that disclosure would cause, or reasonably be expected to cause, actual or significant damage. That is not to say, though, that the parties in that case or the Tribunal accepted the further proposition that the words “*actual and significant*” should be read into, in that case, s 33(1)(a)(iii) or, in this case, s 33(1)(a), to qualify the word “*damage*”. Parliament has not done so and I do not think it open on the reading of either provision that they be read in to them.

143. At the other end of the scale, is embarrassment that disclosure might cause. In *Re Fernandes and National Archives of Australia*,¹⁰⁸ Kerr J said:

*“Counsel were agreed that neither mere embarrassment nor the risk of exposure, or to use the words of Mason J in Commonwealth v John Fairfax & Sons Ltd [1980] HCA 44; (1980) 147 CLR 39 at 52 that it ‘will merely expose... to public discussion and criticism’ the actions of either Australia or Indonesia or any of Australia’s agencies would be sufficient of themselves to justify a conclusion that a document is an exempt document. I propose to act on that basis.”*¹⁰⁹

144. I have gone back to the words of Mason J in *Commonwealth v John Fairfax & Sons Ltd*.¹¹⁰ It was a case concerning injunctions sought by the Commonwealth against publication by the defendants of excerpts from a book entitled “*Documents on Australia’s Defence and Foreign Policy 1968-1975*”. Evidence was given that it contained unpublished memoranda, assessments, briefings and cables relating to such matters as the East Timor Crisis seen largely through cables which passed between the Australian and Indonesian governments at the time. The subjects in the book also related to the renegotiation of agreements covering the United States military bases in Australia, the presence of the Soviet Navy in the Indian Ocean, Australia’s support for the Shah of Iran, the security of the R.A.A.F. base at Butterworth in Malaysia, outlines of the structures of United States and United Kingdom intelligence services and the AN.Z.L.J.S. Treaty.

145. Mason J said that:

“ The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to

¹⁰⁸ (2014) 63 AAR 265;

¹⁰⁹ [2014] AATA 180 at [35]

¹¹⁰ [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485

the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality. Support for this approach is to be found in Attorney-General v. Jonathan Cape Ltd. ... [1976] Q.B. 752].”¹¹¹

146. Mason J went on to find:

“ The contents of some documents possibly suggest that disclosure of them would embarrass Australia’s relations with other countries and consequently affect their willingness to make available defence and diplomatic information on a confidential basis.

I have given particular attention to Ch. 6 of the book and to ten passages in it identified by Mr. Henderson. In some passages overseas political and diplomatic personalities are mentioned, information and attitudes are ascribed to them and comments, some critical, are made about them. Some confidential reports or opinions of ambassadors of foreign countries are set out. Some of the ten passages appear in the East Timor material which the defendants intended to publish. However, I am not persuaded that the degree of embarrassment to Australia’s foreign relations which will flow from disclosure is enough to justify interim protection of confidential information. In any event, the question whether an injunction should be granted on this ground is resolved against the plaintiff by the publication that has taken, and is likely to take, place.”¹¹²

147. I do not think that Kerr J can be understood in *Fernandes* to rule out altogether embarrassment as a possible justification for a conclusion that a document is an exempt document. He specifically referred to “mere” embarrassment. I think that by using that qualifier, his Honour must be understood as recognising that Mason J regarded embarrassment as occurring in various degrees and with various practical consequences. Mason J specifically referred to the “*degree of embarrassment*” finding in that case that “... *he was not persuaded that the degree of embarrassment to Australia’s foreign relations which will flow from disclosure is enough to justify interim protection of confidential information.*” (emphasis added). This was not an issue that was addressed by the Full Court of the Federal Court on appeal in *National Archives of Australia v Fernandes*,¹¹³ which turned on a different issue. It seems to me that it is not the embarrassment itself that is measured but the consequences or damage that is reasonably likely to follow. In some circumstances, embarrassment is of concern only to the person concerned but, in others, it may cause embarrassment to others. Only the particular factual circumstances will determine whether embarrassment caused by disclosure would be reasonably likely to damage the security, defence or international relations of the Commonwealth if the record were made available for public access.

¹¹¹ [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485 at 52; 493

¹¹² [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485 at 53-54; 494

¹¹³ [2014] FCAFC 158; Allsop CJ, Flick and Wigney JJ

148. What s 33(1)(a) requires is an assessment of whether disclosure under the Archives Act could reasonably be expected to cause damage to, in this case, security or the international relations of the Commonwealth. Examples of circumstances in which the Tribunal has decided that disclosure “*would, or could reasonably be expected*” to have caused damage to the security of the Commonwealth under s 33(1)(a)(i) of the FOI Act as it was then drafted include:

(1) “*Disclosure of information could reasonably be expected to cause damage to security if it enables those engaged in espionage, sabotage, subversion, active measures of foreign intervention or terrorism to be better able to prevent a security organisation from obtaining information about their activities.*”¹¹⁴

(2) “*The document in question relates to the tactical response to terrorism and to Army procedures to meet requests for assistance in dealing with terrorism. ...*

Assuming, as we do, that the Army will observe the law, there can be no doubt that the prevention of subversion of The Constitution and of the laws of the Commonwealth and of the States by terrorism must be a primary objective of government. Section 51(vi) of The Constitution makes it clear that the defence power extends not only to external defence but also to the maintenance and control of forces to execute and maintain laws of the Commonwealth, while section 119 of The Constitution requires the Commonwealth, on the application of the government of the State, to protect the State against domestic violence.

Terrorism is the enemy of all forms of civilized government and of the peace, order and good government of both Commonwealth and State. However much one may guess at the types of procedures which the Army will adopt to meet terrorism, it is a very different thing, in our opinion, to describe and confirm those procedures in a public document so that possible enemies of government attain knowledge of those measures. It could also, in our opinion, involve a degree of disloyalty to the armed forces to expose the armed forces to the risk that terrorists become aware of their plans.”¹¹⁵

(3) “*Finally, it cannot be doubted that ASIO personnel have access to a great deal of highly sensitive information, the unauthorised disclosure of which could cause significant damage to the security not only of Australia but of other countries. It is very easy to see that, were the identity of ASIO personnel to be revealed, they could easily become targets for persons and organisations interested in carrying out espionage and politically motivated violence. Such persons are plainly likely to go to great lengths to determine the extent of ASIO’s knowledge about their activities and the nature of intelligence and operational techniques used by ASIO. In addition, s 92 of the ASIO Act makes the unauthorised disclosure of the identity of a present or former ASIO officer employee or agent an offence.*”¹¹⁶

(4) “*... I accept that it is fundamental to the effective operation of ASIO that specific details of its areas or subjects of interest, its ability to obtain*

¹¹⁴ *Re Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110; (1988) 15 ALD 20; 8 AAR 403 at [42]; 29; 412 and see also *Re Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833; Spender J

¹¹⁵ *Re Hocking and Department of Defence* [1987] AATA 602

¹¹⁶ *R v Lodhi* [2006] NSWSC 596; (1999) 199 FLR 270 at [22]; 277; Whealy J

*intelligence, its sources, techniques and work methods, its successes and information derived from its successes be kept secret. This goal may require that it neither confirm nor deny activities which may, or may not have occurred. The need to protect the secrecy of ASIO's operations and its information and intelligence holdings is recognized by statute. I accept Mr Irvine's view that the disclosure of certain information contained in the various documents would be likely to prejudice national security. ..."*¹¹⁷

149. As Ms Stern submitted relying on a passage from the judgment of Mason J in *Church of Scientology v Woodward*, security is a "concept with fluctuating content".¹¹⁸ These are only four cases to illustrate some of the range that might be included. What they show is that different contexts require different considerations even when the same question is being answered in each be it a question whether disclosure either would, or could reasonably be expected to cause damage to the security or international relations of Australia or whether they could reasonably be expected to do so.
150. The notion that security is a concept with a fluctuating content is borne out by the report of the Secretary-General's High-Level Panel on Threats, Challenges and Change entitled "*A more secure world: our shared responsibility*".¹¹⁹ Although lengthy and published over 15 years ago, I think that the modern context is captured by the following passage from the Synopsis to that report when it was said that the founders of the United Nations:

"... understood well, long before the idea of human security gained currency, the indivisibility of security, economic development and human freedom. In the opening words of the Charter, the United Nations was created 'to reaffirm faith in fundamental human rights' and 'to promote social progress and better standards of life in larger freedom'.

The central challenge for the twenty-first century is to fashion a new and broader understanding, bringing together all these strands, of what collective security means — and of all the responsibilities, commitments, strategies and institutions that come with it if a collective security system is to be effective, efficient and equitable.

If there is to be a new security consensus, it must start with the understanding that the front-line actors in dealing with all the threats we face, new and old, continue to be individual sovereign States, whose role and responsibilities, and right to be respected, are fully recognized in the Charter of the United Nations. But in the twenty-first century, more than ever before, no State can stand wholly alone. Collective strategies, collective institutions and a sense of collective responsibility are indispensable.

The case for collective security today rests on three basic pillars. Today's threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats.

¹¹⁷ *Plaintiff B60 of 2012 v Minister for Foreign Affairs and Trade* [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478 at [37]; 119; 487-488

¹¹⁸ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/602/31/PDF/N0460231.pdf?OpenElement>

¹¹⁹ 2 December 2004

And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours.

We must not underestimate the difficulty of reaching a new consensus about the meaning and responsibilities of collective security. Many will regard one or more of the threats we identify as not really being a threat to international peace and security. Some believe that HIV/AIDS is a horrible disease, but not a security threat. Or that terrorism is a threat to some States, but not all. Or that civil wars in Africa are a humanitarian tragedy, but surely not a problem for international security. Or that poverty is a problem of development, not security.

Differences of power, wealth and geography do determine what we perceive as the gravest threats to our survival and well-being. Differences of focus lead us to dismiss what others perceive as the gravest of all threats to their survival. Inequitable responses to threats further fuel division. Many people believe that what passes for collective security today is simply a system for protecting the rich and powerful. Such perceptions pose a fundamental challenge to building collective security today. Stated baldly, without mutual recognition of threats there can be no collective security. Self-help will rule, mistrust will predominate and cooperation for long-term mutual gain will elude us.

What is needed today is nothing less than a new consensus between alliances that are frayed, between wealthy nations and poor, and among peoples mired in mistrust across an apparently widening cultural abyss. The essence of that consensus is simple: we all share responsibility for each other's security. And the test of that consensus will be action.

Collective security and the challenge of prevention

Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security. So defined, there are six clusters of threats with which the world must be concerned now and in the decades ahead:

- *Economic and social threats, including poverty, infectious diseases and environmental degradation*
- *Inter-State conflict*
- *Internal conflict, including civil war, genocide and other large-scale atrocities*
- *Nuclear, radiological, chemical and biological weapons*
- *Terrorism*
- *Transnational organized crime*

... “

C. Section 33(1)(a): “cause damage to ... the international relations of the Commonwealth”

151. A similar approach was taken the following year by Davies J adopted in *Re Maher and Attorney-General's Department*¹²⁰ when considering what was then s 33(1)(a)(iii)¹²¹ of the FOI Act in relation to damage to “*international relations*”. His Honour said:

¹²⁰ (1985) 7 ALD 731; 3 AAR 396

¹²¹ “A document is an exempt document if disclosure of the document under this Act: (a) would, or could reasonably be expected to, cause damage to: (i) ...; (ii) ...; or (iii) the international relations of the Commonwealth; ...”

“... The phrase ‘damage to international relations of the Commonwealth’ comprehends intangible damage to Australia’s reputation though such damage may be difficult to assess. International relations have never been matters easy to define or quantify. Regard must be had, inter alia, to the relationships between particular persons in one government and persons in another. Damage to personal relationships may cause considerable harm for a time at least.”¹²²

152. It seems to me that this is consistent with the ordinary meaning of the expression “*international relations*”. It is not used as any particular term of art. It can be said to refer to the connection, “... *social, political or personal contact between ...*”¹²³ between the Commonwealth and another or other countries so that the connection is “*international*”.¹²⁴ In a world that has moved from a focus on, first the village and then the national market to the global market, however, I think that international relations should be considered more broadly in terms of the political, economic, environmental and legal connections and interactions between or among countries.
153. The “*Commonwealth*” means the “*Commonwealth of Australia*”,¹²⁵ established as a political entity by s 3 of the *Commonwealth of Australia Constitution Act* (Constitution). It legislates by means of the Parliament established by Chapter I of the Constitution. Its judicial power is vested in the High Court of Australia and other federal courts established under Chapter III.
154. Chapter II of the Constitution is concerned with the exercise of the Commonwealth’s executive power. As Mason J said in *Barton v The Commonwealth*:¹²⁶

“... By s 61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.

As Latham CJ said in R v Burgess; Ex parte Henry ...^[127]:

‘This view is, I think, supported by a consideration of the object which must have been in contemplation when the Constitution was enacted. Australia was established as a new political entity and Australia was to be given control of her own external affairs. Under s. 61 of the Constitution the Executive Government of the Commonwealth can deal administratively with the external affairs of the Commonwealth The execution and maintenance of the Commonwealth, particularly when considered in relation to other countries, involves ... the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the

¹²² (1985) 7 ALD 731; 3 AAR 396 at 742; 409

¹²³ “... 8 (*relations*) ...”: Chambers

¹²⁴ Chambers

¹²⁵ *Acts Interpretation Act 1901*, s 17(a)

¹²⁶ (1974) 131 CLR 477

¹²⁷ (1936) 55 CLR 608 at 643-644

*international plane. The most obvious example of such action is to be found in the negotiation and making of treaties with foreign countries.”*¹²⁸

155. The breadth of the Commonwealth’s executive power was discussed by Brennan J in *Davis v The Commonwealth*:¹²⁹

*“... The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite ‘in one indissoluble Federal Commonwealth’, melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood - a flag or anthem, for example - or the benefit of many national initiatives in science, literature and the arts. It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s.61 does confer on the Executive Government power ‘to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’, to repeat what Mason J. said in the A.A.P. Case. ...”*¹³⁰

156. When seen in the context of international relations, Jacobs J observed in *Barton v The Commonwealth* that:

“ It is in my opinion within the executive power of the Australian Government as the government of a sovereign state to communicate in such terms as it thinks fit with ... [an international government] unless by legislation the power of making such a communication is taken away from it. ...

*In the absence of any legislative prohibition the free right of the Australian Government to communicate at will with a foreign government is an essential attribute of this country as a sovereign nation. ...”*¹³¹

157. As a body politic, the Commonwealth cannot exercise its executive power itself. Instead, it must rely on others to exercise it on its behalf. Its executive power is vested in the Queen, and so in the Crown, but is exercisable by the Governor-General as her representative acting with the advice of Federal Executive Council established under ss 62 and 63 of the Constitution. Under s 64, the Governor-General appoints Ministers to administer the departments of State he or she in Council may establish. The appointment of civil servants is authorised by s 67. Although no specific mention is made of other entities, it is clear that

¹²⁸ (1974) 131 CLR 477 at 498

¹²⁹ [1988] HCA 63; (1988) 166 CLR 79; Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ

¹³⁰ [1988] HCA 63; (1988) 166 CLR 79 at 110-111

¹³¹ (1974) 131 CLR 477 at 505

the executive power of the Commonwealth may be exercised through, or by means of, entities other than those I have mentioned but which it establishes in the exercise of its executive power.¹³² Recognition of this is implicit in s 33(1)(b) of the FOI Act when it provides that:

“A document is an exempt document if the disclosure of the document under this Act:

- (a) ...*
- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.”*

158. That is not to say that every connection between entities or persons who happen to be in Australia and in another country amount to “*international relations*” so that any falling out between them might be regarded as “*damage to ... the international relations of the Commonwealth*”. An analogy can be drawn between the exemption in s 33(1)(a)(iii) and that in s 33A(1)(a) which provides for an exemption “... *if disclosure of the document under this Act [the FOI Act]: (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State*”. What is encompassed within the words “*relations between the Commonwealth and a State*” was a matter considered by the Full Court of the Federal Court in *Arnold (on behalf of Australians for Animals) v Queensland*.¹³³ Wilcox J said that:

*“... the words ‘relations between the Commonwealth and a State’ refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word ‘relations’ includes all of those contacts. It would not normally be correct to describe a falling out between particular individuals on each side as constituting damage to ‘relations’ between the two governments, even if there was some loss of co-operation between those individuals. But a dispute may have ramifications sufficiently extensive for it to affect ‘relations’ between the governments as such. Questions of degree arise. They can only be considered in the light of the facts of each case.”*¹³⁴

159. I have also drawn the conclusion from the evidence given by Dr French and Ms Chan as well as from the documents themselves that negotiations and their outcomes develop incrementally over many years just as the personal relationships of officials do so. In part,

¹³² It may, for example, establish a corporate authority to achieve its purpose rather than do so by means of executive action through a Minister of the Crown: *Davis v The Commonwealth* [1988] HCA 63; (1988) 166 CLR 79 at 94-94 per Mason CJ, Deane and Gaudron JJ

¹³³ (1987) 73 ALR 607; 13 ALD 195, Woodward, Wilcox and Burchett JJ. This is the appeal from the Tribunal’s decision in *Re State of Queensland and Australian National Parks and Wildlife Service* [1986] AATA 224; (1986) 13 ALD 158; 5 AAR 328

¹³⁴ (1987) 73 ALR 607; 13 ALD 195 at 616; 204

that is due to the nature of negotiations carried out by officials who represent their governments and who must seek, and abide by, their instructions. In part, it is due to a changing landscape in which negotiations are conducted whether internationally such as the negotiation and implementation of UNCLOS and changing contemporary events affecting negotiating states individually and/or collectively and domestically or internationally.

160. That changing landscape includes UNCLOS and past agreements as Ms Costello and Dr McBeth submitted but it is not shaped by them at the particular time of their making. Even in the period between the years of 1971 and 1972 and the years of 1978 and 1979, on which Ms McGrath has focused, the landscape changed. Although not referred to in the evidence, it is a matter of common knowledge that East Timor declared itself independent from Portugal, which had resumed colonial authority after Japan surrendered at the end of World War II. Its declaration was made in November 1975 but, before the year was out, East Timor was occupied by Indonesia. East Timor, now known as Timor-Leste, gained independence from Indonesia in 2002. Events such as those occurred at a particular time and the fact they happened is fixed forever in the calendar of history but they become inextricably woven into the landscape in which negotiations take place; not separate from it.

D. Section 33(1)(a): the mosaic theory

161. Ms Stern referred also to the “*mosaic theory*”. She referred to an authority from the United States of America: *Central Intelligence Agency v Sims*.¹³⁵ Mr Sims and others had sought disclosure under the *Freedom of Information Act* (USA) of the individuals and institutions conducting research on a project funded by the Central Intelligence Agency. Burger CJ, with whom Marshall and Brennan JJ concurred in a separate judgment, addressed the value of intelligence sources, the CIA’s ability to protect the confidentiality of their relationship with them and the potential consequences for the CIA if it could not maintain that confidentiality. In the course of doing so, Burger CJ said:

“... [T]he realities of intelligence work ... often involve seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information.

Disclosure of the subject matter of the Agency’s research efforts and inquiries may compromise the Agency’s ability to gather intelligence as much as disclosure of the identities of intelligence sources. A foreign government can learn a great deal about the Agency’s activities by knowing the public sources of information that interest the Agency. The inquiries pursued by the Agency can often tell our adversaries something that is of value to them. ... For example, disclosure of the fact that the Agency subscribes to an obscure but publicly available Eastern European technical journal could thwart the Agency’s efforts to exploit its value as a source of information. Similarly, had foreign governments learned the Agency was using certain public journals and ongoing open research projects in its [code-

¹³⁵ 471 US 159 (1985); Burger CJ, Marshall and Brennan JJ

named] *MKULTRA research of 'brainwashing' and possible countermeasures, they might be able to infer both the general nature of the project and the general scope of the agency's inquiry was taking. ...*"¹³⁶

162. A similar approach has been adopted in Australia in various cases. It is commonly referred to as the "*mosaic theory*" or, at times, the "*jigsaw theory*". In summary, the theory is that the evidence may justify a conclusion that disclosure of information by an agency will lead to its being linked with already available information and so lead to the disclosure of yet other information. Regard must be had to all of that information in considering the relevant exemption.

163. The theory was regarded as a relevant consideration by the Tribunal in *Re Slater and Cox (Director-General, Australian Archives)*:¹³⁷

*"... Evidence was placed before me (Ex 4 as explained in oral evidence) by way of an exercise based upon an analysis of 22 thirty-five-year-old documents. This exercise satisfied me that much can be gleaned, by application of the 'mosaic' technique of piecing together small and individually innocuous pieces of information, that is of present and significant relevance. The cumulative prejudice which may flow from disclosure of documents as a group has been recognised in Australia and overseas. In Re Robinson and Department of Foreign Affairs (1986) 11 ALN N48 the Tribunal said: 'Two additional points deserve mention. First, because large parts of the documents had already been released, proceedings before the Tribunal came, at times, close to a word-by-word battle over disclosure. Not surprisingly, adopting this approach it is tempting to conclude that parts of speech which viewed in isolation are innocuous have no basis for exemption. In circumstances such as the present this temptation must be resisted, for it would be too easy, having before one a document in which only those words which, when viewed in isolation, are exempt have been deleted, to reconstruct the entire document by process of educated guesses and thereby cause damage against which s 33(1)(a) is designed to protect.'"*¹³⁸

164. In *Re Millis and Australian Archives*,¹³⁹ Deputy President McMahon described the mosaic theory as an example of the logical process of reasoning by induction although it has also been referred to as inference or deduction:¹⁴⁰

*"... What may be done in analysing the subject documents, and the particular facts recorded in those documents, is to estimate the weight of internal evidence or external connecting evidence in favour of a proposition which is likely to disclose the identity of a confidential source. The so-called mosaic theory is nothing more than this."*¹⁴¹

165. In *Re Petroulias and Commissioner of Taxation*,¹⁴² I said:

¹³⁶ 471 US 159 at 1891-1892 (citations omitted)

¹³⁷ (1988) 15 ALD 20

¹³⁸ (1988) 15 ALD 20 at 27

¹³⁹ (1997) 47 ALD 427

¹⁴⁰ *Re Nitas and Minister for Immigration and Multicultural Affairs* [2001] AATA 392 at [20]

¹⁴¹ (1997) 47 ALD 427 at 430

¹⁴² [2006] AATA 333; (2006) 62 ATR 1175

*“However described, the mosaic theory is not a rule of law determining an outcome. It is no more than a name given to the task of evaluating evidence in order to come to a decision when the evidence comprises that within the documents under consideration and other sources. The decision that is reached is, of course, formulated by the law or is a sub-set of that decision.”*¹⁴³

I remain of the same view.

C. Application of section 33(1)(a) in this case

166. I will begin with Ms Costello’s submission that the material on which Archives relies is out of date: the government has changed and Dr French is no longer involved in maritime boundary negotiations. The appropriate person to give evidence is a person who has taken over from Dr French or a person who has currency in the area but it is not Dr French. If there is to be transparency in the decision-making process, the identity of the decision-maker must be known. Furthermore, the decision must be made on the basis of what can reasonably be expected to follow from access under the Archives Act on the date that access is given and not on the basis of what might have been historically the case.
167. Dr French was asked to read some 6,600 folios in 24 files and to identify the passages that he considered to be exempt under s 33(1)(a). He made recommendations to Archives as to what he considered could reasonably be expected to cause damage to the security or international relations of the Commonwealth. Archives decided whether access would be given to the documents. For the purposes of Part V of the Archives Act, the decision is taken to have been made by the Director-General.¹⁴⁴ Under s 8, the Director-General may delegate his powers under the Archives Act. Therefore, the Director-General could delegate his powers to make decisions to officers of Archives and it appears from the decisions in the T documents that he did. What is clear is that, although Dr French made recommendations to Archives, he was not a delegate of the Director-General making decisions.
168. During cross-examination of Ms Chan, Ms Costello submitted that the process by which Archives has made decisions is relevant in my reviewing those decisions. It is relevant that there is collaboration between Archives and DFAT in making the decisions and it is relevant to know who made the decisions and what material they looked at in coming to those decisions.
169. The identity of the Director-General’s delegate who made the decision on any particular application made by Ms McGrath is of no consequence. It is regarded as the decision of the Director-General.¹⁴⁵ What is of consequence in the context of review of the

¹⁴³ [2006] AATA 333; (2006) 62 ATR 1175 at 1185; [30]

¹⁴⁴ Archives Act; s 50

Director-General's decisions in the Tribunal is the evidence that Archives brings to the Tribunal to support its decisions. It is of consequence because, under s 51 of the Archives Act, Archives carries the burden of establishing that its decision was justified or that the Tribunal should give a decision adverse to the applicant. It is for Archives to select the evidence on which it relies in order to satisfy that burden. Should Archives choose to support its decision by oral evidence, the witness it produces to give that oral evidence is a matter for it. An applicant may question the qualifications of that witness to give evidence and to seek to show whether through cross-examination or otherwise that he or she is not qualified or that his or her evidence should be given little weight.

170. Archives relied on evidence given by, among others, Dr French. Ms Costello and Dr McBeth submitted that Dr French is not qualified and that there are others who have contemporary knowledge of maritime boundaries and Australia's relations with Timor-Leste and Indonesia. I find that Dr French is now Australia's Ambassador to Italy and has held other overseas' posts but he has relevant current and past experience in matters relevant to the issues I must consider in this case. As a career diplomat, Dr French is well-versed in the intricacies of diplomatic relations and negotiation. His past experience as the Legal Adviser (International) and Head of DFAT's International Legal Branch is also relevant. In that position, he had line responsibility for DFAT's Law and Sea Law, Environment Law and Antarctic sections and his work included work on the delimitation of, and control over, Australia's maritime boundaries as well as negotiating treaties. He was actively involved in the negotiations that led to the TST on Timor-Leste's independence. Dr French's past studies and academic qualifications are in international law and his publications are focused on the law of the sea. His being in Italy does not isolate him from contemporary events affecting maritime boundaries. As Dr French said in his evidence, such events are notified in regular bulletins issued from DFAT to all of its Diplomatic Postings. Having seen some of those bulletins in the 24 files, I also find that they provide a comprehensive update of current events in relevant areas of diplomatic concern.
171. In view of his background, experience and currency, I accept Dr French as a person who is well-placed to understand both the particular area of maritime boundaries that is the subject of Ms McGrath's request, the changes in international law and the diplomatic world in which such negotiations were conducted as well as the impact of past actions and words on Australia's contemporary relations with other countries. Whether there is another DFAT officer who is, as Ms Costello and Dr McBeth suggest better qualified than Dr French, to give relevant evidence is of no matter. The evidence of Ms Chan and Mr Whyatt was not

¹⁴⁵ *Acts Interpretation Act 1901*; s 34AB(1)(c)

questioned but I accept their qualifications and their evidence as relevant on the subjects they have addressed.

172. The evidence that is given on behalf of Archives is only one aspect of the material that is relevant on review. Also relevant is the background given by Ms McGrath in her affidavit. She has traced the development of international law since President Truman proclaimed in 1945 that the natural resources of the subsoil and seabed of the United States of America's continental shelf beneath the high seas but contiguous to it would be subject to its jurisdiction and control. Australia followed with a proclamation in 1953 claiming sovereign rights over more than 15 million square kilometres of seabed on the basis that its maritime boundary extended to a point where its continental shelf reached a depth of 200 metres. Various permits have been issued to permit their holders to explore for oil and gas. Agreement was reached between the Commonwealth and States to cooperate for the purpose of ensuring the legal effectiveness of authorities to explore for or to exploit the petroleum resources of submerged lands. Their agreement was reflected in the Commonwealth's *Petroleum (Submerged Lands) Act 1967* and in State legislation such as the *Petroleum (Submerged Lands) Act 1967* (Vic). Various negotiations have been conducted relating to maritime boundaries between Australia and other countries leading to treaties and agreements, to which I have referred above at [8]-[9].
173. Also relevant the information or matter that is claimed to be exempt and the context in which it appears. I have examined the information or matter in each of the folios, or parts of folios, for which exemption has been claimed by Archives. In addition, I have also read folios around the folios or parts of folios claimed to be exempt in order to identify its context. Although I have not read the whole of the 24 files in which the exempt documents are found, I have carefully scanned many of them. That has given me an insight into the place in which the folios sit in the course of events in the events of 1971 and 1972 and those of 1978 and 1979. I have also read the Memorial of the Democratic Republic of Timor-Leste in the ICJ case, the Australia and Timor-Leste Maritime Boundaries Fact Sheet issued by DFAT and UNCLOS. I have had regard to the matters that I have set out in the background above.
174. I accept that the state of the international law of the sea has changed over the years. In 1958, for example, the *Convention on the High Seas* done at Geneva on 29 April 1958 (Geneva Convention) dealt with the "high seas" i.e. "... all parts of the sea that are not included in the territorial sea or in the internal waters of a State."¹⁴⁶ The only reference to

¹⁴⁶ Geneva Convention; Article 1

the continental shelf arises in Article 26 which provides that all states shall be entitled to lay submarine cables and pipelines on the bed of the high seas. Article 26.2 provides:

“Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables or pipelines.”

175. By way of contrast, UNCLOS, which came into force in 1994 and replaced the Geneva Convention, was a much more comprehensive document. Part V introduced the concept of the EEZ, which is an area beyond and adjacent to the territorial sea.¹⁴⁷ It is subject to the legal regime established in Part V. Article 74 is concerned with the delimitation of the EEZ between States with opposite or adjacent coasts. It provides:

“ 1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.”

176. Part VI of UNCLOS is concerned with the continental shelf. Article 76 defines the continental shelf. The starting point is Article 76.1:

“ 1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

177. The continental margin comprises the submerged prolongation of the land mass of the coastal State and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.¹⁴⁸ Article 76.1 is, however, qualified by Articles 76.4 to 76.6.¹⁴⁹ They do so by prescribing the manner in which the outer edge of the continental margin is determined when it extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is

¹⁴⁷ UNCLOS; Article 55

¹⁴⁸ UNCLOS; Article 76.3

¹⁴⁹ UNCLOS; Article 76.2

measured. Article 77 deals with the rights of the coastal state over the continental shelf and Article 78 with the legal status of the superjacent waters and airspace and the rights and freedoms of other States.

178. These are but a handful of Articles from UNCLOS but they illustrate the way in which the law relating to maritime boundaries and the law of the sea has changed. They explain why Dr French said in his evidence that natural prolongation remains a relevant factor in determining an equitable solution for a maritime boundary relating to the seabed but also said that, with respect to coastlines that are less than 400 nautical miles apart, the relative weighting of distance as opposed to geomorphology has changed. In the latter situation, the median line is the starting point for negotiations. That would have been the starting point for the Maritime Boundaries Treaty declared as recently as 6 March 2018. Dr French agreed with Dr McBeth that the Maritime Treaty had been negotiated drawing on the modern approach consistent with UNCLOS. He also agreed that he had no reason to think that Timor-Leste would withdraw from the treaty.
179. The fact that the principles governing the negotiation of treaties and the law of the sea generally has changed does not lead me to a conclusion that everything that has gone before is a matter of mere historical interest. In the closed reasons numbering over 98 pages, I have examined each of the folios according to my understanding of s 33(1)(a). I have concluded that each folio, or part of a folio, is exempt under s 33(1)(a) as claimed by Archives. My reasons group the folios according to the particular reasons why I have concluded that they could reasonably be expected to lead to the outcome prescribed in s 33(1)(a). I have decided that I should not reveal the groups and the folios, or parts of folios, that fall with them because to do so would enable cross-referencing to be had to the folios or passages redacted in the documents, to which Ms McGrath has been granted access. Consistent with the mosaic theory, I am satisfied that conclusions could be drawn as to the content of those redactions. Even if those conclusions were not accurate, speculation as to the correctness or otherwise of the conclusions could reasonably be expected to cause damage to the security and international relations of the Commonwealth.
180. I also note that Ms McGrath wanted me to pay particular regard to File A12909 1865 8911897; Folios 2, 3 and 13. I have done so and, for reasons given in the closed reasons, have decided that the passages redacted from them render them exempt documents on the basis that their disclosure could reasonably be expected to damage Australia's international relations.
181. I also note that the exemption in s 33(1)(a) is claimed for the documents at A1838 1733/3/2 Part 12; Folios 49-65, 274-291, 294-313. Understandably in view of claim of parliamentary

privilege, the transcript is not included in the records for which exemption has been claimed. Consequently, I have not been able to examine the contents of the transcript to consider whether or not it contains information or matter whose disclosure under the Archives Act would lead to the outcome prescribed in s 33(1)(a). One outcome could be that I could find that Archives has not satisfied its onus of establishing that its decision was justified under s 33(1)(a). That outcome, however, would not seem to me to be appropriate when its hands are tied by the certificate given the Clerks of the Houses of Parliament. Therefore, I have decided that I should simply note that, as I have not been able to examine the documents at A1838 1733/3/2 Part 12; Folios 49-65, 274-291, 294-313, I have not been able to consider whether or not they are exempt records by reason of s 33(1)(a).

182. Finally, I have formed the view that access to my closed reasons in relation not only to the exemption under s 33(1)(a) but all exemptions claimed should be restricted to Archives and its legal representatives as well as to members and staff of the Tribunal for those closed reasons would disclose information or matter that would reveal the contents of the material claimed to be exempt.

EXEMPTION: section 33(1)(d) – breach of confidence

Section 33(1)(d)

183. Section 33(1)(d) provides:

For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kind:

...

- (d) *information or matter the disclosure of which under this Act would constitute a breach of confidence;*

...”

The submissions

184. The parties agree that there are two possible interpretations of the words “*would constitute a breach of confidence*”. One is the interpretation by the majority in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*¹⁵⁰ (*Corrs Pavey*). That interpretation was given in the context of s 45(1) of the FOI Act when it was drafted in the same terms as the current s 33(1)(d) of the Archives Act. It is an interpretation that does not require that each and every element for an action for breach of confidence be established. It adopts a statutory test which is necessarily informed by the policy underlying the equitable claim for breach of confidence but is not constrained by it. Even if I were to adopt the dissenting interpretation

¹⁵⁰ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254; Sweeney and Jenkinson JJ; Gummow J dissenting

of Gummow J in *Corrs Pavey*, as I did in *Re Staats and Director-General of Archives*,¹⁵¹ the elements required to establish a breach of confidence in equity would be satisfied in the case of the transcript of the evidence given before the Joint Committee. That is so whether the record in issue is a copy held by DFAT or an original held by Parliament. In relation to the fourth – actual or threatened misuse of the transcript – it would be satisfied by the fact that it would be available to the public under the Archives Act.

Consideration

185. Section 33(1)(d) did not receive a great deal of attention in the hearing. That is understandable given that Archives' primary claims rested primarily on parliamentary privilege in relation to the transcript of the oral evidence given by the Joint Committee. I have accepted that they are subject to Parliamentary Privilege. Whether the transcript is an exempt document under s 33(1)(d) will not change that outcome. Despite that, I have considered the submission relating to the application of s 33(1)(d).
186. In Attachment B of these reasons, I have set out the history of the passage of the *Archives Bill 1978* through Parliament and where it travelled hand in hand with the *Freedom of Information Bill 1978* and where they parted company. I have also set out the amendments that were subsequently made to s 45 both before and after the case of *Corrs Pavey* was decided. No amendment has been made to s 33(1)(d) of the Archives Act since its enactment. The history is important to give context to *Corrs Pavey* and the amendments that Parliament subsequently made to s 45 of the FOI Act.

A. Federal Court's judgment in *Corrs Pavey Whiting & Byrne v Collector of Customs*

187. In 1987, the Full Court of the Federal Court handed down its judgment in *Corrs Pavey*. The construction of s 45 arose in the context of a request made by a firm of solicitors (CPWB) under the FOI Act. CPWB acted for the patentee, Syntex, of an Australian patent for a pharmaceutical drug being Naproxen. Its request sought access to documents in the possession of the Collector of Customs (Collector) concerning the importation of Naproxen by Alphapharm Pty Ltd (Alphapharm). Syntex alleged that Alphapharm's importation infringed the patent. The Collector declined to give access to the documents to CPWB on the ground that they had been supplied by Alphapharm to the Collector in confidence.
188. Jenkinson J, with whom Sweeney J agreed but from whom Gummow J dissented, made the following points in his judgment:

¹⁵¹ [2010] AATA 531 at [136]

- (1) Disclosure of information under the FOI Act is required to be made to any person who requests it.
- (2) Section 91(2)(a) provided:
“The giving of access to a document (including an exempt document) in consequence of a request shall not be taken to constitute an authorisation or approval –
 - (a) *for the purposes of the law relating to ... breach of confidence – of the publication of the document or its contents by the person to whom access is given;*
 - (b) *...*
- (3) *“... I doubt whether the communication of information inherently confidential in pursuance of the Act could, without more, result in the imposition, on the person receiving the information in response to his request, of an obligation of confidence. The imposition of such an obligation would seem to constitute a fetter, not expressed in the Act, on ‘the right of the Australian community to information’ which is declared in s 3(2) to be the object of the Act. An obligation impeding the dissemination through that community of information obtained under the Act ought not, in my opinion, to be derived from the circumstance that the information has ‘the necessary quality of confidence’. Disclosure by the grant of access to a document under that Act is not in my opinion disclosure in circumstances importing an obligation of confidence. ...”*¹⁵²
- (4) *“... Whether or not the recipient of confidential information received under the Act in response to his request may be subjected to any obligation of confidence arising out of that communication, he does not in my opinion have to have any ‘proper interest’ of the kind which would afford, in curial proceedings for breach of confidence, ‘just cause’ for disclosure of the information to him. ...”*¹⁵³
- (5) *“Nor does the Act make any provision for giving the person who provided confidential information to an ‘agency’ of the executive government the opportunity to make submissions in support of a contention that disclosure of a document containing that information would constitute a breach of confidence. (Such a provision is made in respect of documents containing information concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking: see ss. 27 and 43.) ...”*¹⁵⁴
- (6) *“... I am unable to agree that information ‘as to ... real likelihood of commission ... of a civil wrong of public importance’ lacks ‘the necessary quality of confidence’, so that such information could not be the subject of a breach of confidence. Rather should it be said, in my opinion, that the disclosure of such information to those who have a proper interest to receive it will not be restrained, nor redressed, by curial order, notwithstanding breach of confidence by the disclosure. That was, I think, the view which Lord Denning MR expressed in Fraser v Evans [1969] 1 QB 349 at 362:*
*‘They quote the words of Wood V-C that ‘there is no confidence as to the disclosure of ‘iniquity’. I do not look upon the word ‘iniquity’ as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence.’*¹⁵⁵

¹⁵² [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 436-437; 431; 190; 257

¹⁵³ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 437; 431; 190

¹⁵⁴ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 437; 431; 190; 257

- (7) “ *If that view be correct, the language of sub-section 45(1) is not inapt to confer exempt status on a document which contains confidential information received under circumstances importing an obligation of confidence, without regard to those considerations of public policy to which courts have allowed an influence in determining whether to grant or withhold remedies for ‘breach of confidence’ in exercise of equitable or common law jurisdiction. That is the construction I would adopt.*

...

The construction of s 45(1) which I suggest does not hinder, it does not promote, the discovery of iniquity. The agents of the executive government are left free to make such disclosures of information received in confidence as they think to be lawful, albeit without the protection of s 91(1) of the Freedom of Information Act in a case where the discovery of wrongdoing is conceived to make the disclosure lawful. ...”¹⁵⁶

- (8) “... [D]isclosure under the Freedom of Information Act of the importation, by ... Alphapharm ... of the substance Naproxen would constitute a breach of confidence. That information had the required quality of confidentiality at the time it was communicated. ... [T]he information would be commercially useful to a competitor of Alphapharm ... It was not suggested that the circumstances in which communicated the information, that is to say in the knowledge that the Australian Customs Service publicly professed its intention of refraining from disclosure of information furnished in, or in support of, entries of goods to be imported, were not circumstances importing an obligation of confidence. ...”¹⁵⁷

189. Apart from the legal argument regarding the meaning of s 45, Jenkinson J also supported his conclusion by reference to the practicalities of an agency’s coming to a decision on matters relating to the further issues that would give rise to an action for a breach of confidence in a curial setting. His Honour said:

“... The circumstances prescribed or contemplated by the Act as those under which administrative decisions are to be made concerning the grant of access to documents under the Act are so ill suited to the finding of the facts, and to the framing of orders, upon which depends the vindication of those policy considerations which are subsumed under the rubrics ‘just cause’, ‘public interest’ and ‘clean hands’, that I am moved to adopt a construction of s.45 which would displace those considerations from the purview of section 45.”¹⁵⁸

190. This was an observation that found favour with Sweeney J when he decided to prefer the approach taken by Jenkinson J over that of Gummow J. He said:

“ The sub-section lays down a test to be applied by officers who, however expert they may be in customs matters, can hardly have been expected by the legislature to have the necessary legal learning to determine the complex and difficult matters, which Gummow, J. has set out, which are involved in forming a

¹⁵⁵ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 437-438; 432; 191; 258

¹⁵⁶ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 438; 432; 191; 258

¹⁵⁷ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 438; 433; 192; 258

¹⁵⁸ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 437; 431-432; 190-191; 257

judgment as to whether the disclosure of a particular document would be actionable under the general law.

It is this consideration which has led me, in the end, to prefer the construction adopted by Jenkinson, J., which would be relatively simple to apply, and to agree with his opinion that the appeal should be dismissed, with costs, and with his reasons.”¹⁵⁹

191. In his judgment, Gummow J rejected the relevance of the difficulty that might be placed on those administering the FOI Act saying:

“ In dealing with the question of the proper construction of s.45 I have been mindful of the burden that may be placed upon the administration of the FOI Act by the necessity to determine claims to exemption by reference to what may appear complex and technical legal concepts. However, as I have indicated, the legislature has framed various exemptions by reference to concepts apparently drawn from the general law, and it is not for the Court to gainsay the proper construction of the legislation, particularly when, as it appears to me, the contrary conclusion brings with it difficulties and uncertainties of application.”¹⁶⁰

192. Gummow J was of the view that the term “breach of confidence” was used in s 45 in its technical sense. In a case, such as *Corrs Pavey*, where the confidence is not a matter of contract, the question is whether disclosure as requested by Corrs Pavey would be a breach of confidence liable to be enjoined in equity. Protection of obligations of confidence was in the exclusive jurisdiction of equity unless they arose out of contract.¹⁶¹ It was now settled, his Honour said, that:

“...in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge) (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence and (iv) there is actual or threatened misuse of that information ...”¹⁶²

193. This would not involve the Tribunal’s being required to consider any “public interest defence”. In the case before him, what would be required would be a consideration of:

“...(i) there would be a defence of unclean hands where the subject matter of the suit was non-disclosure to Syntex of information showing or tending to show a real likelihood of importation by Alphapharm in infringement of Syntex’s patent, and further, or alternatively (ii) whether the information in question would not be protected in equity, because it did not have the necessary quality of confidence, being information as to commission or the real likelihood of commission by

¹⁵⁹ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 435; 430; 189; 256

¹⁶⁰ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 451; 445; 204; 269

¹⁶¹ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 453; 447; 207; 271 citing *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* [1984] HCA 73; (1984) 156 CLR 414; 56 ALR 193 at 437-438; 208 per Deane J, with whom Gibbs CJ, Mason, Wilson and Dawson JJ agreed

¹⁶² [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 443; 437; 196; 262

*Alphapharm of a civil wrong of public importance, in the redressing of which Syntex had a real and direct interest.”*¹⁶³

194. In reaching that conclusion, Gummow J examined the various provisions of the FOI Act in which reference was made to “*confidence*” or “*confidential*”. They included ss 33(1)(b) and 33A(1)(b) where a document is exempt from disclosure on the ground that disclosure would divulge any information or matter “*communicated in confidence*”. Exemption was also provided in s 37(1)(b) where disclosure would divulge the existence or identity of a “*confidential source of information*” in certain circumstances. When s 45 used the term “*breach of confidence*” the suggestion is that it is meant to import more than the disclosure of information or matter communicated in confidence. The term “*breach of confidence*” is well known to law and is just one of the technical legal expressions used in the FOI Act. Others included “*legal professional privilege*” in s 42, “*trade secrets*” in s 43(1)(a) and “*contempt of court*” in s 46.
195. With effect from 25 October 1991, s 45(1) was “... *amended by omitting from subsection (1) ‘constitute a’ and substituting ‘found an action, by a person other than the Commonwealth, for’.*” The Explanatory Memorandum explained that the amendment overcame decisions of the Tribunal that had expanded the exemption to protect some confidences that the general law does not protect, such as information about a crime or a fraud. The amendment made clear that a document would only be exempt from disclosure if disclosure would found an action, other than the Commonwealth, for a breach of confidence. I have set this out in greater detail at [291]-[293] of Attachment B.

B. Section 33(1)(d) of the Archives Act

196. The judgment of the majority in *Corrs Pavey* was given in the context of interpreting s 45 of the FOI Act. I acknowledge that s 45 and s 33(1)(d) were enacted in the same terms but also acknowledge that s 33(1)(d) has not been amended as has s 45. It could be thought that the fact that s 33(1)(d) has not been amended may indicate acceptance of the majority’s interpretation of s 45 of the FOI Act. Equally, it may not be so for the Minister responsible for one is not responsible for the other. The response of the Attorney-General to amend the FOI Act might not have been thought by the Minister for Administrative Services, who was then administering the Archives Act, to be the appropriate or necessary response.¹⁶⁴ These matters can only be speculated upon.
197. Given their similarities and common history, it might be thought that the principles arising from cases such as *Lennon v Gibson & Howes Ltd*¹⁶⁵ (*Lennon*) and *Harrison v Melhem*¹⁶⁶

¹⁶³ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 7 AAR 187; 13 ALD 254 at 458; 452; 211; 276

¹⁶⁴ *Administrative Arrangements Order* made on 24 July 1987

would be relevant. Those principles are, as expressed by Lord Shaw delivering the judgment of the Privy Council on appeal from the High Court in *Lennon*:

*“... In the absence of any context indicating a contrary intention, it may be presumed that the Legislature intended to attach the same meaning to the same words when used in a subsequent Statute in a similar connection.”*¹⁶⁷

In more modern times, Mason P described the principles in *Harrison v Melhem*:¹⁶⁸

*“... There is a principle of statutory interpretation supporting a presumption that a legislature intends to attach the same meaning to the same words when used in a subsequent statute in a similar connection ...”*¹⁶⁹

198. There are differences, however, between the Archives Act and the FOI Act. The FOI Act is concerned with giving the Australian community access to information held by the Government of the Commonwealth by requiring agencies to publish information and by providing for a right of access to documents.¹⁷⁰ Those documents are documents in the possession of an agency or official documents of a Minister, other than exempt documents.¹⁷¹ An “*official document of a Minister*” is one that meets various criteria specified in s 4(1) of the FOI Act but that is in the possession of the Minister concerned or to which he or she is entitled to have possession but is not a document of an agency. The Archives Act is concerned with the preservation of the Commonwealth’s archival resources, their preservation and the oversight of Commonwealth record-keeping.¹⁷² It is also concerned with the transfer of those archival resources to the custody of Archives¹⁷³ and with making the Commonwealth’s archival resources publicly available in the open access period.¹⁷⁴ The open access period starts 20 or 30 years or so after the creation of the relevant document depending on the date on which it was created.¹⁷⁵
199. Therefore, the Archives Act and the FOI Act are dealing with documents in different timeframes. That difference finds practical expression in s 33(2) that I have set out at [211] below. It provides that, for a record to be an exempt record, not only must it be of such a nature that it would be privileged from production in legal proceedings but that its disclosure would be contrary to the public interest. Section 42 of the FOI Act has been amended over

¹⁶⁵ (1919) 26 CLR 285

¹⁶⁶ [2008] NSWCA 67; 72 NSWLR 380; 26 ACLC 484; at [131]; Spiegelman CJ, Mason P, Beazley, Giles and Basten JJA

¹⁶⁷ (1919) 26 CLR 285 at 287

¹⁶⁸ [2008] NSWCA 67; 72 NSWLR 380; Spiegelman CJ, Mason P, Beazley, Giles and Basten JJA

¹⁶⁹ [2008] NSWCA 67; 72 NSWLR 380 at [131]; 393-394. See also *Statutory Interpretation in Australia*; DC Pearce, 9th edition, Butterworths, Australia, 2019 at [3.42]-[3.43]

¹⁷⁰ FOI Act; s 3(1)

¹⁷¹ FOI Act; s 11

¹⁷² Archives Act; s 2A

¹⁷³ Archives Act; Part V, Division 2

¹⁷⁴ Archives Act; s 2A(ii)

¹⁷⁵ Archives Act; s 3(7)

the years but it has never made reference to any requirement that its disclosure be contrary to the public interest.

200. Given the different contexts in which they are intended to operate, it seems to me that the principles in *Lennon* and *Harrison v Melham* are not applicable. Instead, I should look to the principles of statutory construction without regard to the interpretation given to the very same expression – breach of confidence – in another statute. In doing so, I am having regard to the differences between interpreting, or understanding, the common law and interpreting a statute. This was considered by Gummow J in *Brennan v Comcare*:¹⁷⁶

“ *If Ogden^[177] has any significance for this appeal, it is the statement of their Lordships ([1970] AC at 127):*

It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must be beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.

Those remarks apply a fortiori where what is involved is the translation of remarks construing one statute to the construction of another. They also point to a significant difference in the tasks of the courts in applying the common law and in construing statutes.

The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.

The distinction is usefully expressed in the following passage from Judge Posner's work The Problems of Jurisprudence, 1990, page 248:

Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning of negligence if we put it in different words from those used by Learned Hand, or William Prosser, or some other authoritative expositor of the concept.

Statutory law differs in that the statutory text - the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law decision making - is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute - that is, interpret the statute. (There is a sense in which common law judges 'interpret' common law, but it is the sense in which 'interpretation' means 'understanding'.)”¹⁷⁸

¹⁷⁶ [1994] FCA 1147; (1994) 50 FCR 555; 122 ALR 615; 19 AAR 542; Burchett, Ryan and Gummow JJ

¹⁷⁷ *Ogden Industries Pty Ltd v Lucas* [1970] AC 113; [1969] 1 All ER 121 at 127; 126 per Lord Upjohn delivering the advice of the Privy Council

¹⁷⁸ [1994] FCA 1147; (1994) 50 FCR 555; 122 ALR 615; 19 AAR 542 at [61]-[64]; 572-573; 633-634; 559-560

201. The relevance of the reference to the common law and the difference in the process of reasoning is illustrated by a passage from the judgment of Windeyer J in *Damjanovic & Sons Pty Ltd v The Commonwealth*¹⁷⁹ (*Damjanovic*):

“... Analogy – not in the strict mathematical sense, but in the sense of resemblance of facts – has long had a great place in our system of law. It is at the base of the method of precedent in the common law. ... [R]easoning by analogy is a rather different process in the development of the common law from its use in the interpretation and application of a statute or of the Constitution. Sir Owen Dixon, in an extra-judicial address he delivered in 1933 (reprinted in Jeston Pilate (1965), p. 13), said of the common law that

‘it has undergone a continuous growth and expansion accomplished by continual deduction and induction. By deduction, a new application is given to an existing principle; many single instances having been thus produced, in course of time a new or developed principle is discerned in them and expounded. By this process of imperfect induction, the secondary principle is established as part of the doctrine of the common law, and plays its part in turn in the production of still more doctrine’.

*This, I would respectfully say, is a wholly apt description of the processes of the common law. It points I think the contrast with expositions of the effect of statutes and codes. The process is then one of deduction and subsumption, rather than of imperfect induction. The words of the enactment provide the major premise. The result is not, or ought not to be, the establishment of any secondary principle embodied in new words, but at most the provision of an illustration of the effect in a new setting of the original principle expressed in the original words.”*¹⁸⁰

202. Applying these principles in light of the different objects of the Archives Act and the FOI Act, it seems to me that the better course is to interpret the words of s 33(1)(d) of the Archives Act without reference to the particular interpretation of s 45 adopted by either the majority or Gummow J in the Full Court. At the same time, it must be recognised that, if the words “*breach of confidence*” are used in the way in which they are understood in the general law, the principles set out by Gummow J as to when such a breach occurs have been adopted as an accurate statement of the law.¹⁸¹
203. I begin with the general proposition that ascertaining what the relevant law is requires an analysis of the express terms of the relevant legislation but also a consideration of the context, general purpose and policy underlying those terms and an understanding that they must be construed on the basis that they are intended to give effect to harmonious goals. In *Project Blue Sky Inc v Australian Broadcasting Authority*,¹⁸² for example, McHugh, Gummow, Kirby and Hayne JJ said:

¹⁷⁹ [1968] HCA 42; (1968) 117 CLR 390; Barwick CJ, McTiernan, Kitto, Taylor, Menzies and Windeyer JJ

¹⁸⁰ [1968] HCA 42; (1968) 117 CLR 390 at 408-409

¹⁸¹ See, for example, *Crown Resorts Limited v Zantran Pty Limited* [2020] FCAFC 1; Allsop CJ, White and Lee JJ at [29]; *Commission of Taxation v Donoghue* [2015] FCAFC 183 at [65] per Kenny and Perram JJ with whom Davies J agreed in a separate judgment

¹⁸² [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490; McHugh, Gummow, Kirby and Hayne JJ; Brennan CJ dissenting

“ The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute ... The meaning of the provision must be determined ‘by reference to the language of the instrument as a whole’ ... In *Commissioner for Railways (NSW) v Agalianos* ..., Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed ...

*A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals ...*¹⁸³

204. The language chosen by Parliament and the purpose and policy it sets out to achieve are both to be considered in the task of interpreting a statute. The words cannot be ignored in favour of the purpose and policy Parliament intended to implement. The purpose and policy cannot be ignored in favour of a literal or grammatical construction of the words Parliament has chosen and particularly so when a literal or grammatical construction leads to an outcome that does not accord with Parliament’s purpose or policy.
205. I will start by identifying all of the sections in which the word “*confidence*” or a related word “*confidential*” is used other than s 33(1)(d). With emphasis added, they are:

Section	Text
33(1)(b)(i)	“For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds: (a) ... (b) <i>information or matter:</i> (i) <i>that was <u>communicated in confidence</u> by, or on behalf of, a foreign government, an authority of a foreign government or an international organization (the foreign entity) to the Government of the Commonwealth, to an authority of the Commonwealth or to a person who received the communication on behalf of the Commonwealth (the Commonwealth entity);</i> (ii) <i>which the foreign entity advises the Commonwealth entity is still <u>confidential</u>; and</i> (iii) <i>the confidentiality of which it would be reasonable to maintain.”</i>
50A(1) and (2)(b) with reference to claim that record contains information or matter of a kind referred to, in this case, s 33(1)(b)	“(1) This section applies in any proceedings before the Tribunal under this Act in relation to a record that is claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)... (b). (2) Before determining that the record is not an exempt record, the Tribunal must request the Inspector-General of Intelligence and Security to appear personally and give evidence on: (a) ... (b) <i>whether it would be reasonable to maintain the <u>confidentiality of information or matter</u> to which both of the following apply by not making the record available for public access:</i> (i) <i>the information or matter was <u>communicated in confidence</u> by, or on behalf of, a foreign government or an international organisation (the foreign entity) to the Government of the Commonwealth or to a person who received the communication</i>

¹⁸³ [1998] HCA 28; (1998) 194 CLR 355; 72 ALJR 841; 153 ALR 490 at [69]- [70]; 381-382; 509

Section	Text
	<i>on behalf of the Commonwealth (the Commonwealth entity);</i> (ii) <i>the foreign entity advises the Commonwealth entity that the information or matter is still confidential."</i>
50A(3) with reference to claim that record contains information or matter of a kind referred to, in this case, s 33(1)(b)	<i>"Before determining that part of, or a copy of part of, the record is to be made available for public access under section 38, the Tribunal must request the Inspector-General of Intelligence and Security to appear personally and give evidence on:</i> (a) ... (b) <i>whether it would be reasonable to maintain the <u>confidentiality of information or matter</u> to which both of the following apply by not making the record available for public access:</i> (i) <i>the information or matter was <u>communicated in confidence</u> by, or on behalf of, a foreign government or an international organisation (the foreign entity) to the Government of the Commonwealth or to a person who received the communication on behalf of the Commonwealth (the Commonwealth entity);</i> (ii) <i>the foreign entity advises the Commonwealth entity that the information or matter is <u>still confidential</u>."</i>
33(1)(e)(ii)	<i>"For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds:</i> (e) <i>information or matter the disclosure of which under this Act would, or could reasonably be expected to:</i> (i) ... (ii) <i>disclose, or enable a person to ascertain, the existence or identity of a <u>confidential source of information</u> in relation to the enforcement or administration of the law; ..."</i>
57	<i>"(1) Where, in the ordinary course of the administration of this Act, access is given to a record as being a record required by this Part to be made available for public access:</i> (a) <i>no action for ... breach of confidence ... lies, by reason of the authorizing or giving of the access, against the Commonwealth or any person concerned in the authorizing or giving of the access;</i> (b) <i>no <u>action for ... breach of confidence</u> in respect of any publication involved in, or resulting from, the giving of the access lies against the author of the record or any other person by reason of that author or other person having supplied the record to a Commonwealth institution; and</i> (c) <i>a person concerned in the authorizing or giving of the access does not commit a criminal offence by reason only of the authorizing or giving of the access.</i> (2) <i>The giving of access to a record (including an exempt record) under this Act shall not be taken, for the purposes of the <u>law relating to ... breach of confidence</u>, to constitute an authorization or approval of the publication of the record or of its contents by the person to whom access was given."</i>

206. When regard is had to these provisions and to s 33(1)(d), it is clear that Parliament distinguished between various concepts of confidentiality. In the case of s 33(1)(b), the exemption will not come into consideration unless information or matter has been "*communicated in confidence*" by a foreign entity. That could apply to any information or matter communicated in confidence without necessarily being confidential. Section

33(1)(b)(ii), however, makes it clear that the foreign entity must still advise that the information or matter is “*still confidential*”. A final criterion that must be met before s 33(1)(b) is satisfied is that it would be reasonable to maintain the “*confidentiality*”. If all of the criteria specified in s 33(1)(b) are met, it would follow that the information or matter is exempt from public access under s 31 of the Archives Act. There is no requirement that the information that has been communicated in confidence is itself capable of being confidential but that does not mean that it cannot have been communicated in confidence or that it remains confidential given the context that it must have been communicated by a foreign entity to a Commonwealth agency. Furthermore, there is no requirement in s 33(1)(b) that the foreign entity is a “*confidential source of information*” whose identity would be revealed as is the case in s 33(1)(e)(ii).

207. It is against that background that Parliament then exempts information or matter the disclosure of which under the Archives Act “*would constitute a breach of confidence*” in s 33(1)(d). That is language quite different from that used in s 33(1)(b) and the related provisions of s 50A as well as from s 33(1)(e). It is not so different from that used in s 57 where the reference is to an “*action ... for a breach of confidence*”. The reference to an “*action for breach of confidence*” does not change the meaning of the expression “*breach of confidence*”. In s 33(1)(d), the question that must be asked is whether disclosure under the Archives Act “*would constitute a breach of confidence*”. There is no thought of whether a person might wish to bring an action for breach of confidence. Section 33(1)(d) requires consideration of the step before thought is given to any action i.e. would disclosure constitute a breach of confidence. Section 57 is concerned with that next step i.e. protecting the Commonwealth and those who authorise disclosure under the Archives Act from any action that might be brought against it or them for authorising the giving of that access for breach of confidence as well as defamation and infringement of copyright.¹⁸⁴ As is apparent from the authorities referred to in *Corrs Pavey* an action for breach of confidence was known to the law well before the enactment of the Archives Act.
208. This interpretation is consistent with the objects of the Archives Act in so far as making available to the public the archival resources of the Commonwealth. It requires that each of the four, and possibly five, criteria identified by Gummow J in *Corrs Pavey* for breach of confidence be fulfilled before exemption may be claimed for information or matter in a record. Disclosure would not constitute a breach of confidence if, for example, disclosure were properly characterised as a breach of a contractual term to keep certain information confidential. The four criteria with a possible fifth are:

- (1) identify with specificity the information in question:

¹⁸⁴ Archives Act; s 57(1)(a)

- (2) the information must have the necessary quality of confidentiality and not, for example, be common or public knowledge;
- (3) the information must have been received by the recipient of it in circumstances imparting an obligation of confidence;
- (4) there must be an actual or threatened misuse of the information; and
- (5) the person would suffer a detriment suffered as a result of disclosure of the information.

C. Application of section 33(1)(d) in this case

209. The exemption in s 33(1)(d) is claimed for the documents at A1838 1733/3/2 Part 12; Folios 49-65, 274-291, 294-313. Understandably in view of the claim of parliamentary privilege, the transcript is not included in the records for which exemption has been claimed. While I accept that they are the transcript of the oral evidence taken before the Joint Committee, as described in row 6 of the attached Table, and I might be able to go so far as to say that the evidence was received in confidence, I cannot assess whether all of the information contained in that transcript has the necessary quality of confidentiality and is not, for example, be common or public knowledge. As with any other claim for exemption made in this case, I must look at the document and make that assessment. As I cannot do that, I have decided that I should simply note that I have not been able to examine the documents at A1838 1733/3/2 Part 12; Folios 49-65, 274-291, 294-313 and so have not been able to consider the exemption and have not considered the exemption. I think that is preferable to any conclusion based on s 51 of the Archives Act to the effect that Archives has not satisfied its onus of establishing that its decision was justified. In view of the certificate issued by the Clerk of the House of Representatives and by the Clerk of the Senate on 23 April 2018 under s 17 of the PP Act, Archives could not satisfy its burden regarding exemptions claimed under s 33(1)(d).

EXEMPTION: section 33(2) – legal professional privilege

Section 33(2)

210. Section 33(2) provides:

For the purposes of this Act, a Commonwealth record is an exempt record if it is of such a nature that:

- (a) *it would be privileged from production in legal proceedings on the ground of legal professional privilege; and*
- (b) *disclosure of the record would be contrary to the public interest.”*

The submissions

211. Ms Costello and Dr McBeth framed their submissions in terms of s 118 of the *Evidence Act 1995* (Evidence Act). Section 118 was held by the High Court in *Esso Australia Resources v Commissioner of Taxation*.¹⁸⁵ They further submitted that, in order to satisfy s 33(2)(b), Archives must identify a public interest, which is over and above the public interest that supports the claim for legal professional privilege. Ms Stern disagreed submitting that the Tribunal must take account of all relevant public interests and not simply those underpinning legal professional privilege. She gave as an example those circumstances in which the first limb was satisfied but that disclosure of the copy in the custody of Archives might not be contrary to the public interest because another copy was freely available elsewhere.
212. Ms Stern drew particular attention to the uncertainty that surrounds the issue of the independence or otherwise of in-house legal advisers in the public sector. I will come to the authorities to which she referred but they were the basis of her submission that there is no separate requirement that the in-house lawyer must be “*Independent*”. It is enough that the lawyer is consulted as a lawyer and the legal advice was provided on the necessary basis. In any event, in this case Ms Stern submitted, the identity of the branch that gave the advice and the subject matter of the advice establishes that the advice was legal advice, that it was confidential and that it had the necessary quality of independence.

The evidence

213. The folios in issue are:
- (1) File A1838 1733/3/2 Part 7; Folios 5-32; and
 - (2) File A1838 1733/3/2 Part 6; Folios 183-210.
214. Dr French addressed s 33(2) them in his second affidavit affirmed on 30 April 2018 saying that the folios comprised two copies of legal advice provided by Mr Gervaise Coles, Assistant Legal Adviser and Head, United Nations Legal Section, DFAT, to the Australian Government. They are dated 22 January 1979 and provided advice relating to the determination of maritime boundaries under international law. The advice was given, Dr French said, to assist the Australian Government before negotiations. He was not aware that it had been circulated beyond DFAT.
215. Mr Coles, Dr French said, had been employed in DFAT or under its previous names of the Department of External Affairs and Department of Foreign Affairs since 7 January 1963 and until 3 February 1988. He graduated from the University of Adelaide with a Bachelor of

¹⁸⁵ [1999] HCA 67; (1999) 201 CLR 49; 168 ALR 123; 43 ATR 506; (1999) 2000 ATC 4,042; Gleeson CJ, Gaudron, Gummow and Callinan JJ; McHugh and Kirby JJ dissenting

Laws in 1960 and was first an Associate to Wright J of the Commonwealth Court of Conciliation and Arbitration and then an Articled Clerk at Messrs Kelly, O'Loughlin and White, Solicitors, in Adelaide. During his employment by DFAT, Mr Coles had served at the United Nations Refugee Agency. His service included a period as Senior Legal Adviser to the United Nations High Commissioner for Refugees. At the time he wrote the advice, Mr Coles was employed alongside others with legal qualifications in the Legal and Consular Division of DFAT to provide advice to the Department and the Australian Government on international legal issues.

216. In cross-examination, Dr French said that a very high proportion of the work of the United Nations Legal Section within DFAT would have been the provision of international legal advice to government. He was not an employee of DFAT in the 1970s but he has spoken with colleagues who were employees and, based on what they had told him and his knowledge of how DFAT functions “... *certainly a core and central function of that section would or was the provision of international legal advice.*”¹⁸⁶

Consideration

217. The wording of s 33(2) makes it clear that there are two criteria that must be satisfied before a record is exempt. The first is that the record would be privileged from production in legal proceedings on the ground of legal professional privilege. The second is that disclosure of the record would be contrary to the public interest. I have also considered the impact of the *Evidence Act 1995* (Evidence Act). In *Re Philip Morris Pty Ltd and Prime Minister*¹⁸⁷ (*Philip Morris*), I considered whether the Evidence Act sheds any light on the way in which the concept of legal professional privilege should be understood in s 42 of the FOI Act. I drew a distinction between the reference in s 42 to documents’ being privileged from “*production*” and the Evidence Act when it deals with circumstances in which they may not be “*adduced in evidence*”. I concluded that there was a distinction between the two situations and that the question under s 42 of the FOI Act should be considered under the common law.¹⁸⁸ There is a recognised difference between the two processes¹⁸⁹ and it has also been recognised that common law governs production of documents even if, in a particular Australian jurisdiction, the Evidence Act governs their being adduced in evidence.¹⁹⁰ There is no reason to reach a different conclusion in relation to the interpretation of s 33(2) of the Archives Act.

¹⁸⁶ Transcript at 69

¹⁸⁷ [2011] AATA 556; (2011) 122 ALD 619

¹⁸⁸ [2011] AATA 556; (2011) 122 ALD 619 at [156]; 672

¹⁸⁹ *R v Joyce* [2002] NTSC 70; (2002) 173 FLR 322 at [24]; 331

¹⁹⁰ *Dye v Commonwealth Securities* [2010] FCA 950 at [5] per Katzman J referring to *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49; 168 ALR 123; 43 ATR 506; 2000 ATC 4,042 at [16]; 56; 128; 511 per Gleeson CJ, Gaudron and Gummow JJ and [64]; 73; 140; 522 per McHugh J.

Legal professional privilege

A.1 What is legal professional privilege?

218. Legal professional privilege is a concept known to the common law and its essence was explained in the following passage from *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*¹⁹¹ (*Daniels Corporation*):

“ It is now well settled that legal professional privilege is a rule of substantive law ... which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.”¹⁹²

219. Reference is made to the “dominant purpose” of the client and the lawyer and Kenny J emphasised in *Commissioner of Taxation v Pratt Holdings Pty Ltd*¹⁹³ that:

“ The dominant purpose is not the same as the ‘primary’ or the ‘substantial’ purpose: see *Grant v Downs* at CLR 678; ALR 580-1 per Barwick CJ. The ‘dominant’ purpose may be described as the ruling, prevailing, paramount or most influential purpose The ‘dominant purpose’ brings within the scope of the privilege a document brought into existence for the purpose of a client being provided with professional legal services notwithstanding that some ancillary or subsidiary use of the document was contemplated at the time ...”¹⁹⁴

220. The dominant purpose is that of giving “legal advice” or of giving or obtaining legal services. As Young J said in *Australian Wheat Board v Cole (No 5)*:¹⁹⁵

“The concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context: but it does not extend to advice that is purely commercial or of a public relations character ...”¹⁹⁶

221. How that dominant purpose is to be ascertained was considered by Young J in the earlier case of *AWB Limited v Honourable Terence Rhoderic Hudson Cole*:¹⁹⁷

“ The authorities accept that an appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence: see *Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 136 FCR 357* at [35] per Finn J. I would add that where the document is immediately communicated by its author to several other persons, including the author’s legal adviser, by a circular email (which is the case

¹⁹¹ [2002] HCA 49; (2002) 213 CLR 543; 192 ALR 561; 77 ALJR 40; Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ

¹⁹² [2002] HCA 49; (2002) 213 CLR 543; 192 ALR 561; 77 ALJR 40 at [9]; 552; 564; 42-43 per Gleeson CJ, Gaudron, Gummow and Hayne JJ (citation omitted)

¹⁹³ [2005] FCA 1247; (2005) 225 ALR 266; 2005 ATC 4903; 60 ATR 466

¹⁹⁴ [2005] FCA 1247; (2005) 225 ALR 266; 2005 ATC 4903; 60 ATR 466 at [30]; 279; 4915-4916; 478-479 per Kenny J

¹⁹⁵ [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651

¹⁹⁶ [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651 at [44]; 45; 663 (citations omitted) per Young J

¹⁹⁷ [2006] FCA 571; (2006) 152 FCR 382; 232 ALR 743; 91 ALD 46

here), it is also important to ask what was the dominant purpose of that email communication.¹⁹⁸

222. The dominant purpose will ordinarily be that of the author of the document but it may not be. When, for example, a solicitor commissions an expert report, it will be the solicitor's purpose in commissioning the report that is the relevant purpose and not the expert's in writing it.¹⁹⁹ If a solicitor directs that a document be copied, it will be his or her purpose in so directing that is relevant in determining whether it was for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. The purpose for which the document originally came into existence is not relevant and it may be that the original document is not subject to legal professional privilege but the copy is.
223. Although not addressed in these cases, I would also note that, while the concept of legal advice is wide as Young J observed, it is not without boundaries. It extends to professional legal advice as to what a party should prudently or sensibly do in the relevant legal context²⁰⁰ but it cannot extend to, for example, legal research prepared for a judicial or quasi-judicial officer for the purposes of being incorporated in a reasons for judgment or decision. Their position is to be contrasted with the task of a Minister or officer of a Department who must come to a decision. The Minister or officer can seek legal advice as to what the law is and how it may apply in the circumstances of an issue they must decide. The law is but a part of the issues confronting the decision-maker. The task of a judicial or quasi-judicial member is also to come to a decision. In coming to that decision, however, an integral part of the member's task is to determine, in the case of a judicial member, and to ascertain, in the case of the non-judicial member, the law for the purposes of resolving the dispute. It is difficult to see how legal professional privilege could apply to a research paper or advice obtained by the judicial or quasi-judicial member to assist him or her to come to a decision on an issue which is an integral part of his or her statutory role to fulfil.

A.2 The rationale underpinning legal professional privilege and section 33(2)

224. The rationale for the privilege appears in the judgment of Advocate General Sir Gordon Slynn in *AM & S Europe Ltd v Commission of the European Communities*:²⁰¹

¹⁹⁸ [2006] FCA 571; (2006) 152 FCR 382; 232 ALR 743; 91 ALD 46 at [107]; 411; 767-768; 71

¹⁹⁹ *Hartogen Energy (in liq) v Australian Gas Light Co* [1992] FCA 322; (1992) 36 FCR 557; 109 ALR 177 at [39]-[40]; 568-569; 187 per Gummow J

²⁰⁰ ²⁰⁰ "... In General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84 at [77]-[78], McColl JA quoted, with apparent approval, the observation of Taylor LJ in *Balabel v Air India* [1988] Ch 317 at 330, that 'legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context'. ...": *Sharjade Pty Ltd v RAAF Landings* [2008] NSWCA 151; Rein AJ

²⁰¹ [1983] QB 878; 1 All ER 705

*“Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if the proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.”*²⁰²

225. There are, of course, competing public interests that would favour disclosure but the balance has been found to favour non-disclosure as the Full Court of the Federal Court explained in *Esso Australia Resources Ltd v Sir Daryl Dawson*:²⁰³

*“ Legal professional privilege has long been the subject of controversy. It operates to exclude evidence not because of its unreliability but to advance other objectives. Jeremy Bentham regarded the exclusion of probative evidence as ‘one of the most pernicious and most irrational notions that ever found its way into the human mind’: J S Mill (ed), Rationale of Judicial Evidence (1827), pp 193-194. But the judgment of the common law has been that while the central objective of the legal system is the search for truth, it is more important that some communications be kept secret. In the case of legal professional privilege, secrecy is defended on the basis that it will promote the administration of justice. ‘The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence’: Swidler v United States (1998) 141 L ed (2d) 379 at 389 per O’Connor J (in dissent).”*²⁰⁴

226. In the context of the exemption prescribed in s 42 of the FOI Act, the Explanatory Memorandum to *Freedom of Information Bill 1981* states that the exemption:

“... will prevent freedom of information legislation’s being used to compel the Commonwealth to disclose its hand in pending or likely litigation or to circumvent the ordinary rules of discovery applied by the Courts.”

A.3 Identifying the relationship that may give rise to legal professional privilege

A.3.1 General principles

227. The authorities establish that legal advice must be given by a legal adviser in the context of a professional relationship which secures the advice an independent character.

- (1) *“Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client: Waterford v Commonwealth (1987) 163 CLR 54 at 96 per Dawson J; see also Deane J at 79-82. ...”*²⁰⁵

²⁰² [1983] QB 878; 1 All ER 705 at 913; 732-733

²⁰³ [1999] FCA 363; (1999) 87 FCR 588; 162 ALR 79; Black CJ, Sundberg and Finkelstein JJ

²⁰⁴ [1999] FCA 363; (1999) 87 FCR 588; 162 ALR 79 at [26]; 596; 87

²⁰⁵ *Australian Wheat Board v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651 at [44]; 46; 664 per Young J. Justice Young then referred to other authorities querying whether they required that the legal adviser be admitted to practice or must hold a current practising certificate. The issues in that case did not turn

- (2) “ The authorities recognise that in order to attract privilege the legal adviser should have an appropriate degree of independence so as to ensure that the protection of legal professional privilege is not conferred too widely. Commercial reality requires recognition by the courts of the fact that employed legal advisers not practising on their own account may often be involved to some extent in giving advice of a commercial nature related to the giving of legal advice. Such involvement does not necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and involves a weighing of the relative importance of the identified purposes.

It is well settled that simply to label a document as being ‘prepared for legal advice’ or as ‘privileged’ or as being ‘without prejudice’ is of itself insufficient to justify the privilege. The Court will look to the substance of the matter, having regard to the content, context and evidence as well as the form of the document.”²⁰⁶

- (3) “ The content of the requirement that a legal adviser be independent is understandably less stringent than the requirement that, for example, a judge be independent. However, it is informed by the same notions of absence of fear or favour. The concepts of independence and objective impartiality are closely linked ... An independent legal adviser is one who can bring a disinterested mind to bear on the subject-matter of the legal advice. In the words of Brennan J in *Waterhouse* [sic], what is required is a legal adviser who is able to be ‘professionally detached’ in giving the advice.”²⁰⁷

- (4) Admission to practice and a practising certificate may be relevant in determining whether this is so but neither may be determinative:

“... It seems to us that, while the possession of a certificate is an important factor that would go to establishing the statutory requirement of a confidential communication for the dominant purpose of providing legal advice, to hold that it is conclusive is incorrect. A legal adviser in government or commercial practice may hold a practising certificate, and yet in some aspects of his or her employment, that person may act in a manner inconsistent with the assertion of legal professional privilege. It would not be an answer to the complaint about the conduct of the DLO [Defence Legal Officer] who is said to have handed over the files of their advices to the respondent to the superior officer to say that their conduct met professional standards merely because they held a practising certificate. Equally, a legal adviser may act in an entirely professional manner, generating a claim to client legal privilege, in the absence of a practising certificate.”²⁰⁸

A.3.2 In-house lawyers in government agencies

228. As a general proposition, legal professional privilege may be claimed in legal proceedings in relation to advice sought from and given by a lawyer employed by the government but only if the professional relationship between the lawyer and the government agency

on whether the Australian Wheat Board's legal advisers were admitted to practice or not or on their independence or otherwise and his Honour did not address the matter further. I have analysed each of the cases to which he referred in *Re Philip Morris and Prime Minister* [2011] AATA 556; (2011) 122 ALD 619 at [83]-[100]; 647-654

²⁰⁶ *Seven Network Ltd v News Ltd* [2005] FCA 142 at [5]-[6] per Tamberlin J

²⁰⁷ *Rich v Harrington* [2007] FCA 1987; (2007) 245 ALR 106 at [40]; 115 (citations omitted) per Branson J

²⁰⁸ *Commonwealth v Vance* [2005] ACTCA 35; (2005) 158 ACTR 47; 224 FLR 243 at [31]; 54-55; 252

seeking advice has the necessary quality of independence. In *Waterford v The Commonwealth of Australia*²⁰⁹ (*Waterford*), the High Court considered the relationship of client and legal adviser in the context of correspondence passing between the Attorney-General and the Treasurer and between officers of the then Deputy Crown Solicitors' office and officers of the Treasury. Mason and Wilson JJ held that:

*"... there is no reason to place legal officers in government employment outside the bounds of legal professional privilege. The proper functioning of the legal system is facilitated by freedom of consultation between the client and the legal adviser. ... To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. Whether in any particular case the relationship is such as to give rise to the privilege will be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment."*²¹⁰

229. Brennan J was more circumscribed in his views and accepted only that officers of the Attorney-General's Department or of the Commonwealth Crown Solicitor's Office did not lack the independence that is essential if legal professional privilege is to attach to documents brought into existence for the purpose of their giving advice or for the purpose of obtaining advice from them. They had given advice to officers of The Treasury. The evidence to which he referred in reaching that conclusion was that:

*"The Commonwealth, State and Territorial statutes under which officers are employed in the offices of Crown Solicitors, the Australian Government Solicitor and in the Departments of the respective Attorneys-General give them a certain security of tenure and those statutes would be construed, in the absence of contrary express provisions, as leaving these officers completely professionally independent. The protection of the respective Attorneys-General, as the first Law Officers of the Crown, should extend to all of these officers, so that none of them will be affected in the performance of their professional duty by any sense of loyalty or duty to, or hope of reward from, the government of the day. Counsel for the appellant expressly declined to argue that the Department of the Treasury's advisers in this case lacked the independence which the safeguards to which Mason J. and I referred are intended to secure. I would therefore reject the submission that the officers of the Attorney-General's Department or the Commonwealth Crown Solicitor's Office lack the independence which is essential if legal professional privilege is to attach to documents brought into existence for the purpose of their giving advice or for the purpose of obtaining advice from them. ..."*²¹¹

230. Legal advice given by the Legal and Advice Branch of the Office of Workplace Services (OWS) arose for consideration in the case of *Rilstone v BP Australia Pty Ltd*²¹² (*Rilstone*). Justice Besanko found that the OWS was an executive agency within the responsibility of the Minister for Employment and Workplace Relations. The documents over which legal

²⁰⁹ [1987] HCA 25; (1987) 163 CLR 54; 71 ALR 673; 61 ALJR 350; 12 ALD 741; Mason, Wilson and Brennan JJ; Deane and Dawson JJ dissenting

²¹⁰ [1987] HCA 25; (1987) 163 CLR 54; 71 ALR 673; 61 ALJR 350 at 62; 677; 352

²¹¹ [1987] HCA 25; (1987) 163 CLR 54; 71 ALR 673; 61 ALJR 350 at 72-73; 685; 356-357

²¹² [2007] FCA 1557

professional privilege was claimed had been created during the course of an investigation carried out by the OWS. They were created in the exercise of statutory investigatory powers under the *Workplace Relations Act 1996*.

231. Justice Besanko was not satisfied on the evidence that the documents were created for the dominant purpose of seeking legal advice from OWS's Legal and Advice Branch but he was satisfied on the evidence that it had the necessary degree of independence. His Honour referred to the evidence that the Legal and Advice Branch was the Workplace Ombudsman's central legal division providing nationwide legal advice to inspectors and senior management. It was responsible for engaging and instructing external legal providers such as the Australian Government Solicitor and other legal providers engaged by the Workplace Ombudsman. He concluded:

*"In this case the applicant might have put forward more detailed evidence as to how the Legal and Advice Branch operated and its role in the OWS organisation. However, in my opinion, this case has similarities with the facts in Waterford and ... the necessary degree of independence has been established or, put another way, it has been established that the Legal and Advice Branch was a legal adviser for the purposes of legal professional privilege."*²¹³

232. In *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No. 2)*²¹⁴ (*Telstra v MCITA*), Graham J came to the contrary conclusion in relation to advice given by lawyers who were employees of Telstra. He noted that:

*"No evidence whatsoever has been led by Telstra to establish the role which the various legal practitioners performed within Telstra. In particular, no evidence has been advanced to disclose the measure of independence of the legal practitioners in question and their ability to provide impartial legal advice, given the roles they have had to perform."*²¹⁵

and continued:

*"In my opinion an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied."*²¹⁶

233. Later that same year, Branson J considered the same question in *Rich v Harrington*²¹⁷ in relation to advice given by the OGC located in PricewaterhouseCoopers (PWC). Her Honour found that the person holding the position of General Counsel was a partner of PWC and, as did each of the solicitors in the OGC, held a current practising certificate.

²¹³ [2007] FCA 1557 at [26]

²¹⁴ [2007] FCA 1445

²¹⁵ [2007] FCA 1445 at [12]

²¹⁶ [2007] FCA 1445 at [35]

²¹⁷ [2007] FCA 1987; (2007) 245 ALR 106

That Office operated as a separate unit within PWC and legal advice was provided with the same level of objectivity as would be expected of external lawyers. It is located separately from PWC's business units, its documents and files are maintained separately and its offices are capable of being locked. The office provided legal advice and legal services to PWC on all issues that touched the firm or required legal advice including regulatory enquiries, litigation, contract reviews and transactions. When necessary and appropriate, it briefed external lawyers and counsel to support it in its role and to provide external legal advice and services.

234. The only comment made by Branson J on this evidence was that:

*"... It may be that as in-house lawyers, including corporate counsel, play an increasingly important role in advising and providing other legal services to their employers and firms, the common law has come to accept that the requisite independence can be ensured by measures of the kind adopted by OGC ..."*²¹⁸

235. Her Honour declined, however, to decide whether the measures were enough in that case because she had to decide that question in the context of the particular advice that was claimed to attract legal professional privilege. The advice was given in respect of allegations and claims given by one of PWC's partners, Ms Rich, against others in the firm. Branson J said:

"58 In reaching a decision as to whether the relationship between OGC and the respondents was such as to secure to OGC's advice concerning Ms Rich's allegations and claims an independent character, I am not required to speculate about how General Counsel, or other solicitors in OGC, in fact approached the giving of that advice (Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [7]). It may be that General Counsel and each solicitor in OGC was fully conscious of, and capable of avoiding, the insidious influences of factors such as loyalty to individual partners and to the firm, including its leadership, concern for the reputation of the firm and the reputations of individual partners in the firm and other like matters. The critical question is whether the relationship between OGC and the respondents with respect to Ms Rich's allegations was one of professional detachment.

59 To answer the above question it is necessary to give consideration to the nature of Ms Rich's allegations and the significance that they might have for General Counsel and the OGC generally. As mentioned above, they were made by one partner against other partners. It seems uncontroversial that they were of a kind capable of tarnishing the reputation of the firm of which the OGC is a part. They cast aspersions of a personal, rather than a purely professional kind, on the General Counsel's partners including those partners who comprised the leadership of her firm. The General Counsel and the Deputy General Counsel were themselves likely respondents in the litigation in prospect. Because of its likely subject matter, that litigation, should it eventuate, could reasonably be expected to attract a high level of media interest of a relatively sensational kind. For these reasons I conclude that

²¹⁸ [2007] FCA 1987; (2007) 245 ALR 106 at [56]; 119

Ms Rich's allegations were by reason of their content inherently likely to engage the personal loyalties and the duties and interests of all partners of PwC – and probably many employees of the firm as well.

60 *I therefore conclude that, having regard to the nature and significance of the allegations raised by Ms Rich in her letter of 2 July 2004, the relationship between OGC and the respondents was not such as to secure the advice of the OGC concerning Ms Rich's allegations the objectively independent character necessary to support the respondents' claim of client legal privilege. The OGC was not in a position to give professionally detached advice to the respondents concerning allegations of the character of those made by Ms Rich.*"²¹⁹

236. Branson J went on to say that once the necessary degree of independence has been established and:

*"... communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications In Kennedy v Wallace,^[220] Black CJ and Emmett J inclined to the view that in the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone will provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given. ..."*²²¹

237. The question arose again before Katzman J in *Dye v Commonwealth Securities [No 5]*²²² (*Dye*). Her Honour reviewed the cases of *Waterford* and *Rich v Harrington*, and expressed the view that:

*"With respect, her Honour might have overstated the content of the requirement that legal professional privilege will arise only where the advice has 'an independent character'. Her Honour applied the decision of the High Court in Waterford v Commonwealth ..., a case concerning legal officers employed by the Commonwealth providing legal advice to the Commonwealth. A close examination of the judgments in that case does not seem to bear her Honour out."*²²³

238. After reviewing the authorities, Katzman J said:

*"Thus, with the greatest respect, I doubt that the decision in Waterford requires anything more than that the legal adviser be professionally qualified and acting in a professional capacity. I note that in AWB v Cole (No 5) [2006] FCA 1234, 234 ALR 651 at 664 [44], to which her Honour did not refer, Young J considered that the question of independence involved no more than an inquiry into whether the lawyer was consulted in her or his professional legal capacity, although his Honour also pointed out that some cases have added a requirement that the lawyer who provided the advice must be admitted to practice."*²²⁴

²¹⁹ [2007] FCA 1987; (2007) 245 ALR 106 at [58]-[60]; 119-120

²²⁰ (2004) 142 FCR 185 per Black CJ and Emmett J

²²¹ *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651 at [44]; 45; 663

²²² [2010] FCA 950

²²³ [2010] FCA 950 at [15]

²²⁴ [2010] FCA 950 at [19]

Given the position taken by the parties, Katzman J concluded that she did not have to decide the issue.²²⁵

239. In more recent times, the issue has been considered in *Archer Capital 4A and Sage Group plc (No 2)*.²²⁶ Wigney J also considered *Waterford* and the views expressed by the Justices. I will set out only one passage in relation to that:

“Dawson J in Waterford, considered a submission that for communications between a lawyer and client to be privileged, the relevant legal adviser must be independent of the client. His Honour referred (at p 95) to an observation made by the European Court of Justice in AM & S Europe Ltd v Commission of the European Communities [1983] QB 878 which drew a distinction between independent and employed lawyers. Dawson J said, in relation to that distinction:

Whilst there is something to be said for the distinction drawn from that passage between independent and employed lawyers, it is not a statement of the position at common law and there is authority in this Court and elsewhere for the proposition that legal professional privilege may attach to communications passing between salaried legal adviser and his employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client. (Emphasis added)”²²⁷

240. His Honour referred also to other authorities including *Australian Hospital Care (Pindara) Pty Ltd v Duggan*,²²⁸ *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd*²²⁹ and *Seven Network Ltd v News Ltd*²³⁰ as well as *Dye*. He concluded:

“ I doubt that much turns on the apparent difference of opinion of Katzmann J in Dye and Branson J in Rich. Whilst Branson J considered that the requirement of independence was separate to the requirement that the communication meet the dominant purpose test, it is difficult to see how the two elements are not inextricably linked. A communication between a lawyer and his or her employer is unlikely to satisfy the dominant purpose test if the lawyer was not employed as a lawyer (that is, the relationship between the lawyer and the employer was not professional) or the lawyer was not consulted in his or her professional capacity as a lawyer (for example, if they were consulted to provide commercial advice, or provide an administrative service, or were consulted as a partner or officer of the firm or company, not as a lawyer). A communication between the lawyer and his or her employer in those circumstances would not be privileged because it would not meet the dominant purpose test, not because the lawyer was not independent. On the other hand, if the relationship between the employer and lawyer was professional (in the sense that he or she was employed as a lawyer) and they were consulted in that professional context to provide legal advice, the resulting communication is likely to satisfy the dominant purpose test. It is difficult to see any reason in principle why to attract privilege in those circumstances it would be necessary to also satisfy some element of independence on the part of the employed lawyer, for example, by

²²⁵ [2010] FCA 950 at [20]

²²⁶ [2013] FCA 1098; [2013] 306 ALR 384, [59]–[73]; 398–401

²²⁷ [2013] FCA 1098; [2013] 306 ALR 384, [64]; 399

²²⁸ [1999] VSC 131; Gillard

²²⁹ [2013] QSC 82; Boddice J

²³⁰ [2005] FCA 1551; (2005) 225 ALR 672; Graham J

proving that the lawyer was not subject to pressure or other interference arising from the employment relationship. Like Katzmann J, I doubt that Waterford establishes that there is a separate or distinct requirement to prove independence in the case of privilege claims involving in-house lawyers.

Were it necessary for me to decide, I would err on the side of concluding that there is no separate requirement of independence in the case of privilege claims where the relevant lawyer is an employed or in-house lawyer. The better view is that any requirement of independence on the part of an in-house lawyer is an aspect of the relationship between the lawyer and the employer (client) and the capacity in which the lawyer is consulted. Legal professional privilege will attach to a confidential communication between an employer and its employed solicitor if it is established that the communication arises as a result of the employer consulting the employed solicitor in a professional capacity in relation to a professional matter that arises from the relationship of lawyer and client. In my opinion it is preferable to approach the issue in this way, rather than relying on presumptions and evidentiary onuses of the sort referred to by Gillard J and Boddice J in, respectively, Australian Hospital Care and Aquila Coal.”²³¹

241. It seems to me that the weight of authority favours a more liberal approach in which regard must be had to the circumstances in which the particular legal advice was given and whether they are such that it attracts legal professional privilege. Relevant to that consideration will be such matters as the nature of the employment relationship between the employer and the employed in-house lawyer and the duties of the in-house lawyer for they are relevant to establishing that he or she acted in a professional capacity in relation to a professional matter arising from a relationship of lawyer and client.

A.4 Identifying documents that may be subject to legal professional privilege

242. Legal advice is not given in a vacuum but in a context of events or matters passed or contemplated. Information about those events or matters may need to be gathered by others and that information may include the views of other professionals on them. Legal professional privilege recognises these contextual realities and:

“... extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client’s legal adviser to enable him or her to advise ... The privilege extends to drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are themselves actually communicated to the lawyer ...”²³²

243. Three points arise from this statement:

- (1) The actual form of the communication or the recording of the legal advice is irrelevant.²³³

²³¹ [2013] FCA 1098; [2013] 306 ALR 384 at [72]-[73]; 401.

²³² *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651 at [44]; 46; 663-664 citations omitted

²³³ *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501; 141 ALR 545; 71 ALJR 327; 35 ATR 130 at 553; 584; 356; 167 per McHugh J

- (a) "... [L]egal professional privilege extends to any document prepared either by the client or the legal adviser from which the nature of the advice sought, or given, might be inferred ...".²³⁴
 - (b) "... [I]t must be kept firmly in mind that the privilege protects confidential communications, and not documents as such. As Dawson J said in *Propend* at 515, 'to say that a document is privileged is merely a shorthand way of saying that the communication constituted by the document is privileged' ...".²³⁵
 - (c) "... The question whether privileged communications will be disclosed by virtue of the disclosure of another document, such as a draft pleading, draft agreement or draft witness statement, raises a question of objective fact that depends on what the other document actually states or conveys, either explicitly or as a matter of reasonable inference. ... [T]he question is whether the disclosure of the document in question will directly reveal, or allow its reader to infer, the actual content or substance of a privileged communication.".²³⁶
- (2) The fact that the privilege extends to notes and other material brought into existence for the purpose of communication to the lawyer means that documents that are copied for that purpose may come within it even though the original documents were not written for that purpose and will not themselves be subject to the privilege.²³⁷
 - (3) A person may object to producing part of a document on the ground of legal professional privilege provided it is possible to isolate the privileged material from the remainder of the document.²³⁸

A.5 Legal professional privilege may not be claimed if it has been waived

244. The person entitled to claim the privilege may waive it, either intentionally or by implication.²³⁹

- (1) "... [W]here there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production.".²⁴⁰
- (2) "... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.".²⁴¹

²³⁴ *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571; (2006) 152 FCR 382; 232 ALR 743; 91 ALD 46 at [131]; 417; 773; 76 per Young J

²³⁵ *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571; (2006) 152 FCR 382; 232 ALR 743; 91 ALD 46 at [102]; 410; 766-767; 69-70 per Young J

²³⁶ *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571; (2006) 152 FCR 382; 232 ALR 743; 91 ALD 46 at [132]; 417; 773; 76-77 per Young J

²³⁷ *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501; 141 ALR 545; 71 ALJR 327; 35 ATR 130 at 509-510; 549-550; 331; 134-135 per Brennan CJ; citations omitted

²³⁸ *Grofam Pty Ltd v ANZ Banking Group* [1993] FCA 374; (1993) 43 FCR 408; 116 ALR 535; 26 ATR 174; 93 ATC 4672; 31 ALD 323 at [17]-[19]; 414-415; 542-543; 180-181; 4,677-4,678; 328-329

²³⁹ *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475; 69 ALR 31; 61 ALJR 92 at 481; 34; 93-94 per Gibbs CJ and at 493; 43; 99 per Deane J

²⁴⁰ *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475; 69 ALR 31; 61 ALJR 92 at 481; 34; 94 per Gibbs CJ and see also *Director of Public Prosecutions (Commonwealth) v Kane* (1997) 140 FLR 468 at 478-485 per Hunt CJ at CL

²⁴¹ *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1; 168 ALR 86; 74 ALJR 378 at [29]; 13; 94; 384 per Gleeson CJ, Gaudron, Gummow and Callinan JJ

- (3) “... [I]t is well established that a voluntary disclosure of the gist, substance or conclusion of legal advice will amount to a waiver in respect of the whole of the relevant advice.”²⁴²
- (4) The mere fact of disclosure to a third person, though, does not of itself amount to waiver²⁴³ but:
- “ Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. As *Tamberlin J* said in *Nine Films and Television Pty Ltd v Ninox Television Ltd* ...^[244], questions of waiver are matters of fact and degree. ...”²⁴⁵
- (5) Mere reference to legal advice in another document such as pleadings in civil litigation does not of itself amount to waiver of the privilege although full disclosure of its contents will.²⁴⁶
- (6) “ It would, of course, be a different case if the documents and information that the Commonwealth relies upon were disclosed under legal compulsion. On any view, the fact that documents and information were disclosed under compulsion would be very relevant to the question whether the person claiming privilege had engaged in inconsistent conduct. There is, moreover, authority to the effect that a production of documents or evidence under compulsion will not result in any waiver of privilege: *Goldman v Hesper* [1988] 3 All ER 97; *Trans America Computer Co Inc v IBM Corp* 573 F (2d) 646 at 651 (1978).”²⁴⁷
- (7) “... If it is conceded, as it must be, that a party upon whom a witness statement is served may use that statement in any way within the context of those proceedings (that is the whole reason why it is filed and served), it follows that it is conduct ‘inconsistent with the maintenance of the confidentiality which the privilege is intended to protect’ (*Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [29]) and an implied waiver of privilege has occurred. ... [T]he filing and service operates as a complete, not simply limited, waiver of legal privilege.

17 To put the proposition in different terms, if ‘it is in the other side’s power to destroy the privilege entirely,’ ... it can no longer be said that the original holder can reasonably expect any continued confidentiality. In such circumstances, the existence of the privilege cannot be made to turn on whether the other side in fact places the document into evidence or uses it for examination – either legal privilege exists or it does not, and either the client controls it or they do not: *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts* (No 2) [2007] FCA 1445 at [21] ... In other words, once it is found that the original holder of the privilege cannot control further dissemination of the document, the privilege

²⁴² *Australian Wheat Board v Cole* (No 5) [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651 at [163]; 76; 693 (citations omitted). If, for example, an agency were to disclose to the Tribunal legal advice it had obtained on a particular matter, that would amount to voluntary disclosure and the agency would be taken to have waived any claim it might otherwise have had for legal professional privilege.

²⁴³ *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347 at 355 per Jordan CJ cited with approval in *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1; 168 ALR 86; 74 ALJR 378 at [30]; 14; 95; 385 per Gleeson CJ, Gaudron, Gummow and Callinan JJ

²⁴⁴ [2005] FCA 356; (2005) 65 IPR 442 at [26]; 447

²⁴⁵ *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275; 249 ALR 1; 82 ALJR 1288 at [49]; 298-299; 17; 1302

²⁴⁶ *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475; 69 ALR 31; 61 ALJR 92 at 481; 34; 94 per Gibbs CJ

²⁴⁷ *Australian Wheat Board v Cole* (No 5) [2006] FCA 1234; (2006) 155 FCR 30; 234 ALR 651 at [138]; 69; 686

is destroyed as a matter of law without further inquiry into whether the communication was in fact disseminated.

18 This is not to say that there could never be something less than a full waiver of privilege; rather, the point is that for there to be only a limited waiver, the original holder must still retain full control as to further dissemination of the document. So, for example, providing a witness statement to a party but subject to conditions that the party may use it only for internal purposes, may not read it in court, may not place it into evidence and may not otherwise rely on it in examination or the proceedings generally might constitute a limited waiver only: see *Goldberg v Ng* [1995] HCA 39; (1995) 185 CLR 83, 96 (stating that the waiver ‘can be limited so that it applies only in relation to particular persons, materials or purposes’); *Goldman v Hesper* [1988] 3 All ER 97 (cited in *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [29] for the proposition that disclosure ‘for a limited and specific purpose’ will not lead to loss of the privilege).²⁴⁸

B. Public interest

245. In the words of Mason and Wilson JJ in *Waterford*, it is accepted that “... *it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers.*”²⁴⁹ That public interest extends beyond the needs of government. As Deane J said in the same case:

*“... Another aspect of the rationale of the principle of legal professional privilege is, however, that the ready availability of confidential legal advice and of skilled and adequate legal representation is in the public interest in that it promotes both the observance of the law generally and the administration of justice in particular. ...”*²⁵⁰

246. By requiring that a record that would be privileged from production in legal proceedings on the ground of legal professional privilege must also be a document whose disclosure would be contrary to the public interest, s 33(2)(b) of the Archives Act is requiring consideration of the public interest beyond that inherent in legal professional privilege. There would be no point to s 33(2)(b) if it were enough to attract the exemption under s 33(2)(a) by satisfying the aspect of the public interest already expressed in s 33(2)(a).
247. In *Re Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission*,²⁵¹ I identified principles that would assist in identifying the public interest for the purposes of ss 11A and 11B of the FOI Act. They are no less relevant in this context:

*“(1) ‘... The public interest is a concept of wide meaning and not readily delimited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest. ...’*²⁵²

²⁴⁸ *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88; (2008) 246 ALR 137 at [16]-[18]; 142-143

²⁴⁹ See [229] above

²⁵⁰ [1987] HCA 25; (1987) 163 CLR 54; 71 ALR 673; 61 ALJR 350 at [82]; 82; 692; 361

²⁵¹ [2017] AATA 269

²⁵² *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* [1995] FCA 1060; (1995) 56 FCR 50; (1995) 128 ALR 238; 37 ALD 357 (Lockhart, Beaumont and Gummow JJ) at [34]; 59; 245; 364 per Lockhart J

- (2) ‘... [A] question about ‘the public interest’ will seldom be properly seen as having only one dimension. ...’²⁵³
- (3) There is a ‘... distinction between the public interest and a matter of public interest. The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals: *Sinclair v Mining Warden at Maryborough* [1975] HCA 17; (1975) 132 CLR 473, at p. 480, per Barwick CJ. There are, as appears to be implicit in the quoted passage of the judgment of Morris LJ in *Ellis v Home Office* (supra), several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest....’²⁵⁴
- (4) ‘ It is plain that the categories of public interest are not closed and that different minds will differ as to what is, or what is not, in the public interest. ...’²⁵⁵
- (5) ‘... [I]t is necessary to distinguish between “what is in the public interest and what is of interest to know”: *Lion Laboratories Ltd. v Evans* [1985] QB 526, at p. 553, per Griffiths LJ. On the other hand, “one feature and one facet of the public interest is that justice should always be done and should be seen to be done”: *Ellis v Home Office* [1953] 2 QB 135, at p. 147, per Morris LJ It is this feature of the public interest, namely the appearance of justice having been done, which is inherent in the proper administration of justice.’²⁵⁶
- (6) ‘... [T]he expression “in the public interest”, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view”: *Water Conservation and Irrigation Commissioner (NSW) v Browning* ... [(1947) 74 CLR 492 at 505], per Dixon J. ...’²⁵⁷
- (7) Where the public interest lies in a particular matter ‘... will often depend on a balancing of interests including competing public interests ...’^{258”259}

²⁵³ *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516; 43 AAR 151; 80 ALJR 1549; 63 ATR 409 at [55]; 444; 202; 531; 167; 1561; 424 per Hayne J

²⁵⁴ *Director of Public Prosecutions v Smith* [1991] VicRp 6; [1991] 1 VR 63; (1991) 100 FLR 6 at 76; 18-19; Kaye, Fullagar and Ormiston JJ

²⁵⁵ *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142; (2005) 145 FCR 70; 220 ALR 587; 41 AAR 23; 88 ALD 12; 80 ALJR 1549; 63 ATR 409; Tamberlin, Conti and Jacobson JJ at [246]; 142; 655; 94; 80; 1569; 434 per Jacobson J approved by Callinan and Heydon JJ in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516; 43 AAR 151 at [93]; 456; 212; 541; 177

²⁵⁶ *Director of Public Prosecutions v Smith* [1991] VicRp 6; [1991] 1 VR 63; (1991) 100 FLR 6 at 74; 17 per Kaye, Fullagar and Ormiston JJ

²⁵⁷ *O’Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210; 89 ALR 71; 64 ALJR 87 at 216; 74; 89 per Mason CJ, Brennan, Dawson and Gaudron JJ; Toohey J dissenting and see also *Pilbara Infrastructure Pty Ltd and Ors v Australian Competition Tribunal and Ors* [2012] HCA 46; (2012) 246 CLR 379; 290 ALR 750 at [42]; 400-401; 762-763; French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting but not on this point.

²⁵⁸ *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142; (2005) 145 FCR 70; 220 ALR 587; 88 ALD 12; 41 AAR 23 at [231]; 139; 653; 78; 92 per Jacobson J with whom Tamberlin J agreed, citing *Sankey v Whitlam* (1978) 142 CLR 1 at 60 per Stephen J

²⁵⁹ [2017] AATA 269 at [177]

248. Having mentioned ss 11A and 11B of the FOI Act, I do not regard them as having any relevance in the context of the Archives Act. Section 11A(5) provides that access must be given to a document that is conditionally exempt at a particular time unless that access at that time “*would, on balance, be contrary to the public interest*”. That is different from the expression used in s 33(2) where the criterion is that disclosure “*would be contrary to the public interest*”. Section 11A(5) of the FOI Act adds the notion of its being “*on balance*” contrary to the public interest and not simply being contrary to the public interest. This is a notion that finds expression in s 33(1)(c) of the Archives Act where a Commonwealth record is an exempt record if it contains information or matter the disclosure of which would have a substantial adverse effect on the financial or property interests of the Commonwealth and “*would not, on balance, be in the public interest*”. Section 33(1)(c) is concerned with what would not be in the public interest rather with what would be contrary to the public interest but its structure is consistent with that in s 11A(5) of the FOI Act. Clearly, regard would need to be had to all factors relating to the public interest under each expression of the criterion regardless of whether what is in, or contrary to, the public interest is assessed by reference to what would “*on balance*” or simply by reference to what “*would*” but it is open to question whether the two have slightly different meanings.
249. As used in each, the word “*would*” is used as the future subjunctive of the word “*will*”. The relevant meaning of the word “*will*” is “*what is bound to be the case*”.²⁶⁰ By adding the qualification “*on balance*”, s 11A(5) of the FOI Act is recognising that the issue may be more finely tuned than would be the case under s 33(2) where the decision-maker must be satisfied that disclosure “*would be contrary to the public interest*”. Both expressions require a decision-maker to consider all relevant features of the public interest and weigh those favouring and not favouring disclosure but I think that there is a subtle difference between the two. A decision-maker may be satisfied on the evidence that disclosure would, on balance, be contrary to (or in) the public interest, but that same evidence may not satisfy him or her that disclosure would be, in the sense of bound to be, contrary to (or in) the public interest.

Are the documents subject to legal professional privilege?

250. The documents claimed to be exempt under s 33(2) are those at A1838 1733/3/2 Part 7; Folios 5-32 and A1838 1733/3/2 Part 6; Folios 183-210. Dr French said that he had a high degree of confidence that a very high proportion of the work undertaken by the Legal and Consular Division would have been the provision of international legal advice. I am mindful, however, that Dr French has not worked in that Division during his career whether at the

²⁶⁰ Chambers

time when the documents under consideration were written or otherwise. Even if the work of the Legal and Consular Division involved a high proportion of legal advice, it does not follow that the documents under consideration are legal advice subject to legal professional privilege.

251. I have examined those documents in relation to which the exemption under s 33(2) has been claimed. In addition, I have had regard to other documents in the 24 files I have been given. I have referred to those documents or to passages in them in the closed reasons. To reveal their contents would be to reveal information or material that would render them exempt under s 33(1)(a). I have concluded that Mr Coles was a legally qualified and senior officer in DFAT at the relevant times. He headed DFAT's Legal and Consular Division. His occupying that position does not of itself mean that any statement of law that he might have made was legal advice. His making a statement of the law does not mean that he was giving legal advice. Any statement must have been made for the dominant purpose of providing, or responding to a request for, legal advice.
252. Having regard to all of the evidence in this case, I am not satisfied that the statements of the law were made for the dominant purpose of giving legal advice to DFAT or to any Division or Branch of it. Instead, I find that they were intertwined with statements relevant to development of the policy in relation to the negotiations between Australia and others relating maritime borders. Their dominant purpose was that of developing a negotiating policy and not of giving independent legal advice. The comparison can be made with the development of domestic legal policy such as the FOI Act or the *Contracts Insurance Act 1984* in the Attorney-General's Department when consideration was given to the existing law in the course of developing the policy underpinning that legislation. That consideration does not take on the characteristics of independent legal advice simply because statements of law are made. The overall characteristics of the document must be examined. I have done that in the closed reasons and have concluded that the statements were not made by a lawyer acting in his professional legal capacity but as a lawyer acting as a senior DFAT officer engaged in the development of the negotiating policy or part of it. The documents do not contain legal advice such that they would be privileged from production in legal proceedings on the ground of legal professional privilege. Therefore, I am not satisfied that they are exempt under s 33(2) of the Archives Act.
253. I have formed the view, however, that the documents for which exemption under s 33(2) has been claimed are exempt under s 33(1)(a). It is not an exemption claimed by Archives in the first instance but it was claimed in the alternative during the course of the hearing and Ms McGrath was advised of that. The documents at A1838 1733/3/2 Part 7; Folios 5-32

and A1838 1733/3/2 Part 6; Folios 183-210 do not raise any issues different from the other documents in respect of which they have been raised. I have considered them in the closed reasons and in the context of s 33(1)(a) above. I have concluded that they are exempt under s 33(1)(a).

DECISION

254. For the reasons I have given, I have decided to:

- (1) to affirm the 24 decisions of the respondent on the following bases:
 - (a) With the exception of A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291, 294-313 to affirm the decisions of the respondent that the records are exempt records under s 33(1)(a) of the *Archives Act 1983* (Archives Act) because they contain information or matter the disclosure of which could reasonably be expected to cause damage to the security or international relations of the Commonwealth;
 - (b) A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291. 294-313 are subject to parliamentary privilege and not subject to the Archives Act provided that:
 - (i) if A1838 1733/3/2 Part 12; Folios 49-65, 77-83, 274-291, 294-313 were subject to the Archives Act, the Tribunal would have to have the opportunity to examine the content of the documents in order to consider whether they are exempt under either or both of ss 33(1)(a) or 33(1)(d) of the Archives Act 1983;
 - (c) A1838 1733/3/2 Part 6; Folios 183-210 and A1838 1733/3/2 Part 7; Folios 5-32 are not exempt under s 33(2) of the Archives Act but are exempt under s 33(1)(a); and
 - (d) In accordance with s 38 of the Archives Act, it is reasonably practicable for the respondent to make arrangements for access to be given to a part of, or a copy of part of, each record without disclosing the information or matter by reason of which each record is an exempt record.

PARLIAMENTARY BODIES, CLASS B RECORDS, THE ARCHIVES ACT AND PARLIAMENTARY PRIVILEGE

255. Part V of the Archives Act is entitled “*Commonwealth records*”. It has five Divisions. I have referred above to Division 3, which regulates access to Commonwealth records, and to Division 4, which provides for the review of decisions made under Division 3 and of any decision refusing to grant an extension of time to request internal review under s 42. Both Divisions are concerned with decisions, and review of decisions, relating to Commonwealth records that are in the open access period and in the care of the Archives or custody of a Commonwealth institution. Decisions on review will revolve around issues such as whether the Commonwealth records are exempt records, the conditions on which access to ensure safe custody and proper preservation, the time taken to examine the record.
256. Each House of Parliament is a Commonwealth institution and the documents of each are Commonwealth records.²⁶¹ Like federal courts and certain Territory courts, however, Divisions 2 and 3 do not, subject to ss 20 and 21, apply to “*records in the possession*” of a House of Parliament.²⁶² In relation to a House of the Parliament, s 20 of the Archives Act provides:
- “(1) *Subject to this section, the regulations may provide that all or any of the provisions of Divisions 2 and 3 are, in such circumstances and subject to such conditions as are prescribed, to apply to all or any of the records referred to in section 18 ..., and may provide that those provisions are so to apply subject to such modifications as are prescribed.*
 - (2) *Regulations shall be made for the purposes of subsection (1) in relation to the application of the provisions of Division 2 and 3 to records in the possession of the Senate, the House of Representatives or a Parliamentary Department, unless there has been consultation between the Minister and:*
 - (a) *in the case of records in the possession of the Senate or of the Department of the Senate – the President of the Senate;*
 - (b) *in the case of records in the possession of the House of Representatives or of the Department of the House of Representatives – the Speaker of the House of Representatives; or*
 - (c) *in the case of records in the possession of a Parliamentary Department other than the Department of the Senate or the Department of the House of Representatives – both the President of the Senate and the Speaker of the House of Representatives;**concerning the application of those provisions to those records.”*
257. Subject to any regulations made in accordance with s 20, a person having control of the custody of any records referred to in s 18 may enter into arrangements with Archives with respect to their custody.²⁶³ Section 21(2) provides:

²⁶¹ See [19] above

²⁶² Archives Act; s 18

²⁶³ Archives Act; s 21(1)

“Arrangements referred to in subsection (1) relating to the custody of records may provide for the extent (if any) to which the Archives or other persons are to have access to those records.”

B.1 Archives (Records of the Parliament) Regulations 1995

258. At the time Ms McGrath made her applications for access and up until their repeal on 13 March 2018, the *Archives (Records of the Parliament) Regulations 1995* (1995 Regulations) were in force. The object of those Regulations was:

“... to provide for the preservation, management and use of the records of the Parliament in a manner that reflects:

- (a) the position of the Parliament within the Commonwealth; and*
- (b) the special recognition and treatment that should be given to particular records of the Parliament; and*
- (c) the different powers and functions of Parliament and the Executive Government of Australia.”²⁶⁴*

259. Transcripts of oral evidence given in-camera before a joint Parliamentary committee did not come within paragraph the definition of a “Class A record” in r 3 of the 1995 Regulations:

“‘Class A record’ means:

- (a) the record of the proceedings of the Senate as recorded in the Journals of the Senate; or*
- (b) the record of the proceedings of the House of Representatives as constituted by the Votes and Proceedings of the House of Representatives; or*
- (c) a record that is:*
 - (i) laid before, or tabled in; and*
 - (ii) in the possession of;**the Senate or the House of Representatives; or*
- (d) a record:*
 - (i) that is presented to a committee in camera or on a confidential or restricted basis; and*
 - (ii) that is in the possession of the committee, the Senate or the House of Representatives; and*
 - (iii) that the committee, the Senate or the House of Representatives respectively has not authorised to be published; or*
- (e) a record prepared by:*
 - (i) an officer of a Parliamentary Department; or*
 - (ii) a person employed by, or performing duties for, a Parliamentary Department;**that relates to a record presented to a committee and is in the possession of:*

²⁶⁴ 1995 Regulations; r 2

- (iii) *the committee; or*
- (iv) *the Senate; or*
- (v) *the House of Representatives; or*
- (vi) *a Parliamentary Department”.*

260. A transcript is a document and so a “*record*” within the meaning of s 3(1) of the Archives Act. Clearly, it does not come within paragraphs (a) or (b) of the definition of a “*Class A record*”. It is a transcript of oral evidence given to a Joint Committee. The oral evidence has been presented to the Joint Committee but has the transcript been presented? Ms Costello has taken the position that it has been presented but also acknowledges that she has not seen the record. The ordinary meanings of the word “*present*” include “... **5** *to offer something for consideration. ...*”.²⁶⁵ That would seem to be the sense in which it is used in the definition of a “*Class A record*”. The oral evidence was certainly presented to the Joint Committee in that sense but there is no evidence that the transcript of that evidence has itself has been presented to the Joint Committee. In the absence of that evidence, it does not come within paragraph (d) of the definition of a “*Class A record*”.
261. Even if the transcript had been prepared by an officer of a Parliamentary Department or by a person performing duties for it, it relates to oral evidence and not to a record presented to the Joint Committee. Therefore, it does not come within paragraph (e) of the definition of a “*Class A record*”. As it does not come within the definition of a Class A record, it must be a Class B record because it was in the possession of the Senate, the House of Representatives or of a Parliamentary Department.
262. The 1995 Regulations go on to provide for the provisions of the Archives Act that apply to the records and the modifications to which they are subject. It makes modifications to provisions in Division 2 relating to dealings with the records of the Parliament described in s 18 of the Archives Act. Regulation 5 of the 1995 Regulations omits s 27 relating to the transfer of records to Archives in the case of Class A and Class B documents. In relation to a Class B document, s 27(3) is taken to read:
- “Subject to this Part, if a Class B record has been in existence for more than 25 years, the body holding it must transfer it to the custody of the Archives as soon as practicable.”*
263. Section 29 of the Archives Act exempts certain Commonwealth records from transfer. For the purposes of Parliamentary documents, s 29(1) is omitted and three others substituted.²⁶⁶ The substituted provisions are:

²⁶⁵ Chambers

²⁶⁶ 1995 Regulations; r 7

- “(1) If:
- (a) *the Senate or the House of Representatives determines by resolution that a Class A record is:*
 - (i) *a record that is not to be transferred to the custody of the Archives; or*
 - (ii) *a record to which the Archives is not entitled to have access; or*
 - (iii) *a record to which the Archives is not entitled to have access unless the conditions that are specified in the resolution or determination are complied with; or*
 - (b) *the Presiding Officer makes a similar determination in writing, with the agreement of the Director-General, in relation to a Class B record;*
- the Archives must comply with the resolution or determination.*
- (1A) *If the Archives seeks access to a Class B record that is not in the custody of the Archives, and a person responsible for the custody of the record considers that it may be appropriate for the Presiding Officer to make a determination in relation to the record, the person must:*
- (a) *notify the Archives of his or her opinion; and*
 - (b) *notify the Presiding Officer to allow the Presiding Officer to consider whether a determination should be made.*
- (1B) *If the person notifies the Archives under subsection (1A), the Archives is not entitled to access to the record until the earlier of:*
- (a) *the end of a period of 1 month from the day on which the Archives is notified; or*
 - (b) *the day on which the notification is withdrawn.”*

264. Section 29(3) is also substituted in relation to Class A and Class B records:

“The Director-General may make an agreement, in writing, with the Presiding Officer to allow Class A and Class B records that are transferred to the custody of the Archives to be held by the Archives on the conditions specified in the agreement, being conditions consistent with this Part.”

265. At the time the 1995 Regulations were made, s 31(1) of the Archives Act provided:

“Subject to this Part, the Archives shall cause all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.”

Regulation 9 omitted reference to “*all Commonwealth*” and substituted “*Class B*”.

Reference to “*a Commonwealth institution*” was replaced with “*the Senate, the House of Representatives, a committee or a Parliamentary Department.*” The result was that, subject to Part V, Archives would cause all Class B records in the open access period that are in the custody of Archives or of the Senate, the House of Representatives, a committee or a Parliamentary Department to be made available for public access.

266. Exempt records are the subject of r 10. In relation to Class B records, r 10.1 substitutes “*Class B record*” for “*Commonwealth record*” wherever it occurs in s 33. Similar modifications are made to ss 35, 36, 37, 38 and 39.²⁶⁷

B.2 Archives (*Records of the Parliament*) Regulations 2019

267. The 1995 Regulations were repealed by the *Archives (Records of the Parliament) Regulations 2019* (2019 Regulations). They repealed the 1999 Regulations with effect from 13 March 2019.²⁶⁸ The 2019 Regulations are, for the most part, substantively the same as those they repealed. One change of note is that they introduced Class C records in addition to Class A and Class B records that were already provided for. The definition of a “*Class A record*” is substantively the same as the earlier definition. A Class B record is a record in the possession of the Senate, the House of Representatives or a Parliamentary Department that is not a Class A record or a Class C record.
268. A “*Class C record*” is a record, except an excluded record, in the possession of the Senate, the House of Representatives or a Parliamentary Department that is one of two things. First, it is a record containing information that s 64V of the *Parliamentary Service Act 1999* (PSA) prohibits an entrusted person from disclosing other than for the purposes described in ss 64V(3) or (4B).²⁶⁹ In broad terms, s 64V is concerned with the confidentiality of matters arising in relation to requests by Senators or Members of the House of Representatives relating to policy costings or relating to the budget. That is not the nature of the transcript of oral evidence with which I am concerned.
269. The second way in which a record in the possession of the Senate, the House of Representatives or a Parliamentary Department may be a Class C record occurs if the Presiding Member is satisfied that the record relates to the provision of advice to a Senator or a Member of the House of Representatives and the record should remain under the control of the House of Representatives because of a duty of confidentiality under the PSA and the Director-General agrees.²⁷⁰
270. Regulation 20 of the 2019 Regulations substitutes ss 27, 28, 28A, 29 and 30 of the Archives Act. Substituted s 27(3) provides that ss 27(4) and (5) apply to a Class B record that is in the custody of a Parliamentary body and has been determined to be part of the archival resources of the Commonwealth under s 3C. The person responsible for the custody of the record must cause it to be transferred to the care of Archives in accordance

²⁶⁷ 1995 Regulations; rr 11-15

²⁶⁸ 2019 Regulations; r 2(1), Item 1 and r 4, Schedule 2

²⁶⁹ 2019 Regulations; r 2 modifying Archives Act; s 23A(1)

²⁷⁰ 2019 Regulations; r3; modifying Archives Act; s 23(2)

with arrangements approved by Archives.²⁷¹ The record must be transferred to be readily available for the purposes of a parliamentary body as soon as practicable after it ceases to be so required. In any event, it must be transferred within 15 years of the record's coming into existence.²⁷²

271. The transcript of the oral evidence given to the Joint Committee is neither a Class A nor a Class C document. It was created long before 64V of the PSA was enacted and has nothing to do with requests for costings that are the subject of s 64V. Therefore, it is not a Class C record. It is not a Class A record for the reasons that I have given above. That means that it is a Class B record.

272. As it is in the custody of Archives, it is clearly a record that has been transferred to it consistently with s 27 of the Archives Act. Section 31 applies to it as if references to the expression "*Commonwealth records*" is replaced by "*Class B records*" and reference to "*Commonwealth institution*" is replaced by "*parliamentary body*" and so on.²⁷³

C. Parliamentary privilege and access to archival resources that are Parliamentary records

273. Read on its own, s 13(b) of the PP Act is a prohibition of publication or disclosure of any transcript of oral evidence taken by a House or a committee in camera or a report of such oral evidence. The certificate issued under s 17 in this case is evidence that the transcript is a report of oral evidence. But for the Archives Act, there would be no question that publication or disclosure without authority of a House or a committee would be an offence under s 13 of the PPA. Before the PPA, it would have amounted to breach of Parliamentary Privilege.

274. The provisions of the Archives Act relating to Parliamentary records and the regulations made under it in relation to those records have clearly been made bearing in mind the issues that arise when the executive arm of government wishes to make arrangements for preservation of the archival resources of the Commonwealth and their disclosure in the open access period and those archival resources necessarily include those of the legislative arm of government. Parliament, being the legislative arm, made provision in the Archives Act for the Houses of Parliament to be among those regarded as "*Commonwealth institutions*". It clearly made provision for its documents to be subject to the provisions of the Archives Act, including both those concerned with the preservation of the Commonwealth's archival resources and those concerned with making at least some of

²⁷¹ 2019 Regulations; r 20; modifying Archives Act; s 27(4)

²⁷² 2019 Regulations; r 20; modifying Archives Act; s 27(5)

²⁷³ 2019 Regulations; rr 23-28; modifying Archives Act; s 31

those archival resources publicly available when they were in the open access period. Section 20 provides for regulations to be made regarding the application of Divisions 2 and 3 of Part V of the Archives Act to Parliamentary records provided the Minister consults the President of the Senate and the Speaker of the House. The regulations have been duly made and have made provision for both custody of Parliamentary records under Division 2 and access under Division 3. Modifications have been made to some provisions to cater for Parliamentary records. The Presiding Officers of the Houses of Parliament may come to an agreement to hold some records from public access.

275. When regard is had to the restriction on publication or disclosure in s 13 of the PP Act and to the Archives Act and to the 1995 or 2019 Regulations, it seems to me that Parliament intended that Parliamentary privilege of the sort legislated for in s 13 of the PP Act would not apply to those Parliamentary records that were subject to the regulatory archival scheme. That scheme makes provision for the Presiding Officers to limit access to certain documents beyond the exemption provisions in s 33 that are generally applicable. This is a case in which the privilege preserved by s 13 of the PP Act must necessarily yield to the scheme in the Archives Act. Indeed, it seems to me that Parliament was conscious that this would be so when it enacted the Archives Act and the regulations were made and not subsequently disallowed by the Parliament. Section 13 of the PP Act will continue to apply where the Parliamentary record does not come within the scope of the regulatory scheme established under the Archives Act and regulations.

276. Putting aside s 13 of the PP Act, nothing in the Archives Act and its regulatory scheme is contrary to any provision of the PP Act that restricts the use of Parliamentary records. The Archives Act and its regulations are concerned only with access to Commonwealth records, including Parliamentary records, as part of the archival resource but not with their use. Section 57 of the Archives Act makes this clear. It provides protection from civil actions for defamation, breach of confidence or infringement of copyright laws to those required to give access to a record as well as from criminal offences. Section 57 does not provide similar protection to those to whom access has been given and who would use them. Section 57(2) expressly states that:

“The giving of access to a record (including an exempt record) under this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorization or approval of the publication of the record or of its contents by the person to whom access was given.”

277. No mention is made of breaches of the criminal law or of Parliamentary Privilege in s 57(2) or of those breaches’ not being authorised. There is no need because the tenor of the whole of the regulatory scheme under the Archives Act is that of preservation and custody

of the archival resource and access to it. It is not a scheme about use of the Commonwealth's archival resource. The laws regulating the use of the Commonwealth's archive resource, as opposed to their preservation and custody and access to it, continue to run side by side with the general law including the common law and the legislative law, including the PP Act and s 16 in particular.

BREACH OF CONFIDENCE IN THE ARCHIVES ACT AND THE FOI ACT
section 33(1)(d) and section 45

Background to the enactment of s 33(1)(d) of the Archives Act and 45 of the FOI Act

278. The *Archives Bill 1978* and the *Freedom of Information Bill 1978* (FOI Bill 1978) came under the portfolio responsibilities of different Ministers of State; the Minister for Home Affairs and Environment in relation to the former and the Attorney-General for the latter.²⁷⁴ They were, however, both introduced to the Senate by the Attorney-General of the day, the Honourable Senator Peter Durack, on 9 June 1978.²⁷⁵
279. I do not have the Bills as introduced but I do have the Explanatory Memorandum for each. They indicate an earlier version of the numbering in each and stated:

Bill	Clause	Explanatory memorandum for provision
<i>Archives Bill 1978</i>	31(1)(f)	<i>"This clause defines the kinds of information or matter by reason of which records are to be exempted from the requirement that they be made available for public access. These are:</i> ... <i>- under sub-paragraph (f), that the release of the information or matter would be a breach of confidence."</i>
FOI Bill 1978	34	<i>"126. Clause 34 exempts from mandatory access a document the disclosure of which would constitute a breach of confidence.</i> <i>127. Documents containing material disclosing trade secrets and the personal affairs of individuals are covered by clauses 30 and 32 respectively. The 1976 Report recommends that, in addition, documents containing material obtained in confidence should be separately covered (the 1976 Report, paragraphs 12.15 to 12.17 inclusive).. The 1976 Report bases the exemption on two grounds:-</i> <i>· an understanding that information supplied on a confidential basis ought to be respected; and</i> <i>· the preservation of confidentiality is often essential for the maintenance of the flow of information that government requires for its efficient operation.</i> <i>128. This clause therefore overlaps with clause 30, relating to personal privacy, and clause 32, relating to business privacy, but extends to protect confidential</i>

²⁷⁴ At the time, the Hon Bob Ellicott QC was the Minister for Home Affairs and the Hon Peter Durack QC was Attorney-General. After their enactment, National Archives came within the responsibility of the Department of Home Affairs and Environment and within the portfolio of the Minister for Home Affairs and Environment: *Administrative Arrangements Order* (AAO); 7 May 1982, Special Commonwealth of Australia Gazette; No. S91, 7 May 1982. Under the same AAO, Freedom of Information came within the responsibility of the Attorney-General's Department and so within the portfolio of the Attorney-General.

²⁷⁵ Hansard: The Senate, 9 June 1978 at 2693

Bill	Clause	Explanatory memorandum for provision
		<i>information that might not be covered by those clauses if it can be shown that disclosure of the information would amount to a breach of confidence.</i> 129. ...”

280. While the Bills both dealt with access to Commonwealth records, the *Archives Bill 1978* also dealt with wider issues regarding matters such as the preservation and custody of the national archives. This led to their being referred to different Senate Committees: the Senate Standing Committee on Education and Arts, in so far as the *Archives Bill 1978* dealt with matters other than those related to access to Commonwealth records, and the Senate Standing Committee on Constitution and Legal Affairs in the case of the FOI Bill 1978 in its entirety and those aspects of the *Archives Bill 1981* that related to access to Commonwealth records. Two different reports were the result.²⁷⁶
281. On 11 September 1980, Senator Durack responded to the recommendations made by each of the Committees in relation to the each of the Bills.²⁷⁷ None of the recommendations made by the Senate Standing Committee on Education and the Arts concerned cl 31(f) of the *Archives Bill 1978*. Various recommendations of the Senate Standing Committee did relate to cl 31 but not to cl 31(f). The only general recommendation, which was accepted by the government and which sheds some light on both cl 31 and cl 34 of the FOI Bill 1978 is cl 18 relating to recommendation 96:

“... In particular, it is agreed in principle that the exemption clauses relating to access in both the Freedom of Information and Archives legislation must be co-ordinated and rationalised and that any amendments to the Archives Bill necessary as a consequence of amendments to the Freedom of Information Bill, will be made.”

282. No mention was made in the remainder of the Government’s response to either cl 31(1)(f) of the *Archives Bill 1978* or cl 34 of the FOI Bill 1978 and the exemption from access of those records or documents whose disclosure would constitute a breach of confidence.
283. The consequence was that, when introduced, what were now cl 32(f) of the *Archives Bill 1981* and cl 40 of the *Freedom of Information Bill 1981* (FOI Bill 1982) were in substantively the same terms although their formats were different:

Bill	Clause	Provision
<i>Archives Bill 1981</i>	32(1)(f)	<i>“For the purposes of this Division, a Commonwealth record is an exempt record if it contains information or</i>

²⁷⁶ Statement of the Government’s response to the recommendations made by both Committees to the *Archives Bill 1978* incorporated in Hansard on 11 September 1980: Hansard: The Senate, 11 September 1980 at 827

²⁷⁷ The Senate; Hansard, 11 September 1980, 827

Bill	Clause	Provision
		<i>matter of any of the following kinds:</i> ... <i>(f) information or matter the disclosure of which under this Division would constitute a breach of confidence; ...</i>
FOI Bill 1981	40	<i>"A document is an exempt document if its disclosure under this Act would constitute a breach of confidence."</i>

284. The Explanatory Memoranda to the Bills do not add a great deal.

Bill	Clause	Explanatory memorandum for provision
<i>Archives Bill 1981</i>	32(1)(f)	<i>"This clause defines the kinds of information or matter by reason of which records are to be exempted from the requirement that they be made available for public access. These are, under sub-clause (1):</i> ... <i>Under sub-paragraph (f), that the release of the information or matter would be a breach of confidence."</i>
FOI Bill 1981	40	<i>"155. Clause 40 exempts from mandatory access a document the disclosure of which would constitute a breach of confidence.</i> <i>156. This clause is intended to protect confidential relationships which would not be within the specific protection afforded by such clauses as clause 36 (personal privacy) and clause 38 (business confidences)."</i>

285. Amendments were made during the passage of the Bills through the Houses of Parliament but neither of these clauses was amended in substance. The only change was that cl 32(1)(f) of the Archives Bill 1981 became s 33(1)(f) of the Archives Act and cl 40 of the FOI Bill 1981 became s 45 of the FOI Act. In substantive terms, one reflected the other as set out in the table at [284] above.

B. Amendment of s 45 of the FOI Act but s 33(1)(d) of the Archives Act remains the same

286. Section 23 of the *Freedom of Information Amendment Act 1983*²⁷⁸ amended s 45 of the FOI Act by adding s 45(2):

"Sub-section (1) does not apply to any document to the disclosure of which paragraph 36 (1) (a) applies or would apply, but for the operation of sub-section 36 (2), (5) or (6), being a document prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his duties, or by a prescribed authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State."

²⁷⁸ Act No. 81 of 1983

287. Clause 45 of the Explanatory Memorandum to the Freedom of Information Amendment Bill explained that:

“46. The amendment in clause 23 will give the Act an operation it was intended to have. Clause 23 provides that a document is not an exempt document if its disclosure under the Act would constitute a breach of confidence if it is an internal working document which was prepared by a Minister, or by a member of the staff — 13 — of a Minister, a prescribed authority or an officer or employee of, an agency in the course of his duty for purposes relating to the affairs of an agency or of a Department of State.

47. The object of the proposed amendment is to make it clear that the breach of confidence ground of exemption in section 45 does not apply to internal working documents. The question whether these documents should remain confidential was intended to be considered in the light of the test of the harm to the public interest which would result from disclosure which is contained in section 36. A recent decision of the Administrative Appeals Tribunal has indicated that the mere fact that a departmental officer intended communications with another officer to be confidential may of itself be enough to bring that document within the scope of section 45 as it now stands. On this interpretation, section 45 would have a much wider operation than had been intended and there would be a more limited right of access than intended to internal working documents.”

288. Section 45(2) was itself amended with effect from 18 November 1986²⁷⁹ by s 14 of the *Freedom of Information Laws Amendment Act 1986*, which added to the end of s 45(2) the words:

“unless the disclosure would constitute a breach of confidence owed to a person or body other than —

- (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or*
- (b) an agency or the Commonwealth.”*

289. The reason for this amendment was given in the Explanatory Memorandum to the Freedom of Information Laws Amendment Bill 1986:

“23. Recent decision of the Administrative Appeals Tribunal have indicated that s 45 as amended in 1983 may not exempt confidential information from outside Government (e.g. information provided orally by a business) from disclosure where it is incorporated in an internal working document prepared by an agency or Minister. This is not consistent with the original intention of s. 45(2) as indicated by explanatory materials distributed at the time that sub-section was enacted. The defect will be remedied by the proposed amendment to ensure that confidence owed to persons other than officials and Ministers will be protected.”

C. Amendment of s 45 of the FOI Act in response to Corrs Pavey judgment

290. Section 45(1) was the subject of amendment by s 32 of the *Freedom of Information Amendment Act 1991*.²⁸⁰ That amendment commenced on 25 October 1991 and provided

²⁷⁹ Act No. 111 of 1986; s 2

²⁸⁰ Act No. 137 of 1991

that s 45(1) was "... amended by omitting from subsection (1) 'constitute a' and substituting 'found an action, by a person other than the Commonwealth, for'." The Explanatory Memorandum explained that:

"Clause 32 implements a Senate Committee recommendation that the breach of confidence exemption in the Act be amended to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence. The amendment overcomes decisions by the Administrative Appeals Tribunal which have created uncertainty as to the scope of section 45 and which have expanded the exemption to protect some confidences that the general law does not protect, such as the information about a crime or fraud. Clause 32 amends sub-section 45(1) to provide that a document is an exempt document if its disclosure under the Act would found an action by a person, other than the Commonwealth, for a breach of confidence."

291. The reference to a Senate Committee in this passage is a reference to the Senate Standing Committee on Constitutional and Legal Affairs and to its 1987 Report on the Operation and Administration of Freedom of Information Legislation.²⁸¹
292. There were other amendments to s 45 in the following years but no others to s 45(1). It now reads, as it did at the end of 1991 when Parliament made it very clear that it intended that a document would be exempt only if disclosure were to found an action for breach of confidence i.e. the interpretation favoured by Gummow J:

"A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence."

²⁸¹ Explanatory Memorandum to the *Freedom of Information Amendment Act 1991*; outline

TABLE OF DOCUMENTS IN ISSUE SUMMARISING DOCUMENTS IN DISPUTE, DECISIONS UNDER REVIEW AS AT 1 MAY 2018 AND DECISIONS

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the Archives Act 1983	Decision
1.	2014/1330 252	Law of the Sea – Delimitation – Australia – Indonesia [Timor] A1838 1733/3/2 Part 8, 1763271 <i>(Part 8 of DFAT's digitalised primary file on Australia and Indonesia Timor Sea maritime boundary negotiations post Indonesia's invasion of East Timor and dating from 12 February 1979 to 19 February 1979.</i> <i>It covers the first round of seabed negotiations between Australia and Indonesia between 14 and 16 February 1979.</i> <i>It includes correspondence regarding Australian Timor Sea oil exploration permit holders, reports on official seabed boundary talks with Indonesia in February 1979, summaries of 1971 and 1972 negotiations with Indonesia, the proclamation of an Australian fishing zone, briefs for the Parliamentary Sub-committee on territorial boundaries and related documents.)</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T63 at 156-158) Replaced Decision and Statement dated 13 November 2015 (T36 at 74-76)	<u>Partially exempt (92 folios):</u> Folios: 7, 11, 50, 53, 56-58, 65, 68, 70, 73, 74, 83, 85, 88-90, 95, 100-105, 108-112, 114-116, 117, 118, 127-132, 137-142, 146-150, 152-154, 155, 156, 157, 160-163, 166-171, 191-196, 200-208, 209, 210, 211, 214-219, 221, 222, 231 <u>Wholly exempt (14 folios):</u> Folios: 51-52, 63, 64, 66, 67, 71, 72, 99, 126, 136, 165, 177, 190 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	s 33(1)(a) Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	s 33(1)(a) Exempt
2.	2014/1331 304	Law of the Sea – Delimitation – Australia – Indonesia [Timor] A1838 1733/3/2 Part 9, 1763271 <i>Part 9 of DFAT's primary file on Australia and Indonesia and Timor Sea maritime boundary negotiations post Indonesia's invasion of East Timor.</i> <i>It runs from 1 February 1976 to 6 May 1979.</i> <i>It includes correspondence regarding Australian Timor Sea permit holders, reports on official seabed boundary talks with Indonesia in February 1979, summaries of 1971 and 1972 negotiations with Indonesia, the proclamation of an Australian fishing zone, briefs for the Parliamentary sub-committee on territorial boundaries and related documents.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T62 at 153-155) Replaced Decision and Statement dated 13 November 2015 (T34 at 68-70)	<u>Partially exempt (33 folios)</u> Folios: 15-91, 21-25, 27, 48-49, 75, 79-82, 142, 151, 163-164, 222-225, 281-282, 285-287, 298 <u>Wholly exempt (1 folio):</u> Folio: 64 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	s 33(1)(a) Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	s 33(1)(a) Exempt

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3.	2104/1332 357	Law of the Sea – Delimitation – Australia – Indonesia [Timor] A1838 1733/3/2 Part 10, 1763271 <i>Part 10 of DFAT's primary file on Australia and Indonesia Timor Sea maritime boundary negotiations post Indonesia's invasion of East Timor.</i> <i>It runs from 7 May 1979 to 31 May 1979.</i> <i>It concerns Australia's negotiating position for the second round of talks in May 1979, and includes transcripts of negotiations; correspondence and records of meetings with Australian oil exploration permit holders and related documents.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T61 at 150-152) Replaced Decision and Statement dated 13 November 2015 (T32 at 62-64)	<u>Partially exempt (24 folios):</u> Folios: 14, 15, 20, 32, 38, 52, 60, 65, 66, 73, 76, 86, 89, 94, 96, 112, 114, 163-166, 261-263 <u>Wholly exempt (14 folios):</u> Folios: 16-19, 21, 50, 51, 61-64, 74, 75, 87, 88, 95, 113 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt
4.	2014/1333 164	Law of the Sea – Delimitation boundaries Australia Indonesia Timor – Joint development zones <i>DFAT file on Australia and Indonesia's Timor Sea maritime boundary negotiations.</i> <i>It runs from 12 October 1983 to 7 February 1985.</i> <i>It includes documents regarding: Australia's realisation that agreement could not be reached on a maritime boundary of the Timor Gap, and early discussions on a resource sharing treaty as an alternative to an agreed maritime boundary.</i>	13 November 2015: Updated Access Decision with Statement of Reasons (T29, pp 54-56)	<u>Partially exempt (2 folios):</u> Folios: 128, 129 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt
5.	2014/1334 315	Law of the Sea – Delimitation – Australia – Indonesia [Timor] A1838 1733/3/2 Part 7, 1872072 <i>Part 7 of DFAT's primary file on Australia and Indonesia Timor Sea maritime boundary negotiations post Indonesia's invasion of East Timor.</i> <i>It runs from 15 January to 9 February 1979.</i> <i>It includes versions of briefs for the official talks on delimitation of the seabed boundary between Australia and Indonesia that occurred on 14 to</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T58, pp 140-143) Replaced Decision and Statement dated 30 November 2015 (T37, pp 77-79)	<u>Partially exempt (65 folios):</u> Folios: 4, 63, 87, 94, 95, 99, 100, 105, 117-119, 124-126, 130, 136, 142-144, 185, 187, 188, 191-193, 204, 206, 208, 209, 218-220, 223-225, 228-229, 231, 234-236, 247, 249, 251, 252, 261, 263, 266-269, 272, 275-277, 284, 287, 288, 290, 292, 293, 302, 304, 307-309. <u>Wholly exempt (43 folios):</u>	<u>s 33(1)(a)</u> In respect of all folios, disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the <i>Archives Act 1983</i>	Decision
		<i>16 February 1979, the Report of Australia's Delegation of 2 to 10 October 1972, records regarding companies with Australia oil exploration permits for the Timor Gap, and related documents.</i>		Folios: 5-32, 183, 184, 186, 207, 226, 227, 230, 250, 270-271, 282, 283, 285, 286, 291. <i>For all folios other than 5-32, the records contain information relevant to Australia/Indonesia maritime boundary delimitation negotiations.</i> <i>For folios 5-32, the material is legal opinion.</i>	<u>s 33(2)</u> In respect of folios 5-32, the information is of such a nature that it would be exempt from disclosure in legal proceedings. The legal advice was asked for, and given in, confidence and is protected from release because it would breach the right of the client to seek independent legal advice without it being used against them including in any subsequent legal proceedings. There is no evidence that the client waived or withdrew the privilege in the intervening period and nor has the advice been made public. The advice was provided by a qualified legal practitioner in a relationship of solicitor and client and was not provided for administrative purposes. The public's interest in the right to know about the processes of government are outweighed by the need for information to be protected from release because of the ongoing sensitivities .	<u>s 33(2)</u> Not exempt under s 33(2) but exempt under s 33(1)(a).
6.	2014/1335 254	Law of the Sea – Delimitation – Australia – Indonesia [Timor]	13 November 2015: Updated Access Decision with Statement of Reasons (T38,	<u>Partially exempt (4 folios):</u> Folios: 44, 46, 72, 74	<u>s 33(1)(a)</u> In respect of folios 44, 46,	<u>s 33(1)(a)</u> Folios <u>other than</u>

No.	Tribunal File Number PDF reference	File title and Archives' file reference (Applicant's content description)	Decision reference	Exempt material as described in decision under review Findings of fact by Archives as to content	Exemption claimed under the Archives Act 1983	Decision
		A1838 1733/3/2 Part 12, 1872073 <i>Part 12 of DFAT's primary file on Australia and Indonesia Timor Sea maritime boundary negotiations post Indonesia's invasion of East Timor.</i> <i>It runs from 29 August 1979 to 19 October 1979.</i> <i>It includes documents regarding UN motions on East Timor, Jusuf Wanandi visit to Australia in August 1979, details of petroleum exploration permits in the Timor Gap area, talks between Australia and Indonesia at the UN regarding the Timor Sea, declaration of Australian fishing zone, concerns of the Australian Department of Defence about the disputed fishing zone, and reports of mass casualties in East Timor as a direct result of the Indonesian invasion.</i>	pp 80-82) Further claim that Folios 5-32 exempt under s 33(1)(a) made during the hearing.	<u>Wholly exempt</u> (62 folios): Folios: 49-65, 77-83, 274-291, 294-313 <i>For folios 44, 46, 49-52, 54, 56-59, 72, 74, 275-277, 280-281, 283-285, 287-290, 296-298, 301-302, 304-306, 308-311, the records contain information relating to Australia/Indonesia maritime boundary delimitation negotiations. The information remains sensitive.</i> <i>For folios 49-65, 274-291, 294-313, the records contain transcripts of in camera evidence of briefings provided by DFAT to the Parliamentary Joint Committee of Foreign Affairs and Defence, Sub-committee on Territorial Boundaries, from 19 September 1979 and on of the transcripts for 12 September 1979.</i> <i>Folios 77-83 contain an uncorrected proof of the Parliamentary Joint Committee of Foreign Affairs and Defence, Sub-committee on Territorial Boundaries, from 19 September 1979 and on of the transcripts for 12 September 1979.</i>	49-52, 54, 56-59, 72, 74, 275-277, 280-281, 283-285, 287-290, 296-298, 301-302, 304, 306, 308-311, disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth. <u>s 33(1)(d)</u> In respect of folios 49-65, 77-83, 274-291, and 294-313, the public disclosure of the information would constitute a breach of confidence as there is no record of the transcripts' being approved for publication. A Parliamentary committee's documents that have not been authorised for publication by that committee cannot be disclosed to any person other than a member of the committee (Senate Standing Order 37 and House of Representatives Order 242).	49-65, 77-83, 274-291 exempt Folios 49-65, 77-83, 274-291 not exempt as content not made available to be reviewed as claimed to be subject to parliamentary privilege. <u>s 33(1)(d)</u> Folios 49-65, 77-83, 274-291 not exempt under s 33(1)(d) as content not made available to be reviewed as claimed to be subject to parliamentary privilege. Folios 49-65, 77-83, 274-291 subject to parliamentary privilege and so <u>not</u> subject to the provisions of the Archives Act.
7.	2014/1337 351	Portuguese Timor – Continental Shelf A5034, SR1974/3009 Part 1, 11089375 <i>Part 1 of an Attorney-General's Department file covering 1970 to 1975 concerning Australia's seabed claim in the Timor Sea.</i> <i>It includes records regarding: Oceanic</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T68, pp 171-173) Replaced Decision and Statement dated 13 November 2015 (T35, pp 71-73)	<u>Wholly exempt</u> (1 folio): Folio: 68 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security	<u>s 33(1)(a)</u> Exempt

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the <i>Archives Act 1983</i>	Decision
		<i>Exploration (the US company issued a permit to the median line by Portugal), briefs on visits to Portuguese Timor, correspondence with other departments regarding Oceanic Exploration, reports on the activities of companies issued Australian oil exploration permits, draft and final protest notes to Portugal, maps showing overlapping permits in the Timor Sea, cables regarding approaches to Portugal to negotiation post October 1972 and pre-September 1974, briefs on oil exploration permit holders concerns regarding implications of Oceanic permit, correspondence with the embassy in Lisbon regarding oil exploration permits, and updates on UN Convention on the Law of the Sea.</i>			and international relations of the Commonwealth.	
8.	2014/1342 189	Australia: Portuguese Timor: Seabed Boundary: Timor Gap Treaty A1690, DPIE1975/000958, 31167593 <i>Department of National Development file from April to December 1975 concerning Australia' petroleum exploration permits in the Timor Sea.</i> <i>It includes documents regarding: Portugal's oil exploration permit to Oceanic to the median line in the Timor Gap area, the Australian government's willingness to support the archipelagic principle, and hopes of Timor Sea yielding important gas finds.</i>	23 October 2014: Access Decision together with Statement of Reasons (T33, pp 65-67)	<u>Partially exempt (5 folios):</u> Folios: 70, 74, 82, 83, 122 <u>Wholly exempt (1 folio):</u> Folio: 121 <u>Not within open access period (6 folios):</u> Folios 183-155 <i>The exempt records contain information relating to Australia/Indonesia maritime boundary delimitation negotiations.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt
9.	2014/5348 388	Indonesia – Australia – Indonesia Continental Shelf Boundaries – (Agreement) Negotiations A1838 752/1/23 Part 16, 551881 <i>Part 16 of primary DFAT file on negotiations with Indonesia and Portugal in the early 1970s concerning a seabed boundary in the Timor Sea.</i> <i>It runs from 10 to 17 October 1972, the period immediately following the 4 to 10 October 1972 seabed negotiations between Australia and Indonesia that resulted in the 1972 Treaty.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T67, pp 168-170) Replaces Decision and Statement dated 16 October 2015 (T39, pp 83-85)	<u>Partially exempt (9 folios):</u> Folios: 97, 98, 99, 181 (consisting of sub-folios a, b and d) <u>Wholly exempt (3 folios):</u> Folios: 367, 368, 369 <u>Not within open access period (6 folios):</u> Folios 183-155	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the <i>Archives Act 1983</i>	Decision
		<i>scheduled for February 1979, Portugal's complaint about not being informed regarding Australia's recognition of Indonesia's occupation of East Timor, media coverage of Mochtar's December 1978 visit to Canberra and joint announcement with Peacock regarding start of the Timor Sea maritime boundary, IDC minutes, including reference to delays negotiating with Indonesia holding up petroleum exploration, and related documents.</i>		<i>matters.</i> <i>For the wholly exempt folios: the exempt material is a legal opinion.</i>	<u>s 33(2)</u> In respect of folios 183-210, the exempt information is of such a nature that it would be exempt from disclosure in legal proceedings. Legal advice was asked for, and given, in confidence and is protected from release because it would breach the right of the client to seek independent legal advice without it being used against them including in any subsequent legal proceedings. There is no evidence that the client waived or withdrew the privilege in the intervening period and nor has the advice been made public. The client claimed legal professional advice on the information in the record. There is no evidence the legal professional privilege was waived or withdrawn by the client in the intervening period. Nor has the advice been made public. The advice was provided by a qualified legal practitioner and was not provided for administrative purposes. The information continues to be sensitive despite the	Not exempt under s 33(2) but exempt under s 33(1)(a).

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the <i>Archives Act 1983</i>	Decision
					passage of time and the information has enduring confidentiality. The public's interest in the right to know about the processes of government are outweighed by the need for information to be protected from release because of the ongoing sensitivities .	
12.	2014/5351 336	Timor trough border negotiations [5cm] A452, 1972/1726, 3123655 <i>Department of External Territories file. The Department of External Territories was responsible for Australia's colony of Papua New Guinea, and Australia's territories the Cocos (Keeling) Islands and Christmas Island. The seabed negotiations with Indonesia were intended to settle the seabed border between Indonesia and PNG to the south and north of PNG ahead of PNG's independence in 1975.</i> <i>It includes: transcripts for the October 1972 negotiations between Australia and Indonesia geologists arguing Indonesia and Australia share the same continental shelf, a paper setting out the Department of External Territories' position that there be no concessions beyond the "McCay line", - and a cable from Australia's Ambassador to Indonesia (Robert Furlonger) to DFAT in Canberra dated 18 August 1972 providing advice on seabed negotiations with Indonesia.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T57, pp 137-139) Replaces Decision and Statement dated 16 October 2015 (T42, pp 91-93)	Partially exempt (22 folios): Folios: 21, 25-29, 34-37, 41, 43, 49, 50, 52, 53, 68, 69, 82, 234, 235, 255 <u>Wholly exempt</u> (3 folios): Folios: 238-240 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	s 33(1)(a) Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	s 33(1)(a) Exempt
13.	2014/5352 376	Indonesia – Australia – Indonesia Continental Shelf Boundaries (Agreement) Negotiations A1838 752/1/23 Part 10, 551869 <i>Part 10 of primary DFAT on negotiations with Indonesia and Portugal in the early 1970s concerning a seabed boundary in the Timor Sea.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T66, pp 165-167) Replaces Decision and Statement dated 11 November 2015 (T43, pp 94-96)	Partially exempt (33 folios): Folios: 7-8, 25-27, 54, 55, 61, 62, 65, 67, 68, 71, 164, 168, 191, 191A, 192, 195, 251, 290, 291, 302-307, 339-341, 368 <u>Wholly exempt</u>	s 33(1)(a) Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security	s 33(1)(a) Exempt

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the Archives Act 1983	Decision
		<i>It ran from March to April 1972.</i> <i>It includes: drafts of a cabinet submission by the Foreign Minister, Nigel Bowen, concerning Australia's pending negotiations with Indonesia about a seabed boundary in the Timor Sea, cables and correspondence concerning departmental conflict about Australia's negotiation tactics with Indonesia including the Minister for Interior, correspondence concerning Australia's negotiation tactics at UNCLOS, parts of the record of cabinet decision 999 on Submissions 674 and 675 – Seabed Boundary with Indonesia 23 May 1972, Possible Parliamentary Questions 31 May 1972 for Prime Minister McMahon.</i>		<u>(3 folios):</u> Folios: 245, 246, 271 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i> <i>The exempt records contain information relevant to the capability, sources, objectives, methods, areas of interest or operations of an Australian Intelligence Agency. The information is still regarded as sensitive.</i>	and international relations of the Commonwealth. The public disclosure of this information could compromise the future of activities of an Australian intelligence agency and impair its ability to carry out its statutory functions. I would therefore reasonably be expected to cause damage to the security of the Commonwealth.	
14.	2014/5353 257	Indonesia – Australia – Indonesia Continental Shelf Boundaries (Agreement) Negotiations A1838 752/1/23 Part 11, 551873 <i>Part 11 of primary DFAT on negotiations with Indonesia and Portugal in the early 1970s concerning a seabed boundary in the Timor Sea.</i> <i>It ran from 10 May to 9 June 1972.</i> <i>It includes: the submissions of the Foreign Minister, Nigel Bowen; correspondence regarding Australia's negotiating tactics at UNCLOS; parts of the record cabinet decision 999 on Submissions 674 and 675 – Seabed Boundary with Indonesia 23 May 1972; and possible Parliamentary Questions dated 31 <au 1972 for Prime Minister McMahon concerning Australia's decision to cancel maritime boundary talks with Indonesia.</i>	30 November 2015: Replacement Access Decision together with Statement of Reasons (T44, pp 97-99) Replaces 16 October 2014 Decision and Statement	Partially exempt (13 folios): Folios: 31-33, 44, 47, 48, 49, 53, 89, 99, 100, 191 <u>Wholly exempt</u> <u>(8 folios):</u> Folios: 18, 39-42, 180-182 <i>For all folios except 18, 39-42, 180-182: the exempt information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.</i> <i>For folios 18, 39-42, 180-182: the exempt records contain information relevant to the capability, objectives, methods, areas of interest or operations of an Australia security agency. The information is still regarded as sensitive.</i>	s 33(1)(a) For all folios <u>except</u> 18, 39-42, 180-182: disclosure of the exempt information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth. For folios 18, 39-42, 53, 180-182: the public disclosure of this information could compromise the future of activities of an Australian intelligence agency and impair its ability to carry out its statutory functions. It would therefore reasonably be expected to cause damage to the security of the Commonwealth.	s 33(1)(a) Exempt
15.	2014/5354	Indonesia – Australia – Indonesia Continental	11 November 2015: Updated Access Decision together with	Partially exempt (61 folios):	s 33(1)(a)	s 33(1)(a)

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the <i>Archives Act 1983</i>	Decision
	270	Shelf Boundaries (Agreement) Negotiations A1838 752/1/23 Part 12, 551875 <i>Part 11 of primary DFAT file on negotiations with Indonesia and Portugal in the early 1970s concerning a seabed boundary in the Timor Sea.</i> <i>It runs from 9 June 1972 to July 1972, picking up from the abandoned May 1972 talks.</i> <i>It includes: cabinet submissions regarding negotiation strategies and related cables and correspondence.</i>	Statement of Reasons (T45, pp 100-102)	Folios: 26-29, 55, 58-60, 81-84, 86, 87, 91-94, 98, 100, 118-120, 122, 124, 180-184, 187, 188-191, 197, 199-202, 204, 205, 209-213, 218-221, 224-226, 228, 229, 233, 260 <u>Wholly exempt (4 folios):</u> Folios: 56, 99, 194, 195 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	Exempt
16.	2014/5355 232	Indonesia – Australia – Indonesia Continental Shelf Boundaries (Agreement) Negotiations A1838 752/1/23 Part 13, 551877 <i>Part 13 of primary DFAT file on negotiations with Indonesia and Portugal in the early 1970s concerning a seabed boundary in the Timor Sea.</i> <i>It runs from July 1972 to August 1972.</i> <i>It includes documents concerning: preparation for new seabed boundary talks with Indonesia proposed for September 1972 (after May 1972 talks were deferred); cabinet submissions regarding negotiation strategies including Foreign Minister Nigel Bowen's submission for the September/October 1972 talks; and a cable from Australia's Ambassador to Indonesia, Robert Furlonger, to DFAT in Canberra 18 August 1972 providing advice on seabed negotiations with Indonesia; a Brief titled "Seabed Boundary with Indonesia – political aspects" dated 12 July 1972; and other related documents.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T56, pp 134-136) Replaces Decision and Statement dated 11 November 2015 (T46, pp 103-105)	Partially exempt (29 folios): Folios: 11-16, 20, 21, 23, 49, 50, 82-84, 86, 88, 88, 89, 91, 103, 110, 111, 113, 114 <u>Wholly exempt (1 folio):</u> Folio: 107 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	s 33(1)(a) Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	s 33(1)(a) Exempt
17.	2014/5356 341	Indonesia – Australia – Indonesia Continental Shelf Boundaries (Agreement) Negotiations A1838 752/1/23 Part 14, 551878	14 September 2016: Replacement Access Decision together with Statement of	<u>Partially exempt (19 folios):</u> 25-26, 193-196, 198-201, 220-222, 321, 322, 324, 325	s 33(1)(a) Disclosure of the information could compromise Australian	

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the Archives Act 1983	Decision
		<i>Part 14 of primary DFAT file on negotiations with Indonesia and Portugal in the early 1970s concerning a seabed boundary in the Timor Sea.</i> <i>It runs from 25 September 1972 to 4 October 1972.</i> <i>It includes: documents regarding preparation for new seabed boundary talks with Indonesia proposed for 2 to 10 October 1972 (after May & September dates deferred); cabinet submissions regarding negotiation strategies and related cables and correspondence (including the Bensbach River issue) and the states; Bureau of Mineral Resources survey maps of the Timor Sea; a brief summarising 1970 negotiations between Indonesia's lead negotiator, Kusumaatmadja Mochtar, and Australia's lead negotiator, Laurence McIntyre, and events since (including a paragraph regarding Indonesian protest notes dated 6 March 1972 and the August 1972 cable of Australia's Ambassador to Indonesia, Robert Furlonger); and a transcript of 1970 negotiations.</i>	Reasons (T65, pp 162-164) Replaces Decision and Statement dated 16 October 2015 (T47, pp 106-108)	Folios: <u>Wholly exempt (2 folios):</u> Folio: 210, 328 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	
18.	2014/5357 264	Indonesia – Australia – Indonesia Continental Shelf Boundaries (Agreement Negotiations) A1838. 752/1/23 Part 15 <i>Part 15 of primary DFAT file on negotiations with Indonesia and Portugal in the early 1970s concerning a seabed boundary in the Timor Sea.</i> <i>It runs from 25 September 1972 to 11 October 1972 (which is the period leading up to and including the 4 to 10 October 1972 seabed negotiations between Australia and Indonesia that resulted in the 1972 Treaty.</i> <i>It includes: draft cabinet submission by the Foreign Minister, Nigel Bowen, for talks in September 1972; a paper tabled by Indonesia asserting Timor is on the Australian continental shelf; and other related documents.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T64, pp 159-161) Replaces Decision and Statement dated 11 November 2015 (T48, pp 109-111)	<u>Partially exempt (11 folios):</u> Folios: 7, 8, 10, 11, 15-18, 20, 21, 27 <u>Wholly exempt (1 folio):</u> Folio: 4 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the Archives Act 1983	Decision
19.	2014/5358 328	Australia – Portugal – Negotiations on Portuguese Timor – Continental Shelf A1838 756/1/4 Part 2, 558639 <i>Part 2 of the DFAT file on Australia's response to approaches from Portugal to commence Timor Sea maritime boundary negotiations between 1970-1973.</i> <i>It ran from 1970 to 1973.</i> <i>It includes: briefs, correspondence and cables regarding attempts by Portugal to commence Timor Sea maritime boundary negotiations with Australia; inter-departmental advice on this issue; assurances to Australian oil exploration permit holders that their permits were sound, maps of Oceanic Exploration's permit; and other related material.</i>	16 October 2015: Access Decision together with Statement of Reasons (T49, pp 112-114)	<u>Partially exempt (2 folios):</u> Folios: 125, 126 <u>Wholly exempt (1 folio):</u> Folio: 321 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt
20.	2014/5360 224	Law of the Sea – Delimitation – Australia – Indonesia [Timor] Part 5 A1838 1733/3/2 Part 5, 1872070 <i>Part 5 of DFAT's primary file on Australia and Indonesia Timor Sea maritime boundary negotiations post Indonesia's invasion of East Timor.</i> <i>It runs from 10 October 1978 to 20 December 1978.</i> <i>It includes documents (including briefs cables, draft cabinet submissions) regarding fisheries and seabed negotiations with Indonesia; Forth Committee debates at the UN regarding Indonesia's illegal occupation of East Timor; the issue of negotiations marking Australia's de facto or de jure recognition of Indonesia's illegal occupation of East Timor; discussions with Indonesian Minister Mochtar regarding the Timor Sea maritime boundary negotiations; meetings with offshore oil exploration permit holders and other related documents.</i>	11 November 2015: Updated Access Decision together with Statement of Reasons (T50, pp 115-117) Updated to correct errors in Decision and Statement of dated 16 October 2015.	<u>Partially exempt (2 folios):</u> Folios: 149 and 150 <i>The exempt records contain information relating to Australia/Indonesia maritime boundary delimitation negotiations.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	
21.	2014/5362	Discussions between Indonesia and Australia	Updated Access Decision together with Statement of	<u>Partially exempt (2 folios):</u>	<u>s 33(1)(a)</u>	<u>s 33(1)(a)</u>

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the <i>Archives Act 1983</i>	Decision
	186	regarding continental shelf boundary A1209, 1970/6400 Part 2, 8306788 <i>Prime Minister and Cabinet file from 1971-1972.</i> <i>It includes documents regarding attempts to restart maritime boundary negotiations with Indonesia after the May 1971 Treaty.</i>	Reasons (T51, pp 118-120) Updated to correct errors in Decision and Statement dated 16 October 2015.	Folios: 95 and 96 <i>The exempt records contain information relating to Australia/Indonesia maritime boundary delimitation negotiations.</i>	Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	Exempt
22.	2014/5363 222	Law of the Sea – Delimitation – Australia – Indonesia [Timor] A1838 1733/3/2 Part 4, 1872069 <i>Prime Minister and Cabinet file from 1971-1972.</i> <i>It includes documents regarding attempts to restart maritime boundary negotiations with Indonesia after the May 1971 Treaty.</i>	14 September 2016: Replacement Access Decision together with statement of reasons (T60, pp 147-149) Replaces Updated Decision and Statement dated 11 November 2015 (T52, pp 122-123), which in turn updated access Decision together with Statement of Reasons dated 23 July 2015 (T30, pp 57-58)	<u>Partially exempt (8 folios):</u> Folios: 56, 127, 130, 139, 145, 171, 177 and 197 <i>The exempt records contain information relevant to Australia/Indonesia maritime boundary delimitation negotiations.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt
23.	2014/5364 262	Law of the Sea – Delimitation – Australia – Indonesia [Timor] Part 5 A1838 1733/3/2 Part 5, 1872070 <i>Part 5 of DFAT's primary file on Australia and Indonesia Timor Sea maritime boundary negotiations post Indonesia's invasion of East Timor.</i> <i>It runs from 10 October 1978 to 20 December 1978.</i> <i>It includes documents (including briefs cables, draft cabinet submissions and IDC committee minutes) regarding fisheries and seabed negotiations with Indonesia in December 1978; the issue of negotiations marking Australia's de facto or de jure recognition of Indonesia's illegal occupation of East Timor; oil prospects in East Timor; and the Australian delegation to the 1972 seabed boundary talks.</i>	14 September 2016: Replacement Access Decision together with Statement of Reasons (T59, pp 144-146) Replaces updated decision and Statement dated 11 November 2015 (T53, pp 124-126), which in turn updated Access Decision together with Statement of Reasons dated 26 August 2014 (T31, pp 59-61)	<u>Partially exempt (11 folios):</u> Folios: 18, 24, 27, 36, 42, 57, 78, 118, 124, 232, 238 <i>The exempt records contain information relevant to Australia/East Timor maritime boundary delimitation matters.</i>	<u>s 33(1)(a)</u> Disclosure of the information could compromise Australian foreign policy interests, and thus could be expected to cause damage to the security and international relations of the Commonwealth.	<u>s 33(1)(a)</u> Exempt
24.	2017/2115	Submission No. 1865: East Timor – Australian policy – Decision 4485	Statement of Reasons for Decision on Internal	<u>Partially exempt (3 folios):</u>	<u>s 33(1)(a)</u>	<u>s 33(1)(a)</u>

No.	Tribunal File Number <i>PDF reference</i>	File title and Archives' file reference <i>(Applicant's content description)</i>	Decision reference	Exempt material as described in decision under review <i>Findings of fact by Archives as to content</i>	Exemption claimed under the <i>Archives Act 1983</i>	Decision
	34	(FAD) A12909.1865, 8911897 13 April 2017 <i>The file includes: Cabinet Minute, Foreign Affairs and Defence Committee, dated 17 January 1978, Decision No. 4485 (FAD) and related Submission No. 1865 – East Timor – Australian Policy.</i>	Reconsideration Application under section 42 of the <i>Archives Act 1983</i> (T7 of separate Tribunal documents, pp 13-16)	Folios: 2, 3, 13 <i>The exempt records contain information relating to the security, defence or international relations of the Commonwealth of Australia that continues to be sensitive.</i>	Disclosure of the exempt information could damage Australia's international interests and relations.	Exempt

I certify that the preceding two-hundred and ninety-two (292) paragraphs and Attachment C are a true copy of the reasons for the decision herein of Deputy President S A Forgie

.....[sgd].....
Associate

Date of decision: 9 June 2020

Heard: 30 April 2018; 1, 2, 3 and 4 May 2018; and 11 July 2018

Applicant's counsel: Ms G Costello SC with Dr A McBeth

Applicant's solicitor: Ms M Leikina,
Gordon Legal

Respondent's counsel: Ms K Stern SC

Respondent's solicitor: Mr J Hyland and Mr L Akele
Australian Government Solicitor

THE NEWS CORPORATION LTD and Others v NATIONAL
COMPANIES AND SECURITIES COMMISSION

General Division: Fox, Woodward and Beaumont JJ

New South Wales District Registry

26, 27 September, 17 December 1984

Administrative Law — Administrative Appeals Tribunal — Freedom of Information Act — Documents held by the National Companies and Securities Commission — Access sought and refused — Whether documents “exempt documents” within s 37(1)(a) of the Freedom of Information Act — Appeal to the Administrative Appeals Tribunal — Direction by Tribunal to prepare schedules of the documents claimed to be exempt — Order by Tribunal prohibiting disclosure of schedules to applicant — Private hearing ordered — Whether orders invalid or a denial of natural justice — Companies Act 1981 (Cth), s 12(1)(a)(i) — Freedom of Information Act 1982 (Cth), ss 14, 15, 37(1)(a), 54, 55(1)(a), 58(2), 63(1), (2)(b) and 64(1) — Administrative Appeals Tribunal Act 1975 (Cth), ss 35(1), (2) and (3), 36, 39 and 44(1) — Judiciary Act 1903 (Cth), s 39B.

Section 37(1) of the *Freedom of Information Act* 1982 (the FOI Act) provides: so far as presently relevant:

“(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—

- (a) prejudice the conduct of an investigation of a breach, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.”

Section 35(2) of the *Administrative Appeals Tribunal Act* 1975 (the AAT Act) provides so far as presently relevant:

“(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order—

- (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present.

...

- (c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.”

The respondent was conducting an inquiry as to whether it should take any action against the applicants and others for breaches of the law relating to company takeovers and acquisition of public company shares. The applicants sought access under the FOI Act to documents obtained and compiled by the respondent in the course of its inquiry. The respondent denied access, claiming that the documents were exempt documents within s 37(1)(a) of the FOI Act. This decision was taken for review to the Administrative Appeals Tribunal pursuant to s 55(1)(a) of the FOI Act.

The Tribunal, during the hearing, directed the respondent to provide to the Tribunal and to the applicants, an affidavit annexing a schedule which would list,

identify and adequately describe each document and the reasons for the exemption claim “unless to do so would disclose the matters claimed to be exempted” and where this would occur, another schedule was to be drawn up containing such exempt matter which would only be available to the Tribunal. In response to this request, an affidavit of the Executive Director of the Commission, Mr Schoer, was sworn, and schedules were prepared which were exhibits to Mr Schoer’s affidavit. Some extracts from these schedules were disclosed to the applicants. However, the respondent asked the Tribunal to order that the schedules themselves be disclosed to the Tribunal only.

Such an order was made by the Tribunal pursuant to its discretionary powers contained in s 35(2) of the AAT Act and in addition, pursuant to the same subsection, the Tribunal closed that part of the hearing to the applicants where the schedules were admitted and further oral evidence of Mr Schoer received. Mr Schoer, in his affidavit, also gave evidence at great length and in general terms as to why the required disclosure could reasonably be expected to prejudice the events specified in s 37(1)(a) and in particular, he asserted that the required disclosure would “tip the hand” of the respondent in its investigations and that it might put unspecified persons in a position to mislead or divert the investigation by fabricating defences, setting false trails and seeking to influence witnesses.

The Tribunal accepted Mr Schoer’s evidence and held that s 37(1)(a) was applicable to the documents. The applicants appealed against this decision pursuant to s 44(1) of the AAT Act arguing that s 37(1)(a) had been misconstrued by the Tribunal, that there was no evidence to support the Tribunal’s findings that the required prejudice could reasonably be expected to flow from the premature disclosure and that the Tribunal’s s 35 order was invalid and that being so, there was a denial of natural justice in failing to make the schedules available to the applicants.

Held, dismissing the appeal, (1) (per Fox and Woodward JJ): the “reasonable expectation” in s 37(1)(a) is more than a mere risk, possibility or chance of prejudice. However (per Woodward J) it does not require a probability of prejudice — it would be satisfied by an even chance of the prejudice happening. Further, it is sufficient to show reasonable expectation of prejudice to the carrying out of the investigation and not necessary to also show prejudice to, or frustration of, its outcome.

(Per curiam.) The Tribunal did not misconstrue s 37(1)(a).

(Per Beaumont J.) As a matter of construction, the Tribunal correctly held that premature disclosure of documents and consequent loss of opportunity on the part of the National Companies and Securities Commission to exploit the situation, could constitute prejudice of the kind contemplated by s 37(1)(a) and that this was so, even if the Tribunal could not find a specific person who might interfere with the course of the investigation in the event of the premature disclosure.

(2) (Per Fox and Woodward JJ.) There was ample evidence to enable the Tribunal to reach the conclusion that in this case, the documents were properly exempt within s 37(1)(a).

(Per Beaumont J, dissenting.) The evidence from the affidavit was insufficient to enable a view to be formed one way or another as to whether s 37(1)(a) applies.

(Per Woodward J.) In a case where there are large numbers of documents (here, over 6,000), even though not all would prejudice the investigation if disclosed, if it is not possible to identify from the summaries which pieces might fit into the applicants’ “jig-saw puzzle”, then it is open to the Tribunal to order exemption with a degree of generalisation appropriate to the case.

(Contra per Beaumont J.) The mere fact that a document happens to be found in an investigation file does not entitle it to a blanket exemption.

Re Murtagh and Federal Commissioner of Taxation (1984) 1 AAR 419; *The News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64; *Ad Steam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd* (1984) 2 ACLC 671, referred to.

(3) (Per curiam.) The applicants' challenge to the validity of the Tribunal's s 35 order raised a question of law properly the subject of appeal from the Administrative Appeals Tribunal pursuant to s 44 of the AAT Act.

Director-General of Social Services v Chaney (1980) 47 FLR 80; *Maurice v London County Council* [1964] 2 QB 362; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, referred to.

(4) (Per Fox and Woodward JJ.) "Parties" within s 35(2)(c) includes legal representatives and the Tribunal could therefore exclude as well as the applicants, the applicants' legal representatives from the private hearing and deny them access to the schedules.

(5) (Per Fox and Woodward JJ, Beaumont J dissenting.) Neither the Administrative Appeals Tribunal nor the court should accept undertakings from the applicants' counsel and his instructing solicitor as to confidentiality, namely undertakings that if they were allowed access to the schedules, they would not act for the applicants in any later proceedings under the various Companies Codes.

(Per Woodward J.) The acceptance of such an undertaking would be contrary to the public policy which requires a litigant to be free to be represented by the practitioner of his choice.

Thomson Australian Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150, referred to.

(6) (Per Fox and Woodward JJ.) The Tribunal properly exercised its powers under s 35(2) of the AAT Act in ordering the private hearing and disallowing the applicants' access to the schedules.

(Per Fox J.) It must have been the intent of s 63(1) that s 35(2) applies, inter alia, to the maintenance of privacy in relation to an exempt document; it was apparent from the evidence that to disclose the schedules would disclose the existence and nature of the documents and go a long way towards giving access to them.

(Per Woodward J.) The Tribunal was entitled to consider the alleged policy disclosed by ss 58(2), 63(1) and 64(1) of the FOI Act in relation to exempt documents in deciding whether to make the order for non-disclosure of the schedules and properly exercised its discretion to give the schedules the same exemption as the documents.

(7) (Per Fox and Woodward JJ.) Because the order for non-disclosure of the schedules was properly made in the light of the various statutory provisions contained in the FOI Act, there was no scope for the application of the principles of natural justice.

National Companies and Securities Commission v News Corporation Ltd (1984) 58 ALJR 308, referred to.

(Per Beaumont J, dissenting.) Implicit if not explicit in the Tribunal's reasons is a finding that the justification for upholding the claim for exemption is the evidence from the respondent taken ex parte. The applicants were denied natural justice in not being present when such significant evidence was being presented. Short of a situation involving national security or high government policy, there was no justification for denying the applicants' counsel access, particularly as the matter could be argued by reference to categories.

Harris v Australian Broadcasting Corporation (No 2) (1983) 50 ALR 567; *Kanda v Government of the Federation of Malaya* [1962] AC 322; *Mahon v Air New Zealand Ltd* (1983) 50 ALR 193; *Alister v The Queen* (1984) 58 ALJR 97; *Re Trade Practices Tribunal; Ex parte Tooheys Ltd* (1977) 16 ALR 609; *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, referred to.

APPEAL

Appeal pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) on a question of law from a decision of the Administrative Appeals Tribunal.

J J Spigelman and T Robertson, for the applicants.

The Tribunal misconstrued s 37(1)(a) of the FOI Act, which requires actual prejudice or a reasonable expectation of actual prejudice. To deprive an investigator of an opportunity to ask questions of a person ignorant of the documents could not constitute prejudice within s 37(1)(a). For the conduct of the investigation to be prejudiced, its purpose should be undermined. In the absence of being able to point to any person who would take steps to prevent the respondent from discovering the truth of the events under investigation, there could be no s 37(1)(a) prejudice. There was no evidence of actual prejudice, at least in the public evidence. The secret sessions could not have included such evidence with respect to each and every document. Further, the respondent should have established in the private hearing that in the case of each document the purpose of the inquiry would be better served by witnesses being ignorant of such a document. Such evidence would have had to assert that such ignorance was required notwithstanding the statutory context of the investigation (*National Companies and Securities Commission Act* 1979 (Cth) (NCSC Act), ss 37, 39, 42; *Crimes Act* 1914 (Cth), Pt II; *Companies Act* 1981 (Cth), ss 560, 565(3), 572), (see *Barton v Csidei* [1979] 1 NSWLR 524 at 535). Alternatively, that the investigation's statutory context was a relevant consideration (*Sullivan v Department of Transport* (1978) 20 ALR 323).

Unless the s 35 order is valid, the applicants have been denied natural justice or the Tribunal has failed to comply with its s 39 obligation. "Parties" in s 35(2)(c) does not include legal representatives. (See s 30 and cf s 36(2); *Ex parte Nelson; re Clyne* (1965) 66 SR (NSW) 48.) Alternatively, the s 35(2)(c) order relating to the applicants' legal representatives was ultra vires: (a) because there was no evidence that such an order was necessary to avoid disclosure "to the applicant" within s 63(1); (b) because the alleged policy of s 64 is an irrelevant consideration (cf AAT Act s 37(2) and (3) and also see s 36(2)); and (c) the decision was unreasonable (see *Re B* [1981] 2 NSWLR 372). Alternatively the s 35(2)(c) order was ultra vires because: (a) there was an error of law in the construction of s 37(1)(a); (b) the Tribunal failed to take into account relevant considerations (the statutory context of the investigation); (c) the Tribunal took into account irrelevant considerations (that the schedules would be exempt under the FOI Act — the request for access to the schedules was not under the FOI Act — and the alleged policy in ss 58(2), 63(4) and 64).

A C Chernov QC and J G Santamaria, for the respondent.

The appeal is wholly concerned with whether the Tribunal erred in its construction of s 37(1)(a). The jurisdiction of the court is limited to questions of law from any decision of the Tribunal. "Decision" does not include interlocutory rulings such as those made under s 35(2). The Tribunal properly construed s 37(1)(a) and could properly find on the evidence (consisting of affidavits as to the functions and aims of the NCSC, opinion evidence to that effect from Mr Schoer, and of a chronology (partly in private) of the investigation and impact of disclosure upon the investigation, evidence that the schedules amounted to a summary of the documents and that the disclosure of the schedules would disclose the exempt material) that the disclosure would prejudice the conduct of investigation within the

meaning of s 37(1)(a). The determination of the Tribunal not to grant to the applicants access to the schedules did not involve a breach of the rules of natural justice having regard to ss 14, 58, 63 and 64 of the FOI Act. There was no power in the Tribunal to grant access. In any event, its discretion was properly exercised having regard to the policy of the legislation.

Cur adv vult

17 December 1984

Fox J. For the purposes of an inquiry it was about to undertake the respondent Commission, acting under s 12(1)(a)(i) of the *Companies Act* 1981 (Cth), served a notice on the first applicant to produce certain documents. Notice of the intended inquiry was published a few weeks later. The applicants other than the first applicant are subsidiaries or associates of the first applicant. Shortly after the s 12 notice was received, the applicants served on the respondent under s 15 of the *Freedom of Information Act* 1982 (the FOI Act) what were called "reverse notices", being in closely similar terms to the notice served, but of course relating to documents from whatever source, and applying also to internal memoranda, etc of the Commission. The Commission is an "agency" within the meaning of the Act. The hearing commenced on 19 April 1983, but the applicants made legal challenges which meant that the proceedings were adjourned and did not recommence until on or about 17 July 1984. As I understand, they are still on foot.

The Commissioner refused to grant access to the documents in reliance (so far as presently relevant) upon s 37(1)(a) of the Act:

"37. (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—

- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance."

This decision was taken for review to the Administrative Appeals Tribunal (s 55(1)(a) of the Act). The Tribunal held that s 37(1)(a) was applicable, and the decision of the Commission was affirmed. Over six-and-a-half thousand documents were involved, and for the purposes of the hearing before it, directions were given by the Tribunal which resulted in schedules being prepared, and presented, setting out lists of the documents sought to be exempted, a short description of the contents of each sufficient to provide a prima facie justification for the ground or grounds of exemption relied on, and a statement of the provision of the Act relied upon to support the claim for exemption. Counsel for the present applicants sought access to the schedules, and it was refused. Access was of course not given to the documents to which the lists related. The case before the Tribunal and before us was argued on a substantive basis, accepting that possibly a very few of the documents might not be exempt, and that a few of them most probably were. There was some oral evidence given in the absence of the applicants. The applicants understandably submit that they were at a disadvantage in challenging the claim of the respondent that the documents were exempt.

The Tribunal acted in reliance on s 35(2) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act). That section is as follows:

“35. (1) Subject to this section, the hearing of a proceeding before the Tribunal shall be in public.

(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order—

- (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present;
- (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and
- (c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.

(3) In considering—

- (a) whether the hearing of a proceeding should be held in private; or
- (b) whether publication, or disclosure to some or all of the parties, of evidence given before the Tribunal, or of a matter contained in a document lodged with the Tribunal or received in evidence by the Tribunal, should be prohibited or restricted,

the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.”

There is in the appeal papers a sample of the schedules, with some omissions, relating to about 100 documents, which was made available to the applicants at the hearing before the Tribunal. There is affidavit evidence giving a general classification of the contents of each of the thirty-nine cardboard volumes in which the documents are, and a further broad description, generally by nature of contents but sometimes by origin, of groups of the volumes. Two of the volumes were described as having been produced by the applicants to the National Companies and Securities Commission (the NCSC) (the s 12 notices were apparently complied with, at least in part) but the original application did not relate to them. For one reason and another, the claim to access was not pressed in relation to every volume.

The Tribunal dealt first, in separate reasons, with the application of s 35. It then dealt further, and finally, with the application of s 37(1)(a).

The affidavit of Mr Schoer, Executive Director of the Commission, states some grounds for the exemption claimed, and it is useful to set out the more significant of them so far as presently relevant:

“20. In my opinion, the release of the documents, the subject of this

application (now sought by the Applicants), will interfere with the investigation of the matters referred to earlier. These documents, all of which were obtained or produced for the purposes of the investigation, are sought by those whose conduct is being investigated with a view to seeing whether they breached the relevant law. A disclosure of these documents will have the obvious effect of 'tipping the hand' of the NCSC, a matter of particular relevance in the context of the hearing referred to earlier as well as any prosecutions that may issue against the Applicants as a result of the investigation. This will also prejudice the enforcement by the NCSC of the securities and company law in general and section 11 of the Acquisition of Shares Act, and sections 137 and 138 of the Companies Act in particular. Further, it will also prejudice the administration of the relevant legislation by the NCSC in general and in particular, in relation to the transactions referred to in paragraph 7 above.

21. If the documents of the type in question are released to a person under investigation, he will be in a position to mislead or divert the investigation either by fabricating defences, setting false trails and seeking to influence witnesses. The problems are particularly acute with respect to transactions in securities because of the multiplicity of persons and transactions involved.

22. As I mentioned earlier, in an investigation, information is obtained from parties other than those under investigation, which usually takes the form of documents or is reduced to writing. If such information is made available to a person under investigation, in my opinion and for the reasons given earlier, the information will no longer be readily available to the NCSC thereby inhibiting its ability to administer the relevant legislation and investigate breaches of it.

23. The release to the Applicants of the documentary material sought by them before the conclusion of this investigation will prejudice the conduct of that investigation in that it will indicate to the Applicants:

- (a) the commercial activities of the Applicants and others which are the subject of the investigation;
- (b) the activities which are not under investigation;
- (c) the nature and extent of the evidence which has been accumulated to date in relation to this investigation;
- (d) the reliance placed upon or emphasis which has been given by the NCSC to particular items of evidence or information;
- (e) the direction of the investigation;
- (f) methods of surveillance by the NCSC of transactions under investigation including those in question;
- (g) the disclosure of priorities of the investigation;
- (h) the resources available to the investigators;
- (i) the hypotheses of the investigation and the methods of investigation."

The grounds taken in the notice of appeal are that the Tribunal erred in its construction of s 37(1)(a) of the Act, that it did not, in the hearing before it, comply with the principles of natural justice, that it failed to comply with s 39 of the AAT Act; that the exercise of its discretion under s 35 of that Act miscarried; that the exercise of its discretion under s 63(2)(b) of the FOI

Act miscarried and some grounds related to evidentiary matters, which it is unnecessary to pursue separately.

Counsel for the respondent submits that there is only one question properly before the court, and that is whether the Tribunal erred in its interpretation of s 37(1)(a). The submission is based on s 44 of the AAT Act which gives jurisdiction to this Court to hear appeals on questions of law from “any decision” of the Tribunal. Counsel, in reliance upon *Director-General of Social Services v Chaney* (1980) 47 FLR 80, argues that “decision” means final determination, and submits that interlocutory matters, such as the application of s 35 by the Tribunal, is not properly the subject of the appeal.

The present application, unlike that in *Chaney*, is brought after the Tribunal has made its final order or decision, and relates to that order or decision. It is I think conceded that appeals (so-called) under the AAT Act cannot be taken from interlocutory decisions of the Tribunal unless the earlier decision affects the final order, and an error of law results. The appeal is then from the final decision.

In the present case, it is said that there was, in the conduct of the Tribunal’s review, a denial of natural justice which could well have affected the result. It is accepted that denial of natural justice constitutes an error of law. The decision would presumably be reviewable on that ground in this Court under s 39B of the *Judiciary Act* 1903 (Cth) and, if the ground were made out, a prerogative writ could issue to the Tribunal. I think that an appeal on that ground can also be brought under the AAT Act. The matter in fact arises here in a slightly different way. The Tribunal acted in reliance on s 35(2) of the last-mentioned Act and it is the correctness of its understanding of that subsection which is under challenge. The claim respecting natural justice has been tied specifically to the construction of this subsection. In the language of counsel for the applicants: “. . . if there was a valid s. 35 order then the natural justice question of law does not run.” I do not understand this to involve a separate argument that there was an absence of natural justice in the application of s 35, accepting that it was properly construed, but such a contention could not in my view be sustained.

It is convenient to turn first to the application of s 37(1)(a) of the FOI Act. The decision by the respondent that the paragraph applied is not of course conclusive. The question it poses is to be examined objectively, but in the light of the evidence. I agree that it is not sufficient that there be a mere risk of prejudice to the conduct of an investigation. I would not, however, seek to supply some paraphrase of the statutory language “could reasonably be expected to prejudice”. There is no doubt that an investigation was being carried out (and still is) and that it was an investigation of the kind referred to in par (a). It does not seem to me that the Tribunal misconceived the meaning of the language in question, and there was ample evidence to enable it to reach the conclusion it did. It was submitted that the (disclosed) evidence dealt with documents by broad categories, and separately with the nature of prejudice, without linking the two. This is not entirely accurate, but in any event, it was open to the Tribunal to associate the two, as a matter of judgment and good sense. The matter went further, of course, because the Tribunal saw individual descriptions of the documents. In relation to many of the documents, it would I think take very

little evidence to justify a conclusion of reasonable expectation of prejudice. The courts decided long ago, one imagines with little or no actual evidence of possible prejudice to a fair trial, that an accused should not be entitled to discovery as against the prosecution. What is sought here is analogous to such a claim for discovery.

In dealing with a submission that a document is exempt, as with claims of confidentiality or privilege, a reviewing tribunal, in the absence of a provision such as s 35(2) of the AAT Act, would I think be bound to adopt some practical course, at least on an interim basis, whereby a right to access could be determined without giving access. In the end, a claim to exemption may have to be determined, without the applicant having access to all the material which the tribunal has and without having access to the documents or a schedule describing them. Much would turn on the circumstances of the case. This is, however, hypothetical because there is in the AAT Act not only s 35(2), but s 35(1) and s 39, and there are also ss 63 and 64 of the FOI Act.

A course often followed in litigation is for access to be granted to counsel, on the footing that he, or he and his solicitor, are the only persons to see a document. It is a convenient but dangerous practice, as it involves the withholding from a client by his legal representative of information relevant to the litigation. The acceptance of such a course would not, I imagine, be within the ordinary retainer of counsel, and would as a rule need specific instructions. Counsel relied upon the practice, as part of his argument, and submitted that the Tribunal had erred in not following it. An application to the effect mentioned had been made to the Tribunal, but was rejected by it. In the light of the statutory provisions, I doubt whether the Tribunal had power to act in any such way, but it would in any event be a matter for its discretion, and its failure to exercise the discretion in favour of the applicant is not a matter which would by itself involve an appealable error of law. I should add in this regard that the submission of the applicants depended at several points in drawing a distinction between "party" and the legal representative of a party, when considering the statutory language, but in my opinion the distinction is not sustainable.

The actual decision of the Tribunal was "that the decision of Raymond John Schoer to which the application for review relates be affirmed". This decision was made on review under s 54 of the Act, and access to the documents was thereby denied. In my view the Tribunal did not err in law in its construction and application of s 37(1)(a).

There were grounds relied upon in addition to s 37(1)(a), but, by agreement, the present application has been treated as a challenge only to reliance on s 37(1)(a), on the footing that if the challenge succeeds, the application of other sections of the Act can be dealt with by the Tribunal and, if appealed to, by this Court.

Section 35(2) of the AAT Act is conditioned by the state of satisfaction of the Tribunal. It seems plain, and must have been the intent of s 63(1), that subs (2) applies, among other situations, to the maintenance of privacy in relation to an exempt document. To that end it can exercise the powers in that subsection (see also s 64(1) of the Act). The particular documents to which access was sought were the schedules produced by way of evidence before the Tribunal, for they contained a description of the documents, one by one. It is apparent from the evidence that to disclose the schedules would

disclose the existence of the documents and their nature, would go a long way towards giving access to them (cf s 63(2) of the Act) and might well convey to the applicants, in relation to most documents, all they wished to know. It is not necessary to consider whether the schedules became exempt documents themselves (see s 25(1)).

I am of the view that s 35(2) provided a power which was available to be used, and am not satisfied that there was any error of law affecting its exercise. Section 39, which was relied on, is expressly made subject to s 35. The claim based on denial of natural justice must therefore fail.

It may be that a company whose dealings are the subject of an inquiry by the NCSC should freely have access to all documents in the possession of the Commission for the purposes of that inquiry. This has not been the policy, and I do not suggest it should be. What has happened here is that a company which has been fully informed of the purposes of the inquiry, and knows in detail the documents sought from it, has attempted to obtain from the Commission access to all similar documents in the possession of the Commission, from whatever source. It has not for this purpose used the power available under the legislation governing the inquiry, but has resorted to the FOI Act. It seems to me that it is virtually a foregone conclusion that access to the documents it seeks will be denied. A claim to denial of natural justice seems quite unreal in these circumstances. So far as concerns fairness to the parties, the Administrative Appeals Tribunal will so act as to prevent the accepted principle of non-access being whittled away, more especially when the application has all the appearance of a comprehensive fishing expedition, likely in the immediate and ultimate consequences to hinder rather than help the inquiry.

In my opinion the application should be dismissed with costs.

WOODWARD J. In this matter I have had the advantage of reading the draft reasons for judgment of Beaumont J. His Honour has set out the somewhat tangled history of this matter and I shall not repeat it in any detail.

It is sufficient for my purposes to say that the appeal is brought by the applicants, the News Corporation Ltd and other related companies, pursuant to s 44(1) of the *Administrative Appeals Tribunal Act* 1975 (the AAT Act) which enables a party to a proceeding before the Administrative Appeals Tribunal (the AAT) to appeal to this Court, on a question of law, from any decision of the AAT in the proceeding.

The applicants had applied to the AAT, pursuant to s 55 of the *Freedom of Information Act* 1982 (the FOI Act) for review of a decision of the respondent refusing to grant the applicants access to certain documents. The AAT decided that the respondent's decision should be affirmed, and it is that decision of the AAT which is the subject of the present appeal.

The respondent is conducting an inquiry to determine whether it should take any action against the applicants and others for possible breaches of the law relating to company takeovers and the acquisition of shares in public companies. The particular issues involved relate to the acquisition of shares in Thomas Nationwide Transport Ltd (TNT) by the applicants and other companies or persons who may be associated with the applicants.

The applicants have, in effect, sought access under the FOI Act, to all the documents so far obtained by the respondent, from a wide variety of

sources, in the course of its inquiry, together with any summaries, analyses or other memoranda it may have created itself. These documents number over 6,000 and have been categorised by the respondent in the following terms:

- “(1) Documents produced by stockbrokers — volumes 17, 19, 20, 23, 24, 25 — which relate to the share dealings under investigation, being:
 - (i) contract notes which invoice a broker’s client for securities bought or sold;
 - (ii) settlement notes which record payments to brokers by their clients on contract notes;
 - (iii) client ledgers or account reconciliation sheets which include name of client, the date of transaction, the securities bought or sold, the volume and the price;
 - (iv) buy and sell orders which record clients’ instructions;
 - (v) scrip ledgers or stock book cards which record the movement of share certificates in and out of the broker’s office;
 - (vi) internal memoranda which record communications between brokers, their staff and third persons;
 - (vii) copies of correspondence, telex and file notes which relate to clients’ transactions and clients’ business and dealings between brokers in respect of the same matters.
- (2) Documents produced by the Applicants — volumes 11 and 12.
- (3) Documents produced by persons and companies other than the Applicants (other than stockbrokers) — volumes 1-10, 13-18, 21, 22 which relate to the share dealings under investigation, being:
 - (i) confidential memoranda;
 - (ii) paid contract or settlement notes;
 - (iii) option entitlement forms;
 - (iv) internal memoranda between company officers;
 - (v) schedules of transactions in company securities;
 - (vi) company bank statements;
 - (vii) internal file notes, memoranda re takeover strategy of public company by another public company;
 - (viii) letters;
 - (ix) share transfer forms;
 - (x) draft takeover documents;
 - (xi) schedule setting out interests of certain directors in various companies;
 - (xii) relevant board minutes.
- (4) Draft notices to produce documents, disclose information prepared by NCSC officers — volumes 26 and 27.
- (5) Originals of above notices — volume 28.
- (6) Documents compiled and collected by officers of the NCSC relating to TNT including memoranda to and from the NCSC, copies and originals of telexes between NCSC and the Applicants and others including the Attorneys-General, stockbrokers, etc, all of which were produced in the course of the deliberative process in connection with the investigation — volumes 29 to 31.
- (7) Brief to Counsel for hearing — volumes 32 and 33.
- (8) Analyses of shareholders, trading and like matters prepared by

officers of the NCSC in connection with the investigation — volumes 34 to 39.”

The applicants seek access to all these categories of documents except those referred to in items 2, 4, 5 and 7, that is vols 11-12, 26-28 and 32-33.

The applicants know the general nature of most of the documents they are seeking, because they have supplied exactly such documents themselves. They can deduce readily enough that there will also be in existence internal minutes and memoranda of the respondent commenting on and analysing this basic material which they and others have supplied.

It is true that the respondent may have other documents in its possession which are covered by some such general description as “confidential memoranda” or “internal memoranda between company officers” and which may come as a surprise to the applicants. No doubt an important reason for the FOI Act application is to fossick for such gems.

The applicants have, of course, sought access to all these documents in order to obtain warning of any civil or criminal action which may, in the event, be brought against them. The respondent has resisted the giving of access for the obverse reason that, if the applicants receive such advance warning, they would then be able to take steps, and might in fact take steps, to hinder or frustrate the further conduct of the inquiry. It must be remembered, however, that the applicants seek access to the documents as members of the public. They claim no greater right than a journalist could claim. It is assumed, at least in the circumstances of this application, that access for one is access for all.

The matter which is presently before the court represents the respondent’s second line of defence. It ultimately failed in a previous attempt to demonstrate that it was not bound by the FOI Act at all. It seeks, in these proceedings, to establish that it is entitled to a virtual blanket exemption from the granting of access in the present case, because s 37(1)(a) of the FOI Act exempts documents the disclosure of which “... could reasonably be expected to ... prejudice the conduct of an investigation of a breach, or possible breach, of the law ...”.

If this line of defence should fail, there are other possible exemptions on which the respondent will seek to rely, at least in relation to some categories of documents. But the parties have agreed that it is convenient to deal with this wide-ranging exemption first.

In an effort to secure the orderly handling of the issues involved, the AAT gave directions that the respondent should provide, to the AAT and the applicants, an affidavit annexing a schedule which would list, identify and adequately describe each document for which exemption was claimed “unless to do so would disclose the matter claimed to be exempt”.

In the event, the respondent felt itself unable to comply with this requirement to serve such a schedule on the applicants. Two officers of the respondent worked for over two months to prepare a schedule of all the relevant documents held by it, but the AAT was asked to order that this schedule be not disclosed to any persons other than the Tribunal and its staff. It made this order pursuant to s 35(2) of the AAT Act. The order was later relaxed in some slight measure, with the consent of the respondent, and a small part of the schedule was made available to the applicants. The schedule gave one line to each document, identifying it by date, general

category or type, originator and recipient where appropriate, description or summary of contents and reasons for exemption claim.

The executive director of the respondent gave evidence by affidavit of the nature of the respondent's investigation and the categories of documents which it had amassed in the course of its investigation. He explained how such documents could be used by a person under investigation "to mislead or divert the investigation either by fabricating defences, setting false trails and [? or] seeking to influence witnesses". He went on to list the types of information which would be of value to the person being investigated, and exhibited the schedule of documents for which the order of non-disclosure was made. It is appropriate to set out some of this evidence in full.

"20. In my opinion, the release of the documents, the subject of this application (now sought by the Applicants), will interfere with the investigation of the matters referred to earlier. These documents, all of which were obtained or produced for the purposes of the investigation, are sought by those whose conduct is being investigated with a view to seeing whether they breached the relevant law. A disclosure of these documents will have the obvious effect of 'tipping the hand' of the NCSC, a matter of particular relevance in the context of the hearing referred to earlier as well as any prosecutions that may issue against the Applicants as a result of the investigation. This will also prejudice the enforcement by the NCSC of the securities and company law in general and section 11 of the *Acquisition of Shares Act*, and sections 137 and 138 of the *Companies Act* in particular. Further, it will also prejudice the administration of the relevant legislation by the NCSC in general and in particular, in relation to the transactions referred to in paragraph 7 above.

21. If the documents of the type in question are released to a person under investigation, he will be in a position to mislead or divert the investigation either by fabricating defences, setting false trails and seeking to influence witnesses. The problems are particularly acute with respect to transactions in securities because of the multiplicity of persons and transactions involved.

22. As I mentioned earlier, in an investigation, information is obtained from parties other than those under investigation, which usually takes the form of documents or is reduced to writing. If such information is made available to a person under investigation, in my opinion and for the reasons given earlier, the information will no longer be readily available to the NCSC thereby inhibiting its ability to administer the relevant legislation and investigate breaches of it.

23. The release to the Applicants of the documentary material sought by them before the conclusion of this investigation will prejudice the conduct of that investigation in that it will indicate to the Applicants:

- (a) the commercial activities of the Applicants and others which are the subject of the investigation;
- (b) the activities which are not under investigation;
- (c) the nature and extent of the evidence which has been accumulated to date in relation to this investigation;
- (d) the reliance placed upon or emphasis which has been given by the NCSC to particular items of evidence or information;

- (e) the direction of the investigation;
- (f) methods of surveillance by the NCSC of transactions under investigation including those in question;
- (g) the disclosure of priorities of the investigation;
- (h) the resources available to the investigators;
- (i) the hypotheses of the investigation and the methods of investigation.”

The deponent was cross-examined at length by counsel for the applicants as to whether it would be prejudicial to the investigation to disclose, for instance, the dates of documents or the names of persons exchanging correspondence. He maintained his view that the disclosure of the whole of any of the summaries contained in the schedule or, in most cases, of the component parts of those summaries, would be prejudicial. He explained this on the basis that any such piece of information might well constitute a jig-saw piece which the applicants required to build a better picture as to how the investigation could affect them, thus enabling them to take steps to frustrate the investigation.

The Tribunal, having studied the schedule for itself, and taken further evidence from the deponent in the absence of the applicants, accepted his evidence and eventually reached the decision appealed against.

The appeal falls into two main parts. In the first place it is said that the Tribunal misconstrued the relevant section of the FOI Act, s 37(1)(a), and that, when that section was properly construed, there was no evidence to support the finding that the disclosure of documents in this case “. . . could reasonably be expected to . . . prejudice the conduct of an investigation”.

Secondly, it is said that the order for non-disclosure of the schedule was invalid for several reasons and, that being so, there was a denial of natural justice in failing to make the schedule available to the applicants.

Section 37 of the FOI Act begins as follows:

“37.(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—

- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance”

With respect to those who have taken a different view (*Re Murtagh and Federal Commissioner of Taxation* (1984) 1 AAR 419), I see no need to read the words “in a particular instance” which conclude par (a) as governing the words: “. . . an investigation of a breach, or possible breach, of the law.” If they did, they would not add to the existing requirement that a particular breach (or possible breach) must be under investigation, and not breaches of law in the abstract. However nothing seems to turn on this point in the present case.

The argument for the applicants is that the wording of the subsection requires actual prejudice to be expected, not the mere risk or possibility of prejudice.

I think there is some force in this contention. I think that the words “would, or could reasonably be expected to . . . prejudice” mean more than “would or might prejudice”. A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring. On the other hand, if the legislature had required a probability of prejudice it could easily

have said so. In my view it is reasonable to expect an event to occur if there is about an even chance of its happening and, without attempting to suggest words alternative to those chosen by the draftsman, it is in that general sense that the phrase should be read.

The question then arises whether the AAT misdirected itself on this point or misapplied the law to the facts which it found. I can find nothing in its reasons to suggest that it misdirected itself as to the test it had to apply. It always used the words of the section and nowhere said that a mere possibility or risk of prejudice would meet the statutory test.

The AAT held that it was sufficient to show prejudice to the conduct, in the sense of the carrying on, of an investigation; it was not necessary to show that the outcome of the investigation would be prejudiced. On this basis it found that the conduct of the investigation would be prejudiced if the investigator were deprived of one of his techniques of inquiry — in effect the putting of questions to persons who are not thoroughly prepared for them. However it went on to say that if it were necessary to show prejudice “in respect of the object of investigation, that is the discovery of what happened”, that would be satisfied by

“... the diminishment in assurance of the achievement of that object which attends deprivation of the investigator of one of the means whereby he would have managed the investigation to find the facts. Hindsight may sometimes demonstrate that nothing was lost by disclosure of documents to those the investigator was about to question, but not, as we believe, in this case”.

In my view this passage from the final page of the AAT's reasons for decision amounts to a clear finding that, in the present case, disclosure of the documents to the applicants could reasonably be expected to prejudice the investigation because the applicants would be forewarned and forearmed against questions. The AAT was able to reach this finding even though, as it said, it had no basis for a more positive finding that any person was presently minded to fabricate defences, set false trails or influence witnesses. Such a possibility, of course, remained open.

The AAT accepted the evidence of the respondent's executive director that “the more information the applicants had about documents in the Commission's files, the greater the likelihood that there would be frustration” of the investigation. It also accepted his view that “even the apparently meagre information which any one of the lines” of the schedule “would afford could . . . enable an applicant to achieve that frustration”.

It was suggested, for the applicants, that it was hardly likely that each of over 6,000 documents would prejudice the investigation if disclosed. That is no doubt true, as also is the proposition that the mere presence of a document on an investigation file does not establish its sensitivity.

However, the AAT studied the summaries of the documents as they appeared in the schedule, and accepted the argument of the respondent that it was not possible to identify which pieces might fit into the applicants' jigsaw puzzle. In my view this was a valid argument and, if the Freedom of Information legislation is to remain workable, it must be open to a respondent, and to the AAT, to deal with large numbers of documents with a degree of generalisation appropriate to the case.

I believe that there was ample material before the AAT to justify the findings which it reached.

In the view of the respondent, this should be the end of the appeal, because the applicants' other basic argument relates to the AAT's interlocutory decision not to disclose the schedule to them.

However, in my opinion, it is open to the applicant in these proceedings to raise an alleged error of law in the conduct of the AAT hearing which could be said to vitiate the hearings. Indeed parties should be discouraged from taking separate proceedings, whether by way of prerogative writ or otherwise, to challenge an interlocutory decision on a ground which can conveniently be left to be raised as an issue of law affecting the final decision — if it still needs to be raised at all when that stage is reached. See *Director-General of Social Services v Chaney* (1980) 31 ALR 571.

Counsel for the applicants conceded that they had to challenge the validity of the order for non-disclosure of the schedule "in order to get to the natural justice point. If there was a valid order [pursuant to s 35(2) of the AAT Act] then the natural justice question of law does not run".

They challenged the order on a number of grounds, but in my view only two had any substance. The first was that it was beyond power because it was expressed in terms which extended to the legal representatives of the applicants in addition to the applicants themselves.

Section 37 of the AAT Act requires the lodging with the AAT of all material documents which are relevant to an application for review under that Act. Section 35(2), so far as is relevant, provides:

"Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order—

...

- (c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding."

I think the reference to "parties" in s 35(2)(c) must be taken to include any persons representing those parties pursuant to s 32 of the Act, which is not confined to lawyers. It would be ridiculous if the Tribunal had power in a proper case to deny access to a company or organisation but not to the officer who happened to be representing it. And in my view even lawyers retained for a particular case should not be put in the invidious position of having to conceal important information from their clients, unless the proper trial of an action admits of no reasonable alternative. However, the reference to "restricting the disclosure" indicates that (among other possible conditions) disclosure may, in a proper case, be confined to certain named persons connected with a party.

Secondly, it was said that the AAT took into account an irrelevant consideration in deciding to make the order for non-disclosure. The irrelevant consideration relied upon was the alleged policy disclosed by ss 58(2), 63(1) and 64(1) of the FOI Act (see below). It is true that the AAT treated the schedule as a summary of the documents sought under the FOI Act and took the view that it should — possibly as a matter of law, but certainly as a matter of discretion — extend the same protection to the summary as it was required to give to the documents themselves.

In my view this was the correct approach to the present case, where even

such identifying matters as dates and names of correspondents are said to require protection. It would be different if those items of information had been of no importance and the contents of documents could have been summarised in general terms, while only the detailed contents required protection. But where, as in the present case, the summaries necessarily contain much material which is the subject of the claim for exemption, then I believe the AAT was right to have regard to the sections referred to and exercise its discretion against disclosure of the summaries. I do not find it necessary to decide whether the AAT would have been within its powers if it had directed disclosure of the schedule to the applicants or their representatives.

Because I believe that the order of non-disclosure under s 35(2) of the AAT Act was validly made, it is not strictly necessary for me to deal with the question of natural justice. This much was conceded by the applicants. However because of the extensive argument addressed to this issue, and out of respect for the views of Beaumont J, which differ from my own, I believe I should deal with the issue.

The question is whether the denial to the applicants, and more particularly to their counsel, of access to the bulk of the schedule, constituted a denial of natural justice. At one stage of the hearing before the AAT, counsel offered undertakings that if they and their instructing solicitor were allowed access to the schedule for the purposes of the FOI Act hearing, they would not act for the applicants in any later proceedings which might be brought against their clients under the *Companies Act* 1981 (Cth) or the *Companies (Acquisition of Shares) Act* 1980 or the *Companies Ordinance* 1962 of the Australian Capital Territory. The same undertaking was offered to this Court.

I should say immediately that I have grave doubts whether the AAT, or this Court, could properly accept any such undertaking. An order to that effect would, I believe, be contrary to the public policy which requires a litigant to be free to be represented by the practitioners of his choice. And if such an undertaking could not be enforced, it should not be accepted (see *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150). The only undertakings which could be accepted, in my view, are those which are normally offered in cases involving trade secrets or otherwise requiring confidentiality as between litigants but not between lawyers.

However there are more important questions involved in this issue than the precise nature of counsel's undertaking as to confidentiality. In considering them, I think it is vital to bear in mind the nature of the action and the broad principles involved and not to be distracted by matters of detail.

The respondent is a statutory authority which has embarked upon an inquiry, in accordance with its charter, into certain actions of the applicants and others. That inquiry may result in legal action being taken against the applicants or it may not.

If action is taken, then all the protection which the law affords to persons accused of breaches of statutory provisions will come into play. In particular, requirements of natural justice will ensure that the applicants will be made fully aware of the nature of the case being alleged against

them and that they will have a full opportunity to test the accuracy of that case and to be heard in their own defence.

At this stage, the applicants are seeking, in effect, to “look over the shoulder” of the respondent as it conducts its inquiry. If it decides to take no action, this will prove to have been a waste of time. If it decides to take action, the only purpose which the applicants can hope to have achieved by their present application will be to get advance warning of the actual evidence which is available to the respondent and may ultimately be used against them. They would then be in a position, should they choose to do so, to tailor their response to questions and, if need be, their defence to an action, in order to suit that evidence.

They have applied to look over the respondent’s shoulder pursuant to the FOI Act, which is designed to advance the principle of open government, in the public interest, subject to a number of express exceptions which are equally in the public interest, see *The News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64, a decision of the Full Court of this Court. For present purposes, one exception recognises that persons who break the law should be brought to book and that government officers and authorities having that responsibility should not be hindered in their task by the use or misuse of the FOI Act.

In this case the applicants seek access to thousands of documents, some of which will prove to be relevant to the respondent’s decision as to what action it should take, and some of which will not.

The FOI Act recognises that there will be many cases in which an applicant before the AAT cannot be shown the very documents to which access is sought. Thus ss 58(2), 63 and 64(1) provide:

“58.(1) . . .

(2) Where, in proceedings under this Act, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.

... .

63.(1) In proceedings under this Part, the Tribunal shall make such order or orders under sub-section 35(2) of the Administrative Appeals Tribunal Act 1975 as it thinks necessary having regard to the nature of the proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant of—

- (a) exempt matter contained in a document to which the proceedings relate; or
- (b) information of the kind referred to in sub-section 25(1).

(2) Notwithstanding anything contained in the Administrative Appeals Tribunal Act 1975—

- (a) the Tribunal shall not, in its decision, or reasons for a decision, in a matter arising under this Act, include any matter or information of a kind referred to in sub-section (1); and
- (b) the Tribunal may receive evidence, or hear argument, in the absence of the applicant or his representative where it is necessary to do so in order to prevent the disclosure to the applicant of matter or information of a kind referred to in sub-section (1).

64.(1) Where there are proceedings before the Tribunal under this

Act in relation to a document that is claimed to be an exempt document, section 37 of the Administrative Appeals Tribunal Act 1975 does not apply in relation to the document but if the Tribunal is not satisfied, by evidence on affidavit or otherwise, that the document is an exempt document it may require the document to be produced for inspection by members of the Tribunal only and if, upon the inspection, the Tribunal is satisfied that the document is an exempt document, the Tribunal shall return the document to the person by whom it was produced without permitting any person other than a member of the Tribunal as constituted for the purposes of the proceeding, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person."

Since it is clearly open to the AAT to examine the original documents for itself, it must, in my view, be equally open to it to examine a summary of those documents and order that it be not disclosed to the party seeking access. The relevance of principles of natural justice depends upon the statutory provisions applying to the case. I can see no scope for the application of principles of natural justice in the present case. The application does not involve any personal or proprietary rights of the applicants. They are seeking access to the documents of other companies, government departments and bodies, under a legislative scheme which provides its own entitlements and procedures. Provided the requirements of that legislation are observed — as to which an appeal lies to this Court — there is no need to infer, by way of additional requirement, an obligation to comply with a set of rules designed to ensure that substantive rights are not infringed without a proper hearing. As the High Court has already held in *National Companies and Securities Commission v The News Corporation Ltd* (1984) 58 ALJR 308, principles of natural justice will need to be observed if and when the applicants' officers are summoned to answer questions, but in my view they do not arise in the present FOI proceedings.

Even if I am wrong in this, and there was an obligation to observe principles of natural justice in this case, I do not believe those principles have been infringed. In my view the applicants had every opportunity to state their case as to why they should have access to the documents in question here. They knew the general nature of the documents concerned and of what they could hope to learn from them if granted access. If they had a meritorious case for access to documents of use to them, they could have explained it in appropriate detail. Whatever arguments might have been put, they could not avoid the fact that information of real interest to them would almost automatically be exempt from disclosure for the reasons suggested by Mason, Wilson and Dawson JJ in the earlier proceedings between the same parties when their Honours said (at 437-438):

"It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry. Of course, there comes a time in the usual run of cases when the investigator will

seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment.”

In my opinion, for the reasons I have given, the application should be dismissed with costs.

BEAUMONT J. By their notice of appeal, brought pursuant to s 44 of the *Administrative Appeals Tribunal Act* 1975 on a question of law, the applicants appeal from a decision of the Administrative Appeals Tribunal (the Tribunal) given on 9 August 1984 whereby the Tribunal affirmed the decision of the respondent refusing to provide the applicants access to certain documents in the possession of the respondent pursuant to the *Freedom of Information Act* 1982 (the FOI Act). The documents were held by the Tribunal to be exempt from disclosure under s 37(1)(a) of the Act which provides:

“37. (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—

- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.”

The respondent relies on other grounds for claiming that some at least of the documents in question are exempt under the Act. Since the determination of the present matter, favourably to the applicants, will leave outstanding the other claims for exemption, the applicants accept that, even if the court were persuaded that the decision under appeal should be set aside, the court should not order that access now be granted to the applicants. The orders sought by them from the court are that the decision under appeal be set aside and that the application to the Tribunal for review of the decision of the respondent be remitted to the Tribunal to be determined in accordance with law.

The long history of this matter commences with a notice to produce books dated 2 February 1983, served by the respondent, acting pursuant to s 12(2)(a)(i) of the *Companies Act* 1981, and directed to the first applicant to produce to the respondent the books relating to the affairs of the first applicant specified in the notice. The notice stated that the requirement to produce the books related to matters, which were then specified, that constitute or may constitute a contravention of s 11 of the *Companies (Acquisition of Shares) Act* 1980, ss 137 and 138 of the *Companies Act* 1981 (Cth) and ss 69D and 69E of the *Companies Ordinance* 1962, (ACT). The matters referred to were:

1. The acquisitions of shares between 31 October 1981 and 5 October 1982 in Thomas Nationwide Transport Limited (TNT) by the applicants, Ansett Transport Industries Ltd (Ansett) and certain other companies in contravention of s 11 of the *Companies (Acquisition of Shares) Act* 1980;

2. The failure by TNT, the applicants, Ansett and certain other companies to give a notice in accordance with ss 137 and 138 of the *Companies Act* 1981 (Cth);

3. The failure by TNT and Ansett to give to TNT a notice in accordance with ss 69D and 69E of the *Companies Ordinance* 1962 (Cth).

Notices in similar terms were served upon a number of other parties.

By notice dated 17 March 1983, the respondent gave notice that it

proposed to hold a hearing pursuant to s 36 of the *National Companies and Securities Commission Act 1979* (Cth) in relation to the matters specified in the notice, being, in essence, the matters described in (1) and (2) above. Although the hearing commenced on the date fixed, 19 April 1983, the manner in which the respondent proposed to conduct the hearing was challenged by the applicants in an application, ultimately unsuccessful, made to the court for judicial review of the respondent's conduct brought pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (see *National Companies and Securities Commission v The News Corporation Ltd* (1984) 58 ALJR 308).

Shortly before the commencement of the hearing, on 31 March 1983, the applicants made a request to the respondent, pursuant to s 15 of the Act, for access to certain documents in the possession of the respondent. The request, which is appended to these reasons, as appendix 1, adopted, mutatis mutandis, the notice dated 2 February 1983 served by the respondent upon the applicants to which reference has already been made. Access was denied on the basis of a number of the grounds for exemption stated in the Act. By application dated 14 July 1983, the applicants applied to the Tribunal pursuant to s 55 of the Act for review of the decision of the respondent denying access on the basis of the exemptions already mentioned. The decision of the Tribunal in this application for review, at least so far as concerns s 37(1)(a) of the Act, is challenged in this appeal.

The respondent has in its possession more than 6,000 documents which relate to its hearing. Access is not sought to certain of the documents, such as those furnished to the respondent by the applicants themselves and material the subject of a claim by the respondent for legal professional privilege.

The application for review was remitted to the Tribunal by order of a Full Federal Court dated 1 March 1984 rejecting another claim by the respondent for exemption based on s 38 of the Act and s 47 of the *National Companies and Securities Commission Act* (see *The News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64). After the remitter, the Tribunal, then constituted by Deputy President AN Hall, for the written reasons it delivered on 7 May 1984, gave the following directions in the application for review:

- "1. (i) That the respondent lodge with the Tribunal and serve upon the applicants' solicitors not later than the close of business on 6 July 1984, an affidavit or affidavits annexing a schedule or schedules of the documents to which the claims for exemption relate.
- (ii) The schedule or schedules are to list the documents sequentially by number and, *unless to do so would disclose the matter claimed to be exempt*, (emphasis supplied) to provide the following details in respect of each document:
 - (a) the date of the document;
 - (b) the person or persons by whom the document was created and, where applicable, the person or persons to whom it was directed;
 - (c) a sufficient description of the nature of the contents of the document so as to provide a prima facie justification for the ground or grounds of exemption relied upon;

...
2. In respect of documents in relation to which the respondent claims that the disclosure of any information of the kind referred to above would be to disclose the matter claimed to be exempt, a separate schedule of documents is to be prepared and lodged with the Tribunal on or before the close of business on 6 July 1984, clearly identified as for the information of the Tribunal only."

In his reasons for the directions, Deputy President Hall said (at 3):

"My experience in hearing FOI applications involving even relatively small numbers of documents (up to 100) convinces me of the desirability of the agency concerned preparing a proper affidavit and supporting schedule of documents (consistently with not disclosing the very material said to be exempt) in advance of the hearing so as to allow adequate opportunity for consideration by the applicant of that affidavit and schedule and, if appropriate, for conferral between the parties as to ways of limiting the time required for hearing (as, for example, by identifying categories of similar documents of which one such document can be agreed as representative of a class of documents). It is, I believe, in everyone's interests that such procedures should be followed in the present case."

Unfortunately, despite this explanation, the respondent found itself unable to comply with either the letter or the spirit of the directions. The respondent filed and served an affidavit sworn by its executive director, Mr R J Schoer, in which he identified, but only in a general way, the documents for which exemption is asserted. Mr Schoer also advanced reasons and arguments in support of the claims from exemption based on s 37(1)(a) and other provisions of the Act. In identifying the subject documents, Mr Schoer said:

"16. The documents referred to earlier, not all of which are the subject of the request herein or of this Application are held in 33 separate cardboard volumes and 6 separate plastic volumes. The cardboard volumes bear the numbers 1 to 33 and the plastic volumes bear the numbers 34 to 39. The confidential documents now produced and shown to me and marked with the letters CV1 to CV33 and PV1 to PV6 are schedules, each of which is an index of all the documents held in each relevant cardboard and plastic volume. The production of these schedules and the volumes involved the collation of in excess of 6,500 documents and took up the time of two officers of the NCSC for a period exceeding two months.

17. Within each cardboard volume documents are placed either individually or, where appropriate, grouped into plastic sachets. The schedules exhibited hereto contain an index of each of the documents in each of the volumes showing (1) the number given to the document or sachet of documents (where a number is followed by a further number in parenthesis, the reference is to a sachet containing a group of documents with the numbers in parenthesis being the number of each individual document within the sachet); (2) the date on which the document was created; (3) the person by whom it was created; (4) the person to whom it was directed; (5) a short description of the contents of the document and (6) a statement of the grounds of exemption contained in the relevant sections as originally claimed by me upon

review of the original decision to deny the Applicants access to the documents. . . .”

Mr Schoer then described, but only in the most general terms, the contents of each cardboard volume. To take two random examples to illustrate the method employed, volumes twenty and twenty-nine were described thus:

“Volume 20, (for which Exhibit CV20 is the relevant index): Documents produced to the NCSC by a stockbroker under notice from the NCSC.”

“Volume 29, (for which Exhibit CV29 is the relevant index): Part one of the NCSC’s internal file concerning TNT.”

The crux of the case for exemption under s 37(1)(a) of the Act, and, perhaps, the justification for the respondent’s failure to carry out Deputy President Hall’s directions, were expressed by Mr Schoer as follows:

“20. In my opinion, the release of the documents, the subject of this application (now sought by the Applicants), will interfere with the investigation of the matters referred to earlier. These documents, all of which were obtained or produced for the purposes of the investigation, are sought by those whose conduct is being investigated with a view to seeing whether they breached the relevant law. A disclosure of these documents will have the obvious effect of ‘tipping the hand’ of the NCSC, a matter of particular relevance in the context of the hearing referred to earlier as well as any prosecutions that may issue against the Applicants as a result of the investigation. This will also prejudice the enforcement by the NCSC of the securities and company law in general and section 11 of the *Acquisition of Shares Act*, and sections 137 and 138 of the *Companies Act* in particular. Further, it will also prejudice the administration of the relevant legislation by the NCSC in general and in particular, in relation to the transactions referred to in paragraph 7 above.

21. If the documents of the type in question are released to a person under investigation, he will be in a position to mislead or divert the investigation either by fabricating defences, setting false trails and seeking to influence witnesses. The problems are particularly acute with respect to transactions in securities because of the multiplicity of persons and transactions involved.”

The respondent served a copy of Mr Schoer’s affidavit upon the applicants but, notwithstanding Deputy President Hall’s direction to that effect, none of the exhibits to the affidavit was served upon the applicants. Thus, no schedules of the kind mentioned in par 1(ii) of the directions were served upon the applicants. Counsel for the applicants complained about the respondent’s failure to comply with the directions at the commencement of the hearing before the Tribunal. In response to this complaint and some observations on the point by Mr G D Grant, one of the members of the Tribunal, counsel for the respondent sought to explain the respondent’s position:

“Mr Chernov: I take up the matter . . . and that was principally to do with Mr Grant’s observations about the order made by Mr Hall giving directions. . . . really the directions order can be broken up into two parts, broadly speaking. Whether one calls what was ordered schedules or summaries really does not matter, from one point of view. In

essence, what was ordered was that two sorts of documents be produced; one which virtually summarised the documents, and that is to be seen by the tribunal, and another set of documents giving another sort of description of the documents, without revealing exempt matter, which perhaps could be given to the other side, to the applicants. If that be the correct division of documents contemplated by the order, then as to the first category, in our submission, that has been done in the form of the schedules which are exhibits to Mr Schoer's affidavit.

It is our submission that these documents — that is to say, those schedules — are to go only to the tribunal and no further, and in relation to those we will be seeking a section 35(2) order. As to the second category of documents or schedules contemplated by the order of Mr Hall, it may well be that strict compliance with that order has not yet been achieved, although we would submit that in substance that part of the order has been complied with insofar as the affidavit reveals with some particularity the sort of documents that are held by the commission in respect of which exemption is claimed.

...
Mr Grant: If you read the earlier part of Mr Hall's direction, dated 7 May, it seems to me to make it quite clear that he intended that what was to go to the applicant simultaneously by 6 July was an affidavit together with schedules of the documents, and he later on describes the nature of the contents of the schedules. If in fact the commission has the view that you are now advancing, would it not have been appropriate to take up his direction, where he later on talked about either party being at liberty to apply for a directions hearing and to argue the point you are now arguing shortly after 7 May, rather than raise it today?

Mr Chernov: With great respect, you may be right, but I regret to say in this imperfect world the work to produce those schedules continued until about the middle of last week, and they were just not ready until about the middle of last week. When our friend said to the tribunal that they got the affidavit at stumps, he got it at stumps because work was continuing around the clock to have that affidavit ready. With great respect, I was going to take your point that it might be that that was the time to raise it, but we are submitting the spirit or the intentment of the order was carried out, in our submission, in the sense that a schedule was produced which gives the tribunal the documents or the description of the documents, to enable it to determine whether or not the documents were exempt. In our submission, the affidavit sets out in a meaningful way the categorisation of the documents.

One of the difficulties of having done it in any other way would have been just to see how useful a document could have been produced which could not identify the originator of the document, other than by way of a general description, as distinct from the way it has been defined in the schedule now before the tribunal."

The reference by counsel to an application under s 35(2) was a reference to an application by the respondent in respect of the schedules, which had been lodged with the Tribunal but not then tendered, made under s 35(2) of the *Administrative Appeals Tribunal Act*. By s 35(1), subject to the section,

the hearing of a proceeding before the Tribunal shall be in public. By s 35(2), where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may — by order direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.

By s 35(3), in considering whether orders should be made under s 35(2), the Tribunal shall take as the basis of its consideration:

“... the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.”

Sections 36 and 39 of the *Administrative Appeals Tribunal Act 1975*, are also material for present purposes. By s 36, certain documents and information are not required to be disclosed if the Attorney-General certifies that disclosure would be contrary to the public interest by reason that it would prejudice the security, defence or international relations of Australia; or by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the matter contained in the document should not be disclosed.

By s 39 of the *Administrative Appeals Tribunal Act 1975*, subject to ss 35 and 36, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.

The schedules prepared by the respondent took the form of six columns giving the information described in par 17 of Mr Schoer's affidavit, *supra*. During the hearing before the Tribunal, counsel for the applicants indicated that, although he did not press for immediate access to the fifth column of the schedules, being the description of the document in each case, he did seek access to the remaining five columns in the schedules. Counsel for the respondent then sought to tender Mr Schoer's affidavit and the schedules exhibited to the affidavit but renewed his application under s 35(2) of the *Administrative Appeals Tribunal Act 1975* that the schedules not be disclosed to the applicants or any other person other than members of the Tribunal and Tribunal staff. The learned judge presiding at the hearing then said that “until further order the schedules — the exhibits — are not to be

disclosed to any person other than the members of the Tribunal and members of the staff authorised by the Tribunal”.

Counsel for the applicants next indicated that he wished to cross-examine Mr Schoer and make submissions on the question whether any order should be made under s 35(2) prohibiting disclosure of material to the applicants and their advisers. Mr Schoer was called. In his evidence in chief he said:

“Q What do you say as to whether disclosure of the schedules would disclose any matters in relation to which you claim exemption in the documents? A. Well, the purpose of the schedule is to summarise the main point of the document to help the tribunal decide whether it is exempt matter, so I would claim that disclosure of the schedules would have the same effect as disclosure of the documents themselves.”

In the course of his cross-examination by counsel for the applicants, the following exchange took place between Mr Schoer, the learned judge and counsel for the respondent:

“Q (His Honour): Mr Schoer, of the 6,000 odd documents, would you be able — I do not mean off the top of your head but after looking into these schedules — to select from among them a document of the commission which best expounds what contraventions of the law the commission suspects may have been committed, and by whom, and what further information or other material the commission thinks it will need in order to resolve for itself whether or not any contraventions of the law have occurred, and if so, what they are? A. Yes, your Honour.

Then we propose to call for that document and have it produced to us. When I say that document, we are not concerned about getting the actual original; a photostat copy will be sufficient for our purposes. Do you have anything to say against that, Mr Chernov?

Mr Chernov: No. I would be interested to see what document it is. When your Honour says one document, does the tribunal literally mean one document or can it be a number?

His Honour: Not necessarily number one but for practical reasons we would not want a whole swag of documents; one or two or three. I appreciate your point that it may not clearly appear in one, but it occurred to me that it perhaps may. At any rate, there may be one or two.

Mr Chernov: We will certainly produce that.

...

Mr Chernov: ... I think we have been able to come up with a document of the sort that the tribunal will find of assistance. There is one matter to which I would like to refer your Honour, at the expense of sounding pedantic about it. The document has been extracted. It is for the tribunal's information described in volume 32, which the tribunal may recall is a schedule pertaining to a volume in relation to which our learned friends make no claim because of the legal professional privilege point involved, but nevertheless it is the second document on page 1. (In Mr Schoer's affidavit, volume 32 is described as 'part one of the NCSC's brief to counsel for the TNT hearing'.)

We produce that ... under section 14 of the Act. That should be available today.

...

His Honour: I do not regard it as having been made available under section 14. I regard it as having been made available pursuant to section 64(1). I did not use the language of requirement, which is the language of section 64, but that was the power we conceived ourselves to be exercising when we called for it. . . .”

(Section 14 provides that nothing in the Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required thereby, where they can properly do so or are required by law to do so. On the other hand, s 64(1) provides that where there are proceedings before the Tribunal under the Act in relation to a document that is claimed to be an exempt document, but the Tribunal is not satisfied, by evidence on affidavit or otherwise, that the document is an exempt document, it may require the document to be produced for inspection by members of the Tribunal only, and if, upon the inspection, the Tribunal is satisfied that the document is an exempt document, the Tribunal shall return the document to the person by whom it was produced without permitting any person other than a member of the Tribunal as constituted for the purposes of the proceeding, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person.)

Mr Schoer was cross-examined by counsel for the applicants not only in the application under s 35(2) of the *Administrative Appeals Tribunal Act* 1975 but also in connection with the substantive matters arising in the application for review itself. During the course of this cross-examination, counsel said:

“... I might point out I have not finished my substantive cross-examination but I have finished for the purpose of that application (i.e. under s 35(2) of the *Administrative Appeals Tribunal Act*) and I have indicated to my friend I would adopt this procedure and I believe he might want to re-examine in the context of the application that I propose to make, but perhaps I should first make it. It is this, that we have access to the whole or alternatively part of the material appearing in the schedules, specifically the whole of columns 1, 2, 3, 4 and 6 and so much of column 5 as constitutes — and I am here quoting from Mr Hall’s order (1)(ii)(c) — as constitutes a sufficient description of the nature of the contents of the document so as to provide a prima facie justification for the ground or grounds of exemption. Alternatively to that application I would seek a direction that in so far as pursuant to the first order I am given only part of the material and I am particularly thinking of column 5 where there might be just no way of summarising it to take out a line or something like that, but in so far as we can only have part of the material, a direction that the respondent bring into existence material that would satisfy, in so far as column 5 is concerned, that original direction and they give sufficient description of the nature of it. . . .”

During the re-examination of Mr Schoer, counsel for the respondent indicated that he wished to ask the witness some questions on a confidential basis “pertaining to this particular investigation and relating to more specific schedules”. The learned judge then said:

“His Honour: Yes. We will give a direction under 35(2)(a) that until

further order the hearing take place in private and we will give a direction that the persons who may be present are the court officers, the transcript writers, counsel for the respondents, the witness and solicitor instructing counsel for the respondent and officers of the respondent and no other persons. That is a direction given on the basis that a transcript will be made of what takes place so that the tribunal will be in a position if hereafter it determines that all or part of what takes place should be made known to the applicants, it will be able to do so because it will have transcript that it can make available”

The applicants and their counsel were thus excluded from the private session at which, it subsequently appears, Mr Schoer gave evidence of critical significance to the fate of the application for review.

On resuming its public hearing, the Tribunal indicated its concern with the form of the schedules. The respondent then agreed to grant the applicants and their representatives access to certain extracts from the schedules. The learned judge announced that the application by counsel for the applicants to look at the schedules was granted to the limited extent that access to certain extracts from the schedules was permitted.

The extracts deal with no more than a small fraction of the subject documents. The sixth column of the schedule, previously mentioned, is omitted. In some cases, the description in the fifth column is abbreviated. Appended to these reasons as appendix II is a typical page of the extracts which consist, in all, of fifteen pages. An examination of the extracts indicates that they give no more than a faint clue as to the nature, let alone the contents, of a fraction of the documents in respect of which access is sought.

In response to a request made by counsel for the applicants, on 23 July 1984, the Tribunal gave written reasons for the directions made under s 35(2) of the *Administrative Appeals Tribunal Act* 1975 restricting the disclosure to the applicants of the contents of documents received in evidence. In those reasons, mention was made of the evidence of Mr Schoer, both in his affidavit and viva voce in private session, although no reference was made to the content of the evidence taken ex parte. Particular emphasis was placed upon par 21 of his affidavit, supra, although the Tribunal said that it had then no basis for finding in this case that any person was minded to do any of the things described in that paragraph of the affidavit.

The Tribunal based its decision upon its construction of s 37(1)(a), saying (at 27):

“No doubt one of the principal objects of an investigation of a possible breach of the law is the discovery of what in fact happened, so that a lawyer may determine whether such a breach occurred, and so that all concerned may know in what circumstances any breach occurred. But it is to the *conduct* of the investigation that s 37(1)(a) is addressed, not in terms to the ultimate outcome. The word ‘conduct’ in that paragraph is used, the Tribunal considers, primarily in the sense of management or handling. It is to the impairment or injurious affecting of the management or handling of the investigation that the words ‘prejudice the conduct’ refer, at least in their primary sense. If disclosure of a document to a person before he is questioned in the course of an investigation will deprive the investigator of the oppor-

tunity to exploit the prospect that that person's answers to the investigator's questions will better serve the attainment of the object of the investigation if the answers are given before disclosure of the document to him, that premature disclosure will affect injuriously the handling or management of the investigation. And that will be so even if it somehow appears later that the person to whom disclosure is made would have given the same entirely truthful and accurate answers whether or not the document was prematurely disclosed to him. The prejudice lies in the circumstance that he who is to conduct the investigation has been deprived of one of the means whereby he would have handled or managed the investigation to attain its object."

The Tribunal then concluded (at 28):

"If that be the proper construction of the words quoted from s 37(1)(a), the Tribunal is able, on the evidence presently before it, to conclude that disclosure now of any one of a substantial number of the documents under review could reasonably be expected to prejudice the Commission's investigation; and, to conclude that disclosure now of any of a number of the index lines could reasonably be expected to work the same prejudice."

The Tribunal then referred to s 58(2) of the Act, which provides that where, in proceedings under the Act, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted. Mention was also made of s 63(1), which provides that in proceedings under Pt VI, the Tribunal shall make such order or orders under s 35(2) of the *Administrative Appeals Tribunal Act 1975* as it thinks necessary, having regard to the nature of the proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant of exempt matter contained in a document to which the proceedings related.

Although not specifically then referred to, no doubt the Tribunal also had regard to s 63(2) of the Act which provides that notwithstanding anything contained in the *Administrative Appeals Tribunal Act 1975*, the Tribunal shall not, in its decision, or reasons for a decision, in a matter arising under the Act, include any matter or information of a kind referred to in s 63(1). Section 63(2) further provides that the Tribunal may receive evidence, or hear argument, in the absence of the applicant or his representative where it is necessary to do so in order to prevent the disclosure to the applicant of matter or information of a kind referred to in s 63(1).

Whilst acknowledging the weight to be afforded to ss 35(1), 35(3) and 39 of the *Administrative Appeals Tribunal Act 1975*, the Tribunal said that in determining what, if any, order it should make with respect to exhibits under s 35(2)(c) of the *Administrative Appeals Tribunal Act 1975* "it would be an error to fail to give proper weight to the policy which ss 58(2), 63(1) and 64(1) of the Act discloses concerning exempt matter". The Tribunal thought that the schedules exhibited to Mr Schoer's affidavit, apart from the extracts from those schedules which were volunteered to the applicants, were sufficiently significant to qualify for exemption in their own right. In the Tribunal's view, disclosure of these exhibits could reasonably be expected to prejudice the conduct of the respondent's investigation.

Having mentioned that no undertaking as to confidentiality was proffered by the applicants' legal representatives, the Tribunal confirmed that no

document which it considered to be an exempt document should be shown to the applicants or their representatives.

Upon resumption of the hearing of the application for review on 26 July 1984, counsel for the applicants renewed his application for access and proffered appropriate undertakings as to confidentiality on behalf of himself and one of his instructing solicitors on the footing that neither would be engaged in the hearing to be conducted by the respondent. The Tribunal then gave the following ruling:

“For the reasons given on 23 July 1984 the tribunal is of the opinion that the exhibits disclose some of the exempt matter which is contained in the documents under review, of which the exhibits constitute a descriptive index, and that disclosure of the existence in the respondent commission’s possession of some of those documents would cause the exhibits to be, by force of s 25, exempt documents by virtue of s 37(1). The policy which s 64 discloses of denying the tribunal inspection of documents which the tribunal is satisfied, upon its inspection, are exempt documents would be circumvented by acceding to Mr Spigelman’s application. Section 63, distinguishing as it does between the applicant and his representative, may be thought to suggest quite a different policy. But the two provisions may be reconciled: section 64 is concerned to prohibit disclosure of a document the inspection of which has enabled the tribunal to determine that it is an exempt document. We have been so satisfied in relation to these exhibits after hearing evidence (including evidence in camera) and inspecting them. Although the exhibits are not, in our opinion, documents to which section 64 applies, the policy which that section discloses would be circumvented if we were to accede to Mr Spigelman’s application. That consideration weighs in our exercise of the power conferred by s 35(2) of the *Administrative Appeals Tribunal Act 1975* to lead us to the conclusion that the application should be refused.”

Counsel for the applicants, having indicated that the applicants wished to challenge on appeal the Tribunal’s decision given in the context of the application under s 35 of the *Administrative Appeals Tribunal Act 1975*, that the subject documents fell within the exemption provided by s 37(1)(a) of the Act, invited the Tribunal then to dispose of the substantive application under s 55 of the Act on that ground. The Tribunal acceded to the invitation and dismissed the application for review for the reasons it gave on 9 August 1984.

In those reasons, the Tribunal said (at 4):

“Since 23 July 1984 the Tribunal has heard further evidence by Mr Schoer. We remain as we were then, without any basis for a finding that any person exists who would seek to use information which disclosure of one or more of the documents might afford in order to prevent the respondent Commission from discovering what in fact occurred in relation to the matters which are under investigation by the respondent. Subject to that observation, we record our acceptance of the oral evidence of Mr Schoer, as well as the evidence contained in the passages from his affidavit which we quoted in our reasons given on 23 July 1984.

We adhere to the construction of s 37(1)(a) which we attempted to

state in those reasons. We would only add that, if the words, 'prejudice the conduct of an investigation', in s 37(1)(a) require that there be a prejudice in respect of the object of investigation, that is the discovery of what happened, that requirement will in our opinion be satisfied by the diminishment in assurance of the achievement of that object which attends deprivation of the investigator of one of the means whereby he would have managed the investigation to find the facts. Hindsight may sometimes demonstrate that nothing was lost by disclosure of documents to those the investigator was about to question, but not, as we believe, in this case.

Because of the prohibition which s 63(2)(a) of the *Freedom of Information Act* 1982 expresses, the justification — if justification there be — of our belief, and of our finding that each of the documents the subject of this application is an exempt document, must be sought in the transcript of the evidence given in private."

The applicants challenge both the Tribunal's construction of s 37(1)(a) and its application of the provision to the facts of the case. Specifically, they rely upon the inability of the Tribunal to point to any person who would be minded to use information which disclosure of the documents in question might afford in order to prevent the respondent from discovering what in fact occurred. The applicants say that this finding must mean that the loss of opportunity to exploit the situation relied on by the Tribunal is no more than an academic question, since even if the respondent's hand were "tipped", no adverse impact upon the conduct of its investigation would result.

As part of this argument, the applicants submit, correctly I think, that the question of prejudice under s 37(1)(a) is to be tested, not in any abstract fashion, but by reference to the particular circumstances of the investigation in hand, since the words "in a particular instance" in s 37(1)(a) qualify each of the limbs of the subsection (see *Murtagh v Federal Commissioner of Taxation* (1984) 1 AAR 419). In support of this submission, the applicants point to the legislative history of s 37. In its original form in the Freedom of Information Bill, cl 32(2)(a) contained a provision, subsequently omitted, for the exemption of a document if its disclosure would, or could reasonably be expected to "prejudice the carrying on generally of investigations concerning breaches or evasions of the law". But this provision was omitted from what became s 37(2) of the Act. Further, the decisions of the courts of the United States in this area relied on by the respondent provide no assistance because of the use of the plural in this context in the American legislation (see *National Labour Relations Board v Robbins Tire & Rubber Co* 437 US 214 (1978) at 223-224). This is not to say that exemption may not be claimed under the Act in respect of a document describing methods or procedures for preventing, detecting, investigating or dealing with matters arising out of, breaches or evasions of the law. Section 37(2)(b) provides for such an exemption where disclosure would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures, although no claim under that provision is made here.

However, even if, as the applicants contend, s 37(1)(a) confines the Tribunal's consideration to the facts of the particular case and even if the Tribunal cannot now find that a person exists who might interfere with the course of the investigation, the respondent's loss of opportunity to exploit

the situation may nonetheless constitute prejudice of the kind contemplated by s 37(1)(a). In *National Companies and Securities Commission v The News Corporation Ltd* (supra) Mason, Wilson and Dawson JJ said:

“It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.”

Although the High Court was concerned with a different question, the reasoning is of general application. It indicates prejudice which could reasonably be expected in any investigation. It follows that, as matter of construction, the Tribunal correctly held that premature disclosure by the respondent of material held by it could reasonably be expected to constitute prejudice of the kind contemplated by s 37(1)(a). It follows, in my view, that the applicants’ challenge to the Tribunal’s construction of s 37(1)(a) should be rejected.

Yet, accepting the prejudice which may be expected to flow from premature disclosure of the respondent’s hand, two vital questions remain for decision in any application of s 37(1)(a) to the facts of the case. First, is disclosure still premature, having regard to the lapse of time since the investigation commenced? In this context, it is significant that after their observations cited supra, Mason, Wilson and Dawson JJ went on to say (at 437-438) that

“there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment”.

Secondly, when the respondent speaks of disclosing its hand, exactly what is involved? Does its “hand” include all the documents, more than 6,000 in number, held by the respondent or, more likely, is it only those containing sensitive information? The mere fact that a document happens to be found in an investigation file does not entitle it to the benefit of a blanket exemption under s 37(1)(a) (cf *National Labour Relations Board v Robbins Tire & Rubber Co*, supra (at 236)).

The answer to these questions, fundamental as they are to the case for exemption, cannot rest in general assertions by the respondent or its executive director. The approach adopted by McPherson J in *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Co Ltd* (1984) 2 ACLC 671 in rejecting an objection by the respondent to the production of documents on public interest grounds, is instructive for present purposes. An affidavit similar to Mr Schoer’s was there relied upon. Yet his Honour was unimpressed by the lack of specific evidence demonstrating that production of investigatory documents would occasion any prejudice to the respondent in the execution of its functions.

In the present case, the evidence made available to the applicants does not enable a view to be formed, one way or another, as to the responses which should be given to the two fundamental questions to be answered before the applicants can be excluded from access to all the documents. The affidavit evidence is couched in the most general terms and the extracts from the schedules are hardly comprehensive. Implicit, if not explicit, in the

Tribunal's reasons is a finding that the justification for upholding the claim for exemption is the evidence from the respondent taken *ex parte*.

Given the importance of that evidence, the applicants contend that they were denied natural justice when their counsel was not permitted access to the schedules even upon terms that he undertake to keep the information confidential to himself. They argue that, in the events which happened, although appropriate machinery was available to protect adequately the respondent's interests in not divulging significant information to the applicants, this machinery was never availed of. They suggest that at least two possible courses were open. The public hearing by the Tribunal could have proceeded by reference to categories or classes of documents which would have enabled the point to be argued as a matter of principle, thus avoiding the need to disclose the contents of the documents (see *Harris v Australian Broadcasting Corporation (No 2)* (1983) 50 ALR 567 at 568; on appeal (1984) 51 ALR 581 at 583). Alternatively, the applicants say, if the classification of the documents into categories did not permit a meaningful discussion of the issues, the proper exercise of the Tribunal's discretion in the circumstances would have permitted disclosure of the schedules to counsel for the applicants upon his undertaking not to divulge that information to any person. The adoption of either course would have apprised the applicants of the case sought to be made against them.

There is considerable force in these submissions. Certainly, the applicants were never informed of the content of significant material used against them or even of its general nature. In that important respect, the applicants were not made aware of the case to be made against them. It must follow, that *prima facie*, they were denied natural justice (see *Kanda v Government of the Federation of Malaya* [1962] AC 322 at 337; *Mahon v Air New Zealand Ltd* (1983) 50 ALR 193 at 214, *News* (supra) per Mason, Wilson and Dawson JJ at 438).

The respondent seeks to avoid the *prima facie* conclusion that to proceed against the applicants *ex parte* amounted to a denial of natural justice by resort to ss 58(2), 63 and 64 of the Act. However, in my view, it does not follow from these provisions, taken singly or collectively, that the Tribunal was bound to hear the significant evidence relied on by the respondent in this application in the absence of the applicants and their counsel.

For one thing, s 64(1) was not applicable here. With one exception, what the Tribunal inspected was not the documents for which exemption was claimed but the schedules or "summaries" of their contents. For another thing, it is impossible to imagine any evidence which the respondent would need to adduce in the application for review only upon the extraordinary footing that not only the applicants but also their counsel were excluded. The significance of these documents should not be inflated. They do not concern the security of the nation or sensitive areas of government (as cabinet papers might do) in respect of which, in the public interest, extraordinary measures are called for so as to prevent any loss of secrecy (see *Alister v The Queen* (1984) 58 ALJR 97 at 124). No doubt some of the material in the possession of the respondent was, and perhaps is, commercially sensitive information. To this extent, the material could have been restricted to counsel for the applicants, upon their giving undertakings as to confidentiality usual in this type of case (see *Re Trade Practices Tribunal; Ex parte Tooheys Limited* (1977) 16 ALR 609 at 614; *Australian Broadcast-*

ing *Commission v Parish* (1980) 43 FLR 129 at 147). Alternatively, as has been said, even without undertakings as to confidentiality, the application could have proceeded along the lines usually adopted where a “public interest” claim for privilege is made on a discovery application, that is, by informing the other party of the general nature or class or classes of documents involved so that the matter may be argued and tested by reference to categories of documents rather than by disclosure of their contents. By departing from this procedure, as contemplated by Deputy President Hall’s directions, and by insisting on the holding of not only in camera but also ex parte proceedings, the respondent virtually put it beyond the power of the Tribunal to afford the applicants proper notice of the case to be made against them. In short, in ignoring the directions, the respondent forced the Tribunal into the invidious position of either proceeding ex parte or declining outright to hear the evidence claimed by the respondent to be confidential. If the directions had been complied with (and no satisfactory reason for non-compliance was advanced), the Tribunal would never have found itself in the dilemma with which it was confronted.

The respondent submits that warrant for the extraordinary course of taking significant evidence ex parte may be found in the decisions of the courts of the United States in this area. But the leading authority, *Vaughn v Rosen* 484 F 2d 820 (1973), which, ironically, was also cited by Deputy President Hall in his reasons, establishes that those courts will “simply no longer accept conclusory and generalised allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments” (at 826). It was also there held that an analysis sufficiently detailed (at 826-827):

“ . . . would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the actual language, of the document.”

If anything, the case illustrates the wisdom of the respondent’s following, rather than ignoring, the Deputy President’s directions.

Although in *Arief v United States* 1712 F 2d 1462, reference was made to the possibility of exclusion of not only the party seeking access but also of his lawyers during inspection of the material said to be accessible, it was made clear (at 1471) that such a course should only be embarked upon where “absolutely necessary”. It was there said that such necessity exists when:

“(1) The validity of the government’s assertion of exemptions cannot be evaluated without information beyond that contained in the public affidavits and in the records themselves and (2) Public disclosure of that information would compromise the security asserted.” (Ibid.)

No such necessity existed in the present case. Indeed, short of a situation involving the interests of national security, defence or high government policy, it is impossible to imagine circumstances which would justify the exclusion of counsel for the party seeking access. As has been said, the matter could always be argued by reference to categories. And, if appropriate, counsel could have given, even here, the usual undertaking as to confidentiality in respect of the material disclosed to him, being, on this hypothesis, the schedules exhibited to Mr Schoer’s affidavit (see *Warner — Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354; *Re B* [1981] 2 NSWLR 372 at 382-383).

To proceed ex parte in a matter such as this is a course to be adopted only for the most compelling reasons and as a last resort. Given at least the possibility of adopting the alternative procedures discussed previously, no need for the exclusion of the applicants' counsel was, in my view, demonstrated. It follows, in my opinion, that the applicants were denied natural justice.

The respondent further submits that, even if a denial of natural justice did occur, the matter is not within the jurisdiction of the court under s 44 of the *Administrative Appeals Tribunal Act* 1975. The submission is that, under s 44, the court is confined to dealing with the ultimate decision only (see *Director-General of Social Services v Chaney* (1980) 47 FLR 80) yet the applicants' complaint here relates to a merely interlocutory aspect of the hearing before the Tribunal, being the procedures adopted pursuant to s 35(2) of the *Administrative Appeals Tribunal Act* 1975 and ss 63 and 64 of the Act, as distinct from the ultimate or substantive decision contemplated by *Chaney* (supra).

It is true that an appeal under s 44 of the *Administrative Appeals Tribunal Act* 1975 is limited to a question of law only. But determination of whether there has been a breach of the rules of natural justice does involve a question of law (see *Maurice v London County Council* [1964] 2 QB 362 at 380). Further, it may be accepted that, in a sense, the questions which now arise are adjectival rather than substantive. But it does not follow that a question of law is not thereby involved. In *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 a Taxation Board of Review sought to take evidence in the absence of the taxpayer and his representative. It was suggested that no question of law arose in that connection. Kitto J, in rejecting the suggestion, said (at 496):

“... (a question of law) arises where, in the course of a reference, the Board finds itself unable to perform its function properly without deciding a question, adjectival rather than substantive though it may be, which depends wholly upon the application of the law to a situation which has actually developed.”

In *Chaney* (supra) it was held that only those parts of the Tribunal's reasons which constitute the structure of its ultimate decision can be the subject of an appeal under s 44. However, to withhold from both the applicants and their counsel any meaningful information as to the substantive case to be made against them in the respondent's application under s 35(2) of the *Administrative Appeals Tribunal Act* 1975 was, in my opinion, a denial of natural justice which, in turn, vitiated the ultimate decision to refuse that application for review. Indeed, the making of the order under s 35(2) of the *Administrative Appeals Tribunal Act* 1975 was based on the view that every one of the documents was exempt by virtue of s 37(1)(a). The making of the order under s 35(2) was thus fundamental to the Tribunal's decision to reject the substantive application under s 55 of the Act. It follows that the matter is justiciable under s 44 of the *Administrative Appeals Tribunal Act* 1975.

Since, in my view, the Tribunal erred in law in denying the applicants natural justice, the decision of the Tribunal under appeal should be set aside upon the footing that the question of the claim for exemption under s 37(1)(a) should be considered de novo by the Tribunal. Since I have not seen any of the evidence adduced ex parte by the respondent, I am naturally

unable to express any view on the merits of the application for review. Its fate must depend upon the evidence before the Tribunal.

I would make the following orders. I would allow the appeal, order that the decision of the Tribunal given on 9 August 1984 be set aside, and order that the application for review be remitted to the Tribunal. Since the respondent has had some measure of success in the appeal, I would further order the respondent to pay one-half of the applicants' costs of the appeal.

Appeal dismissed with costs

Solicitors for the applicants: *Dawson & Waldron*.

Solicitor for the respondent: Australian Government Solicitor.

GFV



Prinn and Department of Defence (Freedom of Information) [2016] AATA 445 (29 June 2016)

Division: **FREEDOM OF INFORMATION DIVISION**

File Number: **2014/4841**

Re: **KEITH PRINN**
APPLICANT

And: **DEPARTMENT OF DEFENCE**
RESPONDENT

DECISION

Tribunal **Deputy President S A Forgie**

Date **29 June 2016**

Place **Melbourne**

The Tribunal decides:

to affirm the decision of the Privacy Commissioner dated 29 August 2014 affirming a decision of the respondent dated 27 July 2012.

.....[sgd].....
Deputy President

CATCHWORDS – FREEDOM OF INFORMATION – *whether documents, or parts of documents exempt under s 33(a)(i) – whether disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth – decision affirmed.*

LEGISLATION

Administrative Appeals Tribunal Act 1975 ss 33, 37
Australian Information Commissioner Act 2010 ss 12 and 8(h);
Australian Security and Intelligence Organisation Act 1979 ss 4, 6, 17
Australian Security Intelligence Organisation Act 1956
Australian Security Intelligence Organisation Act 1976
Crimes Act 1914 s 70
Criminal Code 1995 Division 72, 119; Part 5.3 s 100.1, 100.1(1), 100.1(2), 100.1(3)
Freedom of Information Act 1982 ss 4, 4(1), 4(5), 11(1), 11(2), 11A, 11A(3), 11A(4), 11A(5), 11B, 11C, 11C(1), 11C(1)(c), 11C(2), 11C(3), 11C(4), 11C(5), 11C(6), 11C(7), 12, 13, 15(2), 15(2A), 20, 22, 23, 24, 24A, 24AA, 24AB, 29, 31, 31B, 31B(a), 31B(b), 33, 33(a), 33(a)(i), 34, 42, 47, 47(1)(b), 47B(a), 47C, 47D, 47E, 47E(a), 47F, 47G, 55G, 55K, 93A, 93A(2), 93A(3)
Inspector-General of Security and Intelligence Act 1986 s 8
Intelligence Services Act 2001 ss 6, 6B, 7, 13A
Legislative Instruments Act 2003 s 5
Migration Regulations 1994
National Security Information (Criminal and Civil Proceedings) Act 2004
Office of National Assessments Act 1977 s 5
Safety, Rehabilitation and Compensation Act 1988 s 67(8)

CASES

Alister v The Queen [1984] HCA 85; (1984) 154 CLR 404; 50 ALR 41
Attorney-General's Department and Another v Cockcroft (1986) 10 FCR 180; 64 ALR 97
Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd [2008] FCAFC 123; (2008) 169 FCR 227; 247 ALR 646
Australian Securities & Investments Commission v P Dawson Nominees Pty Ltd [2009] FCAFC 183
Church of Scientology v Woodward [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587
Comcare v Labathas [1995] FCA 1702; (1995) 61 FCR 149; (1995) 133 ALR 744; 22 AAR 295; 40 ALD 255
Drake and Minister for Immigration and Ethnic Affairs (No 2) [1979] AATA 179; (1979) 2 ALD 634
Footscray Corp v Maize Products Pty Ltd [1943] HCA 15; (1943) 67 CLR 301
Jaffarie v Director General of Security [2014] FCAFC 102; (2014) 226 FCR 505
Nevistic v Minister for Immigration and Ethnic Affairs [1981] FCA 41; (1981) 34 ALR 639
Plaintiff B60/2012 v Minister for Foreign Affairs [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478
Plaintiff M64/2015 v Minister for Immigration and Border Protection [2015] HCA 50; (2015) 327 ALR 8; 148 ALD 206
R v Lodhi [2006] NSWSC 596; (1999) 199 FLR 270
Re Aldred and Department of Foreign Affairs and Trade [1990] AATA 833
Re Dreyfus and Secretary, Attorney-General's Department [2015] AATA 962
Re Dunn and Department of Defence [2004] AATA 1040; (2004) 84 ALD 419; 39 AAR 322
Re Ewer and Australian Archives (1995) 38 ALD 789
Re Francis and Department of Defence [2012] AATA 838; (2012) 59 AAR 35
Re Hocking and Department of Defence [1987] AATA 602
Re Jones and Australian Federal Police [2016] AATA 329
Re O'Donovan and Attorney-General's Department (1986) 8 ALD 528; 4 AAR 151
Re Rovere and Secretary, Department of Education and Training [2015] AATA 462
Re Secretary, Department of Prime Minister and Cabinet and Wood [2015] AATA 945
Re Slater and Cox (Director-General of Australian Archives) [1988] AATA 110
Re Throssell and Australian Archives [1987] AATA 453

Sankey v Whitlam [1978] HCA 43; (1978) 142 CLR 1
Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another (1992) 36 FCR 111; 108 ALR 163
Spencer v Commonwealth of Australia [2012] FCAFC 169; (2012) 206 FCR 309
Vanstone v Clark [2005] FCAFC 189; (2005) 147 FCR 299; 224 ALR 666; 88 ALD 520
Watson v AWB [2009] FCA 1047; (2009) 259 ALR 524
Zarro v Australian Securities Commission [1992] FCA 233; (1992) 36 FCR 40

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Macquarie Dictionary, revised 3rd edition, 2001, The Macquarie Library Pty Ltd
Shorter Oxford English Dictionary, 5th edition, 2002, Oxford University Press

REASONS FOR DECISION

1. On 16 February 2012, Mr Prinn made a request to the Department of Defence (Department) for access to records associated with his security clearance. The Department has given him access to some documents but has refused him access to all or parts of Documents 51, 53, 106, 107, 131 and 132. At Attachment D to these reasons, I have described the documents and set out the terms of the Department's decision as it applies to each. The Department made its decision on the basis that disclosure of the documents or parts of the documents, would, or could reasonably be expected to cause damage to the security of the Commonwealth under s 33(a)(i) of the *Freedom of Information Act 1982* (FOI Act). It claimed that the documents, or those parts of them as identified, are exempt under that section. In the alternative, the Department claimed that the documents, or parts of them, are exempt under s 47E of the FOI Act. Despite its decision and as it was entitled to do, the Department gave Mr Prinn "*supervised access*" to the documents outside the parameters of the FOI Act. He was not permitted to take copies of the documents or to take notes of them. Such restrictions would not apply were Mr Prinn given access to the documents under the FOI Act and he continued to seek access to them by applying to the Information Commissioner (IC) for review of the Department's decision.
2. On 29 August 2014, the Privacy Commissioner¹ decided to affirm the Department's decision dated 27 July 2012. I have also decided to affirm that decision under s 33(a)(i) on the basis of evidence presented on behalf of the Department and by Mr Prinn and have not required the Department to produce evidence to support its contention that the documents are exempt under s 47E.

¹ The Privacy Commissioner is permitted to perform the freedom of information functions, which include those of reviewing decisions under Part VII of the FOI Act: *Australian Information Commissioner Act 2010*; ss 12 and 8(h).

BACKGROUND

3. In this section of my reasons, I will briefly outline the matters that led to Mr Prinn's making his request under the FOI Act. They are matters that are understandably of deep concern to Mr Prinn but they are not matters in relation to which I make any findings of fact. I do not do so for they go to the reasons for his making his request. As I mention at [18] below, his reasons do not affect his right of access. They neither extend nor diminish it.
Section 33(a)(i), on which the Department relies in claiming that parts of the documents Mr Prinn seeks are exempt does not allow me to have regard to other competing public interests. It does not allow me to weigh any public interest in, for example, ensuring that the Department is carrying out its intelligence functions, or some particular aspects of them, efficiently, effectively and with integrity, against the public interest in protecting the security of the Commonwealth.
4. Mr Prinn was formerly an employee of the Department of Defence (Department). He was a subject matter expert in the area of Personnel Security clearances. In February 2009, he first became ill. As I understand him, Mr Prinn attributed his illness to what he saw as the workplace culture and bullying by certain senior officers in the Department and his concerns about what he saw as severe threats to national security though a lack of professionalism and the destruction of standards in relation to the Top Secret Positive Vetting (TSPV) clearances being processed in his area of the Department. His illness led to his being placed on extended leave in mid 2010. As a result, his own TSPV came under review for cause in December 2010. Mr Prinn alleges that the review process was unethical and, at times, corrupt. The officer who had instigated the review was a witness in the review as well as the person to whom the recommendations of the reviewer were made. He was also a person authorised to make the final decision in relation to Mr Prinn's TSPV.
5. When, in mid October 2011, Mr Prinn complained of these matters, he understood that the first officer would no longer have access to his file and that another officer would be the delegate. He requested access to documents related to the process on 16 February 2012. When, despite Mr Prinn's enquiries, the review had not led to a decision by April 2012, he escalated his enquiries to the Department's Secretary. He was advised that, as he had accepted a transfer to another position some weeks earlier and as that position did not require TSPV clearance, a new clearance would be undertaken at the Secret level only (Negative Vetting Level 1).
6. The Department granted access to some documents in response to his request. Following that, Mr Prinn raised his concerns with a Deputy Secretary of the Department regarding the process in dealing with staff clearances. He felt that the documents to which he had been

given access showed a greater level of unethical conduct, ignoring the conflicts of interest. In July 2013, Mr Prinn again raised issues of what he saw as unethical conduct, conflict of interest and breaches of confidentiality with the Deputy Secretary. He was not satisfied with the response he received. Mr Prinn has since raised issues of this sort with the Inspector-General of Intelligence and Security (IGIS), the Inspector-General Defence under the Public Interest Disclosure Scheme and the Ombudsman. He has put forward his case that he was denied his right to have a fair and unbiased process and denied procedural fairness in contravention of the guidelines laid down by the Attorney-General's Department.

7. The events, Mr Prinn has said, have led to his experiencing a level of suffering that has had an immense impact on his closest personal relationships with his family and friends. They have significantly exacerbated his existing medical conditions that eventually led to his retiring in 2014 on medical grounds at the age of 56. In 2014, Comcare accepted that Mr Prinn's illness was compensable. The loss of his job has, in turn, has had a significant impact on his financial circumstances with the result that he has had to restrict and curtail his standard of living for the rest of his life due to the early termination of his working life. Mr Prinn feels that his sense of worth had been destroyed as has his standing in the Defence security and intelligence community. His work at the Department was not just a job but a calling for him and a calling that enabled him to perform real and genuinely valuable work directed to fostering and supporting the national security of his country.
8. Later in these reasons, I will return to Mr Prinn's submissions in relation to the evidence given by Ms Elizabeth Milne and to those addressing the exemption claimed by the Department under s 33(a)(i).

THE REQUEST

9. On 16 February 2012, Mr Prinn requested access to records associated with his security clearance. He gave details of those records in the following terms:
 - "1. *Please provide copies of all records held on my personal security files including psychological suitability assessment records and file.*
 2. *Printed copies of electronic records from DSA PSAMS system that show identities/positions of all officers that have accessed my personal security files or electronic records since Jan 01 2009 and the dates/periods concerned. This should also include the record on the data base which outlines the dates of recommendations made by the various DSA staff involved and the dates that the file was referred on to the next officer in the decision process.*
 3. *Any e-mails associated with the review of my security clearance initiated by DSA in Dec 2010/conducted during 2011. This should include, but not be specifically limited to, any relevant e-mail records of the following DSA staff (past and present) ... , any staff of the Complex Vetting Team (since Jan*

2011), any staff in the psych team (also since Jan 2011), and any staff member who PSAMS indicates as having accessed my security records since Jan 2009.”²

10. The Department undertook a consultation process under s 24AB leading to Mr Prinn’s limiting his request to:
 - (1) All documents on Mr Prinn’s security file, including psychology documents, since 1 January 2009; (Item 2); and
 - (2) Printed copies of electronic records from the DSA PSAMS system that show the dates of recommendations/decisions made by DSA staff relating to Keith Prinn’s personal security file and the dates that the file was referred on to the next officer in the decision process. (Item 2)

THE DECISIONS

11. On 4 June 2012, an authorised decision-maker under the FOI Act, identified a number of documents meeting Mr Prinn’s request. She decided to grant access to 70 Series in full. Others, she refused access to on the basis that they could not be found within the meaning of s 24A of the FOI Act. She denied access to 16 Serials in full on the basis that they are exempt under s 33(a)(i) but granted access to 30 other Serials after deleting passages for which the Department claimed exemption under ss 33(a)(i), 47F or 47G of the FOI Act. In making the deletions, the authorised officer relied on s 22 of the FOI Act.
12. On 27 June 2012, Mr Prinn sought review of the decision. In the process of carrying out that review, a further 33 Serials (consisting of 171 pages) were identified as coming within the terms of Item 1 of Mr Prinn’s request. An officer of the Department authorised by its Secretary under s 23 of the FOI Act decided that 14 Serials were exempt in their entirety under s 33(a)(i) or 47E. Pages or passages of other documents were exempt under ss 33, 47E, 47F and/or 47G but a copy of the document could be made in accordance with s 22 from which the exempt material had been deleted. Mr Prinn was given access to the resulting copy. He was also given access to a further four documents without deletions.
13. On 7 July 2013, Mr Prinn applied to the IC for review of that decision. Mr Prinn and the Department decided to limit the documents in dispute to Serials 51, 53, 55, 106, 107, 131 and 132. Under s 55G of the FOI Act, the Department made a revised decision granting Mr Prinn access to further documents. It did so on 3 December 2013.
14. On 11 March 2014, the Department purported to make a further substituted decision under s 55G. Its decision was to grant Mr Prinn access to all but one of the remaining documents but only on the basis that the access was by way of supervised inspection. The

² Documents lodged under s 37 of the *Administrative Appeals Tribunal Act 1975* (T documents); T3 at 8

Department made that decision on the basis of its understanding that Mr Prinn had agreed to access on that basis. Mr Prinn had that access on 19 March 2014. Subsequently, on 19 March 2014, Mr Prinn advised the IC that he wished to proceed with his application for unrestricted access to the documents had had requested.

15. The IC subsequently carried out that review and, under s 55K, affirmed the decision made by the authorised officer on internal review. He decided that the Serials are exempt, in part, under s 33(a)(i) of the FOI Act.

THE ISSUES

16. The documents, or parts of documents, that remain in issue are Serials 51, 53, 55, 106, 107, 131 and 132. Details of the documents are set out in Attachment A to these reasons. The issues in this case are:

- (1) whether Serials 51, 53, 55, 106, 107, 131 and/or 132 are exempt under s 33(a)(i);
- (2) if all or any of the documents are not exempt under s 33(a):
 - (a) whether all or any are conditionally exempt under s 47E(a); and
 - (b) if so, whether giving access to those documents, or part of them, would be contrary to the public interest within the meaning of s 11A(5) of the FOI Act.

17. In view of my decision regarding the Department's claim for exemption under s 33(a), I do not consider s 47E in this matter.

THE RIGHT OF ACCESS

18. Subject to the provisions of the FOI Act itself, every person has a legally enforceable right of access to obtain access, in accordance with its terms, to a document of an agency or a document of a Minister, other than an exempt document. This is the right established by s 11(1) of the FOI Act. It is a right that is not affected by any reasons the person gives for seeking access or any belief an agency or Minister may have as to what those reasons may be.³ Corresponding with the right established by s 11(1) is the duty imposed on an agency or Minister by s 11A(3). It provides:

"The agency or Minister must give the person access to the document in accordance with this Act, subject to this section."

19. It is clear from the way in which the right is expressed that it is not an unqualified right. It is qualified by two groups of considerations. The first group comprises what might broadly be described as procedural or administrative qualifications to the right. So, for example, a

³ FOI Act; s 11(2)

request for access must comply with certain procedural requirements.⁴ The right does not extend to the types of documents described in ss 12 and 13. It may be restricted by reference to the workload a request imposes on an agency or Minister in dealing with it.⁵ Charges may be imposed in respect of the request and processing of a request may be deferred pending payment of them.⁶ If, subject to qualifications of this sort, the right exists, it is not a right to have access to a document in any form but in a form that is in accordance with the terms of the FOI Act.⁷

20. The second group of considerations qualifies the right of access by reference either to the class of document or by the type of damage or harm that may follow disclosure under the FOI Act. An agency or Minister is not required by the FOI Act to give a person access to a document at a particular time if, at that time, the document is an exempt document.⁸ An “*exempt document*” is a document that is exempt for the purposes of Part IV, a document in respect of which an agency, person or body is exempt from the operation of the FOI Act or an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department of State.⁹ A document is exempt for the purposes of Part IV if it is either an exempt document under Division 2 of that Part or is conditionally exempt under Division 3 and access to it would, on balance, be contrary to the public interest for the purposes of s 11A(5).¹⁰

THE EXEMPTION

21. As originally enacted in 1982, its exemption provisions have their foundations in the common law in so far as they exempted from disclosure those documents that the courts would have said were exempt from discovery on the basis of considerations of public interest immunity (or Crown privilege as it was previously known) or on the basis of a common law rule of law. The Cabinet document exemption in s 34 is an example of the former and legal professional privilege in s 42 and example of the latter. Both exemptions are framed by reference to the nature or class into which a document may be classified and not by reference to the harm that might result from disclosure under the FOI Act or by reference to other considerations.
22. The Cabinet document exemption set out in s 34 follows closely the general principles established by the High Court in *Sankey v Whitlam*¹¹ in relation to claims of Crown

⁴ FOI Act; ss 15(2) and (2A)

⁵ FOI Act; ss 24, 24AA and 24AB

⁶ FOI Act; ss 29 and 31

⁷ FOI Act; s 20

⁸ FOI Act; s 11A(4)

⁹ FOI Act; s 4(1)

¹⁰ FOI Act; s 31B and see [23]–[25] below

¹¹ [1978] HCA 43; (1978) 142 CLR 1; Gibbs ACJ, Stephen, Mason, Jacobs and Aickin JJ

privilege.¹² It does so by prescribing the limits of the exemption by reference to a class of documents and not by reference to the harm that would result from disclosure of a particular document. As the common law does, it excludes from that class, documents that have been officially published. The common law recognises that, in legal proceedings, a party may object to producing documents on the ground that they are members of a class of documents entitled to protection from production regardless of their contents. As Griffiths ACJ said, however:

*“... the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. ...”*¹³

23. The exemption provided for in s 34 differs from the common law in that it does not contain a balancing test. If the document falls within the class described, it is exempt. It is not subject to a public interest test under s 11A(5). That is consistent with the fact that a request for access to documents made under the FOI Act is not made in any particular context. Indeed, the purpose for which a person requests access does not affect his or her right of access to a document.¹⁴
24. Other exemptions are crafted by reference to the harm that would, or could reasonably be expected to, result from access under the FOI Act. Section 47 relating to documents disclosing trade secrets or commercially valuable information is an example. In the case of information having a commercial value, the question is whether that value would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.¹⁵ There is no balancing of the public interest in ensuring that information having a commercial value is protected against a public interest in, say, sharing that information for the greater good. The public interest in protecting information of that sort would be balanced against the interests of justice if production of the document were called for in legal proceedings but, for the reasons I have given, not under the FOI Act.
25. Division 3 of Part IV of the FOI Act sets out conditional exemptions. They may be framed in terms of the type of document¹⁶ or by reference to the harm that would, or could reasonably be expected to, follow from disclosure under the FOI Act.¹⁷ Section 11A(5) provides:

¹² “... Judicial descriptions of the general doctrine of Crown privilege must necessarily be affected by the facts of the case in hand; they cannot be applied to wholly unforeseen and quite different circumstances and used as rules of law governing those circumstances. ...” [1978] HCA 43; (1978) 142 CLR 1 at 57 per Stephen J.

¹³ [1978] HCA 43; (1978) 142 CLR 1 at 43

¹⁴ FOI Act; s 11(2)

¹⁵ FOI Act; s 47(1)(b)

¹⁶ Documents disclosing deliberative processes within the meaning of s 47C is an example.

¹⁷ Section 47D is an example when it provides that “A document is conditionally exempt if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth, of

*“The agency or Minister must give the person access to the document if it is conditionally exempt **at a particular time** unless (in the circumstances) access to the document **at that time** would, on balance, be contrary to the public interest.”*
(emphasis added)

The emphasis on the time in s 11A(5) clearly indicates that both the status of a document as exempt or otherwise and the application of the public interest test are to be considered by reference to the events of the time. Some of the factors that might be relevant and those that are irrelevant are set out in s 11B. What would, and would not, be contrary to the public interest changes as the environment in which access would be given changes. It may be that announcements have been made by government that have an impact, other events have happened or that time has simply passed and what was contrary to the public interest in the past is no longer.

PUBLICATION

26. If an agency or Minister gives a person access to a document under s 11A, regard must be had to the obligation imposed by s 11C(1), (2) and (3) to publish within ten working days after the day on which access was given.¹⁸ It should be noted at the outset that the obligation does not relate to the document to which access has been given but to the information contained in the document. Even then, it does not apply to all information. Section 11C(1) excludes:

- “(a) personal information about any person, if it would be unreasonable to publish the information;*
- (b) information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information;*
- (c) other information of a kind determined by the Information Commissioner under subsection (2), if it would be unreasonable to publish the information;*
- (d) any information, if it is not reasonably practicable to publish the information under this section because of the extent of any modifications to a document (or documents) necessary to delete information mentioned in paragraphs (a) to (c).”*

For the purposes of s 11C(1)(c), the IC may make a determination by legislative instrument.¹⁹ To date, he has not made any.

27. Section 11C(3) requires an agency or Minister to publish the information to members of the public generally on a website in one of three ways it specifies. Any charges that may be imposed for accessing that information are restricted to those provided for in ss 11C(4) and (5).

Norfolk Island or of an agency. ...”.

¹⁸ FOI Act; ss 11C(6) and (7)

¹⁹ FOI Act; s 11C(2)

THE GUIDELINES

28. Section 93A of the FOI Act makes provision for Guidelines:

“(1) *The Information Commissioner may, by instrument in writing, issue guidelines for the purposes of this Act.*

Note: For variation and revocation of the instrument, see subsection 33(3) of the Acts Interpretation Act 1901.”

(2) *For the purposes of the performance of a function, or the exercise of a power, under this Act, regard must be had to any guidelines issued by the Information Commissioner under this section including, but not limited to, guidelines issued for the purposes of the following provisions:*

(a) *paragraph 9A(b) (information publication scheme);*

(b) *subsection 11B(5) (public interest factors);*

(c) *subsection 15(5A) (decisions on request).*

(3) *Guidelines are not legislative instruments.”*

29. At Attachment A to these reasons, I explore the nature of the obligation that s 93A(2) imposes upon those performing a power or function under the FOI Act. It forms part of these reasons.

THE EXEMPTION CLAIMED: section 33(a)(i)

The provision

30. Section 33(a)(i) of the FOI Act provides that:

“A document is an exempt document if disclosure of the document under this Act:

(a) *would, or could reasonably be expected to, cause damage to:*

(i) *the security of the Commonwealth;*

(ii) *...;*

(iii) *...”*

As s 33(a)(i) comes within Division 2 of Part IV of the FOI Act, any document that comes within its terms is an exempt document.²⁰ It is not subject to the further public interest test set out in s 11A(5), as would be the case if it were a conditionally exempt document.²¹

31. Section 4(5) expands on what is meant by the “*security of the Commonwealth*”:

*“Without limiting the generality of the expression **security of the Commonwealth**, that expression shall be taken to extend to:*

(a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the*

²⁰ Paragraph (a) of the definition of “*exempt document*” in FOI Act s 4 and see also s 31B(a)

²¹ Paragraph (a) of the definition of “*exempt document*” in s 4 and see also s 31B(b)

interests of the Commonwealth or of any country allied or associated with the Commonwealth; and

- (b) *the security of any communications system or cryptographic system of the Commonwealth or of another country used for:*
 - (i) *the defence of the Commonwealth or of any country allied or associated with the Commonwealth; or*
 - (ii) *the conduct of the international relations of the Commonwealth.”*

32. At Attachment A, I set out my understanding of the meaning and scope of s 33(a). The Attachments to these reasons are part of them but I have separated the issues they consider for ease of reading.

ACCESS TO EDITED COPY WITH EXEMPT MATTER DELETED

33. If a document is an exempt document but would not be if certain information were deleted, an agency or Minister must have regard to s 22. If it is reasonably practicable for an agency or Minister to prepare a copy from which those deletions have been made and it is not apparent that the person requesting the document would decline access to an edited copy, the agency or Minister is obliged to give access to such a copy. In deciding whether it is reasonably practicable to make an edited copy, regard is to be had to the nature and extent of the modification and the resources available to modify the document.

Mr PRINN’S SUBMISSIONS

34. Mr Prinn said that he understood that the law might see release of the documents to him as release to the world but thought that, from a commonsense point of view, his intentions should also be considered. He did not make his request under the FOI Act in order to undo the whole security clearance process or to broadcast the contents of the documents to the world at large. His intention is to uncover and understand the whole depth of what has happened to him. In addition, he wanted to be accorded the rights that arise under various legislation, policies and guidelines governing administrative, investigative and employment processes. Mr Prinn has a deep concern regarding the processes and practices that have developed around the vetting process. He has raised his concerns but feels that they have been disregarded. As a result, he feels that changes to the security vetting processes have severely undermined the effectiveness of the process in terms of quality and value.

CONSIDERATION

35. In reviewing a decision under the FOI Act, I am bound to exercise only the powers it confers and to do so within the boundaries defined within that legislation. There is no room for me to exercise my discretion. Therefore, if I find that a document is an exempt

document, I cannot decide that there would be no harm in disclosing it to an applicant who requested access to it under the FOI Act. I am expressly forbidden from doing that by s 58(2) of the FOI Act. That provision states that, in those circumstances, “... *the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.*” It does not matter whether the person requesting access to an exempt document has the most worthy and honourable intentions in mind.

36. Section 11(2) of the FOI Act defines the right of access under the FOI Act in terms of its being a right that is not affected by any reasons the person gives for seeking access or by any reasons an agency or Minister may believe person has. It must be noted, however, that s 11(2) opens with the words “*Subject to this Act*”. That brings into play a qualification to the general statement that the right of access is not affected by a person’s reasons. In the case of a document that is conditionally exempt, a person’s reasons may be relevant in ascertaining competing public interests for the purposes of the determining whether access to a conditionally exempt document would, on balance, be contrary to the public interest. Conditional exemptions are set out in Division 3 of Part IV of the FOI Act.
37. The qualification to the general statement does not apply when a document is exempt under Division 2 of Part IV of the FOI Act. Unlike the conditional exemptions it has prescribed in Division 3 of that Part, Parliament does not permit the Tribunal to balance Parliament’s view of what the public interest requires against other public interests. In relation to exemptions prescribed in Division 2 of Part IV, Parliament has determined where the balance lies.
38. The exemption prescribed in s 33(a) falls within Division 2 of Part IV. If a document comes within that exemption, it follows from what I have said in the previous three paragraphs that it matters not at all whether there are sound reasons why information should be disclosed or whether the person seeking access will not reveal it to another in any circumstances. If a document is exempt, I cannot grant access to it under the FOI Act. Therefore, however worthy Mr Prinn’s intentions may be in seeking to have AGSVA’s vetting system reviewed, the Tribunal’s proceedings on review cannot be used as a forum in which to investigate the appropriateness of the vetting system, whether it accords procedural fairness to those being vetted or whether it is consistent with employment law and, if so, whether it should be.
39. Mr Prinn acknowledged that Ms Milne has a very good reputation but questioned her credibility in relation to the evidence that she gave about the PV clearance process and the risk that disclosure would, or could reasonably be expected to have, on national security.

As Mr Ermert and I have said before in *Re Dunn and Department of Defence*,²² that does not mean that mere assertion that information is said to relate to the Commonwealth's defence or security merits its protection and so its exemption under s 33 of the FOI Act. That is not consistent with the terms of s 33 itself. Nor is it consistent with the notion that there must be evidence that supports the conclusion required by s 33 before a document can be found to be exempt under it. In *Re Ewer and Australian Archives*,²³ Deputy President McMahon said:

"(18) The evidence in the present case, on this aspect of the claim, consists almost entirely of the opinion of Mr Brown. He has been employed for 15 years with ASIO and has had responsibility for the development and management of human source operations and other operations under ASIO's special powers during that time. In his affidavit, he said that he had recruited and run human sources and managed human source operations in the range of subject areas and had been responsible for the resettlement of human sources whose lives had been put at risk as a result of people becoming aware of their work with ASIO. I accept that from this experience, he is entitled to express certain opinions. He did this in paras 7 and 8 of his affidavit:

para 7 — In my view, the public disclosure of information concerning the existence, identity or management of a source would give rise to concern among ASIO's existing and potential sources that the extent and nature of their assistance could be disclosed at some future date, even after 30 years.

para 8 — In my opinion this concern would diminish the willingness of ASIO's present and potential sources, as well as members of the public who wish to assist the organisation, to continue providing ASIO with information relevant to security, and thus diminish the ability of the organisation to provide advice to government, and therefore damage the security of the Commonwealth.

*(19) His opinion, however, is simply that. The assertion that disclosure would damage the security of the Commonwealth, in absence of any evidence to support it other than opinion evidence, is self serving. It is not the type of evidence referred to by Neaves J which would be required to sustain a claim for exemption on this ground. It is true, as was observed in Re Slater (at ALD 29), that security is a particularly sensitive area and particularly dependent for its effectiveness upon an adequate flow of information. I accept this as a notorious fact, and as one which was judicially approved by Davies J in Throssell No 1 at 406. Nevertheless, there must be more information or evidence of some probative value rather than a mere bald opinion to satisfy the onus which the respondent bears, that the expected diminution of the flow of information would occur."*²⁴

40. Ms Milne has gone beyond mere assertion of the damage that she perceives could be expected to follow from disclosure of the information in the documents to which Mr Prinn seeks access. In respect of her assertion that there is a reasonable likelihood that referees will be less open in their responses if they know that they may be disclosed to the clearance subject, Ms Milne referred to the response from one of Mr Prinn's referees who expressed concern that disclosure would lead to referees' being less forthcoming in the

²² [2004] AATA 1040; (2004) 84 ALD 419; 39 AAR 322 at [121]; 453-454; 357-358

²³ (1995) 38 ALD 789

²⁴ (1995) 38 ALD 789 at 791-2

future and in being able to prepare their responses. Certainly, that is only one referee's opinion but evidence must be viewed in its context and weighed with other relevant and probative evidence. Among that relevant and probative evidence is the information in the documents to which Mr Prinn has sought access. It may be that disclosure of referees' comments to Mr Prinn may not have any effect on the particular relationship between him and his referees or whether it would impede his referees generally in their remarks but that is not the question to ask. The question is whether disclosure would, or could reasonably be expected to, have that effect more generally. Having regard to the nature of the questions asked and the responses given, I am satisfied that the question has to be answered in the affirmative.

41. Having regard to the documents under consideration, I am also satisfied that their disclosure would disclose the nature of the psychological tests that are administered, what may be regarded as characteristics or features that are relevant in assessing a clearance subject's suitability to be given a security clearance at a certain level and how they are weighed. That information must be viewed against the background of the reason for the collection and analysis of the information. The reason is aligned with the reason for the introduction and maintenance of a system of security clearance at all. That is to say, it is aligned with the need to protect information held by the Australian Government. The system of security clearance has different clearance processes associated with the sensitivity of the information to which the person is, or may be, given access. The documents to which Mr Prinn seeks access relate to a clearance process for a TSPV security clearance. The document entitled "*Information security management guidelines Australian Government security classification system*" approved on 1 November 2014 and prepared by the Attorney-General's Department sets out the way in which information should be classified. In the case of a classification of "*Top Secret*" it is information that:

*"... requires the highest degree of protection as compromise of the confidentiality of information could be expected to cause exceptionally grave damage to the national interest."*²⁵

42. In light of this but also on the basis of Ms Milne's evidence, I find that TSPV vetting and security vetting in general is intended to ensure that information that is sensitive and whose disclosure can affect the national interest is restricted to those who will protect it. I accept that the psychological tests and vetting process generally is directed to ascertaining whether a person will be able to protect it. Referees' comments are part of that process. If, as I have found, it could reasonably be expected that referees may be inhibited in what they say about a person, I am also satisfied that the flow on effect is that it is a reasonable

²⁵ Ms Milne's Affidavit at EM3; [66]

expectation that the national security could reasonably be expected to be damaged. I reach that conclusion even though there may be no damage in the sense of an inappropriate release of information. Such a release might well be seen as actual damage but, even in the absence of such a release, the damage would lie in the compromise of the security vetting process. The confidence that it can reasonably be expected to identify characteristics and features relevant to a clearance subject's security classification will be diminished.

43. The same reasoning applies to clearance subjects themselves. If access to the documents were given to Mr Prinn, the publication provisions in s 11C would ensure that access would be available to all, including other clearance subjects. The nature of the questions asked and the information sought would enable clearance subjects to consider their answers and, consciously or otherwise, mould their answers. The damage that may reasonably be expected to follow from that would be the same. The processes are designed to elicit information so that it may be analysed for the purpose of assessing whether a person should be cleared to handle sensitive information and, if so, the level of sensitivity that the person is cleared to handle. If a clearance subject were able to mould their answers, the security vetting process would be open to manipulation. I accept Ms Milne's evidence that it is not perfect but I am also satisfied that it could reasonably be expected to be compromised if access were given to information of the sort I have described. That it could reasonably be expected to compromise the security of information regarded by the Australian Government as requiring protection. In the case of the information sought by Mr Prinn, it could reasonably be expected to compromise the national security for the information he seeks relates to a TSPV security clearance process and so is directly relevant to the protection of information classified to the Top Secret level.
44. Some of the information for which exemption has been claimed relates to answers given by Mr Prinn himself. I am satisfied that, under s 22, it is not reasonably practicable for the Department to prepare a copy of the relevant documents from which it has been deleted. Unlike a conditional exemption, where the fact that it is Mr Prinn's personal information would be a relevant consideration in considering whether, on balance, access to the document would be contrary to the public interest, its characterisation as his personal information is not relevant. The fact that it is Mr Prinn's information does not alter its alternative characterisation as information of the sort to which I have referred in the previous paragraphs. It is exempt under s 33(a).
45. For the reasons I have given, I affirm the decision of the Privacy Commissioner dated 29 August 2014.

THE GUIDELINES

46. Section 93A of the FOI Act has been understood to apply to the Tribunal as much as it does to the primary decision-maker and every decision-maker in between. I have also understood it in that way but have struggled with it because it does not seem appropriate that a body that is charged with reviewing a decision-maker's decisions and coming to a decision that is correct in law and on the evidence²⁶ should be required to have regard to the that decision-maker's view of the law. I have set out what I think are the limits of its application.

Application of s 93A if it applies to the Tribunal

47. As s 93A(3) states, the Guidelines are not legislative instruments. Had they been, they must have been validly made. Putting aside considerations such as reasonableness and proportionality, the essential steps that are taken to determine their validity are:

*"... to construe the statute under which the by-law is made and then interpret it to ascertain whether it is within the ambit of the statute."*²⁷

That requires a consideration of whether the power to make them has been:

*"... exercised having regard to the purpose that underlies the empowering provision. Where that purpose is expressly stated, the task of the court in determining validity is to some extent made easier."*²⁸

48. The fact that the Guidelines made under s 93A of the FOI Act are not legislative instruments, means that they cannot have any effect in determining or altering the content of the law and cannot have any direct or indirect effect on a right or obligation under the FOI Act.²⁹ That does not mean that the approach to their interpretation is any different, though, from that which applies to legislative instruments. They must be made within the power that has been granted. The only way in which that can be determined is to construe the FOI Act under which they are made and then interpret the Guidelines to ascertain whether they have been made within the ambit of that statute. It follows that regard cannot be had to the Guidelines to determine the proper interpretation of the FOI Act generally or of a particular provision. It is the FOI Act that is the reference point for the Guidelines' validity and it, and not the Guidelines, determine the content of the law that Parliament has

²⁶ The Tribunal's role is usually expressed as finding the "*correct or preferable decision*" i.e. the decision that is correct in law and on the evidence and, where the decision is discretionary and there may be more than one correct decision, which is the preferable of those decisions to make. See *Drake and Minister for Immigration and Ethnic Affairs (No 2)* [1979] AATA 179; (1979) 2 ALD 634 at 636 per Brennan J, President. The Tribunal has no power to make discretionary decisions under the FOI Act. Not only is it not permitted to do so, it is expressly forbidden from doing so once it has been established that a document is an exempt document: FOI Act; s 58(2).

²⁷ *Footscray Corp v Maize Products Pty Ltd* [1943] HCA 15; (1943) 67 CLR 301 at 308 per Rich J

²⁸ *Vanstone v Clark* [2005] FCAFC 189; (2005) 147 FCR 299; 224 ALR 666; 88 ALD 520 at [112]; 332; 696; 550 per Weinberg J with whom Black CJ agreed on this issue.

²⁹ See definition of "*legislative instrument*": *Legislative Instruments Act 2003*; s 5

enacted. The reference point is informed by the relevant High Court and Federal Court authorities.

49. It seems to me that, in s 93A(2), Parliament has implicitly recognised that the Guidelines have no role to play in the interpretation of the FOI Act. That subsection states that they are made for the purposes of the “*performance of a function, or the exercise of a power, under this Act*”. It does not state that they are made for the purposes of identifying the scope of the function that is to be performed or that of the power that is to be exercised. They are made for the performance of one and the exercise of the other. That, in turn, is consistent with the nature of guidelines of this sort. The power and function is determined by reference to the legislation passed by Parliament but guidelines are developed as to the way in which a function is performed or a power exercised.
50. As authorities have stated over the years, guidelines of this sort play an important role in administrative decision-making. The High Court addressed this quite recently in *Plaintiff M64/2015 v Minister for Immigration and Border Protection*³⁰ (*Plaintiff M64*). The plurality, French CJ, Bell, Keane and Gordon JJ said:

“ *Policy guidelines like the priorities policy promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike ... In particular, policies or guidelines may help to promote consistency in ‘high volume decision-making’, such as the determination of applications for Subclass 202 visas. Thus in Re Drake and Minister for Immigration and Ethnic Affairs (No 2) ..., Brennan J, as President of the Administrative Appeals Tribunal, said that ‘[n]ot only is it lawful for the Minister to form a guiding policy; its promulgation is desirable’ because the adoption of a guiding policy serves, among other things, to assure the integrity of administrative decision-making by ‘diminishing the importance of individual predilection’ and ‘the inconsistencies which might otherwise appear in a series of decisions’ The subjectivity of the evaluation by a decision-maker in a case such as the present highlights the importance of guidelines. The importance of avoiding individual predilection and inconsistency in making choices between a large number of generally qualified candidates by the application of the open-textured criterion of ‘compelling reasons for giving special consideration’ is readily apparent.*”³¹

51. Even though they play such an important role, Guidelines must not be followed without consideration of their validity. As Finn J said about a Practice Direction (Direction) made under s 33 of the *Administrative Appeals Tribunal Act 1975* relating to the Tribunal’s power

³⁰ [2015] HCA 50; (2015) 327 ALR 8; 148 ALD 206

³¹ [2015] HCA 50; (2015) 327 ALR 8; 148 ALD 206 at [54]; 21-22; 219 (citations omitted); Gageler J expressing a similar view at [68]-[69] but, referring to the judgment of Deane J in *Nevistic v Minister for Immigration and Ethnic Affairs* [1981] FCA 41; (1981) 34 ALR 639 at 647 “... emphasised the importance of the adoption and consistent application of policy to the avoidance of substantial injustice in administrative decision-making, which involves ‘competition or correlativity between rights, advantages, obligations and disadvantages’. Each applicant must always be entitled to have his or her application for the exercise of a decision-making power determined on its merits. But the merits of an application cannot always adequately be considered by reference to the circumstances of the applicant alone.”

to award costs under s 67(8) of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act):

“... It is not open to doubt that that Direction cannot confer a jurisdiction on the Tribunal, a Registrar or a Deputy Registrar which is of larger compass than that which is given the Tribunal by the SRC Act, s 67(8) ...”³²

52. In view of these principles, I respectfully note that I do not agree with the way in which Senior Member Popple, most recently in *Re Jones and Australian Federal Police*³³ (*Jones*), expresses his understanding of the obligations imposed by s 93A:

“... The FOI Guidelines are not binding, but decision makers, including this Tribunal, should **apply** the FOI Guidelines unless there are cogent reasons to the contrary...”³⁴ (emphasis added).

53. I agree that they are not binding but I disagree that decision-makers, including this Tribunal, “should” apply the Guidelines. The obligation is to have “regard” to them i.e. “... to take into account; consider. ...”.³⁵ It is not to “apply” them i.e. “... bring to bear, put into practical operation, as a principle, rule, law, etc ...”.³⁶ Regard can only be had to them if they are made lawfully i.e. within the scope of the power conferred by s 93A and consistently with the FOI Act. Decision-makers cannot be required to have regard to the Guidelines in so far as they relate to the interpretation of the FOI Act. Section 93A(2) limits the power to issue Guidelines for the purposes of the performance of a function or the exercise of a power under that legislation. For those purposes, regard must be had to them and there can be no doubt about that. A modern statement of the importance of guidelines of this sort has been made in *Plaintiff M64*, to which I have referred at [50] above.

54. The three authorities to which Senior Member Popple referred do not lead me to a different conclusion. I have already explained in *Re Secretary, Department of Prime Minister and Cabinet and Wood*³⁷ (*Wood*) why I do not agree with the analysis put forward in two of them: *Re Francis and Department of Defence*³⁸ (*Francis*) and *Re Rovere and Secretary, Department of Education and Training*³⁹ (*Rovere*). Without repeating them, I adopt my reasons in that case.

³² *Comcare v Labathas* [1995] FCA 1702; (1995) 61 FCR 149; (1995) 133 ALR 744; 22 AAR 295; 40 ALD 255 at [22]; 154; 749; 300; 259; 259

³³ [2016] AATA 329

³⁴ [2016] AATA 329 at [19] (footnotes omitted)

³⁵ Macquarie Dictionary, revised 3rd edition, 2001, The Macquarie Library Pty Ltd (Macquarie)

³⁶ Macquarie

³⁷ [2015] AATA 945 at [23]–[27]

³⁸ [2012] AATA 838; (2012) 59 AAR 35 at [18]; 39–40 per Deputy President Jarvis

³⁹ [2015] AATA 462 at [12] per Senior Member Popple

55. That brings me to the third of the authorities referred to in *Jones: Re Dreyfus and Secretary, Attorney-General's Department*⁴⁰ (*Dreyfus*). Paragraph 33 was relied upon. It reads:

“ *The Secretary submits that the Tribunal must determine the application on its merits informed, but not bound, by the Guidelines and that the Tribunal should apply the Guidelines unless there are cogent reasons to the contrary* (Re Francis and Department of Defence [2012] AATA 838; (2012) 59 AAR 35 at [18]).

56. In this paragraph, Bennett J has repeated the submission that was made. She has not expressed any view as to whether she accepts it or not. Standing alone, therefore, [33] cannot be regarded as authority for the proposition put forward in *Jones*. That is not to say that Bennett J did not have regard to the Guidelines. She did but she also considered whether they accorded with the FOI Act. I will give two examples:

“ *The Guidelines set out matters relating to the decision on request for access. In each aspect, the Guidelines emphasise the importance of the facilitation and promotion of public access to information. This accords with the general objects as set out in s 3 of the Act, which embody a policy – or presumption – of open government that is relevant to all FOI decision making (s 3(1)). As relevant to the present consideration, the Guidelines mirror the objects of the Act.*”⁴¹

“... *The Guidelines are helpful in providing examples of public interest factors as provided for in s 11B of the Act, in accordance with and in the context of the objects of the Act.*”⁴²

57. Her Honour also tangentially referred to a tension that arises from the fact that s 93A gives the IC power to make Guidelines, to which the Tribunal must have regard for the purposes of the performance of a function, or the exercise of a power, under this Act, and the Tribunal's duty to review the IC's decision if an application is made to it. After setting out the IC's decision under s 22 as to whether it was reasonably practicable for the Attorney-General's Department to prepare an edited copy which would not contain exempt matter or information irrelevant to the request, Bennett J said:

“ *In the Guidelines, the Commissioner relied upon his decision in the present case [Dreyfus] to state that a common sense view should be taken at deletions and that the purpose of providing access to government information under the Act may not be served if extensive editing is required but leaves only a skeleton of the formal document that conveys little of content or substance.*”⁴³

Her Honour did not make any further reference to the tension revealed by this passage. While I can understand the IC's wish to keep the Guidelines up to date, I respectfully

⁴⁰ [2015] AATA 962 at [33] per Bennett J

⁴¹ [2015] AATA 962 at [46]

⁴² [2015] AATA 962 at [66]

⁴³ [2015] AATA 962 at [114]

suggest that the Tribunal should not have regard to those parts of the Guidelines that rely on the IC's decisions that remain subject to the review processes provided for in the FOI Act and any subsequent appeals. That does not mean that the Tribunal may not come to the same conclusion but it will come to it by means of the interpretation of the FOI Act.

SECTION 33(a): documents affecting national security***“Would, or could reasonably be expected to”***

58. On behalf of the Department, Mr Davidson referred to the Guidelines issued by the IC under s 93A of the FOI Act (Guidelines). In particular, he referred to [5.13] where it is said that:

“5.13 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

5.14 The use of the word ‘could’ in this qualification is less stringent than ‘would’, and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future. ... [Re Maksimovic and Australian Customs Service [2009] AATA 28].”

59. The expression *“would, or could reasonably be expected”* is used as a measure of the outcome that is described in s 47B(a) i.e. that disclosure under the FOI Act would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State. In its ordinary usage, the word *“would”* suggests that, as a matter of probability, disclosure under the FOI Act would lead to that outcome as a logical or necessary consequence.⁴⁴ In its ordinary usage, the word *“could”* is *“used to express a possibility”*⁴⁵ that would be the outcome but the word is qualified by the words *“reasonably be expected to”* and all the words must be understood as they stand together rather than individually.
60. The expression *“could reasonably be expected to”* has been considered in past authorities. They establish:
- (1) *“In our opinion, in the present context, the words ‘could reasonably be expected to prejudice the future supply of information’ were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see Kioa v West (1985) 60 ALJR 113 per Mason J and Gibbs CJ).”*⁴⁶

⁴⁴ Chambers

⁴⁵ Chambers

⁴⁶ *Attorney-General’s Department and Another v Cockcroft* (1986) 10 FCR 180; 64 ALR 97 at 190; 106 per Bowen CJ and Beaumont J

- (2) "... stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information."⁴⁷
- (3) In the application of an exemption such as s 47B(a) requiring consideration of whether an outcome would, or could reasonably be expected to follow from disclosure under the FOI Act, "... there would ordinarily be material before the decision-maker which would show whether or not the ... [outcome could be expected to follow] if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable."⁴⁸

"cause damage to ... the security of the Commonwealth"

A. The Guidelines

61. What s 33(a)(i) requires me to assess is the likelihood of damage to the security of the Commonwealth. I have set out the meaning given to that expression in s 4(5) above but it is not an exhaustive definition. I will return to that in a moment. The Guidelines repeat the substance of that provision at [5.26]. They then go on to state at [5.27]:

*"A decision maker must be satisfied that damage to the security of the Commonwealth **would be caused** by disclosure of the information under consideration. The claim has been upheld in the following situations:*

- (a) *If the release of a document would prevent a security organisation from obtaining information on those engaged in espionage, it could reasonably be expected to cause damage to national security if such a document were released.*^{13 [49]}
- (b) *The disclosure of a defence instruction on the Army's tactical response to terrorism and procedures for assistance in dealing with terrorism would pose a significant risk to security by revealing Australia's tactics and capabilities.*^{14[50]}
- (c) *Documents revealing, or which would assist in revealing, the identity of an ASIO informant were held exempt under a similar provision in the Archives Act.*^{15 [51]} (emphasis added)

62. I note that, even though [5.27] is directed to s 33(a)(i), its opening words of [5.27] are not consistent with the words of the provision. Paragraph [5.27] narrows the scope of s 33(a)(i) when it states that "A decision maker must be satisfied that damage to the security of the Commonwealth **would be caused** by disclosure of the information under consideration. ..."
- (emphasis added). Section 33(a)(i) draws within its scope those documents whose

⁴⁷ (1986) 10 FCR 180; 64 ALR 97 at 196; 112 per Sheppard J

⁴⁸ *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 36 FCR 111; 108 ALR 163 at 123; 176 per Davies, Wilcox and Einfeld JJ

⁴⁹ Footnote 13: *Re Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110

⁵⁰ Footnote 14: *Re Hocking and Department of Defence* [1987] AATA 602

⁵¹ Footnote 15: *Re Throssell and Australian Archives* [1987] AATA 453

disclosure “*could reasonably be expected to*” cause damage of the sort it describes as well as those that “*would*”.

B. Ordinary meanings of “*damage*” and “*security*”

63. The Guidelines do not comment on the meaning of “*damage*”. When used as a noun, its ordinary meanings include “*harm or injury*”.⁵² Although that suggests a wide compass, 33(a)(i) draws the boundaries for the damage must be to the “*security of the Commonwealth*”. I have set out the definition of that expression at [31] above but it is clear from its terms that it is not intended to be an exhaustive definition. That takes me to other sources in an endeavour to ascertain its ordinary meanings.

64. The relevant meanings given in various dictionaries include:

“... **1** free from danger; providing safety. **2** protection from the possibility of future financial difficulty. **3** protection from theft □ Our house has good security. **5** the staff providing such protection against attack or theft. **6** freedom from vulnerability to political or military takeover □ national security. ...”⁵³

“... **1.** freedom from danger, risk, etc.; safety. **2.** freedom from care, apprehension, or doubt; confidence. **3.** something that secures or makes safe; a protection; a defence. **4.** Protection from or measures taken against espionage, theft, infiltration, sabotage, or the like. ...”⁵⁴

“... **1** The condition of being protected from or not exposed to danger, safety; spec. the condition of being protected from espionage, attack, or theft. ... **▸b** The provision or exercise of measures to ensure such safety. Also (**S-**), a government department or other organization responsible for ensuring security. ...”⁵⁵

65. These meanings have three aspects. One is that of safety, protection or defence from something that is regarded as a danger. Financial difficulty, attack, theft and political or military takeover are given as examples. A second aspect refers to the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage. The organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect found in the definitions.

C. The legislative context

66. The assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time. Evidence has been given and I will return to that below. Also relevant is the legislative environment that exists pertaining to security. Parliament has enacted three pieces of legislation in that environment and created several

⁵² Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers (Chambers)

⁵³ Chambers

⁵⁴ Macquarie

⁵⁵ Shorter Oxford English Dictionary, 5th edition, 2002, Oxford University Press

bodies with various functions related to security. Those bodies represent the use of the word “security” in the third aspect of its ordinary meanings. They include the Australian Security and Intelligence Organisation (ASIO) continued in existence by the *Australian Security and Intelligence Organisation Act 1979* (ASIO Act) and previously been continued in existence by the *Australian Security Intelligence Organisation Act 1956* and the *Australian Security Intelligence Organisation Act 1976*.⁵⁶ Others include the Australian Secret Intelligence Service (ASIS), that part of the Defence Department known as the Australian Geospatial-Intelligence Organisation (AGO) and that part known as the Australian Signals Directorate (ASD) that are the subject of the *Intelligence Services Act 2001* (IS Act) as well as the Office of National Assessments (ONA) established under the *Office of National Assessments Act 1977*⁵⁷ (ONA Act).

67. The functions assigned to each of these bodies shows that they are functions relevant to security. At the same time, they give a glimpse of the manner in which they carry out their functions and the limit of its functions. I will take ASIO as an example. Section 17 of the ASIO Act sets out its functions:

- “(1) *The functions of the Organisation are:*
- (a) *to obtain, correlate and evaluate intelligence relevant to security;*
 - (b) *for purposes relevant to security, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes;*
 - (c) *to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.*
 - (ca) *to furnish security assessments to a State or an authority of a State in accordance with paragraph 40(1)(b);*
 - (d) *to advise Ministers, authorities of the Commonwealth and such other persons as the Minister, by notice in writing given to the Director-General, determines on matters relating to protective security; and*
 - (e) *to obtain within Australia foreign intelligence pursuant to section 27A or 27B of this Act or section 11A, 11B or 11C of the Telecommunications (Interception and Access) Act 1979, and to communicate any such intelligence in accordance with this Act or the Telecommunications (Interception and Access) Act 1979; and*
 - (f) *to co-operate with and assist bodies referred to in section 19A in accordance with that section.*
- (2) *It is not a function of the Organisation to carry out or enforce measures for security within an authority of the Commonwealth.”*

⁵⁶ ASIO Act; s 6

⁵⁷ Under s 8 of the *Inspector-General of Security and Intelligence Act 1986*, the Inspector-General of Intelligence and Security has oversight of, in summary, the lawfulness and propriety of actions of the AGO, ASD, ASIS, DIO and ONA.

68. “Security” is very much at the front and centre of ASIO’s functions. The harm or danger in respect of which security is required is apparent from the definition of the word “security” in s 4 of the ASIO Act. That section provides:

“security means:

- (a) *the protection of, and of the people of, the Commonwealth and the several States and Territories from:*

- (i) *espionage;*
- (ii) *sabotage;*
- (iii) *politically motivated violence;*
- (iv) *promotion of communal violence;*
- (v) *attacks on Australia’s defence system; or*
- (vi) *acts of foreign interference;*

whether directed from, or committed within, Australia or not; and

- (aa) *the protection of Australia’s territorial and border integrity from serious threats; and*
- (b) *the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).”*

69. The nature of the harm or danger is further identified in other definitions also set out in s 4 and expanding upon expressions used in the definition of “security”. They are:

“attacks on Australia’s defence system means activities that are intended to, and are likely to, obstruct, hinder or interfere with the performance by the Defence Force of its functions or with the carrying out of other activities by or for the Commonwealth for the purposes of the defence or safety of the Commonwealth.”

“acts of foreign interference means activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:

- (a) *are clandestine or deceptive and:*
 - (i) *are carried on for intelligence purposes;*
 - (ii) *are carried on for the purpose of affecting political or governmental processes; or*
 - (iii) *are otherwise detrimental to the interests of Australia; or*
- (b) *involve a threat to any person.”*

“foreign power means:

- (a) *a foreign government;*
- (b) *an entity that is directed or controlled by a foreign government or governments; or*
- (c) *a foreign political organisation.”*

“politically motivated violence means:

- (a) *acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or*
- (b) *acts that:*
 - (i) *involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and*
 - (ii) *are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or*
- (ba) *acts that are terrorism offences; or*
- (c) *acts that are offences punishable under Division 119 of the Criminal Code, the Crimes (Hostages) Act 1989 or Division 1 of Part 2, or Part 3, of the Crimes (Ships and Fixed Platforms) Act 1992 or under Division 1 or 4 of Part 2 of the Crimes (Aviation) Act 1991; or*
- (d) *acts that:*
 - (i) *are offences punishable under the Crimes (Internationally Protected Persons) Act 1976; or*
 - (ii) *threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General.”*

“promotion of communal violence means activities that are directed to promoting violence between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth.”

“terrorism offence means:

- (a) *an offence against Subdivision A of Division 72 of the Criminal Code; or*
- (b) *an offence against Part 5.3 of the Criminal Code.*

Note: A person can commit a terrorism offence against Part 5.3 of the Criminal Code even if no terrorist act (as defined in that Part) occurs.”

70. In very general terms, the offences prescribed in Division 72 of the *Criminal Code* 1995 (Criminal Code) may be described as relating to explosives and lethal devices. Those in Division 119 are concerned with foreign incursions and recruitment and Part 5.3 with offences related to terrorism. Section 100.1, for example, falls within Part 5.3 of the Criminal Code. It provides that a person commits an offence if he or she engages in a “terrorist act”. A “terrorist act” is defined as:

“terrorist act means an action or threat of action where:

- (a) *the action falls within subsection (2) and does not fall within subsection (3); and*

- (b) *the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and*
- (c) *the action is done or the threat is made with the intention of:*
 - (i) *coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
 - (ii) *intimidating the public or a section of the public.*⁵⁸

71. Sections 100.1(2) and (3), to which this definition refers, provide:

- “(2) *Action falls within this subsection if it:*
 - (a) *causes serious harm that is physical harm to a person; or*
 - (b) *causes serious damage to property; or*
 - (c) *causes a person’s death; or*
 - (d) *endangers a person’s life, other than the life of the person taking the action; or*
 - (e) *creates a serious risk to the health or safety of the public or a section of the public; or*
 - (f) *seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:*
 - (i) *an information system; or*
 - (ii) *a telecommunications system; or*
 - (iii) *a financial system; or*
 - (iv) *a system used for the delivery of essential government services; or*
 - (v) *a system used for, or by, an essential public utility; or*
 - (vi) *a system used for, or by, a transport system.*
- (3) *Action falls within this subsection if it:*
 - (a) *is advocacy, protest, dissent or industrial action; and*
 - (b) *is not intended:*
 - (i) *to cause serious harm that is physical harm to a person; or*
 - (ii) *to cause a person’s death; or*
 - (iii) *to endanger the life of a person, other than the person taking the action; or*
 - (iv) *to create a serious risk to the health or safety of the public or a section of the public.*

72. The functions of ASIS, AGO and ASD are set out in ss 6, 6B and 7 respectively of the IS Act. As the name of the legislation suggests, each is concerned with intelligence of various forms. The functions of ASIS are directed to obtaining intelligence about the capabilities, intentions or activities or people or organisations outside Australia generally. Those of

⁵⁸ Criminal Code; s 100.1(1)

AGO are directed to its obtaining geospatial and imagery intelligence about those capabilities, intentions or activities and the ASD to its obtaining intelligence about them in the form of electromagnetic energy. The purpose for which that intelligence is obtained is set out in ss 6, 6B and 7. In very broad terms, it is obtained for, but not limited to, the Government's requirements and to meet the needs of the Defence Force. Within the parameters set out in the IS Act, ASIS, AGO and ASD may co-operate and assist certain other bodies, including ASIO, in the performance of their functions.⁵⁹

73. The functions of the ONA are set out in s 5 of the ONA Act. Again in the broadest of terms, the ONA is required to assemble and correlate information relating to international matters that are of political, strategic or economic significance to Australia. It is required to report on those that are of current significance and ensure that international developments of major importance to Australia are assessed on a continuing basis. The ONA coordinates the foreign intelligence activities that Australia engages in and evaluates those activities.

D. Authorities

74. This summary of the functions of the ONA, ASIS, AGO and ASD, together with those of ASIO, shows the scope of what is regarded as “*security*” and the inter-relationship of those matters with “*intelligence*”. It is apparent that Parliament has given the tools to agencies to both collect intelligence and to protect the integrity of its own information. Tools are given to protect Australia in relation to such matters as the integrity of its territory and borders, its political system, essential services and its defence. The need to use tools in relation to the protection of its security will vary from time to time. They will be the subject of various influences both domestically and internationally. Such matters can be very fluid. As Mason J said in *Church of Scientology v Woodward*⁶⁰ (*Woodward*):

“... *security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time; it is similar to the constitutional concept of defence. ...*”⁶¹

75. The applicants in *Woodward* had sought declarations that they were not security risks and that the then Director-General was acting outside his powers under the ASIO Act in gathering information about them, communicating that information to other persons and in characterising them as such. Within the very narrow confines of the application before it, the High Court was required to consider the relevance of intelligence gathering in the context of assessing whether a person was, or was not, a security risk. Brennan J said of that and of the capacity of a court to evaluate that risk:

⁵⁹ IS Act; s 13A

⁶⁰ [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587

⁶¹ [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587 at 60; 602

“... Unless intelligence is relevant to a risk that such conduct may be engaged in, the assembly and dissemination of that intelligence is not within the legitimate functions of the Organization. But for all the statutory endeavour to give some precision to the Organization’s functions, there is an inherent elasticity in the term ‘relevant’. The requisite degree of relevance must surely depend upon the gravity of the conduct from which the assembly and dissemination of intelligence is intended to provide protection. The gravity of the risk against which protection is needed affects the scope of the inquiries which it is prudent to make, and thus the degree of relevance between the intelligence which the Organization might legitimately assemble and the conduct which is apprehended. But, it may be said, how can the gravity of a security risk be evaluated by a court? It may be necessary to evaluate Australia’s relationships with foreign countries, the stability of international affairs, the passion inspired by a particular cause or the likelihood of adherents to the cause taking violent steps in support of it; it may be necessary to evaluate rumour or suspicion as well as proof. It may be reasonable, even necessary, to determine the gravity of a risk by intuition rather than by deduction. It may be truly said that the skills and procedures of a court do not fit it to find the point on the scale of gravity of every risk which may be thought to pose a threat to the Commonwealth, the States and Territories and the people thereof, and it may be accepted that a court will not necessarily have or be able to obtain all the evidence needed to allow it to quantify a risk precisely. However, it does not follow that judicial review is excluded.”⁶²

76. Together with Mason and Murphy JJ, Brennan J decided that the relevance of intelligence to security and whether communication of intelligence is for purposes relevant to security might be determined by the Court. In his judgment, Brennan J noted that:

“ The court is not bound by the Organisation’s opinion as to what constitutes security or what is relevant to it. As Lord Devlin said in Chandler v Director of Public Prosecutions ... [[1964] AC 763 at 811]:

‘There is no rule of common law that whenever questions of national security are being considered by any court for any purposes, it is what the Crown thinks to be necessary or expedient that counts, and not what is necessary or expedient in fact.’

... ”⁶³

It follows that the veil of secrecy in which intelligence organisations carry out some of their functions:

“... is not absolutely impenetrable, for the public interest in litigation to enforce the limitation of function prescribed by s. 17 is never entirely excluded from consideration (Sankey v Whitlam ...). But the veil is not penetrated merely by a plaintiff’s deposition that he is not a security risk. That, after all, may be the very matter which is under investigation. Nor is the veil penetrated by showing that initial investigation has failed to reveal that he is a security risk, for one who turns out to be a security risk will often be found to have some depth of cover.”⁶⁴

⁶² [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587 at 74; 613-614

⁶³ [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587 at 75; 614

⁶⁴ [1982] HCA 78; (1982) 154 CLR 25; 43 ALR 587 at 76; 615

77. Thirty years later in *Jaffarie v Director General of Security*,⁶⁵ the Full Court of the Federal Court framed the principles relating to the way in which the evidence of ASIO will be regarded by a court in a different way. Flick and Perram JJ put it this way:

“... Although not conclusive, a Court will give ‘full respect’ to the reasons advanced in support of a claim to privilege: cf. Sankey v Whitlam (1978) 142 CLR at 1 at 146 per Gibbs ACJ. And in cases involving national security, Wilson and Dawson JJ in Alister v R (1983) 154 CLR 404 at 435 said that:

... Questions of national security naturally raise issues of great importance, issues which will seldom be wholly within the competence of a court to evaluate. It goes without saying in these circumstances that very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister.

See also: R v Lodhi [2006] NSWSC 596; (2006) 163 A Crim R 508 at 517 per Whealy J.

The ‘weight’ to be given to the reasons expressed in support of a claim to privilege will, obviously enough, depend upon the facts and circumstances of each individual case and the persuasiveness of the reasons advanced. Less ‘weight’, it may be expected, will be given to reasons expressed as mere assertions and conclusions than the ‘weight’ to be given to a course of reasoning, soundly based upon such facts as it is possible to disclose, consistent with the maintenance of the privilege. Some claims may be more susceptible to explanation than others. But those making a claim for privilege, including claims for public interest immunity privilege founded upon concerns as to national security, should be forever conscious of the need to explain the basis upon which the claim is made as fully and as openly as possible – always also conscious of the need to not disclose the very information for which the privilege is claimed. In some cases, perhaps, little information can be publicly disclosed and a court may of necessity have to receive affidavit evidence in confidence. But the confidence and reliance that a court can place upon reasons advanced in support of claims for privilege depend to a very great extent upon the care with which those reasons have been advanced.”⁶⁶

78. There may be occasions on which no evidence is required. Gummow J considered this in *Zarro v Australian Securities Commission*⁶⁷ (Zarro):

“... [C]ases of defence secrets, matters of diplomacy or affairs of government at the highest level are in a special position. It may so readily appear that the balance of public interest is against disclosure that even in the absence before the court of any claim to Crown privilege (perhaps because the Crown is not a party and is unaware of what is afoot) the court of its own motion should enjoin disclosure: see Sankey v Whitlam (at 44, 58-59). ...”⁶⁸

79. Documents must be examined individually but they must also be considered collectively to consider whether, taken together, they convey information which, taken individually, they would not.⁶⁹ This was adopted by the Full Court of the Federal Court in *Australian*

⁶⁵ [2014] FCAFC 102; (2014) 226 FCR 505; Flick, Perram and White JJ

⁶⁶ [2014] FCAFC 102; (2014) 226 FCR 505 at [25]-[26]; 514

⁶⁷ [1992] FCA 233; (1992) 36 FCR 40; Lockhart, Ryan and Gummow JJ

⁶⁸ [1992] FCA 233; (1992) 36 FCR 40 at 60

⁶⁹ *Zarro* (1992) 36 FCR 40 at 60 per Gummow J

*Securities and Investments Commission v P Dawson Nominees Pty Ltd*⁷⁰ in the context of an objection by the Australian Securities and Investments Commission (ASIC) to the production of documents on the ground of public interest immunity. The ground was that they would reveal the identity of informers. In that context, the Court said:

*“... If actual disclosure or identification is taken as the standard, we think the bar is set too high. Consistently with the underlying public policy of public interest immunity, the benefit of the doubt should be in favour of non-disclosure. There is always the risk that seemingly innocuous information in a particular document, when combined with information in another document or the reader’s background knowledge, may reveal the identity of an informer, or at least give rise to strong suspicion.”*⁷¹

80. In later proceedings between P Dawson Nominees Pty Ltd and ASIC, a differently constituted Full Court of the Federal Court considered the “*mosaic effect*” brought about by considering documents in the context of other available information. It approved a summary of that effect set out in the judgment of Foster J in *Watson v AWB*.⁷² His Honour had recited the evidence of the then Director-General that:

*“‘Mosaic analysis’ is a well-established counter-intelligence tool. Mosaic analysis involves combining pieces of information to enable a ‘picture’ to emerge from which inferences can be drawn by targets, or other persons of interest, about matters not otherwise known to them. Some of the pieces of information may appear to be disparate and/or benign; and specific (but important) items of information may only be known by the target(s) or other persons of interest (making it difficult to precisely assess the risk posed by mosaic analysis in any particular scenario). However, in my opinion there is a very high risk that, disclosure of parts of the subpoenaed documents [referring to the 62 reports], in conjunction with other facts already known to relevant persons, would enable them to draw reliable inferences in relation to sources and methods of intelligence collection of Australia’s intelligence partners.”*⁷³

81. In *Spencer v Commonwealth of Australia*,⁷⁴ the Full Court of the Federal Court was careful to say that the “*mosaic effect*” was simply another way of describing a well-accepted reasoning process. It said:

... And as the Commonwealth noted, the reference to ‘mosaic’ is simply a description of the ordinary process by which inferences might be drawn from multiple sources of information and such a process of reasoning is not excluded from application to an assessment of the harm which might result from the disclosure of documents which will enable such inferences to be drawn about governmental advice and decision-making. Indeed, the reasons in Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd (2008) 169

⁷⁰ [2008] FCAFC 123; (2008) 169 FCR 227; 247 ALR 646 at [40]; 236; 654 per Heerey, Moore and Tracey JJ

⁷¹ [2008] FCAFC 123; (2008) 169 FCR 227; 247 ALR 646 at [41]; 236; 655

⁷² [2009] FCA 1047; (2009) 259 ALR 524

⁷³ [2009] FCA 1047; (2009) 259 ALR 524 at [32]; 529 approved in *Australian Securities & Investments Commission v P Dawson Nominees Pty Ltd* [2009] FCAFC 183 at [56] and [62] per Sundberg, North and Tracey JJ

⁷⁴ [2012] FCAFC 169; (2012) 206 FCR 309; Keane CJ, Dowsett and Jagot JJ

FCR 227; [2008] FCAFC 123 at [41]- [44] and Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd [2009] FCAFC 183 at [63] expressly contemplate precisely that process of reasoning as relevant to the public interest against disclosure.”⁷⁵

82. The issue in cases such as the *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* cases and *Zarro* centred on whether the name of an informer or informers who had informed ASIC of the problems faced by companies in the Multiplex Group in carrying out the design and construction of a new Wembley National Stadium in London and their alleged failure to disclose those problems to ASIC. In *Sankey v Whitlam*, the issue was whether Cabinet papers should be disclosed as it was in *Spencer v Commonwealth*. In deciding whether public interest immunity protected such documents from disclosure required the courts to weigh the various public interests. In the process of weighing them, consideration had to be given to the consequences of disclosure and non-disclosure. What would be the harm in disclosure and what would the harm be in non-disclosure at the time the issue was under consideration? There is no basis for defining the nature of that harm for it will depend on the circumstances.
83. In the context of security matters, harm might be identified in various forms. In *R v Lodhi*,⁷⁶ the Supreme Court of New South Wales considered an application for protection orders under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) after it had indicated that it would make orders disclosing certain national security information. The presiding Judge, Whealy J, noted that the:

In general terms, the present application requires the Court to conduct a balancing and weighing exercise in relation to a number of strongly competing considerations. These include the protection of national security; the right of the prosecutor to place before the jury evidence in support of its contention that the accused is guilty of the charges brought against him; the principles of open justice and, importantly, the accused's right to be tried fairly. The Court's ultimate task is to come to a discretionary decision in relation to the imposition of protective orders and, if so, the extent to which such orders should be made. The considerations I have identified, as might be expected, pull strongly in different directions.”⁷⁷

84. Section 33(a)(i) of the FOI Act does not require or permit a balancing of various public interests as is the case when a party in legal proceedings seeks to resist an order for discovery on the basis of public interest immunity. The issue is whether disclosure under that legislation would, or could reasonably be expected to, cause damage to the security of the Commonwealth. While keeping that in mind, I will briefly explore the bases on which security issues are considered when public interest immunity is claimed or an order such as

⁷⁵ [2012] FCAFC 169; (2012) 206 FCR 309 at [49]; 324-325

⁷⁶ [2006] NSWSC 596; (1999) 199 FLR 270; Whealy J

⁷⁷ [2006] NSWSC 596; (1999) 199 FLR 270 at [6]; 273

a protection order is sought. The references to the competing public interests are part of the background in which the courts have considered the consequences of disclosure on Australia's security.

85. One of the bases on which protection orders were sought in *R v Lodhi* in relation to ASIO officers was to protect their identity. Justice Whealy looked to the consequences of disclosure and found that:

“ Finally, it cannot be doubted that ASIO personnel have access to a great deal of highly sensitive information, the unauthorised disclosure of which could cause significant damage to the security not only of Australia but of other countries. It is very easy to see that, were the identity of ASIO personnel to be revealed, they could easily become targets for persons and organisations interested in carrying out espionage and politically motivated violence. Such persons are plainly likely to go to great lengths to determine the extent of ASIO's knowledge about their activities and the nature of intelligence and operational techniques used by ASIO. In addition, s 92 of the ASIO Act makes the unauthorised disclosure of the identity of a present or former ASIO officer employee or agent an offence.”⁷⁸

86. Considerations relating to the exposure to the security and intelligence organisations and their officers that might come about as a result of disclosure was a matter considered by Spender J in the earlier case of *Re Aldred and Department of Foreign Affairs and Trade*:⁷⁹

“ Section 4(5) of the FOI Act provides a non-exhaustive definition of ‘security’. Some of the various kinds of damage to security that might follow disclosure of the documents in issue, which will be recognised as justifying a claim for exemption, were set out in *Re Slater and Director-General of Australian Archives* [1988] AATA 110; (1988) 8 AAR 403 at ... [414-15]: Disclosure might result in a reduction in the flow of information to the Commonwealth from overseas governmental agencies, irrespective of whether this reaction is rational; it might enable those engaged in activities that could threaten security (espionage, sabotage, subversion, terrorism etc.) to be better able to prevent an Australian security agency from obtaining information; and an Australian security agency might find it more difficult to recruit or to retain the services of its employees and agents. It is also the case that, even if a matter is the subject of widespread dissemination and speculation, official acknowledgment might cause damage to security.”

87. In *Plaintiff B60/2012 v Minister for Foreign Affairs*,⁸⁰ Dowsett J considered proceedings seeking a writ of certiorari quashing a determination that she had failed to satisfy public interest criterion 4003(b) as prescribed under the *Migration Regulations 1994* and the consequent refusal to grant her a student visa. When the Court made an order for discovery, the Minister for Foreign Affairs claimed public interest immunity over certain documents. Those documents were described as assessments of Plaintiff B60/2012's link

⁷⁸ [2006] NSWSC 596; (1999) 199 FLR 270 at [22]; 277

⁷⁹ [1990] AATA 833

⁸⁰ [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478

to the proliferation of weapons of mass destruction, summaries of those assessments and a qualified security assessment undertaken by ASIO.

88. In assessing the claim, Dowsett J reviewed the role of various groups within the Department of Defence responsible for protecting Australia's national security by obtaining, correlating and evaluating intelligence in connection with existing and emerging threats to defence and national security interests. They provide advice and independent assessments to government and its Ministers.⁸¹ His Honour summarised the evidence given by Mr Meekin, the Deputy Secretary Intelligence and Security in the Department of Defence. The essence of his evidence was that disclosure of the documents posed a threat to the public interest. His evidence was not directed to any particular information in any particular document but rather to the more general interest in protecting the operation of Australia's security and intelligence organisations. Mr Meekin's:

*"... concern is that the disclosure of such information, and the disclosed documents themselves, might disclose much about each agency's knowledge or lack of knowledge, capacity, interests, methods and personnel."*⁸²

89. Dowsett J did not unquestioningly accept this evidence. He:

*"... kept in mind the risk that, like any specialized group, the intelligence community may become, or have become preoccupied with itself, its own values and perceived importance, so that his affidavit might not present a reliable basis for the balancing exercise which I must perform. However nothing in Mr Meekin's affidavit appears to be extreme, irrational or illogical. In particular I accept that expert analysts are able to make much from a collection of relatively small scraps of apparently unconnected information. I take into account too, the very high security classification attributed to documents of this kind. It seems unlikely that the operational intelligence or security service would want to burden itself with an unduly large number of unnecessarily highly classified documents. That WMD assessments are so treated weighs heavily with me in reaching my conclusions concerning Mr Meekin's evidence."*⁸³

90. Dowsett J reached a similar conclusion in relation to the evidence given by the then Director-General of Security, Mr Irvine, after reviewing ASIO's functions. He found that it is in the public interest that ASIO discharge its core function to protect Australia's security and to provide advice to government in relation to matters relevant to that protection. Dowsett J continued:

"... I accept that it is fundamental to the effective operation of ASIO that specific details of its areas or subjects of interest, its ability to obtain intelligence, its sources, techniques and work methods, its successes and information derived from its successes be kept secret. This goal may require that it neither confirm nor deny activities which may, or may not have occurred. The need to protect the secrecy of ASIO's operations and its information and intelligence holdings is recognized by

⁸¹ [2013] FCA 1303; (2013) 219 FCR; 306 ALR 478 109 at [24]; 116; 485

⁸² [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478 at [30]; 117; 486

⁸³ [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478 at [31]; 117-118; 486

statute. I accept Mr Irvine's view that the disclosure of certain information contained in the various documents would be likely to prejudice national security. ..."⁸⁴

91. He went on to conclude that, subject to any consideration of the public interest in Plaintiff B60/2012's having an opportunity to enter Australia and to have judicial review of the decisions precluding her entry, WMD assessments are documents of a class which ought, for that reason alone, be treated as immune from disclosure. In conclusion, Dowsett J decided:

*"...In the end the public interest in allowing her to challenge the various adverse decisions is significant, but it is far outweighed by the public interest in the protection of the effective operation of our security and intelligence agencies. The whole notion of society involves the compromise to an acceptable degree, of individual interests in order to serve the common good. The public interest in the upholding of such individual interests may also have to be compromised in seeking to achieve the greater good."*⁸⁵

92. In reaching that conclusion, Dowsett J had accepted that:

*"... the public interest in in the decision-making process and in effective judicial review would be better served if the applicant were able to challenge the decisions in the usual way (with access to all relevant documents) than if she were unable to do so. The public interest will rarely be served by arbitrary and unexplained decisions. The Australian government's conduct in offering her the scholarship is a further ground for doubting the appropriateness of the decisions. No doubt it is in the public interest that good students be brought to this country for research purposes. There can be no public interest in excluding a person who has no association with WMD, nor in damaging a young woman's future career or her capacity to travel."*⁸⁶

93. Of more direct relevance to a claim for exemption under s 33(a)(i) is the statement of public interest in the protection of Australia's security:

*"... Such protection necessarily depends upon intelligence gathering, evaluation and distribution. It also relies upon counter-intelligence measures. Whilst these functions may once have been relatively unsophisticated, that is no longer the case. There is nothing surprising about the proposition that we seek to maintain our own secrets and discover the secrets of others. Our secrets include the extent of our own knowledge of the secrets of others, and the methods we use to collect information and evaluate and distribute it."*⁸⁷

94. The approach taken by Dowsett J in *Plaintiff B60/2012 v Minister for Foreign Affairs* is consistent with the approach taken by Gibbs CJ in *Alister v The Queen*.⁸⁸ Gibbs CJ favoured a careful analytical approach both to the claims made by those seeking to protect

⁸⁴ [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478 at [37]; 119; 487-488

⁸⁵ [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478 at [46]; 121; 489-490

⁸⁶ [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478 at [44]; 120; 489

⁸⁷ [2013] FCA 1303; (2013) 219 FCR 109; 306 ALR 478 at [45]; 120-121; 489

⁸⁸ [1984] HCA 85; (1984) 154 CLR 404; 50 ALR 41

documents from discovery on the ground of public interest immunity and to the harm that might follow disclosure. His Honour said:

“ The fact that disclosure of the fact whether the documents sought by the subpoena in the present case exist, and their production if they do exist, would be harmful to the public interest is sought to be established by the affidavit of the Attorney-General. But *Sankey v. Whitlam* decides that an objection, even if properly taken, is never conclusive, although there will of course be instances (such as documents containing defence secrets in time of war) when, as Stephen J. said in *Sankey v. Whitlam* ..., ‘the Court’s acceptance of the claim (to Crown privilege) may often be no more than a matter of form’. When the grounds of objection in the present case are examined it will be seen that the first ground (that stated in par. (a)) is merely preliminary and not in itself sufficient. To say that it is in the public interest to maintain an intelligence organization does not mean that it would necessarily be contrary to the public interest to disclose whether that organization had any records of a particular kind. The second ground (stated in par. (b)) is *prima facie* convincing, but is expressed, with candour, only in a qualified way. ASIO now functions under the Australian Security Intelligence Organization Act 1979 (Cth), as amended, the provisions of which have been discussed by this Court in *Church of Scientology v. Woodward* Its functions include the obtaining of intelligence relevant to security: s. 17(1)(a). The disclosure of information that a particular person had gathered intelligence for ASIO would in many cases not only injure the national security but also endanger the person concerned, but that would not always be so. The ground stated in par. (b) calls for an examination of the circumstances of the particular case in order to decide whether any danger to the public interest is likely if the information is disclosed in those circumstances. The third ground (stated in par. (c)) is expressed absolutely. If it is intended to do no more than state the effect of pars. (a) and (b), it cannot be regarded as accurate, because the categorical assertion made in par. (c) does not follow from the qualified claim made in par. (b). If par. (c) is intended to stand alone as an independent ground, it is unconvincing, because it is difficult to accept that effective security can be maintained only if ASIO can refuse in all cases to disclose whether any documents sought exist. For example, if it was publicly known that a particular person, acting for ASIO, had gathered certain intelligence, it would not seem, generally speaking, to jeopardize security to disclose whether any documents prepared by that informant were in existence. Notwithstanding the respect that must be paid to a claim for immunity made by a Minister in relation to a matter of national security, I am not at all convinced that the public interest requires that ASIO should be able in all cases to refuse to disclose whether any document exists, and to refuse to produce it if it does exist.”⁸⁹

95. These authorities give a flavour of the way in which the courts have understood the word “security” and the way in which they have assessed the damage that might follow from disclosure. As I have said, some of these cases have considered those issues in the context of assessing claims for public interest immunity in legal proceedings. Those claims necessarily require a weighing of competing public interests. The wording of s 33(a)(i) is clear that no such balancing exercise is required. As Deputy President Hall said in *Re O’Donovan and Attorney-General’s Department*:⁹⁰

⁸⁹ [1984] HCA 85; (1984) 154 CLR 404; 50 ALR 41 at 412-413 (citations omitted)

⁹⁰ (1986) 8 ALD 528; 4 AAR 151

“ The words ‘for the reason that’ are synonymous in my view, with the word ‘because’. Far from justifying any balancing of other Interests, those words focus attention specifically on the aspects of the public interest set out in pars (a) and (b) of s. 33 to the exclusion of other relevant interests. Where any of the grounds referred to in those paragraphs are made out, I do not consider it to be open to the Tribunal to find otherwise than that disclosure of the document would be contrary to the public interest within the meaning of s. 33. The absence of any provision comparable to s. 33A(5) enabling consideration to be given to question whether disclosure of the document would, on balance, be in the public interest is of critical importance.”⁹¹

96. While there is no scope to balance competing public interests, whether disclosure would cause damage to, or whether it could reasonably be expected to do so are matters of judgement. Whether disclosure of a document could “*reasonably*” be expected to cause damage to the security of the Commonwealth may well involve difficult questions of fact and degree. Putting aside any countervailing public interests they have taken into account, the authorities to which I have referred give some indication of types of matters that may be relevant.

⁹¹ (1986)_8 ALD 528; 4 AAR 151 at 533; 156 and approved by Spender J in *Re Aldred and Department of Foreign Affairs and Trade*: [1990] AATA 833.

THE EVIDENCE

Security vetting processes

97. Ms Elizabeth Milne is the Assistant Secretary Vetting in the Australian Government Security Vetting Agency (AGSVA) located within the Department. In that role, which she has held since 28 July 2014, Ms Milne is responsible for the core vetting and determination of security clearance applications, the governance arrangements for the delivery of high quality security vetting products and services and the financial management of AGSVA's service delivery. She also holds a delegation to review and decide security clearance applications.
98. Ms Milne described her previous experience in her Affidavit:
- “4. Prior to my current role, I spent approximately 4 years as the Assistant Secretary, Portfolio Reform and subsequently the Acting First Assistant Secretary, ICT Delivery Division in the Chief Information Officer Group (CIOG) in Defence. In these roles with the CIOG, I was responsible for managing cultural reform within Defence and for the delivery of information and communication technologies (ICT). I consider these roles provided me with valuable skills which are useful for AGSVA, including a good understanding of AGSVA's business and the ability to drive cultural reform.
 5. Prior to my roles in CIOG, I had approximately 24 years of experience in intelligence, including in management roles, with the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO). As a result I have experience in the security clearance process from both sides, as the subject of a security clearance application and as a vetting decision-maker. My role in the intelligence community over a number of years also means that I have a first-hand appreciation for the importance in ensuring sensitive and classified information of the Australian Government does not end up in the wrong hands.”
99. Ms Milne described AGSVA's functions in relation to security clearances: assessing applications for security clearances; granting, upgrading, denying or revoking security clearances; managing reports of changes in circumstances; and reviewing existing clearances to assess a clearance subject's ongoing need and suitability to hold a security clearance. The security vetting process is directed to ensuring that those who have access to information and resources on behalf of the Australian Government can be relied on to respect and protect that information it holds. That information may comprise sensitive personal information held about members of the public and public servants who are security cleared as well as security classified information and intelligence products provided by Australia's allies. In Ms Milne's view:
- “... the security vetting of Australian Government employees is a significant component in ensuring information is kept securely. While the Australian Government may have a range of other security systems and ICT measures in place, including secure premises, even the best system is vulnerable to human

*manipulation. For this reason the security vetting process is sometimes described as having been designed to 'mitigate the threat from the trusted insider'.*⁹²

100. Security of information and securing those who might reveal it are related but separate issues. In relation to the security of information, Ms Milne referred to that part of the Australian Government's Information Security Management Guidelines (ISM Guidelines) referring to the Australian Government security classification system. An examination of the ISM Guidelines shows that they have been prepared by the Attorney-General's Department⁹³ and give guidance in first identifying official information and then in identifying what official information does not require additional protection and that which does. If official information requires a security classification, it is classified as Protected, Confidential, Secret or Top Secret information. Information may require a Dissemination Limitation Marker (DLM). A DLM may be: Sensitive: Cabinet; Sensitive: Personal; Sensitive: Legal; and Sensitive. Official information may also require a caveat such as code words, source code words and markings. If a caveat is used, as it may do in the case of some information having an impact on national security, it will indicate that special requirements apply in addition to those indicated by the protective marking. A caveat cannot be used without a protective marking. The ISM Guidelines also address issues such as those who apply and alter protective markings, the management of over-classifications and the duration of classifications. In her affidavit, Ms Milne said that the level of classification reflects the damage done to the national interest or to organisations and individuals in the event of unauthorised disclosure or compromise of the confidentiality of the information.
101. Unlike the ISM Guidelines, the security clearance process relates to those who may come to hold certain official information and not to the information itself. Ms Milne said that AGSVA has three levels of vetting. In order from lowest to highest they are: Baseline, Negative Vetting Level 1 (NV1), Negative Vetting Level 2 (NV2) and Positive Vetting (PV). Whether a person is vetted or not and, if so, the level of vetting are all relevant in determining the official information he or she is permitted to view. A person may not, for example, view a document classified as Top Secret without a NV2 or a PV security clearance. A person with a PV security clearance (PV clearance) may view information at any and all security classifications as required as part of his or her duties.
102. Ms Milne outlined the security clearance process. She explained the six steps that are typically taken to carry out the process:

⁹² Ms Milne's Affidavit at [11]

⁹³<https://www.protectivesecurity.gov.au/informationsecurity/Pages/AustralianGovernmentSecurityClassificationSystem.aspx>

- “15.1 A sponsoring agency will submit a request to AGSVA when it identifies a new or changing security clearance-related requirement. A ‘security clearance pack’ will be completed by the individual requiring the necessary clearance (‘the clearance subject’) and submitted to AGSVA.
- 15.2 A structured examination of the clearance subject (based on the information they provide) will be conducted. This includes a range of checks and inquiries to determine the identity, eligibility and suitability for an individual to hold or maintain a security clearance. Depending on the clearance level, information from external agencies, referee reports and personal interviews may also be required.
- 15.3 A Psychological Assessment of the clearance subject is mandatory for PV clearances and evaluations, and discretionary for clearances up to and including NV2. This includes psychometric tests and a psychological interview with the clearance subject, conducted by a qualified psychologist.
- 15.4 Assessing officers within AGSVA undertake an analysis of a clearance subject’s background, character and suitability to access classified resources and information, based on a ‘whole person’ assessment. This refers to the fact that a complete assessment is undertaken by an assessing officer to evaluate all available and reliable information, both favourable and unfavourable about the clearance subject to assess if, on balance, they are suitable to hold the relevant clearance.
- 15.5 After a recommendation is made, the security clearance application is allocated to a delegate to review and to make a decision. A delegate may also refer a matter back to an assessing officer for re-work or onto Complex Vetting when consideration is being given to denying a clearance subject a clearance at the level requested. The outcome of this process is to ensure that the principles of procedural fairness are followed and an appropriate vetting decision is made. The PSPF stipulates that all vetting decisions are to be based on an assessment of the whole person and, at all stages, are to be made in accordance with the principles of natural justice and procedural fairness.
- 15.6 If a clearance is granted, agencies and individuals are responsible for advising of any significant changes in personal circumstances that may impact on an individual’s continued suitability to hold a security clearance.”

103. Mr Prinn challenged the process set out in [15.5] saying that:

“... this process is clearly not in accordance with the principles and guidelines for personal security processes published by the Attorney-General on his website. These guidelines state that procedural fairness is to be provided for **at all stages** of the security clearance process. Other information including process maps show procedural fairness being undertaken **before the recommendation is made by the AO**. (See attached AG’s information). I also question why this would be shown in the statement as examination of the file will clearly show how I was given no procedural fairness at any time as pointed out on many occasions in my responses through this and other correspondence with Defence and the Information Commissioner.”⁹⁴

104. Ms Milne went on to refer to a document prepared by the Attorney-General’s Department and known as the “Personnel security guidelines Vetting Practices”⁹⁵ (PSVP Guidelines).

⁹⁴ Mr Prinn’s Statement of Facts Issues and Contentions at [27]

⁹⁵ Annexure EM-2 to Ms Milne’s Affidavit and available at

They are intended for use by agencies undertaking security clearance vetting and by all personnel involved in the conduct of vetting.⁹⁶ The Introduction to the PSVP Guidelines makes the following statements:

- “1. *The Australian Government personnel security guidelines – vetting practices have been developed to support the protection of the Australian Government’s people, information and assets, through sound personnel security practices. The guidelines provide advice to agencies to assist in their application of the controls identified in the Australian Government personnel security protocol.*
2. *...*
3. *Personnel security is one element of good protective security management. The Australian Government’s personnel security measures determine the suitability of personnel to access Australian Government resources. A suitable person possesses integrity and reliability and is not vulnerable to improper influence.*
4. *Effective personnel security provides assurance and confidence across government when collaborating or sharing Australian Government resources. This approach mitigates the threat from the trusted insider.”*

105. Part 5 of the PSVP Guidelines is headed “*Personnel security adjudicative guidelines*”. It is said that they:

“... have been developed to assist assessing officers and delegates assess the clearance subject against common factor areas that may impact on the clearance subject’s suitability to hold a security clearance. They apply to considerations for initial or continued suitability for access to security classified material.”⁹⁷

106. The PSVP advises assessing officers to assess each clearance subject on his or her own merits. If there is any doubt, however, concerning a clearance subject’s suitability, that doubt must be resolved in favour of the national interest.⁹⁸ The assessment is undertaken in the context of: external loyalties, influences and associations; personal relationships and conduct; financial considerations; alcohol and drug usage; criminal history and conduct; security attitudes and violations; and mental health disorders. Those factors are developed in Part 5 which states that they may have a bearing on one more of a clearance subject’s character traits.⁹⁹ Those character traits are honesty, trustworthiness, maturity, tolerance, resilience and loyalty.¹⁰⁰

<https://www.protectivesecurity.gov.au/personnelsecurity/Documents/PersonnelsecurityguidelinesVettingpractices.pdf>

⁹⁶ PSVP Guidelines at [6]

⁹⁷ PSVP Guidelines at [234]

⁹⁸ PSVP Guidelines at [236]

⁹⁹ PSVP Guidelines at [241]

¹⁰⁰ PSVP Guidelines at [237]

107. Ms Milne said in her affidavit that disclosure of information going beyond the PSVP and other material that is already in the public domain could impair the integrity of AGSVA's processes. She expressed the view that:

- “18. *It is not possible for AGSVA to entirely eliminate the risk that sensitive information or resources of the Australian Government might end up in the wrong hands. However, if the material over which exemption is claimed in these proceedings were to be released, then in my view the security vetting process would become less effective, thereby significantly increasing the risk.*
19. *I consider the effectiveness of the current security vetting system is in large part due to the fact that clearance subjects do not know precisely how far AGSVA can reach in undertaking checks. The system depends on the integrity and honesty of the clearance subjects and their referees. If information regarding the checks AGSVA undertakes or the information AGSVA considers significant or of concern were to become publicly known, there is a risk that individuals could paint a more favourable picture of a clearance subject or actively circumvent AGSVA's processes.*
20. *Alternatively, if the material over which exemption is claimed were released, I consider it may be necessary for the Australian Government to consider changing one or more of the current security vetting processes. This would be very disruptive to the system and potentially also costly to the Australian taxpayer.”*

108. Paragraph [236] states that clearance subjects must be assessed on their own merits but any doubt about a clearance subject's suitability must be resolved in favour of the national interest. The PSVP Guidelines go on to explore various factors that might be relevant to consider in making a clearance assessment. They include factors that might raise concerns or mitigate concerns.¹⁰¹

109. Later in her Affidavit, Ms Milne addressed the effect that she believed that disclosure of AGSVA's processes would have on Australia's relations with other countries. She believes that:

“... the disclosure of information which has the potential to undermine Australia's ability to effectively undertake security vetting of its personnel would have serious ramifications for the Australian Government's ongoing relationship with our international partners, particularly our information sharing arrangements with our allies. The Australian Government relies heavily on the trust and confidences of foreign governments in receiving information regarding a wide range of matters which are critical to national security. If the international community considered the Australian Government was unable to provide reliable assurances or adequately protect sensitive information that was disclosed to it, our international partners may lose confidence in Australia and impose additional requirements or restrictions on us to protect their information or they may no longer share information with Australia at all. This not a hypothetical concern. In my time in the intelligence community I have seen instances of such concerns being raised.”¹⁰²

¹⁰¹ See generally Part 5 of the PSVP Guidelines

¹⁰² Ms Milne's Affidavit at [33]

The documents in issue before the Tribunal

110. Ms Milne said that she had inspected the documents in issue in this case. While she does not know Mr Prinn, she understands that he has previously worked within AGSVA. As a condition of his employment, she said, he would not have been permitted to disclose information he had obtained in the course of his duties. She referred to the offence created under s 70 of the *Crimes Act 1914* to the effect that, unless authorised to do so, it is an offence for an officer, or former officer, of the Commonwealth to publish or communicate any information obtained in the course of their duties. It was her understanding of AGSVA's previous practices that a clearance subject would not be shown the documents as part of the normal security vetting process. That, Ms Milne said, is certainly the current position.
111. It is Ms Milne's understanding that the documents in issue are dated from May 2009 to June 2011. They are held on Mr Prinn's vetting file and are parts of the processes involving his applications for security clearances during that period. He was involved, Ms Milne said, in both a negative vetting (NV) and a positive vetting (PV) security clearance during that period. Ms Milne added that the documents also relate, in part, to a review for cause of Mr Prinn's security clearance. That review was instigated in January 2010 when there was a concern about whether Mr Prinn should continue to hold a security clearance at his existing level. That review was discontinued when he was transferred into another role within the Department which only required a NV clearance. As a result, Ms Milne said, Mr Prinn's security clearance was downgraded to NV. It was not, she continued, downgraded as a consequence of the review but as a consequence of the level required to perform the duties of the new position. It is standard practice that a person hold a security clearance only at the level required for the performance of their normal duties.
112. Mr Prinn challenged Ms Milne's evidence in this regard saying that he had not been involved in any NV process at all in this period. As late as April 2012, he was still being considered for a TSPV clearance. It was only after he had escalated his enquiries to the Department's Secretary in 2012 that the PV process was discontinued and a NV process was commenced. During the period from May 2009 to June 2011, the documents related only to a TSPV clearance process.
113. In her affidavit, Ms Milne acknowledged that some of the information contained in the documents may appear innocuous in isolation. When viewed together, she continued, it gives a detailed picture about the processes and methods used in AGSVA in assessing an individual's suitability for a PV clearance. The currency of that information has not been

diminished by the age of the documents in which it appears. If they were to be released under the FOI Act, Ms Milne considered that the security vetting process would be undermined and AGSVA would need to give careful consideration to making significant changes to its processes to ensure it continues to be able effectively to undertake security vetting. The changes would be driven by a need to minimise the damage caused by disclosure rather than from a systems improvement perspective.

114. In her affidavit, Ms Milne went on to explain why she believed that it was crucial to the integrity and efficacy of AGSVA's processes for determining when a person is suitable for a PV clearance. She said:

*"... Any damage to the capacity of AGSVA to correctly determine access privileges for highly sensitive government information is likely to have profound consequences for national security because it provides an opportunity for parties with hostile interests to infiltrate sensitive government information and use it in ways which may be contrary to Australia's national interest. The Australian Government has prepared a publication dealing with this issue, entitled 'Managing the Insider Threat to your Business: A personnel security handbook.' ... In particular, the 'insider threat' can apply to current or former employees or contractors who have legitimate access to information techniques, technology, assets or premises. The security clearance process is designed to minimise this threat within the Australian Government, by identifying people who might misuse their access to sensitive information for some personal gain, or to cause harm, loss or damage. ..."*¹⁰³

115. Mr Prinn challenged Ms Milne's statement in this paragraph in so far as it relates to his personal situation. He repeated that he had been denied anything close to a fair and unbiased process and stated that he had been denied procedural fairness. Mr Prinn alleges that, as the vetting process has applied to him, he has been the subject of conflicts of interest and unethical practices, including bullying and intimidation, which have been ignored by a range of senior AGSVA staff. His attempts to have them addressed have, he stated, been thwarted by the Department.

A. Documents 51 and 106: Vetting Analysis Reports

116. Ms Milne described Vetting Analysis Reports (VARs) as being based on a template. They are used by AGSVA officers with responsibility for the evaluation and assessment of individuals seeking a Commonwealth security clearance. Officers use the VARs to ensure that they follow the correct procedures and consider all relevant factors. They record their commentary and conclusions regarding a range of factors and indicators against which a clearance subject has been assessed. Disclosure, therefore, would reveal not only testing methods used by AGSVA but also the factors that it considers favourably and those that it does not. Furthermore, the relative weight attributed to various factors would be revealed

¹⁰³ Ms Milne's Affidavit at [32]

as would the tolerances or thresholds permitted on a range of considerations to be considered in making an assessment.

117. If the VARs were released, it is Ms Milne's opinion that individuals applying for a security clearance would potentially be able to modify their behaviours and responses with a view to modifying their behaviour. They would be able to minimise any areas that might be revealed as part of the AGSVA processing and be perceived as security concerns. There may be speculation about the process and what AGSVA is looking at when conducting security clearance vetting but speculation is very different from knowledge. The system of vetting is neither foolproof nor perfect but disclosure of the VARs makes the process substantially less effective than it currently is. Ms Milne sees the real threat to the effectiveness of those processes as a national security threat.
118. Although the particular VARs in issue in this case relate only to Mr Prinn, Ms Milne said that they would reveal the factors and reasoning process that is applied generally in a security vetting process. *"Disclosure of the VARs would invite readers into the mind of vetting officers in a way that is simply not available from public sources"*, Ms Milne said.¹⁰⁴ Vetting officers are not permitted to reveal this sort of information outside operational requirements, she added.
119. Of the particular VARs in issue, Ms Milne said that Document 106 relates to Mr Prinn's original PV clearance application. Mr Prinn disagreed with her characterisation as relating to his PV clearance saying that it related to a full review of his TSPV clearance that he had held for many years. He saw her statement as an example of a lack of attention to detail. Ms Milne said that Document 51 was created as a result of a *"review for cause"* process begun in January 2011 to review Mr Prinn's security clearance. All security clearances must be revalidated at regular intervals but a review for cause process can be commenced at any time by AGSVA or by a sponsoring agency. It leads to an assessment of a clearance subject's suitability to continue to hold a security clearance.

B. Documents 53, 107, 131 and 132: Psychological Assessment Reports and Psychological Assessment Interview Notes and Analysis

120. Ms Milne addressed her concerns regarding the Psychological Assessment Reports (PAR) and the Psychological Assessment Interview Notes and Analysis (PAINA). She noted that psychological assessment is a mandatory part of the assessment process because PV

¹⁰⁴ Ms Milne's Affidavit at [41]

clearances are re-evaluations. It comprises both psychometric testing and psychological interviews with a clearance subject. These are used by a qualified psychologist to create a Psychological Assessment Report on a clearance subject. The PAR is reviewed by the AGSVA assessing officer and is a critical document in determining a clearance subject's suitability to hold or maintain a security clearance. Ms Milne said that a PAR will assist AGSVA in identifying areas of possible risk, including personality factors, personal relationships and conduct or security attitudes which might increase the risk in granting or continuing a security clearance.

121. Ms Milne said that the level of the security clearance applied for has a direct impact on the nature and complexity of the information which must be collected about a clearance subject by AGSVA. A PV assessment, for example, requires a range of psychological testing that is not typically required at a lower level. The rationale for that heightened requirement is associated with the greater risk posed to the national security when a person is exposed to highly sensitive material. The Australian Government, Ms Milne said, needs to be satisfied that individuals exposed to that material are equipped psychologically to manage the knowledge in a manner that is consistent with the significant importance of maintaining its confidentiality.

122. Document 107 dated 18 May 2009 and relates to Mr Prinn's original security clearance application. Documents 53 and 132 appear to her to be copies of the same PAR completed on 29 June 2011. They were created as a result of a review for cause process which was initiated in January 2011. Mr Prinn challenged Ms Milne's evidence saying that:

"32. ... Serial 107 did not apply to my original PV security clearance it was in fact an assessment completed by a consultant psychologist that I attended in Sydney for the full review of my original PV clearance in 2009. This pattern of facts being stated by AGSVA senior staff based on inaccurate assumptions is worrying given the consequences of these processes and in my case actual prejudicial impacts on my health and life."

123. Ms Milne went on to describe the type of information in the PARs saying that they reveal the types of psychological tests administered as well as very detailed notes regarding Mr Prinn's psychological state. Those notes were prepared by a practising psychologist following a face to face meeting with Mr Prinn. In so far as they contain information given by Mr Prinn to the psychologist, that information has been given to him. To the extent that they contain commentary on, or an analysis of, Mr Prinn's responses, demeanour and personal or psychological characteristics, Ms Milne considered that their disclosure would cause harm to AGSVA's ability to undertake security vetting. She elaborated on the reasons for her view:

- “51. *If the psychological analysis or names of the psychological tests undertaken for a PV clearance were released under FOI, individuals might be able to access the tests and ‘practice’ their responses to the tests undertaken. This would skew the results of the psychological testing being conducted by AGSVA, making it invalid. I consider this risk of harm applies regardless of whether the psychological results and analysis in Mr Prinn’s case was positive or negative.*
52. *In a similar way, seeing what the psychologist made of their interactions with the clearance subject allows a future clearance subject to rehearse the interview process. The effectiveness of the psychological interview depends in part upon the psychologist’s ability to make an assessment of a person’s spontaneous reactions to the situation and the various questions that the psychologist might ask. While a person may not be able to change their psychology upon reading these documents, they could certainly identify techniques used by psychologists, what psychologists are looking for, what psychologists consider significant and what psychologists identify as potential risk factors, and alter their presentation at the psychologist interview in a way that is calculated to manipulate the outcome of the interview process in their favour. The information contained in these documents would be of significant assistance to a person seeking to alter the result of psychological testing to allow them to appear more suitable than they may have appeared if the process had not been interfered with.*
53. *In my view, the psychological testing is a key component of the security vetting process and any prejudice to its effectiveness would be likely to cause extreme harm to the effectiveness of the overall vetting process for high level security clearances. If AGSVA is unable to conduct its psychological testing effectively, there is a real risk that it will be less able to identify unacceptable psychological risks in clearance subjects, with the result that individuals who are not, for one or more reasons, appropriate to hold a security clearance gaining access to highly sensitive Australian Government information. AGSVA places a very high reliance on the expertise of psychologists in conducting and reporting on psychological issues, including the likelihood of being able to mitigate potential risk factors.”¹⁰⁵*

124. Of these three documents, Ms Milne said:

“The PARs at documents 53, 107 and 132 reveal the types of psychological tests administered, but also contain very detailed notes regarding the psychological state of the clearance subject, prepared by a practicing psychologist following a face to face meeting. To the extent documents 53, 107 and 132 reveal information provided by Mr Prinn to the assessing psychologist, they have been released. However, to the extent these documents contain commentary or analysis of Mr Prinn’s responses, demeanour and personal or psychological characteristics (or discuss the way in which these things are potentially relevant to his suitability for a security clearance), I consider that disclosure of these documents would cause harm to AGSVA’s ability to undertake security vetting.”¹⁰⁶

125. It is Mr Prinn’s understanding that psychological records have routinely been released to them on request. He gave examples. In so far as they relate to vetting for a TSPV,

¹⁰⁵ Ms Milne’s Affidavit

¹⁰⁶ Ms Milne’s Affidavit at [50]

Mr Prinn said that he was aware that “... records for the TSPV psych processes have been in the past released to psychologists engaged by clearance subjects to undertake reviews and for associated professional discussions with DSA’ own psychs again on request from clearance subjects.”¹⁰⁷ It is Mr Prinn’s view that psychological tests should be routinely released to applicants on request. They are medical-related reports and their release would accord with community standards and with considerations of procedural fairness. Regarding the Department’s submission that identification of the psychological tests used would undermine the effectiveness of the vetting process, Mr Prinn said:

“... It is also not much of a stretch to think that those with intent to undermine and circumvent the system would quite easily run up a short list of what tests may be used as they are part of a readily available block of psych tests worldwide. The tests used are not proprietary Defence or Australian Intelligence Community (AIC) tests they are simply tests utilised around the world for a variety of reasons. I have in my possession the psych test related document that was actually released to me by the AGSVA psychologist at one of my assessments so the identity of that particular test is already known to me. They are not a classified document or similar and again any opinions that the assessing psychologist comes up with from the tests themselves, or together with an interview with the subject, should be subject to examination and possible alternate or mitigating opinion by another professional as is the process in all other similar employment processes or areas and of course in court proceedings. I also find it significant that psychological testing is not relied upon by our major ally the USA in their security vetting processes. One wonders why they have doubts over the value of psychological testing or assessment to their clearance processes. In fact psych testing is a relatively recent addition to the TSPV clearance processes and was introduced from recommendations made in a review report that followed two prominent treason cases involving officers of the DIA in approx 2000 (Simon Lappas and Jean Pierre Wispelaire).”¹⁰⁸

126. Mr Prinn went on to identify the test and to give a critique of it. His conclusion was that any clearance subject who underwent the test should be entitled to seek an alternate view or analysis by another medical professional of his or her own choice. The test, he said, is capable of leading to different scoring by the same subject on different days and is subject to the views and biases of the rating psychologist. A process that allows for his concerns regarding procedural fairness can only strengthen the process, Mr Prinn said, while meeting any legislative and employment related policies and guidelines. An open and ethical vetting system would lead to a greater level of confidence in the process. As the process stands, Mr Prinn said, the potential for matters taken out of context or opinions of referees not tested for accuracy, reliability or corroboration is too high. The underlying principles of Australia’s legal systems provide for testimony of this sort to be challenged by the person whose interests would, or could, be prejudiced by any decision relying on that testimony, Mr Prinn said.

¹⁰⁷ Mr Prinn’s statement and submission at [33]

¹⁰⁸ Mr Prinn’s statement and submission at [34]

127. Document 131 is a PAINA prepared by the assessing psychologist on a form used by AGSVA to record the psychologist's analysis of findings of the psychometric testing undertaken together with a discussion regarding the interview conducted with the clearance subject. Ms Milne went on to describe the document at [54]:

"Document 131 also contains the psychologist's commentary on particular responses given by Mr Prinn during his psychological interview and whether they are significant or give rise to some concerns in the context of his suitability for a PV clearance. While some of the content of this document are the notes made by the Assessing Psychologist of things Mr Prinn might have said, the information which the assessing psychologist considered significant enough to record might, in and of itself, reveal something of the issues of potential interest and concern in the vetting process. That is, if people knew what matters are important to AGSVA they might respond differently in both the testing and interview process. While some of the information recorded in document 131 might be about, or given by, Mr Prinn, the psychologist's analysis and deliberation is so interwoven with this information that I do not consider it is possible to separate the two without causing the harm I have described immediately above."

C. Document 55: Referee Reports

128. Document 55 contains a bundle of six records of interview conducted by an assessing officer with referees nominated by Mr Prinn. He nominated them as part of AGSVA's usual procedures. An assessing officer contacts each and puts a series of questions to him or her before evaluating their responses, Ms Milne said. The records of interview are recorded on an AGSVA document entitled "*Referee Interview Guide*". All of the questions to be asked of a referee are included in that document. A Referee Interview Guide is typically used in all PV clearance processes regardless of whether that process is undertaken as part of a regular review or as a review for cause process.
129. Over the years, there have been some minor changes to the Referee Interview Guide, Ms Milne said, but the substance of the documents and its questions substantially unchanged. She went on to observe that:

*"... Disclosure of these questions would pre-warn all future PV security clearance subjects and their referees of the specific questions they would be asked in a referee interview and enable them to prepare their responses in advance. This is the case regardless of whether a referee interview is being conducted in the context of an original security clearance application, or where consideration is being given to the continuation of a security clearance (in a review for cause process). The referee checking system used by AGSVA relies entirely on receiving the honest and instinctive responses of a security clearance subject's referees. If the detailed questions to be asked of referees (in the context of a PV security clearance) were released by AGSVA, I would expect that the risk of 'coaching' would considerably increase and AGSVA would be less likely to receive the referees' natural and spontaneous responses to the questions asked of them."*¹⁰⁹

¹⁰⁹ Ms Milne's Affidavit at [61]

130. A little later in her Affidavit, Ms Milne expanded upon her concerns in this area:

“... In a similar fashion to psychological assessment, the success of the referee report process depends in part upon the spontaneity of the referee’s responses to questions. While a referee (and a clearance subject) may be able to predict beforehand the broad themes of questions, the precise framing of those questions, the ordering of those questions and other specifics of the process will be unknown to the referee until they begin the discussion. Removing the spontaneous element and allowing referees to practice their responses introduces another area of risk, and another opportunity for individuals to manipulate the process to achieve a favourable outcome for the clearance subject. This may not be with any malicious intent on the part of the referee, who may see themselves as simply trying to help. However the best evidence for a vetting officer will be the honest and spontaneous evidence that a referee provides without having prepared a script for the interview.”¹¹⁰

131. She went on to contrast the process with that undertaken in recruitment processes. In the latter process, a referee may know that an applicant may be given a copy of any referee comments. In a security vetting process, referees are told that what they say about a clearance subject will not be disclosed to that subject under any circumstances. At a PV clearance referee interview, the referee is informed that information is collected for security purposes and is protected under law. Any AGSVA referee report sent to a referee for completion contains a statement to that effect. He or she is also told that a referee report may be used as a basis for further enquiries and that may lead to further contact with him or her.

132. Ms Milne said that AGSVA is required to afford a clearance subject procedural fairness and an opportunity to respond to any potentially adverse elements of the security vetting process. If a referee raises an issue of concern, an AGSVA assessing officer will always look to corroborate the information by looking for other available information. If the issue remains one of concern, then the assessing officer will approach the clearance subject to give him or her an opportunity to respond. Any adverse issues of concern will be raised in a way that does not identify that they were raised in the context of a referee report.

133. Mr Prinn challenged the accuracy of Ms Milne’s statement in the previous paragraph. He said that he has been given nothing and has been denied a balanced assessment of all relevant information. In his view, there has been no attempt to test the authenticity of information or to corroborate it through additional channels or sources. His conclusion is that:

“... With such a process the only reasonable decision is to release the records to me so that the full picture can be examined and determined with any further action to be explored and decided after that.”¹¹¹

¹¹⁰ Ms Milne’s Affidavit at [65]

134. Ms Milne went on to address her concern that referees would feel constrained about what they say were it to be known that their comments would be disclosed to clearance subjects. The vetting process, she said, looks at the “*whole person*” and his or her suitability to have access to the most sensitive information including that which has significant national security implications. AGSVA relies on referees being honest and forthright in making their comments. Consequently, referees need to feel safe when making disclosures to vetting officers. She explained:

“... If they are concerned that the clearance subject may have access to their answers there is a reasonable likelihood in my view that the referee will be less open. In many cases the referee will be someone who has an ongoing relationship with the clearance subject, such as a colleague. If they believe or fear that the clearance subject will find out what they have said, it would be natural for them to want to protect the relationship with the clearance subject by not fully disclosing information that might be harmful to the clearance subject’s application. They may be concerned about embarrassing the clearance subject (such as by disclosing past indiscretions) or may not want the clearance subject to know that they are aware of certain information about the clearance subject (such as personal or workplace incidents which the referee is aware of from sources other than the clearance sheet). It is for this reason that AGSVA undertakes to maintain the confidentiality of referee reports.”¹¹²

135. Mr Prinn responded saying:

“... a referee feeling safe in disclosing information to the vetting officer is one part of the story but integrity of the system and Australia’s whole legal system is predicated on that information being subject to examination and challenge given the potential consequences to the subject concerned. If the referee is speaking honestly why would they be concerned by disclosure and the argument that they would be less open ignores the legal principles underpinning our systems of administrative and criminal laws. Allowing decisions to be supported by unchallenged and in my situation blatant lies with no provision for procedural fairness and detailed analysis or examination as suggested by Ms Milne is simply unacceptable to me and I believe the Australian community.”¹¹³

136. Ms Milne set out the steps that the Department had taken in advising each of the referees consulted during AGSVA’s assessment of Mr Prinn’s security clearance of his request under the FOI Act. With Mr Prinn’s consent, the Department disclosed that Mr Prinn was the person who had made the request and provided them with a copy of the record of their interview. Each was asked whether the document should be released in full or in part to Mr Prinn. One of his referees had no objection to the release but the other did citing assurances of confidentiality that had been given, the risk that disclosure would enable individuals to prepare their responses in the future and the risk that referees would be less

¹¹¹ Mr Prinn’s statement and submission at [41]

¹¹² Ms Milne’s Affidavit at [67]

¹¹³ Mr Prinn’s statement and submission at [42]

forthcoming in providing information to AGSVA in future. The Department had put the following questions to the referees:

- “68.1 *Would you be prepared to participate frankly and honestly as a referee for a security clearance applicant in the future if some or all of the document containing your responses to the questions asked in the interview were released, particularly to the person you are providing comments about?*
- 68.2 *Would any adverse consequences flow from the disclosure of some or all of the document? (i.e. potential harm to your ongoing relationship with Mr Prinn).*
- 68.3 *Is there anything about the nature of any of the information you have provided which makes it particularly sensitive or private?*
- 68.4 *When you provided your responses to the interview questions asked by the AGSVA assessing officer, did you expect they would be kept confidential? If so, what was the basis on which you formed that expectation?.”¹¹⁴*

137. Mr Prinn said that he had no issue with the last three questions that were posed to the referees but he took issue with the first and raised concerns about the fourth:

“... Asking questions related to the circumstances and their recollections of the interviews they were part of are fair but 68.1 asks about possible future events and is not relevant to the facts for this matter. The fact that this and the other affidavits cite emails that went to referees that simply were not ever sent is a significant matter for me when considering any responses to 68.4. I believe that no such guarantees of confidentiality were made and again as senior experienced AGSVA officers they would have been aware of procedural fairness requirements and other admin law factors relevant. I also believe that if they have ever been cautioned as I have been in other processes that the attempts to influence the decision through lies and other misleading but still damaging testimony may not have occurred. The potential impacts of these processes as occurred in my situation demand that all relevant legal requirements are met and that the vetting process be a valid one with integrity and the confidence of all involved. The current process is far from that and the arguments put forward drawing such a long bow in reality show the current AGSVA to be years behind government guidelines, legislative intents and guidance, administrative and employment law intentions and community expectations. The referees are more likely to have felt safe that DSA would deny their release and that therefore their testimony would not be subject to examination or challenge. In such circumstances the potential for dishonest and misleading testimony not subjected to scrutiny or analysis for its relevance, reliability and base truthfulness is real and the system is in turn compromised. The national and community interest lies in AGSVA undertaking reliable and legally trustworthy processes where clearance subjects are provided with an ethical and unbiased assessment.”¹¹⁵

I certify that the one hundred and thirty seven preceding paragraphs are a true copy of the reasons for the decision herein of
Deputy President S A Forgie,

Signed:[sgd].....

¹¹⁴ Ms Milne's Affidavit at [68]

¹¹⁵ Mr Prinn's statement and submission at [43]

Associate

Dates of Directions Hearing	20 February 2015, 20 July 2015 and 23 March 2016
Date of Decision	29 June 2016
For the Applicant	Self-represented
Solicitor for the Respondent	Mr J Davidson, Australian Government Solicitor

SCHEDULE OF DOCUMENTS REMAINING IN ISSUE

Item	Serial	Date	File reference	Author	Addressee	Document description	Decision	Pages
1	51	15/07/2010	13533	Mr Jack Nicholson		Vetting Analysis Report	Release with deletions in accordance with section 22 on grounds that deleted material is exempt under subsections 33(a)(i) and 47E(a) of the FOI Act.	10
1	53	19/06/2011	13533	Ms Louise Riethmuller		Psychological Assessment Report	Release with deletions in accordance with section 22 on grounds that deleted material is exempt under subsections 33(a)(i) and 47E(a) of the FOI Act.	15
1	55					Referee reports	Deny in accordance with subsections 33(a)(i) and 47E of the FOI Act.	150
1	106	16/06/2009	PV13533	Mr Jack Nicholson		Vetting Analysis Report	Release with deletions in accordance with section 22 on grounds that deleted material is exempt under subsections 33(a)(i) and 47E(a) of the FOI Act.	5
1	107	18/05/2009	13533	Mr John Raue		Psychological Security Assessment	Release with deletions in accordance with section 22 on grounds that deleted material is exempt under subsections 33(a)(i) and 47E(a) of the FOI Act.	3

Item	Serial	Date	File reference	Author	Addressee	Document description	Decision	Pages
1	131	05/06/2011	13533	Ms Louise Riethmuller		Psychological Assessment Interview Notes and Analysis	Release with deletions in accordance with section 22 on grounds that deleted material is exempt under subsections 33(a)(i) and 47E(a) of the FOI Act.	23
1	132	30/05/2011	13533			Psychological Assessment Report	Release with deletions in accordance with section 22 on grounds that deleted material is exempt under subsections 33(a)(i) and 47E(a) of the FOI Act.	15



ADMINISTRATIVE APPEALS TRIBUNAL

CATCHWORDS – FREEDOM OF INFORMATION – applicant former CEO and chief administrator of Sydney International College of Business - provider of education and training to overseas students under general skilled migration program – allegations of providing false qualifications - investigation by New South Wales Fraud Control Section of the Department of Immigration and Citizenship – exemptions claimed under ss 33(1)(a)(iii), 33(1)(b), 37(1)(b), 37(2)(b), 40(1)(d), 41(1) and 45(1).

WORDS AND PHRASES – “would, or could reasonably be expected to” – “the enforcement or administration of the law” – “would, or would be reasonably likely to” – “prejudice the effectiveness” – “substantial adverse effect” and “proper and efficient conduct of the operations of an agency” – “personal information” and “unreasonable disclosure” – “found an action” and “breach of confidence.”

PRACTICE AND PROCEDURE – public interest - provisions of FOI Act state when public interest to be considered and how it is to be considered - whether disclosure is in the public interest or whether disclosure is contrary to the public interest - other provisions not requiring a public interest test can in themselves be in the public interest – such as the public interest in protecting personal information from unreasonable disclosure.

PRACTICE AND PROCEDURE - confidential sources of information not satisfied by witness or potential witness providing statements nor by evidence that communications were of a kind “customarily made in confidence.”

Accident Compensation Commission v Croom [1991] VicRp 72; [1991] 2 VR 322

Arnold (on behalf of Australians for Animals) v Queensland and Anor [1987] FCA 148; (1987) 73 ALR 607; 13 ALD 195

Ascic v Australian Federal Police (1986) 11 ALN N184

Attorney-General’s Department v Cockcroft (1986) 64 ALR 97

Australian Broadcasting Commission v Lenah Game Meats Pty Ltd [2001] HCA 63; 208 CLR 199; 185 ALR 1; 76 ALJR 1

Australian Telecommunications Commission v Krieg Enterprises Pty Ltd (1976) 14 SASR 303; 27 FLR 400

B and Brisbane North Regional Health Authority [1994] QICmr 1; (1994) 1 QAR 279

Bailey v Hinch [1989] VicRp 9; [1989] VR 78

Bartlett v Secretary, Department of Social Security [1997] FCA 1581; (1997) 49 ALD 380

Barton v The Commonwealth (1974) 131 CLR 477

Bouhey v The Queen (1986) 161 CLR 10

Bray and Smith v Workers Rehabilitation Corporation and Stanley [1994] SASC 4478; (1994) 62 SASR 218

Cardile v LED Builders Pty Ltd [1999] HCA 294; (1999) 198 CLR 380; 162 ALR 294; 73 ALJR 657
Colakovski v Australian Telecommunications Corporation [1991] FCA 152; (1991) 29 FCR 429; 100 ALR 111; 13 AAR 261; 23 ALD 1
Commodore Homes WA Pty Ltd v Goldenland Australia Property Pty Ltd & Anor [2007] WASC 146
Commonwealth of Australia v John Fairfax & Sons Limited and Others (1981) 55 ALJR 45
Conway v Rimmer [1968] AC 910
Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd [1987] FCA 266; (1987) 14 FCR 434; 13 ALD 254
CSR Limited v CIGNA Insurance Australia Limited [1997] HCA 33; (1997) 189 CLR 345; 146 ALR 402; 71 ALJR 1143
Davis v The Commonwealth [1988] HCA 63; (1988) 166 CLR 79
Department of Agriculture and Rural Affairs v Binnie [1989] VR 836 (Binnie)
Department of Health v Jephcott [1985] FCA 370; (1985) 8 FCR 85; 62 ALR 421; 9 ALD 35
Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd [1979] VR 167
Do Carmo v Ford Excavations Pty Ltd [1984] HCA 17; (1984) 154 CLR 234; 52 ALR 231; 58 ALJR 287
Esso Australia Resources Ltd v Plowman [1995] HCA 19; (1995) 183 CLR 10; 128 ALR 391; 69 ALJR 404
Fomiatti v University of Western Sydney (No 2) [2006] NSWADT 210
Haigh v Royal Mail Steam Packet Co 52 LJQB 395
Harper v Costigan [1983] FCA 303; (1983) 72 FLR 140; 50 ALR 665
Harris v Australian Broadcasting Corporation and Others (1983) 50 ALR 551; 5 ALD 545
HP Mercantile Pty Ltd v Federal Commissioner of Taxation (2005) 143 FCR 553
Johns v Australian Securities Commission [1993] HCA 56; (1993) 116 ALR 567
Jorgensen v Australian Securities and Investments Commission [2004] FCA 143; (2004) 208 ALR 73
Kemp v Sober I Sim. N.S.517; 61 ER 200
Kristoffersen v Department of Employment Workplace Relations and Small Business [2002] FCA 55
Kunakool v Boys (1987) 14 FCR 489; 77 ALR 435
Latter v Council of the Shire of Muswellbrook [1936] HCA 70; (193-6) 56 CLR 422
Lord Manners v Johnson (1875) 1 Ch D 673
Lorimer v Smail [1911] HCA 44; (1911) 12 CLR 504
Lurie v Lurie 107 LJ Ch 289
McKenzie v Secretary, Department of Social Security (1986) 65 ALR 645
McKinnon v Secretary, Department of the Treasury [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516
Mersey Docks and Harbour Board v Henderson Bros (1888) 13 AC 595
Meyers v Casey (1913) 17 CLR 90; 19 ALR 537
Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) [1984] HCA 73; (1984) 156 CLR 414; 56 ALR 193
O'Sullivan v Farrer (1989) 168 CLR 210
Poignand v NZI Securities Australia Ltd and Others (1992) 109 ALR 213; 37 FCR 363

Public Service Association and Professional Officers Association, Amalgamated Union of NSW v Director General, Premier's Department [2002] NSWADT 277
R v Burgess; Ex parte Henry (1936) 55 CLR 608
R v Corak 24/11/1967 NSWCCA
R v Einfeld [2008] NSWCCA 215; (2008) 71 NSWLR 31; 252 ALR 375
R v Shoreditch County Court Registrar, ex p. Saxon Finance Corporation [1938] 1 KB 402
Re Altman and Family Court (1992) 27 ALD 369; (1992) 15 AAR 236
Re Callejo and Department of Immigration and Citizenship [2010] AATA 244; (2010) 51 AAR 308
Re Chandra and Minister for Immigration and Ethnic Affairs [1984] AATA 437; (1984) 6 ALN N257
Re Connolly and Department of Finance (1994) 34 ALD 655
Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626
Re James and Australian National University (1984) 2 AAR 327; 6 ALD 687
Re Kamminga and Australian National University [1992] AATA 84; (1992) 26 ALD 585; 15 AAR 297
Re Lobo and Department of Immigration and Citizenship [2010] AATA 583
Re Maher and Attorney-General's Department (1985) 7 ALD 731; 3 AAR 396
Re Marshall and Department of Defence and Heath (Joined Party) [2011] AATA 566
Re Matthews and Australian Securities and Investments Commission [2010] AATA 649; (2010) 118 ALD 23
Re McKnight and Australian Archives (1992) 28 ALD 95
Re Millis and Australian Archives (1997) 47 ALD 427
Re Mickelberg and Australian Federal Police (1984) 6 ALN N176
Re McKinnon and Secretary, Department of Prime Minister and Cabinet [2007] AATA 1969
Re Murphy and Australian Electoral Commission [1994] AATA 149; (1994) 33 ALD 718
Re Murtagh and Commissioner of Taxation [1984] AATA 249; (1984) 54 ALR 313; 6 ALD 112; 1 AAR 419; 15 ATR 787
Re Nitas and Minister for Immigration and Multicultural Affairs [2001] AATA 392
Re Petroulias and Commissioner of Taxation [2006] AATA 333; (2006) 62 ATR 1175
Re Slater and Cox (Director-General, Australian Archives) (1988) 15 ALD 20
Re State of Queensland and Australian National Parks and Wildlife Service (1986) 13 ALD 158; 5 AAR 328; [1986] AATA 224
Re Sullivan and Department of Industry, Science and Technology and Australian Technology Group Pty Ltd [1997] AATA 192
Re Thies and Department of Aviation (1986) 9 ALD 454
Re Throssell and Australian Archives (1987) 14 ALD 292; [1987] AATA 453
Re Throssell and Department of Foreign Affairs (1987) 14 ALD 296; [1987] AATA 454
Re Williams and Registrar of the Federal Court of Australia (1985) 8 ALD 219
Regina v L T Hardy [1996] NSWSC 524
RJE v Secretary to the Department of Justice and Others [2008] VSCA 265; (2008) 21 VR 526
Rogers v Home Secretary [1973] AC 388
Sankey v Whitlam (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11
Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another (1992) 108 ALR 163; 36 FCR 111; 16 AAR 28

Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited [2010] FCA 1442; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439
Shi v Migration Agents Registration Authority [2008] HCA 31; (2008) 235 CLR 286; 248 ALR 390; 82 ALJR 1147; 103 ALD 467; 48 AAR 345
Smith v Brown (1871) LR 6 QB 729
Smith Kline & French Laboratories (Aust) Limited v Secretary, Department of Community Services and Health (1990) 22 FCR 73; 95 ALR 87
Smith Kline & French Laboratories (Aust) Ltd and Others v Secretary, Department of Community Services and Health and Another [1991] FCA 150; (1991) 28 FCR 291
Sobh v Police Force of Victoria [1994] VicRp 2; [1994] 1 VR 41
The Queen v Rogerson [1992] HCA 25; (1992) 174 CLR 268
Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union and Others (1979) 27 ALR 367; 42 FLR 331
Trade Practices Commission v TNT Management Pty Ltd (1985) 6 FCR 1
Travelex Ltd v Commissioner of Taxation of the Commonwealth of Australia [2010] HCA 33; ATC 20-214; (2010) 241 CLR 510; 270 ALR 253; 84 ALJR 683; 76 ATR 329
Trent-Stoughton v Barbados Water Supply Company, Limited [1893] AC 502
Victoria Police v Marke [2008] VSCA 218
Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492
Watt v Forests NSW [2007] NSWADT 197
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A New Tax System (Goods and Services) Act 1999
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Administrative Appeals Tribunal Act 1975 s 37, 43(5B), 44(2A)
Administrative Decisions (Judicial Review) Act 1977 s 13(11)
Archives Act 1983 s 33(1)(a)
Commonwealth of Australia Constitution Act s 3
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Criminal Code Act 1995 Div 137
Crimes Act 1900 (NSW) ss 300(1), 300(2)
Criminal Procedure Act 1986 (NSW) s 175
Criminal Code (Tasmania) s 157(1)
Data Protection Act 1988 (Ireland)
Education Services for Overseas Students Act 2000 ss 33, 34, 110
Federal Court of Australia Act 1976 Part IVA
Financial Management and Accountability Act 1997 s 45
Freedom of Information Act 1982 ss 3(1), 4(1), 11(1), 15(2)(b), 22, 25, 27A, 33(1)(a)(ii), 33(1)(a)(iii), 33(1)(b), 33A(1)(b), 33A(5), 36, 36(1)(b), 37(1)(a), 37(1)(b), 37(2)(b), 40(1)(d), 40(2), 41(1), 45(1), 43(1)(c)(ii), 45, 61(1), 58(2), 91(1) and (2)
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Freedom of Information Act 1992 (Qld) s 46

Freedom of Information Act 1991 (SA) Sch 1, cl 13(a)
Freedom of Information Act 1982 (Vic) ss 31(1)(a), 31(1)(e), 33(1), 35(b)(i), 36(3), 36(4), 50(4)
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National Health Act 1953 Part VB
Privacy Act 1988 s 14
Trade Practices Act 1974 ss 45(2)(a)(i), 45(4), 87(1A)

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DECISION AND REASONS FOR DECISION [2011] AATA 705

ADMINISTRATIVE APPEALS TRIBUNAL	)	
	)	2010/0947
GENERAL ADMINISTRATIVE DIVISION	)	

Re: PHILLIP LOBO

Applicant

**And: DEPARTMENT OF IMMIGRATION AND
CITIZENSHIP**

Respondent

DECISION

Tribunal: Deputy President S A Forgie

Place: Melbourne

Date: 11 October 2011

Decision: The Tribunal decides:

1. in relation to those documents or parts of documents which have been marked as “*Exempt*” under one or more of the exemptions listed in Attachment J to these reasons being:
 - (1) **Category A documents**; 5-152, 153, 238, 728, 737, 745, 762 and 991; 7-139, 597, 509, 596 and 1019; 9-87, 553, 579, 620, 635, 640, 643, 723, 731, 734 and 1029; 16-894; 23-140, 321 and 285;
 - (2) **Category C documents** 6-399 and 1001; 7-523 and 1016; 9-53, 469, 472, 482, 483, 485, 527, 547, 549, 570, 650, 692, 693, 1017 and 1020; 18-60, 64, 65, 70, 78, 81, 82, 83, 84, 85, 263, 1023, 1074, 1083, 1084 and 1089; and
 - (3) **Category D documents** 19-401, 1054, 1055, 1056, 1057, 1058, 1059 and 1060;to affirm the decision.
2. in relation to those documents or parts of documents considered under only one exemption and marked as “*Not exempt*” in relation to that exemption listed in Attachment J to these reasons being:
 - (1) **Category B Documents** 9-267, 271, 290, 322 and 1009; 9-486, 662 and 1099; 16-397 and 1062; 16-870; 19-213, 214; 272 and 376; 23-140, 321 and
 - (2) **Category C documents** 9-550;to
 - (3) set aside the decision under review in relation to those documents or parts of the documents; and
 - (4) substitute a decision that those documents or those parts of the documents are not exempt from disclosure under the *Freedom of Information Act* 1982;
3. in relation to those documents or parts of documents marked as “*Adjourned ...*” under one or more of the exemptions listed in Attachment J to these reasons being:

- (1) **Category A documents** 5-152, 153, 238, 728, 737, 745, 762 and 991; 9-209, 695, 725, 760, 898, 900, 556, and 731; and
 - (2) **Category C documents** 9-1017 and 1020; 18-25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76;
- to
- (3) adjourn further consideration;
- 4. in relation to documents in **Category A**, affirm the decision to delete the material under s 22 of the *Freedom of Information Act 1982*; and
 - 5. this decision is not to come into operation until the expiration of the time specified in s 44(2A) of the *Administrative Appeals Tribunal Act 1975* as the time within which a person may appeal to the Federal Court of Australia against this decision.

S A Forgie
Deputy President

REASONS FOR DECISION

Mr Lobo was formerly the Chief Executive Officer and Principal Administrator of the Sydney International College of Business (SICB) located in Melbourne and Sydney. The SICB was registered under the *Education Services for Overseas Students Act 2000* (ESOS Act) as the provider of education and training to overseas students. In that role, it provided vocational qualifications under the General Skilled Migration Program (GSMP) and concentrated particularly on cooking and hospitality. Together with other providers registered under the ESOS Act, Mr Lobo and SICB have been investigated by the New South Wales Fraud Control Section (FCS) of the Department of Immigration and Citizenship (Department) as part of an operation known as Operation Dachshund and arising from allegations of fraud under the GSMP.

2. On 14 November 2008, Mr Lobo made two requests under the *Freedom of Information Act 1982* (FOI Act) for access to documents held by the Department and relating to him, SICB, its students and an investigation regarding certain activities of SICB and its students. The investigation came to be known as Operation Dachshund. In an earlier decision, I limited the documents under consideration to those in the possession of the Department on or before the date it received his request i.e. 14 November 2008.¹ Those documents numbered 1,115 but the total number of pages was vastly greater. After various discussions between the parties and further reconsideration within the Department, 153 documents remain in dispute. Exemption from disclosure under the FOI Act is claimed for 151 of them, either in whole or in part, under one or more of the exemptions set out in ss 33(1)(a)(iii), 33(1)(b), 37(1)(b), 37(2)(b), 40(1)(d), 41(1) and 45(1). The remaining two are said to be irrelevant to fall outside the scope of Mr Lobo's request and access has been refused under s 22.

3. The amount of work involved in the process of simply organising and recording the material, let alone making decisions about it, compiling it into manageable categories and recompiling it as the matter has progressed through settlements and negotiations has clearly been a vast task painstakingly undertaken. It has assisted Mr Lobo and his advisers to understand the nature of the subject matter

¹ See *Re Lobo and Department of Immigration and Citizenship* [2010] AATA 583

for which exemption claims have been made and for the parties to have a basis for negotiations. As a consequence, Schedules numbering 143 pages in 9 point font have been prepared to show the documents to be released in full or in part, those no longer in contention between the parties and those for which exemption continues to be claimed in whole or in part that are no longer in contention. I am left with 20 pages in the same font. The task has still been considerable but much more manageable as a result of the parties' work.

4. I have read each document and considered each against the exemption or exemptions claimed in respect of it.² In some instances, the claim for exemption has been made in respect of the whole document and in others it has been made in respect of part of it. I have not distinguished between them in giving these reasons although I have noted the distinction in Attachment A. Despite that, I have considered the claim only in relation to that part of the document for which exemption is actually claimed and my decision should be read in that way. In many instances, the Department claimed exemption on more than one ground. I have considered each claim and the outcome of my consideration is set out in summary form in Attachment J. The reasons are given in the body of these reasons. Although I have not found each exemption made out in each instance on which it has been claimed, a decision refusing access to a document under the FOI Act need only be supported by one ground. In most cases, the documents have been supported by at least one ground although not necessarily all of the grounds claimed by the Department. I have adjourned further consideration of some documents to enable me to know whether charges have been laid against certain persons but have set out the decisions I would make if the evidence goes one way or the other. The parties may be able to resolve

² For the reasons I gave in *Re Matthews and Australian Securities and Investments Commission* [2010] AATA 649; (2010) 118 ALD 23 at [147]-[148]; 71-72 and which I adopt, it is not appropriate for a merits review tribunal to take the approach of an appellate court and simply examine "... a representative sample of the documents in question, chosen essentially at random, in order to gauge whether ... [the Department's] interpretation of the various provisions upon which it relied in ... [making its] claims for exemption revealed some legal error." (*Jorgensen v Australian Securities and Investments Commission* [2004] FCA 143; (2004) 208 ALR 73 at [56]-[60]; 85-86). The Tribunal's duty is to make a decision under s 43 of the *Administrative Appeals Tribunal Act 1975* and to do so on the basis that it is, in the context of this case, the correct decision (*Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 24 ALR 577 at 589 per Bowen CJ and Smithers J). It cannot make the "correct or preferable decision" in this case as s 58(2) provides that it does not have the power to decide that access be given to a document in so far as it contains exempt matter. The Tribunal must carry out its duty. That means that it must work out the law that applies and how it has been interpreted by the courts, read each and every document and apply the law. This is a painstaking and time consuming task for the Tribunal and for those who read it but not one that can be avoided.

the matter themselves. Finally, I have stayed the operation or implementation of this decision for the length of the appeal period provided under s 44(2A) of the *Administrative Appeals Tribunal Act 1975*.³

STRUCTURE OF THESE REASONS

5. Whenever an application for review under the FOI Act relates to a number of documents and several exemptions, the reasons for decision quickly become lengthy and unwieldy. I continue to experiment with structures that will make them more readable not only by the parties, to whom they are of immediate concern, but to others be they the Federal Court on appeal or other administrative decision-makers. On this occasion, I have decided to set out the requests, a broad description of the categories of documents coming within the ambit of those requests, the events preceding and relating to Operation Dachshund and my consideration of the exemptions in the body of these reasons. Set out in Attachments, but no less a part of my reasons, are descriptions of the more specific categories into which the documents have been grouped, a grouping of those specific categories by reference to the broader categories and my understanding of the law relating to the exemptions claimed. The first of those Attachments, Attachment A, contains a more detailed index to the reasons. A broader indication is:

<i>Paragraph</i>	<i>Attachment</i>	<i>Subject</i>
5		The requests
58		The decision
59	Attachment A	Documents and claimed exemptions
(i) 60-87 (ii) 88-89	Attachment B	Exemption claimed under s 33(1)(a)(ii) (i) law (ii) application of law
(i) 90-94 (ii) 95	Attachment C	Exemption claimed under s 33(1)(b) (i) law (ii) application of law
(i) 96-152 (ii) 153-205	Attachment D	Exemption claimed under s 37(1)(b) (i) law (ii) application of law

³ In doing so, I rely on the power conferred by s 43(5B) of the *Administrative Appeals Tribunal Act 1975*.

(i) 206-214 (ii) 215-220	Attachment E	Exemption claimed under s 37(1)(2)(b) (i) law (ii) application of law
(i) 221-249 (ii) 250-284	Attachment F	Exemption claimed under s 40(1)(d) (i) law (ii) application of law
(i) 285-331 (ii) 332-388	Attachment G	Exemption claimed under s 41(1) (i) law (ii) application of law
(i) 389-412 (ii) 413-416	Attachment H	Exemption claimed under s 45(1) (i) law (ii) application of law
(i) 417-420 (ii) 421-423	Attachment I	Deletion of irrelevant material under s 22 (i) law (ii) application of law
	Attachment J	Table summarising decision on each exemption in relation to each document or part of document in relation to which it is claimed.

THE REQUESTS

6. Mr Lobo made two requests to the Department under the FOI Act.
They were for:

“All documents and files created and held by the Department relating to me since May 2007.”⁴

“All documents and files of whatsoever nature and kind in regard to Philip Lobo, SICB and the NSW Investigations and the students attending who have attended SICB, on the basis of which the Investigation is proceeding.”⁵

DOCUMENTS and EXEMPTIONS CLAIMED

7. The documents in issue in this matter, can be grouped under five main subject headings. Those categories, together with the exemptions claimed are:

Category <i>Exemptions claimed in whole or in part</i>	Description
Category A s 37(1)(b) – confidential source s 40(1)(d) – proper and efficient conduct of	Documents containing information identifying witnesses, Departmental informants and other third parties

⁴ Documents lodged under s 37 of the *Administrative Appeals Tribunal Act 1975* (T documents) at 149

⁵ T documents at 157

Category Exemptions claimed in whole or in part	Description
operations s 41(1) – personal information	
Category B s 37(2)(b) – lawful methods of investigation etc s 33(1)(a)(iii) – international relations s 33(1)(b) – confidential communications with foreign government	Documents disclosing methods for preventing, detecting, investigating or dealing with breaches of the law Correspondence with the US State Department
Category C s 37(1)(b) – confidential source s 40(1)(d) – proper and efficient conduct of operations s 41(1) – personal information s 45(1) – breach of confidence	Documents containing information provided solely for the purposes of the Department’s investigation and/or on the basis that it would remain confidential
Category D s 33(1)(a)(iii) – international relations s 33(1)(b) – confidential communications with foreign government	Correspondence with the US State Department

They are set out in greater detail in Attachment A.

BACKGROUND

8. In this section of my reasons, I set out my findings of fact on matters relating to Operation Dachshund and associated matters. I have referred to the evidence on which I rely but only in general terms where the findings are uncontroversial. Ms Pettit’s history in the Department is an example. I have dealt with the evidence further in considering the claims for exemption.

Ms Pettit, Manager Investigations-Strategy and Coordination, FCIS

9. The events surrounding Operations Dachshund were the subject of both oral and affidavit evidence by Ms Elizabeth Joy Pettit.⁶ Ms Pettit holds a Bachelor of Arts and a Bachelor of Law degree and has worked in the Commonwealth public service for some 23 years. She has worked in the Department since 1991. Her first seven years were spent assessing claims for protection visas made by applicants within Australia’s migration zone. She then became an investigator with the Fraud Control and Investigation Section in New South Wales (FCIS) in 1998. That Section

⁶ Exhibit 2

is part of the Department's Operational Integrity Branch. Ms Pettit held that position for the following seven years before becoming a Team Leader in the same section in 2005. In 2005, Ms Pettit became the Manager Investigations – Strategy and Coordination at FCIS. In her current role, she works with the Manager Operations in FCIS to oversee the investigations undertaken by the section. Her duties include strategic planning and reporting, working with those holding the same position in other States to ensure consistency of their investigation methods and priorities and liaising with other sections located in the Branch within which FCIS is also located i.e. the NSW Operational Integrity Branch.

Investigation and enforcement of alleged breaches of the Migration Act 1958

10. The Department is responsible for matters arising under the *Migration Act 1958* (Migration Act), which is administered by the Minister for Immigration and Citizenship.⁷ One of its responsibilities is to ensure the proper administration of the Migration Act in so far as it and associated regulations provide for visas permitting those who are not Australian citizens to enter the country and remain in it on either a temporary or permanent basis. That, in turn, carries with it the responsibility of investigating any allegations that the Migration Act has not been complied with in the procurement of a visa in a particular case or of visas more generally.

11. The Department has categorised the allegations it receives by reference to whether they relate to contrived relationships, identity fraud, illegal work, people smuggling, overstaying a visa and other criminal activities. Categorisation was given by reference to the 2004-2005 year but I accept Ms Pettit's evidence that they are representative of other years.

12. The Department regards as an "*allegation*" any information that it is given by the public, external agencies or any of its programme areas and that relates to possible fraudulent activity by an individual or organisation. The Department maintains a dedicated toll-free telephone number on which members of the public may tell it of their concerns regarding compliance with the Migration Act. That telephone number is known as the Immigration Dob-In Line. Information that

⁷ Administrative Arrangements Order

members of the public are encouraged to give is found on the Department's website.⁸ It ranges from the name of the person suspected of working or living illegally in Australia and the basis of the suspicion to a sponsor's mistreating a sponsored overseas worker. The information that the Department maintains about the Dob-In Line advises that:

*"The department will treat any information provided by members of the public about people working or living illegally in Australia and 457 sponsors who are not meeting their obligations in the strictest confidence."*⁹

13. While contrived relationships are the subject of most allegations accounting for almost 50%, allegations of identity fraud follow at a little over a quarter of the total. On the basis of the figures referred to by Ms Pettit, I find that over 60% of allegations relate to conduct of the visa applicant with the remaining allegations generally relating to the conduct of one or other of the sponsor, migration agent (whether registered or unregistered), education industry, illegal worker and employer.

14. The Department finds almost 40% of allegations to be unsubstantiated. It refers a handful to another agency such as the Australian Federal Police and another handful of matters to the Commonwealth Director of Public Prosecutions (CDPP) to consider whether criminal charges should be laid. The majority of cases, something under 60%, result in the Department's taking administrative action such as the refusal of a visa application or the cancellation of a visa already issued.

The Fraud Control and Investigations Section

15. Having regard to Ms Pettit's affidavit and to the Commonwealth Fraud Control Guidelines issued by the Minister for Home Affairs,¹⁰ I find that most agencies are required to:

⁸ Exhibit EJP-2 to Exhibit 2; www.immi.gov.au/managing-australias-borders/compliance/staying-legally/dob-in-line.htm

⁹ Exhibit EJP-2 to Exhibit 2 at 2

¹⁰ *Financial Management and Accountability Regulations 1997*, r 16A(1). That regulation provides: "(1) The Minister for Home Affairs may issue guidelines (to be called **Fraud Control Guidelines**) about the control of fraud, dealing with fraud risk assessments, the preparation and implementation of fraud control plans and reporting of fraud."

*“... refer all instances of potential serious or complex fraud offences to the AFP^[11] in accordance with the AGIS^[12] and the AFP referral process published on the website www.afp.gov.au ...”.*¹³

This follows as a consequence of the fact that *“The AFP has the primary law enforcement responsibility for investigating serious or complex fraud against the Commonwealth...”*.¹⁴ Exceptions are made in relation to the manner of referral where particular legislation sets out the requirements for referrals of a particular nature or by a particular class of bodies or agencies. Further exceptions are made *“...where agencies have the capacity and the appropriate skills and resources needed to investigate criminal matters and meet the requirements of the AFP and CDPP in gathering evidence and preparing briefs of evidence. ...”*¹⁵ The Department is regarded as an agency with the appropriate skills and resources to undertake the investigative tasks and prepare the brief of evidence. Even so, it may still choose to refer a matter to the AFP where it deems it appropriate to do so.¹⁶

16. In conducting an investigation, the FCIS is required to observe the requirements of the *Privacy Act 1988* (Privacy Act) regarding the collection and disclosure of personal information. Information Privacy Principle 11.1(e) under s 14 of the Privacy Act allows a record-keeper who has possession or control of personal information to disclose that information to another when believing *“the disclosure of information is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue”*.

17. FCIS must also comply with the restrictions imposed by s 336E of the Migration Act regarding the disclosure of identifying information. Except in very limited circumstances relating to the need to prevent or lessen a serious and imminent threat to the life or health of a person,¹⁷ a person commits an offence if his or her conduct causes disclosure of identifying information when that disclosure is not a permitted disclosure.¹⁸ Section 336E(2) sets out a number of disclosures that are

¹¹ Australian Federal Police

¹² Australian Government Investigation Standards

¹³ Commonwealth Fraud Control Guidelines at [10.11]

¹⁴ Commonwealth Fraud Control Guidelines at [10.11]

¹⁵ Commonwealth Fraud Control Guidelines at [10.11]

¹⁶ Commonwealth Fraud Control Guidelines at [10.11]

¹⁷ Migration Act, s 336E(1A)

¹⁸ Migration Act, s 336E(1)

permitted. Among them is “... *a disclosure that ...is reasonably necessary for the enforcement of the criminal law of the Commonwealth or of a State or Territory*”,¹⁹ disclosure of certain personal identifiers to selected individuals in certain circumstances for the purposes of identifying or locating a person in connection with the administration of the Migration Act²⁰ and disclosure to the general public in similar circumstances.²¹

18. Allegations of serious or organised fraud alleged to have occurred in New South Wales are referred to FCIS. It investigates whether breaches of the Migration Act have occurred and, where it concludes that offences have been committed, prepares briefs of evidence for referral to the CDPP. Under the Commonwealth Fraud Control Guidelines issued by the Minister for Home Affairs,²² FCIS is regarded as a body with “... *the capacity and the appropriate skills and resources needed to investigate criminal matters and meet the requirements of the AFP and CDPP in gathering evidence and preparing briefs of evidence*”.²³ The consequence of that is that, unlike most agencies, it need not refer all instances of potential serious or complex fraud offences to the AFP in accordance with the AGIS and the AFP referral process. It may, instead, investigate allegations and, where it finds evidence of the commission of an offence, prepare a brief of evidence for referral to the CDPP.²⁴

19. On the basis of Ms Pettit’s written evidence, I find that FCIS makes a preliminary assessment of any allegation referred to it. It does so in order to determine whether an offence has occurred and whether, having regard to its resources and the Department’s priorities, there is a sufficient basis to warrant an investigation. The assessor decides whether to recommend that an investigation should proceed or that it should not and refers the recommendation to the manager of FCIS.

¹⁹ Migration Act, s 336E(2)(ea)

²⁰ Migration Act, ss 336E(2)(j) and 336FA

²¹ Migration Act, ss 336E(2)(k) and 336FC

²² *Financial Management and Accountability Regulations 1997*, r 16A(1). That regulation provides: “(1) The Minister for Home Affairs may issue guidelines (to be called **Fraud Control Guidelines**) about the control of fraud, dealing with fraud risk assessments, the preparation and implementation of fraud control plans and reporting of fraud.”

²³ Commonwealth Fraud Control Guidelines at [10.11]

²⁴ Commonwealth Fraud Control Guidelines at [10.11]

20. If the manager refers the matter to an investigator, that investigator prepares an Investigation Plan outlining the nature of the allegations, the nature of the offences and the persons suspected of being involved in the alleged offences, the evidence gathered to date and any additional evidence the investigator hopes to collect through investigation. Once the Investigation Plan has been approved, the investigation begins.

21. Methods of investigation that FCIS may choose to use in an investigation include obtaining and verifying documentary evidence and interviewing witnesses and persons suspected of having committed an offence. FCIS might also work with the AFP and with other State and Commonwealth agencies in gathering evidence.

22. Once an investigation has been concluded, the investigator submits a brief of evidence to the CDPP so that it may decide whether there is a reasonable prospect of securing a conviction should charges be laid.

General Skilled Migration Program

23. Under Part 2 of the Migration Act, the Minister may grant a non-citizen²⁵ permission either to travel to and enter Australia, to remain in Australia for a specified or indefinite period or to both travel and enter and remain. The permission is known as a “visa”.²⁶ A non-citizen who wants a visa must apply for a visa of a particular class.²⁷

24. Putting aside whether they also permit a person to travel to and enter Australia, there are two kinds of visas. One permits its holder to remain in Australia indefinitely and is known as a permanent visa.²⁸ The other permits its holder to remain in Australia during a specified period, until a specified event happens or while the holder has a specified status.²⁹ Visas may also be categorised into classes. There are prescribed classes of visas as well as those classes specified in particular sections

²⁵ A “non-citizen” means a person who is not an Australian citizen: Migration Act, s 5(1).

²⁶ Migration Act, ss 29(1), (2) and (3)

²⁷ Migration Act, s 45(1)

²⁸ Migration Act, s 30(1)

²⁹ Migration Act, s 30(2)

of the Migration Act.³⁰ The prescribed classes of visa are found in Schedule 1 of the *Migration Regulations 1994* (Regulations). Those classes of visa may be of a class for which provision is made in the Migration Act itself.³¹

25. Visas are sometimes referred to by reference to the types of skills that are a pre-condition to a person's being granted a visa. Visas permitting a person who has skills in one or more of a number of specified occupations who does not have an employer-sponsor are referred to as coming under GSMP. Applicants are assessed for eligibility for such a visa by reference to a Points Test. They must achieve a threshold score. Points are awarded for their English language skills, age, work experience and qualifications. Further points are awarded for work experience gained in Australia and qualifications gained from an Australian educational institution. Until February 2010, applicants under GSMP received further additional points if their occupation was included on a list maintained by the Department of Employment, Education and Workplace Relations (DEEWR). That list was known as the Migration Occupations in Demand List (MODL). Occupations on the list included information technology, engineering and accountancy together with cooking, hairdressing and hospitality. Since February 2010 when MODL was revoked, it has been replaced by a new list known as the Skilled Occupation List.

26. Before an applicant may apply for a visa under the GSMP, he or she must demonstrate that his or her skills have been assessed as suitable for their nominated occupation by the relevant assessing authority. When an applicant relies on cooking skills, the assessing authority is Trades Recognition Australia (TRA), which is part of DEEWR. In order to demonstrate that he or she has the requisite skills, knowledge and experience and that they meet Australian standards, the applicant will give TRA evidence of his or her qualifications and of his or her work experience. TRA assesses the evidence and decides whether the applicant's skills, knowledge and experience are equivalent to Australian standards.

³⁰ Migration Act, ss 31(1) and (2)

³¹ Migration Act, s 31(3)

Regulation of Australian education providers

27. In Australia, education providers who provide vocational education and training to overseas students are governed by the *Education Services for Overseas Students Act 2000* (ESOS Act). The effect of Part 2 of the ESOS Act is that all providers of education and training to overseas students must be registered on the Commonwealth Register for Institutions and Courses of Overseas Students (CRICOS). DEEWR and relevant State accreditation authorities regulate compliance with the ESOS Act. In New South Wales, the relevant State accreditation body is the Vocational Education and Training Association Board (VETAB). The Department, DEEWR and VETAB meet regularly to discuss matters of mutual concern.

Ms Pettit's involvement with Operation Dachshund

28. Ms Pettit was not responsible for Operation Dachshund but she did assist the officer then holding her current position of Manager Investigations, Ms Olga Wynne, and the Case Officer with principal responsibility for the investigation, Ms Alison Gibberd, with aspects of the investigation. On the basis of Ms Pettit's affidavit evidence, I find that both Ms Wynne and Ms Gibberd have left the Department. On the basis of her oral evidence, I find that Ms Gibberd left the Department in 2009. Also on the basis of her oral evidence, I find that Ms Pettit had led a team interviewing visa applicants when a team leader was absent overseas. She had interviewed one visa applicant as part of the investigation, helped others and sought legal advice for them.

29. In this section of my reasons, I will refer to the categories by reference to which the Department has grouped the documents. The same categories are referred to under the following section of my reasons when I group the claims for exemption by reference to the categories of documents in dispute. I have also set the categories out in numerical order in the attachment to these reasons.

Operation Dachshund

A. The allegations

30. I accept the evidence of Ms Pettit regarding the manner in which Operation Dachshund was conducted and the focus of its investigation. I do so for

three reasons. The first is that there is no evidence that contradicts her evidence or calls it into question. The second is that it is not inherently implausible or illogical. The third is that it has not been queried by the applicant either in cross examination of Ms Pettit or, if it were feasible, by leading other evidence that throws doubt upon it. That Mr Twigg did not do so on behalf of Mr Lobo is probably a consequence of its not being inherently implausible or illogical. The fourth is that it is a subject on which Ms Pettit has demonstrated her knowledge and basis for her having that knowledge.

31. On the basis of Ms Pettit's evidence, I find that, in late 2005 and early 2006, the Department received a series of allegations regarding SCIB and two unregistered migration agents. In some instances, they were made anonymously but not so in others. The allegations were to the effect that they were providing false qualifications that could be used by visa applicants under GSMP. Specific examples of the allegations made are:

- (1) A member of the public alleged that an unregistered migration agent was charging visa applicants, who had not been students at SCIB, a sum between \$10,000 and \$20,000 to obtain certificates SCIB to the effect that they had completed cookery courses at the college. The allegation was made to the Department's Student Compliance Section on 20 April 2006.
- (2) An unnamed source alleged that two students, who did not study at SCIB, had applied for visas under GSMP after paying their migration agent approximately \$30,000 for certificates in cookery from SCIB. The allegation was made to FCIS on 30 May 2006.
- (3) An anonymous source alleged that students at SCIB were able to buy its certificates from migration agents without attending the course. The allegation was made to the Department's Business Centre in early June 2006 and then referred to its Student Compliance Section.

Documents concerning all allegations of this sort are grouped under *Categories 5* and *7*.

32. At or about the same time that the Department was receiving allegations of this sort, it was also receiving other allegations about the conduct of the unregistered migration agents who were alleged to be involved in some way in the purchase of SCIB certificates. Allegations included:

- (1) Allegations that they, as unregistered migration agents, were giving migration assistance for a fee contrary to ss 280 to 284³² of the Migration Act. Documents concerning all allegations of this sort are grouped under **Category 8**.
- (2) An allegation was made to the Migration Agents Registration Authority by a solicitor representing a visa applicant in the Federal Court. The allegation was to the effect that the visa applicant, had paid one of the unregistered migration agents approximately \$40,000 for immigration assistance including enrolment fees at the Sydney International College. Documents concerning all allegations of this sort are grouped under **Category 6**.

B. Initial response to, and investigation of, the allegations

33. The Department's Adelaide based Skilled Processing Centre (ASPC) is responsible for processing all visa applications under GSMP. As a result of the Department's having received allegations of this sort, ASPC decided to review 71 Skilled Independent Overseas Student visa applications that had been based on a trade qualification from SICB. It allocated the task to its Integrity Branch also based in Adelaide (AIB). On 27 June 2006, AIB completed a preliminary report in which it identified what it saw as a number of inconsistencies and irregularities in the 71 applications. It recommended that investigators visit the premises of SICB to establish the authenticity of the qualifications. AIB's report is grouped under **Category 3** together with its later reports.

34. That recommendation was adopted and implemented on 27 July 2006 when investigators visited the offices of SICB. They asked SICB for verification of the cookery certificates that had been presented to the Department by 108 visa applicants under GSMP and purported, on their face, to have been issued. Some days later, on 3 August 2011, they were sent 108 certificates by facsimile. The certificates bore consecutive numbers and the order of those numbers matched the order in which the names of the 108 visa applicants appeared on the list.

35. On 15 September 2006, Ms Alison Gibberd of FCIS prepared an assessment of the allegations against the unregistered migration agents and SICB. She recommended that the matter be allocated to the investigator for a complete investigation on the basis that the allegations appeared to involve organised fraud

³² In outline, these sections restrict those who may, and circumstances in which, immigration assistance may be given and immigration representations made.

against the GSMP. Ms Gibberd's assessment and other documents relating to the conduct of the investigation are grouped under *Category 23*.

36. In the meantime, AIB had completed its assessment of the 108 certificates sent to it by SICB. On 29 September 2006, AIB issued a report which included the following two recommendations. The first was that thought be given to interviewing each of the 108 visa applicants as part of an assessment of the genuineness of their qualifications from SICB. The second was that there be a further visit to SICB to determine whether it had in place the relevant infrastructure, skills and resources to ensure that its students were trained to an appropriate level. The AIB's report is grouped under *Category 3*.

37. Between the time AIB issued its report and February 2007, the Department received further allegations regarding the unregistered migration agents and SCIB. AIB identified a further 162 cases of concern so that there were now 270 cases of concern in all. It issued a further report in February 2007 to the effect that the scale of the potential fraud was now too large to be dealt with administratively. It needed to be dealt with as a criminal investigation. Again, AIB's report is grouped under *Category 3*.

38. At or about the same time, ASPC decided that it would no longer process applications that appeared to have any links to the unregistered migration agents or to SICB. Instead, it would refer them to FCIS.

C. Preparation and approval of an Investigation Plan

39. On 23 April 2007, Ms Gibberd and Ms Wynne prepared an Investigation Plan summarising the allegations made against the unregistered migration agents and SCIB, identified the offences of which they were suspected of having committed and set out options that would enable FCIS to work with the AFP in gathering evidence for the purpose of the investigation. The Investigation Plan was submitted to the Deputy Director of the Department's State Office in New South Wales for approval. This was an unusual step for most Investigation Plans were submitted to the Manager of FCIS for approval. Operation Dachshund, though, was regarded by the Department as an investigation that would be on a scale not

previously undertaken. After the Investigation Plan was approved, an investigation team was formed.

40. The Investigation Plan had two focal points. One concerned the activities of Mr Lobo and of SICB. The other concerned the activities of the two unregistered migration agents. The Investigation Plan and its approval are grouped under *Category 23*.

D. Gathering evidence

41. On 29 May 2007, FCIS formally asked the AFP for its assistance in the investigation. The request is grouped under *Category 23*. That assistance took the form of the AFP's executing search warrants at the offices of SCIB and those of two unregistered migration agents as well as at Mr Lobo's home. The search warrants had been issued under s 3E of the *Crimes Act 1914* (Crimes Act). Section 3E provides that an issuing officer, and so a magistrate, Justice of the Peace or other person authorised to issue search warrants or warrants for arrest,³³ may issue a warrant to search premises if satisfied that there are reasonable grounds for suspecting that there is or, within the next 72 hours, will be evidential material at the premises. The issuing officer decides whether he or she is satisfied of that on the basis of information given on oath. Copies of the warrants and the affidavit in support of the application for them are grouped under *Category 24*.³⁴

42. The AFP executed the search warrants on 25 June 2007 with the assistance of investigators from FCIS, including Ms Pettit. They were executed simultaneously at the offices of SICB and of the two unregistered migration agents. Evidence was seized. Later in the day, a search warrant was executed at Mr Lobo's home. The FCIS investigators and AFP officers involved made statements regarding the day's events. These are grouped under *Category 26*.³⁵

43. Following the execution of the search warrants, officers in FCIS logged and copied the documents and electronic material seized under the warrants. Mr Lobo was given a copy of the documents and electronic material seized from his

³³ Crimes Act, s 3C(1)

³⁴ Category 24 documents are no longer in dispute between the parties.

³⁵ Category 26 documents are no longer in dispute between the parties.

home and from SICB. The officers then reviewed the material and began to interview witnesses. Among the witnesses were many visa applicants who had submitted qualifications from SICB in support of their applications for a visa. Current and former students and staff of SICB were also interviewed. Interviews extended over several months. Witnesses were first contacted by telephone and then interviewed in person either at their homes or places of work or, failing that, at the Department's premises. Interviews were conducted on the understanding that they were confidential and that the information provided would be used only for the purpose of the investigation or any prosecution that might follow from it. Some of those interviewed told investigators that they did not want their names disclosed to Mr Lobo. Witness statements are grouped under *Category 18*.

44. Part of FCIS's efforts were directed to investigating whether applicants had obtained accreditation for their qualifications from TRA by fraudulent means. Officers spoke with the owners of the businesses where the work experience was said to have been gained and visited their premises. They did so in order to verify the accuracy or otherwise of the information that various visa applicants had given to the TRA in support of their applications for a skill assessment and regarding their work experience. A number of business owners made statements. The documents relating to this part of the investigation are grouped under *Categories 11³⁶* and *16*.

45. Officers interviewed six visa applicants who were found to have provided false work references to the TRA and another four who had not genuinely obtained their qualifications. Others were invited to an interview but declined and withdrew their visa applications. Where visa applications were found to be supported by genuine qualifications and the work experience had been verified, they were returned to ASPC for processing.

46. As part of the investigation, all information had to be verified regardless of whether it was provided by suspects, witnesses or third parties of any description. Documents relating to those searches are grouped under *Category 19* as are those relating to enquiries made by FICS of the immigration authorities in the United States of America (USA) about Mr Lobo. At times, verification required

³⁶ Category 11 documents are no longer in dispute between the parties.

company and business name searches to be conducted. Documents relating to those searches are grouped under **Category 22**.³⁷ Investigations were also made into a company of which Mr Lobo was the Managing Director, Data Generale Pty Ltd. That company had sponsored a number of staff to come to Australia under GSMP. FCIS made enquiries of the immigration authorities in the USA regarding Mr Lobo. Documents relating to this aspect of the investigation are grouped under **Category 14**.³⁸

47. Documents relating to the investigation of the allegations relating to SICB and Mr Lobo are grouped under **Category 9**. Those concerning the unregistered migration agents are grouped under **Category 10**.³⁹

H. Steps taken by TRA and VETAB

48. In June 2006, the Department learned of further allegations about SICB and the unregistered migration agents when it met with TRA and VETAB at one of their regular meetings. These allegations had been made directly to either DEEWR or VETAB. Documents relating to the discussions among the three agencies are grouped under **Categories 17 and 18**.

49. FCIS notified DEEWR that some visa applicants who had presented suspect qualifications from SICB had also presented qualifications which were suspect and which appeared to have been given by other education providers. Documents relating to communications between FCIS and DEEWR are grouped under **Category 16**.

50. On 17 October 2007, VETAB advised FCIS that it had suspended SICB's approval under the ESOS Act for a number of courses relating to Hospitality (including Cookery), Hospitality management and Hairdressing. As a consequence, SICB was prohibited from recruiting or enrolling overseas students in these courses. Four months later, on 18 February 2007, VETAB cancelled SICB's approval and registration as a Registered Training Organisation under the ESOS Act. VETAB's

³⁷ Category 22 documents are no longer in dispute between the parties.

³⁸ Category 14 documents are no longer in dispute between the parties.

³⁹ Category 10 documents are no longer in dispute between the parties.

decisions were affirmed by the New South Wales Administrative Decisions Tribunal when it reviewed them on 7 July 2008.

I. Reports on FCIS's investigation

51. Throughout its investigation, FCIS reported regularly on its progress. It made those reports to the Department's management. Within FCIS, Operation Dachshund was recorded on its Manager's Case Management Board List, which was updated monthly. That List records all current investigations, their status and the issues each raises. Extracts from that List are grouped under **Category 25**.

52. The Department maintains a Sensitive Cases Report regarding investigations and prosecutions relating to its programmes. Operation Dachshund is included in that report. It is also included in the list of fraud and investigations prepared by Investigations in the Department's National Office and used to brief the Minister. These documents are grouped under **Category 27**.

J. The Department's reports and briefings arising from Operations Dachshund

53. If there is media interest in its investigations, the Department prepares an Incident Report summarising the likely interest and summarising the status of the investigation. Incident Reports were prepared in relation to:

- (1) a story broadcast on 8 October 2007 on *Today Tonight* regarding unregistered migration agents and mentioning one of the unregistered migration agents under investigation in Operation Dachshund;
- (2) articles published on 28 November and 5 December 2007 in *The Australian* newspaper regarding SICB and Mr Lobo and mentioning that SICB was being investigated in relation to the sale of qualifications to foreign students applying for General Skilled Migration visas;
- (3) an article published on 9 January 2008 in the *Sydney Morning Herald* regarding allegations against SICB; and
- (4) the suspension and later cancellation of SICB's approval and registration as a Registered Training Organisation under the ESOS Act.

Incident reports are grouped under **Category 4**.⁴⁰

⁴⁰ Category 4 documents are no longer in dispute between the parties.

54. The Department also prepared an Information Brief for the Minister regarding Operation Dachshund and a list of questions he might be asked in Parliament (PPQs). These documents are grouped under *Categories 1* and *2*.

K. Conclusion of the investigation

55. Following FCIS's investigation, it submitted seven briefs of evidence to the CDPP between May and July 2009:

- (1) Four of the briefs concerned visa applicants who were alleged to have presented false qualifications in support of their visa applications. The Department recommended that charges be laid against each under ss 234(1)(a) and (b)⁴¹ of the Migration Act and Division 137⁴² of the *Criminal Code Act 1995* (Criminal Code).
- (2) Two briefs concerned unregistered migration agents. They recommended that charges be laid against each under ss 280(1)⁴³ and 281(1)⁴⁴ of the Migration Act as well a further charge under s 284(1)⁴⁵ against one of them.
- (3) One brief of evidence concerned Mr Lobo. The Department recommended that charges be laid against him under s 300(2) of the *Crimes Act 1900* (NSW) (Crimes Act).⁴⁶ Following discussions between the Department and the CDPP, the Department withdrew this brief of evidence. In its place it submitted another recommending that charges be laid against Mr Lobo under s 300(1)⁴⁷ of the Crimes Act.

⁴¹ Among other things and in summary, s 234(1)(a) prohibits a person from presenting a forged or false document to a person performing functions under the Migration Act in relation to a visa application. Section 234(1)(b) prohibits the making of a false or misleading statement in the same circumstances when the statement is, to the person's knowledge, false or misleading in a material particular.

⁴² Division 137 of the Criminal Code establishes offences relating to false or misleading information or documents.

⁴³ "Subject to this section, a person who is not a registered migration agent must not give immigration assistance." In summary, "a person gives **immigration assistance** if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant ...": Migration Act, s 276(1)

⁴⁴ "Subject to subsection (3), a person who is not a registered migration agent must not ask for or receive any fee or other reward for giving immigration assistance." That section does not prohibit a lawyer from asking for or receiving a fee for giving immigration legal assistance or for another asking for or receiving a fee for a lawyer's giving immigration legal assistance. "Immigration legal assistance" is given by a lawyer within the meaning of s 277.

⁴⁵ "Subject to this section, a person who is not a registered migration agent must not advertise that he or she gives immigration assistance." Exceptions are made in relation to Parliamentarians, lawyers and officials acting as officials: Migration Act, ss 284(2), (3) and (4).

⁴⁶ At the time the brief of evidence was given, s 300(2) specified an offence where "A person uses an instrument which is, and which the person knows to be, false, with the intention of inducing another person: (a) to accept the instrument as genuine, and (b) because of that acceptance, to do or not do some act to that other person's, prejudice, is liable to imprisonment for 10 years."

⁴⁷ "A person who makes a false instrument, with the intention that he or she, or another person, will use it to induce another person: (a) to accept the instrument as genuine, and (b) because of that acceptance, to do or not do some act to that other person's, or to another person's, prejudice, is liable to imprisonment for 10 years."

The brief of evidence also recommended that charges be laid against him under s 110 of the ESOS Act.⁴⁸

56 The Department prepared reports regarding the remaining 266 visa applicants whose circumstances were not referred to the CDPP. In relation to some of those, the investigators concluded that they had provided genuine documents. In relation to others, it decided that administrative action was more appropriate than prosecution. Consequently, the relevant reports were referred to the Departmental officer or officers in ASPC responsible for making decisions on the visa applications. They are grouped under *Category 12*.

L. Action by the CDPP

57. The CDPP subsequently issued a Court Attendance Notice⁴⁹ specifying the offence alleged and its particulars and requiring each of the four visa applicants to attend court. It did not issue a Court Attendance Notice to Mr Lobo and subsequently, on 19 July 2010, notified the Department that it would not proceed with charges against him. In so far as the charges against Mr Lobo were concerned, the CDPP had decided that it did not regard the evidence as sufficient to prove the fault elements of the offences, which I have set out in [55(3)] above.

DECISION

58. For the reasons I have given, I have decided:

- (1) in relation to those documents or parts of documents which have been marked as “*Exempt*” under one or more of the exemptions listed in Attachment J to these reasons being:
 - (a) *Category A documents* 1-798, 853 and 977; 5-152, 153, 238, 728, 737, 745, 762 and 991; 6-346; 7-139, 597, 509, 596 and 1019; 9-87, 553, 564, 571, 577, 579, 620, 635, 640, 643, 644,

⁴⁸ “(1) A person is guilty of an offence if: (a) the person intentionally provides, purports to provide or offers to provide a course to overseas students; and (b) the course is not genuine; and (c) in engaging in the conduct mentioned in paragraph (a), the person intends to facilitate, or is reckless as to facilitating, a breach of one or more conditions of any of the students’ visas (whether or not a breach in fact occurs).

Maximum penalty: Imprisonment for 2 years, 100 penalty units or both.

(2) The fault element for paragraph (1)(b) is knowledge.

(3) For the purposes of subsection (1), a course is not genuine if it is provided without serious regard to reasonable standards of education or training (including standards relating to attendance and participation by students) or if the course is a sham.”

⁴⁹ Criminal Procedure Act 1986 (NSW), s 175

723, 731, 734 and 1029; 12-112, 962 and 963; 13-98 and 99; 15-1018; 16-894 and 956; 23-140, 321 and 285;

- (b) **Category C documents** 6-399 and 1001; 7-523 and 1016; 9-53, 469, 472, 482, 483, 485, 527, 547, 549, 570, 650, 692, 693, 1017 and 1020; 18-60, 64, 65, 70, 78, 81, 82, 83, 84, 85, 263, 1023, 1074, 1083, 1084 and 1089; and
- (c) **Category D documents** 19-401, 1054, 1055, 1056, 1057, 1058, 1059 and 1060;

to affirm the decision.

- (2) in relation to those documents or parts of documents considered under only one exemption and marked as “**Not exempt**” in relation to that exemption listed in Attachment J to these reasons being:
 - (a) **Category B Documents** 9-267, 271, 290, 322 and 1009; 9-486, 662 and 1099; 16-397 and 1062; 16-870; 19-231, 214; 272 and 376; 23-140, 321 and 285; and
 - (b) **Category C documents** 9-550 and 18-261;
to
 - (c) set aside the decision under review in relation to those documents or parts of the documents; and
 - (d) substitute a decision that those documents or those parts of the documents are not exempt from disclosure under the *Freedom of Information Act* 1982;
- (3) in relation to those documents or parts of documents marked as “**Adjourned ...**” under one of more of the exemptions listed in Attachment J to these reasons being:
 - (a) **Category A documents** 5-152, 153, 238, 728, 737, 745, 762 and 991; 7-139, 333, 344, 597, 636, 763, 864, 739, 741, 865, and 998; 9-475, 608, 209, 695, 725, 760, 898, 900, 556, 577, 620, 640, 643, 723, 731 and 1029; 17-286, 287 and 997; 23-140 and 321; and
 - (b) **Category C documents** 9-1017 and 1020; 18-25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76;
- (4) in relation to documents 9-859, 875 and 876 in **Category A**, affirm the decision to delete the material under s 22 of the *Freedom of Information Act* 1982; and
- (5) this decision is not to come into operation until the expiration of the time specified in s 44(2A) of the *Administrative Appeals Tribunal Act* 1975 as the time within which a person may appeal to the Federal Court of Australia against this decision.

ATTACHMENT A

THE DOCUMENTS and EXEMPTIONS

59. Apart from the three documents (Documents 859, 875 and 876) said to be “*exempt*” under s 22(1)(a)(ii) on the basis that they are irrelevant to the request, the remaining 151 documents in dispute before the beginning of the hearing fell into four categories. A brief description of the type of information appearing in each of the four categories, an indication of the essence of the exemptions claimed in respect of all or parts of the documents in each category, the number of documents in issue and the particular documents which are claimed to be exempt in each category appears in the following table. It is based on my examination of the documents together with the categorisation of documents shown in the affidavit of Ms Pettit⁵⁰ and Attachment A to the Department’s written submissions as amended at the hearing and confirmed subsequently by the lodgement of a further copy on 20 January 2011.

<u>CATEGORY A DOCUMENTS</u>				
<u>Broad categorisations of documents</u>		<u>Exemptions</u>	<u>Number of documents claimed as exempt in full or in part</u>	
<i>Documents containing information identifying witnesses, Departmental informants and other third parties</i>		s 37(1)(b) – confidential source	47 (exemption claimed for parts)	
		s 40(1)(d) – proper and efficient conduct of operations	18 (exemption claimed for all)	
		s 41(1) – personal information		
<u>Sub-categorisation of Category A documents</u>				
<i>Sub-categorisation</i>	<i>Description of category of document</i>	<i>Documents claimed exempt in part</i>	<i>Documents claimed exempt in full</i>	
1	PPQs	798, 853, 977		
5	Initial allegations against SICB	152, 153, 238, 728, 737, 745, 762, 991		
6	Allegations re “Sydney International College”	346		
7	Other allegations against SICB	139, 333, 344, 597, 636, 739, 741, 763, 864, 865, 998	509, 596, 1019	
9	Documents created as part of investigation into SICB	475, 564, 571, 577, 608, 620, 640, 643, 644, 723, 859, 1029	87, 209, 553, 556, 579, 635, 695, 725, 731, 734, 760, 898, 900	
12	DIAC investigation reports	112, 962, 963		
13	Third party personal information	98, 99		
15	Communications with VETAB	1018		
16	Communications with DEEWR	956	894	
17	Communications with VETAB and DEEWR	286, 287, 997		

⁵⁰ Exhibit 2, Attachment A

	23	Investigation plans	140, 321	285	
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<u>CATEGORY B DOCUMENTS</u>					
<u>Broad categorisations of documents</u>		<u>Exemptions</u>	<u>Number of documents claimed as exempt in full or in part</u>		
Documents disclosing methods for preventing, detecting, investigating or dealing with breaches of the law		s 37(2)(b) – lawful methods of investigation etc	7 (exemption claimed for parts) 8 (exemption claimed for all)		
<u>Sub-categorisation of Category B documents</u>					
	<u>Sub-categorisation</u>	<u>Description of category of document</u>	<u>Documents claimed exempt in part</u>	<u>Documents claimed exempt in full</u>	
	9	Documents created as part of investigation into SICB	267, 271, 290, 322, 1009	486, 662, 1099	
	16	Communications with DEEWR	397, 1062	870	
	19	Information requests		213, 214, 272, 376	

<u>CATEGORY C DOCUMENTS</u>			
<u>Broad categorisations of documents</u>		<u>Exemptions</u>	<u>Number of documents claimed as exempt in full or in part</u>
Documents containing information provided solely for the purposes of the Department’s investigation and/or on the basis that it would remain confidential		s 37(1)(b) – confidential source s 40(1)(d) – proper and efficient conduct of operations s 41(1) – personal information s 45(1) – breach of confidence	63 (exemption claimed for all)
<u>Sub-categorisation of Category C documents</u>			
<i>Sub-categorisation</i>	<i>Description of category of document</i>	<i>Documents claimed exempt in part</i>	<i>Documents claimed exempt in full</i>
6	Allegations re “Sydney International College”		399, 1001
7	Other allegations against SICB		523, 1016
9	Documents created as part of investigation into SICB		53, 469, 472, 482, 483, 485, 527, 534, 547, 549, 550, 570, 650, 692, 693, 1017, 1020
18	Witness statements and related documents		25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76 60, 64, 65, 70, 78, 81, 82, 83, 84, 85, 261, 263, 1023, 1074, 1083, 1084, 1089

<u>CATEGORY D DOCUMENTS</u>					
<u>Broad categorisations of documents</u>		<u>Exemptions</u>	<u>Number of documents claimed as exempt in full or in part</u>		
Correspondence with the US State Department		s 33(1)(a)(iii) – international relations s 33(1)(b) – confidential communications with foreign government	8 (exemption claimed in full)		
<u>Sub-categorisation of Category D documents</u>					
	<i>Sub-categorisation</i>	<i>Description of category of document</i>	<i>Documents claimed exempt in part</i>	<i>Documents claimed exempt in full</i>	
	19	Information requests		401, 1054, 1055, 1056, 1057, 1058, 1059, 1060	

ATTACHMENT B

EXEMPTION: section 33(1)(a)(iii)

The exemption

60. Section 33(1)(a)(iii) provides that:

“A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:*
 - (i) ...*
 - (ii) ...*
 - (iii) the international relations of the Commonwealth.”*

A. “would, or could reasonably be expected to”

61. I must first consider when disclosure of a document under the FOI Act “would, or could reasonably be expected to” have the outcome identified in s 33(1)(a)(iii) i.e. “damage ... to the international relations of the Commonwealth.” Without having regard to previous authority interpreting the expression, it suggests that the evidence must either establish that disclosure must as a logical or necessary consequence have the ability to cause that damage (so that it “would” do so) or that there is a sensible or rational basis for thinking that the damage is likely to be a consequence. The word “could” is “used to express a possibility”.⁵¹ That is also inherent in the word “expect” which means “to think of something as likely to happen or come ...”.⁵² It is more nebulous than the word “would”, which is used “to express a probability”,⁵³ but it is not without its constraints. The word “reasonably” anchors possibility and expectation in what “could ... be” securely to what is “sensible; rational; showing reason or good judgment ... [and] in accordance with reason”.⁵⁴

62. What of the authorities? There are several for the expression “would, or could reasonably be expected to” appears in other provisions of the FOI Act. I will begin with the expression “could reasonably be expected to”. The Full Court of the Federal Court considered that expression in *Attorney-General’s Department v*

⁵¹ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

⁵² Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

⁵³ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

⁵⁴ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

*Cockcroft*⁵⁵ when it considered s 43(1)(c)(ii) of the FOI Act. That provision exempts from disclosure that information which concerns certain business or professional matters and which “*could reasonably be expected to*” prejudice the future supply of information to the Commonwealth or an agency for the administration of a law or the administration of matters administered by an agency. Bowen CJ and Beaumont J said:

“ In our opinion, in the present context, the words ‘could reasonably be expected to prejudice the future supply of information’ were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (see *Kioa v Minister for Immigration & Ethnic Affairs* (1985) 62 ALR 321 per Gibbs CJ and Mason J).”⁵⁶

63. In that case, Sheppard J made it clear that:

“... stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.”⁵⁷

64. *Cockcroft*’s case was considered by the Full Court of the Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another*.⁵⁸ It said:

“In the application of s 43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable.”⁵⁹

⁵⁵ (1986) 64 ALR 97

⁵⁶ (1986) 64 ALR 97 at 106

⁵⁷ (1986) 64 ALR 97 at 112

⁵⁸ (1992) 108 ALR 163; 36 FCR 111

⁵⁹ (1992) 108 ALR 163; 36 FCR 111 at 176; 123

65. While I realise that s 33(1)(a)(iii) uses the expression “*would, or could reasonably be expected to*” (emphasis added) to describe the outcome of disclosure, I will look also to the authorities that have considered the expression “*could be reasonably likely*” (emphasis added). I will do so for to “*expect*” is to “*to think of something as likely to happen...*” and both the expectation and the likelihood must be reasonably based.

66. I note that one of the earliest authorities to consider the word “*likely*” was *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd*⁶⁰ (*Krieg*) decided by Bray CJ. His Honour considered the meaning of the word “*likely*” in the context of whether an employee of the respondent had reasonable cause to believe that the doing of certain work was likely to interfere with or damage property under the control of the Postmaster-General. Bray CJ said, in part:

“ As I have said, the ordinary and natural meaning of the word is synonymous with the ordinary and natural meaning of the word ‘probable’ and both words mean ... that there is an odds-on chance of the thing happening. That is the way in which statutes containing the words have usually been construed: see, for example, *Re Bayer Products Ltd’s Application* [1947] 2 All ER 188, per Lord Green M.R. at p.191, per Asquith L.J. at p. 193” *Dowling v South Canterbury Electric Power Board* [1966] N.Z.L.R. 676, *Transport Ministry v. Simmonds* [1973] 1 N.Z.L.R. 359. Particularly is this so when the statute is a penal statute (see *Transport Ministry v Simmonds* [1973] 1 N.Z.L.R. 359), or, I think, where, as here, an additional liability in tort beyond the common law liability is being imposed.

*I think that is the meaning which should be attached to the word ‘likely’ in sub-s. (1)(a). It is the natural and ordinary meaning and there is nothing to show that another meaning was intended. Like the learned Special Magistrate, therefore, I think that ‘likely’ in the sub-sections means ‘probable’ and I think that that means that there is a more than fifty per cent chance of the thing happening.”*⁶¹

67. In *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union and Others*⁶² (*Tillmanns Butcheries*) the Full Court of the Federal Court considered whether certain conduct had the likely effect of causing substantial loss or damage to the business of the appellant in the context of the *Trade Practices Act 1974*. Bowen CJ, with whom Evatt J agreed, reviewed the authorities but was not

⁶⁰ (1976) 14 SASR 303; 27 FLR 400

⁶¹ (1976) 14 SASR 303; 27 FLR 400 at 312-313; 410

⁶² (1979) 27 ALR 367; Bowen CJ, Evatt and Deane JJ

prepared to prefer one interpretation of “likely” to another. Deane J reviewed the authorities and concluded:

*“The conclusion which I have reached is that, in the context of s 45D(1), the preferable view is that the word ‘likely’ is not synonymous with “more likely than not” and that if relevant conduct is engaged in for the purposes of causing loss or damage to the business of the relevant corporation, it will suffice, for the purposes of the sub-section, if that conduct is, in the circumstances, such that there is a real chance or possibility that it will, if pursued, cause such loss or damage. Whether or not such conduct is likely (in that sense) to have that effect is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances. In determining the answer to that question, it will be relevant that the persons engaging in the conduct did so with the purpose of causing such loss or damage.”*⁶³

68. Franki J in *Trade Practices Commission v TNT Management Pty Ltd*⁶⁴ was concerned with the meaning of the words “is likely to have” in connection with the words “significant effect on competition” as they appeared in s 45(4) of the *Trade Practices Act 1974*. His Honour’s consideration took place in the context of penal proceedings brought under that Act. He canvassed previous authorities and said

*“In my opinion, it is desirable to note the warning given by Bowen CJ in Tillmanns Butcheries Pty Ltd v Australasian Meat Employees’ Union (supra), and not to place a gloss on the section by preferring one meaning of ‘likely’ rather than another if that is not necessary for the determination of a particular case. If, however, I am required to adopt a view, I consider that the word in s 45(2) now under consideration is to be read with due regard to the fact that it appears in a penal statute, that it is linked with the word ‘significant’ and that this means that, whilst the meaning need not be restricted to a situation where the odds are greater than equally balanced or somewhat less than equally balanced, the probability must be something not very far short of ‘more probably than not’, except in unusual circumstances ...”*⁶⁵

69. The *Tillmanns Butcheries* case was again referred to by the High Court in *Boughey v The Queen*⁶⁶ (*Boughey*). The High Court considered s 157(1) of the *Tasmanian Criminal Code* which provided that culpable homicide was murder if committed, inter alia, by means of an unlawful act or omission which the person

⁶³ (1979) 27 ALR 367 at 382

⁶⁴ (1985) 6 FCR 1

⁶⁵ (1985) 6 FCR 1 at 49

⁶⁶ (1986) 161 CLR 10; Gibbs CJ, Mason, Wilson and Deane JJ, Brennan J dissenting

“... knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person”. Gibbs CJ said

*“It is trite to say that the meaning of a word will be influenced by the context in which it appears. In my opinion the word ‘likely’ in ss.156 and 157 of the Criminal Code Act means ‘probable’ and not ‘possible’. That is its natural meaning. It is the meaning which a draftsman, familiar with the common law rules regarding malice aforethought, might be expected to attribute to it. In any case, if the expression were thought to be ambiguous, the doubt should be resolved in favour of the liberty of the subject. If ‘likely’ in s.157(1)(c) were regarded as meaning ‘possible’, that provision would have a very drastic operation, since it would treat as murder a culpable homicide caused by any unlawful act which the offender knew would possibly cause death. A death in those circumstances might understandably be regarded as manslaughter, but it would be Draconian to call it murder.”*⁶⁷

70. Mason, Wilson and Deane JJ referred to previous authorities, including *Tillmanns Butcheries*, and concluded that, in their view, the word “likely” was used with what they:

“... apprehend(ed) to be its ordinary meaning, namely, to convey the notion of a substantial – a “real and not remote” - chance regardless of whether it is less or more than 50 per cent: cf Sheen v Fields Pty Ltd (51 ALR 345 at 348) and Waugh v Kippen (1986) 160 CLR 156 at pp166-167.

There is a further reason why one should not superimpose upon the word ‘likely’ in either s.156(2) or s.157(1) of the Code refinements of meaning which the word does not convey as a matter of ordinary language. A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement. History would indicate that the codifier will never achieve the clarity and completeness which would obviate any need for subsequent interpretation or commentary: see Jolowicz, Historical Introduction to the Study of Roman Law (1939), pp.491-492; Gray, The Nature and Sources of the Law (1909), pp.176-177. The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty. To bury the word ‘likely’ in s.157(1) of the Code beneath the gloss of ‘more likely than not’ and the explanation of ‘a more than 50 per cent’ or an ‘odds on’ chance would be to succumb to that danger. It would also, in our view, be to attribute to the word ‘likely’ a requirement of a specific degree of mathematical probability which the word does not convey

⁶⁷ (1986) 161 CLR 10 at 14-15

*either as a matter of ordinary language or in its context in s.157(1) of the Code.”*⁶⁸

71. Both *Tillmanns Butcheries* and *Boughey*’s case were referred to by Gummow J in *Poignand v NZI Securities Australia Ltd and Others*.⁶⁹ The case concerned, in part, the standing of unit holders to bring a representative action seeking damages, declaratory relief, an injunction and certain other orders. Their action was brought under Part IVA of the *Federal Court of Australia Act 1976* and required consideration of s 87(1A) of the *Trade Practices Act 1974*. Sub-section 87(1A), wrote Gummow J:

“... authorises applications of persons who have suffered or are ‘likely to suffer’ loss or damage by conduct of another person that was engaged in contravention of the relevant provisions of the TP Act. The phrase ‘likely to’ is susceptible of various meanings, and takes its colour from the statutory context. It may indicate a degree of contingency falling short of probability. This and other shades of meaning are discussed in Boughey v R (1986) 161 CLR 10; 65 ALR 609, in the context of s 157(1) of the Criminal Code (Tas).

One evident purpose of the inclusion of the phrase ‘likely to suffer loss or damage’ in s 87(1A) is to afford the opportunity to an applicant to move quia timet by analogy to the obtaining of injunctive relief against the commission of apprehended wrongs. Section 87(1A) is expressed as being without limit to the generality of s 80. The power of the court to grant prohibitory or mandatory injunctions may be exercised whether or not there is an imminent danger of substantial damage to any person: see s 80(4), (5).

In Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union (1979) 27 ALR 367; 42 FLR 331 at 346-8, in a passage referred to in Boughey at CLR 20, Deane J discussed the sense to be given to ‘likely’ in s 45D of the TP Act. His Honour held that it would suffice for the purposes of that provision if the conduct in question was such that, in the circumstances, there was a real chance or possibility that if pursued it would cause loss or damage.

*As matters stand on the present motion, I accept the submission by the applicant that there is a real chance or possibility that the unit holders are likely to suffer loss or damage by the conduct complained of against the respondents. It may be that some lesser degree of contingency will suffice for s 87(1A) and for s 45D. But that is a question for another day.”*⁷⁰

His Honour did not need to consider the matter further for he found that the applicants had already sustained loss or damage.

⁶⁸ (1986) 161 CLR 10 at 21-22

⁶⁹ (1992) 37 FCR 363; 109 ALR 213

⁷⁰ (1992) 37 FCR 363; 109 ALR 213 at 371; 222

72. I note that, in *Department of Agriculture and Rural Affairs v Binnie*⁷¹ (Binnie), Marks J, with whom Young CJ and Teague J agreed, considered s 31(1)(e) of the *Freedom of Information Act 1982* (Vic). It provided that a document is an exempt document if its disclosure under that Act “*would, or would be reasonably likely to ... endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.*” Marks J concluded:

“ The expression ‘reasonably likely’ is substantially idiomatic, its meaning not necessarily unlocked by close dissection. In its ordinary use, it speaks of a chance of an event occurring or not occurring which is real – not fanciful or remote. It does not refer to a chance which is more likely than not to occur, that is, one which is ‘odds on’, or where between nil and certainty it should be placed. A chance which in common parlance is described as ‘reasonable’ is one that is ‘fair’, ‘sufficient’ or ‘worth noting’. It is not inapt to attribute such meaning to the expression in s. 3(1) of the Act.”⁷²

73. Although not directly in issue in the case, this interpretation did not find favour with a later Victorian Court of Appeal. In *RJE v Secretary to the Department of Justice and Others*,⁷³ Maxwell P and Weinberg JA preferred the view of Bray CJ in *Krieg*.⁷⁴

74. I have referred to Supreme Court and Court of Appeal authorities to illustrate the difficulties that courts have found in trying to explain the task that faces anyone who wants to assess what “*could reasonably be expected to*” happen in certain circumstances. Adapting the words of Marks J, there is a lot to be said for the view that the nature of the task is “*... not necessarily unlocked by close dissection*” but I cannot adopt that approach. I am bound to apply the law. In particular, I am bound by the relevant legislative provisions and, where they have been interpreted by the Federal Court and the High Court, by those authorities. Those of other superior courts are persuasive but not binding. Therefore, it seems to me that the law remains that as stated by Bowen CJ and Beaumont J in *Cockcroft*. That is to say, I must decide whether it is reasonable, as distinct from something that is irrational, absurd or

⁷¹ [1989] VR 836, Young CJ, Marks and Teague JJ

⁷² [1989] VR 836 at 842

⁷³ [2008] VSCA 265; (2008) 21 VR 526; Maxwell P, Nettle and Weinberg JJA

⁷⁴ [2008] VSCA 265; (2008) 21 VR 526 at [35]

ridiculous, to expect that disclosure under the FOI Act could cause damage to Australia's international relations. I may reach that decision on a foundation that is something less than that required to support a finding that access "would" cause that damage. A finding that it "would" cause damage to those international relations, which is the alternative basis giving rise to the exemption under s 33(1)(a)(iii), requires that finding to be made on the balance of probabilities.

B. "international relations of the Commonwealth"

75. I do not think that the term "*international relations*" is meant to be used as any particular term of art. It refers simply to the connection, "... *social, political or personal contact between ...*"⁷⁵ between the Commonwealth and another or other countries so that the connection is "*international*".⁷⁶ The "*Commonwealth*" means the "*Commonwealth of Australia*",⁷⁷ established as a political entity by s 3 of the *Commonwealth of Australia Constitution Act* (Constitution). It legislates by means of the Parliament established by Chapter I of the Constitution. Its judicial power is vested in the High Court of Australia and other federal courts established under Chapter III.

76. Chapter II of the Constitution is concerned with the exercise of the Commonwealth's executive power. As Mason J said in *Barton v The Commonwealth*:⁷⁸

"... By s 61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.

As Latham CJ said in R v Burgess; Ex parte Henry ...^[79]:

'This view is, I think, supported by a consideration of the object which must have been in contemplation when the Constitution was enacted. Australia was established as a new political entity and Australia was to be given control of her own external affairs. Under s. 61 of the Constitution the Executive Government of the Commonwealth can deal administratively with

⁷⁵ "... 8 (*relations*) ...": Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

⁷⁶ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

⁷⁷ *Acts Interpretation Act 1901*, s 17(a)

⁷⁸ (1974) 131 CLR 477

⁷⁹ (1936) 55 CLR 608 at 643-644

*the external affairs of the Commonwealth The execution and maintenance of the Commonwealth, particularly when considered in relation to other countries, involves ... the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane. The most obvious example of such action is to be found in the negotiation and making of treaties with foreign countries.”*⁸⁰

77. The breadth of the Commonwealth’s executive power was discussed by Brennan J in *Davis v The Commonwealth*:⁸¹

*“... The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite ‘in one indissoluble Federal Commonwealth’, melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood - a flag or anthem, for example - or the benefit of many national initiatives in science, literature and the arts. It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s.61 does confer on the Executive Government power ‘to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’, to repeat what Mason J. said in the A.A.P. Case. ...”*⁸²

78. When seen in the context of international relations, Jacobs J observed in *Barton v The Commonwealth* that:

“ It is in my opinion within the executive power of the Australian Government as the government of a sovereign state to communicate in such terms as it thinks fit with ... [an international government] unless by legislation the power of making such a communication is taken away from it. ...

*In the absence of any legislative prohibition the free right of the Australian Government to communicate at will with a foreign government is an essential attribute of this country as a sovereign nation. ...”*⁸³

⁸⁰ (1974) 131 CLR 477 at 498

⁸¹ [1988] HCA 63; (1988) 166 CLR 79; Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ

⁸² [1988] HCA 63; (1988) 166 CLR 79 at 110-111

⁸³ (1974) 131 CLR 477 at 505

79. As a body politic, the Commonwealth cannot exercise its executive power itself. Instead, it must rely on others to exercise it on its behalf. Its executive power is vested in the Queen, and so in the Crown, but is exercisable by the Governor-General as her representative acting with the advice of Federal Executive Council established under ss 62 and 63 of the Constitution. Under s 64, the Governor-General appoints Ministers to administer the departments of State he or she in Council may establish. The appointment of civil servants is authorised by s 67. Although no specific mention is made of other entities, it is clear that the executive power of the Commonwealth may be exercised through, or by means of, entities other than those I have mentioned but which it establishes in the exercise of its executive power.⁸⁴ Recognition of this is implicit in s 33(1)(b) of the FOI Act when it provides that:

“A document is an exempt document if the disclosure of the document under this Act:

- (a) ...*
- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.”*

80. That is not to say that every connection between entities or persons who happen to be in Australia and in another country amount to “*international relations*” so that any falling out between them might be regarded as “*damage to ... the international relations of the Commonwealth*”. An analogy can be drawn between the exemption in s 33(1)(a)(iii) and that in s 33A(1)(a) which provides for an exemption “... *if disclosure of the document under this Act [the FOI Act]: (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State*”. What is encompassed within the words “*relations between the Commonwealth and a State*” was a matter considered by the Full Court of

⁸⁴ It may, for example, establish a corporate authority to achieve its purpose rather than do so by means of executive action through a Minister of the Crown: *Davis v The Commonwealth* [1988] HCA 63; (1988) 166 CLR 79 at 94-94 per Mason CJ, Deane and Gaudron JJ

the Federal Court in *Arnold (on behalf of Australians for Animals) v Queensland*.⁸⁵

Wilcox J said that:

*“... the words ‘relations between the Commonwealth and a State’ refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word ‘relations’ includes all of those contacts. It would not normally be correct to describe a falling out between particular individuals on each side as constituting damage to ‘relations’ between the two governments, even if there was some loss of co-operation between those individuals. But a dispute may have ramifications sufficiently extensive for it to affect ‘relations’ between the governments as such. Questions of degree arise. They can only be considered in the light of the facts of each case.”*⁸⁶

C. “Damage”

81. In ordinary usage, the word “damage” means “... harm or injury, or loss caused by injury. ...”⁸⁷ It suggests “... mischief done to property ...”⁸⁸ but its meaning is controlled by its context⁸⁹ and it may be used to describe more intangible damage. There are to be found, therefore, cases concluding that “*The feeling of anxiety is damage*”.⁹⁰ That conclusion was reached when a covenant stipulating that a school would not be kept on certain premises was broken. Lord Cranworth, Vice Chancellor, concluded:

*“... But a person who stipulates that her neighbour shall not keep a school stipulates that she shall be relieved from all anxiety arising from a school being kept; and the feeling of anxiety is damage.”*⁹¹

82. The invasion of privacy has also been described as “damage”⁹² as has the loss of power.⁹³ Doing or saying something that impinges on the way in which a person is regarded either with regard to personal qualities or skills and abilities may

⁸⁵ (1987) 73 ALR 607; 13 ALD 195, Woodward, Wilcox and Burchett JJ. This is the appeal from the Tribunal’s decision in *Re State of Queensland and Australian National Parks and Wildlife Service* [1986] AATA 224; (1986) 13 ALD 158; 5 AAR 328

⁸⁶ (1987) 73 ALR 607; 13 ALD 195 at 616; 204

⁸⁷ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

⁸⁸ *Smith v Brown* (1871) LR 6 QB 729 at 731-733 per Cockburn CJ

⁸⁹ *Haigh v Royal Mail Steam Packet Co* 52 LJQB 395 at 640

⁹⁰ *Kemp v Sober* 1 Sim. N.S. 517; 61 ER 200 at 519; 2 per Cranworth VC

⁹¹ *Kemp v Sober* 1 Sim. N.S. 517; 61 ER 200 at 519; 2 per Cranworth VC

⁹² *Lord Manners v Johnson* [1875] 1 Ch D 673 per Hall VC at 681

⁹³ *Trent-Stoughton v Barbados Water Supply Company Limited* [1893] AC 502 at 504 per Lord Halsbury

be described as damaging their reputation. Damage of this sort may be difficult to quantify and it may well not be possible to attribute a monetary value to it but it is no less damage for all that.

83. It is in this broader sense of the word “*damage*” that Davies J adopted in *Re Maher and Attorney-General’s Department*⁹⁴ when considering s 33(1)(a) of the FOI Act. His Honour said:

*“... I accept that the mere possibility of damage is not sufficient. However, I do accept that it is necessary to find loss or damage which can be proved in monetary terms. The phrase ‘damage to international relations of the Commonwealth’ comprehends intangible damage to Australia’s reputation though such damage may be difficult to assess. International relations have never been matters easy to define or quantify. Regard must be had, inter alia, to the relationships between particular persons in one government and persons in another. Damage to personal relationships may cause considerable harm for a time at least.”*⁹⁵

84. Justice Davies and Dr Renouf also adopted this broader meaning of “*damage*” in *Re State of Queensland and Australian National Parks and Wildlife Service*.⁹⁶ Sitting as the Tribunal, they applied it to s 33A(1)(a), which is similar to s 33(1)(a)(iii) but which applies to information or matter communicated in confidence by or on behalf of the Government of a State or of a State authority rather than by or on behalf of a foreign government.⁹⁷ Justice Davies and Dr Renouf looked to the way in which the Commonwealth and the State viewed the disclosure of information, which each held in documentary form and which the State of Queensland had argued, unsuccessfully, had been communicated to the Commonwealth in documentary form. At the time, Queensland did not have legislation equivalent to the FOI Act:

“ It must be remembered that the FOI Act is a Commonwealth enactment. The State of Queensland has no similar legislation. Therefore, the attitude which the Government of the State of Queensland takes with respect to the release of documents is different from that taken by the Government of the Commonwealth. It is necessary to have regard to such differences in attitude and to respect the view of the State of Queensland that communications with its authorities which, under the laws and practices of Queensland, would not

⁹⁴ (1985) 7 ALD 731; 3 AAR 396

⁹⁵ (1985) 7 ALD 731 at 742

⁹⁶ [1986] AATA 224; (1986) 13 ALD 158; 5 AAR 328

⁹⁷ While ss 33(1)(b) and 33A(1)(b) are similar, the exemption in s 33A(1)(b) is subject to a further qualification that is not applicable to that in s 33(1)(b). That qualification is that s 33A “... *does not apply in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest*”: s 33A(1)(5).

*be released to the public ought not readily be made available to the public under Commonwealth legislation. Failure to respect this view could well lead to diminishment in the co-operation between the State of Queensland and its authorities with the Commonwealth and its authorities.”*⁹⁸

C. The public interest is an irrelevant consideration

85. Unlike internal working documents where disclosure of them under the FOI Act must be “*contrary to the public interest*” before they are exempt under s 36(1), s 33(1)(a)(iii) does not incorporate a public interest component of any description. There is no room for it to be read into the provision itself. That the words of the exemption are intended not only to describe but to circumscribe the exemption is also clear from s 58(2). That section provides that “*where ... it is established that a document is an exempt document, the Tribunal does not have power to decide that access to a document, so far as it contains exempt matter, is to be granted*”. It clearly intends that the exemptions are to be taken at face value and that is consistent with the object of the FOI Act to create:

*“... a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities ...”*⁹⁹

Parliament has identified those essential public interests and the private and business affairs in the exemptions set out in Part IV of the FOI Act. Taken together, these bases lead me to conclude that s 33(1)(a)(iii) does not implicitly incorporate a public interest test.

86. This conclusion is consistent with the conclusion reached by Neaves J as a Presidential Member in *Re Throssell and Australian Archives*¹⁰⁰ in relation to s 33(1)(a) of the *Archives Act 1983*, which equates with s 33(1)(a) of the FOI Act. He adopted that conclusion in relation to s 33(1)(a) of the FOI Act in *Re Throssell and Department of Foreign Affairs*.¹⁰¹ It is also consistent with that reached by Deputy

⁹⁸ [1986] AATA 224; (1986) 13 ALD 158; 5 AAR 328 at [31]; 161; 336

⁹⁹ FOI Act, s 3(1)(b)

¹⁰⁰ [1987] AATA 453; (1987) 14 ALD 292 at [18]

¹⁰¹ [1987] AATA 545; (1987) 14 ALD 296 at [20] (relevant passage not reported in ALD)

President Todd in *Re Slater and Cox (Director-General, Australian Archives)*¹⁰² and Deputy President Johnston in *Re McKnight and Australian Archives*.¹⁰³

87. I also note that, unlike s 33A which is concerned with documents affecting relations with the States, s 33 is not subject to a qualification. The qualification, found in s 33A(5), is that s 33A “... *does not apply in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.*” Therefore, a public relations test applies when documents affecting relations with the States are requested but not when documents affecting international relations are the subject of the request.

The exemption and the documents

A. Category D documents

Category 19 documents: 401, 1054, 1055, 1056, 1057, 1058, 1059 and 1060

88. All of the documents for which exemption is claimed are correspondence between the Department and the Consulate General of the United States in Sydney regarding Mr Lobo and the Department’s request for information relating to him. Ms Pettit said in her evidence that, in her “... *experience, such requests are customarily made, and their responses treated, in strictest confidence.*”¹⁰⁴ The documents themselves do not contain any classification to suggest that and are marked “*unclassified*”. The correspondence reads as a full and frank exchange of information on issues of mutual concern in an environment in which the authors do not feel constrained by any feeling that the information will be read by a wider audience. That is not to say that the exchange is inappropriate for it is professional and pertinent but it has that flavour. It is a flavour of cooperation between agencies of different countries concerned about common issues arising in law enforcement.

89. Having regard to these matters, I am satisfied that disclosure of the documents under the FOI Act could reasonably be expected to damage the international relations of the Commonwealth. The damage would be in the form of

¹⁰² (1988) 15 ALD 20 at 26

¹⁰³ (1992) 28 ALD 95 at 114

¹⁰⁴ Exhibit 2 at [94]

damage to the working relationships of trust that exist between countries at their Departmental and agency levels and a consequent risk that the free flow of information between the two will be restricted. Therefore, I am satisfied that they are exempt in their entirety under s 33(1)(a)(iii).

EXEMPTION: section 33(1)(b)

The exemption

90. Section 33(1)(b) provides:

“A document is an exempt document if the disclosure of the document under this Act:

(a) ...

(b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.”

A. “*would divulge*”

91. Unlike s 33(1)(a)(iii), the exemption rests solely on whether disclosure of the document under the FOI Act “*would*” have the stipulated consequence. For the reasons I gave when considering s 33(1)(a)(iii), that I must consider whether, on the balance of probabilities, disclosure would divulge information or matter communicated in confidence in the circumstances set out in s 33(1)(b).

B. “*communicated in confidence*”

92. The exemption provided for in s 33(1)(b) is different from that provided for in s 45. Whereas s 45 requires consideration to be given to whether disclosure under the FOI Act would “*found an action ... for breach of confidence*”, all that s 33(1)(b) requires is that the information or matter have been communicated “*in confidence*” by or on behalf of a foreign government or an international organisation. Whether that is so, must be decided on the balance of probabilities.

93. Whether matter or information has been communicated “*in confidence*” is not determined by the view of one party to the communication or the other but by all relevant evidence. The understanding of each is part of that evidence. This is the approach taken by the Tribunal in *Re State of Queensland and Australian National Parks and Wildlife Service* in considering the exemption in s 33A(1)(b). That exemption is similar to that in s 33(1)(b) but applies to information or matter

communicated in confidence by or on behalf of the Government of a State or of a State authority.¹⁰⁵ Justice Davies and Dr Renouf did not accept that communications between an authority of the State of Queensland and the Commonwealth had occurred in circumstances in which both parties considered them to be confidential. Only the Queensland authority had taken that view. Given the circumstances in which the communications had passed and the nature and subject matter of those communications, the Tribunal concluded that it could not draw an inference that both the Commonwealth and Queensland authorities should have understood them to have passed in confidence. That meant that they were not satisfied that the information or matter had been communicated in confidence and so the exemption in s 33A(1)(b) did not apply.

C. The public interest is an irrelevant consideration

94. For the reasons I gave in relation to s 33(1)(a)(iii), public interest considerations are irrelevant under s 33(1)(b).

The exemption and the documents

A. Category D documents

Category 19 documents: 401, 1054, 1055, 1056, 1057, 1058, 1059 and 1060

95. As I have already found, all of the documents for which exemption is claimed are correspondence between the Department and the Consulate General of the United States in Sydney regarding Mr Lobo and the Department's request for information relating to him. Ms Pettit said in her evidence that, in her "... *experience, such requests are customarily made, and their responses treated, in strictest confidence.*"¹⁰⁶ There is nothing on the documents themselves that suggests that their authors thought that they were writing in confidence at the time. Some of the information might be thought to be information that would not generally be available to the public but other information might conceivably be of that nature. That is not conclusive of whether it was communicated in confidence, of course, but it is a factor

¹⁰⁵ While ss 33(1)(b) and 33A(1)(b) are similar, the exemption in s 33A(1)(b) is subject to a further qualification that is not applicable to that in s 33(1)(b). That qualification is that s 33A "... *does not apply in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest*": s 33A(5).

¹⁰⁶ Exhibit 2 at [94]

to take into account in deciding whether the information was communicated in that way. The fact that the information is exchanged between the Department and the Consulate General for the United States does not of itself lead to the conclusion that it was communicated in confidence. Ms Pettit's evidence does not take me any further than that communications of this kind are "*customarily made in confidence*". That does not equate with their having been made on that basis on this occasion. Having regard to all of these matters, I am not satisfied that the documents are exempt under s 33(1)(b).

ATTACHMENT D

EXEMPTION: section 37(1)(b)

The exemption

96. Section 37(1)(b) provides:

“A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

- (a) ...*
- (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement of the administration of the law; ...*
- (c) ...”*

The word “law” used in s 37(1)(b) means the “... law of the Commonwealth or of a State or Territory.”¹⁰⁷

A. “would, or could reasonably be expected to”

97. The principles that I have drawn from the authorities in considering s 33(1)(b) are equally applicable to s 37. I refer particularly to those relating to the meaning of the expression “*would, or could reasonably be expected to*” in relation to the consequences of disclosure under the FOI Act. In this section, I will refer only to those cases in which the principles have been applied in the context of s 37(1)(b).

98. In *McKenzie v Secretary, Department of Social Security*,¹⁰⁸ Muirhead J decided that the Tribunal had not been in error in having regard to the form in which the information had been received. He decided that there was no error of law in the Tribunal’s conclusion that the letter, in its original handwritten and signed form, could

¹⁰⁷ FOI Act, s 37(3). Section 37(2A) clarifies the application of s 37(1)(b) but is not relevant in this case. It provides:

“For the purposes of paragraph (1)(b), a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving, or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory, for the protection of:

- (a) witnesses; or*
- (b) people who, because of their relationship to, or association with, a witness need, or may need, such protection; or*
- (c) any other people who, for any other reason, need or may need, such protection.”*

¹⁰⁸ (1986) 65 ALR 645

reasonably be expected to enable Mrs McKenzie to identify its author. Heerey J in *Bartlett v Secretary, Department of Social Security*¹⁰⁹ did not question the Tribunal's approach in considering whether the nature of the information itself could reasonably be expected to enable the applicant to identify the person who had denounced him.¹¹⁰ The information disclosed the category of person by whom the information had been given, contained an allegation not previously known to the applicant and contained information as to when the allegations had been made.

99. In some cases, the evidence may justify a conclusion that disclosure of information by an agency will lead to its being linked with already available information and so lead to the disclosure of yet other information. This is known as the “*mosaic or jigsaw*” effect and was regarded as a relevant consideration by the Tribunal in *Re Slater and Cox (Director-General, Australian Archives)*:¹¹¹

“... Evidence was placed before me (Ex 4 as explained in oral evidence) by way of an exercise based upon an analysis of 22 thirty-five-year-old documents. This exercise satisfied me that much can be gleaned, by application of the ‘mosaic’ technique of piecing together small and individually innocuous pieces of information, that is of present and significant relevance. The cumulative prejudice which may flow from disclosure of documents as a group has been recognised in Australia and overseas. In *Re Robinson and Department of Foreign Affairs (1986) 11 ALN N48* the Tribunal said: ‘Two additional points deserve mention. First, because large parts of the documents had already been released, proceedings before the Tribunal came, at times, close to a word-by-word battle over disclosure. Not surprisingly, adopting this approach it is tempting to conclude that parts of speech which viewed in isolation are innocuous have no basis for exemption. In circumstances such as the present this temptation must be resisted, for it would be too easy, having before one a document in which only those words which, when viewed in isolation, are exempt have been deleted, to reconstruct the entire document by process of educated guesses and thereby cause damage against which s 33(1)(a) is designed to protect.’”¹¹²

100. In *Re Millis and Australian Archives*,¹¹³ Deputy President McMahon described the mosaic theory as an example of the logical process of reasoning by induction although it has also been referred to as inference or deduction:¹¹⁴

¹⁰⁹ (1997) 49 ALD 380

¹¹⁰ Heerey J did find that that Tribunal had made an error of law in the test it applied but did not comment adversely on the categories of information to which it had regard.

¹¹¹ (1988) 15 ALD 20

¹¹² (1988) 15 ALD 20 at 27

¹¹³ (1997) 47 ALD 427

“... What may be done in analysing the subject documents, and the particular facts recorded in those documents, is to estimate the weight of internal evidence or external connecting evidence in favour of a proposition which is likely to disclose the identity of a confidential source. The so-called mosaic theory is nothing more than this.”¹¹⁵

101. In *Re Petroulias and Commissioner of Taxation*,¹¹⁶ I said:

“However described, the mosaic theory is not a rule of law determining an outcome. It is no more than a name given to the task of evaluating evidence in order to come to a decision when the evidence comprises that within the documents under consideration and other sources. The decision that is reached is, of course, formulated by the law or is a sub-set of that decision.”¹¹⁷

This would seem to remain the case.

B. “confidential source of information”

102. What amounts to a “confidential source of information” was considered by the Full Court of the Federal Court in *Department of Health v Jephcott*¹¹⁸ (*Jephcott*). The context of its consideration was that of a response given by the Department of Health neither confirming nor denying the existence of a document. Forster J said:

“... All the information given to the Department cannot be ‘confidential information’ or ‘given in confidence’ or come from ‘a confidential source’ so that the mere giving of information without more cannot make the giver a confidential source. What then is a ‘confidential source’? I am content to accept the interpretation in *Luzaich v United States* 435 F Supp 31 at 35 (1977): ‘a source is confidential if the information was provided under an express or implied pledge of confidentiality.’ In the case of an existing document containing information it might be simple enough by reading the document to discover that the information was provided under an express or implied pledge of confidentiality but in the case of a document which may or may not exist the matter is more difficult. It could be that departmental practice when receiving information of certain types might be of assistance but this Court knows nothing of this. It could also be that the presumed contents of the possibly non-existing document, apprehension as to its contents and the relationship of the supposed informant to the person supposedly informed about might enable an inference to be drawn that the information

¹¹⁴ *Re Nitas and Minister for Immigration and Multicultural Affairs* [2001] AATA 392 at [20]

¹¹⁵ (1997) 47 ALD 427 at 430

¹¹⁶ [2006] AATA 333; (2006) 62 ATR 1175

¹¹⁷ [2006] AATA 333; (2006) 62 ATR 1175 at 1185; [30]

¹¹⁸ [1985] FCA 370; (1985) 8 FCR 85; 62 ALR 421; 9 ALD 35; Forster, Keely and Davies JJ

provided, if any, was so provided under an implied pledge of confidentiality.
...¹¹⁹

C. “in relation to”

103. In considering whether there was a taxable supply under *A New Tax System (Goods and Services) Act 1999* in the form of the sale of foreign currency and whether any supply was made in relation to rights attached to currency, French CJ and Hayne J said that the expression “in relation to”:

“... is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ (33)^[120]. It may also be accepted that ‘the subject matter of the inquiry, the legislative history, and the facts of the case’ (34)^[121] are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply ‘in relation to’ rights.”¹²²

104. Section 37(1)(b) looks to drawing the connection between the confidential source of information (or its non-existence) and the enforcement or administration of the law. In this context, the word “law” would seem to be of wide compass extending to the “... collection of such rules according to which people live or a country or state is governed. ...”.¹²³ That encompasses both Commonwealth and State and Territory law,¹²⁴ which, in turn, would encompass statutory and common law.

D. “the enforcement or administration of the law”

105. Under this heading, I will first set out five authorities that have considered or touched on s 37(1)(a) or (b). Three are authorities from the Federal Court and two from the Tribunal. I am bound by those of the Federal Court if they have decided the question. It seems to me, however, that, apart from making observations in one case, they have not done so as it has not been necessary in order

¹¹⁹ [1985] FCA 370; (1985) 8 FCR 85; 62 ALR 421; 9 ALD 35 at [11]; 88-89; 425; 38-39 and see also Keely J at [4]; 90; 426; 40

¹²⁰ *HP Mercantile Pty Ltd v Federal Commissioner of Taxation* (2005) 143 FCR 553 at 563 [35] per Hill J.

¹²¹ (2005) 143 FCR 553 at 563 [35] per Hill J

¹²² *Travellex Ltd v Commissioner of Taxation of the Commonwealth of Australia* [2010] HCA 33; (2010) 241 CLR 510; 270 ALR 253; 84 ALJR 683; 76 ATR 329; [2010] ATC 20-214 at [25]; 519-520; 259; 788; 377; 11,540; French CJ, Hayne and Heydon JJ, Crennan and Bell JJ dissenting

¹²³ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

¹²⁴ FOI Act, s 37(3)

to decide the appeals. That has led me to consider the meaning of ss 37(1)(a) and (b) in the following sections of this Attachment to my reasons.

106. The earliest case is that decided by the Full Court of the Federal Court in *Department of Health v Jephcott*.¹²⁵ Mrs Jephcott had asked the Department of Health for access to any letter her sister, Mrs Butler, had written to it regarding the care of their late mother. Mrs Jephcott had been paid a domiciliary nursing care benefit under Part VB of the *National Health Act 1953* to care for her mother. Relying on ss 25 and 37(1)(b), the Department of Health refused to confirm or deny whether it had such a letter in its possession. The Tribunal set that decision aside and directed that access was to be granted to any such letter if it was in the Department's possession.

107. Having decided that the Department could make a decision neither confirming nor denying the existence of a document if a hypothetical document would come within the exemption in s 37(1)(b), the Court proceeded on the basis, as Forster J described it:

“ The central point of this matter is whether if Mrs Butler did give the information to the Department concerning Mrs Jephcott and Mrs Whitehead she should rightly be regarded as a ‘confidential source of information in relation to the enforcement or administration of the law’. ...”¹²⁶

Forster J then focused on whether Mrs Butler should be regarded as a confidential source of information and whether s 37(1)(b) permitted regard to be had to whether there was a risk to the enforcement or administration of the law. Neither he nor Keely and Davies JJ, with whom he sat, considered what was meant by the “*enforcement or administration of the law*” because:

“ It is not disputed that if Mrs Butler did give information to the Department concerning Mrs Jephcott ... such information would on balance be in relation to the enforcement or administration of the law namely, viz the *National Health Act*. ...”¹²⁷

¹²⁵ [1985] FCA 370; (1985) 8 FCR 85; 62 ALR 421; 9 ALD 35; Forster, Keely and Davies JJ

¹²⁶ [1985] FCA 370; (1985) 8 FCR 85; 62 ALR 421; 9 ALD 35 at 88; 424; 38

¹²⁷ [1985] FCA 370; (1985) 8 FCR 85; 62 ALR 421; 9 ALD 35 at 88; 424; 38

108. The second case is *Bartlett v Secretary, Department of Social Security*¹²⁸ decided by Heerey J. The only question was whether a document headed “*Mr Bartlett Referral to the AFP*” was exempt under s 37(1)(b). The Tribunal decided that part of the document was exempt under that provision. In appealing from that decision, Mr Bartlett argued that he had not been accorded procedural fairness. Justice Heerey decided that Mr Bartlett did not succeed on that ground. Mr Bartlett’s other ground met with more success. That was that:

“The Tribunal misconstrued s 37(1)(b) of the FOI Act, which requires a reasonable expectation that information, if disclosed, would enable a person to identify a confidential source of information. At para 15 of its decision the Tribunal apparently decides that a reasonable possibility that such disclosure could eventuate to the same as reasonable expectation under the terms required by s 37(1)(b).”

109. Heerey J noted that:

“... it is not in dispute that the requirement of s 37(1)(b) that disclosure ‘would or could reasonably be expected to’ have the consequences set out in paragraph (b) is a higher standard than possibility. ...”

When he examined the Tribunal’s reasons, he found that the Tribunal had used the test of reasonable possibility and so the incorrect test. Justice Heerey did not consider what is meant by the enforcement or proper administration of the law.

110. The third of the Federal Court cases is the recent case of *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited*.¹²⁹ In that case, Emmett J considered an appeal from a decision of the Tribunal. A company, iNova Pharmaceuticals (Australia) Pty Limited (iNova), made a request under the FOI Act for access to documents relating to the Australian Register of Therapeutic Goods (the Register). That Register is maintained by the Therapeutic Goods Administration (TGA), which is part of the Department of Health and Ageing (DHA). Emmett J explained the way in which the scheme works:

“Pharmaceutical products and therapeutic goods marketed in Australia must be listed on the Register. When a product is listed on the Register, some details of the product are made public, including the company that applies for listing (the Sponsor). Once a product is listed on the Register, the Sponsor may apply for the product to be listed in a schedule (the Benefits Schedule)

¹²⁸ [1997] FCA 1581; (1997) 49 ALD 380

¹²⁹ [2010] FCA 1442; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439

maintained in connection with the Pharmaceutical Benefits Scheme (the Benefits Scheme). Products listed on the Benefits Schedule are dispensed to patients at a price subsidised by the Commonwealth government. Listing a product on the Benefits Schedule makes the product more attractive for doctors and patients, because the patient pays a lower price than would be paid if the product were not listed on the Benefits Schedule.

Two categories of products are listed on the Register, namely, products for which the Sponsor is required to provide detailed evidence supporting claims of quality, safety and efficacy for intended use (Originator Products) and products for which the Sponsor is not required to provide such evidence (Generic Products). However, a Generic Product must contain the same amount of the same active pharmaceutical ingredient as a corresponding Originator Product and, where the Generic Product is absorbed, it must be metabolised and excreted in the same way and at the same rate as a corresponding Originator Product. A Generic Product that meets those criteria is described as the bioequivalent of the Originator Product. Where the Sponsor of a Generic Product can demonstrate that the Generic Product is the bioequivalent of a relevant Originator Product, the Sponsor of the Generic Product can rely on the information supplied to the TGA by the Sponsor of the Originator Product in support of its application for listing of the Generic Product on the Register.

*Under s 99ACB of the National Health Act 1953 (Cth) (the Health Act), once a generic medicine is listed on the Benefits Schedule, there is a 12.5% reduction in the subsidised manufacturer's price for the Originator Product and all the bioequivalent Generic Products listed on the Benefits Schedule. That reduction will be 16% from 1 February 2011.”*¹³⁰

111. The Secretary refused access to any document fitting the description in iNova's requests, without informing iNova whether any such document existed. The Tribunal set aside the Secretary's decision and remitted the matters with a direction that she inform iNova whether the documents sought in its requests existed.

112. The case turned on the interpretation of s 26(2) which provides that a statement of reasons “... is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.” Justice Emmett decided that the Secretary's response to iNova's request was permitted under s 26(2):

“Section 26(2) makes it clear that a non-informative response is authorised in appropriate cases where documents exist. There is nothing in the FOI Act that precludes the making of a response in similar terms, when the documents do not exist. ...

¹³⁰ [2010] FCA 1442; ; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439 at [21]-[23]; 578-579; 717-718; 444

...

65. *I consider that it was open to the Secretary, or her delegate, in giving a notice under s 26(1), to decline to state whether a document existed if to do so would cause the notice of the decision to be an exempt document by reason of the operation of any of the provisions in Part IV of the FOI Act. Accordingly, the Tribunal erred in concluding that the Secretary could not make a decision declining to say whether or not documents of the categories requested by iNova exist.*¹³¹

113. Having made this decision, Emmett J did not need to consider the Secretary's final submission but thought it "...*desirable to make some observations in relation to the Tribunal's determination.*"¹³² The first part of that submission was to the effect that the Tribunal had considered the exemptions in light of what iNova knew and would, or could reasonably be expected to do rather than what any person would or could reasonably be expected to do. His Honour accepted that submission but

" *The second step considered by the Tribunal was whether iNova would take consequent action on discovering the identity of the Sponsor. The Tribunal in part relied upon evidence from iNova that it would not have taken action because it was not aware of the action that could be taken to cause delay. The analysis of the Tribunal in relation to the second step is flawed in the same way as its analysis of the first step. That is to say, the question is not whether iNova would have taken a particular step. The question is whether, considered objectively, disclosure would or could reasonably be expected to prejudice the enforcement or proper administration of the law. The Tribunal did not consider that question objectively and, to that extent, the Tribunal misdirected itself.*"¹³³

114. Justice Emmett had no need to consider when the enforcement or proper administration of the law would be prejudiced or what was meant by the expression "*enforcement or proper administration of the law*". In saying that the Tribunal had not considered the "*question objectively*", Emmett J would seem to be saying that it was possible that disclosure under the FOI Act could prejudice the enforcement or proper administration of the law when that disclosure could damage the integrity of the operation of the Pharmaceutical Benefits Scheme established under statute. He did not go so far as to make a decision on this aspect and did not need to do so but confined himself to what he called "*observations*". Although his

¹³¹ [2010] FCA 1442; ; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439 at [63]-[65]; 587; 726; 452

¹³² [2010] FCA 1442; ; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439 at [66]; 587; 726; 452

¹³³ [2010] FCA 1442; ; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439 at [68]; 587; 726; 452-453

observations are not binding on me, I have looked to them to find the principles that underpin them and particularly the notions of “*enforcement or the proper administration of the law*”. Justice Emmett has not set them out and that is understandable for, as I have said, he did not need to do so. I do need to do so for, if administrative decisions are to be made consistently, they must be made by first identifying the law that applies, working out what that law means and then applying it to the facts found to exist in the particular case. If I were to try to make decisions in particular cases without taking that initial step, I would end up with a series of decisions that may, or may not, be consistent with one another or with what the law requires.

115. That brings me to two previous cases decided by the Tribunal. The first, decided in 1984 by Davies J, President, Sir Ernest Coates and Mr Sinclair, Members, was *Re Murtagh and Commissioner of Taxation*.¹³⁴ Ms Murtagh had asked the Australian Taxation Office for access to documents relating to the income tax returns she had lodged and those lodged by a partnership of which she was a member. Ms Murtagh had also made a complaint on a related matter to the Ombudsman.

116. The Tribunal decided that the documents were not exempt under s 36 as claimed. With respect to the exemption under s 37(1)(a), it noted that the decision-maker had never suggested that there had been any failure to comply with the law. Therefore, the first part of s 37(1)(a) was irrelevant. The argument was that disclosure would prejudice the enforcement or proper administration of the law. The Tribunal stated the issue in dispute and its answer:

“... *The arguments were directed to showing the prejudice to the ‘administration’ of the law rather than to its ‘enforcement’.*

...

If the disclosure of the documents would hinder the proper conduct of the proceedings before the Taxation Board of Review, then such disclosure would ‘prejudice the ... proper administration of the law’. Section 37(1)(a) is the appropriate provision to deal with such a case. But such prejudice must be shown. In the present case, disclosure of the documents would not, we think, have a prejudicial effect upon the proceedings before the Taxation Board of Review. The granting of access would not hinder the respondent in the presentation of his case or unfairly assist the applicant in the presentation of hers. The documents in issue do not disclose names of witnesses or

¹³⁴ [1984] AATA 249; (1984) 54 ALR 313; 6 ALD 112; 1 AAR 419; 15 ATR 787

statements of witnesses or the like. Nor would the grant of access subvert the application of discovery rules in the Taxation Board of Review proceedings. There are no such rules.

...

In our opinion, the prejudicial effect postulated by s 37(1)(a) has not been shown and the documents are not exempt under this head. We should also mention under this head that it has not been shown, nor indeed claimed, by the Ombudsman, that disclosure of the Ombudsman's documents would prejudice the Ombudsman's investigation.”¹³⁵

117. The Tribunal's reasoning suggests that it has taken a view of the meaning of the expression “*proper administration of the law*” that it encompasses a proceeding of a quasi judicial body and an investigation by the Ombudsman. On what basis it reached that decision is not apparent from its reasons. Did the Tribunal take the view that the reference to the “*proper administration of the law*” is a reference to the administration of justice? Did it then take the view that the Taxation Board of Review and the Ombudsman are to be equated with courts in order to draw them within that concept? Did it base its decision on a broader understanding of what amounts to the “*administration of the law*”?

118. The same observation can be made about the reasons for decision of O'Connor J when she was President of the Tribunal but the factual circumstances were more confined. Ms Altman had been a party to a proceeding in the Family Court. A Judge had given an *ex tempore* judgment and, after settling a transcript of it, later gave the parties a written and copy of it. Ms Altman asked the Commonwealth Reporting Service (CRS), which was then an agency for the purposes of the FOI Act, for access to a copy of the *ex tempore* judgment. The CRS transferred the request to the Family Court which claimed exemption for it under ss 37(1), 40(1) and 46(a).

119. When the reasons of O'Connor J regarding the first two exemptions are read together, it becomes apparent that her Honour considered that the reference to the “*proper administration of the law*” is a reference to administration of the “*the law in general*”.¹³⁶ There was no prejudice in a particular instance and so the exemption under s 37(1)(a) was not applicable.

¹³⁵ [1984] AATA 249; (1984) 54 ALR 313; 6 ALD 112; 1 AAR 419; 15 ATR 787 at 332; 129-130; 437; 803-804

¹³⁶ *Re Altman and Family Court* (1992) 27 ALD 369; (1992) 15 AAR 236 at 376-377; 244-245

120. Since these cases were decided, the Full Court of the Supreme Court has decided *Sobh v Police Force of Victoria*¹³⁷ (*Sobh*). It applied a much narrower interpretation of the expression “*administration of the law*” when used in s 31(1)(a) of the *Freedom of Information Act 1982* (Vic) (FOIVIC). That section is the equivalent provision of s 37(1)(a) but no mention was made of the earlier Federal Court and Tribunal cases. I have considered this case in greater detail below¹³⁸ where I have also considered earlier authority on the meaning of the expression “*enforcement of the law*” and “*administration of the law*”.

D.1 “enforcement of the law”

121. Given ordinary meaning of the word “*enforcement*”, the “*enforcement ... of the law*” would seem to refer to “*the act or process of enforcing*” and so to what is done to “*compel obedience to*” the law¹³⁹ or “*to cause (a law or decision) to be carried out*”.¹⁴⁰

122. This is the conclusion reached by French J in *Kunakool v Boys*.¹⁴¹ A magistrate had committed Mr Kunakool to stand trial on two counts of conspiracy under s 86(1)(b) of the Crimes Act “*to prevent or defeat the execution or enforcement of a law of the Commonwealth*” being the Migration Act. The evidence at the committal hearing was to the effect that Mr Kunakool had conspired with two Australian citizens that each would go through a form of marriage with a Thai citizen, sponsor his migration to Australia and, in the course of making that sponsorship application, make false statements to staff at the Australian Embassy in Bangkok.

123. Justice French considered the meanings of both “*execution*” and “*enforcement*” saying:

“ Read according to the ordinary meaning of its words, para (b) protects the ‘*execution*’ and ‘*enforcement*’ of laws of the Commonwealth. The word ‘*execution*’ can be taken to bear the primary meaning given to it in the Shorter Oxford English Dictionary, namely: ‘*The action of carrying out or carrying*

¹³⁷ [1994] VicRp 2; [1994] 1 VR 41; Brooking, Nathan and Ashley JJ

¹³⁸ See [131]-[140] below

¹³⁹ Macquarie Dictionary, 3rd edition, 2001, The Macquarie Library Pty Ltd

¹⁴⁰ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

¹⁴¹ (1987) 14 FCR 489; 77 ALR 435

into effect.’ Applied to a law, this term will include the conduct of an official discharging a statutory duty.

It is well established that if the occasion for the exercise of a statutory discretion arises, a failure to exercise it will constitute a failure on the part of its repository to discharge a statutory duty: ... [citations referred to].

It follows that, when the discretion is exercised, the official exercising it discharges a statutory duty. In doing that, he carries out the law in a sense which is within the primary meaning of the term ‘executes’.

In particular, an official exercising the discretion under s 11A of the Migration Act 1958 to issue or refuse to issue a visa is executing the provisions of that Act.

The word ‘enforcement’ refers to the action of compelling fulfilment of the law (Shorter Oxford English Dictionary), a definition which includes compelling compliance with obligations imposed by law.

It does not seem apposite to the exercise of a discretion to grant or withhold the grant of a statutory privilege. I note, however, that it was thought to be appropriate in the somewhat analogous case of R v Corak, supra. That case was concerned with an agreement to arrange sham marriages to enable Chinese men, who were otherwise obliged to leave Australia at the expiry of their temporary entry permits, to apply for and obtain permanent entry permits.

Absent the grant of permanent permits they would have been compelled to leave Australia. In that context it can be understood why the charge was framed in terms of a conspiracy relating to the ‘enforcement’ of the Act.

Isaacs J in that case was of the view that the words ‘execution’ and ‘enforcement’ as used in s 86(1)(b) [of the Crimes Act 1914] are not mutually exclusive, but may and do overlap in their scope and meaning. I respectfully agree. It may be that the term ‘execution’ is the larger of the two and incorporates enforcement as a special case.”¹⁴²

124. His Honour referred to an unreported judgment of the New South Wales Court of Criminal Appeal in *R v Corak*¹⁴³ (*Corak*), in which Mr Corak had been charged under s 86(1)(b) of the *Crimes Act 1914* with the offence of conspiring with another “to prevent or defeat the execution or enforcement of a law of the Commonwealth”. The judgment in *Corak* was explained by Barr J, with whom Sully J agreed, in *Regina v L T Hardy*.¹⁴⁴

¹⁴² (1987) 14 FCR 489; 77 ALR 435 at 499-500; 446-447

¹⁴³ 24 November 1967

¹⁴⁴ [1996] NSWSC 524; Mahoney ACJ, Sully J, Barr J. Mahoney ACJ came to a similar conclusion but relying on the word “execution”, rather than “enforcement” in the offence: “The term ‘execution’ is in my opinion not a word of narrow meaning. As used in the Crimes Act 1914 s 86(1)(b), it comprehends the way in which the legislation is, according to its terms, being carried out or intended

“... *R v Corak*, Court of Criminal Appeal, New South Wales, 24 November 1967, unreported, concerned charges under s 86(1)(b) of conspiring to prevent the enforcement of the Migration Act. There was a scheme by which a number of foreign nationals present in Australia under temporary permits and liable to be deported contracted ‘marriages of convenience’ with Australian women for the purposes of applications for resident status. Two of the marriages were strictly unlawful, being bigamous, but I think that nothing turns on that fact for present purposes because the substance of the conspiracy was not the marriages themselves but telling lies about them in order to mislead officers administering the provisions of the Migration Act. The Court held that there was a conspiracy to prevent the enforcement of the Act. Nothing turns, I think, on the difference between preventing the enforcement of the Act, as in *Corak*, and defeating its execution, as in the present appeal. The former formulation of s 86(1)(b) was appropriate in *Corak*, since the appellants were attempting to prevent officers deporting them. In his judgment at page 5 *McClemens J*, with whom the other members of the Court agreed, said, referring to s 6 of the Migration Act and to certain other sections, particularly those dealing with deportation of prohibited non-citizens –

‘All those sections are directed to one thing, namely the enforcement of the Act. It may be that s.18 (which deals with deportation) is the ultimate sanction, the act of forcible deportation but short of that there are other sanctions which are part of the enforcement provisions of the Act and it was to prevent these enforcement provisions from coming into existence, in other words to prevent the enforcement of the Act, that this plan on the evidence was entered into.’

D.2 “administration of the law”

125. In its ordinary meanings, the word “administration” is used to refer to “... the directing, managing or governing of a company’s affairs etc. 2 a period of government by a particular party, etc ...”.¹⁴⁵ In the context of s 37(1)(b), these meanings seem awkward. I have turned to the Macquarie Dictionary where the meanings include those of “... 2. The function of a political state in exercising its

to be carried out. Ordinarily, an Act will - at least it may - contemplate that it will or may be carried into effect in one or more of a number of ways. The present case was concerned with the grant of entry permits under the Migration Act. It contemplated that such permits would be applied for and, in an appropriate case, would be granted. But applications could be made in a number of ways and permits could be granted following a number of different procedures. Thus, application might be directed directly to the Minister and to him/her alone and the grant of an entry permit might be restricted to the Minister. In the present case, what was chosen as the procedure to carry into effect this part of the Act was the making of applications for entry permits, the examination of them by departmental officers, and the grant or refusal of them accordingly. The term ‘execution’ was intended to comprehend that procedure. In this regard, it was the purpose of s 86(1)(b) of the Crimes Act 1914 to proscribe conspiracies to prevent the Migration Act being carried out in that chosen way. The Migration Act made provision for the way in which application should be made and should be dealt with. A conspiracy to prevent the Act being executed, in the sense of being carried into effect, in the manner chosen would in my opinion be a conspiracy within s 86(1)(b).”

¹⁴⁵ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

governmental duties. ...”.¹⁴⁶ This is the meaning to which the trial judge, James J, had referred and which was approved on appeal by the New South Wales Court of Criminal Appeal in *R v Einfeld*.¹⁴⁷

“142. On a literal interpretation, the expression ‘the administration of the law’ is apt to include the exercise by a government body of its functions in applying and enforcing the law of this State. See the definition of “administration” in the Macquarie dictionary (2nd ed).”¹⁴⁸

126. The literal interpretation of the expression is not one that found favour with the Full Court of the Supreme Court of Victoria in either of two cases. In the first, *Accident Compensation Commission v Croom*¹⁴⁹ (*Croom*), Ms Croom had asked the Accident Compensation Commission (ACC) for access to a report prepared by investigators. She made her request under the *Freedom of Information Act 1982* (Vic) (FOIVIC). The reports set out details of Ms Croom’s employment, the nature of the work she had performed, statements from employees and opinions on liability for her injury. The ACC was a statutory body established to manage the Accident Compensation Scheme established under the *Accident Compensation Act 1985*. Its functions included its receiving, assessing and accepting or disputing claims for compensation, providing insurance for purposes of the Act and to defend actions against employers at common law. The ACC submitted that disclosure of the reports under FOIVIC would be reasonably likely to “prejudice the ... proper administration of the law in a particular instance” within the meaning of s 31(1)(a) of FOIVIC,¹⁵⁰ which is very similar to s 37(1)(b) of the FOI Act. Access would prejudice its proper administration because it would advantage Ms Croom as a potential claimant for compensation and disadvantage the ACC as a potential defendant.

127. Justice O’Bryan, with whom Young CJ and Vincent J agreed, said that:

“ A careful examination of all the paragraphs in s 31 indicates to me that for a document to fall within one of the exemptions it should have a

¹⁴⁶ Macquarie Dictionary, 3rd edition, 2001, The Macquarie Library Pty Ltd

¹⁴⁷ [2008] NSWCCA 215; (2008) 71 NSWLR 31; 252 ALR 375 at [97]; 56-57; 398; Bell JA, Hulme and Latham JJ

¹⁴⁸ Judgment in *R v Einfeld*, unreported, dated 19 May 2008 at [142] and reproduced in *R v Einfeld* [2008] NSWCCA 215; (2008) 71 NSWLR 31; 252 ALR 375 at [56]; 45; 387

¹⁴⁹ [1991] VicRp 72; [1991] 2 VR 322; Young CJ, O’Bryan and Vincent JJ

¹⁵⁰ Section 31(1) provides “Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance ...”. It was preceded by the heading “Law enforcement documents”.

*connection with the criminal law or with the legal process of upholding or enforcing civil law.”*¹⁵¹

His Honour did not elaborate upon why this is so in the context of s 31 or of the FOIVIC.

128. Young CJ used the case as an opportunity to comment on it as:

“... an example of the difficulty imposed upon the court by legislation which is couched in vague and imprecise language. ...

*The difficulties are created largely by the fact that exempt documents ... are described in terms which admit of no very precise meaning. In such circumstances all that the court can do in any particular case is to attempt to give some meaning to the sections relied upon as exempting the documents in question from disclosure and in so doing make the law which Parliament failed to make. ...”*¹⁵²

129. Relying on ss 35(b)(i), 36(3) and 36(4), Young CJ referred to the heading to s 31(1)(a) while noting that:

“... it is necessary to avoid being diverted into attempting to construe the vague expression ‘Law enforcement documents’ rather than the equally vague provisions of s31(1)(a).

Approaching the section, however, under the influence of the heading and having regard to all of the paragraphs of subs(1) as well as to the exceptions prescribed by subs(2) and subs(3) which exempts any document created by the Bureau of Criminal Intelligence, I am clearly of the opinion that the reports here in question should not be held to be exempt documents pursuant to the section. Exemption was claimed under the ‘administration of the law’ but in my opinion that phrase in the context is quite inapt to protect what the appellant here seeks to protect. Disclosure of the documents could not prejudice the proper administration of the law for they are in no way concerned with that administration. It is sufficient to say that the reports are not concerned with the proper administration of the law. It is better not to attempt to define ‘administration of the law’ or to replace one vague word with another, but the administration of the law indicates something concerned with the process of the enforcement of legal rights or duties. I agree, with respect, in O’Byrne J.’s observation that to fall within s31 a document should have a connection with the criminal law or with the process of upholding or enforcing civil law. In so doing I have not overlooked the words ‘in a particular instance’ but those words cannot control the category or class of document intended to be exempted.

If ‘the administration of the law’ could be construed, as the appellant would have it construed, as including its conduct of its functions under the

¹⁵¹ [1991] VicRp 72; [1991] 2 VR 322 at 328

¹⁵² [1991] VicRp 72; [1991] 2 VR 322 at 323

Accident Compensation Act, I would respectfully agree with O'Bryan J. that the appellant has not shown that disclosure of either document would prejudice the administration of the law in the relevant sense.

*The claim of the appellant for exemption under s31(1)(c) is equally unsound and for similar reasons. Disclosure of the documents would not reveal a confidential source of information in relation to the administration of the law. Further, the evidence does not establish that the witnesses' statements were furnished in confidence. Disclosure of them would neither disclose, nor enable anyone to ascertain the identity of a confidential source of information.”*¹⁵³

130. The Chief Justice seems to have assumed that the expression “administration of the law” has a particular meaning. I respectfully suggest that he has not explained why that particular meaning should be adopted in the interpretation of s 31(1)(a). When speaking some eight years earlier of another expression but one having some relationship with this expression – “administration of criminal justice” – Morling J said in *Harper v Costigan*¹⁵⁴ that “... the task in hand is to ascertain the meaning of the words ... in the particular context in which they appear ...”.¹⁵⁵ In that case, Morling J considered the expression “administration of criminal justice” in the context of s 13(11) of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). That section requires administrative decision-makers to give reasons in certain circumstances. Section 13(11) excludes from that obligation any decision included in any of the classes set out in Schedule 2 to the ADJR Act. Among the classes of decision excluded are those “decisions relating to the administration of criminal justice, and, in particular ...” five types of decision which were then described. Justice Morling decided that, in specifying the five types of decision, Parliament had given the words “administration of ... justice” “... a meaning much wider than they would otherwise have.”¹⁵⁶ It was wide enough to include the activities of the Royal Commissioner on that occasion and so exclude them from the scope of the obligation to provide reasons under s 13 of the ADJR Act.

131. I have spent a moment on the expression “administration of justice” for that is an expression that had some prominence in the second of the two cases considered by the Full Court of the Supreme Court of Victoria. That is the case of

¹⁵³ [1991] VicRp 72; [1991] 2 VR 322 at 324

¹⁵⁴ [1983] FCA 303; (1983) 72 FLR 140; 50 ALR 665

¹⁵⁵ [1983] FCA 303; (1983) 72 FLR 140; 50 ALR 665 at 145; 670

¹⁵⁶ [1983] FCA 303; (1983) 72 FLR 140; 50 ALR 665 at 146; 671

*Sobh v Police Force of Victoria*¹⁵⁷ (*Sobh*). Section 31(1)(a) is very similar to s 37(1)(b) of the Commonwealth FOI Act. Mr Sobh had requested access to his file from the Victorian Police. That file included the police's brief of evidence. That brief included statements of witnesses.

132. Nathan J recognised that:

*"... the FOIA [FOIVIC] sustains the integrity of the prosecutorial process while at the same time making available all documents which will not impede or frustrate it. ... This is the context in which the exemption in favour of documents which 'would, or would be reasonably likely to prejudice the ... proper administration of the law in a particular instance' must be interpreted."*¹⁵⁸

133. His Honour then moved from the context to the words of s 31(1)(a):

"Prejudice is not a term of legal art. It means to impede or derogate from. Its content is governed by the matters which may be impeded or derogated from, which in this case is the administration of the law.

As to what the law may be, there is no doubt. It includes both the civil and criminal law of the State of Victoria, that law is expressed by statute, regulation and the case and common law. Accident Compensation Commission v Croom [1991] VicRp 72; [1991] 2 VR 322, already referred to, acknowledges the width of the term in this section. Young CJ, at 324, said: 'but the administration of the law indicates something concerned with the process of the enforcement of legal rights or duties'.

More difficulty is encountered when dealing with 'the proper administration of the law'. By definition, this law includes the pre existing criminal law, which does not permit pre trial discovery, and the FOIA which permits everything to be discovered by everybody, except those documents which would impede or derogate from the administration of both of these laws. In my view the qualifying word 'proper' is not without meaning; it imputes the notion of being appropriate to ... the administration of the law. That is, the surrounding circumstances must be examined. In the light of that examination, that which is appropriate or fitting to them dictates the way the law should be administered. The phrase 'administration of the law' is not synonymous with 'the administration of justice'. Justice is a more abstract word encompassing morality, ethics and philosophy. The legislature has chosen to use a word of less abstract and of more mechanical import. The appropriate 'law' in any given situation is definable. Rather than the courts having to grapple with the concept of 'justice', or what ought to be the case, here the courts deal with the law, and what is the case.

¹⁵⁷ [1994] VicRp 2; [1994] 1 VR 41; Brooking, Nathan and Ashley JJ

¹⁵⁸ [1994] VicRp 2; [1994] 1 VR 41 at 53

Mere mechanical steps in the prosecutorial process have not been considered to be part of the administration of justice (R v Rogerson [1992] HCA 25; (1992) 174 CLR 268; 107 ALR 225), whereas once the process had commenced the courts have been held to have a part in administering the law: James v Robinson (1963) 109 CLR 693. Similarly, the distinction between ‘maintaining the law’ and the ‘right to a fair trial’ was considered to be significant in Commissioner of Police v Ombudsman [1988] 1 NZLR 385, a case to which I shall refer later, but it underscores the notion that the proper administration of the law is not the same thing, although analogous to, the administration of justice.”¹⁵⁹

134. Ashley J initially appears not to have drawn the distinction between “administration of justice” and “administration of the law” in the same way as Nathan J has done. Like Nathan J, though, Ashley J found that investigative steps fell outside the scope of the “administration of justice”:

“... There being authority for the proposition that police investigation is not part of the administration of justice – see Neilson v Laugharne [1981] 1 All ER 829 and R v Rogerson [1992] HCA 25; (1992) 66 ALJR 500 – it may reasonably be concluded that police investigation is not part of the ‘administration of the law’. That conclusion is reinforced by the fact that, for the purposes of s 31(1)(a), the two matters are dealt with discretely.”¹⁶⁰

135. If considered only in the context of an investigation that leads to criminal charges, this interpretation is all very well in the context of s 31(1)(a) of the Victorian FOI Act and even of s 37(1)(b) of the Commonwealth Act. The distinction between an investigation and the administration of the law would not cause a dilemma for investigative agencies in most circumstances. As Ashley J said in relation to this matter when considering an ongoing investigation after charges have been laid:

“... It is, I think, beyond argument that an investigation may continue notwithstanding the laying of charges. Laying of charges implies only that the informant believes that there is sufficient evidence available to justify that course. It does not mean investigation concerning those matters is at an end; or that investigation relating to other possible breaches of the law by the defendant may not be in train. It may very well be that in many instances a police file would be exempt from disclosure, notwithstanding that charges had been laid, by reason of apprehended prejudice to investigation of a breach or possible breach of the law. The mere fact that there appeared to be sufficient in the file to lay those charges or secure a conviction thereon would not gainsay the prospect of successful use of that ground of exemption.”¹⁶¹

¹⁵⁹ [1994] VicRp 2; [1994] 1 VR 41 at 55-56

¹⁶⁰ [1994] VicRp 2; [1994] 1 VR 41 at 59

¹⁶¹ [1994] VicRp 2; [1994] 1 VR 41 at 59

136. Later in his judgment, Ashley J went back to consider what is encompassed within the “*administration of the law*”:

“ The next step in the resolution of the problem, in my opinion, is to consider the significance or otherwise of the adjective ‘proper’ (qualifying the ‘administration of the law’) and the significance of the verb ‘prejudice’.

The Oxford English Dictionary, 2nd ed, offers somewhat different possible meanings of the word ‘proper’, thus: ‘strictly belonging to or applicable; that is, in conformity with rule; strict, accurate, exact, correct’; and ‘such as a thing of the kind should be; excellent, admirable, commendable, capital, fine, goodly, of high quality’.

With some hesitation I have concluded that the first of these alternative meanings is presently applicable. It seems to me that Parliament should be taken to have intended that there be a consideration of prejudice in the context of the status quo rather than in the context of what should ideally be the case. The latter concept would likely involve considerable uncertainty. The conclusion I have reached is consistent with the opinion of the learned judge at first instance, which I accept, that the ‘administration of the law’ required to be considered is the administration of the law unaffected by any right to access of documents given by the Act. It remains, however, a discrete question, to be resolved hereafter, whether any disturbance of the status quo will necessarily constitute prejudice thereto.

To say that ‘the proper administration of the law’ is inclusive of its practices and procedures does not, in my opinion, exhaust the content of that imprecise phrase. It should be considered to extend to the conduct of litigation generally, the object of which is to achieve justice between the parties; not abstract ‘justice’, but justice achieved within the framework of the law - a framework encompassing both substantive law and practices and procedures both pre-trial and during trial. In Croom’s Case, at 324, Young CJ, referring to s31(1)(a) said this: ‘. . . the administration of the law indicates something concerned with the process of the enforcement of legal rights or duties. I agree, with respect, in O’Byrne J’s observation that to fall within s31 a document should have a connection with the criminal law or with the process of upholding or enforcing civil law.’

The documents whose production was resisted in that case were unrelated to any pending proceedings. The context makes the point of his Honour’s observation very clear. The passage cited does not, in my opinion, support a conclusion that ‘the ... proper administration of the law’ is concerned only with matters of practice and procedure. I should note, for sake of completeness, that O’Byrne J (see at 328), with whom Vincent J agreed, did not decide the matter on the basis of the passage referred to by the learned Chief Justice.

Practices and procedures should be seen not as ends to themselves but as aids to the achievement of ‘justice’ in the sense that I have used that word. Because the ‘proper administration of the law’ is, in my opinion, constituted by more than its practices and procedures, it seems to me that it is wrong to

*ask whether disclosure of a document would (be reasonably likely to) prejudice the application of presently existing rules of practice and procedure. The question to be answered is, in my opinion, a broader one: would disclosure of a document (be reasonably likely to) prejudice 'the proper administration of the law' giving that phrase its full meaning? Or, if (contrary to the view I have expressed) the 'administration of the law' refers to no more than its practices and procedures, would disclosure of a document (be reasonably likely to) prejudice the existing rules of practice and procedure? In answering either of those questions consideration would need to be given to the impact of disclosure, if permitted, upon existing rules of practice and procedure. But the mere fact that disclosure cut across any such rule or rules would not, in my opinion, be decisive of relevant prejudice. To so conclude would be to render the status quo sacrosanct and it would require very clear words in an Act such as that presently under consideration to produce such a conclusion. In my opinion the words used do not compel such an outcome. If the rule(s) infringed were regarded as of far reaching significance relevant prejudice could the more readily be concluded to exist."*¹⁶²

137. I respectfully suggest that the judgment in *Sobh* is better understood when regard is had to cases such as *The Queen v Rogerson*¹⁶³ (*Rogerson*), to which Ashley J referred. It was a case that required consideration of the words "administration of justice". Mason CJ said:

"... that the expression 'course of justice' is synonymous with the 'administration of justice'. In no relevant sense do the police administer justice, notwithstanding that they investigate crime, institute prosecutions (where appropriate) and assist in bringing prosecutions. As Lord Blackburn pointed out in Coomber v Justices of Berks ... [(1883) 9 AC 61 at 67] 'the administration of justice, both civil and criminal, and the preservation of order and prevention of crime by means of what is now called police' are separate functions and not one single function. ...

*... The fact that police investigation stands outside the concept of the course of justice does not mean that, in appropriate circumstances, interference with a police investigation does not constitute an attempt or a conspiracy to pervert the course of justice."*¹⁶⁴

138. Brennan and Toohey JJ reached the same conclusion as Mason CJ saying that "*The course of justice does not begin until the jurisdiction of some court or competent judicial authority is invoked.*"¹⁶⁵ Their Honours had earlier described "justice" and the "course of justice":

¹⁶² [1994] VicRp 2; [1994] 1 VR 41 at 63-64

¹⁶³ [1992] HCA 25; (1992) 174 CLR 268

¹⁶⁴ [1992] HCA 25; (1992) 174 CLR 268 at 276-277

¹⁶⁵ [1992] HCA 25; (1992) 174 CLR 268 at 283

“ Justice, as the law understands it, consists in the enjoyment of rights and the suffering of liabilities by persons who are subject to the law to an extent and in a manner which accords with the law applicable to the actual circumstances of the case. The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case”¹⁶⁶

139. McHugh J identified the beginning and end of the “*course of justice*” in the context of the offence of perverting the course of justice:

*“It follows that for the purpose of the offence of perverting the course of justice, the course of justice does not commence in criminal proceedings until the laying of an information against or the arrest of an accused person In civil proceedings it does not commence until the institution of the civil proceedings. In both criminal and civil proceedings, the course of justice ends when the rights and liabilities of the parties have been finally determined and declared after ‘an inquiry concerning the law as it is and the facts as they are determined’ ...”*¹⁶⁷

140. It is apparent from *The Queen v Rogerson* that the expression “*administration of justice*” is an expression that has acquired a particular and quite confined meaning at common law. It is a meaning that:

*“... would not extend to cover the activities of a Royal Commissioner charged with the responsibility of inquiring into possible breaches of the law. The functions of a Royal Commissioner are to investigate and report A Royal Commissioner has no power to find a person guilty of an offence, or to convict a person of an offence. This being so, ... a Royal Commissioner is not concerned with the administration of justice in the ordinary sense.”*¹⁶⁸

D.3 “*enforcement or proper administration of the law*”

141. Although I am considering s 37(1)(b), I will begin with s 37(1)(a) where the words “*enforcement or administration of the law*”, rather than “*enforcement or proper administration of the law*” (emphasis added) appear. It provides:

“A document is an exempt document if its disclosure under this Act would or could reasonably be expected to:

- (a) *prejudice the conduct of an investigation of a breach, or possible breach, of the law, or of a failure, or possible failure, to comply with a*

¹⁶⁶ [1992] HCA 25; (1992) 174 CLR 268 at 280

¹⁶⁷ [1992] HCA 25; (1992) 174 CLR 268 at 303-304

¹⁶⁸ *Harper v Costigan* [1983] FCA 303; (1983) 72 FLR 140; 50 ALR 665 at 145; 670

law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance; ...”

142. When I look to the cases to which I have referred, s 37(1)(a) appears to me to have been carefully drafted with the principles they establish firmly in mind. Certainly, those cases were decided after the FOI Act was drafted and passed in its initial form but the common law relating to the offence of trying to pervert the course of justice has not changed.

143. Those cases have discussed the various concepts of the “*course of justice*”, the “*administration of justice*” and the “*administration of the law*”. In doing so and adapting the words of Brennan and Toohey JJ in *Rogerson*, those concepts have been clearly limited to the exercise by a court or competent judicial authority of its jurisdiction, be it civil or criminal, to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case. They encompass the practice and procedure of the courts in the exercise of their jurisdiction but are not limited to it.

144. There are limits, though, and those limits are determined by the commencement of proceedings in a court or judicial body. In a criminal court, they begin with the laying of an information or summons, as the case may be, and in a civil court with the lodgement in the court of an originating process. Nothing preceding the commencement of the proceedings comes within any of the concepts. Therefore, investigations do not come within them. Whether criminal or civil proceedings are considered, anything that comes after the conclusion of those proceedings is not regarded as being in the “*course of justice*”, the “*administration of justice*” or the “*administration of the law*”. While it is the fact, and not the means, of conclusion that is the relevant thing, it must be remembered that a court’s powers do not necessarily come to an end with, for example, its delivering a judgment in a civil matter. A superior court has powers that it may exercise when the administration of justice demands that it do so not only to prevent its processes from being abused but to protect the integrity of its processes once they have been set in motion.¹⁶⁹ This was adopted by the majority in *Cardile v LED Builders Pty Ltd*:¹⁷⁰

¹⁶⁹ See *CSR Limited v CIGNA Insurance Australia Limited* [1997] HCA 33; (1997) 189 CLR 345; 146 ALR 402; 71 ALJR 1143; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; Brennan CJ

“... *The integrity of those processes extends to preserving the efficacy of the execution which would lie against the actual or prospective judgment debtor The protection of the administration of justice which this involves may, in a proper case, extend to asset preservation orders against third parties to the principal litigation. This appeal concerns the identification of such proper cases.*

In Jackson v Sterling Industries Ltd,^[171] *Deane J referred to the armoury of a court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction. By this means, the risk of the stultification of the administration of justice is diminished.*
...^{”172}

145. Those drafting s 37(1)(a) appear to have had these principles firmly in mind. They expressly drew within the exemption an investigation of a breach or possible breach of the law, or a failure or possible failure to comply with a law relating to taxation. On the ordinary understanding of the concepts of “*administration of the law*”, whether qualified by the word “*proper*” or not, investigations of that sort would otherwise have fallen outside the exemption established under s 37(1)(a). The fact that an investigation of that sort was expressly included suggests that Parliament intended the expression “*administration of the law*” to have the meaning given to it in cases such as *Sobh* and not its ordinary meaning.

146. That means that steps that are taken by an agency administratively when it finds a failure to comply with the law do not come within the notion of the “*administration of the law*”. Therefore, administrative actions such as cancelling a visa under the Migration Act or recovering overpaid moneys through deductions from an ongoing social security payment are not regarded as part of the “*administration of the law*”. They will, however, be regarded as “*compelling compliance with obligations imposed by law*” and so as part of the “*enforcement ... of the law*” in the sense understood in *Corak* and approved in *Regina v L T Hardy* and *Kunakool v Boys*. They represent acts that can be described as acts or processes of enforcing the law.

dissenting at 391-392; 433; 1165-1166 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ

¹⁷⁰ [1999] HCA 294; (1999) 198 CLR 380; 162 ALR 294; 73 ALJR 657; Gaudron, McHugh, Gummow, Kirby and Callinan JJ

¹⁷¹ [1987] HCA 23; (1987) 162 CLR 612; 71 ALR 457

¹⁷² [1999] HCA 18; 198 CLR 380; 162 ALR 294; 73 ALJR 657 at [25]-[26]; 393; 302; 663 per Gaudron, McHugh, Gummow and Callinan JJ

147. The indicators of when the enforcement of the law begins and ends would not seem to be so clearly defined as they are in the case of the “*administration of the law*”. Cancellation of visas and recovery of overpaid monies may come far nearer the end of enforcement of the law than the beginning. Just where they start is open to question. Finding the start becomes relevant when considering whether investigative processes come within it. If it were proper to draw an analogy between the “*enforcement of the law*” and the “*administration of the law*”, an investigation into whether a person had not complied with the law would not be regarded as encompassed within the notion of the “*enforcement of the law*”. It would precede enforcement action of the sort I have described but not be part of it.

148. The analogy is not sound. Whereas the concept of “*administration of the law*” refers to matters that are connected with the judicial process, that of the “*enforcement ... of the law*” refers to administrative matters connected with enforcement. What is understood by the “*administration of the law*” has acquired a confined technical meaning but that of the “*enforcement ... of the law*” is much broader. It includes the act or process of compelling compliance with the law. Having regard to *Kunakool v Boys*, it extends to actions that precede what might be regarded as the final act of compulsion or enforcement. Those final acts might include cancellation of a right or entitlement or the recovery of monies but they may also extend to an act that may follow such an act. Deportation, for example, may follow the act of cancellation of a visa. It also extends to those acts that precede the final acts of enforcement. In *Kunakool v Boys*, for example, the marriages found by French J to be perverting the enforcement of the law, long preceded any final act of enforcement by the Department of Immigration and Citizenship. Given that acts preceding any investigation may be encompassed within the concept of the “*enforcement of the law*”, it would seem to follow that acts amounting to the investigation in a particular case would come within s 37(1)(a).

149. On this interpretation, the exemption would not apply to documents whose disclosure would, or could reasonably be expected to prejudice the way in which an agency or Minister exercises discretions and makes decisions generally to grant or withhold the grant of rights and privileges under legislation for which it or he or she has responsibility. If the decision-making processes relating to, for example,

whether a person has a particular entitlement under legislation were to be prejudiced in this way, exemption could not be claimed under s 37(1)(a). Those processes could be described as neither enforcement nor as proper administration of the law.¹⁷³ I emphasise that I have not referred to s 40(1)(d) in any way to construe the scope or operation of s 37(1)(a) and so of 37(1)(b). Rather, I have referred to it as an illustration of the pattern formed by the exemptions established under Part IV of the FOI Act. In so far as matters affecting the proper administration of an agency are concerned, I could just as easily refer to the exemptions created by s 36 in relation to internal working documents and by s 38 in relation to secrecy provisions. None limits

¹⁷³ This conclusion does not mean that documents, whose disclosure would, or would reasonably be expected, to have an adverse effect on an agency's proper administration in a more general sense may not be exempt under the FOI Act. If an agency were to come to the view that disclosure under the FOI Act "*would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency*", it could consider claiming exemption under s 40(1)(d). Over the years, the authorities have illustrated the application of this provision in exempting documents whose disclosure would, or could reasonably be expected to, have a substantial adverse effect on the way in which an agency carries out the functions that have been conferred upon it by statute.

Those illustrations do not represent the scope of s 40(1)(d) in its entirety but what they do illustrate is that, as Weinberg J said in *Jorgensen v Australian Securities and Investments Commission* [2004] FCA 143; (2004) 208 ALR 73 (*Jorgensen*), the reference to the "*operations of an agency*" in s 40(1)(d) is not:

"... *limited to matters relating to the internal administration of the agency, such as a consultant's report upon its operations, but extended to the way in which the agency discharged or performed any of its functions.* ..." ([2004] FCA 143; (2004) 208 ALR 73; at [73]; 88)

Mr Jorgensen had asked the Australian Securities and Investments Commission (ASIC) for access to a report it had prepared after he had complained about the way in which its officers had conducted an investigation into whether he had contravened the *Corporations Law*. He also asked for access to all material relating to the investigation. Weinberg J held that the Tribunal had made no error in affirming ASIC's claim to exemption on this ground.

His Honour referred to the earlier case of *Searle Australia Pty Ltd v Public Interest Advocacy Centre* ((1992) 36 FCR 111; 36 FLR 111; 108 ALR 163; Davies, Wilcox and Einfeld JJ). The Public Interest Advocacy Centre had asked the Department of Health for access to the names of external evaluators who had reported to the Department on applications made by Searle Australia Pty Ltd under the *Therapeutic Goods Act 1966*. The issue before the Full Court of the Federal Court was whether disclosure under the FOI Act would have a substantial adverse effect on the operations of the Department of Health. It held that the Tribunal had been correct to reject a submission that s 40(1)(d):

"... *should be read as limited to matters related to the internal administration of the agency, such as a report by an outside agency or consultant on the operations of the agency.* ... *The Tribunal said:*

'41. As was stated in *Re James and Australian National University*¹⁷³ (1984) 2 AAR 327 at 340 the expression "*the conduct of the operations of an agency*" extends "*to the way in which an agency discharges or performs any of its functions*".'

... *There is no warrant for importing into the words of the section a limitation along the lines contended for.*" ((1992) 36 FCR 111; 36 FLR 111; 108 ALR 163)

the scope or operation of another. Each has its role to play. Looking at just the exemptions established by ss 36, 37, 38 and 40, it can be seen that Parliament has sought to achieve a balance between open government and the confidentiality necessary to ensure that Ministers and agencies can carry out their functions, ensure the enforcement of the law and the judicial administration of the law.

150. I note that s 37(2) refers to disclosure that would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case, or disclose certain investigations. I have paid no regard to that provision in interpreting the meaning of s 37(1)(a) (and so of s 37(1)(b) below) because of the provisions of s 32. Both sections are included within Part IV of the FOI Act. Section 32 provides:

“A provision of this Part by virtue of which documents referred to in the provision are exempt documents:

- (a) shall not be construed as limited in its scope or operation in any way by any other provision of this Part by virtue of which documents are exempt documents; and*
- (b) shall not be construed as not applying to a particular document by reason that another provision of this Part of kind mentioned in paragraph (a) also applies to that document.”*

D.4 “in relation to the ... enforcement or proper administration of the law”

151. I have considered the meanings of the words “*enforcement or proper administration of the law*” in the context of s 37(1)(a) because it is to be expected that their meaning will be consistent between ss 37(1)(a) and (b). There is a difference, of course, and that arises from the difference in the outcome that disclosure under the FOI Act would, or could reasonably be expected to have on, or in relation to the either. Beyond that, there is no difference.

E. The scope of the exemption

152. Having decided that disclosure under the FOI Act would have the outcome described in s 37(1)(b), the exemption does not extend to all of the information that has come from the confidential source. Section 37(1)(b) exempts only the information, whether it came from that source or another, that would enable a person to identify that confidential source or, in an appropriate case, the existence or

otherwise of such a source. To the extent that the information does not do that, it is not exempt under that provision.

The exemption and the documents

153. I am satisfied that the investigations generally known as Operation Dachshund have been carried out in relation to the enforcement of a law. The law that is being enforced is that under the Migration Act as well as that under the Crimes Act. The investigations comprise various administrative steps that are directed to enquiring whether there has been, or is continuing to be, a breach of the law. Whether those investigations lead to a view that there has, or has not, been a breach of the law does not matter. It is the process of enquiring whether the law has been properly carried out or put into effect, and not any particular outcome, that comes within the concept of “*enforcement ... of the law*” in s 37(1)(b).

154. It is not only the formal investigations that come within Operation Dachshund that amount to enforcement of the law. The unsolicited receipt of information regarding possible breaches or failures to comply with the law is related to that enforcement. The use that is made of that information is not to the point provided that it has the necessary relationship to law enforcement. Analysis of information may have that necessary relationship. I will deal with examples of the various scenarios that arise when considering the application of the exemption to the documents below. I am satisfied that each document has been prepared and the information in it obtained in relation to the enforcement of the law.

A. Category A documents

Category 1 documents: 798, 853 and 977

155. It is apparent from those parts of Documents **798**, **853** and **977**, which are PPQs and which have been released to Mr Lobo, that the information for which exemption is claimed under s 37(1)(b) contains some type of information that identifies a person or persons who has or have given a witness statement and/or has been interviewed by FCIS. I am satisfied that they have given a statement or been interviewed in relation to the investigation that was Operation Dachshund. As that operation was an investigation into allegations of fraud under the GSMP, the

statements were given and interviews conducted in relation to the enforcement of the law as I have explained that term.

156. That, however, is not enough to turn those who made the statements or who were interviewed from witnesses or potential witnesses or those who were simply making statements or being interviewed into “*confidential sources*”. While each could be regarded as “... *a person ... that can be used to provide information, evidence, etc ...*”,¹⁷⁴ there is nothing in the evidence that satisfies me that the statement was given under an express pledge of confidentiality. The context in which the information appears on folio 38 of **document 798** and 18 of **document 853** satisfies me that no such pledge can be implied. I have accepted that witnesses were interviewed on the understanding that the interviews were confidential.¹⁷⁵ That may have been the understanding at the start of the interview but it does not necessarily mean that it continued to be the understanding. Ms Pettit’s evidence is to the effect that some of the witnesses did not want their names disclosed to Mr Lobo. No mention is made of disclosure to the wider world but I am left with the inevitable conclusion that there were some who either did not mind whether their names were disclosed or did not express an opinion on the subject. I have no way of knowing which is which and there is nothing in the documents that points me in one direction or the other. As the decision-maker carries the burden of proof, I am not satisfied that the persons identified in these documents provided information under an implied pledge of confidentiality. Therefore, they are not exempt under s 37(1)(b).

157. I note that my conclusion is consistent with the view expressed by O’Bryan J, with whom Young CJ and Vincent J agreed, in *Croom* when he said of s 31(1) of FOIVIC:

“... The plain meaning one might ascribe to this paragraph is that it is concerned with protection of the ‘informer’ and not with the protection of a potential witness who would prefer not to be identified. Public interest has dictated for a long time that need to protect the true ‘informer’ but a reluctant witness has never attracted immunity at common law. ...

... The sources were confidential because they gave the information contained in their statements after being given (or offered) a promise of confidentiality.

¹⁷⁴ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

¹⁷⁵ See [43]

In my opinion, the words ‘confidential source of information’ do not apply to a potential witness in a civil proceeding who would prefer to remain anonymous for the time being. A potential witness cannot clothe himself with secrecy in relation to the administration of the law unless he is able to invoke ‘informant’ immunity. Nor may an investigator confer upon a potential witness ‘confidential’ status until it is convenient to his principal to reveal the name of the witness.”¹⁷⁶

158. Documents **798**, **853** and **977** each identify a place at which warrants were executed on 25 June 2007. Exemption is claimed under s 37(1)(b) in relation to that information where it appears in documents **798** and **853**. The same information appears in document **977** but exemption is not claimed for it under this provision. A place cannot be a “*source of information*” in the sense in which that expression is used in s 37(1)(b). Unlike a “... *person, book or document that can be used to provide information, evidence, etc ...*” and so can be regarded as a source of information, a place at which a warrant is executed is a place from which information is obtained or collected. It does not provide information. Furthermore, even if a place could be regarded as a source of information, it cannot be regarded as a *confidential* source of information. “*Confidential*” in s 37(1)(b) does not mean private to the investigators or to the Department. The Full Court of the Federal Court decided in *Jephcott* that a reference to a “*confidential source*” is a reference to “... *information ... provided under an express or implied pledge of confidentiality ...*”. That means that the information has to be provided by a human source for a pledge, whether express or implied, can only be given and received by humans to other humans and not by humans to inanimate places. Even if it could be said to provide information, the fact that the investigators or the Department may want to keep confidential the place from which any information was taken or sought, cannot confer confidentiality on the place. It cannot be a confidential source of information.

159. I do not accept that exemption under s 37(1)(b) has been properly claimed for these documents.

Category 5 documents: 152, 153, 238, 728, 737, 745, 762, 991

160. Exemption is claimed for a two line passage on folio 202 of Document **152**. I am satisfied that it is exempt under s 37(1)(b). Given the content of the two

¹⁷⁶ [1991] VicRp 72; [1991] 2 VR 322 at 329

paragraphs that precede it, the content of the passage could reasonably be expected to enable a person to ascertain the identity of a person who has given the Department information. It is clear from the passage in which it appears that it is a human source. There is no express pledge of confidentiality and there is nothing to suggest that it came to the Department by way of the Dob-In Line which holds out the promise of confidentiality. I am, however, satisfied from the text of the passage claimed to be exempt and its context that the source would want his or her identity to be confidential. He or she is a confidential source and has that role in relation to an alleged breach of the Migration Act. The two line passage on folio 202 for which exemption is claimed under s 37(1)(b) in relation to Document **152** is exempt under that provision.

161. Exemption is also claimed for the second half of folio 202 and the first third of folio 201 of **Document 152**. I am satisfied that this passage refers to an informant or informants and the information provided by him, her or them. I am satisfied that the name or names and details, including contact details, of the informant or informants appearing on folios 202 and 201 could reasonably be expected to enable a person to ascertain the identity of a source of information. Again, there is no express pledge of confidentiality but the content of the passage satisfies me that he, she or they would not want his, her or their identity to be known outside the confines of the Department. I am satisfied that he, she or they is or are confidential sources and that, as consequence, the second half of folio 202 and the first third of folio 201 of **Document 152** are exempt under s 37(1)(b).

162. I am not satisfied that the remaining content of folios 202 and 201 could be used to enable a person to identify the identity of that confidential source or those confidential sources. There is nothing in the content that suggests that to me and there is no evidence to that effect. I have accepted Ms Pettit's evidence that witnesses were reassured that what they said would be confidential. Although he or she may do so, I am not satisfied on the evidence that I have that the person comes within that category. That content is not exempt under s 37(1)(b).

163. In so far as the passage might refer to information conveyed to the Department by one person but coming from a third party, that third party is not a confidential source of information in relation to the enforcement of the law. There is

no suggestion that any information that might have come to the Department in that way is from a “*confidential source*”. It is not exempt under s 37(1)(b).

164. For the reasons I have given in relation to folios 202 and 201 of Document **152**, I am satisfied that the name or names and details, including contact details, of the informant or informants appearing in document **153** other than the name and other identifying details of a Departmental officer already released to the applicant is exempt under s 37(1)(b). For the same reasons, I am not satisfied that the remaining material claimed to be exempt under that document is exempt under s 37(1)(b).

165. I am not satisfied that the passage on folio 19 of Document **238** is exempt under s 37(1)(b). There is nothing on the face of the passage to suggest that the information has any connection with a confidential source of information even though it is in relation to the enforcement of the law. The passage contains information obtained in various ways. In so far as it identifies persons giving information, those persons have provided that information in response to questions asked of them. That is not enough to make them a “*confidential source of information*” within the meaning of s 37(1)(b). I am not satisfied that they have given information on an express or implied understanding that it would be confidential. Their situation is not that of witnesses or potential witnesses but it is far closer to that than that of a “*confidential source*” protected by s 37(1)(b).

166. Exemption is claimed for most of folios 17 and 16 of Document **153**. For the reasons I have given in relation to folios 202 and 201 of Document **152**, I am satisfied that the name or names and details, including contact details, of the informant or informants appearing on folios 17 and 16 are exempt under s 37(1)(b). Apart from that, I am not satisfied that the remainder of the passage for which exemption is claimed could be used to enable a person to identify the identity of that confidential source or those confidential sources. There is nothing in the content that suggests that to me and, on the evidence, I am not satisfied that an implied pledge of confidentiality arises.¹⁷⁷ That content is not exempt under s 37(1)(b).

¹⁷⁷ See [156] above

167. I have come to the same conclusions in relation to the same or similar passages found in Documents **728**, **737**, **745**, **762** and **991**. They are exempt under s 37(1)(b) in so far as they show the name or names and details, including contact details, of any informant or informants appearing in them. That is the information in relation to which the exemption has been claimed.

Category 6: Document 346

168. The Department's solicitors have kindly colour coded the documents according to the exemption or exemptions claimed. No passage has been coloured on Document **346** in the colour allocated to a claim for exemption under s 37(1)(b) but it appears from the Schedule of Documents attached to Ms Creaner's affidavit that the exemption is claimed. That Schedule states that the excluded information concerns an unrelated court proceeding involving a departmental informant, the name of the migration agent under investigation and the name, address and signature of the Departmental informant. When document **346** is read in its entirety, it would seem that the claim for exemption relates to the whole of the document.

169. If it were the case that an unrelated court proceeding were used as the source of the information, it is not a confidential source for the purposes of s 37(1)(b). As the information on the first page of Document **346** released to Mr Lobo shows, the information appears to have been obtained from allegations contained in an affidavit lodged by, or on behalf of, the unnamed person in the course of litigation. That cannot be described as a "*confidential source*" and Document **346** is not exempt under s 37(1)(b).

Category 7: Documents 139 and 597 and Documents 509, 596 and 1019

170. Category 7 contains documents concerning various allegations about SICB. The first is Document **139**. It is a letter addressed to the Department and it is clear from the small amount released to Mr Lobo that it complains about someone for his "*criminal conduct*" and asks that the conduct be investigated. A complaint does not mean that a person is automatically a confidential source of information. There must be something more. On its face, there is nothing to suggest that the author has made the complaint in confidence. The fact that the author has complained does not raise that suggestion by itself. No reference is made to the Dob-In Line and, in the

absence of even an oblique reference, it is difficult to find that the writer of the letter was relying on the Department's undertaking to treat allegations in confidence. Having regard to all of these matters, I am not satisfied that the author is either a source of information or a confidential source of information. I am not satisfied that any part of Document **139** is exempt under s 37(1)(b).

171. For the same reason, I am not satisfied that Document **597**, which is a letter of complaint to the Department, is exempt in any respect under s 37(1)(b).

172. Exemption is claimed for the entirety of Documents **509**, **596** and **1019**. Document **509** is a chain of two emails between Departmental officers attaching photographs obtained from a third party as a result of Operation Dachshund. There is a name appearing on the email that does not belong to either of the officers and it would be reasonable to expect that the subjects in the photographs would be identifiable. I am not satisfied, though, that the photographs come from a confidential source of information within the meaning of s 37(1)(b) or that they identify such a source. The fact that the photographs were obtained during Operation Dachshund does not of itself lead to that conclusion. If, for example, they were obtained during an interview of a person, that does not necessarily make the person a confidential source. Witnesses were offered confidentiality but, as I have explained above, some wanted their identity protected, at least from Mr Lobo but, presumably, others did not, did not mind one way or the other, or had no view. In the absence of anything on the face of the material that leads me to the conclusion that there was an implied, let alone an express, pledge of confidentiality, I am not satisfied that the person can be regarded as a confidential source of information. I am not satisfied that Document **509** is exempt under s 37(1)(b).

173. Document **1019** is the first email in the chain that continues in Document **509**. For the same reasons, it is not exempt under s 37(1)(b).

174. Document **596** is a chain of emails between the Department and an individual. It is a source of information in one sense but the document raises the question as to where the line is drawn between a complaint and a source of information. I have decided that I do not need to address this issue. If the individual is regarded as a source of information, he or she would be regarded as that in relation

to law enforcement. The material relates to matters of the sort under investigation in Operation Dachshund. He or she is not, however, a confidential source. There is nothing in the text that suggests that the information was proffered on the understanding that he or she and the Department had a relationship of confidentiality. Although the classification of a document is not determinative of whether there is such an understanding, I note that the chain of emails has been classified as “*Unclassified*”. I am not satisfied that it is exempt under s 37(1)(b).

Category 9: Documents 564, 570, 571, 577, 620 and 723

(i) Documents 564, 571 and 577

175. Document **564** is a receipt issued by SICB to a person for a payment made by that person. Documents **571** and **577** are receipts issued by the Department. Exemption is claimed for the names of the third parties. This is not a situation in which it can be said that those persons have provided information in the sense of being a confidential source of information. That is certainly the case in relation to Document **564** where the manner in which the document came into the hands of the Department is not clear to me. It might be that it was ceased under the warrant but, if that were the case, it would not make the recipient of the receipt a confidential source of information. If the person gave the Department a copy of the receipt, it would not, without more, make that person a confidential source of information. On the information I have, I am not satisfied that it was provided under an express or implied pledge of confidentiality. Documents **564**, **571** and **577** are not exempt under s 37(1)(b).

(ii) Documents 570 and 620

176. Documents **570** and **620** comprise handwritten notes by a Departmental investigator with a third party. Each names a person described either as a witness or as an informant and Document **620** identifies migration agents or a migration agent under investigation. Again and in so far as the documents reveal information given to the Department by any person, I am not satisfied that the persons were giving information on the basis of an implied or express pledge of confidentiality. There is nothing on the face of the document to suggest that. I am not satisfied that they are exempt under s 37(1)(b).

(iii) Document 723

177. Document **723** differs from Document **596** in that it is classified as “*DIMA-IN-CONFIDENCE*”. It is a chain of emails between Departmental officers regarding SICB and allegations of fraud that had been made about it. It reveals the name of a person described as the “*original informant*”. It is the name in relation to which exemption is sought. The material at the beginning of folio 166 leads me to conclude that the person approached the Department with information and was concerned lest that fact became known to SICB. I am satisfied that the person is a “*confidential source of information*”. The subject of the allegations was in relation to law enforcement in the sense that it raised issues whether the applications were being made and, therefore, decided on proper bases as permitted by the Migration Act. Document **723** is exempt under s 37(1)(b).

Category 12: Documents 112, 962 and 963

178. Exemption is claimed under s 37(2)(b) for a passage at the end of the second page, of folio 75, of Document **112**. This document is described in the Schedule of Documents provided by the Department as a minute from one of the Department’s investigators in Operation Dachshund regarding a third party. Exemption is claimed for the passage I have identified on the basis that it is information provided by a Departmental informant which is likely to identify the informant. Exemption is claimed for similar passages appearing in Documents **962** and **963**.

179. I am not satisfied that the person identified in the passage can be regarded as a confidential source of information. Persons who are approached during an investigation for information, whether they are asked to provide witness statements or not, do not become sources of information as understood by s 37(1)(b) on that basis alone. The document in which the information appears is marked “*IN-CONFIDENCE*”. On its own that would not be enough to satisfy me that the person providing the information wished to be regarded as a confidential source. The subject matter of the passage does not assist me. There is nothing in it that suggests that the person wished to give information on a confidential basis. On the evidence, I do not know whether this is a person who expressed a wish to have his or her identity kept

from Mr Lobo. I might speculate that a person might prefer that but it would be mere speculation. I am not satisfied that the passage for which exemption is claimed would be reasonably expected to disclose the identity of a confidential source of information. Therefore, none of Documents **112**, **962** or **963** is exempt under s 37(1)(b).

Category 15: Document 1018

180. Document 1018 comprises a chain of emails among officers of the Department. It is headed “*Re: audit on Sydney International College of Business*”. A passage at the bottom of folio 117 and the top of folio 118 is said to contain information disclosed to investigators by confidential sources. It is said that disclosure of the passage is likely to identify those confidential sources.

181. I am satisfied that the passage contains information that might identify the person or persons who gave it. I say “*might*” because it would need to be taken with other information in order to come to a precise identification. That other information would not necessarily be known to anybody other than a select circle. I do not need to consider that matter further or try to reach a decision whether disclosure of the identity of the person or persons would be reasonably likely because I am not satisfied that the person or persons can be regarded as confidential sources of information. He, she or they have been interviewed by investigators in the course of the investigation. That alone does not make a person a confidential source of information.

182. There is nothing that states that the interview was conducted on the basis of an express pledge of confidentiality. I note that the document has an “*unclassified*” classification but that reference is made in the document itself to a person’s or persons’ not wanting to be identified. In view of that, I am satisfied that the information was obtained under an implied pledge of confidentiality. As it was a confidential source in relation to Operation Dachshund, it was a confidential source in relation to the enforcement of the law. I am satisfied that Document **1018** is exempt under s 37(1)(b).

Category 16: Document 956

183. Document **956** is a series of emails among officers of the Department and of State education authorities. It names a person and exemption is claimed on the basis that it reveals a Departmental informant. I do not accept that claim. It certainly names a person but that is a person who has made a statement and who, as appears from the face of the document, has spoken with journalists and provided those journalists with a copy of that statement. If this person was a confidential source of information, I am not satisfied that he or she remains so. The person has renounced any relationship of confidentiality was lost when the person interacted with the media as he or she did. There is nothing wrong with doing that but the Department cannot protect confidentiality when the person whom s 37(1)(b) may be able to protect casts confidentiality aside. I am not satisfied that Document **956** is exempt under s 37(1)(b).

184. If it should be that my analysis is incorrect in the previous paragraph, I arrive at the same conclusion by a different route. The attachment referred to in the email is not attached to Document **956**. I have no basis on which I can find that the statement was given on that basis of an implied relationship of confidence between the person and the Department. I do not know whether the person was one to whom the Department made express statements regarding confidentiality. In any event, the person's subsequent actions make it clear that he or she does not wish to preserve any relationship of confidence between him or her and the Department. It seems to me that I can take account of his or her actions subsequent to speaking with officers of the Department in order to determine whether he or she is a confidential source at the date of my decision. The exemption provided in s 37(1)(b) is intended to ensure that the enforcement or administration of the law is not prejudiced. It is not framed in terms of prejudice but in terms of a particular prejudice i.e. the protection of confidential sources from which public administration may gain information that it requires for the enforcement or proper administration of the law. If a person, who has given information to an agency, chooses to forego confidentiality at some time in the future and to disclose that he or she has given information to that agency, how can it be said that the person remains a confidential source? He or she has revealed him or herself as a source and there is no longer a place for the operation of the exemption.

Category 17: Documents 286, 287 and 997

185. The colour coding system has not quite worked on Documents **286**, **287** and **997**. Therefore, I have no indication of the passage claimed as exempt under s 37(1)(b). I know from the Schedule of Documents that exemption is claimed on the basis that the name and other identifying information about a visa applicant under investigation appears in the passage together with the name of a migration agency and agency also under investigation. None of this is exempt under s 37(1)(b). The passage to which the claim for exemption may relate appears at the foot of folio 297 and top of 296 of Document **286**, the bottom of folio 294 and top of 293 of Document **287** and the bottom of folio 46 and top of folio 45 of Document **997**. The passages refer to information that has come to the Department from a person or persons. From their content and context, I am not satisfied that it is information that identifies a confidential source or sources of information. Even if it were, there is nothing to suggest that the information was given in confidence. The fact that information was given does not raise that suggestion by itself. I am not satisfied that the author is or the authors are either a source or sources of information or a confidential source or sources of information. I am not satisfied that any part of Documents **286**, **287** or **997** is exempt under s 37(1)(b).

Category 23: Documents 140, 321 and 285

186. Document **140** is a Minute from one officer of the Department to another and assesses allegations made in relation to certain persons and the SICB. Exemption is claimed for the document under s 37(1)(b) in relation to the passage beginning at the bottom of folio 237 and extending to the top of folio 237. This passage contains information about certain persons. In so far as any person or persons are recorded as having provided information, none has done so as a “*confidential source of information*”. That is not an apt description to apply to persons who provide information because, for example, they are being interviewed, making a witness statement or making a complaint. For the reasons I have given earlier, there has to be something more; something on which I can find an express or implied pledge that the information was given on a confidential basis. As the passage comprises information of this sort, I am not satisfied that it is exempt under s 37(1)(b).

187. **Document 285** is a document prepared by the Department and is headed “*Complaints against Sydney International College of Business*”. Exemption is claimed for that part of the document appearing at folio 299 and summarising allegations made to VETAB concerning possible breaches to the ESOS Act. Exemption is claimed under s 37(1)(b) on the basis that the information, when received from VETAB, was treated by the Department as confidential and not disclosed other than for the purposes of investigation and enforcement purposes.¹⁷⁸

188. While I accept that the Department has treated the information as confidential, I am not satisfied that the information would disclose a confidential source. Other than the fact that the information was initially given to VETAB, there is no evidence of the way in which that information came to it. It might have come as an allegation or as a consequence of a person’s approaching VETAB for another matter. There is no evidence that the information was received on the basis that it would be treated in confidence so that the person supplying it could be regarded as a “*confidential source of information*”. I am not satisfied that Document **285** is exempt under s 37(1)(b).

189. Document **140** is described as a Departmental document entitled “*Investigation Plan for SICB and third party*”. It contains information identifying persons who have made allegations to the Department about the conduct of migration agents as well as other information. There is nothing on the face of the document that suggests that those persons gave the Department information on the basis of an express undertaking that it would be treated in confidence. There is nothing on the face of that information from which I can imply that it was given on the basis that it would be kept confidential. Some might want to give information on that basis and others might not. On the evidence, I am not satisfied that the persons are confidential sources within the meaning of s 37(1)(b). Document **140** is not exempt under that provision.

¹⁷⁸ Affidavit of Ms Pettit, Exhibit 2 at [96]

B. Category C documents

Category 6: Documents 399 and 1001

190. Document **399** is a Ministerial Intervention Request made in relation to a visa held by a person described as a “*Departmental informant*”. It includes a number of attachments. I am not satisfied that the person is a confidential source of information of the sort described in s 37(1)(b). The fact that the Department has obtained information from a person or gleaned information about that person is not sufficient without something more from which I can find that the information was given on the basis of an express or implied basis of confidence. I am unable to make that finding in this instance for the reasons I have given in relation to earlier documents.

191. Document **1001** is not referred to in the Schedules to Ms Creaner’s second affidavit and is not referred to in the Schedules of Documents that are no longer in contention for one reason or another. The reasons I have given in the previous paragraph apply equally to this paragraph. It is not exempt under s 37(1)(b).

Category 7: Documents 523 and 1016

192. Document **523** is an email from what is described in the Schedule as a “*third party*” to an investigator working on Operation Dachshund. Exemption is claimed for the name and contact details of a person described as a “*departmental informant*”. From the information in the document, I cannot tell how that person came to give the information to the department but I do find that the person states that information is given in confidence. In view of that, I am satisfied that the person is a “*confidential source of information*” within the meaning of s 37(1)(b). I am satisfied that the information claimed to be exempt is exempt under s 37(1)(b).

193. Document **1016** has a chain of emails between the Department and another person regarding teachers at the SICB. Exemption is claimed for the name and contact details of the person communicating with the Department on the basis that the person is a “*departmental informant*”. The person has specifically asked that his or her name not be used. In light of that and against the background of the investigation that was ongoing at the time, I am satisfied that the person is a

confidential source and that the document is exempt under s 37(1)(b) in respect of that information.

Category 9: Documents 53, 469, 472, 482, 483, 485, 527, 547, 549, 550, 570, 650, 692, 693, 1017, 1020

194. Document **53** is a file note written as part of Operation Dachshund regarding a telephone conversation with a person said to be a “*confidential informant*”. Again, I am not satisfied that the document is exempt under s 37(1)(b) in respect of that information. I am not satisfied on the material that it was given under any express or implied pledge of confidentiality

195. Document **469** is a facsimile message from a person to the Department attaching a copy of a document belonging to SICB. Exemption is claimed on the basis that it names a departmental informant and the document itself is likely to identify that person. From the document, I may be able to identify the person said to be the departmental informant and the nature of the information conveyed to the Department. I have been unable to glean on what basis that information came to be passed. I am, however, able to imply from its text that it was given in confidence but that is not enough to satisfy me that the person was a confidential source of information. I am satisfied that the document is exempt under s 37(1)(b) in respect of that information. My reasons are the same as those I have given in relation to Document **523**.

196. Documents **472, 482, 483, 485, 527, 547, 549, 570, 650, 692** and **693** are file notes by a Departmental officer made during Operation Dachshund and recording conversations with witnesses. Exemption is claimed under s 37(1)(b) on the basis that the note contains information likely to identify the witnesses. For the reasons I have given earlier, a witness cannot be regarded as a confidential source of information simply by virtue of being a witness. There must be something more and there is not. They are not exempt under s 37(1)(b).

197. Document **550** is a file note setting out the names and contact details of teachers at SICB. A list of names does not amount to a list of confidential sources of information. All that it amounts to is a list of names of teachers compiled from some source or other. It is not exempt under s 37(1)(b).

198. Documents **1017** and **1020** are emails between officers of the Department summarising information that has been given by a person or persons who has or have given information to the Department and that is likely to identify that person or those persons. I agree that the information in the documents is reasonably likely to identify the person or persons who provided some or all of the information. On the evidence I have, I do not know the basis on which that information was given. Was it given by a witness, as a result of an interview or was it given after being given an undertaking that confidentiality would be maintained? I am unable to answer these questions and so am not satisfied that the person is a confidential source of information. Documents **1017** and **1020** are not exempt under s 37(1)(b).

Category 18: Documents 25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76 and 60, 64, 65, 70, 78, 81, 82, 83, 84, 85, 261 and 263 and 1023, 1074, 1083, 1084 and 1089

199. I have divided the documents in Category 18 into four groups.

(i) **Documents 25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76**

200. Each of the documents in this group is a document from SICB which has been attached to a witness statement prepared during the course of Operation Dachshund. The text of the witness statement and any other attachments to it are not included in the document. The documents, which are described in the Schedule of documents include Class Attendance Registers, Practical Tests, Program Guides, Results Registers, Performance Registers and a cleaning roster. I have no evidence as to the manner in which these documents came into existence, were used and stored. If I had, it might be possible to say that they could only have come to the Department in one way. I do have evidence that warrants were executed. That is a possible means by which the Department obtained the documents. Investigators interviewed a number of people including staff at the SICB. That is another avenue. It may be that some were given to it by “*informants*”. It may be that they were given to the Department on a confidential basis. It may be that they were not. On the evidence, I can only speculate. An examination of the documents takes me no further. I am not satisfied that they are exempt under s 37(1)(b).

(ii) Documents 60, 64, 65, 70, 78, 81, 82, 83, 84, and 85

201. Each of these documents sets out notes of conversations with persons described as witnesses in Operation Dachshund. For the reasons I have given earlier, the fact that a person is a witness does not of itself make them a confidential source of information. There is nothing in the text of the notes that suggests to me that any of the persons interviewed was such a source. I am not satisfied that the documents are exempt under s 37(1)(b).

(iii) Documents 261 and 263

202. Document **261** is a computer printout from a website. It contains information about a person whom it identifies. It is claimed to be exempt on the basis that it contains information that may identify a witness. The fact that it is a document that comes within the terms of Mr Lobo's request may indeed lead to that conclusion. That does not make the person a confidential source of information within the meaning of s 37(1)(b). As there is nothing more to show how the person came to be a witness in Operation Dachshund and to give information, if he or she did, I am not satisfied that the document is exempt under s 37(1)(b).

203. Document **263** is an email between officers of the Department discussing a forthcoming interview with a person who has, or will, give a statement. Exemption is claimed on the basis that disclosure may identify the person who is described as a witness. For the reasons I have given above in relation to persons who are described in that way and in the absence of anything in the document itself that persuades me that the person is a confidential source of information, I am not satisfied Document **263** is exempt under s 37(1)(b).

(iv) Documents 1023, 1074, 1083, 1084 and 1089

204. Document **1023** is a chain of emails between an officer of the Department and a third party. They are entitled "*SICB*". I am not satisfied that it would identify a confidential source as that term is used in s 37(1)(b). There is no express statement that the information contained within it is confidential or that the exchange is being conducted on the basis of confidentiality. The classification given to the chain of emails is "*unclassified*". The subject matter does not contain anything

that satisfies me that there was an implicit understanding of confidentiality. Reference is made to an attachment but it does not appear as part of Document **1023**. I am not satisfied that the document is exempt under s 37(1)(b).

205. Documents **1074**, **1083**, **1084** and **1089** are internal emails referring to information that would identify third parties who have, or might help, the Department in its investigations. I am not satisfied that any of them would, or could reasonably be expected to, disclose a confidential source. There is no evidence that any of the third parties has given information on the basis of an express pledge of confidentiality or that they will or may do so. The emails are marked “*unclassified*” and the subject matter does not lead me to find that such a pledge is, or would be, implicit in their giving information to the Department. Therefore, I am not satisfied that the documents are exempt under s 37(1)(b).

ATTACHMENT E

EXEMPTION: section 37(2)(b)

The exemption

206. Section 37(2)(b) of the FOI Act provides:

“A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

- (a) ...*
- (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; ...*
- (c) ...”*

A. ***“would, or could reasonably be expected to” disclose certain matters that “would, or would be reasonably likely to” have the stated consequence***

207. I have already set out general principles in relation to when a defined outcome *“would, or could reasonably be expected to”* follow from disclosure under the FOI Act. They are equally applicable to the interpretation of s 37(2)(b) where the defined outcome is disclosure of the methods or procedures it describes.

208. Where s 37(2)(b) differs from exemption provisions such as s 37(1)(b) or even ss 33(1)(a)(ii) and (b) is that the defined outcome is not itself defined in what might be thought to be absolute terms. The defined outcome is first defined by reference to methods or procedures that have two qualities. The first is that they are methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law. If they are, the exemption does not apply unless the second quality is also present. The second is that they are methods or procedures whose disclosure *“would, or would be reasonably likely to”* prejudice their effectiveness.

209. Whether something *“would”* have a certain outcome is the same whether that word appears in other company in the expression *“would, or would be reasonably likely to”* or *“in the expression “would, or could reasonably be expected to”* have that outcome. It signifies that the outcome is probable as I have explained

above so that the evidence establishes that disclosure must as a logical or necessary consequence have the ability to (and so “*would*”) bring about that outcome.¹⁷⁹ As for whether the outcome “*would reasonably be expected to*” or “*could be reasonably likely to*” follow from disclosure, the word “*reasonably*” carries the same meaning. It derives from the word “*reasonable*” whose ordinary meanings are those of “*sensible; rational; showing reason or good judgment ...*”¹⁸⁰.

210. There is little to choose between the words “*expect*” and “*likely*”. As I have said, it means “*to think of something as likely to happen or come ...*” and the ordinary meanings of “*likely*” include that of “*probable*”,¹⁸¹ “*... having an appearance of truth or fact; seeming as if it would happen, or prove to be as stated; probably ...*”¹⁸² and “*.... probably or apparently going or destined (to do, be, etc): likely to happen. ... seeming like truth, fact or certainty, or reasonably to be believed or expected; probable ...*”¹⁸³

211. When analysed, it seems to me that the expressions “*would, or could reasonably be expected to*” and “*would, or would be reasonably likely to*” lead to little practical difference. Whether disclosure of the lawful methods or procedures referred to in s 37(2)(b) “*would, or would be reasonably likely to*” prejudice their effectiveness must be decided on the basis of whether, when considered on a rational, as distinct from irrational, absurd or ridiculous basis, it is probable that disclosure under the FOI Act will prejudice their effectiveness.

B. “*Prejudice the effectiveness*”

212. “*Prejudice*” to the effectiveness of the methods or procedures would, or would be reasonably likely to follow disclosure under the FOI Act before the exemption in s 37(1)(b). The meaning of “*prejudice*” in this context is that of “*... harm; detriment; disadvantage ...*”.¹⁸⁴ The harm, detriment or disadvantage is to

¹⁷⁹ See [205]–[209] of Attachment E above

¹⁸⁰ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

¹⁸¹ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

¹⁸² Shorter Oxford English Dictionary, 5th edition, 2002, Oxford University Press

¹⁸³ Macquarie Dictionary, 3rd edition, 2001, The Macquarie Library Pty Ltd

¹⁸⁴ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

the ability of the methods or procedures to prevent, detect, investigate or deal with matters arising out of breaches or evasions of the law.¹⁸⁵

213. The way in which the exemption has been applied appears in the reasons for decision by two differently constituted Tribunals. The earlier reasons were prepared by The Hon GD Clarkson QC, Senior Member, Mr Wilkins and Dr Billings, Members in *Re Mickelberg and Australian Federal Police*.¹⁸⁶ They said:

*“... in the public interest it is essential that law enforcement agencies have speedy, accurate and secure systems of communication, both within an agency and between agencies especially where agencies have different fields of responsibility. Secondly, it is one thing for observers to deduce, with varying success from everyday experience media reports and other informal sources, what appear to be the methods and procedures employed by such agencies to achieve their objects, but it is quite another thing to have spelt out publicly from the agencies (sic), own documents or in the proceedings of a Tribunal such as this what those methods and procedures are. The risk that they may be less effective would seem to be increased if a person endeavouring to combat or evade them has authoritative knowledge of them.”*¹⁸⁷

214. A similar approach was taken by Senior Member Beddoe in *Re Murphy and Australian Electoral Commission*¹⁸⁸ when he considered a request for access to documents setting out what the Australian Electoral Commission (AEC) considered to constitute valid and sufficient reasons for a person’s failure to vote in a Federal election. In finding that the documents were exempt under s 37(1)(b), Senior Member Beddoe referred to the AEC’s having guidelines so that its divisional returning officers might make consistent decisions as to whether or not an elector had a valid and sufficient reason for failure to vote at an election. He continued:

“... [T]he divisional returning officers are required to rely primarily on the responses to their Penalty Notices. It is clear, on the material that they do not conduct face to face investigations with each defaulting voter and that they rely, to a large extent, on the honesty of the responses. That procedure depends upon those responses being a frank and factual statement of the facts rather than an excuse which is known to be an acceptable excuse to the electoral office. ... The techniques adopted by the electoral office in the administration of s 245 of the Electoral Act are, in my view, lawful methods or procedures for detecting investigating or dealing with matters arising out of

¹⁸⁵ The ordinary meanings of the word “effective”, which is the root of the noun “effectiveness”, include: “... having the power to produce, or producing, a desired result ...”: Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers.

¹⁸⁶ (1984) 6 ALN N176

¹⁸⁷ (1984) 6 ALN N176 at N176

¹⁸⁸ [1994] AATA 149; (1994) 33 ALD 718

*breaches of s 245 of the Electoral Act and the disclosure of those methods or procedures would or would be reasonably likely to prejudice the effectiveness of those methods or procedures. ...”*¹⁸⁹

The exemption and the documents

A. Category B documents

Category 9 documents: 267, 271, 290, 322 and 1009 and 486, 662 and 1009

Category 16 documents: 397 and 1062 and 870

Category 19 documents 213, 214, 272 and 376

215. Each of these documents is said to discuss or disclose methods of investigation used by FCIS or TRA to investigate breaches of the Migration Act. I am satisfied that those methods are lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the Migration Act. I am satisfied that disclosure of the documents under the FOI Act would disclose those methods let alone “*could reasonably be expected*” to do so.

216. Section 37(2)(b) is not concerned with prejudicing the conduct of a particular operation. If any of the documents raises concerns about persons’ becoming aware of Operation Dachshund, that would not be a relevant consideration under this provision as a matter of law. Apart from that, it would not be a relevant consideration as a matter of fact. The existence of the operation is known and, in any event, it has come to an end.

217. In her affidavit, Ms Creaner said that the methods or procedures referred to in these documents are not commonly known to visa applicants, migration agents or members of the public. They are methods commonly used by FCIS and other agencies to investigate possible breaches of the Migration Act.¹⁹⁰ Ms Creaner was referring in particular to the documents in Category 16 but she has given the same evidence in relation to the documents in the other categories.¹⁹¹

218. The difficulty that I have with the application of s 37(2)(b) in a case such as this always turns on whether disclosure will prejudice the effectiveness of those methods or procedures. The very fact that they must be lawful methods or

¹⁸⁹ [1994] AATA 149; (1994) 33 ALD 718 at [19]; 723

¹⁹⁰ Exhibit 3 at [31(c)]

¹⁹¹ Exhibit 3 at [24(c)] and [34(b)]

procedures means that they may be regulated in some way or, if not regulated, would be generally available. It may be that they are not thought about by members of the general public but, against that, it can be said that they can easily be ascertained as can those who may use them. After all, everyone is, subject to certain qualifications, presumed to know the law.¹⁹² Those qualifications have no place in this context.

219. On my reading of it, there is nothing in the information sought to be exempted that could be said to fall outside the realm of methods of procedures that could be readily contemplated by a person wishing to act in breach of the Migration Act. Reference is made to them from time to time in the various forms of news reporting, in the theatre, at the cinema, on the television and in books, both fiction and non-fiction. They are all known. Given that context, I am not satisfied that their disclosure under the FOI Act will prejudice their effectiveness. What could reasonably be expected to prejudice their effectiveness would come about if those who intend to act in breach of the Migration Act or who in fact do so turn their minds to what is publicly available and believe that it is possible that they could come under suspicion. Disclosure under the FOI Act cannot be reasonably expected to play any part in their coming to that point of view.

220. For these reasons, I am not satisfied that the documents, or parts of them for which exemption is claimed, are exempt under s 37(2)(b).

¹⁹² *Latter v Council of the Shire of Muswellbrook* [1936] HCA 70; (193-6) 56 CLR 422; Latham CJ, Rich and Dixon JJ at 434-435 per Latham CJ

EXEMPTION: section 40(1)(d)

The exemption

221. In so far as it is relevant in this case, s 40(1) provides:

“Subject to subsection (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:

(a)-(c) ...

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency; ...

(e) ...”

Section 40(2), which qualifies s 40(1)(d) provides:

“This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.”

A. “would, or could reasonably be expected to”

222. I adopt my discussion of this expression at [207]-[211] of Attachment E above.

B. “substantial adverse effect”

223. The words “*substantial adverse effect*” have been considered in a number of cases. Beginning with the word “*substantial*”, its ordinary meanings include that of “... *considerable in amount, extent, importance, etc ...*”.¹⁹³ In considering the meaning of the expression “*substantial loss or damage*”, Bowen CJ said in *Tillmanns Butcheries Pty Ltd v. Australasian Meat Employees Union & Ors*¹⁹⁴:

“The word ‘substantial’ would certainly seem to require loss or damage that is more than trivial or minimal. According to one meaning of the word the loss or damage would have to be considerable (see Palser v. Grinling [1984] 1 ALL Er 1; [1984] AC 291 at 316-7). However, the word is quantitatively imprecise; it cannot be said that it requires any specific level of loss or damage. No doubt in the context in which it appears the word imports a notion of relatively, that is to say, one needs to know something of the circumstances of the business affected before one can arrive at a conclusion

¹⁹³ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

¹⁹⁴ (1979) 27 ALR 367; 42 FLR 331

*whether the loss or damage in question should be regarded as substantial in relation to that business.”*¹⁹⁵

Justice Deane said:

*“The word ‘substantial’ is not only susceptible of ambiguity; it is a word calculated to conceal a lack of precision. In the phrase ‘substantial loss or damage’, it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size ... As at present advised, I incline to the view that the phrase, substantial loss or damage, in s45D(1) includes loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal. It is, however, unnecessary that I form or express any concluded view in that regard, since the ultimate conclusion which I have reached is the same regardless of which of the alternative meanings to which reference has been made is given to the word ‘substantial’ in s45D(1).”*¹⁹⁶

224. In *Harris v Australian Broadcasting Corporation and Others*,¹⁹⁷ Beaumont J considered whether reports of an independent review of the Legal Department of the respondent were exempt within the meaning of s 40(b) of the FOI Act as it was then enacted.¹⁹⁸ His Honour found that it was possible that the reports could embarrass those charged with supervising or reviewing the operations of the Legal Department but went on to say:

*“However, I am not persuaded that any such effect, even if adverse, could fairly be described as ‘substantial’ in its impact. In my view, the insertion of a requirement that the adverse effect be ‘substantial’ is an indication of the degree of gravity that must exist before this exemption can be made out.”*¹⁹⁹

225. Muirhead J has also considered the expression “*substantial adverse effect*” as it appears in s 40 in the case of *Ascic v Australian Federal Police*.²⁰⁰ He made specific reference to Beaumont J’s use of the word “gravity” which caused him

¹⁹⁵ (1979) 27 ALR 367 at 374-375

¹⁹⁶ (1979) 27 ALR 367 at 382

¹⁹⁷ (1983) 50 ALR 551; 5 ALD 545

¹⁹⁸ Section 40(b) then provided that a document would be exempt if its disclosure under the FOI Act would be contrary to the public interest by reason that:

“(b) the document contains information the disclosure of which would, or could reasonably be expected to, have a substantial adverse effect on the supervision or review of the operations of an agency for the purpose of ensuring the proper and efficient conduct of those operations; ...”.

¹⁹⁹ (1983) 50 ALR 551; 5 ALD 545 at 564; 557. Beaumont J considered s 40 as it existed before its repeal and re-enactment in 1983. The particular words which he considered were not varied and this passage of his judgment remains relevant.

²⁰⁰ (1986) 11 ALN N184

some difficulty. In Muirhead J's view:

*“‘Substantial’ is a word of common usage which can stand on its own feet and the work ascribed to it in statutory interpretation will depend on the statute and of course the issues under consideration. Deane J gave detailed consideration to the word in Tillmanns Butcheries Pty Ltd v. Australasian Meat Industry Employees’ Union (1979) 27 ALR 376 at 382. Whilst the court there was considering an application under s. 45D of the Trade Practices Act 1974 which refers to ‘substantial loss or damage’ his Honour’s words that ‘substantial loss or damage ... includes loss or damage that is in the circumstances, real or of substance and not insubstantial or nominal’ appear to me to be appropriate to most circumstances and closer to the plain meaning of the word and its dictionary interpretations.”*²⁰¹

226. In the same year as Muirhead J published his judgment in *Ascic*, the Tribunal reached the conclusion that a “*substantial adverse effect*” “*connotes an adverse effect which is sufficiently serious or significant to cause concern to a properly informed reasonable person*”.²⁰²

227. Deputy President McMahon summarised the effect of these authorities when he considered the same expression, “*a substantial adverse effect*”, when used in the context of s 39 of the FOI Act. He did so in *Re Connolly and Department of Finance*²⁰³ when he said:

*“... There must be a degree of gravity before this exemption can be made out (Harris v Australian Broadcasting Corp ...); the effect must be ‘serious’ or ‘significant’: Re James ... Normally a value judgment has to be made as to whether an adverse effect is or is not substantial when considering exemptions claimed under other sections. ...”*²⁰⁴

C. “proper and efficient conduct of the operations of an agency”

228. If a claim under s 40(1)(d) is to succeed, the substantial adverse effect that would, or could reasonably be expected to occur must be on the “*proper and efficient conduct of the operations of an agency*”. The ordinary meaning of the word “*operations*” in this context is:

“...4a An act of a practical or technical nature, esp. one forming a step in a

²⁰¹ (1986) 11 ALN N184 at N185

²⁰² *Re Thies and Department of Aviation* (1986) 9 ALD 454 at 463 (Deputy President Thompson, Senior Member Hallows and Mr Trinick, Member)

²⁰³ (1994) 34 ALD 655

²⁰⁴ (1994) 34 ALD 655 at 662

process. ... **b** ...Also, a business concern or enterprise...”²⁰⁵

229. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another*,²⁰⁶ Davies, Wilcox and Einfeld JJ rejected a submission that the “conduct of an agency” could be limited to matters related to the internal administration of an agency such as a report by an outside agency or a consultant on its operations. They adopted the view of Deputy President Hall in *Re James and Australian National University*²⁰⁷ that the expression extends “to the way in which an agency discharges or performs any of its functions”.²⁰⁸ The issue for the Tribunal in *Re James and Australian National University* was considered in the context of a request for documents recording lecturers’ comments in student record sheets together with the names of examiners of honours theses and their tentative grades. Deputy President Hall said that:

“ The question, in the present case, therefore, is whether the expression ‘the conduct of the operations of an agency’, when applied to the University, extends not only to the way in which it carries out its ‘administrative’ operations, but also its ‘academic’ operations. ...

As a matter of ordinary English I think that the expression ‘the conduct of the operations of an agency’ is capable of extending to the way in which an agency discharges or performs any of its functions. So construed, I agree with Mr Toper that it is capable of extending to the discharge by the University of its academic functions in relation to the awarding and conferring of degrees and diplomas (see s. 6 of the Australian National University Act 1946 (Cth)).”²⁰⁹

230. The occurrence of the substantial adverse effect does not have to be proved as an absolute. The Secretary need only establish that disclosure under the FOI Act “would, or could reasonably be expected” to lead to the designated outcome i.e. a substantial adverse effect on the proper and efficient conduct of the Department’s operations. I have already set out the meaning of this expression in relation to s 37 above.²¹⁰

²⁰⁵ The New Shorter Oxford English Dictionary, 3rd edition, 1993

²⁰⁶ (1992) 36FCR 111; 108 ALR 163; 16 AAR 28

²⁰⁷ (1984) 2 AAR 327; 6 ALD 687

²⁰⁸ (1984) 2 AAR 327; 6 ALD 687 at 340; 699 cited with approval at (1992) 108 ALR 163; 16 AAR 28 at 168; 32

²⁰⁹ (1984) 2 AAR 327; 6 ALD 687 at 340-341; 699.

²¹⁰ See [205]-[209] of Attachment E above

231. The onus of proof imposed on an agency by s 61(1) of the FOI Act is not irrelevant in considering a claim for exemption. That is an onus imposed on an agency to establish that a decision it has given in respect of a request was justified. Taking a decision that a document is an exempt document, the practical consequence of the onus is that, if the agency is to succeed in those proceedings, it must ensure that the Tribunal has sufficient evidence to establish its claim on the balance of probabilities. Generally, an agency will want to produce that evidence itself to the Tribunal. There is, however, nothing to prevent it from relying on evidence produced during the proceedings by the applicant for review or any party joined to the proceeding. When it makes its initial decision, the agency's position is no different. Rather than satisfying the Tribunal, the decision-maker must satisfy him or herself on the balance of probabilities that the document is an exempt document. That will mean that the decision-maker must look to the evidence before making a decision. If the decision is not supported by the evidence, the decision should not be made. A decision to refuse access on the basis that a document is an exempt document without a proper evidentiary basis, for example, would be a decision that would seek to diminish the right that Parliament has given to every person by means of s 11(1) i.e. the right, subject to the other provisions of the FOI Act to obtain access in accordance with this Act to a document of an agency or an official document of a Minister other than an exempt document.

232. The evidentiary basis on which a decision is made in applying the exemption provisions in the FOI Act underpins the comments made by the Tribunal in *Re Williams and Registrar of the Federal Court of Australia*²¹¹ of the difficulties faced by an agency when there is no proper evidentiary basis in the first place. The Tribunal was considering a claim that assessments of the work capacity of the four most highly-rated applicants for a position in the Registry of the Federal Court and a document showing the order of merit of five of the applicants were exempt under ss 41(1) and 40(1)(c). It said:

“ As has been mentioned, it is possible that s 40(1)(c) of the Act could justify the refusal of access in the present circumstances. However, in my opinion, no case has been made out here for the application of that provision. No attempt was made here to demonstrate, by evidence or otherwise, that the

²¹¹ (1985) 8 ALD 219, Beaumont J, Senior Member McMahon (as he then was) and Dr Renouf, Member

‘substantial’ adverse effect contemplated by s 40(1)(c) would or could reasonably be expected to occur (see Harris v Australian Broadcasting Corp (1983) 50 ALR 551 at 545; 5 ALD 545; Public Service Board v Scrivanich (1985) 8 ALD 44; cf Re Witheford v Department of Foreign Affairs (1983) 5 ALD 534 at 544). The difficulties in now establishing such a case are formidable (Science Research Council v Masse [1980] AC 1029 at 1065, 1070-1, 1080-1, 1085; cf Sankey v Whitlam (1978) 142 CLR 1 at 40, 62-3, 97). It follows, in my view, that the documents now in question are also not protected by this provision.”²¹²

233. In *Sankey v Whitlam*,²¹³ to which the Tribunal referred in this passage, Stephen J spoke of the difficulties of relying on evidence that was directed to a class of document rather than to the particular document under consideration. That case concerned, in part, a claim that certain documents were privileged from disclosure in criminal proceedings on the basis that their disclosure would be prejudicial to the public interest. The evidence in support of the claim for privilege was in the form of affidavit evidence sworn by members of the then ministry and senior public servants. It was evidence directed to the class to which the particular documents could be characterised rather than to their contents. It was not suggested that disclosure of their contents would itself result in detriment to the public interest. The:

“... detriment perceived is, rather, that generalized form of apprehended harm which, it is said, will flow from a realization by Cabinet Ministers and by public servants that what they conceived to be confidential communications can, in the event of appropriate curial proceedings being instituted, become public knowledge.

Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden. As Lord Reid said in Rogers v Home Secretary^[214] the speeches in Conway v Rimmer^[215] have made it clear ‘that there is a heavy burden of proof’ on those who make class claims. ...”²¹⁶

D. “disclosure under this Act would, on balance, be in the public interest”

234. Section 40(2) provides that the section “... does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.” The public interest is relevant in a number of provisions of the FOI Act. They take two forms. A provision such as

²¹² (1985) 8 ALD 219 at 222

²¹³ (1978) 142 CLR 1; 21 ALR 505; 53 ALJR

²¹⁴ [1973] AC 388 at 400

²¹⁵ [1968] AC 910

²¹⁶ (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11 at 62; 545; 30-31 per Stephen J

s 36(1)(b) sets out one of the two criteria that a document must satisfy in order to be exempt as what is colloquially described as an internal working document. It provides that the disclosure of the document under the FOI Act would be contrary to the public interest. Section 40(2) provides an example of the second form. It requires me to consider whether disclosure under the FOI Act “*would, on balance, be in the public interest.*” Whichever form is adopted, identification of what is the public interest is common to both. As the leading cases have considered the matter in the context of s 36(1)(b), I will refer to them.

235. What is meant by “*contrary to the public interest*” was considered by the High Court in *McKinnon v Secretary, Department of the Treasury (McKinnon)*.²¹⁷ A conclusive certificate had been issued in relation to a claim that disclosure of certain documents would be contrary to the public interest within the meaning of s 36(1)(b). Although focused in the main on the conclusive certificate and the Tribunal’s task, some mention was made of the general notions of public interest in their Honour’s judgments. There were three different approaches in the three judgments in *McKinnon*.

236. Gleeson CJ and Kirby J examined the object of the FOI Act, the structure of s 36 and its place in the legislation. They continued:

“ *A conclusion that disclosure of an internal working document would be contrary to the public interest may or may not turn upon contestable facts: either primary facts, or inferences to be drawn from those facts. It may or may not turn upon contestable matters of opinion. Inevitably, it will involve a judgment as to where public interest lies. Such judgment, however, is not made in a normative vacuum. It is made in the context of, and for the purposes of, legislation which has the object described above, which begins from the premise of a public right of access to official documents, and which acknowledges a qualification of that right in the case of necessity for the protection of essential public interests (s 3(1)(b)).*”²¹⁸

237. Their Honours’ reference to the fact that “*judgment*” is required in determining where the public interest lies and to that judgment’s being made in a particular context found expression in a later passage in their judgment:

“... *This is a concept that assumes prominence in a different context, in which courts are required to deal with claims of public interest immunity advanced*

²¹⁷ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516

²¹⁸ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at [5]; 428; 189; 518

*in opposition to the production of documents, or example under subpoena, in civil or criminal litigation. There, it is the public interest in the administration of justice, and considerations of fairness to litigants, that may need to be weighed against aspects of the public interest put at risk by disclosure of the documents The image of the scales of justice is pervasive in legal thinking, and it is natural to talk of taking account of competing considerations in those terms. Under the FOI Act, however, the matter of disclosure or non-disclosure is not approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other. There is a 'general right of access to information ... limited only by exceptions and exemptions necessary for the protection of essential public interests [and other matters not presently material]' (s 3(1)(b)). That is the context in which a minister makes a decision under s 36(3), and in which such a decision is reviewed under s 58(5). References to 'balancing' create a danger of losing sight of that context. ..."*²¹⁹

238. Gleeson CJ and Kirby J were in the minority on the final result but their views are not incompatible with those of Hayne J, who was a member of the majority. Hayne J made the following observations on the meaning of “public interest”:

“ *It may readily be accepted that most questions about what is in ‘the public interest’ will require a consideration of a number of competing arguments about, or features or ‘facets’ of, the public interest. As was pointed out in O’Sullivan v Farrer ...* ^[220]:

‘[T]he expression “in the public interest”, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects of the legislature could have had in view” ... ^[221].

That is why a question about ‘the public interest’ will seldom be properly seen as having only one dimension.”²²²

239. In contrast to these expressions of the public interest, Callinan and Heydon JJ made the following observations regarding the public interest:

“ *Nor are we by any means certain that it is apt to describe the public interest as multifaceted. Neither the fact that different people will see it through different prisms, nor the fact that an all-encompassing definition of it*

²¹⁹ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at [19]; 433; 193; 522

²²⁰ (1989) 168 CLR 210 at 216

²²¹ *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J

²²² [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at [55]; 443-444; 202; 531

*for all occasions is not possible, means that the public interest is multifaceted. ... Judges have usually not found it necessary to direct juries at length as to the meaning of the expression, except to warn them that it is not enough that the matter might be of some personal or prurient interest, or merely something about which they may be curious.”*²²³

240. Callinan and Heydon JJ went on to consider the various grounds of public interest that had been claimed by the respondent in that case and said:

“ ... The reference to ‘ongoing sensitivity’ in the first place is not entirely clear. We would be inclined ourselves to think that the fact that the documents have continuing sensitivity, are controversial and affect a minister’s portfolio would not alone provide a reasonable ground for continuing confidentiality. The use of the word ‘ongoing’ strongly suggests currency, and the use of the word ‘controversial’ might well at least imply public interest.

The second ground, which speaks of jeopardy to candour, and the desirability of written communications, obviously cannot readily be dismissed, and it seems to us that this is a matter upon which a minister’s opinion and experience are likely to be well informed and valuable as those of anyone else, including senior officials.

The third ground raises an issue of tentativeness; that is to say, that the documents were concerned with matters that were not settled and recommendations that were not adopted. This too, on its face, is a cogent ground. It is difficult to see how it would not be reasonable for a minister to take the view that the release of the material of that kind would not make a valuable contribution to public debate.

The fourth ground has so much in common with the third that nothing further need be said about it.^[224]

The fifth ground is far less persuasive. It claims that the difficulty of putting financial data into context provides reason for the non-disclosure of otherwise relevant documents. It is, we think, unrealistic for any minister to believe that he or she can control, or dictate the context in which matters of public interest are debated. All that a minister can do is seek to explain the data and to provide as accurate a context for it as possible.

The sixth ground takes the point that such documents as are prepared for possible responses to questions in Parliament should remain confidential because their exposure would threaten the Westminster system of government, that is to say, responsible government to which we have earlier referred. This cannot be said to be an unreasonable view. The minister is the one who is responsible for an answer given in Parliament, within the practical modern

²²³ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at [130]; 468; 221-222; 550-551

²²⁴ “The release of the material would tend to be misleading or confusing in view of its provisional nature, as it may be taken wrongly to represent a final position (which it was not intended to do) and ultimately may not have been used or have been overtaken by subsequent events or further drafts.” [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at 450; 208; 537 [80] per Callinan and Heydon JJ

limits to which we have referred. It is his or her answer itself which is a, or the, matter of public interest, and not the various documents which may have canvassed that answer, or other possible answers. It will be in respect of the answer that the minister actually gives that any political price will have to be paid, just as there may well be a political price to be paid for any claim of conclusiveness, whether it is well-based or not.

The seventh ground is at least arguably not reasonable, in effect, that the public may not be trusted to understand the technicalities of, and the jargon used in otherwise revealable documents. It is not as if the public is unaided by experts and others who can, including, for example, an informed journalist

The grounds taken did not clearly articulate something that the oral evidence suggested, namely that the respondent was concerned that what might be disclosed could well be misrepresented, abbreviated or distorted, or at least not presented in a balanced way. Indeed, cross-examination of the appellant's witnesses certainly did go some way towards demonstrating lack of balance, indeed, lack of balance even in the reporting of the particular issue with which the Tribunal was concerned. That would not however be a ground that we would regard as reasonable, for the same reasons we would not reject a ground based upon an asserted lack of technical expertise, or inability to understand jargon on the part of each and every member of the public.”²²⁵

241. The discussion by Callinan and Heydon JJ of the seventh ground needs to be read with their observations regarding their third ground. It would seem to be consistent with other observations they made earlier in their judgment regarding the opinion evidence given by Mr Dennis Rose, who has formerly been Secretary of the Attorney-General's Department and President of the Australian Law Reform Commission, and Professor Peter Dixon, who is an applied economist. Mr Rose had expressed an opinion that disclosure of documents that were provisional in nature or that were superseded would make a very useful contribution to the public debate. Callinan and Heydon JJ said:

“... Contrary to Mr Rose's opinion that the exposure of these would make 'a very useful contribution to the public debate', in our opinion documents of that kind are more likely to mislead or confuse, or to make no contribution to any useful, or currently relevant debate.

Some of Professor Dixon's evidence made the point, incontestable we think, that the topics were of public interest, as to the way in which, for example, 'bracket creep' adversely affected many taxpayers. But a distinction that he too did not make in his evidence was the distinction between provisional or superseded documents, and current ones. The former could do

²²⁵ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at [120]-[128]; 466-467; 220-221; 549-550

little to advance the analyses which Professor Dixon and other economists would wish to do, of 'the Treasury's apparent concern with the number of people who move from one tax bracket to another in any given year'."²²⁶

242. Hayne J also appears to support the proposition that there could, on the evidence in that case, be a public interest in refusing disclosure of documents in circumstances where they would be likely to mislead. He said:

*"... In the case of those particular documents, the relevant grounds for the claim were grounds asserting that release of the material shown in the documents had 'the potential to lead to confusion and to mislead the public'. The appellant did not assert that this could not constitute a reasonable ground for the claim that had been made."*²²⁷

243. I will refer finally to an earlier decision of Davies J as President of the Tribunal in *Re Howard and Treasurer of Commonwealth of Australia*.²²⁸ His reasons for finding that there existed reasonable grounds for a claim that disclosure of certain documents would be contrary to the public interest were summarised in the head note. Mr Howard had requested documents provided to the then Government by an Australian Council of Trade Unions' (ACTU) Task Force during the formulation of the 1984/85 Budget. When in opposition, the Government had forged an Accord with the ACTU regarding economic policy. In particular, the Government had agreed to consult with the ACTU regarding income and prices policies including taxation. Access was refused to a minute to the Treasurer and a telex to the ACTU. Both documents advised the Treasurer on the implications and estimated cost of certain taxation options. Davies J referred to previous authorities from which he gleaned that the whole of the circumstances needed to be examined. Those circumstances included any public benefit perceived in their disclosure.²²⁹ As general propositions, he drew five propositions to which I referred in *Re McKinnon and Secretary, Department of Prime Minister and Cabinet*.²³⁰

244. Mr Howard had framed his submissions around three points. First, the Accord was a political document. Second, the ACTU had not produced any evidence

²²⁶ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at [116]-[117]; 465; 219; 548

²²⁷ [2006] HCA 45; (2006) 228 CLR 423; 229 ALR 187; 91 ALD 516 at [70]; 448; 206; 535

²²⁸ (1985) 7 ALD 626

²²⁹ (1985) 7 ALD 626 at 634 Given the position expressly taken in *McKinnon* that the exercise does not permit the Tribunal to engage in a balancing exercise, it would seem that this aspect of Davies J's reasons for decision relating to any benefit from disclosure might have to be treated cautiously.

²³⁰ [2007] AATA 1969 at [108]

as to whether maintaining the confidentiality of their discussions was important to them. Third, there is a clear public interest in not only the reality, but the appearance, of equal treatment of claimant groups and their representatives in the Australian community. The Government of the day had appeared, Mr Howard submitted, to have treated the ACTU in a special manner. Davies J dealt with these submissions and analysed the evidence in a way consistent with the approach that appears to underpin the judgments of the High Court in *McKinnon*:

“ In the present case, I think there were and are reasonable grounds for concluding that disclosure of the documents would be contrary to the public interest. In the preparation of the Budget, the Treasurer and officers of his Department would have given consideration to a wide range of options. Some options would have been noted and not further considered, others may have been given scant attention. Some options may have been given serious consideration but not adopted for one reason or another. In the course of the development of the Budget, new options may have come to light. In the end, the Budget would have been formulated. The authorities to which I have referred recognize a public interest in protecting from disclosure such a process of deliberation. Protection of the deliberative process encourages ‘creative debate and candid consideration of alternatives’, to use the words of Wilkey J (*Jordan v Department of Justice*, supra, [591F (2d) 753 (1978)] at 772). It prevents premature disclosure of possible options and confusion arising between options considered and options adopted. And lastly it protects the integrity of the decision-making process by enabling the government to be judged by what it has decided to do rather than by material it has taken into account. These elements of the public interest are as significant in this country as they are in the United States or in the United Kingdom.”²³¹

245. As I have said, s 40(2) requires a consideration of what would, on balance, be in the public interest as does s 33A(5). That section qualifies the exemption specified in s 33A(1) in relation to matters of Commonwealth/State relations and information communicated by a State to the Commonwealth. The relationship between ss 33A(1) and (5) was considered by the Federal Court (Woodward, Wilcox and Burchett JJ) in *Arnold (on behalf of Australians for Animals) v. Queensland and Anor*²³² (*Arnold*). Wilcox J said:

“Finally, it is important to bear in mind the significance of sub-s(5) in the scheme of s33A. Sub-section (5) assumes that, as a general principle, there is a public interest in the non-disclosure of a document falling within sub-s(1). But it contemplates that, nonetheless, it may, on balance, be in the public

²³¹ (1985) 7 ALD 626 at 636

²³² [1987] FCA 148; (1987) 73 ALR 607; 13 ALD 195

interest for matter in that document to be disclosed. The sub-section does not specify criteria for consideration in the making of that judgment. All relevant circumstances must be taken into account. One of those circumstances will always be the principle enshrined in s3 of the Act.

...

It will be noted that Parliament was not content merely to espouse a policy of extending access to information, as stated in s3(1). The legislature went further by requiring the implementation of that policy, as far as possible, in the exercise of the discretions conferred by the Act. Although it would not be correct to regard s33A(5) as conferring a discretion, the command of s3(2) is an indication that Parliament regarded the principle constituting a weighty factor to be taken into account in making a judgment as to the public interest in any decision whether to disclose particular documents. In a particular case, especially where the degree of public disadvantage caused by disclosure is small, or the prospect of any public disadvantage is comparatively remote, that principle may itself be enough to tip the balance in favour of disclosure, notwithstanding that the information falls within s33A(1).”²³³

246. Burchett J (with whom Woodward J agreed) said:

“Reference has also been made to sub-s(5) of s33A which provides: ‘This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.’ That sub-section does not confer a discretion upon anyone. It requires a determination of a matter of fact, albeit a matter upon which different minds might well, in a particular case, reach different conclusions. Where either branch of sub-s(1) is found to apply, what sub-s(5) does is raise the question whether nevertheless it can be affirmed of matter in the document that its disclosure under the Act would, on balance, be in the public interest. In reaching that determination, it is clear that the tribunal would have regard to the object of the Act expressed in s3, but it would also have regard to the provision by Parliament of the exemption. It might be expected in practice to look for special features of the instant case which might indicate where, in that particular case, the balance lay. Parliament having provided an exemption, and an escape route from that exemption, I do not think it is very profitable to put a gloss upon the terms which Parliament has itself laid down as a test to be applied - it is for the decision maker to decide whether he can affirm on balance that disclosure would be in the public interest.”²³⁴

247. At the time *Arnold* was decided, the second of the three objects of the FOI Act (which is the only object relevant to the right of access to information) was expressed in this way:

“The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:

²³³ [1987] FCA 148; (1987) 73 ALR 60; 13 ALD 195 at 616-617; 204-205

²³⁴ [1987] FCA 148; (1987) 73 ALR 607; 13 ALD 195 at 627; 214

- (a) ...
- (b) *creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities; ...*
- (c) ...”²³⁵

248. It remained in this form until recently amended by the FOI Amendment Act. Section 3 now makes no reference to the limitations imposed by the “*exceptions and exemptions necessary for the protection of essential public interests and private and business affairs of persons ...*”. Despite that, they remain in the form of the exceptions in Parts II and III of the FOI Act and in the exemptions in Part IV. The right to access to a document of an agency or an official document of a Minister is not read down in light of the exceptions and exemptions. Rather, it is defined by them. Therefore, an exemption is not read down by reason of a person’s having a right of access. It remains part of the context defining that right and part of the context in which a decision whether disclosure under the Act would, on balance, be in the public interest.

249. Applying the principles to s 40(2), I must make a finding of fact whether disclosure under the FOI Act would, on balance, be in the public interest. It is not a matter of discretion. I need to have regard to the basis of the exemption provided in s 40(1). That is to say, I need to have regard to the fact that, in broad terms, Parliament has considered that documents are not accessible under the FOI Act if their disclosure in that context would, or could reasonably be expected to affect the operations of an agency in a manner specified in ss 40(1)(a) to (e). Also relevant is the use that will, or may, be made of the documents if they were disclosed. Their proposed use may be for a purpose that favours disclosure but regard must be had to the degree of disadvantage that will, or may, flow to the public.

The exemption and the documents

250. Mr Rebikoff submitted that the evidence establishes that the documents for which exemption is claimed under s 40(1)(d) contain information

²³⁵ FOI Act, s 3(1)

obtained from witnesses and Departmental informants on the basis that it would be used solely for the purposes of the Department's investigation. It was also obtained on the understanding that it would not be used for any purposes other than those connected with the investigation or any subsequent prosecution. basis on which this information is claimed to be exempt. He referred to [20] to [21] and [55] to [56] of Ms Pettit's affidavit in support of his submission. I have made findings of fact on the basis of those paragraphs at [43] above.

251. Ms Pettit referred in her affidavit evidence to matters to which the Department must have regard in dealing with allegations. The first is the *Privacy Act 1988* (Privacy Act), which limits the collection and disclosure of personal information about individuals. The second is s 336E of the Migration Act, which provides that a person commits an offence if his or her conduct causes disclosure of identifying information in circumstances in which that disclosure is not a permitted disclosure. The third is the Department's *National Fraud Investigation Guidelines*, which provide that, where possible, confidentiality must be maintained in relation to the receipt of an allegation and that, when receiving allegations from the public, officers should explain that allegations will be managed in accordance with "*privacy provisions*".²³⁶

252. While I accept that these are all very relevant considerations for the Department in managing the information it gathers during an investigation and generally, their relevance in reviewing a decision under the FOI Act is a little different. I will begin with the Privacy Act. Information Privacy Principle 11 (IPP11) set out in s 14 is the relevant IPP. It applies to a record-keeper in possession or control of a record containing personal information. That record-keeper may not disclose that personal information to a person, body or agency unless certain circumstances exist. Among those circumstances is that "*the disclosure is reasonably necessary for the enforcement of the criminal law ...*".²³⁷ That circumstance, among others set out in IPP11.1, will be relevant to the Department when it is engaged in activities that may be described as "*law enforcement*". It may authorise disclosure by the Department of personal information that it would otherwise be obliged to protect. Consideration of this sort are not directly relevant to the Tribunal in reviewing a

²³⁶ Exhibit 2 at [22]

²³⁷ Privacy Act, s 14, IPP11.1(e)

decision under the FOI Act for the effect of IPP11.1(d) is that personal information may be disclosed where “*the disclosure is required or authorised by or under law*”. Where a request for access to a document is made under the FOI Act and it is neither irrelevant to the request nor exempt and workload considerations do not arise, access, and so disclosure, is required or authorised under the law.

253. Where the Privacy Act may be relevant is in providing part of the background in which the Department conducts its operations including its investigations. So too is s 336E, which relates to “*identifying information*”. The first meaning of that expression is that of “*any personal identifier provided under section 40, 46, 166, 170, 175, 188, 192 or 261AA*”.²³⁸ As its remaining three meanings derive from the first, I have looked at the circumstances in which personal identifiers are required. In general terms, they are required in relation to those who seek visas, whose visas are liable to cancellation, who are detained or who enter or leave the country. Personal identifiers that may be prescribed in respect of those sections vary but may include fingerprints or handprints, photograph of face and shoulders, an audio or video recording of the person, an iris scan, the person’s signature, personal identifiers contained in the person’s passport or travel document and any other type prescribed by regulation.²³⁹ Information of this sort is permitted for limited purposes set out in ss 336E to 336FD of the Migration Act. A permitted disclosure is made if disclosure is reasonably necessary for the enforcement of the criminal law of the Commonwealth or of a State or Territory.²⁴⁰ The reference to the “*enforcement of the criminal law*” would seem to be directed to something narrower than “*law enforcement*”. That it is narrower would seem to gain some support from s 336E(3) which provides that disclosure is not a permitted disclosure if it is for the purpose of “*(i) investigating an offence against a law of the Commonwealth or of a State or Territory; or (ii) prosecuting such an offence.*”

254. Again, these provisions provide the background to the Department’s operations but are not directly relevant to the Tribunal in reviewing a decision under the FOI Act. Section 336E(2)(eb) provides that a permitted disclosure is disclosure that “*is required by or under a law of the Commonwealth or of a State or Territory*”.

²³⁸ Migration Act, s 336A at paragraph (a) of definition

²³⁹ See, for example, those prescribed in s 40(3A)

²⁴⁰ Migration Act, s 336E(2)(ea)

Where a request for access to a document is made under the FOI Act and a particular document is neither irrelevant to the request nor exempt and workload considerations do not arise, access, and so disclosure, is required or authorised under a law of the Commonwealth being the FOI Act.

255. Ms Pettit referred also to the Department's National Fraud Investigation Guidelines (DNFI Guidelines) and their requirement to maintain the confidentiality of the source of allegations. I have not been given a copy of those guidelines but presume that they have been made in order to satisfy the Secretary's obligation to implement a fraud control plan for the Department. That obligation arises under s 45 of the *Financial Management and Accountability Act 1997* and assistance in the preparation of the guidelines is to be found in the Commonwealth Fraud Control Guidelines issued by the Minister for Home Affairs under r 16A of the *Financial Management and Accountability Regulations 1997*.²⁴¹ Clause 7.3 of that document requires each agency to include protocols setting out how, in its particular circumstances, it will handle allegations/suspicious of fraud, including assessment of allegations, establishment of investigations and options for resolution of incidents (such as referral to police and when/how to initiate recovery action). Again, these guidelines provide background to the Department's operations but I have not been given a copy of them.

A. Category A documents

Category 1 documents: 798, 853 and 977

256. Documents **798, 853** and **977** are PPQs relating to the probe into the SICB over allegations that it had sold qualifications to overseas students so that those students could obtain visas to remain in Australia. It is apparent from the text of the documents that has been released under the FOI Act that the information claimed to be exempt under s 40(1)(d) refers to the names of migration agents and agencies under investigation, addresses of a third party or parties and information identifying potential witnesses.

257. On the evidence that I have been given, I understand that Operation Dachshund is at an end. The essence of the Department's argument in support of

²⁴¹ See also *Financial Management and Accountability Act 1997*, s 64

exemption is that the Department does not have coercive powers to gather evidence and relies on the cooperation of witnesses and members of the public to give it information on a voluntary basis. If information were to be released regarding the identity of a witness or a potential witness or of a person making an allegation, others would be less willing to come forward in the future.

258. I accept that evidence. Both the offer of confidentiality to intending informants and the maintenance of confidentiality of those with whom it obtains information through more formal ways is clearly an important part of the Department's strategy in ensuring compliance with the Migration Act. That is clear from what I have been told of the DNFI Guidelines and their requirement regarding the way in which the confidentiality of allegations is to be maintained. It is also clear from Ms Pettit's evidence, which I have accepted, that the statements made by witnesses were to be confidential and disclosed only for the purposes of the investigation or any consequent prosecution.

259. It might be said that Operation Dachshund is at an end and that maintaining the confidentiality no longer matters. Section 40(1)(d) is concerned not only with the proper and efficient conduct of a particular operation of an agency being, in this case, the Department. It is concerned with the proper and efficient conduct of the "*operations of an agency*" and so with the way in which it discharges or performs any and all of its functions.

260. If Mr Lobo were to be given access to the information in Documents 798, 853 and 977 about a witness and a person who was to be interviewed by FCIS, that information would have to be given to any other person who made a request for access to that document under the FOI Act. Potentially, everyone could have access to it and the exemption under s 40(1)(d), as with all of the other exemptions apart from ss 41 and 43, must always be viewed in that way. If, potentially, everyone could have access to it, everyone will potentially know that the Department's assertions that it will treat information given to it in confidence in relation to its law enforcement activities counts for nought.

261. That is not to say that everyone would request the document and that everyone would potentially come to that realisation but, given the ease and speed of

modern communication, it could reasonably be expected that it would become reasonably well known that the Department is unable to honour its undertaking of confidentiality. Even if that knowledge were not known throughout the community, the fact that it is likely to be known or to become known is reasonably likely to have a substantial adverse effect on the Department's ability to obtain information in the future. As it has no powers of coercion and is dependent upon information that is volunteered to it, I am satisfied that disclosure would have a substantial adverse effect on the proper and efficient operations of the Department.

262. That finding means that Documents **798, 853** and **977** meet the criteria specified in s 40(1)(d) of the FOI Act but does not automatically lead to the conclusion that the documents are exempt under s 40. They will only be exempt if s 40(2) does not apply. That means that I must ask whether disclosure of the matter in Documents **798, 853** and **977** would, on balance, be in the public interest. If it would be, they are not exempt under s 40.

263. I have decided that disclosure would not, on balance, be in the public interest. There is a public interest in the proper and efficient operation of the Department, in its being able to detect fraud and non-compliance with the law it administers and to investigate behaviour suspected of being fraudulent or illegal and in its being able to prevent or minimise that type of behaviour. There is also a public interest in the community's knowing of the Department's activities but that does not necessarily equate with its being privy to every aspect of those activities in a particular investigation. In this instance, I am satisfied that the degree of adverse effect on the proper and efficient operations of the Department outweighs any benefit to the public or to members of it that may follow upon disclosure. Therefore, this is not an instance in which disclosure of Documents **798, 853** and **977** would, on balance, be in the public interest. Section 40(2) does not arise and the documents are exempt under s 40(1)(d).

Category 5 documents: 152, 153, 238, 728, 737, 745, 762 and 991

Category 6 document: 346

Category 7 documents: 139, 509, 596, 597 and 1019

Category 9 documents: 475, 564, 570, 571, 577, 620 and 723

Category 12 documents 962 and 963

Category 15 document 1018

Category 16 document 956

Category 23 documents: 140 and 321

264. I will deal with these as a group for exemption is claimed under s 40(1)(d) in relation to one or more of three types of information. The first type relates to the name, contact information and other information that identify a person who has given information to the Department. I am satisfied that this is the nature of the information for which exemption is claimed. For the reasons I have given in relation to Document 798, I am satisfied that the passage in each of Documents 152, 153, 238, 728, 737, 745, 762 and 991 (Category 5), 346 (Category 6), 139, 509, 596, 597, 1019 (Category 7), 564, 570, 571, 577 and 620 (Category 9) 962 and 963 (Category 12), 1018 (Category 15), 956 (Category 16) and 140 and 321 (Category 23) specifying this type of information for which exemption is claimed meets the criteria specified in s 40(1)(d). Also for the reasons I gave in relation to Document 798, this is not an instance in which disclosure of Document 798 would, on balance, be in the public interest. Section 40(2) does not arise and the document is exempt under s 40(1)(d).

265. The second type of information for which exemption is claimed is information which identifies, or may identify, the name of a migration agent or migration agents or of an agency or of agencies under investigation. The investigation has come to an end. It is difficult to see how either it, or an unrelated investigation or enforcement action against those under investigation or those who may be investigated in the future, will be prejudiced by disclosure of their identities. Therefore, it is difficult to see how the Department's operations will be prejudiced by granting access to information of this type in Documents 152, 153, 238, 728, 737, 745, 762 and 991 (Category 5), 346 (Category 6), 139 (Category 7), 577, 620 and 623 (Category 9) and 140 and 321 (Category 23). I am not satisfied that they are exempt in respect of that information under s 40(1)(d).

266. The third type of information that some of these documents contain is that identifying visa applicants who were under investigation. Now that Operation Dachshund is at an end and administrative action has been undertaken in relation to some and charges laid in respect of four others, I am not satisfied that disclosure under the FOI Act would have a substantial adverse effect on that investigation or on any other future investigation. I am not satisfied that it would have a substantial adverse effect on the proper and efficient conduct of the operations of the Department. Therefore, I have decided that Documents *152, 153, 238, 728, 737, 745 and 762* (Category 5) are not exempt in so far as exemption is claimed for that type of information.

B. Category C documents

Category 6 documents: 399 and 1001

267. Document *399* is a facsimile communication between officers of the Department attaching a Ministerial Intervention Request as I have described above at [188]. Exemption has been claimed for three types of information. The first is said to identify a person described by the Department as an informant but not accepted by me as a confidential source of information within the meaning of s 37(1)(b). The second is described as likely to identify a person who is a Departmental witness. The third is described as information for the purposes of criminal proceedings.

268. For the reasons I have given in [257]-[263] in relation to Document *798* in Category 1 of Category A and in relation to the first type of information in the documents I have described in Categories 5, 6, 7, 9 and 23 of Category A, I am satisfied that Document *399* is exempt under s 40(1)(d).

269. Document *1001* is not referred to in the Schedules to Ms Creaner's second affidavit and is not referred to in the Schedules of Documents that are no longer in contention for one reason or another. The reasons I have given in the previous paragraph apply equally to this paragraph. It is exempt under s 40(1)(d).

Category 7: documents 523 and 1016

270. To the extent that Documents *523* and *1016* contain the name and contact details of a person providing information to the Department about SICB, I am

satisfied that they are exempt under s 40(1)(d) for the reasons I have given at [257]-[263] in relation to Document 798 in Category 1 of Category A and in relation to the first type of information in the documents I have described in Categories 5, 6, 7, 9 and 23 of Category A.

271. The remaining text of those documents contains information that was provided in confidence to the Department. I am satisfied that this information could be used to identify the person who gave it. That could reasonably be expected to dissuade persons from volunteering information in the future just as much as disclosure of the person's name. For the same reasons, therefore, I am satisfied that both documents are exempt in their entirety under s 40(1)(d) of the FOI Act.

Category 9: documents 53, 469, 472, 482, 483, 485, 527, 534, 547, 549, 550, 570, 650, 692, 693, 1017 and 1020

(i) Document 53

272. Document 53 is a file note made by a Departmental officer of a telephone conversation or conversations with a person regarding the SICB. I do not agree with the description in the Schedule that it contains allegations provided by a Departmental informant. It would be more accurately described as a conversation about the ins and outs of providing information regarding SICB. It discloses the identity of the person with whom the conversation was held. To the extent that it does that, and those passages are marked in colour on the copy I have been given, they are exempt under s 40(1)(d). To know that the fact that such a preliminary conversation might be disclosed could reasonably be expected to dissuade others from contemplating engaging in a conversation at all. That would have the adverse effect prescribed in s 40(1)(d) and it is not a case in which disclosure under the FOI Act would, on balance, be in the public interest. Therefore, I am satisfied that Document 53 is exempt under s 40(1)(d).

273. As for the rest of the text of folios 158 and 157 of Document 53, I am also satisfied that it is exempt. The document contains information of the fact that the conversation occurred and it is that fact that is itself confidential. It is clear from the content of that information that the person wanted any involvement with the Department kept on that basis. I am satisfied that this brings the information in

Document 53 into the same category as Document 798 and related documents. For the same reasons, it is exempt under s 40(1)(d) in relation to those parts for which it is claimed.

(ii) Documents 469, 472, 482, 483, 485, 527, 534, 549, 570, 650, 692, 693, 1017 and 1020

274. Each of these documents contains information that includes the name of a person who has given information to the Department. I am satisfied that the entire content of these documents is exempt under s 40(1)(d) for the reasons I have given in relation to Document 798 at [257]-[263].

(iii) Document 550

275. Document 550 is described in the Schedule of documents as a record of the names and contact details for teachers at SICB. Standing alone, I do not accept that disclosure of the list under the FOI Act could reasonably be expected to have an adverse effect on the proper and efficient conduct of Operation Dachshund. It is at an end. As for the conduct of future operations, I am of the same view. There had been media reports that SICB was under investigation. It is reasonable to expect that a list of the staff at SICB would be compiled during the course of that investigation.

276. There is no evidence that the names of the staff were publicly available but that does not mean that there disclosure would have any adverse effect on the Department's operations in the future. The information might well be available to the Department through other means. I refer in particular to the ESOS Act. Sections 33 and 34 require the Minister responsible for that legislation to make a national code providing nationally consistent standards for the registration and conduct of registered providers and the conduct of those who deliver educational services on their behalf. The National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code) commenced operation on 1 July 2007.²⁴² Part D sets out the standards that registered providers must meet in order to comply, and to continue to comply, with their registration under the ESOS Act. Standard 14 requires that:

²⁴² National Code, Preamble, cl 2.1

“The staff of registered providers are suitably qualified or experienced in relation to the functions they perform for students. The educational resources of registered providers support the delivery of courses to students. The premises of registered providers, including the floor space available for each student, support students to achieve their course outcomes.”

277. In order to ensure compliance with Standard 14, it might be expected that a list of the staff of a registered provider and their qualifications would be made available to the relevant Department. Section 175 of the ESOS Act provides that:

- “(1) For the purposes of:
- (a)-(b) ...
 - (c) promoting compliance with the conditions of a particular student visa or visas, or of student visas generally; or
 - (d) facilitating the monitoring and control of immigration;
- the Secretary may give information obtained or received for the purposes of this Act to:
- (e) an agency of the Commonwealth, or of a State, that is responsible for or otherwise concerned with immigration or the regulation of providers; or
 - (f)-(h) ...”

The Department is such an agency of the Commonwealth to whom the Secretary might give information regarding the staffing of a registered provider under the ESOS Act.

278. Having regard to all of these matters, I am not satisfied that Document 550 meets the criteria set out in s 40(1)(d) of the FOI Act. Therefore, the question under s 40(2) does not arise and Document 550 is not exempt under s 40(1)(d).

Category 18: Documents 25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76 and 60, 64, 65, 70, 78, 81, 82, 83, 84, 85 and , 261 and 263 and 1023, 1074, 1083, 1084 and 1089

- (i) **Documents 25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76**

279. The information for which exemption is claimed in these documents is described in the Schedule as either the “Attendance roll for SICB class”, a “Summary of test results for SICB exam”, “SICB class roster” or “Attendance roll for SICB exam”. The reasons I have given for my not being satisfied that Document 550 is

exempt under s 40(1)(d) apply equally to these. I am not satisfied that they are exempt under that section.

(ii) Documents 60, 64, 65, 70, 78, 81, 82, 83, 84 and 85

280. Exemption is claimed for each of these documents on the basis that they contain information which might identify a witness. For the reasons I have given for being satisfied that Document **798** is exempt under s 40(1)(d), I am also satisfied that each of these documents is exempt. I would add that, apart from the use of any person's name, it is reasonable to expect that the identity of the person providing information could be ascertained from the information recorded by the Department.

(iii) Documents 261 and 263

281. Document **261** is a computer printout from a website. It contains information about a person whom it identifies. It is claimed to be exempt on the basis that it contains information that may identify a witness. The fact that it is a document that comes within the terms of Mr Lobo's request may indeed lead to that conclusion or at least to the conclusion that the person is a person of interest to the Department in the context of Operation Dachshund.

282. On the evidence, I am not satisfied that disclosure of Document **261** would, or could reasonably be expected to have a substantial adverse effect on the proper operations of the Department. Its disclosure would show that the Department has downloaded information from the internet for some reason in the course of Operation Dachshund. Given the ease of access to the internet by most members of the Australian community and the seemingly increasing resort to it in order to find out information, what would be so unusual about the Department's having a look at what is on the internet? Surely, it would be expected to be the normal behaviour by a considerable cross-section of the community. In view of that, I am not satisfied that Document **261** meets the criteria set out in s 40(1)(d) and find that it is not exempt.

283. Document **263** is an email between officers of the Department discussing a forthcoming interview with a person who has, or will, give a statement. Exemption is claimed on the basis that disclosure may identify the person who is

described as a witness. For the reasons I have given above at [257]-[263] in relation to Document **798**, I am satisfied that the document is exempt under s 40(1)(d).

(iv) Documents 1023, 1074, 1083, 1084 and 1089

284. Document **1023** is a chain of emails between an officer of the Department and a third party. They are entitled “*SICB*”. Documents **1074**, **1083**, **1084** and **1089** are internal emails referring to information that would identify third parties who have, or might help, the Department in its investigations. Exemption is claimed for each of these documents on the basis that they contain information which might identify a witness. For the reasons I have given at [257]-[263] for being satisfied that Document **798** is exempt under s 40(1)(d), I am also satisfied that each of these documents is exempt.

EXEMPTION: section 41(1)

The exemption

285. Section 41(1) provides that:

“A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).”

The expression “*personal information*” is defined in s 4(1) to mean:

“... information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.”

286. Section 41(1) is qualified by s 41(2):

“Subject to subsection (3), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.”

The qualification to s 41(2) found in s 41(3) is concerned with a request for a document containing information provided by a qualified person acting in his or her capacity as a qualified person. A “*qualified person*” is a “... *person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being ...*”.²⁴³ The qualification is not relevant in this case.

A. “*personal information*”

287. The expression “*personal information*” is defined to mean:

*“... information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.”*²⁴⁴

²⁴³ FOI Act, s 41(8)

²⁴⁴ FOI Act, s 4(1)

288. I considered this definition in an earlier case of *Re Callejo and Department of Immigration and Citizenship*²⁴⁵ (*Callejo*). In that case, I looked also to the authorities interpreting the expression “*personal affairs*” as that had been the expression used in s 41(1) in earlier times. I concluded that, in its current form, s 41(1) should not be read with any added gloss and I adopt my conclusion and my reasons for it are part of these reasons. Therefore, the personal information protected from access by s 41(1) is simply information or an opinion about an individual whose identity is apparent or can reasonably be ascertained. It is not information or an opinion about a particular part of a person’s life. Consequently, the information protected from disclosure by the exemption is not limited to information about their private or domestic affairs. The protection extends, for example, to information or an opinion about their work or employment. Provided the information or opinion is “*about an individual*” and the identity of that individual is “*apparent or can reasonably be ascertained*”, it is protected from disclosure under the FOI Act. It matters not whether it is true or not.

289. When is information “*about an individual*”? Among the ordinary meanings of the word “*about*” are those relating to its use in reference to time, distance, quantity and position. Another meaning relates to substance or quality and that is the meaning in which it is used in s 41(1). The meaning is that of “... *concerning or relating to someone or something; on the subject of them or it. ...*”.²⁴⁶

290. The identity of the person must either be “*apparent*”, and so “*easy to see or understand; obvious*”,²⁴⁷ or can be “*reasonably ascertained*” from the information or opinion. As I said in *Callejo*:

“ *In Kristoffersen v Department of Employment Workplace Relations and Small Business,*²⁴⁸ *Kiefel J queried whether the definition required not only that the information identify the person but whether it had to go further and say something about them.*²⁴⁹ *Private telephone numbers and addresses of individuals working for a Commonwealth agency have been held to be personal information.*²⁵⁰ *I have not been able to find any cases that refer to*

²⁴⁵ [2010] AATA 244; (2008) 51 AAR 308 at [64]-[67]; 333-335

²⁴⁶ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

²⁴⁷ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

²⁴⁸ [2002] FCA 55

²⁴⁹ [2002] FCA 55 at [27]

²⁵⁰ *Jorgensen v Australian Securities and Investment Commission* [2004] FCA 143; (2004) 208 ALR 73 at [43]; 83 per Weinberg J

the extent to which regard can be had to what might be matters of general public knowledge in deciding whether an individual's identity is apparent, or can reasonably be ascertained, from the information or opinion. That is not an issue that arises in this case."²⁵¹

291. I remain of the same view but these are matters that do require some further consideration in this case. That has occurred in the Victorian Civil and Administrative Tribunal (VCAT) in a case called *WL v La Trobe University (General)*.²⁵² Deputy President Coghlan considered a complaint that had been referred to VCAT by the Privacy Commissioner under s 29(5) of the *Information Privacy Act 2000* (Vic) (IPA). The complaint had been made by WL against the La Trobe University (La Trobe) to the effect that neither WL nor WL's partner had given their informed consent to their participating in, and being interviewed in respect of, a longitudinal study known as the *Australian Longitudinal Study of Health and Relationships* (the study). On receiving the complaint after WL's partner had been interviewed as part of the pilot for the study, La Trobe ordered that the information gathered during the interview be deleted and it was deleted.

292. Section 25 of the IPA provides:

"An individual in respect of whom personal information is, or has at any time been, held by an organisation may complain to the Privacy Commissioner about an act or practice that may be an interference with the privacy of the individual."

The expression "*personal information*" is defined in s 3 of IPA to mean:

"... information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion but does not include information of a kind to which the Health Records Act 2001 applies".

293. Deputy President Coghlan recorded that the "... gravamen of the applicant's case is that a cross-match of answers to questions which isolate so many personal characteristics of the applicant, such as to distinguish the applicant from other individuals, with a cross-matching of telephone numbers, would identify the

²⁵¹ [2010] AATA 244; (2008) 51 AAR 308 at [67]; 335

²⁵² [2005] VCAT 2592; 24 VAR 23; Deputy President Coghlan

applicant with certainty.”²⁵³ La Trobe had submitted that the identity must be able to be reasonably ascertained from the information collected by taking moderate steps. They developed their submissions but I will set out only the primary submission made by each and summarised by Deputy President Coghlan:

“35 *The applicant submits that the ability of modern information systems to ascertain information held in databases puts the word ‘reasonably’ in a practical context. It is submitted that words should not be read in a vacuum, and the Second Reading Speech paid particular attention to the capacity of technology ‘to compile, manipulate and match data’. Further, the use of modern information systems by HVRF allows that organisation to ascertain the identity of the applicant with certainty and this process of ascertaining the applicant’s identity should be considered ‘reasonable’ in the circumstances of the case.*

36 *The respondent submitted that a plain reading of the definition of ‘personal information’ does not support such a view. The definition is not unqualified, it is limited by the requirement that an individual’s identity can reasonably be ascertained ‘from the information’. The submissions continued*

—

No effort should be required in order to understand the person’s identity; it should arise from the information. The definition is reflexive: whether information is ‘personal information’ depends on its capacity, alone, to yield an individual’s identity in the context of the particular circumstances. In the context of the present case, the applicant’s identity must be able to reasonably be ascertained from the information collected and recorded during the interview. There is no ambiguity about the words in the definition.”²⁵⁴

294. She referred to Irish *Data Protection Act 1988* (Ireland) and to the Commonwealth’s *Privacy Act 1988* and found no assistance before turning to the case of *Bailey v Hinch*.²⁵⁵ She drew from that case support for her conclusion that regard could be had to sources other than the information in the document under consideration to decide whether an individual’s “*identity is apparent, or can reasonably be ascertained, from the information or opinion*” expressed in the document.

295. I have looked at *Bailey v Hinch* to understand the basis of her argument. Justice Gobbo considered whether Mr Derryn Hinch, a journalist and the

²⁵³ [2005] VCAT 2592; 24 VAR 23 at [24]; 30

²⁵⁴ [2005] VCAT 2592; 24 VAR 23 at [35]-[36]; 31-32

²⁵⁵ [1989] VicRp 9; [1989] VR 78; Gobbo J

broadcaster of his programme, had been properly convicted of an offence under s 4(1) of the *Judicial Proceedings Reports Act 1958* (Vic) (JPR Act) which provided that:

“A person shall not in relation to any proceedings in any court or before justices in respect of an offence of a sexual or unnatural kind publish or cause to be published in any newspaper or document or in any broadcast by means of wireless telegraphy or television—

(a) *the name address or school or any other particulars likely to lead to the identification of—*

(i) any female; or

(ii) any male under the age of sixteen years—

against or in respect of whom the offence is alleged to have been committed (whether or not such female or male is a witness in the proceedings); or

(b) *any picture purporting to be or to include a picture of any such female or male —*

unless the court or justices order that all or any such particulars or such picture may be so published and the particulars or picture are published in conformity with the order.”

296. Judge Dyett of the Victorian County Court had first ordered that the publication of a report of the proceedings in a trial of a man accused of sex offences against his wife be prohibited. Later on the same day, he ordered that:

*“... no person shall publish or cause to be published in any newspaper or broadcast by means of wireless, telegraphy or television a report of these proceedings containing the locality or any particulars likely to lead to the identification of this Court or the name, address or any particulars likely to lead to the identification of any person concerned in these proceedings either as being the person against whom or in respect of whom the proceedings are taken or as being a witness therein, nor shall any person publish or cause to be published in a newspaper or by television or otherwise any picture as being or including a picture of any person concerned in these proceedings.”*²⁵⁶

297. A Magistrate convicted Mr Hinch and the broadcaster of an offence under s 4 of the JPR Act on the basis that he had named the Judge. The Magistrate convicted them on the basis that the naming of the Judge would enable the name of the accused to be identified from the Law Lists and so the name of the victim in contravention of s 4(1).

²⁵⁶ [1989] VicRp 9; [1989] VR 78 at 80

298. On appeal, in considering whether publication of the name of the Judge was likely to lead to the identification of the victim, and the interpretation of those words, Gobbo J asked whether the publication of the Judge's name was "*likely to lead*" to the identification of the victim:

" This argument concerned the interpretation of the words 'likely to lead'. This was of crucial importance since the learned Magistrate had found as a fact that the publication of the Judge's name was a particular likely to lead to the identification of the victim. It was argued that the purpose of the section was to prevent the physical identification of the victim. The fact that in the words of the learned Magistrate, a 'better informed member of the community' can look up the Judge's name in the law list and find out the name of the accused and thus discover the name of the victim does not necessarily mean that the victim has been identified. Identifying a victim, it was said, must go beyond merely knowing the victim's name; the phrase 'likely to lead to the identification of the victim' refers to the likelihood of a particular person being identified, not merely by a name or description but as a person.

...

There is much force in the argument that a publication that leads or is likely to lead to the name of the victim does not necessarily mean that this is equivalent to identification of the victim. This would seem to be so, for example, where the name of the defendant is John Smith and nothing more is revealed or likely to be revealed. In such a case, where it is known that the accused was alleged to have raped his wife, all that would be known was that the victim's name was Mrs. John Smith. As a matter of construction, I am of the view that the mere surname of the victim cannot automatically be equated with identification. In the John Smith type of example, it is difficult to see how it could, though it could amount to identification if the case took place in a small town where there was only one or there were very few Smiths residing. With a less common name, it may be that the mere name is enough. Further, I do not accept that publication of particulars likely to lead to ascertainment of only the name of the victim cannot amount to identification.

In my view, the operation of the words in question is a matter of fact in each case. It is not open to me to decide this matter as though I can reconsider this issue and then replace the Magistrate's decision with my own if my view of the facts differs from his view.

... The learned Magistrate held that there were circumstances about the case that were unusual, namely, the controversial subject matter of the issue of whether a husband could in law be guilty of the offence of raping his wife; and secondly, in the considerable notoriety and public interest surrounding the case. These circumstances, according to the learned Magistrate, meant that the publication of the name of the Judge was likely to lead to the identification of the victim. That was a question of fact that he had to decide.

It is not open to this Court on an order to review to interfere with a finding of fact by the learned Magistrate unless it can say that the finding was one that no reasonable tribunal could have come to. I could not so find and I was not really asked to so find.”²⁵⁷

299. His Honour’s judgment is helpful but I note that it was given in the context of “*likely to lead to the identification of*” the victim rather than that of whether the identity of an individual “*is apparent, or can reasonably be ascertained, from the information or opinion.*” The use of the word “*from*” indicates that the “*information or opinion*” is the “*source or origin*”²⁵⁸ from which the information is apparent or can reasonably be ascertained. That is a different test from that which applied under JPR Act. On its face, it is a test that is limited to the information or opinion in the requested document. If, on the facts of any particular case, that turns out to be so, then the test is satisfied.

300. If it turns out not to be so, the question then becomes whether the test is limited in that way. I do not think that it is. If access is given to the document under the FOI Act, then, potentially and provided it is not information about the personal or business affairs of the person requesting the document, it becomes part of the information that is available to the public. If the identity of an individual is apparent or can reasonably be ascertained by reading both the information in the document and that which is already available in the public arena, the “*information or opinion*” in the requested document is no less the “*source or origin*” of the identification. It is the source or origin of information that gains its meaning from the context in which it is disclosed. As the definition of “*personal information*” requires that an individual’s identity is apparent or can reasonably be ascertained from the information or opinion, the context in which that is ascertained must also be defined by reference to the information that is apparent in the public arena or can reasonably be ascertained from it.

301. To illustrate, I will mention a couple of examples. If, for example, information in the wider context were only available from a private source, that would not be in the public arena and could not be used to decide whether the information enabled the identity of an individual to be identified as required by the definition of

²⁵⁷ [1989] VicRp 9; [1989] VR 78 at 92-94

²⁵⁸ Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

“personal information”. If that information were in the public arena but could only be obtained after complicated and tedious searches, that would be a factor in determining whether the individual’s identity “*can reasonably be ascertained*” (emphasis added) from the information or opinion.

302. A further question arises in relation to information that is available to some members, or even one member, of the public but is not available to all. This arises below in relation to the academic transcripts showing the names and student numbers of students at SICB and their results. Document 734 in Category 9 is an example.²⁵⁹ Exemption is claimed under s 41(1) for the academic results. In an age in which records are computerised and search engines increasingly sophisticated, it would not be unreasonable to expect that a person who had access to SICB’s records could use the subjects and their codes, the dates of study and the results and marks for each subject to identify the person who is the subject of the academic transcript. It seems to me that regard should be had to all resources that may be available to a member of the public in deciding whether an individual’s identity can reasonably be ascertained from the information or opinion. That may be information that is available to all members of the public or may be available only to a limited number of them. The existence or nature of the information cannot be a matter of conjecture or speculation for the individual’s identity must be something that “*can reasonably be ascertained, from the information or opinion*”. The word “*reasonably*” effectively eliminates conjecture or speculation.

B. “unreasonable disclosure” unqualified by s 41(2)

303. The qualification found in s 41(2) to the exemption in s 41(1) is a qualification which I have considered in previous cases. It does not arise in the circumstances of this case. Therefore, I have considered what is meant by the expression “*unreasonable disclosure*” without regard to it.

304. In *Wiseman v The Commonwealth*,²⁶⁰ the Full Court of the Federal Court said of s 41(1) that “*whether or not disclosure would be ‘unreasonable’ is a question of fact and degree which calls for a balancing of all the legitimate interests*

²⁵⁹ See [350]-[354] below

²⁶⁰ [1989] FCA 434; Sheppard, Beaumont and Pincus JJ

involved”. The Court did not elaborate on the “*legitimate interests*” that were involved.

305. Earlier, Deputy President Hall had explored the issue in *Re Chandra and Minister for Immigration and Ethnic Affairs*²⁶¹ (*Chandra*) when he said:

“51. ... [I]t is not every document, the disclosure of which would involve the disclosure of information relating to the personal affairs of a person, that is exempt from disclosure under the Act. Exemption is only attracted if the disclosure would involve the unreasonable disclosure of information relating to those affairs. Whether a disclosure is ‘unreasonable’ requires, in my view, a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance. Plainly enough what s 41 seeks to do is to provide a ground for preventing unreasonable invasion of the privacy of third parties.

52. However, consistently with the stated object of the Act (see s 3), it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information in documentary form in the possession of an agency and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party whose personal affairs may be unreasonably disclosed by granting access to the document.”²⁶²

306. The legitimate interests inherent in this passage from *Chandra* are twofold. Both are public interests. One is the public interest in the disclosure of information held by government. The other is the public interest in protecting personal privacy of a third party. The balance between the two is achieved by determining whether the personal privacy of that third party might reasonably be disclosed by granting access under the FOI Act. The reasons in *Chandra* did not take the matter further.

307. Lockhart J adopted a similar course in *Colakovski v Australian Telecommunications Corporation*²⁶³ (*Colakovski*) when he said:

“ Before parting from the case there is a final observation I wish to make. The FOI Act is, as its preamble states, ‘an Act to give to members of the public rights of access to official documents of the Government of the

²⁶¹ [1984] AATA 437; (1984) 6 ALN N257

²⁶² [1984] AATA 437; (1984) 6 ALN N257 at [51]-[52]; N259

²⁶³ [1991] FCA 152; (1991) 29 FCR 429; 100 ALR 111; 13 AAR 261; 23 ALD 1

Commonwealth and of its agencies'. The object of the Act is stated in s 3 as being to enable Australians to have access, as far as is possible, to information in the possession of the Federal Government by making available to the public, information about the operations of Departments of the Commonwealth and its public authorities and by creating a general right of access to information in documentary form in the possession of ministers, departments and public authorities. But, as s 3 itself recognises, there are limitations upon these rights of the Australian community which are expressed as being 'necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities'".²⁶⁴

308. This passage underlines what is clear from s 3(1)(b) itself. The FOI Act seeks to achieve a balance among several public interests. On one side of the scales is the public interest in the public's having a right of access to official documents of the Commonwealth and of government. On the other side are several public interests. One is the public interest in protecting other public interests such as the efficient operation of government, Commonwealth/State relations and Australia's security and international relations. Another is the public interest in protecting from disclosure the private and business affairs of those who deal with agencies. In some instances, Parliament has defined the public interest it seeks to protect by reference, in part, to the public interest. Section 40, which is one of the sections in issue in this case, is an example and I will return to that below.

309. This is the point that Lockhart J made in *Colakovski* when he said:

*"... The exemptions necessary for the protection of 'personal affairs' (s 41) and 'business or professional affairs' (s 43) are themselves, in my opinion, public interest considerations. That is to say, it is not in the public interest that the personal or business or professional affairs of persons are necessarily to be disclosed on applications for access to documents. The exemption from disclosure of such information is not to protect private rights; rather it is in the furtherance of the public interest that information of this kind is excepted from the general right of public access, provided the other conditions mentioned in ss 41 and 43 are satisfied. An examination of the other provisions of Pt IV of the Act concerning exempt documents confirms this approach."*²⁶⁵

²⁶⁴ [1991] FCA 152; (1991) 29 FCR 429; 100 ALR 111; 13 AAR 261; 23 ALD 1 at [35]; 438; 121; 270; 9

²⁶⁵ [1991] FCA 152; (1991) 29 FCR 429; 100 ALR 111; 13 AAR 261; 23 ALD 1 at [35]; 438; 121; 270; 9

310. Therefore, the exemption in s 41 encapsulates an existing public interest as did all the exemptions in Part IV at the time the FOI Act was enacted. Encapsulation of a public interest does not equate with the incorporation of a public interest consideration as the Tribunal in *Re Marshall and Department of Defence and Heath (Joined Party)*²⁶⁶ has concluded. After quoting the definition of “personal information” in s 4(1) and referring to the requirement that the disclosure must be unreasonable, it said:

“... The test of unreasonable disclosure requires, essentially, a public interest consideration [*Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, per Lockhart J at 437-8] in which regard must be had to all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance [*Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257 at [51]].”²⁶⁷

311. The Tribunal then applied these principles to documents relating to the evaluation of certain tenders that had been submitted to the Department of Defence. The Inspector-General of Defence had conducted an enquiry into that evaluation and into allegations of misconduct. The Tribunal concluded:

“... In the circumstances the public interest in the protection of personal privacy and the public interest in the proper investigation of alleged misconduct weigh against disclosure. Considering the terms of the section and all the particular circumstances, we accept that the disclosure of personal information that has not been properly tested or obtained in the course of an investigation by the Inspector-General, and that is likely to be prejudicial, may well be unreasonable.”²⁶⁸

312. The factors to which the Tribunal referred in stating the general principles are taken, as it acknowledges, from the passage at [51] of Deputy President Hall’s reasons for decision in *Chandra*. That passage has long been taken to be a classic statement of what is “unreasonable” as it is used in s 41(1). No reference is made in *Chandra* to weighing competing public interests and none is made in the later case of *Colakovski*. Neither is authority for that proposition and, for the reasons I have given above, s 41(1) does not incorporate a public interest test or a weighing of

²⁶⁶ [2011] AATA 566; Deputy President Constance and Senior Member Webb

²⁶⁷ [2011] AATA 566 at [26]

²⁶⁸ [2011] AATA 566 at [33]

one public interest against another. The test is cast in terms of what is an “unreasonable” disclosure of personal information. Protecting personal information about a person from unreasonable disclosure is the public interest that is protected. It should not be recast in terms of a “*public interest in protecting personal privacy*”²⁶⁹ for, while that may be a relevant consideration under the *Privacy Act 1988*, it is not the public interest encapsulated in s 41(1) of the FOI Act. The public interest is in restricting access to documents where their disclosure under the FOI Act would involve the unreasonable disclosure of personal information, as that term is defined, about any person.

313. Apart from specific instances such as s 40, the FOI Act does not contain any provision requiring or encouraging access to be given when the agency, Minister or Tribunal is of the opinion that the public interest requires disclosure. Provided there is no other law preventing it, the agency or Minister may give access even if exemption could be claimed under the FOI Act. Although not specifically stated in the FOI Act, it is clear from a reading of ss 58(1) and (2) that this is the case. Section 58(1) provides that, subject to the section itself, the Tribunal has power to decide any matter that could have been decided by an agency or Minister in relation to a request under the FOI Act. Section 58(2) immediately qualifies the Tribunals’ power by providing that “... *the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.*”

314. This express denial of power is to be contrasted with s 50(4) of VicFOI. Subject to four exceptions, that section provides that VCAT:

“... shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document ...where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.”

No similar power is to be found in the FOI Act. Consequently, I can have regard to the public interest only in the context of the particular exemptions in which it is expressed to be a criterion.

²⁶⁹ [2011] AATA 566 at [38]

315. The right of access to documents is not given pre-eminence over the exemptions and exceptions to it so that the right of access is construed liberally and the exception and exemptions narrowly. The right of access is subject to the exceptions and exemptions necessary for the protection of the public, personal and private interests identified in the FOI Act and delineated in Parts III and IV.

316. Had Parliament given the right of access a pre-eminence of some sort, the correlative duty imposed on the Minister or agency would have mirrored that right. As it is, the duty mirrors a right that is qualified. It follows that the exceptions and exemptions to the right of access should not, as a matter of principle, be construed narrowly and the right of access more liberally. Each must be given its meaning according to its terms and the context in which it appears and not artificially narrowed or extended.

317. The interest of a person in requesting access is the subject of s 11(2) when it provides:

“Subject to this Act, a person’s right of access is not affected by:

- (a) any reasons given by the person for seeking access; or*
- (b) the agency’s or Minister’s belief as to what are his or her reasons for seeking access.”*

318. The words “*Subject to this Act*” has taken me on a search of the FOI Act to consider the circumstances in which a person’s right of access would be affected by the person’s reasons for gaining access. Arguably, an example could arise under exemptions requiring consideration of whether disclosure would be contrary to the public interest. The use that the person might want to make of the information could be relevant.²⁷⁰

319. What s 11(2) does not refer to is the identity of the person. That does not mean that it is irrelevant for the right of access is formulated in terms that are also “*Subject to this Act*”. The identity of the person requesting access is clearly relevant in the qualification appearing in s 41(2) and in the similar qualification found in s 43(2) in relation to the business affairs exemption.

²⁷⁰ Examples are found in ss 36(1)(b) and 40(2)

320. The question remains whether either reasons for seeking access or the identity of the person doing so are relevant in deciding whether disclosure is unreasonable within the meaning of s 41(2). I have looked also to s 27A of the FOI Act for some guidance. It is the means by which an agency can find out the thoughts of the person whose personal information is the subject of a request under the FOI Act. In general terms, it applies if an agency receives a request in respect of a document containing personal information about a person and it appears that the person might reasonably wish to contend that the document is an exempt document in so far as it contains that information.

321. In deciding whether that person might reasonably wish to contend that a document is an exempt document under s 41, the agency must have regard to:

- “(a) *the extent to which the personal information is well known;*
- (b) *whether the person to whom the personal information relates is known to be associated with the matters dealt with in the document;*
- (c) *the availability of the personal information from publicly accessible sources;*
- (d) *such other matters as the officer, Minister or reviewer, as the case requires, considers relevant.”*²⁷¹

322. Each of the first three of these criteria is determined by reference to objective factors all of which are focused on the public availability of the information. None is determined by reference to the person’s relationship with the person requesting the information. That this is so is underlined by the lack of any suggestion in s 27A that the agency must reveal the name of the person making the request. Applying Principle 11 of the IPPs established under s 14 of the Privacy Act, the agency would not be permitted to reveal that name unless the person requesting access consented to the disclosure. The emphasis of the first three factors influences and constrains those matters that the officer, Minister or reviewer might consider relevant under the fourth criterion. The emphasis is one of public availability of the information.²⁷² That genus is consistent not only with the first three criteria but with the absence of any limitation in the FOI Act upon the use that a person might choose to make of information received in documentary form under it.

²⁷¹ FOI Act, s 27A(1A)

²⁷² I have applied the ejusdem generis rule of statutory interpretation. See *Statutory Interpretation in Australia*, 6th edition, 2006, LexisNexis, Australia at [4.21]-[4.26]

323. There are three matters that favour my concluding that s 41(1) must be assessed on an objective basis. They are the balance that s 41 seeks to achieve between two public interests, the specific exceptions to the general principle that a person's reasons for seeking access are irrelevant and the criteria to which an agency must have regard. They are persuasive but I have also had regard to whether there are any limitations that can be placed on the use of personal information in a document to which access has been given. If there are limitations that can be imposed in particular instances by reference to the particular identity of the recipient of the information, they could be relevant in considering whether identity is relevant.

324. On its face, the FOI Act contains no restrictions on the use that may be made of a document to which access is given under it. It does, however, recognise that there may be restrictions under the general law. Section 91(2) expressly provides that the grant of access under the FOI Act is not to be taken as an authorisation or approval for the purposes of the law relating to defamation or breach of confidence or for the purposes of the law of copyright. That means that there is no protection from an action should the person to whom access is given choose to publish the document or its contents or do anything that would amount to a breach of copyright. Protection is available to those who give access under the FOI Act as the giving (as distinct from the dissemination by those to whom it is given) does not amount to a publication of the document or of its contents or to the doing of anything that would otherwise be a breach of copyright.²⁷³

325. In his judgment in *Colakovski*, Jenkinson J reached the same conclusion:

“... [N]o provision is made in the Act for restricting dissemination of information contained in a document to which access is granted. I say nothing as to whether in this case the use of such a provision, if it had existed, might have been appropriate. But it is not difficult to imagine circumstances in which the recipient of telephone calls of the kind made in this case would be thought to have a strong moral claim to access to information about the caller's personal affairs which it would be unreasonable to disclose to other members of what s 3 of the Act calls ‘the Australian community’. But nothing in the Act except s 91(2) qualifies the recipient's freedom to disseminate throughout that community information contained in a document to which he

²⁷³ FOI Act, ss 91(1) and (2)

has been granted access. The second is that, in determining what is to be considered 'the unreasonable disclosure of information' for the purposes of s 41(1), the provisions of s 14 of the Act should in my opinion be kept in mind. That section provides:

'Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.'

*Again I say nothing as to whether in this case reference to that provision would have been useful. But it may, in my opinion, be in some cases a consideration relevant to the determination of the reasonableness of a disclosure under the Act, a disclosure which may result in general public dissemination of the information, that disclosure may properly be made otherwise than under the Act to him who has a particular interest to receive the information, or some part of the information.'*²⁷⁴

326. It follows both from the principles applied in *Colakovski* and from the provisions of the FOI Act that the right of access given to every person is a right that does not change its nature according to the person who seeks to exercise that right. The right remains constant and the way in which the provisions of the FOI Act delineate that right must be interpreted and applied consistently. Consistent application means that what is unreasonable disclosure in terms of s 41(1) must be judged by reference to an objective standard and not by reference to the interests, knowledge or reasons of the person requesting access or by reference to the identity of that person. If it were otherwise, s 27A would require the agency to disclose the identity of the person requesting access to the person whose personal information appears in the requested document. It would require the agency to have regard to matters that are relevant to the reasons for seeking access and to reasons for refusing access to the particular person. Section 27A requires no regard to be had to matters of that sort.

327. The FOI Act imposes no restriction on the dissemination of the information that is obtained in documentary form under it. That is also a relevant consideration. Any restrictions that are imposed upon it are to be found in laws other than the FOI Act be they embedded in other legislation or in practical restrictions that flow from laws such as those regulating defamation, breach of confidence and copyright.

²⁷⁴ [1991] FCA 152; (1991) 29 FCR 429; 100 ALR 111; 13 AAR 261; 23 ALD 1 at 440; 122-123; 272; 10-11

328. I realise that this conclusion leaves me at odds with that reached by the Victorian Court of Appeal in *Victoria Police v Marke*²⁷⁵ (*Marke*). The Court of Appeal considered s 33(1) of the *Freedom of Information Act 1982* (Vic) (VicFOI) which provides that a document is an exempt document if “... *its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).*” The issue was whether the decision-maker had to, or could, consider the likelihood that Mr Marke would publish the document or information to any other person. The Court of Appeal decided that possible publication was an irrelevant consideration. It also decided that the decision-maker would need to take account of a number of matters including whether, and to what extent, the personal information was known to the applicant and the nature of any interest which the applicant could demonstrate in the information in the document be it personal information or other information.²⁷⁶ The decision as to whether:

“... *disclosure would be unreasonable is to be arrived at by examining matters peculiar to the applicant, the document and the personal information in question. ... [W]hat s 33(1) requires is the making of a judgment, based on a synthesis of the relevant features of the case at hand, about whether the disclosure of the personal information to the applicant would be unreasonable.*”²⁷⁷

329. The Court of Appeal also rejected the proposition that disclosure of a document under VicFOI is disclosure to the world at large. I have described the same proposition above when I said that the FOI Act imposes no restriction on the dissemination of the information that is obtained in documentary form under it. In rejecting the proposition, Maxwell P said:

“... *The concern of s 33(1) is with ‘disclosure under this Act’, that is, with disclosure to the applicant and, critically for present purposes, with what that disclosure involves. As counsel for Mr Marke submitted, disclosure to the applicant is not disclosure to the world. It is disclosure to a person who can, if he/she chooses, communicate the information selectively, or generally, or not at all. Disclosure to the applicant does not involve – that is, entail or have as its necessary corollary – disclosure by the applicant to any other person.*”²⁷⁸

²⁷⁵ [2008] VSCA 218, Maxwell P, Weinberg JA and Pagone AJA

²⁷⁶ [2008] VSCA 218 at [19] per Maxwell P

²⁷⁷ [2008] VSCA 218 at [23] per Maxwell P

²⁷⁸ [2008] VSCA 218 at [28]

330. The judgments of Weinberg JA and Pagone AJA were to similar effect. While Weinberg J referred to the judgment of Lockhart J in *Colakovski*, he did not refer to the passages which I have touched upon above. Instead, he limited himself to the passage in which Lockhart J considers the disclosure of personal information which is already regarded as notorious.²⁷⁹

331. This is a case I considered in *Callejo* and distinguished. I did not do so lightly for, although not bound by judgments of a Court outside the federal jurisdictional hierarchy, they should be regarded as very persuasive. I distinguished it on two bases. The first is that it is not consistent with *Colakovski*, which is a judgment of the Federal Court by which I am bound. The second is that the structures of the FOI Act and that of VicFOI are a little different. I adopt my reasons in *Callejo*²⁸⁰ in addition to those I have given above.

The exemption and the documents

A. Category A documents

Category 1 documents: 798, 853 and 977

332. Documents 798, 853 and 977 each contains information identifying a person or persons who has or have given a witness statement and/or has been interviewed by FCIS. I am satisfied that the information that is contained in the documents is information about an individual or individuals whose identity is apparent. Therefore, it is “*personal information*” as defined in s 4(1) and as referred

²⁷⁹ See [2008] VSCA 218 at [83]:

“ It must be remembered that all this had to be considered in the context of a complainant who had apparently been willing to go on television to voice her complaints. It is appropriate to note here the observations of the Full Court in *Colakovski* in which, Lockhart J (with whom Jenkinson and Heerey JJ relevantly agreed), in considering an equivalent provision in the Commonwealth freedom of information legislation, said:

‘For example, a document may contain statements about a person’s private life, in the sense of his personal life, which is widely known in various sections of the community. Something may be notorious, but its notoriety does not deprive it of the character of information relating to the person’s “personal affairs”. Such a document would therefore prima facie answer the description of one which relates to the ‘personal affairs’ of a person within s 41(1). Whether any disclosure of the information would be an “unreasonable disclosure” within s 41(1) is a different question. **If something is notorious about a person and recorded in a document, this may provide in a given case cogent evidence to justify the finding that its disclosure would not represent an “unreasonable disclosure”...**’ ... [(1991) 29 FCR 429 at 436] (Emphasis added.) ”

²⁸⁰ [2010] AATA 244; (2010) 51 AAR 308 at [104]-[109]; 346-347

to in s 41(1). I am also satisfied that the personal information was given by each person or persons when making a statement or giving information in relation to the investigation that was Operation Dachshund.

333. I am satisfied that the disclosure of each would be unreasonable within the meaning of s 41(1) of the FOI Act. If access were to be granted, disclosure would not, and could not, for the reasons I have given be conditional or be regulated in any way. That means that use may be made of the whole of the information about any individual or any part of it. Reference could be made to the fact that the personal information has been obtained as a result of an FOI request for access for documents relating to Operation Dachshund without reference to the reason for its being kept on Departmental files associated with that investigation or the way in which the personal information came to be kept on the Department's files. Disclosure would permit an association to be drawn between the individual or individuals and a Departmental investigation into allegations of fraud. That, in turn, could reasonably be expected to lead to a question regarding the role of the individual or individuals in the fraud alleged to have been perpetrated.

334. This is not a case in which the person or persons who gave the information contained in the documents has or have been charged. Had charges been laid, that would have been a relevant consideration for that takes a certain amount of personal information into the public domain. There is no suggestion that the person or persons have been the subject of any publicity, that they are known to be associated with matters relating to Operation Dachshund or that the information is already publicly available. On the face of the information contained in the documents, I am satisfied that the individual or individuals would be unlikely to consent to its being disclosed even though the investigation has now been completed.

335. Having regard to all of these matters, I am satisfied that disclosure of Documents **798, 853 and 977** would involve an unreasonable disclosure of personal information about the person or persons identified in them. They are exempt under s 41(1).

Category 5 documents: 152, 153, 238, 728, 737, 745, 762 and 991

(i) Documents 152, 238, 762 and 991

336. These documents contain the names and contact details of persons who have given information to the Department. For the reasons I have given in [332] to [334] above, I am satisfied that the information is exempt under s 41(1).

337. These documents also contain information relating to the names and contact details of migration agents and agencies under investigation. It is personal information. I do not have any evidence whether the Department's recommendations to charge two migration agents with offences under the Migration Act was ever acted upon by the CDPP. Whether they have been would be a relevant consideration. Section 59A(3) of the FOI Act obliges the Department to take all reasonable steps to inform persons such as the migration agents when it had refused access to the documents under s 41 and Mr Lobo had applied to the Tribunal for review of its decision. Its obligation is to do that "*as soon as practicable*". On the material that I have, I do not know whether it has done so yet. Whether it is still within the time limit defined by what is "*as soon as practicable*" is not important for the moment. What is important is that they be informed now. They need to have the opportunity to exercise their rights under s 59A if they wish to do so but, at this stage of the proceedings, they need to have the opportunity to have their views heard. I propose to adjourn further consideration of the exemption in so far as it relates to information regarding those migration agents to enable the Department to ascertain whether charges were laid. If they have not been laid, I will find the relevant parts of the documents exempt. If they have been laid, I will consider the information that has been disclosed in the charges and in the subsequent prosecution together with any other information that relates to the interests of the migration agents.

338. My reasons for finding the information exempt if the migration agents have not been charged are these. The investigations into the activities of the migration agents were considered in the context of Operation Dachshund. Even if the Department recommended that charges be laid, there is a considerable difference between charges' being recommended and being laid. The laying of charges takes a matter into the public arena of the criminal courts. The proceedings are conducted in public and those charged answer the charges in public. To disclose personal

information relating to an investigation when those under investigation were not charged and have no opportunity to answer any allegations made against them is unreasonable.

339. Document **152** also contains the names and other information that might reasonably be expected to identify visa applicants. It is personal information. I have found that the CDPP laid charges against four visa applicants. If the information in this document relates to one or more of those four visa applicants, that will be a relevant consideration in considering whether disclosure would be an unreasonable disclosure of his, her or their personal affairs. If it does not, I am of the view that the document is exempt under s 41(1) in so far as it contains personal information of that sort. My reasons would be the same as those I have given in relation to the migration agents. As with the migration agent information, I will adjourn further consideration of whether the documents are exempt under s 41(1) in relation to this information and for the reasons I have given at [336] to [337].

340. For these reasons, I have adjourned further consideration of the claims for exemption made in respect of Documents **152, 238, 762 and 991**.

(ii) Documents 153, 728, 737 and 745

341. Each of these documents contains information I have found to be personal information about two classes of persons. One class comprises those who have given information to the Department. For the reasons I have given in relation to Documents **152, 728, 737 and 745**, these documents are exempt under s 41(1). The other class comprises personal information about migration agents under investigation. For the reasons I have given at [336]-[337], I have adjourned further consideration of that claim for exemption.

Category 6 document: 346

342. The name, address and signature of a person who has given information to the Department is personal information.

343. The information that Document **346** contains regarding the court proceeding is unrelated to Operation Dachshund but it is related to a person who has

given the Department information in relation to that operation. I have said that the fact that charges are laid in a court against a migration agent is a relevant consideration in deciding whether or not it is unreasonable to disclose that migration agents' personal information gathered during Operation Dachshund. That does not mean that court proceedings are always a relevant consideration and the information in Document **346** provides an illustration of a situation in which it is not. The fact that the proceedings have occurred is publicly available as are the nature of the documents lodged in the proceeding and the outcome of the proceedings. The content of the documents is not publicly available. To disclose the information would, for the reasons I have given in relation to Documents **798, 853 and 977** at [333] to [334] above be an unreasonable disclosure of the personal affairs of the person identified in Document **346**.

Category 7 documents: 139, 333, 344, 597, 636, 739, 741, 763, 864, 865 and 998 and 509, 596 and 1019

(i) Document 139

344. Document **139** contains information, that I am satisfied is personal information, regarding a migration agent and a person who has provided information to the Department. For the reasons I have given in relation to Documents **798, 853 and 977** at [333] to [334] above, it is exempt under s 41(1) in relation to the personal information of the person who has provided information. In relation to the information relating to a migration agent, I have adjourned further consideration for the reasons I have given at [336] to [337] in relation to Document **152, 238, 762 and 991**.

(ii) Documents 333, 344, 597, 636, 763 and 864

345. Documents **333, 344, 597, 636, 763 and 864** each contains information relating to a migration agent and agency under investigation and a visa applicant under investigation. I do not know whether any of the migration agents or visa applicants were charged. Therefore, for the reasons I have given at [336] to [337] (Document **152, 238, 762 and 991**) in respect of the investigations of migration agents and at [339] (Document **152**) in respect of the investigations of visa applicants, I

adjourn further consideration of the exemption claims under s 41(1) in relation to these documents.

(iii) Documents 509, 596 and 1019

346. Documents **509, 596 and 1019** each contains information that might identify a person providing information to the Department. I am satisfied that it is personal information. For the reasons I have given at [333] in relation to Documents **798, 853 and 977**, I am satisfied that the documents are exempt under s 41(1) in relation to that information.

(iv) Documents 739, 741, 865 and 998

347. Documents **739, 741, 865 and 998** contain information that identifies visa applicants who were under investigation in Operation Dachshund. It is personal information. For the reasons I have given at [339] above in relation to Document **152**, I am satisfied that the information would be exempt under s 41(1) of the FOI Act if it does not relate to any of the four visa applicants who were charged. If it does relate to them, I would need to consider the matter further in light of the information revealed on the charges and after considering any further information. For the reasons I gave at [336]-[337], I adjourn further consideration of this claim for exemption.

Category 9 documents: 475, 564, 577, 608, 620, 640, 643, 644, 723 and 1029 and 87, 209, 553, 556, 579, 635, 695, 725, 731, 734, 760, 898 and 900

(i) Documents 475 and 608 and 209, 695, 725, 760, 898 and 900

348. Each of the documents in this sub-category contains the name, birth date and other information identifying a visa applicant under investigation. Documents **475**, are emails between officers of the Department. Documents **608** are computer printouts of the Department's records of the courses in which visa applicants under investigation have enrolled. Documents **209, 898 and 900** list the names and personal and contact details of visa applicants under investigation. Documents **725 and 760** are similar to Documents **209, 898 and 900** in that they list the personal details of visa applicants under investigation together with information such as that relating to the date on which they arrived in Australia. Both Documents **725 and 760** are AIB reports. **Document 695** is an incoming passenger card that has

been annotated by the Department and contains the name and personal information about a visa applicant under investigation.

349. The information for which exemption is claimed is personal information. For the reasons I have given at [339] above in relation to Document **152**, I am satisfied that the information would be exempt under s 41(1) of the FOI Act if it does not relate to any of the four visa applicants who were charged. If it does relate to them, I would need to consider the matter further in light of the information revealed on the charges and after considering any further information. For the reasons I gave at [336]-[337] I adjourn further consideration of this claim for exemption.

(ii) Documents 564 and 644 and 87, 635 and 734

350. Document **564** is a receipt issued by the SICB containing the name of a student at SICB and other information identifying that student. Document **644** is a Diploma of Hospitality – Management that shows a student’s name and other identifying information. Document **734** is made up of academic transcripts and certificates prepared by SICB and showing the name of a student together with other identifying information. Documents **87** and **635** are lists of the names of students at SICB.

351. I am satisfied that the information for which exemption is claimed is personal information. The identity of individuals is apparent from the students’ names themselves. The student identification numbers are means by which their identity could be reasonably ascertained if access were had to SICB’s records. These are not records that are available to the public but they are records that are likely to still be in existence and available to some person or persons. That leads me to conclude that the student number is personal information. The marks and results awarded for each subject do not themselves identify the individual. They are more problematic than the student numbers but the same reasoning leads me to conclude that they are also personal information about an individual. They express an opinion about the standard that individual met on being assessed for each subject. They express a fact about the mark or result that was awarded on being assessed. If SICB’s records were searched for the mark or result in conjunction with the subjects and the dates they were undertaken, all of which have been disclosed, it is likely that the

identity of the person to whom they were awarded could reasonably be ascertained. Therefore, I have concluded that the names, student numbers and marks and results are personal information as that term is defined in s 4(1) of the FOI Act.

352. To disclose that personal information in response to a request under the FOI Act would be an unreasonable disclosure of that information. Disclosure would not, and could not, for the reasons I have given be conditional or be regulated in any way. That means that use may be made of the whole of the information about any individual or any part of it. Reference could be made to the fact that the personal information has been obtained as a result of an FOI request for access for documents relating to Operation Dachshund without reference to the reason for its being kept on Departmental files associated with that investigation or the way in which the personal information came to be kept on the Department's files. Disclosure would permit an association to be drawn between the individual or individuals and a Departmental investigation into allegations of fraud. That, in turn, could reasonably be expected to lead to a question regarding the role of the individual or individuals in the fraud alleged to have been perpetrated.

353. This is not a case in which the person or persons who gave the information contained in the documents has or have been charged. Had charges been laid, that would have been a relevant consideration for that takes a certain amount of personal information into the public domain. There is no suggestion that the person or persons have been the subject of any publicity, that they are known to be associated with matters relating to Operation Dachshund or that the information is already publicly available. On the face of the information contained in the documents, I am satisfied that the individual or individuals would be unlikely to consent to its being disclosed even though the investigation has now been completed.

354. Having regard to all of these matters, I am satisfied that Documents **564** and **644** and **87**, **635** and **734** are exempt under s 41(1) to the extent to which exemption has been claimed.

(iii) Documents 577, 620, 723, 731 and 1029

355. Document **577**, contains the name of a person described by the Department as its witness together with other information that identifies that person.

It also contains details of documents that the person has given to the Department. Those documents include some relating to migration agents under investigation. Document **620** is a file note prepared by a Departmental officer. It records a telephone conversation with a person described as a Departmental witness. The note identifies that person by name and through other information and records the name of a migration agent under investigation. Document **731** is a statement by a visa applicant under investigation. Documents **723** and **1029** are similar in the type of information it records but takes the form of a chain of emails between Departmental officers.

356. I am satisfied that the information for which exemption is claimed is personal information within the meaning of the FOI Act. I do not know whether the migration agents were ever charged with offences. For the reasons I have given at [352]-[353] in relation to the personal information of the person giving material or information to the Department, I am satisfied that its disclosure under the FOI Act would be an unreasonable disclosure. Documents **570** and **620** are exempt to the extent that they contain that information. For the reasons I have given at [336] to [337] above, (Document **152**, **238**, **762** and **991**) in respect of the investigations of migration agents and [339] in relation to the investigation regarding the visa applicant named in Document **152**, I adjourn further consideration of the exemption claims under s 41(1) in relation to these documents.

(iv) Documents 640, 643,

357. Documents **640** and **643** contain the name of a migration agent under investigation and that of a visa applicant under investigation. They are file notes kept by Departmental officers. Again, the information is personal information but I do not know whether the migration agent has been charged. The same applies to the visa applicant.

358. For the reasons I have given at [336] to [337] (Document **152**, **238**, **762** and **991**) in respect of the investigations of migration agents and at [339] (Document **152**) in respect of the investigations of visa applicants, I adjourn further consideration of the exemption claims under s 41(1) in relation to these documents.

(v) **Document 553**

359. Document **553** is a table compiled by the Department. It summarises documents received from a witness and includes receipts, academic transcripts and other documents from SICB. Some of the information is personal information in the sense that it is information about a person or persons. Only some of that information is about a person or persons whose identity is apparent. It is only that information that is personal information within the meaning of s 4(1) and so of 41(1) of the FOI Act. A receipt number, for example, can identify a person who already has the receipt records of SICB. As those records are not in the public arena, a receipt number does not identify an individual in any way. Comments recorded in the document are not necessarily directed at the person named in those comments. Rather, the name of the person is used as a means of identifying an issue of concern. The name is personal information but nothing from the context in which names appear in the document is of that nature.

360. Disclosure of the names in Document **553** would be an unreasonable disclosure of personal information within the meaning of s 41(1) of the FOI Act. It would take place in the context of a request for access under the FOI Act for information relating to Operation Dachshund. There is no suggestion that the person or persons have been the subject of any publicity, that they are known to be associated with matters relating to Operation Dachshund or that the information is already publicly available. To disclose in those circumstances would be unreasonable. On the face of the information contained in the documents, I am satisfied that the individual or individuals would be unlikely to consent to its being disclosed even though the investigation has now been completed.

361. Therefore I find that Document **553** is exempt to the extent that names appear in the document. None appears in the first column, one in the second in the seventh line, none in the third, fourth sixth and seventh columns. In the fifth column, a name appears in the 8th, 13th, 17th, 22nd (two names), 24th, 25th (two names), 26th, 27th and 29th lines. Each is exempt under s 41(1) but the document is not otherwise exempt. Having regard to s 22, the names should be deleted and access given to the remainder.

(vi) Document 579

362. Document **579** is a computer printout showing extracts from a visa applicant's social networking website. The information contains text giving personal details and photographs. It identifies the visa applicant and other persons identifying themselves as friends of the visa applicant. The information is personal information in the sense that it is information about a person or persons whose identity is apparent. To disclose it in response to a request under the FOI Act for information regarding an investigation of alleged fraud and in circumstances in which there is no evidence in the material to suggest that the visa applicant has been charged with an offence is unreasonable. It suggests an association between the person and allegations of fraud that does not necessarily have any foundation in fact. It is exempt in its entirety under s 41(1) of the FOI Act.

(vi) Document 556

363. Document **556** is a Departmental document entitled "*Application for Assessment of Trade Training and Expertise*". It contains information from a visa applicant who was under investigation for the purposes of a skill assessment by the TRA. For the reasons I have given at [339] above in relation to Document **152**, I adjourn further consideration of the exemption claims under s 41(1) in relation to this document. I do not know whether the visa applicant has been charged or not. Without that information and without taking steps to give the person an opportunity to express a view, I am not in a position to decide whether or not disclosure of the information in the document, which is personal information relating to a particular visa applicant would be unreasonable.

Category 12 documents: 112, 962 and 963

364. Document **112, 962 and 963** are copies of the same minute written by a Departmental investigator regarding the qualifications of a visa applicant who was under investigation. For the reasons I have given at [339] in relation to Document **152**, I have adjourned further consideration of the exemption in relation to the personal information relating to the visa applicant.

365. The documents also include information about a person who has given information to the Department. I am satisfied that it is information that is personal

information and that is reasonably likely to identify the person giving it. To disclose it under the FOI Act in response to a request of the sort made by Mr Lobo is unreasonable. The passage in which this information appears at folio 75 of Document **112**, page 7 of Document **962** and page 12 of Document **963** also includes information that is not personal information. I have considered whether it is reasonably practicable to delete the personal information from the remainder so that Mr Lobo can be given access to the remainder in accordance with s 22(1) but have decided that it is not. The whole of the passage that appears at the end of folio 75 and for which exemption has been claimed is exempt under s 41(1).

Category 13 documents: 98 and 99

366. Document 98 is an Academic Transcript issued by the SICB in respect of a student's course of study for Certificate III in Hospitality – Commercial Cookery. Only part of the information is claimed to be exempt under s 41(1). That information encompasses the student's name, student number, the subjects studied, the marks attained and the date on which the marks were awarded. I accept that all of this is personal information about an individual whose identity is apparent. For the reasons I have given at [350]-[352] above in relation to Documents **564** and **644** and **87**, **635** and **734**, I am satisfied that the information is exempt under s 41(1).

367. Document **99** confirms the enrolment of a student in a course at SICB and asks the student to lodge it with the Department when applying for a student visa. It sets out the name and date of birth of the student as well as other information identifying that student. For the reasons I have given in the previous paragraph, I am satisfied that it is exempt under s 41(1).

Category 15 document: 1018

368. Document 1018 comprises a chain of emails among officers of the Department. It is headed "*Re: audit on Sydney International College of Business*". A passage at the bottom of folio 117 and the top of folio 118 is said to contain information disclosed to investigators by confidential sources. It is said that disclosure of the passage is likely to identify those confidential sources.

369. I am satisfied that the passage contains information that might identify the person or persons who gave it. I say “*might*” because it would need to be taken with other information in order to come to a precise identification. That other information would not necessarily be known to anybody other than a select circle but it would be known to those. For the reasons I have given above,²⁸¹ I consider that I can have regard to that fact in deciding whether the identity could reasonably be ascertained from the passage for which exemption is claimed. Given the context in which the personal information would be disclosed under the request, I am satisfied that its disclosure would be unreasonable. That part of Document **1018** is exempt under s 41(1).

Category 16 documents: 956 and 894

370. Document 894 is a list showing the names of a number of persons and recording their names, migration status, nationality, addresses, courses they are studying and fees they have paid. Exemption is claimed for it in full. For the reasons I have given in relation to Documents **564** and **644** and **87**, **635** and **734**, I am satisfied that Document **956** is exempt under s 41(1) to the extent to which it has been claimed and that Document **894** is exempt in its entirety.

Category 17 documents: 286, 287 and 997

371. Documents **286**, **287** and **997** are emails in the same chain between a VETAB officer and an officer of the Department. Each records the name of a migration agent and agency under investigation and the name and other information that identifies a visa applicant under investigation. That is personal information in relation to the migration agent and the visa applicant. As I do not know whether the migration agent and/or the visa applicant has been charged, I have adjourned further consideration of the exemption claim. If they have not, the documents are exempt under s 41(1) to the extent claimed. If they have, they are not exempt. My reasons are the same as those I have given in relation to **Documents 152, 238, 762 and 991** at [336] to [339] above.

Category 23 documents: 140, 321 and 285

²⁸¹ See [302]

372. Exemption is claimed in part for Documents **140** and **321**. The first is a minute between officers of the Department assessing the allegations made against certain migration agents and migration agencies. The second is a document called an “*Investigation plan*” relating to SICB and another. Exemption under s 41(1) is claimed in respect of the names of migration agents and migration agencies under investigation, of other information identifying them and of allegations made against them. I am satisfied that the information referred to is personal information but again adjourn further consideration for the reasons given in relation to **Documents 152, 238, 762 and 991** at [336] to [337] above.

373. Documents **140** and **321** also contain information identifying persons who have made allegations to the Department about the conduct of migration agents. It appears at pages 2 and 3 of Documents **140** together with passages on pages 4, 5, 6 and 7. On Document **321**, it appears at pages 4 to 9. This is information that is personal information in the sense that it is information about individuals whose identity is apparent. It is the personal information about both the persons making the allegation and the persons about whom the allegations are made. They are interwoven and it would not be reasonably practicable to separate them. Even if the migration agents about whom the allegations have been made have ultimately faced charges so that disclosure of their information might not be unreasonable, it would remain the case that disclosure of the personal information about those making the allegations would remain unreasonable. It is unreasonable that their personal information be disclosed under the FOI Act in response to a request that asks for all documents relating to certain persons in relation to whom the Department is conducting an investigation. Those passages of the document are exempt under s 41(1).

374. Document **285** is entitled “*Complaints against Sydney International College of Business*”. Exemption is claimed for it in full. As with the passages in the two documents I have considered in the previous paragraph, the information relates to the affairs of both the persons making the allegations and those about whom they are made. Obviously, some of the information concerns SICB but that is not an individual. Consequently, any information that concerns it is not personal information and considerations that arise under s 41(2) are not relevant. They are also irrelevant in so far as Mr Lobo is concerned for none of the information relates to

him. For the reasons I have given in relation to particular passages in Documents **140** and **321** for which exemption has been claimed, I am satisfied that the whole of Document **285** is exempt under s 41(1).

B. Category C documents

Category 6 documents: 399 and 1001

375. Document **399** is a Ministerial Intervention Request made in relation to a visa held by a person described as a “*Departmental informant*”. It includes a number of attachments. Exemption is claimed under s 41(1) in relation to the whole of the document. I am satisfied that it contains information about a number of individuals including the person described as a Departmental informant. It is information about each of them and some information can be described as being information about more than one individual. All of it is information about the Departmental informant for it records his or her views on certain matters. That is personal information. I am satisfied that it would be an unreasonable disclosure of that person’s personal information if it were disclosed under the FOI Act in response to a request that asks for all documents relating to certain persons in relation to whom the Department is conducting an investigation. That document is exempt under s 41(1).

376. Document **1001** is very similar. The reasons I have given in relation to Document **399** apply equally to it. I am satisfied that it is exempt under s 41(1).

Category 7 documents: 523 and 1016

377. Document **523** is an email from what is described in the Schedule as a “*third party*” to an investigator working on Operation Dachshund. Document **1016** has a chain of emails between the Department and another person regarding teachers at the SICB. I am satisfied that both are exempt in their entirety under s 41(1). Both contain information about individuals that is personal information within the meaning of s 4(1) of the FOI Act. It would be an unreasonable disclosure of that person’s personal information if it were disclosed under the FOI Act in response to a request that asks for all documents relating to certain persons in relation to whom the Department is conducting an investigation.

Category 9: Documents 53, 469, 472, 482, 483, 485, 527, 534, 547, 549, 550, 570, 650, 692, 693, 1017, 1020

(i) Document 53

378. Document 53 is a file note written as part of Operation Dachshund regarding a telephone conversation with a person said to be a “*confidential informant*”. Exemption is claimed for parts of the document under s 41(1). Some of those parts set out the names of those who have given information to the Department. That is personal information of the sort defined in s 4(1). For the reasons that I have given in the previous paragraph in relation to Documents 523 and 1016, those parts of Document 53 are exempt. That conclusion relates to those parts for which the exemption has been claimed in lines 1 to 10, 21, 28, 29 and 35 on the first page of the document. It also applies to those parts for which the exemption has been claimed in lines 1, 5, 13, 22, 29 and 31 on the second page.

379. Exemption is claimed for other passages on both pages of the documents. With the exception of two passages, I am not satisfied that the remainder are personal information within the meaning of s 4(1). It may be information about an individual or individuals but his, her or their identity is not apparent and cannot reasonably be ascertained. Taking as an example a passage that appears on the first page, access has been granted to a paragraph in the following form. It is written by an officer of the Department in a file note recording a telephone conversation:

“I understand your concern, I will double check about the FOI Act and anything we know about [passage for which exemption claimed] by speaking to us. Are you still prepared to speak to us again next Friday as we’d planned?”

Revelation of the subject matter of the officer’s enquiries in this instance does not reveal the identity of the person when read by itself or in the context of the whole of the file note.

380. One exception to this is found in the penultimate paragraph on the first page. I am satisfied that, were the passage released, the identity of the persons to which it refers could, when taken with the rest of the document, be reasonably ascertained. I have reached the same conclusion in relation to the second passage that

I have excluded from my general comment. That is found in lines 7 and 8 on page 2 of Document **53**.

381. For the reasons I have given in relation to Documents **523** and **1016**, disclosure of these two parts of Document **53** would be an unreasonable disclosure of personal information and are exempt under s 41(1).

(ii) Document 469

382. Document **469** is a facsimile message from a person to the Department attaching a copy of a document belonging to SICB. It contains information that is personal information within the meaning of s 4(1). The identity of those to whom the information refers or concerns are identified. For the reasons I have given in relation to Documents **523** and **1016**, disclosure of these two parts of Document **53** would be an unreasonable disclosure of personal information and are exempt under s 41(1).

(iii) Documents 472, 482, 483, 485, 527, 547, 549, 570, 650, 692 and 693

383. Documents **472, 482, 483, 485, 527, 547, 549, 570, 650, 692** and **693** are file notes by a Departmental officer made during Operation Dachshund recording conversations with witnesses. Exemption is claimed in full for each of them and each of them contains personal information. I am satisfied that each of the documents contains information that is information about an individual whose identity can be reasonably ascertained. Therefore, I find that it is personal information and am satisfied that its disclosure in the context of a request for access to documents having a connection with Operation Dachshund is an unreasonable disclosure of the personal information of those individuals. That personal information is exempt under s 41(1).

384. I have considered whether it is possible to make a copy of the document from which the exempt matter has been deleted so that it would no longer be exempt. I have decided that it would not be possible to do so. Any information that might be regarded as information about a subject²⁸² other than the individual remains that person's personal information for it is information of views held by that individual. Therefore, I have decided that s 22 does not impose any obligation to

²⁸² As none of the subjects related to Mr Lobo, s 41(2) did not come into consideration.

make such a copy. The whole of Documents **472, 482, 483, 485, 527, 547, 549, 570, 650, 692 and 693** are exempt under s 41(1).

(iv) Documents 1017 and 1020

385. Documents **1017** and **1020** are emails between officers of the Department summarising information that has been given by a person or persons who has or have given information to the Department and that is likely to identify that person or those persons. Exemption has been claimed for them in their entirety under s 41(1). Again, I am satisfied that they contain information about an individual or individuals whose identity is either apparent or can reasonably be ascertained. For the reasons I have given in relation to similar information, its disclosure would be unreasonable if it was the personal information of persons who have not been charged with offences as a result of Operation Dachshund and so would be exempt under s 41(1). Its disclosure would not be unreasonable if they have been charged. I have adjourned further consideration of the exemption claimed under s 41(1) in relation to these documents so that I can be given further information on whether they have been charged.

Category 18: documents 25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76 and 60, 64, 65, 70, 78, 81, 82, 83, 84, 85, 261 and 263 and 1023, 1074, 1083, 1084 and 1089

(i) Documents 25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76

386. The information for which exemption is claimed in these documents is described in the Schedule as either the “*Attendance roll for SICB class*”, a “*Summary of test results for SICB exam*”, “*SICB class roster*” or “*Attendance roll for SICB exam*”. I am satisfied that they contain personal information as that term is defined in s 41(1). It is information about a person or persons whose identity is apparent. If it were information about a person or persons who have been charged as a consequence of Operation Dachshund, I would not be satisfied that its disclosure under the FOI Act would be unreasonable and, to that extent, the document would not be exempt but the remainder would be exempt. In compliance with the obligation in s 22 and which I have considered in Attachment I, I would be satisfied that it would be both possible and reasonably practicable to prepare a document from which the exempt matter had

been deleted and so give access to that which is not exempt. If the personal information is about a person or persons who have not been charged, I would consider its disclosure under the FOI Act to be unreasonable and the documents exempt in their entirety under s 41. As I do not have information of that sort, I have adjourned further consideration of the claim for exemption made in relation to them.

(ii) Documents 60, 64, 65, 70, 78, 81, 82, 83, 84, 85, 261 and 263

387. Exemption is claimed in their entirety for each of these documents under s 41(1). Each records notes taken by an officer of the Department of conversations with various witnesses. I am satisfied that each contains information about individuals whose identity is apparent from the documents. For the reasons I have given in relation to Documents **472, 482, 483, 485, 527, 547, 549, 570, 650, 692 and 693**, I am satisfied that their disclosure under the FOI Act would be unreasonable and that it is neither possible nor reasonably practicable to prepare copies of the documents from which exempt matter has been deleted. Therefore, I am satisfied that Documents **60, 64, 65, 70, 78, 81, 82, 83, 84, 85, 261 and 263** are exempt in their entirety under s 41(1) of the FOI Act.

(iii) Documents 1023, 1074, 1083, 1084 and 1089

388. Document **1023** is made up of a chain of emails between an officer of the Department and a third party and entitled "*SICB*". Documents **1074, 1083, 1084 and 1089** are internal emails referring to information that would identify third parties who have, or might help, the Department in its investigations. I am satisfied that each of the documents contains personal information and that it is neither possible nor reasonably practicable to prepare copies of the documents from which exempt matter has been deleted. Therefore, I am satisfied that, for the reasons I have given in the previous paragraph they are exempt in respect of that information under s 41(1) of the FOI Act. I am also satisfied that that it is neither possible nor reasonably practicable to prepare copies of the documents from which exempt matter has been deleted. Therefore, the documents are exempt in their entirety under s 41.

EXEMPTION: section 45

The exemption

389. Section 45(1) provides that:

“A document is an exempt document if its disclosure under this Act would found an action, by a person (other than an agency or the Commonwealth), for breach of confidence.”

This provision is qualified by s 45(2). Except in two situations, s 45(2) excludes from the exemption internal working documents of the sort that come within the description set out in s 36(1)(a) or that would be of that sort if it were not for the qualifications to s 36(1)(a) found in ss 36(2), (5) and (6). Those two situations arise if disclosure would constitute a breach of confidence owed to a person or body other than a person in the capacity of a Minister, member of staff of a Minister, a Commonwealth agency or an officer of an agency.

A. “found an action”

390. In an earlier decision, *Re Callejo and Department of Immigration and Citizenship (Callejo)*,²⁸³ I set out the history of s 45. I adopt that reasoning but, for the purposes of this case, it is enough to note that s 45 had been amended on several occasions before its latest amendment. The Full Court of the Federal Court considered s 45 in its original form in *Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd*²⁸⁴ (*Corrs Pavey*). Gummow J dissented in that case but it is his interpretation that is now regarded as the appropriate interpretation of s 45 as it was enacted immediately before 1 November 2010. His Honour considered that s 45 used the expression “*breach of confidence*” in the sense known to law. Consequently, he continued:

“... the case is to be approached in terms of the general law, not as a case of confidence protected by contract, but as one, if anything, of confidence protected in equity. It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff (i) must be able to identify with

²⁸³ [2010] AATA 244; (2010) 51 AAR 308 at [120]-[127]

²⁸⁴ [1987] FCA 266; (1987) 14 FCR 434; 13 ALD 254; Jenkinson and Sweeney JJ, Gummow J dissenting

specificity, and not merely in global terms, that which is said to be the information in question, and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge), (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of that information. Saltman Engineering Co Ltd v Campbell Engineering Co (1948) 65 RPC 203 at 215; Commonwealth v John Fairfax and Sons Ltd (1980) 147 CLR 39 at 50-1; 32 ALR 485 at 491-2; O'Brien v Komesaroff (1982) 150 CLR 310 at 326-8; 41 ALR 255 at 266-8. It may be necessary, as Megarry J thought probably was the case (Coco v Clark (AN) (Engineers) Ltd [1969] RPC 41 at 48), and as Mason J (as he then was) accepted in the Fairfax decision was the case (at least for confidences reposed within government), that unauthorised use would be to the detriment of the plaintiff....”²⁸⁵

391. A little earlier in his reasons, Gummow J had noted that the Tribunal had found that the information sought by the appellant had been given to the respondent by another entity, which was an importer. It had not been given on the basis of a contract between them but on the basis that it had been given voluntarily but in a legislative context. Had the respondent required the importer to give the information by directing it under a statutory power, his Honour said that he:

“... would have some difficulty in seeing how from these circumstances any obligation of confidence could arise under the general law. The question in such a case would rather be one of finding a statutory restriction (if there be one) upon use by the service of the information in the documents, and then of measuring the terms of that statutory restriction against the terms of the exemption in s 38 of the FOI Act. ...”²⁸⁶

B. On which bases may an action be found?

392. Some of the earlier authorities have suggested that the exemption under s 45 is not limited to disclosure which would found an action for breach of confidence in equity but extends to other such actions arising, for example, under contract. In the case of *Re Callejo and Department of Immigration and Citizenship*²⁸⁷ (*Callejo*), I reviewed a number of authorities on this subject. I concluded that:

- (1) Regard must be had to the terms in which the exemption in s 45 is expressed i.e. in order to be an exempt document, its disclosure under the FOI Act must be such that it “*would found an action ... for breach of confidence*”. That action is an action in equity and would have to be

²⁸⁵ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 13 ALD 254 at [14]; at 443; 262-263; 437; 262-263

²⁸⁶ [1987] FCA 266; (1987) 14 FCR 434; 74 ALR 428; 13 ALD 254 at [12]; 442-443; 437; 262

²⁸⁷ [2010] AATA 244; (2010) 51 AAR 308

by a person other than an agency or the Commonwealth for s 45(1) expressly excludes actions by an agency or the Commonwealth).

- (2) under the general law, actions for a breach of confidence may be based on a number of bases including that of contract but these are irrelevant under s 45. If a document is to be an exempt document, its disclosure under the FOI Act must be such that it “*would found an action ... for breach of confidence*”. That action would have to be by a person other than an agency or the Commonwealth for s 45(1) expressly excludes actions by an agency or the Commonwealth).
- (3) Actions in contract, tort, negligence and for breach of statutory duty are not actions for breach of confidence known to the general law even though they may be based on disclosure, or threatened disclosure, of information claimed to be confidential.

I set out my reasons for these conclusions and others in *Callejo* adopt and make them part of these reasons but will not repeat them.²⁸⁸

C. The first four elements required to found an action for breach of confidence

393. As applied to s 45, the four elements identified by Gummow J in *Corrs Pavey* are that:

- (1) the information must be identified specifically;
- (2) that information must be capable of being confidential so that it is not, for example, already a matter of public knowledge;
- (3) the information must have been communicated to and received in circumstances that imported an obligation of confidence; and
- (4) there is an actual or threatened misuse of that information.

394. It must be remembered that each of these elements must be considered against a background of “*disclosure under this [FOI] Act*”. That does not mean that reference may be had to any disclosure of information that would otherwise satisfy the four elements. The question must be asked in relation to disclosure under the FOI Act. Suppose, for example, information were given by a person to another in circumstances meeting all four elements but that other person passed the information to the Commonwealth in circumstances in which the Commonwealth was unaware of the confidentiality of the information and which imported no obligation of confidence. Access under the FOI Act would not found an action for breach of confidence against

²⁸⁸ [2010] AATA 244; (2010) 51 AAR 308 at [128]-[166]

the Commonwealth. What it would do would be to reveal an earlier disclosure which would found an action for breach of confidence against the person communicating it to the Commonwealth. The exemption under s 45 would have no application in that situation.

D. Is a fifth element – detriment – required to found an action for breach of confidence?

395. There has been uncertainty in the cases as to whether detriment must be established before the exemption may be claimed. In his judgment in *Corrs Pavey, Gummow J* had raised the possibility that it might be necessary to establish detriment. He referred to two judgments but the judgment of Mason J in the latter, *Commonwealth of Australia v John Fairfax & Sons Limited and Others*²⁸⁹ (*John Fairfax*) decided that it is necessary to establish that unauthorised use would be to the detriment of the plaintiff.

396. Mason J had said in *John Fairfax*:

“ However, the plaintiff must show, not only that the information is confidential in quality and that it was imparted so as to import an obligation of confidence, but also that there will be ‘an unauthorised use of that information to the detriment of the party communicating it’ (*Coco v. A.N. Clark (Engineers) Ltd. (1969) RPC 41, at p 47*). The question then, when the executive government seeks the protection given by equity, is: What detriment does it need to show?

The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.

It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.

²⁸⁹ (1981) 55 ALJR 45

*Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.”*²⁹⁰

397. At one level, Mason J's judgment in *John Fairfax* is distinguishable on the basis that it was not concerned with s 45 of the FOI Act. It was concerned instead with whether the Commonwealth itself could claim breach of a confidence. It was in that context that the High Court said that the Commonwealth had to establish detriment on the basis of broader public interests. Those considerations are not directly relevant under s 45(1) for the exemption it establishes does not extend to an action founded by an agency (i.e. by a Department, a prescribed authority or an eligible case manager)²⁹¹ or by the Commonwealth.

398. Its principles may, however, be relevant in considering the fifth element of detriment in the context of s 45(1). Whether there is detriment must be considered by reference to the person by whom, if minded to do so, the action for breach of confidence would be founded. While an action for breach of confidence founded by the Commonwealth or an agency would not establish the exemption under s 45(1), it may be that an action by a body such as a public utility or incorporated body in which the Commonwealth is a shareholder would do so. That would follow from the fact that it may not be regarded as either the Commonwealth or an agency as that term is defined in s 4(1) of the FOI Act. If it were excluded from the definition of a “*prescribed authority*” so that it is not an “*agency*”, an exemption under s 45(1) might be able to be established on the basis that disclosure would found an action by the public utility or incorporated body for breach of confidence. If that is the case, then consideration would need to be given to the fifth element of detriment identified by Gummow J in *Corrs Pavey*.

399. Whether detriment would be caused to two public utilities by an alleged breach of confidence was considered by the High Court in *Esso Australia Resources Ltd v Plowman*.²⁹² In that case, the majority of the High Court applied the principles in *John Fairfax* to documents held by public utilities owned by a State Government. It did so in the course of deciding whether an arbitrating party is under

²⁹⁰ [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485; 55 ALJR 45 at [25]-[28]; 51-52; 492-493; 49

²⁹¹ FOI Act, s 4(1)

²⁹² [1995] HCA 19; (1995) 183 CLR 10; 128 ALR 391; 69 ALJR 404

an obligation of confidence in relation to documents and information disclosed in, and for the purposes of, a private arbitration. The arbitration concerned issues arising from two agreements for the sale of natural gas from the Bass Strait fields to the Gas and Fuel Corporation of Victoria and the State Electricity Commission of Victoria.

Mason CJ, with whom Dawson and McHugh JJ agreed said:

“39. The courts have consistently viewed governmental secrets differently from personal and commercial secrets As I stated in *The Commonwealth of Australia v. John Fairfax and Sons Ltd.* ..., the judiciary must view the disclosure of governmental information ‘through different spectacles’. This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure

40. This approach was not adopted by the majority of the House of Lords in *British Steel Corporation v. Granada Television Ltd.* ..., where the confidential documents in question revealed the internal mismanagement of a statutory authority. In passing, the majority attributed to the public interest exception a very narrow scope, stating that, although disclosure was of public interest, it was not in the public interest I would not accept this view. The approach outlined in *John Fairfax* should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn notes ..., in the public sector ‘(t)he need is for compelled openness, not for burgeoning secrecy’. The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?”²⁹³

400. This approach was adopted by the Tribunal in *Re Sullivan and Department of Industry, Science and Technology and Australian Technology Group Pty Ltd.*²⁹⁴ The Tribunal found the Australian Technology Group Pty Ltd, whose shares were owned solely by the Commonwealth and which could be wound up by the Commonwealth without any difficulty, was a public body and so required to establish detriment in the terms described by Mason J in *John Fairfax*.²⁹⁵

401. The principles in *John Fairfax* are not directly applicable to the disclosure of information where the claim for exemption is not centred on a claim by the Commonwealth government (or of a public body of the sort referred to in *Esso*) that information is confidential. Detriment, though, may still have relevance for s 45 is not concerned with whether disclosure of any sort would found an action for breach

²⁹³ [1995] HCA 19; (1995) 183 CLR 10; 128 ALR 391; 69 ALJR 404 (footnotes omitted)

²⁹⁴ [1997] AATA 192; Senior Member Bayne

²⁹⁵ ²⁹⁵ [1997] AATA 192 at [27]-[35]

of confidence. Instead, it is concerned with whether disclosure “*under this Act*” would found that action. That is disclosure made in a legislative framework that reflects what Parliament considers is a proper balance of the public interest in disclosure and the public interest in protecting essential public interests and private and business affairs of persons dealing with the Commonwealth and its agencies.

402. The public interest grounds are not relevant to an action by a person who is not a public body of the sort considered in *Eссо*. If, detriment is a necessary element in an action founded by such a person then, as Mason J said in *John Fairfax*, detriment may be that disclosure of information relating to his or her affairs will expose his or her actions to public discussion and criticism. It is apparent, though, from Fullagar J’s judgment in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* that there is more than one basis upon which breach of confidence may be established in equity. In analytical terms, one is to protect property, and information is regarded as property. The other is, in effect, to ensure that the confidant acts in a way that is consistent with good conscience and not unconscionably. If that is the case, the detriment may be the disclosure itself in circumstances in which the disclosure is neither consented to nor otherwise justified. That disclosure may be accompanied by embarrassment, distress or the like or by tangible loss or it may simply be unconscionable.

403. This analysis would seem to be consistent with the later judgment of Gummow J in the case of *Smith Kline & French Laboratories (Aust) Limited v Secretary, Department of Community Services and Health*²⁹⁶ when he said:

“...The basis of the equitable jurisdiction to protect obligations of confidence lies, as the present case illustrates, in an obligation of conscience arising from the circumstances in or through which the information, the subject of the obligation, was communicated or obtained: *Moorgate Tobacco Co Limited v Philip Morris Ltd (No. 2)* at 438. The obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff. The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss. To look into a related field, when has equity said that the only breaches of trust to be restrained are those which would prove detrimental to the beneficiaries?”²⁹⁷

²⁹⁶ (1990) 22 FCR 73; 95 ALR 87

²⁹⁷ (1990) 22 FCR 73; 95 ALR 87 at 112; 126

On appeal, the Full Court adopted a similar approach.²⁹⁸

E.6 *Is it necessary to have regard to possible defences to an action for breach of confidence?*

404. I note that, in *B and Brisbane North Regional Health Authority*²⁹⁹ (*B and B*) which considered s 46 of the *Freedom of Information Act 1992* (Qld) (QldFOI), Information Commissioner Albietz considered:

“... that it is consistent with the general scheme of the Act (in which public interest considerations, and the balancing of competing public interest considerations are predominant ...) that s. 46(1)(a) should be interpreted as requiring defences to an action for breach of confidence to be taken into account. ...”³⁰⁰

Section 46(1)(a) of QldFOI provides that “*Matter is exempt if – (a) its disclosure would found an action for breach of confidence ...*”.

405. The defences to which the Information Commissioner turned were:

1. there is just cause or excuse for disclosing the information i.e. where it is in the public interest to use or disclose the information in that way;³⁰¹
2. it is in the public interest to disclose the information where that disclosure reveals evidence of a crime, serious wrongdoing or matters injurious to the public health; and
3. as the person who would bring an action of the sort referred to in s 46(1)(a) of the QldFOI would have to do so with “*clean hands*”, the action can be resisted on the basis that the person does so with “*unclean hands*”.³⁰²

Information Commissioner Albietz expanded upon the circumstances in which these defences may be made out.

406. Gummow J also analysed the defence of unclean hands in *Corrs Pavey* where the person who had given the information to the respondent was called to give evidence. He expressly rejected any notion that what he called a “*public interest*

²⁹⁸ *Smith Kline & French Laboratories (Aust) Ltd and Ors v Secretary, Department of Community Services and Health and Another* [1991] FCA 150; (1991) 28 FCR 291 at [51]; 304

²⁹⁹ [1994] QICmr 1; (1994) 1 QAR 279; FN Albietz, Information Commissioner

³⁰⁰ [1994] QICmr 1; (1994) 1 QAR 279 at [119]; 330

³⁰¹ [1994] QICmr 1; (1994) 1 QAR 279 at [123]-[124]; 331-332

³⁰² [1994] QICmr 1; (1994) 1 QAR 279 at [119]-[133]; 330-335

defence” in the sense used in the English cases, could be considered. The English authorities to which he referred extended the unclean hands defence to “... cases where the plaintiff’s misconduct has operated to the prejudice of third parties, especially where some general public interest is involved ...”.³⁰³

407. If I am correct in my view that the founding of an action is separate and apart from the defences to that action, I would also come to the view that it is irrelevant to consider them under s 45. I would so for another reason as well and will refer to a maxim to illustrate it. That maxim is described as meaning “... *that when a plaintiff whose conduct has been improper in a transaction seeks relief in equity that relief will be refused*”.³⁰⁴ It has been considered in a variety of contexts but one example will suffice:

“... in *Harrigan v Brown* [1967] 1 NSW 342, which concerned the manager of a group of entertainers who sought an injunction restraining them from employing a rival manager, in breach of their contract with him. He failed because he had kept his accounts in a most improper manner, contrary to his agreement with the troupe, although Street J specifically held that his breach of contract was not of the kind which amounted to a repudiation of it such as would entitle the defendants to rescind. ...”³⁰⁵

408. In *Meyers v Casey*,³⁰⁶ a member of the Victorian Racing Club was being threatened with expulsion after he attended a race meeting while a disqualified person. He sought an injunction on the basis that he had not been given an adequate opportunity to defend the charge. Isaacs J said:

“ But the maxim, even where the plaintiff is forced to resort to equity for its assistance, has not an unrestricted application. In the leading case of *Dering v. Earl of Winchelsea* ... [1 Cox, 318], at p. 319 Lord Chief Baron Eyre, with reference to an objection that the plaintiff had been guilty of misconduct, said:-- ‘It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense.’

³⁰³ (1987) 74 ALR 428 at 451

³⁰⁴ Meagher R, Heydon D and Leeming M, *Equity Doctrines & Remedies*, 4th edition, Butterworths, 2002

Equity Doctrines & Remedies, R Meagher, D Heydon and M Leeming, 4th edition, 2002, Butterworths, Australia (Meagher, Heydon and Leeming)

³⁰⁵ Meagher, Heydon and Leeming at [3-125]

³⁰⁶ (1913) 17 CLR 90; 19 ALR 537; Barton ACJ, Isaacs, Powers and Rich JJ

In that case, the Lord Chief Baron thought the plaintiff was the moral author of his own wrong, but not legally, and therefore did not refuse the relief. Now, in attempting to apply the principle as laid down in that case, we find that the rights asserted by the appellant, namely, membership of the club and public right under the by-laws to enter the racecourse, of course exist, if at all, by reason of circumstances wholly independent of the alleged misconduct; the wrong he complains of, namely, his condemnation by an incompetent and unauthorized tribunal in the one case, and a disregard of natural justice in the other, are equally independent of any misconduct by him. It is therefore impossible to say, in the Lord Chief Baron's words, that his alleged misconduct has 'an immediate and necessary relation to the equity sued for,' or that it was 'a depravity in a legal as well as in a moral sense.'

*It is altogether different from the cases where the right relied on, and which the Court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff, so that protection for what he claims involves protection for his own wrong. No Court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim. As an illustration, see *Cadman v. Horner* ...[18 Ves,10]. Not only these considerations, but one other which should be specially mentioned in justice to the appellant, show that the maxim is not applicable here. That other reason is this: that the issue of whether the appellant was or was not in fact guilty of misconduct is in no way raised for the Court's determination, whereas the misconduct in respect of which the maxim is always applied is equally with all the other matters an issue within the Court's sphere of determination. If the racing tribunals had, or are to be taken to have had, the requisite authority, and to have acted within their powers, the finding of guilt must stand; if not, he has never been tried, and must be considered innocent until he is condemned by the proper tribunal--which was not the Supreme Court, and is not this Court. ..."³⁰⁷*

409. It is apparent that a defence of unclean hands requires examination of far more than the information contained in a document which is in the possession of an agency and which is requested under the FOI Act. It would require more than an examination of the views of the person who confided the information. Indeed, it may be that, as far as that person is concerned, he or she has observed every propriety in dealing with others and has the cleanest of hands. Whether the person seeking a remedy for a breach of confidence has clean or unclean hands depends in part on the person whom he or she alleges is in breach. The impropriety complained of under the defence of unclean hands must have an immediate and necessary relationship with, in the case of an action for breach of confidence, that breach. It is difficult to see how that immediate and necessary relationship can ever exist in the context of the FOI Act.

³⁰⁷ (1913) 17 CLR 90; 19 ALR 537 at 123-124; 550

As a person's right of access under the FOI Act is unaffected by his or her reasons for requesting that access, the application or otherwise of the exemption is not assessed by reference to a particular person or in a particular context other than that of the FOI Act. It is whether disclosure "*under this Act*" would found an action for breach of confidence and not whether disclosure to a particular person in particular circumstances would do so. The defence of unclean hands is dependent upon disclosure by a particular person in particular circumstances. It cannot apply.

410. The inapplicability of the defence is underlined by the lack of particular provision made in the FOI Act for consultation in relation to s 45.³⁰⁸ In only three instances has the FOI Act prescribed a formal process of consultation. One occurs in relation to a request in respect of documents likely to affect Commonwealth-State relations and so possibly exempt under s 33. It is found in s 26A. Another is found in s 27A in relation to a request for documents containing personal information and possibly subject to the exemption in s 41. The third is found in s 27 in relation to a request for documents containing information relating to business affairs and possibly subject to the exemption in s 43.

411. Had it been thought that it relevant to consider possible defences in deciding whether or not disclosure would found an action for breach of confidence within the meaning of s 45, it would have been expected that the FOI Act would have prescribed a formal process of consultation of some sort. That it has not done so in relation to s 45 when it has done so in relation to ss 26A, 27 and 27A is a recognition that it is not required by the terms of s 45.

412. I realise that this appears to be a conclusion contrary to that favoured by Gummow J in *Corrs Pavey*. I am not bound by his judgment, given as it is in relation to an earlier version of s 45 and then in dissent. Even so, in the context of the development of s 45, I regard it with a considerable amount of respect. On the

³⁰⁸ This is quite apart from the informal processes of consultation that may occur. There is no question that, in relation to some exemptions and in some circumstances at least, an agency or Minister will wish to consult with those who have supplied information to it. Whether it does so or not will be determined by whether the document concerned clearly falls within or without an exemption or whether the application of the exemption is unclear. Some exemptions will, for all practical purposes, require the agency to whom the request is directed to consult with another. Cabinet documents of the sort described in s 34 may provide an example of that. Others will require an agency or Minister to look within to determine whether or not a document is exempt. Section 40 is an example of that.

unclean hands defence, though, I note that his Honour has considered that defence only in the context of cases in the general law. His attention does not appear from his judgment to have been drawn to the particular context in which disclosure is made under the FOI Act and it is disclosure under the FOI Act to which s 45 refers. It seems to me that the context of the FOI Act is an important difference and one which permits me to distinguish his Honour's judgment in *Corrs Pavey*.

The exemptions and the documents

A. Category C documents

Category 7 documents: 523 and 1016

Category 9 documents: 53

413. Document **523** is an email from what is described in the Schedule as a “third party” to an investigator working on Operation Dachshund. It contains an express statement that the information it provided “*is to be confidential*”. That information is the information within the email. I am satisfied that it is capable of being confidential. It is not publicly available. It is clear from the text of the email that it has been communicated in confidence. On the basis of the evidence of Ms Pettit regarding the manner in which the information was collected, I am satisfied that information communicated in confidence was received on that basis. It has been given and received in circumstances that create an obligation of confidence from the Department to the third party. Although there is no specific evidence on the point, I am satisfied from its subject matter and the circumstances in which it was given that to disclose the information would bring at least embarrassment or discomfort to the third party. If detriment is required, that would be the detriment.

414. Having regard to all of these matters, I am satisfied that disclosure of Document **523** would found an action for breach of confidence by the third party. It follows that it is exempt under s 45 of the FOI Act.

415. Document **1016** comprises a chain of emails between the Department and another person regarding teachers at the SICB. Exemption is claimed for the name and contact details of the person communicating with the Department on the basis that the person is a “*departmental informant*”. For the reasons that Document **523** is exempt, so too is this document. It contains information of the sort found in

Document **523**. In so far as it contains additional information, that information reflects that in Document **523**. Disclosure of that information would be equally subject to an obligation of confidence and disclosure under the FOI Act would be a breach of confidence. I am satisfied that Document **1016** is exempt under s 45.

416. Document **53** is a file note written as part of Operation Dachshund regarding a telephone conversation with a person said to be a “*confidential informant*”. I am not satisfied that the document is exempt under s 45 as a whole or at all. I have already decided that certain parts are exempt under s 40(1)(d) but I am not satisfied that the information it records has been communicated in confidence or is capable of being regarded as confidential information. It has not been communicated in circumstances that give rise to an obligation of confidence and disclosure of it under the FOI Act would not found an action for breach of confidence. Document **53** is not exempt under s 45 of the FOI Act.

DELETION: section 22

The provision

417. Section 22 provides for the deletion of exempt matter or irrelevant material. In this instance, it is relied upon only for the deletion of what is claimed to be irrelevant material. Therefore, I have set out its provisions only in so far as they relate to that. Section 22(1) provides:

“Where:

- (a) an agency or Minister decides:*
 - (i) not to grant a request for access to a document on the ground that it is not an exempt document; or*
 - (ii) that to grant a request for access to a document would disclose information that would reasonably be regarded as irrelevant to that request; and*
- (b) it is possible for the agency or Minister to make a copy of the document with such deletions that the copy:*
 - (i) would not be an exempt document; and*
 - (ii) would not disclose such information; and*
- (c) it is reasonably practicable for the agency or Minister, having regard to the nature and extent of the work involved in deciding on and making those deletions and the resources available for that work, to make such a copy;*

the agency or Minister shall, unless it is apparent from the request or as a result of consultation by the agency or Minister with the applicant, that the applicant would not wish to have access to such a copy, make, and grant access to, such a copy.”

Section 22 does not provide for an exemption

418. A claim that s 22 applies is often framed in terms of documents’ being exempt under s 22 or that an exemption under s 22 is claimed. This is not accurate. Section 22 is a tool and not a barrier. It is a tool that must be used if it is reasonably practical to use it in the sense understood in s 22(1)(c) and if the outcome will be a document that does not contain exempt matter or information irrelevant to the request.

419. The term “*exempt matter*” is a reference to “... *matter the inclusion of which in a document causes the document to be an exempt document.*”³⁰⁹ An “*exempt document*” means “*a document which, by virtue of a provision of Part IV, is an exempt document*”,³¹⁰ “*a document in respect of which, by virtue of section 7, an agency is exempt from the operation of this Act*”³¹¹ or “*an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department of State.*”³¹² Section 22 is not a provision of Part IV coming, as it does, in Part III. It comes into consideration when documents are assessed as exempt but that does not make it an exemption provision itself. A decision that a document is exempt is made under the relevant provision or provisions of Part IV. A decision that information in a document is irrelevant to the request is made under s 15. Both are decisions refusing to grant access in accordance with a request and are reviewable under s 54.

420. In the meantime, the tool in s 22 enhances the object of the FOI Act to “... *extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth ...*”.³¹³ If it were not available, those requesting access to a document that contained some exempt matter and some that is not would be denied access to the whole document. The same would be true of irrelevant matter. This comes about because a person’s legally enforceable right to obtain access to a document in accordance with that legislation is, in the case of an agency, limited to a document of an agency, “*other than an exempt document*” be it of a document of an agency or an official document of a Minister.³¹⁴ It is a right that is, subject to the provisions of the FOI Act circumscribed by the request that is made under s 15. That request must provide “... *such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it*”.³¹⁵ By deleting the exempt matter and the irrelevant matter, the document becomes a document, to which the person making the request has a right of access.

³⁰⁹ FOI Act, s 4(1)

³¹⁰ FOI Act, (a) of definition in s 4(1)

³¹¹ FOI Act, (b) of definition in s 4(1)

³¹² FOI Act, (c) of definition in s 4(1)

³¹³ FOI Act, s 3(1).

³¹⁴ FOI Act, s 11(1)

³¹⁵ FOI Act, s 15(2)(b)

The provision and the documents

421. Two of the three documents said to be irrelevant to Mr Lobo's request are Documents **875** and **876** in Category 9. These documents comprise different snapshots of the same chain of emails. Mr Lobo has been given access to those parts of the information in those emails that relate to him, SICB or students who have attended SICB. That was the information he sought in the documents that he requested under s 15.³¹⁶ The remaining content of those documents does not. I am satisfied that they are irrelevant to the documents he requested and that the content has been properly deleted from the documents to which he has been given access under the FOI Act.

422. Document **859** is a printout from a computerised record and headed "*Search Results*". Having read the documents in the four volumes of documents in dispute, I am satisfied that the Department has properly deleted the names and identifying information of several people. Those people do not feature in any of the other documents and I am satisfied that there is no basis for considering that they bear any relationship to Mr Lobo or to SICB, the investigation or the students attending SICB.

423. In relation to some exemptions in relation to some documents for which exemption has been claimed in part, I have addressed the obligations that arise under s 22 in relation to the deletion of exempt matter. I have come to a conclusion on those documents. I have also considered the issue in relation to all of the documents for which partial exemption was claimed but, rather than setting out my reasons in relation to each, I decided to give them for all at once. I am satisfied that the decisions made as a consequence of s 22 are the correct decisions. I have made specific reference to instances in which non-exempt material has been interwoven and it would not be reasonably practicable to separate it from the exempt material. On other instances, I am satisfied that only that material for which exemption has been claimed has been properly deleted.

³¹⁶ See [6] above

ATTACHMENT J

DECISION

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
Category A ³¹⁷								
1-798, 853 and 977			Not exempt ³¹⁸		Exempt ³¹⁹	Exempt ³²⁰		
5-152			Exempt in respect of two line passage on folio 202 and first third of folio 201 and second half of folio 202. ³²¹		Exempt re person giving information ³²² Not exempt re names migration agents ³²³ or visa applicants ³²⁴	Exempt re identifiers of those giving information ³²⁵ Adjourned re identifiers of migration agents/agencies and visa applicants under		

³¹⁷ Document's sub-category noted in bold numbering

³¹⁸ See [155]-[159]

³¹⁹ See [256]-[263]

³²⁰ See [332]-[335]

³²¹ See [160]-[167]

³²² See [264]

³²³ See [265]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
						investigation ³²⁶		
5-153			Exempt respect of name or names and details, including contact details, of the informant or informants. ³²⁷		Exempt re person giving information ³²⁸ Not exempt re names migration agents ³²⁹ or visa applicants ³³⁰	Exempt re identifiers of those giving information ³³¹ Adjourned re identifiers of migration agents/agencies under investigation ³³²		
5-238			Not exempt ³³³		Exempt re person giving information ³³⁴	Exempt re identifiers of those giving		

³²⁴ See [266]

³²⁵ See [336]

³²⁶ See [337]-[340]

³²⁷ See [164]

³²⁸ See [264]

³²⁹ See [265]

³³⁰ See [266]

³³¹ See [341]

³³² See [341]

³³³ See [165]

³³⁴ See [264]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
					Not exempt re names migration agents ³³⁵ or visa applicants ³³⁶	information ³³⁷ Adjourned re identifiers of migration agents/agencies under investigation ³³⁸		
5-728, 737 and 745			Exempt ³³⁹		Exempt re person giving information ³⁴⁰ Not exempt re names migration agents ³⁴¹ or visa applicants ³⁴²	Exempt re identifiers of those giving information ³⁴³ Adjourned re identifiers of migration agents/agencies under		

³³⁵ See [265]

³³⁶ See [266]

³³⁷ See [336]

³³⁸ See [337]-[340]

³³⁹ See [167]

³⁴⁰ See [264]

³⁴¹ See [265]

³⁴² See [266]

³⁴³ See [336]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
						investigation ³⁴⁴		
5-762			Exempt ³⁴⁵		Exempt re person giving information ³⁴⁶ Not exempt re names migration agents ³⁴⁷ or visa applicants ³⁴⁸	Exempt re identifiers of those giving information ³⁴⁹ Adjourned re identifiers of migration agents/agencies under investigation ³⁵⁰		
5-991			Exempt ³⁵¹		Exempt ³⁵²	Exempt re identifiers of those giving information ³⁵³		

³⁴⁴ See [341]

³⁴⁵ See [167]

³⁴⁶ See [264]

³⁴⁷ See [265]

³⁴⁸ See [266]

³⁴⁹ See [336]

³⁵⁰ See [337]-[340]

³⁵¹ See [167]

³⁵² See [264]

³⁵³ See [336]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
						Adjourned re identifiers of migration agents/agencies under investigation ³⁵⁴		
6-346			Not exempt ³⁵⁵		Exempt re person giving information ³⁵⁶ Not exempt re names migration agents ³⁵⁷	Exempt ³⁵⁸		
7-139			Not exempt ³⁵⁹		Exempt re person giving information ³⁶⁰ Not exempt re names	Exempt re identifiers of those giving information ³⁶² Adjourned re		

³⁵⁴ See [337]-[340]

³⁵⁵ See [168]-[169]

³⁵⁶ See [264]

³⁵⁷ See [265]

³⁵⁸ See [342]-[343]

³⁵⁹ See [170]-[171]

³⁶⁰ See [264]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
					migration agents ³⁶¹	identifiers of migration agents/agencies under investigation ³⁶³		
7-333 and 344						Adjourned re identifiers of migration agents/agencies under investigation ³⁶⁴		
7-597			Not exempt ³⁶⁵		Exempt ³⁶⁶	Adjourned re identifiers of migration agents/agencies under investigation ³⁶⁷		
7-636, 763 and						Adjourned re		

³⁶² See [336]

³⁶¹ See [265]

³⁶³ See [344]

³⁶⁴ See [345]

³⁶⁵ See [170]-[171]

³⁶⁶ See [264]

³⁶⁷ See [345]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
864						identifiers of migration agents/agencies under investigation ³⁶⁸		
7-509, 596 and 1019			Not exempt ³⁶⁹		Exempt ³⁷⁰	Exempt ³⁷¹		
7-739, 741, 865 and 998						Adjourned re identifiers of visa applicants under investigation ³⁷²		
9-87						Exempt ³⁷³		
9-475 and 608, 209, 695, 725, 760, 898 and 900						Adjourned re identifiers of visa applicants under investigation ³⁷⁴		
9-553						Exempt re names		

³⁶⁸ See [345]

³⁶⁹ See [172]-[174]

³⁷⁰ See [264]

³⁷¹ See [346]

³⁷² See [347]

³⁷³ See [350]-[354]

³⁷⁴ See [34]-[349]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
						identified in [361] of reasons ³⁷⁵		
9-556						Adjourned re identifiers of visa applicants under investigation ³⁷⁶		
9-564			Not exempt ³⁷⁷		Exempt ³⁷⁸	Exempt ³⁷⁹		
9-571			Not exempt ³⁸⁰		Exempt ³⁸¹			
9-577			Not exempt ³⁸²		Exempt re person giving information ³⁸³ Not exempt re names	Exempt re identifiers of those giving information ³⁸⁵ Adjourned re		

³⁷⁵ See [355]-[361]

³⁷⁶ See [363]

³⁷⁷ See [175]

³⁷⁸ See [264]

³⁷⁹ See [350]-[354]

³⁸⁰ See [175]

³⁸¹ See [264]

³⁸² See [175]

³⁸³ See [264]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
					migration agents ³⁸⁴	identifiers of migration agents/agencies and visa applicants under investigation ³⁸⁶		
9-579						Exempt ³⁸⁷		
9-620			Not exempt ³⁸⁸		Exempt re person giving information ³⁸⁹ Not exempt re names migration agents ³⁹⁰	Exempt re identifiers of those giving information ³⁹¹ Adjourned re identifiers of migration agents/agencies and visa		

³⁸⁵ See [357]-[358]

³⁸⁴ See [265]

³⁸⁶ See [355]-[356]

³⁸⁷ See [362]

³⁸⁸ See [176]

³⁸⁹ See [264]

³⁹⁰ See [265]

³⁹¹ See [354]-[356]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
						applicants under investigation ³⁹²		
9-635						Exempt ³⁹³		
9-640 and 643						Exempt re identifiers of those giving information ³⁹⁴ Adjourned re identifiers of migration agents/agencies and visa applicants under investigation ³⁹⁵		
9-644					Exempt ³⁹⁶			
9-723			Exempt ³⁹⁷			Exempt re identifiers of		

³⁹² See [355]-[356]

³⁹³ See [350]-[354]

³⁹⁴ See [357]-[358]

³⁹⁵ See [357]-[358]

³⁹⁶ See [350]-[354]

³⁹⁷ See [178]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
						those giving information ³⁹⁸ Adjourned re identifiers of migration agents/agencies and visa applicants under investigation ³⁹⁹		
9-731						Exempt re identifiers of those giving information ⁴⁰⁰ Adjourned re identifiers of migration agents/agencies and visa applicants under investigation ⁴⁰¹		

³⁹⁸ See [356]-[358]

³⁹⁹ See [355]-[356]

⁴⁰⁰ See [354]-[356]

⁴⁰¹ See [355]-[356]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
9-734						Exempt ⁴⁰²		
9-859, 875 and 876								Properly deleted ⁴⁰³
9-1029						Exempt re identifiers of those giving information ⁴⁰⁴ Adjourned re identifiers of migration agents/agencies and visa applicants under investigation ⁴⁰⁵		
12-112			Not exempt ⁴⁰⁶			Exempt ⁴⁰⁷		
12-962 and 963			Not exempt ⁴⁰⁸		Exempt ⁴⁰⁹	Exempt ⁴¹⁰		

⁴⁰² See [350]-[354]

⁴⁰³ See [422]-[423]

⁴⁰⁴ See [354]-[356]

⁴⁰⁵ See [355]-[356]

⁴⁰⁶ See [178]-[179]

⁴⁰⁷ See [364]-[365]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
13-98 and 99						Exempt ⁴¹¹		
15-1018			Exempt ⁴¹²		Exempt ⁴¹³	Exempt ⁴¹⁴		
16-894						Exempt ⁴¹⁵		
16-956			Not exempt ⁴¹⁶		Exempt ⁴¹⁷	Exempt ⁴¹⁸		
17-286, 287 and 997			Not exempt ⁴¹⁹			Adjourned re identifiers of migration agents/agencies and visa applicants under investigation ⁴²⁰		

⁴⁰⁸ See [178]-[179]

⁴⁰⁹ See [264]

⁴¹⁰ See [364]-[365]

⁴¹¹ See [366]-[367]

⁴¹² See [181]-[183]

⁴¹³ See [264]

⁴¹⁴ See [368]-[369]

⁴¹⁵ See [370]

⁴¹⁶ See [183]-[184]

⁴¹⁷ See [264]

⁴¹⁸ See [370]

⁴¹⁹ See [185]

⁴²⁰ See [371]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
23-140 and 321			Not exempt ⁴²¹			Exempt re identifiers of those giving information Adjourned re identifiers of migration agents/agencies under investigation ⁴²²		
23-285			Not exempt ⁴²³			Exempt ⁴²⁴		
<u>Category B</u>								
9-267, 271, 290, 322 and 1009; 9-486, 662 and 1099;				Not exempt ⁴²⁵				

⁴²¹ See [186]-[188]

⁴²² See [372]-[373]

⁴²³ See [186]-[188]

⁴²⁴ See [374]

⁴²⁵ See [215]-[220]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
16-397 and 1062; 16-870; 19-231, 214, 272 and 376								
23-140, 321 and 285			Not exempt ⁴²⁶					
<u>Category C</u>								
6-399 and 1001			Not exempt ⁴²⁷		Exempt ⁴²⁸	Exempt ⁴²⁹		
7-523 and 1016			Exempt ⁴³⁰		Exempt ⁴³¹	Exempt ⁴³²	Exempt ⁴³³	
9-53			Not exempt ⁴³⁴		Exempt ⁴³⁵	Exempt re: (1) names in	Not exempt ⁴³⁸	

⁴²⁶ See [186]-[189]

⁴²⁷ See [190]-[191]

⁴²⁸ See [267]-[269]

⁴²⁹ See [375]-[376]

⁴³⁰ See [192]-[193]

⁴³¹ See [270]-[271]

⁴³² See [377]

⁴³³ See [413]-[415]

⁴³⁴ See [194]

⁴³⁵ See [272]-[273]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
						lines 1-10, 21, 28, 29 and 35 on first page and lines 1, 5, 13, 22, 29 and 31 on second page; ⁴³⁶ and (2) penultimate paragraph and lines 7 and 8 on second page. ⁴³⁷		
9-469			Exempt		Exempt ⁴³⁹	Exempt ⁴⁴⁰		
9-472, 482, 483, 485, 527, 547, 549, 570, 650, 692 and 693			Not exempt ⁴⁴¹		Exempt ⁴⁴²	Exempt ⁴⁴³		

⁴³⁸ See [416]

⁴³⁶ See [378]-[379]

⁴³⁷ See [380]-[381]

⁴³⁹ See [274]

⁴⁴⁰ See [382]

⁴⁴¹ See [196]

⁴⁴² See [274]

⁴⁴³ See [383]-[384]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
9-550			Not exempt ⁴⁴⁴		Not exempt ⁴⁴⁵			
9-1017 and 1020			Not exempt ⁴⁴⁶		Exempt ⁴⁴⁷	Adjourned re identifiers of migration agents/agencies and visa applicants under investigation ⁴⁴⁸		
18-25, 27, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 63, 69, 74 and 76			Not exempt ⁴⁴⁹		Not exempt ⁴⁵⁰	Adjourned re identifiers of migration agents/agencies and visa applicants under investigation ⁴⁵¹		

⁴⁴⁴ See [197]

⁴⁴⁵ See [275]-[278]

⁴⁴⁶ See [198]

⁴⁴⁷ See [274]

⁴⁴⁸ See [385]

⁴⁴⁹ See [200]

⁴⁵⁰ See [279]

⁴⁵¹ See [386]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
18-60, 64, 65, 70, 78, 81, 82, 83, 84, and 85			Not exempt ⁴⁵²		Exempt ⁴⁵³	Exempt ⁴⁵⁴		
18-261			Not exempt ⁴⁵⁵		Not exempt ⁴⁵⁶			
18-263			Not exempt ⁴⁵⁷		Exempt ⁴⁵⁸			
18-1023, 1074, 1083, 1084 and 1089			Not exempt ⁴⁵⁹		Exempt ⁴⁶⁰	Exempt ⁴⁶¹		
<u>Category D</u>								
19-401, 1054,	Exempt ⁴⁶²	Exempt ⁴⁶³						

⁴⁵² See [201]

⁴⁵³ See [280]

⁴⁵⁴ See [387]

⁴⁵⁵ See [202]-[203]

⁴⁵⁶ See [281]-[282]

⁴⁵⁷ See [202]-[203]

⁴⁵⁸ See [283]

⁴⁵⁹ See [204]-[205]

⁴⁶⁰ See [284]

⁴⁶¹ See [388]

⁴⁶² See [88]-[89]

DOCUMENT	EXEMPTIONS							SECTION 22
	33(1)(a)(iii)	33(1)(b)	37(1)(b)	37(2)(b)	40(1)(d)	41(1)	45(1)	
1055, 1056, 1057, 1058, 1059 and 1060								

⁴⁶³ See [95]

I certify that the four hundred and twenty three paragraphs
and ten attachments are a true copy of the reasons for the
decision herein of
Deputy President S A Forgie,

Signed:
Leah Berardi, Associate

Date of Hearing	17 January 2011
Date of Decision	11 October 2011
Counsel for the Applicant	Mr J Twigg
Solicitor for the Applicant	Ms M Jockel Russell Kennedy
Counsel for the Respondent	Mr S Rebikoff
Solicitor for the Respondent	Ms M Gangemi Australian Government Solicitor



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Re Laurence William Maher and Attorney-General's Department [1985] AATA 180 (17 July 1985)

ADMINISTRATIVE APPEALS TRIBUNAL

Re: LAURENCE WILLIAM MAHER
And: ATTORNEY-GENERAL'S DEPARTMENT
No. V.84/291A
Freedom of Information

COURT

ADMINISTRATIVE APPEALS TRIBUNAL
GENERAL ADMINISTRATIVE DIVISION
Mr Justice J.D. Davies (President)

CATCHWORDS

Freedom of Information - request for access - letter between US and Australian Attorneys-General - conclusive certificate - claim of communication in confidence between Governments - nature of confidential relationships envisaged by FOI Act considered - public interest considerations - claim of damage to international relations - meaning of "damage"

[Freedom of Information Act 1982](#) (Cth) - [ss.33](#), [45](#), 58C

[Administrative Appeals Tribunal Act 1975](#) (Cth) - [s.37](#)

United States v Aluminium Co of America [148 F 2d 416](#) (1945)

Coco v A.N. Clark (Engineers) Limited [\(1969\) RPC 41](#)

Duchess of Argyll v Duke of Argyll [\(1967\) 1 Ch 302](#)

Attorney-General v Jonathon Cape Limited [\(1976\) 1 QB 752](#)

Re Witheford and Department of Foreign Affairs [\(1983\) 5 ALD 534](#)

Re Brennan and The Law Society of the Australian Capital Territory (No. A.84/29, 5 July 1985)

Sankey v Whitlam [\(1978\) 142 CLR 1](#)

Saltman Engineering Company Limited v Campbell Engineering Company Limited ([1948](#)) 65
[RPC 203](#)

Ansell Rubber Company Pty Limited v Allied Rubber Industries Pty Limited [[1967](#)] [VicRp 7](#);
[\(1967\) VR 37](#)

Re Howard and The Treasurer of the Commonwealth of Australia (No. A.84/154, 29 April 1985)

HEARING

CANBERRA
17:7:1985

ORDER

1. The Tribunal declares that there exist reasonable grounds for the claims made in the certificate issued 15 June 1984 under [s.33\(2\)](#) of the [Freedom of Information Act 1982](#) (Cth).
2. The Tribunal affirms the decision under review.

DECISION

This is a review of a decision not to grant to the applicant, Mr Laurence William Maher, access under the [Freedom of Information Act 1982](#) (Cth) ("the [FOI Act](#)") to paragraphs 4 and 5 of a letter, dated 30 September 1980, from the then Attorney-General of the United States of America, Mr Benjamin R. Civiletti, to the then Attorney-General of the Commonwealth of Australia, Senator the Honourable Peter D. Durack, QC.

2. On 15 June 1984, the then Attorney-General of the Commonwealth, Senator the Honourable Gareth Evans, QC, issued under [s.33\(2\)](#) of the [FOI Act](#) a certificate with respect to the subject letter which read:

"Whereas pursuant to a request dated 24 February

1984 by Laurence W. Maher for access to a letter
dated 1 October 1980 from the then United States
Attorney-General referred to at page 6 of the
Press Release No. 73 of 1980 of the
Attorney-General of the Commonwealth; I, GARETH
JOHN EVANS Attorney-General, having examined the

document described in the Schedule to this
Certificate, hereby certify in accordance with
sub-section 33(2) of the Act that I am satisfied
that that document is exempt

(i) under sub-paragraph 33(1)(a)(iii) of the Act
because the disclosure of information would
or could reasonably be expected to cause
damage to the international relations of the
Commonwealth; and

(ii) under paragraph 33(1)(b) of the Act because
it would divulge information or matter
communicated in confidence by or on behalf

of the United States Government to the then Attorney-General of the Commonwealth.

For the purposes of sub-section 33(3) of the Act, the particular parts of the document by reason of which the certificate is given are identified as paragraphs 4 and 5 of the said document."

This certificate did not expressly state that the Attorney-General was satisfied that disclosure under the [FOI Act](#) of the subject letter would be contrary to the public interest. However, it was issued under [s.33\(2\)](#) and I am content to infer such a statement from it.

3. Access to paragraphs 4 and 5 of the letter was refused, by the agency, reliance being placed upon [ss.33\(1\)\(a\)\(iii\)](#) and [33\(1\)\(b\)](#) of the [FOI Act](#). Mr Maher was granted access to the remainder of the document under s.14 of the [FOI Act](#). At the hearing of the review, Mr Maher requested that the Tribunal determine the question whether there were reasonable grounds for the claim made in the certificate of 15 June 1984 that the letter was exempt under [s.33](#) of the [FOI Act](#).

4. Much of the hearing was necessarily conducted in private because of the provisions of s.58C of the [FOI Act](#), though the applicant himself was excluded from only a small part of the proceedings. However, after the hearing several documents were forwarded to the Tribunal which were exhibits tendered in evidence during the private hearing. These exhibits were in the possession of the respondent prior to the hearing and, in my view, were relevant documents which ought to have been made available to the Tribunal either under the disclosure required by [s.37](#) of the [Administrative Appeals Tribunal Act 1975](#) (Cth) or, to the extent that those documents came into the hands of the respondent after the lodgement of the [s.37](#) documents, in a subsequent lodgement complying with the intent and spirit of [s.37](#). As they have now been so lodged with the Tribunal, I have received them as part of the public evidence and have given them the following numbers:

TC.18 Copy of agreement between the Government of Australia and the Government of the United States of America relating to co-operation on antitrust matters, dated 29 June 1982

TC.19 Copy of a letter, dated 10 May 1984, from Mr Charles S. Stark, Chief Foreign Commerce Section Antitrust Division to Mr David Edwards, Legal Counsellor at the Australian Embassy, Washington

TC.20 Copy of a press release by the then Attorney-General, Senator the Honourable Peter Durack, QC, dated 13 August 1980.

5. Now that those materials are part of the public evidence in these proceedings, not subject to the restrictions imposed by s.58C, I am able to give reasons for my decision which are not subject to any restriction as to distribution. In formulating my reasons for decision, I refer to the public material, that is, the [s.37](#) documents, the three documents I have mentioned and the evidence given by and submissions made by Mr Maher. In forming my views, I have also had regard to the private evidence adduced and the private submissions made on behalf of the respondent but it is not necessary to refer to them in these reasons.

6. For the purpose of my decision, I have not found it necessary to call for and to inspect the two paragraphs for which exemption has been claimed.

7. There is in evidence a press release by Senator the Honourable Peter Durack, QC, dated 5 October 1980 which outlines the events which led to the subject letter. During the 1970s, private litigation in the United States of America, particularly litigation seeking treble damages in suits under the antitrust laws of the United States, raised problems for companies and organisations in other countries of the world and for the governments of those countries. Senator Durack cited from the "Antitrust Guide for International Operations" issued by the United States Department of Justice on 26 January 1977 :

"where foreign transactions have a substantial and foreseeable effect on United States commerce they are subject to United States law regardless of where they take place."

Senator Durack referred to the fact that United States law may be applied to non-United States nationals and that the extra territorial jurisdiction of the United States antitrust laws extends to the foreign commerce of the United States.

8. I may interpolate that that principle was established in *United States v Aluminium Co of America* [148 F 2d 416](#) (1945) ("the Alcoa Case"), in which a Canadian Corporation was held to be in violation of the Sherman Act by virtue of its agreement with aluminium producers to stay out of the United States market. Judge Learned Hand said, at p.443, that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends;", at least where those effects were intended. Further examination of the principle may be found in Areeda & Turner "Antitrust Law", 1st ed (1978), Vol.I, at Chapter 2E.

9. Private litigation of this type was encouraged in the United States by the provision of treble damages and such suits were not subject to control either by the Government of the United States or by the Governments of other countries affected. Yet such a suit could very often affect not only the citizens and residents of countries other than the United States but also the policies of the Governments of those countries.

10. In the 1970s, a private proceeding of this type, known as the Westinghouse Case, was commenced in the United States claiming treble damages against a number of companies, four of which were incorporated in and resident in Australia. The subject of the proceedings was an alleged uranium cartel. Not only did those proceedings affect the Australian companies, they also affected the Government of Australia in its control and regulation of the export of uranium from Australia.

11. During the 1970s and early 1980s, legislation was passed in many countries of the world giving some protection against proceedings of this nature, either by way of preventing the disclosure of relevant evidence, by way of inhibiting enforcement of judgments or by way of providing for the recovery back of sums paid pursuant to judgment. But there was no total solution to the problem having regard to the extra-territorial effect which the Courts of the United States gave to the laws of that country.

12. Senator Durack's press release of 5 October 1980 records other steps that were taken to minimise the problems. The press release states:

"For some time Australia and the United States have been negotiating a bilateral agreement designed to avoid the kind of differences which had arisen in the uranium matter from occurring in the future.

That proposed agreement would formulate a process of intergovernmental consultation on the whole range of each government's interests so that consultations could take place in advance of proceedings or any allied processes.

'I was encouraged' Senator Durack said 'by the warm response to the proposed agreement which the United States Attorney-General, Mr Civiletti, expressed when he was in Australia last month. There are difficulties but I attach the greatest importance to agreement in this area. I was left in no doubt following our discussions that the United States Government holds the same view. If, as Mr Civiletti hoped, such an agreement could become a model, so much the better. At the end of the day these differences must be resolved by agreement.' Negotiations for an agreement are continuing.

The Attorney-General added that he was fortified in the views expressed above as to the United States Government's attitude by a letter dated 1 October 1980 which he had just received from Mr Civiletti."

The letter from Mr Civiletti last referred to is the subject letter of 30 September 1980, its date being wrongly recorded. I pause at this moment to say that those paragraphs of Mr Civiletti's letter to which access has been given clearly support what Senator Durack had to say of it.

13. Discussions were subsequently held between the Attorneys-General for the two countries and the agreement of 29 June 1982, Exhibit TC.18, was negotiated and finalised. The treaty recognised that conflicts had arisen between the interests reflected in the United States antitrust laws and policies and those reflected in Australian laws and policies and that there was a need for such conflicts to be resolved by mutual respect for each country's sovereignty and with due regard for considerations of comity. The treaty established a structure for the notification by the Government of Australia of policies that it considered may have antitrust implications for the United States and by the Department of Justice or the Federal Trade Commission of the United States of any antitrust investigation that might have implications for Australian laws, policies or national interests. The treaty provided that, upon receiving any such notification, the recipient country could request consultation with the other and that the countries would thereafter enter into consultations and should seek earnestly to avoid possible conflict between the respective laws, policies and national interests. The treaty provided for frank disclosure and for confidentiality. Article 2.7 and Article 3 read:

"2.7 Each Party during consultations shall provide as detailed an account as possible, under the particular circumstances, of the basis and nature of its antitrust investigation or proceeding, or its national policy and its implementation, as the case may be.

3. Documents and information provided by either Party in the course of notification or consultations under this Agreement shall be treated confidentially by the receiving Party unless the providing Party consents to disclosure or disclosure is compelled by law. The Government of the United States shall not, without the consent of the Government of Australia, use information or documents provided by the Government of Australia in the course of notification or consultations under this Agreement as evidence in any judicial or administrative proceeding under United States antitrust laws. The Government of the United States shall not, however, be foreclosed from pursuing an investigation of any conduct which is the subject of notification or consultations, or from initiating a proceeding based on evidence obtained from sources other than the Government of Australia."

The treaty contained other detailed provisions but I need not describe them.

14. A further matter of fact which I should mention is that the United States Government has not objected to the release to Mr Maher of those passages of Mr Civiletti's letter that have been released to him but has objected to the release of paragraphs 4 and 5 and has put the view that the letter was confidential. Mr Charles S. Stark, Chief of the Foreign Commerce Section Antitrust Division, wrote on 10 May 1984, Exhibit TC.19, as follows:

"There are two basic reasons why we would be concerned if the letter were released in its entirety. The first of these concerns is a general, but nonetheless important, one. It is important to protect the confidence of communications between governments, where those communications are made with the express or tacit expectation that they would be held in confidence. Both of our countries have freedom of information laws based on our shared view that, to the extent consistent with their proper functioning, the activities of democratic governments should be open to the scrutiny of their citizens. Nonetheless, it is our standard practice in responding to requests for disclosure made under our law to protect the confidentiality of communications from other governments that were made in the expectation of confidentiality, unless the other government consents to disclosure. It would be difficult if not impossible for our governments to communicate with one another with the candor that is presumed and required by our close relationship if we did not have that sort of assurance. Indeed, the express provisions for the

confidentiality of communications between us contained in our 1982 Antitrust Cooperation Agreement -- provisions that are of great importance to both of us -- underscore that recognition.

Our second concern is specific to the contents of the letter between our former Attorneys General. The letter refers to, and in substance is part of, the negotiations that led to our 1982 agreement. As you know, we recently concluded an antitrust understanding with the Government of Canada, and are likely to be engaged in similar discussions with other governments in the future. Our ability to conduct negotiations of that nature would be impaired if a detailed record of positions taken and views exchanged in previous negotiations (whether in their entirety, or partially) were freely available. While we of course enter into all such negotiations in a spirit of good faith and candor, each such bilateral setting is in important respects sui generis and could be severely complicated if every interim position and view we expressed in an earlier negotiation with another government were available to subsequent negotiating partners.

For these reasons, we reiterate our view that the fourth and fifth paragraphs of the September 1980 letter should not be released. Release would be inconsistent with our expectation of the confidentiality of such communications generally, and with our interest in preserving the confidentiality of this communication in particular. Release would also undermine our confidence in the confidentiality of such communications in the future, and to that extent would detract from the openness and candor in these matters which we both hope for and expect from one another.

I have discussed the contents of this letter with our Department of State, and can confirm that it reflects the views of both the Department of State and the Department of Justice."

15. Those are the principal facts to be considered. The law to be applied is set out in [s.33](#) of the [FOI Act](#) which reads, inter alia,

"33.(1) A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for the reason that the disclosure -

(a) would, or could reasonably be expected to, cause damage to -

.....

(iii) the international relations of the Commonwealth; or

(b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth."

16. It is convenient to deal first with the question whether the paragraphs of the letter for which exemption is claimed, paragraphs 4 and 5, were communicated in confidence by the Attorney-General of the United States, Mr Civiletti, to the Attorney-General of Australia, Senator Durack.

17. The law recognises that a contractual obligation for confidentiality may be expressed between the parties or it may be implied, as it often has been in master and servant and agency relationships. The law also recognises that information may be received in confidence and that that confidence may be protected whether or not there be a contractual term as to confidentiality. The protection of confidential information communicated during negotiations for contract is a clear example. See *Coco v A.N. Clark (Engineers) Limited* ([\(1969\) RPC 41](#)). But there are many others. In *Duchess of Argyll v Duke of Argyll* ([\(1967\) 1 Ch 302](#)), the matrimonial relationship was held to give rise to an obligation of confidentiality with respect to disclosures between spouses. In *Attorney-General v Jonathan Cape Limited* ([\(1976\) 1 QB 752](#)), it was accepted that, as the doctrine of joint responsibility was an established feature of the British form of government, matters leading to a cabinet decision were to be regarded as confidential.

18. [Sections 33\(1\)\(b\)](#) and [45](#) (the general confidentiality exemption) of the [FOI Act](#) are concerned not only with communications which would be protected by courts under the common law principles with respect to express or implied obligations of confidence or by courts of equity with respect to communications made under special relationships but also with information that was communicated to an agency in confidence, that is to say, information that was communicated and received under an express or inferred understanding that the communication would be kept confidential. (cf. *Re Witheford and Department of Foreign Affairs* ([\(1983\) 5 ALD 534](#), 542; *Re Brennan and The Law Society of the Australian Capital Territory* (No. A 84/29, delivered 5 July 1985) paras.30, 37-38).

19. It is not to be expected that precedents can be found in the legal authorities for all the types of circumstance that meet that criteria. The courts of common law require there to be an express or implied duty of confidence, a breach of which would give rise to an action for damages. Courts of equity require a fiduciary or other special relationship and for it to be established that the information that was in fact communicated was confidential and ought to be protected. In the past, courts have not been much concerned with communications to or between agencies of the Commonwealth for, until the coming into operation of the [FOI Act](#) in this country, the disclosure of such information could be enforced only under the principles established in the Crown privilege cases (see, eg, *Sankey v Whitlam* ([\(1978\) 142 CLR 1](#))). There are few precedents which deal directly or even indirectly with the problem which the Tribunal now has to consider.

20. It is clear, however, from such authorities as there are, that a conclusion may be drawn that information was communicated in confidence either because of the particular relationship between the parties or because the information communicated was and would be recognised to be of a confidential nature. The relationships of solicitor and client, of doctor and patient, of priest and penitent and of husband and wife are special relationships of the type which prima facie give rise to a relationship of confidence. It has been recognised that communications between a person seeking advice and an adviser may well give rise to a relationship of confidence. Negotiations may give rise to a confidential situation. In the administrative field, it has been recognised that communications within Cabinet or between Cabinet and the Crown have a particular element of confidentiality about them. In the present case, the letter from Mr C.S. Stark, Exhibit TC.19, suggests that communications between Governments are to be treated as having a special confidentiality about them.

21. If a communication includes confidential information, that fact may, when taken with the surrounding circumstances, give rise to an inference that the information was communicated in confidence, but it may not be simple to identify information that was and would be recognised to be confidential. In *Saltman Engineering Company Limited v Campbell Engineering Company Limited* (1948) 65 RPC 203 at p.215, Lord Greene said that "something which is public property and public knowledge" cannot per se provide any foundation for proceedings of breach of confidence. In the United States, "The Restatement of the Law of Torts" (1st ed.) Ch.IV, Section 757 contains this comment with respect to trade secrets, at pp.5-6:

"Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are : (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with

which the information could be properly acquired or duplicated by others."

Megarry J said, at p.47, in *Coco v A.N. Clark (Engineers) Limited*, cited above,

"Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality : for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends, on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components."

In *Ansell Rubber Company Pty Limited v Allied Rubber Industries Pty Limited* [\[1967\] VicRp 7; \(1967\) VR 37](#) at 49, Gowans J, after referring to numerous authorities, said:

"There is very little in these English cases to enable one to identify a 'trade secret'. But some collation of the characteristics may be attempted, without trying to make it an exhaustive statement. Its subject-matter may not be a process in common use, or something which is public property and public knowledge, but if it is the result of work done by the maker upon materials which may be available for the use of anybody, so as to achieve a result which can only be produced by somebody who goes through the same process, it will be sufficient. All of its separate features may have been published, or capable of being ascertained by actual inspection by any member of the public, but if the whole result has not been achieved, and could not be achieved, except by someone going through the same kind of process as the owner, it will not fail to qualify by reason of the publication. It may derive from a maker in another country without losing its character, if it is used, or entitled to be used, by the owner alone in the country in which the owner operates. There is no suggestion of the need for invention. ...".

22. However, those cases were directed at trade secrets, a subject remote from the present problem. More assistance can be gained from decisions dealing with communications among Ministers and the bureaucracy or to them. A discussion of some of the circumstances in which there is a need to protect the confidentiality of documents held by the bureaucracy may be found in *Re Howard and The Treasurer of the Commonwealth of Australia* (No. A 84/154, delivered 29 April 1985), in which I said, with respect to s.36 of the [FOI Act](#):

"In *Re Murtagh and Commissioner of Taxation*, cited above, the Tribunal said, at p 121 :

'It is clear that the public interest is not to be limited by the prescription of categories or classes of documents the disclosure of which to the public would be contrary to the public interest. The public interest is not to be circumscribed. All documents must be examined to ascertain whether, having regard to the circumstances, their disclosure would be contrary to the public interest.'

The Tribunal went on to consider a number of American authorities on Exemption (b)(5), including (at pp.121-2) the following remarks of Wilkey J in *Jordan v Department of Justice* 591 F (2d) 753 (1978) :

' "... The privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy. There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. See *NLRB v Sears Roebuck & Co*, 421 US at 151; 95 S Ct 1504; *Montrose Chemical Corp v Train*, 160 US App DC 270, 273; [\[1974\] USADC 40](#); [491 F 2d 63](#), 66 (1974). Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. See *Grumman Aircraft Eng Corp v Renegotiation Board*, note 77 supra, 157 US App DC at 129; 482 F 2d at 718; *Sterling Drug Inc v FTC*, [\[1971\] USADC 275](#); [146 US App DC 237](#), 245-246; [\[1971\] USADC 275](#); [450 F 2d 698](#), 706-708 (1971). And third, it protects the integrity of the decision-making process itself by confirming that 'officials should be judged by what they decide(,) not for matters they considered before making up their minds'. *Grumman Aircraft Eng Corp v Renegotiation Board*, supra. See *Boeing Airplane Co v Coggeshall*, [108 US App 106](#), 112; 280 F 2d 654, 660 (1960); *Carl Zeiss Stiftung v VEB Carl Zeiss Jena*, note 77 supra, 40 FRD at 325-326".'

The Tribunal referred to the decisions of *Conway v Rimmer* [\[1968\] UKHL 2](#); [\(1968\) AC 910](#) and *Sankey v Whitlam* (1978)

[142 CLR 1](#), both of which considered public interest in the context of Crown privilege. The Tribunal concluded, at p.123 :

'... Broadly speaking, s 36 can be seen as an attempt by the legislature to protect the integrity and viability of the decision-making process. If the release of documents would impair this process to a significant or substantial degree and there is no countervailing benefit to the public which outweighs that impairment then it would be contrary to the public interest to grant access.'

The Tribunal also referred to the object of the Act expressed in [s.3\(1\)\(b\)](#) and the reference in that paragraph to 'essential public interests'. A generally similar approach was taken by the Tribunal in *Re Lianos and Secretary to the Department of Social Security* (N.83/893, delivered 19 February 1985), though the Tribunal there gave rather more attention to the Crown privilege cases.

Reference should also be made to the remarks of Lord Reid in *Conway v Rimmer*, cited above, where his Lordship said at p.952 :

'I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence

with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in Duncan's case [\[1942\] UKHL 3; \(1942\) AC 624](#), 642, whether the withholding of a document because it belongs to a particular class is really "necessary for the proper functioning of the public service".'

These remarks were referred to and in general approved in the judgments delivered in *Sankey v Whitlam*, cited above.

In considering the public interest element of s.36, the Tribunal may be called upon and in this review is called upon to have regard not only to the incidents of the disclosure of the particular documents but also to the effect which availability for disclosure to the public under the [FOI Act](#) of like documents would have upon the decision-making processes of the Minister and of his Department. The task reposed upon the Tribunal by s.36 is not that which arises in the Crown Privilege cases of which *Conway v Rimmer*, cited above, and *Sankey v Whitlam*, cited above, are pre-eminent examples, or that undertaken in *Jordan v Department of Justice*, cited above, which considered US Exemption b(5). Yet those authorities throw light upon the elements of the public interest to be considered and the circumstances in which traditionally it has been thought that the reservation of documents from public view should be maintained. From such authorities and from decisions of Tribunals, including *Re Peters and Department of the Prime Minister and Cabinet* (1983) 5 ALN No.218, *Re Waterford and Department of Treasury*, cited above, *Re Murtagh and Commissioner of Taxation*, cited above, *Re Chandra and Minister for Immigration and Ethnic Affairs* [\(1984\) 6 ALN 257](#), *Re Burns and Australian National University* and *Re Lianos and Secretary to the Department of Social Security* it is possible to postulate that in each case the whole of the circumstances must be examined

including any public benefit perceived in the disclosure of the documents sought but that :

(i) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;

(ii) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

(iii) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

(iv) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;

(v) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process."

See also the comments on [s.45](#) by Deputy President Hall in *Re Brennan and The Law Society of the Australian Capital Territory* (A 84/29, delivered 5 July 1985) paras.37-47).

23. In the light of the above discussion, I turn now to the circumstances of the particular case.

24. The situation under consideration in this review is one where there were communications with a view to a joint agreement being reached between Australia and the United States, a factor which, in itself, tends to give rise to a confidential relationship.

25. Moreover, as I have said, communications may be made not under any express agreement or even any necessarily implied agreement as to confidentiality but pursuant to a general understanding that communications of that nature will be treated in confidence. Mr Stark's letter states that Mr Civiletti's letter was written subject to a "tacit expectation" that it would be held in confidence. Such a statement is not unexpected in communications of this nature. The cases referred to in *Re Howard and The Treasurer of the Commonwealth of Australia* make it plain that there is a general understanding that communications at the highest level of government which are of a sensitive nature will be so treated. It is equally to be expected that sensitive communications between two governments will be so regarded.

26. Clearly the higher the office of the persons between whom the communications pass, the more likely it is that the communications may be confidential. Matters which are dealt with at the highest level of government tend to be of a sensitive nature and, moreover, the fact that a communication is between persons at a high level of government may give a sensitivity to communications that might otherwise seem to be of a routine nature.

27. Not only was the subject letter one between the Attorneys-General each acting on behalf of his own Government but Mr Stark's letter makes it clear that paragraphs 4 and 5 contained sensitive material of the type that, in the view of the United States Government, ought to be kept confidential. In the circumstances of this case, I am prepared to conclude, on the basis of Mr Stark's letter, Exhibit TC.19, that paragraphs 4 and 5 of Mr Civiletti's letter contained specific sensitive and confidential material.

28. Mr Maher submitted that there was nothing in the terms of the subject letter to the extent that it had been disclosed which showed that it was a confidential communication. He pointed to the fact that the letter concluded with greetings from Mr Civiletti to Senator Durack. But, as was said in *Re Howard and The Treasurer of the Commonwealth of Australia*, there is a tendency for a pre-decisional communication written between persons at the highest level of decision-making with respect to sensitive subjects to be regarded as documents which ought not to be generally available for public inspection and therefore to be subject to a tacit understanding as to confidentiality. The disclosed parts of Mr Civiletti's letter do not lead me to think that it was written on a different basis.

29. Mr Maher relied upon the fact that the letter was referred to by Senator Durack in his press release of 5 October 1980. But Senator Durack did not make public the whole of the letter and I do not conclude that he intended to do so or that he thought that the whole of the letter should be made public.

30. Mr Maher further submitted that a cloak of confidentiality cannot be created retrospectively and that, if a communication is not made in a confidential situation, then confidentiality cannot be claimed simply because some officer has subsequently looked at the letter and has thought that it ought to have been confidential. I do not dispute that contention but, as I have said, it appears to me that this letter was one which I would expect to have been written and received under a general understanding as to confidentiality. I accept Mr Stark's contention in his letter that,

"Our ability to conduct negotiations ... would be impaired if a detailed record of positions taken and views exchanged in previous negotiations (whether in their entirety, or partially) were freely available."

Such concepts are well understood. It seems to me to be unlikely that Mr Civiletti's letter was either written or received on the understanding that the letter would be freely available to the public. It was written from one Attorney-General to another during the course of negotiations on a subject that was then sensitive and likely to remain so for a considerable time. These are circumstances which give rise to an understanding as to confidentiality whether or not the confidentiality be expressed.

31. I am therefore satisfied that disclosure of paragraphs 4 and 5 of the subject letter would disclose matters communicated in confidence from the Attorney-General of the United States to the Attorney-General of Australia.

32. I now turn to the issue of public interest.

33. Mr Maher submitted that it cannot be the case that the mere fact that another government has expressed concern about the disclosure of a communication can be a complete case for showing that there are reasonable grounds in favour of non-disclosure. Plainly, Mr Maher is correct. Nevertheless, although the issue as to public interest is not correlative to that of confidentiality, the two concepts are not unrelated. In *Re Howard and The Treasurer of the Commonwealth of Australia*, I discussed the reasons why it was not in the public interest that communications of a particular type should be disclosed to the public. It is considerations of that nature which have led officials of government and representatives of governments to an expectation that certain communications will be received and held in confidence, whether confidentiality is expressly claimed or not. Thus, the very reasons which lead to the conclusion that a communication has been made in confidence often provide, and in this case are, reasons which would support a conclusion that access to the document should not, in the public interest, be granted under the [FOI Act](#).

34. Of course, it is necessary to look at other features of the case to ascertain whether there are specific or special reasons favouring disclosure of the document in the public interest. In the Crown privilege cases, there is always the element of public interest in ensuring that justice is done in the particular proceeding. That is one factor which has to be taken into account if it exists both in those cases and in any ascertainment of the public interest under [s.33](#) or s.36. But no such circumstance here exists. Nor is it shown that the document does not support the statement that Senator Durack made of it in his press release of 13 August 1980. In brief, Mr Maher has not brought forward any particular factor supporting disclosure of the document in the public interest. He claims access to the document as a member of the general public and relies upon no special circumstance relating to the document itself other than Senator Durack's mention of it in his 1980 press release.

35. I take into account the objects expressed in [s.3](#) of the [FOI Act](#) but am of the view that the letter was written in confidence from one Attorney-General to another, that the views put forward by Mr Stark in his letter opposing disclosure are sound and that, in the light of the opposition from the Government of the United States to the release of the paragraphs 4 and 5 of the letter, there are reasonable grounds for the claim that disclosure of those paragraphs would be contrary to the public interest.

36. It follows that the claim made in the certificate dated 15 June 1984 should be upheld and that paragraphs 4 and 5 of the letter are exempt under [s.33](#).

37. The claim made for exemption under [s.33\(1\)\(a\)\(iii\)](#) is, I think, equally sound.

38. In this respect it could merely have been put that the publication of information which had been communicated from the Attorney-General of the United States to the Attorney-General of Australia and which was claimed by the Government of the United States to be confidential could be expected to cause damage to the international relations of the Commonwealth. However, the decision under review and the decision to issue the conclusive certificate also took into account the nature of the treaty between Australia and the United States with respect to consultation on antitrust problems affecting the two countries. That treaty provides both for the free communication of all relevant information and for the confidentiality of that information and of any consultations which may take place thereon.

39. In my opinion, the disclosure of the letter which the United States Government regards as having been written in confidence could prejudice both the flow of information and the process of consultation and dispute solving which the treaty has established.

40. Mr Maher correctly submitted that [s.33\(1\)\(a\)\(iii\)](#) has in mind that disclosure would or could reasonably be expected to cause actual and significant damage to relations between Australia and

another country. Those were not his precise words but that was the purport of the submission. I accept that the mere possibility of damage is not sufficient. However, I do not accept that it is necessary to find loss or damage which can be proved in monetary terms. The phrase "damage to international relations of the Commonwealth" comprehends intangible damage to Australia's reputation though such damage may be difficult to assess. International relations have never been matters easy to define or to quantify. Regard must be had, inter alia, to the relationships between particular persons in one government and persons in another. Damage to personal relationships may cause considerable harm for a time at least.

41. I accept that it must be shown that the publication of a document claimed to be exempt could reasonably be expected to cause damage to the international relations of the Commonwealth. A mere allegation to that effect is not enough. There must be cause and effect which can reasonably be anticipated. But if it can reasonably be anticipated that disclosure of the document would lessen the confidence which another country would place on the Government of Australia, that is a sufficient ground for a finding that the disclosure of the document could reasonably be expected to damage international relations. Trust and confidence are intangible aspects of international relations.

42. Therefore, I would conclude that the disclosure to the public of this letter for which confidentiality is claimed by the Government of the United States could reasonably be expected to inhibit the flow of information which would otherwise come to Australia from the United States under the antitrust treaty and would inhibit co-operation thereunder. I would conclude that the disclosure of the matter claimed by the Government of the United States to have been communicated in confidence to the Government of Australia would be likely to damage the trust and confidence which the Government of the United States places in the Government of Australia.

43. Mr Maher submitted that the United States would not take offence if the Administrative Appeals Tribunal came to a view different from that of the Government and further that the United States Government would, in any event, comply with its legal obligations under the treaty. But the operation of a treaty such as the treaty of 29 June 1982 requires, for its effective fulfilment, trust and wholehearted co-operation. That is what the treaty seeks to achieve and it establishes a structure to that end. The disclosure of the letter written by the former Attorney-General of the United States to the former Attorney-General of Australia in circumstances which, in the view of the United States Government, gave rise to a tacit expectation of confidentiality, would be likely to significantly inhibit the co-operation which is essential for the effective working of the treaty.

44. Thus, I am satisfied that publication of the letter could reasonably be expected to cause damage to the international relations of the Commonwealth. For like reasons I am satisfied that publication of the letter is contrary to the public interest.

45. In the circumstances, the claim made in the certificate of 15 June 1984 with respect to the operation of [s.33\(1\)\(a\)\(ii\)](#) should be upheld and the decision under review with respect to that aspect of the matter should be affirmed.

46. There are two further matters which I should mention. The first is that Mr Maher submitted that whatever reasons prevailed for restricting disclosure of Mr Civiletti's letter prior to the execution of the treaty, those considerations no longer apply. However, Mr Stark's letter shows that there are continuing reasons why the document should not be disclosed. In any event, I am satisfied that the conditions which would have made the letter sensitive prior to entering into the treaty still prevail. The extra-territorial effect of the United States antitrust laws is still a current and volatile issue.

47. Secondly, I should mention that there is no evidence that Mr Civiletti's letter has been made public in the United States under the United States Freedom of Information legislation or

otherwise. Accordingly, I proceed upon the assumption that confidentiality remains attached to it both in the United States and in Australia.

48. For the reasons I have stated, I am satisfied that reasonable grounds exist for the claim made in the certificate of 15 June 1984 and that I should affirm the decision under review.

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Re McKNIGHT and AUSTRALIAN ARCHIVES

ADMINISTRATIVE APPEALS TRIBUNAL

DEPUTY PRESIDENT P W JOHNSTON

17 June 1991, 28 July 1992 — Canberra

Archives — Claim that ASIO records exempt — What constitutes reasonable expectation of danger to international relations and Australia's defence and security — Validity of mosaic theory of cumulative prejudice — Protection of confidential sources and methods of obtaining information — Adequacy of ASIO's record-keeping procedures — Whether further searches should be directed — Whether ASIO acted within charter.

The applicant requested a review of two distinct but related decisions made by the respondent. First, the respondent had refused the applicant's request under s 40 of the Archives Act for access to certain records relating to Dr J F Cairns. These documents had been in the possession of the Australian Security Intelligence Organisation (ASIO). Thirty years had elapsed since their creation. They had, therefore, been transferred to the Australian Archives. Nevertheless, despite the presumption that all such records will be open after that time, the documents in dispute had been designated as exempt. In these proceedings the respondent argued that they were exempt in accordance with the provisions of s 33 of the Act.

Secondly, the respondent had determined that, as far as it could ascertain, there were no further records relating to Dr Cairns that had been within the holdings of ASIO. This being so, it was not required to engage in further, more extensive searches to establish whether other relevant documents existed.

In relation to the first matter, the applicant contended that insufficient evidence had been adduced to demonstrate that the disclosure of the documents in dispute could reasonably be expected to damage the security, defence or international relations of the Commonwealth: s 33(1)(a). More particularly he argued that:

- (a) a reasonable expectation of damage could not be established in the absence of knowledge on the part of respondent as to whether the information contained in the documents had or had not been released in the United Kingdom;
- (b) in the absence of evidence as to the existence of a concrete and tangible mosaic of which otherwise innocuous information might form a part, it was a matter of pure speculation that damage might follow from the disclosure of the documents in question;
- (c) without clarification by the respondent about why it had been thought proper to collect the information in dispute, it was open to the tribunal to conclude that there was no basis on which the collection of the information could be said to have been necessary for the task of protection from communism. Hence, if ASIO had acted outside its charter, it could not be claimed that there would be damage to security within the meaning of s 33(1)(a) of the Act;
- (d) because the respondent's witness had no familiarity with the specific transactions that were the subject of the information in dispute, little reliance could be placed on his evaluation of the circumstances of contested documents.

In relation to the second matter, the applicant contended that the tribunal should order that further searches for relevant documents be made, it being no excuse that ASIO's filing system was inadequate.

Held: (i) The grounds for a claim that the disclosure of information might reasonably be expected to cause damage to Australia's relationship with other security organisations must be reasonable, no irrational, absurd or ridiculous.

Attorney General's Department v Cockcroft (1986) 12 ALD 468, applied.

(ii) The inability of the respondent to establish whether or not any of the information in dispute had or had not been released by overseas authorities does not lead to the conclusion that the ground for claiming exemption is fanciful or irrational. Here, the tribunal was satisfied that there would be substantial detriment to the further release of current and future intelligence information if overseas authorities among others were not secure in the belief that the confidentiality of their intelligence communications would be respected.

(iii) The mosaic theory is not discredited merely because those seeking to uphold it are not able to verify or identify the other circumstances which, when put with the information being sought, may reveal a source or method for collecting such information.

(iv) Even if the collection of any particular piece of information in dispute had travelled beyond the strict boundaries of the task given to ASIO, that did not, in itself, invalidate the claim to exemption. Information gathering activity may still properly be pursued even though, at the time of seeking, its relevance to a particular security matter may not yet have been established.

(v) Lack of specific knowledge on the part of a witness about what dangers the activities or associations of Dr Cairns might constitute do not defeat the claim of exemption. The character of the activities and the nature of ASIO's investigations at the time are not dependent on the state of knowledge of a particular witness.

(vi) The respondent has not been deficient or desultory in seeking to discharge its duties to search for documents in response to the request which had been made. Therefore, an order that further searches be entered into is inappropriate. If the applicant had reason to believe other lines of inquiry could disclose further documents, he could make application in that respect and the respondent could then, in a cooperative way, pursue those inquiries.

Dr G Flick instructed by *Mallesons* for the applicant.

A Robertson instructed by the *Australian Government Solicitor* for the respondent.

Deputy President P W Johnston. This is an application to review what effectively amounts to two distinct but related decisions made by the respondent, the first in response to an application under s 40 of the Archives Act 1983 (Cth) (the Act) for access to certain records relating to Dr J F Cairns, which application was refused on the ground that the particular records to which access was sought constituted, either in whole or part, "exempt records" for the purposes of s 33 of the Act. The second decision in respect of which review is sought is a determination by the respondent that, so far as it could ascertain, there were no other records that had been within the holdings of the Australian Security and Intelligence Organisation (ASIO) which related to Dr Cairns. This raises an issue of the adequacy of the record indexing system maintained by ASIO by which access to documents held by the Archives is regulated.

History of application

More specifically, the process by which those decisions came to be made and submitted for review by this tribunal is as follows. On 27 September 1989 the applicant, Mr McKnight, made an application under s 40 of the Act for access to certain documents relating to Dr Cairns by filling out a request form. This was treated as access to four particular folios of records which originally were within the collection maintained by ASIO and which now are held by the Archives. On that day

he was orally advised that access would not be granted. On 9 October 1989 the respondent received an application for review of the decision not to grant access. This was treated as an application for an internal reconsideration, under s 42 of the Act. At this time, the issue was raised whether there were any other records relating to Dr Cairns which might be the subject of the request for access.

By letter dated 14 November 1989 Dr H Stokes, the Director (Access) of the Archives advised Mr McKnight of the decision to wholly exempt folios 3, 4, 8 and 9 of Item 312 of the ASIO records, giving reasons in support of that decision. The letter also addressed the question of whether the nine folios comprising item 312 were the only "open period records" held by ASIO relevant to Dr Cairns. The letter continued:

In relation to the existence of additional open period material we passed a copy of your letter of 29 September 1989 to ASIO as you requested. ASIO undertook a further search but they were unable to locate any open period material created up to the end of 1957 other than that already identified.

On 12 January 1990 there was an application by Mr McKnight's solicitors for review by this tribunal of that decision, including the determination that there were no other open period records held by ASIO relevant to Dr Cairns. Subsequently, on 12 March 1990, in the light of the knowledge that not only were ASIO records indexed by reference to individuals but also by reference to subjects, Mr McKnight, through his solicitors, nominated 11 subject matters as warranting further searches for possible material relevant to Dr Cairns. In the same vein, he also gave a reference to the records of a particular individual.

Searches relating to these further subjects revealed that there were potentially a large number of documents that might be in dispute. In particular, as indicated in the summary statement of Dr Stokes to this tribunal dated 30 September 1990, a number of folios in Item 407 relating to Dr Cairns were discovered and exemption was claimed in respect of various folios among them. After internal reconsideration, the claim for exempt status in respect of certain of the folios in Item 407 was upheld (see letter of Dr Stokes dated 12 September 1990). The applicant still maintained that there were other records that fell within the ambit of his application to this tribunal. A directions hearing was subsequently held by the tribunal, and after examination by Deputy President Todd, the additional documents to which access was sought were ruled not to be the subject of the present application either on the grounds of relevance or because of concessions made by the applicant that he did not press access to information of a technical nature.

The hearing

At the hearing before me, which took place over two days, Dr G Flick of counsel appeared for the applicant and Mr A Robertson of counsel for the respondent. The tribunal received into evidence and has taken into account the documents furnished to it pursuant to s 37 of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act) as well as a number of other affidavits and documents which are set forth in Sch 1 to these reasons and to which reference will be made where necessary. Oral evidence on behalf of the respondent was given, in both open and closed sessions, by a senior officer of ASIO whom I shall refer to as "witness X" to avoid infringing s 92 of the Australian Security Intelligence Organisation Act 1979 (Cth) (the ASIO Act).

Preliminary observations

Necessarily, since these proceedings relate essentially to matters of national security, the tribunal is subject to somewhat special and restrictive constraints, not only in terms of the records themselves which are claimed to be exempt but also in respect of the extent to which some of the supplementary documentary evidence and certain oral evidence could be disclosed. In the course of proceedings, I made specific orders pursuant to s 35(2)(b) of the AAT Act that certain evidence or parts of evidence not be disclosed other than to certain persons being myself and my then associate, certain officers of the two affected agencies (the respondent and ASIO) and nominated legal representatives of the respondent. I further directed, pursuant to s 35(2)(a) of the AAT Act, that the evidence of witness X be given in private (ie in closed session) with all persons other than those just mentioned excluded. Dr Flick, on behalf of the applicant, objected to certain aspects of these orders, and in particular, whilst he did not contend that the applicant should be present when evidence was given in closed session, he objected to his exclusion, as the applicant's legal representative, from each of the two sessions in which sensitive evidence was given in confidence by a senior officer of ASIO. He submitted that his exclusion would deprive the applicant of a reasonable opportunity to respond to the evidence led in closed session. As Brennan J (President) said in *Re Pochi and the Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 508:

Serious though the exclusion of the public is, the exclusion of a party from a hearing which affects his interests is a much graver step. To exclude a party from such a hearing, even if his legal advisers are permitted to remain, is to deny him a full opportunity to cross-examine upon, to comment on or to controvert the case against him — a denial which, in the absence of statutory authority, would constitute an indefensible denial of fair treatment by the tribunal.

As I indicated at the time, I made the relevant ruling in my discretion, having regard to the rather peculiar and unique circumstances that any documents such as correspondence produced to substantiate the claims to exemption and any supporting oral evidence from witness X could possibly have national security implications of the very kind in issue under s 33 of the Archives Act. This required, as I saw it, some exceptional restriction and modification to the normal rules of natural justice. In this regard, though s 35(3) of the AAT Act recognises and enshrines the policy of the common law that proceedings should be held in public, there were overbearing considerations, in my opinion, in the present case to justify a departure from the normal rule. Section 35(3), to the extent that it recognises that exceptional circumstances justifying restriction may exist, provides a statutory warrant so to do in this instance when read in the context of s 33 of the Archives Act. As Tucker LJ said in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

Dr Flick's particular concern was that evidence could be led in those circumstances the nature of which might not be indicated, in general terms, in the open affidavits filed with the tribunal. He gave as an instance the possibility that correspondence admitted in evidence in closed session might travel beyond the limits of the matters addressed in para 16 of the affidavit of 29 April 1991 (Ex 4). As it happened, I was able to indicate to him upon resumption in open session after the first closed session the broad nature of the further evidence submitted to me under

cover of the order made under s 35(2) and, further, assure him that materials so admitted did not trespass into areas beyond the subject matter described in the open affidavits.

Legislative framework

The legislative scheme by which this matter calls to be determined is set forth in detail in Sch 2 of these reasons.

Shortly summarised, relevantly to this application, the scheme works in this way. The documents in dispute fall within the description of "Commonwealth records" for the purposes of s 3(1), either as being "originally" the property of the Commonwealth or alternatively those of a Commonwealth institution (ie ASIO). Those records in turn would constitute "archival resources of the Commonwealth" unless they are excluded by reason of being "exempt material" for the purposes of s 3(2)(j).

Since the records in question have been held for a period of at least 30 years, they fall, by reason of s 3(7) within the "open access period". By virtue of s 7(2) the Director-General of the Australian Archives is authorised to exercise any powers conferred on the Archives and perform any duties imposed upon that body. So far as this application is concerned, a decision given by the Archives is deemed to have been given by the Director-General: see s 50.

Section 31(1) requires all Commonwealth records in the open access period, *other than exempt records*, to be made available for public access. Such access is achieved by virtue of arrangements made between the Archives and the relevant institution: s 31(2).

The critical provision as far as these proceedings are concerned is s 33 which sets forth the criteria by which a Commonwealth record is to be determined an exempt record. That depends on whether it contains information or matter on the various kinds specified in subs (1). Relevantly to the present application, exemption is claimed in respect of the records in dispute under various nominated paragraphs of that provision. The specific claims for exemption in respect of each document are particularised in the schedule to the open affidavit of witness X dated 29 April 1991: Ex 4. (The description "open" is used in respect of materials or proceedings not subject to an order of non-disclosure under s 35(2) of the AAT Act. In the case of Ex 4, the name of the deponent and identifying initials are subject to a non-disclosure order, the rest of the contents are open.)

The procedure for making applications for access is addressed in s 40. Section 42 deals with internal reconsideration of decisions refusing access. If access is still denied s 43 establishes the jurisdiction of this tribunal to entertain applications for review of relevant decisions of the Archives in respect of access to particular records, including, as in this case, refusal on the ground that the records are exempt.

Section 44 empowers this tribunal, in conducting a review of any decision of the Archives for access to a record to decide any matter which could have been decided by the Archives in relation to that application. It is this provision that, according to the applicant's submission, provides a foundation for this tribunal considering and determining whether in fact the searches made to date by ASIO of the files within the archival material has been adequately pursued.

The evidence

In the open affidavit dated 29 April 1991 (Ex 4) witness X in support of the claims that the respective documents were exempt, stated as follows:

7. On the basis of my experience as an ASIO officer, the knowledge I have gained as the senior executive officer within ASIO responsible for overseas liaison and the expressed views of the United Kingdom Security Service (UKSS) I can affirm that folios 3 and 4 of item 312, which are together a report compiled by a colonial police force, and folio 8 of item 407 (which is a memorandum from a UKSS liaison officer) were passed in confidence by the UKSS to the CIS.

8. In the performance of its functions and the provision of advice to the Australian Government, ASIO cooperates with friendly overseas liaison services as sources of information, particularly in regard to counter-espionage, counter-terrorism and technical research and development in a number of spheres. The UKSS is such a service. The information obtained through this cooperation is extremely important in allowing ASIO to conduct its statutory functions effectively. There is no prospect of such information being obtained by means other than liaison with cooperating overseas security services. . . .

9. In this regard the UKSS is a major source of information and assistance. . . .

10. . . . Experience of a similar, recent incident involving release of information into the public domain to which the United Kingdom authorities objected causes me to believe that, at the very least, an early result would be a review of liaison intelligence exchange arrangements with ASIO and the UKSS. Such a review would result in diminished confidence by the British security and intelligence services, and by the British Government, in the protection of confidentiality afforded to their information passed to Australian agencies. A likely consequence of such an assessment would be a reduction in the quality and quantity of intelligence passed together with the imposition of restrictive caveats constraining the purposes to which that information may be put.

11. Therefore, I believe that the consequence of breaching the confidentiality of UKSS supplied information would seriously damage the security of Australia through the limiting of ASIO's capacity to obtain information relevant to the performance of its functions under the ASIO Act. In addition, the public release of folios 3, and 4 of Item 312 and folio 2 of Item 407 would become known to the United Kingdom authorities other than the UKSS and that those authorities would react in a manner similar to the UKSS, not only in their consideration of what information they may provide to ASIO, but also in their attitude to the confidential arrangements which may exist between them and other Commonwealth agencies.

. . .

13. On the basis of discussions with senior officers of the UKSS, I believe that the United Kingdom authorities including the security service are concerned to ensure that the principle of confidentiality of a source, and of the contents of information provided, is to be preserved regardless of whether a specific item of information is, was, or remains sensitive. All such information transmitted from such sources is treated in confidence by long-standing convention accepted and honoured by the security services in many countries with which we have dealings. It is understood by ASIO and the security and intelligence agencies with which it cooperates that, unless explicitly advised to the contrary by the donor service, all exchanges of intelligence are made in confidence regardless of when they were made and that this confidentiality exists until such time as the originator of the document agrees that it may be released in so far as the release of the information/material into the public domain may be involved.

. . .

16. On 19 September 1984, ASIO sought from the UKSS a letter explaining its position with regard to the release of intelligence exchanges under the Australian Archives Act. On 3 October 1984 the UKSS replied confirming that "... intelligence exchanges are and always have been conducted on the basis that they are in confidence ... such exchanges remain in confidence irrespective of the lapse of time". . . .

17. Folio 8 of Item 312 is a report received by the Regional Director of the CIS in Victoria . . . The material obtained therein was obtained from a confidential source. It would be possible for the source to be identified from the document. There is, and always has been, a confidential relationship between ASIO and providers of information to it and such a relationship existed between ASIO's predecessor organisations and their providers

of information. Further, material contained in this folio would, if released, be an unreasonable disclosure of the personal affairs of persons described in the report.

18. Material contained in folio 9 of Item 312 and folios 34, 45-49, 73, 84-86 of Item 407 were obtained from confidential sources by ASIO officers. The public disclosure of information concerning the existence, identity or management of a source would give rise to concern amongst ASIO's existing and potential sources that the extent and nature of their assistance could be disclosed at some future date. . . .

19. Material contained in folios 84 and 87-88 of Item 407 was supplied to ASIO by sources in confidence. To release this material into the public domain would constitute a breach of that confidence and would further diminish the willingness of other sources to continue providing ASIO with information relevant to security.

20. Material contained in folio 8 of Item 312 and folios 4-5, 6, 9, 33, 41, 45-48, 72, 82-86 and 91 of Item 407 could be used to gain an understanding of ASIO's *modus operandi* which has in many respects changed little to this day. Such an understanding could prejudice the operations of ASIO and thus reduce the effectiveness of the organisation in meeting its statutory obligations. . . .

21. Material contained in folio 9 of Item 312 and folios 45-48, 49 and 84-86 of Item 407 could enable a researcher to discern the identity of a confidential source. The effect of such an identification taking place even after 30 years could further discourage existing sources from cooperation with ASIO.

22. Material contained in folios 87 and 88 of Item 407 relates to a confidential interview between Dr Cairns and an ASIO officer, . . . The interview was held at Dr Cairns' request and was regarded by both parties as being confidential. To release this information, even after 32 years, would be a breach of confidence both to Dr Cairns and the third party concerned. . . .

Prime Ministerial directives and the Hope Report recommendation

Because they play a significant part in the evidence given by witness X, it is appropriate to set forth the terms of those parts of the two Prime Ministerial directives that were given to the Director-General of ASIO by Prime Ministers B Chifley on 16 March 1949 and R Menzies on 6 July 1950, respectively (Ex 14):

(a) The Chifley directive

5. The Security Service is part of the Defence Forces of the Commonwealth and save as herein expressed has no concern with the enforcement of the criminal law. *Its task is the defence of the Commonwealth from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations, whether directed from within or without the country, which may be judged to be subversive of the security of the Commonwealth.*

6. You will take especial care to ensure that the work of the Security Service is *strictly limited* to what is necessary for the purposes of this task and that you are fully aware of the extent of its activities . . .

7. No enquiry is to be carried out on behalf of any government department unless you are satisfied that an important public interest bearing on the defence of the Commonwealth as defined in para 5 is at stake.

10. You will establish a comprehensive set of security records. In order to do this you will arrange that all government departments and agencies submit to you for inclusion in your records all information bearing on security which may be in or come into their possession. You will also arrange to have such access to the records of government departments and agencies as you may deem necessary for the purposes of your work.

(b) The Menzies directive (Charter of ASIO)

5. The organisation is part of the defence system of the Commonwealth, and save as herein expressed has no concern with the enforcement of the criminal law. *Its task is the*

defence of the Commonwealth and its Territories from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations, whether directed from within or without the country, which may be judged to be subversive of the security of Australia.

6. You will take especial care to ensure that the work of the organisation is *strictly limited to what is necessary for the purposes of this task*, and that you are fully aware of the extent of its activities . . .

7. No enquiry is to be carried out on behalf of any government department unless you are satisfied that an important public interest bearing of the safety of the Commonwealth as defined in para 5 is at stake.

12. For the purposes of the organisation you will establish the maximum cooperation with other agencies, whether of the Commonwealth or of the States, operating in the field of security (and, where appropriate, in the field of law-enforcement) in Australia, and will maintain effective contact with appropriate security agencies in other countries.

(Emphasis added.)

Also referred to in evidence were the recommendations made by Mr Justice R Hope in the first report of the Royal Commission on Intelligence, (Ex 15). Relevantly the report states (at p 102):

188. ASIO is an intelligence organisation and is required to make assessments based on the information it collects. Consequently one of its primary requirements is to have an adequate records system for the storage and retrieval of information.

Oral evidence of witness X

In the first open session, witness X affirmed the statements made in the three affidavits sworn by him (subject to corrections of a typographical kind made to para 18 of his affidavit of 31 January 1991). He also gave evidence subsequently, the effect of which is summarised below.

At the first closed session he also submitted three further letters which the tribunal has accepted as Exs 6, 7 and 8. These were submitted to the tribunal in substantiation of para 16 of the open affidavit of 24 April 1991 (Ex 4) as well as the final point made in para 17 thereof. They addressed the concern of the overseas agencies about the maintenance and importance of confidentiality to the existing relationships. The tribunal would emphasise that the further material submitted did not introduce any new matter but stood by way of amplification or substantiation of the claims made in those two paragraphs. To similar effect was a further telex (Ex 9) unavailable at the time of the hearing but subsequently filed with the tribunal. The tribunal made an order pursuant to s 35(2) of the AAT Act restricting disclosure of Exs 6, 7, 8 and 9.

During the first closed session the witness also referred to instances in substantiation of the proposition that individuals who had acted as sources for ASIO were concerned about possible repercussions if their identity came to light. The earliest of these instances dated from the early 1960s. On the basis of the evidence received in closed session I am satisfied that foreign security agencies with which Australia cooperates would in fact take an unfavourable view about the extent of future cooperation if information supplied by them, even four decades previously, were revealed in Australia without their concurrence. I am also satisfied that there would in fact be legitimate instances in which particular individuals would be concerned if their assistance as ASIO sources were revealed despite the long passage of years since the information in question was obtained.

In the second closed session witness X also elaborated on ways in which during the cold war years espionage activities were carried on by Soviet agencies in Australia through the vehicle of the Communist Party of Australia (the CPA) and

how an organisation could become the subject of interest to that party. The witness spoke to circumstances where the concern of ASIO was not merely about specific people who were actually doing things that could be judged as prejudicial to security, but also about others whose activities may have security implications. I accept that in pursuing its inquiries it was necessary for ASIO to cast the investigatory net widely, and encompass persons who had no communist connections themselves and certainly no malevolent intent towards Australia's security.

In respect of particular matters, the witness gave evidence as follows:

No personal knowledge of Dr Cairns

In cross-examination by Dr Flick, witness X conceded that though he had been an officer of ASIO for 21 years his duties had not involved any investigation of Dr Cairns nor had he had reason to acquire information about the latter. Accordingly, his experience with ASIO did not enable him to form a personal view about the role which that organisation had been taking in relation to Dr Cairns. Nevertheless, the witness asserted that his knowledge of what was disclosed in the documents in dispute was based on his reading of them and his considerable experience in collecting intelligence including the problems that are associated with it.

Relationship with other security agencies

With respect to the effect of disclosure on operational security relationships with the United Kingdom, his judgment was based on his experience in the organisation since 1969. He assumed that the relationship between ASIO and its UK counterpart had been constant after and prior to 1968. His judgment of such matters was based, in part, on advice communicated in a document emanating from the United Kingdom dated 16 April 1991. This and other documents received since 1986, from the United Kingdom had sought to clarify the relationship in security matters between the two countries. The documents could be seen to be a restatement of the conditions which applied prior to 1986.

Witness X further conceded that in the United Kingdom some security material is released at times. In relation to the exempt materials, the subject of this application, the United Kingdom authorities had not been asked, however, whether or not the information in the documents in dispute remained confidential or whether the information was publicly available in the United Kingdom.

Other documents known to refer to Dr Cairns

Witness X was shown two pages apparently marked as folios 68 and 69 (Ex 13) and asked whether they formed part of the sequence of the folios 66-70 of item 407. Subsequently, on the second hearing day, the witness was able to confirm that the folios in question were not folios 68 and 69 of item 407. His affidavit of 14 June 1991 (Ex 12) confirmed this. The witness then explained that the two pages constituting Ex 13 were obviously part of ASIO's records at one point of time that had been transferred to the Australian Archives so that the organisation no longer had a copy of the original in its possession at the time that Mr McKnight made his application. He added that whilst in the possession of ASIO the document would have been in a subject file relating to the Communist Party of Australia Dissolution Bill Referendum Campaign 1952 but, because it had not been considered relevant to the file relating to Dr Cairns, it would not have been included in the latter's file. On a practical level, there might well be a number of other documents relating to Dr Cairns which would not have been accessed because the filing system would not have

been directed to the specific subject of Dr Cairns himself. He therefore conceded that there may be other documents collected in relation to Dr Cairns apart from the ones that he had read.

Protection of "modus operandi"

The witness was also asked a number of questions in cross-examination concerning the effect of disclosure of what had been called in his affidavits, the "modus operandi" of the organisation and how such disclosure would bring the information within the purview of s 33(1)(a) of the Act. He agreed that the protection sought by ASIO extended not only to the disclosure of any *methodology* employed by the organisation to acquire and assimilate information but also to the *particular circumstances* in which a methodology was employed. He did not agree that much of the methodology actually employed by ASIO was already the subject of public analysis and disclosure. It was true, however, that among the methodologies employed to gather information, telephone interception and the interception of telexes were employed. As the witness pointed out, these are available, subject to ministerial authorisation, under the provisions of the ASIO Act itself. (See, for example, s 26 and s 27 relating to use of listening devices and inspection of postal materials.)

He also confirmed that ASIO employed the method of keeping people under surveillance and that of intercepting mail. He went on to draw a distinction between the act of surveillance itself and the particular techniques of how surveillance was conducted and the circumstances in which it was used. In the case of the information, the subject of the present application, the witness believed that something in the methodology used in a particular case was different from what had already been publicly disclosed. With respect to some of the documents in dispute the witness denied that the methodology of surveillance of student groups was apparent, though in a more general sense he conceded that the organisation did collect information about student groups. It was therefore true to say that some of the documents in dispute did disclose that ASIO had acquired information about various student groups. Nevertheless, ASIO did not want to indicate the precise details of the method used in a particular instance since revelation of the method would be damaging to ASIO's ability to do its job at the present time. A distinction should be drawn between *general modes of surveillance* and the *particular method*. In the latter respect, having access to certain precise bits of information containing the *analysis* of primary information collected by ASIO could itself reveal how the information was obtained and could lead further to the identification of a confidential source.

With respect to the specific documents included as folios 4 and 5 of item 407 (in respect of which only a partial exemption is asserted), though it was clear that the document disclosed membership of the Malayan Students Association of Victoria, the location of its headquarters and information about its various committees, the witness maintained there would be prejudice in releasing the balance of the information since it could disclose both a source of that information as well as an analysis of it. In qualification of whether it disclosed a confidential source, the concern of the witness was that whilst the document itself might not disclose the source, put together with other documents it might well do so (see "Mosaic" theory in following section). From ASIO's point of view, it was not possible to consider one document in isolation. He conceded that if the judgment was to be made solely on folios 4 and 5 of item 407 and without regard to other information, it would be hard to support the denial of access on that ground.

Further cross-examined on the meaning of *modus operandi*, the witness agreed that surveillance includes following people covertly, but that ASIO engaged in covertly obtaining information by methods other than following people. In such cases it was the actual mechanism whereby information was covertly obtained that would constitute a method which ASIO would not wish to have publicly disclosed.

The "mosaic" theory

With respect to what has generally been described as the "mosaic" theory, the witness conceded that he was unable to point to any other document in issue in these proceedings which might affect the disclosure of the three specific paragraphs claimed in folios 4 and 5 of item 407.

With respect to folio 82 of item 407 the witness asserted that disclosure of the particular notation on the document might enable people to look at other documents and draw conclusions from them in terms of identifying an individual or acquiring information that could form part of the mosaic theory. In relation to the mosaic theory, the witness was of the view that it was necessary to err on the side of caution.

In that respect the witness identified, by reference to folio 5 of item 407, that if two of the deletions made to that folio were put together with other information they could lead to the identification of the source. The witness conceded that identification would depend on whether someone had sufficient information about the person so that the subject of the information involving a number of incidents could, by a process of deduction, result in the identification of the source. The witness could not however identify any concrete circumstance within his knowledge that could form part of the mosaic.

Re-examined about the mosaic theory, he explained that the information that could be brought to bear to come to such conclusions might not be contained in ASIO's records themselves but be known to persons engaged in researching security issues.

In this respect it was relevant to recall that, first, ASIO could not be sure about what other information might be held by a researcher such as the applicant. Further, given that the number of persons in the groups who associated with Dr Cairns was relatively small, an interested person like the applicant could possibly deduce the identity of a confidential source from other information held by that person.

The witness was referred to folio 40 of item 407, a document which, as appears from p 7 of the schedule to the affidavit of witness X sworn 29 April 1991 (Ex 4), contains technical exemptions not in dispute between the parties. The witness stated that the document attracted s 33(1)(a) because it revealed a source of information which should be kept confidential. The witness conceded that relation to this and other documents in respect of which exempt status was claimed he had had no personal involvement as an ASIO officer. His judgment was based upon the content of the document and his experience. Shown a document by Dr Flick (Ex 11) which was the same as the one in respect of which exemption was claimed the witness said it would not surprise him to know that that document had in fact been released by Archives. He said that nevertheless it would not change his opinion in any substantial way to know that.

Whether ASIO acted within its charter

In respect of a more general issue raised by an applicant, namely whether ASIO was acting within the terms of its charter when accumulating any of the documents in dispute, the witness stated that he was not aware of the particular task that ASIO

was engaged in in 1949 or 1951 that might have caused the documents to be collected or produced. Not being able to identify the tasks that were being pursued by ASIO in the early 1950s which led to the production of the documents, the witness could not say whether the information contained in them was strictly limited to what was necessary for the purposes of pursuing those tasks.

Concerning the directives of Prime Minister Chifley and Prime Minister Menzies, the witness stated that he believed that the information in the documents in contention was generated in the course of ASIO pursuing the general task of defence of the Commonwealth from external and internal dangers. His knowledge was not such that he could tell the tribunal why the information in the documents was essential to that task.

In subsequent re-examination of the witness he stated that at the time when it was collecting the information the subject of the proceedings one of the tasks of ASIO was investigation into the activities of the Communist Party of Australia. It had exploited other groups by having members of the CPA join in those groups, quite often without declaring their affiliation with the party, and seeking to influence the activities of those groups. In his view, entities mentioned in the documents in question were organisations of interest to the CPA and it was ASIO's task at the time to establish the extent of the success of particular communists within those organisations. ASIO had had to come to some conclusions as to whether the activities of those communists were relevant to security or not. The East West Committee, from his experience, was such an entity and, from the documents, he would conclude that the Malayan Students Association of Victoria was also such an entity of interest to the party.

Adequacy of records

With respect to the maintenance of records, the witness confirmed that in the 22 years that he had worked for ASIO, he had been responsible for the ASIO registry which included the filing system. He confirmed that the filing section had at least two components, that if files classified according to subject matter and a category according to particular persons. This system, the witness stated had remained much the same since its inception and would only have involved small changes from 1955 to 1985. When first questioned about it by Dr Flick, the witness said that it could not be described as a "comprehensive" filing system. In latter evidence he explained what he understood by "comprehensive".

The witness confirmed there was a file in the name of Dr Cairns. He agreed that the more comprehensive a filing system was the more complete the response that could be given by ASIO to a request for access. When referred to the directive by Mr Chifley, Prime Minister, establishing ASIO, and in particular the direction that the organisation should establish a comprehensive set of security records, and asked whether he would agree with the proposition that at no point since 1949 had ASIO kept "a comprehensive set of security records", the witness described that proposition as correct. He qualified this by agreeing that the retrieval system was nevertheless "adequate". With respect to the recommendation in the Hope Royal Commission's first report that ASIO maintain an adequate record system for retrieval of information (see above), he stated that that recommendation had not been implemented at the date of hearing. The witness later pointed out that whether one held the opinion that the records were comprehensive depended on the interpretation of the word "comprehensive". He maintained nevertheless that the organisation had taken significant steps to computerise the *indices* of the files though

the *information* in the files was not on computer. The fact of automating the indices did have a result that searchers can now be far more efficient than was the case with the retrieval of information in 1977.

In re-examination, when asked about the requirement in the Prime Ministerial Directive that ASIO establish a comprehensive set of security records (see above), the witness stated that he believed ASIO was complying with them in that the records were “comprehensive” *in the sense* of enabling the organisation to perform its functions of *obtaining intelligence relevant to security* and advising governments where necessary. When, in cross-examination, he had expressed the opinion that ASIO’s records were not comprehensive, he had taken the question to mean whether the records were *capable of retrieving information about every name that might appear in those records*. He conceded that they were not comprehensive in that sense but were sufficiently comprehensive for ASIO’s purposes of obtaining and recording information relevant to security.

The witness further explained that there would certainly be other files where Dr Cairns’ name would occur but a decision would have been made by the record keepers of the day not to copy that information onto Dr Cairns’ personal file. Thus while records could exist within ASIO’s holdings which include the name of Dr Cairns or contain other information about him, that information was not necessarily linked to the reasons why ASIO held a personal file on Dr Cairns. It would take a considerable research task, if, besides looking through Dr Cairns’ personal files, a search were to be made by taking the name of every other individual or organisation with which he was associated, going through that file, and continuing that process further.

Submissions of parties

(1) Applicant’s contentions

By way of general observations, Dr Flick submitted that so far as the respondent’s claim that particular documents or parts of them are exempt was based on paras (a) and (e) of s 33(1), the requirement of a *reasonable expectation* in each case could not be satisfied if any relevant expectation entertained about those documents was *irrational, absurd or ridiculous: Attorney-General’s Department v Cockcroft* (1986) 12 ALD 468. He further submitted that the requirement was not satisfied for any one of four reasons:

(i) As a factual matter that negated the ability of the respondent to assert that there was a *reasonable expectation of damage*, the lack of knowledge on the part of the witness as to whether or not the information contained in particular documents had or had not been released in the United Kingdom left it a matter of *speculation* as to whether or not damage of the requisite kind would follow. Being speculation, this tribunal could not say that there was a reasonable basis for any expectation of damage. This was compounded by the fact that as recently as 16 April 1991 an inquiry had been directed to the United Kingdom authorities, to ascertain the general situation with respect to possible release of documents such as those in dispute, but the respondent had not taken advantage of that opportunity to check if any of the information in contention in which the UK authorities had an interest had been released in that country. This was not to say that there was an *obligation* upon the respondent to make inquiries to see whether other parties objected to the release of information, but given that the opportunity was there it should have been taken to pursue the matter further.

(ii) Further, in addressing the *mosaic theory* as a basis for claiming that the release of a particular piece of information, innocuous in itself, could, in conjunction with other known information, be reasonably expected to cause relevant damage, counsel for the applicant accepted that it *might* apply where disclosure of a particular piece of information about circumstances in which surveillance was being conducted could, when taken with other *specific* facts, (eg of the particular location), fit into a larger mosaic *where that mosaic was concrete and tangible*. In the present circumstances, however, since witness X could not clarify what the elements of any particular mosaic might be, it was therefore a matter of pure speculation about what damaging effects release might have. Since he had not been able to identify any particular circumstances which might contribute to the mosaic theory in relation to the information claimed to be exempt, the tribunal could not say that there was a *reasonable expectation* of the kind of damage that might ensue. This was particularly so as regards a claim under s 33(1)(e)(ii) of the Act seeking to prevent disclosure of a confidential source of information. This was not only the case with respect to the identification of particular facts, matters and circumstances limited to the information in issue; it was the case so far as it concerned any information on a far broader basis. As such it was, again, a matter of pure speculation whether some such other information forming part of a mosaic might exist. As a matter of speculation, lacking something concrete or tangible, it must be regarded as something *absurd* or *irrational* and could not satisfy the condition of a *reasonable* expectation.

(iii) Prior to 1956, (ie when the Australian Security Intelligence Organisation Act 1956 (Cth) came into operation), at the time when a large number of the documents in dispute came into existence, ASIO was operating on the Prime Ministerial directives. Its task as stipulated in those directives was the defence of the Commonwealth from internal or external dangers arising from attempts at espionage. It was part of this responsibility that the organisation should take special care to ensure that the work of the security service was *strictly* limited to what was "*necessary*" for the purposes of that task (eg para 6 of Chifley directive). Since no clarification had been provided by the witness of why collecting the information in dispute in these proceedings had been necessary for those purposes, it was open for the tribunal to conclude that there was no basis upon which the information could be said to be strictly necessary for the task of protection against communism (which was the principal task undertaken by the organisation). If ASIO was acting outside the charter entrusted to it, it could not claim that there would be damage to security within the meaning of s 33(1)(a) of the Act. That is, information not relevant to that issue would not legitimately be within the subject of the legislative structure. This would turn, to some degree, upon the meaning of the expression "damage to security, defence or international relations" and involve an implication that exempt information would have to have been acquired legitimately by ASIO in discharging its responsibilities.

As an alternative way of approaching the subject, even if release of information collected in pursuit of an impermissible task could still damage security, to do so could not be said to create a *reasonable expectation* of damage in the absence of any concrete identification of what were the necessary objects of the acquisition.

(iv) The tribunal, in deciding what weight to place on the evidence of the witness should take into account that by his own concession, he had no familiarity with the transactions that were the subject of the information in dispute, hence little reliance could be placed on his evaluation of the circumstances of each document. Thus when confronted with the fact that one of the documents (item 407 folio 40) referred to in his affidavit of 26 April 1991, though not in contest in these proceedings, had

in fact been the subject of *release* (see Ex 11), his judgment about whatever *damage* might have been caused could not be relied on in the absence of any direct knowledge.

Adequacy of search

Relating to the adequacy of the search (described by Dr Flick as “the subsidiary issue”), it was submitted for the respondent that this tribunal possessed the power to direct further searches and that this was a proper case in which that should be done. This flowed from the fact that the legislation provided that there was a right of access to certain documents. That right of access could not be frustrated or impaired by a totally inadequate filing system, if that were the case in this instance. Dr Flick submitted that it was not enough to say the filing system was sufficient to allow retrieval of information relevant to ASIO’s purposes (in terms of discharging ASIO’s primary function and statutory responsibilities) but whether it was adequate to locate documents to give effect to the statutory right of access.

In this particular case it was submitted there had been a total disregard to the directives of Prime Ministers Chifley and Menzies and a further disregard of the recommendations of the Hope Royal Commission regarding maintenance of an adequate record system. He referred in particular to the directive that the Director-General of Security should “establish a comprehensive set of security records” (para 10 of Chifley directive) and further that: “In order to do this you will arrange with all government departments and agencies to submit to you for inclusion in your records, all information bearing on security which may or may not come into their possession.” Based on the answers of the witness, that the records retrieval system had remained constant and had changed very little over four decades, although the indices to the filing system had been computerised, this tribunal could not say with any confidence, so it was submitted, that all the documents within the ambit of the request had been identified, either for the purposes of release or for the claim of exemption. This was in the context where the onus of making any exemptions remained on the respondent: s 51(a) of the Act. Nor was the proper response to say that the files of ASIO were directed towards ASIO accessing information for its national security purposes and not for complying with any other legislative requirements. In this instance the applicant had himself been able to point to another document (Ex 11) and establish that witness X was unaware that it had been released. Arguably, it also fell within the request for disclosure. This demonstrated that an adequate search had not been conducted.

(2) Respondent's contentions

(i) As to whether there was a reasonable expectation of damage to international relations, the respondent primarily relied on Exs 6, 7, 8 and 9. These established the guidelines upon which foreign agencies have established and re-established their relationship with the Australian securities services in relation to the release of documents and information supplied by those foreign services. The question posed in respect of damage within s 33(1)(a) was not limited to any harm that could reasonably be expected to flow merely from a release of the information itself, but extends to the *harm of disruption to security relationships* that could reasonably be expected to flow from non-compliance and non-fulfilment of the procedures that have been established between the agencies and different governments. Hence what the British authorities might choose to do by way of release of documents in the United Kingdom should be viewed differently from the consequences that might follow if the Australian authorities released the same information in Australia.

(ii) Turning to the mosaic theory, it was submitted that merely because a witness was not able to give a concrete example of why release of a particular piece of information would be prejudicial, that did not detract from the contention that there was a well-recognised way in which the analysis of information by reference to an increase of other information could lead to the discovery of a person's identity. The absence of an example could not make the expectation of damage unreasonable.

(iii) With regard to the arguments based on the possibility that ASIO may have been collecting information outside its charter, Mr Robertson contended that there was simply no factual basis supporting such a claim. The fact that the witness was not able to address, from his knowledge, the precise details of the operations engaged in by ASIO provided no basis for saying that the activities might have been beyond the relevant functions of the organisation at the time. In fact, on the contrary, it was open to the tribunal to find that the information gathered, on the face of the documents, quite clearly related to matters that were at the heart of one of the major functions of ASIO at the time, going as they did to the question of the impact of the Soviet Union on the domestic affairs of Australia during the Cold War period.

In this respect it was not proper to interpose between the language of a statute and the documents to which the language of the statute had to be applied, the Prime Ministerial directives concerning the function of the organisation since, by their nature, they did not give rise to any right to information. They were commands to people in the executive arm of government, primarily the Director-General of the organisation, as to how they should conduct the affairs of the organisation. They could not be taken to be legal prescriptions. Rather, the question with which the tribunal was concerned was the quality of the information in the documents.

(iv) The fact that the witness was not directly involved in the transactions concerned in collecting the information in the disputed records should not be taken to detract from the fact that the witness had 22 years experience of intelligence gathering and analysis. No adverse inference should therefore be drawn from his evidence. He was entitled to take the view that he did not agree with the release of a particular document that was in contention in these proceedings. This view was consistent with the decision of Deputy President Todd in *Re Slater and Cox (Director-General, Australian Archives)* (1985) 15 ALD 20 and at 29. It was conceded that the fact that it had been released might complicate the matter but this did not prevent the respondent maintaining its view about the information. In this regard the respondent accepted that disclosure would weaken a claim to exemption but insisted that the question was still whether the further disclosure could reasonably be expected to have the relevant consequence. The fact that a document had been released does not mean that it necessarily loses its character as an exempt document.

Adequacy of search

Going to the adequacy of search, Mr Robertson conceded that in relation to the powers of the tribunal, and particularly stemming from s 44 of the Act, the tribunal could say that it was satisfied there was a particular document in existence that had not been produced, or that there was a particular class of document that existed that had not been produced.

In the latter respect, the tribunal should distinguish between documents which merely had some peripheral relationship to Dr Cairns in the sense of perhaps mentioning his name or the name of someone with whom he was associated, and those documents in issue in this hearing that had a more substantial relationship to Dr Cairns.

In the light of the extensive searches that had been made and, following communication with the applicant which led to further searches of files relating to particular nominated organisations, which process had more documents being produced, there was no obligation upon the respondent to seek further for other documents.

The fact that the system had been constant for 40 years was not to be taken as criticism of the system. Hence, overall, there was no basis for the tribunal, as a matter of evidence, to make any order for any further searches to be done.

Discussion of general submissions and relevant findings

In respect of the matters discussed below, I have proceeded on the basis that, by virtue of s 51 of the Act, the onus lies on the respondent to sustain the claim that the records in dispute are exempt.

For the purposes of dealing with the above submissions, I make the following findings based on the evidence I have read and heard in this matter.

(a) Witness X was not aware prior to the hearing whether any of the information contained in the materials in dispute had been released in the United Kingdom.

(b) Witness X was not able to refer to particular instances in the materials in dispute, or in any other document, which when read with specific pieces of information claimed to be exempt, could lead to the identification of a confidential source of information.

(c) Witness X was not involved in, or had any direct knowledge, of the transactions concerned with the collection of the information in dispute.

(d) Disclosure of the notations on document folio 82 of Item 407 could allow inferences to be drawn that could lead to the identification of individuals as sources if put in context with information in other documents.

(e) The document received in evidence as ex 11 is the same as that in item 407, foilo 40.

(f) There is no basis in the evidence including the documents themselves to suggest that in collecting the information in dispute, ASIO, at the time, was acting beyond or outside the terms of its charter as specified in the Prime Ministerial directives.

(g) In relation to the techniques and methods employed by ASIO to gather information, revelation of the circumstances in which it was gathered may also disclose the technique or method.

Other relevant findings are made below.

Discussion of submissions

It is true that, when evaluating for the purposes of s 33(1)(a) and (e) of the Act whether the disclosure of any particular information could reasonably be expected to cause damage to Australia's relationship with other security organisations and hence impair the future exchange of relevant information, the grounds for such a claim must not be fanciful, imaginary or contrived but must be reasonable in the sense that they are based on reason, or agreeable to reason, and are not irrational, absurd or ridiculous: *Attorney-General's Department v Cockcroft* (1986) 12 ALD 468; *Slater* 15 ALD at 26. I do not accept, however, that the inability of the respondent to establish whether or not any of the information in dispute has or has not been released by overseas authorities leads to the conclusion that the ground for claiming exemption can be described as fanciful or irrational. The fact that ASIO could have verified whether any of the information had been released elsewhere does not require, as a matter of logic, that any of the material claimed to come within

s 33(1)(a) or (e) of the Act loses its exempt status. Further, the tribunal is satisfied, on the materials before it, particularly the communications of overseas authorities and those emanating from overseas governments (Exs 6 to 9), that there would be a substantial detriment to the further release of current and future intelligence information if they were not secure in the belief that, even in many years to come, the confidentiality of information so supplied would be respected. It is true that there must be something more than the *mere possibility* of damage: *Re Maher and Attorney-General's Department* (1985) 7 ALD 731 at 742. In this respect it is the *potential* detriment in terms of a possible diminution of the flow of intelligence that is relevant, not whether the attitude of those foreign authorities and governments is itself reasonable. It is enough if the tribunal finds, as I do, that disclosure of exempt material furnished by a foreign government would lessen the confidence which another country reposes in the Australian authorities: *Maher*, above, at 742. As Deputy President Todd pointed out in *Slater*, 15 ALD at 29, "security is a particularly sensitive area and particularly dependent for its effectiveness upon an adequate flow of information". The damage that can be reasonably expected to flow from such disclosure can be characterised as being both to Australia's *international relations*, in the first instance, and to its *defence and security* as a consequence.

In general terms, I do not regard the mosaic theory, otherwise described as a theory of "cumulative prejudice", to be discredited merely because those seeking to uphold it are not able to verify or identify the other circumstance which, when put with information to which access is sought, may reveal either a source of information or a particular method for collecting such information, or disclosure of the kind of circumstances which may be the subject of security analysis. The mosaic theory does not depend, as I understand it, simply upon information within the possession or knowledge of a security organisation. It may be accepted that claims made in respect of the mosaic theory are ultra cautious but it would be a logical fallacy to conclude that even an excessive degree of caution exercised in that respect demonstrates, in itself, a lack of rationality. Where particular claims for exempt status rely on this theory, the tribunal should be slow to substitute its own non-expert judgment for that of officers who have had a long connection with intelligence gathering. This tribunal has consistently given credence to the mosaic theory: see *Slater* 15 ALD at 27; *Re Robinson and Department of Foreign Affairs* (1986) 11 ALN N48; *Re Throssell and Australian Archives* (1986) 10 ALD 403 at 406 and 407 (*Throssell (No 1)*) and *Re Throssell and Department of Foreign Affairs* (1987) 14 ALD 296 (*Throssell No 2*). Whilst I accept that in the present instance, on the evidence before me, including that of witness X, there is a *degree of speculation*, I am nevertheless satisfied that, if regard is had to the kind of materials dealt with in the documents in issue, and especially the possibilities of an informed researcher making deductions from the kind of analyses there recorded, given the relatively small size of the group of persons involved, that speculative element is not sufficient of itself to defeat a claim for exemption.

In response to the argument that the tribunal could not be satisfied that ASIO was acting within its charter at the time when the relevant information was being collected, and further if that be the case, the respondent could not claim that the release of the information to which access is sought could compromise the pursuit of the legitimate objectives of ASIO, I am of the opinion that, in the first place, even if the collection of any particular piece of information in dispute had travelled outside the strict boundaries of the task given to ASIO in the Prime Ministerial Directives, that does not, of itself, invalidate the claim to exemption. Even if, to put the case at its highest, the information had been illegally or improperly obtained, its

disclosure could still seriously prejudice the ongoing operations of ASIO. To say that is not to sanction any possible breach of the law: it is to say that release to someone such as the applicant is not an appropriate remedy. In this regard, I agreed with counsel for the respondent that the directives were administrative commands addressed to the organisation: they were not directed to providing a mandate for access.

More significantly, the activity of gathering such information necessarily occurs in a context where information may be sought even though at the time of seeking it, its relevance to a particular security matter may not have been established. I accept, in any event, that the information in dispute was pursued as part of an exercise to gather information about the extent of penetration of particular organisations by the CPA and about the activities of particular individuals who, though they might not themselves be members of that party, were subject to its influence.

The tribunal further accepts that that is a judgment that should be evaluated according to the perceptions current in the late 1940s and early 1950s. At that time covert activities by the CPA were considered to be detrimental to the security and defence of Australia. In other words even if to a present-day eye a different conclusion might be drawn about whether surveillance of particular individuals or activities was justified, or whether or not there was an undue concentration on particular activities, that is not to the point. At the time when the information was being collected, the organisation was not constituted by statute. Nevertheless to the extent that, as in the case of Australian Security Intelligence Service discussed in *Slater*, above, the organisation drew its authority from the prerogative or executive powers of the Commonwealth, relying on a combination of constitutional powers such as s 61 in execution of s 51(vi) and s 51(xxxix) and the "inherent power of nationhood": see *Protective Security Review*, Report of Justice Hope, 1979, Parl Paper 397 at 149 discussed in P W Johnston, "Re Tracey: Some Implications for the Military-Civil Authority Relationship" (1990) 20 *UWA Rev* 73 at 79) the ambit of its tasks and powers should be read in an expansive manner. Moulding my interpretation of the Prime Ministerial Directives to that broad understanding, I do not accept that the activities of ASIO indicated in the records under review can be found to be in excess of its stipulated role, even taking into account that the mandate given by the charter is that the organisation restrict its activities to those *strictly necessary* for the preservation of Australia's *defence and security*.

On the evidence before me, including my reading of the documents in dispute, I am therefore satisfied that ASIO did not exceed its charter, and to that extent the argument relying on that feature cannot succeed. The kind of interest shown towards organisations such as the Malayan Students Association, though perhaps curious at this remove of time, could fall legitimately within ASIO's charter to protect the nation against threats to its defence and internal security and thus fit within para 6 of the Chifley and Menzies Directives respectively.

Further, I am not prepared to hold that the lack of specific knowledge on the part of the witness about what dangers the activities or associations of Dr Cairns constituted, or why he was the subject of interest by ASIO, can defeat the claims for exemption. The character of the activities and the nature of ASIO's investigations at the time are not dependent on the state of knowledge of a particular witness. In this regard, even if it be the case, in hindsight, that the interest shown by the organisation in Dr Cairns was misguided and misplaced, that does not of itself render illegitimate the information-gathering so conducted.

In particular, the claim for exemption does not fail, in my opinion, even if it should be established (which it has not been) that there had been an exceeding on the part

of ASIO of its charter under the Prime Ministerial Directives, because of some public interest consideration. There is in fact no public interest test requiring a balance between the statutory right to access and the interests of security imposed in relation to s 33 of the Act: *Slater*, 15 ALD at 26; *Throssell (No 1)*, above, at 406. Unlike s 33A(2)(b) of the Freedom of Information Act 1982, s 33 of the Archives Act contains no balancing test.

The fact that a particular document has been released into the public domain in my opinion, does throw a significant shadow over a claim for exempt status. I agree with counsel for the respondent that release is not determinative and as Deputy President Todd did in *Slater* (15 ALD at 29) I accept that a claim for exemption may be sustained despite such release. Nevertheless the weight of a claim for exemption in relation to a document already released must be substantially discounted in such circumstances.

So far as the adequacy of search is concerned, I have found this the most problematic aspect of this application. I accept, in the first place, the general proposition advanced by Dr Flick that the adequacy of the filing system employed by ASIO is a matter properly within the consideration of the tribunal in order to make effective the right of a person to request access to archival matter available for public access pursuant to s 31(1) of the Act. I also accept that incidental to its review function under s 44(1) of the Act the tribunal has at its disposal such necessary powers vested in it by virtue of s 50(a) of the Act as the Director-General of the Archives could exercise under s 7 of the Act. This would entail a power to give directions relating to further searches if proper grounds exist. Not to be so armed would sterilise the tribunal's effective review of this application.

It should first be said that I do not accept that the matter rises or falls on whether or not ASIO has maintained, in general terms, "a comprehensive" set of records within the terms of the Prime Ministerial Directives. Though there was much debate about the meaning of the word "comprehensive" and in particular whether the judgment of whether the system was such as to be made having regard to the function of retrieval of such information for the purposes of the organisation, or for the purposes of satisfying public requests for access, that, as I see it, is not to the point. A finding that the records are not "comprehensive" within the terms of the Prime Ministerial Directives does not necessarily carry with it a conclusion that this tribunal should require further measures to be undertaken so that all documents that potentially are within the applicant's request can be identified. The question of adequacy must be approached from the point of view of the state of the records as they now exist, including the capability of the system for locating particular records subject to the Archives Act.

So far as this application is concerned, it was, at least in its original terms, directed to the files of ASIO that directly concern Dr Cairns. The initial response of the respondent was in those terms, taking into account that the personal indexes are the prime source of information in that regard. Accepting the possibility (as I do) that he *may be* the subject of other records or documents that have been within ASIO's possession, and which may be disclosed by further searches according to various categories of subject matter, it is significant, in my view, that the Act does permit someone in the position of the applicant, whose researches may encompass a very wide range of knowledge of relevant organisations, to make *other requests* for access based on such knowledge, in terms of disclosure of information in those files which relates to Dr Cairns. That is in fact what happened here. Absent a clear or even substantial indication that there is a particular area of information that should be further searched for the purposes of satisfying the requests on which this application

is founded, I am not prepared to find that the searches to date have been inadequate in so far as they have failed to disclose other documents that could fall within those requests. I take the view that this is a matter where it is open to the applicant, as the requestor, to initiate lines of inquiries that may then be pursued seriatim by the respondent in a cooperative way, mindful of its responsibilities under the Act. In regard to the latter, I am satisfied that the respondent has not been deficient or desultory in seeking to discharge its duties under the Act in its responses to date. The fact that a particular document relating to Dr Cairns has been produced from those released publicly, which document was not previously included in those provided to the applicant in response to his request does not, in my view, detract from that finding. It illustrates the difficulty of locating individual documents among the large number within ASIO's collection at the time, many of which will bear dual or multiple characterisation depending on what were the principal reasons why the information in them was recorded.

Put another way, the tribunal has to approach this aspect of its task with a degree of practicality. Though there may be singular instances that suggest the potential existence of further documents, lacking something more tangible, the tribunal should not give directions that would entail an exponentially widening search based merely on references to Dr Cairns. That would be to invite an endless search of corridors leading off corridors. Such a prospect can be avoided pragmatically, in the present case, by the applicant availing himself of his accumulated knowledge of Dr Cairns' affairs to make further requests for access to other files that, in the light of what he knows, might yield the further information he seeks.

Consideration of particular documents in dispute

Below, I deal with certain of the records claimed to be exempt where I have considered it desirable or necessary to make particular comments. In respect of other documents not so singled out, I have accepted the reasons more particularly set forth in the schedules to the affidavits of witness X (Exs 4 and 5) and upheld the claim on the bases there indicated.

Where I have concluded that any part of a document should not be accepted as exempt, apart from generally indicating it in these reasons, I have specified it more particularly in the confidential schedule to the reasons, the contents of which are not to be made public until 14 days after delivery of this decision and reasons.

(a) *Item 312, folios 3 and 4.* This is a report supplied in confidence through the UKSS. I am satisfied that this document qualifies for exemption under both s 33(1)(a) and (b) as its release could reasonably be expected to cause damage to Australian security arrangements and international relations with other countries and in consequence, damage to the security of the Commonwealth itself by reason of the potential diminution of the flow of intelligence from overseas sources. It also qualifies as material passed in confidence by an authority of a foreign government.

(b) *Item 312, folio 8.* This is a report of an investigating officer. I am *not* satisfied that the disclosure of the paras numbered 2 and 3 in this report can be characterised as exempt for the reasons set forth in either s 33(1)(a) or (e)(i) of the Act. Whilst the information in those paragraphs does relate to the methods and techniques by which ASIO, through its past operational procedures, has gathered information, and to the purposes for which that information might be sought, I consider that the revelation that ASIO used the particular source of information indicated there to ascertain the relationship between individuals is a matter that would be apparent to anyone who gives it a moment's thought. Since the onus is on the respondent in this instance (see s 51 of the Act), I am not satisfied that the onus has been discharged

with respect to the claims based on s 33(1)(a) and (e). I cannot accept that damage can *reasonably* be expected to flow from the revelation of the use of this source, any more than it would be the case if it became known that security organisations may from time to time resort to the telephone book to establish an address. I have formed the view, however, that paras 2 and 3 of the document *are* exempt by reason of s 33(1)(g) in that they do reveal information of a private nature and that release of the same would involve an unreasonable disclosure of private affairs. It might be thought that the information so revealed is well known and could be established through other sources but as I understand s 33(1)(g) it is the aspect of privacy that is paramount and merits special protection. There being a reasonable basis for concluding that disclosure of the fact that information was collected about an individual could embarrass that person, I uphold the document as exempt under s 33(1)(g).

In respect of the balance of the document, for the reasons given in the two affidavits of witness X (Exs 4 and 5) I am satisfied that it has a character falling within s 33(1)(a), (e)(i) and (g). Particularly in respect of the latter provision the information contained in the document, if disclosed, would amount to an unreasonable revelation of, and intrusion into, the private affairs of an individual.

(c) *Item 312, folio 9*. I accept and am satisfied that apart from the information indicated below, the balance of this document is exempt by reason of s 33(1)(a) and (e)(ii) since its disclosure could reasonably be expected to cause damage to the security of the Commonwealth, and further, the possible revelation of the identity of a confidential source.

I am not so satisfied in respect of the part indicated in the confidential schedule to these reasons. The facts there recorded represent partly facts and partly the recording of an opinion which may or may not be true. The fact that the statement which I consider is not entitled to an exempt status was to be found in ASIO records is quite equivocal. Nothing is to be inferred either as to its accuracy or liability.

With respect to the remainder of the document, I am satisfied that the respondent has discharged its onus for the reasons given in the affidavits of witness X.

(d) *Item 407, folio 2*. Memorandum from UKSS to ASIO. I am quite satisfied by virtue of s 33(1)(a) and (b) that this is a document given in highest confidence by an agency of a foreign government and its release could reasonably be expected to result in damage to Australian security, particularly having regard to the views expressed in Exs 6 and 7. For the reasons claimed in the schedule to the affidavits of witness X, I am satisfied that the material deleted from this document is exempt.

(e) *Item 407, folio 4 and 5*. For the reasons given in the affidavits of witness X, I consider this material is exempt. I should say that the statement deleted from para 3 of folio 4 should be regarded as exempt by reason of s 33(1)(a) alone.

(f) *Item 407, folio 84*. Whilst I would uphold the exempt status of most of the deletions made to this folio for each of the reasons asserted in the affidavit, I would not do so in respect of the two references in the confidential schedule. My reason for not being satisfied that those two items are exempt is that I do not accept that a more precise identification of two persons whose names are otherwise disclosed have any of the detrimental effects alleged. Whilst this may be only a small concession, I am of opinion that an overly rigorous resort to a claim for exemption is not justified in this instance.

(g) *Item 407, folio 86*. Apart from the material listed in the confidential schedule I would uphold the exempt status of the information deleted in this document for the reasons appearing in the schedule to the affidavit. My reason for not being satisfied in relation to the particular sentence in question is that, put on a

commonsense basis, I am not persuaded that harm could *reasonably* be expected to result from the disclosure I have indicated in the confidential schedule. Nothing novel or otherwise significant for security purposes flows, in my judgment, from the revelation of the interest ASIO held in regard to the information so indicated. In my opinion it should be disclosed as not satisfying any of the tests presented by s 33(1)(a), (e)(i) or (ii). I do not regard disclosure to the very limited extent that I propose, as disclosing the *modus operandi* of the organisation, or anything of substance about its process of analysis that would lead to damage to Australian security or prejudice to the operations of the organisation. Nor am I persuaded it would lead to the identification of a confidential source.

Other records claimed to be exempt

I have carefully taken into account the evidence, including reading each record in the light of the grounds for the claim of exempt status set forth in the schedules to Exs 4 and 5. I am satisfied that, subject to the variations I have indicated in the confidential schedule to these reasons, the decision under review should be affirmed in respect of the archival records to which access is sought by Mr McKnight and which are before me in the present application.

So far as the information that I have found not to be exempt is concerned, though no public interest test is to be read into s 33 of the Act, a sense of proportion should nevertheless be maintained in relation to records that fall within the open record period. The concessions made in this decision in favour of disclosure of particular information may not appear of great significance. But they represent my view of the relevant provisions of the Act that, consistently with the onus lying on the respondent to justify exemption, an overly strict approach is not to be encouraged.

Ruling on adequacy of search

For the reasons and in the light of the findings set forth above, I do not propose to give any directions for the conduct of further searches by the respondent or ASIO. This does not, however, prevent the applicant pursuing other requests for access to archival material that may relate to Dr Cairns.

SCHEDULE 1 --- EXHIBITS

Documents filed with the tribunal pursuant to s 37 of the Administrative Appeals Tribunal Act 1975: Ex 1.

Affidavit of applicant sworn 30 April 1991 attesting to oral refusal to grant access (the primary decision under review): Ex 2.

Affidavit (open) of witness X sworn 1 November 1990: Ex 3.

Affidavit (open except for name of deponent and identifying initials) of witness X sworn 29 April 1991: Ex 4.

Affidavit (closed) of witness X sworn 31 January 1991: Ex 5, including corrected para 18 thereof: Ex 5A.

Letter dated 3 October 1984 from UK: Ex 6 (closed).

Letter dated 16 April 1991 from UK: Ex 7 (closed).

Letter dated 30 April 1991 from foreign agency: Ex 8 (closed).

Telex — (later supplied): Ex 9 (closed).

Documents (being those folios in items 312 and 407) in respect of which claim of exemption made: Ex 10 (subject to order of non-disclosure).

Document being copy of Item 407, folio 40: Ex 11.

Affidavit sworn 14 June 1991 by witness X: Ex 12.

Pages numbered 68 and 69 referred to in the affidavit accepted into evidence as Ex 12: Ex 13.

Pages 2 to 7 of Vol 2 of the report of the Royal Commission on Intelligence, 4th report, 1977, being the Directive of Prime Minister Chifley dated 16 March 1949 establishing ASIO and that of Prime Minister Menzies dated 6 July 1950 setting forth the Charter of ASIO: Ex 14.

Pages numbered 102-106 being extracts from first report of Royal Commission into ASIO: Ex 15.

SCHEDULE 2

RELEVANT PROVISIONS OF ARCHIVES ACT 1983

“3(1) In this Act, unless the contrary intention appears:

‘Archives’ means the Australian Archives established by this Act;

‘Commonwealth record’ means:

(a) a record that is the property of the Commonwealth or of a Commonwealth institution; or

(b) . . .

‘record’ means a document (including any written or printed material) . . . that is, or has been, kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connection with any event, person, circumstance or thing;

...

“(2) For the purposes of this Act, the archival resources of the Commonwealth consist of such Commonwealth records and other material as are of national significance or public interest and relate to:

...

but do not include:

...

(j) exempt material

...

“(7) For the purposes of this Act, a record is in the open access period if a period of 30 years has elapsed since the end of the year ending on 31 December in which the record came into existence.

...

“7(1) There shall be a Director-General of the Australian Archives, . . .

“(2) The Director-General, in addition to exercising powers or performing duties expressly conferred or imposed on him by this Act, may, in the name of the Archives, exercise any powers and perform any duties that are by this Act expressed to be conferred or imposed on the Archives.

...

“31(1) Subject to this Part, the Archives shall cause all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.

“(2) A Commonwealth institution that has the custody of Commonwealth records in the open access period, other than exempt records, shall make such arrangements with the Archives as will enable the Archives to meet its obligations under subsection (1) in relation to those records.

...

“33(1) For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds:

- (a) information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth;
- (b) information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth, being information or matter the disclosure of which under this Act would constitute a breach of that confidence;
- (c) ...
- (d) information or matter the disclosure of which under this Act would constitute a breach of confidence;
- (e) information or matter the disclosure of which under this Act would, or could reasonably be expected to:
 - (i) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, . . . or prejudice the enforcement or proper administration of the law in a particular instance;
 - (ii) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law; or
- ...
- (f) ...
- (g) information or matter the disclosure of which under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);

...
“(2) For the purposes of this Act, a Commonwealth record is an exempt record if it is of such a nature that:

- (a) ...
- (b) disclosure of the record would be contrary to the public interest.

...
“38. Where a record that would otherwise be required to be made available for public access under this Part is an exempt record, the Archives may, where it is reasonably practicable to do so, make arrangements for part of, or a copy of part of, that record to which access could be given without disclosing information or matter by reason of which the record is an exempt record to be made available for public access in accordance with this Part.

...
“40(1) This section applies in relation to an application to the Archives for access, or for an extension of partial access, to a record referred to in section 31, being an application:

...

“(5) Where, in relation to an application, a decision is made relating to a refusal to grant access to a record in accordance with the application, the decision-maker shall cause the applicant to be given notice in writing of the decision and the notice shall:

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision;
- (b) ...
- (c) ...

...
“42(1) Where a person has made an application to which section 40 applies and is dissatisfied with the decision on the application, he may, within 28 days after the day on which notice of the decision was given to him or within such further period as the Archives allows, apply in writing to the Archives for a reconsideration of the decision.

(2) ...

“43(1) Subject to this section, an application may be made to the Administrative Appeals Tribunal for a review of a decision of the Archives in respect of access to a record, being:

- (a) a decision refusing to grant to the applicant access to the record on the ground that the record is an exempt record or is a Commonwealth record to which Division 3 does not apply;

...
“(2) Subject to subsection (3), where, in relation to a decision referred to in subsection (1), a person is or has been entitled to apply under section 42 for a reconsideration of the decision, that person is not entitled to make an application under subsection (1) in relation to that decision, but may make such an application in respect of the decision made on such a reconsideration.

...
“(7) If the Tribunal, upon application for a declaration under this subsection made to it by a person to whom a notice has been furnished under subsection 40(5), considers that the notice does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision to which the notice relates, the Tribunal may make a declaration accordingly, and, where the Tribunal makes such a declaration, the person responsible for furnishing the notice shall, as soon as practicable but in any case within 28 days after the Tribunal makes the declaration, furnish to the applicant an additional notice or additional notices containing further and better particulars in relation to matters specified in the declaration with respect to those findings, that evidence or other material or those reasons.

“44(1) Subject to this section, in proceedings under this Division, the Tribunal has, in addition to any other power, the power to review any decision of the Archives upon an application for access to a record and to decide any matter in relation to that application that, under this Act, could have been or could be decided by the Archives, and any decision of the Tribunal under this section has the same effect as a decision of the Archives.

“(2) Where an applicant makes an application under section 43 in respect of a decision of the kind referred to in paragraph (1)(d) of that section, the Tribunal has power to grant access to the record to which the application relates, or to grant

access to that record on particular conditions, notwithstanding any determination made by the Director-General under section 37 in relation to that record.

“(3) Where, in proceedings before the Tribunal in pursuance of an application under section 43, it is established that a record is an exempt record, the Tribunal does not, except as provided by subsection (7), have power to decide that access is to be granted to the record.

“(4) Where there is in force in respect of a record a certificate under section 34, the powers of the Tribunal do not extend to reviewing the decision to give the certificate but the Tribunal, constituted in accordance with section 46, may determine such question in relation to that certificate as is provided for in whichever of subsections (5) and (6) applies in relation to that certificate.

“(5) ...

“(6) ...

“(7) On a review in pursuance of an application to the Tribunal under section 43, the Tribunal may, if it is satisfied that it would be practicable to give access to, or a copy of, part of an exempt record in a form that would not disclose information or matter by reason of which the record is an exempt record, direct that access be given accordingly.

...

“50. For the purposes of this Part and of the application of the Administrative Appeals Tribunal Act 1975 in respect of proceedings under this Part:

(a) a decision given by the Archives shall be deemed to have been given by the Director-General; and

(b) ...

“51. In proceedings before that Tribunal in pursuance of an application under section 43:

(a) the Archives has the onus of establishing that a decision given by the Archives was justified or that the Tribunal should give a decision adverse to the applicant; and

(b) the Tribunal is not restricted by any determination made at any time under section 35.

...”

CONFIDENTIAL SCHEDULE

Attached to this document

<i>Item</i>	<i>Folio</i>	<i>Material claimed as exempt which the tribunal finds not to be such</i>
312	9	In lines 1 to 5 of the first substantive paragraph of folio: namely the words “J F CAIRNS (James Ford CAIRNS deletion) of the Faculty of Economics and Commerce, University of Melbourne, (deletion) was at one time a member of the Communist Party of Australia. It is not known whether he still is” [rest deleted]
407	84	[Next to Dr A C JACKSON] “JACKSON, Allan Cameron” [Next to Mr J F CAIRNS] “CAIRNS, James Ford”

- 407 86 After “3. *With continued reference to H Q* . . . the words (Deletion) “Up to date details of membership (deletion) in the various clubs are not available to this Office.” [rest of deletion upheld]

SPENCER ZIFCAK
BARRISTER

**Secretary, Department of Prime Minister and Cabinet
and Summers (Freedom of information) [2019] AATA
5537 (20 December 2019)**

Division: FREEDOM OF INFORMATION DIVISION

File Number: **2018/0686**

Re: **Secretary, Department of Prime Minister and Cabinet**
APPLICANT

And **William Summers**
RESPONDENT

DECISION

Tribunal: **Justice M A Perry, Deputy President**

Date: **20 December 2019**

Place: **Sydney**

The Tribunal determines:

1. The decision under review be set aside.
2. In substitution thereof, the documents the subject of the request by the respondent for access are exempt under s 33(a)(iii) of the *Freedom of Information Act 1982* (Cth).

.....[SGD].....
Justice M A Perry, Deputy President

CATCHWORDS

FREEDOM OF INFORMATION – request for access to all letters from the Prime Ministers of Australia to the Queen since 1 January 2013 – where all letters were received by the Queen in her capacity as Queen of Australia – whether documents exempt under s 33(a)(iii), Freedom of Information Act 1982 (Cth) (**FOI Act**) on the ground that disclosure “would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth” – where appropriate to require the documents to be produced for inspection by the Tribunal under s 58E, FOI Act – where content of individual letters not determinative – whether onus of establishing “could reasonably be expected to” must be discharged on the balance of probabilities – construction of “the international relations of the Commonwealth” – consideration of the tripartite convention, the cardinal convention, and the convention and practice of confidentiality with respect to correspondence between Australian Prime Ministers and the Queen – where mutual expectation that the confidentiality convention will be strictly observed embodied in exchange of letters – where confidentiality convention forms part of the constitutional systems of other Commonwealth realms – where the evidence established that disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth by reason of Australia being regarded as a less trustworthy confidant – where documents exempt under s 33(a)(iii), FOI Act

FREEDOM OF INFORMATION – whether letters conditionally exempt under s 47C, FOI Act – where the letters contained deliberative matter under s 47C(1), FOI Act – where letters created in furtherance of the tripartite convention – where the confidentiality convention applies to protect the neutrality of the Crown and ensure full and frank discussion between Australian Prime Ministers and the Queen – where release of documents would on balance be contrary to the public interest

LEGISLATION

Freedom of Information Act 1982 (Cth) ss 33, 47C

Governor-General Act 1974 (Cth)

Freedom of Information Act 2000 (UK) s 37

CASES

Attorney-General's Department v Cockcroft (1986) 10 FCR 180
Commonwealth v Hittich (1994) 53 FCR 152
Dickson v Viscount Combermere (1863) 3 F & F 527; 176 ER 236
Evans v Information Commissioner [2012] UKUT 313 (Administrative Appeals Chamber)
Jorgensen v Australian Securities and Investments Commission [2004] FCA 143; (2004) 208 ALR 73
Kamasae v Commonwealth (No 4) [2016] VSC 492; (2016) 52 VR 368
Maksimovic and Attorney-General's Department [2008] AATA 1089; (2008) 109 ALD 417
McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423
Re Dunn and Department of Defence [2004] AATA 1040; (2004) 84 ALD 419
Re Haneef and Australian Federal Police [2009] AATA 51; (2009) 49 AAR 395
Re Lobo and Department of Immigration and Citizenship [2011] AATA 705; (2011) 56 AAR 1
Re Maher & Attorney-General's Department (1985) 7 ALD 731
Re McKnight and Australian Archives (1992) 28 ALD 95
Re O'Donovan and Attorney-General's Department (1985) 8 ALD 528
Re State of Queensland and Australian National Parks and Wildlife Service (1986) 13 ALD 158; (1986) 5 AAR 328
Re Wang and Department of Employment, Education and Training (1988) 15 ALD 497
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111
Secretary, Department of Foreign Affairs and Trade v Whittaker [2005] FCAFC 15; (2005) 143 FCR 15
Van Xinh Bui and Department of Foreign Affairs and Trade [2005] AATA 97
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SECONDARY MATERIALS

Walter Bagehot, *The English Constitution* (Vol III, 1909)
 Vernon Bogdanor, *The Monarchy and the Constitution* (Clarendon Press, 1995)
 Peter Boyce, *The Queen's Other Realms* (2008)
 Ian Killey PSM, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2012)
 Sir Ivor Jennings, *The Law and the Constitution* (5th edition, 1959)
 A Twomey, *The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018)
 Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (version 1.4, December 2016)
The Cabinet Manual: A guide to laws, conventions and rules on the operation of government (1st edition, 2011)

REASONS FOR DECISION

Justice M A Perry, Deputy President

20 December 2019

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1. INTRODUCTION

- 1 This case concerns a request by Mr William Summers for access under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) to “*all letters sent from the Prime Minister(s) of Australia to Queen Elizabeth II (or her representatives) since 1 January 2013*”. The Department of the Prime Minister and Cabinet (the **Department**) was deemed to have refused this request when it did not make a decision on 8 January 2017.
- 2 On 10 January 2017, Mr Summers requested that, in effect, the Office of the Australian Information Commissioner (**OAIC**) review the deemed decision under s 54L of the FOI Act.
- 3 On 18 January 2017, the Acting Assistant Secretary of the Department (the **Assistant Secretary**) made a decision refusing access to the 11 documents then identified as relevant to the request pursuant to arrangements approved by the Secretary of the Department under s 23 of the FOI Act (T10). In making her decision, the Assistant Secretary relied on the damage to the international relations of the Commonwealth exemption in s 33(a)(iii) of the FOI Act and the deliberative processes exemption in s 47C.
- 4 Mr Summers notified the OAIC on 20 January 2017 that he was not satisfied with that decision and wished the review to proceed (T12). During the course of the review before the Information Commissioner, the Department identified a further two documents as being within the scope of the request, but submitted that the 13 documents are exempt in full from disclosure under s 33(a)(iii) and that 12 of them would also be conditionally exempt in full under s 47C.
- 5 On 16 January 2018, the Information Commissioner made a decision under s 55K of the FOI Act setting aside the decision of the Assistant Secretary, and substituted a decision that the documents are not exempt from release (T26). The Department seeks review, pursuant to s 57A of the FOI Act, in the Administrative Appeals Tribunal (**Tribunal**) of this decision.
- 6 In the course of preparing for the hearing before the Tribunal, the Department located a further document relevant to Mr Summers’ request. As a result, there are 14 documents now in issue (applicant’s statement of facts, issues and contentions (**ASFIC**) at [7]). The Department alleges (and the respondent does not dispute) that all 14 documents comprise letters *from* the Prime Minister of Australia *to* Her Majesty the Queen between 1 January 2013 and 8 November 2016 (the **Letters**). Aside from document 10, in respect of which a

claim is made only under s 33(a)(iii), the Letters are said to be both exempt under s 33(a)(iii) and provisionally exempt under s 47C.

7 Where, as here, a claim is made that a document is an exempt document under s 33 of the FOI Act, the Tribunal must request the Inspector-General of Intelligence and Security to appear personally and give evidence on the damage that might be caused (relevantly) to the international relations of the Commonwealth if access to the document were given in accordance with the request (s 60A(2)(a)(iii)). The Inspector-General must comply with such a request unless, in her opinion, she is not appropriately qualified to give evidence on the matters in relation to which her evidence has been requested. In the present case, the Deputy President wrote to the Inspector-General requesting her to give evidence pursuant to s 60A(2) of the FOI Act. By letter dated 15 March 2019, the Inspector-General replied advising that the question of whether the correspondence from the Prime Minister to the Queen at issue in this matter could reasonably be expected to harm international relations was outside her area of expertise as Inspector-General and for this reason, she declined to give evidence in the matter.

8 For the reasons set out below, I have reached the conclusion that all of the Letters are exempt under s 33(a)(iii) of the FOI Act. Further and in any event, I consider that the Letters, save for document 10, are conditionally exempt under s 47C and that it would be contrary to the public interest for them to be released.

2. WITNESSES

9 The Secretary relied upon the affidavit evidence of the following witnesses, both of whom were also cross-examined at the hearing:

- (1) the affidavit of Andrew Todd, First Assistant Secretary of the Consular and Crisis Management (**CCM**) Division, Department of Foreign Affairs and Trade (**DFAT**) affirmed on 25 May 2018 (the **Todd affidavit**); and
- (2) the affidavits of Mark Fraser LVO OAM, Official Secretary to the Governor-General, affirmed on 1 June 2018 (the **first Fraser affidavit**) and affirmed on 14 August 2018 (the **supplementary Fraser affidavit**).

10 Mr Fraser held the position of Deputy Official Secretary to the Governor-General from 16 January 2009 before being appointed to the position of Official Secretary to the Governor-General (**OSGG**) from 26 June 2014 to 17 August 2018 (T, 21 March 2019 at p. 43). The

OSGG is an office established by s 6 of the *Governor-General Act 1974* (Cth) constituted by the Official Secretary and the staff employed under s 13 of the *Governor-General Act*. The function of the OSGG is to assist the Governor-General (s 6(3), *Governor-General Act*). Subsequently, Mr Fraser came to hold the position of First Assistant Secretary of the Protocol and International Visits Division of the Department which was his current position at the time of the Tribunal hearing (T, 21 March 2019 at p. 43.15).

- 11 Mr Todd has over 25 years' experience as a career diplomat. He has been the First Assistant Secretary of the CCM Division since October 2017. His responsibilities in that position include overseeing DFAT's consular policy, crisis response, crisis management, and travel advice. Mr Todd was also the Deputy High Commissioner at the Australian High Commission in London from January 2013 to December 2016. His responsibilities as Deputy High Commissioner included assisting the Australian High Commissioner in managing Australia's diplomatic relationship with the United Kingdom (UK), providing information and advice to the Australian Government on developments in the UK, developing policy responses and initiatives, communicating with senior UK government officials, and liaising and communicating with members of the Royal Household, including the Private Secretary to the Queen, regarding Australia's constitutional relationship with the Queen. Mr Todd held a variety of earlier roles within DFAT including Counsellor, Congressional Liaison at the Embassy of Australia in Washington DC (1998-2002) where his responsibilities included reporting on domestic political developments in the United States and promoting links between Australia and the United States. During his posting to the High Commission in London, Mr Todd was involved in facilitating the transmission of a number of letters from Australian Prime Ministers to the Private Secretary's Office (Todd affidavit at [9]).
- 12 Based upon these matters, I accept that Mr Fraser and Mr Todd hold ample relevant experience qualifying them in particular to explain the constitutional conventions and practices pertaining to correspondence between the Queen and Australian Prime Ministers, and the practices and conventions observed by other Commonwealth realms. In referring to the **Commonwealth realms**, I am referring to those countries within the Commonwealth of Nations for whom the Queen is monarch, including the UK, Australia, Canada, and New Zealand. I also accept that, based upon their extensive experience and particularly Mr Todd's extensive experience as a diplomat, they are qualified to give evidence as to the sensitivity of communications between the Queen and the Prime Minister and the nature and extent of damage to Australia's international relations with the Queen, the Royal Household, and other

countries, particularly the Commonwealth realms, which may ensue if correspondence from an Australian Prime Minister to the Queen were released. Nor was their expertise to address the matters the subject of their evidence challenged by the respondent. In this regard, I consider that it is appropriate to adopt an approach akin to that adopted by Macaulay J in *Kamasae v Commonwealth (No 4)* [2016] VSC 492; (2016) 52 VR 368 where his Honour said, in considering evidence by Mr Sloper, the First Assistant Secretary of the Pacific Division of the Department of Foreign Affairs and Trade, on the sensitivity of material to Australia's relationship with Papua New Guinea, that:

36. ... I bear in mind the risk of underestimating the sensitivity of certain information by virtue of not having the nuanced understanding that a person with Mr Sloper's knowledge and experience would have.

37. For these reasons I consider that Mr Sloper's views should be accorded significant weight especially regarding specific subject matter which is likely to be of real sensitivity. Indeed, because of Mr Sloper's specialised experience in these matters, and because the court does not have the same experience in dealing with the diplomatic service network and foreign governments, the court would be slow to adopt a view different to his concerning the significance and effect of communications between governments and officials, and within a government, about another government and its officials. Of course, that is not to deny that the court is bound to form its own views about these matters, but I would need to have a good reason to prefer some other view.

- 13 Finally, Mr Todd had read a copy of the Letters for the purpose of giving evidence about them in the Tribunal proceeding in the lead-up to affirming his affidavit on 25 May 2018 but had not read them since that time (Todd affidavit at [6]; T, 21 March 2019 at p. 62.1-21). Mr Fraser, however, had not read the Letters and had no personal knowledge of their contents. Rather, Mr Fraser relied upon advice from the solicitors for the Department that the Letters were correspondence between Australian Prime Ministers and the Queen (T, 21 March 2019 at p. 44.27-45).

3. ISSUES

3.1 The substantive issues

- 14 There are three substantive issues for determination.

- (1) Are the Letters exempt from release under s 33(1)(iii) of the FOI Act because disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth?
- (2) If the answer to (1) is "no", are the Letters conditionally exempt under s 47C of the FOI Act?

- (3) If the answer to (2) is “yes”, would release of the Letters on balance be contrary to the public interest?

3.2 A preliminary issue: inspection of the Letters

15 A preliminary issue also arose as to whether the Tribunal should inspect the Letters in order to determine whether they were exempt under s 33.

16 Section 58E of the FOI Act limits the circumstances in which the Tribunal may require production and inspection of documents claimed to be exempt under ss 33, 34 and 45A of the FOI Act. Section 58E relevantly provides that:

(1) In any proceedings before the Tribunal under this Act in relation to a document that is claimed to be an exempt document under section 33, 34 or 45A, the Tribunal is entitled to require the production of the document in accordance with this section and not in accordance with section 64, section 37 or 38AA of the *Administrative Appeals Tribunal Act 1975* or otherwise.

(2) If the Tribunal is not satisfied by evidence on affidavit or otherwise that the document is an exempt document under section 33, 34 or 45A, the Tribunal may require the document to be produced for inspection by the Tribunal as constituted for the purposes of the proceeding.

(3) If, after an inspection of a document under this section, the Tribunal is satisfied that the document is an exempt document, the Tribunal must return the document to the person by whom it was produced without permitting a person to have access to the document or disclosing the contents of the document to a person, unless the person is:

(a) a member of the Tribunal as constituted for the purposes of the proceeding; or

(b) a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff; or

(c) in the circumstances permitted under paragraph 60A(6)(a) – the Inspector-General of Intelligence and Security.

17 As such, it was not in issue that the Tribunal was only entitled to require production of documents which are claimed to be exempt under s 33 if the Tribunal is not satisfied by evidence on affidavit or otherwise that the documents are exempt under s 33 (ss 58E(1) and (2), FOI Act).

18 Having considered the Department’s affidavit evidence in chief and the parties’ submissions about the evidence in writing and at the hearing, I determined at the hearing that I was not satisfied that the Letters were exempt documents under s 33 of the FOI Act based upon the material before me at that time. Nor was there any suggestion that the documents were exempt under ss 34 or 45A. In the circumstances, I considered that it was appropriate to

require the documents to be produced for inspection by the Tribunal as constituted by me under s 58E(1) and (2) as the respondent submitted, subject to appropriate confidentiality directions. Notably, s 58E(2) provides only for inspection “*by the Tribunal as constituted for the purposes of the proceeding*”. It does not vest any discretion in the Tribunal to permit the parties and/or their legal representatives to inspect the documents.

4. PRINCIPLES

4.1 The scheme of the FOI Act

19 The general objects of the FOI Act are set out in s 3 as follows:

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia’s representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government’s activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

20 The term “agency” is defined to include “*a Department*” or a “*prescribed authority*” with the latter including the person holding, or performing the duties of, an office established by an enactment. It was not in issue that the Department was “*a Department*” for the purposes of the Act.

21 In furtherance of the object in s 3(1)(b) of the FOI Act, s 11(1) provides that:

- (1) ***Subject to this Act***, every person has a legally enforceable right to obtain access in accordance with this Act to:

- (a) a document of an agency, other than an exempt document; or
- (b) an official document of a Minister, ***other than an exempt document***.

(emphasis added)

22 The right created by s 11(1) is not affected by the person's reasons or perceived reasons for seeking access (s 11(2)).

23 Conversely, s 11A(3) provides that where a person makes a request in accordance with s 15(2) to an agency or Minister for access to a document and pays the required charge, the agency or Minister **must** give the person access to the document in accordance with the Act "*subject to this section*". As to the latter, s 11A(4), (5) and (6) exempt certain classes of documents from the obligation to give access as follows:

(4) The agency or Minister is **not** required by this Act to give the person access to the document at a particular time if, at that time, the document is an **exempt document**.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects – information or documents otherwise accessible)).

(5) The agency or Minister must give the person access to the document if it is **conditionally exempt** at a particular time **unless** (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

(6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is **both**:

- (a) a conditionally exempt document; and
- (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

(emphasis added)

24 The term "*exempt document*" is relevantly defined in s 4(1) to include "*a document that is exempt for the purposes of Part IV (exempt documents) (see section 31B)*". Section 31B in turn provides that:

A document is **exempt** for the purposes of this Part if:

- (a) it is an exempt document under Division 2; or

(b) it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

(emphasis in original)

25 In short, as summarised in the table in s 31A:

How this Act applies to exempt and conditionally exempt documents			
Item	If ...	then ...	because of ...
1	a document is an exempt document under Division 2 (exemptions) or under paragraph (b) or (c) of the definition of exempt document in subsection 4(1)	access to the document is not required to be given	subsection 11A(4).
2	a document is a conditionally exempt document under Division 3 (public interest conditional exemptions)	access to the document is required to be given, unless it would be contrary to the public interest	subsection 11A(5) (see also section 11B (public interest factors)).
3	a document is an exempt document as mentioned in item 1, and also a conditionally exempt document under Division 3	access to the document is not required to be given	subsections 11A(4) and (6), and section 32 (interpretation).
4	access to a document is refused because it contains exempt matter, and the exempt matter can be deleted	(a) an edited copy deleting the exempt matter must be prepared (if practicable); and (b) access to the edited copy must be given;	section 22.
5	a document is an exempt document because of any provision of this Act	access to the document may be given apart from under this Act	section 3A (objects – information or documents otherwise accessible).

26 It follows, as French CJ, Crennan, Kiefel and Bell JJ emphasised in *Kline v Official Secretary to the Governor-General* [2013] HCA 52; (2013) 249 CLR 645 (**Kline**) at [37], that the FOI Act “does not pursue its objects, as legislative purposes, at any cost.” Rather, their Honours explained:

37. ... The statutory scheme is complex in achieving a balance between the exposure of some government processes and activities to increased public participation and scrutiny, by making information freely available to persons on request, and exempting other government processes and activities from public participation and scrutiny, in order to secure a competing or conflicting public interest in non-disclosure.

- 27 As to the balance struck by the Act, it is notable that the Governor-General is not subject to the FOI Act because she or he is not an “agency” as defined in s 4 of the Act (*Kline* at [33]). Furthermore, s 6A of the FOI Act provides that the Act does not apply to any request for access to a document of the OSGG unless the document is of an administrative nature, that is, unless it concerns the management and administration of office resources (*Kline* at [41]). It follows, as the Department emphasises, that if Mr Summers had requested the Letters from the Office of the Official Secretary to the Governor-General (**OOSGG**) and the OOSGG had been in possession of the Letters, the OOSGG would have been entitled to refuse access under s 6A(1). However, as the respondent submitted, there is no express exemption for correspondence of this nature where it is held by the Department. As such, the question of access must be decided by reference to Division 2 (ss 33-47A) of Part IV of the FOI Act which creates a variety of exemptions from the obligations imposed by the FOI Act, and Division 3 of Part IV which creates a number of conditional exemptions.
- 28 Exemptions in Division 2 include cabinet documents (s 34), documents affecting law enforcement and protection of public safety (s 37), and documents protected by secrecy provisions or containing material obtained in confidence (ss 38 and 45 respectively). I consider the exemption in s 33 later in these reasons.
- 29 As the respondent acknowledged, a document which falls within an exemption in Division 2 of Part IV such as s 33, must not be disclosed by virtue of s 11A(4). Nothing further need be established.
- 30 The position is different with respect to documents falling only within Division 3 of Part IV. As mentioned, Division 3 contains a scheme of conditional exemptions, i.e. exemptions from disclosure under s 11 that are conditional upon there being a public interest to be served by non-disclosure. As such, it is not sufficient merely to establish that a document is of a kind falling within a provision in Division 3. In the present case, the Department alleges that all but one of the Letters are also or in the alternative conditionally exempt under s 47C, and resists their disclosure on the ground that it would be contrary to the public interest. I consider the conditional exemption under s 47C below, after considering whether s 33 applies.

4.2 The exemption in s 33 of the FOI Act

4.2.1 Criteria in s 33, FOI Act

31 Section 33 of the FOI Act provides that:

A document is an exempt document if disclosure of the document under this Act:

- (a) would, *or could reasonably be expected to*, cause damage to:
 - (i) the security of the Commonwealth;
 - (ii) the defence of the Commonwealth; or
 - (iii) the international relations of the Commonwealth; or
- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

Note: See also subsection 4(10).
(emphasis added)

32 Before turning to consider the proper construction of s 33(a)(iii), it is helpful to emphasise the following aspects of s 33.

33 First, as the Full Court held in *Commonwealth v Hittich* (1994) 53 FCR 152 at 154, s 33(a)(iii) (then s 33(1)(a)(iii)) “does not provide any basis for a public interest criterion extending beyond the terms of the section. Either a document is within the section, in which case it is an exempt document, or it is not”: see also e.g. *Re O’Donovan and Attorney-General’s Department* (1985) 8 ALD 528 (**O’Donovan**) at 534 (19)-(20) (Deputy President Hall); and *Re Lobo and Department of Immigration and Citizenship* [2011] AATA 705; (2011) 56 AAR 1 (**Lobo**) at [85] (Deputy President Forgie). Equally, the strong personal interest which an applicant may have in obtaining access to the document in question is irrelevant: see e.g. *Van Xinh Bui and Department of Foreign Affairs and Trade* [2005] AATA 97 (**Bui**) at [24] (Allen SM); *Re Wang and Department of Employment, Education and Training* (1988) 15 ALD 497 (**Wang**) at 500 (17) (Deputy President Thompson).

34 Secondly, the criteria prescribed by s 33(a) and (b) do not turn upon an assessment of the reasonableness of the Department’s claims. Rather, they turn upon cause and effect which can reasonably be anticipated (*Re Maher & Attorney-General’s Department* (1985) 7 ALD 731 (**Re Maher**) at 742 (Davies J (President))). As such, the Department correctly submits that s 33 does not require the Tribunal to consider the objective reasonableness of the

Queen's expected response to disclosure or that of the Royal Household or member States of the Commonwealth.

35 Thirdly, the Full Court observed in *Secretary, Department of Foreign Affairs and Trade v Whittaker* [2005] FCAFC 15; (2005) 143 FCR 15 (*Whittaker*) that the relevant time for considering damage that might be caused by disclosure for the purposes of s 33(a) is the time at which disclosure is to occur, in contrast to s 33(b). As the Court explained:

26. ... That is to say, disclosure of a document at the time of its creation might cause damage, but if at the time when access is sought disclosure would not cause damage, the document will not be exempt under s 33(1)(a)(iii). On the other hand, if disclosure of a document, whenever the disclosure is made, would divulge any matter communicated in confidence, the document will be exempt under s 33(1)(b), even if that matter is no longer confidential at the time when access is sought.

36 Finally, it is clear from s 58(2) that the Tribunal has no discretion to permit disclosure once satisfied that the ground of exemption in s 33(a) or (b) is established even though an agency may permit access in accordance with other laws and practices: see e.g. *O'Donovan* at 534 (20) (Deputy President Hall); and *Re Dunn and Department of Defence* [2004] AATA 1040; (2004) 84 ALD 419 at [80] (Full Tribunal).

4.2.2 The respondent's contention that the content of the individual Letters is determinative

37 The respondent contends that s 33(a)(iii) of the FOI Act should not be construed as conferring an absolute exemption upon a class of communications between the Queen and Prime Minister. He submits that, in contrast to the absolute exemption under the FOI Act afforded to the Governor-General and the OSGG, there is no general exemption for this class of information and s 33 should not be construed as if it created such an exemption. As such, the respondent submits that the content of each of the Letters should be considered individually in order to determine whether their content reveals that they could reasonably be expected to cause damage to the international relations of the Commonwealth. To conclude otherwise, in the respondent's submission, would have the effect of creating an exemption for all information contained in a letter from a Prime Minister to the Queen irrespective of its content despite the fact that the Parliament has not seen fit to enact any such general exemption. In his submission, it would also be highly surprising if s 33(a)(iii) operated as if it were an absolute exemption in relation to communications with the Queen where that result has otherwise been achieved only by the enactment of a specific exemption to that effect in the UK and New Zealand (RSFIC at [23]-[25]).

38 This construction should be rejected. There is no foothold in the text of s 33 for a construction that would limit the grounds on which a document may reasonably be expected to cause damage to Australia's international relations, or indeed to Australia's security or defence as is also provided for in s 33(a). Nor did the respondent cite any authority in support of the submission that the terms of s 33 should be read down in the manner suggested or point to any purpose to be served by so narrow a construction. To the contrary, the reason for the breadth of the exemption is obvious from the significance of the subject matter for the nation with which the provision deals. It can readily be imagined, for example, that in some cases the risk to Australia's international relations, defence or security might be posed by the source of the information, the information itself, or in this case, as the evidence establishes, by the very nature of the communication itself. No reason is apparent as to why the provision should exempt some documents and not others depending upon such technical distinctions. Rather, the "check" in the balance between these vital interests on the one hand, and the public's interest in disclosure on the other hand, is found in the necessity to establish that disclosure "*would, or could reasonably be expected, to cause damage*" to one of the specified interests. It is not therefore sufficient, as I later explain, merely to assert such damage.

4.2.3 "*would, or could reasonably be expected to ...*" (s 33(a)(iii), FOI Act)

39 It was not in issue that, by virtue of s 61(1)(a) of the FOI Act, the onus lies upon the Department on this review of establishing that the decision of the Information Commissioner is not justified, or that the Tribunal should give a decision adverse to the applicant in relation to the request for access. That provision does not specify that the onus must be discharged on the balance of probabilities or according to some other standard.

40 The Department submitted in its SFIC at [44] that "*the phrase 'could reasonably be expected to' does not require the decision-maker to be satisfied, on the balance of probabilities, that the release of the document will cause damage of a relevant kind. What is required is a possibility (and not probability) of damage that is reasonably based and supported not only by assertion but by evidence of probative value*" (footnotes omitted). The respondent submitted that the onus of establishing that the exemptions are made out must be discharged by the Department on the balance of probabilities, relying upon the decision in *Fisse v Secretary, Department of the Treasury* [2008] FCAFC 188; (2008) 172 FCR 513 at [30] and [36] (Buchanan J) and [91] (Flick J) (citing with approval *Jorgensen v Australian Securities*

and Investments Commission [2004] FCA 143; (2004) 208 ALR 73 (**Jorgensen**) at [65] (Weinberg J)): see the respondent's statement of facts, issues and contentions (**RSFIC**) at [16]; cf e.g. the approach adopted in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 226 FCR 555 at [115] (Flick and Perry JJ).

41 However, the decision in *Fisse* concerned the question of whether the Tribunal had erred in holding that a report was exempt under s 34(1)(a) of the FOI Act on the ground that it was created for the purpose of consideration by, and was in fact submitted to, Cabinet, as well as s 36(1)(b) on the ground that disclosure would be contrary to the public interest because it would breach Cabinet confidentiality. Section 33, on the other hand, requires the Tribunal relevantly to engage in an evaluative task, namely, to determine whether, if disclosed, the document “*would, or could reasonably be expected to, cause damage*” to one of the enumerated interests. The answer initially given by Mr Howe QC for the Department to this difficulty was that the Tribunal must be satisfied on the balance of probabilities that damage to the international relations of the Commonwealth is a reasonable possibility (T, 21 March 2019 at 8.34-9.9) – a test, with respect, that makes little sense. On being further pressed, however, he submitted that “*basically your Honour simply needs to be satisfied as to whether or not the infliction of harm is a real possibility based upon matters of substance and not just mere assertion or allegation and the like*” (T, 21 March 2019 at 9.8-9). However, even to speak of “*a real possibility*” is to impose a gloss on the words of the section.

42 In this regard it is true that in *Jorgensen* Weinberg J stated with respect to the onus imposed by s 61 of the FOI Act that it “*seems*” that the applicant has the onus of proving that the decision to claim the exemption is justified “*on the balance of probabilities*”, citing *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 (**Searle**) at 116. It is also true to say that the grounds on which the exemption was claimed in *Jorgensen* included s 37(1)(b) of the FOI Act which provided that a document was exempt if its disclosure “*would, or could reasonably be expected to*” have certain effects. However, Weinberg J does not appear to have definitively decided the issue, but only to have indicated what “*seems*” to be the test. Nor, with respect and in any event, does the decision in *Searle* support the proposition that an applicant must establish that it is more probable than not that an exemption expressed in terms of reasonable expectations applies to the documents in question. To the contrary, the Full Court in *Searle* held that the words “*could reasonably be expected to*” in s 43(1)(b) and (c) of the FOI Act “*are ordinary words of the English language and are used in the sense in which they would be employed in common parlance*”

(at 122). In so holding, the Full Court approved the approach of Bowen CJ and Beaumont J in *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 (*Cockcroft*) at 190 that:

In our opinion, in the present context, the words “could reasonably be expected to prejudice the future supply of information” were intended to receive their ordinary meaning. That is to say, ***they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous***, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, ***it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like***. To construe s 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an ***unwarranted gloss*** upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based: see *Kioa v West* [(1985) 159 CLR 550] per Mason J and per Gibbs CJ.

The majority of the Tribunal thought an assessment of what was more probable than not was called for. As Woodward J has pointed out, there are difficulties in this approach for the legislature has chosen not to introduce the notion of a “probable” result: cf *Ex parte White; Re White* (1885) 14 QBD 600. It is also unnecessary to consider whether an “even chance” or something of that kind is needed. ***It is preferable to confine oneself to the language of the provision itself and to attempt to form an opinion, on the evidence, as to what can reasonably be expected to happen if disclosure occurs***. In our opinion, in departing from the terms of s 43(1)(c)(ii) and requiring the applicants to establish a case on the balance of probabilities, the majority of the Tribunal fell into error in their construction of the provision.

(emphasis added)

43 With respect to these passages, the Full Court in *Searle* at 123 explained that:

Their Honours did not suggest ... that it was sufficient that there be a ***possibility*** not irrational, absurd or ridiculous that the specified consequence would occur. Their Honours specifically rejected that approach, saying that the words “could reasonably be expected” meant what they said. The practical application of their Honours’ view will not necessarily lead to a result different from that proposed by Sheppard J [also in *Cockcroft*].

In the application of s 43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable.

(emphasis in the original)

44 Applying these principles, the Full Court in *Searle* found at 123 that the Tribunal in that case had fallen into error:

In par 58 of its reasons, the Tribunal said:

“A decision-maker is required to make a judgment as to whether there is a ‘reasonable’ basis for a claim that disclosure of information would destroy or diminish the commercial value of such information, as distinct from something that is ‘irrational, absurd or ridiculous’.[”]

However, the question under s 43(1)(b) is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant’s behaviour, but with the effect of disclosure. The Administrative Appeals Tribunal failed to determine that question and erred in law in this respect.

- 45 The Full Court’s understanding in *Searle* of the relevant passages in *Cockcroft* was subsequently approved by Hayne J in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423 (**McKinnon**) at [60] who held that:

The expression “not irrational, absurd or ridiculous” is not synonymous with “reasonable grounds”. Of course, absurd, 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.

(See also *McKinnon* at [129] (Callinan and Heydon JJ); and e.g. in the Tribunal, *Bui* at [15]-[17] (Allen SM).)

- 46 This view of the authorities is reflected in the Guidelines issued by the OAIC (the **FOI Guidelines**) to which regard must be had by virtue of s 93A(2) of the FOI Act. Specifically, the FOI Guidelines state at [5.17] that the use of the word “*could*” in this context is less stringent than “*would*”, and requires an analysis of the **reasonable expectation** rather than the certainty of an event or damage occurring: see also e.g. *Lobo* at [74] (Deputy President Forgie).

- 47 Applying the decisions in *Searle* and *Cockcroft* and the FOI Guidelines, the question posed by s 33 is therefore (relevantly) whether disclosure of the Letters “*would, or could reasonably expected to*” cause damage to the international relations of the Commonwealth.

- 48 Finally, paragraph [5.37] of the FOI Guidelines explains that:

... The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship.

(See also *O’Donovan* at 534 (21) (Deputy President Hall); and *Bui* at [23] (Allen SM).)

49 It follows that the grounds for the exemption will vary according to the circumstances of each case (FOI Guidelines at [5.37]-[5.38]). By way of example, the FOI Guidelines explain that:

5.38 For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future. On the other hand, the disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.

4.2.4 “*the international relations of the Commonwealth*” (s 33(a)(iii), FOI Act)

50 There is no definition in the FOI Act of the phrase “*international relations of the Commonwealth*”. The phrase however has been interpreted broadly in decisions of the AAT. The relevant principles may be summarised as follows.

51 First, as Deputy President Forgie explained in *Lobo* at [75], the term international relations is not meant to be used as a particular term of art but rather “*refers simply to the connection, ‘social, political or personal contact between ...’ ... the Commonwealth and another or other countries so that the connection is ‘international’*” (emphasis added). This includes relations with international organisations, as the FOI Guidelines recognise at [5.36]. In this regard, the High Court held in *Sue v Hill* (1999) 199 CLR 462 at [65], [96] (Gleeson CJ, Gummow and Hayne JJ) and [172]-[173] (Gaudron J) that the UK is a foreign power. It follows that Australia’s relationship with the UK is an international one.

52 Secondly, s 33(a)(iii) extends to damage to relations between agencies of the Commonwealth and of other governments where those relations “*may have repercussions on the international relations of their respective [S]tates*”: *Re Haneef and Australian Federal Police* [2009] AATA 51; (2009) 49 AAR 395 (***Re Haneef***) at [38] (Deputy President McPherson CBE). Thus, the FOI Guidelines provide at [5.36] that “[*t*]he exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries”.

53 Thirdly, as the Department submits in its SFIC at [48], avoiding disclosures that diminish the confidence which a foreign authority would have in Australia as a reliable recipient of confidential information is a well-recognised basis for invoking s 33(a)(iii): see e.g. *Re McKnight and Australian Archives* (1992) 28 ALD 95 at 112 (Deputy President Johnston); *Bui* at [21] (Allen SM); and *Xenophon v Secretary, Department of Defence* [2019] AATA 3669 (***Xenophon***). As the FOI Guidelines state at [5.36], “[*t*]he phrase ‘international relations’ has

*been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations **and to protect the flow of confidential information between them***” (emphasis added).

54 Thus it is unnecessary to find loss or damage in monetary terms in order to attract the exemption, as Davies J found in *Re Maher* at 742. Rather, his Honour continued:

The phrase “damage to international relations of the Commonwealth” comprehends **intangible damage to Australia’s reputation** though such damage may be difficult to assess. International relations have never been matters easy to define or to quantify. ... Regard must be had, *inter alia*, to the relationships between particular persons in one government and persons in another. Damage to personal relationships may cause considerable harm for a time at least.

(emphasis added)

(See also FOI Guidelines at [5.37].)

55 For example, in *Maksimovic and Attorney-General’s Department* [2008] AATA 1089; (2008) 109 ALD 417 at [12], the Tribunal found that the names of Costa Rican intelligence officers were exempt from disclosure under s 33(1)(a)(iii) of the FOI Act on the ground that if their names were disclosed, there was a reasonable expectation that damage to Australia’s international relations with Costa Rica by way of a lessening of trust or confidence would occur.

56 Similarly, in *Wang*, Deputy President Thompson accepted that two letters from the Embassy of the People’s Republic of China to the Department of Immigration attracted the exemption from disclosure under s 33(1)(a)(iii) of the FOI Act having regard to the circumstances in which the letter was disclosed and the expectations of the foreign government concerned as to the confidentiality of the terms in which the letters were expressed. Specifically, Deputy President Thompson found at 501 that:

... The circumstances proved in the present case are that the Chinese government, through its Embassy in Canberra, has made it known that it objects to the disclosure of the two letters. The letters relate to a matter of some sensitivity to the government of China ... Although the general nature of the contents of the letters has been disclosed, the government of China may properly be concerned that the precise mode of its expression of its views in those letters should not be known by persons other than those in the service of the Australian government who have a reason to know it. In those circumstances, to grant access to those two letters could reasonably be expected to anger the Chinese government. Although no doubt, as Mr Irvine [an officer with the Department of Foreign Affairs and Trade with experience in international diplomacy] stated, China’s participation in its relationship with Australia is founded primarily on its self-interest, it might well regard that self-interest as threatened by a deliberate refusal to meet its wishes with regard to the

disclosure of those letters. I have come to the conclusion, therefore, that Mr Irvine's opinion that such disclosure could reasonably be expected to damage the international relations of the Commonwealth and the People's Republic of China is correct.

57 Thus the view which a foreign State may take with respect to disclosure under its laws and practices is relevant to the question of whether disclosure may damage Australia's international relations with that State where the failure to respect that State's view may lead to a diminishment in co-operation: see by analogy *Re State of Queensland and Australian National Parks and Wildlife Service* (1986) 13 ALD 158; (1986) 5 AAR 328 (*Australian National Parks and Wildlife*) at ALD 161, AAR 336; and *Lobo* at [84] (Deputy President Forgie). This is not, however, to suggest that the mere fact that a foreign State has expressed concern about disclosure is sufficient to attract the operation of s 33(a): see e.g. *O'Donovan* at 534 (21).

5. DOES THE EXEMPTION IN S 33 OF THE FOI ACT APPLY?

5.1 The issues

58 It was not in issue that all of the Letters were from Prime Ministers of Australia to the Queen and that she in fact received the correspondence in her capacity as the Queen of Australia.

59 The Department submits that release of the Letters could reasonably be expected to cause damage to the international relations of the Commonwealth and, in particular, would, or could reasonably be expected to:

- (1) diminish the confidence of foreign authorities in Australia as a reliable recipient of its confidential information; and
- (2) damage the relationships between:
 - (a) Australia and the Queen;
 - (b) Australia (and especially the OOSGG) and the Royal Household; and
 - (c) Australia and other Commonwealth realms, and the other countries within the Commonwealth of Nations more generally.

(ASFIC at [40]-[41].)

60 Underpinning these submissions is the constitutional convention that communications between the Queen and Her Ministers, including the Prime Minister, are confidential by their very nature and must remain confidential (ASFIC at [19]). The Department submits that the existence of the convention of confidentiality is supported by the evidence and by a

substantial body of literature and legal principle. In the Department's submission, the convention of confidentiality extends to correspondence between the Queen and the governments of each of the Commonwealth realms, being the 16 countries (including the UK) of which the Queen is the constitutional monarch. Because the Queen is the Sovereign of all 16 Commonwealth realms concurrently, the confidentiality of communications with the Queen is mutually important to all of the Commonwealth realms (ASFIC at [20]). The Department also submits that the significance of the convention of confidentiality as a core element of the system of Parliamentary democracy in the UK and other Commonwealth nations strongly supports and explains the proposition that Australia's relations with those countries could reasonably be expected to be damaged if Australia discloses the Letters in breach of the convention (supplementary ASFIC at [2]).

61 While Mr Summers accepts that "*there is a general convention that correspondence between The Queen and her advisers is confidential*" (RSFIC at [43]), Mr Summers submits that the exemption in s 33(a)(iii) does not apply for the following reasons.

- (1) Section 33(a)(iii) cannot be construed so as to create by implication a general exemption for information falling within the class of information in letters sent to the Queen of Australia irrespective of its content. The question of whether the exemption applies can be determined only by examining the content of each of the Letters individually.
- (2) Australia's relationship with the Queen of Australia does not comprise part of Australia's "*international relations*". It is irrelevant that Her Majesty is also sovereign of other nations as the Queen is not one and indivisible throughout the Commonwealth and in her dealings with the Australian Prime Minister, the Queen is acting solely in her capacity as the Queen of Australia (RSFIC at [31]). Nor in any event does the evidence establish that disclosure would, or could reasonably be expected to, damage Australia's relationship with the Queen as it is not reasonable to expect that the Queen would regard it as disrespectful or a personal affront if the Letters were required to be disclosed in accordance with Australian law (RSFIC at [36]-[40]). Furthermore, as none of the Letters were sent by the Queen but only by the Australian Prime Minister, disclosure could not affect the political neutrality of the Queen (RSFIC at [44]).

- (3) As the Royal Household is not another government or an international organisation, any damage to the relationship between Australia and the Royal Household could not constitute damage to Australia's international relations (RSFIC at [47.1]). In any event, there is insufficient evidence that disclosure of any Letter, even if entirely innocuous in content, could be expected to damage Australia's relationship with the Royal Household (RSFIC at [47.2]).
- (4) It is not reasonable to expect that disclosure of the Letter would diminish the confidence of foreign States in Australia as a reliable *recipient* of confidential information when none of the Letters were received by Australia, having all been sent by Australian Prime Ministers (RSFIC at [52]). Nor, as the facts of *Evans v Information Commissioner* [2012] UKUT 313 demonstrate, is all correspondence between the Royal Family and the Government confidential (RSFIC at [51]). Furthermore, it is unreasonable to expect that disclosing the Letters, irrespective of their age or contents, could damage Australia's relationship with other countries (RSFIC at [53]-[54]).

62 In order to address these issues, it is necessary first to consider the constitutional roles of, and relationship between, the Queen and the Prime Minister of Australia and the conventions and practices that apply to correspondence between them. These matters are addressed in Part 5.2, "*Relevant constitutional relationships, practices and conventions*". Secondly, against that context, the question of whether it can reasonably be expected that Australia's international relations could be damaged by disclosure of the Letters then falls to be addressed.

5.2 Relevant constitutional relationships, practices and conventions

63 Save where otherwise indicated, the matters which follow were not in issue between the parties.

5.2.1 The relationship between Australia, the Prime Minister of Australia, the Queen and the Royal Household

64 As the applicant contends, the roles of, and relationship between, the Queen and the Prime Minister of Australia are largely informed by convention, being long-standing practices established by general consent. The functions of the interaction of the Queen, the Royal Household, the Governor-General and the Prime Minister of Australia are explained at [7]-[15] of the first Fraser affidavit from which the following explanation is in large part drawn.

- 65 While Australia is a self-governing nation, the Queen is the constitutional head of the Australian Government. As the constitutional head of State of Australia and the other Commonwealth realms, Her Majesty conventionally has the right to be consulted, the right to encourage, and the right to warn (Walter Bagehot, *The English Constitution* (Vol III, 1909) at p. 75; A Twomey, *The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) at pp. 93-107). This is known as the “**tripartite convention**” or the “*classical trinity of rights*”: see also *Evans v Information Commissioner* [2012] UKUT 313 (Administrative Appeals Chamber (AAC)) (**Evans**) at [77]-[87].
- 66 The Queen and the Royal Family more generally are supported by the **Royal Household**. The Royal Household is not a part of the Government of the UK but is an organisation attached to the Royal Family comprised of a number of departments with responsibility for discrete portfolio matters. It includes the Private Secretary’s Office, with the Private Secretary being a senior figure in the Royal Household. The Royal Household supports the Queen in her constitutional, governmental, and political duties and is the principal channel of communication between the Queen and Her Governments, including the Commonwealth of Australia. It also supports the Royal Family otherwise in the execution of their official duties (Todd affidavit at [7]).
- 67 More specifically, the Private Secretary’s Office has responsibility for matters relating to the Queen’s role as monarch to the Commonwealth realms including Australia, and correspondence with the Queen comes through the Private Secretary’s Office (Todd affidavit at [8]). The multiple roles of the Queen as the Sovereign of the Commonwealth realms is reflected in the staffing arrangements of the Royal Household which includes an Assistant Private Secretary with responsibility for Foreign and Commonwealth Affairs but does not include a separate officer for each Commonwealth realm (Todd affidavit at [23]). Mr Todd accepted in cross-examination that the Royal Household is not an overseas government or a government at all, and that that part of the Royal Household which is arranged to assist the Queen in fulfilling her role as Queen of Australia is not an international organisation (T, 21 March 2019 at p. 63.9-17 and 63.45).
- 68 The **Governor-General** is the Queen’s representative in Australia: see also s 2 of the Constitution. As earlier mentioned, the Governor-General is assisted by the OSGG and other staff who together comprise the OOSGG.

69 Under s 64 of the Constitution, the Governor-General may appoint officers to administer departments of State, and they shall be “*the Queen’s Ministers of State for the Commonwealth*”. The ***Prime Minister of Australia*** is the most senior Minister, and is conventionally the leader of the Parliamentary party (or coalition of parties) that controls a majority of the House of Representatives. The office of Prime Minister is not mentioned in the Constitution, and exists through long-standing political convention. While the practice is not universal, Prime Ministers may choose to swear an oath of allegiance to faithfully serve the monarch, as did Prime Minister Tony Abbott and Prime Minister Malcolm Turnbull. The Letters emanate from these Prime Ministers and are addressed to the Queen (first Fraser affidavit at [10]).

70 By convention, the Queen acts on the advice of Her Ministers as does the Governor-General as Her representative. This is known as the “***cardinal convention***”. The Prime Minister is accordingly the Queen’s principal ministerial adviser in Australia at the federal level.

71 Furthermore, by long-standing convention the Queen remains politically neutral. As Mr Fraser explained (and it was not disputed), “[p]ublic and governmental confidence in the Monarchy relies on the Sovereign not publicly expressing any personal or partisan views about political issues either within the United Kingdom or any other Commonwealth Realm” (first Fraser affidavit at [11]).

5.2.2 Correspondence passing between an Australian Prime Minister and the Queen

72 It was not in issue that the Prime Minister corresponds with the Queen via letter both on matters of state and on matters of a more personal nature (first Fraser affidavit at [15]; ASFIC at [10]). Mr Fraser explained that there were a range of circumstances in which a Prime Minister may write to the Queen. The examples which he identified include to seek the issuing of letters patent for example to establish a Royal Commission (although he was not aware of any cases where the Queen performed that function rather than the Governor-General (T, 21 March 2019 at p. 48.3)) or to create or amend certain official awards and honours such as the Order of Australia or the endeavour by Prime Minister Abbott to re-introduce Knights and Dames (T, 21 March 2019 at p. 49.24). The Prime Minister might also write to recommend the appointment of a new Governor-General (T, 21 March 2019 at p. 50.19 (Mr Fraser)). In addition, Mr Todd explained that the Queen regularly seeks views and advice about issues in Australia, ranging from natural disasters to social developments, from

a range of people (T, 21 March 2019 at p. 66.30-33). He also said that that advice may be offered where it is sought, or offered independently of being sought (ibid at p. 67.6-8).

73 Mr Fraser also said that the Prime Minister may write “*on a more personal note, such as to wish The Queen well if she has been ill, or to offer congratulations in the event of a significant event, such as a royal wedding*” (first Fraser affidavit at [15]; T, 21 March 2019 at p. 50.39-44).

74 There may also be correspondence between the Prime Minister and the Queen which falls into both categories (i.e. matters of state and of a more personal nature) such as correspondence about a royal visit (T, 21 March 2019 at p. 51.36 (Mr Fraser)).

75 The evidence as to the manner in which correspondence from Australian Prime Ministers to the Queen is handled and transmitted was not challenged save insofar as Mr Todd and Mr Fraser were cross-examined about whether factors such as the age or content of such correspondence might bear upon its sensitivity if disclosed. First, in his affidavit, Mr Fraser explained that:

12. Correspondence from Australian Prime Ministers to The Queen is often transmitted through the OOSGG, under a cover letter from the Governor-General. On occasion, a Prime Minister may write directly to The Queen (such as on matters relating to the appointment of a new Governor-General).

13. Within the Palace, correspondence from the Prime Minister of Australia is managed by the Private Secretary’s Office. ...

14. The relationship between the Governor-General of Australia and the Prime Minister of Australia, on the one hand, and the Private Secretary, on the other, is an important one. The Private Secretary is effectively the gatekeeper to The Queen on official matters involving Australia and acts for, and on behalf of, Her Majesty.

(first Fraser affidavit at [12]-[14])

76 Secondly, as alleged in the ASFIC and accepted at [6] of the RSFIC:

11. This correspondence [i.e. between the Prime Minister and the Queen] is often transmitted to the Private Secretary’s Office by the OOSGG on the Prime Minister’s behalf. Both the OOSGG and the Private Secretary’s Office understand and treat correspondence from the Prime Minister to The Queen as being in confidence. When correspondence is sent from the Prime Minister to The Queen via the OOSGG, it is handled only by the Governor-General, the OSGG and his or her Executive Assistant, and is secured in a safe when in hard copy. This understanding of confidence between the OOSGG and the Private Secretary’s Office is the product of convention, and is reflected in an express agreement between these offices: see MF-1 and MF-2 to Mr Fraser’s affidavit of 1 June 2018.

12. Similarly, when the Australian High Commission is involved in transmitting correspondence from the Prime Minister to The Queen this correspondence is

understood to be confidential, and is treated accordingly.

5.2.3 The convention and practice of confidentiality with respect to correspondence between Australian Prime Ministers and the Queen

77 Mr Fraser’s evidence that regardless of the subject matter of the correspondence, there is a long-standing convention that *all* correspondence to the Queen, including correspondence from an Australian Prime Minister, is transmitted in confidence, was not challenged in cross-examination (first Fraser affidavit at [16]). Nor was his evidence that correspondence from the Prime Minister to the Queen sent via the OOSGG “*is treated with the utmost confidence*” and handled on a “*need-to-know basis only*” (first Fraser affidavit at [17]). In line with this, it was his understanding that the Private Secretary’s Office treats correspondence from the Prime Minister to the Queen as having the same character as correspondence from the Governor-General to the Queen, which is also treated in strict confidence save where there is an express arrangement in place to enable publication (first Fraser affidavit at [19]). That understanding was based upon his own experience as well as discussions with his counterparts including the official secretaries to the governors of Australian states, official secretaries to the governors-general of other nations, and members of the Royal Household, suggesting (as is apparent from other evidence) that this understanding is one shared within Australia, within the Royal Household, and throughout the Commonwealth realm (first Fraser affidavit at [19]; see further below).

78 Similarly, Mr Todd’s evidence as to the long-standing convention of treating correspondence between the Prime Minister and the Queen as confidential, and as to his personal observance of that convention, was not challenged. In this regard, Mr Todd explained that:

12. I would characterise the conventions that govern communications with The Queen as concerned with maintaining confidentiality, frankness and discretion. There is a historical context, going back hundreds of years, of advisers to The Queen having a relationship of confidentiality with the Monarch. I can say from my own observations of the subject matter of the interactions between The Queen and Australian Prime Ministers that The Queen viewed those Prime Ministers as adviser[s] in a literal, and not merely figurative, sense. She expected to be kept informed of matters occurring in Australia, and would seek advice from them on matters of state. *At all times there was a clear understanding that those conversations, whether written or oral, were undertaken in complete confidence.*

(emphasis added)

79 In this regard, Mr Todd agreed with Mr Fraser’s evidence that the default position was that all such correspondence attracts confidentiality unless marked to the contrary, even though

the correspondence with which he was most familiar had in fact been marked private and confidential in any event (T, 21 March 2019 at pp. 92.35-93.24).

80 As to the importance in his opinion of the convention and practice of confidentiality, Mr Fraser opined in his first affidavit that:

22. The mutual understanding of confidentiality referred to above is important to preserve the proper and effective functioning of the relationship between the Commonwealth of Australia and The Monarch, including relations with The Queen personally, and relations with the Royal Household including the Private Secretary to The Queen. It is important to these relationships that each party to the correspondence is able to raise any matter as appropriate, on the understanding that the correspondence will be treated as confidential and will not enter the public domain.

81 The importance of the obligation of confidence is also emphasised by the fact that it has been reduced to writing by an exchange of letters between the OOSGG and the Private Secretary, as the Department submits. This exchange took place before the Letters were created (as Mr Fraser accepted (T, 21 March 2019 at p. 53.41)), and is properly understood as confirming the long-standing, pre-existing convention.

82 Mr Tom Laing-Baker, Assistant Private Secretary to the Queen, has also apparently confirmed the position of the Royal Household with respect to the confidentiality of this class of correspondence. He advised Mr Fraser that “[t]he principle that communications between The Queen and Her Majesty’s representative and ministers in Australia should be treated in strict confidence is one that The Royal Household support **in the strongest terms**” and further explained that:

3.2 The principle of confidentiality, due to the constitutional position as the Sovereign, facilitates The Queen’s Relationship with the Governor-General and her Australian Ministers by creating a space in which each party is able to communicate with the other freely and frankly, on any given matter, on the understanding that the correspondence will remain confidential for the duration of the reign.

(Supplementary Fraser affidavit at [3] (emphasis added); see also T, 21 March 2019 at p. 55.10-40.)

83 While that evidence is hearsay in nature, as the Assistant Private Secretary is located abroad, there would at the least be logistical difficulties in the Assistant Private Secretary giving evidence and self-evidently he could not be compelled to do so. In any event, I have no basis on which to consider that the Royal Household’s position was not reliably conveyed by Mr Fraser. Furthermore, the position which the Assistant Private Secretary holds is one which plainly placed him in a position to be able to convey the position of the Royal Household and,

I would infer, authorised him to do so. That position also accorded with all of the other evidence. As such, I accept that this evidence accurately conveys the position of the Royal Household.

84 This is not to deny that limited exceptions to the convention and practice of confidentiality exist, such as a letter from the Prime Minister to the Governor-General proposing an election, and correspondence which bears an express statement that it is to be made public at an appropriate time (first Fraser affidavit at [20]). However, none of the Letters relate to the calling of an election or bear any such express statement. Otherwise, as Mr Fraser explained, correspondence with the Queen addresses matters of state and/or matters of a more personal nature and in each case the expectation is the same, namely, that unless otherwise stated, “*the correspondence is absolutely confidential and private*” (first Fraser affidavit at [24]). Mr Fraser was also emphatic in his evidence under cross-examination in rejecting the propositions that letters from the Prime Minister to the Queen could contain information that is “*entirely innocuous or anodyne*” and that the sensitivity of this category of correspondence depends upon the surrounding circumstances (T, 21 March 2019 at p. 54.27-38). I do not consider that in so doing, Mr Fraser was failing to make appropriate concessions. Rather, to describe such communications as potentially innocuous or anodyne, with respect, ignores the fact that correspondence from the Prime Minister to the Queen will always by its nature be a communication at the highest level of government and assumes the answer to the very question in issue here, namely, that their disclosure could not reasonably be expected to impact adversely upon Australia’s international relations.

5.2.4 Recognition of the convention of confidentiality in the UK and the Commonwealth realms

85 In *The Monarchy and the Constitution* (Clarendon Press, 1995) at p. 71, Vernon Bogdanor of the University of Oxford referred to three propositions as setting the constitutional parameters which the sovereign must respect if she or he is to exercise influence constitutionally as described by Sir William Heseltine, the Queen’s Private Secretary, in a letter to *The Times* on 28 July 1986, namely:

The first was that the queen enjoyed the right, and indeed the duty, to express her opinions on government policy to the prime minister. His second proposition was that the queen must act on the advice of her ministers, whatever her own opinions might be. ... Sir William’s third proposition was that communications between the sovereign and the prime minister were entirely confidential. Indeed, at the weekly audiences which the queen grants the prime minister when both in London, neither the queen’s private secretary nor any civil servant, nor indeed any third person, is

present, although the queen may discuss points which arise with her private secretary afterwards.

86 In this regard, Bogdanor emphasised that the first of these propositions entailed the third, it being a fundamental condition of royal influence that it remains private. It follows, as Bogdanor then pointed out, that the sovereign must observe a strict neutrality in public (ibid).

87 More recently, in *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2012) in the context of discussing two of the Bagehot “rights” (the rights to be consulted and to encourage), Ian Killey PSM identified “two obvious points ... which are essential in relation to discussions between Ministers and Monarchs or Governors”, namely:

First, that the discussions, if not necessarily completely frank, must not lead either party to be misled.

Secondly, the Monarch or Governor must remain neutral and be seen publicly as neutral. This is necessary to protect the viability of the office and its holder, particularly for such events as a change of government. This does not mean that differences cannot be raised in discussions, but it means that *any* discussions between Ministers and the Governor or Monarch are to remain *strictly confidential*.

(at pp. 199-200; emphasis added, citations omitted)

88 The confidentiality convention can be traced back to at least 1863: see *Dickson v Viscount Combermere* (1863) 3 F & F 527; 176 ER 236 at 242 and 264. It is recognised in the UK in *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government* (1st edition, 2011) which states at [6] that:

The Sovereign is the Head of State of the UK, providing stability, continuity and a national focus. By convention, the Sovereign does not become publicly involved in the party politics of government, although he or she is entitled to be informed and consulted, and to advise, encourage and warn ministers. For this reason, there is a convention of confidentiality surrounding the Sovereign’s communications with his or her ministers.

89 The existence of certain constitutional conventions was also considered by the AAC of the United Kingdom Upper Tribunal in *Evans*, which concerned certain letters (the so-called “black spider memos”) from Prince Charles to various UK government ministers advocating for particular causes. The decision was primarily concerned with the convention that the heir to the throne is entitled and bound to be instructed in the business of government (“the education convention”), which is not in issue here. The AAC decided that the correspondence must be released under the *Freedom of Information Act 2000* (UK) (**FOI Act (UK)**) on the basis that it fell outside the scope of that convention and that its disclosure was

in the public interest (at [4], [111]). Those findings were not disturbed in subsequent related decisions.

90 The AAC stressed that major constitutional conventions, and in particular the cardinal convention and the tripartite convention, “*are core elements in the United Kingdom’s parliamentary democracy*” (Evans at [67]). The AAC adopted the test suggested by Sir Ivor Jennings in *The Law and the Constitution* (5th edition, 1959) that a constitutional convention exists if: (a) there are precedents underpinning it; (b) the parties to the relevant practice consider themselves to be bound by it; and (c) there is a reason for the existence of the convention (Evans at [69]-[75]). Professor Rodney Brazier of the University of Manchester School of Law emphasised the confidential nature of communications between the Prime Minister and the Sovereign, consistently with the analysis by Bogdanor to which I have earlier referred. Professor Brazier gave additional reasons as to why the cardinal and tripartite conventions must be exercised in complete confidence, namely: the danger of the perception of partiality; and the risk that disclosure would lead to an inhibition on frankness (Evans at [84]). Based on this evidence, the AAC found that:

87. In our view when one analyses this material there is ample reason to justify the principle that the internal operation of these two conventions is not revealed, at least until after a long time has passed. Our constitution reconciles monarchy and democracy through fundamental constitutional mechanisms under which (1) state power is exercised by and in the name of the monarch in accordance with the advice of ministers, and (2) the monarch is entitled to be consulted, to encourage, and to warn, but so long as ministers are in office their advice must be followed. In order to ensure that these fundamental mechanisms are not put in doubt, it is not until a long time has passed that details of how they operated in any particular instance can be revealed. We accept for the purposes of this case, and indeed it was not challenged on behalf of Mr Evans, that the possible advantages of avoiding accusations of partiality and avoiding a chilling effect on frankness may be additional reasons why both the cardinal convention and the tripartite convention must be exercised “in complete confidence”, but we do not by any means regard these possible advantages as fundamental.

91 The evidence establishes that the long-standing convention of confidentiality attaching to correspondence with the Queen is also observed by the governments of the 15 Commonwealth realms outside the UK. I have referred already to the evidence of the existence and observance of the convention in Australia. It extends to communications between the Queen and the other governments of Commonwealth realms in order to facilitate communication between the Sovereign and the governments of Commonwealth realms (first Fraser affidavit at [26]; Peter Boyce, *The Queen’s Other Realms* (2008) at p. 48). As such, as the Department submitted, it is apparent that Commonwealth nations have a common, and

shared, interest in preserving the integrity of the Queen's role under their systems of government. For example, Mr Fraser also gave evidence that while in performing his duties he was concerned primarily with Australia's relationship with the Queen as Queen of Australia, he was equally conscious that "*She is the Sovereign of many other nations and that any offence we might inadvertently cause to Her is caused simultaneously to the Sovereign of those other nations*" (first Fraser affidavit at [27]). Similarly, the evidence of Mr Todd is to the effect that a fundamental breach of the confidentiality convention by one of the Commonwealth realms would be a matter of serious concern to other Commonwealth realms, as I later explain.

92 Furthermore, as the Department submitted, a majority of the countries constituting the Commonwealth realms has enacted FOI legislation and in each case that legislation includes protection for material that would prejudice the international relations of the State and/or material provided in confidence by another State: *Freedom of Information Act* (2004) (Antigua and Barbuda), s 28(c); *Freedom of Information Act* (2017) (The Bahamas), s 17; *Freedom of Information Act 2000* (Belize), s 22(1); *Access to Information Act 1982* (Canada), ss 13(1)(a) and 15(1); *Access to Information Act (Jamaica)*, s 14; *Official Information Act 1982* (NZ), ss 5 and 6(a) and (b); *Freedom of Information Act* (St Lucia), s 28(c); FOI Act (UK), s 27; see also s 51, *Constitution of the Independent State of Papua New Guinea*.

93 In certain Commonwealth countries, communications with the Sovereign and/or her representative are absolutely or conditionally exempt under legislation. For example, s 37 of the FOI Act (UK), which was amended to address the decision in *Evans*, provides that:

- (1) Information is exempt information if it relates to –
 - (a) communications with the Sovereign,
 - (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,
 - (ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,
 - (ac) communications with other members of the Royal Family ...
 - (ad) communications with the Royal Household ...
 - (b) the conferring by the Crown of any honour or dignity.
- (2) The duty to confirm or deny does not arise in relation to information which is ... exempt information by virtue of subsection (1).

94 The duty to confirm or deny referred to in s 37(2) is the duty imposed by s 1(1) of the FOI Act (UK) providing that any person requesting information from a public authority is entitled to be advised as to whether the public authority holds information of the description specified in the request (s 1(6), FOI Act (UK)).

95 By virtue of s 2(3)(ea) of the FOI Act (UK), paragraphs (1)(a) to (ab) and (2) of s 37 confer an absolute exemption insofar as it relates to those paragraphs. Notably, the reference to “*communications with the Sovereign*” in s 37(1)(a) is not limited to communications by Her Majesty’s Ministers in the UK but extends to communications with, for example, the Commonwealth realms.

96 As a further example, s 9(2)(f) of the *Official Information Act 1982* (NZ) provides for the withholding of information to maintain the constitutional conventions protecting the confidentiality of communications by or with the Sovereign or her representative save where the withholding of that information is outweighed by the public interest.

5.3 Could it reasonably be expected that disclosure of the Letters could damage the international relations of the Commonwealth?

97 In my view, the evidence clearly establishes that it can reasonably be expected that disclosure of the Letters could damage the international relations of the Commonwealth. Indeed, I consider that it is likely that the international relations of the Commonwealth would be damaged.

5.3.1 The scope of the confidentiality convention

98 **First**, the evidence of Mr Todd and Mr Fraser as to the scope of the confidentiality convention establishes that the convention:

- (1) applies to communications both to and from the Prime Minister and the Queen;
- (2) is not limited to communications related to the tripartite convention; and
- (3) applies irrespective of the subject matter of the communication, i.e., whether it involves a matter of state and/or of a more personal nature.

99 That evidence is also consistent with the literature, relevant authority, and the codification of the convention contained in s 37(1)(a) of the FOI Act (UK), which I have earlier discussed.

5.3.2 Expectations on the part of the Queen, the Royal Household and Australia that the convention will be strictly observed

100 *Secondly*, the evidence of Mr Todd and Mr Fraser establishes that there is an expectation on the part of the Queen and the Royal Household, on the one hand, and Australia, on the other hand, that the confidentiality convention will be strictly observed. That evidence was not challenged and there was no evidence whatsoever that that expectation was limited to correspondence emanating only from the Queen. This expectation is also reflected in the established procedures adopted for the handling and transmission of correspondence between the Australian Prime Ministers and the Queen (see above at [72]-[76]). It is embodied in an exchange of correspondence between the OOSGG and the Private Secretary (see above at [81]) and is protected by law in the UK as a result of the amendments made to the FOI Act (UK) following the decision in *Evans*. The Royal Household has also confirmed its support of the principle that communications between the Queen and Her Ministers in Australia should be treated “*in strict confidence ... in the strongest terms*” (see above at [82]-[83]). It follows that there is a shared expectation between the UK and Australia that the confidentiality convention will be respected.

101 Such expectations are relevant to assessing damage, as is illustrated by analogy with the decision in *Australian National Parks and Wildlife*, albeit that the present case is stronger as the expectation is a shared one: see also, e.g. *Wang*, discussed at [56] above. The decision in *Australian National Parks and Wildlife* concerned, relevantly, whether correspondence between the Commonwealth parks and wildlife service agency and the equivalent agency in Queensland regarding the policy for the export of koalas could reasonably be expected to cause damage to relations between the Commonwealth and a State so as to attract the absolute exemption under s 33A(1) of the FOI Act. The Tribunal (Davies J (President) and Renouf SM) found that the documents were exempt from disclosure under s 33A(1) on the basis that the State entertained the communications on the understanding that they were confidential, even though the Commonwealth agency did not share that understanding, and the evidence established that disclosure of such communications would lead the State to be reluctant to put its views in writing in the future (at ALD 160-161, AAR 334-336). An analogy can therefore be drawn between the present case and that in *Australian National Parks and Wildlife*, albeit that the present case is stronger given that the expectation is shared by all parties to the communications.

5.3.3 Disclosure would breach the confidentiality convention and be viewed as such

102 **Thirdly**, given the scope and strictness of the confidentiality convention, there is no question that disclosure of the Letters would breach the confidentiality convention and that the Queen and the Royal Household would view it as a breach of that convention.

103 In this regard, Mr Todd emphasised the centrality of trust and confidence in international diplomatic relationships in the following passage:

15. ... I am aware of the need for Australian diplomats to build and maintain relationships of trust with overseas governments and international organisations, including The Queen and the Royal Household. Much of the work of diplomatic relations is demonstrating that you can be trusted. A tangible and obvious measure of that trustworthiness is whether you can keep confidential the things you say you will keep confidential. In diplomatic relationships, as in personal relationships, trust is often hard won, can be easily lost, and once lost can be very difficult to regain.

104 Consistently with this, Mr Todd, in common with Mr Fraser, was of the view that the Queen and the Royal Household (and, in particular, the Private Secretary) trust Australian officials to maintain the confidentiality of communications passing between the Queen and Australian Prime Ministers (see e.g. T, 21 March 2019 at p. 71.32-37). He expressed “*no doubt*” that if Australia were to publish any part of those conversations, the Queen and the Private Secretary would consider that Australia had breached a long-standing, well respected, and observed convention of confidentiality and therefore would regard that breach as a betrayal of trust (Todd affidavit at [16]). In this regard he emphasised the very deep and solemn role of convention and tradition within the Royal Family and the Royal Household which are closely followed, and govern and determine nearly all aspects of the workings of the Royal Family and Royal Household (Todd affidavit at [17]; see also e.g. T, 21 March 2019 at p. 70.46-71.1 (Mr Todd)).

5.3.4 Damage which could reasonably be expected to flow from disclosure of the Letters for Australia’s relationship with the Queen and Royal Household

105 **Fourthly**, it is well established that a breach of an internationally recognised convention of confidentiality can cause damage to Australia’s international relations for the purposes of s 33(a)(iii): see *Whittaker*.

106 The evidence established that it could reasonably be expected that damage to Australia’s relations with the Queen and the Royal Household would be caused by disclosure. That evidence does not provide any basis for distinguishing between the impact of disclosing

correspondence from the Prime Minister of Australia, and correspondence from the Queen. Thus, Mr Todd explained in his affidavit that a number of adverse practical consequences could be expected to flow from disclosure of the Letters for the relationship between the Queen and the Royal Household, on the one hand, and Australia, on the other hand, including:

18.1 The Royal Household would be less likely to pass communications or information through, or to, the Australian High Commission;

18.2 The communications which did pass through, or to, the Australian High Commission could reasonably be expected to contain less sensitive information, arising from an assumption that the communications may be published in Australia;

18.3 The Queen and the Royal Household would be reluctant to seek advice from Australian diplomats or DFAT, which would be likely to impair DFAT's ability to carry out its functions.

107 As to paragraph [18.3] quoted above, Mr Todd explained that advice might be sought in two key relevant capacities, namely as Queen of Australia and as head of the Commonwealth, and that advice during his time as Deputy High Commissioner was sought more frequently in the latter capacity (T, 21 March 2019 at pp. 80.36-38 and 81.25-28).

108 Mr Todd also considered that disclosure would likely lead the Queen, other members of the Royal Family, and the Royal Household to infer that the Australian Government is unable to ensure that private or confidential communications are not published, and have a chilling effect. In his opinion, therefore, the effect of disclosing the Letters would undermine Australia's reputation with those persons as a country able to communicate with the Queen in all of her capacities in confidence (Todd affidavit at [19]; T, 21 March 2019 at p. 81.33-42). It can also reasonably be expected that the sense of grievance which may be felt by the perceived breach of trust in disclosing the Letters may be exacerbated by the significant media interest which the release of the Letters is likely to attract (Todd affidavit at [20], [22]).

109 Mr Fraser was also strongly of the view that disclosure of the Letters could damage Australia's relations with the Queen and the Royal Household, and emphasised the importance of respect for the convention in the proper and effective functioning of the relationship between the Australia, the Queen and the Royal Household in his first affidavit:

29. Disclosure would represent a breach of the longstanding convention of confidentiality with regard to correspondence between the OOSGG on behalf of the Prime Minister and the Governor-General, on the one hand, and the Royal Household on behalf of The Queen, on the other. Tradition, convention and respect play an immensely significant role in the working of the Royal Family and the constitutional framework of Australia's government at the highest levels. This is something that

has been impressed upon me through many conversations and interactions with the Royal Household. Such a breach of convention would likely be seen as disrespectful to Australia's established relationship with its Monarch.

30. Disclosure could disrupt the proper functioning of the relationship between the OOSGG and the Royal Household more broadly. It is a relationship which relies on the ability to exchange views and information which can be highly confidential, without the prospect of the content of those communications being published without prior consent.

110 Indeed, in his view, should documents enjoying the benefit of the convention of confidentiality be made publicly available, that *"might then inhibit the proper and effective functioning of the relationship, and curb the form and the manner of communications between her Majesty, regardless of the substance of correspondence. If her Majesty didn't have confidence that this material would be protected, she may seek to stop communicating in such a manner, and that would inhibit the relationship severely"* (T, 21 March 2019 at p. 59.30).

111 In short, the evidence establishes that it can reasonably be anticipated that the Queen and the Royal Household would infer that Australian domestic law fails to protect such communications in accordance with the long-standing convention and practice of confidentiality – in other words, that Australia has failed to put in place the necessary protections under its domestic law to ensure that that confidentiality is respected and therefore that Australia cannot be trusted to keep such communications confidential.

112 Against this, the respondent submitted that the Department's claim that the exemption is engaged because disclosure of the Letters could reasonably be expected to damage the relationship between Australia and the Queen must fail because Australia's relationship with the Queen of Australia does not form part of Australia's *"international relations"* (cf ASFIC at [41.2.1] and [41.2.2]). To the contrary, the respondent submits that *"the Queen of Australia forms part of the domestic or internal system of responsible government of the Commonwealth government"* (RSFIC at [30]). In the respondent's submission it is irrelevant that the Queen is also the Queen of other countries including Great Britain and Ireland because as a matter of law there is a distinction between the capacity of the Sovereign as Queen of Australia and her other capacities. Specifically, the respondent submits that:

31.1. While there is only one person who is the Sovereign within the British Commonwealth, in matters of law and government the Queen of Australia is entirely independent and distinct from the Queen of the other Commonwealth countries [citing *Sue v Hill* (1999) 199 CLR 462 at [57] (Gleeson CJ, Gummow and Hayne JJ)].

31.2 Under the *Royal Style and Titles Act 1973* (Cth), the Royal Style and Title of Queen Elizabeth II is “Queen of Australia”. That Act recognises that the Crown is not one and indivisible throughout the Commonwealth [citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [125] and [127] (McHugh J)]. In her dealings with the Australian Prime Minister, The Queen is acting in her capacity as Queen of Australia. And as the Department has conceded [in its SFIC at [52]], the Letters were sent to The Queen in that capacity.

113 In my view, that submission must be rejected for the simple reason that the evidence established that communications between the Australian Prime Minister and the Queen are not solely addressed to the Queen in her capacity as the Queen of Australia. Furthermore, it is artificial to suggest that simply because the letters in question here were addressed solely to the Queen in her capacity as Queen of Australia, that her role and status in other capacities is irrelevant when it comes to assessing the impact of disclosure of the Letters. Indeed, during Mr Todd’s time as Deputy High Commissioner, the Queen and the Royal Household sought advice more frequently in the Queen’s capacity as head of the Commonwealth (T, 21 March 2019 at pp. 80.36-38 and 81.25-28). As such, it cannot be said that the chilling effect of which Mr Todd and Mr Fraser spoke would be limited to its impact upon relations with the Queen in her capacity as Queen of Australia. The evidence was to the contrary.

114 Equally, the fact that the Royal Household is not a government or an international organisation does not mean that damage to relations with the Royal Household would not have repercussions with respect to the flow of confidential information to Australia from the UK and other Commonwealth realms. This is particularly so given that the Royal Household supports the Queen in all of her capacities and is the principal channel of communication between the Queen and the Commonwealth realms: see by analogy *Re Haneef* at [38].

5.3.5 Damage to Australia’s international relations with the UK and other Commonwealth nations

115 *In the fifth place*, the evidence established that the confidentiality convention forms part of the constitutional systems of the other Commonwealth nations in respect of whom the Queen is also the constitutional monarch. As such, I accept that they have a common, and shared, interest in preserving the integrity of the Queen’s role under their systems of government, as the Department submitted.

116 I accept that it can reasonably be expected that disclosure of the Letters could damage Australia’s relations with other Commonwealth nations and in particular the Commonwealth realms. Mr Todd explained that the practice of diplomacy among and between Commonwealth realms relies on a set of principles, codes, and practices which govern the

behaviour of the member States with respect to how information is communicated and held (Todd affidavit at [24]). These principles also apply to the conduct of diplomacy with non-Commonwealth countries in that “[i]n all cases it is fundamental to the conduct of effective diplomacy to demonstrate an ability to maintain the privacy of information exchanged on an understanding of confidentiality” (Todd affidavit at [25]). He explained that disclosing the Letters would be reasonably likely to impair Australia’s diplomatic relationships and the conduct of diplomacy bilaterally and through multilateral fora such as the Commonwealth of Nations for the following reasons:

26.1 Other countries and particularly Commonwealth Realms would be concerned by the disclosure. Officials from other countries would be very likely to see it as Australia’s duty to maintain the confidentiality of communications ***which it knew to be confidential***. In the case of Commonwealth Realms, that would be felt even more acutely in light of our shared understanding of the obligations which attach to correspondence passing between the Sovereign and Her ministers;

26.2 Disclosure could lead to an inference that information disclosed to the Australian Government is not safe from disclosure, despite any assurances given to the contrary. This information is likely to be seen by most nations with whom Australia regularly engages as being at the most sensitive end of the spectrum. In simple terms, the disclosure is likely to inspire comments or concerns such as “if Australia cannot even respect obligations of confidence owed to its own Monarch, what chance is there that it will respect obligations of confidence owed to us?”; and

26.3 An inference of the kind outlined above could create concern on the part of foreign governments that there is a real risk in sharing highly sensitive or classified information with Australian officials. This is likely to have a chilling effect on the conduct of international relations in a whole host of forums, but not least with the UK and other Commonwealth realms.

(emphasis added)

117 In a telling piece of evidence, Mr Todd explained that if he were to imagine his own response to a comparable Commonwealth realm disclosing letters from its Prime Minister to the Queen pursuant to the domestic law of that country, he would reassess what further information Australia could provide to that country given that it was unable to keep the hypothetical letters confidential (Todd affidavit at [27]; T, 21 March 2019 at p. 89.15-24). In this regard, Mr Todd emphasised that his concern would be more about the principle and the practice whereby disclosure could take place under the law of that country, rather than the age of the document or whether the information was already in the public domain: “*My concern would be general, that if one form of correspondence could be revealed, I would be concerned as to what other forms of correspondence could be revealed ...*” (T, 21 March 2019 at p. 90.16-18). Mr Fraser’s evidence was to similar effect (first Fraser affidavit at [31]).

118 In this regard, I do not accept the respondent's submission that the evidence of Mr Todd and Mr Fraser as to the likely or expected responses of the Queen, the Royal Household, or other States to be purely speculative and therefore of little or no weight. First, the Tribunal is not bound by the rules of evidence, even though they may provide a guide. Secondly, as Kenny J (Deputy President) recently found in *Xenophon* at [127] with respect to expert evidence given by Mr Fletcher, First Assistant Secretary, North Asia Division, Department of Foreign Affairs and Trade:

126. ... it was clear from Mr Fletcher's evidence that it was, for the most part, based on his own knowledge and experience of Australia's relationship with Japan over time and of the Japanese Government, including his involvement in diplomatic efforts to minimise the damage to the relationship flowing from the outcome of the CEP and his evaluation of the current political and diplomatic environment between Australia and Japan. ...

127. To the extent that Mr Fletcher's evidence was speculative, it was necessarily so. His evidence was directed to the central question posed by s 33(a)(iii) of the FOI Act – whether disclosure of the relevant documents could reasonably be expected to cause damage to the international relations of the Commonwealth. The question invites a degree of speculation, although it also requires that there be a reasonable basis for such speculation. As already indicated, Mr Fletcher gave evidence about the circumstances affecting Australia's relationship with Japan, with reference to the documents in issue. This evidence was not speculative: rather, it was based on his knowledge and experience. To the extent that his evidence might be regarded as speculative, in the sense his evidence was directed to whether the projected disclosure of the documents would or could cause damage to Australia's relations, it was necessarily so since the documents had not in fact been disclosed. As the respondent put it, he was required "to mentally project a circumstance where disclosure has occurred and to test whether that looks like 'damage' in the relevant sense". Further, as the respondent emphasised, the issue falling for consideration is the reasonableness of the expectation of damage. In this context, no question arises as to the reasonableness of Japan's anticipated response to disclosure of the documents in issue. Mr Fletcher's evidence was clearly relevant and, for the reasons stated, credible, setting forth a well-reasoned and well-informed basis for the speculation he was required to make.

119 In short, the evidence plainly establishes that disclosure of the Letters pursuant to law could reasonably be expected to lead other Commonwealth realms to regard Australia as a less trustworthy confidant particularly given the exchange of letters pursuant to which Australia expressly recognised and accepted the confidentiality convention.

120 Finally, the significance of a breach of the confidentiality convention by Australia is likely to be heightened in the case of the UK because that outcome is directly in conflict with the codification of the confidentiality convention in the FOI Act (UK) in unqualified terms. As such, the UK will continue to observe the convention strictly with respect to the Letters and

generally with respect to such correspondence, while Australia would not. As the Department submits:

... it is not at all far-fetched to envisage the disclosure of the Letters causing appreciable disturbance to the quality of Australia's relationship with the UK government. Disclosure of the Letters has an obvious tendency to undermine aspects of the operation of the UK's system of government, because the confidentiality of The Queen's communications is protected in the UK by both convention and domestic legislation. The UK Government can reasonably be expected to have a diminished sense of trust and confidence in the Australian Government if it discloses copies of correspondence with The Queen in circumstances where disclosure of the originals of those Letters would be contrary to convention and domestic legislation operating in the UK as a [sic] core elements underpinning its system of government.

(supplementary ASFIC at [9])

5.3.6 The respondent's submission that disclosure would not damage Australia's international relations because it is required by law

121 *In the sixth place*, the convention of keeping confidential correspondence of this nature cannot override a requirement to disclose such correspondence when required by a law of the Parliament, as the respondent submits (T, 21 March 2019 at p. 56.18 (Mr Fraser)). Observance of the rule of law requires no less. However, that a law of the Parliament may "trump" an unwritten convention, albeit constitutional in nature, and that the respect by the Queen and the Royal Household for that result reflects their respect for the rule of law, do not answer the question of whether such disclosure will damage Australia's international relations. Rather, as the Department submitted, if the Tribunal were to reject the claim that the Letters are exempt from disclosure under the FOI Act, the Queen and other Commonwealth realms would no doubt accept the requirement for disclosure as a consequence of the rule of law, but still profoundly regret that outcome for the conduct of international relations between them and Australia.

122 In this regard, I accept Mr Todd's evidence that while the Queen would be concerned to ensure that the Australian Government complies with all laws relating to disclosure of communications between Her Majesty and the Prime Minister, the Queen would still be concerned if such correspondence was no longer being treated in a private and confidential manner and would regard that as a betrayal of that trust irrespective of the age or contents of the letters (T, 21 March 2019 at p. 68.25-37 and p. 69.7-34). Indeed, the evidence of Mr Todd suggested that the concern as to the likely chilling effect would be greater if this result were required by law, rather than if disclosure occurred as a consequence of a leak which would generally be a criminal matter (T, 21 March 2019 at p. 89.5-9). The reality of these

concerns is illustrated by the UK Parliament's decision to enact an absolute exemption from disclosure of (relevantly) communications with the Sovereign and the Royal Household under s 37 of the FOI Act (UK) following the decision in *Evans*.

123 Equally, it is no answer to the evidence of damage to submit, as did the respondent, that it can reasonably be expected that if the Tribunal were to find that the Letters were not exempt that the Royal Household and the Private Secretary in particular would take advice about the operation of Australian FOI laws and reassess their practices accordingly. The respondent's submission to this effect was based upon the evidence of Mr Todd as to what he would do if another Commonwealth realm were to decide in a like manner. That submission, however, ultimately does not do more than acknowledge the reality of the likely lessening of trust and consequential diminution in the flow of information to Australia which the UK considered to be confidential. The respondent also suggested that there would be no effective damage because the re-assessment would establish that only correspondence *from* an Australian Prime Minister to the Queen which was personal and innocuous in nature would be disclosed. Underlying this appeared to be an assumption that upon being so informed about the state of Australian law, the Queen would still feel free to express such views as Her Majesty wished in correspondence *to* the Australian Prime Minister confident in the knowledge that that correspondence would remain confidential. However, there is simply no evidence which suggests that the Queen and the Royal Household would take that position. The submission is ultimately premised upon the erroneous imposition of a "reasonable monarch" test which is contrary to the authorities reviewed earlier.

124 Further, even assuming that the Queen and the Royal Household would respond in the manner postulated by the respondent, it can reasonably be expected that that outcome would still be injurious to the free flow of communications between the Prime Minister of Australia and the Queen. In particular, it can be expected that it would have a chilling effect upon what the Prime Minister might say, and how the Prime Minister might express herself or himself, in correspondence to the Queen. As Mr Howe QC, counsel for the Department, submitted:

... ventilation might compromise the willingness of principal advisors to either express some personal observation or the terms in which they do so. That might even, in turn, lead to a level of confected insincerity. Her majesty might, for instance, take the view that she doesn't want her principal advisors throughout the Commonwealth realms to be sending her personal communications that they then ventilate for, perhaps, partisan reasons in the press or in connection with some particular issue that has arisen in that country.

One can surmise perfectly sound reasons for the existence of the Confidentiality

Convention extending beyond what is strictly necessary to fulfil the Tripartite Convention. But, for our purposes, it's enough to note that the Convention does extend beyond those and its extension beyond those forms of communications is considered valuable and important by not only the Queen but by the UK.

(T, 22 March 2019 at p. 14.29-41)

125 The respondent's submission also assumed that correspondence between the Queen and a Prime Minister could be characterised as entirely personal and innocuous, and that a bright line could be drawn between such correspondence and other correspondence between these heads of State. Those assumptions again were not borne out by the evidence. For example, I have already referred to the evidence of Mr Fraser rejecting the propositions that such correspondence could of its nature contain information that is innocuous or anodyne (see above at [84]). Rather, as Mr Howe QC, counsel for the Department, submitted;

... matters which facilitate a warm and high functioning relationship between the Queen as monarch of the country and his or her principal advisors in a country, such as the Prime Minister, are themselves important aspects which go to the fulfilments and facilitation of the role of the monarch. And that, in our submission, is a reason itself for the application of the Confidentiality Convention to all communications between the monarch and the monarch's principal advisors in all Commonwealth countries including in relation to communications of a more personal kind because ventilation of those is itself antithetical to the privacy and the dignity of her majesty – her majesty's expectation as monarch.

(T, 22 March 2019, at p. 14.6-14)

126 Furthermore, Mr Todd explained in evidence that correspondence between a Prime Minister and the Queen “*is likely to be seen by most nations with whom Australia regularly engages as being at the **most sensitive** end of the spectrum*” (Todd affidavit at [26.2] (emphasis added)).

5.3.7 The evidence of other publicly available correspondence between the Prime Minister and the Queen

127 Finally, the fact that a letter from a member of the Queen's Secretariat to Prime Minister Fraser in 1976 may have been released under the *Archives Act 1983* (Cth), and two other pieces of correspondence put to Mr Fraser in cross-examination were released takes the matter no further. There is no information about the circumstances of their release, or even whether the Queen, the Royal Household or any other Commonwealth realms were aware of their release before these proceedings (see in particular T, 21 March 2019 at p. 59.4-16 (Mr Fraser)). As such, it is not possible to draw any inferences from the apparent release of these documents about the damage which might be caused by the disclosure of the Letters. This is particularly so given the unchallenged evidence of Mr Todd that release of the Letters would be highly likely to generate significant media interest in publicity both in the UK and in

Australia (Todd affidavit at [20]). I understand that evidence to relate to the fact of the release of the Letters rather than any observation about likely media interest in their content.

5.4 Conclusion on s 33 exemption

128 For the reasons set out above, I consider that all of the Letters are exempt from disclosure under s 33(a)(iii) of the FOI Act.

5.5 Are the Letters conditionally exempt under s 47C of the FOI Act and would release be contrary to the public interest?

5.5.1 The issues

129 The Department contends that all of the Letters except for document 10 are also conditionally exempt under s 47C of the FOI Act. It will be recalled that where a document is both an exempt document and a conditionally exempt document, access to the document is not required to be given by force of s 11A(6): see above at [23]. As a consequence, the question of whether documents 1 to 9 and 11 to 14 (the **s 47C Letters**) are conditionally exempt would be material only if I were wrong in finding that the exemption in s 33 of the FOIA Act applies to all of the Letters.

130 Nonetheless, even if I had not found that the s 47C Letters were exempt under s 33, I would have found that they were conditionally exempt on the ground that disclosure would disclose deliberative matter for the purposes of s 47C(1) and that disclosure would be contrary to the public interest for the following reasons.

5.5.2 Are the s 47C Letters conditionally exempt under s 47C because they contain deliberative matter?

131 Section 47C of the FOI Act provides that:

(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

- (a) an agency; or
- (b) a Minister; or
- (c) the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see section 8A);
- (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

...

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

132 “Operational information” is defined in s 8A in the following terms:

(1) An agency’s *operational information* is information held by the agency to assist the agency to perform or exercise the agency’s functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).

Example: The agency’s rules, guidelines, practices and precedents relating to those decisions and recommendations.

(2) An agency’s *operational information* does not include information that is available to members of the public otherwise than by being published by (or on behalf of) the agency.

133 As is apparent from the terms of s 47C, the conditional exemption will not be made out unless the s 47C Letters contain deliberative matter as defined in s 47C(1). While Mr Summers does not contend that this requirement is not satisfied, he has of course not had the opportunity to examine the documents in dispute. Furthermore and in any event, as he submitted, it was necessary for me to examine the documents in dispute in order to be satisfied as to whether the s 47C Letters contain material of this kind and not purely factual material (RSFIC at [59] and [60]).

134 In the s 47C Letters, the Prime Minister seeks the Queen’s recommendation or advice. As the Department submits, while as a matter of convention the Queen generally accepts the recommendations and advice of her ministers, this process is not merely figurative as Her Majesty may question the advice or recommendation, seek further advice, encourage, or warn: see above at [65]; see also the first Fraser affidavit at [23] and the Todd affidavit at [12]. As such, I am satisfied that the s 47C Letters contain deliberative material and are conditionally exempt under s 47C of the FOI Act.

5.5.3 Would release of the s 47C Letters be contrary to the public interest?

135 The task of determining whether access would be contrary to the public interest under s 11A(5) is elaborated upon in s 11B, which provides that:

Scope

- (1) This section applies for the purposes of working out whether access to a

conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
- (b) inform debate on a matter of public importance;
- (c) promote effective oversight of public expenditure;
- (d) allow a person to access his or her own personal information.

Irrelevant factors

(4) The following factors **must not** be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- (d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

136 The Department accepts that “*there is some limited public interest in the release of the [s 47C] Letters*” which favours their disclosure, referring in particular to the following factors under 11B(3) including the objects in s 3 of the FOI Act:

- 64.1 increasing scrutiny, discussion, comment and review of the Government’s activities (s 3(2)(b), s 11B(3)(a))
 - 64.2 informing debate on matters of public importance (s 11B(3)(b))
 - 64.3 promoting effective oversight of public expenditure (s 11B(3)(c)).
- (ASFIC at [64])

137 However, I agree with the Department's submission that notwithstanding these considerations, the Letters are not connected with matters of ongoing political controversy and do not shed substantial light on the workings of government that directly impact on a broad cross-section of the community (ASFIC at [65.1]). I also agree that the s 47C Letters *"relate to matters that have been the subject of government decisions ... [but] do not substantially advance the public's understanding beyond what is already publicly known, in a way that would lend real weight to the public interest factors in favour of disclosure"* (ASFIC at [65.2]). As such, when consideration is given to the contents of the s 47C Letters, it cannot be said that there is a compelling public interest in their release.

138 By contrast, there is in my view significant public interest in maintaining confidentiality over the s 47C Letters.

139 First, the correspondence attracts the long-standing confidentiality convention which is recognised and adhered to by Australia, is embodied in legislation in the UK, is the subject of shared expectations between Australia and the UK, and has been the subject of an exchange of letters between the Private Secretary and OSGG.

140 Secondly, as the Department contends, an analogy can be drawn between the s 47C Letters and the specific exemption for documents of the OSGG by s 6A(1) of the FOI Act. Save for those of an administrative kind, s 6A(1) embodies the Parliament's judgment that it is not in the public interest for documents associated with the exercise of the Governor-General's substantive powers and functions to be disclosed irrespective of their content, as the High Court held in *Kline*. This exemption arose for consideration in *Kline* in the context of a request for disclosure of documents held by the OSGG relating to certain nominations for the making of an award of the Order of Australia. The rationale identified by the joint judgment in *Kline* for the exemption in s 6A(1) was the independence from government inherent in the Governor-General's role. As their Honours explained:

34. Thus the processes and activities of government, which are opened to increased public scrutiny by the operation of the FOI Act, do not include those associated with the exercise of the Governor-General's substantive powers and functions, many (even most) of which are exercised in public. Similarly, the FOI Act does not expose to public scrutiny the discharge of the substantive powers and functions of judicial officers or holders of quasi-judicial office to the extent that they have not been discharged in an open court or a public forum. Independence from government and the public is important in relation to the exercise of the various responsibilities of the Governor-General, including, but not limited to, the making of decisions. Furthermore, freedom from interference or scrutiny by members of the public (or other branches of government) is an essential aspect of the making of decisions in

relation to the General Division of the Order.

141 On the other hand, the express exclusion of documents relating to “*matters of an administrative nature*” in s 6A(1) was narrowly construed to connote only “*documents which concern the management and administration of office resources*” (Kline at [41]). The correctness of this construction was held to be illustrated by its application to the categories of documents the subject of the request in Kline, “*striking a balance between the public interest in maintaining an Australian system of honours and the public interest in efficient public administration, which is supported by the scrutiny for which the FOI Act provides*” (at [42]). As to the public interest in the former, the plurality had earlier explained that:

39. ... The proper independent discharge of the Governor-General's responsibility for the administration of the Order ***requires full and frank assistance*** to the Governor-General from the Council for the Order. The Council, in turn, requires full and frank assistance from the Office of the Official Secretary. The possibilities of giving offence to failed nominees, defamation, or political controversy in the administration of the General Division of the Order are all avoided by the confidentiality of the selection process, which culminates in public announcement, in due course, of appointments and awards in the Order. The Office supports the Council and the Governor-General in completing the selection process.

(emphasis added)

142 Equally, the confidentiality convention exists in part to protect the neutrality of the Crown and to ensure that discussions between the Queen and the Prime Minister (and the Prime Minister and the Governor-General as the Queen's representative) are full and frank in furtherance of the tripartite convention: see above at [65], [71], [85]-[87] and [90]. This is a relevant consideration applying to all of the s 47C Letters given that they are in fact deliberative in nature and therefore created in furtherance of the tripartite convention. It follows that the same considerations which underlie the express exemption in s 6A(1) are equally applicable to communications both from the Prime Minister to the Queen and vice versa.

143 It also makes no sense, with respect, in this context to accept that it would be contrary to the public interest to release one half of the communications, namely from the Queen to the Prime Minister, while permitting the release of correspondence from the Prime Minister to the Queen. For example, if correspondence from the Australian Prime Minister to the Queen was in the public arena, it could provide a basis on which ill-informed speculation might occur about responses by the Queen to the communications or the motives of the government in writing the correspondence, which would undermine a full and frank discussion between these heads of State in the future.

144 Finally, for the reasons I have earlier given, release of the Letters could reasonably be expected to have a significant adverse effect on the functioning of the Royal Household, Australia's relations with the Queen in her capacity as Queen of Australia and in her other capacities especially as head of the Commonwealth, Australia's relations with the Royal Household, and Australia's international relations with the Commonwealth realms. Indeed, the evidence that release under the FOI Act would impact adversely upon the flow of confidential information between Australia and these entities was compelling.

145 It follows that while there is a limited public interest in disclosure of the s 47C Letters, there are a number of factors weighing strongly against their release. On balance, therefore, I consider that the release of the s 47C Letters would be contrary to the public interest.

6. CONCLUSION

146 For the reasons given above, the decision of the OAIC dated 16 January 2018 must be set aside. The request for access under the FOI Act to the Letters from the Prime Minister of Australia to the Queen must be refused on the ground that the Letters are exempt under s 33(a)(iii) of that Act.

I certify that the preceding 146 (one hundred and forty-six) paragraphs are a true copy of the reasons for the decision herein of Justice M A Perry, Deputy President

Associate

Dated: 20 December 2019

Dates of Hearing: 21-22 March 2019

Counsel for the Applicant: Mr Tom Howe QC with Mr J Davidson

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent:

Mr J Pizer QC with Mr G Hill (pro bono)



Administrative Review Tribunal (Freedom of Information) Practice Direction 2026

I, the Hon Justice Emilios Kyrou AO, President of the Administrative Review Tribunal, make the following Practice Direction.

Dated: 27 January 2026

THE HON JUSTICE EMILIOS KYROU AO
President, Administrative Review Tribunal

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Part 1. Preliminary

- 1.1 This Practice Direction is made under section 36(1) of the *Administrative Review Tribunal Act 2024* (Act).
- 1.2 This Practice Direction is arranged in 5 Parts:
 - (a) Part 1 – Preliminary;
 - (b) Part 2 – General conduct and procedure of reviews of FOI Decisions;
 - (c) Part 3 – Procedures relating to documents in issue;
 - (d) Part 4 – Confidential evidence and submissions, closed hearings and confidential reasons; and
 - (e) Part 5 – Inspector-General of Intelligence and Security to give evidence in certain proceedings.
- 1.3 This Practice Direction commences on 2 March 2026 and has effect from that date. This Practice Direction applies to all applications for review of FOI Decisions whether lodged before, on or after this date, and remains in effect until it is superseded or revoked.
- 1.3A On the commencement of this Practice Direction, the *Administrative Review Tribunal (Freedom of Information) Practice Direction 2024 (previous instrument)* is revoked. The revocation of the previous instrument does not affect the validity of any act done in accordance with that instrument prior to its revocation.
- 1.4 The purpose of this Practice Direction is to make directions about the practice and procedures relating to applications for review of FOI Decisions and the conduct of proceedings that apply to the review of FOI Decisions.
- 1.5 This Practice Direction should be read together with the *Administrative Review Tribunal (Common Procedures) Practice Direction 2026*.
- 1.6 To the extent that this Practice Direction is inconsistent with the *Administrative Review Tribunal (Common Procedures) Practice Direction 2026* in relation to applications for review of FOI Decisions, the provisions of this Practice Direction prevail. However, where this Practice Direction is silent in respect of any matter, the provisions of the *Administrative Review Tribunal (Common Procedures) Practice Direction 2026* shall apply.
- 1.7 This Practice Direction does not apply to the extent that it is inconsistent with:
 - (a) a provision of the Act or another Act or instrument under which the Tribunal has powers to review decisions;
 - (b) a provision of a regulation made under the Act or another Act; or
 - (c) a provision of a rule made under the Act.
- 1.8 If the Tribunal makes a direction in relation to a proceeding that is inconsistent with this Practice Direction, the Tribunal's direction applies to that proceeding and this Practice Direction does not apply, to the extent of the inconsistency.
- 1.9 A failure by the Tribunal to comply with this Practice Direction does not affect the validity of anything done by the Tribunal.

- 1.10 A failure by a party or any other person to comply with this Practice Direction may have consequences for the progress of the application or the person's participation in the review, including dismissal of the application or removal of the non-compliant person as a party to the review, in accordance with the provisions of the Act or any other applicable statutory instrument.

Definitions

- 1.11 In this Practice Direction:

access applicant means the person who made the request for access to documents in respect of which the decision under review was made.

Act means the *Administrative Review Tribunal Act 2024*.

affected third parties has the same meaning as under the FOI Act.

closed hearing means a hearing that proceeds in the absence of the access applicant and the access applicant's representatives.

closed submissions means written submissions which are lodged with the Tribunal but not disclosed to the access applicant or the access applicant's representatives.

decision-maker means the principal officer of the agency, or the Minister, to whom the request for access to documents under the FOI Act was made.

documents in issue means the documents subject to the decision under review that are claimed to be exempt.

exempt document has the same meaning as in the FOI Act.

FOI Act means the *Freedom of Information Act 1982*.

FOI Decisions means those decisions identified at 1.12 below.

Guidance and Appeals Panel has the same meaning as in the Act.

IC Review means a review undertaken by the Information Commissioner.

IC Reviewable Decision has the same meaning as in section 54K of the FOI Act.

Information Commissioner has the meaning given by the *Australian Information Commissioner Act 2010*.

Member means a member of the Tribunal.

open submissions means submissions relating to confidential evidence or a closed hearing which can be provided to the access applicant or the access applicant's representative.

redact means to obscure or remove sensitive information from a document so that the sensitive information is no longer visible.

representative means a person who is authorised to represent a party.

Rules means the Rules made under the Act.

Tribunal means the Administrative Review Tribunal.

Decisions covered by this Practice Direction

1.12 This Practice Direction applies to:

- (a) decisions made by the Information Commissioner on an IC Review; and
- (b) IC Reviewable Decisions if the Information Commissioner makes a decision under section 54W(b) of the FOI Act that it is desirable that the review of the IC Reviewable Decision be undertaken by the Tribunal.

Note: Proceedings involving a review of a decision of the National Archives of Australia in respect of access to a record claimed to be an exempt record under the *Archives Act 1983* (**Archives Act proceeding**) are similar to proceedings involving a review of a decision referred to in paragraph 1.12. Accordingly, the Tribunal may rely upon aspects of this Practice Direction in determining the procedure that will apply to an Archives Act proceeding.

1.13 Proceedings in relation to an exempt security record decision (as defined in the Act) which, under section 134 of the Act are to be conducted in the Intelligence and Security jurisdictional area in accordance with Part 6 of the Act will usually be case managed individually by a member, who will determine the procedure that will apply to it. The provisions of this Practice Direction may be used by a member as a guide to the directions that may be made to the extent considered appropriate.

Part 2. General conduct and procedure of reviews of FOI Decisions

2.1 A person making an application for review of an FOI Decision should follow the requirements in the *Administrative Review Tribunal (Common Procedures) Practice Direction 2026* except where expressly set out otherwise in this Practice Direction.

2.2 An application for review of decisions referred to at 1.12(b) above must be made within the period starting on the day the decision by the Information Commissioner is made and ending at the period prescribed by the Rules. For all other applications paragraphs 3.10 to 3.11 of the *Administrative Review Tribunal (Common Procedures) Practice Direction 2026* apply.

2.3 The access applicant will be a party to the review, even if they did not make the application to the Tribunal.

2.4 In accordance with section 60AA of the FOI Act (but subject to section 60AB of that Act), as soon as practicable (but not less than 14 days before a scheduled hearing) the agency to which (or the Minister to whom) the request for access was made must notify affected third parties that an application has been made to the Tribunal. That notification should include:

- (a) details of the parties to the proceeding;
- (b) the date, time and location of any scheduled hearing;
- (c) the right of an affected third party to apply to the Tribunal under section 22(1) of the Act to become a party to the proceeding; and
- (d) the Tribunal's contact details in the event that an affected third party wishes to apply to the Tribunal to become a party to the proceeding.

2.5 FOI Decisions cannot be referred to the Guidance and Appeals Panel.

Part 3. Procedures relating to the documents in issue

3.1 Where the decision-maker claims that a document is an exempt document, the decision-maker must not include that document with the documents lodged with the Tribunal under section 23 of the Act.

Note: The decision-maker must not lodge the documents that are claimed to be exempt and then request that the Tribunal make a confidentiality order under section 70 of the Act.

Provision of documents in issue

3.2 The decision-maker may elect to lodge the documents in issue, or the Tribunal may require lodgement, under sections 58E or 64 of the FOI Act.

3.3 The decision-maker should ordinarily lodge the documents in issue, to which section 64 of the FOI Act applies, 28 days after the decision-maker was given notice of the application in accordance with section 64(4A) of the FOI Act.

3.4 Before requiring production under section 58E of the FOI Act of a document claimed to be exempt under section 33, 34 or 45A of the FOI Act, the Tribunal will advise the parties whether it is satisfied by evidence on affidavit or otherwise that the document is exempt.

3.5 If the documents in issue include documents that have a security marking and documents that do not have a security marking, the decision-maker must provide the documents to the Tribunal in separate bundles, one containing the documents without a security marking and one containing the documents with a security marking.

3.6 The bundle of documents in issue without a security marking should be provided to the Tribunal in accordance with 3.1 to 3.5 above. The bundle of documents in issue with a security marking should be provided to the Tribunal in accordance with 3.1 to 3.5 above and 3.7 to 3.8 below.

3.7 When a decision-maker or their representative provides material to the Tribunal that has a security marking, the decision-maker must:

- (a) contact the Tribunal prior to lodging any such material in accordance with this Practice Direction; and
- (b) inform the Tribunal of the date, time and method the decision-maker is proposing to provide such material to the Tribunal (such as by courier) and confirm the Tribunal is available to receive it.

3.8 The decision-maker must not provide material to the Tribunal which has a security marking without complying with paragraph 3.7.

Provision of the schedule of documents in issue

3.9 Except where to do so would disclose the matter claimed to be exempt, the decision-maker must, not later than 7 days prior to the hearing date or at such earlier time as directed by the Tribunal, lodge with the Tribunal and give to any other party a schedule (or schedules) of the documents in issue.

- 3.10 When preparing the schedule, each document in issue must be numbered sequentially and each page within a bundle of documents in issue given a page number.
- 3.11 The schedule must list the documents in issue sequentially by number and include the page numbers of the documents. The schedule must provide the following details in respect of each document, unless to do so would disclose the matter claimed to be exempt:
- (a) the date of the document;
 - (b) the person or persons by whom the document was created and, where applicable, the person or persons to whom it was directed;
 - (c) a description of the nature of the contents of the document so as to provide an indicative justification for the ground or grounds of exemption relied upon;
 - (d) where applicable, a statement as to the ground or grounds of public interest relied upon in support of the claim of exemption;
 - (e) where the claim of exemption relates only to part of the document, an indication of the part or parts involved; and
 - (f) where a document is a copy of another document for which exemption is claimed, it should be identified as a copy. The claim(s) of exemption do not need to be repeated in respect of the copy document.

Non-disclosure of certain matters

- 3.12 The Tribunal will have regard to the need to avoid disclosing to an access applicant or their representative exempt documents or exempt matter contained in a document when considering whether to make orders:
- (a) directing that a hearing or a part of a hearing take place in private;
 - (b) directing that a hearing or part of a hearing take place as a closed hearing; and/or
 - (c) restricting the publication or disclosure of:
 - (i) information tending to reveal the identity of, or otherwise concerning, a party to or witness in a proceeding in the Tribunal or any person related to or otherwise associated with any party to or witness in the proceeding; and/or
 - (ii) information relating to a proceeding in the Tribunal and comprising of evidence or information about evidence or other information given to the Tribunal.
- 3.13 If an order is made restricting the publication or disclosure of information, the Tribunal will not refer to any of the restricted information in any published decision.
- 3.14 If the Tribunal is considering whether it is practicable for a decision-maker to grant access to a document if redactions are applied, it will invite the decision-maker to propose relevant redactions and submissions in support.

Return of documents in issue

- 3.15 Where the Tribunal is satisfied that a document is an exempt document:

- (a) it will not require the decision-maker to produce the document to any other party to the review; and
- (b) the document will be returned to the decision-maker (or, with the written consent of the decision-maker, destroyed) as soon as practicable after the expiration of the applicable appeal period.

Transfer of request for access to documents between agencies

- 3.16 Where any part of a request for access to documents has been transferred to another agency pursuant to the provisions of section 16 of the FOI Act, the referring agency must identify in its statement under section 24(2)(a) of the Act:
- (a) which aspects of the request for access have been transferred;
 - (b) the name of the transferee agency; and
 - (c) the date on which each such transfer was made.

Part 4. Confidential evidence and submissions, closed hearings and confidential reasons

- 4.1 A closed hearing may be convened to receive confidential submissions or adduce confidential evidence.
- 4.2 Where a decision-maker determines that a confidential affidavit and/or a closed hearing is necessary to avoid disclosing documents in issue, the decision-maker must inform the Tribunal and any other party as soon as possible.
- 4.3 Parties should ensure confidential affidavits or submissions are drafted narrowly and limited to evidence that would disclose or tend to disclose information claimed to be exempt so as not to give rise to procedural fairness issues in circumstances where the access applicant is prevented from accessing this material.
- 4.4 The Tribunal may require that the decision-maker provide open and closed written submissions as to why a confidential affidavit and/or closed hearing is necessary. If such submissions are ordered, the closed submissions will not be provided to the access applicant or the access applicant's representatives.
- 4.5 When the Tribunal determines that a closed hearing is necessary, that hearing will be conducted in the absence of the access applicant and the access applicant's representatives.
- 4.6 Whether the Tribunal's decision is published will be determined in accordance with the Tribunal's publication policy. However, the Tribunal will not publish its statement of reasons where to do so would disclose information, the disclosure of which is prohibited under the Act or another Act or instrument. In those circumstances, the Tribunal may make an order restricting the publication, in full or in part, of the statement of reasons to the Tribunal and the decision-maker.
- 4.7 The Tribunal may make a temporary order restricting publication, in full or in part, of the statement of reasons to the Tribunal and the decision-maker to enable the decision-maker's representatives to confirm the statement of reasons does not disclose

information, the disclosure of which is prohibited under the Act or another Act or instrument.

Part 5. Inspector-General of Intelligence and Security to give evidence in certain proceedings

- 5.1 Under section 50A of the *Archives Act 1983* and section 60A of the FOI Act, the Tribunal, before determining that a document is not an exempt document under section 33 of the *Archives Act 1983* or section 33 of the FOI Act, must request the Inspector-General of Intelligence and Security to appear personally and give evidence on:
- (a) the damage that would, or could reasonably be expected to, be caused to the security, defence or international relations of the Commonwealth if access is given to the document; or
 - (b) whether giving access to the document would divulge information communicated in confidence by a foreign government, authority or international organisation.
- 5.2 In considering whether to make a request under section 50A of the *Archives Act 1983* or section 60A of the FOI Act prior to, or at the time of, the decision-maker giving evidence or making submissions, the Tribunal will have regard to:
- (a) the number and nature of the documents that are claimed to be exempt under section 33 of the *Archives Act 1983* or the FOI Act;
 - (b) the extent to which the Tribunal is able to limit the number of documents in relation to which the Inspector-General will be requested to give evidence;
 - (c) the likely time required by the Inspector-General to:
 - (i) advise whether they are qualified to give the evidence; and
 - (ii) if qualified, to prepare the requested evidence;
- Note:** The current Inspector-General has indicated that in determining whether they are 'qualified' to give evidence they will have regard to their functions under the *Inspector-General of Intelligence and Security Act 1986*. Generally, those functions pertain to the oversight of the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Defence Signals Directorate, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation and the Office of National Assessments.
- (d) the procedural rights of the parties; and
 - (e) whether directions for the management of the hearing can be made consistently with those rights so as to limit the time and resource demands on the Inspector-General and their office.

PART 5 — EXEMPTIONS

Version 1.6, May 2024

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- (b) would divulge information or matter communicated in confidence to the Commonwealth by a foreign government, an agency of a foreign government or an international organisation.

5.22 In claiming the exemption, decision makers must examine the content of each document within the scope of the FOI request and come to a conclusion about whether disclosure of that content would cause, or could reasonably be expected to cause, the damage specified in s 33(a)(i)–(iii). The context of each document is also relevant because, while the information in the document may not itself cause harm, in combination with other known information it may contribute to a complete picture which results in harm (the ‘mosaic theory’). See [5.43] – [5.44] below for more detail on the mosaic theory.

5.23 The classification markings on a document (such as ‘secret’ or ‘confidential’) are not of themselves conclusive of whether the exemption applies (see also [5.45] – [5.50] below in relation to information communicated in confidence).⁸

Would, or could reasonably be expected to, cause damage to the Commonwealth’s security, defence or international relations (s 33(a))

Reasonably expected

5.24 The term ‘reasonably expected’ is explained in greater detail at [5.15] – [5.18] above. There must be ‘real’ and ‘substantial’ grounds for expecting the damage to occur which can be supported by evidence or reasoning.⁹ A mere allegation or possibility of damage is insufficient to meet the ‘reasonable expectation’ test.¹⁰ Davies J said in *Re Maher and Attorney-General’s Department* that ‘there must be a cause and effect that can be reasonably anticipated’:

But if it can be reasonably anticipated that disclosure of the document would lessen the confidence which another country would place on the Government of Australia, that is a sufficient ground for a finding that the disclosure of the document could reasonably be expected to damage international relations. Trust and confidence are intangible aspects of international relations.¹¹

Damage

5.25 ‘Damage’ for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign

⁸ *Re Anderson and Department of Special Minister of State* [1984] AATA 478; *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

⁹ *Attorney-General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft* [1986] FCA 35; (1986) 10 FCR 180.

¹⁰ See *Re O’Donovan and Attorney-General’s Department* [1985] AATA 330; *Re Maher and Attorney-General’s Department* [1985] AATA 180; *Rex Patrick and Department of Defence (Freedom of information)* [2021] AICmr 39 [30].

¹¹ *Re Maher and Attorney-General’s Department* [1985] AATA 180 [41]. Also see *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667.

Part 6 — Conditional exemptions

Version 1.5, February 2026

Introduction

- 6.1 This Part of the FOI Guidelines sets out each of the conditional exemptions in Division 3 of Part IV of the FOI Act and explains the threshold criteria that must be met before deciding that a document is conditionally exempt.
- 6.2 Section 11A(5) of the FOI Act provides that when a document is conditionally exempt under a conditional exemption in Division 3 of Part IV of the FOI Act, access must be given to the document unless, in the circumstances, giving access would, on balance, be contrary to the public interest (s 11A(5)).
- 6.3 After discussing each conditional exemption and its threshold criteria, Part 6 sets out how decision-makers should apply the public interest test, which is common to all conditional exemptions in Division 3 of Part IV.
- 6.4 It is important to recognise that agencies and ministers retain a discretion to provide access to a document, even if the document meets the criteria for one of the exemptions in Division 2 of Part IV (s 3A). In each case, agencies and ministers should consider the information sought and the public interest factors in favour of release of a conditionally exempt document. This process can involve factors such as the current context, the passage of time and the availability of related information.
- 6.5 Sections 90, 91 and 92 of the FOI Act provide protection against civil and criminal liability when documents are disclosed or published in good faith in the belief that publication or disclosure is required or permitted under the FOI Act or otherwise, whether under an express legislative power or not.
- 6.6 As noted in *‘ACV’ and Tertiary Education Quality and Standards Agency*,¹ agencies [and ministers] are not legally bound to refuse access if a document is exempt and may consider disclosure of a document if this is not otherwise legally prohibited. Such an approach is consistent with the pro-access parliamentary intention underpinning the FOI Act.

Decision making under Division 3 of Part IV

- 6.7 Deciding whether a document is exempt under Division 3 of Part IV of the FOI Act requires decision makers to:
 - consider the document at issue and the criteria that must be established for each conditional exemption
 - decide, in the context of each individual document, whether the threshold for one or more conditional exemptions is met²
 - consider whether giving access would be contrary to the public interest test (s 11A(5)) by:
 - identifying the public interest factors favouring disclosure (s 11B(3)) (see [6.229] – [6.231])
 - identifying the public interest factors against disclosure (see [6.232] – [6.233])

¹ *‘ACV’ and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89] and [90].

² If the statutory criteria for the conditional exemption is not met, the document is not conditionally exempt. Unless another exemption applies, access to the document must be given (s 11A(5) of the FOI Act).

- 6.14 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.¹²
- 6.15 The use of the word ‘could’ is less stringent than ‘would’ and requires analysis of the reasonable expectation rather than the certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.¹³
- 6.16 The mere risk, allegation, possibility, or chance of prejudice does not qualify as a reasonable expectation.¹⁴ There must be, based on reasonable grounds, at least a real, significant or material possibility of prejudice.¹⁵

Substantial adverse effect

- 6.17 Several conditional exemptions¹⁶ require the decision maker to assess the impact and scale of an expected effect or event that would follow disclosure of the document. That is, the expected effect needs to be both ‘substantial’ and ‘adverse’.
- 6.18 The term ‘substantial adverse effect’ broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’.¹⁷ The word ‘substantial’, in the context of substantial loss or damage, has been interpreted as including ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.¹⁸
- 6.19 A decision maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons under s 26 to show their deliberations in determining the extent of the expected effect. It may sometimes be necessary to use general terms to avoid making the statement of reasons itself an ‘exempt document’ (s 26(2)).

Prejudice

- 6.20 Some exemptions and conditional exemptions¹⁹ require the decision maker to assess whether the potential disclosure of a document would be prejudicial. The FOI Act does not define prejudice. The Macquarie Dictionary definition of ‘prejudice’ requires:
- (a) disadvantage resulting from some judgement or action of another
 - (b) resulting injury or detriment.

¹² The test ‘would or could reasonably be expected’ has been discussed in various decisions. For example see *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [37]; *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667 [98]–[103].

¹³ *Re Maksimovic and Australian Customs Service* [2009] AATA 28 [28].

¹⁴ *Re News Corporation Limited v National Companies and Securities Commission* [1984] FCA 400; (1984) 5 FCR 88 per Fox and Woodward JJ; *Re Maher and Attorney-General’s Department* [1985] AATA 180 [41]; (1985) 7 ALD 731 at 742.

¹⁵ *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623 [79].

¹⁶ Sections 47D, 47E(c), 47E(d) and 47J.

¹⁷ See *Re Thies and Department of Aviation* [1986] AATA 141 [24].

¹⁸ See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* [1979] FCA 85 [14]–[15]; (1979) 27 ALR 367 [383]; per Deane J in relation to the meaning of ‘substantial loss’ in s 45D of the *Trade Practices Act 1974*. Although Deane J noted that it was unnecessary that he form a concluded view, Deane J’s interpretation of ‘substantial’ provides general guidance on the interpretation of this term under the FOI Act. See also for example *Re Marko Ascic v Australian Federal Police* [1986] FCA 260.

¹⁹ Sections 37(1)(a), 37(2)(a), 37(2)(c), 47E(a), 47E(b) and 47G(1)(b).