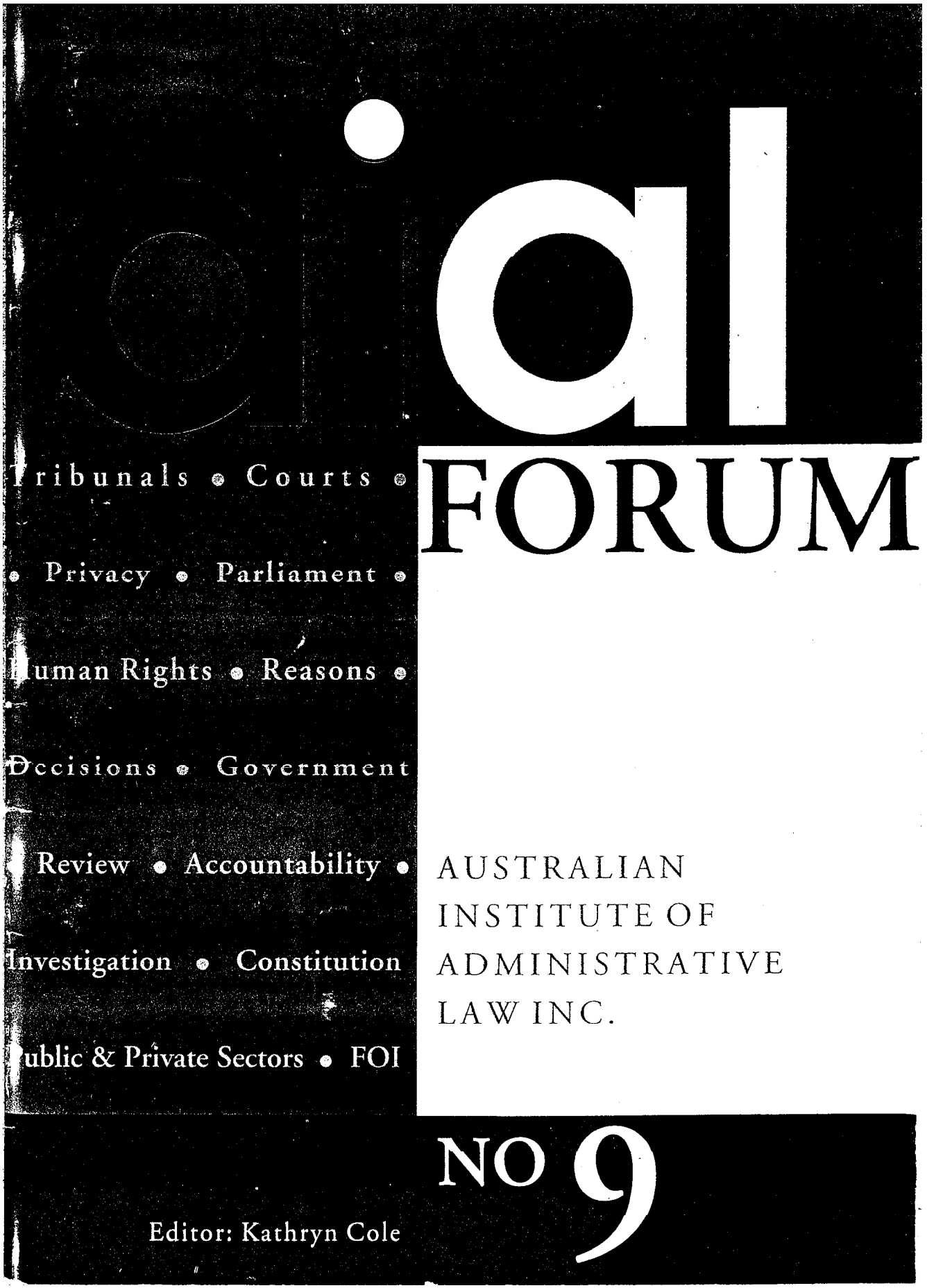

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COMMERCIAL CONFIDENTIALITY, FREEDOM OF INFORMATION AND THE PUBLIC INTEREST#

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Paper presented to AIAL seminar, Commercial Confidentiality and the Freedom of Information Act, Melbourne, 8 May 1996.

Introduction

The purpose of this paper is to evaluate the exercise of the discretion[1] by the Administrative Appeals Tribunal (AAT) on review to order the release, in the public interest, of documents otherwise exempt under section 34 of the *Freedom of Information Act 1982* (Vic) (FOI Act).

The issues raised for consideration are how the AAT has struck a balance between the competing interests in favour of and against disclosure. In favour of disclosure are the democratic accountability values reflected in the "creation of a general right of access"[2] in the objects clause of the Act. Against disclosure are the "exemptions necessary for the protection of essential public interests and the ..... business affairs in respect of persons of whom information is collected..."[3] External review of agency decisions by the AAT has allowed it to recognise and articulate how these conflicting interests have been balanced. This paper considers a number of recent cases where the AAT has had the opportunity to achieve the balance. It will be argued that the AAT has, in general, properly balanced the competing interests.

Because the "strength"[4] of the section 34 exemption has been early recognised by the AAT the paper will seek to consider the exemption and the content of the "public interest" within the context of the Act as a whole and the recent recognition by the High Court of a constitutional implication of freedom of communication. Before turning to the cases the paper will thus briefly consider the background rationale to Freedom of Information (FOI), the proper approach to disclosure, and the development of the concept of the public interest.

The democratic rationale of FOI - the "political speech" cases

It is important to remember that freedom of information in Australia had its genesis in a dissatisfaction with existing accountability mechanisms under the Westminster system of government.[5] The proponents of FOI saw that the accountability of government could be improved by providing access to information held by government:

> Open Government in the true sense is a central need in a democracy. People must have information to enable them to make choices about who will govern them and what policies the individuals or political parties that they choose to govern, shall implement.

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> Freedom of information is very closely connected with the fundamental principles of a democratic society and is based on three major premises:
>
> 1 The individual has a right to know what information is contained in Government records about him or herself.
>
> 2 A Government that is open to public scrutiny is more accountable to the people who elect it.
>
> 3 Where people are informed about Government policies, they are more likely to become involved in policy making and in government itself.6

The accountability and participatory rationale behind FOI has now been given important recognition by the High Court in the *"political speech"* cases.[7] This is because of the recognition by the High Court in those cases of an implication in the Constitution of an implied *"freedom of communication"*. In the cases are a number of references to democratic and accountability principles, and of the need for information which it can be argued are part of the public interest.

In the *Australian Capital Television* case[8] Mason CJ based his support for an implied guarantee of freedom of communication on the basis of the Constitution providing for a representative government where politicians are accountable:

> The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.
>
> .....
>
> Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may be called for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and response to the will of the people. Communication and the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.[9]

The Chief Justice went on to hold that the freedom of communication did not cease with communication between representatives and the electorate. It also applied to "all persons, groups and other bodies in the community.[10] It was seen as "a central element of the political process". Deane and Toohey JJ adopted a similar position to Mason CJ in relation to the implication of freedom of communication within the Constitution and relied on their reasoning in *Nationwide News*[11] Importantly they also found that the implication extends to all political matters including the matters relating to other levels of government.[12]

Gaudron J based her decision on the representative nature of our parliamentary democracy and held that "freedom of discussion of matters of public importance is essential to the maintenance of a free and democratic society."[13] She also held that free elections entail at the very least "freedom of political discourse. And that discourse is not limited to communications between candidates and electors, but

extends to communication between the members of society generally."[14]

McHugh J found that the Constitution created institutions of representative and responsible government that:

> must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities of policies of all candidates for election. Before they can cast an effective vote at election time they must have access to the information, ideas, and arguments which are necessary to make informed judgment as to how they had been governed and as to what policies are in the interests of themselves, their communities and the nation.[15]

This need for information to participate and to bring accountability was also accepted in *Theophanous*[16] where Deane J noted that modern developments "have greatly enhanced the need to ensure that there be unrestricted public access to political information and to all points of view." He confirmed the "freedom of the citizen to examine, discuss and criticise the suitability for office of the elected members of Parliament."[17]

In *Stephens*[18] McHugh J provides another argument in favour of access. In the course of his judgment he found that the law of qualified privilege gives protection in the law of defamation to the communication of information about government. He recognised important participatory and accountability values when he said:

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials.[19]

By analogy his comments illustrate the important interest of the public in receiving information about the functioning, powers or performance of representatives and officials. These are democratic accountability and participatory values which he is articulating. They are the values which inform "the public interest" in the FOI Act.[20]

Applying the public interest over rider

The Victorian FOI Act is unique in that it is the only one in Australia that has an "over-riding" public interest test allowing the AAT to override, in the public interest, exemptions made out by agencies.[21] As the 1979 Senate Report indicated, a "properly framed public interest test, provides a balancing test by which any number of relevant interests may be weighed one against another."[22] The report endorsed the principle of external review in the Act on the basis that it would "allow for a natural growth in the ideas about the way in which government should relate to the community."[23] It is submitted that the comments in the political speech cases now narrow the "essential public interests" against disclosure in section 3 of the Act. In any balancing process they tip the scales in favour of disclosure because disclosure of information is so important to the representative democracy in which we live. They give added weight to and complement the "right" conferred in section 3 of the Act.

This is important because the public interest is a key concept in its general application, and the approach to its interpretation has a major impact on the utility of the Act as an accountability

mechanism. Further, in contrast to the position at the federal level,[24] there is consistent authority that a "leaning approach" to disclosure should be adopted.

In *Victorian Public Service Board v Wright*[25] the Court said "(I)t is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information". In the recent case of *Sobh v Police Force of Victoria*[26] the Court said that "while the issue is ultimately one of statutory construction, the court should lean in favour of disclosure".[27] Nathan J, after reviewing with approval the US authorities which have held that "exemptions are to be narrowly construed",[28] said that the interpretation of the FOI Act in the particular cases should be approached "with a predisposition in favour of access..."[29] This analysis is supported by a comment in *Arnold v Queensland*[30] where the structure of the Commonwealth FOI Act was considered. Wilcox J noted that the policy of extending information in the objects clause (s 3(1)) was taken further by "requiring the implementation of that policy in the exercise of the discretions conferred by the Act."[31] He then went on to note that while the exemption under consideration did not confer a discretion "the command of s 3(2) is an indication that Parliament regarded the principle of facilitating and promoting the disclosure of that information as itself 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."[32]

When these comments are combined with earlier comments that the Act is remedial[33] they amply support the conclusion of the Australian Law Reform Commission and the Administrative Review Council that "agencies should, therefore, approach a request with a presumption that documents should be disclosed."[34] Further the exemption provisions should be interpreted against a "presumption that disclosure of government information is in the public interest".[35]

These comments are particularly important in relation to the power in subsection 50(4) to override certain exemptions when the public interest "requires" it. In a number of cases the Tribunal has suggested that this imparts "an imperative" tone.[36] The legislative history of this provision is not clear but it is suggested that there is no warrant for any gloss on the word "requires" in subsection 50(4) and that it bears its ordinary meaning in this context. Consistent with section 3 the discretion in subsection 50(4) should not be fettered by any requirement other than the public interest considerations in favour of disclosure outweigh those against disclosure. Such an interpretation is consistent with the object of the Act.

Evolution of the content of the public interest

Before turning to recent decisions involving the public interest and commercial confidentiality it should be noted that in the leading early cases on confidential documents and public interest there has been a theme of participation and accountability. In *Re Binnie and DIETR*,[37] the public interest in having an informed debate on the "humanitarian issue" of animal testing was enough to prompt release of documents otherwise exempt under section 34. The respondent submitted that the public interest included "the achievement of the benefit to Victoria of the project, the undesirability of impeding that development and the undesirability of the revelation by Government of material gained by it in confidence from commercial sources." These considerations were held to be insufficient to override, in the circumstances, the public's "right to know".[38] The Tribunal said :

> The ground of public interest requiring that access be granted is the desirability that the public have sufficient knowledge to properly consider and debate the issue

> surrounding the chemical testing upon animals at the proposed centre.[39]

While *Re Binnie* recognised the importance of public debate and participation the earlier case of *Re Gill*[40] had identified an aspect of the public interest that has been a recurring feature of subsection 50(4) cases, namely the revelation of iniquity.

> Clearly the revelation in the documents of iniquities such as illegal or sharp practices detrimental to the welfare of the State and its citizens would be amongst the factors which would prompt release.[41]

When the concept of the public interest was considered by the Supreme Court of Victoria in *DPP v Smith*[42] the Court recognised the centrality of standards administration when it said:

> 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 wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.[43]

The comments in *DPP v Smith* were applied in *Re State Bank of NSW and Department of Treasury*[44] where the AAT gave weight to the need for "an informed public debate" on a matter that had been "of great public interest" when ordering the partial release of documents exempt under section 34. The sensitivities of the commercial organisation and the public interest in giving "appropriate protection to sensitive information" were overridden in the interest of the community being provided with information to assist it in public debate.

This theme of the right of the public to information to assist debate and to decide for itself about the proprieties of action by agencies and public figures was recognised as an aspect of the public interest in *Re Robinson and the University of Melbourne.*[45] The public interest in scrutinising the indirect financial sources of support provided to a Member of Parliament outweighed the interest of the respondent in maintaining financial support. On appeal Brooking J said that "(O)ne of the strongest public interests is in the purity of public administration".[46]

Recent decisions on business and commercial information and the public interest

Politicians and journalists have been repeat players in FOI applications. With the change of government in Victoria in October 1992 the Opposition has attempted to utilise FOI to expose a number of matters relating to commercial interests of organisations dealing with government. A number of cases will be considered in two categories. The first is where the information sought was asserted to be commercially sensitive by the agency. The second category is where the information was covered by an express or implied undertaking of confidentiality. These FOI applications have generally been well reported and have allowed the AAT to explore a number of heads of public interest relating to government administration. This use is not new but the fact that so many cases have been brought to judgment since the change of government does allow a good focus on the public interest considerations recognised since *Smith's* case[47]

It is now proposed to consider a number of recent cases, most involving Opposition politicians, which deal with documents which relate to the business and financial affairs of government and the private sector. The cases have a number of common features in that they were all the subject of political controversy, they involved the expenditure or potential expenditure of government monies, they all relate to commercial or quasi commercial activities of government and in all of them there were existing forms of accountability mechanisms available. Speaking generally

the applicants were substantially unsuccessful in the applications. Even so it can be argued that the appeal hearing itself allowed a number of public interest issues to be agitated as well as the elucidation of evidence relating to the government decision-making process which justified the exercise, at least from the applicant's point of view.

Contracts for government services

In three of the cases the applicants were seeking details of contractual arrangements between government agencies and the private sector in relation to matters the subject of political controversy and media interest. The first of the cases was *Re Thwaites and Department of Premier and Cabinet*[48] *(DDB Needham case)*. This request related to advertising arrangements undertaken by the incoming government and sought details of documents relating to an advertising agency appointed in the first two months of the new government. The actual appeal was reduced to two documents which related to details of an arrangement between the respondent and the agency DDB Needham, and an invoice which detailed the actual rate at which advertising was procured. The political controversy associated with the issue was the fact that the person involved in the advertising contract for the respondent was a member of the Liberal Party, had worked on the Liberal Party campaign for government and had formerly worked for DDB Needham. Further the new contract substituted for an existing arrangement for government advertising. The issue of the contract between the Department of Premier and Cabinet and DDB Needham had been the subject of extensive press coverage as well as a parliamentary debate. The exemptions sought by the respondent were paragraph 34(1)(a) and this exemption was ultimately held to be made out. A claim for exemption under subsection 34(4) failed.

The public interest grounds upon which the applicant relied were directed to the issue of accountability of government administration. They included:

(i) government accountability for the proper administration of public monies;

(ii) that consultants and contractors are engaged under a fair and proper tendering system and without apparent or real favouritism;

(iii) that regulations were complied with;

(iv) the evaluation of claims of commercial efficiency made by Ministers;

(v) participation and informed debate about contracting out of services;

(vi) assessing whether there was value for money and clearing the air.[49]

All these heads were in a sense subsets of the "purity of the public administration"[50] public interest and the respondent asserted against that interest the fact that the documents contained "rather sensitive information reflective of an important element of the conduct of business of DDB".[51] The document contained details of commission, rebate and fee structures and there was evidence that it would impinge adversely on the DDB business. Thus the exemptions under paragraphs 34(1)(a) and (b) were made out. The Tribunal ultimately rejected release of the documents on public interest grounds but expanded on the meaning of public interest as discussed in *Smith's* case.[52] It was said that there is involved in the public interest "an element of what is for the good or benefit of the community."[53]

The Tribunal did concede that "the quality of professional assistance engaged by government... and in a broad sense the terms and conditions upon which such assistance is obtained are matters of public interest".[54] Release however would only be ordered if the public interest demanded it.

The Tribunal held that there was no suggestion that Mr Bennett, despite having worked for the Liberal Party election campaign was "in any respect unsuitable for the task or undeserving of the appointment or that his engagement was motivated by bias or favouritism".[55] In relation to the argument that the new agreement overtook an existing agreement the Tribunal rejected this and noted that the new arrangement did not show anything "apparently sinister, untoward or inconsistent."[56] The fact that it had not been submitted to the Tender Board as it should have been was not a factor because there was no evidence of anything which would cause public concern. It further noted that the whole arrangement had now expired and had been replaced by a more permanent arrangement.[57]

The overall decision is cautious and reflected the Tribunal's assessment of the commercial interests claim made by the private sector organisation. This is consistent with the comments in *Gill's* case[58]where the Tribunal spoke of the "strength of the business affairs" exemption. Further there was nothing apparent in the documents which would have focused on the public interest arguments of the applicant. It can however be argued that the appeal was a vindication for the applicant in that at least an independent Tribunal in public assessed the fact there was nothing untoward or irregular associated with the transaction or reflected in the documents. This applied particularly where there were such close connections between the incoming government, DDB Needham and Mr Bennett.

The public interest considerations which were rejected or not made out on the evidence in the *DDB Needham* case were however made out in another case involving some of the same issues and personnel, the *Leeds Media* case.[59] That case arose out of the granting of a tender to Leeds Media Pty Ltd by the respondent agency for master media agency services. The tender process was managed by Mr Bennett who was referred to in the earlier case. The issue here was whether there had been proper compliance with the government processes and in particular whether the successful applicant was giving the government value for money. The particular public interest heads argued included:

(i) engagement of consultants and contractors under a fair system;

(ii) scrutinising contracts involving the media because of potential of government to pressure the media;

(iii) evaluation of claims of commercial efficiency to participate in the public debate;

(iv) to clear the air after a major public controversy over advertising contracts and the role of Mr Bennett in recommending the contracts.[60]

The documents in dispute essentially included a number of documents containing commercial information from potential tenderers for the master media contracts. They also consisted of correspondence between Mr Bennett of the respondent and the tenderers, and the unsuccessful tenderers, as well as correspondence by Bennett to the Tender Board. Exemptions sought to be made out included subsection 30(1) and paragraphs 34(1)(a) and (b) and subparagraph 34(4)(a)(ii). Despite the respondent making out exemptions on a number of documents, the Tribunal ordered release of three documents in the public interest.

The Tribunal first referred to the dicta of Mason CJ in the *Television* case.[61] The Tribunal proposed to release material which "will assist in informing the public as to the basis on which the... contract was awarded". The Tribunal accepted that there was high level of public debate and interest, and further the debate did not reflect a mere "political controversy". The debate involves speculation concerning matters relating to the contract and the

credentials of the winning bidders. The Tribunal said:

> Public debate is not surprising given the fact that the contract is a substantial and lucrative one and it was keenly sought by advertising agencies. The contract has an added significance in that it would appear that contracts led by Leeds will not be subject to scrutiny by the State Tender Board.[62]

It was held that release would assist in establishing the criteria on which the contract was awarded "rather than allowing the matter to remain one of conjecture, speculation and rumour".[63]

The Tribunal considered the matters that had been raised by the respondent and noted that release would not cause detriment to any of the companies involved. Further, some of the material had been released in general terms in Parliament and one particular item of information was not a closely guarded secret within the industry. The Tribunal accepted that the partial release of information given in confidence was presumably in recognition "of the need to better inform Parliament concerning the matter".[64] The Tribunal then noted that commercial entities must expect that in some circumstances material provided to government will be released. A "frankness and candour" argument as well as an argument that release would mislead the public were summarily dismissed.

It can be seen that the depth of the public controversy here as well as the fact that an existing accountability mechanism, the Tender Board, appeared to have been bypassed were factors. Perhaps the most significant aspect of the case however is the acceptance of the need for governments to be accountable as reflected in the *Television* case.[65] As will be seen below however, the sentiments in this decision have not at this stage commanded universal respect.

The third case involving government contracts was the *Office Renovations* case.[66] This case involved the various documents relating to the renovations of the Minister of Health's office. The only exemption claimed was paragraph 34(1)(a). Significantly the respondent chose to call no evidence but sought to rely on the documents as, on their face, containing information which came within the description "business, commercial or financial nature".

The decision is of interest as an indication of at least one division of the AAT being prepared to give weight to the accountability rationale of the Act. The applicant argued the following grounds of public interest:

(i) accountability of government;

(ii) informed public participation in government decisions;

(iii) knowing the cost of upgrading or refurbishing a Minister's office at a time of major budget cuts;

(iv) ensuring that proper processes were followed, including tendering and Treasury approval;

(v) ensuring that government money was not wasted;

(vi) informing the public about matters which are the subject of political debate and media attention.[67]

The AAT followed *Smith's* case[68] and accepted that the public interest "is a fluid concept which evolves and changes with the passage of time".[69] Each of the heads argued by the applicant was accepted, although there was no finding that there had been a breach of any Treasury Regulations.[70] The Tribunal noted that the respondent called no evidence and there was no evidence that the material would be detrimental to the suppliers of the information, or that it was supplied in confidence.[71] The *Leeds Media* case[72] was cited in support that release "will remove the disputed matters from the arena of

conjecture, speculation and rumour". The Tribunal also said, after noting the fact that there was no evidence of any detrimental effect to the private businesses that "(b)usiness and commercial organisations dealing with government, in the absence of unusual or special circumstances, must expect that release of material provided by them is very much a possibility if not a likelihood." [73]

This decision is also of significance for a thoughtful analysis of the difficulties of the wide possible interpretation of the words "business, commercial or financial nature" in paragraph 34(1)(a) given by Murray J in *Gill's* case.[74] The analysis makes it clear that there is conflict in the authorities and that if there is any doubt as to whether matter comes within that category then consistent with section 3 of the Act[75] disclosure would follow. The decision is strongly confirmatory of a "pre-disposition to disclose" approach which has now been endorsed by the Australian Law Reform Commission and the Administrative Review Council.[76]

These cases have all related to commercial contracts with government. The principle that, in general, the community is entitled to know what use is being made of public funds has also been applied to the personnel area where the individual came from the private sector.

Thus in the *Eslake* case[77] the employee, a high level officer engaged in the State Audit, was seconded from a private sector organisation. The Tribunal said that disclosure of government expenditure details "should not be able to be circumvented by the secondment of a person, rather than the use of a consultant or a public servant".[78] In that case the public interest in accountability was sufficient to override subsection 34(1) of the Freedom of Information Act because the respondent argued that details of the fee for the secondment of the individual constituted information caught under subsection 34(1). It further argued that release of that information would cause problems within the private sector organisation because executive salaries were a closely guarded secret and release of the salary paid to Mr Eslake would expose him to being headhunted and create resentment within the organisation.

On the basis of the public interest in accountability the Tribunal would not accept that this justified the material being exempt. A further consideration was that a corporation that agrees to its employee being seconded and enters into an arrangement with the government for the payment to it from public funds of an amount in respect of the secondment, "ought not to expect to keep the amount of the payment confidential" for the same reason that a person who is an individual government sector employee who has been paid ought not to expect that the amount of the payment should be kept confidential.[79] The only matter which remains confidential is the individual configuration of the remuneration package of a public servant. This is presumably on the basis that how an individual takes his or her package within a "total cost to the government" remuneration is a matter for the person even though it has been argued[80] that this was government sanctioned tax avoidance.

In another "political" case the principles accepted in these cases were accepted and it was said the tribunal had "on many occasions, recognised the public interest in knowing the amounts paid not only to public servants but to others who provide services to the State".[81]

On the other hand, where release of personal information given in confidence did not relate to a matter of current relevance, and its release would give rise to competitive disadvantage, the AAT had no hesitation in finding that release was unreasonable.[82]

Accountability and confidentiality

In the next three cases there were major political controversies and the public interest arguments for release came into direct conflict with the need for the government agencies to protect commercial confidences. How the AAT resolved this conflict was very unsatisfactory for applicants because the AAT fell back on the argument that there were existing adequate accountability mechanisms which would serve the public interest. The outcomes were thus different from the broad public interest considerations in favour of release that commanded support in earlier leading cases and in some of the cases just considered.[83]

The Grand Prix case[84]

In this case an Opposition frontbencher sought documents "relating to the awarding of the Formula 1 Grand Prix to Victoria". The documents in dispute related mainly to financial arrangements between the agency and a government sponsored corporation (Melbourne Major Events Co Pty Ltd) which had been made a joined party to the appeal. The documents were generated over a fairly short period and appeared to document the government's involvement in providing some sort of financial accommodation to the corporation. It had an agreement with the promoters to host the race at a major public park close to the city . The documents were almost all covered by sections 34, 32 and 30 of the Freedom of Information Act. Many of the matters in the documents were covered by a confidentiality agreement entered into between the joined party and the promoters.

The applicant raised a number of democratic accountability grounds associated with the awarding of the race, the issue of accountability of government sponsored corporations, the issue of the public being able to evaluate the costs and benefits of the race. It was held that the grounds raised probably did not meet the test laid down in *Smith's* case[85] and the grounds were re-formulated as follows:

(a) the right of the public to know the nature and extent of the potential financial liability of the government by reason of the arrangements it has made to support the staging of the Grand Prix;

(b) the public interest in the accountability of the decision-making process and the transparency of the liabilities incurred by the government or government sponsored corporations;

(c) the interest of the public in ensuring that publicly appointed officials in publicly sponsored corporations are beyond criticism concerning conflict of interest;

(d) the right of the public to have access to information concerning the use of a public park where there is public controversy as to its use.[86]

It may be argued that the comment of the Tribunal in finding that these grounds were seen as "different aspects of a 'right to know' something of importance in the context of s3 of the Act" was wrong.[87] The grounds, it may be argued, were not aspects of a "right to know" but were aspects of the public interest in the proper functioning of a democracy.[88] The accountability arguments were rejected on the basis that there were other accountability mechanisms in place in legislation, including the power of the Auditor-General to conduct certain audits of bodies corporate that have received a public grant. The accountability also was said to include "the general scrutiny of the action of the executive government through the Parliament and its committees all in the end responsible to the electorate at the ballot box. If the community desires methods and levels of government accountability over and above those

presently provided by law, that is a matter to be pursued by legislative change"[89]

The Tribunal then said that the issue was not that the public is being denied the information about the liability of the government or the accountability of the decision-making process but "rather of the public being permitted to know and have such accountability at the time and place and to the extent permitted by the general law of the land unless the public interest "requires" access to the pursued documents".[90] This analysis gives no weight at all to the political speech cases.[91] It gives no weight to the fact that it is information itself which provides or assists in the accountability. It gives no weight to the fact that the Act is a new accountability mechanism, designed to complement existing mechanisms. It gives no weight to the interest of the community, through their elected representatives, in the involvement in policy formation or in participation. It fails to recognise that documents have been released in the past even though there were existing accountability mechanisms.

The Tribunal did accept that some of the aspects of public interest relied upon "more particularly as re-formulated, do qualify for recognition as aspects of the public interest as that notion is to be understood".[92] They were held to be of insufficient weight. In balancing the public interest in confidentiality and the disclosure considerations the Tribunal held that the claim for disclosure on the ground of accountability failed because there was no reason to think that public accountability will in the end be avoided. Where the information remains confidential the public interest is served by maintenance of confidentiality, particularly where the claim for confidentiality is not a sham or spurious. Also it was held that it was not a case where there was "any issue of illegality, unlawfulness, irregularity, antinomy, impropriety or sharp practice by any of the parties involved."[93]

This case can be seen as a victory and a defeat. It is a victory in that there is a recognition of a very wide set of accountability and public interest claims. On the evidence the claims were not made out but it is clear that in certain circumstances they could be made out. Further, claims on behalf of a relatively small group, the users of the Park, fanned by a limited but vocal media campaign, were enough to deserve recognition as aspects of the public interest. The sentiments expressed can be used in later cases. The disappointing aspect of the case is the endorsement of existing accountability mechanisms, particularly on the issue of timing. The Tribunal seems to conclude that because in the long run the extent of government funds will be revealed or audited by the Auditor General, then that is enough. In the light of the political speech cases, this devalues the values of participation, and fails to recognise that existing accountability mechanisms have failed in the past.[94]

Tabcorp documents case

Unfortunately the same principles were applied in another case involving the same parties but a different public controversy.[95] This case dealt with the appointment of the project manager and principal adviser (Centaurus) to the government in a major privatisation project. The documents related to the involvement of various private sector organisations in the tendering process which led to the appointment. The documents contained material which had been supplied in confidence and indeed one particular document was a confidentiality agreement. Some of the matter related to the personal affairs of members of the tender panel. The evidence was that release of the documents would give rise to a competitive disadvantage to the firms involved and would inhibit the provision of proper information to government in the future.[96]

The public interest grounds relied on by the applicant were somewhat thin in that he

acknowledged "that there is no discernible public interest in the appointment of Centaurus save in relation to the haste with which the process of appointment was carried out."[97] The other general grounds argued, that there should be full disclosure because there was taxpayer's money involved, and that the information would contribute to the lessons to be learnt from this privatisation exercise, were rejected.[98] Two other matters which were argued were also held not to require release. These were that Centaurus was involved in policy, and that the confidentiality agreement was a way of getting around the Act. It was held on the evidence that neither of the matters were made out. There is an inference in the decision that if either of those factors did exist then they could be grounds where the public interest would demand release.[99] The ultimate argument supporting non-release was that the "privatization exercise was subject to both audit by the Auditor-General and approved by the State Tender Board, those measures combining to constitute scrutiny or potential scrutiny on the public's behalf."[100]

This decision is of some importance as it confirms the significance of the external review process itself as an accountability mechanism. While the documents were, it seems, of only historical interest, the AAT was prepared to scrutinise by reference to the content of the documents each of the public interest arguments raised. While none were made out at least the public knows that there was nothing untoward about this aspect of the privatisation process.

The Casino documents case[101]

The third of the "political" cases where the applicant was faced with a wall of confidentiality was in a request for documents relating to the assessment of bids and awarding of contracts for the Melbourne Casino. The request covered a period both before and after the decision to award the contract to the joined party, Crown Casino Ltd. The function of the respondent agency was to seek expressions of interest for a casino licence and then recommend to the relevant minister a preferred applicant and the proposed terms and conditions. The *Casino Control Act 1991* contained a very wide secrecy provision[102] and this provision was relied on to argue that the documents were exempt under section 38 of the Freedom of Information Act. Evidence was led about the highly sensitive nature of the documents and the process of selecting the successful bidder. Crown Casino Ltd gave evidence that its competitive position would be damaged by release of the information. The respondent agency gave evidence that the information was commercially sensitive and that release would impair its ability to obtain proper advice in the future.

The public interest grounds argued by the applicant were that there was a major public controversy about the bidding and licensing process leading to a loss of public confidence in the process, the joined party and the respondent. There were suggestions of conflict of interest, increased bids at a late stage and changes to the design. It was argued that the public had an interest in release of the documents because of the public interest in the Casino and the licensing process. Confidence could only be restored by disclosure of the deliberations of the respondent which led to the granting of the licence.

The AAT accepted the argument that there was a public interest in the granting of the casino licence. It rejected the argument that the public interest required disclosure of the licensing process to restore an alleged loss of public confidence in the licensing process, the casinos and the respondent:

> In the Tribunal's view, if it could be established that there has been a breakdown in the licensing process or if some illegality, impropriety or potential wrongdoing can be demonstrated, and the documents would reveal that, then it would be in the public interest to release the documents.[103]

The Tribunal then held that the documents did not throw light on the various allegations made by the applicant. The applicant had not proved the facts to show that would reveal any wrongdoing or impropriety.[104] There was thus no basis to release the documents to clear the air.

The Tribunal was prepared to accept a public interest in "people being informed of the processes of and having confidence in agencies such as the Authority and those agencies being accountable for their decisions."[105]This public interest had, however, to be considered in the context of the secrecy provision in the Casino Control Act[106] as well as the other provisions of the Act which allowed the Authority to choose whether to operate in public or private, or to give reasons for its decision. The Tribunal accepted the submissions that the material went far beyond what would have been supplied and used in a normal commercial transaction. It also accepted that there would be less frankness and candour shown by outside experts and that release of the documents, or part of them could tend to mislead.[107] The Tribunal clearly rejected evidence led from the applicant that the "corporate sector ... was aware that information it provided could become public."[108]

This decision was attacked by the applicant as "disappointing and deplorable." The AAT had "assert(ed) in effect that the cloak of commercial confidentiality outweighed the public's democratic right to be informed."[109] The decision is consistent with earlier decisions such as the *Grand Prix* case[110] and *Gill's* case.[111] The decision is defensible because the competing public interests are properly balanced in a reasonable argument. The legislative structure established for the Authority cannot be ignored in deciding where the proper balance lies. Unfortunately an applicant will rarely be in a position to lead evidence which points to wrongdoing. It will always be in the interests of government to deny any such wrongdoing. The external review process has the advantage that the public interest arguments can get a public airing, even if the process is expensive.[112] It will always be a matter of judgment as to when it is necessary to "clear the air."[113] The Tribunal here has at least articulated principles of public accountability which show that in certain circumstances release will be ordered to vindicate an accountability principle.

An alternative argument is that the decision is not consistent with earlier cases such as *Re Lapidos and Office of Corrections (No 4)*,[114] *Re Smith and Attorney-General's Department*[115] and *Re Robinson and University of Melbourne*.[116] In all these cases documents were released to allow the public to satisfy itself in relation to the public interest grounds argued. In the *Casino Documents* case,[117] as opposed to the *Grand Prix* case,[118] it could be argued that given the size and importance of the project the public interest did require that the relevant documents, or at least some of them be released to satisfy the public interest issues raised. A further argument is that the Respondent in the former case conceded that the FOI Act did apply to the respondent Authority. Given that this can be seen as a recognition that in certain circumstances the powers of the Tribunal in subsection 50(4) could be exercised.

Conclusion

This review of the recent public interest cases involving commercial information supports the view expressed in *Gill's* case[119] that the business information exemption is drafted in strong terms. The protection which the exemption provides was also noted in the 1989 review of the Victorian Act.[120] The AAT has been very reluctant to over-ride business or agency confidences. It may be argued that the accountability rationale of the Act has been met by the fact that in all cases the Tribunal has been anxious to record the fact that the documents do not reveal anything untoward. The circumstances in which the public interest would require release of

matter which is the subject of a confidentiality agreement or which has been received in explicit circumstances of confidence remain unknown, and will need to be the subject of further exploration.

The AAT to date has been very generous to business, but has tempered this upholding of exemptions with an articulation of accountability principles that is consistent with the underlying philosophy of the Act and the sentiments in the political speech cases. The public interest will always be an evolving concept. The challenge for those involved in freedom of information is to ensure that the application of the Act, and in particular subsection 50(4), keeps pace with the requirements of accountability and participation identified in the political speech cases.

Endnotes

1 Subsection 50(4) of the Victorian FOI Act provides as follows:

> "On the hearing of an application for review the Tribunal 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 (not being a document referred to in section 28, section 31(3) or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act" (emphasis added).

2 *Freedom of Information Act 1982* (Vic) section 3.

3 Ibid.

4 See *Re Gill and DITR* (1985) 1 VAR 97, 103.

5 See Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, *Freedom of Information* (1978) Ch 2, Bayne *Freedom of Information* (1984) Ch 1, Australian Law Reform Commission Issues Paper 12 "Freedom of Information"(1994) ("ALRC IP 12") Ch 2, and Australian Law Reform Commission and Administrative Review Council, Open Government : a review of the federal Freedom of Information Act 1982 (1995) (ALRC 77) Ch 3.

6 *Parliamentary Debates (Vic.) Legislative Assembly 1982 v. 367* 1061 [Second reading speech].

7 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 108 ("Television"), *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ("Nationwide News"), *Theophanous v The Herald & Weekly Times Limited and Anor* (1994) 124 ALR 1 ("Theophanous"), *Stephens and Ors v West Australian Newspapers Limited* (1994) 124 ALR 80 ("Stephens") and *Cunliffe and Anor v The Commonwealth of Australia* (1994) 124 ALR 120.

8 (1992) 177 CLR 108.

9 Ibid 137-138.

10 Ibid.

11 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75.

12 Ibid.

13 177 CLR at 211.

14 Ibid at 212.

15 Ibid at 231.

16 (1994) 124 ALR 1, 52.

17 Ibid at 58.

18 (1994) 124 ALR 80.

19 Ibid at 114.

20 ALRC 77 para 2-4.

21 See ALRC 1P 12 at 5.12 for a discussion of the different types of tests.

22 1979 Senate Report, see above note 5, at 5.28, quoted in ALRC IP12 above note 5 at 5.11.

23 1979 Senate Report, see above note 5, para 19.27.

24 *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64; For the most recent consideration of the matter see O'Connor J in *Re Cleary and Department of Treasury* (1993) 18 AAR 83 at 87-8.

25 (1986) 160 CLR 145, 153.

26 [1994] 1 VR 41.

27 Ibid, Ashley J at 61, approving comments of Young CJ in *Accident Compensation Commission v Croom* [1991] VR 322 at 323.

28 Ibid at 54.

29 Ibid at 56. Note also that the New Zealand case relied on makes reference to the "deliberate and significant" conferment by Parliament of a "right" of access, with the word being described as "strong". (See Cooke P in *Commissioner of Police v. Ombudsman* [1988] 1 NZLR385 at 389).

30 (1987) 73 ALR 607.

31 Ibid at 617.

32 Ibid. See also the comments of Kirby P in *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 at 627.

33 *Ryder v Booth* [1985] VR 869 at 877 per Gray J. See also the comments of Kirby P in *Perrins* case (1993) 31 NSWLR 606 at 612 where he contrasts the "radical" nature of the FOI legislation with the previous common law and statutory position.

34 ALRC 77 para. 4.2 (see above note 5).

35 Ibid para. 4.3.

36 See *Re Gill and DITR* (1985) 1 VAR 97 and *Re Thomas and Royal Women's Hospital* (1988) 2 VAR 587. See the emphasis added in the *Casino Documents* case 8VAR 212, 232, but cf *Re Mildenhall and Vic Roads* (19 February 1996, Judge Fagan P, at 72).

37 (1986) 1 VAR 345.

38 Ibid at 348.

39 Ibid at 353.

40 1 VAR 97.

41 Ibid at 103.

42 [1991] I VR 63, 75.

43 Ibid.

44 (1991) 5 VAR 78, 89.

45 (1991) 5 VAR 213.

46 [1993] 2 VR 177, 182.

47 [1991] 1 VR 63.

48 AAT of Vic., Galvin DP, 21 January 1994.

49 At 26.

50 *Robinson's* case [1993] 2 VR 177 at 182.

51 Above at 33.

52 [1991] 1 VR 63.

53 Ibid at 39. cf *O'Farrell v Road Construction Authority* (County Court of Victoria, Judge Hewitt, 19 December 1984) "the public weal" at 12.

54 Ibid.

55 At 41. The comments here are very similar to the comments made in *Re Thwaites and Department of Justice* (AAT of Vic, J Rosen PM, 8 February 1994).

56 At 40. Cf *Re Mildenhall and Casino and Gaming Authority* (AAT of Vic., R Ball DP, 16 January 1996).

57 Ibid. The comments here are similar to those in *Re Pescott and Victorian Tourism Commission (No 2)* (1988) 2 VAR 437 at 454 where commercial documents were not released on the basis that "there is no indication in the documents of illegal or improper practices or use of funds, which the public interest would require be disclosed." See however *Re Mildenhall and Department of Treasury* (AAT of Vic., J Galvin DP, 15 January 1996).

58 (1985) 1 VAR 97 at 103.

59 *Re Thwaites and Department of Premier and Cabinet*, (AAT of Vic. J Rosen PM, 23 March 1994).

60 Ibid at 22

61 (1992) 177 CLR 108 at 138, see note 7 above.

62 *Leeds Media* case at 38.

63 Ibid.

64 Ibid at 40.

65 177 CLR 106

66 *Re Thwaites and Department of Health and Community Services* (AAT of Vic, P. Nedovic PM, 22 August 1994).

67 Ibid at 13.

68 [1991] 1 VR 63.

69 *Office Renovations* case ibid note 66 at 16.

70 Ibid at 18.

71 Ibid at 18.

72 Above note 59.

73 *Office Renovations* case above at note 66 at 18.

74 [1987] VR 681 at 687.

75 *Office Renovations* case above note 66 at 15.

76 ALRC 77 (see note 5).

77 *Re Thwaites and Department of The Treasury* (AAT of Vic., J A Bretherton PM, 11 April 1994).

78 Ibid at 12.

79 Ibid.

80 In *Re Forbes* (1993) 6 VAR 53.

81 *Re Cole and Department of Justice* (1994) 8 VAR 114, 130. See also the comments in *Re Lamont and Department of Arts, Sports and Tourism* (AAT of Vic, JA Bretherton PM, 11 April 1994) where it was held that the public had an interest in knowing what claims are made for payment from the public purse by senior public servants. For a case involving a more lowly public servant where the public interest justified release see *Re Atkinson and Public Transport Commission* (1992) 5 VAR 255.

82 *Tabcorp Documents* case 8 VAR 102.

83 Eg *Easdown* (1987) 2 VAR 102, *Chadwick* (1987) 1 VAR 444 and *Perton* (1992) 5 VAR 290.

84 *Re Mildenhall and Department of Treasury*, (1994) 7 VAR 342.

85 [1991] 1 VR 63.

86 7 VAR at 371.

87 Ibid.

88 See the comments in "Report of the Royal Commission into Commercial Activities of Government and Other Matters" (1992) (Perth) at 2.5-6. See also the reference at 371 in the *Grand Prix* case.

89 Ibid 372.

90 Ibid .

91 Above note 7.

92 Ibid at 374.

93 Ibid at 375, cf *Gill's* case 1 VAR 97 at 103. See also *Re Blums and Department of Premier and Cabinet* (1992) 5 VAR 290.

94 See WA Royal Commission Report at 2.6. See also the comments in the *State Bank of NSW* case (1991) 5 VAR 78, 89.

95 *Re Mildenhall and Department of Treasury*, (No 2) (1994) 8 VAR 102.

96 Ibid at 106. Such an argument is easy to make but hard to refute.

97 Ibid at 110.

98 Ibid.

99 Ibid at 111.

100 Ibid.

101 *Re David Syme & Co Ltd and Victorian Casino & Gaming Authority* (1995) 8 VAR 212 (*Casino Documents* case).

102 Section 151.

103 *Casino Documents* case at 229.

104 Ibid at 230.

105 Ibid at 231.

106 Section 151.

107 *Casino Documents* case at 231.

108 I Munro "The Battle to Reveal Casino Papers" *The Age* 11 December 1994.

109 "Secrecy rules, for your information" *The Age*, 26 February 1995.

110 7 VAR 342.

111 (1987) 1 VAR 97.

112 According to the Applicant "tens of thousands of dollars" See ibid f 108.

113 See, eg *Easdown's* case (1987) 2 VAR 102, and *Re Lapidos and OOC (No 4)* (1989) 4 VAR 283.

114 (1989) 4 VAR 283.

115 (1989) 2 VAR 543, confirmed on appeal, [1991] VR 63.

116 (1991) 5 VAR 231.

117 8 VAR 212.

118 7 VAR 342.

119 (1987) 1 VAR 97 at 103.

120 Legal and Constitutional Committee of the Victorian Parliament *Report upon Freedom of Information in Victoria* (1989) at 4.32. See also ALRC 77 at para 10.31 recommending retention of existing Commonwealth section 43.

COMMERCIAL CONFIDENTIALITY AND THE VICTORIAN *FREEDOM OF INFORMATION ACT 1982*

*Tom Hurley**

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Introduction

This paper is delivered in a context where the role of state government, and local government, bodies has changed over recent times. A number of functions which were formerly considered the responsibility of government have been released by government in favour of the private sector. Services such as rubbish collection, non-emergency ambulance services and the provision of the services by which the state's highways are maintained. This process has had its sequel in applications under the *Freedom of Information Act 1982* (Vic) (the FOI Act) which have had to be determined by the AAT. For each application determined by the AAT there are many more which must be determined by primary decision makers and on internal review. This talk seeks to draw together the lessons that can be learnt from recent decisions in the AAT.

This paper commences with a review of the received learning of the two key FOI Act exemptions: s.34(1) and 34(4). That received learning is found in *Gill's* case (*Re Gill and DITR* (1985) 1 VAR 97, affirmed by the Full Court in *Gill v DITR* [1987] VR 681) and *Croom's* case (*Re Croom and ACC* (1989) 3 VAR 441, and in the Court of Appeal: *ACC v Croom* [1991] 2 VR 322).

The paper then examines issues that have arisen in recent decisions of the AAT involving these two exemptions. The most recent decisions are:

- *Re Mildenhall and Vic Roads* (Fagan P, 19 February 1996) concerning the decision by Vic Roads to enter into a contract to "outsource" its Plant Branch to a company managed by former employee of Vic Roads;
- *Re Thwaites and Metropolitan Ambulance Service* (Galvin DP, 5 February 1996) concerning the award of tenders to private companies to transport non-emergency ambulance cases;
- *Re Marple and Department of Agriculture* (1995) 9 VAR 29 (MacNamara DP, 20 July 1995) concerning documents generated in the decision to grant one company the tender to acquire the lease of government veterinary clinics;
- *Re Mildenhall and Department of Treasury (No. 2)* (1994) 8 VAR 102 concerning tender documents leading to the appointment of one company as financial adviser on the restructure of the TAB - the *Tabcorp* case;
- *Re Mildenhall and Department of Treasury* (1994) 7 VAR 342 concerning documents whereby a company "owned" by the State Government entered into contractual

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arrangements to stage the Grand Prix - *the Grand Prix* case.

The paper addresses other exemptions by which information conveyed to agencies can be viewed under the FOI Act including:

- paragraphs 30(1)(a) & (b) (internal working documents) - as to when "consultants" are viewed as "officers" for the FOI Act: *Re Mildenhall and Vic Roads*;
- paragraph 31(1)(e) (enforcement of the law) - *Re Schifferegger and Department of Agriculture* (1995) 9 VAR 61;
- subsection 33(1) (personal affairs) - *Re Mildenhall and Department of Treasury (No. 2)* (supra) (personal details); *Re Cole and Department of Justice* (1994) 8 VAR 114 (the *DPP* case) (at p 129 concerning Counsel's fees).

The alignment of *Gill* and *Croom*

The meaning of a phrase as found in subsection 34(1) and paragraph 34(4)(a) of the FOI Act involves the proper construction of these provisions of an Act of Parliament. Decisions of the Full Court (or now the Court of Appeal) of the Supreme Court determine the meaning of these provisions. The two decisions of the (former) Full Court on these provisions involve, it is submitted, on analysis, the application of principles that are not congruent.

In *Gill*, in the leading judgment of Justice Murray, at p.687, the Full Court established that the presence of the word "or" between paragraphs 34(1)(a) and 34(1)(b) of the FOI Act was to be given effect to, that is, the contention that Parliament intended the two paragraphs should be read conjunctively (as if "and" appeared between them) was rejected: [1987] VR 686 at line 40. More relevantly, for this discussion, the Full Court, in the leading judgment of Murray J, considered what meaning should be given to the phrase "other matters of a business, commercial or financial nature" which appear in paragraph 34(1)(a) after the phrase "trade secrets". The AAT had concluded that the phrase should be read in context and in particular with the context of the words "trade secrets" and concluded:

> The material must have some special characteristic which distinguishes it from the more mundane information acquired by the agency. If s.34(1)(a) was given such a wide interpretation all material would be exempt and there would be no necessity for s.34(1)(b) or (2). ...

Justice Murray rejected the view of the AAT (Judge Higgins) notwithstanding that it "might have a great deal to commend it from the point of view of practical common sense". The Full Court in *Gill* concluded that the words of subsection 34(1):

> ... are absolute and it is not open to the Court to import into them a discretionary power to make *ad hoc* judgments in particular cases. It does not appear to me that it is open to the Court to adopt any other view than that the words of (a) mean what they say. It may well be that this result extends exemption further than Parliament, as a matter of policy, would wish but this is a matter for Parliament and not for the Court. [1987] VR 687.

The tension is evident by examining the second decision in *Croom*. The leading judgment was given by Justice O'Bryan. He agreed that the words employed by Parliament must be given their ordinary meaning, but such a meaning is determined by reference to the context. He concluded that Parliament did not intend to exempt from the operation of the FOI Act every piece of written information obtained by an agency merely on the basis that it had been acquired and provided by a business undertaking in the ordinary course of its business. He observed:

> The provision appears to be directed to the possibility that information of what could be regarded as a sensitive kind from the perspective of the undertaking should not become generally available. Protection is to be provided to the undertaking and not simply against the disclosure of information which falls within the general described category set out in this section. Such an approach is consistent with the language of the section, in conformity with the scheme and purposes of the Act, and does not conflict with anything said by the Court in Gill's case. Accordingly, where information contained in a document relates to some matter of business in order that a claim for exemption could be successfully made, it would be necessary to show that the information impinged in some way or other upon the actual conduct or operations of the undertaking itself. (emphasis added)

O'Bryan J. concluded that accident investigation reports prepared for workers' compensation purposes for the Accident Compensation Commission by insurance assessors were not exempt: [1991] 2 VR 322 at 330, 331.

O'Bryan J also considered subsection 34(4), but in passing. He observed that the term "disadvantage" in the context of trade or commerce carried on by an agency means "injury of a financial kind" and not mere tactical disadvantage in litigation: [1991] 2 VR 322 at 331.

While the Full Court in *Croom* did not in terms overrule the decision in *Gill* there is a distinction between giving the words "other matters of a business, commercial or financial nature" their "ordinary meaning" (*Gill*) or as describing documents that "impinge" on the operations of the undertaking (*Croom*). It is the *Croom* gloss that is now applied.

Subsection 34(1) - documents relating to trade secrets etc.

Subsection 34(1) of the FOI Act provides:

> 1. A document is an exempt document if its disclosure under this Act would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking, and -
>
> (a) the information relates to trade secrets or other matters of a business, commercial or financial nature; or
>
> (b) the disclosure of the information under this Act would be likely to expose the undertaking to disadvantage.
>
> 2. In deciding whether disclosure of information would expose an undertaking to disadvantage, for the purposes of paragraph (b) of sub-section (1), an agency or Minister may take account of any of the following considerations:
>
> (a) whether the information is generally available to competitors of the undertaking;
>
> (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
>
> (c) whether the information could be disclosed without causing substantial harm to a competitive position of the undertaking; and
>
> (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental control-
>
> and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

As noted above, the primary issue under paragraph 34(1)(a) is whether the information relates to matters of a business etc. nature to the extent of impinging in any way on the actual conduct or operations of such

undertaking. In practical terms this raises questions of proof: the FOI applicant may be expected to assert release can have no such effect; the respondent agency may assert, but without proof or conviction, that release will have the postulated effect (the onus rests on the agency to establish the exempt status of the document); yet few undertakings that provide information care to be joined as "party joined" (subsection 34(3) FOI Act and under the AAT Act). In the absence of the "undertaking" the AAT is left to make its own judgment as to the effect of releasing documents which judgment may in turn be guided by the assertion that the undertaking knows of the proceedings before the AAT but has chosen not to participate. This was the case in *Re Mildenhall and Vic Roads*.

"Commercial in confidence" is a mark which often appears upon documents in this area. The decision of Fagan P in *Mildenhall and Vic Roads* (see above) establishes that such a marking is not conclusive. Fagan P observed (p 69):

> Many of the documents in this case are marked with expression 'Commercial in Confidence" or with some similar rubric. That factor was frequently emphasised. Such a marking cannot in all cases prevail. It may be for example that the material contained in the document in question has no intrinsic quality attaching confidentiality at all or that the document was disseminated by its maker far and wide beyond the bounds of confidentiality.

It is possible to conceive of circumstances where documents contained business information which did not impinge on the commercial operations of the business (paragraph 34(1)(a)) and which did not expose the undertaking to disadvantage (paragraph 34(1)(b)) could be said to have been "communicated in confidence" within subsection 35(1) where disclosure would be expected to impair the ability of the agency to obtain the information in the future (paragraph 35(1)(b)). The most recent illustration of this exemption (*Re Thwaites and Department H&CS* (1995) 8 VAR 361) concerned that arose within the Public Service, namely whether release of "re-admission" statistics obtained in a confidential survey of hospital doctors would be perceived as exposing those doctors to criticism and removing the source of the information. In relation to the dealings between agencies and commercial undertakings, it is suggested that there is a live issue as to whether information provided *by tenderers* to agencies which is claimed to be "in confidence" could be exempt under paragraph 35(1)(b) of the FOI Act, notwithstanding that it could be not exempt under paragraph 34(1)(a). Such an issue could arise where a tender was submitted on the explicit basis that the agency would not release the information. In *Re Mildenhall and Department of Treasury* (1994) 8 VAR 102 the AAT (Mr Galvin DP) found that -

> ... the evidence was clear that the information in dispute [documents by tenderers seeking to advise on the float of the TAB or analysis of these findings] is regarded by those who provided it as being communicated in the strictest confidence and that a major consideration in that regard is prevention of its becoming known to competitors. According to the evidence, release would give rise to real not merely fanciful disadvantage to tenderers. (8 VAR 102 at p 108).

Only half of this issue arose in *Re Mildenhall and Vic Roads* because the "confidentiality agreements" which were there made between the agency and the tendering commercial undertakings had the effect that the *undertakings* undertook not to release the information but it would seem no like obligation was imposed on the agency. The decision of *Re Mildenhall and Vic Roads* represents a high water mark in this process. The tenders submitted by the unsuccessful and successful tenderers (Documents 2, 3 and 4) were found to be not exempt from release (Reasons pp 24, 25).

Each case must be judged upon its facts. This conclusion can be contrasted with

that obtained in *Re Mildenhall and Department of Treasury (No 2)* (see 8 VAR at 106-109) where it was concluded that release of the documents in question would involve releasing:

> ... information concerned with the capacity of the relevant firms to provide assistance in the pursuit of their professional objectives [the information] deals with the personnel, qualifications, experience, fees and modus operandi. It is not merely derived from a business undertaking but is of a business or commercial nature.
>
> The evidence was that it was provided on a confidential basis because it was commercially sensitive and because release of it would prejudice the firms in regard to their competitors.

Apart from information concerning the "structure" of commercial agencies, the AAT has respected information involving "methodology" of agencies, that is, information which would reveal the methodology by which the agency set about its task: see *Thwaites and Metropolitan Ambulance Service* where the methodology of a consultant as to valuation of ambulance services was considered in this light.

Recent decisions reveal that the AAT does not accept that the concluded agreements between agencies and commercial undertakings contain information acquired from the commercial undertaking but rather "constitute the record of the transaction between the parties" (*Thwaites and MAS* at p 393).

Often in analysing what information has been "acquired" from a commercial undertaking in a commercial environment, it is well to acknowledge the amount of information that is publicly available from the ASC under the *Corporations Law*. There may well be cases where "proposed" financial structures submitted to agencies in the course of their dealings with commercial undertakings are exempt because they do not represent the final financial structure which may be recorded, by way of a registered security over company assets such as a debenture, as required by the *Corporations Law*.

As a conclusion, there is a lot to be said for the aphorism that if you sup with the devil you are best to use a long spoon, that is, that commercial undertakings who seek to obtain business and profit from agencies do so in the knowledge that the provisions of the FOI Act (*inter alia*) have the effect that, like all government contractors, their fees, and the basis on which they are earned, are matters of public record. How much more information will be released under the FOI Act depends, in practical terms, on whether the information is of a self-evidently confidential nature (in which case the undertaking would be expected to argue for exemption before the AAT) or such inferences as can be drawn from the acquiescence of the undertaking.

Subsection 34(4) - agencies in trade and commerce

Subsection 34(4) of the FOI Act provides:

> A document is an exempt document if -
>
> (a) it contains -
>
> (i) a trade secret of an agency;
>
> or
>
> (ii) in the case of an agency engaged in trade or commerce -information of a business, commercial or financial nature-
>
> that would if disclosed under this Act be likely to expose the agency to disadvantage...

Recent decisions under this paragraph raise the following points.

(a) ***Whether an agency engaged in trade or commerce***

In *Re Marple* MacNamara (DP) had to consider whether the Department of Agriculture, in operating regional veterinary laboratories at regional centres, was engaged in "trade or

commerce" within subsection 34(4). He concluded:

(i) Because the reference in subsection 34(4) was only to agencies "engaged in trade and commerce" it did not seek to cast an overall characterisation upon an agency; thus an agency could be regarded as "engaged in trade and commerce" even if the trade and commerce was insignificant and only incidental to its other functions (9 VAR at 46).

(ii) The terms "trade" and "commerce" are ordinary terms and not terms of art. They are expressions of fact and terms of common knowledge (9 VAR at 47).

(b) *"One off" foray into trade and commerce*

In *Re Vic Roads and Mildenhall* Fagan P concluded that the "one off" sale by Vic Roads of its Plant Branch did not constitute Vic Roads as being "engaged in trade and commerce".

He further concluded that Vic Roads was not in the "trade and commerce" of having sold its Plant Branch, advising other Victorian or interstate government agencies of the means by which such "Plant Branches" were valued.

(c) *Date of characterisation*

In *Marple and Department of Agriculture* (9 VAR at 47) MacNamara concluded that the date on which the status of the agency was to be determined was the day that the exemption was sought to be invoked. He observed:

> For myself I see no reason why the expression 'an agency engaged in trade or commerce' when used in a section creating a Freedom of Information exemption should not be regarded as speaking as at the date that the exemption is sought to be invoked. I am fortified in that view by the balance of the exemption insofar as it extends to material which, if disclosed, would 'be likely to expose the agency to disadvantage ...'. This seems to be looking to the future and it is not obvious how an agency which had ceased to trade as at the date of the freedom of information request would thereafter be disadvantaged with respect to its trade and commerce. The rights of an applicant for documents under the FOI Act and the responsibilities of the respondent agency are fixed as at the date of making the request ... It seems a corollary from this that the elements establishing the existence or non-existence of an exemption should be judged as at that date. In my opinion, therefore, the question of whether, for the purpose of s.34(4), an agency is engaged in trade or commerce or not must be resolved as at the date of the request.

(d) *Disadvantage.*

It will be remembered from *Croom* that the "disadvantage" of the agency must be of a commercial kind ([1991] 2 VR at 331).

Other relevant exemptions

(a) *Paragraph 30(1)(a) - internal working documents*

This provision exempts from release documents which would disclose matter in the nature of opinion, advice or recommendation prepared by an officer, or consultation or deliberation between officers.

It is noteworthy that in *Re Mildenhall and Vic Roads* Fagan P accepted that consultants (such as accountants retained by Vic Roads to value its Plant Branch) were "officers" of an agency because they were "any person employed by or for the agency" within the definition of 'officer' in section 5 of the FOI Act (Reasons, p 12 citing *Ryder v Booth* [1985] VR 869; *Re Brogg and Department of the Premier in Cabinet* (1989) 3 VAR 201 at 207-8).

A further noteworthy point of the *Vic Roads* decision is that the distinction must be borne in mind between information obtained from a commercial agency and opinions of officers as to what that information means; thus in *Vic Roads* opinions of officers, expressed by means of a corporate diagram, were found to be exempt within subsection 30(1) as representing consultation between those officers as to the meaning of documents submitted by tenderers.

(b) *Paragraph 31(1)(e) - law enforcement documents*

By paragraph 31(1)(e) documents are exempt if disclosure would endanger the lives or physical safety of persons who have provided confidential information in relation to the administration of the law - In *Schifferegger and Department of Agriculture* (1995) 9 VAR 61, AJ Coghlan concluded that this exemption extended to protect the identity of persons who held licences under the *Prevention of Cruelty to Animals Act 1986* (Vic) to conduct a scientific establishment where experiments were conducted on animals.

(c) *Subsection 33(1) - personal affairs*

By subsection 33(1) the FOI Act provides:

> 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 reconciliation of the decisions under this exemption would be worthy of a separate paper. Recent decisions indicate that the exemption does not prevent the disclosure of salary details within a "band" or range (see *Re Forbes and Department of the Premier in Cabinet* (1993) 6 VAR 53; cf *Ricketson and Royal Women's Hospital* (1989) 4 VAR 10). This exemption does not render exempt payments made to counsel: *Re Cole and Department of Justice* (1994) 8 VAR 114 at 129.

(d) *Public interest*

In two of the recent "commercial" decisions considerations of "public interest" within subsection 50(4) loomed large.

In *Mildenhall and Vic Roads* the transaction in question concerned the sale of the Plant Branch of Vic Roads to a company managed by persons who had formerly been managers of Vic Roads who ran the Plant Branch. Fagan P found that there was no suggestion of wrong-doing on the part of the persons involved; he found there was no "illegality, unlawfulness, irregularity, antinomy, impropriety or sharp practice" (*Mildenhall and Department of Treasury & Ors* (1994) 7 VAR 342 at 375). However, Fagan P was "put in mind" of analogous relationships in the law which involve fiduciary obligations such as those between directors of a company and a company itself, or a trustee and beneficiaries or members of local government authorities voting on matters in which they have an interest. He therefore concluded that subsection 50(4) of FOI Act applies to, in an unstated sense, "clear the air".

In *Thwaites and Metropolitan Ambulance Service* a tender was granted to several companies to run the "non-emergency" ambulance service. An officer of the service, who was involved in analysing the tenders submitted, had previously resigned from the service and been financially involved in one of the tenderers. The officer was invited to reply to the

service and rejoinder on the basis that he had severed all lease work for the company. Inadvertently he remained as a surety for one of the tenderers. Galvin DP concluded this circumstance, together with others, warranted the release of otherwise commercially confidential information. The other circumstances were:

- the acknowledgment by a consultant that the consultant had no knowledge of government's "outsourcing" guidelines;
- the fact that all of the successful tenderers were companies who had previously been invited to be "interim" transporters;
- the circumstance that the annual report of the Metropolitan Ambulance Service totally obscured the amount paid to the private contractors.

Conclusions

It is submitted that these recent decisions establish that:

(a) the AAT will not find exempt documents which are described or labelled as "commercial in confidence" for that reason alone;

(b) the question of whether documents provided to an agency under contractual arrangements which impose an obligation of confidence on the agency are exempt notwithstanding that the contractual obligations run counter to the FOI Act is an issue that remains open;

(c) documents supplied to an agency by commercial undertakings will only be exempt under paragraph 34(1)(a) where the documents "impinge" on the actual conduct and operations of the agency: and even then, it is submitted, where the documents contain currently sensitive material, that is, not material which is of historic value or which has been superseded;

(d) while the Tribunal accepts that paragraphs 34(1)(a) and (b) are to be read disjunctively by reason of the word "or", the flavour of "disadvantage" to an agency within paragraph 34(1)(b) is entering upon the question of whether the documents "impinge" upon the conduct of the undertaking;

(e) an agency itself can be engaged in trade or commerce within subsection 34(4) of the FOI Act notwithstanding that is only a small part of the operation of the agency;

(f) the activities of an agency are to be determined as at the date the exemption under subsection 34(4) is claimed;

(g) other exemptions remain to be applied to documents which may not be exempt under subsection 34(4), eg, documents relating to the personal circumstances or qualifications of employees can be exempt under subsection 32(1) and/or paragraph 31(1)(e) and/or subsection 35(1);

(h) on a practical level the AAT, and the decision maker, will respect (but not unquestioningly implement) the views of a commercial undertaking as to the effect of release of its documents;

(i) the "commercial" exemption remains subject to subsection 50(4) where the public interest "requires" release.

The amount of public information can militate both in favour and against release under subsection 50(4):

- it can militate in favour of release where the public is otherwise not fully informed (eg. *Thwaites and Metropolitan Ambulance Service*);

- it can militate against release where the AAT may conclude that other aspects of the law (such as corporate law) indicate a limit of public disclosure (see *the Grand Prix* case, *Re Mildenhall and Department of Treasury* (1994) 7 VAR 342 at 371-372).

THE ROLE OF THE CRIMINAL JUSTICE COMMISSION IN CRIMINAL JUSTICE ADMINISTRATION (with an emphasis on Investigative Hearings)

*Marshall Irwin**

Text of an address to AIAL seminar, Brisbane, 13 June 1995.

In Australia, the last decade has seen the emergence of permanent statutory agencies which, in effect, are standing Royal Commissions or Commissions of Inquiry. These bodies include the National Crime Authority, the Australian Securities Commission, the NSW Crime Commission, the Independent Commission Against Corruption (ICAC) and, in Queensland, the Criminal Justice Commission (CJC). In addition, Queensland established the Public Sector Management Commission and the now defunct Electoral and Administrative Review Commission (EARC) with significant coercive powers to inquire.

Functions of the CJC

The CJC has functions of inquiring and reporting. It derives its authority and coercive powers from the *Criminal Justice Act 1989* (Qld) (CJ Act).[1] The CJC is a unique organisation combining under the one umbrella activities as diverse as:

- investigation of complaints against police and public sector;
- complaint resolution;
- corruption and organised crime investigation;
- corruption prevention education;
- witness protection;
- law reform research; and
- intelligence gathering.

However, the public perception of its primary function is undoubtedly that of the investigation of corruption and organised crime through the conduct of associated investigative hearings.

In discharging these functions and responsibilities, the CJC is required to make administrative decisions on a daily basis which may be subject to judicial review under the *Judicial Review Act 1991* (Qld) (JR Act). In addition, there is a specific mechanism in the CJ Act for the review of the activities of the Official Misconduct Division (OMD).[2] The OMD is the investigative arm of the CJC.[3] There are other specific provisions in the CJ Act which subject the exercise of the CJC's coercive powers to Supreme Court scrutiny. The *Freedom of Information Act 1992* (Qld) (FOI Act) also applies to the CJC. Therefore, the operation of the CJC provides a fertile field for the application of administrative law.

Natural justice

The CJ Act also has a specific requirement that the CJC must act in accordance with the rules of natural justice or procedural fairness in the

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discharge of each of its functions and responsibilities. Section 22 provides that:

> The Commission must at all times act independently, impartially, fairly and in the public interest.

This obligation was originally imposed by paragraph 3.21(2)(a) in a Division of the Act entitled 'Procedures for Taking Evidence'. In *Ainsworth v Criminal Justice Commission*,[4] the High Court of Australia decided that the application of this provision was not confined just to formal hearings but applied to any step, no matter how informal, taken in the course of, or in relation to, the functions and responsibilities of the CJC, including researching and generating proposals for law reform.

Subsequently the CJ Act was amended and the provision was transferred into a general Division of the Act which delineated the functions and responsibilities of the CJC.[5] The CJ Act does not indicate what constitutes unfairness in a particular situation; therefore, it is necessary to turn to the general law to ascertain the content of the entitlements to procedural fairness in a particular case.

Another two provisions of the CJ Act emphasise the requirement that the CJC afford natural justice in the discharge of its functions and responsibilities. Paragraph 21(2)(b) requires CJC reports to present a fair view of all submissions and recommendations made to it in connection with the matter - whether they support or contradict the CJC's recommendations. Paragraph 93(1)(b) requires CJC reports to include an objective summary of all matters of which the CJC is aware that support, oppose or are otherwise relevant to its recommendations. The CJC may also comment on those matters.[6]

Judicial Review Act 1991 (Qld)

Any administrative decision made, or proposed, or required to be made under the CJ Act may be reviewed under the JR Act.[7] This includes conduct relating to[8] a decision or even failure to make a decision.[9]

A review application can be made by any entitled person. The CJC is obliged upon request to provide a written statement of its reasons for a decision,[10] unless the decision relates to:

- the investigation or prosecution of people for offences against the law of Queensland, the Commonwealth, another State, a Territory or a foreign country;
- the appointment of investigators for the purpose of such investigations;
- the issue of search warrants under Queensland law (including under section 72 of the CJ Act);
- a Queensland law requiring:
  - production of documents or things;
  - the giving of information; or
  - the summoning of witnesses;
- the investigation of people for misconduct (including official misconduct) under the CJ Act;
- the initiation of matters in the original jurisdiction of a Misconduct Tribunal;
- the performance of the functions of the Intelligence Division under section 58 of the CJ Act;
- the role and functions of the Witness Protection Division under section 62 of the CJ Act;
- the entry of premises by CJC officers under section 70 of the CJ Act;
- the attendance of prisoners or patients before the CJC under section 81 of the CJ Act;

- the use of listening devices under s 82 of the CJ Act;

- the exercise of powers of CJC officers under section 84 of the CJ Act.[11]

Some of these exceptions apply expressly to CJC decisions; others apply by implication through the exercise of powers such as issuing notices. These usually require the production of documents or things, the giving of information,[12] and the summonsing of witnesses[13] - all of which are an integral part of the conduct of investigative hearings.

Four applications concerning CJC decisions have been made to Queensland courts under the JR Act. Two of these applications have been determined by the Court of Appeal.

In *Walker*[14] and *Behrens*,[15] the applications concerned decisions by the CJC Complaints Section not to recommend that disciplinary action be taken against police officers. In *Walker*, White J considered the authorities and decided that such a decision is reviewable under the JR Act. *Behrens* was decided by the Court of Appeal. In each case the applications were dismissed.

In *Boe*,[16] the applicant succeeded. This concerned a decision by the CJC not to hold a hearing as part of its statutory responsibility to monitor and report on the funding of criminal justice agencies, including the Legal Aid Office and the Director of Prosecutions. This is a responsibility which is discharged through the Research and Co-ordination Division. De Jersey J decided that the CJC had been influenced by an irrelevant consideration, or had failed to take account of a relevant consideration. It was also decided that the applicant, a solicitor practising mostly in the criminal jurisdiction with a majority of clients funded by Legal Aid, was 'a person aggrieved' within the meaning of subsection 7(1) of the JR Act. His Honour held that, consistent with decisions in other jurisdictions, this phrase should not be read narrowly. The applicant did not have to establish that his interest was financial or primarily financial. His interest in the proper or improved representation of his clients was sufficient.

In *CJC and Public Trustee of Queensland v Queensland Advocacy Incorporated*,[17] the Court of Appeal was concerned with a decision made during an investigative hearing. In conducting the Basil Stafford Centre Inquiry, the Hon DG Stewart refused leave for Queensland Advocacy Incorporated (QAI) to appear at the hearing either on behalf of the residents of the Centre or in its own right. The decision of the Supreme Court in favour of the QAI was set aside by the Court of Appeal (Macrossan CJ and Demack J; Davies JA dissenting). This is addressed in examining the conduct of investigative hearings.

Freedom of Information Act 1992 (Qld)

To ensure its accountability, the CJC has always said that it should be subject to Freedom of Information legislation. This was reflected in the CJC submission to the EARC on the proposed legislation. If an FOI application is made to the CJC, it may only withhold the material if the matter is exempt under Division 2 of the FOI Act. There is only one specific reference to the CJ Act in the FOI Act. This relates to a limited secrecy provision exemption[18] which has recently been inserted. This prohibits disclosure of information obtained under a statutory provision listed in the Schedule[19] unless disclosure is required by a compelling reason in the public interest. Section 83 of the CJ Act is included in the Schedule. This applies to the use of information obtained by a listening device which has been authorised by a Supreme Court judge under the CJ Act. Information obtained through the use of the listening device shall not be disclosed otherwise than to the CJC chairperson or a person

nominated by the chairperson for that purpose.[20] Furthermore, this information shall not be used for any purpose, including a CJC investigation, without the approval of the chairperson or further approval of a Supreme Court judge.

Supreme Court scrutiny

As has recently been observed by Demack J in the *Queensland Advocacy Incorporated* case[21] the CJC has wide powers of search and interrogation. His Honour made reference to:

- *section 69*

  notices to produce documents and things and discover information;

- *section 70*

  entry to public premises;

- *sections 71, 72 and 73*

  search warrants;

- *section 74*

  summonses to witnesses;

- *section 79*

  warrants for the apprehension of witnesses;

- *section 82*

  authority to use listening devices;

- *section 84*

  authorisation of surveillance which would otherwise constitute an offence;

  authorisation to take possession of passports, other travel documents, instruments of title to property, certain securities, and financial documents;

  authority to enter, during business hours, premises in which are to be found records of any bank or financial institution, insurance company, share or stockbroker, person engaged in the business of investing money on behalf of others, or person suspected of having a relevant association with a person to whom an investigation by the CJC relates, to inspect and make copies or extracts from such records so far as they relate to the affairs of the person to whom the investigation relates;

  authority to require a person to furnish affidavits or statutory declarations relating to the property, financial transactions, or money or asset movements of a person holding an appointment in a unit of public administration or any person associated with that holder;

- *section 94*

  a person's obligation to furnish information, to produce a record or thing or answer questions (subject to claims of privilege under section 77).

However, the exercise of these powers is strictly limited by criteria contained in each of the provisions; consequently the exercise of these powers depends on the CJ Act which grants the powers. When examining the use of a particular power, this is the first statute to consider.[22]

In the case of the CJC, Supreme Court approval is required to use many of these powers, including the powers:

- to issue search warrants;
- to use listening devices;
- to issue a notice or summons where there is a duty of confidentiality;[23]
- to obtain a warrant to apprehend a person who does not comply with a

summons to attend as a witness before the CJC; and

- to exercise any of the powers under section 84 other than the chairperson's authorisation to perform surveillance which would otherwise constitute an offence.

In relation to the CJC, the Supreme Court also determines claims of privilege. This includes legal professional privilege, Crown or other public interest privilege, or parliamentary privilege which may be claimed in relation to:

- a notice to discover information;
- a notice to produce records or things;
- a notice of summons;
- an authority to enter public premises;
- a search warrant.[24]

When an authority to enter public premises or a search warrant is involved, the CJC Act includes a specific procedure to be followed on a claim of privilege. This includes placing the record for which privilege is claimed in a sealed container and making a written record of the container's contents. The container and the record is then delivered to the Registrar of the Supreme Court so the claim can be determined.[25]

In addition, the CJC has adopted internal procedures to provide additional accountability. The coercive powers are exercised only by the chairperson, the Director of the OMD or General Counsel and are documented. The Director and General Counsel exercise these powers through delegation from the chairperson under subsection 140(1) of the CJ Act.

The CJC is directly accountable to the Parliament and the people of Queensland through the Parliamentary Criminal Justice Committee (the PCJC).[26] All the major political parties in the Queensland Parliament are represented on the seven member committee. The PCJC is required to monitor and review the discharge of the functions of the CJC as a whole and of the OMD in particular, and to have tabled in the Parliament a report on the CJC near the expiry of each three years.[27]

There have been two PCJCs to date. The second PCJC recommended in its three year review of the CJC[28] that the CJC's coercive powers be confined to the investigation of official misconduct, organised or major crime.

Anyone who considers that an OMD investigation is being conducted unfairly or that the investigation is not warranted can seek a mandatory or restrictive injunction from the Supreme Court.[29] The Court may direct that the investigation cease or not proceed, or may require that it be conducted under certain guidelines.[30] When the application is on the basis that an investigation is not warranted, the applicant is not entitled to be provided with particulars of information or the complaint, or the source of the information or complaint[31] by or on behalf of the CJC. This raises the question of whether or not the Court may order the CJC to provide this information, subject to issues of privilege, where the application is based on the alleged unfair conduct of the investigation. The CJC may apply for the revocation of the order if further factors have emerged which put the propriety of the injunction in question. The Supreme Court may revoke or vary the order as it sees fit.[32]

The procedures for Supreme Court applications are contained in Part 5 of the CJ Act. The applications must be heard in chambers.[33] In *CJC v The Council of the Shire of Whitsunday*[34] the Court of Appeal unanimously decided that subsection 119(1) requires that an application for an injunction under the CJ Act be heard in chambers throughout its duration.

Certain applications and authorities must be heard *ex parte*. These include:

- application for revocation of an injunction;[35]
- authority to issue a search warrant;[36]
- authority to issue a notice or summons where confidentiality is involved;[37]
- authority to use a listening device;[38] or
- authority under section 84.[39]

These applications must be supported by evidence on oath or affirmation.[40] In practice, this requirement is fulfilled by an affidavit.

To date there have been two applications under section 34 which have proceeded to decision. These are *In the Application of Bryant*[41] and *Kolovos v O'Regan*.[42]

In the Application of Bryant concerned the investigation which was the subject of the public CJC *Report on an Investigation into the Tow Truck and Smash Repair Industries*.[43] The judgment of Ryan J is extensively referred to in that report. One issue was whether or not the court was entitled to examine or take into account material to support the position of the CJC without disclosing it to the applicant. The CJC asked the court to consider information obtained in the course of the CJC's investigation which was in a sealed envelope. The CJC objected to the disclosure of the information to the applicant on the basis that this would harm the integrity of the investigation and therefore would be injurious to the public interest. Ryan J ruled that it would be wrong for him to receive and act upon such an *ex parte* communication.[44]

In Report No 26 the PCJC recommended that section 120 of the CJ Act be amended to provide that a judge hearing an injunction application on the ground that an investigation is unwarranted may take or receive evidence in camera from the CJC as to the basis of the investigation. The applicant or his representatives would not be entitled to be present when the evidence is taken.

In *Kolovos v O'Regan*,[45] the Court of Appeal dismissed an appeal from the Supreme Court and upheld the chairperson's decision to direct the OMD to conduct an investigation, having formed the opinion that it involved 'major crime' which was not appropriate to be discharged or could not effectively be discharged by the Police Service or other Queensland agencies. The Court decided that this opinion formed under subparagraph 23(f)(iv) of the CJ Act was not beyond judicial scrutiny; but there was no evidence to show that any error affected his opinion in that case. The Court decided:

> ... there would be no foundation sufficient to sustain the investigation as a lawful exercise of the powers of the Commission were it made to appear, for example, that the chairman had not addressed matters which the legislation makes necessary to such an investigation, that he had taken into account some extraneous consideration or had ignored a material consideration, or that no grounds existed to support his conclusions.[46]

Among the authorities referred to in support of this proposition was *In the Application of Bryant*.[47]

Investigative hearings

The CJC is authorised to conduct a hearing in relation to any matter relevant to the discharge of its functions and responsibilities.[48] In theory, a hearing may be held for the purpose of any of the wide range of matters within the CJC's jurisdiction; however, in practice hearings relate to OMD investigations. Even when the principal basis for a hearing is an OMD function, the hearing may also assist

the CJC to discharge ancillary functions such as recommendations for law reform.[49]

A hearing conducted for the purpose of discharging OMD functions may be constituted by:

- the chairperson alone;
- the chairperson and one or more of the part-time CJC commissioners;
- the Director of the OMD;
- the legally qualified part-time commissioner; or
- a legal practitioner authorised by the chairperson.[50]

The presiding officer for the majority of hearings is a senior CJC lawyer. In general, these are relatively short private hearings held as part of CJC investigations. Although these investigations usually do not conclude in public reports under section 26 of the CJ Act, the *Report on an Investigation into the Tow Truck and Smash Repair Industries*[51] is an example of *in camera* hearings conducted by a CJC lawyer in support of an investigation which was the subject of a public report.

Private hearings are generally to assist in determining whether to report in the form of a brief of evidence to the Director of Prosecutions or other prosecuting authority,[52] or report for reference to a Misconduct Tribunal,[53] or to report to a principal officer of a unit of public administration with a view to disciplinary action.[54]

The majority of section 26 reports result from public hearings at which the chairperson or an eminent lawyer independent of the CJC presides. To date these lawyers have been retired members of the judiciary.

Section 26 reports have resulted from investigations by:

- the Honourable RH Matthews QC - *Allegations of Laurelle Anne Saunders Concerning Circumstances Surrounding her being Charged with Criminal Offences in 1992* (April and December 1994) - *Improper Disposal of Liquid Waste in South-East Queensland* (June and October 1994);
- the Honourable WJ Carter QC - *Inquiry into the Selection of the Jury for the Trial of Johannes Bjelke-Petersen* (August 1993);
- former District Court Judge, Mr PV Lowenthal - *Inquiry into Allegations by Terrance Michael MacKenroth MLA* (March 1993) (this concerned the conduct of former Queensland Police Commissioner Newnham).

There has only been one case in which the chairperson has conducted an investigative hearing with one or more of the part-time commissioners. On 15 March 1991, the then chairperson, Sir Max Bingham QC, sat with the four commissioners at a public hearing to respond to allegations made against the CJC by Channel 7 and Mr RD Butler about its investigations associated with former Superintendent JW Huey of the Queensland Police Service.[55] In 1993/94, the Yock Investigation was conducted by the legal part-time commissioner, Mr LF Wyvill QC.

A person who constitutes the CJC to conduct a hearing has the same protection and immunity as a Supreme Court judge.[56] A person before the CJC has the same protection and immunity as a witness in the Supreme Court.[57]

Procedures for taking evidence at CJC hearings are detailed in Division 2 of Part 3 of the CJ Act which is concerned with investigations. In *Ainsworth*,[58] the High

Court considered that Division 2 was not limited to formal hearings held under what is now section 25. However, the Division will mostly apply and be considered by the courts in relation to hearings in support of OMD investigations.

Under subsection 90(1) of the Act hearings are generally open to the public. However, the hearing may be closed at any time on the order of the person presiding if it is considered that an open hearing would be unfair or contrary to the public interest, having regard to:

(a) the subject matter of the hearing; or

(b) the nature of evidence expected to be given.[59]

In *ICAC v Chaffey*,[60] the majority of the NSW Court of Appeal decided that procedural fairness did not require a private hearing but that this was a matter for the discretion of the presiding commissioner.[61]

Generally, CJC hearings are relatively short and have a senior CJC lawyer presiding. These hearings are held to supplement other investigative techniques. These techniques include the usual methods and powers available to all police officers and may or may not be combined with other special CJC powers.

Staff of the CJC include Queensland police officers who retain their authority as such.[62] Therefore, a CJC investigation can proceed in the traditional manner by interviewing witnesses and using search warrants issued under provisions such as section 679 of the Criminal Code (Qld). In certain circumstances, listening devices may be used under the *Invasion of Privacy Act 1973* (Qld) or the *Drugs Misuse Act 1986* (Qld).

However it may become apparent in the conduct of an OMD investigation that the use of these more traditional powers will not be effective to get to the truth. This could include investigations into alleged misconduct (including official misconduct) by members of the Queensland Police Service or alleged official misconduct by other persons holding appointments in units of public administration, or organised or major crime under subparagraph 23(f)(iv) of the CJ Act. For example, in some cases there may be value in assessing the account of the complainant or some other witness on oath; or, it may be considered that a full investigation requires the testing of the account of the person against whom the allegations are made, by cross examination in the witness box. It may be that a potential witness, including the person the subject of the allegation has exercised the right not to answer questions in an interview; however, there is no right for any person not to attend, give evidence, or answer questions at a hearing.[63]

In such cases, it will generally not be difficult for the presiding officer to decide that an open hearing would be:

- unfair to a person because of the prejudicial effect of the publicity associated with the allegations or with the mere requirement that the person attend as a witness; and/or

- contrary to the public interest, by prematurely disclosing the investigation or the extent of information known to the CJC.

Matters generally considered by the CJC in determining whether or not a hearing should be closed are listed at page 153 of a submission on *Monitoring of the Functions of the Criminal Justice Commission*.[64]

The CJC may also make a suppression or non-publication order under section 88 to supplement the closed hearing. This may extend not only to the evidence given or to what is produced to or seized by the CJC, but also to the fact that someone has given or may give evidence before it

(including information that may help to identify this person). Suppression orders may also be used to protect the identities of witnesses or people who are the subject of allegations in a public hearing. It is contempt of the CJC to breach a suppression order.[65]

In general, the CJC will hold public hearings if it considers that the subject matter of the investigation is of such public importance that a public report should be made under section 26. Even in such cases, parts of the evidence may be taken *in camera*. Such hearings are the most public manifestation of the work of the CJC. The practice is to make a formal resolution to conduct the investigation. These resolutions also refer to the appointment of the presiding officer and the terms of reference of the inquiry. The resolutions are published in the final report.

The CJC has published its procedures for public hearings to supplement the express terms of the CJ Act. They are designed to ensure procedural fairness to persons affected by the hearings. For example there is provision for a Notice of Allegation be given to a person who may be the subject of adverse evidence in the hearing and giving the person an opportunity to appear in person or by legal representative. Where possible a person against whom an allegation is made is given an opportunity to make a brief response on the same day. The procedures are published in the *Submission on Monitoring the Functions of the Criminal Justice Commission*.[66]

The PCJC in Report No 26 recommended that the power of the CJC to hold hearings be subject to, and on terms approved by a District or Supreme Court Judge. It also recommended that a person affected by the operation of an investigative hearing, either as a witness or as the subject of the hearing, be able to apply to the approving court for a variation of the terms of that hearing.

The PCJC also recommended that hearings be conducted in private unless the CJC is able to establish to the approving court that the hearing is of an administrative nature and/or would not be unfair to any person and/or that to hold the hearing in private would be contrary to the public interest.

Criticisms and legal challenges have mostly been directed to the procedures which are adopted at closed CJC hearings. These difficulties arise because these are inquisitorial hearings which may obtain evidence to be used in an adversarial system. Additionally, the hearings have many of the trappings of an adversarial system.

As with the ICAC, the appearance of CJC hearings is not very different from those of a court. There is a bench and bar table, witnesses give evidence after the administration of an oath or affirmation,[67] evidence is given from the witness box, witnesses are allowed legal representation and are examined by lawyers, and there is a presiding officer.[68] The presiding officer ensures that the proceedings are conducted in accordance with the CJ Act and rules on whether a witness is required to answer a question. Because the presiding officer will be a legal practitioner authorised by the chairperson for the purpose of the particular investigation there should be an internal document evidencing the authorisation and the investigation to which the authorisation is limited.

Despite these similarities to an adversarial trial, the CJC, in conducting a hearing, is not bound by the rules or practice of any court or tribunal about matters of procedure and may conduct its proceedings as it considers proper; nor is it bound by the rules of evidence, and may inform itself on any matter as it considers appropriate.[69]

The Commission may also receive written evidence, which in general will be on

statutory declaration.[70] It may refer any matter on which it seeks expert evidence to a person of relevant competence, and may admit that person's report as evidence before it and act upon the report.[71]

The mechanism to have persons appear to give evidence before a hearing is a summons issued under section 74 of the CJ Act. A person served with a summons is obliged to comply with it in all respects unless the person has a lawful excuse or is not a 'subject person'.[72] It is not a lawful excuse that the person is subject to an obligation of confidentiality concerning the information, record or thing to which the summons relates, or service is outside Queensland.[73] A failure to comply with a summons is contempt of the CJC[74] and an offence under section 135 of the CJ Act.[75] The chairperson may apply to a judge of the Supreme Court for a warrant to apprehend a witness who fails to comply with a summons.[76]

A witness before the CJC is first examined and cross-examined by a counsel assisting as is the case in a Royal Commission or Commission of Inquiry. Any legal practitioner may perform the role of counsel assisting. The CJC may appoint a legal practitioner employed by it or engage a lawyer in private practice to assist.[77] In general CJC lawyers assist the relatively short private hearings. Senior private practitioners are engaged to assist hearings which will involve a public report. The private practitioners will generally be assisted by a junior who will often be a CJC lawyer.

Counsel assisting will be supported by multi-disciplinary investigative teams of lawyers, investigators (including members of the Police Service), accountants and other professionals whose particular expertise is required. Under s95(2) counsel assisting may examine and cross-examine any witness on any matter relevant (in the CJC's opinion) to the subject matter of the proceedings. This is always subject to the direction of the presiding officer.

A 'person concerned' in the proceedings may appear in person or represented by counsel or solicitor, or by an agent approved by the CJC under section 95(1) of the CJ Act. Subsection 95(2), after referring to the authority of counsel assisting, goes on to provide:

> ... any Counsel, Solicitor or other agent authorised by the Commission to appear in any proceedings of the Commission may examine and cross-examine any witness on any matter relevant (in the Commission's opinion) to the subject matter of the Commission's proceedings, subject always to the direction of the person conducting the proceedings.

Section 95 has been considered by the Queensland Supreme Court in four cases, the first of which was *Re Whiting*[78] where each member of the Court of Appeal commented on the unsatisfactory drafting of section 95 (which was then section 3.23) and related provisions. The appeal had proceeded on the basis that a mere witness to an investigative hearing was a 'person concerned'. However, Macrossan CJ observed that the ambit of the category might have to be considered in greater detail on another occasion.[79]

The issue of who is a 'person concerned' was considered by the Court of Appeal in *Queensland Advocacy Incorporated*[80] case. As mentioned above, the issue in that case was whether the QAI was entitled to appear on behalf of the residents of the Basil Stafford Centre or in its own right before a CJC investigative hearing. The majority (Macrossan CJ and Demack J) decided in the negative. The members of the Court considered the meaning of 'person concerned' with reference to either the concept of 'person aggrieved' or a person who has standing in an action to enforce a public right. Neither party contended that the residents of the centre were not 'persons concerned'. However at no stage of the proceedings had anyone appeared on

behalf of the residents claiming to have been appointed in any formal way. It was understood that the residents lacked the capacity to take that step on their own behalf. It was in these circumstances that the QAI sought to appear before the inquiry.

Macrossan CJ while accepting that it would not always be a simple task to decide whether a particular person is a 'person concerned' considered the category should be taken as conveying some personal and relatively direct involvement in the outcome being investigated or to adopt a phrase used in another context, more than 'a mere intellectual or emotional concern'.[81] This phrase was adopted from *Australian Conservation Foundation v The Commonwealth*.[82] The Chief Justice considered that the relevant comparison is more with a party than a witness.[83] His Honour also drew some support from the additional opportunities for appearance and participation, which appear to be envisaged by subsection 95(2) under the reference to 'any person authorised by the Commission to appear in any proceedings of the Commission'.[84] Therefore it was within the discretion of the presiding officer to determine the extent of the participation that he or she would accord QAI in the proceedings and it could not be said that it was inappropriate or an error to order that QAI only receive the transcript and have an opportunity to make written submissions.[85]

Demack J also considered the question of whether QAI was a 'person concerned' by reference to the *Australian Conservation Foundation*[86] case. He considered that QAI could not show, any more than the Foundation, that it had the necessary standing, and added;

> The general principle that the majority of the High Court applied may be expressed succinctly in the words of Lord Wilberforce in Gouriet v. Union of Post Office Workers (1970) A.C. 435, at p.477: "in general, no private person has the right of representing the public in the assertion of public rights". A group of citizens who adopt a corporate identity cannot, by doing that, give themselves a right they did not have as individuals; (c.f. Stephen J. 146 C.L.R. at 539).[87]

Davies JA (dissenting) considered that the QAI was, by reason of its objects and functions, a 'person concerned' in the proceeding to the extent that it may involve recommendations relevant to the treatment of residents of the Centre or the reporting of such treatment or related matters.

In *Re Whiting*[88] the Court of Appeal had to consider whether having regard to, *inter alia*, section 95, the appellant was permitted to appear at a closed hearing of the CJC by the counsel or solicitor of his choice. This arose from an investigative hearing of a complaint against a police officer. Counsel instructed by a firm of solicitors acting for the appellant who was witness in the proceeding, two other police witnesses, and the police officer against whom the complaint was made, sought to represent the appellant. The presiding officer at the hearing ruled that the same legal representatives would not be authorised to represent both the potential witnesses and the officer against whom the complaint was made.

In dismissing the appeal, Macrossan CJ and Moynihan J (Pincus JA dissenting) considered that the dominant provision for the entitlement to legal representation was the provision which is now subsection 95(1), which conferred upon persons concerned in CJC proceedings a full right of legal representation and a qualified right of non-legal representation. The reference to approval in that provision did not relate to legal representatives. Their Honours also decided (Pincus JA not deciding) that the ruling was a proper exercise of the implied power of the CJC to control its own proceedings so as to prevent its proceedings being prejudiced. In particular, Macrossan CJ decided that the ruling was justified because it had been concluded in good faith that to allow

the particular representation sought by the appellant would, or would be likely to prejudice the investigation or the effective discharge of the CJC's functions.

Pincus JA also decided that the CJC could refuse to allow particular representatives to appear where to do so would prejudice proceedings or impede its functions. However this was because the appellant's entitlement to representation depended on the CJC's approval or authorisation.

This decision was applied *In the Application of Bryant*[89] in deciding that the presiding officer did not err in directing that a witness was not entitled to be represented at a closed investigative hearing concerning the tow truck industry by the same counsel and solicitors representing another witness. In that case a non-publication order had been made under the equivalent to the present section 88 of the CJ Act.

In *Re an application under the Criminal Justice Act 1989*[90] the issue was not whether the applicant police officer was entitled to be legally represented but whether the applicant was entitled to be present at all, either personally or through some representative. The police officer was the person under investigation. The presiding officer denied the applicant and his legal representatives permission to be present at the interrogation of other witnesses before a closed hearing. Derrington J answered the question in the negative on the authority of the High Court in *National Companies and Securities Commission v News Corporation Ltd.*[91] He observed:

> The purpose behind this closed session is to exclude other persons, including a person concerned so that the Commission may properly perform its function of investigation.[92]

However, he considered that once the reason for the exclusion ceased to exist, the applicant's rights to natural justice should be restored to permit the opportunity of knowing, meeting and testing any evidence received during the exclusion. Therefore subject to any interference involved with the performance of the CJC contrary to the purpose of the CJ Act, the applicant was to be fully informed of any proposed adverse report which the CJC may consider making, and the details of it to such an extent that he would know the evidence that had been received; and he would have the right to test all such evidence that may be relevant to the conclusion that would lead to the making of such an adverse report.

In practice, for public hearings and closed hearings with a view to a report under section 26, the CJC seeks to ensure that procedural fairness is provided as required by this decision by serving a Notice of Possible Adverse Findings on persons in jeopardy of such a finding in the final report. This provides an opportunity to the person to make a submission in response. This submission is to be taken into account in completing the report. In the inquiry into the tow truck industry,[93] all of the submissions are set out in full in the report.[94]

In closed hearings supporting an OMD investigation which may result in the referral of a report to the Director of Prosecutions or other prosecuting authority, the Misconduct Tribunal, or the appropriate principal officer in a unit of public administration with a view to disciplinary action, the general approach is to give any person the subject of an allegation or who may be adversely named in the report an opportunity to respond either through a formal interview or a Notice of Allegation or of Provisional Adverse Finding.[95] On some occasions this will involve the person responding to the allegations on oath or affirmation in an investigative hearing. In all such cases the CJC report does not involve an ultimate finding of fact. If prosecution or disciplinary proceedings are instituted as a result, the person charged will have the

normal opportunity to challenge and respond to the allegations through the court or disciplinary processes as the case may be.

Privilege against self incrimination

Although a witness at a hearing may not refuse to answer a question or produce any record or thing that in the opinion of the CJC (through the Presiding Officer) is relevant to its investigation and is required by the CJC, on the ground that the disclosure may incriminate the witness,[96] such disclosure will not be admissible in any proceedings against the person giving it, provided an objection was made to the disclosure.[97] This extends to statements of information provided under section 69 of the CJ Act.[98] The protection does not apply to proceedings for contempt of the CJC or perjury.[99] A witness who, without lawful excuse, fails to answer a question when required to do so by the CJC, is guilty of contempt.[100]

Although a disclosure made pursuant to a section 69 notice requiring a statement of information or a section 74 summons may not be recycled into any later proceedings for use against the person making the disclosure, this does not prevent the use of evidence derived from the inadmissible material. There is no 'derivative use immunity'[101] such as was previously found in subsection 68(3) of the *Australian Securities Commission Act 1989* (Cth).[102] Disclosures made to the CJC in response to such compulsory processes may be used for the purposes of the investigation and the evidence obtained as a result, may be admitted in evidence against the person making the disclosure, despite the objection. However, the CJ Act has not gone as far as the *Independent Commission Against Corruption Act 1988* which has an express provision to this effect.[103]

Sherman has recently discussed the use of coercive powers once legal proceedings have commenced. He concludes that not every use of an investigative power in these circumstances will be invalid, but there must be an examination of how the use of the power relates to the proceedings and whether it interferes with the proceedings.[104] The PCJC has recommended an amendment to section 96 to provide an exemption to the abrogation of privilege against self incrimination where the person affected is awaiting the outcome of a charge for an offence in relation to which the information, evidence or records or thing sought may tend to be incriminating.[105]

Subsection 94(5) provides that a person is not compellable to disclose a secret process of manufacture. This does not apply to section 69 notices. The PCJC has recommended that it be extended to apply to such notices.[106]

Public interest immunity

The CJC will often be the subject of subpoena to produce information obtained in an investigation to a court hearing a matter to which the investigation relates. It is likely that the CJC will claim public interest immunity for some of this information. The approach to be taken to such a claim will be governed by the decision of the Queensland Court of Appeal in *Criminal Justice Commission v Collins*.[107]

In that case, the CJC applied for an order to review a magistrate's decision that there was no public interest immunity in favour of it not producing, under a subpoena, its tape recorded interview with a police officer during an investigation. The respondent issued the subpoena in connection with charges preferred against him by the officer. The respondent had complained to the CJC about the officer's conduct concerning the incident from which the charges arose. After the taped interview, the CJC investigation was suspended pending the outcome of the court proceedings. The magistrate

rejected the CJC's objection and ordered the tape recorded interview be produced to him. The Court of Appeal (Macrossan CJ, and McPherson JA; Pincus JA dissenting) allowed the appeal and set aside the order overriding the CJC claim of public interest immunity. It ordered the magistrate to further hear the claim and undertake a balancing of the competing public interests as to whether the taped interview should be produced.

The majority observed that it may be accepted that statutory bodies with functions like those of the CJC must have some degree of immunity if they are to function as intended. It may also be accepted that provisions of the kind found in the CJ Act can be taken as establishing some *prima facie* claim to immunity from obligations of disclosure on public interest grounds. However, such provisions do not, without more, demonstrate how a court should deal with a claim for immunity when faced with a competing claim for access to information by somebody in the position of the respondent. In particular, there was no single broad class enjoying public interest immunity which would embrace all documents recording information collected in CJC investigations.

Therefore there can be no blanket claim of public interest immunity by the CJC. In each case the court must make a decision considering the relevant statute and public policy considerations. The decision will involve a balancing exercise once it has been decided that a public policy entitlement to protection exists. Therefore claims of public interest immunity by the CJC will be decided case by case.[108]

The future

In addition to the two three year reports, the PCJC has issued numerous reports recommending changes in the operation of the CJC. Many of these which require amendment of the CJ Act remain under consideration. It is ultimately a matter for the Government to determine whether and what changes will be introduced into Parliament.

If some of these recommendations are accepted there will be no significant changes in the CJC. Some of these recommendations have been referred to in this article. The most recent of these, in Report No 26, could lead to:

- coercive powers being confined to the investigation of official misconduct, organised or major crime;
- investigative hearings being held only on the approval of a District or Supreme Court judge;
- a person affected by a hearing, as a witness or the subject of the hearing, being able to apply to the approving court for a variation of its terms;
- hearings being closed to the public unless the CJC is able to establish to the approving court that the hearing is of an administrative nature and/or would not be unfair to any person and/or that to hold the hearing in private would be contrary to the public interest;
- the PCJC formulating policies and issuing general guidelines which must be adhered to by the CJC;
- the PCJC being able to direct the CJC to commence or continue a criminal investigation;
- the creation of a division to investigate organised and major crime, separate from the OMD which would be confined to the investigation of misconduct and official misconduct;
- the abolition of the Corruption Prevention Division;
- the transfer of the Misconduct Tribunals from the CJC;

- the abolition of the co-ordination function of the Research and Co-ordination Division; and
- the establishment of the Whistleblower Support Program as a separate organisational unit in the CJC reporting directly to the Chairperson.

The CJC will continue to exist for the foreseeable future. However, its form and functions are likely to change as part of the continuing process of review. As to what this form and future will be, only time will tell.

Endnotes

1 See T Sherman, 'Administrative Law and Investigative Agencies', (1995) 4 *AIAL Forum*, p 2 (' Sherman').

2 CJ Act, s34.

3 CJ Act, s29(1).

4 (1992) 175 CLR 564.

5 *Criminal Justice Amendment Act 1993* (Qld) s9.

6 CJ Act, s93(2).

7 JR Act, ss 4 and 20.

8 JR Act. s21.

9 JR Act, s 22.

10 JR Act, Part 4.

11 JR Act, Schedule 2.

12 CJ Act, s69.

13 CJ Act, s74.

14 *Walker v Criminal Justice Commission* QLR, 4 September 1993.

15 *Behrens v Criminal Justice Commission* (1994) 2 QdR 578.

16 *Boe v Criminal Justice Commission* (1993) 1 QAR 167.

17 Queensland Court of Appeal, 8 March 1995, unreported decision.

18 Section 48 as inserted by the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994* (Qld), s5.

19 FOI Act, Schedule 1.

20 CJ Act, s83(1).

21 Above n 17.

22 Sherman, 9.

23 CJ Act, s75.

24 CJ Act, s77.

25 CJ Act, s78.

26 Since this paper was prepared, the PCJC has been replaced by the Legal, Constitutional and Administrative Review Committee. It has been reported that the new committee plans to institute regular and routine auditing of the CJC and to impose stricter guidelines on the CJC complying with requests from the committee for information: see *The Australian*, 9 November 1994, p 4.

27 CJ Act, para 118(1)(a) and (f).

28 Second Parliamentary Criminal Justice Committee, Report No 26 (1995), ('Report No 26').

29 CJ Act, s34.

30 CJ Act, s120(1).

31 CJ Act, s120(2).

32 CJ Act, s35.

33 CJ Act, s119(1).

34 Queensland Court of Appeal, 8 March 1995, unreported decision.

35 CJ Act, s119(2).

36 Id.

37 CJ Act, s121(1).

38 CJ Act, s123(1).

39 CJ Act, s124(1).

40 CJ Act, s119(5).

41 OS Nos 758, 770 and 894 of 1992 (unreported) 6 January 1993.

42 Queensland Court of Appeal, 13 May 1994, unreported decision.

43 Queensland Criminal Justice Commission, *Report on an Investigation into the Tow Truck and Smash Repair Industries* (1994).

44 Ibid, 16.

45 Above n 42.

46 Ibid, 3.

47 Above n 41, 23-24.

48 CJ Act, s25(1).

49 See for example the resolution by the CJC to undertake an investigation and conduct public hearings in Appendix 1 to *A Report on an Investigation into the Arrest and Death of Daniel Alfred Yock* (March 1994).

50 CJ Act, s25(2).

51 Above n 43.

52 CJ Act, para 33(2)(a).

53 CJ Act, para 33(2)(b).

54 CJ Act, para 33(2)(g).

55 *In the Application of Bryant*, above n 41, 35.

56 CJ Act, para 100(1)(c).

57 CJ Act, s100(2).

58 Above, n 4.

59 CJ Act, s90(2).

60 (1993) 30 NSWLR 21.

61 See also PD McClelland QC, 'Administrative Law and the ICAC', (1995) 4 *AIAL Forum* 30.

62 CJ Act, s67(3).

63 CJ Act, s94.

64 Queensland Criminal Justice Commission, Report, 1991.

65 CJ Act, s106(i).

66 Above, n 64.

67 CJ Act, ss 25(1) and 89.

68 See also ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC Comparison* (November 1994) ('ICAC'), 31.

69 CJ Act, s92(1).

70 CJ Act, s25(1).

71 CJ Act, s92(2).

72 CJ Act, s76(1). This subsection also defines who is a 'subject person'.

73 CJ Act, s76(3).

74 CJC Act, paras 106(1) and (b).

75 Maximum penalty - 85 penalty units or imprisonment for one year.

76 CJ Act, s79(1).

77 CJ Act, s91.

78 (1994) 1 Qd R 561.

79 Ibid.

80 Above, n 17, 8.

81 Ibid, 8.

82 (1980) 146 CLR 493, 530, per Gibbs CJ.

83 Above, n 17.

84 Id.

85 Ibid. 9.

86 Above, n 82.

87 Above, n 17.

88 Above, n 78.

89 Above, n 41.

90 OS No 68 of 1993, 17 September 1993, (1994) QLR 2 July 1994.

91 (1985) 156 CLR 296, 323-324.

92 Above, n 90, 3.

93 Above, n 43.

94 See the section on 'Procedural Fairness', pp 28-29 and Appendices 1 and 2.

95 See *Submission on Monitoring of the Functions of the Criminal Justice Commission* (April 1991), 168-71.

96 CJ Act, s94(2); see also ICAC, 32.

97 CJ Act, s96(1); see also ICAC, 32.

98 Id.

99 CJ Act, s96(2).

100 CJ Act, para 106(c)(ii).

101 For the purpose of this paper, 'derivative use immunity' is the inadmissibility against a person in any later proceedings (other than for contempt of perjury), of any information, record or thing obtained as a direct or indirect consequence of the person giving evidence, providing a statement of information or producing records or things pursuant to a compulsory process.

102 Section 4 of the *Corporations Legislation (Evidence) Amendment Act 1992* amended subsection 68(3) by removing the 'derivative use immunity'.

103 ICAC Act, s26(3).

104 Sherman, 14-16.

105 PCJC Report No 20, Part B (September 1993), 48.

106 Ibid, 89.

107 (1994) 74 A Crim R 63.

108 *Sankey v Whitlam* (1978) 142 CLR 1; *Alister v The Queen* (1984) 154 CLR 404; *Commonwealth v Northern Land Council* (1993) 176 CLR 406, followed.

FAIRNESS IN ADMINISTRATIVE DECISION-MAKING: THE IMMIGRATION REVIEW TRIBUNAL MODEL

*Sue Tongue**

Text of an address to AIAL seminar, Adelaide, 21 May 1996.

Introduction

The purpose of my presentation is to give a brief introduction to the Immigration Review Tribunal (IRT), discuss how it goes about achieving fairness in administrative decision-making and talk about some current issues in administrative law and policy. I am sure most of you are familiar with the work of the Tribunal and its method of operation but I will briefly recap before addressing current issues facing the Tribunal.

The IRT

The Tribunal has been in existence for six years. It was established as part of the package of changes to the *Migration Act 1958* passed by Parliament in 1989. The creation of a mechanism for independent review of migration decision-making consistent with the requirements of administrative law was recommended by the Committee to advise on Australia's Immigration Policies (Fitzgerald). Earlier reports to the Government by the Administrative Review Council (ARC) and Human Rights Commission (HRC) had also proposed a system of review. Prior to the establishment of the IRT, decision-making was primarily policy based with individual decision-makers exercising a degree of discretion. Non-statutory, non-determinative review was available through the Immigration Review Panels.

The 1989 package established two tier review. The first tier is a discrete and independent Migration Internal Review Office (MIRO) within the Department of Immigration and Multicultural Affairs (DIMA). The second tier is independent review by the IRT. The IRT's jurisdiction covers:

- all decisions refusing or cancelling visas in Australia other than decisions:
  - on people who have not been cleared by Immigration on arrival in Australia
  - on refugee status (reviewable by the Refugee Review Tribunal (RRT))
  - to refuse or cancel visas to people overseas on character grounds and to cancel business visas (reviewable by the Administrative Appeals Tribunal (AAT))
- reviewing decisions refusing visas to people overseas where there is an Australian sponsor or nominator or (in relation to return resident visas and close family visitor visas) a close relative in Australia who may pursue review of the matter.

Most decisions refusing visas must first be reviewed by MIRO but visa cancellations and decisions refusing visas which result in people being held in immigration detention (bridging visas) come directly to the IRT. At present about 38% of those

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eligible to apply for review of a MIRO decision do so. The Tribunal makes over 2000 decisions a year and this year is setting aside the department's decision in about 54% of cases. The Tribunal may set aside the Department's decision because new evidence has emerged and this often occurs when the Tribunal talks to the applicant and their family. Also the Tribunal is not bound by departmental policy in making its decision.

The present rate of appeal from Tribunal decisions is about 4% which is an increase on the usual rate of around 2.5%. The increase is directly attributable to the appeals in relation to class 816 visas. The Department has only appealed in two cases.

The Tribunal's principal registry is in Canberra but it has registries in Adelaide, Brisbane, Melbourne, Perth and Sydney. The Northern Territory is serviced by the Adelaide registry and Tasmania is serviced by the Melbourne registry. The Tribunal has 17 full-time Members and 17 part-time Members who are independent statutory office holders. It has about 50 staff. To date it has made 6870 decisions.

The Tribunal is required by subsection 353(1) of the Migration Act to "pursue the objective of providing a mechanism of review which is fair, just, economical, informal and quick". It has been given a clear mandate to adopt non-adversarial methods. The legislation reflects the response of Parliament to the costs of justice and fears about increasing legalism and formality in administrative review.

In *Tordo*[1] Keely J said:

> In my opinion the provisions in the Act demonstrate an intention by Parliament to confer upon the Tribunal extremely wide powers to decide what method of conducting the hearing will provide "a mechanism of review that is fair, just, economical, informal and quick" (s 123(1)), and to do so in its discretion although it must act "according to substantial justice and the merits of the case": s.123(2)(b).

The Tribunal's procedures were developed recognising natural justice principles. The Tribunal is "not bound by technicalities, legal forms or rules of evidence". It acts "according to substantial justice and the merits of the case." The only party to the review is the applicant who, in addition to providing documentary evidence, may make written submissions to the Tribunal. The Secretary of DIMA is required to provide the Tribunal with a written statement of the Department's reasons for the decision under review. The Department can be called to give evidence or arrange for an investigation or examination at the Tribunal's request but is not a party to the review. One of my colleagues on the Tribunal says he has an empty chair at a hearing. After an application is lodged it is constituted to a Member for consideration. The Member does a review on the papers and can find for the applicant at this stage. However most matters proceed. In many cases the Member will hold a preliminary meeting with the applicant and their adviser to explain the Tribunal's processes, discuss the evidence that will be required and identify key issues. A hearing is usually held at which evidence is taken from the applicant and their witnesses then the Tribunal Member writes their decision.

The Tribunal's procedure is similar to, but different from, other Commonwealth tribunals. There are elements of Social Security Appeals Tribunal and Veterans' Review Board procedures and some similarity with the Administrative Appeals Tribunal (AAT). Tribunal members have a "hands on" approach to the conduct of the review. They have the ability to take evidence on oath or affirmation, the power to authorise another person to take evidence inside or outside Australia, the power to summon a person to give evidence or produce documents, to require the Secretary to arrange for an investigation and report on it and to obtain such other evidence as it thinks necessary.

The use of advisers by applicants to the Tribunal is steadily rising. In 1990-91 about 20% of applicants were assisted by advisers. By the end of 1991-92 this had increased to about 30%, by 1993-94 to 55% of applicants and by 1994-95 to 58%. In 1994-95 63% of decisions on applications in which an adviser was used were favourable compared to 58% the previous year. There are a number of possible reasons for the changes but there is, at present, no clear evidence available to support any particular reason. I understand one likely reason for the changes is the difference in the Tribunal's case mix as a consequence of the new legislative scheme introduced on 1 September 1994. Also applicants for bridging visas may be more likely to have an adviser. Another theory I have heard is that there has been an improvement in services offered by advisers. I have been told that advisers are now more likely to give a realistic indication of the prospects for success in overturning a departmental rejection of a visa application. Sometimes people choose to appear before the Tribunal alone if an adviser has told them their chance of success is low. The Tribunal is concerned to ensure that applicants without advisers are not disadvantaged by Tribunal procedures and will be examining the reasons for the 1994-95 changes in outcomes.

In August 1995 AGB McNair conducted a survey or IRT clients. 403 telephone interviews were conducted with applicants to the IRT. In addition there were 69 telephone interviews with law firms, immigration consultants and other community groups who have dealt with the IRT as part of a "community survey". The survey results showed 37% of applicants were aware of the correct role of the Tribunal and 55% of respondents in the community survey believed their clients know the correct role. Respondents to the community survey generally believed the IRT is sensitive to the language needs, ethnic background and lack of experience of their clients in appealing against government decisions. The majority of respondents (68%) believed that the Tribunal process is fair and just. However opinions were split on the speed of the process. These responses were echoed by respondents to the community survey.

There had been a previous client survey in 1992 and some differences between the two surveys emerged. More applicants in the 1995 survey sought assistance from law firms (30% in 1995 compared to 20% in 1992). More applicants in 1995 believed all aspects of their application were fully considered than the 1992 respondents (65% compared to 47% in 1992) and more applicants indicated they fully understood the reasons for the Tribunal's decision than the 1992 applicants (73% compared to 59% in 1992).

The Tribunal will take the results of the survey and other comments it receives into account in monitoring its policies and procedures. The increase in size of the membership of the Tribunal has led to the need to establish more structured processes for ongoing review of its operations and development of policies in response to legislative change, client and community feedback and other developments. Such processes should assist in improved service delivery by the Tribunal and are being actively pursued by the Tribunal.

Current issues

Recent amendments

When the Tribunal was established the ARC, among others, had concerns about its methods and the Government undertook that a review would be conducted after two years of the Tribunal's operation. That review Committee, the Committee for the Review of the System of Review of Migration Decisions (CROSROMD), reported in 1993. It made a number of recommendations for legislative change designed to strengthen and clarify the non-adversarial process used by the Tribunal. The *Migration Legislation Amendment Act (No 1) 1995*[2]

introduced a number of changes to the Migration Act. The amendments were intended, among other things, to give effect to some recommendations of CROSROMD. The aim was to enhance the operation of the IRT and further strengthen its non-adversarial operation.[3] The amendments which will have the most impact on the operations of the Immigration Review Tribunal are the following:

- section 366A on the role of assistants when an applicant is appearing before the Tribunal
- section 366D stating that a person is not entitled to examine or cross examine any person
- section 362A which provides that applicants and their assistants may have access to any written material given or produced to the Tribunal
- section 366C requiring the Tribunal to provide an interpreter when requested unless a person is sufficiently proficient in English
- section 375A allowing for certification by the Minister that disclosure of a document would be contrary to the public interest and notification of that to the Tribunal by the Secretary.

Administrative Review Council Report on Tribunals

In September 1995 the ARC report, *Better Decisions: Review of Commonwealth Merits Review Tribunals* was released. Consultations have been held with groups affected by the report. The Government has not yet responded to that report.

The Council's report discusses adversarial and inquisitorial approaches to tribunal proceedings. It says that:

> specific features of practice in the specialist tribunals were the subject of criticism during the inquiry. For example, the general lack of agency presentation in cases before the tribunals other than the AAT means that in those tribunals, members take a much more active role in eliciting information from applicants at hearings. They are obliged to ask questions of applicants and to test their veracity where relevant, rather than leaving the more contentious aspects of this process to be performed by agency representatives.[4]

The Report suggests that, in some ways, the AAT is too formal. On the other hand it also suggests that the specialist tribunals can draw from the AAT's experience with alternative dispute resolution techniques and sometimes adopt a more legalistic and adversarial approach.

Australian Law Reform Commission inquiry

The Australian Law Reform Commission has been asked to inquire into the adversarial and inquisitorial processes. It is hoped that the IRT and RRT will be involved in that work as their non-adversarial methods provide an interesting Australian model.

Access to justice

In recent years a number of reports on the legal system have indicated that many in the community lack access to justice. The 1995 Sackville Committee report on Access to Justice showed evidence of lack of access to justice and suggested a number of improvements. At the Tribunal we are conscious that many applicants come from non-English speaking backgrounds. We use interpreters extensively and publish information in community languages. We are conscious we can do more and are considering improvements.

Review

Prior to the last federal election the Coalition announced that if elected they would conduct a review of the IRT and

RRT. Details of that review are expected to be announced shortly.

Achieving economical and quick decision-making

One of the criticisms of the IRT to emerge from the client survey was the delay in receiving a decision. Dean Roscoe Pound said that justice that has been delayed or is so formalistic that it is beyond the reach of the average person is a negation of justice. The Tribunal is required to do economical and quick reviews and is considering steps to improve its delivery of decisions. It is examining shortening the length of written reasons. It is also reviewing its current time standards and case management to see where improvements can be made.

Conclusion

The IRT is facing challenges in meeting its objective. However it has advantages. In particular, its Members and staff are committed to its objective and take pride in using non-adversarial processes that are "user-friendly" to applicants and their advisers. The Tribunal is working to improve its service delivery and in doing so is having regard to feedback from its users.

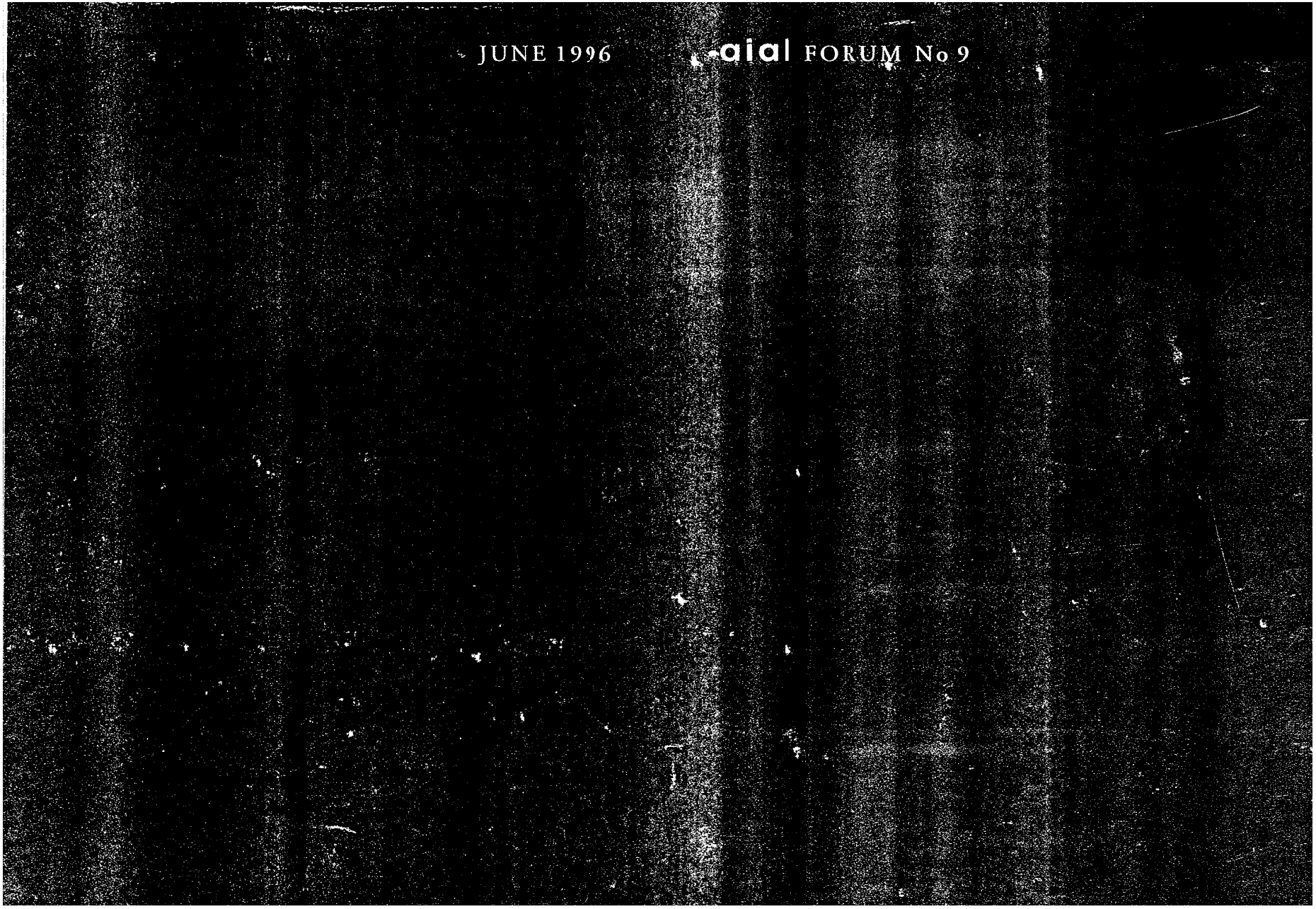
Endnotes

1 *Minister for Immigration, Local Government and Ethnic Affairs v Immigration Review Tribunal and Ors* (1993) 113 ALR 737.

2 This Act was known as the *Migration Legislation Amendment Bill (No 5) 1994* when it was going through Parliament and is sometimes referred to as "Bill 5".

3 House of Representatives *Hansard*, 9 February 1995, p 855.

4 Para 3.42.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