Peter McDonald presented a 'Charter of Reform' to the Government.

The Charter received little attention, and even less action for some time. When, however, an International Credit Rating Agency warned that New South Wales' 'Triple A Credit Rating' might be damaged by perceptions of 'political instability' in the State, a deal was made. In return for an undertaking by the Independents not to vote against the Government in the absence of maladministration, the Charter was dusted off, revamped, turned into a 'Memorandum of Understanding' and duly signed by both sides.

The Charter deals with a number of different areas, and is predominantly concerned with Parliamentary Reform. Headed 'Guaranteeing Open and Accountable Government' are proposals for changes to the *Freedom of Information Act.* The Statement of Principle provides:

> The Government and Independent Members agree that there is a need to strengthen the Government's *FoI Act* to allow the public access to all government information unless a compelling case can be made for such information remaining confidential.

The Independents' original Charter had been drafted without reference to the Ombudsman's Office or the (then existing) FoI Unit of the Premier's Department. Consequently, some of the ideas expressed score well on enthusiasm but less well on practicality. For instance, it had stated that all internal reviews should be conducted by the Ombudsman (effectively removing the right of internal review within an agency); that the Ombudsman should be able to *enforce* the release of a document (the Ombudsman has consistently stated that determinative powers are not appropriate for his Office); and that the turn-around period for requests should be shortened from 45 to 14 days (rarely achieved in jurisdictions with such time limits).

The new Memorandum of Understanding reflects agreement to a number of desirable reforms. It states that by June 1992, legislation will have been passed to:

- apply the *FoI Act* to local government on the same broad basis as it applies to State government. (Despite a commitment to this effect by the Premier in 1990, local government is still only covered in relation to documents which concern personal affairs);
- shorten the 45 day statutory time limit for responses to 21 days;
- provide that some agencies now totally exempt (e.g. the Independent Commission Against Corruption, the Office of the Director of Public Prosecutions and the Auditor-General) are no longer exempt in relation to their administrative functions;
- provide that Ministerial Certificates will be reviewed by the Supreme Court rather than the District Court;
- define 'public interest' to exclude embarrassment or loss of confidence in the Government or an agency, or the fact that release would lead to confusion on the part of the applicant, or to the applicant misinterpreting or misunderstanding the document;
- provide that refusals to process applications on the grounds of 'unreasonable demand' are reviewable decisions; and
- repeal the five-year time limit for non-personal documents.

The Memorandum also reflects a commitment to making available more government information. For example, at present, many Annual Reports are used mainly for public relations purposes and contain little substantive information. The Memorandum states that a wider range of information should be provided by Departments and Statutory Authorities in their Annual Reports, and commits the Government to 'examine matters currently omitted from annual reporting requirements.'

Although minutes of Board Meetings for Statutory Authorities are not infrequently requested under FoI, access is not always freely given. Under the terms of the Memorandum, a circular is to be distributed to all Ministers, urging them to ensure that:

> minutes of Board Meetings of Statutory Authorities are made more readily accessible . . . and that maximum access (is) provided to such minutes notwithstanding that they may technically fall within one or more FoI exemptions.

It may be that these latter proposals lead to little real change, but they are another step in increasing administrative access to Government information. Alternatively, if there is another by-election in New South Wales, members of the current Government will have other issues on their minds and the Memorandum may count for nothing!

FoI Review will keep you up to date on changes resulting from the agreement.

References

1. Annual Report on the New South Wales Ombudsman, 30 June 1991
2. *FoI Act*, s.6 and 7; *Police and Superannuation Legislation Amendment Act* 1990.
3. *FoI Act*, s.67: *Statute Law Miscellaneous Provisions Act* 1989.
4. *FoI Act*, s.25: *Statute Law Miscellaneous Provisions Act* 1991.
5. *FoI Act*, Schedule 2; *Ombudsman Amendment Act 1990*
6. *Ombudsman Act* 1975, s.35: *Ombudsman Amendment Act* 1990.
7. *FoI Act*, Schedule 2; *State Owned Corporations Act* 1989.
8. *FoI Act* Schedule 1; *Adoption Information Act* 1990.

CLARIFICATION

In my article 'Freedom of Information in Tasmania' (1992) FoI Review 2 in referring to the bodies covered by the FoI Act, which includes 'Agency' as defined by the Tasmanian State Service Act 1984, I should have stated that an 'Agency' only includes a 'State Authority' specified in a Schedule to the Tasmanian State Service Act. In recent times, the number of 'State Authorities' specified has been greatly reduced, as most of them have now been brought within the umbrella of Government Departments.

The statement that the FoI Act has a wide coverage is still correct, but not solely as a result of the definition of 'State Authority' which was the impression I may have given in my article.

PETER MALONEY

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

WAGEN and COMMUNITY SERVICES VICTORIA
No. 91/26202

Decided: 21 November 1991 by Judge A. F. Smith (President)

Request for briefing note to Minister concerning implications of High Court decision — claim for exemption under ss.30 and 32.

An article appeared in the *Herald* newspaper in Melbourne commenting on a High Court decision which, according to the author of the article, would make it harder to convict child molesters. After reading the article the Minister for Community Services directed her staff to prepare a briefing note on the implications of the decision. The note was subsequently prepared by Ms Fiona Kerr, who was the Director of the Legislation and Legal Services Section in the Department. It discussed the court's decision and a recent report by the Victorian Law Reform Commission on Sexual Offences Against Children and also referred to the implications of the decision for a pending prosecution against the applicant, an officer of the respondent who, at the time of the hearing, had been committed for trial on charges of allegedly molesting five children.

Access to the briefing note was refused by the respondent on the grounds that the document was exempt under ss.30 (deliberative processes) and 32 (legal professional privilege).

The Tribunal first considered whether the document was exempt under s.32. It noted that the privilege extended to in-house government lawyers (like Ms Kerr) and was not defeated simply because the advice also contained reference to matters of policy (*Waterford* v *Commonwealth of Australia* (1987) 71 ALR 673).

Ms Kerr gave evidence that the sole purpose of preparing the document was to give legal advice to the Minister, although it did contain material of a legal policy nature, and that the advice was later given effect through an amendment to the *Crimes (Sexual Offences) Act* 1991. She also gave evidence that she would be less 'creative' in her advice if the document was released.

After reviewing Ms Kerr's evidence the Tribunal was satisfied that the document had been brought into existence for the sole purpose of providing legal advice to the Minister and was therefore subject to legal professional privilege. This finding meant that the document was exempt under s.32.

The Tribunal was also satisfied that the document was exempt under s.30. In deciding that disclosure would be contrary to the public interest, the Tribunal relied upon the 'frankness and candour' argument, which has gained in popularity since *Howard* and *Treasurer of the Commonwealth* (1985) 3 AAR 169, despite being initially rejected by a series of Commonwealth AAT decisions. The Tribunal reasoned that:

> Plainly, a Minister of the Crown holds high office and a communication containing advice and recommendation from a legal officer to a Minister on such a sensitive issue as proposals for the reform of the law relating to sexual offences against children, renders it more likely that the communication should not be disclosed.

For similar reasons the Tribunal also refused to exercise its discretion under s.50(4) to release the document in the public interest.

In view of the Tribunal's findings, the decision of the respondent was affirmed.

[P.V.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

BURCHILL and DEPARTMENT OF INDUSTRIAL RELATIONS
(No. V88/584)

Decided: 5 November 1990 by Deputy President B.M. Forrest.

Ruling on the interpretation of s.58(4) as far as it relates to ss.34(1)(c) or (d).

The Tribunal was requested by counsel for both parties to give a ruling on the interpretation of s.58(4) as far as it relates to ss.34(1)(c) or (d). These provisions in so far as relevant read:

> 34. (1) A document is an exempt document if it is —
>
> (a) a document that has been submitted to the cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;
>
> (b) an official record of the Cabinet;
>
> (c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
>
> (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
>
> 58. . . .
>
> (4) Where application is or has been made to the Tribunal for the review of a decision refusing to grant access to a document in accordance with a request, being a document that is claimed to be an exempt document under section 33, 33A, 34 or 35 and in respect of which a certificate (other than a certificate of a kind referred to in sub-section (5A)) is in force under that section, the Tribunal shall, if the applicant so requests, determine the question whether there exist reasonable grounds for that claim.

It was argued by counsel for the respondent that the Tribunal should give a ruling as a means of prevent-

ing a possible breach of the law with respect to it exceeding its jurisdiction. This argument was rejected by the Tribunal which pointed out that, although the wording of s.58(4) was clearly mandatory, a non-compliance with a procedural requirement of that provision would not necessarily lead to the invalidity of the ultimate decision, if the decision and its reasons complied with the provision. In other words the non-compliance would become trivial and unsubstantial.

Counsel for the applicant submitted that the Tribunal should interpret s.58(4) by considering a broad range of matters other than those implicit in the terms of ss.34(1)(c) or (d). The Tribunal was, however, unable to rule that the words 'whether reasonable grounds exist' in s.58(4) involved grounds other than those required in s.34.

It first discussed the history of ss.58(4) and 34 and noted that although both had been amended, in essence the principles of the legislation as far as it concerned the present inquiry had not changed. It referred to the Minister's Second Reading speech of the *Freedom of Information Act* 1981 and noted that s.34(1) was expressly drafted with the purpose of validating the well known principle that the confidentiality accorded to Cabinet documents should be maintained. Consequently, the ultimate decision as to the release of Cabinet documents was vested upon Ministers and senior officials directly responsible to Ministers. However, the issue of public interest was not directly affected by these provisions as the principle expressed by Lord Reid in *Conway v Rimmer* [1968] AC 910, 940 that

> There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

was provided for.

The Tribunal noted that in *Conway* the public interest was viewed as a matter of degree and that in such cases the courts were looking at two different definitions of the term public interest: a positive and a negative. It was clear that due to their nature some documents were not to be disclosed, except in cases where the principle of confidentiality was overridden by the fact that their non-disclosure would have been harmful to the public interest. On the other hand, a positive public interest issue was not enough to compel the disclosure of this kind of document.

This categorisation was, in the opinion of the Tribunal, embodied in the Act which provided agencies and Ministers with the option either to claim that a document was exempt or to issue a conclusive certificate. These two options lead on to two different types of proceedings as discussed by Northrop J in *Department of Industrial Relations v Forrest* 21 FCR 93, 96.

The Tribunal then turned to the issue as to whether there were limits imposed on it by the legislation as to the interpretation of the words 'whether there exist reasonable grounds'. It referred to the comments of Hartigan J in *Aldred and Department of Foreign Affairs and Trade* (8 February 1990):

> The question for the Tribunal in exercising its supervisory jurisdiction is not whether the document is an exempt document but whether grounds exist for the claim in the certificate and whether those grounds are reasonable.

In its view, the issue of reasonableness arose because a claim that a document was a Cabinet document referred to a kind or class of document with a limited number of characteristics. The question was then whether the claim that the document possessed any of those characteristics was valid.

As to a possible public interest issue, the Tribunal cited with approval the following passage from *Re Prosser and Australian Telecommunications Commission* 17 ALD 389:

> In view of the absolute terms of the exemption created under s.34, there is no issue of accountability or public interest which could authorise the publication of that information (see s.58(2) of the Act.

In as far as the document contains decisions or deliberations of Cabinet, then those parts of the document are exempt from access.

It, however, stressed that it was the applicant's prerogative to present any evidence or argument which he deemed appropriate to make out his case.

[M.P.]

LYNCH and HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION and HIGGS representing the SISTERS OF CHARITY (3rd Party)
(No. N90/441)

Decided: 21 February 1991 by Deputy President C.J. Bannon QC.

Request for access to notes of Commissioner of Human Rights and Equal Opportunity Commission in relation to claim under Sex Discrimination Act 1984 — whether confidential — s.45(1) — whether disclosure in error affects confidentiality — whether part of deliberative process — s.36(1) — whether adverse effect on conduct and operation of an agency — whether in public interest — s.40 — whether prejudicial to future supply of information to an agency — s.43(1)(c)(ii).

The applicant had been a nurse employed at St Vincent's Private Hospital. Following alleged harassment by other nurses, the applicant made a complaint under the *Sex Discrimination Act* 1984 (the 1984 Act). Dissatisfied with the Commissioner's decision to take no further action after conciliation was attempted, the applicant exercised her right to refer the matter to the Commission and the matter was ultimately settled between the parties.

In the course of his investigations relating to the latter proceedings, the Commissioner made inquiries of officials of the hospital, including a Mr Brooker and Mr Birchall. Part of the enquiries were answered orally and the conversations were duly noted. The applicant was supplied with all written documents pertinent to the proceedings, with the exception of the notes of the conversations with these officials. Exemption was claimed in respect of these notes under ss.36(1), 40(1)(d) and 45(1) of the *Freedom of Information Act* 1982. In addition to these grounds, s.43(1)(c)(ii) was claimed by the Sisters of Charity, as third party.

It was noted by the Tribunal that certain documents had, in the course of a previous application by the applicant under the Act, been mistakenly disclosed to the applicant. The Tribunal stated that such disclosure did not detract from their confidentiality and referred to its previous decision in *Re Sullivan and Secretary, Department of Social Security* (1990) 20 ALD 251 on this matter. The fact that confidential documents have come into

the possession of a third party does not affect their confidentiality where the third party has reason to believe they are confidential.

Section 45.(1)

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

The Tribunal referred to the case of *Smith, Kline and French Laboratories (Australia) Ltd v Secretary of the Department of Community Services and Health* (1990) 95 ALR 87 in which Gummow J considered the question of confidentiality and whether or not a person would know that a conversation was confidential. The Tribunal concluded, after considering the 1984 Act and its provisions, that the discussions under examination were confidential and that this ground alone would uphold the objections to production. The conciliation procedure contained in the 1984 Act was seen as one aimed essentially at obtaining an off-the-record resolution of a dispute and one that compelled frank communication with the Commissioner in order to achieve such resolution. Citing the test used by Sir Nigel Bowen in *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* (1975) 2 NSWLR 104, Deputy President Bannon QC stated —

> I am comfortably satisfied that these discussions were of a kind which would generally be assumed by those taking part to be treated as confidential in the sense that use would be made of what had been said for purposes consistent with the holding of the conciliation but not otherwise.

A further reason supporting the conclusion that the discussions with the Commission were regarded as confidential was the assertion by Mr Brooker in his affidavit, that records regarding nurses and their employment were treated by the hospital as confidential.

The Tribunal added, however, that little reliance could be placed on claims by Mr Brooker and Mr Birchall in their affidavits that 'if they had have thought of it they would have treated them as confidential'. The Tribunal considered such *post hoc* analyses to be of little use in determining whether or not a matter was considered confidential. Rather, confidentiality was something to be obtained by express agreement, express notice or deduced from surrounding circumstances.

The Tribunal referred also to the majority view, set out in the judgment of Jenkins J., of the Federal Court in *Corrs, Pavey Whiting & Byrne v Collector of Customs* (1987) 74 ALR 428 to the effect that s.45(1) is concerned with confidentiality, and not with the question of whether or not use or disclosure of documents would be actionable at general law.

Section 36.(1)

36.(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act —

(a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the curse of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and . . .

The Tribunal rejected the argument that the documents formed part of the deliberative process carried out by the Commissioner, stating a conciliation process does not involve 'the weighing up of different matters'.

Section 40(1)(d)

40.(1) Subject to sub-section (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to —

. . .

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency; or

(e) . . .

(2) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

The Tribunal viewed s.40 as raising 'a question of what may be described as a qualitative evaluation of the effect of disclosure' and one that could be determined only by looking at the nature of the communications made between the officials and the Commissioner. These dealt with the settlement of a dispute and comments about the hospital's view of the applicant and their veracity or otherwise was irrelevant. The Tribunal considered that frank discussions would be unlikely to take place between people and government officials if they were to believe that disclosure would result. The fact that the 1984 Act provided that such discussions would not be used in court was also of significance in this respect, and the objection was upheld.

As to sub-section (2), the Tribunal felt that it would not be in the public interest to disclose the documents. Reference was made to *Attorney-General of United Kingdom v Heinemann Publishers Pty Ltd* 165 CLR 30 and its discussion of cases where public interest is obviously affected, with the Tribunal ruling that this was not such a case.

Section 43(1)(c)(ii)

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

. . .

(c) . . . information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information —

. . .

(ii) the disclosure of which under this could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

For the same reasons given for upholding the objection under s.40, the Tribunal considered the notes of the Commissioner to be an exempt document under s.43(1)(c)(ii). That is, the officials, though obliged at law to give information, would not have spoken with such frankness to the government official had they believed their discussions would be disclosed.

The applicant argued that consideration should be taken by the Tribunal of three summonses and particulars of claim issued in the District Court by her against various persons. The Tribunal stated that such matters had no bearing upon the decision under the Act.

[G.W.]

BURCHILL and DEPARTMENT OF INDUSTRIAL RELATIONS
(No. V88/584)

Decided: 22 March 1991 by Deputy President B.M. Forrest.

Request for access to a government submission to an anomalies conference of the Remuneration Tribunal

— claims for exemption under ss.36(1), 40(1)(d) and (e) and 45 — conclusive certificate under s.34.

The applicant journalist had requested access to a government submission to an anomalies conference of the Remuneration Tribunal. His request for access was refused in reliance on claims for exemption under ss.36, 40 and 45. In addition, a conclusive certificate was issued to the effect that the submission was an exempt document under ss.34(1)(c) and (d).

The Tribunal noted that, in a case where a respondent claims exemption under various general provisions and also issues a conclusive certificate, two different kinds of proceedings apply. In the first the powers of the Tribunal are set out in s.58(1) which reads:

> 58. (1) Subject to this section, in proceedings under this Part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

In the second kind of proceeding the powers of the Tribunal are given by the provisions of sub-sections 58(3) and (4) which read:

> 58.(3) Where there is in force in respect of a document a certificate under ss. 33, 33A, 34, 35 or 36, the powers of the Tribunal do not extend to reviewing the decision to give the certificate, but the Tribunal, constituted in accordance with s.58B, may determine such question in relation to that certificate as is provided for in whichever of sub-sections (4), (5) and (5A) applies in relation to that certificate.
>
> (4) Where application is or has been made to the Tribunal for the review of a decision refusing to grant access to a document in accordance with a request, being a document that is claimed to be an exempt document under ss. 33, 33A, 34 or 35 and in respect of which a certificate (other than a certificate of a kind referred to in sub-section (5A)) is in force under that section, the Tribunal shall, if the applicant so requests, determine the question whether there exist reasonable grounds for that claim.

The effect of having the two types of claims for exemption made in relation to the same document, as Northrop J stated in *Department of Industrial Relations v Forrest and Another* (supra) at p.106, was that 'no matter what the Tribunal might decide in the exercise of the power under sub-section 58(1) with respect to a particular document, a decision under the power conferred by sub-section 58(4) must take precedence with the ultimate decision being taken by the Minister'. As His Honour said at p.98, 'presumably, if the certificate is not revoked, it remains conclusive evidence that the document is an exempt document and the Tribunal has no power to determine what decision it would have made on the application to review the decision made by the Agency'; that is, the application to review the decision under the provision of sub-section 58(1) of the Act.

It followed that the Tribunal has to concern itself only with the issue of whether there exist reasonable grounds for the claim that the document is an exempt document.

Section 34 of the Act reads:

> 34.(1) A document is an exempt document if it is —
>
> (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;
>
> (b) an official record of the Cabinet;
>
> (c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
>
> (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
>
> (1A) This section does not apply to a document (in this sub-section referred to as a 'relevant document') that is referred to in paragraph (1)(a), or that is referred to in paragraph (1)(b) or (c) and is a copy of, or of part of, or contains an extract from, a document that is referred to in paragraph (1)(a), to the extent that the relevant document contains purely factual material unless —
>
> (a) the disclosure under this Act of that document would involve the disclosure of any deliberation or decision of the Cabinet; and
>
> (b) the fact of that deliberation or decision has not been officially published;
>
> (2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in paragraph of sub-section (1) establishes conclusively, subject to the operation of Part VI, that it is an exempt document of that kind.
>
> (3) Where a document is a document referred to in paragraph (1)(c) or (d) by reason only of matter contained in particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.
>
> (4) For the purposes of this Act, a certificate signed by th Secretary to the Department of the Prime Minister and Cabinet certifying that a document as described in a request would, if it existed, be one of a kind referred to in a paragraph of sub-section (1) establishes conclusively, subject to the operation of Part VI, that, if such a document exists, it is an exempt document of that kind.
>
> . . .

The Tribunal had previously made a ruling in respect of an argument by the applicant that public interest considerations were to be taken into account by the Tribunal in deciding whether reasonable grounds existed for the certificated claims (see *Burchill and Department of Industrial Relations* above).

In this case the sole issues before the Tribunal were whether there were reasonable grounds for the certificated claim that the submission was a document which did not contain pure factual material or would disclose the deliberations of Cabinet and its decision on 17 November 1987, being a document other than a document by which a decision of the Cabinet was officially published.

The applicant raised two arguments in this respect. The first was that it was wrong to call the submission a deliberative document as it had been prepared and presented to an external body. This was rejected by the Tribunal which referred with approval to the judgment of Deputy President Todd in *Re Porter and Department of Community Services and Health* 14 ALD 403, 407, in which he defined 'deliberation' of Cabinet as connoting what was actively discussed in Cabinet.

The applicant's second argument was that the document had already been circulated to other persons. The Tribunal noted that the submission had been presented to the participants at the anomalies conference

and took the view that it was not reasonable to claim that disclosure of the submission would involve the disclosure of a decision of Cabinet in circumstances where disclosure had already occurred. In its view the confidentiality of the conference, whatever that might mean, did not amount to ordinary and reasonable means of giving effect to Cabinet privilege. On the contrary, once the submission was disclosed the privilege of Cabinet confidentiality ceased to exist. As stated by Deputy President Hall in *Re Anderson an Australian Federal Police* 4 AAR 414, 442, s.34(1)(d) only protects a document if the disclosure of its contents would involve the disclosure of any Cabinet deliberation or decision. Paragraph 34(1)(d) was therefore inapplicable.

The Tribunal then went on to consider the claim under s.34(1)(c) having regard to both the strong arguments in favour of preserving Cabinet confidentiality and the object of the Act 'to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth'. It concluded that the Government forsook Cabinet privilege when it allowed the submission containing an extract from the record of Cabinet to be disclosed at the conference and that the claim for exemption under s.34(1)(c) was therefore artificial and unsustainable.

In the light of its findings the Tribunal concluded that reasonable grounds did not exist for the certificated claims.

[M.P.]

FORREST and DEPARTMENT OF SOCIAL SECURITY
(No. V91/477)

Decided: 21 June 1991 by Deputy President I.R. Thompson.

Request for access to documents lodged by applicant's estranged de facto spouse — whether documents contain information relating to personal affairs of applicant — whether documents exempt under s.38.

The applicant sought access to four documents lodged by his estranged *de facto* spouse to the respondent. The documents were headed 'Claim Index Sheet', 'Separation Details', 'Pension Claim' and 'Maintenance Action Questionnaire' and related to claims for assistance from the respondent. Each document contained information relating to the relationship of the applicant and respondent.

Exemption was claimed under s.38(1) of the Act.

Section 38(1)

38.(1) A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

(2) Where a person requests access to a document, this section does not apply in relation to the document so far as it contains information relating to the person's personal affairs.

The respondent argued that s.19 of the *Social Security Act* 1947 was the enactment which applied to the information in the documents and which prohibited its disclosure. That section, relevantly, reads:

19(2) An officer shall not, either directly or indirectly, except in the performance or exercise of any duty, function or power as an officer, make a record of or divulge or communicate to any person any information concerning another person obtained by reason of the performance or exercise of his or her duties, functions or powers under this Act.

Penalty: $12 000 or imprisonment for 2 years, or both.

(3) An officer shall not, except for the purposes of this Act, be required:

(a) to produce in court any document in his or her possession by reason of; or

(b) to divulge or communicate to a court any matter or thing of which he or she had notice by reason of;

the performance or exercise of his or her duties, functions or powers under this Act.

(4) Subject to sub-section (4E), but notwithstanding sub-sections (2) and (3), the Secretary may:

(a) if the Secretary certifies that it is necessary in the public interest to do so in a particular case or class of cases — divulge information acquired by an officer in the performance of his or her functions or duties or in the exercise of his or her powers under this Act to such persons as the Secretary determines;

(b) divulge any such information to the Secretary of a department of State of the Commonwealth or to the head of an authority of the Commonwealth for the purposes of that Department of authority; or

(c) divulge any such information to a person who is expressly or impliedly authorised by the person to whom the information relates to obtain it.

(4A) In giving certificates for the purposes of paragraph (4)(a), the Secretary shall act in accordance with guidelines from time to time in force under sub-section (4B).

(4B) The Minister, by determination in writing:

(a) shall set guidelines for the exercise of the Secretary's power to give certificates for the purposes of paragraph (4)(a); and

(b) may revoke or vary those guidelines.

. . .

(4E) The Secretary shall not, under paragraph (4)(a) or (b), divulge information relating to any person other than a person who:

(a) is receiving a pension, benefit or allowance under this Act; or

(b) has received, or made a claim for, a pension, benefit or allowance under this Act within the period of 12 months preceding the divulging of the information.

(5) An authority or person to whom information is divulged under subsection (4), and any person or employee under the control of that authority or person, shall, in respect of that information, be subject to the same rights, privileges, obligations and liabilities under sub-sections (2) and (3) as if the authority, p rson or employee were an officer who had acquired the information in the performance or exercise of duties, functions or powers under this Act.

(5A) Nothing in this section is to be taken to prevent a person from divulging or communicating information to another person if the information is divulged or communicated for the purposes of the *Child Support (Registration and Collection) Act* 1988 or the *Child Support (Assessment) Act* 1989.

(6) In this section, 'court' includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

The respondent relied upon the decision of the Tribunal in *Re Lianos and Secretary to the Department of Social Security* (1985) 7 ALD 475 in support of its argument that s.19 was an enactment applying specifically to information of the kind contained in the documents relating to the applicant's estranged spouse. In that case, the provisions of s.38 were considered at length, along with the provisions of s.17 of the *Social Security Act*

1947 (now renumbered as s.19 with some amendments).

The Tribunal adopted the reasoning of the earlier case in arriving at the same conclusion that s.17 was an enactment of the type referred to in s.38, declaring the documents, subject to s.38(2), to be exempt documents.

Personal affairs

As the respondent did not argue that the phrase 'personal affairs' bore any different meaning in s.39(2) from the meaning borne in s.41, the Tribunal adopted the reasoning of the previous Tribunal decisions in *Re Jones and Attorney-General's Department* (1989) 16 ALD 732 and *Re VXH and Public Service Commission* (Decision No. 5794, 23 March 1990), holding that the same meaning was borne in both sections.

As to the meaning of the phrase, reference was made to a number of cases, in particular, the observations of St. John J in *News Corporation Ltd and Others v National Companies and Securities Commission* (1984) 6 ALD 83 and Lockhart and Heerey JJ in *Colakovski v Australian Telecommunications Corporation* (No. VG 254 of 1990: 17 April 1991). In the light of these two decisions, Deputy President Thompson concluded —

> I have no doubt that informations to the relationship of two persons with one another as *de facto* husband and *de facto* wife, the facts relating to the break-up of that *de facto* marital relationship and the time and circumstances win which it occurred, the existence of a child born of that relationship, property of the person either alone or jointly with his or her *de facto* spouse and details of the person's or the couple's financial circumstances are all 'information relating to the person's personal affairs'.

The respondent argued, however, that even though the documents might contain information of that character, s.38(2) was concerned only with information relating to a person's personal affairs *if* it related to his or her own dealings with the agency in possession of the information. The respondent added that the sub-section referred only to information which had a bearing on the purpose for which some transaction took place between the person and the agency. As the transaction involved here was between only the *de facto* wife and the respondent, it was argued that s.38(2) had no application since the applicant had no dealings with the respondent.

This argument was rejected as unsound by the Tribunal for two reasons. First, the respondent's argument sought to give to s.38(2) a meaning other than its natural meaning: it is clear that *the* person in the phrase 'the person's personal affairs' related to the person requesting access to the document. The object of the Act is clearly to create a general right of access to information, not a right restricted to persons dealing with the Minister, department or authority in possession of the information (see s.15).

Secondly, Part V of the Act contains provisions enabling amendment of information relating to personal affairs — to accept the respondent's argument would mean that only where information was held by an agency for the purpose of dealings between the agency and a person, could such person have an interest in having information about himself amended. Clearly such a construction would be contrary to the objects of the Act.

As no other reason was put forward as to why s.38(2) should bear anything other than its natural meaning, The Tribunal concluded that each of the documents in question, in so far as they contained information relating to the personal affairs of the applicant, fell under the sub-section.

As the respondent had not granted access to the applicant, no notice had been given to the *de facto* wife under s.27A so that she might object to access on the ground that s.41 was applicable to the whole of the documents. Accordingly, the Tribunal ruled that, before access to any part of the documents could be granted, it was necessary that the respondent consider each document in the light of s.41. If the respondent was of the opinion that s.41 applied, it would then need to decide whether or not those parts of the documents relating to the applicant's personal affairs could be disclosed to the applicant pursuant to s.22 (provided, of course, that s.27A was fully complied with in so doing). The matter was thus remitted to the respondent for reconsideration.

[G.W.]

CARR and DEPARTMENT OF TRANSPORT AND COMMUNICATIONS

(No. N89/124)

Decided: 19 July 1991 by Justice P.J. Moss.

Request for access to ABC Internal Discussion Paper — whether reasonable grounds for claim for exemption under s.34 — procedure to be followed in determining validity of certificate under s.34(2).

In this application the applicant sought to pursue two issues. First he argued that it was apparent from evidence before the Tribunal that the respondent had still not produced all relevant documents, excluding documents claimed to be exempt. Secondly, he sought to challenge the respondent's claim that certain documents, which were the subject of a certificate under s.34(2), were exempt under s.34.

The Tribunal referred to s.34, the Cabinet documents exemption provision, and to the procedures set out in s.58C which were required to be followed in determining whether reasonable grounds existed for a certificated claim under s.34(2). It also referred to its earlier ruling that two certificates initially filed were invalid because it was not possible to discern from their face when read in conjunction with s.34 the particular kind of document in respect of which the exemption had been claimed (applying the test in *Department of Industrial Relations v Forrest* (1990) 91 ALR 417, 444). A further certificate had been subsequently filed and it was argued by the applicant that it was defective insofar as it failed to address whether the relevant document was brought into existence for the purpose of submission to Cabinet. This argument was rejected by the Tribunal which took the view that such a statement was necessarily implied and that, moreover, the reference in each paragraph to 'an official document of the Cabinet' was sufficient to come within s.34(b). It therefore held that the certificate established conclusively, subject to the operation of Part VI that the relevant documents were exempt documents of the kind described and concluded that, in the absence of any evidence challenging that the documents were as described, it could not be other than satisfied that the documents were exempt documents.

The Tribunal was also satisfied on the basis of evidence given on

HOCKNELL and AUSTRALIAN TELECOMMUNICATIONS CORPORATION

(No. N90/956)

Decided: 23 July 1991 by Deputy President C.J. Bannon, QC.

Request for access to letter seeking transfer to another section — author experiencing difficulties with superior officer — whether disclosure of contents would have substantial adverse effect on management of personnel — s.40(1) — whether unreasonable disclosure of information relating to personal affairs — s.41(1).

The applicant was employed as Personnel Officer of the respondent Corporation and sought access to part of a letter written by her junior officer which he requested a transfer to another Personnel Unit because of his dissatisfaction with his working relationship with the applicant. The applicant claimed that the letter had been used before an Investigating Committee as evidence against her and that she had been denied access to it.

Exemption was claimed initially by the respondent under s.41(1). However, the further ground of s.40(1)(c) was raised at the hearing. The Tribunal accordingly considered both grounds of exemption.

Section 40(1)(c)

> 40.(1) Subject to sub-section (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to —
>
> ...
>
> (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency.

In support of its claim for exemption pursuant to s.40(1)(c), the respondent relied upon an affidavit of a Mr M.J. Hedges which had not been the subject of any objection. In his affidavit, Mr Hedges concluded, after considering the contents of the letter, that disclosure of the letter could have an adverse effect on personnel management within the respondent Corporation. He stated:

> The reasons which employees give when requesting transfers are, in my experience, sometimes the first indications a manager receives regarding problems which have arisen in his or her area; once alerted, the manager can take steps to rectify problems. If the contents of requests for transfer were freely disclosed, I would not expect employees to give full or frank reasons, with the result that problems would not be identified, and personnel management in the Corporation would suffer.

This reasoning was accepted by the Tribunal which acknowledged that in any organisation, particularly one as large as that of the respondent, the smooth running of the organisation was dependent upon free and confidential communication between staff and superior officers concerning both personal problems and management difficulties. It was accepted that disclosure of reasons for requests for transfer would obstruct channels of confidential communication, thus seriously hampering the management of the organisation.

Section 41(1)

> 41.(1) 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).

After examination of the letter, Deputy President Bannon QC concluded that it did refer to matters of private concern to the author and added that the fact that such matters also related to the pursuit of his vocation did not derogate from that description. The letter was not an attempt to denigrate the applicant, but was a sincere account of the difficulties the author had experienced in working with her. As such, it was simply an explanation of reasons of private concern to him for seeking a transfer. The Tribunal stated that disclosure would result in preventing subordinates from raising problems with another officer without the attendant risk of that officer being apprised and possibly taking legal action against them.

The Tribunal dealt briefly with the subject of qualified privilege and stated that the privilege would probably be available to prevent disclosure of the letter at common law. It added that, had the letter in fact been used against the applicant before an Investigating Committee, review of those proceedings on the ground of denial of natural justice was a possible avenue for the applicant in review of such proceedings. However, the Tribunal expressed these matters to be beyond its province.

[G.W.]

PUBLIC INTEREST ADVOCACY CENTRE and DEPARTMENT OF COMMUNITY SERVICES AND SCHERING

(No. 89/537)

Decided: 16 August 1991 by Justice D.F. O'Connor (President), Mrs J.H. McClintock (Member) and Dr M.E.C. Thorpe (Member).

Request for access to documents relating to an intrauterine contraceptive device 'Nova T' — extent of participation in proceedings by the party joined — whether evidence and submissions of party joined limited to grounds of exemption in s.43 — meaning of 'document' — whether documents which disclose identity of external evaluators exempt under s.40(1)(d) — meaning of 'public interest' — meaning of 'trade secrets' in s.43(1)(a) — whether information relating to health and safety testing can be 'trade secret' — whether documents exempt pursuant to s.43(1)(b) — whether 'commercial value' can attach to the compilation of material otherwise publicly available — meaning of 'unreasonable' in s.43(1)(c)(i) — whether there can be prejudice to the future supply of information within the meaning of s.43(1)(c)(ii) in circumstances where companies are seeking approval in accordance with guidelines to market devices in Australia — tests to be applied in considering 'breach of confidence' in s.45(1).

The applicant had requested access to documents relating to the intrauterine contraceptive device 'Nova-T', including documentary information supplied in support of an application for import approval and any reports of adverse reactions. It sought review of the decision to withhold certain documents in whole or in part under ss. 40, 41, 43 and 45. Schering Pty Ltd, which supplied the bulk of the documents was joined as a party to the proceedings pursuant to s.30(1A) of the *Administrative Appeals Tribunal Act* 1975 (the *AAT Act*).

The first issue considered by the Tribunal was whether Schering Pty Ltd should be confined to arguments relating to s.43 grounds. It concluded that it should not. Since the Tribunal had to exercise afresh the decision-making powers of the administrator it would be assisted by the submissions of all parties and s.39 of the *AAT Act* required that every party to a proceeding should be given a reasonable opportunity to present his or her case.

The Tribunal then considered an argument by counsel that certain documents could not be classified as single documents for the purposes of the Act because they were a collection of large numbers of documents having different authors and dates, some of which were external and some internal. His primary concern in this regard was that the application of s.22 would be made more difficult in view of the requirement to examine the whole document to determine which portions, if any, might be released. The Tribunal commented that it had to take a commonsense approach to this issue. It was not persuaded that the material in question should not be classified as single documents or that its task under s.22 was made more difficult by such a classification

Section 40(1)(d)

The first ground of exemption relied on by the respondent was s.40(1)(d) which provides:

> 40.(1) Subject to sub-section (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to . . .
>
> (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency . . .
>
> (2) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

It claimed that several of the documents were exempt by reason of the fact that they disclosed the identity of an external evaluator.

The Tribunal referred to its earlier decision in *Re James and Australian National University* (1984) 2 AAR 327, 340, where it stated that 'the conduct of the operations of an agency' extends to the way in which an agency discharges or performs its functions and that the effect of disclosure must be 'serious' and 'significant' and not 'mere prejudice'. It was satisfied on the basis of evidence presented to it that the referral of material to external evaluators came within the discharge of the respondent's functions in approving applications for the marketing of therapeutic substances and that disclosure would have a substantial adverse effect by making evaluators less likely to undertake work for the Commonwealth. In assessing the question of public interest, the Tribunal referred to evidence presented by the applicant that there were various persons, including women in whom the devices had been inserted and medical practitioners, who would have an interest in the information claimed to be exempt and referred to the following passage from its earlier decision in *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113, 124:

> In relation to the public interest . . . it needs to be said that merely because there is a section of the public that is interested in a certain activity it does not follow that disclosure of documents related to that activity is in the public interest. There are two reasons for this. First, there is a distinction between that in which the public, or a part of the public is interested, and that which is 'in the public interest'. Second, it does not necessarily follow that because there is a public interest in an activity there is a public interest in disclosure of every document relating to that activity.

It concluded that, on balance, it would not be in the public interest to release the identity of external evaluators.

Section 43(1)

The Tribunal then considered a further claim for exemption under s.43(1) which provides:

> 43. (1) A document is an exempt document if its disclosure under this Act would disclose —
>
> (a) trade secrets;
>
> (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
>
> (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information —
>
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
>
> (ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Section 43(1)(a)

In considering the application of s.43(1)(a) the Tribunal adopted the factors outlined in *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588, 593-4 to which regard should be had in determining the existence of trade secrets. These are:

> (a) whether the information is of a technical character;
>
> (b) the extent to which the information is known outside the business of the owner of that information;
>
> (c) the extent to which the information is known by persons engaged in the owner's business;
>
> (d) measures taken by the owner to guard the secrecy of the information;
>
> (e) the value of the information to the owner and to his competitors;
>
> (f) the effort and money spent by the owner in developing the information;
>
> (g) the ease or difficulty with which others might acquire or duplicate the secret.

The Tribunal rejected arguments by counsel for the applicant that factor (f) was irrelevant, that it was required to give a restrictive interpretation to FoI exemption provisions and that it should adopt the more narrow United States definition of trade secrets. It referred to the decision of the Full Federal Court in *News Corporation v National Companies and Securities Commission* (1984) 1 FCR 84 which specifically rejected the proposition that it should lean towards a narrow interpretation of exemption provisions. It did, however, accept an argument that information relating to the effect that a product might have on animals or people was outside the ambit of a trade secret. Such information did not satisfy the tests laid down in *Re Organon* as it was not information of a technical character and was capable of being understood by an educated lay person with no technical expertise. It rejected as unsupported by evidence a submission that the information in question was not in fact secret as it had been published in numerous articles.

Section 43(1)(b)

The Tribunal then considered s.43(1)(b) and referred with approval to the view of the majority in *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97, 106, that the words 'could reasonably be expected' re-

quired a judgment as to whether there was a reasonable basis for a claim that disclosure of information would destroy or diminish its commercial value, as distinct from something that was 'irrational, absurd or ridiculous'. It accepted an argument by counsel for the applicant that much of the information in question had no commercial value as it was already publicly available in the form of patents or in published journals. It was of the view that to interpret s.43(1)(b) as applying to the compilation of material otherwise publicly available would circumvent the application of s.22 and was contrary to the intention of the Act as set out in s.3(1).

The Tribunal, however, found that there were a number of documents containing information including health and safety data which was not in the public domain and which might be commercially valuable to a company very active in the pharmaceutical market. The value of that information could reasonably be expected to be diminished by disclosure.

Section 43(1)(c)(i)

The Tribunal considered that the words 'could reasonably be expected' should be given the same meaning as those in s.43(1)(b) as defined in *Cockcroft*. It also held that the word 'unreasonable' should be interpreted as requiring an effect which was of substance rather than incidental or trivial. It specifically rejected the view taken in *Re Actors' Equity Association of Australia and Australian Broadcasting Tribunal (No. 2)* (1985) 3 AAR 1 that a concept of public interest was imported into the subsection.

The Tribunal rejected a submission by counsel for the applicant that s.43(1)(c)(i) applied only to 'lawful' business affairs and that, because Schering Pty Ltd had failed to distribute health and safety information when distributing Nova-T thereby contravening s.52 of the *Trade Practices Act* 1974, information relating to health and safety did not come within its 'lawful' business. It considered that it lacked the jurisdiction to make any determination under the *Trade Practices Act*. It also rejected an argument that health and safety information was outside the ambit of s.43(1)(c).

A further argument raised by counsel for the applicant was that, as the Nova-T was no longer distributed in Australia, there could not be any adverse effect upon the business of Schering Pty Ltd. The Tribunal referred to the following passage from its decision in *Re Organon (Australia) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588 at 594:

> Whether or not the applicant in the present proceedings viewed as an agent of the owner of the secret is, in our opinion, not to the point. The section is intended to preserve the secret itself. Consequently all those parties who derive benefit from the continued status of secrecy are entitled to maintain that benefit, once the existence of a trade secret has been established.

It considered that these comments, which were made in the context of s.43(1)(a), applied equally to the other paragraphs in s.43 and that noted that Schering Pty Ltd was in the same position as Organon (Australia) Pty Ltd being a wholly-owned subsidiary of an overseas company which marketed and distributed in Australia a device manufactured by another overseas company. In the light of uncontested evidence to the effect that the release of information by Schering Pty Ltd would prejudice the availability of products supplied to its parent company by the manufacturer of Nova-T, the Tribunal concluded that the documents were exempt under s.43(1)(c)(i).

Section 43(1)(c)(ii)

The Tribunal noted that in *Re Organon* (supra) there was a distinction drawn between information volunteered to the government and information compelled. It referred to an acknowledgment by counsel for Schering Pty Ltd that it would go out of business if it was not prepared to submit information to the Department of Health and concluded that no prejudice to the future supply of information arose in these circumstances.

Section 45(1)(a)

The Tribunal referred to the judgment of the Federal court in *Corrs Pavey Whiting and Byrne v Collector of Customs* (1987) 13 ALD 254 and applied a twofold test which required it to consider whether the information in question was communicated in confidence and whether it was confidential. It also referred to the judgment of Gummow J in *Smith Kline and French Laboratories (Aust.) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 and noted that, while the case dealt with the extent of the equitable obligation of confidence, it was of some assistance in determining whether the first part of the test had been satisfied. In *Smith Kline* Gummow J, who had received similar evidence, found that there had been an understanding, implicit rather than explicit, between pharmaceutical companies that such information would be kept confidential. The Tribunal made a similar finding here but was not satisfied that the second part of the test had been made out. It noted that a large number of documents in issue were published articles and summaries of published material which could not be described as confidential.

Conduct of Department

The Tribunal was critical of the Department for its failure to examine the contents of individual documents and queried whether the Department had made sufficient use of appropriate expertise available to assist in the task of examining them. It also noted evidence that the Department did not make applicants aware of the implications of the *FoI Act* and stated that, while it was not incumbent upon Departments to do so, it was of the view that the Department's guidelines for the submission of applications should be developed with FoI in mind.

Comment:

1. The Tribunal's narrow interpretation of the expression 'unreasonably affect' in s.43(1)(c)(i) is arguably not sustainable in the light of the decision in *Colakovski v Australian Telecommunications Commission* (1991) 13 AAR 261. In that case, Lockhart J, in a judgment which was endorsed by Jenkinson and Heerey JJ, stated that:

> What is unreasonable disclosure for the purposes of s.41(1) must have as its core public interest considerations. The exemptions necessary for the protection of 'personal affairs' (s.41) and 'business or professional affairs' (s.43) are themselves in my opinion, public interest considerations.

2. Section 45 has been amended by the *Freedom of Information Amendment Act* 1991. It now provides:

> 45.(1) A document is an exempt document if its disclosure under this Act would *found an action by a person other than the Commonwealth* for breach of confidence.

[M.P.]