tion of detailed rules, 'preeminently legislative and administrative in character'. Another Constitutional Commission might think differently now that every State has enacted FoI laws.

The 1988 Commission's chief concern about an FoI amendment seemed to be that the reasonableness of a withholding of information would ultimately be a matter for judicial decision. 'In our view, the Constitution is not an appropriate vehicle for the creation of an open-ended public right of access to government information, the content of which would then have to be worked out on a case-by-case basis by the courts' (paras 9.917–918).

This awkwardness about the judiciary adjudicating in disputes over access to government documents seems odd, for just such a role has been firmly asserted in many cases, among them *Sankey v Whitlam, Commonwealth v John Fairfax* (defence papers case), and the *Spycatcher* litigation.

The Commission's reticence about the courts in the FoI context is in clanging contrast to its calm confidence in the courts' ability to interpret the recommended freedom of expression amendment:

> Australian courts have considerable experience in dealing with cases in which claims to freedom of expression have had to be set off against claims for the protection of other interests, and in which legal principles have had to be shaped with regard to the competing claims and interests. The course of judicial development of the law on defamation, on obscenity and indecency, on contempt of court, and on confidential information — to take a few examples — is replete with instances in which courts have moulded the law with reference to competing interests.
>
> *[Para 9.341]*

Twelve years of cautious interpretation of FoI legislation by the courts ought by now to have allayed concern that an FoI amendment to the Constitution will imperil national security, rupture Australia's international relations or harm Cabinet solidarity (any more than intentional leaks do). Judicial interpretation of these and other exemption categories commonly found in FoI Acts has fulfilled the prophecy made during the parliamentary debates over FoI in the 1970s that 'judges are not wild-eyed radicals'.

If the advisory committee's qualifier 'unreasonably' is thought insufficient, an amendment may be framed expressly to acknowledge that while disclosure is to be the rule, there are proper exceptions. The objects sections of the several FoI Acts offer guidance. An amendment might read:

> The Commonwealth or a State shall not withhold information unless withholding is necessary for the protection of essential public or private interests.

Or, instead of expressing the FoI trump as a limitation on government, we might add to the Constitutional Commission's list of rights and freedoms (clause 124E, Volume Two, p. 1087) that:

> Everyone has the right to government information.

Like the other rights recommended, this would be qualified by clause 124C, so that, in practice, access to information would be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

Discussion of FoI tends naturally to focus on the relationships between governments and individual citizens. But we must also consider the implications of any constitutional amendment for the relationship between the Executive and the citizenry collectively represented by Parliament.

Last year the Senate committee inquiring into foreign ownership of the press sought certain information from senior Treasury officials, who refused to provide it because the Treasurer instructed them not to. That standoff between Parliament and the Executive is unresolved and the inquiry is still on foot. Meanwhile the High Court has pronounced on the need to ensure the efficacious working of representative democracy. So far, the focus has been on the electors and their freedom of political discussion. But what of the *representatives* and the need to ensure that they can work efficaciously?

If the Constitution contained a freedom of information amendment and a dispute such as the one described arose, the courts may have a clearer role to determine whether information may be withheld from Parliament by an Executive which is presently judge in its own cause.

One of the great themes in Australian FoI has been its capacity to attract the support of parliamentarians who know too well the frustration of being 'outside the loop'. Prominent examples include the late Senator Alan Missen, Barry Jones, Mark Birrell in Victoria, and in Tasmania, Bob Brown. The Executive can frustrate government backbenchers almost as much as it can frustrate Opposition MPs and independents by denying them the information they regard as necessary to their task of representing the people who directly chose them. Even if they don't use FoI formally, its successful use by others tends to weaken the general presumption of secrecy and to improve the availability of official information. Consequently unusual alliances tend to form across party lines to try to protect FoI.

Perhaps they will form again to promote the cause of a 'freedom of information amendment' to the Constitution by 2001.

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VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

MILDENHALL and DEPARTMENT OF TREASURY (No. 94/017694)

D cid d: 16 September 1994 by Fagan, J, President.

Sections 3 (Objects), 5 (Definitions), 13 (Right of access), 14 (Documents already open to public access), 28 (Cabinet documents), 30 (Internal working documents), 32 (Legal professional privilege), 34 (Business, commercial or financial), 36 (Economy), 50(4)(Public interest override).

The applicant had applied to the Department of Treasury for 'All documents relating to the awarding of the

Formula 1 Grand Prix to Victoria'. Some documents had been released, but some 50 separate documents remained in dispute.

The background to the case was set out in detail in the Tribunal's judgment. Of importance to the matter was a confidentiality agreement between Melbourne Major Events Co. Ltd (MMEC), the company set up to attract major events to Melbourne, and Ecclestone, who was in charge of the commercial and financial aspects of the Formula 1 Constructors Administration. Simultaneously with the negotiations for bringing the Grand Prix to Melbourne, the MMEC set up a subsidiary, originally called the Melbourne Major Events Promotions Ltd (MMEP) and changed to the Melbourne Grand Prix Promotions Pty Ltd. On 30 March 1993 a preliminary contract was agreed to in London between Ecclestone on behalf of the Formula 1 administration and Ron Walker acting on behalf of MMEC. One of the time limits for agreed steps to be taken was to expire on 30 April 1993.

Most of the documents in dispute were generated during the period from 30 March 1993 to the end of April 1993.

The Tribunal accepted that there would be a substantial beneficial economic effect for Victoria in holding the event, and that all parties were in favour of the Grand Prix taking place in Victoria under some conditions or other. All the negotiations seem to have been based on the race taking place at Albert Park.

The Tribunal was provided with the group of confidential documents and kept them confidential.

The Tribunal formed its discussion in relation to the documents according to subject headings: 'Initial Negotiations', 'Formation of a Subsidiary', 'Financial Matters and Arrangements', 'Banking Arrangements', 'Financial Provisioning by Government and Bank', 'Treasurers Powers', 'Requirements as to Documentation', and 'Other matters covered'.

Documents under 'Initial Negotiation' and 'Other matters covered' were withheld on the basis of ss.28, 30, 32, 34, and 36. The documents relating to the 'Formation of a Subsidiary' were released by the respondent, ss.28,30 and 34 were relied on for the 'Financial Matters and Arrangements' documents, s.34 for the 'Banking Arrangements', ss.30,32, 34, 36 for 'Financial Provisioning by Government and Bank' and 'Treasurers Powers' and 'Requirements as to Documentation'.

Cabinet documents: s.28(1)(b)

Given that s.28(7) defines cabinet to include committees or sub+committees of Cabinet and the documents in question were prepared by the Department of Sports and Tourism for the purpose of submission to Cabinet they were found to be exempt and no question of public interest arose under s.50(4).

Business, commercial or financial undertaking: s.34

The applicants argued that none of the documents for which s.34 was claimed were exempt under s.34 because none of them contained information acquired from a business, commercial or financial undertaking' as the MMEC and MMEP were limited by guarantee and looking at the memorandum of the companies were denuded of any character of a business, commercial or financial undertaking. The Tribunal looked to the company's activities and held that they were in fact carrying on activities as a business, commercial, or financial undertaking. The Tribunal held that this view was consistent with *Re Collins and Greyhound Racing Control Board* (1990) 4 VAR 65 and *Croom* (1989) 3 VAR 441.

In general the disputed material covered the state of finances of MMEC and MMEP and of financial negotiations between all parties involved in the staging of the Grand Prix in Melbourne, the price to be paid for the rights to stage the event and the methods and structures to be employed in paying the price and for staging the event and the Tribunal held that they fell under s.34. The next question was whether s.50(4) overrode the s.34 exemption — i.e. whether the public interest required access.

Public interest in access: s.50(4)

Mildenhall submitted 11 grounds of public interest which included among other things, public accountability of government-sponsored corporations, transparency of financial obligations incurred by the Crown, and the ability of the community to evaluate the overall costs and benefits of the Grand Prix. The Tribunal looked to the test in *DPP v Smith* (1991) 1 VR 63 at 75, and also pointed out that 'the general law of the land does impose substantial requirements for the auditing and disclosure of accounts and information'. The Tribunal referred to the requirements of the Corporations Law as an example. Furthermore, the role of the State Auditor-General was another requirement. Over and above those examples the Tribunal also referred to the 'general scrutiny of the actions of the Executive Government through the Parliament and its committees'. The Tribunal then looked at the fact that the matter related to Albert Park and the public interest that flowed from that. In the end, the aspects of interest which were relied upon by the applicant did qualify for recognition as public interest, but in conducting the balancing test, they were of insufficient weight to say that the public interest requires access.

Legal professional privilege

Several of the documents not exempt under ss.28 and 34 were claimed under s.32. The Tribunal referred to the sole purpose test — of giving and obtaining legal advice. Requests by the Treasurer for legal advice came within that test, but the faxing of documents from the solicitor to Treasury were not, however, within the test. Memorandums of legal advice fell within the section. There was no overriding public interest in s.50(4).

Internal working documents

For the remainder of the documents not within the above sections, s.30 was relied upon. A handwritten part of a document as an instruction consequent to the legal advice was 'matter within the nature of opinion, advice or recommendation . . .' and was of an officer, as was a draft letter for the Premier's signature. However, both documents were deemed not to be misleading or lead to confusion, and therefore would not be contrary to the public interest.

[K.R.]