OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 98005
Application S 10/96
Application S 74/96
Application S 103/97

S 10/96
Participants:

QUEENSLAND LAW SOCIETY INC
Applicant

LEGAL OMBUDSMAN
Respondent

SIR LENOX HEWITT
Third Party

S 74/96
Participants:

QUEENSLAND LAW SOCIETY INC
Applicant

LEGAL OMBUDSMAN
Respondent

SIR LENOX HEWITT
Third Party

S 103/97
Participants:

SIR LENOX HEWITT
Applicant

QUEENSLAND LAW SOCIETY INC
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - letter of advice from a firm of solicitors retained by the Queensland Law Society to provide legal advice in respect of a complaint against another solicitor - whether letter of advice subject to legal professional privilege - whether disclosure to the complainant of a summary of the conclusions reached in the letter of advice, together with a statement by the respondent to the effect that it "adopted" the advice in resolving to take no action on the complaint, gave rise to a waiver by imputation of the privilege attaching to the letter of advice - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - 'reverse FOI' applications - memoranda from a salaried lawyer employed by the Queensland Law Society to the Society's Professional Standards Committee concerning complaints of unprofessional conduct against a solicitor - whether segments of the memoranda comprise legal advice given on a professional matter referable to a professional relationship of lawyer and client - whether segments of legal advice, in documents that would have been brought into existence for administrative purposes in any event, are capable of satisfying the 'sole purpose' test to attract legal professional privilege - application of s.43(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - 'reverse-FOI' applications - memoranda from salaried lawyer to the Queensland Law Society's Professional Standards Committee - whether analysis and legal opinion expressed by salaried lawyer is deliberative process matter falling within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether any of the matter in issue is excluded from eligibility for exemption under s.41(1), because it is merely factual matter within the terms of s.41(2)(b) - whether disclosure would, on balance, be contrary to the public interest - public interest in accountability of the Queensland Law Society for the regulatory functions which it discharges for the benefit and protection of the Queensland public - application of s.41(1) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - 'reverse-FOI' applications - memoranda from salaried lawyer to the Queensland Law Society's Professional Standards Committee:

- whether disclosure of legal opinions expressed by the salaried lawyer could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case - application of s.42(1)(a) of the *Freedom of Information Act 1992* Qld;

- whether disclosure of legal opinions expressed by the salaried lawyer who investigated complaints against a solicitor could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law - application of s.42(1)(e) of the *Freedom of Information Act 1992* Qld;

- whether disclosure to the complainant of legal opinions expressed by the salaried lawyer who investigated the complaints could reasonably be expected to prejudice a system or procedure for the protection of persons or property - application of s.42(1)(h) of the *Freedom of Information Act 1992* Qld;

- whether matter in issue can be characterised as related to a "test, examination or audit" within the terms of s.40(a) of the *Freedom of Information Act 1992* Qld - whether disclosure of matter in issue could reasonably be expected to prejudice the effectiveness of a method or procedure for the conduct of a test, examination or audit - application of s.40(a) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.5, s.7, s.21, s.26, s.40(a), s.41(1), s.41(1)(a), s.41(1)(b), s.41(2)(b), s.42(1), s.42(1)(a), s.42(1)(e), s.42(1)(h), s.43(1), s.51, s.52, s.87
Freedom of Information Act 1982 Cth s.42(1)
Freedom of Information Act 1992 WA
Evidence Act 1995 Cth s.122
Evidence Act 1995 NSW s.122

Independent Commission Against Corruption Act 1988 NSW s.37(2), s.37(5)
Judicial Review Act 1991 Qld s.4, s.5, s.31
Queensland Law Society Act 1952 Qld (as in force in August 1996) s.6(2), s.6(2B), s.6O, s.6S
Queensland Law Society Legislation Amendment Act 1997 Qld s.9

Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No. 2) [1972] 2 QB 102
Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd (1996) 69 FCR 149
Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1996) 40 NSWLR 12
Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd & Ors (1996) 137 ALR 28
Argyle Brewery Pty Ltd (t/a Craig Brewery Bar and Grill) v Darling Harbourside (Sydney) Pty Ltd (1993) 120 ALR 537
Attorney-General (NT) v Kearney (1985) 158 CLR 500
Attorney-General (NT) v Maurice (1986) 161 CLR 475
"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Baker v Campbell (1983) 153 CLR 52
Baker & Ors v Evans & Ors (1987) 77 ALR 565
Bayliss v Cassidy & Ors (Supreme Court of Queensland - Court of Appeal, No. 1225 of 1998, Williams J, Davies and McPherson JJA, 11 March 1998, unreported)
Brambles Holdings Ltd v Trade Practices Commission (No. 3) (1981) 58 FLR 452
BT Australasia Pty Ltd v State of New South Wales & Anor (No. 7) (1998) 153 ALR 722
Carter v Managing Partner, Northmore Hale Davy & Leake (1995) 183 CLR 121; 129 ALR 593
Clements v Grayland Hospital and Anor (Sup Ct of WA, No. SJA 1198 of 1996, Owen J, 4 April 1996, unreported)
Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy, Re (1987) 6 AAR 80
Commissioner, Australian Federal Police v Propend Finance Pty Ltd (1997) 71 ALJR 327; 141 ALR 545
Criminal Justice Commission and Director of Public Prosecutions, Re (Information Commissioner Qld, Decision No. 96012, 28 June 1996, unreported)
Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd [1987] 2 Qd R 335
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Esso Australia Resources Limited & Ors v Plowman & Ors (1995) 183 CLR 10
Ferrier and Queensland Police Service, Re (Information Commissioner Qld, Decision No. 96016, 19 August 1996, unreported)
General Accident Fire & Life Assurance Corp Ltd v Tanter [1984] 1 All ER 35
Godwin and Queensland Police Service, Re (Information Commissioner Qld, Decision No. 97011, 11 July 1997, unreported)
Goldberg v Ng (1994) 33 NSWLR 639
Goldberg v Ng (1995) 185 CLR 83; 69 ALJR 919; 132 ALR 57
Grant v Downs (1976) 135 CLR 674
Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529, [1981] 2 All ER 485
Grofam Pty Ltd v Australian and New Zealand Banking Group Ltd (1993) 116 ALR 535
Gunawan and Directorate of School Education, Re (1994) 6 VAR 418
Hongkong Bank of Australia Ltd v Murphy [1993] 2 VR 419
Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development, Re (1993) 1 QAR 123
Independent Commission Against Corruption v Cripps & Anor (Supreme Court of New South Wales, ALD No. 30082/96, Sully J, 9 August 1996, unreported)

McCann and Queensland Police Service, Re (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported)
Munday and ACT Attorney-General's Department, Re (Australian Capital Territory Administrative Appeals Tribunal, Professor L J Curtis (President), No. C95/85, 29 August 1996, unreported)
Myles Thompson and Queensland Law Society Inc, Re (Information Commissioner Qld, Decision No. 97003, 28 February 1997, unreported)
Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp (No. 2) [1981] Comm LR 138
Pemberton and The University of Queensland, Re (1994) 2 QAR 293
Potter and Brisbane City Council, Re (1994) 2 QAR 37
Price and the Director of Public Prosecutions, Re (Information Commissioner, Decision No. 97016, 24 October 1997, unreported)
Queensland Law Society Inc v Albietz [1996] 2 Qd R 580
R v Derby Magistrates Court; *Ex parte B* [1996] 1 AC 487
"ROSK" and Brisbane North Regional Health Authority and Ors, Re (Information Commissioner Qld, Decision No. 96019, 18 November 1996, unreported)
Smith and Administrative Services Department, Re (1993) 1 QAR 22
South Australia v Peat Marwick Mitchell (1995) 65 SASR 72
Spier and ACT Electoral Commissioner, Re (1995) 41 ALD 374
Sullivan and Department of Industry, Science and Technology, Re (Commonwealth Administrative Appeals Tribunal, Mr P Bayne (Senior Member), No. A95/157, 6 June 1997, unreported)
"T" and Queensland Health, Re (1994) 1 QAR 386
Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re (1996) 3 QAR 206
Waterford v Commonwealth of Australia (1987) 163 CLR 54; 61 ALJR 350; 71 ALR 673
Weeks and Shire of Swan, Re (Information Commissioner WA, Decision No. D00595, 24 February 1995, unreported)

DECISION

1. In application for review no. S 10/96, I affirm the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision).

2. In application for review no. S 74/96, I affirm the decision under review (which is identified in paragraph 4 of my accompanying reasons for decision).

3. In application for review no. S 103/97, I set aside the decision under review (which is identified in paragraph 6 of my accompanying reasons for decision), and, in substitution for it, I decide that the matter in issue (which is identified in subparagraphs 8(e) and (f) of my accompanying reasons for decision) is not exempt from disclosure to the applicant under the *Freedom of Information Act 1992* Qld.

Date of decision: 24 June 1998

....
F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. These cases arise out of successive access applications made by Sir Lenox Hewitt in an effort to obtain access, under the *Freedom of Information Act 1992* Qld (the FOI Act), to documents concerning the handling by the Queensland Law Society Inc (the QLS) of formal

complaints of unprofessional conduct made to the QLS by Sir Lenox Hewitt against a solicitor who had acted on behalf of Sir Lenox Hewitt in a civil action, and in a series of property transactions.

2. Until 1 March 1996 (when Derrington J of the Supreme Court of Queensland published his reasons for decision in *Queensland Law Society Incorporated v Albietz* (1996) 2 Qd R 580), the QLS had adopted the position that it was not an agency subject to the application of the FOI Act. Presumably, that was the reason Sir Lenox Hewitt lodged his first two access applications, dated 16 November 1995 and 28 February 1996, with the Lay Observer (the predecessor of the Legal Ombudsman), and why the Lay Observer was prepared to deal with those applications. (When the Lay Observer received Sir Lenox Hewitt's third access application, dated 10 February 1997, he transferred the application to the QLS, which consented to deal with the application in accordance with s.26 of the FOI Act.) The Lay Observer was a statutory office established by the former s.6O of the *Queensland Law Society Act 1952* Qld, with a function of monitoring written complaints to the QLS against solicitors or employees of solicitors, and the manner in which such complaints were dealt with by the QLS. For that purpose, the Lay Observer was empowered by the former s.6S of the *Queensland Law Society Act* to investigate, examine, and make reports and recommendations to the relevant Minister and to the QLS concerning prescribed categories of written complaints against legal practitioners or their employees, and was also empowered to require the QLS to furnish any information in its possession or control relevant to the discharge of the Lay Observer's functions. The office of Lay Observer has since been superseded by the office of the Legal Ombudsman: see s.9 of the *Queensland Law Society Legislation Amendment Act* 1997 Qld, and Part 2B of the *Queensland Law Society Act*, as thereby amended.

3. Sir Lenox Hewitt's first FOI access application, dated 16 November 1995, was for a copy of the complete report (his solicitors having previously been provided with an edited version) by Ms Linda Dreghorn (a solicitor employed in the Professional Standards Department of the QLS who had carriage of the investigation of the complaints lodged by Sir Lenox Hewitt) which report was referred to the QLS's Professional Standards Committee at its meeting on 31 August 1995. His second FOI access application, dated 28 February 1996, was for "the further reports on this matter that have been made to the Professional Standards Committee since my application of 16 November 1995". In both instances, the Lay Observer consulted with the QLS pursuant to s.51 of the FOI Act. In the first instance, the QLS objected to disclosure of all of the requested information, asserting that it was exempt matter under s.40, s.41, s.42 and s.43 of the FOI Act. In the second instance, the QLS objected, on the same grounds as before, to the disclosure of specified passages in four reports to the Professional Standards Committee prepared by Ms Dreghorn. (The QLS also objected to disclosure of another document, but it was later acknowledged that it had previously been disclosed to Sir Lenox Hewitt, and it is no longer in issue in this review.)

4. In both instances, by decision letters respectively dated 19 December 1995 (application for review no. S 10/96) and 4 April 1996 (application for review no. S 74/96), the Lay Observer rejected the arguments of the QLS and decided to grant Sir Lenox Hewitt access in full to the requested documents. The QLS subsequently lodged 'reverse FOI' applications with me (by letters dated 11 January 1996 and 2 May 1996) seeking review, under Part 5 of the FOI Act, of each of the Lay Observer's decisions.

5. Sir Lenox Hewitt's third FOI access application, dated 10 February 1997, was for "copies of the further reports to the Professional Standards Committee subsequent to 4 April 1996, the date of your decision on my previous request ...". The QLS agreed to accept a transfer of

that FOI access application from the Lay Observer, in accordance with s.26 of the FOI Act. By letter dated 21 May 1997, Mr Steven O'Reilly, on behalf of the QLS, informed Sir Lenox Hewitt that he had decided to grant access to a memorandum dated 8 July 1996 by Ms Dreghorn to the Professional Standards Committee, subject to the deletion of the portion of the memorandum entitled "Analysis of Investigation", which he found to be exempt matter under s.43(1) of the FOI Act (the legal professional privilege exemption). In respect of a letter dated 9 August 1996 containing legal advice that had been requested by the QLS from Mr Brian Bartley, a partner in the firm of Corrs Chambers Westgarth, Solicitors, Mr O'Reilly also decided to refuse access on the ground that the letter of advice was exempt matter under s.43(1) of the FOI Act.

6. Sir Lenox Hewitt applied for internal review in accordance with s.52 of the FOI Act. By letter dated 18 June 1997, Mr Scott Carter, Solicitor to the QLS, informed Sir Lenox Hewitt that he had decided to affirm Mr O'Reilly's decision in all respects. Sir Lenox Hewitt applied to me for review, under Part 5 of the FOI Act, of Mr Carter's decision.

7. The QLS has responsibility under the *Queensland Law Society Act* for regulating compliance by Queensland solicitors with proper standards of professional conduct. The arrangements in place at the time that Sir Lenox Hewitt's complaints were being dealt with by the QLS were described in detail in a written submission from the QLS dated 25 October 1996. In summary, any aggrieved person was entitled to make a written complaint to the QLS alleging malpractice, professional misconduct, or unprofessional conduct or practice, against a solicitor or employee of a solicitor. Any such complaints were referred in the first instance to an organisational unit of the QLS known as the Professional Standards Department, for investigation. (Ms Dreghorn was employed in that Department.) That Department appears to have had the authority to resolve complaints by negotiation between complainant and solicitor, or to decline to deal further with complaints which, even if proved, were not capable of constituting malpractice, professional misconduct, or unprofessional conduct.
However, complaints which were subject to detailed investigation were ultimately considered by the Professional Standards Committee (the PSC), which was a Committee of the Council of the QLS to which the Council had delegated relevant powers. The PSC consisted of five members of the Council of the QLS (all of whom were, of course, solicitors) and two lay persons. The Lay Observer attended meetings of the PSC but was not a voting member of the PSC. The PSC reviewed investigations of complaints and decided whether or not action against a solicitor was warranted. The PSC could decide to take no action, or to censure or admonish a solicitor. In more serious cases, the PSC could decide that a disciplinary charge was warranted, in which case it would make a recommendation to the Council of the QLS.
The Council of the QLS would make any final decision to prefer a disciplinary charge against a solicitor, and any charge would be brought in the name of the Council of the QLS. In the discussion which follows, the PSC can be treated as the *alter ego* of the QLS, it being the delegate through which the Council of the QLS had chosen to exercise certain of the powers, functions and duties committed to the Council of the QLS by the *Queensland Law Society Act*.

8. Each of the documents which contains or comprises matter remaining in issue was prepared for consideration by the PSC in conjunction with its consideration of what action, if any, should be taken in respect of the formal complaints lodged by Sir Lenox Hewitt. The matter remaining in issue in the three applications for review is:

   (a) in a memorandum dated 18 January 1994 from Ms Dreghorn to the PSC - the three paragraphs which appear under the heading "Conclusion:" on pages 3 and 4;

(b) in a memorandum dated 13 April 1995 from Ms Dreghorn to the PSC - the five paragraphs which appear under the heading "Analysis of Investigation" on pages 3 and 4;

(c) in a memorandum dated 22 January 1996 from Ms Dreghorn to the PSC - the paragraphs numbered 20-27 (inclusive);

(d) in a memorandum dated 27 February 1996 from Ms Dreghorn to the PSC - the four paragraphs which appear under the heading "Analysis of Investigation" on pages 2 and 3, plus the one paragraph under the heading "Recommendation" on page 3;

(e) in a memorandum dated 8 July 1996 from Ms Dreghorn to the PSC - the sentence under the heading "Analysis of Investigation" on page 3; and

(f) a letter of advice dated 9 August 1996 from Corrs Chambers Westgarth, Solicitors, to the Director, Professional Standards, of the QLS.

9. In assessing the claims by the QLS that the matter listed above is exempt matter under the FOI Act, I have taken into account:

- copies of the documents referred to in paragraph 8 above, which were provided by the QLS for my inspection;
- the reasons for decision given in the decisions under review;
- the arguments raised by the participants in s.51 consultation letters, applications for internal review, and applications for external review;
- written submissions/points of reply by the QLS dated 6 March 1996, 9 May 1996, 25 October 1996 and 7 November 1997;
- written submissions/points of reply by Sir Lenox Hewitt dated 18 April 1996, 31 January 1997, 8 September 1997 and 5 December 1997.

(All written submissions were exchanged between the participants, with an opportunity given for reply.)

Application of s.43(1) of the FOI Act

10. All of the matter in issue is claimed by the QLS to be exempt matter under s.43(1) of the FOI Act, which provides:

> ***43.(1)*** *Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege.*

11. The s.43(1) exemption turns on the application of those principles of Australian common law which determine whether a document, or matter in a document, is subject to legal professional privilege. The grounds on which a document can attract legal professional privilege are fairly well settled in Australian common law. In brief terms, legal professional privilege attaches to confidential communications between lawyer and client made for the sole purpose of seeking or giving legal advice or professional legal assistance, and to confidential communications made for the sole purpose of use, or obtaining material for use, in pending or anticipated legal proceedings. Inevitably, there are qualifications and exceptions to that broad statement of principle, and due regard must be paid to issues like waiver of the privilege, and the principle that communications otherwise answering the description above do not attract privilege if they are made in furtherance of a crime, fraud, illegal purpose, or abuse of statutory power.

12. The matter in issue in this case raises three comparatively difficult issues in the application of Australian law with respect to legal professional privilege. The first, which concerns document (f) described in paragraph 8 above, is whether the disclosure (by the QLS to Sir Lenox Hewitt) of a summary of the conclusions reached in the legal advice the QLS had obtained, together with the statement by the PSC that it "adopted" the advice (in resolving to take no formal action in respect of one of the complaints lodged by Sir Lenox Hewitt), gave rise to an imputed waiver of the legal professional privilege that would otherwise attach to the letter of advice.

13. The communications comprised in the matter in issue described in subparagraphs 8(a) to (e) above raise two issues -

    (a) whether those communications, made by a salaried legal officer to her employer, can properly be characterised as communications for the purpose of giving legal advice or professional legal assistance on a professional matter referable to the relationship of lawyer and client, or whether they were communications made merely in the capacity of an employee; and

    (b) to the extent that the communications fall into the first category described in (a), whether the communications satisfy the 'sole purpose' test.

14. I will deal with those three issues in turn.

Imputed waiver and the letter of advice from Corrs Chambers Westgarth

15. It is clear from my examination of the letter dated 9 August 1996 from Corrs Chambers Westgarth, Solicitors, to the QLS that -

    (a) Mr Bartley, a partner in the firm of Corrs Chambers Westgarth, had been retained by the QLS to provide legal advice to the QLS on issues relevant to the consideration by the QLS of Sir Lenox Hewitt's complaints against his former solicitor; and

    (b) the letter dated 9 August 1996 was created for the sole purpose of communicating legal advice to the QLS on those issues.

16. Thus, at the time of its creation, the letter attracted legal professional privilege according to well established principles (see *Re Smith and Administrative Services Department* (1993) 1 QAR 22 at pp.51-52, paragraph 82, and the cases there cited), the privilege being that of the QLS as client.

17. In a submission to me dated 8 September 1997, Sir Lenox Hewitt questioned the entitlement of the QLS to claim legal professional privilege for the letter of advice dated 9 August 1996, having regard to the contents of a subsequent letter dated 22 August 1996 from the QLS to the solicitors acting for Sir Lenox Hewitt, advising the outcome of his complaint against his former solicitor. The letter from the QLS dated 22 August 1996 had first advised that the PSC had resolved not to take any action in respect of the complaints concerning the conveyancing matters. That letter continued as follows:

    > *The Committee resolved at the same meeting that one of the Society's panel solicitors for disciplinary matters be instructed on the Society's behalf to advise in relation to your complaints arising from the* [litigation matter].

> *Mr Brian Bartley of Corrs Chambers Westgarth was engaged and his opinion was considered by the committee at its meeting held on 15 August 1996.*
>
> *Mr Bartley's opinion was that the conduct of* [the solicitor complained against] *did not amount to unprofessional conduct and did not warrant disciplinary action being taken to safeguard the public interest. The Professional Standards Committee adopted the advice of Mr Bartley and resolved that no disciplinary action would be taken against* [the solicitor complained against] *in respect of any of the matters raised by your firm on behalf of Sir Lenox Hewitt.*
>
> *The Society's file has now been closed.*

18. By letter dated 11 September 1997, a copy of the submission by Sir Lenox Hewitt was forwarded to the Law Society for response. That letter raised the issue of whether legal professional privilege in the letter of advice dated 9 August 1996 had been waived, having regard to the summary of that advice which was set out in the letter quoted above. The QLS was referred to the decision of the Western Australian Information Commissioner in *Re Weeks and Shire of Swan* (Information Commissioner WA, Decision No. D00595, 24 February 1995, unreported) and the cases cited in that decision. The QLS lodged a written submission addressing the issue of waiver, and I will refer further to that submission below.

<u>Legal principles concerning waiver of privilege</u>

19. In *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, Gibbs CJ said (at pp.480-481): ... *like every privilege properly so called* [legal professional privilege] *can be waived, although only by the person entitled to claim it, that is the client, and not the client's legal representative.* A person entitled to the benefit of legal professional privilege can waive the privilege through intentionally disclosing protected material (see *Maurice* at p.487, per Mason and Brennan JJ). If disclosure is incompatible with retention of the confidentiality which is necessary for maintenance of the privilege, there will ordinarily be a general waiver of privilege: see *Goldberg v Ng* (1995) 185 CLR 83 per Deane, Dawson and Gaudron JJ at p.95, per Toohey J at p.106. However, the courts will allow an exception for a limited intentional disclosure of privileged material, if the disclosure is compatible with the retention of confidentiality. Thus, disclosure of privileged information by the beneficiary of the privilege to another person for a limited and specific purpose, on the clear understanding that the recipient is not to use or disclose the information for any other purpose, will not involve a general waiver of privilege, and, subject to questions of imputed waiver, may not disentitle the beneficiary of the privilege from asserting the privilege against other persons: see *Goldberg v Ng* per Deane, Dawson and Gaudron JJ at p.96, per Toohey J at pp.106-109, and per Gummow J at p.116.

20. The judgments of the High Court of Australia in *Maurice* and in *Goldberg v Ng* also confirmed that a doctrine of waiver by implication, or imputed waiver, applies with respect to legal professional privilege. In *Maurice,* Gibbs CJ (at p.481), Mason and Brennan JJ (at p.488) and Dawson J (at p.498) endorsed a passage from Professor Wigmore's text, "Evidence in Trials at Common Law" (1961) vol. 8, paragraph 2327, at p.636. The same passage was quoted, with apparent approval, by Gummow J in *Goldberg v Ng* (at p.120):

> *... in answer to the question what constitutes waiver by implication,* [Wigmore] *said:*

> Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

21. In *Goldberg v Ng*, Deane, Dawson and Gaudron JJ said (at pp.95-96):

> *The circumstances in which a waiver of legal professional privilege will be imputed by operation of law cannot be precisely defined in advance. The most that can be done is to identify a number of general propositions.*
> *Necessarily, the basis of such an imputed waiver will be some act or omission of the persons entitled to the benefit of the privilege. Ordinarily, that act or omission will involve or relate to a limited actual or purported disclosure of the contents of the privileged material. When some such act or omission of the person entitled to the benefit of the privilege gives rise to a question of imputed waiver, the governing consideration is whether "fairness requires that his privilege shall cease whether he intended that result or not". ...*
>
> *In* Attorney-General (NT) v Maurice*, it was accepted in all judgments that the question of whether a limited disclosure gives rise to an implied or imputed waiver of legal professional privilege ultimately falls to be resolved by reference to the requirements of fairness in all of the circumstances of the particular case.*

22. In *Goldberg v Ng* itself, there was no limited actual or purported disclosure of privileged material by the privilege-holder (Mr Goldberg) to the party asserting that privilege had been waived by imputation (Mr Ng). Rather the disclosure of privileged material was made to the New South Wales Law Society (in answer to a complaint lodged against Mr Goldberg by Mr Ng). The New South Wales Law Society was not a party to the litigation between Mr Goldberg and Mr Ng. The majority in the High Court held that Mr Goldberg's privilege in the documents supplied to the Law Society had been waived by imputation, even though the conduct said to warrant that finding did not occur in the course of the legal proceeding in which the issue of imputed waiver was raised for adjudication (in that regard, see also paragraph 39 below).

23. It is notable that, while the act or omission which gives rise to a question of imputed waiver will ordinarily involve or relate to a limited actual or purported disclosure of privileged material, the passage quoted at paragraph 21 above allows that other acts or omissions (not involving a limited actual or purported disclosure of privileged material) by the privilege holder which bear on maintenance of the privilege, may give rise to a question of imputed waiver. In the present case, the conduct of the QLS which gives rise to a question of

imputed waiver consists of the disclosure to Sir Lenox Hewitt of a summary of the conclusions reached in the legal advice which the QLS had obtained from Mr Bartley, coupled with the written statement that the PSC had "adopted the advice of Mr Bartley" in resolving that no disciplinary action should be taken against the solicitor who was the subject of Sir Lenox Hewitt's formal complaints alleging unprofessional conduct.

24. It is a point of considerable significance (at least to the issue I am required to determine in this review) whether the reference at the end of the passage quoted at paragraph 21 above to a "particular case" was intended (and indeed whether references to similar effect in other passages in the leading authorities were intended) to indicate that the principles of imputed waiver operate only in the context of proceedings before a court or tribunal, by reference to what fairness requires in the particular circumstances of any given case (being an issue upon which the presiding judge or tribunal member is well placed to adjudicate), or whether the principles of imputed waiver can apply to a dispute over access to privileged information which does not arise in the context of proceedings before a court or tribunal (hereinafter referred to as an "extra-curial dispute"). Moreover, if the doctrine of imputed waiver can apply in the latter case, does it apply by reference to what ordinary notions of fairness require, having regard to all relevant circumstances attending the extra-curial dispute, or would such a standard be effectively unmanageable outside the context of a proceeding in a court or tribunal where the issues in dispute requiring determination are clearly defined, and the court or tribunal has power to compel a party to the proceeding to produce relevant evidence where that is required for the fair resolution of the issues in dispute?

25. I will endeavour first to explain the significance of the questions posed in the preceding paragraph for cases which, in the context of an FOI access application for a document which *prima facie* attracts legal professional privilege, raise an issue of imputed waiver of the privilege. I will then analyse the assistance to be gleaned from Australian authorities in attempting to answer the questions posed above.

Imputed waiver and s.43(1) of the FOI Act

26. The FOI Act affords a citizen or corporation a source of legal authority to compel the production of documents (without having to commence a legal proceeding and invoke the coercive powers of the relevant court or tribunal), provided they are documents of an agency subject to the application of the FOI Act, and provided the documents do not fall within one of the exceptions to the right of access that are provided for in the FOI Act itself (the significant exception, for present purposes, being the s.43(1) exemption provision in the FOI Act). The FOI Act therefore affords a possible source of power, in an extra-curial setting, to compel the production of a legal opinion in respect of which there has been a limited actual or purported disclosure (or some other conduct of the privilege-holder which, though falling short of intentional waiver, is inconsistent with the maintenance of the privilege), by asserting imputed waiver in answer to a claim of legal professional privilege (*cf.* paragraph 42 below).

27. I do not see any bar to the consideration of questions of waiver of privilege in the application of s.43(1) of the FOI Act. In *Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy* (1987) 6 AAR 80, a case which applied the legal professional privilege exemption in s.42(1) of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act), Jenkinson J, sitting as a Deputy President of the Commonwealth Administrative Appeals Tribunal (AAT), expressed the view (at p.83) that:

... the operation of s.42(1) is unaffected by any conduct which in legal proceedings would be regarded as having constituted waiver of legal

> *professional privilege. The subsection does not require that the document would be privileged from production, but that the document be "of such a nature that it would be privileged". The criterion of exemption, so expressed, is in my opinion framed by reference to acts and events which precede or are contemporaneous with the making of the document: the nature of the document is determined by what occasioned, and by what went into, its making and is unaffected, in my opinion, by subsequent events of the kind which might constitute waiver of legal professional privilege.*

28. It is clear, however, that Jenkinson J's view was based on the significance of the words "of such a nature that", which appeared in s.42(1) of the Commonwealth FOI Act, but which do not appear in s.43(1) of the Queensland FOI Act. Jenkinson J said that s.42(1) of the Commonwealth FOI Act did not require that the document in issue would be privileged from production (in a legal proceeding), but the terms of s.43(1) of the Queensland FOI Act do expressly require that the matter in issue would be privileged from production in a legal proceeding. (I note that other tribunals applying s.42(1) of the Commonwealth FOI Act, or corresponding exemption provisions in other jurisdictions, have held that waiver of privilege is to be taken into account: see the discussion of this point in *Re Sullivan and Department of Industry, Science and Technology* (Commonwealth AAT, Mr P Bayne (Senior Member), No. A95/157, 6 June 1997, unreported) at paragraphs 52-58.)

29. Section 43(1) of the Queensland FOI Act requires an authorised decision-maker under the FOI Act to assess whether the matter in issue would be privileged from production in a legal proceeding on the ground of legal professional privilege. (I note that "legal professional privilege relates to production, not admissibility": per Toohey J in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 71 ALJR 327 at p.341). In my opinion, it is proper for an authorised decision-maker under the FOI Act to take into account any conduct of the privilege holder, apparent as at the time the authorised decision-maker comes to make a decision on access, which raises a question of waiver of privilege in respect of the matter in issue. Where a privilege holder has intentionally disclosed privileged material in such a manner as to result in a general waiver of privilege in the material thus disclosed (see paragraph 19 above), it can safely be said that the material thus disclosed would not be privileged from production in any legal proceeding on the ground of legal professional privilege, and hence does not qualify for exemption under s.43(1) of the FOI Act.

30. However, where imputed waiver of privilege is relied upon by an applicant for access to matter that *prima facie* attracts legal professional privilege, the issues stated in paragraph 24 above become significant. If, under the general law, the principles of imputed waiver operate only in proceedings before courts and quasi-judicial tribunals, by reference to what fairness requires in the particular circumstances of the case in which a court or tribunal is required to rule on an issue of imputed waiver, then, in my opinion, it will not ordinarily be possible for an authorised decision-maker under the FOI Act, applying s.43(1) by reference to whether the matter in issue would be privileged from production in a hypothetical legal proceeding, to be satisfied that the court in the hypothetical legal proceeding would make a finding of waiver of privilege, by imputation of law, in respect of matter that *prima facie* attracts legal professional privilege.

31. The confines of what can be reasonably hypothesised about the legal proceeding to which the terms of s.43(1) direct attention, must, in my view, be narrow. It is probably appropriate to hypothesise that the applicant for access under the FOI Act is the party in the hypothetical legal proceeding who seeks production of the matter in issue. However, I do not think it would be proper to hypothesise as to the nature of the issues for determination in the hypothetical legal proceeding, and whether the

requirements of fairness in all the circumstances of the particular case

warrant a finding of imputed waiver, since that would inevitably be an exercise in mere speculation. It would be inherently unreliable and/or capricious, since, in most situations, it would be possible to hypothesise different kinds of proceedings, and different issues in the proceedings, such that it would be just as easy to produce a hypothesis supporting a finding of imputed waiver (e.g., with reference to the present case, an action of the kind referred to in paragraph 73 below) as to produce a hypothesis in which fairness would not require a finding of waiver by imputation.
(I note that if a question of imputed waiver arises in the application of s.43(1) of the FOI Act, it will ordinarily be by reason of some limited actual or purported disclosure of privileged material that has occurred otherwise than in the course of a legal proceeding, so there is no warrant for assuming that the same consequences would apply as when a partial disclosure of privileged material is made by the privilege holder in the course of a legal proceeding, whereupon the privilege holder would ordinarily be imputed to have waived the privilege: see the passages quoted in paragraphs 40 and 64 below.)

32. Thus, if, under the general law, the principles of imputed waiver operate only in proceedings before courts and quasi-judicial tribunals, by reference to what fairness requires in the particular circumstances of the case in which a court or tribunal is required to rule on an issue of imputed waiver, I could not be satisfied on the balance of probabilities that imputed waiver applies to the letter of advice dated 9 August 1996 from Corrs Chambers Westgarth to the QLS, which (as I have stated at paragraph 16 above) otherwise satisfies the relevant tests for attracting legal professional privilege.

33. If, on the other hand, the principles of imputed waiver can also apply in the context of an extra-curial dispute, by reference to what ordinary notions of fairness require having regard to all relevant circumstances attending the extra-curial dispute, it may be possible for an authorised decision-maker under the FOI Act (having regard to some prior conduct of the privilege-holder which, though falling short of intentional waiver, appears to be inconsistent with maintenance of the privilege) to determine that privilege has been waived by imputation, according to those criteria. Accordingly, the material subject to imputed waiver would not be privileged from production in a legal proceeding on the ground of legal professional privilege, and hence would not be exempt from disclosure to the applicant for access under s.43(1) of the FOI Act. Is there sufficient indication in Australian authorities for me to be confident that that is the correct legal position?

Do Australian authorities support the application of principles of imputed waiver in extra-curial disputes?

34. In the introduction to his judgment in *Maurice*, Deane J made a point of highlighting the fact that, since *Baker v Campbell* (1983) 153 CLR 52, legal professional privilege has been a substantive general principle of Australian common law, and not merely a rule of evidence. (In *Baker v Campbell*, it was decided that a citizen could rely on legal professional privilege to resist a demand for production of documents in an extra-curial setting, i.e., pursuant to the execution by police of a search warrant.) Deane J went on in *Maurice* (at pp.492-493) to state principles in respect of imputed waiver in language that was consistent with their application in either a curial or an extra-curial setting:

> *Waiver of legal professional privilege by imputation or implication of law is based on notions of fairness. It occurs in circumstances where a person has used privileged material in such a way that it would be unfair for him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage.*

(Deane J then went on to give a specific example of the application of the principle in circumstances where an assertion of the effect of privileged material, or disclosure of part of its contents, is made in the course of proceedings before a court or quasi-judicial tribunal: the example is quoted in paragraph 64 below.)

35. The analysis by other judges in *Maurice* could not be regarded as inconsistent with an understanding that imputed waiver, as an exception or qualification to legal professional privilege, remained merely a principle of evidence (i.e., capable of application only in legal proceedings, according to the requirements of fairness in the circumstances of the particular case). Since, in *Maurice*, the issue of imputed waiver arose in the course of curial proceedings, it was unnecessary in practical terms for the Court to consider whether it was applying a substantive principle of common law (operating as an exception or qualification to another substantive principle of Australian common law in legal professional privilege) or merely a rule of evidence. The same observations can be made of the judgments of the members of the High Court in *Goldberg v Ng*, and most other judgments of superior courts in Australia which have dealt with imputed waiver, post 1983. Of course, prior to the High Court's decision in *Baker v Campbell* in 1983, there would have been no reason to consider imputed waiver as being other than a rule of evidence.

36. In dealing with imputed waiver in *General Accident Fire & Life Assurance Corp Ltd v Tanter* [1984] 1 All ER 35, Hobhouse J said (at p.47): "The underlying principle is one of fairness in the conduct of the trial and does not go further than that". However, until recently (see *R v Derby Magistrates Court; Ex parte B* [1996] 1 AC 487 at p.507), English courts have treated legal professional privilege itself, and hence also the qualifications and exceptions to it, as mere rules of evidence. In Australian authorities decided since 1983,
I have found no statement to similar effect as that made by Hobhouse J.

37. Consistently with *Baker v Campbell*, the rules with respect to legal professional privilege, and the qualifications and exceptions to its application, must apply in extra-curial settings, unless some of the exceptions or qualifications remain merely rules of evidence, and only capable of applying as such. It appears to have been definitively established that the principle precluding legal professional privilege from attaching to communications made in furtherance of a crime, fraud, illegal purpose or abuse of statutory power applies in the context of extra-curial disputes (see *Baker & Ors v Evans & Ors* (1987) 77 ALR 565, and *Propend Finance*) and hence is a substantive principle of law rather than merely a rule of evidence. Express or general waiver of privilege seems, of its very nature, to be a principle which can operate outside of the context of litigation, and is more than a mere rule of evidence. It could arguably be the case that imputed waiver remains merely a rule of evidence, especially since there may be difficulties in applying it in a context other than litigation between parties.
However, (apart from the comments of Kirby P referred to in the following paragraph, which cannot, for reasons there explained, be treated as authoritative) I have found no analysis of that issue, and certainly no clear statement to that effect, in Australian authorities. I note that in *South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72, Olssen J said (at p.81): "As Deane J emphasised in *Maurice* (at 490) the rules relating to privilege (and its qualifications such as waiver) are substantive general principles of the common law and not mere rules of evidence."

38. In a dissenting judgment in *Goldberg v Ng* (1994) 33 NSWLR 639, Kirby P (then of the New South Wales Court of Appeal) said (at p.657):

> *Imputed or implied waiver, as enunciated in* [Maurice]*, does not apply to conduct* ***outside*** *the court or quasi-judicial tribunal ultimately determining the contested issue. The reasons of the High Court in* [Maurice] *do not*

> *support such an application of imputed or implied waiver to such a case.*
> *Nor does there appear to be any case in which imputed or implied waiver has been so applied. The doctrine should not be extended to erode the valuable facility of legal professional privilege where what is involved is not conduct before the court or tribunal hearing the contest.*

39. However, on the appeal to the High Court in *Goldberg v Ng*, all five judges accepted that, in a legal proceeding, a court could find that conduct of the privilege-holder outside of that legal proceeding, was capable of effecting a waiver of privilege by imputation (see per Deane, Dawson and Gaudron JJ at p.98, per Toohey J at p.110, per Gummow J at p.121), and the majority judges held that that had in fact occurred having regard to the circumstances attending Mr Goldberg's conduct in disclosing privileged material to the New South Wales Law Society in answer to a complaint lodged by Mr Ng. (See also *Argyle Brewery Pty Ltd (t/a Craig Brewery Bar and Grill) v Darling Harbourside (Sydney) Pty Ltd* (1993) 120 ALR 537 at p.543; *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* (1996) 69 FCR 149 at p.162; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at pp.14-15 and p.18, and, on appeal, (1996) 137 ALR 28; *BT Australasia Pty Ltd v State of New South Wales & Anor (No. 7)* (1998) 153 ALR 722 at pp.743-744.)

40. Cases decided on the application of principles of imputed waiver have assessed the requirements of fairness by reference to the issues for determination by the court in the proceeding in which the court was required to rule on imputed waiver. Thus, for example, the courts have had regard to issues of the kind indicated in the following passages -

    - *The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. ...*
      In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter: see Great Atlantic Insurance Co v Home Insurance Co *[1981] 1 WLR 529; [1981] 2 All ER 485* (per Mason and Brennan JJ in *Maurice* at p.488)

    - *... where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood* (per Mustill J in *Nea Karteria Maritime Co Ltd v Atlantic & Grant Lakes Steamship Corp (No. 2)* [1981] Comm LR 138 at p.139).

41. Issues such as the importance of having all relevant evidence, and being able to test the proper weight and credibility of certain evidence (or the credibility of certain witnesses), bearing on the issues for determination by a court in the proceeding before it, loom large in the assessments made in decided cases as to whether fairness requires a finding of imputed waiver of privileged material. Similar considerations may be diminished, or even absent, from some extra-curial disputes in which imputed waiver of privileged material could be asserted. In *Baker v Evans* (see paragraph 45 below), Pincus J expressed doubt as to whether the criterion of fairness could be sensibly applied in such circumstances.

42. My research has disclosed only three instances in which judges in Australian superior courts have considered the application of imputed waiver in an extra-curial setting (see paragraphs 45-53 below). The dearth of authority is not surprising. "[Legal professional] privilege is to be characterised as a bar to compulsory process for the obtaining of evidence ...": per Gummow J in *Propend Finance* at p.366. Unless a person alleging imputed waiver of privileged material has the legal authority (or is in the position of being able to invoke the legal authority of a court or tribunal) to compel the production of documents from a person or organisation asserting privilege, the latter can treat the allegation with impunity, knowing it cannot be compelled to part with documents that it owns, irrespective of whether it has made an actual or purported limited disclosure of privileged material. Suppose, for example, an insurance company wrote to a claimant for damages denying liability and disclosing part of the legal advice said to support its position. The claimant might reply, demanding that he/she be provided with a complete copy of the relevant legal advice on the basis that there had been an imputed waiver of the insurance company's privilege. Since the claimant has no legal authority to compel production, the insurance company could choose to ignore the demand, with impunity. However, once the claimant commenced a legal action for damages, the claimant/plaintiff could enlist the coercive powers available to a court to compel production of the legal advice for inspection, if the court were satisfied that fairness in the resolution of the issues for determination by the court required that course of action.

43. The right of access conferred by s.21 of the FOI Act affords a potential source of legal authority by which a citizen or corporation could compel the production of "a document of an agency" (as defined in s.7 of the FOI Act), without needing to commence a legal proceeding and invoke the coercive powers of a court or tribunal. As in the present case, disputes have arisen under FOI legislation in other jurisdictions as to whether imputed waiver can apply where a partial disclosure of privileged material has been made in an extra-curial setting. The relevant tribunal decisions are noted at paragraphs 55-60 below, but the issue which concerns me has not arisen for consideration by an Australian superior court in an FOI context. Nevertheless, the same issue could arise in other contexts.

44. Situations may arise where a law enforcement/regulatory agency, possessed of coercive powers to compel the production of information, employed those powers to demand access, from a company under investigation, of a complete copy of a legal opinion from which a limited actual or purported disclosure of part of the contents had been made. Suppose the company refused to produce the legal opinion on the ground that it was subject to legal professional privilege, and the agency commenced an action for a declaration that the company was obliged to produce the opinion, because the privilege attaching to the document had, in the circumstances, been waived by imputation of law. Would an Australian court determine that issue by reference to what ordinary notions of fairness require, having regard to all relevant circumstances attending the extra-curial dispute, or would it decline to grant the declaration sought by the regulatory authority on the ground that it had no manageable standards for determining what fairness required in the context of the extra-curial dispute (or alternatively on the ground that imputed waiver is merely a rule of evidence)?

45. A case of the kind described arose in *Baker & Ors v Evans & Ors*, in which the Australian Federal Police (AFP) had sought to execute (at the office of a firm of solicitors) a search warrant for documents relating to an alleged sales tax evasion scheme, and Pincus J of the Federal Court of Australia was required to rule on whether certain documents were privileged from production (in response to the search warrant) on the ground of legal professional privilege. The AFP argued 1) that the sole purpose test was not satisfied, 2) that the documents were not subject to legal professional privilege because they came into existence in the course of devising and

implementing a fraudulent scheme to evade sales tax, and 3) that if the privilege ever existed, it had been waived. The third argument relied on imputed waiver, and was put on the basis that an earlier disclosure of certain legal opinions made it unfair to the investigators to withhold the documents and instructions upon which the legal opinions had been obtained. Pincus J found in favour of the AFP on the second argument above, but considered it appropriate to make some *obiter* comments on the third argument as well (at p.576):

> *The use of the criterion of fairness in determining questions of waiver is easily comprehensible where, for example, a party to litigation tenders part of a connected series of privileged documents and seeks to withhold the rest. The part produced may create a misleading impression. But it is not easy sensibly to apply that doctrine to disclosure by persons suspected of crime.*
>
> *... It was argued by counsel for the respondents that it would be unfair in an "abstract" sense (to use counsel's word) to withhold from the investigators the instructions upon which the opinions in question were obtained, those opinions having been disclosed to the investigators and others. I cannot see what is unfair about it. The police, having seen the opinions, are no worse off than if they had not seen them.*
>
> *Until the decision in* Baker v Campbell *(1983) 153 CLR 52; 49 ALR 385 it was not clear that legal professional privilege was a ground of resistance to search warrants and the like. ... The consequences of the new view established in the* Baker *case have yet to be worked out. I do not regard the decision in* Attorney-General (NT) v Maurice *as necessarily providing guidance as to the test of waiver of privilege in respect of extra-curial documents, as opposed to cases in which privilege is claimed for documents discovered in the course of litigation.*
>
> *I would therefore have held against the respondents on the question of waiver ... .*

46. Thus, while finding no unfairness that might have been sufficient to warrant imputed waiver of privilege (if it had attached to the documents in issue), Pincus J expressed doubts about the suitability of applying fairness as a criterion for assessing imputed waiver in an extra-curial setting. Pincus J did not suggest any preferable alternative approach.

47. On the other hand, in dealing with a similar factual situation in *Propend Finance*, Brennan CJ of the High Court of Australia appears to have accepted that imputed waiver could apply by reference to the requirements of fairness in the relevant circumstances. *Propend Finance* was another case in which legal professional privilege was invoked as a ground for resisting production of documents in response to a search warrant. The privilege was asserted to attach to copies of non-privileged documents held at the premises of a solicitor, the copies having been brought into existence solely for the purpose of obtaining legal advice or solely for use in legal proceedings.

48. A problem addressed by several of the majority judges in *Propend Finance* (who held that the copies were privileged) was whether a wrongdoer might be enabled to escape justice by making a privileged copy, for submission to legal advisers, of documents evidencing an incriminating transaction, before destroying the non-privileged originals. Several judges saw the answer to that problem as being that a copy made for those reasons would have been brought into existence for a non-privileged purpose as well as a privileged purpose, and hence could not satisfy the 'sole purpose' test to attract legal professional privilege: see per McHugh J at p.358, per Gummow J at p.367, per Kirby J at p.377. Brennan CJ, however, was concerned at the prospect of frustration

of the proper administration of criminal justice if, for whatever reason, the unprivileged originals, or other unprivileged copies, of documents covered by a valid search warrant were not in existence or not accessible, and only copies brought into existence solely for a privileged purpose were located on the execution of the search warrant. Brennan CJ expressed the view that imputed waiver could apply. After quoting briefly from the judgment in which he had joined with Mason J in *Maurice*, and quoting the same passage from the judgment of Deane J in *Maurice* as is set out at paragraph 34 above, Brennan CJ observed (at pp.332-333):

> *Unfairness in the context of the execution of a search warrant might be found in maintaining the confidentiality of a privileged copy of an unprivileged original when neither the original nor its whereabouts is disclosed or any secondary evidence of its contents is made available. In such a situation, privilege becomes a cloak thrown over evidence which the execution of the search warrant is intended to reveal.*
>
> *... I would state the qualification in this way: if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the person seeking to execute the warrant and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the privileged copy loses the privilege. ...*

49. I consider it clear enough, from his observations in *Propend Finance* at pp.332-333, that Brennan CJ considered that the doctrine of imputed waiver of privilege could be applied by reference to the requirements of fairness in the relevant circumstances attending an extra-curial dispute over access to documents which otherwise attracted legal professional privilege.

50. *Independent Commission Against Corruption v Cripps & Anor* (Supreme Court of New South Wales, ALD No. 30082/96, Sully J, 9 August 1996, unreported) affords another example of a case arising from circumstances of the kind described in paragraph 44 above. The Independent Commission Against Corruption (ICAC) sought declarations to the effect that, by the conduct of himself and his counsel during the course of an investigative hearing before an Assistant Commissioner of ICAC, the respondent, Mr Cripps, had waived legal professional privilege in certain documents, and in certain oral advice given by his solicitor, such that Mr Cripps was obliged to produce the documents, and his solicitor was obliged to answer questions concerning the oral advice, in response to formal demands made by ICAC pursuant to its statutory coercive powers. Section 37(2) of the *Independent Commission Against Corruption Act 1988* NSW (the ICAC Act) appears to have been framed in terms broad enough to exclude legal professional privilege as a ground for refusing to answer any question, or refusing to produce any document, on the part of a witness summoned to attend or appear at an investigative hearing convened by ICAC. However, s.37(5) of the ICAC Act permitted an exception for privileged communications between a legal practitioner and client made for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of the client at a hearing before the ICAC, unless the privilege was waived by a person having authority to do so. Sully J held that the expressions and concepts in s.37(5) ought to be understood according to the settled general law with respect to legal professional privilege. Sully J also held that, apart from the question of waiver, the documents and oral advice in question would be entitled to legal professional privilege in accordance with s.37(5) of the ICAC Act.

51. From a line of questioning addressed to Mr Cripps by the ICAC Assistant Commissioner, Mr Cripps' counsel had perceived that an adverse inference might be drawn from Mr Cripps' failure to include certain information in a statement he had provided to ICAC (Mr Cripps having

stated in evidence that he had disclosed that information to his solicitor). His counsel sought to elicit evidence from Mr Cripps to the effect that he had received advice from his solicitor not to include the information in his statement provided to ICAC. Sully J accepted that Mr Cripps did not intend to waive privilege, but held:

> *I am wholly unable to see how a sensible reading of the questions asked of* [Mr Cripps] *by his own senior counsel, coupled with the answers given to those questions by* [Mr Cripps]*, can be regarded on a reasonable view of what is fair in the* [Goldberg v Ng] *sense, as anything other than conduct giving rise to an imputed waiver* pro tanto *of legal professional privilege.*

52. The significance of this case for present purposes is that, although the hearing in which imputed waiver of privilege was found to have occurred had some of the trappings of a hearing before a quasi-judicial tribunal, it was in truth no more than a formal process for obtaining and testing evidence in the course of an investigation of an allegation or complaint of corrupt conduct. (The ICAC was empowered to make findings and form opinions, on the basis of the results of its investigations, but for the purpose of making recommendations for formal action to be taken by others, e.g., the laying of disciplinary or criminal charges.) Nevertheless, Sully J considered it proper to apply the principles with respect to imputed waiver stated in *Goldberg v Ng* (specifically in the passage quoted at paragraph 21 above), which he saw as requiring modification (for application in the particular context in which the question of imputed waiver had arisen) only to the extent stated in this passage:

> *... it needs to be borne in mind that the concept of imputed waiver, in a context such as that of the present case, cannot involve, as it does in ordinary civil litigation, a balance between what is fair from the point of view of the person claiming privilege and resisting a suggestion of waiver; and what is fair to the party to that civil litigation should the claim of privilege be held not to have been waived.*
>
> *What has to be balanced for present purposes is fairness to* [Mr Cripps]*; and fairness to the public interest and the public trust, the proper protection of which is, by the express terms of section 12 of the* [ICAC Act]*, the "paramount" concern of ICAC.*

53. The *ICAC* case therefore involved a conscious application of the *Goldberg v Ng* principles with respect to imputed waiver of privilege, in the context of an extra-curial dispute, by reference to the requirements of fairness in the particular case.

54. I should also mention a number of tribunal decisions where imputed waiver has been considered in the context of applying legal professional privilege exemptions in the FOI statutes of other Australian jurisdictions.

55. In the *Colonial Mutual* case, after expressing the views quoted at paragraph 27 above, Jenkinson J went on to consider what the position would be in the case before him if, contrary to his opinion, questions of waiver of legal professional privilege were relevant to the application of s.42(1) of the Commonwealth FOI Act. Jenkinson J said (at p.84):

> *... the development of the doctrine of waiver of legal professional privilege has been evolved in resolution of competition between the interests of opposed litigants. In determining what conduct shall be held to have constituted waiver of his privilege by a party to litigation the influence of the other party's claim to*

protection of that other party's interests in the litigation has been very substantial: see Great Atlantic Insurance Co v Home Insurance Co *[1981] 1 WLR 529, especially at p.537-539.* [Jenkinson J then quoted the passage from Wigmore which is set out in paragraph 20 above].

In the administration of the Freedom of Information Act 1982 *no interest of a litigant claims attention, as such. The disclosures* [of aspects of a legal opinion given by the Commonwealth Solicitor-General] *in the eight documents* [disclosed to the applicant in response to its FOI access application] *state merely a few general conclusions which are to be found in the written opinion, but not any of the reasons stated for those conclusions. Nothing appears to suggest that the person who made the decision to grant access to the documents might have supposed it possible that thereby the privilege in respect of the written opinion would be waived. No consideration of fairness to the applicant or to any other person moves to a conclusion that the privilege has been waived.*

56. The consideration stated in the second last sentence of the above-quoted passage appears to be inconsistent with the position stated in the later High Court decision of *Goldberg v Ng*, to the effect that imputed waiver is to be judged objectively by reference to the requirements of fairness, irrespective of the subjective intention of the privilege-holder (at p.96): *When some such act or omission of the person entitled to the benefit of the privilege gives rise to a question of imputed waiver, the governing consideration is 'whether fairness requires that his privilege shall cease whether he intended that result or not'.* Nevertheless, while noting that considerations of fairness in the context of litigation did not apply, Jenkinson J went on to consider whether any general consideration of fairness told in favour of imputed waiver (finding that none did).

57. In *Re Spier and ACT Electoral Commissioner* (1995) 41 ALD 374, Mr Spier had made a formal complaint to the ACT Electoral Commissioner about intimidation of persons handing out how-to-vote cards outside a polling place on an election day. The Electoral Commissioner sought advice as to whether a prosecution should be instituted. The ACT Administrative Appeals Tribunal recorded the outcome of that process, and its findings on the question of waiver of legal professional privilege, at p.379 (paragraphs 20 and 21):

(20) In a letter to Mr Spier dated 14 March 1995, the Electoral Commissioner said:

> Both the Government Solicitor's Office and the Director of Public Prosecutions are of the opinion that the available evidence does not disclose a breach of s.228 of the *Electoral Act 1922* or s.28 of the *Commonwealth Crimes Act 1914*, both of which deal with intimidation in the political context, and that a prosecution is not warranted in the circumstances of this case.
> On that basis I do not intend to pursue this matter further.

(21) This disclosure in the letter to Mr Spier of the conclusions reached by the ACT Government Solicitor and the Director of Public Prosecutions does not, in my view, amount to a waiver of the privilege in the communications by which that advice was conveyed to the Electoral Commissioner. It does not amount to a use of the advice in a way which would make it unfair for the Electoral Commissioner not to disclose the documents by which the advice

was communicated - Attorney-General for the Northern Territory v Maurice *(1986) 69 ALR 31; 161 CLR 475.*

58. I take it from the references to both *Maurice* and unfairness, that the Tribunal was considering the application of imputed waiver. It also seems that the Tribunal approached its task on the basis that it was able to assess what fairness did or did not require, in an extra-curial setting.

59. In *Re Sullivan and Department of Industry Science and Technology*, the applicant argued imputed waiver in respect of a draft statement claimed to be subject to legal professional privilege, on the basis that the substance of the draft statement had been incorporated in either or both of the pleadings in, and an affidavit admitted into evidence in, an arbitration proceeding in which the applicant had been a party. The Tribunal was prepared to entertain the issue of imputed waiver, but found as a fact (at p.30, paragraph 77) that there had been no partial disclosure of the draft statement and "no basis upon which any other conduct of [the third party] would make it unfair that [the third party] be able to maintain a claim of privilege against any person in some legal proceeding". Again, the quoted statement appears to reflect an understanding on the part of the Tribunal that it was able to assess what fairness did or did not require by reference to conduct in an extra-curial setting.

60. In *Re Weeks and Shire of Swan*, an officer of the respondent Council had read aloud to the applicant "selected but relevant parts" of a four page legal advice (amounting to approximately 7% thereof) obtained by the Council, which advice related to an application for a land use approval that had been made by the applicant to the Council. In what was clearly an extra-curial dispute over access to otherwise privileged documents, the Western Australian Information Commissioner held that there had been an intentional waiver of privilege in the parts of the legal advice that were read out to the applicant, and that the act of reading out parts of the legal advice to the applicant amounted to a waiver, by imputation, of privilege concerning the whole document.

61. It must be acknowledged that most of the cases referred to above deal only briefly with the issue which concerns me (although that issue was the central issue in the *ICAC* case and in *Re Weeks*). Nevertheless (apart from the position advocated by Kirby P in *Goldberg v Ng*, but not accepted by the High Court in the ensuing appeal: see paragraphs 38-39 above), there is no clear statement in Australian authorities decided since *Baker v Campbell* in 1983, to the effect that the principles of imputed waiver of privilege cannot apply in the context of extra-curial disputes, or that imputed waiver remains merely a rule of evidence only capable of application in legal proceedings. Pincus J expressed reservations in *Baker & Ors v Evans & Ors* as to whether the criterion of fairness in determining questions of imputed waiver could be sensibly applied in some extra-curial disputes.
However, in the *ICAC* case, Sully J demonstrated that the criterion of fairness endorsed by the High Court in *Goldberg v Ng* required only some minor re-orientation for its application in the context of the extra-curial dispute which came before him. And in *Propend Finance*, Brennan CJ (who, jointly with Mason J, had authored one of the influential judgments in *Maurice*) considered that the requirements of fairness in the relevant circumstances could be applied to determine an issue of imputed waiver of legal professional privilege in the context of an extra-curial dispute.
The quoted statements by Deane J from *Maurice* (see paragraph 34 above) and by Olsson J (see paragraph 37 above) also lend support to that view (as do the Tribunal decisions referred to in paragraphs 55-60 above). Therefore, I have reached the view that Australian law with respect to legal professional privilege allows for the application of principles of imputed waiver of privilege in the context of an extra-curial dispute, by reference to some act or omission of the privilege holder which, though falling short of intentional waiver, is inconsistent with maintenance of the privilege, and by reference to what ordinary notions of fairness require having regard to all relevant circumstances attending the extra-curial dispute.

Application of the principles of imputed waiver of privilege in the circumstances of this case

62. The text of the letter dated 22 August 1996 from the QLS to Sir Lenox Hewitt's solicitors is set out at paragraph 17 above. The conduct of the QLS which, in my view, gives rise to a question of imputed waiver of privilege consists of the disclosure by the QLS of a summary of the conclusions reached in the legal advice it had obtained from Mr Bartley, together with the statement that the PSC had "adopted the advice of Mr Bartley" in resolving that no disciplinary action would be taken against Sir Lenox Hewitt's former solicitor in respect of any of Sir Lenox Hewitt's formal complaints of unprofessional conduct.

63. In its written submission dated 7 November 1997, the QLS referred to the passage from *Goldberg v Ng* quoted at paragraph 21 above, but sought to distinguish this case from other cases in which imputed waiver had been found, on the following basis:

> *... The letter of 22 August* [from the QLS to the solicitors acting for Sir Lenox Hewitt - see paragraph 17 above] *does not disclose any part of the opinion from Mr Bartley and in particular, it does not quote from any portion of the written advice obtained. It merely states the gravamen of Mr Bartley's opinion, namely, "the conduct of* [the solicitor complained against] *did not amount to unprofessional conduct and did not warrant disciplinary action being taken to safeguard the public interest".*
>
> ...
>
> *It is clear that in both* Weeks [see paragraph 60 above] *and* [*Great Atlantic Co v Home Insurance Co & Ors* [1981] 2 All ER 485]*, the document in respect of which legal professional privilege was claimed was partly disclosed. This is not the case in the present case where no part of the Bartley advice has been provided to the applicant but simply a summary of the effect of the advice by an officer of the Law Society.*
>
> ...
>
> *... It is a common enough event for parties to disclose publicly that they have received legal advice supporting the taking of a certain course of action. ...*
>
> *It is submitted that there could be no suggestion that the mere disclosure that a party has taken advice to support a course of action would constitute a waiver of legal professional privilege.*
>
> *If such were the case, then no person who had obtained advice would ever mention to another that they had in fact obtained advice or that the course of action they were taking was supported by legal advice.*
>
> ...

64. I am not satisfied that the QLS can succeed on the point relied on its written submission. Although it may seem a fine distinction in practical terms, the difference between stating "I have received legal advice and I deny liability", and stating "I have received legal advice that I am not liable to compensate you", is nevertheless a real and material one, in that the former involves no conduct inconsistent with maintaining privilege in the legal advice, but the latter does. At least in extra-curial contexts, I tend to agree with the contention put by the QLS that a

mere reference to the existence of legal advice, or a statement that a person or

company was adopting a certain course of action (e.g., denying liability to compensate a claimant for damages) based on legal advice, should not ordinarily, of itself, involve an imputed waiver of privilege in the content of the legal advice. (In the context of litigation, even an implicit assertion, in pleadings or evidence, about the content of privileged material, may involve an imputed waiver of privilege if fairness requires it: see *Bayliss v Cassidy & Ors* (Supreme Court of Queensland - Court of Appeal, No. 1225 of 1998, Williams J, Davies and McPherson JJA, 11 March 1998, unreported) at p.3.) However, the reference in the passage from *Goldberg v Ng* quoted at paragraph 21 above to "a limited actual or purported disclosure of the contents of the privileged material" extends, in my opinion, to disclosure of a summary of the conclusions reached in legal advice. I consider that support for that view can be found in the following statement by Deane J in *Maurice* (at p.493):

> *Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance upon legal professional privilege.*
> (my underlining).

(See also *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at pp.14-15, and p.18. In that case, Ampolex sought declarations that the proper conversion ratio of certain convertible notes issued by it was one share for one note. In a report prepared by an independent valuer, which report had entered the public domain, it was stated that "Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position." Rolfe J found that this statement had voluntarily disclosed the substance of the legal advice, and held that privilege in that legal advice had been waived. That issue was, however, decided under s.122 of the *Evidence Act 1995* NSW, rather than under common law principles. See also the decision of Kirby J of the High Court of Australia dismissing an application for a stay of the decision that privilege in the relevant legal advice had been waived: *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd & Ors* (1996) 137 ALR 28.
A similar conclusion was reached, in similar circumstances, applying s.122 of the *Evidence Act 1995* Cth, in *BT Australasia Pty Ltd v State of New South Wales & Anor (No 7)* (1998) 153 ALR 722 at pp.743-744.)

65. The disclosure in the QLS's letter dated 22 August 1996 of the conclusions reached in the legal advice it had obtained was not made in the course of proceedings before a court or quasi-judicial tribunal. If it had been, it appears that the considerations of fairness that would be relevant in that context would ordinarily require disclosure of the whole of the legal advice (consistently with the above-quoted statement by Deane J, and the statements by Mason and Brennan JJ quoted at paragraph 40 above). Since the application of principles of imputed waiver is being considered in the context of an extra-curial dispute, it must still be assessed whether the extent of the disclosure of privileged material made by the QLS reached a point where, having regard to all the relevant circumstances, fairness requires a finding of waiver, by imputation, of privilege in the whole of the legal advice (*cf.* the findings of the respective Tribunals in the *Colonial Mutual* case and in *Re Spier*, which are reproduced above at paragraphs 55 and 57). However, I am not satisfied of the correctness of the contention by the QLS that the fact that it did not quote from the letter of advice, but merely gave a summary of the conclusions reached in the legal advice, is sufficient in itself to preclude the application of the principles of imputed waiver of privilege.

66. I note that the QLS did not take the opportunity, in its written submission dated 7 November 1997, to address any considerations bearing on the application of the criterion of

fairness, in the circumstances of this case. Sir Lenox Hewitt's case for unfairness is conveyed by the following extracts from his submission dated 8 September 1997, and from his submission in reply dated 5 December 1997:

> *... The Society purported to dispose of the Charge* [of unprofessional conduct] *of 19 October 1993 by advising that they had "adopted the advice of Mr Bartley".*
>
> *In the normal course of administrative procedures the reasoning leading to a decision would be contained in a report submitted, in this case, to the Law Society or to any other body charged with a similar quasi-judicial responsibility.*
>
> ...
>
> *... if the Law Society chooses to seek and to adopt the advice of another for the purposes of discharging its statutory responsibilities then that "advice" ceases to be exempt under s.43(1) of the FOI Act. Upon its adoption by the Law Society, the reasoning therein contained becomes the reasoning of the Law Society itself and the grounds upon which, pursuant to its statutory responsibilities, the Law Society reaches its decision. It thereupon becomes information properly to be made available pursuant to the FOI Act.*
>
> *To conclude otherwise, I submit, would be to frustrate the Parliamentary intent expressed in the* Queensland Law Society Act *and the FOI Act. The Law Society, by the simple expedient of referring to a solicitor a matter brought to it pursuant to the* Queensland Law Society Act, *and adopting the advice of the solicitor would not, and could not, be required to give any explanation of the decision it reached. Just as it has, so far, in relation to the Charge of 19 October 1993.*
>
> ...
>
> *If Mr Bartley's letter is to be withheld from me it will constitute a ready means by which the Legislature's intentions can be frustrated. By delegating the processes of enquiry and investigation to a retained legal practitioner and adopting the conclusion, the Law Society's reasoning, the basis for its decision to reject a Charge can never be scrutinised by the dis-satisfied complainant. Surely a denial of natural justice.*

67. I note that in other submissions, Sir Lenox Hewitt has asserted that his sole purpose in this matter lies in ensuring that the QLS discharges its statutory responsibilities in respect of his formal charge of unprofessional conduct (against his former solicitor), and has expressed concern that the material withheld from him by the QLS may be flawed or incomplete, and not properly represent his charge against his former solicitor.

68. Against considerations of the kind raised by Sir Lenox Hewitt, one of the factors to be weighed is that which was emphasised in the *ICAC* case, where Sully J said that, in assessing the requirements of fairness, proper regard should be had to the fundamental importance which legal professional privilege has under the general law, its rationale being fundamental to the proper administration of justice. The rationale of the law with respect to legal professional privilege has received attention in nearly all of the major cases in which the High Court of Australia has considered aspects of legal professional privilege since *Grant v Downs* in 1976. In the particular context in which legal professional privilege has been invoked in the present case, the following judicial statements are most apposite:

- *An important part of the rationale of the principle of legal professional privilege is the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law... . Another aspect of the rationale ... is ... that the ready availability of confidential legal advice and of skilled and adequate legal representation is in the public interest in that it promotes both the observance of the law generally and the administration of justice in particular. That aspect of the rationale of the principle applies with as much force to a public official as it does to a private individual ...* (per Deane J in *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at p.82).

- *To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. ... The growing complexity of the legal framework in which government must be carried on renders the rationale of the privilege ... increasingly compelling when applied to decision-makers in the public sector.*
  The wisdom of the centuries is that the existence of the privilege encourages resort to those skilled in the law and that this makes for a better legal system.
  Government officers need that encouragement, albeit, perhaps, for reasons different to those which might be expected to motivate the citizen (per Mason and Wilson JJ in *Waterford* at p.62, p.64).

69. With due regard to those considerations, there is nevertheless, in my view, considerable merit in the case made by Sir Lenox Hewitt that the QLS has made use of the letter of advice dated 9 August 1996 in such a manner that, in all the relevant circumstances, it would be unfair not to impute a waiver of privilege in the letter of advice. The question arises in the context of an extra-curial dispute as to whether the QLS had properly discharged its functions as a regulatory authority in dealing with complaints of unprofessional conduct made by Sir Lenox Hewitt against his former solicitor. The complaint by Sir Lenox Hewitt was subject to extensive investigation and consideration by the PSC and staff of the Professional Standards Department of the QLS. As the body charged by the Queensland Parliament with responsibility for regulating compliance by solicitors with proper standards of professional conduct, it was incumbent on the relevant delegate of the powers of the QLS (in this instance, the PSC) to reach its own conclusions on whether the conduct complained of by Sir Lenox Hewitt was conduct in respect of which the QLS had power to take action (i.e., whether it constituted malpractice, professional misconduct, or unprofessional conduct or practice).

70. If the relevant delegate determined that issue in favour of the subject of the complaint, I consider that the delegate was at least morally obliged, as a matter of sound administrative practice on the part of a body discharging a regulatory function for the benefit and protection of members of the public who deal with Queensland solicitors, and arguably obliged by the requirements of procedural fairness, to provide an explanation to the complainant as to why the conduct complained of did not constitute malpractice, professional misconduct, or unprofessional conduct or practice (*cf.* the comments of Brennan J in *Esso Australia Resources Limited & Ors v Plowman & Ors* (1995) 183 CLR 10 at pp.37-38; and my observations in *Re Godwin and Queensland Police Service* (Information Commissioner Qld, Decision No. 97011, 11 July 1997, unreported) at paragraphs 51-52). The delegate was certainly entitled to obtain independent legal advice to assist the delegate in reaching conclusions on the relevant issues. But, in my view, it was then incumbent on the delegate to provide the complainant with an explanation of the reasons for the delegate's conclusion that the conduct complained of did not constitute malpractice, professional misconduct, or unprofessional conduct or practice.

71. The decision by the delegate was probably a decision to which Part 4 of the *Judicial Review Act 1991* Qld applied (see s.31, s.4 and s.5 of the *Judicial Review Act*, and s.6(2) and s.6(2B) of the *Queensland Law Society Act* as in force in August 1996), in which case a written statement of reasons for that decision could have been requested. However, the FOI Act was also intended as a means for keeping the community informed of the operations of government agencies, enhancing the accountability of government agencies, and enabling members of the community to have access to information held by government agencies relating to their personal affairs (see s.5(1) of the FOI Act). Indeed, in a situation where the decision-maker for the QLS had adopted, as the basis for its decision, reasons which were set out in an existing document, use of the FOI Act was arguably the preferable means for Sir Lenox Hewitt to seek to hold the QLS to account for its decision.

72. The conduct of the delegate in purporting to "adopt" privileged legal advice (while disclosing only a summary of its conclusions) as the basis for its decision that Sir Lenox Hewitt's complaints did not disclose a case of unprofessional conduct against his former solicitor (an issue which, given the extent of investigation undertaken, and the fact that additional legal advice was sought from Mr Bartley, could not have involved an entirely straightforward and uncomplicated judgment) should not in fairness be allowed to make the delegate's adopted reasons for decision effectively unexaminable. In my opinion, the law should impute a waiver of the privilege otherwise attaching to the letter of advice dated 9 August 1996, because having regard to the conduct referred to above, considered in light of all the circumstances attending the extra-curial dispute, it would be unfair not to do so.

73. The QLS and its delegate were not acting in this matter in their own interests. They were discharging a public regulatory function committed to the QLS by the Queensland Parliament, to be undertaken for the benefit and protection of persons who deal with solicitors licensed by the QLS to practise in Queensland. The QLS was undertaking statutory responsibilities and was bound to perform them according to law. The question of whether a written charge lodged under s.6(2) of *Queensland Law Society Act* (as in force in August 1996) was sufficient (in light of any additional relevant material obtained on investigation by the QLS) to raise a case against a solicitor of malpractice, professional misconduct, or unprofessional conduct or practice, was a threshold question (akin to a jurisdictional fact) involving issues of fact and law, of which the QLS had to be satisfied as a basis for exercising its statutory jurisdiction to take formal disciplinary action against a solicitor. If Sir Lenox Hewitt considered that that threshold question had been wrongly determined by the QLS, avenues existed (and, subject to questions of delay, may still exist) for challenging that finding, e.g., by commencing an action for a declaration that the matters he complained of did disclose a case of unprofessional conduct or practice against his former solicitor, together with an injunction, or perhaps an order in the nature of mandamus, compelling the QLS to deal with his written charge on that basis.

74. In my opinion, fairness requires that Sir Lenox Hewitt should have the opportunity to assess whether he is satisfied with the reasons for deciding the threshold question in favour of the solicitor against whom Sir Lenox Hewitt had complained. The reasons which the QLS adopted as the basis for its decision on that threshold question should not, in fairness, be unexaminable because they are contained in a document that *prima facie* attracts legal professional privilege.
(In that regard, this case bears some similarities to *Goldberg v Ng*, in which (at p.102) the High Court considered it relevant, to the application of the criterion of fairness, that a solicitor called upon to explain his conduct to the NSW Law Society would normally do so in a letter not subject to the protection of legal professional privilege. Similarly, a complainant to the Queensland Law Society could normally expect an explanation of reasons for a decision to take no disciplinary

action against a solicitor, to be explained in a document not subject to legal professional privilege.) Those considerations, together with the more general consideration of fairness that the QLS should be properly accountable to an individual complainant for the exercise of its public regulatory function in a particular case, supports my view that it would be unfair not to impute a waiver of the privilege which *prima facie* attaches to the letter of advice dated 9 August 1996.

75. I should also note, since the requirements of fairness ought to be assessed having regard to all relevant circumstances, that the letter of advice makes observations on the issue of whether the conduct of the solicitor complained against was merely negligent, as distinct from unprofessional. In some circumstances, it could be argued that disclosure of legal advice concerning such issues would be unfair to the solicitor complained against, e.g., where an action in negligence against the solicitor is pending. I would have reservations about the merits of such arguments, since the issue of whether conduct by a solicitor was unprofessional or merely negligent must be one of the most frequent issues which the PSC, and the Professional Standards Department of the QLS, have to assess in determining whether to take action on complaints against solicitors, and, in my view, that issue would have to be regularly addressed when accounting to a complainant for the outcome of a complaint. In any event, it is clear on the material before me in the present case that Sir Lenox Hewitt commenced an action in negligence against his former solicitor and that that action had been settled, with compensation to Sir Lenox Hewitt, prior to the creation of the letter of advice dated 9 August 1996. In those circumstances, I do not consider that any considerations of fairness to the solicitor complained against, tell against a finding of imputed waiver.

76. The statement in the letter from the QLS dated 22 August 1996 was not misleading as a bare summary of the conclusions reached in the advice obtained from Mr Bartley. (It is interesting to speculate how the criterion of fairness should operate in the context of an extra-curial dispute, where a tribunal able to examine the material which *prima facie* attracts privilege ascertains that a limited actual or purported disclosure by the privilege-holder of the contents of the privileged material was deliberately or inadvertently misleading. But that is not the case here.) I am able to say that because I have had the opportunity of comparing the two, but I consider that ordinary notions of fairness require that Sir Lenox Hewitt should have the opportunity to satisfy himself that the QLS's summary of the conclusions reached in the advice which it "adopted" was not misleading, and that the reasoning which supported those conclusions was not affected by error (eg, a misapprehension of the correct factual position: *cf.* the concerns expressed by Sir Lenox Hewitt as noted at paragraph 67 above).

77. It seems that the QLS need only make a slight adjustment to its procedures to avoid an issue of this kind arising again. If the letter dated 22 August 1996 from the QLS had not referred to Mr Bartley's opinion at all, but merely stated that it was the opinion of the PSC that the conduct of the solicitor complained against did not amount to unprofessional conduct and did not warrant disciplinary action being taken to safeguard the public interest, then the letter would not, in my opinion, have afforded a satisfactory explanation to the complainant for the PSC's conclusions, but no question of imputed waiver of the privilege attaching to the letter of advice from Mr Bartley could have arisen. Nevertheless, it was the conduct of the QLS in disclosing the conclusions reached in Mr Bartley's advice, and in stating that Mr Bartley's advice had been "adopted" by the PSC in resolving to take no formal action against the solicitor for the conduct complained of by Sir Lenox Hewitt, which opened the door to the application of principles of imputed waiver.

78. Applying the principles stated in *Goldberg v Ng* (see paragraph 21 above) according to the standard of what ordinary notions of fairness require, having regard to the relevant circumstances attending the particular case, I find that the QLS has used privileged material in such a way (i.e., by adopting the privileged advice as the basis for a decision made in the exercise of its statutory

responsibilities, in lieu of explaining to Sir Lenox Hewitt why his formal complaints did not disclose a case of unprofessional conduct) that fairness requires a finding that the privilege which would otherwise attach to Mr Bartley's letter of advice dated 9 August 1996 has been waived, by imputation of law, as against Sir Lenox Hewitt, whether the QLS intended that result or not.

79. Accordingly, I find that the letter of advice dated 9 August 1996 to the QLS from Mr Bartley of Corrs Chambers Westgarth is not exempt from disclosure to Sir Lenox Hewitt under s.43(1) of the FOI Act.

The matter in issue in Ms Dreghorn's memoranda to the Professional Standards Committee - communications made in a professional capacity as a lawyer, or made merely in the capacity of an employee?

80. The Australian authorities which I examined in *Re Potter and Brisbane City Council* (1994) 2 QAR 37 at pp.45-47, establish that legal professional privilege may apply with respect to qualified legal practitioners employed by a statutory authority which performs public functions (as is the case with the QLS when regulating compliance by solicitors with proper standards of professional conduct), in respect of professional legal work undertaken for their employer as client, provided there is a professional relationship which secures to the legal work an independent character notwithstanding the employment (see per Mason and Wilson JJ in *Waterford's* case at p.62). Important indicia are whether the legal adviser has been admitted to practice as a barrister or solicitor, and remains subject to the duty to observe professional standards and the liability to professional discipline. Possession of a current practising certificate is not necessary for establishing the requisite degree of independence, but will carry some weight in assisting to establish that requirement.

81. The QLS has provided me with a copy of the job description applicable to Ms Dreghorn's position as "Solicitor, Professional Standards" in the Professional Standards Department of the QLS. I am satisfied that, while the primary duties of the position appear to consist of investigating complaints and assisting in disciplinary proceedings against solicitors, the duties of the position also include the provision of legal advice. The QLS has submitted (at p.3 of its written submission dated 25 October 1996):

> *... at the time that the memoranda were written, Linda Dreghorn was:-*
>
> *(a) admitted as a solicitor of the Supreme Court;*
> *(b) the holder of a current Practising Certificate; and*
> *(c) subject to professional disciplinary action.*
>
> *In relation to the requirements of a solicitor in corporate practice in Queensland, it is instructive to consider Chapter 15 of the Queensland Solicitors' Handbook (copy enclosed). The Professional Standards department in employing in-house lawyers to investigate and, where required, provide advice to the Professional Standards Committee in relation to complaints, has regard to Chapter 15 and is careful not to compromise the independence of its employed lawyers. The lawyers within the Professional Standards department are expected to operate independently and to provide candid advice having regard to the fact that their first duty is to the law.*

82. I accept that the circumstances of Ms Dreghorn's employment guaranteed her the requisite independence when called upon to provide professional legal advice to her employer, as client. In *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 (at pp.530-531), Dawson J saw no

reason for denying privilege to communications passing between salaried lawyers and their employers "provided that they are consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client". (Dawson J's statement was cited with apparent approval by Mason and Wilson JJ in *Waterford's* case at p.61, and re-stated by Dawson J in the same case at pp.95-96.) The difficult issue in the present case lies in deciding whether all of the matter from Ms Dreghorn's memoranda that has been claimed to comprise privileged legal advice, satisfies the requirements of the proviso expressed in Dawson J's statement of principle.

83. In *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No. 2)* [1972] 2 QB 102, an English case endorsed by judges of the High Court of Australia in *Kearney* and in *Waterford*, Lord Denning MR, in holding that the work of salaried employee legal advisers could attract legal professional privilege, also observed (at p.129):

> *I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege.*

84. Thus, in *Re Munday and ACT Attorney-General's Department* (Australian Capital Territory Administrative Appeals Tribunal, Professor L J Curtis (President), No. C95/85, 29 August 1996, unreported), one of the documents in issue was a letter from a solicitor in the ACT Attorney-General's Department to the ACT Commissioner for Housing, concerning an FOI request made by Mr Munday to the Attorney-General's Department for documents concerning the ACT Housing Trust. The Tribunal observed (at p.3, paragraph 8):

> *The mere fact that the author of the letter is a solicitor with the GSO* [the ACT Government Solicitor's Office] *and that the recipient of the letter is a client of the GSO does not afford protection: see* Minter v Priest *[1930]*
> *AC 558. It is only if the letter was written by Mr Killalea in his professional capacity as a lawyer providing advice to the client that it is privileged. If it was written in his capacity as an officer of the Department dealing with the request under the FOI Act and for the purpose of finding out whether another agency having an interest in the documents falling within the request would wish exemptions to be claimed for those documents, then it is not privileged.*

85. Similarly, in *Re Gunawan and Directorate of School Education* (1994) 6 VAR 418, the Victorian Administrative Appeals Tribunal decided (at p.428 and p.430) that some documents (and segments of documents) in issue in that case were created by a salaried legal officer of the respondent agency while performing an administrative function, and hence did not attract legal professional privilege (see also *Re Price and the Director of Public Prosecutions* (Information Commissioner, Decision No. 97016, 24 October 1997, unreported) at paragraph 38).

86. By letter to the QLS dated 19 December 1995, the Lay Observer explained his finding that the matter in issue described in subparagraph 8(a) above was not exempt under s.43(1) of the FOI Act, as follows:

> *Whilst Ms Dreghorn is a legal practitioner and is employed as an Investigating Officer by the Queensland Law Society, I do not believe that the section of the report would be covered by legal professional privilege as it was not in the nature of legal advice prepared for the Law Society but*

simply an analysis of the investigation undertaken by Ms Dreghorn into the substance of the complaint. On this basis, I do not believe that this ground is sufficient to justify the withholding of the report from the applicant.

Having regard to the content of the material to which the applicant seeks access, I do not believe there is any reason why he should not be given access to it. There is nothing of a confidential, contentious or controversial nature disclosed, it is simply a short statement prepared by the investigating officer for the benefit of the Committee.

87. The Lay Observer's decision of 4 April 1996, rejecting the claim by the QLS that the matter described in subparagraphs 8(b), (c) and (d) above is exempt matter under s.43(1) of the FOI Act, appeared to incorporate by reference his above-quoted reasons for decision. In his submission dated 31 January 1997, Sir Lenox Hewitt argued:

Without seeing the documents, I cannot make a judgment as the Lay Observer was able to do. However, I do not think it can be a difficult matter to establish whether the reports I wish to see were the results of, and reports upon, investigations, or were prepared for the sole purpose of responding to a direction to provide legal advice. Or, alternatively stated, was the author of the document instructed, as a solicitor, to provide legal advice upon the matter and do the documents constitute legal advice.

To my lay mind, they are probably nothing more than investigation reports, as such documents are commonly known throughout government departments.

88. The QLS did not contest the disclosure, under the FOI Act, of the bulk of Ms Dreghorn's reports to the PSC. The QLS has conceded (in its written submissions dated 25 October 1996) that memoranda by Ms Dreghorn for the assistance of the PSC (reciting the history and factual basis of the relevant complaints) would have been created in any event. That is the basis on which it has not contested disclosure of the memoranda, other than the segments claimed to comprise legal advice by Ms Dreghorn to the PSC. That concession by the QLS has implications for the application of the 'sole purpose' test, and I have addressed those implications in detail below. However, I am now considering whether the segments of the memoranda for which the QLS has claimed exemption under s.43(1) can be properly characterised as professional legal advice referable to a professional relationship of lawyer and client between Ms Dreghorn and the QLS.

89. Difficult questions of characterisation are liable to arise when a salaried legal practitioner performs duties for his or her employer as an investigator. Assessing what factual material should relevantly be obtained to enable legal advice to be given on the application of a statutory provision or common law principle, in the context of a situation or dispute affecting a client, is clearly a professional matter on which a legal practitioner may advise or assist a client. So too is the analysis of relevant factual material as an incident to, and for the purpose of, giving legal advice. At an early stage of this review, the QLS explained its position, in respect of one of Ms Dreghorn's earlier memoranda, as follows:

In respect of the observations made by the Lay Observer in his letter [to the Deputy Information Commissioner] *of 23 January 1996, the Society rejects the contention that the release of a major part of the report to the applicant "clearly detracts from their submission that the analysis is in a special*

category and should be withheld". With respect, the material contained in the analysis is of a distinctly different nature to the rest of the material contained in the report, much of which is merely a re-stating of events that have taken place. The analysis is essentially a distilling of the facts by the creator of the memorandum and the provision of advice to the Professional Standards Committee based upon the author's assessment of those facts. It is this analysis, advice and recommendation, as opposed to mere re-statement of facts and events, which the Society submits is distinctly different in quality to the remainder of the report and should be exempt for the reasons outlined in its previous submissions.

90. In a later submission dated 25 October 1996, the QLS contended:

> *The portions of the memoranda which recite the history and factual basis of the complaint, would, as a matter of administrative necessity, have had to be supplied to the Committee to enable the Committee to consider and make decisions in respect of complaints. The administration of the complaints system would have required the provision of this information in any case.*
> *This is not the case with the analysis/recommendation sections of the memoranda. These sections would not have been brought into existence in any event. The Committee could have elected to rely on its own lawyer members for legal advice or, alternatively, obtained such advice from external lawyers. It chose to do otherwise, namely to obtain advice from the Society's internal lawyers. This course is hardly exceptional. Lawyers in the Professional Standards department deal with issues of the conduct of the profession on a regular basis and could be expected to have a particular expertise in the area, which expertise would obviously be of great use to the Committee in its deliberations.*
>
> *A close analysis of the advice given in the exempt portions of the memoranda shows that the advice was of a legal nature. In view of your intention to provide a copy of this letter to the applicant, I will not provide any detailed analysis in respect of the portions of the memoranda for which exemption is claimed as to do so would obviously reveal the contents.*
>
> *Suffice to say that the memoranda deal with such issues as what constitutes misconduct or unprofessional conduct and the proper legal categorisation of the facts allegedly grounding the complaint. These types of issues are clearly of a legal nature.*

91. The QLS also forwarded to me, as a confidential attachment to its submission dated 7 November 1997, a document headed "Nature of Advice Given" which was intended as: "a summary which details in a more particular manner the Society's submissions as to why the advice provided by [Ms Dreghorn to the PSC] is best characterised as legal advice rather than advice of an administrative nature". The attachment was submitted on a confidential basis because it discussed the matter in issue "in sufficient detail as to disclose the contents of the exempt matter to the applicant if the document was provided to him" (see, in this regard, s.87 of the FOI Act). I accepted the attachment on the basis that it remain confidential from Sir Lenox Hewitt, and I have had regard to the attachment when examining the matter in issue to arrive at the conclusions stated below.

92. I consider that some parts of the matter claimed by the QLS to be exempt matter under s.43(1) of the FOI Act cannot be properly characterised as legal advice, or professional legal assistance, on a professional matter referable to a relationship of lawyer and client between Ms Dreghorn and the QLS; rather, it must be properly characterised as material for the information and assistance of the PSC, prepared by Ms Dreghorn in an administrative capacity as an employee of the QLS. In two instances (the matter identified in subparagraphs 93(a)(i) and (b)(i) below), the essential character of the matter is, in my opinion, no different to that of material already disclosed under the FOI Act, i.e., it is merely a re-stating of events that have already taken place (for the purpose of informing the PSC) without any discernible element of analysis of factual material as an incident to the provision of legal advice for consideration by the PSC. In other instances, it consists of matter that, in my view, is properly referable to the relationship of employer and employee, rather than to a professional relationship of solicitor and client. The matter identified in subparagraph 93(c) below is perhaps close to the borderline. In it, Ms Dreghorn identified four issues for consideration by the PSC, without offering any legal advice, opinion or recommendation as to their proper resolution. It could be argued that identification of the four issues involved an exercise in legal analysis by Ms Dreghorn. However, I consider that identification of those issues would properly be expected of an investigator or administrative officer, without legal qualifications, whose duties of employment required the preparation of a similar memorandum for the information and assistance of the PSC.

93. I find that the following segments of the matter in issue cannot be properly characterised as communications comprising, or made for the purpose of giving, legal advice or professional legal assistance on a professional matter referable to a relationship of lawyer and client between Ms Dreghorn and the QLS:

(a) in the memorandum dated 18 January 1994 from Ms Dreghorn to the PSC -

(i) the first paragraph, and the first sentence of the second paragraph, below the heading "Conclusion:" on p.3; and
(ii) the last sentence on p.4;

(b) in the memorandum dated 13 April 1995 from Ms Dreghorn to the PSC -

(i) the last paragraph on p.3; and
(ii) the last sentence on p.4;

(c) in the memorandum dated 8 July 1996 from Ms Dreghorn to the PSC, the sentence which appears under the heading "Analysis of Investigation" on p.3.

94. I am satisfied from my examination of them that the following segments of the matter in issue consist of legal opinion or advice (including analysis of factual material, or selection or highlighting of particular factual material, as an incident to the giving of legal advice), communicated by Ms Dreghorn for consideration by the PSC, on professional matters referable to a relationship of lawyer and client between Ms Dreghorn and the QLS:

(a) in the memorandum dated 18 January 1994 from Ms Dreghorn to the PSC -

(i) the last two sentences of the last paragraph on p.3; and
(ii) the first paragraph on p.4;

(b) in the memorandum dated 13 April 1995 from Ms Dreghorn to the PSC -

(i) the first two paragraphs below the heading "Analysis of Investigation" on p.3; and
(ii) the first paragraph on p.4;

(c) in the memorandum dated 22 January 1996 from Ms Dreghorn to the PSC, the paragraphs numbered 20-27 (inclusive);

(d) in the memorandum dated 27 February 1996 from Ms Dreghorn to the PSC -

(i) the four paragraphs which appear under the heading "Analysis of Investigation" on p.2 and p.3; and
(ii) the paragraph which appears below the heading "Recommendation" on p.3.

95. Whether the matter identified in the preceding paragraph qualifies for exemption under s.43(1) as matter that would be privileged from production in a legal proceeding on the ground of legal professional privilege depends on the application of the 'sole purpose' test.

Application of the 'sole purpose' test to matter in issue in Ms Dreghorn's memoranda to the Professional Standards Committee

96. As appears from the first paragraph of the extract from its submission quoted at paragraph 90 above, the QLS has conceded that the memoranda from Ms Dreghorn to the PSC would have come into existence in any event, "as a matter of administrative necessity", in order to supply the PSC with the history and factual basis of the relevant complaints so that the PSC could consider and make decisions in respect of those complaints (though the QLS does not concede that the segments comprising legal advice would have been brought into existence in any event). This means that each document containing matter in issue, that is referred to in paragraphs 93 or 94 above, was brought into existence for at least one purpose which does not attract legal professional privilege.

97. For its entitlement to sever, and claim legal professional privilege/s.43(1) exemption for, the segments of Ms Dreghorn's memoranda to the PSC which comprise legal opinion or advice, the QLS has asserted reliance (at p.4 of its submission dated 25 October 1996) on the following statement of the 'sole purpose' test by Deane J in *Waterford's* case (at p.85):

> *... a document (or a severable part of a document) will not be protected by legal professional privilege if it "would have been brought into existence ... in any event" for purposes other than that which attracts legal professional privilege ...".*

98. However, Deane J was in the dissenting minority on the issue of the application of the 'sole purpose' test to one group of documents in issue in *Waterford's* case. Since *Waterford's* case was a decision of the High Court of Australia on the application of a statutory provision (s.42(1) of the Commonwealth FOI Act - the legal professional privilege exemption) very similar in its terms, and its intended operation, to s.43(1) of the Queensland FOI Act,
I consider that I am bound to apply any ruling statements of principle on which the majority judges decided the issue which concerned the application of the 'sole purpose' test.
Waterford's case therefore warrants closer analysis. The relevant issue for present purposes is that concerning alleged error in the application of the 'sole purpose' test to certain documents, which was dealt with in the joint judgment of Mason and Wilson JJ at pp.65-66, by Brennan J at pp.75-78, by Deane J at pp.83-93, and by Dawson J at pp.101-105.

99. The appeal stemmed from a decision of the Commonwealth AAT which found certain documents (including a related group of documents numbered for identification as documents 28, 29, 33, 35 and 38) to be exempt under s.42(1) of the Commonwealth FOI Act. Documents 28, 29, 33, 35 and 38 comprised correspondence (or drafts thereof) between the Attorney-General and the Treasurer, prior to the hearing of a previous application to the AAT in which Mr Waterford had sought review of a decision by the Treasurer under the Commonwealth FOI Act.

100. Mr Waterford argued that the advice proffered by the Attorney-General was properly characterised as policy advice rather than legal advice, and was not subject to legal professional privilege. The AAT accepted the evidence of a witness that "the Attorney-General's legal opinion had been furnished in relation to the then pending application by Mr Waterford before the Tribunal". The AAT held that legal professional privilege attached to all letters to and from the Attorney-General (including drafts) "whether or not the legal advice also included advice as to the policy of the FOI Act".

101. Prior to the hearing of an appeal by Mr Waterford to the Federal Court of Australia, challenging the decision of the AAT, the Commonwealth disclosed document 29 (subject to the deletion of nine lines said to relate to Cabinet discussions) to Mr Waterford's legal advisers, and that version of document 29 was apparently tendered to the Federal Court (it was certainly available to, and referred to by, the judges in the High Court). The judges of the High Court differed markedly in their treatment of the significance of the contents of document 29, which were revealed to have been different, in at least some material respects, to what had been described in evidence given by Treasury officers to the AAT.

102. Deane J (at p.91) and Dawson J (at pp.103-104) expressed the view that document 29 contained no professional legal advice, but merely policy advice on the administration of the Commonwealth FOI Act, and that document 29 illustrated the error in the AAT's approach to the application of the 'sole purpose' test. Deane J and Dawson J would have upheld Mr Waterford's appeal on the ground of legal error in the AAT's application of the 'sole purpose' test. Brennan J also expressed the view that "document 29 did contain advice as to executive policy" (at p.77), but decided to dismiss the appeal on the ground that any error in the application of the 'sole purpose' test would merely have involved the making of a wrong finding of fact, not an error of law, and Mr Waterford's right of appeal from the decision of the AAT was limited to errors of law. Mason and Wilson JJ (who, with Brennan J, formed a majority in dismissing Mr Waterford's appeal on this issue) expressed the view (at pp.66-67) that document 29 contained policy advice intermingled with legal advice, but held that the AAT was nevertheless entitled to make a finding of fact that the sole purpose for bringing document 29, and related documents, into existence was to seek or give legal advice, and that there was no error of law in the AAT's approach to the making of that finding of fact.

103. In my opinion, the approach adopted by Deane and Dawson J on the application of the 'sole purpose' test to a document which (like those identified in paragraph 94 above) contains legal advice and other "extraneous matter", conflicts with the test applied by the majority judges, in which case the latter should prevail. However, since at least one superior court judge has applied Deane J's approach in *Waterford*, declaring that it was not in conflict with the majority judges (see paragraph 115 below), it is necessary to examine those judgments in greater detail.

Approach of the dissenting judges in *Waterford*

104. Deane J's views on the application of the 'sole purpose' test are encapsulated in the following extracts from his judgment (at pp.84-87):

> *... at least some of the disputed documents contained or recorded both legal professional advice given by the Crown Solicitor's Office and general policy advice given by the "freedom of information" section of the Attorney-General's Department.*
>
> *The circumstance that advice of different categories was contained in some of the disputed documents did not, of itself, give rise to any insurmountable problem. If privileged material was contained in one distinct part of a document and non-privileged material was contained in another, protection of the confidentiality of the privileged part of the document would not, as the Act itself recognizes (see, e.g., ss. 22, 33(3), 33A(3), 34(3), 35(3), 36(4), 58(2), 64(2) and (4)), ordinarily require that that part which was not covered by privilege should also be immune from production: see, e.g.,* Ainsworth v Wilding *[1900] 2 CL 315 at p.325;* Great Atlantic Insurance Co v Home Insurance Co *[1981] 2 All ER 485 at pp.488-489;* Brambles Holdings Ltd v Trade Practices Commission [No. 3] *(1981) 58 FLR 452 at pp.459, 462. If it were not possible to classify the contents of the document into distinct parts, it would be necessary to determine whether the contents as a whole were outside the protection of legal professional privilege for the reason that notwithstanding the professional legal advice, they did not satisfy what has conveniently, if somewhat loosely, been referred to as "the sole purpose" test: see* Grant v. Downs *(1976) 135 CLR 674 at p.688. That test looks to the purpose for which the contents of a document were brought into existence.*
> *To adapt the words of Stephen, Mason and Murphy JJ. in* Grant v. Downs*, a document (or a severable part of a document) will not be protected by legal professional privilege if it "would have been brought into existence ... in any event" for purposes other than that which attracts legal professional privilege ... Applying that test to the circumstances of the present case, a document containing general policy advice from the "freedom of information" section of the Attorney-General's Department would not* prima facie *enjoy the protection of legal professional privilege if the moving purpose underlying its preparation had been to convey advice about the observance and application of general government policy proffered by the section of the Department responsible for the general administration of the Act. For the document to be protected, the cause of its existence, in the sense of both* causans *and* sine qua non*, must be the seeking or provision of professional legal advice. That is not, of course, to say that every statement in a letter from a professional legal adviser must be scrutinized to see whether it contains other than legal advice. Ordinarily, a letter from a professional legal adviser will be written only in his character as such and only for the purpose of furnishing professional legal advice. The cases where such scrutiny will ordinarily be necessary are cases like the present where a letter is or may be written in one or both of two capacities: e.g., a letter written to the secretary of a company by a person who is both a director of the company and the company's solicitor.*

The material before the Tribunal indicated that the Department of the Treasury had made no effective attempt, at least in the case of some of the disputed documents, to sever privileged legal professional advice from any non-privileged advice about government policy in relation to the administration of the Act. It also indicated that the Department had made no attempt to determine whether a particular document satisfied the requirements of the "sole purpose" test. ...

...

... Since the material before the Tribunal indicated that some of the disputed documents contained or recorded policy advice not proffered in the capacity of the Treasury's professional legal adviser at all, it was incumbent upon the Department to satisfy the Tribunal that legal professional privilege somehow extended to protect the confidentiality of that part of the contents. The Department might have discharged that onus by satisfying the Tribunal that it was not practicable to sever and disclose what constituted advice or directions about general government policy without disclosing the content of professional legal advice contained in the document and that the purpose, in the sense discussed above, for which the document had been brought into existence was to be found in the provision of the legal professional advice. ...

105. Dawson J adopted a similar approach, and reached the same conclusions, as Deane J on the application of the 'sole purpose' test, but with a noteworthy qualification on the issue of severance (at p.103):

It was submitted that if a document containing or recording legal advice also included policy advice it could not survive the sole purpose test laid down in Grant v. Downs *and should have been produced. But* Grant v. Downs *was a decision in which this Court refused to extend legal professional privilege to material obtained by a corporation from its agents for more than one purpose, only one of which was the purpose of submission to its legal advisers in order to obtain legal advice. Documents of that kind are not privileged because the communications or intended communications which they contain belong in a category which does not attract privilege, albeit they also belong in a category which does. Legal advice given by a qualified legal adviser in his professional capacity to his client falls only within the category of a communication which is privileged. Legal advice serves no other function than legal advice. No doubt if the legal advice is accompanied by advice of another kind which can be separated from it, e.g., by blanking out parts in a document, then only the legal advice will be privileged. But if the legal advice contains extraneous matter which cannot be separated from it, the legal advice will not lose its privilege for that reason. There is only one purpose in legal advice and the privilege which it attracts cannot be lost by the application of the principle which applies when a document containing information of a factual nature is brought into existence for more than one purpose.*

The Tribunal was of the view that the advice of the Attorney-General or his Department may have contained advice other than legal advice but it failed to consider whether the legal advice could be separated from the other advice. In so doing it fell, in my view, into error.

106. I consider Dawson J's observation distinguishing legal advice from other kinds of matter which might, subject to the application of the 'sole purpose' test, attract legal professional privilege, to be significant on the issue of severance. Dawson J accepted that severance is appropriate for matter contained in a document that was created for dual or multiple purposes (at least one of which was not a privileged purpose) if the matter can be properly characterised as legal advice given by a qualified legal adviser in his/her professional capacity to his/her client. However, the passage above suggests that Dawson J would deny severance, and hence privilege, to other kinds of matter that might attract legal professional privilege if it were contained in a document the sole purpose for the creation of which was a privileged purpose (eg, obtaining information for use in anticipated litigation), whenever it is the case that the matter is in fact contained in a document that was created for dual or multiple purposes (at least one of which was not a privileged purpose). I think it is clear enough from the opening segments of the extract from Deane J's judgment which is reproduced at paragraph 104 above, that Deane J was confining his remarks about severance of distinct parts of a document, to distinct parts comprised of professional legal advice. However, to the extent that Deane J's references to severability of distinct parts of privileged material might be taken to incorporate reference to privileged material other than professional legal advice (eg, instructions for the purpose of seeking legal advice, communications for the purpose of obtaining information for use in litigation), it appears that Dawson J would not endorse such an extension.

107. In any event, according to the test which formed part of the *ratio decidendi* of the judgments pursuant to which both Deane J and Dawson J would have upheld Mr Waterford's appeal, the matter in issue identified in paragraph 94 above would be properly characterised as distinct segments of legal advice given to her client by a qualified legal adviser acting in her professional capacity, which advice should appropriately be severed from non-privileged material in the documents in which it appears, and should, in its severed form, retain the protection of legal professional privilege. Hence, it would qualify for exemption under s.43(1) of the FOI Act.

Approach of the majority judges in *Waterford*

108. Two of the majority judges, Mason and Wilson JJ, stated (at pp.66-67) a different test on their way to reaching the opposite conclusion to Deane J and Dawson J on the application of the 'sole purpose' test:

> *The questions raised under this head of the argument are not without difficulty. The fact that the Attorney-General was also the Minister administering the Act might create difficulty in a particular case in determining the purpose or purposes attaching to a document. Matters of policy and legal advice may be intermingled in the one document as appears to be the case with document numbered 29, which was made available to the appellant prior to the hearing of his appeal to the Federal Court. However, we do not think that the allegation of error of law by the Tribunal can be sustained. The appellant's submission fails to appreciate that the sole purpose test is a test that looks to the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice in relation to a matter, then the fact that it contains extraneous matter will not deny to it the protection of the privilege. The presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact to be determined by the Tribunal and its decision on such a question is final.*

109. The test stated by Mason and Wilson JJ in the above passage, when applied to the matter in issue identified in paragraph 94 above, produces the opposite result to that which would be obtained under the principles stated by Deane J and Dawson J. It is clear from the admission made by the QLS (see paragraph 90 above), and from my own examination of the documents in issue, that none of the memoranda prepared by Ms Dreghorn for the assistance of the PSC (which are identified in paragraph 8 above) was brought into existence for the sole purpose of seeking or giving legal advice, nor for the sole purpose of use in connection with pending or anticipated legal proceedings. Mason and Wilson JJ treated the 'sole purpose' test as stated in *Grant v Downs* (a case in which the documents in issue did not include professional legal advice given by a lawyer to a client) as the proper test to apply to a document which contained professional legal advice intermingled with other matter. The consequences of focussing on whether the sole purpose for the creation of such a document was a privileged purpose are -

(a) if the 'sole purpose' test is satisfied, the other matter in the document, as well as the professional legal advice, attracts legal professional privilege (though Mason and Wilson JJ clearly acknowledged that, at least in the context of an FOI statute containing specific provisions for severance, the other matter could then be severed and disclosed: see paragraph 113 below); or

(b) if the 'sole purpose' test is not satisfied, neither the professional legal advice, nor the other matter contained in the document, attracts legal professional privilege.

110. By way of contrast, according to the approach favoured by Dawson J and Deane J, one looks first to whether a distinct segment of professional legal advice can be severed, and accorded privilege, while the balance of the document is disclosed. (According to Deane J at p.85, if it were not possible to classify the contents of the document into distinct parts, it would then be necessary to apply the 'sole purpose' test by reference to the purposes for the creation of the document as a whole.)

111. The third judge comprising the majority, Brennan J, saw the resolution of Mr Waterford's contentions on the application of the 'sole purpose' test as turning on the fact that the right of appeal from a decision of the AAT lay only on a question of law. In this, Brennan J can be seen as supporting the statement by Mason and Wilson JJ that "The presence of matter other than legal advice may raise a question as to the purpose [a document] was brought into existence but that is simply a question of fact to be determined by the Tribunal and its decision on such a question is final ...", and thereby providing a *ratio decidendi* for the decision of the majority to dismiss the ground of Mr Waterford's appeal which alleged an error of law in the application of the 'sole purpose' test. Brennan J said (at pp.77-78):

> *The error of law which an appellant must rely on to succeed must arise on the facts as the AAT found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make. There is no error of law in simply making a wrong finding of fact.*
> *Therefore an appellant cannot supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact. As the purpose for which a document is brought into existence is a question of fact (per Jacobs J in* Grant v Downs*), the contents of document 29 are immaterial to the question whether the AAT has made an error of law on the material before it.*

112. Brief as it is, Brennan J's reference to the purpose for which a document is brought into existence being a question of fact (citing *Grant v Downs*), must, in my view, be read as support for the test adopted by Mason and Wilson JJ which focuses on whether a document was created solely for a purpose which attracts legal professional privilege. Any doubt in that regard would, in my opinion, be dispelled by reference to Brennan CJ's judgment in the *Propend Finance* case, where his Honour made clear his understanding of the 'sole purpose' test (at p.330):

> *... since* Grant v Downs*, the protection of legal professional privilege has been confined to documents that have been brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. ... The test is anchored to the purpose for which the document was brought into existence ... .*

Can the approach of the dissenting judges in *Waterford* on the issue of severance of legal advice be reconciled with the majority judgments in *Waterford*?

113. Immediately following the passage quoted at paragraph 108 above, Mason and Wilson JJ added some comments which have been regarded in some quarters as adding a significant qualification to the test stated in the passage quoted at paragraph 108 above (which test necessarily has the consequence that, if a document containing matter other than legal advice was not brought into existence solely for a privileged purpose, the document does not attract legal professional privilege):

> *It may also be appropriate in a particular case for the Tribunal to require those parts of the document which do not bear the necessary relation to legal advice to be disclosed. The doctrine of legal professional privilege allows room for questions of fact and degree such as these to fall for decision.*
> *Moreover, the* [Commonwealth FOI Act] *contemplates that where an exempt document contains material which, standing alone, would not render the document exempt, the agency or Minister should, if it is reasonably practicable to do so, delete the privileged material and grant access to the remainder: s.22.*

114. It is necessary for me to consider whether this passage assists the case made by the QLS that severable parts of Ms Dreghorn's memoranda are entitled to legal professional privilege. In *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419, Smith J made it clear that he saw the passage quoted immediately above as containing no significant general qualification to the test stated in the passage quoted at paragraph 108 above. Smith J said (p.430):

> *High Court authority does not in my view support the proposition relied on by Hongkong Bank that privilege can attach to part of a document. The propositions advanced by the High Court advert to the whole document in question and the purpose of its creation. Severance was considered in* Waterford's *case by Mason and Wilson JJ at p.66 and Dawson J at p.103 but this occurred in the context of the* Freedom of Information Act 1982 *Cth which expressly provided for severance of passages that gave rise to claims of privilege for a document. Deane J asserted that the common law permitted severance of a distinct part of a document that contained otherwise privileged material (at p.85) but this was not consistent, in my view, with the views expressed by other members of the court or earlier High Court decisions.*

115. However, in *Grofam Pty Ltd v Australian and New Zealand Banking Group Ltd* (1993) 116 ALR 535, Heerey J of the Federal Court of Australia expressly disagreed with Smith J's reading of *Waterford's* case on this issue, and found support in the passage quoted at paragraph 113 above for his view that Australian law with respect to legal professional privilege permits severance, and the application of legal professional privilege to part of a document. (I note that Heerey J's decision in *Grofam* was cited and applied, on an issue of severance of privileged material, by Moore J in *Alphapharm v Eli Lilly Australia*, at p.159, but with no analysis of supporting principles.) Heerey J quoted the passage set out at paragraph 114 above, and observed that Smith J had not been referred to the decision of the Full Court of the Supreme Court of Queensland in *Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd* [1987] 2 Qd R 335, which came to the conclusion that there is no rule of law that objection cannot be taken to production of part of a document on the ground of legal professional privilege. In respect of the passage from the judgment of Mason and Wilson JJ in *Waterford's* case that is quoted at paragraph 113 above, Heerey J said:

> *... The* [first] *sentence makes it clear that their Honours are contemplating production of part only of a document and withholding another part which is subject to legal professional privilege. It is true that the FOI Act contains a number of specific provisions for exemption from disclosure of parts of documents ... . However, in using "Moreover" to commence the last sentence of the passage, their Honours show they are treating those statutory provisions as something additional to the common law to which they have been referring in the previous two sentences. They are saying that severance is permitted by "the doctrine of legal professional privilege" and also that the* [Commonwealth FOI Act] *itself makes similar provisions. But in the view they took it was not necessary to consider severance. ("Severance" is a convenient description of the concept of withholding part of a document from production. However, physical separation or mutilation of the document are not comprehended: see* Curlex *at 338.) The other member of the majority, Brennan J, did not advert to the issue.*
>
> *The matter is more explicitly dealt with in the dissenting judgment of Deane J...* [Heerey J then quoted the first two sentences of the second paragraph of the passage from Deane J's judgment which is reproduced at paragraph 104 above.] ...
>
> *Again, when his Honour speaks of "the Act itself recognising" the concept of severance it is plain that there must be something in the common law already existing for the Act to recognise. None of the authorities cited by his Honour were concerned with FOI. To my mind, neither this passage nor that from the judgment of Mason and Wilson JJ already referred to provide any support for the proposition that the FOI Act made a provision for severance which the common law did not.*

116. I am attracted to Heerey J's conclusion, since I consider that the principle stated by Dawson J in the passage quoted at paragraph 105 adds a sensible qualification to the 'sole purpose' test stated in *Grant v Downs* (see paragraphs 127-128 below). However, I find myself unable to accept that Heerey J's reading of the passages from the judgment of Mason and Wilson JJ in *Waterford's* case that are quoted at paragraphs 108 and 113 above, is a logical and correct reading of those passages. In my view, those passages are logically to be read as meaning that once the application of the 'sole purpose' test, as stated by Mason and Wilson JJ, has produced the result that a document containing legal advice, as well as other matter, attracts legal professional privilege, the Tribunal could, if appropriate in a particular case, require disclosure of the parts of

the document which do not bear the necessary relation to legal advice. However, once the application of the 'sole purpose' test stated by Mason and Wilson JJ has produced the result that such a document does not attract legal professional privilege, there is no privileged material that might be severed. I do not think that the second sentence of the passage quoted at paragraph 113 above can be taken as some general indication that the doctrine of legal professional privilege is flexible enough to support the materially different approach adopted by Deane J and Dawson J.

117. Heerey J placed considerable reliance on the *Curlex* case. I do not think I am entitled to prefer a decision of the Full Court of the Supreme Court of Queensland to a majority decision of the High Court of Australia (especially where the former was decided earlier than the latter), but in any event it is possible to read the former in a way that is not inconsistent with the latter. The document in issue in *Curlex* was a draft report prepared by accountants for an insurer's solicitors, assessing the value of a plaintiff's insurance claim for loss of income and profits from the plaintiff's business after a fire. That is a document of a kind that would ordinarily attract legal professional privilege, being prepared for the sole purpose of submission to legal advisers for use in pending litigation. Parts of the draft report (pages 1 to 5 and a draft schedule) were disclosed in Part 1, Schedule 1, to the defendant's affidavit of documents for discovery, while in Part 2 of the same Schedule, objection to production was taken in respect of another part of the draft report (pages 6-11). It is clear from p.336 of the judgment that the plaintiff conceded that the accountant's report, or pages 6-11 of it, was entitled to the benefit of legal professional privilege, subject to the issue of whether, by disclosing the report in Part 1 of Schedule 1, the defendant had waived its right to claim privilege in respect of the whole of the document. Thus, the Full Court was not called upon to determine the anterior question, which the Court was addressing in *Waterford's* case, of whether the document in issue attracted legal professional privilege, according to the application of the 'sole purpose' test. Once it is established that a document attracts privilege, the privilege holder may waive privilege, and indeed must do so, sooner or later, if it is desired to make use of the privileged material in a court hearing. There is clear authority that a waiver of privilege may be confined to all parts of a privileged communication on a particular subject matter, while privilege is maintained for communications on separate and distinct subject matters appearing in the same document: see the *Great Atlantic Insurance* case, which was cited with approval in *Maurice* by Gibbs CJ at p.482, by Mason and Brennan JJ at p.488, and by Dawson J at p.497. I regard *Curlex* as a case dealing with issues as to waiver of privilege, against a background of practices and procedures then applicable to the process of discovery of documents in litigation in Queensland courts. It has no necessary inconsistency with the approach of the majority of the High Court in *Waterford's* case to the determination of whether a document attracts legal professional privilege in the first place.

118. Heerey J referred to certain cases cited by Deane J in *Waterford's* case as affording support for the proposition that the common law with respect to legal professional privilege recognises a concept of severance. Those cases did recognise or employ severance, but not in the context of applying the 'sole purpose' test to determine whether a document attracts legal professional privilege in the first place. Of the two more recent cases referred to by Deane J, *Great Atlantic Insurance* was a case dealing with waiver by imputation, where counsel read part of a privileged document to the court at the outset of a hearing. The Court held that the disclosure warranted a finding of waiver by imputation of the privilege attaching to the whole document, which dealt with a single subject, but indicated that if the document

had dealt with separate and distinct subject matters, it would have found that privilege had been waived only in respect of the entire contents of the particular subject matter from which part of the privileged communication had been disclosed.

119. The other comparatively recent case referred to by Deane J in *Waterford's* case was *Brambles Holdings Ltd v Trade Practices Commission (No. 3)* (1981) 58 FLR 452, in which Franki J of the Federal Court of Australia said (at pp.458-459 and p.462):

> [The disputed claim of legal professional privilege] *is not limited to an internal memorandum merely setting out legal advice which has been obtained and which would be the subject of legal professional privilege if it was a record of a communication of advice from a legal adviser in the litigation.* [The disputed claim of legal professional privilege] *in its terms is applicable to an internal memorandum setting out legal advice together with comment on that advice by other persons in the Commission. In such a case that part of the memorandum which set out the legal advice would be privileged but not that part which set out the comment on the advice. I agree with the unreported views in this regard of Rath J in* Komacha v Orange City Council [Supreme Court of New South Wales, Rath J, 30 August 1979, unreported]:
>
>> The privilege attaching to a document will be accorded to copies made of it, provided confidentiality is maintained. If for example counsel's advice is circulated among officers of a corporation obtaining the advice, then privilege is preserved, whether the circulation is of the original or of copies. If in such a case an officer of the corporation were to report to another officer setting out portions of the advice, privilege would attach to the report in respect of those portions. The problem arises where the reporting officer makes recommendations that relate to the advice received.
>> The recommendations seem to me to be an activity of the corporation, and not a transmission of the advice from one officer of the corporation to another. This will be especially so where the recommendations are not simply based on the advice received, but are made upon a critical appreciation of the advice received and the situation in which the client finds itself.
>>
>> I think that a distinction should be drawn between the circulation in a corporation of advice received from legal advisers, and recommendations made by officers of the corporation as to the action to be taken, having regard to that advice. The recommendations are corporate action, and are not privileged, whether they follow the advice or disregard it. If the recommendations are found in a report which sets out the advice (or part of it) verbatim or in substance then I think that the privilege remains attached to that part of the report so setting out the advice. But if the officer making the recommendations is in substance tendering his own advice, then (if at all events he is not himself a professional legal adviser) his advice is not privileged.
>
> ...

> *My decision in relation to any document which I have held not to be privileged is subject to the qualification that any part of any such document which does no more than reproduce legal advice obtained in relation to the proceedings need not be made available for inspection.*

120. The decisions of both Franki J and Rath J proceeded on the basis that a corporation had obtained legal advice which attracted legal professional privilege. I have always regarded their decisions as establishing a separate principle (or at least a necessary exception for preserving the efficacy of the doctrine of legal professional privilege) to the effect that a body corporate must be permitted to inform its servants or agents (who are responsible for taking some action in connection with, or to comply with, privileged legal advice which the body corporate has obtained) of the contents, or the substance, of privileged legal advice which the body corporate has obtained, without losing the benefit of the privilege. (In my view, that principle would have afforded a proper basis for finding, in *Grofam*, that privilege attached to the AFP "running sheets" which recorded privileged legal advice, obtained in relation to an ongoing investigation, for reference and use by officers engaged in the investigation.) Such communications would frequently not even fall within the realm of communications that might attract legal professional privilege, even if the 'sole purpose' test were satisfied - they are not communications between a client and its legal adviser (though, in some circumstances, communications between servants or agents of the client made for the sole purpose of obtaining material for submission to the client's legal advisers may attract privilege). The principle might well be better characterised as an illustration of the principles of limited waiver of legal professional privilege (see paragraph 19 above), but it is clear that both Franki J and Rath J were prepared to allow severance of privileged legal advice from other communications contained in a document circulated by a corporation to its servants or agents. Arguably, the decisions of Franki J and Rath J are distinguishable from the majority decision in *Waterford's* case, because the former permitted severance of legal advice which had already satisfied the 'sole purpose' test to attract legal professional privilege, whereas the latter was concerned with whether a document containing legal advice attracted legal professional privilege in the first place. (However, the justification for maintaining privilege in respect of a severable segment of privileged legal advice in a document created after the legal advice was obtained, is difficult to reconcile with the justification for denying privilege to a severable segment of legal advice contained in a document created to communicate that legal advice to a client, but for other purposes as well. To my mind, that difficulty underscores the logic of the qualification to the 'sole purpose' test which Dawson J considered necessary, in the passage from his dissenting judgment in *Waterford's* case which is quoted at paragraph 105 above.)

121. The point of the foregoing discussion is that I am unable to find support in the passage quoted at paragraph 113 above, nor elsewhere in the judgment of Mason and Wilson JJ in *Waterford's* case, for the approach of Deane J and Dawson J which would have permitted severance of professional legal advice from a document which, considered as a whole, did not satisfy the 'sole purpose' test to attract legal professional privilege.

122. At paragraph 102 above, I indicated that Mason and Wilson JJ disagreed with Deane J and Dawson J on the proper characterisation of document 29 and other disputed documents.
Mason and Wilson JJ considered (at pp.67-68) that those documents would satisfy the test of having been brought into existence for the sole purpose of enabling a confidential professional communication between a client and his legal adviser in connection with pending legal proceedings, and observed that in such a case it is not to the point that the document may contain advice which relates to matters of policy as well as of law. On the other hand,

Deane J (at p.84 and p.91) and Dawson J (at pp.103-104) considered and rejected the proposition that the disputed documents qualified for 'litigation privilege' as distinct from 'advice privilege'. (Brennan J expressed no view on that issue.)

123. It is arguable that by using the words "the point of overriding importance to the appellant's argument focuses on the second category of documents to which the privilege attaches, that is to say, professional communications between a client and his legal adviser *in connexion with legal proceedings*" (my underlining), Mason and Wilson JJ intended to indicate that the real basis of their decision on the application of the 'sole purpose' test was that the disputed documents qualified for 'litigation privilege'. The argument could then be made that the observations by Mason and Wilson JJ on the application of 'advice privilege' to documents in which legal advice is intermingled with policy advice (or other "extraneous matter") were merely *obiter dicta*, and that courts and tribunals are entitled to assess whether the principles stated by Deane J and Dawson J, in judgments which rested on the application of 'advice privilege' to documents in which legal advice is intermingled with policy advice or other matter, are logically preferable to the *obiter dicta* of Mason and Wilson JJ.

124. However, I do not consider that the statements made by Mason and Wilson JJ on the application of 'advice privilege' to documents in which legal advice is intermingled with policy advice (or other "extraneous matter") can be properly construed as *obiter dicta*. Mason and Wilson JJ proceeded on the basis that they were applying a statement of principle established by *Grant v Downs* (1976) 135 CLR 674 at p.688. Both Deane J (at p.85) and Dawson J (at p.103) were conscious of the fact that they were stating an adaptation or qualification of the statement of principle in *Grant v Downs*. I consider that Mason and Wilson JJ proceeded on the basis that the statement of principle from *Grant v Downs* did not require any adaptation or qualification to meet the case of a document in which legal advice was intermingled with policy advice or other "extraneous matter". Brennan J's reasoning (at p.78) also makes clear that he regarded the applicable test as that stated in *Grant v Downs*.
I consider that at least part of the *ratio decidendi* of the majority judges is embodied in these sentences (from Mason and Wilson JJ at p.66):

> *The appellant's submission fails to appreciate that the sole purpose test is a test that looks to the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice in relation to a matter, then the fact that it contains extraneous matter will not deny to it the protection of privilege. The presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact to be determined by the Tribunal and its decision on such a question is final.*

125. In several judgments in the High Court's most recent consideration of aspects of legal professional privilege, the *Propend Finance* case, there is a renewed emphasis on the fact that legal professional privilege attaches to communications, as distinct from documents. For example, Gummow J said (at pp.365-366): "... the subject of the privilege is communications made solely for a particular purpose. ... These communications may be oral, written or a combination thereof. ... In a number of the authorities, the reasoning proceeds from the false premise that what is involved is privilege for particular documents rather than for communications." I have considered whether this development lends sufficient support for preferring the views of Deane J and Dawson J on severance of legal advice from a document which, considered as a whole, would not satisfy the 'sole purpose' test; however, I do not think it does, since none of the judges in *Propend Finance* specifically adverted to issues concerning severance.

Conclusion on the application of the 'sole purpose' test

126. I therefore consider that the ruling statement of principle from *Waterford's* case is that which is set out at paragraph 108 above, and which has the consequences I have stated at paragraph 109 above. I consider that I am bound, in the case before me, to apply the 'sole purpose' test as stated by Mason and Wilson JJ in *Waterford's* case, i.e., by reference to whether the memoranda by Ms Dreghorn to the PSC were created solely for a purpose which attracts legal professional privilege, rather than by reference to whether the parts of those memoranda identified in paragraph 94 above were created solely for a purpose which attracts legal professional privilege. (That was also the conclusion reached, correctly in my view, by Mr P Bayne (Senior Member) of the AAT in *Re Sullivan* (cited above at paragraph 28) at pp.26-27 (paragraphs 65-68). Similarly, in *Clements v Grayland Hospital and Anor* (Sup Ct of WA, No. SJA 1198 of 1996, Owen J, 4 April 1996, unreported), a case on the application of the exemption provision in the *Freedom of Information Act 1992* WA which corresponds to s.43(1) of the Queensland FOI Act, Owen J applied the test stated by Mason and Wilson JJ in finding that a letter containing legal advice was created solely for a purpose which attracted legal professional privilege, notwithstanding that it also included reference to policy matters.)

127. If I considered that it was open to me to prefer the approach taken by Dawson J in *Waterford's* case at p.103 (quoted at paragraph 105 above), I would do so. In general, I consider that the public policy considerations which support the existence of legal professional privilege as a substantive principle of Australian common law would be better served if a discrete portion of confidential professional legal advice was able to be severed from a document that was not brought into existence solely for a purpose which attracts legal professional privilege, with the severed portion retaining the protection of privilege. The semantics of the test adopted in *Grant v Downs*, and by Mason and Wilson JJ in *Waterford*, seem, in my opinion, to put undue emphasis on the sole purpose of creation of a document, rather than the sole purpose for the making of a particular communication. Legal professional privilege may attach to oral communications as well as communications embodied in documents. If a solicitor were to telephone a client, and in the course of the conversation were to gently prod the client about non-payment of an outstanding bill for a completed matter, and then go on to provide professional legal advice in respect of a current matter, I do not think it could be seriously suggested that the conveying of legal advice did not qualify for legal professional privilege because it occurred as part of a communication that was not made for the sole purpose of giving legal advice. If the conversation conveying legal advice should properly be treated as a separate communication capable of satisfying the sole purpose test to attract legal professional privilege, it is difficult to see any reason, in principle, why a discrete communication of legal advice, contained in a document, could not be severed and attract the protection of legal professional privilege, as Dawson J opined in *Waterford* at p.103.

128. Moreover, the approach of Dawson J and Deane J sits more easily with the scheme of the Queensland FOI Act. The exemption provisions in the Commonwealth FOI Act require consideration of the whole document in issue to determine whether it is an exempt document, with s.22 then requiring that attention be given to the possibility of severance. The term "exempt matter" is defined in s.4 of the Commonwealth FOI Act to mean "matter the inclusion of which in a document causes the document to be an exempt document". In contrast, the Queensland FOI Act contemplates that documents may be comprised either totally or partly of exempt matter, and the exemption provisions of the Queensland FOI Act

require an evaluation of the "matter in issue", rather than of a document in issue, so that attention is directed from the outset to the possibility of severance in accordance with s.32 of the Queensland FOI Act.

129. However, under the test applied by the majority judges in *Waterford's* case, the question of whether the matter in issue identified in paragraph 94 attracts legal professional privilege depends on whether the documents in which the matter in issue is contained, were brought into existence solely for a purpose which attracts legal professional privilege. As I have explained at paragraph 109 above, they were not, and hence I find that the matter in issue identified in paragraph 94 above does not qualify for exemption under s.43(1) of the FOI Act.

Application of s.41(1) of the FOI Act

130. Both the matter listed at paragraph 93 above, and the matter listed at paragraph 94 above, have been claimed by the QLS to be exempt matter under s.41(1) of the FOI Act. Section 41(1) and s.41(2) of the FOI Act provide:

> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it merely consists of—*
>
> *(a) matter that appears in an agency's policy document; or*
>
> *(b) factual or statistical matter; or*
>
> *(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.*

131. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22), I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*

(b) would disclosure, on balance, be contrary to the public interest?

22. The fact that a document falls within s.41(1)(a) (i.e., that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...

132. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (1996) 3 QAR 206, I said (at p.218, paragraph 34):

> *The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity when weighed against competing public interest considerations which favour disclosure of the matter in issue, that it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

133. Under s.41(2)(b) of the FOI Act, matter is not exempt under s.41(1) if it merely consists of factual or statistical matter: see *Re Eccleston* at p.71, paragraphs 31-32. Applying the principles referred to there, and explained more fully in *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at pp.144-147 (paragraphs 49-58), I find that the following segments of the matter claimed to be exempt under s.41(1) comprise merely factual matter which is not eligible for exemption under s.41(1) of the FOI Act, by virtue of s.41(2)(b):

(a) in the memorandum dated 18 January 1994 by Ms Dreghorn to the PSC - the first sixteen words in the first paragraph, and the first sentence of the second paragraph, below the heading "Conclusion:" on p.3; and

(b) in the memorandum dated 13 April 1995 by Ms Dreghorn to the PSC - the last paragraph on p.3.

134. I am satisfied that the balance of the matter claimed to be exempt under s.41(1) is deliberative process matter falling within the terms of s.41(1)(a) of the FOI Act (as to the meaning of the term "deliberative processes", see *Re Eccleston* at pp.70-71, paragraphs 27-30). The relevant deliberative process is that undertaken by the PSC for the purpose of deciding what action, if any, to take in respect of the complaints lodged with the QLS by Sir Lenox Hewitt. Whether the balance of the matter claimed to be exempt under s.41(1) does qualify for exemption depends on whether its disclosure would be contrary to the public interest, in terms of s.41(1)(b).

135. The QLS briefly addressed that issue in its submissions dated 11 January 1996, 6 March 1996, and 7 November 1997, respectively, as follows:

- *... in the Society's view, release* [of the deliberative process matter] *would be contrary to the public interest, insofar as it would tend to prejudice the*

effectiveness of the Society's regulatory function in protecting the public from unprofessional conduct and professional misconduct.

- *The Society ... remains firmly of the belief that as a matter of general principle it is fundamental to its investigative, disciplinary and prosecution functions that it be able to rely upon opinions and advice that have been prepared in the course of the deliberative process by its legal officers, without such advice or opinion being capable of release beyond those persons authorised access pursuant to the Queensland Law Society Act.*

  It is essential in considering this claim for exemption to consider the seriousness of the work carried out by the Society in investigating the conduct of its members and pursuing prosecutions. The Society must be able to rely upon complete and candid advice from its in-house lawyers and it is a common sense conclusion that should such advice be susceptible to access under FOI then the quality and candour of such advice could very well be affected.

- *... the Society notes and relies on the comment of the New South Wales Law Reform Commission in its report on the scrutiny of the legal profession* - Complaints Against Lawyers *(Report 70, page 232) as follows:-*

  > There is a strong public interest in ensuring that the investigation of complaints against lawyers is conducted in a thorough and active manner, and that lawyers are under an obligation to be candid with disciplinary authorities. Confidentiality is an essential part of any investigative procedure, whilst subsequent proceedings should, to the greatest extent possible, be subject to the principles of open justice.

  The New South Wales Law Reform Commission recommended that the investigation of complaints against legal practitioners be excluded from the Freedom of Information Act. *Of course, whilst that is not the case here, the comments made by the Commission above are relevant to the public interest arguments against disclosure of the memoranda.*

136. The contentions put by the QLS are similar, in essence, to those which it put, and which I rejected, in *Re Myles Thompson and Queensland Law Society Inc* (Information Commissioner Qld, Decision No. 97003, 28 February 1997, unreported) at paragraphs 13-14. At paragraph 14, I said:

> *14. The above submission by the Law Society appears to be putting a very broad claim, tantamount to a 'class claim', for exemption on public interest grounds of any material arising out of investigations conducted by the Law Society into allegations of malpractice, professional misconduct or unprofessional conduct, because of the inherent sensitivity of the material. That is not an acceptable approach to the application of s.41(1) of the FOI Act (see* Re Eccleston *at p.97, paragraph 192, and at p.111, paragraph 149): a 'class claim' will not be accepted, rather the apprehended consequences of disclosure of the particular matter in issue must be evaluated in each case.*

137. The QLS has submitted no material which specifically addresses the apprehended adverse consequences of disclosure of the particular matter in issue. The QLS has emphasised the seriousness of the work which it carries out in investigating the conduct of its members and pursuing prosecutions. However, I do not consider the work of the QLS in that regard to be any more significant than the work undertaken by other law enforcement/regulatory agencies for the benefit and protection of the public, and I have adopted a consistent approach to the application of s.41(1) to deliberative process documents of such agencies: see, for example, *Re Criminal Justice Commission and Director of Public Prosecutions* (Information Commissioner Qld, Decision No. 96012, 28 June 1996, unreported) at paragraphs 24-44, and *Re McCann and Queensland Police Service* (Information Commissioner Qld, Decision No. 97010, 10 July 1997, unreported) at paragraph 103.

138. The QLS has also attempted to rely upon a 'candour and frankness' argument of the kind in respect of which I made the following comments in *Re Eccleston* at pp.106-107 (paragraphs 132-134):

> *132 I consider that the approach which should be adopted in Queensland to claims for exemption under s.41 based on the third* Howard *criterion (i.e. that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind) should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second* Fewster *case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.*
>
> *133 I respectfully agree with the opinion expressed by Mason J in* Sankey v Whitlam *that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.*
>
> *134 Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.*

139. Similarly, in the present case, I am not satisfied on the material before me that the substance or quality of advice prepared by staff employed in the Professional Standards Department of the QLS, for the assistance of the PSC, would be materially altered for the worse, by the threat of disclosure under the FOI Act (in that regard, see my comments at paragraph 152 below).

140. Although not specifically raised by the QLS, it is arguable that, since the matter identified in paragraph 94 above would attract legal professional privilege if contained in a document created solely for the purpose of giving legal advice, I should have regard to the public interest considerations which underlie the doctrine of legal professional privilege, in finding that disclosure of that matter would, on balance, be contrary to the public interest. I referred at paragraph 68 above to those public interest considerations underpinning the doctrine of legal professional privilege which seem most apposite for present purposes.

141. When a valid claim of legal professional privilege is made in legal proceedings, no balancing exercise with respect to competing public interest considerations can defeat it. It is a rule of law which is itself the product of a balancing exercise between competing public interests: per Mason and Wilson JJ in *Waterford* at pp.64-65. However, in the context of legal proceedings, the only competing public interest consideration weighing against the paramountcy of legal professional privilege is the "public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence" (per Mason and Wilson JJ in *Waterford* at p.65).
If, in the very different context of the application of the FOI Act, reliance is sought to be placed on the public interest considerations which underpin legal professional privilege (because for technical reasons, the privilege itself cannot be made out), then, as I explained in *Re Eccleston* at p.101 (paragraphs 116-117), a much wider array of competing public interest considerations telling in favour of disclosure are liable to become relevant (including those related to open and accountable government, which are given recognition in s.5 of the FOI Act).

142. Moreover, several judgments of the High Court have warned of the importance of confining legal professional privilege within its proper limits, including the limits imposed by the 'sole purpose' test (which, as I have already found, the matter in issue does not satisfy): see *Grant v Downs* at p.685, *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 at p.147, pp.150-154, and the *Propend Finance* case at p.563 where Toohey J quoted Wigmore's statement that:

> [Legal professional privilege] *is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.*

143. While I am mindful of the considerations referred to in paragraph 68 above, I am not satisfied that disclosure of the particular matter in issue identified in paragraph 94 above, or indeed the matter in issue identified in paragraph 93 above, would be contrary to the public interest in the efficient and effective performance of the QLS's regulatory functions. The disclosure of that matter to Sir Lenox Hewitt (who, as I explained at paragraphs 69-74 above, has a proper interest in obtaining a satisfactory explanation of the reasons for the PSC's decision to take no formal action in respect of his complaints) would disclose the legal and factual issues that the QLS's investigator considered relevant to the distinction (which must be perplexing to non-lawyers) between unprofessional conduct and mere negligence, and the considerations which bear on the issue of whether disciplinary action against a solicitor is necessary to protect the public interest. The matter in issue from Ms Dreghorn's memorandum dated 8 July 1996 would disclose her assessment of the issues and options for consideration by the PSC prior to the meeting which finally disposed of the

complaints lodged by Sir Lenox Hewitt. The disclosure to a complainant, after the completion of investigations into the complaint, of material that would assist the complainant to understand the nature of the issues involved in, and the reasons for, a decision to take no formal action on the complaint, would not, in my opinion, prejudice the public interest in the efficient and effective performance of the relevant regulatory functions of the QLS.

144. The public interest in the accountability of the QLS for the discharge of its regulatory functions for the benefit and protection of the public, in my view, carries considerable weight in favour of disclosure of the matter in issue that has been claimed to be exempt under s.41(1) of the FOI Act. The need for accountability is more acute in the case of a complainant dissatisfied with a decision to take no formal action in respect of his complaint, and who has not been given a satisfactory explanation of the reasons for that decision. Sir Lenox Hewitt's involvement in, and concern with, the particular matter in issue is, in my opinion, of such a nature that it is capable of being taken into account as a public interest consideration favouring disclosure of the matter in issue, when applying the public interest balancing test in s.41(1)(b), according to the principles which I examined in *Re Pemberton and The University of Queensland* (1994) 2 QAR 293 at pp.368-377 (paragraphs 164-193). If there were a different applicant for access to the matter in issue, other exemption provisions might come into play and it might, for instance, be considered necessary to delete identifying references to the solicitor complained against (though that would clearly be a futile exercise where disclosure to the complainant himself is contemplated), or indeed to delete identifying references to the complainant. But disclosure in such an anonymised form would nevertheless, in my view, serve the public interest in scrutiny and accountability for the performance by the QLS of its regulatory functions with respect to proper standards of professional conduct. There is a natural tendency for the public to be suspicious of professional bodies which are accorded the privilege of self-regulation, the suspicion being that there will be a tendency to favour the interests of, or show leniency to, a fellow member of the profession, as against the interests of the complainant. I find myself in agreement with the submissions of the Lay Observer who (in his submission dated 23 January 1996) said:

> *There is nothing in the withheld section which would prejudice the investigative process or which is in any way controversial ... .*
>
> *In my opinion, the complainant is entitled to know how the Society's investigators analysed his complaint and, rather than being against the public interest, providing full particulars to the complainant is more likely to enhance public confidence in the system. The complainant can then see and appreciate the comprehensive work performed by the Law Society in analysing complaints of this kind and presenting them to the Professional Standards Committee for consideration.*

145. I am not satisfied that disclosure of the matter in issue identified in paragraphs 93 and 94 above would cause any harm to the public interest in the efficient and effective performance of the QLS's regulatory functions. Having regard to the public interest considerations which favour disclosure, I am not satisfied that disclosure would, on balance, be contrary to the public interest. I find that the matter identified in paragraphs 93 and 94 above does not qualify for exemption from disclosure to Sir Lenox Hewitt, under s.41(1) of the FOI Act.

<u>Application of s.42(1) of the FOI Act</u>

146. The QLS claimed the matter in issue identified in paragraphs 93 and 94 above to be exempt matter under s.42(1)(a), s.42(1)(e), and s.42(1)(h) of the FOI Act, which provide:

42.(1) *Matter is exempt matter if its disclosure could reasonably be expected to—*

(a) prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case; or

...

(e) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); or

…

(h) prejudice a system or procedure for the protection of persons, property or environment; ... .

147. The test imposed by the phrase "could reasonably be expected to" governs each paragraph of s.42(1), and also affects the test for exemption under s.40(a) of the FOI Act, which is considered below. I analysed the meaning of the phrase "*could reasonably be expected to*", by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the Commonwealth FOI Act, in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at pp.339-341, paragraphs 154-160. Those observations are also relevant here. In particular, I said in *Re "B"* (at pp.340-341, paragraph 160):

> *The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

The ordinary meaning of the word "expect" which is appropriate to its context in the phrase "could reasonably be expected to" accords with these dictionary meanings: "to regard as probable or likely" (Collins English Dictionary, Third Aust. ed); "regard as likely to happen; anticipate the occurrence ... of" (Macquarie Dictionary, 2nd ed); "Regard as ... likely to happen; ... Believe that it will prove to be the case that ..." (The New Shorter Oxford English Dictionary, 1993).

148. In its submission dated 11 January 1996, the QLS argued as follows:

> *The effectiveness of the Society's investigative and disciplinary procedures is central to ensuring that a proper system exists for the detection, investigation and punishment of behaviour prejudicial to clients' interests and to the broader public interest. It should be noted that as a result of matters uncovered in the course of the Society's investigative process, situations arise from time to time where criminal prosecutions are pursued by the relevant authorities.*
>
> *If the Society's investigative and disciplinary system is to be in any way prejudiced by the release of information that would undermine its effectiveness then clearly it is not in the public interest for such information to be disclosed. The disclosure to the complainant or the solicitor under*

investigation of internal memoranda directed to the Professional Standards Committee would clearly prejudicially affect the flow and/or candour of such advice.

In the Society's submission, the material subject to the current application is capable of exemption under a number of heads - Section 42(1)(a), (e) and (h).

149. The essence of the QLS's above submission is virtually identical to its submissions on the application of the public interest balancing test in s.41(1)(b) of the FOI Act.

Application of s.42(1)(a)

150. During the course of the external review, the investigation of Sir Lenox Hewitt's complaint against his former solicitor was finalised: see paragraph 17 above. Section 42(1)(a) focuses on prejudice to the investigation in a particular case. Since the only case, investigation of which could arguably have been prejudiced, has been finalised, I find that disclosure of the matter in issue could not reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case. Hence, the matter in issue does not qualify for exemption under s.42(1)(a) of the FOI Act.

Application of s.42(1)(e)

151. I have previously set out my views on the correct approach to the interpretation and application of s.42(1)(e) of the FOI Act in *Re "T" and Queensland Health* (1994) 1 QAR 386. The focus of s.42(1)(e) is on prejudice to the effectiveness of a lawful method or procedure for preventing, detecting, investigating, or dealing with, a contravention or possible contravention of the law.
The QLS has not identified a lawful method or procedure, and explained how it would be prejudiced by disclosure of the matter in issue, apart from its contention that "disclosure to the complainant or the solicitor under investigation of internal memoranda directed to the Professional Standards Committee would clearly prejudicially affect the flow and/or candour of such advice."
This really amounts, in a slightly different guise, to the same class claim, based on the 'candour and frankness' argument, that I referred to in paragraph 138 above.

152. Even if it be assumed that the task of analysing information obtained on the investigation of a complaint against a solicitor, and providing advice and recommendations thereon for the benefit of the PSC, is a lawful method or procedure for dealing with a possible contravention of the law, within the terms of s.42(1)(e), I am not satisfied that prejudice to the effectiveness of that method or procedure could reasonably be expected to follow from disclosure of the particular matter in issue (the general nature of which is indicated at paragraph 143 above). Investigators employed in the Professional Standards Department of the QLS must appreciate that their analysis, opinion and recommendations will be carefully scrutinised by the senior practitioners and lay members of the PSC. If the PSC considers that charges should be laid against a solicitor, both the legal analysis, and the sufficiency and reliability of the evidence, which support the charges, will be carefully scrutinised by the relevant disciplinary tribunal. I do not regard this as a situation where any prejudicial effects could reasonably be expected, through a diminution in candour and frankness in the expression of future documents of a similar kind, if the matter in issue were to be disclosed.
Given the seriousness of the potential consequences for solicitors complained against, and the extent of the scrutiny liable to be applied to analysis, opinion and recommendations of the kind in issue, I am not satisfied that the quality and thoroughness of similar assessments and recommendations could be materially altered for the worse, by the threat of disclosure under the FOI Act.

153. I do not mean to foreclose the possibility that the QLS could, in a future case, having regard to the nature of the particular information in issue in that future case, persuade me of the existence of a reasonable basis for expecting that disclosure could cause prejudice of the kind contemplated by s.42(1)(e). However, I am not satisfied that disclosure of the matter in issue in this case could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a possible contravention of the law, and I find that the matter in issue does not qualify for exemption under s.42(1)(e) of the FOI Act.

Application of s.42(1)(h)

154. I have some reservations as to whether the statutory responsibilities of the QLS with respect to the regulation of compliance by solicitors with proper standards of professional conduct, can be properly described as "a system or procedure for the protection of persons, property or environment", within the terms of s.42(1)(h). (For examples of systems or procedures which,
I have held, do satisfy the description in s.42(1)(h), see *Re Ferrier and Queensland Police Service* (Information Commissioner Qld, Decision No. 96016, 19 August 1996, unreported) at paragraphs 28-33, and *Re "ROSK" and Brisbane North Regional Health Authority and Ors* (Information Commissioner Qld, Decision No. 96019, 18 November 1996, unreported) at paragraphs 13-15.)
Many clients do entrust money or property to their solicitors, or seek the assistance of solicitors to safeguard or further their property or financial interests. It may well be the case that most disputes that come to the QLS by way of a complaint of unprofessional conduct against a solicitor are, at base, disputes in which the complainant is seeking to protect property or financial interests.
In any event, it is unnecessary in this case for me to resolve the aforementioned reservations, since the only apprehended prejudice which the QLS has raised for the purposes of s.42(1)(h) is the same as that which I have considered (and rejected) above in respect of s.42(1)(e) and s.41(1).
For the same reasons given at paragraphs 138-139, 143-145 and 152 above, I am not satisfied that disclosure of the matter in issue could reasonably be expected to prejudice the systems and procedures established by the QLS for dealing with complaints against solicitors (assuming, for the moment, that they constitute a system or procedure for the protection of persons or property), and I find that the matter in issue does not qualify for exemption under s.42(1)(h) of the FOI Act.

Application of s.40(a) of the FOI Act

155. In its written submission dated 7 November 1997, the QLS expressly abandoned any claim for exemption under s.40(a) of the FOI Act in respect of the matter in issue from Ms Dreghorn's memorandum to the PSC dated 8 July 1996. It may well have been the intention of the QLS to abandon reliance on s.40(a) in respect of the matter in issue from Ms Dreghorn's earlier memoranda to the PSC, but that has not been clearly communicated to me, so I will briefly deal with the s.40(a) exemption.

156. Section 40(a) of the FOI Act provides:

> ***40.*** *Matter is exempt matter if its disclosure could reasonably be expected to—*
>
> *(a) prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency;*
>
> *...*
>
> *unless its disclosure would, on balance, be in the public interest.*

157. In its submission dated 11 January 1996, the Law Society contended that to have internal memoranda pertaining to the investigative process released to one or other of the parties involved in a complaint would clearly prejudice the effectiveness of the investigative process and that, far from the disclosure of this class of material being in the public interest, its deleterious effect on the investigative process of complaints would be quite adverse to the public interest.

158. I consider that the Law Society's claim for exemption under s.40(a) must fail. I consider that the matter in issue cannot be properly characterised as bearing any relationship to the conduct of a "test, examination or audit", giving those words their ordinary and natural meaning. There will be occasions when the QLS conducts audits of solicitors' trust accounts, a process which I consider would fall within the terms of s.40(a) of the FOI Act, but the matter now in issue does not fall within the ambit of the s.40(a) exemption. Even if it did, the basis advanced by the QLS for apprehended prejudice appears to be no different to that which I have considered, and rejected, in dealing with s.41(1) and s.42(1)(e) above.

159. I find that the matter in issue does not qualify for exemption under s.40(a) of the FOI Act.

Conclusion

160. The formal decisions set out below give effect to the findings I have stated above:

(a) in application for review no. S 10/96, I affirm the decision under review (i.e., the decision of the Lay Observer dated 19 December 1995 that the matter in issue identified in subparagraph 8(a) above is not exempt from disclosure to Sir Lenox Hewitt under the FOI Act);

(b) in application for review no. S 74/96, I affirm the decision under review (i.e., the decision of the Lay Observer dated 4 April 1996 that the matter in issue identified in subparagraphs 8(b), (c) and (d) above is not exempt from disclosure to Sir Lenox Hewitt under the FOI Act); and

(c) in application for review no. S 103/97, I set aside the decision under review (being the decision made on behalf of the QLS by Mr Scott Carter on 18 June 1997), and, in substitution for it, I decide that the matter in issue (which is identified in subparagraphs 8(e) and (f) above) is not exempt from disclosure to Sir Lenox Hewitt under the FOI Act.

....
F N ALBIETZ
INFORMATION COMMISSIONER