

Participants:

Mr S T HUDSON as agent for
FENCRA Y PTY LIMITED
Applicant

- and -

DEPARTMENT OF THE PREMIER,
ECONOMIC AND TRADE DEVELOPMENT
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - decision giving access to a document subject to the deletion of exempt matter - exemption for Cabinet matter - access given to applicant of "merely factual matter" contained in a Cabinet submission - whether the extent of deletions made from the Cabinet submission exceeded what was permissible under s.36 of the *Freedom of Information Act 1992* (Qld) - whether particular passages in the Cabinet submission comprised merely factual matter and if so whether they are still exempt from disclosure under s.36(2).

FREEDOM OF INFORMATION - proper construction of s.36(1) and s.36(2) of the *Freedom of Information Act 1992* (Qld) - words and phrases: "deliberation of Cabinet"; "merely factual matter"; "officially published by decision of Cabinet".

Freedom of Information Act 1992 (Qld), s.36(1), s.36(2), s.41(1), s.41(2), s.76(2), s.87

Freedom of Information Act 1992 (Cth), s.3, s.34(1), s.34(1A), s.36

Freedom of Information (Amendment) Act 1983 (Cth)

Freedom of Information Act 1982 (Vic), s.3, s.28(1)

Freedom of Information (Amendment) Act 1993 (Vic)

Freedom of Information Act 1989 NSW, Sch. 1, cl. 1(2)

Freedom of Information Act 1991 SA, Sch. 1, cl. 1(2)

Freedom of Information Act 1991 Tas, s.24(5)

Freedom of Information Act 1992 WA, Sch. 1, cl. 1(2)

Freedom of Information Ordinance 1989 ACT, s.35(2)

Re Aldred and Department of Foreign Affairs and Trade (1990) 20 ALD 264

Commonwealth of Australia v Northern Land Council and Another (1993) 67 ALJR 405

Re Porter and Department of Community Services and Health (1988) 14 ALD 403

Re Anderson and Department of Special Minister of State (No. 2) (1986) 11 ALN N239

Victorian Public Service Board v Wright (1986) 64 ALR 206

Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (Information Commissioner, Qld, Decision No. 93002, 30 June 1993, unreported)

Re Birrell and Department of Premier and Cabinet (No. 1) (1986) 1 VAR 230

Re Waterford and the Treasurer of the Commonwealth of Australia (1985) 7 ALD 93

Re Howard and the Treasurer of the Commonwealth (1985) 3 AAR 169

Harris v Australian Broadcasting Corporation and Others (1984) 5 ALD 564

Public Service Board v Scrivanich (1985) 8 ALD 44

DECISION

1. The decision of Mr E J Bigby made on behalf of the respondent on 18 March 1993 is set aside.
2. In substitution therefor, it is decided that the matter contained in Cabinet Submission No. 02492 is exempt matter under s.36(1)(a) of the *Freedom of Information Act 1992 (Qld)* except for the matter identified below which, by virtue of s.36(2) is not exempt matter under s.36(1) of the Act, and to which the applicant is entitled to be given access:
 - (a) in the Cover Sheet to Cabinet Submission No. 02492 -
 - (i) the line under the first heading on page one;
 - (ii) the last two paragraphs on page one, all material on page two above the heading which appears on page two, the last paragraph on page 3, and the first paragraph on page 4 (being the factual matter previously released to the applicant pursuant to the respondent's initial decision of 17 February 1993);
 - (iii) the paragraph which immediately precedes the heading "URGENCY" on page three;
 - (iv) the three sentences which immediately follow the third heading which appears on page four;
 - (b) in the Body of Submission of Cabinet Submission No. 02492 -
 - (i) page one, the first two paragraphs on page two, and the first two paragraphs on page seven (being the factual matter previously released to the applicant pursuant to the respondent's initial decision of 17 February 1993);
 - (ii) the last two paragraphs on page two, and the first four paragraphs on page three;
 - (iii) the third and fourth paragraphs on page four;
 - (iv) all of the paragraphs contained on page five except for the fourth paragraph, the second sentence of the second paragraph, and the second sentence of the sixth paragraph;
 - (v) the second and third sentences of the second paragraph on page six;
 - (vi) the first sentence of the third paragraph on page six;
 - (vii) the last paragraph on page seven;
 - (viii) the first paragraph on page eight.

Date of Decision: 13 August 1993

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F N ALBIETZ
INFORMATION COMMISSIONER

OFFICE OF THE INFORMATION)
 COMMISSIONER (QLD))

S 53 of 1993
 (Decision No. 93004)

Participants:

Mr S T HUDSON as agent for
 FENCRA Y PTY LIMITED
 Applicant

- and -

DEPARTMENT OF THE PREMIER,
 ECONOMIC AND TRADE DEVELOPMENT
 Respondent

REASONS FOR DECISION

BACKGROUND

- 1 By letter dated 22 December 1992, Mr S T Hudson, a consulting surveyor acting on behalf of his client, Fencray Pty Ltd, lodged with the Department of the Premier, Economic and Trade Development (the Department) a request under s.25 of the *Freedom of Information Act* 1992 (Qld) (the FOI Act) for access to "any Government submissions associated with the proposed development of "The Lagoons at Pimpama", by Fencray Pty Ltd".
- 2 By a decision made on 17 February 1993, the applicant was granted access to several documents, but was refused access to other documents and parts of documents which the Department decided were exempt under s.36(1)(a), (c) or (e) of the FOI Act.
- 3 On 3 March 1993, Mr Hudson lodged an application for internal review (under s.52 of the FOI Act) of the Department's decision of 17 February 1993. His application for internal review stated:

"The specific document relating to this review is referred to as a Cabinet Submission No. 02492. What is sought is presentation of some of the "facts" presented to Cabinet in order that Cabinet was able to draw its determination. The information presented merely reflects a set of known or accepted circumstances relating to the proposal. The basis for Cabinet's decision does not lie specifically in the information presented, and more specific information is sought."

- 4 The internal review was conducted by Mr E J Bigby (Executive Director, Government & Corporate Services Division, within the Department) who by letter dated 18 March 1993 informed the applicant that he had decided to affirm the Department's decision of 17 February 1993. Mr Bigby's reasons for decision, so far as relevant, were as follows:

"I have confirmed by way of reference to the official records of Cabinet that the matter was submitted to Cabinet. I can also confirm that the matter was brought into existence for the purpose of submission for consideration by Cabinet. The matter is therefore exempt under [s.36(1)(a) and (b)] of the Act. ..."

I have examined the matter in question. Matter exempted on pages one to five of the Cover Sheet of the Submission relates directly to the deliberations of Cabinet. In addition, matter exempted on pages one to eight of the Body of the Submission also relates to the deliberations of Cabinet.

As the additional matter sought formed the basis of deliberation by the Cabinet, I am of the opinion that the disclosure of such matter would involve the disclosure of deliberations of Cabinet and therefore the matter is also exempt under s.36(1)(e).

However, s.36(2) of the Act provides that:

36.(2) Matter is not exempt under subsection (1) if it is merely factual or statistical matter unless -

- (a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and*
- (b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.*

I have examined the matter in the light of the tests imposed by s.36(2)(a) and (b) and in accordance with these sections of the Act, I do not believe any additional factual or statistical matter could be released without disclosing the deliberations of Cabinet which has not been officially published by decision of Cabinet."

THE REVIEW PROCESS

- 5 Mr Hudson lodged an application, dated 7 April 1993, for review of Mr Bigby's decision, asking the Information Commissioner to "determine whether these presently exempted parts of the Cabinet submission are able to be accessed". At my request, the Department supplied me with a complete copy of Cabinet Submission No. 02492 (the Cabinet submission), together with a copy of the version, with deletions, that had been released to the applicant. After these documents had been carefully examined, a telephone conference was held with the applicant on 25 May 1993. The applicant confirmed that he understood that the Cabinet submission was *prima facie* exempt, but that he sought independent review by the Information Commissioner of whether the Department had given him access to all "merely factual or statistical matter" to which he was entitled to have access pursuant to s.36(2) of the FOI Act.
- 6 In that conference and in a subsequent letter dated 2 June 1993, the applicant explained that his client, Fencray Pty Ltd, had spent approximately \$170,000 on having an Environmental Impact Assessment prepared by consultants in respect of a proposed development project on the Pimpama River at Pimpama (near Jacobs Well). His client was determined to find out the reasons for the State Government's opposition to the proposed development, so that it could determine whether the individual reasons for opposition could be overcome, or whether the project would have to be abandoned. He was trying to gather as much information as he could with a view to seeking audiences with relevant Ministers or senior officials to get them to explain precisely their objections to the proposed development, so that his client could assess whether the objections could be overcome. The applicant's letter of 2 June 1993 stated:

"Our client has sought a review of the decision to exempt most parts of a Cabinet submission relating to an Environmental Impact Assessment prepared for a proposed project on the Pimpama River at Pimpama (near Jacobs Well).

Freedom of Information searches through several Departments have included the following Departments:

- (1) Department of Primary Industries*
- (2) Department of Environment & Heritage*
- (3) Department of Housing, Local Government & Planning*
- (4) Department of the Premier, Economic & Trade Development*
- (5) Office of the Cabinet.*

All searches have led ultimately to a Cabinet document much of which appears to be exempt.

In the course of preparing the Environmental Impact Assessment, numerous communications were made with officers of the departments listed above. Throughout the process there was some indication that Government was predisposed to the form of development proposed.

Our client has expressed some degree of concern that a comprehensively prepared study enlisting the aid of numerous well credentialled professional advisers and involving considerable dialogue between those professionals and relevant departments should exact such an outcome from Government.

*It seems all the more incredulous that **not one** department saw fit to request any further advice and/or clarification of information presented in relation to the study.*

The cost of the study to date has amounted to some \$170,000.00 being expended in its production and consequent accreditation by an independent firm of engineers chosen by the Albert Shire Council.

Given that the basic terms of reference for the study were established by Government and modified as appropriate by Albert Shire Council, in consultation with relevant Government Departments, our client now seeks to determine what matters were put before Cabinet to sway it so strongly against the proposals for development of its property. It is our client's belief that the positive aspects of the proposals as supported by the Environmental Study were simply ignored or worse, simply not presented within the Cabinet options for consideration of the proposal.

Further to this, a concerted media campaign sprang up only one month prior to consideration of the study by Cabinet and it seems that some of the public opinion being expressed at the time may have influenced the presentation of the information for consideration by Cabinet. This possible aspect has also concerned our client.

Any further assistance you can provide to enlighten my client and allay his concerns as far as the submission is concerned would be most welcome."

7 It was explained to Mr Hudson that most of the matter which had been deleted from the copy of the Cabinet submission released to him was clearly exempt matter. There were a number of deleted paragraphs, however, which arguably contained merely factual matter. Because that matter could not be revealed to him (by virtue of s.76(2)(a) and s.87 of the FOI Act), his opportunities for meaningful participation in the conduct of my review were severely limited. Mr Hudson accepted this, saying that he did not wish to expend money on legal representation, and was content to accept the results of the Information Commissioner's legal research and assessment of the contents of the Cabinet submission.

8 By letter dated 28 May 1993 I wrote to the Department advising that the applicant had indicated that the scope of his application for review was confined to questioning whether all "merely factual or statistical matter" contained in the Cabinet submission had been disclosed to him. I said that the essential issue for my determination was whether the extent of the deletions made from the Cabinet submission in the version released to the applicant, exceeded what was appropriate and permissible under s.36 of the FOI Act. I drew the Department's attention to relevant case law of the Federal Court of Australia and the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) that might be of assistance in determining this issue. I then identified eleven passages in the Cabinet submission which in my preliminary assessment arguably contained merely factual matter. I asked the Department to respond to the following questions in relation to each of the passages:

- (1) Do you dispute that this passage contains matter that is merely factual matter?
- (2) If so, how do you characterise this matter?
- (3) If the answer to (1) is no, do you allege that disclosure of this matter would involve the disclosure of any deliberation or decision of Cabinet, the fact of which has not been officially published by decision of Cabinet?
- (4) If the answer to (3) is yes, please explain the background facts and reasons to justify your response.

9 I also extended to the Department the opportunity to forward to me a written submission which in addition to addressing the issues referred to above, set out -

- (a) any other facts, matters or circumstances; and
- (b) any legal arguments,

on which it wished to rely to establish that the matter deleted from the Cabinet submission was exempt matter, according to the terms of s.36 of the FOI Act. On 21 June 1993, the Department supplied a detailed written submission in support of its decision under review. I have carefully assessed that submission against the contents of the parts of the Cabinet submission which were deleted in the version supplied to the applicant.

10 It will be difficult to explain my reasons for decision in a manner that will prove completely intelligible to the vast majority of readers, because they largely turn on whether individual sentences and paragraphs in the Cabinet submission can properly be characterised as "merely factual matter", and s.87 of the FOI Act prevents me from including in my reasons for decision matter which has been claimed by an agency to be exempt matter. My reasons for decision therefore are only likely to be fully intelligible to those who have access to an unexpurgated copy of the Cabinet submission. Nevertheless, I have tried as far as practicable to expound the general principles applicable to the questions I have to determine, so that my reasons for decision may be of some benefit to the majority of readers who will not have access to a copy of the Cabinet submission.

- 11 Since I consider that the Department's decision-making in this case has proceeded upon an interpretation of s.36 (more particularly s.36(1)(e) and s.36(2)(a) and (b)) of the FOI Act which is mistaken in part, I will commence with an analysis of that provision.

ANALYSIS OF S.36

- 12 Section 36 of the FOI Act is in the following terms:

"Cabinet matter

36.(1) Matter is exempt matter if -

- (a) *it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; or*
- (b) *it forms part of an official record of Cabinet; or*
- (c) *it is a draft of matter mentioned in paragraph (a) or (b); or*
- (d) *it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a) or (b); or*
- (e) *its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet.*

(2) Matter is not exempt under subsection (1) if it is merely factual or statistical matter unless -

- (a) *the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and*
- (b) *the fact of the deliberation or decision has not been officially published by decision of Cabinet.*

(3) For the purposes of this Act, a certificate signed by the Minister certifying that matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2), establishes, subject to Part 5, that it is exempt matter.

(4) In this section -

"Cabinet" includes a Cabinet committee."

- 13 The essential justification for the existence of the Cabinet matter exemption is to facilitate the process of Cabinet deliberation and decision-making, by providing the optimum conditions in which the highest policy-making body in the executive branch of government can make informed choices according to its judgment of what the public interest requires. (I use the word optimum in the sense of striking the appropriate balance between the public interests that are served by the appropriate degree of secrecy in the Cabinet process and the public interests that are served by openness, accountability and informed public participation, in the processes of government.)

- 14 Cabinet stands at the apex of government and its members, comprising all Ministers of the Crown, are collectively responsible for the performance of the Queensland government. The Queensland Cabinet Handbook (GoPrint, Brisbane, August 1992) lays down the procedures and principles under which the Queensland Cabinet is to operate:

"The procedures are designed to implement the following principles:

Cabinet is responsible for the development and co-ordination of the policies of the Government;

the convention of the collective responsibility of Ministers for Government decisions requires collective adherence to all Government decisions made in Cabinet; Cabinet decisions reflect collective deliberation and are binding on Cabinet Ministers as Government policy;

consultation is an essential element of the Cabinet process;

the deliberations of Cabinet and Cabinet Committees shall be conducted in a secure and confidential environment;

the Cabinet process will allow for considered and detailed examination of specific matters before Cabinet;

the processes of Cabinet are established by the Premier to ensure that all Ministers are bound by the same rules and by high standards of probity; and

Cabinet collectively, and Ministers individually, are responsible and accountable to the Crown, the Parliament, and ultimately the electorate.

Adherence to these principles is the corner-stone of an effective and efficient Cabinet system.

For Cabinet to operate effectively, Cabinet documents are to be prepared by Ministerial Departments in a manner that aids well-informed decision-making. The purpose of Cabinet documents is to allow Ministers to discuss, analyse and resolve issues on their merits and in ways which can be effectively implemented."
(at p.9)

- 15 The most extensive and instructive analyses of the rationale for a Cabinet exemption in freedom of information legislation (considered in the light of the key role which Cabinet, and the convention of collective ministerial responsibility, play in our processes of government) are to be found in the 1979 Report on the Draft Commonwealth Freedom of Information Bill by the Senate Committee on Constitutional and Legal Affairs (at Chapter 18), and the 1989 Report of the Legal and Constitutional Committee of the Parliament of Victoria, titled "Report Upon Freedom of Information in Victoria" (at Chapters 4 and 5). Since both reports represent the work of Members of Parliament, they benefit from the insight of political "insiders".
- 16 The Victorian Report discussed (at pp.70-72) both the virtues and vices of Cabinet secrecy:

"The convention [of collective ministerial responsibility] serves several important constitutional purposes. It secures the responsibility of Cabinet to the Parliament and, through the Parliament, to the electorate. The coherence of government exercises pressure on the opposition to unite in the presentation of alternative policies and ministries. The convention assists in the maintenance of government control of legislation and public expenditure. It acts as a strong incentive towards the co-ordination of departmental policies and actions. More practically, Cabinet unanimity conforms with the expectations of the electorate which, in general, disapproves of divisiveness in its government ...

However, some of the political purposes facilitated by the convention have been the subject of substantial criticism ... It is argued that the accretion of power at the centre of government has been at the cost of effective accountability to both Parliament and people ...

Similarly, there has been criticism of the degree to which collective Ministerial responsibility has been productive of secrecy throughout government. Excessive secrecy can be seen as counter-productive to effective government since it conceals and distorts the process of decision-making ... Secrecy, like the ripples of a pond, can radiate from its centre in Cabinet to encircle the entirety of governmental administration. ... [Reproduced here was part of the passage from the Fitzgerald Report which is set out in the following paragraph] ...

It is partly in response to such criticism that freedom of information legislation has been introduced in many nations with Westminster type governments.

It is a central question for this inquiry to determine what degree of secrecy should attach to Cabinet and other documents in order to effectively preserve the convention of collective ministerial responsibility. In examining this question, the Committee must weigh carefully two competing public interests. There is first, the public's interest in preserving the proper and efficient conduct of affairs of state. Secondly, there is the public interest in ensuring that, in the conduct of those affairs, the government is fully accountable to the people it exists to serve."

17 The Fitzgerald Report had in 1989 warned Queenslanders of the dangers of excessive Cabinet secrecy (at pp.126-127):

"Although "leaks" are commonplace, it is claimed that communications and advice to Ministers and Cabinet discussions must be confidential so that they can be candid and not inhibited by fear of ill-informed or captious public or political criticism. The secrecy of Cabinet discussions is seen as being consistent with the doctrines of Cabinet solidarity and collective responsibility under which all Ministers, irrespective of their individual views, are required to support Cabinet decisions in Parliament.

It is obvious, however, that confidentiality also provides a ready means by which a Government can withhold information which it is reluctant to disclose.

A Government can deliberately obscure the processes of public administration and hide or disguise its motives. If not discovered there are no constraints on the exercise of political power.

The rejection of constraints is likely to add to the power of the Government and its leader, and perhaps lead to an increased tendency to misuse power.

The risk that the institutional culture of public administration will degenerate will be aggravated if, for any reason, including the misuse of power, a Government's legislative or executive activity ceases to be moderated by concern for public opinion and the possibility of a period in Opposition. ...

The ultimate check on public maladministration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and public administration to manipulate, exploit and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended.

Secrecy and propaganda are major impediments to accountability, which is a prerequisite for the proper functioning of the political process. Worse, they are the hallmarks of a diversion of power from the Parliament.

Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.

The involvement of Cabinet in an extended range of detailed decisions in the course of public administration gives principles intended to apply in different circumstances an operation that cannot have been contemplated or intended. Excessive Cabinet secrecy has led to the intrusion of personal and political considerations into the decision-making process by bureaucrats and politicians."

- 18 Due regard should be had to these warnings. It has nevertheless become widely (and in my opinion, quite properly) accepted that debate within Cabinet, and the views contributed to debate by individual Ministers, should be entitled to secrecy. The 1989 Report of the Legal and Constitutional Committee of the Victorian Parliament said (at p.83):

"... there is a clear and forceful public interest in creating a context for Cabinet discussion which promotes and enhances the vigorous exchange of opinions between Ministers in Cabinet. In the Committee's view better decision-making is likely to result when Ministers feel able to articulate and explore tentative, innovative and even radical views without fearing that these may subsequently attach to them individually. Better decisions will be produced where compromises can be made reflecting the application of Cabinet's collective mind to issues at hand, a process made difficult if Minister's individual positions are known. Government acts with more authority where decisions it takes are seen as having the endorsement of Ministers collectively rather than individually."

- 19 In the context of the law relating to Crown privilege/public interest immunity (by which courts determine when it is appropriate for government-held information to be disclosed to a court for use as evidence in litigation, notwithstanding that the government objects that disclosure would be contrary to the public interest) the High Court of Australia has recently re-affirmed in *Commonwealth of Australia v Northern Land Council and Another* (1993) 67 ALJR 405, that the interest of a government in the maintenance of the secrecy of deliberations within Cabinet constitutes a public interest that will be accorded protection by the courts in all but exceptional cases. The majority judges (at p.406) saw fit to point out that the documents in issue in the case

were "documents which record the actual deliberations of Cabinet or a Committee of Cabinet", and not "documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet".

20 The public interest rationale for paragraphs (b) and (e) of s.36(1) of the FOI Act is therefore, in my opinion, unexceptionable. Section 36(1)(e) covers both deliberations and decisions of Cabinet, so as to permit Cabinet to determine the appropriate timing and manner of the announcement of its official decisions.

21 The wording of s.36(1)(a) arguably extends further than is strictly required by the public interest in creating the optimum conditions for Cabinet decision-making. As the 1989 Report of Legal and Constitutional Committee of the Victorian Parliament said (at p.88):

"... it is only documents which disclose the individual submissions or opinions of Ministers and the nature and content of their collective deliberations [the latter being covered by s.36(1)(b) and (e) in the FOI Act] which must be protected. This is because it is these documents which by their nature expose Cabinet divisions and therefore prejudice collective Ministerial responsibility."

Section 36(1)(a) may extend to a wider class of documents than simply documents which are prepared for the purpose of submitting to Cabinet the views and contributions of individual Ministers. In this, however, Queensland has done no more than follow the example of other Australian governments which have enacted freedom of information legislation, and indeed s.36(1)(a) is a fairly narrowly confined exemption provision compared to corresponding provisions in the freedom of information statutes of some other Australian jurisdictions.

22 There is a significant difference between the wording and punctuation of s.36(1)(a) of the FOI Act compared to s.34(1)(a) of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act), a difference which renders inapplicable in Queensland the interpretation given to s.34(1)(a) of the Commonwealth FOI Act by the Commonwealth AAT in *Re Porter and Department of Community Services and Health* (1988) 14 ALD 403. Section 34(1)(a) of the Commonwealth FOI Act is in the following terms:

"34(1) A document is an exempt document if it is -
 (a) *a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet; "*

23 In *Porter's* case at p.407, the Commonwealth AAT said:

"In my opinion the words "being a document that was brought into existence for the purpose of submission for consideration by the Cabinet" govern only the words "or is proposed by a Minister to be so submitted". The provision should accordingly be read as referring to:

a document that has been submitted to Cabinet;

a document proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by Cabinet.

This construction ensures that actual submission of a document to Cabinet, and preparation of a document for the purpose of submission although not actually submitted, each receive the protection of the exemption provision."

- 24 The interpretation of s.34(1)(a) given by the Commonwealth AAT in *Porter's* case is surprising for two reasons. First, because it was contrary to the interpretation previously given by Deputy President Hall of the Commonwealth AAT in *Re Anderson and Department of Special Minister of State (No. 2)* (1986) 11 ALN N239 where he said (at N243):

"Section 34(1)(a) provides that a document is an exempt document if it is a document that has been submitted to Cabinet for its consideration, being a document that was brought into existence for the purpose. It is the fact of having been submitted to Cabinet for its consideration and of having been brought into existence for that purpose that, prima facie, attaches exempt status to the document as such. If those conditions are satisfied, the contents of the document are given exempt status regardless of the actual subject matter."

Secondly because, if it be accepted that there is an ambiguity as to whether the words following the comma in s.34(1)(a) of the Commonwealth FOI Act qualify both documents that have been submitted to Cabinet and documents proposed to be submitted to Cabinet, then recourse to:

- (a) the legislative history (in particular, the 1979 Report of the Senate Legal and Constitutional Affairs Committee at paragraphs 18.3 to 18.9 (pp.206-207) - part of which is set out below at paragraph 31; and the Senate Explanatory Memorandum for the Freedom of Information Bill 1981 at pp.29-30); and
- (b) the principle endorsed by the High Court of Australia in *Victorian Public Service Board v Wright* (1986) 64 ALR 206 (at p.212) that (in the light of the objects clause in s.3 of the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act), which is for practical purposes identical to the objects clause in s.3 of the Commonwealth FOI Act): *"It is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information"*;

would seem to indicate that any ambiguity should be resolved in favour of the interpretation preferred by Deputy President Hall in *Re Anderson*.

- 25 No such ambiguity arises in respect of s.36(1)(a) of the FOI Act, however, which clearly is confined to two kinds of matter contained in documents, i.e.:

- (a) matter which has been submitted to Cabinet for its consideration; and
- (b) matter which is proposed by a Minister to be submitted to Cabinet for its consideration;

but which, in either case, was brought into existence for the purpose of submission for consideration by Cabinet.

26 This means that a document is not exempt merely because it has been submitted to Cabinet. Inquiries must be pursued into the "genealogy" of such a document, to establish the purpose for which it was brought into existence. The time of the creation of the document is the time at which the purpose for its creation is to be ascertained. The fact that it was subsequently decided to annex to a Cabinet submission, a document that was brought into existence for a purpose other than submission to Cabinet for Cabinet consideration, will not bring the document within s.36(1)(a). A document which is created for the purpose of assisting in the preparation of a draft or final Cabinet submission (or some other kind of document that is being created for the purpose of submission to Cabinet) would not itself have been brought into existence for the purpose of submission for consideration by Cabinet. Such a document may gain exemption under s.41 of the FOI Act if it falls within the terms of s.41(1)(a), but it must also be established that its disclosure would be contrary to the public interest (*cf* the "co-ordination comments" on a draft Cabinet submission held not to be exempt under s.41 of the FOI Act in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs*, Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported).

27 A practical consequence (and no doubt an intended one) of the wording of s.36(1)(a) is that it is not open to a Minister or official simply to attach to a Cabinet submission a document not designed for Cabinet consideration but believed to be sensitive, and thereby claim that it is exempt from disclosure under s.36(1)(a) of the FOI Act.

28 The use of the present tense in the phrase "... or is proposed by a Minister to be submitted, to Cabinet for its consideration ..." also imposes a requirement of eligibility for exemption under s.36(1)(a) in respect of matter that has not been submitted to Cabinet, that there be a current proposal by a Minister for its submission to Cabinet. Thus matter may acquire exempt status under s.36(1)(a) but lose it upon the Minister abandoning the proposal for its submission to Cabinet. I consider that Hartigan J (President) of the Commonwealth AAT was clearly correct when he said of the corresponding phrase in s.34(1)(a) of the Commonwealth FOI Act:

"It seems to me that the words of s.34(1)(a) make it clear that the time the document "was brought into existence" is the relevant time at which to look at the document. However, the document must be one of which it can be said that it is proposed to be submitted to Cabinet. I consider that the subsection does not grant an exemption to documents that are not submitted to the Cabinet despite the intention to do so at the time of their creation. It seems to me that the subsection only grants exemption to documents already submitted or proposed to be submitted if they were created with that intention. The subsection clearly grants the exemption to documents that are proposed to be put before the Cabinet not to documents that were proposed to be put before the Cabinet but never were. Thus a document may lose its claim for exemption when it is proposed no longer to submit the document to Cabinet." (Re Aldred and Department of Foreign Affairs and Trade (1990) 20 ALD 264 at p.265-6)

29 Hartigan J also made some comments in *Re Aldred* (at p.266) on s.34(1)(c) of the Commonwealth FOI Act which are relevant to the interpretation of the equivalent words in s.36(1)(d) of the FOI Act:

"To be a copy or extract of another document it necessarily follows that the copy or extract succeeds the document. In this instance the "copy or extract" precedes the document. I cannot accept that the subsection should be so construed as to allow a document that precedes another to be included in the definition of copy or extract. Ordinary usage of language requires that the copy or extract come from the document referred to in s.34(1)(a) or (b) and not vice versa."

30 In the present case, there is no doubt that the document in issue has been submitted to Cabinet and was brought into existence for the purpose of submission for consideration by Cabinet and hence contains exempt matter pursuant to s.36(1)(a) of the FOI Act. The question for my determination is the extent to which any matter contained in the document is not exempt under s.36(1), because it falls within the terms of the exception provided for in s.36(2) of the FOI Act.

Section 36(2)

31 Section 36(2) of the FOI Act can (though it contains some material differences) be said to correspond to s.34(1A) of the Commonwealth FOI Act, a provision which did not appear when the Commonwealth FOI Act was first enacted by the Fraser Liberal Government in 1982, but which was inserted by the incoming Hawke Labour Government in 1983 in response to recommendations contained in the 1979 Report of the Senate Committee on Constitutional and Legal Affairs. The relevant parts of the Senate Committee's Report were as follows:

"... *some amendment by the draftsman to clause 24(1) is necessary to clarify the question of attachments to Cabinet submissions. Currently the exemption includes 'a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted' (para 24(1)(a)). The only express limitation upon this provision is sub-clause (4) which provides that the earlier definition*

does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

18.6 *Notwithstanding this limitation many documents will possibly be included as Cabinet documents that should not be. For instance, it is possible that a Minister may order the compilation of a broad category of important statistics on Australian social or economic life, for consideration by Cabinet, in relation to a proposed policy. Again, Cabinet may require a major study, primarily of a factual nature, on the feasibility of a new policy or on the implications for Australia of a projected proposal. Reference can also be made to important reports prepared by such bodies as the Administrative Review Council on new or proposed legislation, which we understand are often submitted to a Minister for consideration by the Cabinet. Of a comparable nature are the reports of consultants. Quite often these are prepared, at considerable cost to the public, to evaluate the efficiency of existing government programs. Each of these examples refers to a document that has been brought into existence for the purpose of submission to Cabinet. In each case, the document, which is an important one of public interest, could be treated as conclusively exempt as a Cabinet document.*

- 18.7** *We believe that clause 24 lays down an inappropriate criterion for determining what is exempt. Essentially, the clause is designed to protect the Cabinet decision-making process. Yet, in protecting anything that is submitted or proposed to be submitted to Cabinet, it goes far beyond what is reasonably necessary for this purpose. To disclose documents of the type to which we referred in a previous paragraph is to disclose only the raw material on which the Cabinet process operates; it is not necessarily to disclose anything about Cabinet process itself. Disclosure may conceivably damage the political fortunes of those who participate in the Cabinet process, but this is essentially distinct from, and should not be confused with, the Cabinet process itself. Only the latter should be protected by the exemption.*
- 18.8** *When determining the criterion which should be used in clause 24, useful reference can be made to clause 26. That exemption (for internal working documents) seeks to differentiate between policy documents containing opinion, advice or recommendations (which are protected) and factual, statistical, and scientific and technical reports or analyses (which are not protected). We think that a similar distinction can be drawn in clause 24, so that any document or report of that nature which was attached to a Cabinet submission would not be protected. Indeed, we think that an even broader distinction could be drawn than in clause 26. For instance, the draftsman could exclude from clause 24 a range of general categories of documents such as consultants' reports, reports from advisory committees, and so on. These reports would still be entitled to protection under clause 26, but a decision to this effect would have to satisfy the public interest criterion contained in that clause.*
- 18.9** *Recommendation: Clauses 24 and 25 should be amended to limit the scope of the conclusive exemption for Cabinet documents to documents containing opinion, advice or recommendations of a policy nature, thereby excluding documents of a purely factual nature such as consultants' reports, reports from advisory committees, and so on."*

32 The insertion of s.34(1A) in the Commonwealth FOI Act did not precisely implement the Senate Committee's recommendation, but it did give effect to the principle that disclosure of some of the raw material upon which the Cabinet decision-making process operates, can be disclosed without compromising the efficacy of the Cabinet process. As Deputy President Hall of the Commonwealth AAT said when applying s.34(1A) to part of a document in *Re Anderson and Department of Special Minister of State (No. 2)* (1986) 11 ALN N239 (at N244):

"... in my opinion, para (2) of document 15 contains "purely factual material" ... and ... its disclosure would not involve the disclosure of any deliberation or decision of Cabinet. The disclosure of the purely factual material will give some indication of the subject matter of the document submitted to Cabinet. It will imply that the facts, as stated, were relevant to a matter considered by Cabinet. But the facts give no indication of the thinking processes of Cabinet or of any of its members."

33 While the Victorian FOI Act (which was introduced shortly after, and modelled on, the Commonwealth FOI Act as enacted in 1982) did not contain a provision corresponding to s.34(1A) of the Commonwealth FOI Act, each freedom of information statute subsequently enacted by an Australian legislature has contained a provision which corresponds to s.34(1A) of the Commonwealth FOI Act (see *Freedom of Information Act 1989 NSW*, Sch. 1, cl. 1(2); *Freedom of Information Act 1991 SA*, Sch. 1, cl. 1(2); *Freedom of Information Act 1991 Tas*, s.24(5); *Freedom of Information Act 1992 WA*, Sch. 1, cl. 1(2); *Freedom of Information Ordinance 1989 ACT*, s.35(2)). The 1989 Report of the Legal and Constitutional Committee of the Victorian Parliament recommended the enactment of a provision excluding from the Cabinet exemption in the Victorian FOI Act, documents containing the raw material of Cabinet discussion. The relevant parts of the Report (at pp.93-94) are as follows:

"7.51 ... It will be recalled that the Senate Standing Committee on Constitutional and Legal Affairs (1979) drew a distinction between documents reporting and reflecting Cabinet's deliberations and those, such as statistical, scientific and technical reports or analyses, which provided the factual background for those deliberations ... The Committee recommended that the deliberative documents should be protected but that the factual documents providing the 'raw material' for Cabinet discussion should not be.

7.52 The following passage from the submission of the Law Institute of Victoria summarises well the position of witnesses arguing this case.

We consider that a document should not be exempt under s.28 if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet. As Judge Rowlands observed in Re Birrell and Department of Premier and Cabinet (No. 1) (1986) 1 V.A.R. 230, 236:-

If large sums of public money are spent on fact gathering exercises and scientific and technical reports whether conducted by consultants or public servants, it seems a great pity if these are not generally available to members of Parliament, the media and the public so that informed people may 'become involved in policy making and in government itself'.

... It follows in our view that documents which contain factual or statistical material which is used as a background for Cabinet discussions should not necessarily be exempt under s.28 if they do not disclose information concerning any deliberation or decision of Cabinet. Disclosure of these documents would not disclose anything about the Cabinet process itself. Nor of course would it disclose the decision making process of Cabinet. The convention of collective ministerial responsibility is hardly going to be offended in these circumstances. (Submission, p.14).

7.53 ... The [Victorian] Committee has been consistent in its view that only documents which, if disclosed, would undermine the unanimity of Cabinet should be protected as Cabinet documents. Therefore, documents which canvass or disclose the individual views or votes of Cabinet members should be exempt. Further, for the reasons already given, the decisions of Cabinet should not be disclosed unless and until the government determines that this is appropriate. However, factual documentation provided to assist Cabinet in its deliberations pre-dates decisions based upon it and in consequence will not disclose these

decisions. Therefore, in the Committee's opinion, the disclosure of background material will not prejudice the maintenance of the convention of collective ministerial responsibility.

7.54 The availability of Cabinet's raw material will provide the community with a means of assessing the appropriateness of Cabinet decision making. Moreover, it will also assist the Parliament in exercising its legislative and supervisory functions. The Committee believes that these are important factors militating in favour of disclosure. In this regard, the comments of The Honourables Sir Rupert Hamer and Lindsay Thompson, former Premiers of Victoria, are apt.

We should remember that factual material protected from disclosure is denied not merely to the community at large but to Parliament itself as well. That very material may well be important to the Parliament not only in exercising its legislative judgment but also in its vital function of supervising the administrative activities of government. Documents of a factual kind such as statistical surveys, opinion polls, feasibility and impact studies, consultants' reports, etc., will normally be an essential ingredient in decision-making, both in the Parliament and in the wider community, and democratic principle requires that they be made generally available.

(Submission, p.2)

7.55 The Committee noted at the commencement of this chapter that there were two competing democratic principles bearing on the question of whether and which Cabinet documents should be protected. First, there is the importance of collective ministerial responsibility. Secondly, there is the public interest in the disclosure of information affecting the welfare of the community. The principle that Cabinet solidarity should be maintained is a vital one. So too, is the public interest in drawing government to account for its actions.

7.56 ... the Committee is of the view that Cabinet unanimity will be unaffected by disclosure of the 'raw material' providing the backdrop to its deliberations. At the same time the interests of accountability will be considerably advanced if it is available. In these circumstances, the Committee proposes to recommend that factual, statistical, technical and scientific material submitted to Cabinet should be capable of disclosure under the Freedom of Information Act."

34 The *Freedom of Information (Amendment) Act 1993 Vic.* contains a provision which was apparently intended to implement the Committee's recommendations, though it is curious that the amending provision omits the word "factual". The amended s.28(3) of the Victorian FOI Act now reads as follows:

"(3) Sub-section (1) does not apply to a document referred to in a paragraph of that sub-section to the extent that the document contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet."

35 The terms of s.36(2) of the FOI Act are set out at paragraph 12 above. Its effect is to exclude from the category of matter that might otherwise be exempt matter under s.36(1), matter which is merely factual or statistical, unless the disclosure of such matter under the FOI Act would involve the disclosure of any deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published by decision of Cabinet. In the light of the written submission received from the Department, there are three issues which require clarification. The first is the meaning of the term "deliberation of Cabinet", since the Department's submission argues for a broader interpretation and/or application of the term than I consider can be justified on the proper construction of s.36 as a whole. The second issue is the meaning of "merely factual matter", and how one approaches the task of characterising matter contained in a document as merely factual matter as opposed to some other kind of matter. The third issue is the meaning and effect of the qualification (which applies when both the condition stipulated by s.36(2)(a) and the condition stipulated by s.36(2)(b) are satisfied) to the s.36(2) exception for merely factual or statistical matter.

The Meaning of "Deliberation of Cabinet" in s.36(1)(e) and s.36(2)(a) and (b)

36 In my letter to the Department of 28 May 1993 drawing its attention to what I considered to be the issues for my determination and inviting a written submission, I said:

"... I first pose as a general question whether you contend that the word "deliberation" in s.36 of the FOI Act bears any meaning different to the meaning of the equivalent word in the equivalent provision (s.34) of the Commonwealth Freedom of Information Act 1982, that was accepted by Deputy President Todd of the Commonwealth AAT in Re Porter and Department of Community Services and Health (1988) 14 ALD 403 at page 407:

"'Deliberation' of Cabinet seems to me to connote what was actively discussed in Cabinet. It is not the agenda for a meeting of Cabinet, nor is it what Cabinet formally decided. What the words "deliberation or decision" of Cabinet cover is debate in Cabinet, and formal decisions made in Cabinet. It is not to be concluded that there was deliberation in respect of matter contained in a document merely because a document was before Cabinet at a meeting thereof." "

37 The Department's submission on this point was a little confusing to follow. It seemed at first to be attempting to persuade me that it was appropriate to adopt a more extensive meaning for the word "deliberation" (which would extend to "careful consideration as distinct from discussion"), though it was ultimately indicated that the Department accepted the meaning of "deliberation" as expressed by Deputy President Todd in *Porter's* case. The submission stated that the Queensland system of recording the proceedings of Cabinet is materially different to the Commonwealth system:

"In contrast to the documents of the Federal Cabinet, the only documents which record actual discussion by Cabinet are the "Cabinet Minutes" which document Cabinet decisions and the "Collective Minutes of Proceedings" (the "Collectives") which briefly record general matters raised in Cabinet. The Collectives also list the title, number and sponsoring Minister of those Cabinet Submissions deliberated on by Cabinet. The Collectives do not record particular issues discussed by Cabinet on a written Cabinet Submission although they may record issues raised by an oral Cabinet submission. Handwritten notes taken by the Secretary of Cabinet are destroyed once the Cabinet decisions in the form of

"Cabinet Minutes" and the Collectives are typed. Consequently, the Queensland Cabinet process does not give rise to the type of Cabinet documents kept by the federal Cabinet which were under consideration in Commonwealth of Australia v Northern Land Council and anor. (unrep. 21 April 1993) and in the Commonwealth jurisdiction in Re Porter and Department of Community Services and Health (1988) 14 ALD 403."

38 It was therefore argued that I should accept that:

"If there are any documents which record 'active discussion and debate' by Cabinet in the Queensland Cabinet system, then those documents include written Cabinet submissions being documents which procure or form the basis of Cabinet decisions. It is clear that Collectives recording issues raised in oral submissions would constitute a record of deliberations by Cabinet. It follows that written Cabinet submissions also constitute a record of deliberations by Cabinet. There is no other such record of the deliberations when a matter is the subject of a written Cabinet submission. When a Cabinet submission is in written form, it is annexed to the official record of a Cabinet decision as a matter of course and not recorded in the Collectives other than by title, number and Minister."

39 The first and third sentences of this passage contain propositions which I consider to be logically (and semantically) unacceptable. A document whose creation preceded "active discussion and debate" in Cabinet (even though it was created and submitted to provide information to assist Cabinet debate or indeed to contribute the opinions and recommendations on policy matters of an individual Minister) cannot logically constitute a record of what was actively discussed and debated in Cabinet on the occasion of that document's consideration by Cabinet. Such material could be incorporated by reference into the active discussion and debate, for example "I agree with the recommendations set out in the Cabinet submission", but that cannot equate the material prepared to assist Cabinet deliberation with the Cabinet deliberation itself. It cannot in my opinion be said that disclosure of the former would involve disclosure of any of the active discussion and debate within Cabinet. It is only documents created contemporaneously with, or subsequent to, active discussion and debate within Cabinet, that in my opinion are capable of disclosing any deliberation of Cabinet so as to fall within s.36(1)(e).

40 The position in respect of Cabinet decisions may be slightly different. Cabinet submissions are generally required to set out the sponsoring Minister's recommendations in a form capable of adoption as a Cabinet decision, if the recommendations are accepted (see the Queensland Cabinet Handbook, p.36). It must frequently occur that a decision in the terms recommended in a Cabinet submission is agreed to by Cabinet, with or without discussion and debate. That part of the Cabinet submission setting out the terms of the recommended Cabinet decision would probably in those circumstances be exempt under s.36(1)(e) because its disclosure would involve the disclosure of a decision of Cabinet (assuming that the decision had not already been officially published by decision of Cabinet). The same matter, however, will already have qualified for exemption under s.36(1)(a) (as it would have even if Cabinet had rejected the recommended decision) and it is difficult to conceive of any circumstances in which a recommendation for a Cabinet decision (whether accepted by Cabinet or not) could constitute "merely factual or statistical matter" so as to fall within the s.36(2) exception to the categories of exempt matter provided for in s.36(1). But, even if a recommendation in a Cabinet submission, and all its supporting material, is accepted by Cabinet without discussion or debate, that does not, in my opinion, somehow elevate the material prepared to assist the deliberations of Cabinet to the status of constituting the deliberations of Cabinet. The matter contained in such a Cabinet submission will generally be exempt under s.36(1)(a), rather than s.36(1)(e). (Exceptions may occur in

respect of some parts of the matter contained in a Cabinet submission, as instanced in this paragraph and the following paragraph.)

- 41 Some issues will be the subject of deliberation by Cabinet (or a Committee of Cabinet) on two or more occasions, probably with further written submissions being prepared to assist each new round of deliberation, before an acceptable outcome is agreed upon. In such instances, the second and subsequent Cabinet submissions are likely to contain matter summarising previous Cabinet deliberations on the issue. Similarly, policy proposals will frequently come before Cabinet after having been the subject of extensive consideration by a Cabinet Committee. In such cases, the Cabinet submission is likely to contain matter summarising the deliberations of the Cabinet Committee. Matter of the kind referred to in these two examples would clearly be exempt under s.36(1)(e) (assuming it has not been officially published by decision of Cabinet) as well as being contained in a document which is exempt under s.36(1)(a). But these two instances are no more than specific illustrations of the proposition contained in the last sentence of paragraph 39 above.
- 42 The introduction in the second sentence of the passage quoted at paragraph 38 above, of the process of recording in the "Collectives" issues raised in oral submissions to Cabinet, seems to me to be rather a red herring. The record in the "Collectives" of an oral submission will always fall within the terms of s.36(1)(b) of the FOI Act. If an oral submission is made merely for the purpose of informing Cabinet Ministers on some matter, and no deliberation or decision is called for, then the record of the oral submission probably does not also fall within the terms of s.36(1)(e), there being no deliberation of the Cabinet in the sense of careful consideration and discussion with a view to making a decision. If an oral submission calls for deliberation and decision by Cabinet, then the record in the "Collectives" of the oral submission will probably also be exempt under s.36(1)(e) because its disclosure would involve the disclosure of a contribution by an individual Minister to what was actively discussed and debated within Cabinet with a view to arriving at a decision. In the event that a Minister merely repeated in a Cabinet debate what was contained in the Minister's written submission to Cabinet, a record of the Minister's contribution to active discussion and debate within Cabinet would be exempt under s.36(1)(e) (assuming it had not been officially published by decision of Cabinet), but the Minister's written submission to Cabinet would, in my opinion, still only fall within s.36(1)(a).
- 43 The fact that the Queensland system of recording the proceedings of Cabinet is different to the Commonwealth system does not afford any justification for interpreting the words of s.36 other than according to their natural and logical meaning when the section as a whole is properly construed. I consider that Deputy President Todd of the Commonwealth AAT was clearly correct in *Porter's* case when he said that the term "deliberation of Cabinet" connotes what was actively discussed in Cabinet. That is properly to be inferred from the scheme evident in the structure of s.36(1) of the FOI Act, which contemplates that the exempt status of matter which has been brought into existence for the purpose of submission for consideration by Cabinet (and which necessarily therefore predates any deliberation by Cabinet in respect of that matter) is to be determined under s.36(1)(a), and not under s.36(1)(e) which is designed to accord protection to what was actively discussed in Cabinet, and to formal decisions made in Cabinet.
- 44 Clearly, s.36(1)(e) still has work to do in the scheme of s.36, even though, according to the Department's submission, the general practice with official records of the Queensland Cabinet does not involve the recording of particular issues discussed by Cabinet on a written Cabinet submission. It is likely that documents, other than official records of Cabinet, will be created which record the substance of deliberations within, and the terms of decisions made by, Cabinet or a Committee of Cabinet, so as to inform the responsible officials of what they need to know in order to implement effectively the government's decisions, e.g. minutes of briefings by a Minister to his or her Departmental officials on a Cabinet decision which the Minister has been

charged with implementing; minutes prepared by Departmental officials allowed to be present at meetings of Cabinet Committees recording the substance of deliberations and decisions on matters for which they have responsibility for implementation. Matter contained in documents of this kind may fall within s.36(1)(e) of the FOI Act (assuming that the matter has not been officially published by decision of Cabinet).

- 45 I should add that my conclusion as to the meaning of the term "deliberation of Cabinet" is also supported by the meaning given to the word "deliberation" where it appears in s.28(1)(d) of the Victorian FOI Act (which corresponds to s.36(1)(e) of the FOI Act) by Judge Rowlands, the then President of the Victorian AAT, and Mrs Rosen (Member) in *Re Birrell and Department of the Premier and Cabinet (No. 1)* (1986) 1 VAR 230 at page 239:

"It was submitted on behalf of the respondent that the word "deliberation" encompassed any act of Cabinet including its mere receipt of information such as, for instance, a report without the need for debate or consideration. It is our opinion that "deliberation" encompasses more than the mere receipt of information in the Cabinet room for digestion by Cabinet Ministers then or later. The word "deliberation" connotes careful consideration with a view to the making of a decision. The mere acceptance of material which may or may not provide the basis for further action or decision-making (certainly if there is not discussion or consideration concerning its worth or merit) does not in our view amount to "deliberation"."

- 46 Some confirmation that this interpretation accords with the natural meaning of the words "deliberation of Cabinet" even in a non-statutory context can be found in the observation of the High Court of Australia in *Commonwealth v Northern Land Council* (1993) 67 ALJR 405 (at p.406) which described the documents in issue in that case as:

"... documents which record the actual deliberations of Cabinet or a committee of Cabinet. They are not documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet".

- 47 It is a basic principle of statutory construction that a particular word or phrase is to be interpreted consistently throughout a statute in which it appears, except so far as the context and subject matter of particular provisions otherwise indicate or require:

"I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament, and with especial force to words contained in the same section of an Act. There ought to be very strong reasons present before the Court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section." (Craig, Williamson Pty Ltd v Barrowcliff [1915] VLR 450 per Hodges J at 452; see also Registrar of Titles (WA) v Franzon (1976) 60 ALJR 4 at 6 per Mason J.)

While the presumption that a word has been used consistently throughout a statutory provision must yield to a contrary intention evident from the context of the provision, I can see nothing in the context of s.36(2) which requires the term "deliberation of Cabinet" to be given any different meaning in s.36(2) to that which it bears in s.36(1)(e).

The Meaning of "Merely Factual Matter"

48 Section 36(2) requires that, once matter in a document has been found to fall within one or more of the five paragraphs of s.36(1), it be carefully examined to identify any matter that is properly to be characterised as "merely factual or statistical matter". It must then be established whether the disclosure under the FOI Act of any such factual or statistical matter would involve the disclosure of any deliberation or decision of Cabinet, the fact of which deliberation or decision has not been officially published by decision of Cabinet (this issue is examined at paragraphs 62 to 73 below).

49 I consider that, for practical purposes, there is no difference in meaning between the term "merely factual matter" in s.36(2) of the FOI Act and the term "purely factual material" which appears in s.34(1A) of the Commonwealth FOI Act. The adverb "merely" connotes that which is solely or no more than "factual material". (I should note that nothing in the nature of statistical matter is contained in the Cabinet submission in issue in this case.) There are very few cases from tribunals or courts hearing appeals under the freedom of information statutes of other Australian jurisdictions, which contain any worthwhile discussion as to what constitutes factual matter, and how it is to be distinguished from other kinds of matter contained in a document. The available cases have mostly involved the application of exemption provisions which correspond to s.41 (matter relating to deliberative processes) rather than to s.36 of the FOI Act, but these are largely comparable (subject to one note of caution sounded below) because both provisions place merely factual or statistical matter outside the scope of the exemption.

50 In *Re Waterford and the Treasurer of the Commonwealth of Australia* (1985) 7 ALD 93, a case dealing with s.36 of the Commonwealth FOI Act (which corresponds to s.41 of the FOI Act), Deputy President Todd considered the issue of what constituted "purely factual material" within the meaning of that provision. He said (at paragraphs 12-15):

"12. *"Factual material": In various areas of the law it is necessary to decide what is a question of fact. But where that question arises it does so where an alternative is presented: Is the matter a question of fact or a question of law? Is what is asserted a matter of fact or a matter of opinion? Hard as those questions may on occasion be to resolve, the task is perhaps aided rather than hampered by the fact that the nature of the alternative tells us something of the nature of the propositus. ...*

13. *The question is therefore whether the document consists of "factual material". As referred to in Morley v National Insurance Co. [1967] VR 566 at 567, it is stated in *Wigmore on Evidence*, 3rd ed, Vol 1 paragraph 1 page 2, that in one sense "everything in the cosmos is a fact or a phenomenon". Yet plainly the relevant words must have been used with the intention of differentiating factual material from other kinds of material. Mr Waterford argued that the purpose of s.36 was to shield the decision-making process, not to shield the factual material with which the decision makers were armed. Disclosure of the relevant document, he contended, would not disclose anything about the decision making process. He said that all that the material was designed to do was to provide a factual background against which policies could be made adding, perhaps disarmingly, "assuming the correctness of the assumptions".*

14. *The difficulty, as it seems to me, is that I am still required, in order that the applicant may succeed on this point, to determine whether the document contains "purely factual material", there being as I understand the position nothing else in the document other than the material in question and explanatory headings. The word "purely" is clearly not used to denote something about the character of what is comprised in "factual material". It has the sense of "simply" or "merely". It seems to me that to be described as "factual" the material must be "factual" in fairly unambiguous terms. This is confirmed by resort to the dictionaries, where for "factual" there appears:*

Random House: "1. Of or pertaining to facts; concerning facts; factual accuracy. 2. Based on or restricted to facts: a factual statement."

Macquarie: "Pertaining to facts; of the nature of facts; real."

Shorter Oxford: "Concerned with facts; of the nature of fact, actual, real."

15. *In Harris v ABC (1984) 51 ALR 581 at p.586 there is reference to the difficulties which occur when a statement is made of an ultimate fact involving a conclusion based on primary facts which may be unstated. Such a statement may be a statement of "purely factual material". On the other hand "a conclusion which involves opinion, advice or recommendation for the purposes of the deliberative process may well prevent material from being purely factual and render it exempt". Problems of the kind so raised in Harris v ABC are of course likely to recur, and there will no doubt be cases at the borderline. But I consider that projections or predictions of likely future revenue are a long way from being capable of being considered as facts or as "purely factual material" according to ordinary conceptions of the use of the language."*

51 *In Re Howard and the Treasurer of the Commonwealth* (1985) 3 AAR 169 at 174, the President of the Commonwealth AAT, Davies J, said:

"The shorter Oxford English Dictionary defines "factual" as "concerned with facts; of the nature of fact, actual, real". The dictionary defines "fact" as, inter alia, "3. something that has really occurred or is the case; hence, a datum of experience, as dist. from conclusions 1632". In my opinion, the subject documents do not contain purely factual material. Estimates as to what will happen if certain changes are made to the taxation laws and rates involve elements of judgement or assumption. They are concerned with the future, not with facts. As the Tribunal said in Re Waterford and Department of Treasury (No. 1) (1985) 7 ALD 93:

"... I consider that projections or predictions of likely future revenue are a long way from being capable of being considered as facts or as 'purely factual material' according to ordinary conceptions of the use of the language."

52 *In Harris v Australian Broadcasting Corporation and Others (1984) 5 ALD 564, a Full Court of the Federal Court had to consider arguments as to the extent of the purely factual material contained in two interim reports by a consultant (Miss Pearlman) who had been appointed by the ABC Board to conduct an investigation into the operations of the ABC legal department. The Full Court said at page 569:*

"We have given consideration to sections of the report where passages are introduced by such phrases as "I am of opinion", "I am inclined to the view", "I find", or "I conclude". However, in all of these cases we consider that the statement made is in the nature of a statement of the facts as Miss Pearlman sees them. In each case the statement is preceded by a recital of particular facts in detail. In our view, a provision such as section 36 of the Freedom of Information Act Cth [which corresponds to s.41 of the Qld FOI Act] is to be applied according to common sense and the substance of the matter and not as an exercise in semasiology."

53 It is also worth drawing attention to a short passage in the judgment of Keely J of the Federal Court of Australia, in *Public Service Board v Scrivanich* (1985) 8 ALD 44, which was an appeal from the Commonwealth AAT. His Honour found that the Tribunal had erred in law in its application of s.36(5) of the Commonwealth FOI Act:

*"The Tribunal (para 26) stated that the report involved "an opinion as to ultimate facts and not an analysis of primary facts". In my view that passage indicates that the Tribunal assumed that such "an opinion" necessarily excluded "an analysis of primary facts". In my opinion, such an assumption is not consistent with the opinions expressed by the Full Court in *Harris v Australian Broadcasting Corp* (1984) 51 ALR at 586; 5 ALD 564."*

54 Thus a commonsense approach should be taken to the task of characterising matter as factual matter or otherwise, according to its substance (i.e. its substantive nature or character) rather than merely to semantics (i.e. merely by reference to the particular terms in which it is couched). Material which contains elements of judgment or opinion concerning purely factual matters may still be capable, depending on its context and its purpose in that context, of properly being characterised as merely factual matter.

55 The judgment of the Full Court in *ABC v Harris* also contains a passage at page 568 which is worth noting, but is subject to the cautionary note referred to above:

"Counsel for the [applicant] argued that there should be excluded from the category of purely factual material under section 36:

- (a) *summaries (because of the judgemental process involved in compiling them);*
- (b) *conclusions expressed as findings by Miss Pearlman;*
- (c) *judgments founded upon Miss Pearlman's expertise or the application of some standard.*

In our view some summaries may be classed as purely factual material; others, which are of such a character as to disclose a process of selection involving opinion, advice or recommendation for the purpose of the deliberative process, may be exempt under section 36.

Equally, some conclusions may be classed as purely factual material. We hesitate to import notions from the law of evidence into this field. However, it may be useful to refer to the distinction, with which lawyers are familiar, between primary facts and ultimate facts. In our view a statement of ultimate fact may be a statement of purely factual material, notwithstanding it involves a conclusion

based on primary facts. Many common statements of fact may, if analysed, be found to be based on primary facts. For example, the statements x has a cold or y resides in Sydney are both statements based on primary facts, which are unstated. On the other hand, a conclusion which involves opinion, advice or recommendation for the purposes of the deliberative process may well prevent material from being purely factual and render it exempt."

- 56 The caution which should be sounded is that some of these observations on distinguishing factual material from opinion, advice or recommendation may only be relevant to the application of an exemption provision which corresponds to s.41 of the FOI Act.
- 57 Section 41(1) provides that matter consisting of an opinion, advice or recommendation that has been obtained, prepared or recorded, or 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, is exempt if its disclosure would be contrary to the public interest. Section 41(2)(b) then provides that matter is not exempt under s.41(1) if it merely consists of factual or statistical matter.
- 58 Since it is only matter in the nature of opinion, advice or recommendation which can be exempt under s.41 (and then only if its disclosure would be contrary to the public interest), most of the case law under provisions that correspond to s.41 of the FOI Act deals with the issue of whether or not factual or statistical matter is inextricably intertwined with the matter comprising opinion, advice or recommendation (which may qualify for exemption).
- 59 Section 36 on the other hand does not define its category of exempt matter by reference to public interest considerations, or by reference to its character as advice, opinion or recommendation, but rather according to whether the matter has been, or is proposed to be submitted to Cabinet (and was brought into existence for that purpose), or whether it forms part of an official record of Cabinet, or whether its disclosure would involve the disclosure of any unpublished deliberation or decision of Cabinet. These are largely questions of fact, not dependent on the characterisation of the actual content of the matter in issue. Section 36(2) then provides that matter is not exempt under s.36(1) if it is merely factual or statistical matter, unless disclosure of factual or statistical matter would disclose any deliberation or decision of Cabinet, the fact of which has not been officially published by decision of Cabinet.
- 60 Arguably, there is not the same scope or requirement under s.36(2) for distinguishing between two kinds of factual matter, in the manner of the distinction referred to in the second passage quoted from *Harris v ABC*, i.e. between those summaries of facts and conclusions of fact which are purely factual, and those which are of such a character as to disclose a process of selection involving opinion, advice or recommendation for the purpose of a deliberative process (and which may therefore qualify for exemption under s.41, depending on public interest considerations). After all, the Cabinet process is by its very nature a deliberative process, and a process protected on public interest grounds from mandatory disclosure, yet Parliament has still seen fit to provide that merely factual or statistical matter generated for and by the Cabinet process does not qualify for exemption (unless it would involve the premature disclosure of any deliberation or decision of Cabinet). Thus, it may be argued that some opinions or advice on merely factual matters submitted to provide the factual background to assist Cabinet's deliberations on policy issues, are still properly to be characterised as merely factual matter in the context of s.36(2).

61 My task then is to determine which parts of the matter contained in the Cabinet submission comprise merely factual matter (i.e. that which is only, or purely, or no more than, factual matter), adopting a commonsense approach to the task of characterising matter as factual matter or otherwise according to its substantial nature or character rather than merely to the form of words in which it is couched. I do not propose to attempt to define the other kinds of matter from which "merely factual matter" is to be distinguished. In the context of the s.36 exemption, however, given its rationale as discussed at paragraphs 12 to 21 above, and the rationale for the s.36(2) exception as discussed at paragraphs 31 to 33 above, I think it is safe to say that merely factual matter is generally to be distinguished from matter expressing the opinions and recommendations of individual Ministers on policy issues and policy options requiring Cabinet determination. Factual matter which merely provides the factual background, or informs Cabinet of relevant facts, so as to assist its deliberations on policy issues, will generally constitute "merely factual matter".

The Qualification to the s.36(2) Exception for "Merely Factual and Statistical Matter"

62 Once merely factual matter has been identified, it must be established whether its disclosure would involve the disclosure of any deliberation or decision of Cabinet, the fact of which deliberation or decision has not been officially published by decision of Cabinet.

63 Section 36(2) contemplates that merely factual matter or statistical matter may be found in documents falling within any of the five categories set out in s.36(1), though in practice it is most likely to be found in documents falling within s.36(1)(a), and in copies or drafts of, or extracts from, such documents. Since, as I have concluded above, the word "deliberation" refers to active discussion and debate within Cabinet, it is highly unlikely that any deliberation of Cabinet on an issue could be revealed through the disclosure of merely factual or statistical matter that was submitted to Cabinet prior to, and for the purpose of assisting, Cabinet's deliberation on that issue. Some possible exceptions were mentioned in paragraphs 40 and 41 above, together with my opinion that matter comprising a recommendation for a Cabinet decision is unlikely ever to qualify as merely factual or statistical matter. It is highly unlikely therefore that the disclosure under the FOI Act of merely factual or statistical matter contained in a document that otherwise falls within s.36(1)(a) (or a copy or draft of, or extract from, such a document) would involve the disclosure of any deliberation or decision of Cabinet. This should generally be true (exceptions would include the two instances referred to in paragraph 41) of any such matter which has not yet been submitted to Cabinet, because no deliberation has occurred and no decision has been made, which could be disclosed as contemplated by s.36(2)(a) and (b).

64 Section 36(1)(b) and (e) cover the documents created during and following Cabinet deliberation and decision-making, and which are therefore more likely to fall within s.36(2)(a). It would be relatively unusual for Cabinet to debate merely factual issues (though perhaps less so for Committees of Cabinet), rather than opinions and recommendations in respect of policy options. It should be the normal result of the consultation process prior to submission of a proposal to Cabinet that areas of factual disagreement are investigated and resolved, rather than having the factual basis of a Cabinet submission questioned and debated in the Cabinet room.

65 Nevertheless, the operation of s.36(2) can be illustrated by considering a hypothetical case where matter contained in a document records deliberations of Cabinet on factual matters in such a form that the matter contained in the document can properly be characterised as merely factual matter. The point of this hypothetical case is that the matter contained in the document is *prima facie* exempt under s.36(1)(e) because it would disclose that which was actively discussed in Cabinet and which has not been officially published by decision of Cabinet but, being merely factual matter, it also falls within the s.36(2) exception. The exempt status of such matter will turn purely on the question of whether or not the fact of Cabinet's deliberation has been officially

published by decision of Cabinet. If it has not, then the matter will still be exempt because both s.36(2)(a) and (b) are satisfied. If it has, then the matter will not be exempt because s.36(2)(b) has not been satisfied. Section 36(2)(a) is satisfied because disclosure will still involve the disclosure of what was actively discussed in Cabinet. But whereas under s.36(1)(e) protection for matter which would disclose any deliberation of Cabinet is not lost unless that matter has been officially published by decision of Cabinet, under s.36(2)(b) protection for merely factual matter which discloses any deliberation of Cabinet is lost when the fact of the deliberation having occurred has been officially published by decision of Cabinet. Both s.36(2)(a) and (b) must be satisfied to prevent the disclosure, by virtue of s.36(2), of merely factual or statistical matter.

66 When a Cabinet decision is officially published by decision of Cabinet, that in my opinion involves, for the purposes of s.36(2)(b), publication of both the fact of the decision, and (by necessary implication) the fact of deliberation by Cabinet in arriving at the decision. If the decision was arrived at without deliberation by Cabinet, e.g. by acceptance of a Minister's written recommendation without debate, then there is no deliberation of Cabinet that is capable of being disclosed in the circumstances.

67 The words which qualify the s.36(2) exception for "merely factual or statistical matter" (i.e. the words commencing with "unless" through to the end of the subsection) are for practical purposes equivalent to the corresponding words in s.34(1A) of the Commonwealth FOI Act. Section 34(1A) was inserted in the Commonwealth FOI Act by the *Freedom of Information (Amendment) Act* 1983, and its purpose was described in the Attorney-General's Second Reading Speech to the House of Representatives (Hansard, 18 October 1983, at p.1350) as follows:

"... the exemption for Cabinet and Executive Council documents has been narrowed to exclude from its scope documents of a purely factual character the disclosure of which would not reveal a hitherto unpublished decision of the Cabinet."

68 This confirms, in my opinion, that the primary purpose of the words specified above which qualify the s.36(2) exception for "merely factual or statistical matter" is to prevent the premature disclosure of the fact that Cabinet has deliberated and/or made decisions, upon a particular subject. Once the fact of deliberation or decision has been officially published by decision of Cabinet, the scheme of s.36(2)(a) and (b), with its material change of wording compared to s.36(1)(e), indicates that there is no longer any concern to protect against the disclosure of any deliberation of Cabinet that may be involved in the disclosure under the FOI Act of merely factual or statistical matter.

69 I accept the Department's submission as to the meaning of the phrase "officially published by decision of Cabinet" which appears in s.36(1)(e) and s.36(2)(b) of the FOI Act:

"The combined effect of "officially" and "by decision of Cabinet" means that the publication of the deliberation or decision be authorised or enabled by Cabinet decision. ("Cabinet" includes a Cabinet Committee)".

70 It is appropriate to note in this context that page 35 of the Queensland Cabinet Handbook discloses that "Public Presentation" is to be a mandatory heading in Cabinet Submissions and Significant Appointment Proposals:

"Ministers are required to give careful consideration to the public presentation and timing of announcements of their proposals. If the announcement is to be made by media release, a draft media release should be attached to the Cabinet submission. If no public presentation of the Cabinet Decision is necessary, this should be indicated on the cover sheet."

71 The Department's submission explains that:

"In the present case, Cabinet decided that the Albert Shire Council be advised that the State Government is unable to support the rezoning proposal by Fencray Pty Ltd on a number of grounds which were specified. A letter dated 14 December 1992 was forwarded to the Shire Clerk of the Albert Shire Council by the Minister for Housing, Local Government and Planning, Mr T Mackenroth. I accept that a letter by authority of Cabinet decision, signed by a Minister and addressed to a "third party" is a means of publication within the phrase "officially published by decision of Cabinet" ..."

72 On the basis of this publication, the Department's submission made the concession that:

"... the Ministerial letter to Albert Shire Council dated 14 December 1992, officially publishes by decision of Cabinet the fact that the "proposed 'Lagoons at Pimpama' development by Fencray Pty Ltd" was the subject of deliberation and decision by Cabinet."

73 That concession was, in my opinion, correctly made, and I formally make a finding in like terms to those set out in the passage just quoted. It is not clear from the balance of its submission, however, that the Department appreciated that this constitutes an insuperable barrier to any argument that merely factual matter contained in the Cabinet submission in issue remains exempt under s.36(2), because it means that the second of the two cumulative requirements imposed by s.36(2)(a) and (b) cannot be satisfied in the circumstances of this case.

APPLICATION OF THE PRINCIPLES DISCUSSED TO THE CABINET SUBMISSION

74 The Cabinet submission here in issue follows the format prescribed at page 31 and following of the Queensland Cabinet Handbook. It is divided into two parts, namely the Cover Sheet and the Body of Submission, the former being intended to provide a succinct overview of the contents and implications of the latter. The Queensland Cabinet Handbook seems to contain an administrative instruction that Cabinet documents are to be set out according to mandatory headings which are detailed at pages 31-49 of the Cabinet Handbook. In my letter to the Department dated 28 May 1993, I queried why some of the mandatory headings for a Cabinet submission had been deleted from the version of the Cabinet submission released to the applicant, when the Cabinet Handbook makes it clear that all Cabinet submissions must be structured according to those mandatory headings. The version with deletions released to the applicant had left in the headings "Background", "Urgency" and "Consultation" in both the Cover Sheet and the Body of Submission, but a number of other headings were deleted. The Department's response was as follows:

"Despite the publication by the Cabinet Handbook of the list of mandatory headings, it is to be noted that as a result of common administrative practice a "mandatory" heading may not necessarily be used where it is inapplicable in the context of a particular submission. The headings used in a Cabinet submission, therefore, have not been published by the Cabinet Handbook."

In any event, it is submitted that it is not the function of the decision-maker to inquire as to whether the applicant may or may not be aware of matter in respect of which an exemption is claimed. The fact that the information can be obtained elsewhere does not negate an otherwise legally valid exemption. Only the title of each mandatory heading is publicly available, not the quantity of deleted text below each heading. Therefore, disclosure of the heading would disclose what level of detail Cabinet deliberated on each issue/heading. This may in turn reveal the fact of deliberation or absence thereof. Release of the headings would disclose, for example, that ... were considered only so far as four lines would permit. This would breach Cabinet confidentiality by effectively disclosing the extent of Cabinet deliberations upon matter which has not been officially published."

- 75 These comments by the Department reflect the misapprehension that a document submitted to Cabinet to assist deliberation within Cabinet would disclose the deliberation of Cabinet. There may in fact be no debate within Cabinet at all on certain parts of a Cabinet submission. Revealing the quantity of deleted text will, in my opinion, disclose nothing about the extent of deliberation by Cabinet under certain headings, it will only disclose the extent of the material that was submitted to Cabinet to assist its deliberations in respect of that heading.
- 76 The headings are contained in a document which is exempt under s.36(1)(a) of the FOI Act, subject to the operation of s.36(2). Disclosure of the headings could not in itself reveal any deliberation or decision of Cabinet. It is difficult, however, to characterise them as merely factual matter. Headings in a document are used to provide structure and give the reader an indication of the topic or nature of the material considered below the heading. I do not propose to rule that the headings comprise merely factual matter, though it would be preferable for the Department to adopt a commonsense approach and exercise its discretion under s.28(1) to disclose a heading where that will give the proper context to other material which is to be released (as indeed the Department has done in respect of the small amount of factual matter contained in the Cabinet Submission which it has so far been prepared to release to the applicant).
- 77 The Department's submission conceded that *"the Ministerial letter to Albert Shire Council dated 14 December 1992, officially publishes by decision of Cabinet the fact that the "proposed 'lagoons at Pimpama' development by Fencray Pty Ltd" was the subject of deliberation and decision by Cabinet"*. The matter deleted from the first line under the first heading in the Cover Sheet should therefore now be disclosed to the applicant. I suggest to the Department that it may also be appropriate to exercise its discretion to release the heading which appears above that sentence.
- 78 In my letter to the Department dated 28 May 1993, I queried why the identity of the Minister or Ministers sponsoring the Cabinet submission had been deleted. The Department's response was as follows:
- "As a mode of practice, it is in the public interest that the principle of collective responsibility not be undermined and Cabinet secrecy not be compromised by disclosing [which Minister or Ministers] brought the matter to Cabinet."*
- 79 I accept the Department's submission in this regard. I consider that it is consistent with the basic rationale of the Cabinet exemption in preserving the convention of collective Ministerial responsibility that the opinions or recommendations of particular Ministers should not be disclosed.

80 My letter to the Department dated 28 May 1993 identified eleven separate passages in the Cabinet submission which arguably contain merely factual matter, and asked for the Department's response to the four questions set out above at paragraph 8. It will assist to ensure that my reasons for decision do not disclose matter which has been claimed by the Department to be exempt matter, if my following analysis refers to those passages as passages (a) to (k) inclusive, as they were identified on page 6 of my letter to the Department of 28 May 1993. As I pointed out at paragraph 10 above, the constraints upon me in stating my reasons for decision, unfortunately mean that the following discussion will be of little practical value to readers who do not have access to the Cabinet submission in issue.

Passage (a)

81 The Department argues that the second sentence of this two sentence paragraph is not merely factual matter, because it does not present as a statement or record of fact, but rather as a perception, belief or understanding. The Department argues that it is not unambiguously factual in nature (citing *Re Waterford and Treasurer (No. 1)*; see paragraph 50 above).

82 In my opinion, the Department has here fallen into the error cautioned against in *Harris v ABC* of paying undue regard to the terms in which the sentence is couched, rather than to its substantive character. In my opinion, the whole of the paragraph is merely factual in character, being clearly intended to convey to Cabinet the factual position with respect to the consideration by the relevant local authority of Fencray's development proposal.

83 The Department conceded that the first sentence of the paragraph comprised merely factual matter, but argued that its disclosure "would disclose matter considered by Cabinet in its deliberations". That may well be the case, but the disclosure of factual matter considered by Cabinet in its deliberations does not equate to and does not necessarily involve (and indeed in my opinion for the reasons explained at paragraphs 39 to 41 and paragraph 62 above, could only in an exceptional case involve) the disclosure of any deliberation of Cabinet, as that term has been explained earlier in these reasons. As the Tribunal observed in the passage from *Re Anderson* quoted at paragraph 32 above, the disclosure of purely factual material will give some indication of the subject matter submitted to Cabinet, and will imply that the facts as stated were relevant to the issues considered by Cabinet. But the s.36(2) exception for merely factual matter is based on the principle that disclosure of material of this nature will not unduly compromise the efficacy of the Cabinet process. In my opinion, neither s.36(2)(a), nor (for the reasons explained at paragraph 73 above) s.36(2)(b), apply to the matter contained in passage (a).

84 I find that passage (a) comprises merely factual matter which is not exempt matter under s.36(1) because it falls within the terms of s.36(2).

Passage (b)

85 The first sentence of passage (b) is phrased as a statement of fact about the outcome of the consultation among Departments which were consulted on the applicant's Environmental Impact Statement (EIS). Reference to page 34 of the Queensland Cabinet Handbook affords confirmation of the purpose of this segment of a Cabinet submission:

"Cabinet submissions and memoranda should state the extent of agreement or disagreement arising from the consultation process ... Where there is agreement amongst those consulted, it is sufficient to record this fact ..."

I disagree with the Department's submission that the substance of the statement is an opinion as to how to describe the results of consultation. It is essentially a statement of fact about the outcome of consultation. In summarising the outcome of consultations, however, the sentence refers to matter other than purely factual matter, being matter in the nature of analysis, judgment and opinion in relation to the EIS. This passage is very much a borderline case, but I think the better view is that, although essentially factual in character, the reference to the material of a different nature means that the sentence cannot be said to comprise merely factual matter, in the sense of containing no more than factual matter.

86 I find that passage (b) does not fall within the terms of s.36(2), and therefore is exempt matter under s.36(1)(a) of the FOI Act.

Passage (c)

87 This passage comprises three sentences. The Department argues that the substance of the first and third sentences are conclusions involving elements of judgment, opinion and assumption. The fact that a conclusion may involve elements of judgment or opinion concerning factual matters need not alter its essential character as merely factual matter (*cf* the passages from *Harris v ABC* and *Public Service Board v Scrivanich* quoted above). In my opinion, the first sentence of this passage, even if it is based on some element of judgment or opinion, can only properly be characterised as merely factual matter. The second sentence of the passage states as a fact that a particular claim has been made by the applicant in its EIS. In my opinion, the second sentence can only properly be characterised as merely factual matter.

88 The third sentence then states that the claims made by the applicant are not substantiated in the EIS. In my opinion, the third sentence would constitute a mere statement of fact if the EIS contains no material which attempts to substantiate the claims. If on the other hand there had been an attempt in the EIS to provide material to substantiate the claims, the third sentence would amount to a subjective judgment on the part of the author of the document based on analysis of the EIS, that the claims had not been substantiated. The applicant supplied me with a copy of its EIS, the relevant part of which has been examined. It contains no material which attempts to substantiate the particular claims in question here, apart from a brief explanation of the "methodology" on which the claims are based. In my opinion, then, the third sentence constitutes a mere statement of fact.

89 Again, the Department has submitted that to reveal the matter contained in this passage would involve disclosure of unpublished deliberations of Cabinet and for the same reasons given at paragraph 83 above I reject the argument.

90 I find that the whole of passage (c) is properly to be characterised as merely factual matter, and hence by virtue of s.36(2), it is not exempt from disclosure under s.36(1) of the FOI Act.

Passage (d)

91 This passage has a subheading (not being one of the mandatory headings stipulated in the Queensland Cabinet Handbook) which the Department argues constitutes matter of a conclusive nature involving judgment or opinion. I have already indicated that I do not propose to rule that headings in a document fall within the terms of s.36(2).

92 The Department argues that the other matter in this passage *"is not of a merely or purely factual nature because the presentation of the statements made has involved the processes of interpretation ..., deliberation ... and summary for the purposes of deliberation by Cabinet"*. If that is so, then in my opinion this passage illustrates that factual matter can be the subject of

interpretation, deliberation, and summary without altering its essential character as factual matter. The Department also argues that the matter in question presents the policy issues to be addressed by Cabinet, and cannot therefore, by its nature or purpose, be purely or merely factual matter. No matter what the major heading to this passage may say, the matter contained in the passage which I have identified to the Department as passage (d) does not present major points of policy requiring resolution by Cabinet. It presents a series of statements of fact for the assistance of Cabinet's deliberations on policy issues. It is essentially a factual account of relevant aspects of a strategic plan and draft strategic plan which are pertinent to the applicant's development project. I do not accept the Department's argument that this factual matter is inextricably intertwined with the policy issues for deliberation by Cabinet. I consider that this factual matter is separate and readily distinguishable from the expression of policy issues for Cabinet's deliberation.

- 93 In my opinion, this passage is properly to be characterised as merely factual matter. Again, the Department has argued that its disclosure would involve disclosure of unpublished deliberations of Cabinet, and for the same reasons given at paragraph 83 I reject that argument. I find that passage (d) comprises merely factual matter which, by virtue of s.36(2) of the FOI Act, is not exempt from disclosure pursuant to s.36(1) of the FOI Act.

Passage (e)

- 94 The Department's submission conceded that the substance of the two paragraphs comprising this passage is merely factual in nature. Again, however, it argued that disclosure of the matter would involve the disclosure of unpublished deliberations of Cabinet and in this instance also of an unpublished part of Cabinet's decision. In my opinion, there is nothing in passage (e) that would disclose the terms of any part of Cabinet's decision made in response to the Cabinet submission. For the reasons given at paragraph 83 above, I reject the argument that disclosure of this matter would disclose any unpublished deliberation of Cabinet.
- 95 I find that passage (e) comprises merely factual matter, which by virtue of s.36(2) of the FOI Act, is not exempt from disclosure pursuant to s.36(1) of the FOI Act.

Passage (f)

- 96 The last two lines on page 4 of the Body of the Submission are comparable to passage (b) above. Although they constitute essentially a statement of fact which summarises the findings of the review by Departments of the EIS, they also incorporate matter in the nature of analysis, judgment and opinion in relation to the EIS. I find that these two lines cannot be said to comprise merely factual matter in the sense of containing no more than factual matter. Hence they do not fall within the terms of s.36(2), and they constitute exempt matter under s.36(1)(a) of the FOI Act.
- 97 The first paragraph on page 5 of the Body of the Submission contains some elements of judgment or opinion but only in relation to factual matters, such that the paragraph as a whole is still properly to be characterised as merely factual matter.
- 98 The first sentence in the second paragraph on page 5 contains a purely factual statement about the proposed development. The second sentence of this paragraph records as a fact that one of the Departments consulted has raised concerns about a particular aspect of the proposed development. The concerns referred to, however, are framed in terms of possible consequences of the project. They reflect judgments or opinions of a predictive or speculative nature. I find that the second sentence does not comprise merely factual matter and does not fall within s.36(2), but is exempt matter under s.36(1)(a) of the FOI Act.

- 99 The third paragraph on page 5 quotes a sentence from the EIS, and then makes categorical assertions of fact about what is not contained in the EIS.
- 100 The fourth paragraph on page 5 is framed in terms of a judgment about future consequences of the project and subjective judgments about deficiencies in the EIS (based on analysis of the EIS) which cannot be characterised as merely factual matter. Hence, I accept the Department's submission that this paragraph does not fall within the terms of s.36(2), and therefore is exempt matter under s.36(1)(a) of the FOI Act.
- 101 The fifth paragraph on page 5 contains mere statements of fact about what is, and (in the last line) what is not, contained in the EIS.
- 102 The final paragraph on page 5 contains in the first sentence a statement of fact about the developer's intentions in respect to one aspect of the project. It constitutes merely factual matter. The second sentence of the final paragraph is framed in terms of a Department's opinion about possible future adverse consequences which may stem from the aspect of the project referred to in the first sentence. I do not think that the second sentence can be characterised as merely factual matter, hence it does not fall within the terms of s.36(2), and is therefore exempt from disclosure under s.36(1)(a) of the FOI Act.
- 103 I find that passage (f) (apart from the opening two lines, the second sentence of the second paragraph on page 5 of the Body of the Submission, the fourth paragraph on page 5, and the last sentence on page 5, which are exempt matter under s.36(1)(a) of the FOI Act) comprises merely factual matter which, by virtue of s.36(2) of the FOI Act is not exempt from disclosure pursuant to s.36(1) of the FOI Act.

Passage (g)

- 104 My letter of 28 May 1993 to the Department had already indicated that the first sentence on page 6 of the Body of the Submission could not be characterised as merely factual matter. The second sentence of that paragraph also appears to me to contain a subjective judgment of deficiencies in the EIS based on an analysis of the EIS, rather than a statement of fact about matter which is or is not contained in the EIS. The first sentence in the second paragraph on page 6 seems to me to fall within the same category. It is a general statement of opinion based on analysis of the EIS.
- 105 That is not the case, however, with respect to the second and third sentences in the second paragraph on page 6 which resort to specific examples to back up the general statement of opinion contained in the first sentence. The second and third sentences in the second paragraph are properly to be characterised as statements of fact about what is and what is not contained in the EIS.
- 106 It would normally be impractical and potentially misleading to sever from the statement of a general opinion, two examples designed to illustrate it, and disclose the latter while withholding the former from disclosure. In the particular circumstances of this case, however, given the material which has been conveyed to the applicant through the letter by which Cabinet's decision was officially published, and the applicant's indication to me that he would wish to be given access to material of this nature (*cf* s.32(c) of the FOI Act), I consider that these two sentences are capable of conveying meaningful information to the applicant and that it is practicable to give the applicant access with the surrounding exempt matter deleted. I find that the last two sentences in passage (g) comprise merely factual matter which by virtue of s.36(2) of the FOI Act, is not exempt from disclosure under s.36(1) of the FOI Act. The balance of passage (g) does not fall within the terms of s.36(2) and hence is exempt from disclosure under s.36(1)(a) of the FOI Act.

Passage (h)

107 This comprises one sentence which makes an assertion about a deficiency in the EIS. The relevant parts of the EIS have been examined in order to determine whether this passage is properly to be characterised as a mere statement of fact about what is not addressed in the EIS, or a subjective judgment based on analysis of material appearing in the EIS. Although the EIS contains some three and a half pages of material which purport to be relevant to the general topic of passage (h), they do not address at all the issue on which passage (h) alleges there is a deficiency in the EIS. I am satisfied that passage (h) is properly to be characterised as a mere statement of fact about what is not addressed in the EIS, and hence it comprises merely factual matter which by virtue of s.36(2) of the FOI Act is not exempt from disclosure under s.36(1) of the FOI Act.

Passage (i)

108 This passage is identical to the first sentence of passage (b), the latter appearing in the Cover Sheet and the former appearing in the Body of Submission. For the same reasons given at paragraphs 85 and 86 above, I consider that this passage does not fall within the terms of s.36(2), and therefore is exempt matter under s.36(1)(a) of the FOI Act.

Passage (j)

109 This passage comprises two sentences, the second of which restates in slightly different words the first sentence of passage (c) and for the same reasons given at paragraph 87 above, I consider that the second sentence of this passage is also properly to be characterised as merely factual matter. The first sentence of this passage is indisputably a statement of fact. I find that passage (j) comprises factual matter which, by virtue of s.36(2) is not exempt from disclosure under s.36(1) of the FOI Act.

Passage (k)

110 This passage restates with slightly different wording the second and third sentences from passage (c). For the reasons given at paragraphs 87 to 90 above, I consider that this passage comprises merely factual matter which by virtue of s.36(2) of the FOI Act, is not exempt from disclosure under s.36(1) of the FOI Act.

111 As already stated, the balance of the Cabinet submission, apart from the matter which I have identified as merely factual matter falling within s.36(2), is clearly exempt matter under s.36(1)(a) of the FOI Act. The result is that the applicant is entitled to obtain access to a number of paragraphs and individual sentences containing merely factual matter that were deleted from the version of the Cabinet submission to which the applicant was previously given access. The precise description of the matter to which the applicant is entitled to obtain access is set out in the terms of my decision which precedes these reasons for decision.