OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 15 of 1993 (Decision No. 93002)

Participants:

ROY ECCLESTON
Applicant

- and -

DEPARTMENT OF FAMILY SERVICES AND ABORIGINAL AND ISLANDER AFFAIRS
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - Refusal of access - consultation comments by one agency on policy proposals in development by another agency for eventual consideration by Cabinet - matter relating to deliberative processes of government - whether disclosure contrary to the public interest - factors relevant to the public interest.

FREEDOM OF INFORMATION - proper construction of s.41 of the *Freedom of Information Act* 1992 (Qld) explained - the concept of the public interest in freedom of information legislation explained - objects of the *Freedom of Information Act* 1992 (Qld) explained - accountability of government - fostering informed public participation in government decision-making and policy forming processes - words and phrases : "deliberative processes of government".

Freedom of Information Act 1992 (Qld) ss.5, 6, 7, 14(b), 21, 28(1), 34(2), 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 72, 76(2)(b), 81, 82, 87(2)(a), 88(2)
Freedom of Information Act 1982 (Cth) s.36
Acts Interpretation Act 1954 (Qld) s.27B
Judicial Review Act 1991 (Qld) s.4, Part 4
Freedom of Information Act 1989 (NSW) s.59A
Freedom of Information Act 1982 (Vic) s.30
Freedom of Information Act 1966 (US)

Mabo v Queensland (No. 2) (1992) 175 CLR 1, (1992) 107 ALR 1
Re Lianos and Secretary to Department of Social Security (1985) 7 ALD 475
Re Rae and Department of Prime Minister and Cabinet (1986) 12 ALD 589
Re VXF and Human Rights and Equal Opportunity Commission (1989) 17 ALD 491
Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588; 1 AAR 1
Glasgow Corporation v Central Land Board [1956] S.C. (HL) 1
Sankey v Whitlam (1978) 142 CLR 1
Commonwealth of Australia v John Fairfax and Sons Limited (1981) 55 ALJR 45; (1980) 32 ALR 485
Attorney-General (UK) v Heinemann Publishers Pty Ltd (the Spycatcher case) (1987) 10 NSWLR 86

Commonwealth of Australia v Northern Land Council and Another (1993) 67 ALJR 405
Attorney-General v Jonathan Cape Ltd [1976] QB 752
Director of Public Prosecutions v Smith [1991] 1 VR 63
R v the Inhabitants of the County of Bedfordshire (1855) 24 L.J.Q.B. 81
Lion Laboratories Limited v Evans [1985] QB 526
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473
Re Angel and Department of Arts, Heritage and Environment (1985) 9 ALD 113
D v The National Society for the Prevention of Cruelty to Children [1978] A.C. 171
Attorney-General (NSW) v Quin (1990) 64 ALJR 627
Re James and Others and Australian National University (1984) 6 ALD 687
Re Burns and Australian National University (1984) 6 ALD 193
Re Peters and Department of Prime Minister and Cabinet (No. 2) (1983) 5 ALN No. 218
Australian Capital Television Pty Ltd v The Commonwealth (No. 2) (1992) 66 ALJR 695
Attorney-General v Times Newspapers [1974] AC 273
Re Howard and Treasurer of Commonwealth of Australia (1985) 3 AAR 169; 7 ALD 626
Re Western Mining and Department of Conservation, Forests and Land (1989) 3 VAR 150
Re Murtagh and Commissioner of Taxation (1983) 6 ALD 112
Re Dillon and Department of the Treasury (1986) 4 AAR 320; 10 ALD 366
Conway v Rimmer [1968] AC 910
Harris v ABC (1983) 50 ALR 551; 5 ALD 545
Harris v ABC (1984) 1 FCR 150; 5 ALD 564
Re Sunderland and Department of Defence (1986) 11 ALD 258
In Re Grosvenor Hotel, London (No. 2) [1965] Ch 1210
Rogers v Home Secretary [1973] AC 388
Re Fewster and Department of Prime Minister and Cabinet (1986) 11 ALN N266
Re Fewster and Department of Prime Minister and Cabinet No. 2 (1987) 13 ALD 139
Re Bartlett and Department of Prime Minister and Cabinet (1987) 12 ALD 659
Re Anderson and Department of Special Minister of State (No. 2) (1986) 4 AAR 414; 11 ALN N239
Re Brennan and Law Society of Australian Capital Territory (No. 2) (1985) 8 ALD 10
Kavvadias v Commonwealth Ombudsman (1984) 2 FCR 64
Ryder v Booth [1985] VR 869
Re Pescott and Auditor-General of Victoria (1987) 2 VAR 93
Penhalluriack v Department of Labour and Industry (County Court, Victoria, 19 December 1983, unreported)
Re Smith and Administrative Services Department (Information Commissioner Qld, Decision No. 93003, 30 June 1993, unreported)
Grant v Downs (1976) 135 CLR 674
Re Heaney and Public Service Board (1984) 6 ALD 1310
Re Porter and the Department of Community Services and Health (1988) 14 ALD 403
Duncan v Cammell Laird and Co Ltd [1942] AC 624
Waterford v Commonwealth of Australia (1987) 163 CLR 54

DECISION

1. That part of the decision under review by which it was decided to refuse the applicant access to matter claimed to be exempt matter under s.41 of the *Freedom of Information Act* 1992 (Qld) is set aside.

2. In substitution therefore, it is decided that the applicant is entitled to be given access to the matter contained in documents 1, 2, 3, 4, 5, 6 and 7 (being the documents referred to and described in paragraph 76 of the Reasons for Decision) which relates to assessment or advice of the consequences of the High Court decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, except for the matter contained in the last two subparagraphs of the final paragraph on page one of document 4, which is exempt matter under s.36(1)(d) of the *Freedom of Information Act* 1992 (Qld).

Date of Decision: 30 June 1993

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F N ALBIETZ
INFORMATION COMMISSIONER

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Participants:

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Applicant

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DEPARTMENT OF FAMILY SERVICES AND ABORIGINAL AND ISLANDER AFFAIRS
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REASONS FOR DECISION

BACKGROUND

1 The applicant is a journalist, and Queensland Bureau Chief, for the national newspaper, *The Australian*. In that capacity, he has written several articles published in *The Australian* on topics relating to Aboriginal land rights, and in particular dealing with the *Aboriginal Land Act* 1991 (Qld) and the implications of the judgment given by the High Court of Australia on 3 June 1992 in the case of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, (1992) 107 ALR 1 (hereinafter referred to as the *Mabo case* or *Mabo*).

2 On 24 November 1992, the applicant lodged with the Department of Family Services and Aboriginal and Islander Affairs (the Department) a written request under the *Freedom of Information Act* 1992 (Qld) (the FOI Act) for access to documents relating to "assessment or advice of the consequences for the Queensland Government of the recent decision of the High Court in the *Mabo case*". It is noted in the Department's records that in a telephone conversation on 18 December 1992 between the applicant and the Department's Senior FOI Officer, the application was clarified as being one for access to "those documents relating to assessments or advice which were provided within Queensland Government and those requested by Queensland Government".

3 In a notification of decision letter (dated 28 January 1993) given under s.34(2) of the FOI Act, the Department notified the applicant that it held 124 pages of material which fell within the ambit of the request for access. The Department decided to give the applicant access in full to 62 pages, to give access to two pages from which exempt matter had been deleted (in reliance on s.43 of the FOI Act), and to refuse access to 60 pages claimed to be exempt from disclosure pursuant, variously, to s.36 (Cabinet matter), s.41 (matter relating to deliberative processes) and s.43 (legal professional privilege) of the FOI Act.

4 On 8 February 1993 the applicant lodged a request under s.52 of the FOI Act for internal review of the decision to refuse him access to the documents, and parts of documents,claimed to be exempt. While the application for internal review was not in terms confined to the documents claimed to be exempt under s.41 of the FOI Act, it was only to that category of documents that

some brief arguments by the applicant, in favour of disclosure, were addressed:

> *"I contest in particular your decisions that release of certain documents involving the deliberative process of government would be contrary to the public interest.*
>
> *The notion that the public should be involved in the deliberative process was foreshadowed explicitly in Attorney-General Dean Wells' second reading speech, when he said the Bill would "provide a greater opportunity for the public to participate in policy-making and government itself".*
>
> *It is difficult for anyone to participate in policy-making if the government is making its decisions in secrecy, under the cloak of "public interest".*
>
> *The legislation itself, while not defining the public interest, says that such interest is served "by promoting open discussion of public affairs and enhancing government's accountability".*
>
> *Your decision does not recognise this new requirement on the public service, and I consequently seek a review."*

5 The application for internal review was considered by Mr D A C Smith, a senior officer of the Department who decided on 16 February 1993 to affirm the decision under review. Mr Smith's reasons for decision are analysed in more detail below. However, I think it is appropriate in passing to give credit to Mr Smith for providing a reasons statement which complies with statutory requirements and sets out an appropriately detailed explanation of the basis for his decision. Both the Information Commissioner and the applicant have been afforded a clear understanding of the basis for Mr Smith's decision, and this has certainly facilitated the process of external review.

6 To the date of publication of this decision, the Office of the Information Commissioner has received some 119 applications for external review and in the course of investigating those applications, the reasons for a decision adverse to the applicant, both at first instance and on internal review, are carefully examined. It is a matter of some concern for the general administration of the FOI Act that many agencies, and especially internal review officers, do not appear to be fully and adequately complying with the statutory obligations imposed on them by s.34(2) (in particular paragraphs (f) and (g)) of the FOI Act, and s.27B of the *Acts Interpretation Act* 1954 Qld, in respect of the content of reasons statements. This is a matter which has been raised informally with the head of the Freedom of Information and Administrative Law Division in the Department of Justice & Attorney-General. I have on occasion exercised the discretion conferred on the Information Commissioner by s.82 of the FOI Act to require an agency to provide an additional statement of reasons where the statement provided to the applicant was inadequate for the purposes of satisfactorily progressing the conduct of my investigation and review. I could have done so in a great many more cases, if my only purpose was to ensure that decision-makers fully comply with the statutory requirements in respect of the content of reasons statement. Now that agencies have had some seven months experience of the practical application of the FOI Act, I hope that more attention will be paid to the quality of reasons statements.

THE REVIEW PROCESS

7 Mr Eccleston's application for review by the Information Commissioner was received on 22 February 1993. I requested the Department to provide me with copies of the documents to which Mr Eccleston had been refused access in accordance with the internal review decision of 16 February 1993. After these documents were produced and examined, concerns were raised directly with the Department about whether two pages, and part of the matter deleted from another two pages, could properly be claimed to be exempt under s.43 (legal professional privilege) of the FOI Act. The Department subsequently informed me that it did not wish to press its claim for exemption in respect of that matter, and I authorised the Department to allow Mr Eccleston to have access to it.

8 [Similar procedures are adopted whenever it appears appropriate following examination and assessment of the documents in issue in a review proceeding before me. The FOI Act requires the Information Commissioner to conduct reviews with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Information Commissioner permits (s.72(1)(b)). It was Parliament's clear intention that the Information Commissioner provide a speedier, cheaper, more informal and more user friendly method of dispute resolution than the court system or tribunals which adopt court-like procedures,and to this end to try whenever possible to ensure that any unnecessary expense or delay is reduced or eliminated. I consider it appropriate in pursuit of those goals that consultation be undertaken directly with the agency concerned when examination and assessment of documents claimed to be exempt indicates that the agency may have misunderstood or misapplied the exemption provisions or other provisions of the FOI Act. In the absence of the applicant, I, or my staff, are free to discuss in detail the actual contents of the matter or documents claimed to be exempt (c.f. the prohibition on the disclosure to the applicant or the applicant's representative of exempt matter imposed by s.76(2) and s.87 of the FOI Act). By putting my views to an agency and inviting reconsideration of the exempt status of a particular document, it is possible that speedy concessions can be obtained for the applicant, with a consequent narrowing of the range of documents which remain in issue for formal determination by the Information Commissioner. Further progress towards settlement, or at least a narrowing of the issues in dispute, may be made in subsequent discussions with the applicant and the agency.]

9 At a conference of the participants held on 19 May 1993 to clarify precisely what matters remained in issue and to discuss the procedure for further conduct of the review, Mr Eccleston stated that he did not wish to contest the Department's decision to refuse him access to those documents claimed to be exempt under s.36 (Cabinet matter) and s.43 (legal professional privilege) of the FOI Act. He wished to press for access only to the matter claimed to be exempt under s.41 (matter relating to deliberative processes) of the FOI Act. This left in issue some seven documents comprising 26 pages. In most of the documents, however, only a small amount of the matter fell within the terms of the applicant's FOI access request, that is, most of the documents dealt principally with material that cannot be characterised as relating to assessment or advice as to the consequences for the Queensland Government of the *Mabo case*.

10 Each participant was invited to consider whether it wished to put evidence before the Information Commissioner to establish any facts on which it wished to rely to advance its case. Neither participant wished to bring evidence, and both were content to put their case by way of written submission. Agreement was reached on a timetable and directions were made that:

(a) the Department deliver to the Information Commissioner's office by 2 June 1993, a written submission detailing the arguments on which it relies to establish the exempt

status of the documents or matter in issue;

(b) a copy of the Department's written submission, with such deletions as are necessary to avoid the disclosure of matter claimed to be exempt, be delivered to the applicant by 4 June 1993; and

(c) the applicant deliver to the Information Commissioner and the Department by 11 June 1993, a written submission setting out all arguments on which he relies to support his contention that the documents in issue are not exempt from disclosure under the FOI Act.

11 These directions were complied with and no deletions to the Department's written submission were necessary, for the purpose of providing a copy to the applicant.

12 The issue raised for my determination is whether s.41 of the FOI Act has been correctly applied to those parts of the seven documents remaining in issue which fall within the terms of the applicant's FOI access request. The corresponding provisions of the freedom of information legislation of the Commonwealth of Australia and of Victoria are probably the most frequently litigated exemption provisions in those jurisdictions. There is a considerable amount of case law from the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) and the Victorian Administrative Appeals Tribunal (the Victorian AAT), some of which is contradictory and confusing, and in some respects unsympathetic to the professed objects of freedom of information legislation. It is important that Queensland should choose carefully the guidance which it is appropriate to obtain from Tribunal decisions of other jurisdictions, so that a correct course is charted from the outset in the application of the deliberative process exemption in this State.

THE MEANING OF SECTION 41 : CONTRAST WITH OTHER EXEMPTION PROVISIONS

13 Section 41 of the FOI Act is in the following terms:

"**Matter relating to deliberative processes**

41.(1) *Matter is exempt matter if its disclosure -*

(a) would disclose -

(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) a consultation or deliberation that has taken place;

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and

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

(2) *Matter is not exempt under subsection (1) if it merely consists of -*

(a) matter that appears in an agency's policy document; or

(b) factual or statistical matter; or

(c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

(3) *Matter is not exempt under subsection (1) if it consists of -*

(a) a report of a prescribed body or organisation established within an agency; or

(b) the record of, as a formal statement of the reasons for, a final decision, order or ruling given in the exercise of -

(i) a power; or

(ii) an adjudicative function; or

(iii) a statutory function; or

(iv) the administration of a publicly funded scheme."

14 Perhaps the only neat categorisation which could be made of the 15 exemption provisions in Part 3 of the FOI Act is between those which call for the application of a public interest balancing test and those which do not. Section 41 falls into the former category but for reasons explained below the operation of its public interest balancing test is materially different from all other exemption provisions which fall into the former category, except s.48 (matter to which secrecy provisions of enactments apply).

15 The only sections in Part 3 of the FOI Act which do not contain a public interest balancing test of some kind are s.36 (Cabinet matter), s.37 (Executive Council matter), s.43 (legal professional privilege) and s.50 (matter the disclosure of which would be contempt of Parliament or contempt of court). It should be noted for the sake of completeness that:

(a) the public interest balancing test in s.45(1) qualifies only paragraph 45(1)(c) and not paragraphs 45(1)(a) and (b), with the result that trade secrets and information whose commercial value would be diminished by disclosure, will be exempt matter irrespective of any countervailing public interest considerations which might favour disclosure;

(b) the exemption for research matter in s.45(3) is not qualified by a public interest balancing test;

(c) the public interest balancing test in s.46(1) (which deals with matter communicated in confidence) qualifies only paragraph 46(1)(b) not paragraph 46(1)(a); and

(d) while s.42(1) (matter relating to law enforcement or public safety) is not itself qualified by a public interest balancing test, the exception to s.42(1), which is contained in s.42(2), is qualified by a public interest balancing test.

16 Most of the exemption provisions call for a judgment to be made about whether disclosure of

particular matter contained in a document would have certain specified effects, which in Parliament's judgment would be injurious to the public interest.

17 The exemptions in respect of Cabinet matter and Executive Council matter (ss.36 and 37) on the other hand, do not require any judgment to be formed about the likely effects of disclosure. Matter in a document is exempt upon proof of the facts which bring it within the prescribed class, irrespective of whether disclosure of the contents of the document would cause any damage to the public interest. This reflects Parliament's judgment that the maintenance of the convention of collective responsibility of all Ministers for decisions of Cabinet and advice tendered to the Governor by Executive Council (through protection of the confidentiality of Cabinet deliberations and decisions, and of Executive Council deliberations and advice) is a public interest of such importance to the proper functioning of our system of government that no other public interest considerations should be permitted to take precedence over it.

18 Other exemption provisions, like s.43 (legal professional privilege) and s.46(1)(a) (disclosure which would found an action for breach of confidence) call for the application of a legal test to be derived from the general law. Because that aspect of the general law has itself been developed for the protection of important public interests, satisfaction of the legal test means that disclosure would be contrary to the public interest.

19 Among the category of exemption provisions which call for the application of a public interest balancing test, the operation of the test in s.41 and s.48 is materially different from that of the other provisions (ss.38, 39, 40, 44, 45(1)(c), 46(1)(b), 47 and 49). In general, the latter group of provisions are framed so as to require an initial judgment as to whether disclosure of matter in a document would have certain specified effects, which if established will constitute a *prima facie* ground of justification in the public interest for non-disclosure of the matter (for example, under s.38(a): if disclosure of matter in a document could reasonably be expected to cause damage to relations between the State and another Government), unless the further judgment is made that the *prima facie* ground is outweighed by other public interest considerations, such that disclosure of the matter in the document "would, on balance, be in the public interest".

20 By contrast, the application of s.41 to matter in a document does not call for an initial assessment of the effects of disclosure of that matter, but rather of whether it falls within a prescribed class (i.e. matter relating to deliberative processes as defined by s.41(1)(a)) which is ascertained by considering its proper characterisation in light of its role in the processes of government. Unlike s.36 and s.37, however, exemption is not complete upon proof of the facts which bring the matter in a document within the class prescribed by s.41(1)(a). The judgment must then be made, quite independently of the issue of whether the matter satisfies the description contained in s.41(1)(a), that disclosure of the matter would be contrary to the public interest.

21 Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:

(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and

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

22 The fact that a document falls within s.41(1)(a) (i.e. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. This is to be logically inferred, as a matter of statutory construction, from the fact that in s.41 -

(a) Parliament has not provided that matter in a document is exempt (because damage to the public interest is demonstrated) merely on proof of the facts which bring it within a defined class (as is the case with the class of documents protected by s.36 and s.37 for example), but has added a separate and additional requirement which must be proved to establish exempt status; and

(b) a finding that matter in a document falls within the class defined in s.41(1)(a) involves no assessment of the effects of its disclosure, such as is called for in the exemption provisions referred to in paragraph 19 above, which require a decision-maker to be satisfied that disclosure would have certain specified effects which are *prima facie* injurious to recognisable aspects of the public interest, subject to the existence in any particular case of countervailing public interest considerations favouring disclosure which outweigh and displace the public interest consideration which Parliament has recognised and provided for in the opening words of the exemption provision.

23 These factors were recognised in respect of s.36(1) of the *Freedom of Information Act* 1982 (Cth) (the Commonwealth FOI Act), a provision which in my opinion is not materially different from s.41(1) of the FOI Act, by Deputy President Hall of the Commonwealth AAT in *Re Lianos and Secretary to Department of Social Security* (1985) 7 ALD 475 at 493 (paras 66-67) and by Deputy President Todd of the Commonwealth AAT in *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 603, where he dealt with a submission by the respondent Department that "there was a general public interest in the non-disclosure of documents which form part of the decision-making process and which represent policy-making at a high level", in the following terms:

> *"(42) Although the fact of documents having been created in the course of policy-making is relevant to s.36(1)(a), I am unable to see its relevance to the public interest. The existence of the separate, twin requirement of s.36(1)(b) clearly suggests that the fact of a document being of a type referred to in s.36(1)(a) is of no relevance to a consideration of the public interest. By creating two separate requirements in two separate paragraphs, as opposed to the method used in ss.33(1), 33A(5) and 39(2) and 40(2), the legislature appears to have put the two in contradistinction to one another. To accept Mr Gardiner's submission would amount to a dilution of the public interest requirement in s.36(1)(b)."*

24 I do not consider that any material difference was intended to be caused by the appearance of the words "on balance" in s.41(1)(b) of the FOI Act, which do not appear in the otherwise identical wording of s.36(1)(b) of the Commonwealth FOI Act. In particular, I do not think it can be suggested that the appearance of the words "on balance" is any kind of indication that there is an inherent public interest in the non-disclosure of deliberative process documents that has to be weighed against countervailing public interest considerations. If that had been Parliament's intention, it would surely have adopted the same drafting technique as appears in the exemption provisions listed in parentheses in the first sentence of paragraph 19 (above), and s.41(1)(b) would have appeared in these terms:

> *"(b) unless its disclosure would, on balance, be in the public interest."*

25 Rather, I consider that the words "on balance" reflect a recognition by the legislature that in this context public interest considerations favouring disclosure will generally always exist (comprising at least those public interest considerations which underpin the grant in s.21 of a legally enforceable right of access to government documents, and which are given legislative recognition in s.5(1)(a) and (b) of the FOI Act) and must be outweighed by factors favouring non-disclosure to the extent that disclosure would be contrary to the public interest.

26 In summary then, the fact that matter in a document falls within s.41(1)(a) carries no presumption that its disclosure would be contrary to the public interest - that is a separate requirement for exemption that must be separately established. (This is entirely appropriate when regard is had to the breadth of the range of documents that could fall within the description in s.41(1)(a), the vast majority of which could not conceivably have any adverse affect on the public interest if disclosed - see the wide interpretation given to the meaning of "deliberative process" in paragraph 28 below.) Moreover, in contrast to the other exemption provisions to which I have referred, Parliament has not sought to identify any facet of the public interest that may justify non-disclosure; for example, the kinds of prejudicial effects resulting from disclosure that would make disclosure contrary to the public interest are left entirely open.

27 The critical words in s.41(1)(a) are "deliberative processes involved in the functions of government". (The word "government" is given a non-exhaustive definition in s.7 of the FOI Act as follows: "'**government**' *includes an agency and a Minister*;".) A document which embodies a communication between a Minister and an official may contain matter in the nature of advice, but it will not fall within s.41(1)(a) unless the advice was obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of government. Matter in a document can fall within this exemption even though it originated outside government, but it must relate to the deliberative processes of government.

28 There was some early controversy evident in the decisions of the Commonwealth Administrative Appeals Tribunal as to whether the words "deliberative processes" in s.36(1)(a) of the Commonwealth FOI Act were confined to policy forming processes. A brief history of the controversy is sketched in a later decision of the Commonwealth AAT, *Re VXF and Human Rights and Equal Opportunity Commission* (1989) 17 ALD 491 at pp.499-500 (paragraphs 29-31 inclusive). The position which has come to be accepted in the Commonwealth AAT is that while the term "deliberative processes" encompasses the policy forming processes of an agency, it extends to cover deliberation for the purposes of any decision-making function of an agency. It does not, however, cover the purely procedural or administrative functions of an agency. One passage in particular has come to be accepted as correctly expounding the meaning of the term "deliberative processes" involved in the functions of an agency. In *Re Waterford and Department of Treasury (No. 2)* (1984) 5 ALD 588 at 606: 1 AAR 1 at 19-20, the Commonwealth AAT (comprising Deputy President Hall, Mr I Prowse and Professor Colin Hughes) relied on the Shorter Oxford English Dictionary meaning of "deliberation" as "the action of deliberating: careful consideration with a view to decision" and said:

> *"The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters*

> *undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play.*
>
> *It by no means follows, therefore, that every document on a departmental file will fall into this category. Section 36(5) provides that the section does not apply to a document by reason only of purely factual material contained in the document (see, in this regard, the Full Court decision in* Harris *(1984) 51 ALR 581). See also s.36(6) relating to reports and the like. Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FOI Act is not a document to which s.36(1)(a) applies. "* [For another example of a document held to relate to purely procedural or administrative functions of an agency, rather than to deliberative processes, see *Re VXF and Human Rights and Equal Opportunity Commission,* cited above.]

29 I consider that this passage should be accepted and applied in Queensland as correctly stating the meaning of the term "deliberative processes" in s.41(1)(a) of the FOI Act. In my opinion, further support for the proposition that deliberative processes extends beyond policy forming processes can be found in the wording of s.41(3)(b) (particularly sub-paragraph (iv) which has no counterpart in the Commonwealth FOI Act) which indicates Parliament's intention that deliberative processes preceding the exercise of a decision-making power under a statute or a publicly funded scheme, of the kind referred to in s.4 of the *Judicial Review Act* 1991, are covered by s.41(1)(a).

30 Normally, deliberative processes occur toward the end stage of a larger process, following investigations of various kinds, establishing facts, and getting inputs from relevant sources, perhaps obtaining expert opinion or analysis from a technical expert. Section 41(1)(a) covers only matter which can properly be characterised as opinion, advice or recommendation, or a consultation or deliberation, that was directed towards the deliberative processes, or as they are sometimes referred to in decisions of the Commonwealth AAT the "pre-decisional thinking processes" of an agency or Minister.

31 The s.41 exemption is not intended to protect the "raw data" or evidentiary material upon which decisions are made. This is evident from the terms of s.41(2), which provides that the s.41 exemption does not extend to matter which merely consists of factual or statistical matter, expert opinion or analysis, or any statement of policy already formulated which may apply to the making of a decision (matter that appears in an agency's policy document is excluded by s.41(2)(a), and the term "policy document" is defined in s.7). The use of the word "merely" in s.41(2), however, indicates that if for example factual or statistical matter is inextricably intertwined with matter expressing an opinion, advice or recommendation obtained for the purposes of a deliberative process - it may still be exempt under s.41, provided s.41(1)(b) is satisfied. Likewise, for expert opinion which is contributed in the course of, or for the purposes of, the deliberative process itself, rather than as technical data, or expert opinion evidence to be evaluated during the course of the deliberative process.

32 Disclosure of the kind of information referred to in s.41(2) will not compromise the deliberative

processes of government agencies, and will serve to some extent to inform members of the public of the nature of those processes, and perhaps if they are so inclined, to contest the validity of, or seek to correct errors in, the factual and technical assumptions on which government decisions are made. It is possible of course that factual or statistical information, or expert opinion or analysis, might be exempt under some other exemption provision in a particular case.

33 Section 41(3)(b) also makes it clear that once a deliberative process is over and a final decision has been made under one of the sources of decision-making authority set out in s.41(3)(b)(i) to (iv) inclusive, exemption cannot be claimed in respect of the record of, as a formal statement of the reasons for, that final decision, order or ruling. Providing material to citizens which explains and justifies government decisions which affect them is a key element of government accountability, and is one of the key objects of the FOI Act recognised by Parliament in s.5(1)(a) of the FOI Act, and also Part 4 of the *Judicial Review Act* 1991.

34 It is clear from the foregoing discussion that not only is the "public interest" a key element in the application of s.41, but also in the application of the majority of the exemption provisions in Part 3 of the FOI Act. As this is the first case for determination by the Information Commissioner which calls for the application of a Part 3 exemption provision, it is appropriate that I record some general observations about the concept of the "public interest" in the context of the FOI Act.

THE NOTION OF "PUBLIC INTEREST" IN FOI LEGISLATION

35 In *Official Information (Integrity in Government Project: Interim Report 1) (Canberra , 1991)* Professor Paul Finn summarised the changing constitutional landscape which has culminated in the Commonwealth Government and State Governments in Australia responding to public pressures for the enactment of freedom of information legislation (at pp.92-94):

> *"The manner in which government manages - and is lawfully allowed to manage - information in its hands has a marked bearing both on the quality of the citizen-State relationship and on the vitality of the democracy in which it governs. In the 200 years of our legal and governmental history, the latitude given to government in this has been variable. To the extent that it is possible to make broad generalisations and disregarding the very early colonial period, one can discern three overlapping phases in our law's governing of information management generally and of official secrecy in particular. Each, as will be seen, reflects rather different assumptions about the nature and proper working of our constitutional system. Each, for a period, has been the predominant influence in our law ... While the impact of these phases has been variable in our nine governmental systems, and while the pace of legal development in them is by no means uniform, the following discussion will proceed on a broad national basis, emphasising the change in constitutional and democratic principles which are embodied in our law, and particularly in the emerging law of the last decade.*
>
> *Assigning labels to the three phases, the <u>first</u> can be described as one of "<u>public interest paternalism</u>" ... While using the "public interest" to set the legal limits to the protection of official information, deference to the Crown and its advisers left it very much to the Crown to determine both what constituted the public interest and what and when official information should be made publicly available. The <u>second</u> phase, and much the most influential in Australia, has been that of*

> *"governmental authoritarism" ... In it neither official secrecy nor the public availability of information was made to depend upon the "public interest". It allowed government to elevate its interests over all others; to regulate at its discretion the public dissemination of information; and, formally at least, to coerce subservience from its officials through stringent official secrecy regimes. The third and much the most recent phase, can be designated the liberal-democratic one. Its manifestations are various: in Freedom of Information and in Privacy legislation; in the common law's "public interest" test for protecting governmental information; and in the now less deferential attitude taken to government in privilege cases. While accepting that official secrecy has a proper and necessary province, the guiding ideas here are that: "the interests of government ... do not exhaust the public interest" (*Glasgow Corporation v Central Land Board *[1956] S.C. (HL) 1 at 18-19, endorsed by Stephen J in* Sankey v Whitlam *(1978) 142 CLR 1 at 59); that the public availability of information is an important value to be promoted in a democratic society especially where this enables "the public to discuss, review and criticize government action" (*Commonwealth of Australia v John Fairfax and Sons Limited *(1981) 55 ALJR 45 at 49; (1980) 32 ALR 485 at 493 per Mason J) (the democratic theme); and that persons and bodies who supply confidential information to government about their own affairs have a legitimate interest in having the integrity and confidentiality of that information respected (the liberal theme).*
>
> *For the most part contemporary Australian law is in a period of transition from the second to the third of these phases. The power of government to act in the manner of its own choosing in the management of official information is being subordinated progressively to wider considerations of public interest. This trend in this particular sphere is not an isolated one. It reflects a wider and more general commitment to liberal-democratic ideals now evident in Australian public law generally."*

36 Modern notions of the public interest underpin, and have been the catalyst for the enactment of, freedom of information legislation. In *Attorney-General (UK) v Heinemann Publishers Pty Ltd* (the Spycatcher case) (1987) 10 NSWLR 86 explicit recognition was given to a principle that lies at the heart of our democratic system - that government exists for the benefit of the community it serves and that government officials, both elected and appointed, do not hold office for their own benefit but for the benefit of the public they serve (per McHugh JA at p.191):

> *"But governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest."*

37 The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of government exist, and who ultimately (through one kind of impost or another) fund the institutions of government and the salaries of officials.

38 These considerations are reflected in the Attorney-General's second reading speech to the Queensland Legislative Assembly on the introduction of the Freedom of Information Bill

(Parliamentary Debates [Hansard], 5 December 1991, at p.3850):

> *"In conclusion, this Bill will effect a major philosophical and cultural shift in the institutions of Government in this State. The assumption that information held by Government is secret unless there are reasons to the contrary is to be replaced by the assumption that information held by Government is available unless there are reasons to the contrary. The perception that Government is something remote from the citizen and entitled to keep its processes secret will be replaced by the perception that Government is merely the agent of its citizens, keeping no secrets other than those necessary to perform its functions as an agent. Information, which in a modern society is power, is being democratised. I commend the Bill to the House."*

39 Thus notions of the public interest constitute the basic rationale for the enactment of, as well as the unifying thread running through the provisions of, the FOI Act. Section 21 of the FOI Act reverses the general legal position which (apart from the power of a court to order the disclosure of government-held information for use as relevant evidence in legal proceedings) accorded governments an unfettered discretion in the dissemination of information about its own actions and operations, merely informing the public of these as and when it felt the need to do so. The reversal of the general legal position is justified, *inter alia*, by public interest factors of the kind given explicit recognition by Parliament in s.5(1) of the FOI Act.

40 Subsections 5(2) and (3) of the FOI Act, however, also recognise that both secrecy and openness with respect to government held information are relative, not absolute, values; and that the FOI Act is intended to strike a balance between competing interests in secrecy and openness for the sake of preventing prejudicial effects to essential public interests, or to the private or business affairs of members of the community, in respect of whom information is collected and held by government.

41 Part 3 of the FOI Act embodies Parliament's assessment of the interests which require, or may require protection to an extent which justifies an exception to the general right of access to government-held information conferred by s.21 of the FOI Act. As explained at paragraph 17 above, some exemption provisions (s.36 and s.37) reflect a public interest considered to be worthy of protection by according secrecy to any documents falling within a defined class, irrespective of whether prejudicial effects will follow from the disclosure of the actual contents of particular documents in that class. Most of the exemption provisions, however, operate according to whether a judgment can properly be made that disclosure of matter in a document will have certain prejudicial effects which Parliament has judged to be injurious to essential public interests or to the private or business affairs of members of the community in respect of whom information is collected and held by government. Some of these provisions, like s.45(1)(a) and (b), are not further qualified by the possibility that countervailing public interest considerations may outweigh the prejudicial effects of disclosure stipulated in the first part of the exemption provision (such that on balance disclosure would be in the public interest). Most of the exemption provisions in Part 3, however, (as noted above in paragraph 19) do contain this public interest balancing test. Thus, where apparently legitimate interests conflict, as will frequently arise when competing interests of individuals, of government in the conduct of its affairs, and of the public generally (or a substantial segment thereof) are sought to be protected or furthered in disputes over access to information, it is the balance of public interest which determines the particular interest(s) which it will be appropriate to protect, and whether by openness or secrecy. It is inherent in the process of balancing competing interests that one or

more interests, whether public, individual or government interests, will in fact suffer some prejudice, but that that prejudice will be justified in the overall public interest.

42 Because government is constitutionally obliged to act in the public interest, the protection which government can claim for its own interests cannot exceed that which is necessary to prevent possible injury to the public interest. The common law has long recognised, however, that important public interests are secured by the proper and effective conduct of government itself, so that there are likely to be many situations in which the interests of government can for practical purposes be equated with the public interest: for instance, 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 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.

43 By way of contrast, however, an important principle was enunciated by Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd and Ors* (1981) 55 ALJR 45; (1980) 32 ALR 485, which illustrates that the interests of government are not always synonymous with the public interest. The Commonwealth government sought an injunction to restrain the disclosure of confidential information about to be published in a book, with extracts from the book also to be published in the *Age* and the *Sydney Morning Herald*. To establish its case for an injunction to restrain the publication of the confidential information, the Commonwealth government had to show that it would suffer detriment from the unauthorised publication of the confidential information. Mason J said (at ALJR p.49, ALR p.493):

> *"The question then, when the executive Government seeks the protection given by Equity, is: What detriment does it need to show?*
>
> *The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that Equity will not protect information in the hands of the Government, but it is to say that when Equity protects Government information it will look at the matter through different spectacles.*
>
> *It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise Government action.*
>
> *Accordingly, the Court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.*
>
> *The Court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so*

long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.

Support for this approach is to be found in Attorney-General v Jonathan Cape Ltd *[1976] QB 752, where the Court refused to grant an injunction to restrain publication of the diaries of Richard Crossman. Widgery LCJ said (at pp. 770-771):*

> *"The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.""*

44 As this case was directly concerned with public interest considerations bearing on the publication of government information, the principles enunciated by Mason J are particularly apposite in the context of freedom of information legislation, and indeed some of his words are reflected in s.5(1)(a) of the FOI Act, which embodies the "democratic accountability" rationale for the enactment of freedom of information legislation.

45 None of the foregoing discussion attempts to accord any precise meaning to the term "public interest", which is really a legal term of art. It is no coincidence that neither the FOI Act nor any other statute has attempted to define the term, nor that the courts have tended to avoid any comprehensive attempt at a similar task, considering it to be a term incapable of exhaustive definition. A provision was inserted into the *Freedom of Information Act* 1989 (NSW) by the F*reedom of Information (Amendment) Act* 1992 (NSW) to give some legislative guidance as to matters that should not be taken into account in the application of a public interest balancing test in an exemption provision, but it did not attempt a comprehensive definition of the public interest. Section 59A of the NSW Act now provides:

"**Public Interest**

59A. For the purpose of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:

(a) cause embarrassment to the Government or a loss of confidence in the Government; or

(b) cause the applicant to misinterpret or misunderstand the information

> *contained in the document because of an omission from the document or for any other reason."*

46 The enactment of s.59A(a) may not have been strictly necessary, since such a principle is implicit in legal authorities dealing with the weighing of competing public interests relevant to the disclosure of government-held information. It is implicit in the passage quoted from *Commonwealth v John Fairfax* for instance that embarrassment to the government or exposing the government to criticism will not be a ground for refusing the disclosure of information. Similarly, public interest considerations would not protect against the disclosure of information relating to government impropriety. The Commonwealth AAT has accepted in cases determined under the Commonwealth FOI Act that there is a public interest in ensuring that a public authority acts within its lawful authority (*Re Heaney and the Public Service Board* (1984) 6 ALD 310 at p.323; *Rae*'s case, cited above, at p.605). To allow considerations favouring secrecy to cloak the disclosure of impropriety on the part of a government agency or official would be a subversion of the constitutional responsibility of government to act in the public interest. (Thus in *Sankey v Whitlam* (1978) 142 CLR 1, one of the factors which led Stephen J, at p.56, to consider that disclosure of the government documents was required, was that the government's reliance on the need to safeguard the proper functioning of the executive arm of government and of the public service, seemed "curiously inappropriate" when the legal proceedings for which disclosure of the documents was sought alleged a grossly improper functioning of that very arm of government and of the public service which assists it.)

47 The enactment of s.59A(b) may have been a response to the kinds of considerations discussed in paragraphs 136 and 137 below.

48 The 1979 report of the Senate Committee on Constitutional and Legal Affairs on the draft Commonwealth Freedom of Information Bill contains (at pp.64-67) an informative discussion of the role which the notion of the "public interest" has to play in freedom of information legislation, and expresses the view that it is neither practicable nor desirable to seek to define the term "public interest" in this context:

> "**5.21** *In almost every submission where the phrase ["public interest"] was discussed objections were raised against its inclusion in any provision of the Bill. Many referred to it as an ill-defined or amorphous concept, one that eludes definition even by jurists and whose meaning may vary at the whim of a minister or official. Thus, many also felt that the inclusion of the phrase in the Bill will in fact work to the disadvantage of members of the public and will provide a loophole to be exploited by agencies. The suggestions for reform generally fell into three categories: that the phrase be discarded; that it be defined either in the Bill or by this Committee; or that an appeal to the Tribunal be allowed against any decision made on a public interest ground.*
>
> **5.22** *We cannot accept the thrust of this criticism as it is our firm opinion that a 'public interest' criterion is a very useful one that should be used throughout the Bill. ...*
>
> **5.23** *Basically, we are in favour of using the concept because we believe that by so doing the Bill can require both an agency and the Tribunal to consider many factors favouring disclosure that might otherwise be ignored. This opinion has been strengthened by the decision in the* Sankey *case in which their Honours*

individually identified aspects of the public interest that supported the case for non-disclosure on the one hand and disclosure on the other. The range of factors identified affords some guidance as to how the phrase 'public interest' may work in the context of the Bill. ...

5.25 *To our mind, this analysis by the court indicates that 'public interest' is a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general - as opposed to merely private - concern. Although in that case the starting point was the nebulous interest of 'due administration of justice' and 'proper functioning of the public service', the court broke these down to practical, recognisable considerations that were capable of being weighed one against the other. The 'public interest', which has been described as an amorphous concept, incapable of useful definition, proved to be a viable concept enabling all relevant considerations to be brought to bear. Nor do we think that the utility of this concept is confined to Crown privilege cases, where the court can weigh against the government's interest in confidentiality the litigant's 'need to know'. It does not appear that the 'need to know' criterion as applied to a single litigant made the balancing process in the* Sankey *case any more or less difficult. There is no reason for supposing that in a freedom of information case (where the particular applicant's interest is irrelevant) it would be more difficult for a tribunal to isolate factors that are related to the* public's *interest in disclosure, or 'need to know'.*

5.26 *Indeed it is perhaps possible to speculate on the basis of this judgment as to the utility of the concept of 'public interest' in various clauses in the Bill (particularly the exemptions). The main effect would be to allow the consideration of a range of factors that might otherwise be ignored. ... Coupled with an exemption protecting business and commercial information, such a criterion might permit argument as to whether the details of a particular manufacturing process designed, for example, to ensure health and quality controls, or safeguards against water or air pollution should be disclosed where there may be a strong public interest in examining the effectiveness of these controls and safeguards. ...*

5.28 *In our view then, 'public interest' is a phrase that does not need to be, indeed could not usefully, be defined - a task that many submissions asked us to undertake. Yet it is a useful concept because it provides a balancing test, by which any number of relevant interests may be weighed one against another. ... the relevant public interest factors may vary from case to case - or in the oft-quoted dictum of Lord Hailsham of Marylebone 'The categories of public interest are not closed'. It is essential therefore that wherever the phrase is used the Bill should provide scope for adequate argument as to what result the public interest may require. This scope will only exist if the Tribunal is empowered to adjudicate on the question. 'Public interest' is not a balancing test that is customarily applied by administrators. It is a test that must be weighed by an adjudicator who has no interest in the outcome of the proceeding and who is skilled by professional experience in weighing factors one against another. ... in many of the submissions ... [o]bjection was made not so much to a public interest ground but to the interpretation and application of it by administrators alone."*

49 The courts have occasionally made comments which shed some light on the meaning of "the public interest" when used as a legal term of art. In *Director of Public Prosecutions v Smith* [1991] 1 VR 63 a case involving the *Freedom of Information Act* 1982 (Vic) (the Victorian FOI Act), a Full Court of the Supreme Court of Victoria said (at pp. 73-75):

> *"In the present case, the learned judge recognised the existence of the public interest in the proper and due administration of criminal justice. It seems he considered that to give effect to the interest it was necessary for the exempt documents to be made available for public scrutiny.*
>
> *There are many areas of national and community activities which may be the subject of the public interest. The statute does not contain any definition of the public interest. Nevertheless, used in the context of this statute, it does not mean that which gratifies curiosity or merely provides information or amusement: cf.* R v the Inhabitants of the County of Bedfordshire *(1855) 24 L.J.Q.B. 81, at p.84, per Lord Campbell LJ. Similarly it is necessary to distinguish between "what is in the public interest and what is of interest to know":* Lion Laboratories Limited v Evans *[1985] QB 526, at p.553, per Griffiths LJ ...*
>
> *The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals:* Sinclair v Mining Warden at Maryborough *(1975) 132 CLR 473, at p.480 per Barwick CJ. There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest* per se *is not a facet of the public interest."*

50 The last point made in this passage illustrates that a matter which is of interest to the public does not necessarily equate to a matter of public interest (see also in this regard *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113 at p.124). A further illustration of the courts' conception of the term "public interest" is to be found in the judgments of the High Court of Australia in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473, where the issues involved an objection by Mr Sinclair on his own behalf and on behalf of the Fraser Island Defence Organisation to an application for the grant of a mining lease on Fraser Island. In the hearing before the Mining Warden, the objector had adduced extensive expert evidence of the damage to the environment that mining was likely to cause. The mining warden was required by statute to consider whether "the public interest or right will be prejudicially affected by the granting of an application for a mining lease", but in the result recommended that the applications for mining leases be granted. In the course of his decision, the mining warden stated that the objector represented "the views of a section of the public" and that he was unable to conclude from the evidence that "the interest of the public as a whole" would be prejudicially affected by the grants. Barwick CJ said (at p.480) that the mining warden had erred in drawing:

> *"... the irrelevant distinction between the views of a section of the public and the public interest as a whole ... the interest, of course, must be the interest of the public and not mere individual interest which does not involve a public interest.*

Clearly enough, the material evidence by the appellant did relate to a public interest not limited to the interests of a less than significant section of the public".

51 In the same case, Jacobs J said (at p.487):

"The interest of a section of the public is a public interest but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by the public interest in having the mining operation proceed. It does not, however, affect the quality of that interest. The warden looked for what he described as the public interest as a whole and he did so in contradistinction to the interest of a section of the public. Moreover, he limited the area of public interest to the section of the public who propounded the views expressed by the objector. This was not permissible. The views may have been propounded by a section of the public but the matters raised went to the question of the interest of the public as a whole. The warden appears not to have given weight to the fact that the evidence produced by the objectors should be regarded as evidence on the public interest generally and needed to be weighed in all the circumstances of the public interest whether or not the evidence and the views therein were put forward by a large or a small section of the public."

52 In other words, the interest which the objector Mr Sinclair sought to protect, i.e. the environment and unique character of Fraser Island, was properly to be characterised as a public interest, and it could not be deprived of that character because it was only a small segment of the public that was seeking to protect that interest.

53 *Sankey v Whitlam and Others* (1978) 142 CLR 1 was a case in which the High Court of Australia reviewed the law relating to public interest immunity (formerly known as Crown privilege) by which the law attempts to reconcile, in specific cases, competing claims by government that the public interest would be injured by the disclosure in legal proceedings of government-held information, with the public interest that a court of justice performing its functions should not be denied access to relevant evidence. Stephen J said (at p. 60):

"Relevant aspects of the public interest are not confined to strict and static classes. As Lord Hailsham of St Marylebone observed in D. v The National Society for the Prevention of Cruelty to Children *[1978] A.C. 171, at p.230, "The categories of public interest are not closed ...". In that case their Lordships discerned an aspect of the public interest, hitherto unremarked and which was quite unconnected with the affairs of central government but which were nevertheless proper to weigh in the balance and which in the outcome sufficed to outweigh that other public interest which exists in there being available to the court the information necessary for it to do justice between litigants.*

That case provides an illustration of the need to consider the particular nature of the proceedings in which the claim to Crown privilege arises in order to determine what are the relevant aspects of public interest which are to be weighed and what is to be the outcome of that weighing process. It was just such a recognition of the need to take account of what was in issue in the particular case that led Lord Keith, in Glasgow Corporation v Central Land Board *[1956] SC (HL) 1 at p.25, to cite with approval an earlier authority which spoke of the possibility that "a matter of private right might be of such magnitude, and might*

> *indeed be so related to public interest, as to make the problem a delicate one and difficult to solve" and then to go on to consider the magnitude of the private right in the instant case, concluding that "everything must depend on the particular circumstances of the case. It is impossible to lay down broad and general rules". "*

54 Likewise, under freedom of information legislation, the task of determining, after weighing competing interests, where the balance of public interest lies, will depend on the nature and relative weight of the conflicting interests which are identifiable as relevant in any given case.

55 While in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, the courts have recognised that: "the public interest necessarily comprehends an element of justice to the individual" (per Mason CJ in *Attorney-General (NSW) v Quin* (1990) 64 ALJR 627). Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration worthy of protection, depending on the circumstances of any particular case.

56 Such factors have been acknowledged and applied in several decisions of the Commonwealth AAT; for example in *Re James and Others and Australian National University* (1984) 6 ALD 687 at p.701, Deputy President Hall said:

> *"87 In [*Re Burns and Australian National University *(1984) 6 ALD 193] my colleague Deputy President Todd concluded that, for the purposes of the Freedom of Information Act, the concept of public interest should be seen as embodying public concern for the rights of an individual. Referring to a decision of Morling J, sitting as the former Document Review Tribunal (*Re Peters and Department of Prime Minister and Cabinet (No. 2) *(1983) 5 ALN No. 218) Deputy President Todd said:*
>
> > *"But what is important is that his Honour clearly considered that there was a public interest in a citizen having such access in an appropriate case, so that if the citizen's 'need to know' should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged." (at 197)*
>
> *I respectfully agree with Mr Todd's conclusion ... The fact that Parliament has seen fit to confer upon every person a legally enforceable right to obtain access to a document of an agency or an official document of a minister, except where those documents are exempt documents, is to my mind a recognition by Parliament that there is a public interest in the rights of individuals to have access to documents - not only documents that may relate more broadly to the affairs of government, but also to documents that relate quite narrowly to the affairs of the individual who made the request."*

57 The force of this principle has been recognised, at least in so far as it relates to documents concerning the personal affairs of an applicant for access, in s.6 of the FOI Act, which is in the following terms:

"Matter relating to personal affairs of applicant

6. *If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -*

(a) whether it is in the public interest to grant access to the applicant; and

(b) the effect that the disclosure of the matter might have".

THE PUBLIC INTEREST IN ACCOUNTABILITY OF GOVERNMENT AND PUBLIC PARTICIPATION IN GOVERNMENT

58 The democratic rationale for the enactment of freedom of information legislation, the cornerstone of which is the conferral of a legally enforceable right to access government-held information, is encapsulated in the notions of accountability and public participation. With the object of assisting to secure a more healthy functioning of the democratic aspects of our system of government, and in particular a government responsive to the public it serves, the FOI Act is intended to:

(a) enable interested members of the public to discover what the government has done and why something was done, so that the public can make more informed judgments of the performance of the government, and if need be bring the government to account through the democratic process; and

(b) enable interested members of the public to discover what the government proposes to do, and obtain relevant information which will assist the more effective exercise of the democratic right of any citizen to seek to participate in and influence the decision-making or policy forming processes of government.

59 The public participation rationale for freedom of information legislation is inherently democratic in that it affords a systemic check and balance to any tendency of the small elite group which ultimately manages and controls the processes of high level government policy formulation and decision-making, to seek participation and input only from selected individuals or groups, who can thereby be accorded a privileged position of influence in government processes.

60 The public interest in accountability of government has been given express recognition by Parliament in s.5(1)(a) and (b) of the FOI Act which refer to the public interest being served by promoting open discussion of public affairs and enhancing government's accountability, and to the desirability of the community being kept informed of government operations. The Fitzgerald Report (which recommended that consideration be given to the enactment of FOI legislation in Queensland) warned (at p.126) of the dangers to the public interest posed by an excessive preoccupation with secrecy in government:

"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 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. ...

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."

61 Similar concerns were addressed by McHugh J of the High Court of Australia in *Australian Capital Television Pty Ltd v The Commonwealth (No. 2)* (1992) 66 ALJR 695 at p.743:

"If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation. ... Only by the spread of information, opinions and arguments can electors make an effective and responsible choice in determining whether or not they should vote for a particular candidate or the party which that person represents. Few voters have the time or the capacity to make their own examination of the raw material concerning the business of government, the policies of candidates or the issues in elections even if they have access to that material. As Lord Simon of Glaisdale pointed out in Attorney-General v Times Newspapers *[1974] AC 273 at 315:*

> *"People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.""*

62 Governments of all persuasions spend substantial sums of public money in disseminating information about those operations and achievements which they wish to make known to the public. It is legitimate in the interests of a free flow of information between the public, its elected representatives, and the agencies of government established to serve the public interest, that government Ministers and agencies should employ staff and expend public funds to help ensure that the public is kept informed. That there is potential for abuse, however, was

recognised in the Fitzgerald Report (at pp.141-2) which referred to the ability of government media units, with almost exclusive control over the release of official information and complementary news management techniques, to control and manipulate the information obtained by the media and disseminated to the public. (This topic is explored in more detail in the Electoral and Administrative Review Commission's Report on Review of Government Media and Information Services, April 1993, No. 93/R1.)

63 Freedom of information legislation provides some check against this potential for manipulation of the dissemination of government-held information, and affords a measure of reciprocity in access to information between government and the governed, by conferring on members of the public a legally enforceable right to obtain government-held information which is of interest or concern to them.

64 The two basic democratic justifications for the enactment of freedom of information legislation (accountability of, and fostering informed public participation in, government) have received widespread recognition. For instance, the former Deputy Premier of New South Wales, Mr Wal Murray, in the second reading speech upon the introduction of the Freedom of Information Bill to the New South Wales Parliament in 1988, said:

> *"This Bill is one of the most important to come before this House because it will enshrine and protect the three basic principles of democratic government, namely, openness, accountability and responsibility ... It has become common place to remark upon the degree of apathy and cynicism which the typical citizen feels about the democratic process ... This feeling of powerlessness stems from the fact electors know that many of the decisions which vitally affect their lives are made by, or on advice from, anonymous public officials, and are frequently based on information which is not available to the public. The government is committed to remedying this situation."* (Legislative Assembly Debates, New South Wales, 2 June 1988, p. 1399).

65 The enhancement of public participation in government is not a purpose given explicit recognition in the FOI Act itself, though it is probably implicit in some of the concepts expressed in s.5(1), for example, "promoting open discussion of public affairs". (Certainly, the Explanatory Notes to the Freedom of Information Bill, referred to in paragraph 67 below, entertain no doubt on this topic.) It is clear, in any event, from materials comprising the legislative history leading up to the passage of the FOI Act, that it was one of the purposes sought to be achieved by the legislation. At paragraph 3.36 of the Electoral and Administrative Review Commission's Report on *Freedom of Information* (December 1990, No. 90/86), it is said that:

> *"The fairness of decisions made by government, and their accuracy, merit and acceptability, ultimately depend on the effective participation by those who will be affected by them. Further, when access to information is denied to the public it is denied its right to exercise control over government. FOI legislation is crucial if access to information is to be obtained, and thereby participation in the processes, and control of, government is to be achieved."* (See also paragraphs 7.19, 7.108.)

66 In his second reading speech on the Freedom of Information Bill, the Attorney-General, the Hon. D M Wells, said (Parliamentary Debates [Hansard], 5 December 1991, at p. 3849):

> *"Freedom of information legislation throughout Australia enshrines and protects three basic principles of a free and democratic government, namely, openness, accountability and responsibility ... [after repeating the terms of s.5(1) of the FOI Act] ... The Bill enables people to have access to documents used by decision-makers and will, in practical terms, produce a higher level of accountability and provide a greater opportunity for the public to participate in policy making and government itself."*

67 The Explanatory Notes to the Freedom of Information Bill 1991 (circulated by the Attorney-General for the benefit of Members of Parliament) say in respect of clause 5 (now s.5 of the FOI Act):

> *"The clause states two basic reasons for the enactment of FOI legislation. First, the public interest is served by public participation in, and the accountability of, government. Second, the public interest is served by enabling persons to have access to documents held by government which contain information which relates to their personal affairs. The clause acknowledges that the public interest is also served by the non-disclosure of certain information, where disclosure would harm the essential public interests or the private or business affairs of members of the community."*

68 Of interest in this context is part of an article by English legal academic David Feldman (D Feldman, "Democracy, the Rule of Law and Judicial Review", (1990) 19 Federal Law Review 1, at p.2-4) in which he attempted to define a category of higher order democratic rights, which cannot, in a democracy, be subject to political interference:

> *"The reason for desiring public political institutions to be organised democratically is that democracy allows individuals a say in the terms and conditions on which social rules which bind them are developed. Intrinsically undemocratic social organisations may make the trains run on time but are bad because, regardless of the benefits which they produce, they deny the autonomy of individual citizens by denying them a voice in the determination of policies, rules and procedures. ...*
>
> *... there are (higher order) democratic rights. These should be respected and protected by a system which claims to be democratic; failure in this will represent a lapse from the democratic ideal. ...*
>
> *These higher order rights secure each citizen's access to the machinery of political decision-making. ... This provides a reason for individuals to subject some of their interests and freedom of choice to the public political process for some purposes. If it is ever rational for citizens to accept that their rights and obligations will be fixed by social institutions, it will be so only if the institutions operate under rules which guarantee to all citizens an equal right to influence decisions about the form and behaviour of those institutions. ... Some rights, at least are necessary to democratic institutions.*
>
> *For instance, it would be undemocratic to deny the vote to blacks, Jews or women because that would contravene the principle of political equality. On the*

> *other hand, it would not be illegitimate to fix a minimum voting age, so long as it is reasonably related to the age at which people are regarded as capable of discharging civic responsibilities and applies to all groups in a non-discriminatory way. These limitations on the majority's power to disenfranchise a minority are not limitations on democracy. They are an essential part of democracy. The same applies to a wide range of rights, which take up a special status as higher order democratic rights which need special protection under a democratic constitution. These include freedom of speech and association, the right to receive information which is relevant to public political decisions which one is entitled to make or influence, and perhaps the right to be provided with forums for speech and association."* (my emphasis)

69 The right of access to government-held information conferred by freedom of information legislation, and aimed at promoting (as at least one of its objects) informed public participation in the processes of government, can be seen to further what Feldman would classify as the higher order democratic right underlined in the passage just quoted.

70 There are strong echoes of Feldman's argument for the recognition of higher order democratic rights in the opinions of the majority judges of the High Court of Australia in *Australian Capital Television Pty Ltd v the Commonwealth [No. 2]* (1992) 66 ALJR 695 in which it was held that Part IIID of the *Broadcasting Ac*t 1942 (Cth) (introduced into that Act by the *Political Broadcast and Political Disclosures Act* 1991 (Cth)) was invalid in its entirety because of its severe impairment of the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticise Federal institutions -freedoms embodied by constitutional implication in an implied guarantee of freedom of communication as to public and political discussion. Mason CJ said at p.703:

> *"The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. ... The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.*
>
> **Freedom of Communication as an Indispensable Element in Representative Government**
>
> *Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the*

> *exercise of this freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative."* (my emphasis)

71 It is implicit in this passage, and in particular the sentences underlined, that citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them (whether or not they choose to exercise the right). The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.

72 The FOI Act must be applied in a manner that pays appropriate regard to the objects which the framers of the legislation sought to achieve.

73 Already, after less than a year of operation of the FOI Act, views have been publicly expressed by some Ministers and administrators that the FOI Act and other Fitzgerald inspired accountability mechanisms have "gone too far", and constitute an expensive and inefficient distraction to the performance of the main tasks of government. One can anticipate a lack of sympathy in many quarters of the Queensland public sector to the inconvenience posed by the added and time-consuming burdens of new accountability measures and demands for greater public scrutiny and public participation, particularly at a time when the Queensland public sector, in common with other Australian governments, has been embracing the ethic of the "new managerialism", designed to engender and exploit a corporate management public service mentality in the interests of cost cutting and obtaining the government's desired outcomes with the most efficient use of limited public resources.

74 However, the scheme of the FOI Act can accommodate the conflict which may sometimes occur between the public interest in the effective and efficient conduct of government business, and the public interest in accountability of, and public participation in, government processes. There will be some instances where it is neither practicable nor appropriate for public participation or consultation in a government decision-making or policy forming process. The appropriate balance in the public interest will be struck according to the relative weight of the competing interests at play in any particular set of circumstances. Sometimes the public interest in accountability and public participation will outweigh the public interest in the effective and efficient use of limited government resources to obtain the government's desired outcomes. A certain amount of inefficiency in getting things done should be a burden that democratic governments are prepared to accept as the price of honouring the higher values of the democratic process. [On the virtues of public participation in the policy forming functions of government, see T Sherman, "Administrative Law - The State of Play", Canberra Bulletin of Public Administration, No. 66, October 1991, 63-68.]

75 The significance of the foregoing discussion to the present case is that s.41 of the FOI Act is the exemption provision whose application will most frequently call for the resolution of the tension between the objects which the FOI Act seeks to attain, and the tradition of secrecy which has

surrounded the way in which government agencies make decisions which affect the public. Unless the exemption provisions, and s.41 in particular, are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged.

NATURE OF THE MATTER TO WHICH THE APPLICANT HAS BEEN REFUSED ACCESS

76 The applicant has been refused access to matter contained in seven separate documents (comprising 26 pages) which the Department has described as follows:

Document 1 (2 pages)	A memorandum, dated 11 August 1992, of a Senior Legal Officer (within the Department) relating to consultations with another agency;
Document 2 (4 pages)	A letter dated 5 August 1992 from the Director-General of the Department to the Chief Executive of another agency;
Document 3 (7 pages)	A letter dated 27 November 1992 from an Assistant Divisional Head of the Department to a Senior Manager in another agency;
Document 4 (5 pages)	An undated letter from the Director-General of the Department to a Chief Executive of another agency;
Document 5 (3 pages)	A memorandum, dated 20 August 1992, of a Policy Resource Officer (in the Department) relating to consultations with another agency and including matters for discussion with the Crown Solicitor;
Document 6 (3 pages)	A letter dated 14 August 1992 from a Divisional Head (within the Department) to a Senior Executive in another agency;
Document 7 (2 pages)	An undated Departmental brief for the Minister.

77 It is only a part of each document that falls within the terms of the applicant's specific request for access to documents relating to assessment or advice of the consequences for the Queensland Government of the High Court decision in the *Mabo* case: in document 1, one sub-paragraph; in document 2, four paragraphs; most of document 3; in document 4, three paragraphs and an attachment; in document 5, one paragraph and an attachment; in document 6, four paragraphs; in document 7, one paragraph.

78 Section 87(2)(a) of the FOI Act prohibits the Information Commissioner from including in a decision on a review, or in the reasons for such a decision, matter that is claimed to be exempt matter. Without disclosing the matter claimed to be exempt, it is permissible and necessary for the sake of explaining my reasons for decision, to make some brief observations on the general nature of the matter claimed to be exempt, and to describe in general terms the nature and purpose of the document in which it appears.

79 In so doing, I propose to rule on some portions of the matter claimed to be exempt, where I consider that the result required by the application of the exemption provisions is clear cut. I also propose to identify those parts of the matter claimed to be exempt which I am satisfied fall within the terms of s.41(1)(a) of the FOI Act, and which call for careful consideration of the public interest balancing test under s.41(1)(b) which I have applied below at paragraphs 146 to

185.

80 Document 1 is an internal Departmental memorandum recording the substance of a telephone conversation between the author and an officer of another agency, in the latter's capacity as the officer having responsibility for the development of a draft Coastal Protection Bill. The first paragraph is the relevant paragraph and it merely records the then proposed steps in the process of preparation and circulation of the draft Bill, indicating the expected time lines. It is in that context that one sentence refers to matters raised by the Department concerning the Bill's relationship to the *Mabo* case and how they will be addressed during the process of development of the Bill.

81 It is clear from other documents in issue that some organisations external to government have been afforded the opportunity of consultation on the draft Coastal Protection Bill. I do not accept that any injury to the public interest could flow from the incidental revelation that this Bill was being developed in August 1992, and the then-expected time lines for the process.

82 In my opinion, the paragraph, generally, and the particular subparagraph which falls within the terms of the applicant's FOI access request, are entirely innocuous and I cannot foresee that any injury to the public interest could occur as a result of its disclosure. It evidences none of the characteristics relied on by the Department in its reasons for decision on internal review and in its written submission to the Information Commissioner (see paragraphs 94 to 96 below) as indicating that disclosure may prejudice the effective and proper workings of government or cause unnecessary public concern or confusion. Indeed so innocuous is the matter in question that it is difficult to see any benefit to the public interest that might arise from its disclosure. Having regard to the terms in which s.41(1) is framed, however, if the public interest considerations favouring disclosure and non-disclosure are in effect evenly balanced or neutral, the exemption is not made out, and an applicant is entitled to have access. The FOI Act does not require an applicant to demonstrate that disclosure of a deliberative process document would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of a deliberative process document would be contrary to the public interest.

83 Document 2 is a letter from the Director-General of the Department to the Chief Executive of another agency, responding to an invitation to comment on the draft Coastal Protection Bill. All proposed legislation must be approved by Cabinet and a consultation process prescribed by the Queensland Cabinet Handbook (see p.102 and p.32) requires that the agency and Minister sponsoring a legislative proposal must ensure that consultation occurs with any relevant agencies or organisations affected by the proposal. Document 2 has been prepared as part of that consultation process; it submits to the agency sponsoring the draft Bill, the Department's views on matters (falling within its portfolio responsibilities) that may be affected by provisions of the draft Bill. One such matter is the implications of the *Mabo* case for some provisions of the draft Bill. It is mentioned in one paragraph on page 2 and dealt with in three paragraphs on page 3, the first of which (comprising one sentence only) can really only be characterised as a pure statement of fact (and one of which the applicant is doubtless well aware). I am satisfied that this paragraph comprises merely factual matter, which is capable of being severed from surrounding matter which is in the nature of opinion, advice or recommendation. It cannot therefore be exempt under s.41, by virtue of s.41(2)(b). The remaining three paragraphs fall within the terms of s.41(1)(a) and their exempt status depends on the application of s.41(1)(b), which is considered below.

84 Document 3 is a letter by an officer of the Department to an officer of another agency written in

response to a request for consultation comments on a draft strategic plan, in the context of formulating a Queensland Government position. The context suggests that the draft strategic plan will ultimately be submitted for Cabinet endorsement, though the contents of document 3 suggest that the draft strategic plan was not then in a particularly late stage of development. It appears that only three paragraphs in a document of seven pages do not relate to matters connected with the consequences of the *Mabo* case. The matter contained in the document clearly falls within the terms of s.41(1)(a), and its exempt status depends on the application of s.41(1)(b), which is considered below.

85 Document 4 is a letter from the Director-General of the Department to the Chief Executive of another agency addressing the Department's concerns on matters within the Department's portfolio responsibilities, that are affected by proposals in a document prepared by the other agency and which is referred to as the final draft of a Cabinet submission. Document 4 contains three paragraphs and an attachment which fall within the terms of the applicant's FOI access request. The first sentence of the first of the relevant paragraphs comprises purely factual matter. It is in fact identical to the sentence referred to in paragraph 83 above, and for the same reasons there referred to, I am satisfied that this sentence is not exempt matter. There is other factual matter in the first of the relevant paragraphs, but it is inextricably bound up with the expression of opinion which brings the matter in the first paragraph within the terms of s.41(1)(a) of the FOI Act. It cannot therefore be characterised as merely factual matter so as to attract the application of s.41(2)(b). Its exempt status, and the exempt status of the attachment to document 4, depend on the application of s.41(1)(b), which is considered below.

86 The consideration of the second of the relevant paragraphs in document 4 creates difficulty because it quotes three sentences from the final draft of the Cabinet submission which document 4 addresses. Although the Department has not relied upon s.36 in its submission, I am satisfied that the three sentences quoted from the final draft Cabinet submission fall within s.36(1)(d) of the FOI Act, being matter that is exempt matter because it is an extract from a draft of matter mentioned in s.36(1)(a), i.e. matter that 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. I am further satisfied that the first of the quoted sentences is not exempt matter under s.36(1) because it is merely factual matter, the disclosure of which would not involve the disclosure of any deliberation or decision of Cabinet (i.e., it falls within the exception to s.36(1) provided for in s.36(2) of the FOI Act). The second and third of the quoted sentences cannot be characterised as merely factual matter, and hence I find that they constitute exempt matter under s.36(1)(d) of the FOI Act.

87 By virtue of s.88(2) of the FOI Act, the Information Commissioner has no power to direct that access be given to matter that is established to be exempt matter. This contrasts with the general discretion conferred on agencies and Ministers by s.28(1) of the FOI Act which allows them (when responding to an application for access under the FOI Act) to choose whether to refuse, or to grant, access to exempt matter or an exempt document. Section 14(b) also reserves to agencies and Ministers the right to give access to exempt matter outside of the framework of the FOI Act, provided that it would not be illegal or improper to do so.

88 When the matter which I have found at paragraph 86 above to be exempt matter, is severed from the second of the relevant paragraphs in document 4, the balance of that paragraph can properly be characterised as merely factual matter. Hence it is not exempt matter by virtue of s.41(2)(b).

89 The third of the relevant paragraphs in document 4 comments specifically on the second and

third of the sentences quoted from the final draft Cabinet submission (which I have decided are exempt from disclosure under s.36(1)(d) of the FOI Act). It poses two questions about those sentences, but in a way which does not reveal their nature or content. The third paragraph is for practical purposes, meaningless, without access to the material on which it is commenting. Its disclosure therefore could neither benefit nor harm the public interest. Consistently with my comments in paragraph 82 above, I consider that the s.41 exemption does not apply to this paragraph - the public interest considerations bearing on disclosure are entirely neutral and hence disclosure would not be contrary to the public interest.

90 Document 5 is an internal Departmental memorandum recording the substance of oral consultations between less senior officers of the Department and of the agency sponsoring the final draft Cabinet submission which was the subject of document 4. The only real significance of the document for the applicant's FOI request is its reference to the attachment comprising questions which Departmental officers have suggested should be referred to the Crown Solicitor, and which raise specific concerns as to the implications of the *Mabo* case. The relevant matter falls within the terms of s.41(1)(a), and its exempt status depends on the application of s.41(1)(b), which is considered below.

91 Document 6 is a letter from a Divisional Head within the Department to a Divisional Head within the agency sponsoring the draft Cabinet submission that was the subject of document 4. Only four paragraphs deal with implications of the *Mabo* case. Again the sentence referred to in paragraphs 83 and 85 appears, and for the same reasons there referred to I consider that it is not exempt from disclosure by virtue of s.41(2)(b). The balance of the matter in issue relates to the form of questions which it is suggested the addressee should refer to the Crown Solicitor for legal advice. This material falls within the terms of s.41(1)(a), and its exempt status depends on the application of s.41(1)(b), which is considered below.

92 Document 7 is a Departmental briefing note to the Minister which deals generally with issues relating to a draft Coastal Protection Bill in preparation by another agency. Unlike the other documents considered, this document does not provide opinion, advice or recommendation for the purposes of a deliberative process. It is in the nature of an information paper, to provide information to the Minister. It does, however, record very briefly (in one paragraph) the substance of consultation comments provided by the Department on the implications of the *Mabo* case, to the agency preparing the draft Bill. This paragraph therefore falls within s.41(1)(a), since its disclosure would disclose opinion, advice or recommendation that was prepared for the deliberative processes of government. Its exempt status depends on the application of s.41(1)(b), which is considered below.

SUBMISSIONS BY THE PARTICIPANTS

93 The relevant matter contained in the seven documents which falls within the terms of s.41(1)(a) of the FOI Act has been identified above. To qualify for exemption under s.41(1), it must also be demonstrated that disclosure of the matter would, on balance, be contrary to the public interest. Pursuant to s.81 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified.

94 The Department's written submission to me repeated and relied on the reasons for decision given by the Departmental decision-maker at internal review level. That reasons statement sets out the facts relied on as the basis of the decision as follows:

"(1) Agencies are routinely requested by other agencies to provide comment on policy and legislation, prior to a proposal being submitted to Cabinet.

(2) The documents concerned contain advice and comment on proposed co-ordinated policy and legislation.

(3) These proposals have not yet been approved or considered by Cabinet."

95 The reasons statement then correctly stated the test which must be satisfied for matter to be exempt matter under s.41(1), and then summarised the main points from the applicant's application for internal review, as set out at paragraph 4 above. The reasons statement then addressed the application of s.41(1)(b) in the following terms:

"The argument in favour of disclosure "in the public interest" has been put in detail, and correctly, by the applicant, referring to the object of and reasons for the FOI Act, as outlined in sections 4 and 5 (1) of the Act. The applicant has not presented any further and specific considerations in favour of disclosure.

I need as well to consider the provisions of section 5(2) and (3) of the Act -

> *the recognition of Parliament that there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on essential public interests; and*
>
> *the intent of the Act to strike a balance between competing interests.*

In this situation, one public interest [in the public having access and being informed] is in conflict with another public interest [the view that to release the documents would be contrary to the public interest of maintaining the proper workings of government].

In respect of this application, in considering the public interest of maintaining the proper workings of government, including effective decision making processes, I have adopted the following broad propositions:

* *It is essential to the workings of government for agencies which have a primary responsibility for the development of legislation or some other particular proposal for Cabinet or other senior level of consideration, that those agencies be able to freely consult with other agencies of government.*

* *Those consultations are often the expression of one point of view only.*

* *At certain phases of this process, confidentiality is essential and may otherwise confuse the community if a number of different single-interest views were being publicly canvassed. At these phases, particularly with Cabinet documents and those in preparation, access is confined even within agencies to a very senior level and tight security control.*

* *The release of an individual agency's comments and opinions may be detrimental to the workings of government as a whole and to the responsibilities of government in the development of policy and legislation.*

* *If the requesting agency knew that the views of another agency were to be made public, it may be less inclined to canvass those views and interests; in the co-operative workings and reversal of roles in another matter, the commenting agency may likewise be reluctant to seek the views of another important agency. Thus the matter under consideration may not be subjected to the fullest possible scrutiny and comment, leading to a less than full consideration, to the detriment of the public interest. It is in the public interest that policy and other decisions be taken only after the frankest possible expression of views between officers and agencies of the government.*

* *Premature disclosure of what may only be an opinion of one agency and not the final proposal of government may lead to premature debate, unnecessary concern and confusion in the community.*

In respect of the documents in question, they fall into the categories of:

* *Comments of a sensitive nature, made at a sensitive time in the process involved in the functions of government, that is, consideration of proposals for legislation or other Cabinet considerations.*

* *Comments on highly complex issues that are not yet well understood in the community.*

* *Communications or relating to communications between agencies at a senior level.*

<u>Balancing the competing public interests</u>,

* *the general public interest of disclosure so that the public is informed and can participate in the processes of government and government is able to be held more accountable, which interest is recognised in the FOI Act itself and is proposed by the applicant, is recognised;*

* *specifically, achieving certainty in understanding the High Court decisions in the Mabo matter is also recognised to be in the public interest;*

* *the desirability of preventing a prejudicial effect to the general public interest of maintaining effective decision making processes in government, based on the propositions outlined above, is in the present matters under consideration, a substantial public interest; and*

* *certainty in relation to the High Court decision in the Mabo matter is a*

considerable distance from being reached in the community at all levels - politically, legally and in respect of the views of government and of special interest groups, in particular the Aboriginal and Torres Strait Islander people. There continues to exist many related sets of facts that are not clearly determined by the Court decision and in relation to which a great deal of uncertainty exists. Public expression of the views of one agency or person in this debate would reasonably be expected to lead to uninformed and premature debate in issues that remain legally highly complex and undecided and to a great deal of confusion and unnecessary concern, for the various interests groups and individual persons. It would be detrimental to this public interest to release the documents in question.

The interests of maintaining effective and proper workings of government and of not causing public concern are in this issue substantial, and in my view, on balance, they significantly outweigh the competing interests.

Decision: ***The documents referred to in respect of consideration of this exemption provision come within the provisions of section 41(1)(a) of the FOI Act. To release the documents would, on balance, be contrary to the public interest, pursuant to section 41(1)(b) of the Act. The material therefore is exempt and the original decision is affirmed."***

96 The case made in the reasons statement on internal review was supplemented by a general reference to the principles outlined in the cases of *Sankey v Whitlam* (1978) 142 CLR 1; *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626, 3 AAR 169; *Re Western Mining and Department of Conservation, Forests and Land* (1989) 3 VAR 150. It was submitted that:

"The principles from these cases that are relied on in respect of the documents under consideration are:

* *these documents [particularly ... 2, 3, 4 and 6] were generally created by a senior officer;*

* *senior officers would have difficulty in discharging the responsibilities of their office if every document prepared to enable policies to be formulated was liable to be made public;*

* *the documents are sensitive, prepared at a sensitive stage of government policy-making consideration;*

* *they are documents created in the course of development of policy by another agency and eventually for Cabinet consideration;*

* *release of the information may inhibit frankness and candour in future exchanges of information between agencies in pre-decisional consultations; sound working relationships between agencies of government are essential to the efficient operation of government and*

this is in the public interest;

* *release of the information, which represents one particular view of one agency, where there may be a number of other views held by other agencies or by the agency with carriage of the issues, may cause confusion and unnecessary debate.*

Thus the view is reinforced that the documents come within the provisions of s.41(1) of the FOI Act and that to release them would, on balance, be contrary to the public interest."

97 Finally, it was submitted that certain material in items 4 and 5 is exempt matter pursuant to s.43 (legal professional privilege) of the FOI Act as it was brought into existence for the purposes of obtaining legal advice from the Government's legal adviser, the Crown Solicitor.

98 The applicant responded to the Department's submission on the application of the public interest balancing test in s.41, as follows:

"Firstly, ... [s.41] ... places the onus on the Department to prove its case. It requires that the Department must satisfy you that, on balance, the release of the documents wold be "contrary to the public interest".

I believe that it would not be sufficient for the Department to argue in broad terms about the possible difficulties for the public service which could result from release of these documents; rather it should be able to demonstrate that some real detriment will result.

On my reading of its response to you, the Department has not done this. Instead it merely refers to a number of previous cases from which certain principles are drawn.

It says that the documents were generally created by senior officers and that these senior officers would have difficulty doing their job "if every document prepared to enable policies to be formulated was liable to be made public".

I do not seek every document prepared; merely the ones set out in my request. Nor do I see any validation of the claim that public servants could not in future do their job if these PARTICULAR documents were released. In any event, I have difficulties with the general proposition that public servants ought to be able to work in isolation of the public they serve.

The Department also says the documents are "sensitive". What does this mean precisely? Does it mean the Minister or the Premier will become upset if they are released? Does it mean they are controversial? Neither of these reasons would be sufficient to block their release. Such a meaningless description is clearly not a good enough reason to keep the documents hidden from public gaze.

Further, the Department says the documents were created by another agency for eventual Cabinet consideration. Surely this excuse could apply to any number of

documents and ought not be used as a reason for exemption without some evidence that these documents particularly will be against the public interest.

The Department speaks of problems with lack of frankness and candour. The government's own FOI manual, page 131, says that such arguments are often put and points out this is unlikely to be sufficient without some additional clear public detriment. In my view, none has been demonstrated to you.

The Department also suggests that releasing the view of one agency may lead to public confusion and unnecessary debate. There are two points to rebut this - the reality and the philosophical. In reality, there are already so many different views about Mabo, so much public confusion, that the release of a small number of this Department's documents could not conceivably exacerbate the situation - whatever it said. Philosophically, this idea is objectionable and goes to the general point I want to make.

The public is far more mature than the Department seems to believe. It is quite capable of making a rational decision once presented with accurate information. It is capable of differentiating between a draft position and a final position, between one Department's view and that of a government. This level of discernment by the electorate is necessary to elect governments ... in the first place; it is the cornerstone of our society. It is called democracy. And for it to function properly, people need to know what is going on. They are indeed entitled to know, and the FOI Act is not just recognition of this, but also that in the past the overwhelming public service ethos has been the opposite.

In my view it is beyond argument that governments across Australia in recent years have been damaged far more by their activities carried out hidden from public scrutiny than by the release of any documents under FOI or for that matter, information leaked to reporters. The Fitzgerald Inquiry in Queensland and the WA Inc Royal Commission have revealed much political and other official corruption carried out at least in part BECAUSE of inadequate scrutiny. Among other things, Fitzgerald questioned the role of the Queensland media; the WA Inc Royal Commission proposed a standing investigatory body on official corruption and a greater review role for the Upper House.

Accordingly, it is in the public interest to encourage and enforce the release of information wherever possible. The arguments that governments and their bureaucrats cannot function in the public gaze must be rejected. Governments leak confidential information when it suits them, and the public interest is not claimed to be at risk then. Ensuring that the most information possible is made available on request under FOI is surely one of the best weapons at preventing problems revealed by Fitzgerald and others.

I also draw your attention to relevant comments by the Attorney-General, Mr Dean Wells, in the second reading speech introducing the FOI Bill. Wells said that the access would allow greater public participation in policy-making ... he clearly then envisaged the public release of information which makes up the so-called deliberative process. Wells also said the "Bill replaces this presumption of secrecy with a presumption of openness". And in his accompanying media

release, Mr Wells said "opening the books to such an extent could be considered brave - it could even be considered foolhardy. But we believe the government exists to serve the people - the information held by the government for that purpose belongs to the people. We are prepared to wear the consequences".

Of course in making your decision you must consider the importance of the subject matter itself. Undoubtedly the Mabo case is one of the most important decisions the High Court has made. The issue is one of the most crucial modern Australia has considered. As I write this, the Council of Australian Governments has failed to reach a common view; and aboriginal groups around the nation have been making new land claims. It is difficult to conceive of a matter of greater genuine public interest and importance than Mabo. The Australian newspaper has given the issue greater and more serious attention than any other media outlet. It has nominated Eddie Mabo posthumously as its Australian of the Year. This newspaper believes it has demonstrated its genuine interest in this matter. And I urge you on the paper's behalf to reject the general and inadequate arguments that release of the documents sought would be contrary to the public interest."

ANALYSIS OF THE DEPARTMENT'S SUBMISSION

99 Having considered the arguments put forward by the Department in the light of my examination of the matter claimed by the Department to be exempt, I consider that the Department has failed to establish that any damage would be caused to the public interest in maintaining effective and proper workings of Government, by the disclosure of the relevant parts of the deliberative process matter contained in the seven documents identified in paragraph 76 above. Nor do I accept that disclosure of the matter claimed to be exempt would be injurious to the public interest by leading to premature debate, unnecessary concern and confusion in the community.

100 In the specific circumstances of this case, therefore, I do not consider that any public interest considerations favouring non-disclosure have been established which could weigh against the two public interests identified in the reasons for decision on internal review as weighing in favour of disclosure. I have set out in more detail below my reasons for rejecting the public interest considerations said by the Department to favour non-disclosure. Those reasons will be more readily understood in the light of my following comments on the three cases on which the Department sought to rely in this matter.

101 *Re Howard and Treasurer of the Commonwealth of Australia* (1985) 3 AAR 169 was a case decided by the President of the Commonwealth AAT at a time when that body had little more than two years experience in determining appeals under the Commonwealth FOI Act. The documents in issue in the case comprised advice to the Treasurer on the implications and estimated cost of tax options, given in the course of the deliberative process involved in the formulation of the 1984/85 Federal budget. The case was therefore somewhat exceptional in terms of the technical complexity and extreme political sensitivity of the deliberative process documents in issue. It was also a case where a "conclusive" certificate had been issued under s.36(3) of the Commonwealth FOI Act, so the Tribunal was not exercising a merits review function, but was confined to the issue of whether reasonable grounds existed for the issue of the certificate. (Certificates of a similar kind may be issued by the Minister under the FOI Act, but only in respect of ss.36, 37 and 42.) I do not doubt that a correct decision was reached on the application of the relevant provisions of the Commonwealth FOI Act to the documents in issue.

The Tribunal, however, made what I consider, with the benefit of hindsight, to have been an ill-advised attempt to formulate a list of five general principles to indicate when disclosure of a deliberative process document is likely to be contrary to the public interest. For reasons explained below, I consider some of those five principles (hereinafter referred to as the five *Howard* criteria) are incorrect and should not be followed in Queensland, while the others all require significant cautionary qualifications.

102 In its comments under the topic heading "Public Interest", the Tribunal commenced by quoting a passage from a prior decision of the AAT (*Re Murtagh and Commissioner of Taxation* (1983) 6 ALD 112 at 121) which has been accepted and applied in subsequent decisions of the AAT, warning against the introduction of class claims (i.e. a claim that disclosure of a document would be contrary to the public interest because of its membership of a particular class, usually defined according to its role in the processes of government, rather than because disclosure of the actual contents of the document would be contrary to the public interest) to the consideration of public interest factors under s.36 of the Commonwealth FOI Act:

> *"It is clear that the public interest is not to be limited by the prescription of categories or classes of documents the disclosure of which to the public would be contrary to the public interest. The public interest is not to be circumscribed. All documents must be examined to ascertain whether, having regard to the circumstances, their disclosure would be contrary to the public interest."*

103 Another passage from *Murtagh* (at p.123) was quoted:

> *"... Broadly speaking, s.36 can be seen as an attempt of the legislature to protect the integrity and viability of the decision-making process. If the release of documents would impair this process to a significant or substantial degree and there is no countervailing benefit to the public which outweighs that impairment, then it would be contrary to the public interest to grant access."*

104 While I can understand the general notions about the weighing of competing interests expressed in this passage, I share the concerns expressed by Deputy President Todd in the subsequent case of *Re Dillon and Department of the Treasury* (1986) 4 AAR 320 at p.330 about the vagueness of the public interest ground identified in the first sentence of the passage above:

> *"The first public interest ground offered [by the respondent] was that there was a public interest in "protecting the viability of the decision-making process". Without more, this is too vague and amorphous a concept to be considered a legitimate public interest. It is, moreover, a tag which an agency could easily attach to any document which is sought not to be disclosed and which, if accepted, would greatly reduce the review function of the Tribunal in this jurisdiction."*

105 After discussing authorities under the United States *Freedom of Information Act* 1966 (the U.S. FOI Act), and referring to cases on public interest immunity (*Conway v Rimmer* [1968] AC 910 and *Sankey v Whitlam*) and a list of some of the earliest decisions of the Commonwealth AAT dealing with the s.36 exemption under the Commonwealth FOI Act, the Tribunal in *Howard* set out its attempt to formulate general principles to indicate when disclosure of a deliberative process document is likely to be contrary to the public interest. The relevant passage (at p.634-5) is in the following terms:

"From such authorities and from decisions of Tribunals ... it is possible to postulate that in each case the whole of the circumstances must be examined including any public benefit perceived in the disclosure of the documents sought but that:

(a) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;

(b) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

(c) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

(d) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;

(e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

The FOI Act has been in operation since 1 December 1982 ... the Tribunal has not yet received evidence that disclosure under the FOI Act has in fact led to a diminishment in appropriate candour and frankness between officers. As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest. Weight must be given to the object of the FOI Act."

106 The words which introduced the list of the five criteria provide some balance by referring to the need in each case to examine the whole of the circumstances including any public benefit perceived in the disclosure of a document. Likewise the paragraph which follows the list of the five criteria sounds a note of scepticism about whether disclosure under the FOI Act does lead to a diminishment in appropriate candour and frankness between officials, and also states that weight must be given to the object of the FOI Act. That paragraph also rather suggests that the preceding five criteria should not be regarded as set in concrete, but as indicators which might require revision with the gaining of greater experience in the operation of the Act and of the extent to which disclosure of deliberative process documents is in the public interest. These factors, however, are rarely acknowledged when the five *Howard* criteria are called in aid to support the non-disclosure of documents.

107 I consider that the formulation of the five *Howard* criteria was ill-advised for a number of reasons. First, it placed an unwarranted emphasis on factors justifying non-disclosure, and provided an easy checklist of factors that could be called in aid to justify non-disclosure. No similar set of criteria specifying considerations which favoured disclosure was enunciated.

108 Second, the terms in which the criteria were framed, using words like "tends not to be", "is likely

to be", "may be unfair to", "may prejudice", and referring only to general and mostly intangible kinds of harm (e.g. prejudice to the "integrity of the decision-making process"), has given government agencies the impression that it is sufficient to point in a general and speculative way to largely intangible kinds of harm to the public interest, instead of requiring them to state with precision the kinds of tangible harm to effective government decision-making processes (or other aspects of the public interest) that can be expected to flow from disclosure.

109 Third, in respect of at least the first two of the criteria, aspects of the class claim (against which the Tribunal specifically warned in the passage from *Murtagh* quoted earlier in the *Howard* decision itself) were permitted to re-enter by the specification of categories of documents disclosure of which tends not to be in the public interest (high-level documents, policy documents) without any qualifying reference to the overriding need to consider whether disclosure of the actual contents of such documents would be injurious to the public interest.

110 Fourth, the Tribunal seems to have drawn on principles from United States case law interpreting the fifth exemption, (b)(5), of the US FOI Act (see especially at p.633 of the case report) which are not necessarily appropriate to the materially different wording and structure of s.36 of the Commonwealth FOI Act (a fact which was recognised by Beaumont J in *Harris v ABC* (1983) 50 ALR 551 at p.563, and by a Full Court of the Federal Court of Australia in *Harris v ABC* (1984) 1 FCR 150 at p.154). Exemption 5 in the US FOI Act excludes from the obligation of disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency". The US legislature was prepared to express its exemption in terms which incorporated by reference the US law with respect to a government agency's privilege from production in legal proceedings (which would roughly equate to the English and Australian law of Crown privilege/public interest immunity plus legal professional privilege) and thereby accepted the limitations inherent in that law, with its very narrow focus on public interest considerations favouring disclosure - see paragraph 116 below. The Commonwealth Parliament, on the other hand, and all State legislatures that have followed it, chose to adopt a quite different statutory formula which left wide open the range of competing interests that might bear on the question of whether disclosure of particular deliberative process documents would on balance be contrary to the public interest. There is no requirement to import notions from the law of discovery in legal proceedings into the interpretation of s.36 of the Commonwealth FOI Act or s.41 of the FOI Act, and attempts to do so should be tempered by an appreciation of the quite different objects that the law is seeking to achieve in these two different contexts.

111 Fifth, the Tribunal has drawn on some principles expressed in the leading English and Australian authorities on Crown privilege/public interest immunity and sought to apply them in a manner that is quite inappropriate, having regard to the materially different context and objects of freedom of information legislation. Take for instance the passage from the judgment of Lord Reid in *Conway v Rimmer* which was quoted in *Howard*'s case shortly before the formulation of the five criteria, and seems to have influenced the formulation of at least the second and fourth of those criteria. That passage from Lord Reid's judgment is in the following terms (at p.952):

> *"I do not doubt that there are certain classes of documents which ought not be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is*

> *difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments, including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further, it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition, but there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in Duncan's case [1942] AC 624 at 642, whether the withholding of a document because it belongs to a particular class is really 'necessary for the proper functioning of the public service'."* (my emphasis)

112 The sentences which I have underlined express principles which I consider to be particularly inappropriate for transposition into the context of freedom of information legislation. It is doubtful that Lord Reid's remarks about disclosure creating or fanning ill-informed or captious public or political criticism have ever been accepted by the High Court as reflecting an appropriate justification for Crown privilege/public interest immunity in Australian law. In *Sankey v Whitlam*, Gibbs ACJ after quoting those remarks of Lord Reid, said (at p.40):

> *"Of course, the object of the protection is to ensure the proper working of government and not to protect Ministers and other servants of the Crown from criticism, however intemperate and unfairly based."*

113 Mason J after referring to the same passage said (at p.97):

> *"I also agree with his Lordship that the efficiency of government would be seriously compromised if Cabinet decisions and papers were disclosed whilst they or the topics to which they relate are still current or controversial. But I base this view, not so much on the probability of ill-formed criticism with its inconvenient consequences, as upon the inherent difficulty of decision-making if the decision-making processes of Cabinet and the materials on which they are based are at risk of premature publication."*

114 In addition, Lord Reid's comments appear to be contrary to the principles enunciated by Mason J in *Commonwealth of Australia v John Fairfax and Sons*, as set out in paragraph 43 above, and inconsistent with Mason CJ's comments in the *Australian Capital Television Pty Ltd v Commonwealth (No. 2)* as set out in paragraph 70 above (though legal questions of a different kind were under consideration in those cases).

115 It is important to remember that both *Conway v Rimmer* and *Sankey v Whitlam* were decided in an era when the prevailing law was that, apart from the curial processes of discovery, interrogatories and subpoena, the Executive government could not be compelled to disclose any information which it possessed. The authority of the courts was limited to compelling disclosure of government-held information for the purpose of its use as relevant evidence in court proceedings, and the courts were generally conscious that they were exercising an exceptional power. (Those two cases were in fact among the first in their respective jurisdictions to mark the

end of a longstanding trend of judicial deference to the judgment of the Executive government as to whether the public interest would be injured by disclosure in court proceedings of government-held information.)

116 It is particularly important to bear in mind that in the Crown privilege/public interest immunity cases, there is only one facet of the public interest for which disclosure of government information is being sought, and it is generally the only public interest consideration favouring disclosure which is placed on the scales in the weighing process which occurs in these cases, namely, the public interest in the due administration of justice by the courts, in that litigants should be entitled to have their disputes resolved by the courts in the light of all relevant and admissible evidence which bears on the dispute. Occasionally other public interest considerations favouring disclosure have been recognised in these cases, but generally only as factors which neutralise a claim of harm to the public interest through disclosure, which is advanced by the government party. The only purpose for which disclosure is being contemplated is for use in court proceedings. Public interest considerations relating to open and accountable government are not directly relevant in that context, and this is especially so of the cases decided against a background where the prevailing law accepted that Executive governments otherwise possessed a largely unfettered discretion as to the release or withholding of information.

117 Freedom of information legislation, however, has turned on its head the natural order that had prevailed for centuries with respect to the disclosure of government-held information. It has done so in the pursuit of objects of the kind discussed in paragraphs 58 to 75 above. Among its avowed objects are to facilitate informed scrutiny and indeed criticism of the performance of Government. The comments of Lord Reid underlined in the passage above (and indeed several other facets of the public interest recognised in some of the Crown privilege cases as weighing against disclosure of government information) must be recognised as the product of a different legal order, and as being inimical to the attainment of the avowed objects of freedom of information legislation.

118 Decisions in the Crown privilege/public interest immunity cases can provide guidance as to aspects of the public interest which have been acknowledged by the courts to exist, and as to how the process of identifying and balancing competing public interests is to be approached. But in my opinion, the leading authorities on Crown privilege/public interest immunity must be used with a keen awareness of the factors which I have referred to above, which may make some statements of principle incompatible with, and unsuitable for application within, the very different legal framework of freedom of information legislation.

119 The five *Howard* criteria have been subjected to telling criticism by Deputy Presidential members of the Commonwealth AAT in subsequent cases (some of which are referred to below), by academic critics (see for example S. Zifcak, "Freedom of Information: Torchlight but not Searchlight", Canberra Bulletin of Public Administration No. 66, October 1991, 162 at p.165; P. Bayne, "Freedom of Information : Democracy and the protection of the processes and decisions of government", (1988) 62 ALJ 538) and in the EARC Report on Freedom of Information at paragraph 7.121-7.127 inclusive. The five *Howard* criteria have

also, however, been uncritically embraced and applied by some members of the Commonwealth AAT and some members of the Victorian AAT (doubtless influenced to some extent by the stature of the presiding member of the Tribunal), and probably also by a host of FOI decision-makers eager to embrace a simple set of criteria set out in such general and easily manipulable

terms, all of which are directed toward affording support for a finding that disclosure of documents would be contrary to the public interest.

120 In respect of the first of the *Howard* criteria, I endorse what was said by Deputy President Todd in *Re Dillon and Department of Treasury* (1986) 4 AAR 320 at 331 in response to an argument by the respondent (relying on the first of the *Howard* criteria) that as the documents in issue involved high-level communications their disclosure would be contrary to the public interest:

> *"It is enough to say that I consider that the mere fact of a document being a high level communication does not make its disclosure contrary to the public interest. If any doubt were entertained on this point reference to ss.3 and 11 of the Act, dealing with the Act's object and granting the basic right of access, discloses that documents in the possession of a Minister and official documents of a Minister are treated on an equal footing with more mundane documents in the possession of an agency."*

121 These remarks are equally applicable to the FOI Act, in light of its corresponding provisions. Deputy President Todd made the same point in *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 in which he sought to characterise the *Howard* criteria (at p.597) as "empiric conclusions ... not intended to be used as determinative guidelines for the classification of information". At p.603, Deputy President Todd said:

> *"... I do not consider that because the documents are 'high-level' correspondence their disclosure is necessarily contrary to the public interest. It may be that high-level correspondence is more likely than lower-level material to have characteristics which make its disclosure contrary to the public interest. If so, it is those characteristics, and not the mere fact of it being high-level, which makes its disclosure contrary to the public interest. Once again, this can readily be seen by reference to ss.3 and 11 (stating the object of the Act and giving the basic right of access) which treat all the documents of an agency and official documents of a Minister on an equal basis. I do not regard any of the cases cited by Mr Gardiner as suggesting otherwise. In each case where the disclosure was considered to be contrary to the public interest, careful regard was had to the character of the document."*

122 In *Re Dillon*, Deputy President Todd also dealt (at p.332) with an argument based on the second of the *Howard* criteria:

> *"... Miss Kenny [for the government party] submitted that the public interest leant towards non-disclosure where the documents were made in the course of, and subsequent promulgation of, policy. While I consider that this would be a matter relevant to s.36(1)(a), I am unable to see its relevance to the public interest. The separate, twin requirement of s.36(1)(b) clearly suggests that the fact of a document being of a type referred to in s.36(1)(a) is of no relevance to a consideration of the public interest. By creating two separate requirements in two separate paragraphs, as opposed to the method used in ss.33(1), 33A(5), 39(2) and 40(2), the legislature has put the two in contradistinction to one another. To accept Miss Kenny's argument would amount to a dilution of the public interest requirement in s.36(1)(b)."*

123 In my opinion, the second *Howard* criterion is plainly wrong. The only material which could support its formulation is contained in some of the U.S. case law under Exemption 5 of the U.S. FOI Act and in some of the Australian and UK authorities on Crown privilege/public interest immunity. I have already stated my view that it was quite inappropriate to transpose those principles into the context of Australian freedom of information legislation. To uphold the second *Howard* criterion in the very broad terms in which it is stated would defeat one of the main purposes of the FOI Act which is to allow citizens access to documents that will permit informed participation in the development of government policy proposals which are of concern to them.

124 The third of the five *Howard* criteria, the "candour and frankness" argument has been viewed with a healthy scepticism by most presiding members of the Commonwealth AAT. Indeed some have made remarks which suggest that inhibition of candour and frankness is unlikely ever to suffice as a ground of injury to the public interest that would justify non-disclosure of documents under FOI legislation (see for example *Re VXF and Human Rights and Equal Opportunity Commission* (1989) 17 ALD 491 at p.504-5, paragraphs 48 and 52; *Re Sunderland and Department of Defence* (1986) 11 ALD 258 at p.263).

125 There is respectable support for such an approach in decisions of the High Court of Australia. In *Sankey v Whitlam* (1978) 142 CLR 1 at p.62-63, Stephen J said:

> *"The affidavits sworn by members of the present ministry and by senior public servants make it clear that all the claims to Crown privilege are class claims, not contents claims; it is not suggested that to disclose the contents of any of the documents, the Loan Council documents apart, will of itself result in detriment to the public interest flowing directly from the nature of what is disclosed. The detriment perceived is, rather, that generalised form of apprehended harm which, it is said, will flow from a realisation by Cabinet Ministers and by public servants that what they conceived to be confidential communications can, in the event of appropriate curial proceedings being instituted, become public knowledge.*
>
> *Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden. ... Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour. The affidavits in this case make reference to this aspect. Recent authorities have disposed of this ground as a tenable basis for privilege. Lord Radcliffe in the* Glasgow Corporation *case remarked (1956 SC(HL) 1 at page 20) that he would have supposed Crown servants to be "made of sterner stuff", a view shared by Harman LJ in the* Grosvenor Hotel *case [1965] Ch at p.1255; then in* Conway v Rimmer *[1968] AC 901, Lord Reid dismissed the "candour" argument but found the true basis for the public interest in secrecy, in the case of Cabinet minutes and the like, to lie in the fact that were they to be disclosed this would "create or fan ill-formed or captious public or political criticism". ... and see as to the ground of "candour" per Lord Morris, Lord Pearce and Lord Upjohn. In* Rogers v Home Secretary *[1973] AC at p.413, Lord Salmon spoke of the "candour" argument as "the old fallacy"."*

126 The comments of Lord Upjohn in *Conway v Rimmer* to which Stephen J referred were (at p.994):

> *"... I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day. His worst fear might be libel and there he has the defence of qualified privilege like everyone else in every walk of professional, industrial and commercial life who everyday has to express views on topics indistinguishable in substance from those of the servants of the Crown."*

127 Also in *Sankey v Whitlam*, Mason J said (at p.97):

> *"... The possibility that premature disclosure will result in want of candour in Cabinet discussions or in advice given by public servants is so slight that it may be ignored, despite the evidence to the contrary which was apparently given and accepted in* Attorney-General v Jonathan Cape Limited *[1976] QB 752. I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient."*

128 Gibbs ACJ was prepared to leave open the possibility that "in some matters at least" the frankness and candour argument may be persuasive, though the example he chose in illustration related to the assessment of personal and professional qualities for suitability to high office, rather than to policy-forming processes. He said (at p.40):

> *"One reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least, communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However, this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind."*

129 The dominant approach which has applied in the Commonwealth AAT is exemplified by what was said by Deputy President Todd in *Re Fewster and Department of Prime Minister and Cabinet No. 2* (1987) 13 ALD 139 at 141 (paragraph 11). After quoting the five *Howard* criteria, he said:

> *"With respect, proof of the "indicators" set out by the Tribunal in para (c) of the passage quoted has been, in the light of subsequent consideration in other cases, culminating in the first* Fewster *case, so elusive as to attract consistent*

scepticism on the part of the Tribunal. When married to the principle that, in the absence of an ability to secure exemption under a particular class (such as Cabinet documents), it is the information in the particular document that counts, it is in my view really time that agencies stopped repeating the "candour and frankness" claim under s.36 unless a very particular factual basis is laid for the making of the claim."

130 In the earlier *Fewster* case (1986) 11 ALN N266, Deputy President Hall was reviewing the grounds of exemption relied upon in a conclusive certificate issued under s.36 of the Commonwealth FOI Act, those grounds being in the following terms:

> *"(1) In respect of documents 1, 2 and 3, disclosure would undermine the necessary confidentiality between Commonwealth Ministers and thereby inhibit their proper expression and exchange of views and opinions on matters relating to government policy.*
>
> *(2) In respect of document 3, disclosure would undermine the necessary confidentiality relating to considerations of matters which deal, inter alia, with sensitive discussions between the Commonwealth and the State Governments.*
>
> *(3) In respect of documents 4 and 5, disclosure would adversely affect the operation of the Department by inhibiting the frank and open expression of advice, opinion and recommendation by senior officers to the Prime Minister. "*

131 Deputy President Hall's comments on these grounds were as follows (at p. N270-1):

> *"(37) I agree with Mr Bayne that, as expressed in the s.36 certificate, and as supported by Mr McInnes' affidavit evidence, the grounds relied upon were thinly-veiled "class" claims. Although couched in terms that purported to relate to the individual documents, the substance of the ground in each case (as Mr McInnes' affidavit evidence made clear) was that to release the particular document (or part of document) would "increase the expectation that* such documents *would be released in the future" and would thus prejudice either the necessary "confidentiality" that must exist in high level communications between Ministers or the necessary "candour and frankness" with which advice to Ministers must be expressed. In other words, so the argument ran, the need to ensure confidentiality and candour and frankness in* future "similar" documents *is of such overriding importance in the public interest, that the present documents should not be disclosed. Such an argument, if accepted by the Tribunal, would lead inevitably to the conclusion that all deliberative process documents of the kind in question are exempt from disclosure under the Act. To disclose one such document would be likely to destroy the climate of confidentiality and candour and frankness which is essential to communication between and with Ministers.*
>
> *(38) In my view, a proposition in those broad terms cannot be sustained for the purposes of s.36(1)(b) of the FOI Act. ... no justification is to be found within the language of s.36 of the Act for a "class" claim of exemption. As framed, grounds*

1 and 2 would be satisfied on proof that the communications in question were "confidential" communications between Ministers (ground 2, in my view, being no more than a particular application of ground 1). Ground 3 would be satisfied on proof that the minute contained "candid and frank" advice from a senior public servant to the Prime Minister. In my view, more than that is required for the purposes of s.36(1)(b).

(39) Where parliament has deemed it necessary to give paramountcy to the undoubted public interest in confidentiality and candour and frankness by protecting a class of documents containing high level communication from disclosure under the Act, it has done so by express proscription. Thus, by force of s.34(1)(a) of the Act, 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 that purpose. Similar provision has been made with respect to Executive Council documents: see s.35(1)(a). The document is exempt upon proof of the facts which bring it within the prescribed class, regardless of the actual contents or subject matter: see Re Anderson and Department of Special Minister of State (No. 2) *(1986) 4 AAR 414 at 441-2; 11 ALN N239; cf* Re Lianos and Secretary, Department of Social Security *(1985) 7 ALD 475 at 493. Parliament has not gone on to provide, as it might well have done, had it been so minded, that documents containing confidential communications between Ministers or between senior public servants and Ministers are also exempt, as a class, from disclosure under the Act. Rather, the question whether such communications should be exempt has been left to be determined having regard to the contents of each document, in the light of the public interest test posed by s.36(1)(b): see* Lianos *at 494-5. The need to ensure candour and frankness in the expression of advice etc and to maintain confidentiality, where appropriate, are left, in my view, as facets of the public interest to be weighed and evaluated in each case with other competing considerations. They are relevant but not determinative considerations: see* Re Brennan and Law Society of Australian Capital Territory (No. 2) *(1985) 8 ALD 10 at 21; cf Re Lianos at 496.*

(40) The Tribunal has repeatedly indicated its reluctance to accept the candour and frankness argument, particularly when presented, in substance, as a "class" claim ... ."

132 I consider that the approach which should be adopted in Queensland to claims for exemption under s.41 based on the third *Howard* criterion (i.e. that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind) should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second *Fewster* case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.

133 I respectfully agree with the opinion expressed by Mason J in *Sankey v Whitlam* that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.

134 Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.

135 I leave open the possibility that circumstances could occur in which it could be demonstrated by evidence that the public interest is likely to be injured by a disclosure of deliberative process advice that would inhibit the candour and frankness of future communications of a like kind. An example of such a possibility is given at p.216 of the "Report on the Freedom of Information Bill 1978" by the Senate Standing Committee on Constitutional and Legal Affairs (1979). The example relates to a public servant who is responsible for advising the Minister in a particular area, and who needs to be acceptable to a number of parties who have competing interests - preservation of confidentiality of the official's views may be the only way of preserving the relationship of frankness between the official and all parties. The remark is made that this consideration is particularly important in areas where Government exercises a regulatory function.

136 The formulation of the fourth of the *Howard* criteria seems to be based on principles gleaned from the Crown privilege/public interest immunity cases which are incompatible with the objects and legal framework of the FOI Act. The fourth criterion suggests that, without regard to questions of injury to effective government processes, a judgment may be made that disclosure of particular information will confuse the public or lead to unnecessary debate. This seems to me to be impliedly inconsistent with the views expressed by a majority of judges of the High Court of Australia in *Australian Capital Television Pty Ltd v Commonwealth [No. 2]* (see paragraph 70 above, and paragraph 180 below) as to the indispensability in a representative democracy of freedom of communication in relation to public affairs and political discussion.

137 This fourth criterion is based on rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it, and can judge what is a necessary or an unnecessary debate in a democratic society. I consider that it is better left to the judgement of individuals and the public generally, as to whether information is too confusing to be of benefit or whether debate is necessary. Public response (or lack of it) is more likely to be a reliable determinant (than individual judgment) of what constitutes necessary or worthwhile debate. I note that this criterion was singled out for special comment by the Senate Standing Committee on Legal and Constitutional Affairs in its "Report on the Operation and Administration of the Freedom of Information Legislation" (1987). I find the Committee's criticism of the fourth *Howard* criterion logical and compelling. The Committee said (at p.166-8):

> *"11.6 In general, the Committee is satisfied by the way the public interest test has been applied. However, the Committee regards one aspect with concern. In Re Howard and Treasurer of Commonwealth of Australia, Justice Davies extracted from earlier cases a number of guidelines as to when disclosure will*

not be in the public interest. One of these was that 'disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest'.

11.7 In commenting upon this guideline, the Committee does not seek to second guess the Tribunal's decision. The Committee recognises that selecting one of a list of five factors to which the Tribunal adverted in its decision may distort the significance attributed by the Tribunal to that factor.

11.8 However, this guideline has been adopted in subsequent cases, and appears to be gaining currency amongst decision-makers. The Committee is concerned that, under this guideline, FOI decision-makers may take it upon themselves to decide what will and will not confuse the public and what is an 'unnecessary debate' in a democratic society.

11.9 In one case in which the guideline was applied, access was sought to a document prepared for a senior policy advising committee. The Tribunal ... said on this point:

> *If it were possible to put together all the written and oral submissions made to the committee, the discussions of those submissions and any other element that led to the making of the final decision, and to make all that material available to one who was qualified to understand it and debate it, perhaps confusion could be avoided. That is not however the situation with which we are confronted at the moment. We have only one ingredient in the debate the disclosure of which could possibly distort the validity of the final decision that was made.*

11.10 The Committee regards with some concern the implication that access to material would be given to 'one who was qualified to understand it and debate it', but not to a member of the general public or, as in this case, a journalist.

11.11 In Re Howard, the documents concerned possible taxation options. With respect to the particular guideline, the Tribunal said: 'disclosure of the documents could lead to confusion and debate about taxation proposals which were not in fact adopted by the Government'. The implication is that the Australian community lacks the sophistication to distinguish between a proposal canvassed as an option and a proposal actually adopted. Debate after the event on an option that was not adopted is presumably 'unnecessary debate'.

11.12 The Committee regard the Australian community as more sophisticated and robust than the guideline assumes. The Committee acknowledges that documents relating to policy proposals considered but not adopted can be used to attempt to confuse and mislead the public. But the Committee considers that such attempts, if made, will be exposed. The process of doing so will lead to a better public understanding of the policy formation process.

11.13 Consistent with its attitude to the basis on which deletions should be able to be made, the Committee records its conclusion that possible confusion and

> *unnecessary debate not be factors to be considered in calculating where the public interest lies."*

138 The fifth of the *Howard* criteria may be justified in particular circumstances. For instance, I find unexceptionable the decisions of the Federal Court of Australia in *Harris v Australian Broadcasting Commission* (cited above, paragraph 110) and *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64 where it was held that it would be contrary to the public interest to disclose interim reports critical of particular persons who were still to be given the chance to respond to those reports. The response of those persons might result in further refinement or greater balance in those reports. (Significantly, those judgments are not inconsistent with the proposition that once a response has been received and a final balanced report made, the disclosure of both interim and final reports would not necessarily be contrary to the public interest). I consider it particularly important, however, to endorse the comments made by Deputy President Todd in *Rae*'s case (at p.606) in response to a submission by the respondent (relying on the fifth *Howard* criterion) that disclosure of any of the documents would be contrary to the public interest because "it would not fairly disclose the reasons for a decision subsequently taken or yet to be taken":

> *"I agree with Mr Bayne that a distinction may be drawn between the disclosure of a 'preliminary' document which contains criticism of a specific individual and a 'preliminary' document which reflects a stage of thinking in the policy making process ... It is true that the documents to which access is currently sought are different from the documents in* Harris *and* Kavvadias *and the rationale for the public interest findings in those cases is not directly applicable here. Moreover, the documents here relate to a continuing administrative process. It will rarely be possible to say of any policy document that it reflects the ultimate view of government from which there will be no departure. If the fact of a document not accurately reflecting current government policy were a determinative public interest consideration, no policy document would ever be released, for it is always possible that some person some day might read such a document in the mistaken belief that it represents current thinking. There will no doubt be instances where an interim document by its very nature, or because of circumstances surrounding it, ought not be released.* Harris *and* Kavvadias *afford two such examples. But it will not be enough for a respondent to rely on the mere fact of the contents of a document being subject to change to support a claim that disclosure would be contrary to the public interest."*

139 It follows that in my opinion, it would be unsatisfactory for Queensland government agencies and Ministers to apply uncritically the five *Howard* criteria to determining questions under s.41(1)(b) of the FOI Act of whether or not the disclosure of deliberative process documents would be contrary to public interest. I consider that the second and fourth of the *Howard* criteria are wrong in principle, and should not be applied in Queensland; and further that the first, third and fifth of the *Howard* criteria should not be applied without regard to the qualifications on their relevance and appropriateness which I have made or endorsed in the foregoing discussion.

140 The decision of the Victorian AAT on which the Department sought to rely in its written submission, *Re Western Mining Corporation and Department of Conservation Forests and Lands* (1989) 3 VAR 150, also constitutes an unsatisfactory precedent because of its uncritical application of the *Howard* criteria. The Tribunal in that case was even moved to remark that it was according weight to evidence given on behalf of the Department in an attempt to establish

the *Howard* criteria, which involved "a substantial element of speculation" in its assessment of the consequences of disclosure. In my opinion, an external review authority should be cautious of accepting that damage to the public interest will flow from the disclosure of deliberative process material unless a government agency or Minister can establish that specific and tangible harm can be expected to flow from disclosure.

141 There are passages in the *Western Mining* decision which suggest to me that the Tribunal has proceeded on a misunderstanding of principle. At p.157, the Tribunal says:

> *"It is well established that the Tribunal's task in regard to this aspect of s.30(1) is to balance the public interest in pursuing the statute-given entitlement to access against the public interest in protecting the deliberative processes of Government:* Ryder v Booth *[1985] VR 869 at 879;* Re Pescott and Auditor-General of Victoria *(1987) 2 VAR 93 at 96."*

142 Section 30(1) of the Victorian FOI Act is for practical purposes indistinguishable from s.36(1) of the Commonwealth FOI Act and s.41(1) of the FOI Act. To interpret it as though Parliament had intended to give effect to a fully fledged public interest in protecting the deliberative processes of Government seems to me to be inconsistent with the proper inferences to be drawn from a careful construction of the provision, and which I have expressed in paragraphs 20 to 26 above and which Deputy President Todd of the Commonwealth AAT expressed in the passage quoted in paragraph 23 above (with which I respectfully agree).

143 In my opinion the only intention which can properly be attributed to the wording of each of these exemption provisions is that the respective legislatures intended that deliberative process matter be protected from disclosure only to the extent that disclosure of particular deliberative process matter would be contrary to the public interest. The Tribunal in *Western Mining* cited two authorities in support of the proposition quoted above, but a quick reference to those authorities shows that they afford no support for a proposition stated in such broad terms as the one quoted.

144 The real source of that proposition appears to be a passage from the judgment of Lazarus J in *Penhalluriack v Department of Labour and Industry* (County Court, Victoria, 19 December 1983, unreported p.29) which is set out at the bottom of p.155 of the Tribunal's decision. The passage is in these terms:

> *"It is sufficiently apparent that the purpose of [s.30 of the Victorian FOI Act] is to protect the deliberative processes of government and to ensure that measure of confidentiality which will enable policy and the like decisions to be taken after the frankest possible interchange of views and ideas between officers of the public service and between them and their Minister, as well as between members of the Ministry."*

145 Again, this passage considered in isolation, considerably overstates the extent of any apparent legislative purpose that could be gleaned from s.30 of the Victorian FOI Act, as a matter of statutory construction, and evidences an assumption about the protection of candour and frankness which should not be preferred to the more logical approach of the Commonwealth AAT decisions endorsed above at paragraphs 133 to 135.

APPLICATION OF s.41(1)(b)

146 In essence, the Department's decision in this matter was that the interests of -

(a) maintaining effective and proper workings of Government; and

(b) not causing confusion and unnecessary concern to the public in respect of the implications of the *Mabo* case;

on balance outweigh -

(c) the general public interest in disclosure so that the public is informed and can participate in the processes of government, and government is able to be held more accountable, which interest is recognised in the FOI Act itself; and

(d) the interest in achieving certainty in understanding the High Court decision in the *Mabo* case.

147 The Department's written submission to the Information Commissioner, and its written reasons for decision on internal review, attempt to set out specific reasons (which largely overlap between the two documents) as to why disclosure of the documents in issue would be contrary to the public interest in maintaining effective and proper workings of government.

148 Many of the factors so identified, and set out at paragraphs 95 and 96 above, are phrased in very general and speculative terms, with the use of the word "may" qualifying most of the verbs that appear. I have to make due allowance for the fact that the Department did not in its reasons statement or written submission wish to address the particular contents of the matter claimed to be exempt, so as to avoid disclosing such matter to the applicant. Rather I have assessed whether the concerns of potential harm raised by the Department in general terms could be applied to the particular contents of the documents in issue.

149 As should be clear from the authorities endorsed in the course of my analysis of the Department's submission, I would not accept an argument that these documents fall within a class of documents (such as agency consultation comments on proposals for legislation, or agency consultation comments on proposals intended for eventual submission to Cabinet) the disclosure of which would be contrary to the public interest, irrespective of whether the disclosure of the contents of particular documents would be contrary to the public interest (see also *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659 at p.662, affirming that "disguised class claims" will not be permitted under s.36 of the Commonwealth FOI Act).

150 One group of reasons given is that the documents in issue (particularly documents 2, 3, 4 and 6) were "created by senior officers for communication between agencies at a senior level", and "senior officers would have difficulty in discharging the responsibilities of their office if every document prepared to enable policies to be formulated was liable to be made public". Fortunately, I do not have to deal with every document prepared to enable policies to be formulated, but only with the matter claimed to be exempt in the seven documents in issue in this case. Different public interest considerations may present themselves in different cases, and judgments must be made on a case by case basis. None of the documents in issue in this case are communications between Ministers. The only document addressed to a Minister was merely an information paper (document 7). Two of the documents are communications between Department Heads, and the rest are between less senior officers. I accept and endorse the

criticism made of the first *Howard* criterion (see paragraphs 120 and 121 above) in that the fact of documents being "high-level" correspondence is irrelevant in itself as an indicator that disclosure of the documents may be contrary to the public interest. It is at best an indicator to alert one to the possibility that these documents may require more careful scrutiny for factors that may point to tangible harm which would follow from disclosure of the actual contents of the documents (which factors, if identified, may therefore have to be weighed in the public interest balancing process against other relevant factors).

151 The first two points made in the internal review decision are put simply as broad, and unexceptionable propositions:

> *"* It is essential to the workings of Government for agencies which have a primary responsibility for the development of legislation or some other particular proposal for Cabinet or other senior level of consideration, that those agencies be able to freely consult with other agencies of Government.*
>
> ** Those consultations are often the expression of one point of view only."*

152 I can readily agree with those propositions, while observing that it is up to the Department to satisfy me that disclosure of the documents in issue in this case will inhibit free consultation between agencies of the Government to an extent that is contrary to the public interest.

153 The Department appears to have three broad arguments in this regard -

(a) in the course of development of policy for eventual consideration by Cabinet, confidentiality is essential at certain phases of the process (I prefer the use of the term "secrecy" rather than "confidentiality" in this context so as to avoid any suggestion that the FOI Act recognises mutual obligations of confidence in respect of the communication of deliberative process documents, which plainly, in light of the terms of s.46(2) of the FOI Act, it does not);

(b) release of the documents in issue may inhibit frankness and candour in future exchanges of information between agencies in predecisional consultations, as agencies may be less inclined to canvass the views and interests of other agencies; thus policy development proposals may not be subjected to the fullest possible scrutiny, comment and consideration, to the detriment of the public interest;

(c) the release of an individual agency's comments and opinions may be detrimental to the workings of government as a whole and to the responsibilities of government in the development of policy and legislation.

154 The Department also puts a variation of argument (c) which seems to be based on the fourth *Howard* criterion, in that apart from any injury to government processes, it is suggested that if the single interest views of an agency (or a number of different single interest views of agencies) were being publicly canvassed, it may cause premature and unnecessary debate, concern and confusion in the community.

155 The trouble with argument (a) is that the Department has not attempted to specify the precise phases in the course of the development of policy for eventual consideration by Cabinet at which secrecy is claimed to be essential, and to relate those phases to the documents in issue in this case. Leaving aside document 7 which is merely an information paper, there are indications in documents 1, 2 and 3 which suggest that the policy proposals on which they are commenting are

not in a particularly refined or late stage of development. Documents 4, 5 and 6 relate to a draft Cabinet submission. It was actually described in the undated document 4 as a "final draft Cabinet submission", but the nature and extent of the comments contained in document 4 suggest that considerable revision would have been required in any event. The Department's internal review decision informs us that, as of 16 February 1993, none of the proposals had yet been approved or even considered by Cabinet. The Department understood this to have still been the case early in June 1993.

156 The FOI Act contains specific provisions which afford more than adequate protection for the Cabinet process. Section 36 not only provides complete protection for official records of Cabinet and any matter the disclosure of which would disclose any deliberation or unpublished decision of Cabinet (which arguably is all that is necessary for the maintenance and protection of the convention of collective responsibility of Ministers for Government decisions), it also affords complete protection to a range of documents intended to play a role in Cabinet deliberations and decision-making, irrespective of whether disclosure of their actual contents would harm the public interest. Thus any matter in a document which -

(a) has been submitted to Cabinet for its consideration; or

(b) is proposed by a Minister to be submitted to Cabinet for its consideration;

and which (in either case) was brought into existence for the purpose of submission for consideration by Cabinet (or which is a draft or copy of, or contains any extract from any such matter) is exempt irrespective of countervailing public interest considerations which may favour disclosure.

157 No claim has been made by the Department in this case that the documents in issue fall within the class protected by s.36 of the FOI Act, nor in my opinion could such a claim have validly been made. In particular there is nothing to suggest that the documents in issue are proposed by a Minister to be submitted to Cabinet for its consideration, and were brought into existence for that purpose.

158 There are sound reasons why the class of documents entitled to strict protection under s.36 of the FOI Act should be narrowly confined. To do so will permit full scope to the object of fostering informed public participation in the processes of developing policy proposals, and this in turn will benefit the Cabinet process itself and through it, the public interest. I do not suggest that elected governments do not have the legitimacy and authority to make decisions without public consultation. In circumstances requiring urgent government action, there may be no practical alternative, and some government decision-making and policy-forming processes may be quite inappropriate for public consultation. There can be no doubt, however, that public consultation is a natural expression of the democratic process, and most governments are aware that to ignore it would be to their own peril. The mobilisation of majority public opinion against the announcement of a new government policy proposal tends to signal a government in difficulty.

159 It is instructive on this point (and indeed in respect of each of the Department's three broad arguments set out in paragraph 153 above) to have regard to the Queensland Cabinet Handbook (which is a document in the public domain, issued by the Government in August 1992, and available for purchase through Goprint). It contains a foreword by the Premier welcoming its publication as a step in the "consolidation of open and accountable Government in Queensland". On the topic of consultation in the preparation of Cabinet documents, the Cabinet Handbook

says (at p.32-35):

> *"Consultation is an essential part of the development of all Cabinet documents. It should commence as soon as possible and carry through to Ministerial clearance of the final draft of the document. Consultation should be held with any relevant agencies or organisations affected by the proposal including Ministers, Departments and other bodies such as employers, unions, community and special interest groups.*
>
> *A brief summary of the nature of the consultation process undertaken within the public sector and with non-government organisations must be provided.*
>
> *Ministers have a responsibility to their colleagues to ensure that consultation takes place at Ministerial and Departmental level on all matters in which other portfolio interests are involved. Consultation is the responsibility of the initiating Minister and, except in special circumstances, must take place before the matter is formally submitted to the Cabinet Secretariat. ...*
>
> *Consultation with persons or organisations external to Government should be a routine part of policy development, but should not involve the unauthorised disclosure of previous or proposed discussions or deliberations by Cabinet. Non-government organisations or persons may not be given a Cabinet document for comment.*
>
> **Results of Consultation**
>
> *Cabinet Submissions and Memoranda should state the extent of agreement or disagreement arising from the consultation process and should not be unduly delayed because of the failure to reach full agreement on all the recommendations.*
>
> *The results of consultation must be adequately reflected and recorded. Where there is agreement amongst those consulted, it is sufficient to record this fact and to state which Ministers, Departments, committees, employers, unions, professional groups, community groups and others have been consulted.*
>
> *Where agreement has not been reached on a significant issue, this should be indicated briefly on the cover sheet and cross referenced to detailed information in the body of the document. The Cabinet document should concisely state any differing views from agencies or non-government organisations that either support a proposal with reservations or do not support a proposal and where subsequent agreement cannot be reached. Direct summary quotations from these groups should be used wherever possible."*

160 In the pursuit of open and accountable government, the Queensland Government has placed a high value on the importance of consultation in the development of Government policy proposals. This is in sympathetic accord with the public participation objects of the FOI Act discussed at paragraphs 58 to 75 above. Interestingly, the only embargo which the Cabinet Handbook (see the fourth paragraph of the extract quoted) places on the disclosure of information to persons and organisations external to government (to allow for meaningful

consultation) is that no Cabinet document, or previous or proposed discussions or deliberations by Cabinet, are to be disclosed. This roughly accords with the scope of the protection afforded by s.36 of the FOI Act.

161 The extracts from the Cabinet Handbook quoted above seem to contemplate a managed process of consultation, where the agency developing a proposal for consideration by Cabinet selects the persons or organisations who will be accorded the opportunity of consultation. (Pages 27-28 of the Cabinet Handbook discuss the use of Green papers and White papers in a consultation process for policy development, which is aimed at achieving a high level of information dissemination, public discussion and comment, and which is open to all; but the Cabinet Handbook contains no guidelines which indicate when that process should be adopted, leaving it to the choice of individual Ministers and Chief Executives.)

162 The right of access to government-held information conferred by the FOI Act may assist interested persons or organisations who are not selected for participation in a consultative process, first, to discover that an agency is developing a policy proposal, and second, to obtain the information which would permit meaningful participation; for instance by seeking to make their views known to the agency or the responsible Minister.

163 The general tenor of the Cabinet handbook on the subject of consultation is quite consistent with the notion that if an interested person or organisation has views to contribute to a policy formulation process, they should be taken into account with all other relevant views, so that the deliberation and decision-making processes within Cabinet itself can take account of all facets of public opinion, and all views which for instance question the factual or technical bases of a proposal under consideration. Not all relevant information is in the possession of Government. The process of public consultation is generally a learning process, both for the government officials and the members of the public who engage in it. Not even our elite bureaucratic policy makers have a monopoly on wisdom. In the processes of Cabinet deliberation and decision, the relative strengths and weaknesses of all relevant options will be canvassed, so that Cabinet can make an informed choice according to its judgment of what the public interest requires. The Cabinet process is likely to produce better outcomes, in the public interest, when the legitimate concerns of all interested persons and groups have been taken into account, and the factual and technical data and assumptions on which a proposal is based have been exposed to the scrutiny of interested persons and groups.

164 I have difficulty accepting the Department's argument that there are certain phases in the development of policy for eventual consideration by Cabinet, at which secrecy is essential. First, it has elements of a "disguised" class claim, which (I have already stated) is not a permissible approach to the application of s.41(1)(b) of the FOI Act. Second, if there is any such phase it should be confined as strictly as possible so as to maximise the opportunities for fostering informed public participation in the processes of policy development. It is obviously preferable that public participation should occur in the pre-Cabinet phase of policy development, so that Cabinet deliberations can take account of the legitimate concerns of all interested persons and groups. Doubtless the emphasis of the Cabinet Handbook on consultation in the development of policy is aimed at avoiding or minimising hostile public reaction to the announcement of government policy decisions, by those whose legitimate concerns have not been taken into account (always allowing, of course, that there will be many areas where it is impossible to reconcile all competing interests).

165 I doubt that there is any phase common to the development of all proposals for eventual

consideration by Cabinet, in which secrecy is essential. There may be particular kinds of policy proposals where secrecy is essential, for instance, secrecy in the development of new taxation proposals may be of the highest importance until their public announcement, but not necessarily thereafter. Similarly, where premature disclosure of a proposal intended eventually for consideration by Cabinet might create unfair advantage to particular individuals to the detriment of the public at large, or prejudice Government negotiating strategy in such a way as to prejudice the public interest, secrecy may be essential. Each case must be judged on its merits. The fact (adverted to in the Department's reasons for decision on internal review) that during some phases, "access is confined even within agencies to a very senior level and tight security control" is in itself irrelevant. This is doubtless a longstanding practice in government agencies, predating the fundamental change with respect to rights of access to government-held information that has been effected by s.21 of the FOI Act.

166 At the very latest stage of the policy development process, immediately prior to Cabinet deliberation, it is possible that documents may be generated for the purposes of a deliberative process, that do not fall within the terms of s.36 of the FOI Act, but whose relationship to the Cabinet process is such as to raise some of the public interest considerations which underpin the s.36 exemption itself. Considerations of this kind were accepted as being relevant public interest considerations under s.36(1)(b) of the Commonwealth FOI Act in *Re Porter and the Department of Community Services and Health* (1988) 14 ALD 403 at p.409, where the documents in issue were agency consultation comments on a draft Cabinet submission. The applicability of this part of *Porter*'s case to the FOI Act would have to be approached with caution, however, for two reasons.

167 First, the system of consultation comments under the Commonwealth Cabinet Handbook, as described in *Porter*'s case, appears to operate in a manner that is materially different from the system under the Queensland Cabinet Handbook. It appears that the Commonwealth system described in *Porter* required consultation comments on a draft Cabinet Submission to be attached to the Cabinet Submission itself. In the words of the Tribunal (at p.409): "When prepared, the comment is destined to go before Cabinet ...". This is not necessarily the case with consultation comments under the process described in the Queensland Cabinet Handbook.

168 The last three paragraphs quoted in the extract from the Queensland Cabinet Handbook at paragraph 159 above, recognise that consultation with interested parties should aim at reaching full agreement on all recommendations in a Cabinet document, but will not always be successful. Where agreement has been reached, only the identities of those consulted needs to be recorded. Consultation comments by government agencies will not then find their way into the Cabinet document. They may do so, however, where there is disagreement on a significant issue. The editorial judgment is left to the agency responsible for the preparation of the Cabinet document as to whether it will paraphrase an agency's consultation comments or provide a summary quote, in discharge of its duty to "concisely state the differing views".

169 It will be impossible to tell in advance of course whether (and if so, which part of) an agency's consultation comments may ultimately appear in a Cabinet document. That in itself constitutes a sound practical reason why public interest considerations of the kind recognised in *Porter* are not likely to be enlivened until the very latest stage of the policy development process, immediately prior to Cabinet deliberation, when the issues that will require resolution by Cabinet (and are therefore likely to be the subject of deliberation within Cabinet) are finally being isolated, and made the subject of deliberative process advice.

170 Second, *Porter* was a case involving review of the issue of a conclusive certificate under s.36(3) of the Commonwealth FOI Act, and the Tribunal was therefore not exercising a merits review jurisdiction, but rather a supervisory jurisdiction confined to the issue of whether reasonable grounds existed for the certificate's claim that disclosure of the documents would be contrary to the public interest. The limited nature of the review being undertaken in *Porter*'s case (explained at p.405-6) may have inhibited the identification and weighing of countervailing public interests to those public interest grounds identified in the conclusive certificate. No similar restriction can be placed on the Information Commissioner's power to review the merits of a refusal of access to documents based on s.41 of the FOI Act. Assuming for the moment that public interest considerations of the kind recognised in *Porter* are potentially applicable to consultation comments by Queensland government agencies on Cabinet proposals, this certainly would not require acceptance of a proposition that consultation comments on Cabinet proposals constitute a class of documents requiring protection in the public interest. Whether the public interest considerations recognised in *Porter* are applicable at all to a particular document would have to be considered in the light of its actual contents and of evidence as to the issues identified in a final Cabinet submission as requiring deliberation and resolution by Cabinet. Competing public interest considerations could weigh the balance in favour of disclosure, e.g. the public interest in fostering informed public participation in government policy forming processes.

171 I think it is highly unlikely in any event that public interest considerations of the kind recognised in *Porter* could be proved to be anything more than speculative, at any stage in the policy development process prior to the time frame between the final opportunity given to government agencies to comment on a draft Cabinet document and the actual lodgement of the Cabinet document with the Cabinet Secretariat. If that should prove to be the case, it would leave sufficient scope for interested persons to use the FOI Act to facilitate informed participation in the process of policy development.

172 The Department has not sought in this case to rely on *Porter*, and there is therefore no evidence before me to suggest that any part of the relevant matter contained in the documents in issue in this case is destined to go before Cabinet as an issue requiring deliberation and decision. I cannot therefore be satisfied that there is a public interest in non-disclosure of any part of the relevant matter in issue for the sake of protecting the secrecy of Cabinet deliberations.

173 In summary, the Department's argument (a) (see paragraph 153 above) fails to satisfy me that the public interest in the proper and efficient workings of government requires that secrecy be accorded to the relevant matter in issue in this case.

174 As to the Department's argument (b), I do not accept that there is any real possibility that disclosure of the documents in this case under the FOI Act will mean that agencies will not consult other relevant or interested agencies on the development of Cabinet proposals. There are too many checks and balances in the Cabinet process, and any agency sponsoring a proposal for consideration by Cabinet which did not seek the views of agencies with relevant contributions to make, would certainly be exposed and censured.

175 Nor do I accept that disclosure of the documents in issue in this case would result in agency consultation comments on Cabinet proposals becoming less frank and candid. I have examined the contents of the documents in issue very carefully, and I can find nothing in their expression which is likely to have been written more circumspectly, nor anything in their contents which is likely to have been withheld, had the authors known that the documents would be disclosed. The documents reflect considerable credit on the Department, disclosing nothing but

conscientious endeavours to bring to the attention of other agencies the possible implications of the *Mabo* case for the policy proposals in development. I do not accept that professional public servants would be inhibited from raising with another agency known to be bringing a proposal before Cabinet, any opinion, advice or recommendation of a similar kind to that put forward in the documents in issue in this case.

176 The Department's argument (c) is difficult to evaluate without particulars of specific detriment to the workings of government as a whole, likely to flow from disclosure of the relevant matter in issue in this case. There is none that is apparent to me on the face of the documents. The phrasing of argument (c) tends rather to invite an applicant to make an FOI request of every relevant government agency, so as to avoid being met with the argument that it is detrimental to seek documents from just one. In view of the particular subject matter that the applicant wished to obtain, however, it was obviously appropriate to seek disclosure from the Department. It was pre-eminently the agency likely to be giving assessments on the possible consequences of the *Mabo* case in a number of different contexts. While many other agencies are likely to have submitted consultation comments on the policy proposals which are the subject of the documents in issue, it is not really fair to say that the applicant is seeking the views of just one agency on those policy proposals. He is seeking the views of the appropriate agency on one significant topic, which happens to traverse a number of different policy areas. The Department has not satisfied me that release of its comments and opinions on that one significant topic, for which it has special responsibility, would be detrimental to the workings of government as a whole.

177 The Department also appears to be putting a variation of argument (c), to the effect that, quite apart from any detriment to the workings of government, it would be contrary to the public interest for the views of one agency on the *Mabo* case to be released as this could reasonably be expected to lead to uninformed and premature debate, confusion and unnecessary concern. This argument reflects the fourth *Howard* criterion, which for reasons stated earlier I consider to be wrong in principle and inappropriate to be followed in Queensland.

178 In any event, I do not accept that disclosure of the relevant matter in issue in this case would cause premature and unnecessary debate, concern and confusion in the community to an extent that would be contrary to the public interest. I consider that the electorate in general, and certainly that segment of it which takes a keen interest in political matters, is aware that conflicting interests have to be reconciled in most of the difficult policy areas in which Governments have to make decisions, and that there would be something severely deficient with the processes of government if alternative views and different policy options were not being put, and on occasions put strongly, in advice received by the Government. In the processes of Cabinet deliberation and decision, the relevant strengths and weaknesses of competing views and options will be canvassed, so that Cabinet can make an informed choice according to its judgment of the public interest. I consider that the electorate is capable of distinguishing between an individual agency's policy advice and a Government decision arrived at after consideration of all relevant advice.

179 In my opinion, it is likely to be a rare case where exposure of an individual agency's views on a policy proposal in development would lead to a degree of premature debate, and unnecessary concern and confusion in the community, sufficient to amount to an injury to the public interest. The very process of community debate about government proposals should be valued in a democratic society and if unrepresentative views are expressed by one agency, this can be corrected through the process of community debate itself.

180 In the instant case, however, the documents in issue relate to a topic which has been for some time the subject of widespread community debate, and is of major concern to the Commonwealth Government and all State and Territory Governments in Australia. It is apparent that there is already some confusion and concern in some quarters. However, one does not clear up confusion and concern by suppressing information and stifling public debate. The following remarks of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth (No. 2)* (1992) 66 ALJR 695 (at p.706), though directed to a different kind of legal issue, are, in my opinion, nonetheless apposite in this context:

> *"The raison d'être of freedom of communication in relation to public affairs and political discussion is to enhance the political process (which embraces the electoral process and the workings of Parliament), thus making representative government efficacious. ...*
>
> *Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often, attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process."*

181 I accept and endorse two points that were made in the applicant's written submission, viz:

> *"The public is far more mature than the Department seems to believe. It is quite capable of making a rational decision once presented with accurate information. It is capable of differentiating between a draft position and a final position, between one Department's view and that of a Government ...",*

and

> *"Undoubtedly the Mabo case is one of the most important decisions the High Court has made. The issue is one of the most crucial modern Australia has considered ... It is difficult to conceive of a matter of greater genuine public interest and importance than Mabo."*

182 I consider that there is a public interest in having as much information as possible to enable adequate public debate on an issue of widespread public concern. The Department's internal review decision seemed to accept this as a public interest which favoured disclosure of the documents in this case, but one that was outweighed by the possibility of generating confusion and unnecessary concern.

183 The relevant matter in issue in this case relates to the possible implications of the *Mabo* case for three separate policy proposals involving environmental protection matters. Environmental protection is an area where a great many competing interests are generally in play, for example, the interests of economic development versus conservation, the public interest in job creation during a time of economic recession, and the interests of those who already live and work in the areas subject to the new proposals. Policy development in the area of environmental protection generally requires a process of consultation with interested persons and organisations outside

government, and it is clear from the documents in issue that this has occurred in the development of the policy proposals to which the documents relate. The process has included consultation with a number of Aboriginal groups. It must be a regular occurrence in any well-managed consultation process, that differing views of interested parties are disclosed and discussed with a view to attempting to reconcile the differences. The fact that the Department has contributed its views to a consultation process of this kind makes it even less likely that there is an overriding need for the preservation of secrecy in respect of its consultation comments.

184 In my opinion the disclosure of the deliberative process matter in issue in this case will have a beneficial, educative effect for the public, drawing attention to the possible implications of the *Mabo* case, and to the fact that issues relating to the existence or extinguishment of native title constitute a further competing interest that must be taken into account in environmental protection matters (an area which is already of considerable public interest and concern). I do not think it can harm the community to have information that will enable it to appreciate all the possible implications of the *Mabo* case, irrespective of whether preliminary or tentative concerns expressed in the documents in issue prove ultimately to be justified. No person or group and no Government in Australia has a ready solution to all the problems and potential implications of the *Mabo* case. The eventual working out of solutions or liveable compromises, whether through government leadership or legal action, is more likely to be assisted than harmed by the disclosure of relevant information which promotes informed debate (cf. s.5(1)(a) of the FOI Act).

185 The Department has failed to satisfy me that disclosure of the relevant deliberative process matter contained in the seven documents identified in paragraph 76 above, would be contrary to the public interest.

186 It remains to deal with the Department's argument that certain material in documents 4 and 5 (and I assume also document 6 which contains similar matter) is exempt matter pursuant to s.43 of the FOI Act in that it was brought into existence for the purposes of obtaining legal advice from the Government's legal adviser, the Crown Solicitor. Without disclosing the matter claimed to be exempt, it is sufficient to explain that in those documents the Department has drawn another agency's attention to the possible implications of the *Mabo* case for the policy proposal which the other agency was developing, and has suggested the form of a number of questions which the other agency (it is suggested) should refer to the Crown Solicitor for legal advice.

187 In my opinion, this material is not exempt under s.43 of the FOI Act. The essence of legal professional privilege in Australia is that it attaches to all oral or written confidential communications between a client and the client's barrister or solicitor, made or brought into existence for the sole purpose of seeking or giving legal advice, or for the sole purpose of use in existing or anticipated litigation (the authorities are discussed in more detail in my decision in *Re Smith and Administrative Services Department*, Decision No. 93003 given on 30 June 1993). In *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at p.63, Mason and Wilson JJ restated the principle in terms applicable to the relationship between government agencies and professional lawyers employed by government as follows:

> *"The common law ... recognises that legal professional privilege attaches to confidential, professional communications between government agencies and their salaried legal officers undertaken for the sole purpose of seeking or giving legal advice or in connection with anticipated or pending litigation."*

188 In *Grant v Downs* (1976) 135 CLR 674 at 685, Stephen, Mason and Murphy JJ said of the doctrine of legal professional privilege:

> *"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. ... As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. Nonetheless, there are powerful considerations which suggest that the privilege should be confined within strict limits."*

189 Here, the matter claimed to be exempt under s.43 is not contained in, and does not purport to be, a confidential written communication between a client and the client's legal adviser. The matter in issue has been communicated between agencies, not between an agency and its legal adviser. The Department no doubt contemplated in bringing this material into existence that the other agency would act on its suggestion and seek legal advice, though it must have remained a matter of discretion for the agency to whom the Department's documents were addressed, whether it chose to seek legal advice, and if so, whether it chose to use the precise form of the questions suggested by the Department.

190 Section 43 of the FOI Act is not subject to a public interest balancing test The only issue is whether the matter claimed to be exempt would or would not be privileged from production in a legal proceeding on the ground of legal professional privilege. In my opinion it would not.

191 The result is that the applicant is entitled to have access under the FOI Act to all of the matter in the seven documents identified in paragraphs 76 and 77 above as falling within the terms of his FOI access request, with the exception of the material which I identified in paragraph 86 above as being exempt matter under s.36(1)(d) of the FOI Act.

192 All of the matter that was claimed to be exempt is contained within larger documents, which (it is clear from the phrasing of the Department's decision letters) were also considered to be exempt in full under s.41(1). The balance of material in the seven documents was not in issue before me, and I have not ruled upon it. It is a matter for the Department whether it wishes to release some or all of the surrounding material so that the applicant can see the context of the material in which he has a particular interest. Under s.28(1) of the FOI Act, the Department has a discretion to release exempt matter if it so chooses.

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F N ALBIETZ
INFORMATION COMMISSIONER