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| **OFFICE OF THE INFORMATION** | **)** | S 223 of 1993 |
| **COMMISSIONER (QLD)** | **)** | (Decision No. 95001) |

Participants:

ANTHONY HAMILTON WOODYATT
Applicant

- and -

MINISTER FOR CORRECTIVE SERVICES
Respondent

**DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION - refusal of access - document in issue comprising a report to the respondent on recommended changes to Queensland's corrective services legislation - whether the document in issue is exempt matter under s.36(1) (the Cabinet matter exemption) of the *Freedom of Information Act 1992* Qld - whether the document in issue was prepared for the purpose of submission to Cabinet for its consideration and is proposed by a Minister to be submitted to Cabinet for its consideration - whether merely factual matter contained in the document in issue is not exempt matter by virtue of s.36(2) of the *Freedom of Information Act 1992* Qld

STATUTES - amendment - effect on Information Commissioner's review - FOI access application lodged, and decision refusing access made, prior to the amendment of s.36 by the *Freedom of Information Amendment Act 1993* Qld, but application for review by the Information Commissioner lodged after that amendment - whether the applicable law for the purposes of the Information Commissioner's review is s.36 in its pre-amendment form or its post-amendment form - whether, prior to the amendment, the applicant had, for the purposes of s.20 of the *Acts Interpretation Act 1954* Qld, an accrued right to be given access to non-exempt matter contained in the document in issue - observations on the nature of the right conferred by s.21 of the *Freedom of Information Act 1992* Qld

*Freedom of Information Act 1992* Qld s.11, s.21, s.22, s.23, s.25, s.27, s.27(2), s.27(4), s.27(7), s.28(1), s.28(2), s.31, s.32, s.36(1), s.36(2), s.36(4), s.41, s.52(6), s.71(1), s.73(3)(b), s.79, s.88(1), s.88(2)
*Acts Interpretation Act 1954* Qld s.4, s.14A, s.14B, s.20, s.20(1)(c), s.20(1)(e), s.20(2), s.32CA
*Acts Interpretation Act 1901* Cth s.8
*Administrative Appeals Tribunal Act 1975* Cth s.43(1)
*Corrective Services Act 1988* Qld
*Freedom of Information Act 1982* Cth
*Freedom of Information Act 1982* Vic s.13, s.17, s.20(2), s.28, s.31(3), s.33, s.50, s.50(4)
*Freedom of Information Amendment Act 1991* Cth s.29(1), s.29(2)
*Freedom of Information Amendment Act 1993* Qld

*Freedom of Information (Amendment) Act 1993* Vic
*Interpretation of Legislation Act 1984* Vic s.14
*Queensland Coast Islands Declaratory Act 1985* Qld

*Abbott v Minister for Lands* [1895] AC 425
*Athlumney; Ex parte Wilson, Re* [1898] 2 QB 547
*Birrell and Victorian Economic Development Corporation, Re* (1989) 3 VAR 358
*Carr v Finance Corporation of Australia Ltd* (1982) 150 CLR 139; 56 ALJR 730; 42 ALR 29
*Caruth and Department of Health, Housing, Local Government and Community Services, Re* (Commonwealth AAT, No. W90/215, 18 June 1993, unreported)
*Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27
*Commonwealth of Australia v Esber* (1991) 29 FCR 324; 101 ALR 35
*Costello and Secretary, Department of Transport, Re* (1979) 2 ALD 934
*Ellis v Minister for Lands* (1985) 82 FLR 58; 37 NTR 29
*Esber v Commonwealth* (1992) 174 CLR 430; 66 ALJR 373; 106 ALR 577
*Fisher v Hebburn Ltd* (1960) 105 CLR 188; 34 ALJR 316
*Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379; 51 ALJR 445; 13 ALR 17
*Harding v Commissioner of Stamps (Qld)* [1898] AC 769
*Hudson, as agent for Fencray Pty Ltd, and Department of the Premier, Economic and Trade Development, Re* (1993) 1 QAR 123
*Inland Revenue Commissioners v Joiner* [1975] 1 WLR 1701
*Lord Suffield v Inland Revenue Commissioners* [1908] 1 KB 865
*Mabo v Queensland* (1988) 63 ALJR 265
Madsen v Western Interstate Pty Limited, Ex parte Western Interstate Pty Limited [1966] Qd R 163
*Mathieson v Burton* (1971) 124 CLR 1; 45 ALJR 147
*Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154
*New South Wales Aboriginal Land Council v Minister for Natural Resources* (1986) 59 LGRA 318
*New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act* (1988) 14 NSWLR 685; 66 LGRA 265
*Robertson v City of Nunawading* [1973] VR 819; 29 LGRA 44
*RS Howard & Sons Ltd v Brunton* (1916) 21 CLR 366
*Thwaites and Department of Justice, Re* (1993) 6 VAR 63
*Wallace v Health Commission of Victoria* [1985] VR 403
*Young v Adams* [1898] AC 469

## DECISION

1. I set aside the decision under review (being the decision deemed to have been given on behalf of the respondent affirming the decision of Ms Joan Mary McGrath made on 4 October 1993).

2. In substitution for it, I decide that the Mulholland Report (being the document described in the first paragraph of my reasons for decision) is an exempt document under s.36(1)(a) of the *Freedom of Information Act 1992* Qld, as in force prior to the amendments to s.36 effected by the *Freedom of Information Amendment Act 1993* Qld (which I find to be the applicable law by virtue of s.20 of the *Acts Interpretation Act 1954* Qld), except for the following paragraphs of the Mulholland Report which are not exempt matter by virtue of s.36(2) of the *Freedom of Information Act 1992* Qld (as in force prior to the amendments to s.36 effected by the *Freedom of Information Amendment Act 1993* Qld) and which therefore comprise matter to which the applicant has a right to be given access:

> paragraphs 1.1, 1.2, 1.4 (with the exception of the last four sentences), 1.5, 1.9, 1.12 (with the exception of the last sentence), 2.1, 2.2, 4.1, 4.2, 4.3, 4.4, 4.5, 5.1, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.9, 7.1, 7.3, 7.8, 7.9, 7.12, 8.2, 9.1, the first two sentences of 9.3, the first two sentences of 9.4, 10.1 and 11.1.

Date of Decision: 10 February 1995

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**INFORMATION COMMISSIONER**

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**OFFICE OF THE INFORMATION COMMISSIONER (QLD)** ) S 223 of 1993 ) (Decision No. 95001)

Participants:

ANTHONY HAMILTON WOODYATT
Applicant

- and -

MINISTER FOR CORRECTIVE SERVICES
Respondent

## REASONS FOR DECISION

### Background

1. The applicant, Mr Woodyatt, seeks review of a decision made on behalf of the former Minister for Corrective Services, the Honourable Glen Milliner, MLA (who will be referred to in these reasons for decision as "the former Minister") to refuse the applicant access to a report to the former Minister by Mr R A Mulholland QC, entitled "Commentary on Recommended Changes to the Corrective Services legislation" (the report will be referred to in these reasons for decision as the "Mulholland Report" or "the Report"). Mr Woodyatt, a solicitor, was a member of a Committee (the Review Committee) which met from October 1990 to April 1991, chaired by Mr Mulholland, for the purpose of reviewing the *Corrective Services Act 1988* Qld and providing views which Mr Mulholland might draw on for the preparation of the Report.

2. Mr Woodyatt's access application under the *Freedom of Information Act 1992* Qld (the FOI Act or the Queensland FOI Act) was made by way of a letter dated 17 August 1993 to the former Minister, the relevant portion of which is as follows:

> ***category of document sought*** *official document of a Minister*
>
> ***held by*** *the Minister for Corrective Services*
>
> ***description of document*** *report to the Minister by R A Mulholland QC*
>
> ***subject*** *his review of Corrective Services legislation*
>
> ***form of access required*** *copy of entire report together with any appendices, addenda or other related material.*

3. A decision dated 4 October 1993, in response to Mr Woodyatt's FOI access application, was made on behalf of the former Minister by Ms Joan Mary McGrath, Senior Ministerial Policy Adviser. Ms McGrath's decision was to deny access to the whole of the Mulholland Report on the basis that it was exempt under s.36(1)(a) of the FOI Act. The full text of s.36 of the FOI Act, as in force on 4 October 1993, is set out in paragraph 9 below. The relevant part of Ms McGrath's decision is as follows:

> *In this particular case, I believe the requirements of section 36(1)(a) have been met. Although the report has not yet been submitted to Cabinet, it is proposed to be submitted to Cabinet by the Minister before the end of this year as an attachment to*

*a Cabinet Submission. The second requirement of s.36(1)(a) has also been fulfilled since the report was brought into existence for the purpose of submission for consideration by Cabinet.*

*The report concerns proposed changes to the* Corrective Services Act 1988 *and regulations made pursuant to that Act. At the time the Minister requested the report he intended that, being a report on proposed changes to existing legislation, it would be submitted for consideration by Cabinet when complete.*

4. On 28 October 1993, Mr Woodyatt applied for internal review of that decision. By that time, the Honourable Paul Braddy MLA had become Minister for Corrective Services (he will be referred to in these reasons for decision as "the Minister" or "the respondent"), and accordingly, the application for internal review was made to him. No decision was made in response to Mr Woodyatt's application for internal review, prompting Mr Woodyatt to apply to me, by letter dated 2 December 1993, seeking external review on the basis of a deemed refusal of his application for internal review (see s.52(6) and s.73(3)(b) of the FOI Act).

**External review process**

5. On 23 December 1993, the Minister's office (at my request) forwarded for my examination a copy of the Mulholland Report, plus copies of other pertinent documents from the relevant file of the Queensland Corrective Services Commission (the QCSC) relating to the commissioning and preparation of the Mulholland Report, and the purposes for which it was to be used.

6. Following examination of that material, the relevant issues to be addressed in this review were outlined in a letter to the respondent dated 11 January 1994, which requested the respondent to lodge any evidence or written submissions in support of his case for exemption by 14 February 1994. After a long delay, I was informed by a member of the Minister's staff that assistance was being sought from the Crown Solicitor's office in the preparation of a submission and evidence.

7. On 20 May 1994, the Crown Solicitor wrote to me suggesting that I deal with a preliminary question of law, namely, whether s.36 of the FOI Act was to be applied in its form at the time of Ms McGrath's decision (made on 4 October 1993 in response to Mr Woodyatt's FOI access application) or in its current form, as amended by the *Freedom of Information Amendment Act 1993* Qld, which took effect on 20 November 1993. This is a complex legal issue, involving questions as to the proper construction of the FOI Act, and the application of s.20 of the *Acts Interpretation Act 1954* Qld (see paragraphs 34-101 below). I did not think it appropriate to deal with this issue as a preliminary question, and requested that the respondent lodge evidence aimed at establishing whether the Mulholland Report was exempt under s.36(1) in its pre-amendment form, or in its present form, or both (the material facts in this regard being within a fairly brief compass). Ultimately, a timetable was set pursuant to which both participants lodged evidence and written submissions.

8. During the course of this external review, a number of proposals were put to the respondent in an attempt to resolve this external review. Having given of his time to assist the government by serving on the Review Committee at the invitation of the former Minister, Mr Woodyatt feels that, quite apart from the FOI Act, he should be entitled to see the fruits of that process. Mr Woodyatt has a particular interest in assessing whether the Mulholland Report reflects the views of the whole Review Committee and in addressing a submission to the Minister setting out his own views (to the extent that they differ from those conveyed in the Mulholland Report) and his arguments in support of them. Mr Woodyatt proposed an arrangement whereby, if a copy of the Mulholland Report was released to him, he would agree to be bound by an obligation of confidence with respect to its contents, and to use the information so acquired only for the limited purpose of making his own

written submission to the Minister on issues raised by the Report. However, Mr Woodyatt's proposal was rejected by the respondent.

**Relevant provisions of the FOI Act - the history of s.36**

9. Section 36 of the FOI Act, as originally enacted, provided as follows:

> ***36.(1)*** *Matter is exempt matter if -*
>
> *(a) it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; or*
>
> *(b) it forms part of an official record of Cabinet; or*
>
> *(c) it is a draft of matter mentioned in paragraph (a) or (b); or*
>
> *(d) it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a) or (b); or*
>
> *(e) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet.*
>
> ***(2)*** *Matter is not exempt under subsection (1) if it is merely factual or statistical matter unless -*
>
> *(a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and*
>
> *(b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.*
>
> ***(3)*** *For the purposes of this Act, a certificate signed by the Minister certifying that matter is of a kind mentioned in subsection (1), but not of a kind mentioned in subsection (2), establishes, subject to Part 5, that it is exempt matter.*
>
> ***(4)*** *In this section -*
>
> ***"Cabinet"*** *includes a Cabinet committee.*

10. I explained the correct approach to the interpretation and application of s.36, as originally enacted, in my decision in *Re Hudson, as agent for Fencray Pty Ltd, and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 (*Re Fencray*). Some three months after my decision in *Re Fencray* was given, s.36 was amended by the *Freedom of Information Amendment Act 1993* Qld. Section 36 now provides as follows:

> ***36. (1)*** *Matter is exempt matter if -*
>
> *(a) it has been submitted to Cabinet for its consideration; or*
>
> *(b) it was prepared for submission to Cabinet for its consideration and*

*is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet for its consideration; or*

*(c) it was prepared for briefing a Minister about an issue proposed, or that has at any time been proposed, to be considered by Cabinet; or*

*(d) it forms part of an official record of Cabinet; or*

*(e) it is a draft of matter mentioned in paragraph (a), (b), (c) or (d); or*

*(f) it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a), (b), (c) or (d); or*

*(g) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet.*

***(2)** Matter is not exempt under subsection (1) if it is merely statistical, scientific or technical matter unless -*

*(a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and*

*(b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.*

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

***(4)** In this section -*

*"**Cabinet**" includes a Cabinet committee.*

*"**matter**" includes matter that was prepared before the commencement of the* Freedom of Information Amendment Act 1993.

11. Section 36 of the Queensland FOI Act now corresponds fairly closely to the amended Cabinet exemption provision (s.28) in the *Freedom of Information Act 1982* Vic (the Victorian FOI Act), introduced by the Kennett government in mid-1993 (see the *Freedom of Information (Amendment) Act 1993* Vic). The Victorian provision in its present form has been the subject of criticism in a number of articles: see S. Zifcak, "Freedom of Information and Cabinet Government: Are They Compatible in Every Dissimilar Respect?" (1994) 1 A J Admin L 208; K. Rubenstein, "Freedom of Information-Victoria" (1993) 1 A J Admin L 51. The Cabinet exemption provisions in Queensland and Victoria now have an extremely wide coverage. The original exemption provisions were predominantly designed to permit secrecy for proceedings within Cabinet and for the contribution of individual Ministers to Cabinet deliberations and decision-making (being the extent of protection necessary, according to the traditional understanding of its scope, for the convention of collective Ministerial responsibility on which the Cabinet process is based - see *Re Fencray* at paragraphs 13-21). The amendments, however, seem designed to extend unqualified protection to the contributions of those who brief Ministers on issues that are to come or may come before Cabinet

(amended s.36(1)(c)), any documents submitted to Cabinet, whether or not the documents were initially prepared for submission to Cabinet (amended s.36(1)(a)), and any document which a Minister has at some time proposed for submission to Cabinet, irrespective of whether that proposal was subsequently abandoned (amended s.36(1)(b)). Documents of this kind would formerly have fallen under the deliberative process exemption (s.41) and would have been exempt only if the disclosure of their contents would be contrary to the public interest. The particular changes effected by the new form of s.36 of the FOI Act are detailed in the following paragraphs.

12. Prior to amendment, s.36(1)(a) provided:

> ***36. (1)*** *Matter is exempt matter if -*
>
> (a) *it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet*; (my emphasis).

The former s.36(1)(a) has been broken into two provisions, (the current s.36(1)(a) and s.36(1)(b)) and its scope has been broadened. Section 36(1)(a) now provides that matter is exempt if *"it has been submitted to Cabinet for its consideration"*. The requirement under the former s.36(1)(a) that the matter in issue must have been brought into existence for the purpose of submission for consideration by Cabinet, which had placed sensible limits on the scope of the exemption, has been dispensed with. Thus, documents submitted to Cabinet merely to provide background information relevant to a proposal contained in a Cabinet submission, and which do not reflect the views of a Minister on the proposal (but which could be valuable for informing the general public, or any interested member thereof) will be exempt, even though not initially prepared for the purpose of submission to Cabinet. The current s.36(1)(a) is so wide that it would apply to a document submitted to Cabinet which has previously been released into the public domain, such as a Green Paper. It also permits an avenue for potential abuse of the accountability objects of the FOI Act by enabling an agency or Minister to prevent disclosure of an embarrassing or damaging document, merely by ensuring that it is submitted to Cabinet for its consideration (even though the document was not initially prepared for the purpose of submission to Cabinet). It is to be hoped that the government will issue guidelines to FOI decision-makers encouraging the appropriate exercise of the discretion conferred by s.28(1) of the FOI Act in respect of documents which are technically exempt under the current s.36(1)(a), but the disclosure of which could do no harm to the effective working of the Cabinet process.

13. Section 36(1)(b) in its present form provides:

> ***36. (1)*** *Matter is exempt matter if -*
>
> ...
>
> *(b) it was prepared for submission to Cabinet for its consideration and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet for its consideration*; (my underlining).

This extends the Cabinet exemption to documents that were at some time proposed for submission for Cabinet's consideration, but were not, in fact, submitted to Cabinet for its consideration. Such documents were not exempt under s.36(1)(a) as originally enacted (see *Re Fencray* at paragraph 28).

14. The current s.36(1)(c) provides an exemption for briefing notes prepared for briefing a Minister

about an issue which is proposed, or that has at any time been proposed, to be considered by Cabinet. This provision refers to a category of documents that had no counterpart in s.36(1) as originally enacted. The current s.36(1)(c) extends to documents never intended for submission to Cabinet, but prepared about "an issue" to be considered by Cabinet, or that had at any time been proposed to be considered by Cabinet, regardless of whether or not Cabinet in fact considered the issue.

15. The current s.36(1)(d) merely re-enacts the former s.36(1)(b) without change. The current s.36(1)(e) has the effect of making drafts of other Cabinet matter exempt. Section 36(1)(c), as originally enacted, protected drafts of matter, but only in the more limited categories of matter contained in s.36(1)(a) and s.36(1)(b), as originally enacted. The drafts of matter now protected under s.36(1)(e) are drafts of the broader categories of documents contained in the amended s.36(1)(a), (b), and (c) (and the current s.36(1)(d) which is identical to the former s.36(1)(b)). In other words, s.36(1)(e) is now broad enough to make exempt a draft of a document that was not prepared for the purpose of submission to Cabinet, but was eventually submitted to Cabinet for its consideration.

16. Section 36(1)(d), as originally enacted, protected from disclosure a copy of, or an extract from, matter or a draft of the matter referred to in s.36(1)(a) or (b), as originally enacted. Section 36(1)(f), as presently enacted, performs the same function in respect of the current s.36(1)(a), (b), (c) and (d). However, s.36(1)(a), (b), (c) in their present form have a much broader scope. The current s.36(1)(f) is wide enough to exempt an extract of a draft of a document not prepared for the purposes of submission to Cabinet, but submitted to Cabinet in any event, which extract may be contained in some other document.

17. Section 36(2), as originally enacted, provided that matter which was merely factual or statistical matter (subject to the proviso contained in the former s.36(2)(a) and (b)) was not exempt under s.36(1). In its present form, the s.36(2) exception has been narrowed to matter which is merely "statistical, scientific or technical matter" (the proviso contained in s.36(2)(a) and (b) has not changed).

18. Section 36(4) contains a definition of "matter" for the purposes of s.36, which was not present in s.36 as originally enacted, and which extends to matter prepared before the commencement of the Act by which s.36 was amended, namely the *Freedom of Information Amendment Act 1993* Qld.

**Evidence and submissions of the participants**

19. The evidence lodged on behalf of the respondent comprised -

> a statutory declaration (dated 20 June 1994) of Joan Mary McGrath, who was the Senior Ministerial Adviser to the former Minister.
>
> a statutory declaration (dated 20 June 1994) of Romey Frances Stubbs, the Senior Policy Adviser to the Minister.

The respondent's evidence was supplemented by a lengthy written submission lodged on 15 August 1994, and short points of reply (to Mr Woodyatt's submissions) dated 11 October 1994.

20. Mr Woodyatt relied on his own statutory declaration dated 28 September 1994, a preliminary submission dated 13 July 1994, a major submission (in response to the respondent's major submission) dated 28 September 1994, and a short reply dated 24 October 1994.

21. The respondent has, in essence, argued that the evidence establishes that the Mulholland Report is

exempt under s.36 of the FOI Act in either its pre-amendment or post-amendment forms, but that as a matter of law, I am required to apply s.36 in its current (i.e. post-amendment) form at the time I come to issue a formal decision. The respondent asserts that Mr Woodyatt is not entitled to the benefit of s.20 of the *Acts Interpretation Act 1954* Qld (the AI Act) and advances three alternate arguments in support of this proposition:

(a) Mr Woodyatt has no accrued right for the purposes of s.20(1)(c) of the AI Act;

(b) the application of s.20(1)(c) of the AI Act has been displaced by the scheme of the FOI Act itself; and

(c) the application of s.20(1)(c) of the AI Act has been displaced by a contrary intention appearing in the amended s.36 itself, in particular the new s.36(4).

22. Mr Woodyatt disputes these arguments, contending that he has an accrued right under s.20(1)(c) of the AI Act and that by virtue of s.20(1)(c), s.20(1)(d) and s.20(2) of the AI Act, his application for review is to be dealt with on the basis that s.36 of the FOI Act in its pre-amendment form is the applicable law. He contends that the Mulholland Report is not exempt under s.36(1)(a) of the FOI Act in its pre-amendment form, and (as a fallback position only) that if it is, then any "merely factual matter" in the Mulholland Report is not exempt by virtue of s.36(2) of the FOI Act in its pre-amendment form. Mr Woodyatt concedes that the Mulholland Report would be exempt under s.36(1)(c) in its current (i.e. post-amendment) form.

23. After carefully considering all of the evidence, and the submissions of the parties, I consider that I am bound to find that the Mulholland Report satisfies the relevant tests for exemption under both s.36(1)(a) in its pre-amendment form, and s.36(1)(b) and (c) in their current (i.e. post-amendment) form. Were it not for a complication introduced by s.36(2), such a finding might make it unnecessary to deal with the rather complex arguments advanced by the participants as to whether s.36 in its pre-amendment or post-amendment form is the applicable law for the purposes of Mr Woodyatt's application for review. The following paragraphs of the Mulholland Report, however, contain matter which, in my opinion, is properly to be characterised as merely factual matter, which would not be exempt matter on the application of s.36(2) in its pre-amendment form:

> 1.1, 1.2, 1.4 (with the exception of the last four sentences), 1.5, 1.9, 1.12 (with the exception of the last sentence), 2.1, 2.2, 4.1, 4.2, 4.3, 4.4, 4.5, 5.1, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.9, 7.1, 7.3, 7.8, 7.9, 7.12, 8.2, 9.1, the first two sentences of 9.3, the first two sentences of 9.4, 10.1 and 11.1

24. If s.36 in its pre-amendment form is the applicable law, then Mr Woodyatt would have a right to be given access to the paragraphs of the Mulholland Report listed above. The factual material involved is, in my opinion, quite innocuous, but despite my requests, the respondent was not prepared to consent to its disclosure to the applicant, nor was Mr Woodyatt prepared to forego the chance to obtain it, notwithstanding my indications that it was too innocuous to be of any real interest or benefit for his purposes. It is therefore necessary for me to resolve the question of whether s.36 in its pre-amendment or post-amendment form is the applicable law for the purposes of this review, and to deal with the lengthy and complex arguments submitted by the participants. It is first necessary for me to explain my findings on the application of s.36(1) of the FOI Act in both its pre-amendment and post-amendment forms, and for that purpose, I will summarise the facts established by the evidence lodged by the participants.

**Chronology of events**

25. The relevant facts are essentially not in dispute between the participants (although there is a wide

divergence of views as to how the relevant statutory provisions apply to those facts), and it will be useful to set out a chronology:

01/05/90 The former Minister met with Mr Woodyatt and Mr Hamburger (Director-General of the QCSC) to discuss review of the *Corrective Services Act*. At that time, it was indicated that the recommendations of the Review Committee were to be prepared in the form of a Green Paper (paragraph 5(a) McGrath's statutory declaration). A Green Paper is a discussion paper on proposed legislation put forward by a government (Osborne's Concise Law Dictionary, 8th ed., 1993, page 160: the term takes its origin from the colour of the cover of such documents traditionally used within the Westminster system of government).

19/06/90 An internal memo by the Acting Director-General of the QCSC was sent to the former Minister enclosing draft terms of reference. This memo makes it clear that it was then intended that the Review Committee's recommendations would appear by way of a Green Paper (paragraph 5(b), McGrath's statutory declaration).

02/08/90 The former Minister met with Mr Mulholland QC and the Deputy Director-General of the QCSC, and decided that a Green Paper would not be necessary and that the recommendations of the Review Committee would proceed through to Cabinet, and appear in the form of a Bill (paragraph 5(b) and exhibit "C", McGrath's statutory declaration).

12/09/90 The former Minister sent a letter to Mr Woodyatt, inviting him to participate in the Review Committee (exhibit "A" to Woodyatt's statutory declaration). Nothing was said in that letter about the ultimate form which the Review Committee's recommendations would take.

18/09/90 The first meeting of the Review Committee occurred. The minutes of the meeting (exhibit "D" to McGrath's statutory declaration) record that Mr Mulholland explained to the members of the Review Committee that there would be no Green Paper and that his mandate was to provide information to the Minister, following consultation with the Review Committee. It is not stated in the minutes of that meeting that it was then intended that Mr Mulholland's report would proceed to Cabinet for consideration.

05/11/90 A letter was sent by the former Minister to Dr M Finnane, chair of the Prisoner's Legal Service Inc. (exhibit "B" to Woodyatt's statutory declaration). That letter responded to a suggestion apparently contained in an earlier letter of 4/10/90 by Dr Finnane (not exhibited) that the review process should involve the preparation of a Green Paper. In paragraph 2 of his statutory declaration, Mr Woodyatt states the former Minister's letter advised that the recommendations of the Review Committee would be made to the former Minister (as opposed to being made directly to Cabinet). This is not said explicitly in the former Minister's letter, but there is no doubt that the Mulholland Report was intended to be furnished to the former Minister in the first instance. That is not necessarily inconsistent with the proposition that the Report was also prepared for the purpose of submission to Cabinet (see paragraph 30 below). The former Minister's letter implicitly rejected the idea that the review process should involve the preparation of a Green Paper, and clarified the aims of the review process, but I can find no clear indication in that letter which supports Mr Woodyatt's contentions.

19/11/90 The former Minister forwarded a letter to Mr Woodyatt which referred to Mr Mulholland *"preparing his final advice to me"* (exhibit "C" to Woodyatt's statutory declaration and paragraph 3 of that statutory declaration). The inference that Mr Woodyatt wishes me to

draw from paragraph 3 and exhibit "C" to his statutory declaration is that the Mulholland Report was prepared for the former Minister rather than for submission to Cabinet.

15/04/91 The final meeting of the Review Committee was conducted (paragraph 6 of Woodyatt's statutory declaration). Exhibit "F" to Mr Woodyatt's statutory declaration is the minutes of that meeting. The final paragraph of those minutes indicated that Mr Mulholland's intention was to submit a report to the former Minister in due course.

17/06/93 Mr Mulholland delivered his report to the former Minister (paragraph 5(f), McGrath's statutory declaration).

02/07/93 Mr Woodyatt wrote to the former Minister requesting a copy of the Mulholland Report, although this request was not expressed to be an application for access to the document under the FOI Act (paragraph 5(g), McGrath's statutory declaration).

20/07/93 The former Minister wrote to Mr Woodyatt declining the request for a copy of the Mulholland Report and stating:

> *It is intended that the recommendations of Mr Mulholland will form the basis for an eventual submission to Cabinet. Accordingly, it is not appropriate to disclose the substance of the recommendations while they are to be the subject of Cabinet consideration.*
>
> *The legislative processes adopted by this Government will ensure the proposed changes are subjected to a full and open debate. Your comments at that time will be appreciated.*
>
> (Paragraph 5(g) and exhibit "F", McGrath's statutory declaration)

27/07/93 The former Minister wrote to Ms Burgess, then the Co-ordinator of the Prisoner's Legal Service, who had also applied for the Mulholland Report, and who was also refused, in similar terms to those set out immediately above (paragraph 5(e) and exhibit "E", McGrath's statutory declaration).

17/08/93 Mr Woodyatt made his FOI access application for the Mulholland Report.

04/10/93 Ms McGrath made her decision to deny access to the Mulholland Report, claiming the document to be exempt under s.36 of the FOI Act.

28/10/93 Mr Woodyatt made his application for internal review. No response was received to that application.

20/11/93 Amendments to s.36 of the FOI Act took effect.

02/12/93 Mr Woodyatt applied for external review of the decision deemed to have been made on behalf of the respondent, affirming Ms McGrath's decision (see s.52(6) of the FOI Act).

**Whether the Mulholland Report falls within the terms of s.36(1) of the FOI Act in its pre-amendment form as well as its post-amendment form**

26. Mr Woodyatt submits that the Mulholland Report is not exempt under s.36(1)(a) in its pre-amendment form (which he contends to be the applicable law).

27. In my decision in *Re Fencray*, at paragraph 25, I stated that s.36(1)(a) (as originally enacted) is

confined to two kinds of matter contained in documents, namely:

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

but which, in either case, was brought into existence for the purpose of submission for consideration by Cabinet. I further described the application of s.36(1)(a) as follows:

> *26. This means that the document is not exempt merely because it has been submitted to Cabinet. Inquiries must be pursued into the "genealogy" of such a document, to establish the purpose for which it was brought into existence. The time of the creation of the document is the time at which the purpose for its creation is to be ascertained. The fact that it was subsequently decided to annex to a Cabinet submission, a document that was brought into existence for a purpose other than submission to Cabinet for Cabinet consideration, will not bring the document within s.36(1)(a). ...*
>
> *27. A practical consequence (and no doubt an intended one) of the wording of s.36(1)(a) is that it is not open to a Minister or official simply to attach to a Cabinet submission a document not designed for Cabinet consideration but believed to be sensitive, and thereby claim that it is exempt from disclosure under the FOI Act*
>
> *28. The use of the present tense in the phrase " ... or is proposed by a Minister to be submitted, to Cabinet for its consideration ... " also imposes a requirement of eligibility for exemption under s.36(1)(a), in respect of matter that has not been submitted to Cabinet, that there be a current proposal by a Minister for its submission to Cabinet. Thus matter may acquire exempt status under s.36(1)(a) but lose it upon the Minister abandoning the proposal for its submission to Cabinet. ...*

28. Applying these principles to the evidence presented in this case, I think the following conclusions must be drawn. Although at one stage it was intended that the Mulholland Report would form the basis of a Green Paper, there is objective evidence which confirms that this intention had been abandoned before the Review Committee first met (exhibits "C" and "D" to McGrath's statutory declaration). A minute prepared by the Deputy Director-General of the QCSC of a meeting with the former Minister and Mr Mulholland (exhibit "C" to McGrath's statutory declaration) establishes that the former Minister had decided as early as 2 August 1990 (well before the Review Committee first met on 18 September 1990) that Mr Mulholland's recommendations, after consultation with the Review Committee, "*would proceed to Cabinet through the Minister and appear in the form of a Bill*". The Mulholland Report appears to have had a long gestation period, finally being delivered to the former Minister on or about 17 June 1993. There is no evidence which suggests that the purpose for which the Mulholland Report was brought into existence had changed since the former Minister's meeting with Mr Mulholland on 2 August 1990. On the contrary, within six weeks of receiving the Mulholland Report, the former Minister had written to Mr Woodyatt, and to Ms Burgess of the Prisoners' Legal Service (both of whom had requested copies of the Mulholland Report), stating that he intended that Mr Mulholland's recommendations be submitted to Cabinet (Exhibits "E" and "F" to McGrath's statutory declaration). Ms McGrath states in paragraph 5(h) and paragraph 8 of her statutory declaration that it was the former Minister's intention at that time, and until he ceased to be the Minister for Corrective Services (on 18 October 1993) that the Mulholland Report would be an annexure to, and form part of, a Cabinet submission. The statutory declaration of Ms Stubbs establishes that it is the intention of the respondent that the Mulholland Report be submitted to Cabinet for its consideration.

29. On the basis of these facts, I consider that the Mulholland Report falls within the terms of s.36(1)(a) in its pre-amendment form. It 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.

30. Mr Woodyatt raised two main arguments as to why the Mulholland Report did not fall within the terms of s.36(1)(a) in its pre-amendment form. Firstly, he submitted that the Report was not brought into existence for the purpose of Cabinet consideration:

> *... I submit that the* [Review] *Committee process was preparation for the Report and should be included as part of the period during which the document was brought into existence.*
>
> *Accordingly, the document was not 'brought into existence" for Cabinet but for the Minister's use as a Green Paper. Use as a Cabinet submission was not the main, or one of the main, reasons for its creation. It became the main reason at a later time.*
>
> *...*
>
> *... I was informed that* [the Mulholland Report] *was intended as a Green Paper and subsequently for the Minister - to identify weaknesses in the law, to form the basis of amending legislation, and to inform the Minister. These were the primary reasons for the establishment of the review process (which encapsulated committee meetings and a report with recommendations) and it is insufficient to subsequently brand it as a Cabinet document to invoke s.36, despite the fact that the Minister changed his mind quite early in the process.*

I find this submission untenable, however, in light of the facts which I have found in paragraph 28 above. As for the proposition that the purpose of the Mulholland Report was for submission to the Minister for consideration, as opposed to submission to Cabinet for consideration, I consider that the fact that a document passes through a Minister's hands before going to Cabinet does not forestall a finding that the document was brought into existence for the purpose of submission for consideration by Cabinet. The system of government, derived from the Westminster system, which prevails in Queensland, contemplates that proposals will be sponsored by individual Ministers in the course of progress through Cabinet.

31. Secondly, Mr Woodyatt submitted that if the Mulholland Report is submitted to Cabinet at all, it will be attached to a detailed Cabinet submission, not for Cabinet's consideration, but for its information, as background material. Mr Woodyatt submits that the distinction between material for the information of Cabinet, and for Cabinet's consideration, is important in this case, especially in view of the fact that a new review of the Corrective Services legislation has commenced, co-ordinated by the Office of Cabinet, with community groups again being asked to comment in relation to a number of proposals for reform:

> *The new review of the Act will, in my submission, lead to new recommendations from the QCSC and the Office of Cabinet, and therefore must make the Mulholland Report to some extent, if not completely, superfluous. If it is attached at all to the Cabinet submission, it will be in my view, of background use only.*
>
> *...*
>
> *... the Mulholland Report could only provide background information for the main recommendations, and it is unlikely that Cabinet will give consideration to another*

*set of recommendations that have been superceded or to some extent differ from those of the Cabinet Office.*

*If wide definition is given to "Cabinet consideration", then any document at any time can be exempted from access under the Freedom of Information Act because any document could be attached as background information to a Cabinet submission. That is why it is important to look at the document, the context in which it was created, and the context in which it will be submitted to Cabinet. The Minister has provided no information about the Cabinet Office process now under way.*

32. On the facts before me, however, I cannot accept Mr Woodyatt's submission that the Mulholland Report will be submitted for the information of Cabinet rather than for consideration by Cabinet. Since the Mulholland Report has not yet been submitted to Cabinet, it is entirely too speculative to conclude that it will not be submitted for Cabinet's consideration. There is evidence before me that the respondent currently proposes that the Mulholland Report will be submitted to Cabinet for its consideration (paragraph 5 of Stubbs' statutory declaration), which satisfies the relevant part of the test for exemption under s.36(1)(a) in its pre-amendment form.

33. If s.36 in its current (i.e. post-amendment) form is the applicable law, then my findings at paragraph 28 also compel the conclusion that the Mulholland Report is exempt under both s.36(1)(b) and s.36(1)(c) of the FOI Act. The Mulholland Report was prepared for submission to Cabinet for its consideration, and it is proposed by the respondent (as it was proposed by the former Minister) that it be submitted to Cabinet for its consideration (amended s.36(1)(b)). The Mulholland Report was also prepared for briefing a Minister about an issue proposed to be considered by Cabinet (amended s.36(1)(c)). As noted above, Mr Woodyatt concedes that the Mulholland Report would be exempt under s.36(1)(c) of the FOI Act in its present form.

**Whether s.36 in its pre-amendment form or its post-amendment form is the applicable law for the purposes of Mr Woodyatt's application for review**

34. If s.36 in its pre-amendment form is the applicable law, then, as already explained at paragraphs 23-24 above, there are a number of paragraphs of the Mulholland Report that would not be exempt by virtue of s.36(2), since they comprise merely factual matter which is not caught by the proviso in s.36(2)(a) and (b). This makes it necessary to resolve the issue of whether the applicable law, for the purposes of Mr Woodyatt's application for review, is s.36 in its pre-amendment form or its post-amendment form. I propose to deal with that issue by considering in turn the three arguments raised by the respondent as to why, as a matter of law, I am bound to apply s.36 in its post-amendment form.

35. As to the law to be applied by a tribunal which, like the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) or the Queensland Information Commissioner, is empowered to conduct a full review of the merits of an administrative decision under challenge (see, respectively, s.43(1) of the *Administrative Appeals Tribunal Act 1975 Cth* and s.88(1) of the FOI Act), the respondent has referred me to the passage (well known to practitioners in this field) from *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, at pp.943-4, which has been approved in many subsequent cases (see, for example, *Commonwealth of Australia v Esber* (1991) 101 ALR 35, an appeal from the Commonwealth AAT to a Full Court of the Federal Court of Australia, per Davies J at p.37). From that passage a number of propositions can be distilled. A tribunal, empowered to conduct a full review of the merits of an administrative decision under challenge, ordinarily has regard to the relevant facts and circumstances as they stand at the date of its decision, and ordinarily applies the law in force at the date of its decision. Where the relevant law at all material times is the same, no problem arises as to the law to be applied. But where the law has been changed between the date of the administrative decision under review and the decision

of the tribunal, the question of the law to be applied by the tribunal must be resolved by having regard to the nature of the decision under review and whether the applicant has any accrued rights or liabilities, and the provisions of the legislation by which the change in the law is effected. (The principle that a subsequent change in the law will not be interpreted as operating so as to affect accrued rights or liabilities, unless the change in the law is expressed to, or necessarily intended to, apply retrospectively, is a common law principle of construction of statutes which has been confirmed in Australian jurisdictions by statutory provisions which correspond to s.20 of the *Acts Interpretation Act 1954* Qld.) Where the nature of the decision under review does not involve a consideration of accrued rights or liabilities, but rather involves an investigation of whether the applicant has a present entitlement to some right, privilege or benefit, the tribunal is to apply the law in force at the time of its decision, unless the amending law otherwise provides.

36. Thus, in appeals to the Commonwealth AAT from decisions under the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act), the Commonwealth AAT ordinarily applies the law in force at the date of its decision, provided there is no contrary indication in the amending law, and there is no destruction of an accrued right: see *Re Caruth and Department of Health, Housing, Local Government and Community Services* (Commonwealth AAT, No. W90/215, 18 June 1993, unreported) at p.5.

**Does Mr Woodyatt have an "accrued right" for the purposes of s.20 of the *Acts Interpretation Act 1954* Qld?**

37. Section 20 of the AI Act, so far as relevant to the issues raised in this external review, provides as follows:

> ***20. (1)*** *The repeal, amendment or expiry of an Act or a provision of an Act does not -*
>
> *...*
>
> *(b) affect the previous operation of the Act or provision or anything suffered, done or begun under the Act or provision; or*
>
> *(c) affect a right, privilege or liability acquired, accrued or incurred under the Act or provision; or*
>
> *...*
>
> *(e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) ... .*
>
> *...*
>
> ***(2)*** *The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the Act or provision had not been repealed or amended or had not expired.*
>
> *...*
>
> ***(4)*** *This section is in addition to, and does not limit, any provision of the law by which the repeal, amendment or expiry is effected.*

38. Section 4 of the AI Act provides as follows:

> ***4.*** *The application of this Act may be displaced, wholly or partly, by a contrary intention appearing in any Act.*

39. In dealing with the Commonwealth provision which corresponds to s.20 of the AI Act (s.8 of the *Acts Interpretation Act 1901* Cth) the High Court of Australia has said in *Esber v Commonwealth* (1992) 174 CLR 430, at p.439:

> *The first step in a consideration of s.8* [of the Acts Interpretation Act 1901 Cth] *is to identify the "right" which the applicant says was acquired or accrued under the repealed Act.*

40. The respondent submits that, as at the date the relevant amendments to s.36 of the FOI Act came into force, no right of the type contemplated by s.20(1)(c) of the AI Act had accrued to the applicant. The essence of the respondent's lengthy submissions in this regard is captured in the following passage (from which case citations have been omitted):

> *A person has a "legally enforceable right" to be given access to particular documents under the FOI Act (see s.21 of the FOI Act). However, that right is subject to the FOI Act itself.*
>
> *Therefore, it is submitted that the FOI Act gives to a person a right to access to documents subject to the statutory regime which is the FOI Act. To maintain a right to access to documents, the applicant must comply with that regime and not have access rights denied by the FOI Act itself.*
>
> ...
>
> *It is submitted that the applicant does not by simply lodging an application for access to documents pursuant to s.25 of the FOI Act or by receiving an adverse decision thereon acquire at those times a "right" to have the application proceed to its finality undisturbed by any amendments that the Parliament chooses to make.*
>
> *It is submitted that the "right" that the applicant acquires on lodging an application for access under the FOI Act is simply a right to have the application dealt with by the relevant decision maker. The step that crystallises the right is the lodging of the application.*
>
> *It is submitted that the critical factor in this case is the date the applicant sought external review before the* [Information] *Commissioner. That date was 2 December 1993 and was therefore after the relevant amendment came into force (i.e. 20 November 1993).*
>
> *A right may be accrued only if it is a specific right which is vested in an individual by reason of the happening of some event or events specified by the amended Act or by virtue of some act done by the individual before the amendment.*
>
> *As at 20 November 1993, the applicant had not, it is submitted, taken the vital step that would have crystallised his right for the purpose of s.20 of the AI Act.*
>
> ...

> *... The applicant's position as at 20 November 1993 was, it is submitted, more akin to a person who has, prior to the change in law, done nothing specific in order to vest in himself an accrued right. To perfect his right he needed to lodge his application for external review.*

41. The respondent's contention that the right which an applicant acquires on lodging an FOI access application is simply a right to have the application dealt with by the relevant decision-maker is based, in my opinion, on far too narrow a conception of the right conferred by s.21 of the FOI Act. I note in this regard what was said by the High Court of Australia in *Carr v Finance Corporation of Australia Ltd* (1982) 150 CLR 139 at p.151 (per Mason, Murphy and Wilson JJ):

> *The common law presumption against imputing to the legislature an intention to interfere retrospectively with rights which have already accrued does not call for a narrow conception of a right. If it were otherwise, the essential justice of the rule would be eroded.*

42. Section 21 of the FOI Act provides as follows:

> ***Right of Access***
>
> ***21.*** *Subject to this Act, a person has a legally enforceable right to be given access in accordance with this Act to -*
>
> *(a) documents of an agency; and*
>
> *(b) official documents of a Minister.*

43. To assist an understanding of the observations which follow, I should also set out, at this point, relevant parts of s.25 and s.27. Section 25 of the FOI Act sets out the means by which persons wishing to obtain access to documents under the FOI Act avail themselves of that right, and s.27 imposes a duty on agencies and Ministers to consider applications received, and decide whether access is to be given to requested documents:

> ***25.(1)*** *A person who wishes to obtain access to a document of an agency or an official document of a Minister under this Act is entitled to apply to the agency or Minister for access to the document.*
>
> ***(2)*** *The application must -*
>
> *(a) be in writing; and*
>
> *(b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency or the Minister to identify the document.*
>
> *...*
>
> ***27.*** *...*
>
> ***(2)*** *After considering the application, the agency or Minister must decide -*
> *(a) whether access is to be given to the document; and*
>
> *(b) if access is to be given - any charge that must be paid before access is*

*granted; and*

*(c) any charge payable for dealing with the application.*

44. The general scheme of the Victorian FOI Act is similar to that of the Queensland FOI Act (although there are significant differences in detail). Section 13 and s.17 of the Victorian FOI Act correspond to s.21 and s.25 of the Queensland FOI Act, respectively, although the wording of the provisions is not identical. The nature of the right conferred by s.13 of the Victorian FOI Act was analysed by a Full Court of the Supreme Court of Victoria in *Wallace v Health Commission of Victoria* [1985] VR 403, at p.406:

> *In our opinion, s.13 of the* Freedom of Information Act 1982 *confers upon every person within the jurisdictional power of the Victorian legislature an enforceable legal right which may be described as a right to obtain access to documents of an agency as defined. But that right is expressly made " subject to this Act" and, more importantly, the right is a right "to obtain access* in accordance with this Act". *In accordance with the Act itself the right arises in respect of any particular documents, and therefore comes into existence as an enforceable right only if a request is made which satisfies the requirements of the Act. Section 17 requires, as one would expect, that a person who wishes to obtain access to an agency document must make a written request to the agency or the Minister as the case requires, and the request shall provide such information as is reasonably necessary to enable identification of the documents sought. The giving* by the applicant *of a s.17 request is a prerequisite to enforceability of any right to access and indeed a prerequisite to the rights given by the Act. Section 13, as stated, does not give a legally enforceable right to access, but on the contrary a legally enforceable right* to obtain access by the means laid down in the Act, *and it does not give any other relevant enforceable right at all.*

45. In *Re Birrell and Victorian Economic Development Corporation* (1989) 3 VAR 358, Jones J (President) of the Victorian Administrative Appeals Tribunal (the Victorian AAT) after quoting the passage from *Wallace v Health Commission of Victoria* which is set out above, made the following observations (at pp.378-9):

> *In my view, the following conclusions apply to the FOI Act. The right* [conferred by s.13 of the Victorian FOI Act] *arises in respect of particular documents. It comes into existence as an enforceable right when, and only when, a request is made in accordance with s.17. The right is to access to a document of an agency for which a request is made. ... The right that arises is a right to obtain access in accordance with the FOI Act, that is by the means laid down in the Act. There is a correlative duty on an agency to grant access pursuant to s.20. However, where a request for access relates to exempt documents or documents otherwise excluded from access under the Act, there is no enforceable right of access. Consequently, there is no correlative duty in these circumstances to grant access pursuant to s.20 and by way of necessary implication there is a power to refuse access in such circumstances. If access is refused the FOI Act gives an applicant a right of internal review and a right of review by the tribunal, which stands in the shoes of the agency and makes what is considers to be the correct or preferable decision.*
>
> *...*
>
> *It would appear to me that the scheme of the FOI Act is quite clear. The starting point is information that is in the possession of the government. The object is to*

> *provide ready access to that information subject to certain exceptions and exemptions. Any person can request access to that information and upon making that request is entitled to access in accordance with the provisions of the Act. ... If certain exemptions or exceptions apply to the document requested, there will be no right to access. However, there is a right to have a decision refusing access reviewed on its merits. But the right to access can only be defeated in accordance with the provisions of the FOI Act.*
>
> ...
>
> *... Parliament intended, in my view, that once access to a document in the possession of an agency is requested, access can only be defeated by limited specified circumstances.*

46. Similarly, the language of s.21 of the Queensland FOI Act leaves no room for doubt that the Queensland Parliament intended to confer a right, on any person within its jurisdictional power, to be given access (by the means prescribed in the FOI Act, and subject only to any exceptions to be found in the FOI Act itself) to documents of an agency or official documents of a Minister. There is no justification for refusing to recognise as a right that which the legislature has expressly described as such. As Gibbs J explained in *Mathieson v Burton* (1971) 124 CLR 1 (at p.23), to say that a right is of a qualified, limited or transitory nature is to define or explain the nature of the right, but is not to deny its existence. Gibbs J went on to explain that a provision comparable to s.20(1)(c) of the AI Act does not preserve a mere power to take advantage of an enactment, and does not apply where there is merely a hope or expectation that a right will be created, but it does protect anything that may truly be described as a right, although that right might fairly be called inchoate or contingent.

47. For the purposes of applying a provision like s.20 of the AI Act, a mere right existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself or herself of that right, cannot properly be deemed a right accrued: see *Abbott v Minister for Lands* [1895] AC 425. However, when the scheme of the FOI Act, and the nature of the rights it confers, are properly understood, it becomes apparent that the only necessary step which must be taken for persons to avail themselves of the right conferred by s.21 of the FOI Act, so that it becomes an accrued right (i.e. a right capable of being enforced) for the purposes of s.20 of the AI Act, is the lodgment of an FOI access application which complies with the requirements of the FOI Act itself.

48. In my view, the correct analysis (which is supported by the Victorian authorities quoted in paragraphs 44 and 45 above) is that when a person lodges an application for access to documents of an agency or official documents of a Minister, which application complies with the requirements of the FOI Act, the person has a legally enforceable right to be given access under the FOI Act to the requested documents, other than any of the requested documents to which the relevant agency or Minister is entitled to refuse (or defer) access in accordance with exceptions to be found in the FOI Act itself. The most significant exception is s.28(1) of the FOI Act which confers on agencies or Ministers a discretion to refuse access to exempt matter or exempt documents. An agency or Minister has no discretion to refuse access to matter which is not exempt matter, unless it is caught by some other exception in the FOI Act itself (e.g. s.11 or a regulation made under s.11(1)(q), s.22, s.23, s.28(2), s.31). If no provision of the FOI Act permits an agency or Minister to refuse or defer access to a requested document (or part thereof), then the applicant has a legally enforceable right to be given access under the FOI Act to the requested document (or part thereof).

49. Where a requested document contains both exempt matter and non-exempt matter, the giving of access to the non-exempt matter may depend on whether it is practicable to give, and whether the applicant wishes to have, access to a copy of the requested document from which exempt matter has

been deleted: see s.32 of the FOI Act. This depends on whether it is physically practicable to give access in such circumstances (which is a question of fact) and on the applicant's wishes. The terms of s.32 do not confer any discretion on an agency or Minister in this regard, e.g. as to whether the document, with deletions, would be intelligible. I note that no difficulty arises in the present case with respect to giving Mr Woodyatt access to the parts of the Mulholland Report which contain merely factual matter.

50. The respondent's submission referred me to a number of cases which deal with the questions of whether a repealed or amended statute had conferred a right and/or whether a litigant had taken a sufficient step towards invoking the right, such that the litigant could be said to have an accrued right prior to the relevant repeal or amendment. None of the cases is precisely analogous to the present case, but the case which comes closest to the present case is that decided by the New South Wales Court of Appeal in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act* (1988) 14 NSWLR 685 (the *Aboriginal Land Council* case). After carefully reviewing the relevant authorities, Hope JA (with whom Samuels JA and Clarke JA agreed) said (at p.696):

> *These decisions satisfy me that a statutory right will be preserved, notwithstanding the repeal or amendment of the statute even though the right can only be implemented by a non-discretionary decision of an official or a court provided that the statutory machinery for obtaining that decision has been set in train before the repeal or amendment.*

51. Upon receipt of an FOI access application, which complies with the requirements of the FOI Act, an agency or Minister is required to undertake an investigation (including searches and inquiries to locate requested documents, examination of requested documents, s.51 consultations and the like) for the purpose of making, within the time fixed by s.27 of the FOI Act:

    (a) a non-discretionary decision giving the applicant access under the FOI Act to any document, or (subject to s.32) part of a document, covered by the terms of the FOI access application which does not comprise exempt matter, or matter to which access may be refused under s.11, s.22, s.23 or s.28(2), or matter to which access may be deferred under s.31; and

    (b) a decision in exercise of the discretions conferred by s.28(1) (where the FOI access application seeks access to exempt matter or an exempt document), or by s.22, s.28(2) or s.31, if applicable to the documents requested in the FOI access application.

52. The determination of whether a requested document is or is not exempt may involve difficult questions of judgment, but this does not alter the essential nature of the non-discretionary decision identified in (a) above: see the *Aboriginal Land Council* case at p.691-2. In dealing with Mr Woodyatt's FOI access application, the respondent had no discretion under the terms of the FOI Act to refuse Mr Woodyatt access to any matter in the requested document (the Mulholland Report) which was not exempt matter (there being no other relevant provision in the FOI Act which might have entitled the respondent to refuse or defer access). In my opinion, the lodging of an FOI access application (which satisfied the requirements of the FOI Act) was sufficient to set in train the statutory machinery for obtaining the decision which the FOI Act required. My opinion in this regard is fortified by the comments of Hope JA in relation to the action taken to preserve the rights of the New South Wales Aboriginal Land Council *vis-à-vis* the effect of the amending legislation in the case before him. At p.697, Hope JA expressed the view that the lodging of the claim by the Land Council with the Minister was sufficient to preserve its rights against intrusion from the amending legislation, even though the lodging of an appeal with the Land and Environment Court made that preservation more certain.

53. It follows that I reject the respondent's argument that Mr Woodyatt cannot rely on s.20 of the AI Act because it was a necessary step, to have the benefit of that provision, that he lodge an application for review under Part 5 of the FOI Act before the relevant amendments to s.36 of the FOI Act came into force.

54. Having lodged an FOI access application which complied with the requirements of the FOI Act, Mr Woodyatt had an accrued right to be given access under the FOI Act to any matter contained in the Mulholland Report which was not exempt matter (no other exception to his right of access being applicable). Mr Woodyatt is entitled to the benefit of s.20 of the AI Act in respect of that accrued right (provided the application of s.20 of the AI Act is not displaced by a contrary intention appearing in any relevant Act: see s.4 of the AI Act). If an incorrect decision was made by the respondent such that Mr Woodyatt was wrongly refused access to matter which at that time he had a right to be given access, it would be fundamentally unjust if, after taking action to enforce his right, he was subsequently denied access solely by reason of a subsequent change in the law which had the effect of making exempt from disclosure that which previously was not exempt from disclosure, and to which he should previously have been given access. It was to prevent injustice of this kind that the common law developed the principle that a statute should not be construed as operating retrospectively so as to override accrued rights (unless it was clearly intended to do so) and that legislatures enacted provisions comparable to s.20 of the AI Act.

55. I should also draw attention to s.20(2) of the AI Act, which was not dealt with in the respondent's submission, but which relevantly provides that an "*investigation, proceeding or remedy may be started ... and the* [accrued] *right ... may be enforced ... as if the Act or provision had not been repealed or amended* ... ". In other words, s.20 of the AI Act itself contemplates that a proceeding may be commenced to enforce a right accrued under an amended or repealed Act or provision, after the date of the relevant repeal or amendment. This is confirmed by *Madsen v Western Interstate Pty Limited, Ex parte Western Interstate Pty Limited* [1966] Qd R 163, where a Full Court of the Supreme Court of Queensland expressed the view that s.20 of the AI Act would justify the conviction of the appellant for an offence committed under a statutory provision which had been repealed before proceedings against the appellant, in respect of the offence, had been commenced (per Hanger J at p.165; per Lucas J at p.169). In my opinion, a review by the Information Commissioner under Part 5 of the FOI Act is either an "investigation" (see the opening words of s.71(1) of the FOI Act), "proceeding" or "remedy", which is instigated by an applicant to enforce the rights conferred by the FOI Act, and which falls within the terms of s.20(1)(e) and s.20(2) of the AI Act.

56. Before leaving this issue, I wish to record some further observations for the benefit of FOI administrators. The FOI Act provides for time limits by which an agency or Minister must give a decision in response to a valid FOI access application. Time is generally needed to locate and examine documents, consult with third parties under s.51 of the FOI Act, prepare reasons for decision, et cetera. An agency may give a decision on any day from the date of receipt of the valid FOI access application up to the last day of the time limit fixed by s.27(4) and s.27(7) of the FOI Act, but if no decision is made and notified to the applicant within the time limit fixed by s.27, then for the purpose of permitting an applicant to take proceedings to enforce the right of access, the relevant agency or Minister is deemed to have refused access: see s.27(4) and s.79 of the FOI Act. Thus, while, in my opinion, an applicant's right to be given access to non-exempt matter (not otherwise subject to an exception provided for in the FOI Act) accrues on the date that an agency or Minister becomes possessed of an FOI access application which complies with the requirements of the FOI Act (I note here that a non-complying FOI access application may be put into valid form following consultation between the applicant and the agency: see s.25(4) of the FOI Act), the question of whether or not the requested documents contain exempt matter generally falls to be determined by an agency or Minister at a later date.

57. That may raise an issue as to whether the law by which it is determined that a document is or is not

exempt is that which is in force at the time of lodgment of a valid FOI access application, or at the time a decision is given. The issue does not arise in the present case because Mr Woodyatt's valid FOI access application was lodged, and a decision given in respect of it, prior to the amendment of s.36. However, where a change in the relevant statute law occurs between the date of receipt of a valid FOI access application and the date of a decision in response to it, I think the correct position is reasonably clear.

58. In my opinion, the principles set out at paragraph 35 above in respect of tribunals empowered to conduct a full review of the merits of an administrative decision (to, in effect, "stand in the shoes of the decision-maker") must logically also apply to the initial decision-maker; i.e. he or she must ordinarily have regard to the relevant facts and circumstances as they stand at the date a decision is given, and ordinarily apply the law in force at the date a decision is given. However, if a change in relevant statute law between the date of lodgment of a valid FOI access application and the date of a decision would affect the applicant's accrued right to be given access to non-exempt matter (not otherwise subject to an exception provided for in the FOI Act) falling within the terms of the FOI access application, then the decision-maker must have regard to s.20 of the AI Act. If the application of s.20 is not displaced by a contrary intention in a relevant Act, the decision-maker must give a decision in response to the FOI access application on the basis that the applicant's accrued right is not to be affected by the change in the law. An applicant will ordinarily be entitled to any benefit from a change in the law (unless the statute effecting the amendment makes provision to the contrary), but by virtue of s.20 of the AI Act (unless its application is displaced) an applicant's accrued right is not to be prejudiced by a subsequent change in relevant statute law. The material facts and circumstances would still have to be assessed as at the time of making a decision, but in light of the law in force before the change in the law took effect. A significant change in material facts or circumstances may still mean that a requested document which was not exempt at the time of lodgment of an FOI access application, has become exempt by the time of making a decision in response to the application (and vice versa), but that is simply a risk which an applicant must bear given the nature of many of the exemption provisions. Section 20 of the AI Act only operates in respect of changes in the statutory law; it does not operate to preserve a state of facts, a material alteration in which might affect an applicant's right of access.

**The respondent's submission that the application of s.20(1)(c) of the *Acts Interpretation Act 1954* Qld is displaced by a contrary intention appearing in the scheme of the FOI Act itself**

59. In contending that the scheme of the FOI Act has the effect of displacing s.20(1)(c) of the AI Act, the respondent relies on the reasoning of the Victorian AAT in *Re Thwaites and Department of Justice* (1993) 6 VAR 63, the material facts of which are similar to those of Mr Woodyatt's case (though there are material differences between the relevant FOI statutes in each case). Mr Thwaites had applied under the Victorian FOI Act for access to documents "relating to the position of judges of the Accident Compensation Tribunal, including documents relating to their termination of office". A decision refusing access to certain documents was made in January 1993. Mr Thwaites applied for review by the Victorian AAT in February 1993. Amendments to the Cabinet exemption provision in the Victorian FOI Act (see paragraph 11 above) came into force in June 1993. In August 1993, the respondent informed the Tribunal of the discovery of additional documents within the terms of Mr Thwaites' FOI access application, and stated that exemption was claimed for two of those documents under the amended Cabinet exemption provision. The Tribunal was asked to rule on the preliminary question of whether the amended Cabinet exemption provision was the applicable law for the purposes of the application for review by the Tribunal. The Tribunal decided that the amended Cabinet exemption provision applied to the documents in issue, and gave two distinct bases to support its findings. The second of these is, in my opinion, mistaken (see paragraphs 76-84 below). The first of them may arguably be correct, but if so, only by virtue of a provision in the Victorian FOI Act which has no precise counterpart in the Queensland FOI Act. Certainly, part of the reasoning by which the Tribunal supported the first basis for its findings is, in

my opinion, mistaken.

60. In support of the contention now under consideration, the respondent in the case before me relies on the first basis given in support of the Tribunal's findings in *Re Thwaites*, and in particular the following passage (at pp.65-67):

> *Both Mr Finkelstein* [counsel for the respondent] *and Ms Cohen* [counsel for the applicant] *drew the Tribunal's attention to the long established general rule of construction at common law that a statute changing the law ought not to be taken to have retrospective operation so as to affect rights or obligations which exist "unless the intention appears with reasonable certainty" - per Dixon J in* Maxwell v Murphy *(1957) 96 CLR 261 at 267.*
>
> *The Tribunal agrees with Mr Finkelstein's submission that this rule of construction is not relevant in the circumstances of this application as the provisions of the* Freedom of Information Act *itself preclude its operation.*
>
> *Section 13 of the Act provides that: "Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to ...".* [The Tribunal then quoted the passage from *Wallace v Health Commission of Victoria* set out at paragraph 44 of my reasons for decision] ... .
>
> *Section 17(1) of the Act requires a person who wishes to obtain access to a document to make a request in writing and s.20(1) entitles the person to be given access "subject to this Act". Section 20(c) provides that "an agency or Minister is* not *required by this Act to give access to a document* at a time *when the document is an exempt document."* (*My emphasis.*)
>
> *Mr Finkelstein contended that the reason for the inclusion of the words "at a time" in the subsection is that the Act contemplates that the character of the document as to whether or not it is exempt is not fixed as at any point of time and may change. A document may at some time be exempt and then subsequently lose that exemption and conversely.*
>
> *In support of this contention he drew the Tribunal's attention to s.28(2) of the Act which provides that a document which may have been an exempt "Cabinet document" under subs.(1) of the section ceases to be an exempt document when a period of ten years has elapsed. Section 29 and 30 exempt documents where disclosure would be "contrary to the public interest". He said that facts would dictate whether or not a disclosure would be contrary to the public interest and these facts may alter from time to time and may change so that at some time disclosure might be contrary to the public interest and at another time it might not. Similarly circumstances may change from time to time so that the exemption to documents under s.31 (law enforcement documents) may likewise cease to be exempt, for example, following the completion of the trial of a person. He submitted that it is critical to look at whether or not an exemption applies* at the time *it is proposed to hand over or give access to a particular document.*
>
> *He finally drew the Tribunal's attention to the provisions of s.38 which provides that a document is an exempt document "if there is in force an enactment applying specifically to information of a kind contained in a document ...". He said that an enactment may be passed after the receipt of a request but before the hand-over and s.20(2) requires an assessment to be made* at the time *access is given to the*

*document.*

*Mr Finkelstein referred the Tribunal to the decision of the High Court in* Western Pastoral Company v Eyeington *(1971) 125 CLR 342 where the Court was considering the application of an amendment to s.53 of the* Worker's Compensation Act *1926 (NSW). Chief Justice Barwick said (at 347):*

> There is in my opinion in this case no occasion to discuss the distinction between the retrospective operation of a procedural statute and that of a statute creating or allowing substantive rights.
>
> The question in the case resolves itself in my opinion by direct construction of the language of s.53(1) in the context of the Act as a whole. Properly construed, it has no retrospective operation. It operates at the time the Commission is called upon to adjudicate in proceedings to recover compensation. It speaks as of that time being a time subsequent to the making of the amendment.

*The Tribunal agrees with Mr Finkelstein that because of the wording of s.20(2) a decision as to whether to give access to a particular document should be made at the time the document is to be handed over and if, as in* Eyington's *case, the law was changed at the time that assessment is to be made then the legislation "speaks as at that time being a time subsequent to the making of the amendment."*

...

*To determine whether or not an agency or minister is required to give access to the document assessment must be made whether or not the document is exempt and that assessment must be made* at the time *that access is to be given or handed over* not *at a time when the request for access is made. In the decision of the Full Court in* Wallace v Health Commission of Victoria *(at 408) the court said that a pre-requisite to enforcement of the legal right to access was the making of an application. However in my view the decision of the High Court in* Esber v Commonwealth of Australia *(1992) 174 CLR 430 when considering the effect of the operation of s.8 of the* Acts Interpretation Act *1901 (Cth) confirms that the accrued right of the applicant is to have the application for access to the documents reviewed by this Tribunal in accordance with the law applicable at the time access is to be given. The court said (at 440):*

> Once the appellant lodged an application to the Tribunal to review the delegate's decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely 'a power to take advantage of an enactment'. Nor was it a mere matter of procedure; it was a substantive right. Section 8 of the *Acts Interpretation Act* protects anything that may be truly be described as a right 'although that right might fairly be called inchoate or contingent'. This was such a right.

*I therefore accept that the applicant in this instance had an accrued right at the time the amending legislation to the* Freedom of Information Act *came into operation on 8 June 1993 to have this Tribunal review the decision refusing access. That decision as to whether or not access is to be given to the documents is to be made by this Tribunal some time during September 1993 or later and in accordance with the view*

*I have expressed as to the meaning and construction of s.20(2) of the* Freedom of Information Act *the law applicable as at that time must be applied.*

61. It should first be noted that the propositions advanced in the fifth, sixth and seventh of the paragraphs quoted in the above extract from *Re Thwaites* contemplate no amendment to existing exemption provisions, but rather the prospect of changes over time in the material facts by which the application of (unamended) exemption provisions is to be assessed. The amendment of an exemption provision is materially different because the effect of a provision comparable to s.20 of the AI Act (the Victorian equivalent is s.14 of the *Interpretation of Legislation Act 1984* Vic) must be taken into account. With respect, the Tribunal does not appear to me to have paid sufficient regard to the nature of the right acquired or accrued on the lodgment of Mr Thwaites' FOI access application. Consistently with the view I have stated at paragraphs 47-52 above, it appears to me that by January 1993, Mr Thwaites had an accrued right to obtain access to any document covered by the terms of his FOI access application which was not an exempt document at that time. In the absence of a contrary intention in the relevant legislation, s.14 of the *Interpretation of Legislation Act 1984* Vic enabled him to enforce that right as if the Cabinet exemption provision of the Victorian FOI Act had not been subsequently amended.

62. In the last two paragraphs quoted in the extract from *Re Thwaites* set out above, the Tribunal says that *Esber's* case confirms that the only relevant accrued right which Mr Thwaites had at the time of the relevant amendments to the Victorian FOI Act was a right to have the Victorian AAT review the decision refusing access under the law in force at the time the Tribunal gives its decision. I am unable to see how support for the Tribunal's view, in this regard, is to be found in *Esber's* case. The Tribunal appears to have distinguished what, in my opinion, is a correct statement of the law in the decision of the Full Court of the Supreme Court of Victoria in *Wallace v Health Commission of Victoria* (i.e. the prerequisite to the enforcement of the legal right to access is the making of an application for access in accordance with the FOI Act), on the basis of a misunderstanding of the result in *Esber's* case.

63. In *Esber*, the appellant had a right to apply under a statutory provision for a lump sum redemption of his entitlement to continuing weekly payments for workers' compensation. The relevant statutory provision conferred a discretion on an official to make a decision whether or not to redeem (by the payment of a lump sum) Mr Esber's entitlement to continuing weekly payments, by reference to specified statutory criteria. Mr Esber applied for redemption in February 1987. The relevant official refused Mr Esber's application in October 1987. Mr Esber applied to the Commonwealth AAT in September 1988 for review of that decision. With effect from December 1988, the relevant statutory provision was repealed, and under new legislation Mr Esber would not have been eligible to apply for a lump sum redemption. By a 4-1 majority, the High Court found that, by virtue of s.8 of the *Acts Interpretation Act 1901* Cth, Mr Esber had a right to have the Commonwealth AAT determine his application for review in accordance with the law that had since been repealed, rather than in accordance with the law in force at the time the Commonwealth AAT was to make its decision.

64. The fact that, on analysing the nature of the right which Mr Esber claimed was acquired or accrued (under repealed Commonwealth workers' compensation legislation), the High Court found that he had an accrued right to have his application to the Commonwealth AAT determined (with the repealed statute as the applicable law), does not appear to me to support the proposition stated in *Re Thwaites* immediately before the passage quoted from *Esber's* case (see the second last paragraph of the extract at paragraph 60 above). Nor is it possible to draw a general proposition from *Esber's* case that a right to have a tribunal deal with an application for review lodged before a statute was repealed or amended, is the only relevant right which a person might accrue or acquire upon receiving an adverse decision, where a right of appeal to a tribunal is available. The first step must be to correctly identify the nature of any rights acquired or accrued under the particular statutory

framework which is relevant to the particular circumstances of the applicant. In finding that the only accrued right which Mr Thwaites had, at the time of the relevant amendments to the Victorian FOI Act, was a right to have the Tribunal review the decision refusing access, I consider that the Tribunal failed to correctly analyse and identify the nature of the accrued rights available to Mr Thwaites at that time.

65. The majority Judges in the High Court also briefly considered (at pp.439-40) whether s.8 of the *Acts Interpretation Act 1901* Cth preserved a right to redemption of weekly payments under the repealed legislation, in accordance with Mr Esber's application for redemption. This depended on an analysis of the scope of the statutory discretion conferred on the relevant official. The High Court said that it was not profitable to explore this aspect, since Mr Esber had a right to have his application to the Commonwealth AAT determined in accordance with the repealed provision (at p.440). There is a suggestion in the observations of the majority (at p.439) that while it may not be possible to say that Mr Esber had a right to redemption (given the nature of the statutory discretion) Mr Esber had a right to have his application for redemption determined (i.e. to have the relevant official exercise the statutory discretion) according to law, and that s.8 of the *Acts Interpretation Act 1901* Cth preserved that right, with the repealed provision as the applicable law. It was unnecessary for the majority judges to explore this aspect further.

66. There is nothing in *Esber's* case which is inconsistent with my analysis of the right to access conferred by the Qld FOI Act (see paragraphs 47-58 above) and indeed the right of access (to requested matter not falling within one of the exception or exemption provisions) conferred by the Queensland FOI Act, not being dependent on the exercise of discretion, is a considerably stronger right than the alternative right which the High Court considered briefly in *Esber's* case, but did not pursue (i.e. a right to have the application for redemption, the award of which was dependent on the exercise of discretion, determined according to law).

67. The Tribunal in *Re Thwaites* may nevertheless have reached a correct conclusion if it is right that the words of s.20(2) of the Victorian FOI Act evidence a sufficient intention to displace the application of s.14 of the *Interpretation of Legislation Act 1984* Vic. The curious words in s.20(2) of the Victorian FOI Act (and the words on which the Tribunal in *Re Thwaites* based its findings) are those which I have underlined:

> *An agency or Minister is not required by this Act to give access to a document <u>at a time when the document is an exempt document</u>.*

68. The provision might have been framed with greater economy of words as: "An agency or Minister is not required by this Act to give access to an exempt document", which raises a question as to whether some particular result was intended by the use of the underlined words. The Tribunal in *Re Thwaites* obviously thought so. In my opinion, it is equally arguable that the words I have underlined at the end of s.20(2) merely acknowledge that the material facts which might attract to a particular document the application of an exemption provision (or not) may change over the course of time (see paragraph 61 above) and a rather more explicit contrary intention would be necessary to oust the application of s.14 of the *Interpretation of Legislation Act 1984* Vic.

69. I also see difficulty in the proposition advanced by the Tribunal in *Re Thwaites* that the words of s.20(2) of the Victorian FOI Act speak as of the time a decision is required to be given by the Victorian AAT on an application for review. *Prima facie*, the words of s.20(2) speak as of the time a decision on access is required to be made by an agency or Minister. If the words "An agency or Minister is not required by this Act" are taken to extend to the provision of the Victorian FOI Act (s.50) which empowers the Victorian AAT to review decisions refusing access, it raises an immediate conflict with s.50(4) which empowers the Victorian AAT to grant access to exempt documents (other than documents exempt under s.28, s.31(3) or s.33 of the Victorian FOI Act) if the

public interest requires it. Perhaps the specific provision in s.50(4) overrides the general provision in s.20(2) (assuming it to speak as of the time of a Tribunal decision) to the extent of any inconsistency. If s.20(2) is properly to be construed as speaking as of the time of a Tribunal decision, then it may be that the conclusion in *Re Thwaites* is supportable on the basis that the Victorian AAT has no power to give access to a document exempt under s.28 of the Victorian FOI Act, provided it is proper to construe the words "not required by this Act", in conjunction with the words in s.20(2) which I have underlined above, as manifesting a necessary intention that the Victorian AAT is obliged to apply the provisions of the Victorian FOI Act as in force at the time when it gives a decision, to the exclusion of s.14 of the *Interpretation of Legislation Act 1984* Vic. (I note that the last-mentioned provision actually states that its application is not to be overridden unless the contrary intention expressly appears. Section 4 of the AI Act does not, in its terms, require that a contrary intention expressly appear.)

70. I doubt that there is such a necessary intention, but in any event there are no comparable words in the Queensland FOI Act on which a similar argument might be based. In the scheme of the Queensland FOI Act, the provision which has a purpose and function similar to that of s.20(2) in the scheme of the Victorian FOI Act is s.28(1), which provides:

*An agency or Minister may refuse access to exempt matter or an exempt document*

The use of the word "may" in s.28(1) of the Queensland FOI Act means that the power to refuse access to exempt matter or an exempt document may be exercised or not exercised at the discretion of the relevant agency or Minister (see s.32CA of the AI Act). In using the language that an agency or Minister is "not required by this Act" to give access to exempt documents, s.20(2) of the Victorian FOI Act has a similar effect, leaving an agency or Minister free to choose whether or not to give access to exempt documents. However, in the absence of words like "not required by this Act" and "at a time when the document is an exempt document", s.28(1) of the Queensland FOI Act provides no basis on which to build an argument similar to that sketched in the preceding paragraph.

71. In contending that I should follow the decision of the Victorian AAT in *Re Thwaites* in respect of the issue now under discussion, the respondent has submitted that although the words "at any time" do not appear in s.28 of the Queensland FOI Act, those words must reasonably be implied into that section. I consider that it is implicit in s.28(1) of the Queensland FOI Act that the discretion conferred by that section is ordinarily (subject to the qualification explained in paragraph 58 above) to be exercised according to the law in force (and the material facts and circumstances which prevail) at the time a decision by an agency or Minister is required to be made in response to an FOI access application. But there are no words in s.28(1), and nothing in the scheme of the Queensland FOI Act, to suggest that s.28(1) has any operation which extends beyond the time at which an agency or Minister is required to make a decision in response to an FOI access application. In any event, the Information Commissioner cannot exercise the discretion conferred on an agency or Minister by s.28(1), which permits the release of exempt matter. That is expressly forbidden by s.88(2) of the FOI Act, the text of which is set out in the following paragraph. In cases where an applicant disputes a refusal of access to documents, the Information Commissioner is ordinarily called upon to determine whether matter in issue is or is not exempt matter, and hence whether an applicant for access has or has not a legally enforceable right to be given access in accordance with the FOI Act to the matter in issue. An application for review by the Information Commissioner under Part 5 of the FOI Act is either an "investigation", "proceeding" or "remedy" (in terms of s.20(1)(a) or s.20(2) of the AI Act) to enforce a right of access to non-exempt matter asserted by an applicant. I can find nothing in s.28(1), or the scheme generally, of the Queensland FOI Act which evidences an intention to displace s.20 of the AI Act as part of the applicable law in such an investigation, proceeding or remedy.

72. The only other provision which might be thought to raise the possibility of a contrary intention

displacing the application of s.20 of the AI Act (though I note that this was not argued by the respondent) is s.88(2) of the Queensland FOI Act. Section 88 provides as follows:

> ***Powers of Commissioner on review***
>
> ***88.(1)*** *In the conduct of a review, the Commissioner has, in addition to any other power, power to -*
>
> *(a) review any decision that has been made by an agency or Minister in relation to the application concerned; and*
>
> *(b) decide any matter in relation to the application that could, under this Act, have been decided by an agency or Minister;*
>
> *and any decision of the Commissioner under this section has the same effect as a decision of the agency or Minister.*
>
> ***(2)*** *If it is established that a document is an exempt document, the Commissioner does not have power to direct that access to the document is to be granted.*

73. I am unable to find in the use of the present tense in the phrase "a document is an exempt document" in s.88(2), a sufficient intention to displace the application of s.20 of the FOI Act. The obvious intention of s.88(2) is to qualify the fulsome grant of power to the Information Commissioner in s.88(1), by making it clear that the Information Commissioner's power to decide any matter in relation to an application that could, under the FOI Act, have been decided by an agency or Minister, does not extend to the discretion possessed by agencies and Ministers under s.28(1) to give access to an exempt document. Given that, in accordance with the principles stated in paragraph 35 above, the Information Commissioner ordinarily has regard to the relevant facts and circumstances as they stand at the date of a decision, and ordinarily applies the law in force at the date of a decision (in determining whether a document in issue is or is not exempt) the use of the present tense in s.88(2) is logically to be expected. However, there is no express intention or necessary implication in the phrase "if it is established that a document is an exempt document" to the effect that the relevant law, by which that issue is to be established, is not to include s.20 of the AI Act, and any law whose application is preserved by virtue of s.20 of the AI Act for the purposes of an application to the Information Commissioner to enforce an accrued right.

74. I do not accept the respondent's contention that s.28(1) of the FOI Act, or the scheme of the FOI Act generally, manifests a "contrary intention" sufficient to displace the application of s.20 of the AI Act.

**The respondent's submission that the amended s.36 of the FOI Act manifests an intention to displace s.20 of the *Acts Interpretation Act 1954* Qld**

75. The full text of the amended s.36 of the FOI Act which came into force on 20 November 1993 is set out at paragraph 10 above. It includes a new s.36(4) which relevantly provides:

> ***(4)*** *In this section -*
>
> *...*
>
> ***"matter"*** *includes matter that was prepared before the commencement of the* Freedom of Information Amendment Act 1993.

The respondent contends that this provision evidences the necessary "contrary intention" (see s.4 of the AI Act) to displace the application of s.20 of the AI Act.

76. The respondent, in making this submission, relies on the reasoning in support of the second basis given to justify the finding of the Victorian AAT in *Re Thwaites* (see paragraph 59 above). The passage from *Re Thwaites* relied upon by the respondent is as follows (at pp.67-68):

> *I am also of the view that the amending Act includes an express intention that it should apply to any decision to be made after the amending legislation came into operation, even though the application for such access was made prior to the date of operation.*
>
> ... [The Tribunal then set out an extract from s.14(2) of the *Interpretation of Legislation Act 1984* Vic which corresponds to s.20(1)(c) and (e) and s.20(2) of the AI Act] ...
>
> *I agree with the submission from Mr Finkelstein that s.12(2) of the amending Act which inserts a new subs (7) to s.28 represents an express contrary intention that any right acquired by a person should be affected by the amendment.*
>
> *The new subsection to s.28 of the* Freedom of Information Act *dealing with "Cabinet documents" is as follows:*
>
> > ***(7)*** *In this section -*
> >
> > *(a)* ...
> >
> > *(b)* *a reference to a document includes a reference to a document whether* created before or after *the commencement of s.12 of the Freedom of Information (Amendment) Act 1993" (My emphasis).*
>
> *This is, in my view, a clear and express intention that the amending legislation is to apply to all documents in existence whether created before or after the commencement of the amending Act. In this instance the documents came into existence (were created) and the application for access was made* before *the coming into operation of the amending Act and the new s.28(7)(b) makes it clear that the* Freedom of Information Act*, as amended, applies to any decision made to give access to a person to these documents.*

77. The respondent submits that the definition of the word "matter" which was inserted in the amended s.36(4) of the Queensland FOI Act has the same effect as s.28(7)(b) of the Victorian FOI Act. In my opinion, the construction given by the Tribunal in *Re Thwaites* to the words of the amended s.28(7) of the Victorian FOI Act is simply mistaken, and should not be followed. In particular, I cannot see in the words of that provision any express intention that a right acquired by a person prior to the amendment should be affected by the amendment. Nor can I see any similar intention in the definition of matter contained in the amended s.36(4) of the Queensland FOI Act.

78. In *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at p.194 (in a passage approved in *Geraldton Building Co Pty Ltd* v May (1977) 136 CLR 379 by Gibbs J at p.398, by Stephen J at pp.399-400 and by Mason J at p.401), Fullagar J said:

> *There can be no doubt that the general rule is that an amending enactment - or, for*

> *that matter, any enactment - is* prima facie *to be construed as having a prospective operation only. That is to say, it is* prima facie *to be construed as not attaching new legal consequences to facts or events which occurred before its commencement.*

79. This basic principle, of course, underlies s.20 of the AI Act, and both must yield to a contrary intention. It is useful for the purposes of this case to have regard to the additional clarification of the basic principle which is to be found in the following passages -

> *It is a settled rule of construction of statutes that a law is not to be construed as retrospective in its operation unless the legislature has clearly expressed that intention, and a further rule that it is not to be construed as retrospective to any greater extent than the clearly expressed intention of the legislature indicates* (per Griffith CJ in *RS Howard & Sons Ltd v Brunton* (1916) 21 CLR 366).
>
> *Upon a consideration of the authorities, I think that, as regards any matter or transaction, if events have occurred before the passing of an Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities* (per Jordan CJ in *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27 at p.31).
>
> ... [the] *principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that* (per the Full Court of the Supreme Court of Victoria in *Robertson v City of Nunawading* [1973] VR 819 at p.824).
>
> *Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only* (per Wright J in *Re Athlumney; Ex parte Wilson* [1898] 2 QB 547 at pp.551-2; approved by Gibbs J in *Mathieson v Burton* at p.22 and by O'Leary CJ of the Northern Territory Supreme Court in *Ellis v Minister for Lands* (1985) 37 NTR 29 at p.35).

80. When the words of the definition of "matter" in the amended s.36(4) are given their natural meaning, they certainly do not evidence any express intention to override rights accrued prior to the amendment, nor, in my opinion, can any necessary intention, or necessary implication, to that effect be found in the language which the legislature has employed. The definition of matter in s.36(4), according to its plain meaning, merely requires that the word "matter", as contained in the operative words of the amended s.36(1) (which provide that matter <u>is</u> exempt matter if specified criteria are satisfied) and of the amended s.36(2) (which provide that matter <u>is not</u> exempt matter under s.36(1) if specified criteria are satisfied), is to be read as including matter that was prepared before the commencement of the *Freedom of Information Amendment Act 1993* Qld, as well as matter prepared after its commencement. Both the principles outlined in paragraphs 78-79 above, and the ordinary and natural meaning of the words employed by the legislature, indicate that the operative

words of the amended s.36(1) and the amended s.36(2) should be construed as applying prospectively, from the date of their commencement, to matter that was prepared before or after the date of their commencement. In other words, the amended s.36 merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that.

81. The only doubt which could be used as a basis to argue that the words of the definition of "matter" in the amended s.36(4) should not be given their natural meaning, is that the definition is arguably otiose. Given the scheme of the FOI Act (by which people are given rights of access to documents regardless of when they came into existence: see s.10 and s.21) and the language of the criteria for exemption in the amended s.36(1), the word "matter" in the amended s.36, even if left undefined, could probably only have been properly understood as referring to matter which came into existence both before and after the amendments. If the definition is otiose, then it might be suggested that the legislature had another purpose, beyond that which appears from the plain meaning of the words, which ought to be divined and given effect to. I note in this regard, that s.14A of the AI Act now provides that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation (s.14A(1)) and that this applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.

82. In the particular circumstances under consideration, however, this simply gives rise to circularity. The presumption that amendments to a statute are to apply prospectively, and not so as to retrospectively override accrued rights, will yield to a contrary intention which appears by express words, or by necessary implication. A purpose of overriding any accrued rights under the pre-amendment law, has to be discerned from the language of the statute (i.e. from express words or necessary implications) unless resort to extrinsic materials is permitted under s.14B of the AI Act. Although I do not think that there is any ambiguity or obscurity (see: s.14B(1)(a) of the AI Act) as to the meaning of the definition of "matter" in the amended s.36(4), nor that its ordinary meaning leads to a result that is manifestly absurd or unreasonable (see: s.14B (1)(b) of the AI Act), I have examined the Explanatory Memorandum relating to the *Freedom of Information Amendment Bill* 1993 Qld, the Attorney-General's second reading speech in respect of that Bill, and the Hansard record of debates in the Legislative Assembly concerning that Bill. There is no material contained in them which provides a clear indication that the amendments to s.36 were intended to operate retrospectively so as to override any accrued rights under the pre-amendment law.

83. I have explained in paragraph 80 above why I do not think that the definition of matter in s.36(4) evidences any express intention, or necessary implication, that the amended s.36 is to apply retrospectively so as to override any accrued rights under the pre-amendment law. The fact that the definition is probably otiose is not sufficient, to my mind, to give rise to a necessary implication that the definition was intended to give the amended s.36 a retrospective effect of that kind, when its language is not capable of bearing that meaning. It is not uncommon for legislatures to enact statutory definitions and other clarifying provisions, which may not strictly be necessary, out of an abundance of caution; perhaps in this case to ensure that no suggestion could possibly be raised that the amended s.36 was to be interpreted as applying only to matter which came into existence after the commencement of the amendments.

84. It would not have been difficult for the legislature to give a clear indication that the amended s.36 was to apply retrospectively so as to override any accrued rights under the pre-amendment law (if that were the legislature's intention). An example of a provision which is effective for that purpose can be found in s.29(2) of the *Freedom of Information Amendment Act 1991* Cth. After s.29(1) of that Act had amended the s.41 exemption in the Commonwealth FOI Act so as to significantly broaden the scope of the exemption, s.29(2) went on to provide:

> ***(2)*** *The amendments made by this section apply to any documents in respect of which a request for access was or is made under this Act before or after the*

> *commencement of this section, other than a request that was finally disposed of before the commencement of this section.*

This provision correctly fastened on the significance, for the purpose of achieving a retrospective operation, of stating that it was intended to apply to requests for access made before or after its commencement (unless finally disposed of), rather than to documents which came into existence before or after its commencement.

85. I should note (though it was not argued by the respondent in this case) that there is a faint suggestion in the wording of the Preamble/Statement of Intention to the *Freedom of Information Amendment Act 1993* Qld that the amendments to s.36 of the FOI Act were intended to be declaratory:

> ***(4)*** *An object of Parliament in enacting the Freedom of Information Act 1992 was to ensure that the convention of Ministerial responsibility was preserved.*
>
> ***(5)*** *It is, therefore, the intention of Parliament to make provision, by amendments included in the amendments made by this Act, to remove any doubt that Cabinet documents and discussions are to receive a level of confidentiality appropriate to preserving the convention of Ministerial responsibility intended by Parliament.*

86. The words "to remove any doubt", or a similar formulation, sometimes appear in true declaratory Acts, generally in conjunction with words which make it clear that the legislature intends to declare the law (on a specific topic) as it is and has always been. I do not think there is any clear indication in the terms of the *Freedom of Information Amendment Act 1993* Qld, that Parliament was intending to declare the meaning of s.36 of the FOI Act as it is, and has always been, as opposed to amending that provision and explaining why amendment was considered to be necessary or desirable. That Act does not employ the term "it is declared that" (or any relevant variation thereof) or otherwise use language purporting to declare what the law has been; rather clause (5) of the Preamble refers to making provision by way of amendment, and uses language such as "*Cabinet documents ... <u>are to receive</u> a level of confidentiality ...*" (my underlining) which is consistent with the amendments to s.36 having a prospective operation, albeit on documents prepared before the commencement of the amendments. The faint suggestion I have referred to may have passed unnoticed, but perhaps requires further examination in the face of a remark made in the course of debate in the Legislative Assembly on 18 November 1993, by the Minister for Justice and Attorney-General, who, after reading out the Preamble, said (at Hansard, p.6059): "*In other words, that Preamble is saying that, to a very considerable extent, these amendments are declaratory. They re-affirm the original intention of this Parliament when the Freedom of Information Act was passed".*

87. The significance of whether or not the amendments are declaratory is explained in the following passage from D C Pearce and R S Geddes, <u>Statutory Interpretation in Australia</u> (3rd ed, 1988, Butterworths), at paragraph [10.10], pp.185-6:

> *Acts that declare or interpret the meaning of earlier Acts are regarded by the courts as forming an exception to the presumption against retrospectivity. They are treated as if they came into operation on the date on which the Act that they are interpreting came into operation. The reasoning behind this presumably is that such Acts are not altering the law in any way but are only making its meaning clearer. Persons affected by the law are therefore not subjected to any greater liability than previously existed and thus the rationale of the retrospectivity rule is negated.*
>
> *However, the incidence of such Acts is very rare. The normal pattern is that amending Acts add to or subtract something from an existing Act; they do not*

*merely make the meaning of the Act a little clearer.*

88. In *Inland Revenue Commissioners v Joiner* [1975] 1 WLR 1701 at p.1715, Lord Diplock explained the rationale for treating one type of declaratory Act as having retrospective operation:

> *Where there are ambiguities in the existing statute law it is a legitimate purpose of legislative action by Parliament to clarify the law by indicating in which of the two alternative meanings the ambiguous language of the earlier statute is to be understood. Where it does so, this will have retrospective effect upon transactions undertaken before the clarifying statute by persons whose guess as to the meaning of the earlier statute differed from the meaning subsequently attributed to it by Parliament; but this is only to forestall the inevitable retrospective effect of a decision of a court of justice resolving the ambiguity one way or the other and to reduce the period of uncertainty during which persons embarking upon a course of conduct have not the means of knowing what the legal consequences of their doing so will be.*
>
> *So the presumption against ascribing to the language of a statute a meaning which would have retrospective effect upon transactions undertaken before it came into force does not apply to a statute whose only purpose is to clarify previously existing statute law.*

89. *Re Gardiner* [1938] SASR 6 (at p.12) and *Re Lovell and Collard's Contract* [1907] 1 Ch 249 afford examples of Acts of Parliaments passed to, respectively, "explain" and declare the meaning of, particular terms used in prior Acts, and which were construed as relating back to the time when the prior Acts were passed. In another case, an Act of Parliament which commanded that the meaning of a term in a prior Act be construed in a particular way, was held to be declaratory and to operate retrospectively so as to override rights accrued under the prior law: *Attorney General v Theobald* (1890) 24 QBD 557. The *Freedom of Information Amendment Act 1993* Qld, however, is neither in form, nor in substance (see paragraphs 94-100 below) an Act which has been passed to explain or declare the meaning of terms used in a prior statute.

90. Examples of another kind of declaratory Act or declaratory provision can be seen in *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 (which considered s.45 of the *Western Lands Act 1901* NSW, inserted by the *Western Lands (Amendment) Act 1985* NSW) and in *Mabo v Queensland* (1988) 63 ALJR 84, which considered the *Queensland Coast Islands Declaratory Act 1985* Qld. These cases demonstrate that, provided the terms of a statute make its intention to do so sufficiently clear, a legislature may declare the law to be, and to have been, different from what, apart from the statute, the law is and has been:

> *The effect of such a statute is to change the law and the courts are thereafter bound to take the law as the statute declares it to be. <u>If the statute declares what the law has been</u>, the courts are commanded to decide future cases in conformity with the declaration though the circumstances to which the declaration applies occurred prior to the enactment of the statute ... The operation of a declaratory statute, like the operation of any other statute, depends upon the intention of Parliament ascertained by construction of its terms: see, for example,* Young v Adams *[1898] AC 469.*
>
> *The* [Queensland Coast Islands Declaratory] *Act therefore operates to extinguish any legal rights the existence of which is inconsistent with the law as the Act declares the law to be or to have been.* (my underlining).
> (per Brennan, Toohey and Gaudron JJ in *Mabo v Queensland* (1988) 63 ALJR 84 at

p.93)

91. There are no words in the *Freedom of Information Amendment Act 1993* Qld which evidence a clear intention to declare what the law has been with respect to the Cabinet matter exemption (so as to override accrued rights under the prior law); it is in terms an amending Act.

92. There is authority for the proposition that the question of whether or not an Act of Parliament is truly a declaratory Act intended to have retrospective operation is a question of substance not form, depending on a proper analysis of the content and substantive effect of the Act, considered in light of the law in force prior to the Act's commencement. Thus in *Harding v Commissioner of Stamps (Qld)* [1898] AC 769, the Privy Council analysed the true nature of an Act that had been held by the Supreme Court of Queensland to be declaratory and retrospective in its application, on the basis that its operative provision had used the opening expression "it is declared". The Privy Council said (at p.775):

> *The nature of the Act must be determined from its provisions. Now, the Act does not contain any words to show that it purports to construe the* [prior Act]*; it does purport to amend it; every other of its provisions is in language prospective ... In fact, the language of the Act points, as their Lordships think, distinctly to future operations. And, inasmuch as it falls under two well-established canons of construction, both requiring that, as against the persons sought to be affected, it should be shown quite clearly and strictly to affect them - first, that which relates to statutes imposing liabilities, and, secondly, that which relates to retrospective statutes - their Lordships feel no hesitation in deciding that the Act cannot be retrospective.*

93. A similar exercise was undertaken by Stein J of the New South Wales Land and Environment Court in *New South Wales Aboriginal Land Council v Minister for Natural Resources* (1986) 59 LGRA 318 at pp.327-9, but in respect of a statutory provision which expressed a clear intention to declare what the law is and has always been. In this regard, Stein J was corrected by the New South Wales Court of Appeal (in the case cited in paragraph 90 above), which held that such a clearly expressed intention on the part of the legislature must be given legal effect. However, the following remarks of McHugh JA (at p.162) are of significance:

> ... *the* Western Lands (Amendment) Act *1985 amended the* Western Lands Act *1901 by inserting s.45 which provides:*
>
> > "For the avoidance of doubt it is declared that section 136K of the Crown Lands Consolidation Act 1913 and any other provision of that Act relating to a permission to occupy Crown lands or a permissive occupancy of Crown lands apply, *and shall be deemed always to have applied,* to land in the Western Division." *(My emphasis.)*
>
> *Stein J took the view (at 329) that he was entitled to ascertain whether any doubt about the operation of s.136K existed. His Honour found that that section did not extend to the granting of permissive occupancies of land within the Western Division. His Honour then said:*
>
> > It follows that it is my opinion that the legislature was attempting to alter the law rather than declare its true meaning - see *Lord Suffield v Inland Revenue Commissioners* [1908] 1 KB 865 at 892. In the event, therefore, the presumption (against retrospectivity) applies and the provision cannot be construed to operate retrospectively - see in particular *Young v Adams*

> [1898] AC 469 at 476.
>
> In my view the legislature has adopted the incorrect approach in what it was attempting to effect. To validate permissive occupancies of land in the Western Division it is necessary to alter the law, there being no statutory base. To declare something to be black when it is indubitably white is of no effect. ...
>
> *Senior counsel for the Land Council - in my opinion quite correctly - found himself unable to support this reasoning. By its very terms, s.45 was intended to operate retrospectively as well as prospectively. With great respect to the learned judge, he has dealt with s.45 as though it involved the problem which arises when Parliament has enacted a declaratory Act which, on one construction, is capable of being construed as operating both retrospectively and prospectively and on another construction as operating only prospectively: see, eg,* Attorney General v Theobald *(1890) 24 QBD 557;* Re Lovell and Collard's Contract *[1907] 1 Ch 249*; Harding v Commissioner of Stamps for Queensland *[1898] AC 769. If the words in s.45, which I have emphasised, were absent, those cases and the approach which his Honour took would be relevant. But the words in s.45 "and shall be deemed always to have applied" answer the very problem which arose in those cases. They are words of the plainest possible intendment. When read with the words which precede them, they make it clear that s.136K applies retrospectively and prospectively.*

I draw attention to the fourth last sentence of this passage, and note that no words of the kind emphasised by McHugh JA appear in the *Freedom of Information Amendment Act 1993* Qld.

94. An analysis of the kind referred to at the start of paragraph 92 above demonstrates that there is no sense in which it can truly be said that the amended s.36 introduced by the *Freedom of Information Amendment Act 1993* Qld is declaratory of the correct meaning of s.36 as originally enacted. Rather, what has occurred is that after appreciating the extent of the protection conferred by the original wording of s.36 of the FOI Act as explained in *Re Fencray*, the government has determined that it wishes to considerably expand the scope of protection available under s.36, and has amended the original s.36 for that purpose.

95. When the former s.36 is compared with s.36 in its current form, it can be seen that the original paragraphs (b), (c), (d) and (e) of s.36(1) have been re-enacted as paragraphs (d), (e), (f) and (g) respectively, of the present s.36(1), with only consequential amendments. The present s.36(1)(a), (b) and (c), however, effect major changes to the former s.36(1)(a).

96. The amended s.36(1)(a) now provides that matter is exempt matter if it has been submitted to Cabinet for its consideration. Under the former s.36(1)(a), matter which had been submitted to Cabinet for its consideration was exempt only if it had also been brought into existence for the purpose of submission for consideration by Cabinet: see *Re Fencray*, paragraphs 32-36. There was no ambiguity about the interpretation of the former s.36(1)(a) in that regard. Only one interpretation was reasonably open on the words which the legislature had chosen to employ. That interpretation was correctly stated in the FOI Policy and Procedures Manual published by the Department of Justice and Attorney-General (at p.110 thereof), for the purpose of providing guidance to authorised FOI decision-makers in agencies subject to the FOI Act. (I am aware that this Manual was submitted to Cabinet for approval, before it was issued, but I attach no significance to this since Cabinet is unlikely to have turned its attention to the fine detail of the explanations given in the Manual interpreting exemption provisions in the FOI Act.) I do not necessarily agree with every commentary contained in that Manual, but in this instance, there was only one possible interpretation available of the wording of the former s.36(1)(a) and it was correctly stated by the

authors of the Manual. The purpose of the amended s.36(1)(a) was not to declare the meaning of the original s.36(1)(a), but to alter it so as to expand the scope of the original Cabinet matter exemption in a very substantial way (see paragraph 12 above).

97. The original s.36(1)(a) also applied to matter which had not been submitted to Cabinet, but which had been brought into existence for the purpose of submission for consideration by Cabinet, and was subject to a current proposal by a Minister for its submission to Cabinet for consideration. The present s.36(1)(b) re-enacts this exemption, but adds to it by specifying that matter which has been prepared for submission to Cabinet for its consideration is exempt if it has at any time been proposed by a Minister to be submitted to Cabinet for its consideration (i.e. the proposal by a Minister for its submission to Cabinet need not be a current one). Again, the intention here is to effect a change in the previous law, rather than to declare the meaning of the previous law.

98. The current s.36(1)(c) is entirely new; it has no counterpart in s.36(1) as originally enacted. Parliament's intention in enacting the current s.36(1)(c) can only have been to change the law, by extending the scope of the s.36(1) exemption, rather than declaring the meaning of the original s.36(1) exemption. It applies to a class of documents not even within the contemplation of the original s.36(1)(a), being documents that have neither been submitted to Cabinet, nor are proposed to be submitted to Cabinet, nor were brought into existence for that purpose.

99. The original s.36(2) provided for an exception to s.36(1) in respect of "merely factual or statistical matter" (subject to a proviso, the wording of which remains unchanged in the present s.36(2)). Under the present s.36(2), the exception applies only to "merely statistical, scientific or technical matter". It cannot be credibly suggested that the word "factual" was initially intended to mean "scientific or technical". Obviously, what the legislature intended to do here was to change the law, by significantly narrowing the scope of the exception, rather than declare the meaning of s.36(2) as originally enacted.

100. Thus it can be seen that the amendments to s.36 effected by the *Freedom of Information Amendment Act 1993* Qld were not in substance declaratory, and in the absence of a clear indication that they were intended to have retrospective effect (so as to override accrued rights) they should not be so construed.

101. There is considerable scope for debate over what is the "level of confidentiality appropriate to preserving the convention of Ministerial responsibility" as is evident from paragraph 11 above. Parliament is, of course, in the position to have the last word on that debate, and has made clear, in the amended s.36 of the FOI Act, the extent of the confidentiality which it considers appropriate. The amended s.36 of the FOI Act is to apply so as to qualify the right of access under s.21, in respect of FOI access applications lodged after 20 November 1993. But the *Freedom of Information Amendment Act 1993* Qld is not a declaratory Act, and does not evidence an intention, whether by express words or necessary implication, to override any rights of access accrued under the pre-amendment law.

**Conclusion**

102. It follows that, by virtue of s.20 of the AI Act, the applicable law in respect of Mr Woodyatt's application under Part 5 of the FOI Act, by which he seeks to enforce a right of access to non-exempt matter in the Mulholland Report which accrued prior to the commencement of the *Freedom of Information Amendment Act 1993* Qld, is to be determined on the basis that the applicable law is the law that would have applied if the FOI Act had not been amended by the *Freedom of Information Amendment Act 1993* Qld.

103. I have already explained at paragraphs 28-29 above my reasons for holding that the Mulholland

Report falls within the terms of s.36(1)(a) of the FOI Act in its pre-amendment form. The paragraphs of the Mulholland Report specified in paragraph 23 above, however, fall within the exception provided for by s.36(2) in its pre-amendment form. In a letter to the respondent dated 11 January 1994, I conveyed my view that those paragraphs of the Mulholland Report comprised merely factual matter. The respondent was therefore aware that I considered it to be an issue in my review, but has not addressed any submission to me asserting that those paragraphs, or any part of them, do not comprise merely factual matter. It may be inferred that the respondent concedes that those paragraphs contain merely factual matter. In any event I am satisfied that those paragraphs comprise merely factual matter according to the principles which I explained in *Re Fencray* at paragraphs 49 to 54. The matter contained in those paragraphs does not refer to any decision or deliberation of Cabinet, and hence does not fall within the proviso to the s.36(2) exception. I find that those paragraphs do not comprise exempt matter, and that Mr Woodyatt has a legally enforceable right to be given access to those paragraphs in accordance with the FOI Act.

104. I set aside the decision under review, and in substitution for it, I find that the Mulholland Report is an exempt document under s.36(1)(a) of the FOI Act, as in force prior to the amendments to s.36 effected by the *Freedom of Information Amendment Act 1993* Qld, but that the following paragraphs of the Mulholland Report are not exempt matter by virtue of s.36(2) of the FOI Act (as in force prior to the amendments to s.36 effected by the *Freedom of Information Amendment Act 1993* Qld) and that Mr Woodyatt has a right to be given access to them:

> paragraphs 1.1, 1.2, 1.4 (with the exception of the last four sentences of that paragraph), 1.5, 1.9, 1.12 (with the exception of the last sentence), 2.1, 2.2, 4.1, 4.2, 4.3, 4.4, 4.5, 5.1, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.9, 7.1, 7.3, 7.8, 7.9, 7.12, 8.2, 9.1, 9.3 (with the exception of the last two sentences), 9.4 (with the exception of the last five sentences), 10.1 and 11.1.

.....
F N ALBIETZ
**INFORMATION COMMISSIONER**