OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 178 of 1993 (Decision No. 95022)

Participants:

STEPHEN JOSEPH ENGLISH
Applicant

- and -

QUEENSLAND LAW SOCIETY INCORPORATED
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - jurisdiction of Information Commissioner - whether the respondent is an agency subject to the *Freedom of Information Act 1992* Qld - whether the respondent is "a body (whether or not incorporated) that is established for a public purpose by an enactment" within the meaning of s.9(1)(a)(i) of the *Freedom of Information Act 1992* Qld - words and phrases: "is established"; "established ... by an enactment"; "established for a public purpose".

Freedom of Information Act 1992 Qld s.4, s.7, s.8(1), s.8(2), s.9(1)(a), s.9(1)(a)(i), s.11(1)(k), s.11(1)(m), s.11(1)(n), s.11(1)(p), s.11(1)(q), s.11A, s.18, s.18(1), s.19, s.19(1), s.21, s.25, s.27(2), s.52, s.52(4), s.52(6), s.71(1)(a), s.71(1)(b), s.73, s.73(3), s.75
Acts Interpretation Act 1954 Qld s.36
Associations Incorporation Act 1981 Qld
Financial Administration and Audit Act 1977 Qld
Freedom of Information Act 1982 Cth s.4(1)
Freedom of Information Act 1982 Vic s.5(1)
Freedom of Information Regulation 1992 Qld s.5A
Income Tax Assessment Act 1936 Cth s.117(1)
Law Institute Act 1917 Vic
Legal Practitioners Ordinance 1972 Cth
Legal Profession Practice Act 1958 Vic s.16(1)
Pharmacy Act 1976 Qld s.30, s.30(3)(a)(ii), s.30(7)
Queensland Law Society Act of 1927 s.3(1), s.3(3), s.3(4), s.4(1), s.4(9), s.4(9)(i)(a), s.4(9)(ii), s.4(10), s.4(11), s.5(1), s.5(9)(i)(ha), s.5(9)(v), s.5(9)(vi), s.5(9)(vii), s.6, s.7, s.8, s.10, s.11, s.11A, s.31, s.36, s.36E, s.36O
Queensland Law Society Act Amendment Act of 1930
Statutory Instruments Act 1992 Qld s.32, s.34
Supreme Court Act 1867 Qld s.41

A & S Ruffy Pty Ltd v Federal Commissioner of Taxation (1958) 98 CLR 637
Anti-Cancer Council of Victoria & Ors, ex parte State Public Services Federation, Re (1992) 175 CLR 442
Brennan and the Law Society of the Australian Capital Territory, Re (1984) 1 AAR 529; 6 ALD 428
Brennan and Law Society (ACT) (No. 2), Re (1985) 8 ALD 10
Brookton Co-operative Society Limited v Commissioner of Taxation (1981) 147 CLR 441
Christie and Queensland Industry Development Corporation, Re (1993) 1 QAR 1
Clunies-Ross v Commonwealth of Australia & Ors (1984) 55 ALR 609
Committee of Direction of Fruit Marketing v The Delegate of the Australian Postal Commission (1980) 144 CLR 577
Council of the Municipality of Randwick v Rutledge & Ors (1959) 102 CLR 54
Dickson and the Law Institute of Victoria, Re (1994) 6 VAR 237
Ipswich & West Moreton United Friendly Societies Dispensary v Minister for Health [1994] 1 Qd R 375
Law Institute of Victoria v Irving & Ors [1990] VR 429
Renmark Fruitgrowers Co-operated Ltd v Federal Commissioner of Taxation (1969) 121 CLR 501
Renmark Hotel Inc v Federal Commissioner of Taxation (1949) 79 CLR 10
Richards v The Law Institute of Victoria (Victorian County Court, Dixon J, 13 August 1984, unreported)
State Government Insurance Office v City of Perth (1987) 71 LGRA 123
Tinker Tailor Pty Ltd v Commissioner For Main Roads [1960] ALR 588
Walter v Council of Queensland Law Society Inc (1988) 62 ALJR 153
Wentworth v New South Wales Bar Association (1992) 66 ALJR 360
Western Australian Turf Club v Federal Commissioner of Taxation (1978) 139 CLR 288
Wheeler & Anor v Kelly & Ors (1956) 94 CLR 206

DECISION

I decide that -

(a) the respondent is a body that is established for a public purpose by an enactment within the meaning of s.9(1)(a)(i) of the *Freedom of Information Act 1992* Qld, and hence, by virtue of s.8, is an agency for the purposes of the *Freedom of Information Act 1992* Qld; and

(b) I have jurisdiction under Part 5 of the *Freedom of Information Act 1992* Qld to deal with the applicant's application, dated 20 October 1993, for review of the respondent's refusal of access to documents to which the applicant requested access, in accordance with s.25 of the *Freedom of Information Act 1992* Qld, by letters to the respondent dated 24 August 1993.

Date of Decision: 4 August 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

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REASONS FOR DECISION

Background

1. The applicant seeks review of the respondent's refusal of access to documents on the basis of the respondent's contention that it is not an agency within the meaning of the *Freedom of Information Act 1992* Qld (the FOI Act), and therefore not subject to the provisions of the FOI Act.

2. By letter dated 24 August 1993, Mr English made application to the Queensland Law Society Incorporated (the Society), under the FOI Act, in the following terms:

> *RE: FREEDOM OF INFORMATION ACT 1992*
>
> *Would you please provide to me a copy of your most recent statement of affairs together with a copy of each of the Society's policy documents that the Society is required by the Act and in particular Section 19 thereof to make available for inspection and purchase by members of the community.*
>
> *If any fee is payable for this documentation please advise forthwith.*

3. By separate letter dated 24 August 1993, Mr English sought access from the Society to certain documents concerning himself:

> *RE: FREEDOM OF INFORMATION ACT 1992*
>
> *I formally make application for a photocopy of the following documents or part thereof which relate to myself and/or the companies Dalpura Enterprises Pty Ltd and Pinjarra Properties Pty Ltd of which I am a director:-*
>
> [There then followed a list of 21 separate categories of documents to which Mr English sought access].
>
> *Please advise the costs thereof so that I may forward my cheque to you. When so advising please advise when I may expect to receive such photocopies.*

In a further letter dated 24 August 1993 to the Society, Mr English added another category of documents which he had inadvertently omitted from the list of 21 categories of documents to which he sought access.

4. In a letter dated 25 August 1993, Mr M C Behm, Director of the Society's Law Claims Department, responded to Mr English's three letters of 24 August 1993. The relevant portions of Mr Behm's reply to Mr English are as follows:

> *The Queensland Law Society Incorporated does not believe that it falls within the definition of "agency" in sections 8 and 9(1)(a) of the* Freedom of Information Act 1992 *(Queensland) for the following reasons:*
>
> > *A review of the history of the* Law Society Act 1927 *and the* Hansard *record of the passage of that Act reveals that the Society was neither "established" by an enactment nor was it established for a "public purpose".*
> >
> > *The Queensland Law Society, previously known as the Queensland Law Association, had considered the benefits of incorporation as early as the 1870's and 1880's as a suitable structure for the professional body and as a means of obtaining better authority to enforce its decisions and directions. It had, prior to incorporation, been recognised by the Supreme Court as having standing in applications to discipline solicitors or to resist admission. The Council was responsible for the preparation of a draft bill which was considered in January 1927, recommended to government and enacted later that year.*
> >
> > *In the circumstances of the above history, it is clear that the Society existed before the enactment of the 1927 legislation and the purposes of the legislation were to incorporate a private professional association and to place regulation of the solicitors' branch of the legal professional more firmly in the hands of the solicitors' own organisation; that is the Society was neither "established" by an enactment nor was it "established for a public purpose".*
> >
> > *The case of* Richards v Law Institute of Victoria *(unreported County Court, 13 August 1984), concerned an appeal pursuant to the* Freedom of Information Act *(Victoria) by a solicitor to the County Court against the failure by the Institute to produce a letter of complaint. The appeal was dismissed. The tests for application of that legislation in that jurisdiction are substantially the same as the tests under the Queensland statute.*
> >
> > *The Institute was held not to be subject to the* Freedom of Information Act *on the basis that the dominant purpose for establishment of the Law Institute was a private one to create a body corporate consisting of all solicitors who were previously members of the Law Institute or who would later voluntarily join it, to regulate the internal affairs of the solicitors' side of the legal profession. The judgment acknowledges that when established, the Institute had some public purposes but that it was not "established for a public purpose" but "was set up to regulate the affairs of its members".*
> >
> > *It is apparent that the Law Institute has received an increased range of "public purpose" powers subsequent to the enactment of the* Legal Practitioners Act *in 1917 and the same is true of the Queensland Law Society subsequent to the 1927 Act, but those additional powers are not relevant to the primary test of establishment for a public purpose. There has been no legislative change or other challenge subsequent to the* Richards

> *decision in that jurisdiction.*
>
> *The New South Wales Law Society also considers itself not caught by the* Freedom of Information *legislation in that State for reasons similar to those successfully argued by the Law Institute of Victoria in the* Richards *case. No Freedom of Information returns are lodged. The position adopted in New South Wales has never been subject to challenge.*

5. By letter dated 9 September 1993, Mr English applied to this office for review, under Part 5 of the FOI Act, of the Society's decision that it was not subject to the provisions of the FOI Act.

6. In a letter dated 13 September 1993, the Deputy Information Commissioner advised Mr English that his application for review was premature, and that the Information Commissioner lacked jurisdiction to deal with the matter at that stage, because s.73(3) of the FOI Act provides that a person is not entitled to apply to the Information Commissioner for review of a decision (other than a decision of a Minister or the principal officer of an agency) unless an application for internal review has been made in accordance with s.52 of the FOI Act. Mr English was advised that, as the decision contained in the Society's letter of 25 August 1993 was not made by the principal officer of the Society, he must first make application under s.52 of the FOI Act seeking internal review of the decision of Mr Behm.

7. By letter dated 15 September 1993, Mr English made application to the Society, under s.52 of the FOI Act, for an internal review of Mr Behm's decision. On the same day, Dr A A Tarr, Chief Executive Officer of the Society, replied to Mr English in the following terms:

> *As previously explained to you the Queensland Law Society does not believe that the provisions of the* Freedom of Information Act 1992 *are applicable to this organisation. Accordingly your request for a review pursuant to Section 52 of the legislation is ill founded.*

8. On 20 October 1993, Mr English made application, under Part 5 of the FOI Act, for review of Dr Tarr's decision.

Jurisdiction of the Information Commissioner

9. Pursuant to s.71(1)(b) of the FOI Act, the Information Commissioner has jurisdiction to investigate and review decisions of agencies and Ministers refusing, *inter alia*, to grant access to documents in accordance with applications under s.25 of the FOI Act.

10. Mr English made application for access to documents of the Society in purported reliance on s.25 of the FOI Act. The Society has refused to grant access to the documents requested, on the basis that it is not an "agency" within the meaning of the FOI Act, and hence the FOI Act does not apply to the Society. In the Society's view, the fact that it is not an "agency" as defined in the FOI Act means that Mr English was not entitled to make application to the Society under s.25 of the FOI Act, nor to seek internal review of its refusal to process his access application (nor, by extension of that logic, to apply for external review by the Information Commissioner).

11. The jurisdictional issue raised in this case is somewhat similar to that discussed in my decision in *Re Christie and Queensland Industry Development Corporation* (1993) 1 QAR 1. That case involved consideration of s.11(1)(k) of the FOI Act, which then provided that the FOI Act did not apply to the Queensland Industry Development Corporation in relation to its "investment functions". In line with the reasoning set out in *Re Christie* at p.4 (paragraph 7), the jurisdictional argument in the present case can be summarised as follows. If the Society is not an "agency" as defined in the FOI Act, then the FOI Act does not apply to it, and I have no jurisdiction to investigate and review the

Society's decision to refuse Mr English's access application. If, however, the Society is an "agency" within the meaning of the FOI Act, then these consequences would follow:

(a) Mr English would have made a valid application for access to documents under s.25 of the FOI Act;

(b) the Society would thereby have come under a legal obligation imposed by s.27(2) of the FOI Act to consider the application, and to make one or more of the decisions referred to in s.27(2);

(c) Mr English would have made a valid application for internal review in accordance with s.52 of the FOI Act, since the Society's decision refusing access was a decision which it was obliged to make by virtue of s.27(2) of the FOI Act; and

(d) the requirements of s.73, including s.73(3), would have been satisfied by the application for review lodged with the Information Commissioner by Mr English, and the Information Commissioner would have jurisdiction to investigate and review the Society's decision refusing to grant access to documents in accordance with Mr English's application under s.25 of the FOI Act.

12. Hence, whether the Society is or is not an "agency" for the purposes of the FOI Act is determinative of Mr English's rights in the present case, and it is my view that the determination of that issue is a matter falling within my jurisdiction under Part 5 of the FOI Act. Support for this view is to be found in the cases referred to in *Re Christie* at pp.5-6; paragraphs 8-12. As I said in *Re Christie* (at p.6; paragraph 13):

> *I take it therefore to be well established in law that an appeal tribunal of limited jurisdiction has both the power, and a duty, to embark upon a consideration of issues relating to the limits of its jurisdiction, when they are raised as an issue in an appeal lodged with the tribunal.*

13. By letter dated 26 October 1993, I advised the Society that, consistently with the approach which I had adopted in *Re Christie*, I proposed to undertake preliminary inquiries in accordance with s.75 of the FOI Act for the purpose of determining whether I had power to review the matter to which Mr English's application relates, i.e., whether the Society is an "agency" for the purposes of the FOI Act.

The question for determination

14. As the review has progressed, it has become clear that the participants agree that the jurisdictional question turns on whether the Society is a "public authority" within the meaning of s.9(1)(a)(i) of the FOI Act - i.e. "a body (whether or not incorporated) that is established for a public purpose by an enactment".

The relevant provisions of the FOI Act

15. The following provisions of the FOI Act are, in my view, relevant to the determination of the question in issue:

Preamble

An Act to require information concerning documents held by government to be made

available to members of the community, to enable members of the community to obtain access to documents held by government and to enable members of the community to ensure that documents held by the government concerning their personal affairs are accurate, complete, up-to-date and not misleading, and for related purposes.

4. *The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.*

...

7. *In this Act -*

*"**agency**" has the meaning given by section 8;*

...

*"**enactment**" means an Act or a statutory instrument;*

...

*"**government**" includes an agency and a Minister;*

...

*"**public authority**" has the meaning given by section 9; ...*

8.(1) *In this Act -*

*"**agency**" means a department, local authority or public authority.*

(2) *In this Act, a reference to an agency includes a reference to a body that -*

(a) forms part of the agency; or

(b) exists mainly for the purpose of enabling the agency to perform its functions.

9.(1) *In this Act -*

*"**public authority**" means -*

(a) a body (whether or not incorporated) that -

(i) is established for a public purpose by an enactment; ...

...

21. *Subject to this Act, a person has a legally enforceable right to be given access under this Act to -*

(a) documents of an agency; ... .

<u>The external review process</u>

16. On 26 October 1993, I wrote to the Society, inviting it to provide me with a written submission, setting out all facts, matters and circumstances, and any legal arguments, on which the Society wished to rely in support of its contention that it is not an agency subject to the FOI Act.

17. In that letter, I indicated that the Society's position that it was not subject to the provisions of the FOI Act (as set out in the 25 August 1993 letter from Mr Behm to Mr English) appeared to rely heavily on the decision of Dixon J of the County Court of Victoria in *Richards v The Law Institute of Victoria* (unreported, 13 August 1984). I pointed out that in a case decided six days prior to the decision in *Re Richards*, and apparently not cited to Dixon J, Deputy President Hall of the Commonwealth Administrative Appeals Tribunal had decided that the Law Society of the Australian Capital Territory was an agency subject to the *Freedom of Information Act 1982* Cth - see *Re Brennan and the Law Society of the Australian Capital Territory* (1984) 1 AAR 529; 6 ALD 428.

18. In order to assist in the focus of the Society's written submission, I also identified three points relied upon by Mr Behm, in his 25 August 1993 letter to Mr English, about which I entertained doubts:

> ...
>
> *(a)* *the relevant issue (in terms of s.9(1)(a)(i) of the FOI Act) is whether the legal entity which is the Queensland Law Society Incorporated (established by the* Queensland Law Society Act 1927*) was established for a public purpose by an enactment. The fact that there was a pre-existing body known as the Queensland Law Association does not seem to me to alter the fact that the Queensland Law Society Incorporated was established by the* Queensland Law Society Act 1927*;*
>
> *(b)* *Mr Behm's letter states that the purposes of the* Queensland Law Society Act 1927 *were to incorporate a private professional association and to place regulation of the solicitors' branch of the legal profession more firmly in the hands of the solicitors' own organisation, and therefore it could not be said that the QLS was established for a public purpose; however, it seems to me that the regulation of the solicitors' branch of the legal profession is a public purpose, whether the task be committed by statute to the solicitors' own organisation or to a Ministerial department;*
>
> *(c)* *whether it is sufficient to meet the test under s.9(1)(a)(i) of the FOI Act that a public purpose (in this case the regulation of the solicitor's branch of the legal profession for the benefit of members of the public who have dealings with solicitors) need be only one of the purposes for the establishment of a body by an enactment, i.e. that s.9(1)(a)(i) does not impose a requirement that a public purpose be the sole or dominant purpose for the establishment of a body by an enactment.*

19. In response to that invitation, the Society forwarded a written submission to me by letter dated 19 November 1993. Submissions in reply were received from Mr English under cover of a letter dated 22 December 1993.

20. In late April 1994, I brought to the attention of both the Society and Mr English a recent unreported decision of Strong J, Deputy President of the Administrative Appeals Tribunal of Victoria, which had examined the reasoning in the decisions of *Re Richards* and *Re Brennan*, and had followed *Re*

Richards in finding that the Law Institute of Victoria was not a "body corporate established for a public purpose", and therefore did not fall within the statutory definition of "prescribed authority" in the *Freedom of Information Act 1982* Vic.

21. I provided both participants with a copy of that decision (*Re Dickson and Law Institute of Victoria*, now reported at (1994) 6 VAR 237), and invited them to make any supplementary submissions they wished to make concerning *Re Dickson*. In response to that invitation, I subsequently received supplementary submissions from both the Society and Mr English.

22. Further supplementary submissions on the question for determination in this review were received from the Society (under cover of letters dated 28 January 1994, 7 October 1994, and 8 June 1995) and from Mr English (by letters dated 29 August 1994 and 13 June 1995).

Analysis of s.9(1)(a)(i) of the FOI Act

23. As indicated previously, the Society's basic contentions are that it was neither "established ... by an enactment", nor "established for a public purpose", within the meaning of s.9(1)(a)(i) of the FOI Act.

Legislative history

24. An examination of the legislative history of the FOI Act has afforded me no assistance in the interpretation of s.9(1)(a)(i). The Electoral and Administrative Review Commission's *Report on Freedom of Information* (December 1990, Serial No 90/R6) contains some discussion of the inclusion or exclusion of bodies from the ambit of freedom of information legislation (at paragraphs 8.1 - 8.5) but that discussion is too general in nature to be of any assistance in this case.

25. The Parliamentary Committee on Electoral and Administrative Review report entitled "Freedom of Information for Queensland" (18 April 1991) contains no relevant discussion concerning the scope of the definition of "public authority" (then contained in clause 8 of the draft Freedom of Information Bill, as proposed by the Electoral and Administrative Review Commission).

26. Neither the second reading speech on the *Freedom of Information Bill 1991*, nor the Explanatory Notes which accompanied it, contain any useful explanatory material in respect of s.9(1)(a)(i) of the FOI Act.

Decided cases from other jurisdictions

27. It is useful to refer to cases which have been decided under provisions, in the FOI legislation of other Australian jurisdictions, which roughly correspond to s.9(1)(a)(i) of the FOI Act. The cases most directly on point are the three decisions referred to previously (i.e. two decisions concerning the status of the Law Institute of Victoria, and one decision concerning the status of the Law Society of the Australian Capital Territory.)

28. In *Re Brennan and the Law Society of the Australian Capital Territory* (1984) 6 ALD 428, the question of whether the Law Society of the Australian Capital Territory (the ACT Society) was subject to the provisions of the *Freedom of Information Act 1982* Cth (the Commonwealth FOI Act), depended on whether the ACT Society was a "prescribed authority" within the meaning of the Commonwealth FOI Act. Relevantly, the definition of "prescribed authority" in s.4(1) of that Act included:

> *(a) a body corporate, or an unincorporated body established for a public*

> *purpose by, or in accordance with the provisions of, an enactment, other than -*
>
> *(i) an incorporated company or association.*

29. The applicant in that case argued that the ACT Society satisfied all the requirements of the definition of "prescribed authority". In response, the ACT Society submitted that, while it had been incorporated by the *Legal Practitioners Ordinance 1972*, and that Ordinance was an "enactment", the Ordinance had not "established" the ACT Society within the ordinary meaning of that word. The ACT Society contended that it had been established in 1933, when formed as an unincorporated association, and that the 1972 Ordinance had merely reconstituted, or converted, the former unincorporated association into an incorporated association.

30. The ACT Society further contended that, even if it had been "established" by the 1972 Ordinance, it had not been established "for a public purpose", arguing that the definition of "prescribed authority" in the FOI Act contemplated that the requisite public purpose would be the main or characteristic purpose for which the body corporate was established by the enactment. If this were not so, the ACT Society argued, a body corporate established for a large number of purposes, only one of which was a public purpose, would have to disclose documents relating to all its purposes, which it was submitted was unlikely to be what Parliament had intended. The ACT Society cited a number of cases on the meaning of "public authority" and similar expressions, which it argued confirmed the impression that the ACT Society was unlikely to have been the type of body intended to be covered by the Commonwealth FOI Act. Finally, the ACT Society argued in the alternative that it fell within the exception in sub-paragraph (a)(i) of the definition of "prescribed authority".

31. In his reasons for decision, Deputy President Hall reviewed the history of the ACT Society, noting that an unincorporated association known as the Law Society of the Australian Capital Territory had first been formed in 1933. After noting various developments in the history of the ACT Society from that time until 1972, Deputy President Hall stated (at pp.434-435):

> *... it was not until 1972 that the* Legal Practitioners Ordinance 1970 *was amended so as to provide for the incorporation of the Law Society, and for the conferral upon it of a wide range of functions in relation to the conduct of the legal profession in the Territory.*
>
> ...
>
> *It is appropriate to observe ... that when it assumed the wide range of self-regulatory functions conferred by the Ordinance concurrently with being constituted as a body corporate, the Law Society surrendered its autonomy over its own constitution [see s.6(6)] and, it would seem, over its own destiny. Having been constituted a body corporate by Ordinance, it presumably could not be dissolved except by the same process or, at the very least, without an amendment to its constitution - either of which process requires government approval and cooperation.*

32. On the question of whether the Society had been "established" by the 1972 Ordinance, Deputy President Hall concluded (at p.436):

> *In my view, therefore, when the Law Society was "constituted a body corporate" pursuant to s.6(1) of the Legal Practitioners Ordinance it was "established" as a body corporate within the ordinary meaning of that word. It matters not, in my opinion, that the Law Society was previously an unincorporated body established as such in 1933. For the purposes of the definition of "prescribed authority", the question is whether the Law Society is a body corporate "established (sc.* as a body

> corporate*) ... by an enactment". In my view, the Law Society clearly satisfies this requirement. It owes its existence as a body corporate to the 1972 Ordinance. It was that Ordinance that established the Society as such.*

33. Regarding the proper interpretation of the definition of "prescribed authority", the ACT Society argued that it was helpful to look at cases interpreting the expression "public authority" and that in keeping with the analysis in those cases, the ACT Society could not properly be characterised as a body in the nature of a "public authority". In response to this argument, Deputy President Hall concluded that while the question of whether the ACT Society was a "public authority" within the ordinary meaning of that expression would involve a determination of the ACT Society's status, the proper interpretation of whether the ACT Society was a "prescribed authority" depended upon a consideration of the purposes for which the ACT Society had been established, and that cases interpreting the phrase "public authority" were of little assistance in this regard.

34. In his reasons for decision, Deputy President Hall stated that, contemporaneously with its incorporation in 1972, the ACT Society had assumed a wide range of powers and functions in relation to the conduct of the legal profession in the ACT, some of which had formerly been vested in the Attorney-General (including the power to object to, and to be heard on the hearing of, applications for admission as a practitioner; powers concerning the issuance of practising certificates; powers concerning disciplinary proceedings, including the power to make complaints to the Disciplinary Committee and the power to be represented in any proceedings before the Court), or formerly vested in the Inspector of Solicitors' Trust Accounts (including powers and functions in respect of supervision of trust moneys and trust accounts, and concerning claims in respect of defalcations by solicitors and their employees).

35. After providing particulars of the relevant provisions in the *Legal Practitioners Ordinance 1972*, Deputy President Hall stated (at pp.439-440):

> *A consideration of the provisions of Ordinance No. 4 of 1972 leaves no room for doubt in my mind that the Society was established as a body corporate for the purpose of enabling it to exercise the powers and functions that were conferred upon it. The history of the events leading up to the passage of that Ordinance confirms that conclusion. Until 1972, similar powers and functions (at least in part) had been exercised either by the Attorney-General or the Inspector of Solicitors' Trust Accounts. Those powers and functions were clearly powers and functions intended to be exercised on behalf of the Commonwealth for the benefit of the public, or at least of that sector of the public having dealings with the legal profession. Those powers and functions were no less capable of being characterised as public powers and functions when they fell to be performed by the Society. By conferring those functions upon the Society, the Society, in my view, was established as a body corporate for public purposes. The fact that the Society may have, pursuant to its constitution, other objects and purposes which may not be characterised as public purposes is, in my view irrelevant.*

36. Deputy President Hall went on to find that the ACT Society had not been incorporated as an association by the 1972 Ordinance, but constituted as a body corporate, and therefore did not fall within the exception in sub-paragraph (a)(i) of the definition of "prescribed authority". He then concluded (at p.440):

> *In the result, it is my view that the Law Society is a "prescribed authority" within the meaning of the definition in s.4(1) of the Act and that, as such, it is an agency to which a request may be made in accordance with the Act for access to documents. That conclusion is, I think, consistent with the object expressed in s.3(1) of the Act*

> *and with the underlying philosophy of public accountability of bodies exercising public functions.*
>
> *There is a question (yet to be decided) whether the Law Society is an agency for the purposes of the Act in respect of all its functions or only insofar as it discharges the public purposes for which it was established as a body corporate or which have subsequently been conferred upon it. Furthermore, there has, as yet, been no close consideration given to the ambit of the applicant's request for access. Nothing I have said should be taken, therefore, as indicating any concluded view on my part as to the accessibility of the requested documents under the Act.*

37. In the result, Deputy President Hall decided that the matter should be remitted to the ACT Society for its further consideration, in light of his reasons for decision. (I note that following this decision, the ACT Society appears to have conceded its status as an agency subject to the Commonwealth FOI Act, as later proceedings involving the same parties (*Re Brennan and Law Society (ACT) (No. 2)* (1985) 8 ALD 10) involved determination by the Commonwealth AAT of the validity of exemption claims made by the ACT Society for documents which it held, and to which Mr Brennan sought access.)

38. Just six days after Deputy President Hall delivered his reasons for decision in *Re Brennan (No. 1)*, Dixon J of the County Court of Victoria delivered reasons for decision in the case of *Re Richards and the Law Institute of Victoria*, which involved a similar question of law under the *Freedom of Information Act 1982* Vic (the Victorian FOI Act). The specific question for determination in *Re Richards* was whether the Law Institute of Victoria (the Institute) was a "prescribed authority" within the meaning of s.5(1) of the Victorian FOI Act, which relevantly defined "prescribed authority" to mean:

> *(a) a body corporate established for a public purpose by, or in accordance with, the provisions of an Act, ...*

39. Dixon J found that, in determining the purpose for which the Institute was established, reference must be had to the *Law Institute Act 1917* Vic, in view of the express terms of s.16(1) of the *Legal Profession Practice Act 1958* Vic, which provided:

> *There shall be a body corporate by the name of the Law Institute of Victoria which is hereby declared to have been established and incorporated by the* Law Institute Act 1917.

40. Having examined the provisions of the *Law Institute Act 1917* (the 1917 Act), Dixon J concluded that the provisions of that Act enabled members of the public who were aggrieved by alleged misconduct by practitioners to complain to the Council of the Institute, empowered the Council to appoint a practitioner to investigate charges of professional misconduct, and empowered the Institute to refer, for inquiry, any question of professional misconduct.

41. With respect to whether a finding that a body was "established for a public purpose" necessitated that the purpose in question be the sole purpose, or merely one of the purposes, for the body's establishment, Dixon J stated (at pp.3-4 of his reasons):

> *... it seems to me that where the application of certain provisions of an Act depend upon whether a body corporate is established for a public purpose, a common sense approach to that description requires that at least one of the dominant purposes of that legislation should be seen to create a body of a public or Governmental nature.*

> *The purpose for which a body corporate was established must, I think, be gleaned principally from the Act itself. One must see what it does; what it effectuates by its provisions, in order to determine what the purpose of its establishment is or was. One also must sharply distinguish the reasons behind the incorporation from the purposes of the incorporation as revealed by the wording of the Act.*

42. Specifically with respect to the purposes for the incorporation of the Institute, Dixon J stated (at p.3):

> *... the dominant purpose for the establishment of the Law Institute was a private one, and that was to create a body corporate consisting of all solicitors who were previously voluntary members of the Law Institute, or who would later voluntarily join it, to regulate the internal affairs of the solicitors' side of the legal profession.*

43. Later in his reasons for decision, Dixon J added (at pp.5-6):

> *In my view, the term "public purposes" should be confined to what may be broadly described as Government purposes, and the Law Institute, in my view, was clearly not incorporated for Government purposes. That this somewhat narrow interpretation cannot frustrate the purposes of the Act is clear, because pursuant to the definition of "prescribed authority" in the Act, it is open to the Governor-in-Council to declare any body, whether incorporated or unincorporated, to be a prescribed authority for the purposes of the Act, if inter alia the body is one established by or under an Act of Parliament.*
>
> *The Solicitors' Disciplinary Tribunal has, in fact, already been gazetted as a prescribed authority, but I do not think it was ever intended that voluntary professional associations incorporated by law should fall within the purview of the Freedom of Information legislation ... .*
>
> *In my view, the fact that an Act which sets up an unincorporated body for predominantly private purposes also requires that body to perform one or more minor functions which might be regarded as having some public purpose does not mean that the body is established for a public purpose. The common sense answer to the question "Was the Law Institute established for a public purpose?" would be "No, it is set up to regulate the affairs of its voluntary members."*
>
> *This proposition is made more striking when one considers s.11 of the* Law Institute Act, *which committed to the Law Institute itself the sole management thereof, and s.12 which enabled the Institute to define the objects of the Institute. The objects of the Institute were left to be determined by the Institute itself, so that it cannot be said, in my view, that the Law Institute was established for a public purpose.*

44. Ten years later, the same question arose for determination by the Victorian Administrative Appeals Tribunal (which had assumed the external review jurisdiction in FOI matters formerly exercised by the County Court of Victoria), in the decision of Strong J (Deputy President) in *Re Dickson and the Law Institute of Victoria* (1994) 6 VAR 237.

45. The Institute argued that, in determining the purpose for which the Institute was established, one should look to the 1917 Act, and that in this regard the previous Victorian decision in *Re Richards* ought to be followed. The applicant contended, on the other hand, that the words "a body corporate established for a public purpose" meant "a body corporate which is established for a public purpose" or "a body corporate which exists for a public purpose". As noted by Strong J (at p.239), the applicant argued that this construction of the phrase would better promote the objects of the

Victorian FOI Act:

> *If the definition is construed in this way,* [counsel for the applicant argued]*, regard can be had to the Institute's present purposes, which are set out in the* Legal Profession Practice Act. *He said it could hardly have been Parliament's intention, when it passed the* Freedom of Information Act *in 1982, that the purpose for which a body corporate was established should be determined by reference to legislation of such antiquity - instead of the legislation which currently maintains the existence of the body corporate.*
>
> ...
>
> [Counsel for the applicant] *submitted that the construction for which he contends would promote the purpose or object underlining the Act to a greater extent than would the construction for which* [the Institute] *contends. If the Institute were to be incorporated today in the terms of the Legal Professional Practice Act, its purpose - in substantial measure, at least - would plainly be public. It would be an odd result (and one surely not intended by the Parliament) if the Institute, and other bodies corporate in the same position, could escape the operation of the Act simply because many years ago their purposes were described in different terms.*
>
> *The superficial appeal of this argument cannot be denied. But it is unsustainable unless a purposive construction of the definition of "prescribed authority" is justified.*

46. After reviewing Victorian authorities, Strong J held that the purposive construction contended for by the applicant was not justified. Strong J then stated (at pp.241-242):

> *Although the construction pressed by* [the applicant] *can be said, on one level, to better promote the purpose or object underlining the Act, it must also be said that such a construction would lead to uncertainty. A body corporate might be an agency at some stage during its history, but at some other stage not. It would depend whether at the time the Freedom of Information request was made the body corporate existed for a public purpose. Such uncertainty would be troublesome.*
>
> *I have concluded that although the construction for which* [the Institute] *contends is arguably unintended, it is not obviously so - especially having regard to the omission of the legislature to amend the definition and the uncertainty which such an amendment would produce.*

47. In determining whether the Institute was established for a public purpose, Strong J considered that he must confine himself to an examination of the 1917 Act (and, if necessary, the relevant parliamentary debates). He noted that it was important to distinguish between the Institute and the Statutory Committee, which had also been established by the 1917 Act, and which in Strong J's view, clearly was established for a public purpose (to consider allegations of misconduct against practitioners). Strong J ultimately found that, so far as the Institute was concerned, the 1917 Act was concerned with the internal management and government of the Institute, and did not give the Institute any powers, or impose upon it any duties, that would justify the view that it was established for a public purpose. Hence, the Institute was not an "agency" for the purposes of the Victorian FOI Act.

History of the Society

48. In light of the matters discussed in the three cases referred to above, and for a proper understanding of the submissions lodged by the participants in this review, it is helpful to set out relevant particulars of the history of the Society. Both Mr English and the Society made reference in their submissions to a text entitled The Queensland Law Society Inc 1928-1988: A History, by Ms Helen Gregory, which was published by the Society in 1991. That text contains extensive discussion of the circumstances leading up to the incorporation of the Society as of 1 April 1928, including reference to relevant excerpts from the *Hansard* record of debates in the Legislative Assembly concerning the Queensland Law Society Bill of 1927.

49. From those sources, I have established that an unincorporated body called the Queensland Law Society was formed in 1873, but ceased to exist in 1880. Subsequently, a voluntary association called the Queensland Law Association was formed in 1883, and until 1928 that Association remained the professional entity concerned with matters affecting Queensland solicitors. The *Queensland Law Society Act of 1927*, which received the Royal Assent on 17 December 1927, and came into force on 1 April 1928, created a body corporate called the "Queensland Law Society Incorporated".

50. The Preamble to the *Queensland Law Society Act of 1927* (the 1927 Act) stated:

> *An Act to provide for the Incorporation of the Queensland Law Society, to make Further Provision for Regulating the Legal Profession in Queensland, and for Other Purposes incidental thereto and consequent thereon.*

51. Subsection 3(1) of the 1927 Act provided for the Society's incorporation, and specified that the Society's membership was to consist of all persons who at the commencement of the 1927 Act were members of the Queensland Law Association, and those persons becoming members of the Society after the commencement of the 1927 Act. In addition, the 1927 Act also contained provisions which:

> granted the Society perpetual succession, the capacity to sue and be sued, the capacity to acquire, receive and hold real and personal estate, and the capacity to dispose of or mortgage its property *[s.3(3)]*;
>
> vested in the Society all property formerly belonging to, and all obligations formerly incurred by, the Association *[s.3(4)]*;
>
> for the good government of the Society, established a council of the Society, of 8 to 11 persons, including one member of the legal profession appointed by the Minister *[s.4(1)]*;
>
> conferred on the council the power to make, amend, and revoke rules for a number of purposes, including to define the objects of the Society *[s.4(9)(i)(a)]*;
>
> provided that rules and by-laws made by the council were to be approved by the Governor in Council, by Order in Council, and published in the *Gazette*, and that thereupon, such rules and by-laws *"shall have the same force and effect as if they were embraced in and formed part of this Act, and shall be judicially noticed, and shall not be questioned in any proceedings whatever." [s.4(9)(ii)]*;
>
> gave the council a right of audience before the Statutory Committee (established under s.5 of the Act), or any court, in any matter affecting the interests of the Society or its members, or in which the Society was directly or indirectly concerned or interested *[s.4(10)]*, and the right to institute or defend proceedings, including, in particular, prosecutions or proceedings

for breaches of the 1927 Act or any statute or rules relating to the practice of law *[s.4(11)]*;

established a committee of council, called "The Statutory Committee of the Queensland Law Society Incorporated", for the purpose of hearing charges of illegal or professional misconduct upon the part of practitioners, whether such practitioners are members of the Society or not *[s.5(1)]*;

established offences of "illegal practices", including pretending to be, implying, or holding oneself out to be a duly qualified practitioner *[s.6]*;

vested in the Society the power to bring action to recover monies payable under the rules and by-laws of the Society or of the council, or under the Act *[s.7]*; and

provided for the recording of minutes of the proceedings and resolutions of the Society and of the council, and for the entering of such minutes in evidence *[s.8]*.

52. Subsequently, the *Queensland Law Society Act Amendment Act of 1930* was passed, adding to the Act Part II (containing provisions for the establishment and administration of the Legal Practitioners' Fidelity Guarantee Fund) and Part III (containing provisions relating to the issuing of Annual Practising Certificates to practising solicitors, and related matters).

The constituent elements of s.9(1)(a)(i)

53. The relevant part of the definition of "public authority" in s.9(1)(a)(i) of the FOI Act contains a number of separate elements, each of which must be addressed in analysing the provision:

(1) whether the Society is "a body (whether or not incorporated)"

(2) the meaning of "is established for a public purpose by an enactment", which involves consideration of:

(a) the significance, if any, of "is" (the 'temporal element');

(b) the meaning of "established ... by an enactment"; and

(c) the meaning of "established for a public purpose", including -

(i) the significance of the word "a"; and

(ii) the meaning of "public purpose".

Whether the Society is "a body (whether or not incorporated)"

54. No issue was taken by the Society in regard to this element of the definition of "public authority" in s.9(1)(a)(i), and I find that, by virtue of the Society's status as a body corporate, it satisfies this element of the relevant definition.

The significance of the present tense verb form "is" (the 'temporal element')

55. The relevant definitions of "prescribed authority" in s.4(1) and s.5(1), respectively, of the Commonwealth and Victorian FOI Acts, are framed in terms of "a body ... established", and thus do not explicitly raise for consideration the temporal issue raised by the inclusion in s.9(1)(a)(i) of the Queensland FOI Act of the present tense "is established".

56. Mr English argued that the explicit use of the present tense in s.(9)(1)(a)(i) of the Queensland FOI Act was significant, and meant that in determining the purposes for the Society's establishment, one must look not only to the situation which existed at the time of the Society's incorporation in 1927, but also at the Society's present activities. In support of his contention in this regard, Mr English referred to several decisions of the High Court of Australia (*Brookton Co-operative Society Limited v Commissioner of Taxation* (1981) 147 CLR 441; *A & S Ruffy Pty Ltd v Federal Commissioner of Taxation* (1958) 98 CLR 637 at 656; *Renmark Fruitgrowers Co-operated Ltd v Federal Commissioner of Taxation* (1969) 121 CLR 501), which had involved consideration of the phrase "is established ... for the purpose", as contained in s.117(1) of the *Income Tax Assessment Act 1936* Cth.

57. Mr English contended that the cases to which he referred stood for the proposition that the use of the present tense indicated that, in determining whether a body "is established" for a particular purpose, the relevant date is the date of consideration of that question and not the date when the body was initially created. In the particular circumstances of the present case, Mr English submitted that to determine the purposes for the Society's establishment, one must therefore look not only to the situation existing at the time of the Society's incorporation in 1927, but also at the Society's present activities.

58. In response, the Society argued that the taxation cases cited by Mr English were clearly distinguishable from the present situation involving the Society, as the taxation cases involved the determination of a body's tax liability in a given year, which was clearly dependent upon the purposes of the body in the relevant tax year. I think the Society's point, in that regard, is correct. In the present case, the Society argued that the phrase "is established" must be interpreted according to its normal meaning in the context of the FOI Act:

> *In the Society's submission it is clear that one must take account of the purpose and intent of Parliament at the time it turned its mind to enacting the legislation establishing the Queensland Law Society. The purpose and intent behind the establishment and the creation of powers for a company or other entity are clearly of no relevance in the interpretation of the words "is established" for the purposes of determining liability under the* Income Tax Assessment Act *in any particular year* [emphasis in original]. *It is an entirely distinct issue to consider why Parliament has established a particular body and for what purpose - that is an assessment which must be made within the context of the time at which the body was established and not by some post facto assessment of purposes and functions that may have been subsequently added.*

59. The Society referred to the comments which had been made by Strong J in *Re Dickson* (in the passage reproduced at paragraph 46 above) about the "troublesome uncertainty" which would attend the adoption of an interpretation which could result in a body corporate being an agency for the purposes of the FOI Act at some stage during its history, but not constituting an agency at some other stage. The Society further stated:

> *It cannot be said that in passing Freedom of Information legislation the Parliament would have intended that an indeterminate group of organisations would be covered by its provisions, some covered one year and not in others, while some passing chrysalis-like from one status to another, depending on whether they could or could not at a particular point in time be said to exist for a public purpose.*

60. In my opinion, both the Society (and Strong J) have overstated the extent of any uncertainty that might arise from the interpretation contended for by Mr English (and by the applicant in *Re Dickson*). The passage of legislation to confer on a body responsibility for discharging "public

purposes", whether the body was initially established for "a public purpose" or not, is not a frequent occurrence. I do not think there would be any great difficulty for a body (after the passage of any legislation affecting it) in assessing the functions which (at least until the passage of further relevant legislation) it is required by statute to undertake, and assessing whether in light of those functions it can be said to exist for "a public purpose".

61. I consider that the cases to which I have been referred by Mr English are of little assistance in the determination of the question before me, as I agree with the Society's submission that my analysis of the relevant provision of the FOI Act must involve consideration of that provision in the specific context of the FOI Act. Nevertheless, the use of the words "is established" in s.9(1)(a) of the FOI Act, rather than simply "established", remains curious if, as the Society contends, s.9(1)(a) is intended to direct attention to the purposes for establishing a body at the time of its establishment, rather than the purposes for which a body is presently established. As it turns out, the view which I have ultimately come to (see paragraphs 90-92 below) would not be affected by a preference for Mr English's submission over the Society's submission (or vice versa) on the issue of whether any significance is to be accorded to the legislature's use of the words "is established" in s.9(1)(a) of the FOI Act.

62. I incline to the view that, in the specific context in which the present tense verb form "is" is employed in s.9(1)(a)(i) of the FOI Act, it has no temporal connotation, but is merely descriptive of the purpose for establishment of the body in question. If, however, there is any significance in the use of the words "is established" rather than "established", I think it must lie in permitting regard to be had to whether a body established by an enactment (whether for a public purpose or not, at the time of its establishment) has subsequently been conferred by statute with powers, functions, or duties for a public purpose, or for additional public purposes. If that is the correct interpretation, then my conclusion at paragraphs 90-92 below would be reinforced because, since its establishment, the Society has been progressively conferred by statute with additional powers, functions and duties which, in my opinion, were clearly conferred for public purposes (e.g. administration of the Legal Practitioners' Fidelity Guarantee Fund and other functions referred to in paragraph 93 below).

<u>The meaning of "established ... by an enactment"</u>

63. With regard to this element of the relevant definition in s.9(1)(a)(i), the Society adopted the same line of argument as that advanced by the ACT Society in *Re Brennan*; namely, that the relevant enactment which had provided for the Society's incorporation (i.e. the 1927 Act), had not "established" the Society, but had merely re-constituted the pre-existing private, voluntary and unincorporated Queensland Law Association in an incorporated form, to provide the Society with a statutory foundation to better carry out its functions. In support of this argument, the Society referred specifically to s.3(1) of the 1927 Act (which it stated had no counterpart in the Commonwealth legislation considered in *Re Brennan*), and s.3(4) of the 1927 Act. (Those two sub-sections of the 1927 Act provided for, respectively, the membership of the Society (which was to comprise the membership of the Association at the time of the commencement of the 1927 Act, and all future members of the Society) and the transfer to the Society of all property held by the Association, as well as the assumption by the Society of all obligations and liabilities of the Association.)

64. In reply, Mr English noted that s.36 of the *Acts Interpretation Act 1954* Qld contains the following definition of the word "establish": ***"establish"*** *includes constitute and continue in existence."* In Mr English's view, while the Society at the time of its incorporation in 1927 had substantially the same membership as the former Queensland Law Association, its powers were far different from those of the former Association, and for this reason could not be considered to have been "merely re-constituted" under the 1927 Act.

65. I note that this particular issue did not arise for determination in the Victorian cases, *Re Richards* and *Re Dickson*, since, as stated in *Re Richards*, s.16(1) of the *Legal Profession Practice Act 1958* expressly provided that the Law Institute of Victoria was declared to have been established and incorporated by the *Law Institute Act 1917*, and accordingly, reference to the 1917 Act was necessary in order to determine the relevant question of whether the Institute was *"a body corporate established for a public purpose by or in accordance with the provisions of an Act"*.

66. My research has disclosed only one reported case involving the interpretation of the definition of "establish" in s.36 of the *Acts Interpretation Act 1954* Qld. That case, *Ipswich & West Moreton United Friendly Societies Dispensary v Minister for Health* [1994] 1 Qd R 375, involved consideration of provisions in the *Pharmacy Act 1976* Qld concerning statutory limitations on ownership of pharmacies, and in particular provisions in s.30(3)(a)(ii) and s.30(7) of that Act which, when read together, permitted the "establishment" of a pharmacy by a registered friendly society, with Ministerial approval.

67. The specific question for determination in that case was whether the word "establishment", as used in s.30(3)(a)(ii) and s.30(7) contemplated only the starting up of a new business, or whether it also included the acquisition of an existing business. The applicant in that case relied on the definition of "establish" in s.36 of the *Acts Interpretation Act* as authority for taking an expansive view of the word "establishment", to include not only the development of new pharmacies, but also the acquisition of existing pharmacies. However, in his decision, Shepherdson J noted that there had been no definition of "establish" in s.36 of the *Acts Interpretation Act* prior to 1991 (the relevant definition having been inserted by s.32 of Act No. 30 of 1991), and thus the wording of s.30 of the *Pharmacy Act 1976* had not been drafted by reference to any statutory definition of "establish". Shepherdson J held that the word "establishment", as used in s.30(3)(a)(ii) and s.30(7) of the *Pharmacy Act 1976*, must be interpreted according to its normal meaning, in the context of the relevant legislative framework as a whole. On reading s.30 as a whole, Mr Justice Shepherdson was satisfied that the word "establishment" was employed in a prospective sense only, and therefore applied only to the establishment of new pharmacies, and did not also extend to the acquisition of existing pharmacies.

68. By contrast to the situation dealt with in that case, the present case involves the interpretation of the relevant form of the word "establish" as employed in the FOI Act, which was enacted after a statutory definition of "establish" was added to the *Acts Interpretation Act* in 1991. With respect to the proper interpretation of the word "establish" in the context of the present case, I find persuasive the line of reasoning advanced by Deputy President Hall in *Re Brennan* (at pp.435-437) in the passage set out at paragraph 32 above.

69. I am of the view that, in interpreting the word "by" according to its ordinary meaning in the context of s.9(1)(a)(i) of the FOI Act (i.e. in the phrase "a body that ... is established ... by an enactment"), it signifies that the establishment of the body in question (as a body corporate, or as an unincorporated body) must be effected by, i.e. directly provided for in, an enactment. The unincorporated body known as the Queensland Law Association, which existed from 1883 until 1 April 1928, did not derive its status as such from any enactment, and hence was not "established [as an unincorporated body] by an enactment". In direct contrast, the Society's status as a body corporate, since 1 April 1928, derives entirely from the 1927 Act. The Society was "established" (or alternatively, to use the included terms in the definition of the word "establish" in s.36 of the *Acts Interpretation Act*, "constituted" or "continued in existence") <u>as a body corporate</u> by s.3(1) of the 1927 Act.

70. I find, therefore, that the Society is *"a body (whether or not incorporated) that ... is established ... by an enactment"*, within the meaning of those words in the definition of "public authority" in s.9(1)(a)(i) of the FOI Act.

<u>The meaning of "established for a public purpose"</u>

71. With respect to the proper interpretation of the expression "public purpose", both Mr English and the Society provided extensive submissions on the applicability to the determination of this question of a number of decisions of the High Court of Australia interpreting the meaning of the phrase "public authority" (e.g. *Renmark Hotel Inc v Federal Commissioner of Taxation* (1949) 79 CLR 10; *Western Australian Turf Club v Federal Commissioner of Taxation* (1978) 139 CLR 288; *The Committee of Direction of Fruit Marketing v The Delegate of the Australian Postal Commission* (1980) 144 CLR 577; *Re Anti-Cancer Council of Victoria & Ors, ex parte State Public Services Federation* (1992) 175 CLR 442).

72. I agree, however, with Deputy President Hall in *Re Brennan* (at pp.438-439), that it is unnecessary to follow the approach adopted in cases which have interpreted the undefined phrase "public authority" in a variety of statutory contexts:

> *Whether the Law Society is a "public authority" within the ordinary meaning of that expression involves a determination of the* status *of the Society. In respect of a body such as the Law Society having a variety of functions, all the relevant circumstances have to be weighed in the balance. ...*
>
> ...
>
> *By contrast, the focus of the definition of "prescribed authority" is upon the purpose or purposes for which the Law Society was established as a body corporate. If those purposes are characterisable as public purposes, that is sufficient to satisfy the definition. No question of balancing those public purposes against any private purposes of the Law Society arises.*
>
> *I find it unnecessary therefore, to decide whether the Law Society is a public authority in the ordinary sense of those words. In my view, the answer to the question that arises for my decision is to be found within the language of the definition of "prescribed authority" by a consideration of the purposes for which the Society was established as a body corporate.*

73. The cases which have interpreted the phrase "public authority" in a variety of statutory contexts are, nevertheless, of general assistance in interpreting the adjective "public" in the phrase "public purpose", as contained in s.9(1)(a)(i) of the FOI Act. Also of general assistance are those cases in which Australian courts have considered the phrase "public purpose", again in a variety of statutory contexts, but most commonly in cases involving the compulsory acquisition/resumption of land for public purposes (*Wheeler & Anor v Kelly & Ors* (1956) 94 CLR 206; *Tinker Tailor Pty Ltd v Commissioner For Main Roads* [1960] ALR 588; *Clunies-Ross v Commonwealth of Australia & Ors* (1984) 55 ALR 609) or exemption from liability to pay rates on land used for public purposes (e.g. *Council of the Municipality of Randwick v Rutledge & Ors* (1959) 102 CLR 54; *State Government Insurance Office v City of Perth* (1987) 71 LGRA 123).

74. With this assistance, and paying appropriate regard to the specific legislative context in which it appears, I think the meaning of the phrase "public purpose" in s.9(1)(a) of the FOI Act is relatively straightforward. The word "purpose" directs attention to the objects or aims for which a body has been established as evidenced by the relevant powers, functions or duties conferred on it by Parliament. The word "public" imposes a requirement that a purpose be one for the benefit of members of the community generally (or a substantial segment of them, e.g. those who have dealings with solicitors).

75. For my part, I entertain no doubt that regulation of the practice by solicitors of their profession, for

the protection of members of the public who deal with solicitors (and pursuant to statutory powers, functions and duties conferred for that purpose) qualifies as a public purpose within the meaning of s.9(1)(a) of the FOI Act. It is a well-established principle that disciplinary proceedings against legal practitioners have as a primary object the protection of members of the public from professional misconduct: see *Walter v Council of Queensland Law Society Inc* (1988) 62 ALJR 153 at p.157; *Wentworth v New South Wales Bar Association* (1992) 66 ALJR 360 at p.363. Further, I draw attention to what was said by a Full Court of the Supreme Court of Victoria in holding that the Law Institute of Victoria is entitled to take objection to the production of documents in legal proceedings on the ground of public interest immunity. In *Law Institute of Victoria v Irving & Ors* [1990] VR 429 at p.437, the Full Court said:

> *The Institute is a corporate entity charged with the performance of statutory duties. Those statutory duties include regulating the behaviour of solicitors, ensuring that only qualified persons are permitted to practise as solicitors, protecting moneys held by solicitors on behalf of members of the public, administering the Solicitors Guarantee Fund from which payments can be made to members of the public who have suffered at the hands of defaulting solicitors, taking appropriate proceedings against solicitors guilty of misconduct to ensure they cause no further loss to members of the public, ensuring that solicitors are insured against liability in respect of their own negligent conduct and generally protecting the reputation of the legal profession.*
>
> *In our opinion, all those duties can properly be said to be exercisable in the public interest.*

(The Full Court did not refer to *Re Richards*, nor thus to the apparent incongruity between its finding and the fact that the Institute had been held in *Re Richards* not to have been established for a public purpose. I should note, however, that the Full Court was assessing the position of the Institute under the *Legal Profession Practice Act 1958* Vic, whereas *Re Richards* was confined to an examination of the purposes of the *Law Institute Act 1917* Vic.)

76. Regarding the significance of the inclusion of the word "a" in the phrase "for a public purpose" employed in s.9(1)(a)(i) of the FOI Act, Mr English contended that the inclusion of the word "a" was significant, and meant that a body would be properly characterised as coming within the terms of s.9(1)(a)(i) if any one of the purposes for which it is established is properly characterisable as a public purpose, no matter how many other purposes for the body's establishment there might be.

77. The Society submitted that Mr English's argument is not sustainable, either on the interpretation of s.9(1)(a)(i) of the FOI Act in isolation, nor when that provision is considered within the context of the background and intended effect of the FOI Act as a whole. The Society argued that s.9(1)(a)(i) contemplates that the requisite public purpose must be the primary or fundamental purpose for the establishment of the body in question, and not a public purpose which is ancillary to other purposes which are properly characterisable as private purposes. To conclude otherwise, in the Society's view, would have the effect of requiring a body established for a number of purposes, only one of which was a public purpose, to grant access under the FOI Act to documents pertaining to all of its purposes (which was unlikely to be what the legislature intended).

78. I prefer the view taken by Dixon J in *Re Richards* (at pp.3-4) that, in determining whether a body is established for a public purpose, the correct test to employ is whether at least one of the "dominant purposes" for its establishment is a public purpose. There may be some difficulty, however, with the use of the word "dominant" in this context, since its primary meaning is "ruling, prevailing, most influential": arguably there can be only one of two or more purposes which is the dominant of those purposes. I think Dixon J's basic idea is better captured by the use of the word "major" rather than

"dominant". Therefore, in determining whether a body is established for a public purpose, I consider the correct test to employ is whether at least one of the major purposes for its establishment (as distinct from minor or ancillary purposes) is a public purpose. I consider that this test strikes an appropriate balance between serving the FOI Act's underlying philosophy of public accountability of bodies exercising public functions, and the concern expressed in the last sentence of the preceding paragraph. My view is reinforced by the fact that the Queensland Parliament has seen fit to provide that some public authorities should be subject to the FOI Act in respect of certain functions but not others (see s.11(1)(m), (n) and (p) and s.11A of the FOI Act) and has reserved a regulation-making power which permits certain functions of an agency to be prescribed by regulation as functions which are not subject to the FOI Act (see s.11(1)(q) of the FOI Act and s.5A of the *Freedom of Information Regulation 1992* Qld).

79. In practical terms, different results could emerge from the application of a "major purpose" test rather than the test of "primary or fundamental purpose" favoured by the Society, but in the present case I consider that the same result follows from the application of either formulation, for reasons which I explain below.

Application of general principles

80. In light of the conclusions which I have reached concerning the meaning of the constituent elements of the relevant definition of "public authority" in s.9(1)(a)(i), the question which I must determine calls for an examination of whether the major purposes for which the Society was established as a body corporate, by an enactment (the 1927 Act), were public or private in nature.

81. The Society has made extensive submissions in this case, in an effort to persuade me that its incorporation was for private purposes, and that any public benefits which flowed from that were purely incidental. In discussing the historical background to the passage of the 1927 Act, the Society stated:

> *It was the Association which as a private professional body sought a more suitable structure to carry out its functions with an ever-growing profession. ... Quite simply the structure of an unincorporated voluntary association was seen by the Council of the Queensland Law Association as no longer appropriate if it were to continue to exert authority over the profession. It was the Association which asked the Attorney-General of the day to include provision for practising certificates and for penalties for practising without a certificate. One of the most serious weaknesses of the old voluntary associations in New South Wales and Victoria as well as Queensland had been their inability to compel solicitors who did not want to join to abide by Council decisions.*
>
> *In sum, the history of the Society's incorporation amply demonstrates that it took place to further the private purposes of the Queensland Law Association and that any public benefits flowing from that were purely incidental. In no sense can it be said that in such context the Society was "established for a public purpose".*
>
> ...
>
> *Ultimately, solicitors are professionals by and large in private practice and look to their Society to carry out a broad range of functions to represent them in a "trade union" capacity, to promote the use of their services, to assist individual members in maintaining a high standard of professional expertise and so on. There is also the disciplinary function of the Society and this is a function which pre-dated incorporation and has always been a central part of the self-regulatory nature of the profession. Whilst there are undoubtedly public benefits which flow from regulation*

of the profession, the profession has always strongly perceived a fundamental self-interest in maintaining professional integrity and standards. That there is a benefit to the community in also maintaining those standards is unquestioned, but in the view of the Society it is not correct to say that the Society was established for a public purpose, that public purpose being the regulation of the profession.

82. The Society also stressed that it is an *"independent professional body subject to the governance of its elected Council"*, and sought to minimise the significance of the inclusion of the Society in the definition of "public authority" under the *Financial Administration and Audit Act 1977*, the presence on the Council of the Society of a representative of the Attorney-General, and the statutory requirement (initially imposed by s.4(9)(ii) of the 1927 Act; now see s.5A(2) of the *Queensland Law Society Act 1952*, Reprint No. 1) that rules and by-laws passed by the Council of the Society must be approved by the Governor in Council:

> *The Queensland Law Society is an integral component of the independent legal profession in this State. The Queensland Law Society, in common with similar Societies throughout the Commonwealth, performs a very different function to that of government and quasi-government regulatory bodies. It has long been considered in Australian society that there is a fundamental need for an independent legal profession. An independent profession, albeit one whose members are required to adhere in particular areas to certain statutorily imposed standards of behaviour, is a hallmark of a democratic society. The status of law societies in Commonwealth jurisdictions has always been one consonant with the independence of the profession itself. This is entirely consistent with the Queensland Law Society requesting and receiving over a period of years statutory authority to better carry out certain of its tasks.*
>
> *...*
>
> *It is, in the Society's view, difficult to see how the fundamental quality of independence possessed by the Society can be said to have been lost because it has sought and received statutory authority to carry out certain of its functions. If an independent and self-regulating legal profession is considered a basic component of our society, it is difficult to see how the body charged with the task of overseeing the self-regulation of that independent profession can be considered by any definition, including that in the* Freedom of Information Act*, to be an agency of Government. With respect, this appears to be entirely inconsistent.*
>
> *...*
>
> *... the presence of the Attorney-General's nominee on the Council, a Council of 17 persons, is indicative of the independence of the Society and indeed the profession as a whole. Far from being an agency of Government in any shape or form, here there is clear recognition that the only relationship which Government maintains with the decision-making organ of the Society, the Council, is its nomination of a single individual to sit on that Council, thereby providing a liaison point between the Attorney-General and the Council of the Society. That person is not in any way a member of Government authority, but is a member of the private profession and votes at Council meetings independently of the direction or control of the Government.*

83. Emphasising what it considered to be the essentially private nature of its tasks or functions, the Society submitted:

> *... the Society performs a very extensive range of functions for and on behalf of its private membership, functions which remain at the core of the Society's activities. These activities include provision of representation for and on behalf of its members to Government, industry and the community on a wide range of issues; promotion of the use of its' members professional services; provision of financial and other services to members; provision of educational facilities, seminars and publications; public relations and marketing activities, etc.*

84. Finally, the Society mentioned the consequences which would flow from a determination that it was an agency for the purposes of the FOI Act, and stated that such an outcome would be inconsistent with the objects of the FOI Act, as expressed in s.4:

> *... it is difficult to gather, either from the Act itself or from the Minister's Second Reading Speech, that the Act was ever intended to extend to provide access to information held by a body by and large carrying out functions for and at the direction of its private membership, where such organisation's activities might also in certain areas be said to have some public purpose.*
>
> *An interesting consequence of an interpretation which saw the Queensland Law Society characterised as an agency for the purpose of [the FOI] legislation would be that it would be required to make available for inspection and purchase copies of its most recent statement of affairs and "each of its policy documents". Clearly, these documents would not simply be those which could be characterised as relating to some public purpose served by the activities of the Society, but would indeed extend to all the activities of the Society, such activities being overwhelmingly private. Section 18 outlines a very detailed list of information concerning the affairs of agencies which must be made available to the public. When one considers the nature of Sections 18 and 19 and the very detailed and extensive range of information that agencies are required to make available to the public, can it be reasonably concluded that there was ever the contemplation that such legislation would attach to an organisation which was not an organisation predominantly carrying out activities of a public nature, whether in a direct governmental or quasi-governmental manner? In this regard the words of His Honour Judge Dixon in the near identical Victorian situation deserve restatement - "I do not think that it was ever intended that voluntary professional organisations or associations incorporated by law should fall within the purview of the Freedom of Information Legislation".*

85. While I appreciate the force with which the Society has advocated its position, I do not find its arguments persuasive on the specific question before me. As indicated at paragraph 50 of this decision, the designated statutory purposes for the passage of the 1927 Act, as set out in the Preamble to that Act, included the incorporation of the Society, and "making further provision for regulating the legal profession in Queensland". The express provisions of the Act in relation to the regulation of the legal profession which were conferred on the Society contemporaneously with its incorporation included the following powers and functions:

> institution of proceedings for breaches of the 1927 Act (including the provisions of s.6 of the Act relating to "illegal practices"), or of any statute or rules relating to the practice of law;
>
> institution of proceedings for breaches of s.41 of the *Supreme Court Act* 1867 (which regulated conveyancing);

of its own motion, referring to the Statutory Committee of the council any question as to the conduct of any practitioner which appeared to the council to require investigation;

acting as complainant with respect to any investigation resulting from such reference.

86. I consider it significant that the Society's regulatory powers extended not only to those practitioners who were members of the Society, but to all practising solicitors in Queensland. The significance of this broad mandate was expressly referred to in the second reading speech made by the Attorney-General, the Honourable J Mullan, concerning the *Queensland Law Society Bill 1927*, on 8 November 1927 (see *Hansard*, pp.825-826):

> *The Bill which it is proposed to introduce will provide for the incorporation of the Queensland Law Society and the regulation of the legal profession. The Queensland Law Society is merely a voluntary body, at present having no statutory control over its members, and therefore, it is not in the position to discipline its members or other members of the legal profession outside the Law Society who may be guilty of professional misconduct. We propose to remedy this. The Law Society will become a body corporate having the power to sue and be sued; and machinery will be set up which will enable it to deal with any of its members who may be guilty of professional misconduct, and who now really, by their actions, bring the legal profession into disrepute. No men in Queensland have greater confidence or trust reposed in them than the members of this profession, whose clients impart to them information of the utmost importance. They are daily called upon to transact business running into very large sums of money, involving sometimes the life savings of their clients. It will, therefore, be seen that it is absolutely necessary that the members of the legal profession should be men of the highest character and integrity. I frankly admit that the overwhelming majority of the members of the legal profession come up to the requirements; but, unfortunately, like every large body of men, there are a few black sheep among them - men who are prepared to prey upon the easy victims they sometimes meet. This Bill gives the power to deal with these men.*
>
> ...
>
> *I hope that when the Bill is passed, the Law Society, which will then be incorporated, will take such advantage of it that it will ruthlessly root out of this honourable profession men who are not acting as honourably as they should.*
>
> *In my capacity as Attorney-General, I have had occasion to write to the Law Association complaining of the actions of some of its members - actions perhaps not sufficiently serious to justify striking them off the roll, but still sufficiently serious to merit disapproval. The Public Curator in his work has also had occasion to write complaining of the actions of solicitors in different parts of Queensland, but, unfortunately, as the President of the Law Association pointed out to me in response, the Association has no power to deal with such cases since it is not a corporation.*

87. I note that, in response to questions during the course of the legislative debates concerning the Bill, the Attorney-General stated that the Bill's provisions would apply to solicitors, legal practitioners (i.e. barristers acting as solicitors), and conveyancers, but would not apply to barristers because *"they do not handle the money of clients in the same way as solicitors"* (see *Hansard*, p.826), and confirmed that the intention of the Bill was to provide mechanisms for dealing with not only those who were members of the Society, but all practitioners.

88. Further, I note that in his remarks during the legislative debates concerning the Bill, the Attorney-General discussed the significance of the mechanism provided for approval of rules and by-laws passed by the Council of the Society (see *Hansard*, 15 November 1927, p.1000):

> *A further important duty of the council will be to make rules for the administration of the society; also to amend or revoke rules. In turn, we have a further safeguard here for the Government and for the people in that the Governor in Council will have to approve of these rules before they become effective. The Governor in Council will not only have power to approve of rules but to revoke any rule that is found to be inimical to the welfare of the community.*

89. I also find significant the history of the inclusion in the 1927 Act of the provisions of s.6, dealing with "illegal practices", which were not included when the 1927 Act was originally introduced in Bill form, but were subsequently added when the Bill was considered in Committee. The *Hansard* record for 22 November 1927 (at p.1165) contains the following exchange:

> *[Mr KING (*Logan*)] ... To make this Bill perfect, power should be given to the Queensland Law Society Incorporated to deal with persons who hold themselves out as professional men. ... I would ask the Minister to give earnest consideration to its inclusion here.*
>
> *The ATTORNEY-GENERAL (Hon J Mullan (*Flinders*): I have studied the amendment, and recognising that it will be more in the interests of the public than of the profession, I accept it.*

90. In light of all of the above, I find that the major purpose, indeed the "primary or fundamental" purpose, for the incorporation of the Society, as provided for in the 1927 Act, was clearly to bring into existence a statutory framework for the effective regulation of the solicitors' side of the legal profession in Queensland, for the ultimate benefit of the people of Queensland, or at least of that sector of the public having dealings with members of the solicitors' side of the profession, or with persons holding themselves out to be practitioners.

91. As I have said at paragraph 75 above, I consider that this is a public purpose within the meaning of s.9(1)(a) of the FOI Act. The essentially private purposes of the Society, of the kind described in the passage quoted at paragraph 83 above, were, and still are, quite capable of being carried on by a voluntary association, or perhaps, since 1981, by a body incorporated under the *Associations Incorporation Act 1981* Qld. The major purpose, indeed, in my view, the primary or fundamental purpose, of establishing the Society as a body corporate by an enactment was to give it the authority, and the statutory powers and duties, to effectively regulate the practice of their profession by all solicitors in Queensland, and not just voluntary members of the Society.

92. I therefore find that the Society is a "public authority" within the meaning of s.9(1)(a)(i) of the FOI Act, and is therefore an agency to which applications may be made under Part 2 (regarding publication of Statements of Affairs and policy documents), Part 3 (access to documents) or Part 4 (amendment of information) of the FOI Act. I consider that my conclusion in this regard is consistent with the underlying philosophy of the FOI Act, in ensuring the public accountability of bodies, such as the Society, which exercise public functions.

93. Should it be relevant (for the reasons discussed in paragraph 62 above), I note that, since the Society was established, amendments to the *Queensland Law Society Act* have conferred on the Society additional powers, functions and duties, which in my opinion have also been conferred for public purposes, i.e. to benefit and/or protect members of the public who deal with solicitors, notably:

power to make rules "to provide for and with respect to indemnity against loss arising from claims in respect of every description of civil liability incurred by a practising practitioner or former practising practitioner" (see s.5A(1)(ha) and s.5(A)(5), (6) and (7) of the *Queensland Law Society Act 1952*, Reprint No. 1);

power for the Council of the Society to assume control over practitioners' trust accounts and appoint receivers of trust property (see s.10, s.11 and s.11A of the *Queensland Law Society Act 1952*);

responsibility for administration of the Legal Practitioners' Fidelity Guarantee Fund (see Part 3 of the *Queensland Law Society Act 1952*);

power to appoint accountants to conduct audits of practitioners' trust accounts (see s.31 of the *Queensland Law Society Act 1952*);

responsibility for administration of the General Trust Accounts Contribution Fund and Grants Fund, which are liable to be distributed for such beneficial public purposes as funding the Legal Aid Commission of Queensland and the Public Defender (see s.36E of the *Queensland Law Society Act 1952*) and as grants for objects which are mostly for the benefit of the public (see s.36O of the *Queensland Law Society Act 1952*);

power to regulate the right to practise as a solicitor in Queensland by administration of a scheme for the issue of annual practising certificates (see Part 4 of the *Queensland Law Society Act 1952*).

94. I note the Society's argument that a determination that the Society satisfies the definition of "public authority" in s.9(1)(a)(i) of the Act has the effect, *prima facie*, of finding the Society to be an agency in respect of all of its purposes, not merely those purposes which can properly be characterised as public purposes. In this regard I should point out that a mechanism exists in the FOI Act for prescribing, by regulation, that the FOI Act does not apply to certain bodies in respect of specific functions performed by those bodies: see s.11(1)(q) of the FOI Act. If the Queensland government wishes, as a matter of policy, to exclude the non-public functions of the Society from the FOI Act, it will be able to do so relatively easily. However, by virtue of s.32 and s.34 of the *Statutory Instruments Act 1992* Qld, a regulation of that kind could not be given retrospective effect. It follows that Mr English is entitled to have his application, dated 24 August 1993, to the Society, for access to documents in accordance with s.25 of the FOI Act, dealt with on the basis that the Society is an agency subject to the FOI Act in respect of all its functions.

95. Mr English's letter dated 24 August 1993 requesting a copy of the Society's most recent statement of affairs and each of its policy documents (see paragraph 2 above) was not framed in the terms of a notice under s.20(1) of the FOI Act, so as to trigger the rights of review conferred by s.71(1)(a) of the FOI Act in respect of a decision under s.20 not to publish a statement of affairs. Nevertheless, in view of the conclusion I have reached, I consider it appropriate to make a finding that the Society is subject to the obligations imposed by s.18 and s.19 of the FOI Act. My review will proceed only in respect of the 22 categories of documents to which Mr English requested access in the letters referred to in paragraph 3 above.

Conclusion

96. For the foregoing reasons, I find that:

(a) the Society is an agency subject to the FOI Act, because it is a body that is established for a public purpose by an enactment within the meaning of s.9(1)(a)(i) of the FOI Act;

(b) as an agency subject to the FOI Act, the Society is subject to the obligations imposed by s.18(1) and s.19(1) of the FOI Act, respectively, to publish an up-to-date statement of the affairs of the agency, and to make copies of its most recent statement of affairs and each of its policy documents available for inspection and purchase by members of the community;

(c) Mr English made a valid application for access to documents under s.25 of the FOI Act (by virtue of his letters dated 24 August 1993 referred to in paragraph 3 of my reasons for decision);

(d) the Society thereby came under a legal obligation, imposed by s.27(2) of the FOI Act, to consider the application, and to make one or more of the decisions referred to in s.27(2);

(e) Mr English made a valid application for internal review in accordance with s.52 of the FOI Act, since the Society's decision refusing access to the requested documents was a decision it was obliged to make by virtue of s.27(2) of the FOI Act;

(f) the Society thereby came under a legal obligation, imposed by s.52(4) read together with s.25, to decide that application and notify Mr English of the decision within the time specified in s.52(6) of the FOI Act; and

(g) having been informed of the result of his application for internal review by the Society, Mr English was entitled to make an application for external review under Part 5 of the FOI Act, and I have jurisdiction to investigate and review the Society's decision to refuse to grant access to documents in accordance with Mr English's initial access application under s.25 of the FOI Act.

97. I will write to the Society separately giving directions for the further conduct of this review, specifically in regard to any documents, covered by the terms of Mr English's FOI access application, in respect of which the Society claims to be entitled, under the exemption provisions of the FOI Act, to refuse Mr English access.

.....
F N ALBIETZ
INFORMATION COMMISSIONER