

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 111 of 1993
(Decision No. 94017)

Participants:

CAIRNS PORT AUTHORITY
Applicant

- and -

DEPARTMENT OF LANDS
Respondent

- and -

CAIRNS SHELF CO NO. 16 PTY LTD
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - "reverse FOI" application - documents in issue comprising valuation reports and draft valuation reports relating to the valuation of land vested in the applicant and leased to the third party - whether obligation of confidence owed by a valuer to a client applies to the documents in issue - whether documents in issue are exempt under s.46(1)(a) of the *Freedom of Information Act 1992 Qld* - whether excluded from s.46(1)(a) by virtue of s.46(2) - whether documents in issue contain matter of a kind mentioned in s.41(1)(a) ("deliberative process matter") - whether documents in issue are exempt under s.41(1) or excluded from exemption under s.41(1) by virtue of s.41(2)(b) (as merely factual matter) and s.41(2)(c) (as merely expert opinion or analysis) or s.41(3)(b) (as the record of, as a formal statement of reasons for, a final decision given in the exercise of a power or a statutory function).

FREEDOM OF INFORMATION - whether documents in issue are exempt under s.45(1)(c) of the *Freedom of Information Act 1992 Qld* - whether the documents in issue concern the business, professional, commercial or financial affairs of the applicant - whether disclosure of the documents in issue could reasonably be expected to have an adverse effect on those affairs - adverse effect from expected litigation - application of public interest balancing test in s.45(1)(c)

FREEDOM OF INFORMATION - whether documents in issue are exempt under s.49 of the *Freedom of Information Act 1992 Qld* - whether disclosure could reasonably be expected to have a substantial adverse effect on the financial or property interests of the applicant - application of public interest balancing test in s.49 - words and phrases: "substantial adverse effect".

FREEDOM OF INFORMATION - whether documents in issue are exempt under s.48 of the *Freedom of Information Act 1992 Qld* - elements of s.48 explained - whether s.11 of the *Valuation of Land Act 1944 Qld* or s.6 of the *Valuers Registration Regulation 1992 Qld* are secrecy provisions which satisfy the requirements of s.48(1)(a) of the *Freedom of Information Act 1992 Qld* - application of the public interest balancing test in s.48(1)(b) of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.7, s.40(c), s.40(d), s.41, s.41(1), s.41(1)(a), s.41(1)(b), s.41(2), s.41(2)(b), s.41(2)(c), s.41(3), s.41(3)(b), s.44(1), s.45(1), s.45(1)(b), s.45(1)(c), s.45(1)(c)(i), s.45(1)(c)(ii), s.45(2), s.46, s.46(1), s.46(1)(a), s.46(1)(b), s.46(2), s.46(2)(a), s.46(2)(b), s.47(1)(a), s.47(1)(b), s.48, s.48(1), s.48(1)(a), s.48(1)(b), s.48(3), s.49, s.51, s.51(2)(e), s.72(1)(c), s.78, s.80, s.81

Freedom of Information Act 1982 Cth s.38, s.38(1) s.40(1)(c), s.40(1)(d), s.40(1)(e), s.45(2)

Freedom of Information Act 1982 Vic s.34(1)(a), s.38

Freedom of Information Act 1989 NSW s.32(1)(c)

Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994

Acquisition of Land Act 1967 Qld

Acts Interpretation Act 1954 Qld s.13, s.36

Cairns Airport Act 1981 Qld s.9

Harbours Act 1955 Qld s.18, s.58, s.59, s.64, s.64(3), s.64(4)(b), s.72, s.73, s.74, s.105(2), s.105A, s.106, s.107(1), s.107(2), s.114, s.115, s.117

Health Insurance Act 1973 Cth s.130(1)

Income Tax Assessment Act 1936 Cth s.16

National Companies and Securities Commission Act 1979 Cth s.47

Ombudsman Act 1976 Cth s.35(2)

Reprints Act 1992 Qld s.43

Statutory Instruments Act 1992 Qld

Valuation of Land Act 1944 Qld (as in force prior to issue of Reprint No. 1) s.5, s.8, s.10, s.11, s.27, s.27(1), s.27(1)(i), s.27(1)(ii), s.27(2), s.27(4)

Valuation of Land Act 1944 Qld (Reprint No. 1) s.11, s.11(1), s.11(2), s.11(3), s.12, s.13, s.18, s.37, s.40(4), s.41(1), s.74, s.74(1), s.74(2)

Valuation of Land Regulation 1993 Qld

Valuers Registration Act 1992 Qld s.30, s.63, s.63(1)

Valuers Registration Regulation 1992 Qld s.6

Accident Compensation Commission v Croom [1991] 2 VR 322

Ascic v Australian Federal Police (1986) 11 ALN N184

Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109

B and ACT Medical Board of Health, Re (ACT AAT, Professor L J Curtis, President, C93/46, 11 April 1994, unreported)

"B" and Brisbane North Regional Health Authority, Re (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported)

Baker v Gibbons [1972] 1 WLR 693

Cannon and Australian Quality Egg Farms Limited, Re (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported)

Department of the Premier and Cabinet v Birrell (No. 2) [1990] VR 51

Dyrenfurth and Department of Social Security, Re (1987) 12 ALD 577

Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (Information Commissioner Qld, Decision No. 93002, 30 June 1993); (1993) 1 QAR 60

Federal Commissioner of Taxation v Swiss Aluminium Australia Ltd and Others (1986) 10 FCR 321; 66 ALR 159

Harrigan v Department of Health & Ors (1987) 72 ALR 293; 11 ALD 268; 6 AAR 184

Harris v ABC (1983) 78 FLR 236; 50 ALR 551; 5 ALD 545

Healy and Australian National University, Re (Cth AAT, No. N84/445, 23 May 1985, unreported)

Heaney and Public Service Board, Re (1984) 6 ALD 310; 1 AAR 335

James and Australian National University, Re (1984) 6 ALD 687; 2 AAR 327

Johns v Australian Securities Commission (1993) 67 ALJR 850; 116 ALR 567

Kamminga and Australian National University, Re (1992) 26 ALD 585
Kavvadias v Commonwealth Ombudsman (1984) 1 FCR 80; 52 ALR 728
Lapidos and Ombudsman (No. 1), Re (1987) 2 VAR 82
Mayne Nickless Ltd v Solomon [1980] Qd R 171
News Corporation Limited and Others v National Companies and Securities Commission
(1984) 1 FCR 64; 52 ALR 277
Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1982) 62 FLR 437; 44 ALR 557
*Russell Island Development Association Inc and Department of Primary Industries and
Energy, Re* (Cth AAT, Deputy President Forgie, No. Q93/270, 13 January 1994,
unreported)
Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203
Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111; 108 ALR 163
Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union (1979) 42 FLR
331; 27 ALR 367
Victorian Public Service Board v Wright (1986) 160 CLR 145; 60 ALJR 304; 64 ALR 206
*Wittingslow Amusements Group Pty Ltd and Anor v the Director General of the Environment
Protection Authority of NSW* (Supreme Court of NSW, Equity Division, No. 1963 of 1993,
Powell J, 23 April 1993, unreported)

DECISION

The decision under review (being the decision made on behalf of the respondent by Mr Martin Holmes on 13 May 1993 that the valuation reports and draft valuation reports dealt with in his decision are not exempt documents under the *Freedom of Information Act 1992 Qld*) is affirmed.

Date of Decision: 11 August 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

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Participants:

CAIRNS PORT AUTHORITY
Applicant

- and -

DEPARTMENT OF LANDS
Respondent

- and -

CAIRNS SHELFNO. 16 PTY LTD
Third Party

REASONS FOR DECISION

Background

1. This is a "reverse FOI" application by the Cairns Port Authority (the CPA) which objects to a decision of the Department of Lands (the Department) to the effect that the third party, Cairns Shelfco No. 16 Pty Ltd (Cairns Shelfco), is entitled to have access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to certain documents comprising valuation reports (and draft valuation reports) on a parcel of land, bordering Cairns Harbour, which is vested in the CPA and leased to Cairns Shelfco.
2. Cairns Shelfco's FOI access application was made through its solicitors, Clayton Utz, by a letter dated 21 January 1993 in the following terms:

On behalf of our client, Cairns Shelfco No. 16 Pty Ltd, we hereby apply to you in the terms of the Freedom of Information Act for all documents held by your Department in respect of valuations carried out by the Valuer-General under s.27 of the Valuation of Land Act in respect of the property described as:-

[a full description of the relevant parcel of land was then set out], which said land is designated "harbour lands" under the provisions of the Harbours Act 1955-87 and more commonly known as the Pier Hotel and Shopping Complex situated at Pierpont Road, Cairns.

3. The CPA was consulted by the Department, in accordance with s.51 of the FOI Act, in respect of documents the disclosure of which (in the Department's opinion) might have been of substantial concern to the CPA. The CPA wrote to the Department on 11 March 1993 stating that the Department should refuse the applicant access to the documents (to which the Department had drawn the CPA's attention) on the basis that they were exempt documents under s.45(1) and s.49 of the FOI Act. However, the Department's authorised decision-maker, Mr D B Forrest, decided that access to the documents should be granted. Mr Forrest's decision was conveyed to the CPA by letter dated 7 April 1993. The brief reasons given in support of that decision were:

It should be noted that the applicant in this case is the lessee, Cairns Shelfco No. 16 Pty Ltd. Therefore, Mr Forrest is of the view that there is no reason to exempt any documents.

It would be in this instance in the public interest to release the documents.

4. The CPA applied, by letter dated 5 May 1993, for internal review of Mr Forrest's decision in accordance with s.52 of the FOI Act. In that letter, the CPA claimed that the documents were exempt under s.45(1)(c), s.46(1)(a), s.47(1)(b), s.48(1) and s.49 of the FOI Act, and enclosed submissions in support. The internal review decision (dated 13 May 1993) was made on behalf of the Department by Mr M Holmes, who addressed each exemption provision relied on by the CPA, but was not satisfied that any of the claimed exemptions could be established. Extracts from Mr Holmes' reasons for decision are referred to in the analysis of individual exemption provisions which appears later in these reasons for decision.
5. The CPA applied, by letter dated 11 June 1993, for external review of Mr Holmes' decision under Part 5 of the FOI Act. The result of that application is that, by virtue of s.51(2)(e) of the FOI Act, the Department has been obliged to defer giving Cairns Shelfco access to the documents in issue pending the outcome of the CPA's application for review. Before proceeding to the substantive issues raised by the CPA's application for review, it will be helpful to set out some further background material about the CPA, and about the nature of the documents in issue.
6. The CPA is a Harbour Board established pursuant to the provisions of the *Harbours Act 1955 Qld*. Harbour Boards are incorporated by virtue of s.18 of the *Harbours Act* and are empowered, by virtue of that provision, to acquire, hold and dispose of land and other property and to do and suffer all such acts, matters and things as bodies corporate may by law do and suffer.
7. The powers and duties of Harbour Boards are set out in Part III of the *Harbours Act*. Section 58 provides that subject to and for the purposes of the *Harbours Act*, every Harbour Board shall control and manage the harbour for which it is constituted together with all associated harbour works. Section 59 of the *Harbours Act* confers on Harbour Boards extensive powers in relation to construction of works in and around the harbour. Throughout Part III of the *Harbours Act*, extensive powers are given to Harbour Boards for the purpose of better managing the harbours for which they are responsible. Of particular relevance to this external review is s.64 of the *Harbours Act* which provides that a Harbour Board may, upon such terms and conditions as it thinks fit, lease (for a purpose consistent with the *Harbours Act*) land vested in the Harbour Board. Section 64(3) provides that a Harbour Board shall not lease or license the use of or occupation of harbour lands unless the relevant Minister's approval in writing of the lease or licence is first obtained. Section 64(4)(b) provides that every lease shall provide for a rent payable to the Board in such amount as the Board fixes. Several provisions of the *Harbours Act* permit Harbour Boards to conduct, on a commercial basis, businesses associated with the management of a harbour, for example, s.72, s.73 and s.74
8. There is ample evidence to justify a finding that Harbour Boards, like the CPA, carry on activities on a commercial basis, and that the CPA is an agency which has "business or commercial affairs" within the meaning of s.45(1)(c) of the FOI Act. The lease between the CPA and Cairns Shelfco was not an isolated transaction for the CPA, but merely one incident of its ordinary business or commercial activities, which include entering into leasing arrangements, on commercial terms, in respect of land vested in the CPA.

9. At the same time, however, the CPA (like other Harbour Boards) continues to be subject to many of the accountability mechanisms commonly associated with government agencies, such as the need to obtain Ministerial approval for some transactions (and see also, by way of example, sections 106, 107, 114 and 115 of the *Harbours Act*). The finances of Harbour Boards, including the CPA, are closely regulated by Part VI of the *Harbours Act*. Monies received by the CPA by way of rent are to be applied in the manner stipulated by s.105(2) of the *Harbours Act* (or by s.105A in the case of surplus funds). Much of the revenue which the CPA derives from commercial leases is reinvested in the upgrade and development of facilities in Cairns Harbour (see paragraph 15 of the affidavit of Robert Charles Manning, the Chief Executive Officer of the CPA, which is reproduced at paragraph 89 below). Section 117 of the *Harbours Act* provides that the accounts of a Harbour Board shall be audited by the Auditor-General.
10. The CPA is a significant landholder and landlord with respect to land bordering Cairns Harbour. The CPA also has responsibility for the management, conduct and operation of the Cairns International Airport pursuant to the *Cairns Airport Act 1981 Qld*. In this capacity, the CPA has the power to grant leases, licences or permits of land forming part of the airport in the same way as for harbour lands within the meaning of the *Harbours Act* (s.9 *Cairns Airport Act*).
11. Cairns Shelfco is the lessee (under a lease agreement with the CPA as lessor) of the parcel of land bordering Cairns Harbour which is referred to in paragraph 2 above (the subject land). There has been a history of dispute over the rent payable by Cairns Shelfco to the CPA due to differences of opinion over the proper valuation of the subject land. The CPA has provided me with a copy of the lease agreement between the CPA and Cairns Shelfco in respect of the subject land. The rent payable under the lease is calculated according to express terms of the lease stipulating an agreed formula which, in the third and subsequent years of the lease, depends on percentage increases, between specified intervals, in the valuations of the unimproved value of the subject land assessed by the Valuer-General in accordance with the *Valuation of Land Act 1944 Qld*. Property values in prime tourism areas of Cairns appear to have been particularly volatile since 1988, when the lease commenced, and Cairns Shelfco probably considers that it has been unfortunate with the timing of the agreed intervals for calculating percentage increases in the unimproved value of the subject land (and corresponding percentage increases in the rent payable), the value of the subject land having risen dramatically in the first two years of the lease, only to decline thereafter. This is explained in more detail at paragraphs 106-114 below.
12. At this point I should explain that on 27 January 1994, after nearly all evidence and submissions had been lodged by the participants in this review, the *Valuation of Land Act* was reprinted in accordance with the *Reprints Act 1992 Qld*, and its provisions were renumbered in accordance with s.43 of the *Reprints Act*. To minimise confusion, I have referred in my reasons for decision to the *Valuation of Land Act*, as it was numbered prior to the issue of its first reprint under the *Reprints Act*, as the VL Act; and I have referred to the reprinted *Valuation of Land Act* as the VL(R) Act. Any references to the "*Valuation of Land Act*" in passages quoted from the evidence or submissions of the participants in this review, will be to the former (i.e. the VL Act).
13. I need not set out the terms of the clause of the lease which provides for calculation of rent payable in respect of the subject land. I need to explain, however, that the clause stipulates a formula, for the third and fourth years of the lease, under which the calculation of rent depends on the percentage increase in the unimproved value of the subject land, assessed by the Valuer-General under s.27 of the VL Act, as between two specified dates. For the fifth and subsequent years, the lessor (the CPA) is entitled to elect which of two stipulated formulae is to apply, the first being again based on the unimproved value of the land assessed by the Valuer-General under s.27 of the VL Act, and the second being based on the percentage increase, as between specified dates, in the general or annual valuations which are in force and effect in respect of the subject land, as assessed by the Valuer-General in accordance with s.11 of the VL Act. The differences between these two kinds of valuation are explained at paragraphs 20-22 below.

14. Several of the valuation reports on which relevant valuations under s.27 of the VL Act were based, comprise the documents in issue in this external review. Those documents may be described as follows (using the folio numbers given by the Department):
- (a) folios 49 to 52, comprising a draft valuation report (unsigned) for which the date of the valuation is 12 January 1990;
 - (b) folios 58 to 62, comprising a further draft valuation report (unsigned) for which the date of valuation is 12 January 1990;
 - (c) folio 63, which is an exact copy of folio 59 (i.e. one page of the draft valuation report described in (b));
 - (d) folios 77 to 83, comprising a further draft valuation report (unsigned) for which the valuation date is 12 January 1990;
 - (e) folios 94 to 99, comprising a signed copy of the valuation report for the valuation date 12 January 1990; and
 - (f) folios 166 to 171, comprising a signed copy of the valuation report for the valuation date 12 January 1992.
15. At the commencement of this external review, folios 100, 120, 123-125 and 172 were also in issue. Those documents are described on their face as certificates of valuation issued by the Valuer-General under s.27(4) of the VL Act. Those documents describe the formal details of the subject land, including its real property description, and set out the actual valuation figure assessed by the Valuer-General, but not the valuation methodology on which it is based. It appeared to me that Cairns Shelfco, as the tenant, was entitled to know the valuation recorded in the certificates since the lease provides for the calculation of rent based on the Valuer-General's valuation of the land. The CPA consented to those valuation certificates being provided to Cairns Shelfco, and I authorised the disclosure of those certificates of valuation to Cairns Shelfco.
16. The role of the Valuer-General is, historically, well known to Queensland landowners. The functions, powers and duties of the Valuer-General were described in the VL Act. They predominantly involved the provision of valuation services to Queensland government agencies and local authorities. The former Department of the Valuer-General was absorbed within the Department of Lands *circa* 1990. The statutory office of Valuer-General continued to exist until it was effectively abolished by amendments to the VL Act assented to in December 1992, which provided that "a reference in any Act or document to the Valuer-General is a reference to the chief executive [of the Department of Lands]" (see s.10 of the VL Act). The chief executive of the Department then became responsible for the discharge of the powers, functions and duties under the VL Act which had previously been the responsibility of the Valuer-General. The documents in issue in this review were prepared by staff of the former office of Valuer-General, and issued in the name of the Valuer-General. Moreover, the evidence and submissions lodged by the participants continue to refer to the Valuer-General rather than to the chief executive. I will therefore continue to refer in these reasons for decision to the Valuer-General, where that seems the most appropriate course to avoid confusion.
17. The Valuer-General was (and the chief executive of the Department continues to be) responsible for preparing valuations which fall into two broad categories:

- (1) valuations required to be prepared on a regular basis pursuant to statutory obligation, such as valuations for rating and other revenue purposes, for local authorities and the Office of State Revenue;
 - (2) valuations prepared for specific clients for specific purposes, e.g. for government agencies which compulsorily acquired land under the *Acquisition of Land Act 1967 Qld*, or which required valuation advice in relation to sale, purchase or rental of real property.
18. The matter in issue in this external review comprises information as to the basis of valuations falling within category (2). In its Annual Report for the year 1992-1993, the Department described the valuation fees received for valuations in category (1) referred to above as being in the amount of \$6.38 million (p.33). As to category (2), the same Annual Report referred to 695 valuations being undertaken in the financial year 1992-3, for which fees in the amount of \$359,380 were received. This gives some indication of the extent of the work undertaken in the two different categories. The Valuer-General had (and the chief executive has) no monopoly on valuations falling within category (2), and its potential clients among government agencies were able to use the services of the Valuer-General or a private valuer. In its 1992-1993 Annual Report, the Department has signalled its intention to approach valuations in category (2) in a more commercial way. It noted that in 1992-1993, 87 valuations were provided to government agencies for no charge, but that in future a fee will be charged for all valuation services (p.33). In the Department's Annual Report for the year 1991-1992, the Department referred to a strategy to be adopted for category (2) valuations, in that it was intended to enter into a consultative process with major clients, with the aim of identifying and implementing changes required to meet their needs within a competitive business environment (p.48).
19. The valuation reports and draft valuation reports which are in issue in this review were prepared under the authority of s.27 of the VL Act (which has been renumbered as s.74 of the VL(R) Act). Section 27 of the VL Act was the provision which enabled the Valuer-General to prepare valuations in category (2) referred to above. At the time the documents in issue were prepared, s.27(1)(i) of the VL Act provided that the Valuer-General had the power and authority to make, and indeed was obliged to make, a valuation of any real and/or personal property when required to do so by a government instrumentality, such as the CPA. Section 27(1)(ii) also permitted the Valuer-General to make a valuation of property when required by any person (i.e., including a member of the public), although the Valuer-General was not obliged to prepare a valuation based on such a request. Section 74 of the VL(R) Act now simply provides that the Valuer-General may value real or personal property for a person if the person asks (s.74(1)) and the person must pay the prescribed fee for the valuation (s.74(2)). No special position is accorded to government agencies. These legislative changes are consistent with the intentions disclosed in the Annual Reports referred to above.
20. Valuations prepared under s.74 of the VL(R) Act should be contrasted with valuations prepared under Part 3 and Part 4 of the VL(R) Act which, together with valuations performed for the Office of State Revenue, comprise valuations in category (1) set out above. Under Part 3 of the VL(R) Act, s.13 provides that the chief executive must decide the unimproved value of the land to be valued for the Acts under which local authorities are established. The purpose of such valuations is to enable local authorities to levy rates on such land according to the value of land. From time to time, the chief executive may conduct a general valuation of land pursuant to s.18 of the VL(R) Act, which is to be a comprehensive revaluation of land in a particular area. Between the times when general valuations are carried out, Part 4 of the VL(R) Act requires the chief executive to make an annual valuation of land (see s.37 of the VL(R) Act). Pursuant to s.40, the chief executive is required to make particulars of each annual valuation available for inspection by the public, as the chief executive thinks fit. In particular, the annual valuations are to be made available for inspection without a fee (s.40(4)) and this fact is to be advertised (s.41(1)). A landowner who is

dissatisfied with such an annual valuation may object to that valuation, and, if dissatisfied with the result of the objection, may appeal that decision to the Land Court. There is no obligation to advertise a "special" valuation under s.74 of the VL(R) Act or to make that valuation available for public examination.

21. The next distinction between annual and general valuations under Parts 3 and 4 of the VL(R) Act and a "special" valuation under s.74, is that while a valuation under s.74 in respect of land may be "in its unimproved state, the value of improvements, or the improved value according to the nature of the request concerned", annual and general valuations carried out pursuant to Parts 3 and 4 of the VL(R) Act are made in respect of the unimproved value of the land only. In this case, the relevant terms of the lease agreement between the applicant and the third party provide that valuations of the unimproved value of the subject land are to be used as the basis for the formulae for calculation of rent payable, even where a "special" valuation is employed.
22. A further distinction between the annual or general valuations prepared pursuant to Parts 3 and 4 of the VL(R) Act, and a "special" valuation prepared under s.74, is that, in the case of the former, all the land in a particular area is valued at the same date. A "special" valuation prepared pursuant to s.74 is prepared as at the date which the person requesting the valuation nominates. The obvious consequence of this is that the unimproved value of a parcel of land for the purposes of a general or annual valuation may vary from the unimproved valuation of the same parcel of land as at a different date, due to the rise and fall of the real estate market in the area.

The External Review Process

23. The CPA's application for external review was accompanied by a 14 page preliminary submission addressing arguments in support of its case that the documents in issue were exempt under s.45(1)(c), s.46(1)(a), s.48(1) and s.49 of the FOI Act. (The CPA abandoned its previous reliance on s.47(1)(b) of the FOI Act.) Cairns Shelfco was invited to apply, in accordance with s.78 of the FOI Act, to be a participant in the review, and was provided with a copy of the CPA's preliminary submission. Cairns Shelfco's application to be a participant in the review was granted, and it supplied a preliminary written submission (dated 6 August 1993) of some 22 pages in support of its case. It was not necessary to obtain a preliminary submission from the Department, which had adequately set out its position in the reasons statement given by Mr Holmes. The preliminary submissions were exchanged among the participants.
24. Apart from the concession noted above in paragraph 15 which resulted in Cairns Shelfco being allowed access to the formal certificates of valuation issued under s.27(4) of the VL Act, there did not appear to be further scope for resolving the dispute between the participants by negotiation or mediation (as contemplated by s.80 of the FOI Act) and accordingly directions were given for the participants to lodge evidence and written submissions in support of their respective cases.
25. The evidence lodged on behalf of the CPA comprises the following:
 - (a) an affidavit of Robert Charles Manning (Chief Executive Officer of the CPA), sworn 22 October 1993, which sets out the history of the commercial relationship between the CPA and Cairns Shelfco, highlighting (in particular) past challenges by Cairns Shelfco to the valuation of the subject land, and describing the particular concerns and expectations of detriment which the CPA has with respect to disclosure of the documents in issue to Cairns Shelfco under the FOI Act.;

- (b) an affidavit of Bruce Arthur McFarlane (a valuer in private practice) sworn 21 October 1993, which deposes to the duty of confidence owed by a valuer to a client;
- (c) an affidavit of Glen James Coonan (a valuer in private practice) sworn 20 October 1993, which supports the evidence of Mr McFarlane, and discusses valuation of the subject land;
- (d) an affidavit of Bernard Treston (a partner in the firm of solicitors which acts for the CPA) sworn 22 October 1993, which contains evidence as to the potential costs to the CPA of any litigation that might be commenced by Cairns Shelfco to challenge the valuations to which the documents in issue relate; and
- (e) a statutory declaration of Professor William David Duncan (Feez Ruthning Professor of Property Law at the Queensland University of Technology and author of the legal text *Commercial Leases*, (Law Book Co., 2nd ed., 1993)) declared on 19 October 1993. The object of this statutory declaration appears to be to give expert opinion evidence as to the possible bases for legal challenge to a valuation on which the calculation of rent in a commercial lease depends. (I have been assisted by Professor Duncan's exposition of the law, though I think it should more appropriately have been put as a written legal submission rather than as sworn evidence).

26. The evidence submitted by Cairns Shelfco comprises the following:

- (a) an affidavit of Michael John Stephens (a registered valuer and Director of QEB Enterprises Pty Ltd, the letting agent for Cairns Shelfco) sworn 2 December 1993, which refers to the history of the valuations of the subject land for the purposes of the lease, and the challenges to valuations which have been made by Cairns Shelfco; and
- (b) an affidavit of Rodney Louis Brett (a valuer in private practice in Brisbane) sworn 2 December 1993. (The solicitors for the CPA have objected to the two substantive paragraphs of that affidavit on the basis that Mr Brett purports to swear to the correct legal interpretation and effect of a clause in the lease between Cairns Shelfco and the CPA. The same point is argued in Cairns Shelfco's written submissions, and Mr Brett's affidavit does not, in my opinion, add any further weight to that argument.)

27. Interestingly, the evidence lodged by the Department tends to support the CPA's case rather than Mr Holmes' decision on the Department's behalf. Mr Eric John Woolley, who was the Valuer-General before that position was abolished, and became (until his recent retirement) the Program Director, Valuations, in the Department, and delegate of the chief executive under the VL Act, has provided two affidavits sworn on 14 December 1993 and 17 December 1993, which deal with the duties of confidentiality owed by a valuer to a client. In the only submission provided by the Department in this review (comprising two sentences in a letter dated 24 January 1994) Mr Holmes says that any divergence of views between Mr Woolley and himself may arise because of their different functions within the Department; but Mr Holmes also makes it clear that he does not believe that Mr Woolley's evidence assists the CPA's case for exemption on grounds of confidentiality, because of the effect of s.46(2) of the FOI Act (explained at paragraph 40 below).

28. Considerations of space make it impractical to reproduce all relevant passages from the evidence noted above, but key passages will be referred to in the appropriate sections of these reasons for decision.

29. The evidence was exchanged between the participants. (Some material was deleted from the copy of Mr Manning's affidavit provided to Cairns Shelfco; however, I am satisfied that the substance of the CPA's evidence has been adequately conveyed to Cairns Shelfco.) Each participant was then given the opportunity to make a detailed written submission in support of its case. Cairns Shelfco provided an eight page submission dated 2 December 1993. The CPA provided an undated 38 page submission, which was received on 24 December 1993 (and which is referred to below as the CPA's final submission). Cairns Shelfco provided a short submission in reply dated 1 February 1994. The Department's letter dated 24 January 1994 stated that "the Department really has no further submissions in this matter", before making the brief observations referred to in paragraph 27 above.

The Issues in this External Review

30. The CPA claims that the valuations and draft valuations in issue in this review are exempt under one or more of the following exemption provisions of the FOI Act:
- s.46(1)(a), with the proviso that if the documents are not exempt under s.46(1)(a) because they fall within the terms of s.46(2), then it is contended that the documents are exempt under s.41(1)
 - s.45(1)(c)
 - s.49
 - s.48
31. Section 81 of the FOI Act provides that in a review under Part 5 of the FOI Act, the agency which made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant. In the present case, therefore, the formal onus remains on the Department to justify its decision that the valuation reports and draft valuation reports in issue are not exempt documents under the FOI Act. The Department can discharge this onus, however, by demonstrating that any one of the necessary elements which must be established to attract the application of each of the exemption provisions relied on by the CPA, cannot be made out. Thus, the applicant in a "reverse-FOI" case, while carrying no formal legal onus, must nevertheless, in practical terms, be careful to ensure that there is material before the Information Commissioner from which I am able to be satisfied that all elements of the exemption provisions relied upon are established.
32. I will consider in turn each of the four bases for exemption argued by the CPA, as set out in paragraph 30 above.

The Claim for Exemption Under s.46(1)(a), or Alternatively, s.41(1) of the FOI Act

33. Sub-sections 46(1)(a) and 46(2) provide as follows:

46.(1) Matter is exempt if -

(a) its disclosure would found an action for breach of confidence; ...

(2) Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than -

(a) a person in the capacity of -

- (i) *a Minister; or*
 - (ii) *a member of the staff of, or a consultant to, a Minister; or*
 - (iii) *an officer of an agency; or*
- (b) *the State or an agency.*

34. Section 41 of the FOI Act is in the following terms:

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

- (a) *would disclose -*
 - (i) *an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
 - (ii) *a consultation or deliberation that has taken place;*

in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and
- (b) *would, on balance, be contrary to the public interest.*

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

- (a) *matter that appears in an agency's policy document; or*
- (b) *factual or statistical matter; or*
- (c) *expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.*

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

- (a) *a report of a prescribed body or organisation established within an agency; or*
- (b) *the record of, as a formal statement of the reasons for, a final decision, order or ruling given in the exercise of -*
 - (i) *a power; or*
 - (ii) *an adjudicative function; or*
 - (iii) *a statutory function; or*
 - (iv) *the administration of a publicly funded scheme.*

The Submissions of the Participants

35. The Department's position in respect of the claimed application of s.46(1)(a) to the documents in issue was succinctly put by Mr Holmes in his internal review decision as follows:

The purpose of this exemption is to protect the flow of confidential information to government agencies.

It is intended to exempt individuals and organisations who provide information to government on a genuinely confidential basis.

The matter in question is generated by the Department, and comprises information on which the valuation is based. This information is collated data from a variety of sources, for the most part in the public domain.

...

I do not believe that the documents are exempted under this section.

After reviewing the CPA's evidence and written submission aimed at establishing that the Valuer-General owed a duty of confidence to the CPA, Mr Holmes again contented himself with a succinct observation (in his letter of 24 January 1994) as follows:

Insofar as s.46 is concerned, it would seem that the Authority would come within s.46(2)(b), so that s.46(1)(a) does not apply.

36. The CPA's rather lengthy submission on this issue was as follows:

This is not a situation where confidential information has been provided by the [CPA] to the Valuer-General, it is rather a situation where there is a fiduciary relationship between the Valuer-General and the [CPA]. The nature of the relationship is that of private valuer and client. There is no doubt that a private valuer has a duty to observe confidentiality in relation to any information in its possession dealing with the affairs of the client (see Affidavit of McFarlane and paragraph 10 of the Code of Professional Conduct of Valuers. See also paragraph 9 of the Affidavit of Coonan and paragraph 5 of the Statutory Declaration of Duncan and paragraphs 17 and 18 and Exhibits RCM 11, 12, 13, 14 and 15 of the Affidavit of Manning). See also Affidavit Woolley paras 3-6 and Regulation 6 of the Valuers' Registration Regulation 1992 made pursuant to the Valuers' Registration Act 1992.

It is submitted that there is an implied duty to observe confidentiality arising out of the nature of the relationship between the [CPA] and the Valuer-General. The nature of the relationship is a contractual one, a valuer and client, and there is no doubt that a private valuer is obliged to observe confidentiality in relation to valuation reports prepared by him in respect of his client's affairs. There is no reason why the Valuer-General should be in any different position, at least when preparing reports for the [CPA] under section 27 of the Act. Lands accepts this proposition (see Affidavit Woolley paras 3-5). [Note - it would be more correct to say that Mr Woolley accepts this proposition. Mr Holmes has expressed no view on this proposition, other than his view that the issue is rendered irrelevant by s.46(2).]

There is no doubt that the information contained in the reports and valuations and related documents is confidential in that it is not information generally known to anyone other than the Valuer-General. The information is only compiled by the Valuer-General for the purposes of arriving at a valuation as requested by the [CPA]. The Valuer-General is paid for carrying out this task on behalf of the [CPA].

...

*To establish confidentiality it is not necessary to prove an express contract made or an expressed or explicit stipulation imposed at the time information was imparted as confidentiality can be established by inference drawn from the whole of the circumstances (see **Wiseman -v- The Commonwealth** (unreported), 24 October 1989, Sheppard, Beaumont and Pincus JJ). There is an implied term of the contract between the [CPA] and the Valuer-General under which the valuations were prepared that the Valuer-General would keep the contents of his reports and valuations and the material relied upon in arriving at those reports and valuations secret and not disclose them to anyone else without just cause. See for example **Parry-Jones -v- Law Society** [1969] 1 Ch 1.*

*Not only information provided in confidence by the [CPA] to the Valuer-General would be confidential, any information obtained by the Valuer-General in the course of carrying out his terms of engagement on behalf of the [CPA] would also be confidential in the same way as any information which a Solicitor gathers for the purposes of prosecuting an action on behalf of his client is confidential. Information can be confidential even though its disclosure does not cause detriment (**Halsbury's Laws of England**, 4th edition, Volume 45, para. 1536 N5).*

...

In this case the [CPA] approached the Valuer-General for a valuation. The fact that the Valuer-General is obliged to provide the valuation to the [CPA] is nothing to the point. The nature of the relationship between the [CPA] and the Valuer-General is still that of client and valuer. Any commercial valuer who is approached by a client and engaged to provide a valuation is obliged to provide that valuation in the normal course of events otherwise the valuer would be in breach of contract. The only difference between that situation and this is that the Valuer-General would be in breach of its statutory duty if it failed to provide a valuation as well as being in breach of contract. The nature of the relationship is a confidential one and a fiduciary one. ... This matter is not concerned with information provided by the [CPA] to the Valuer-General but rather with information gathered by the Valuer-General in the course of carrying out its contractual and statutory duty to provide valuations as sought by the [CPA]. For the reasons previously referred to herein that information is confidential.

...

*It may be observed that none of the information contained in the valuer's reports etc. is in the public domain in any real sense. The information has been used by the Valuer-General to arrive at a valuation and even if some of it is in the public domain it is the application of the Valuer-General's mind to the information which has been gathered by him to arrive at a conclusion which gives the information its confidentiality. See **Saltman Engineering**, supra.*

Section 46(2) must be looked at in relation to this matter. If any of the information in the documents for which exemption is claimed is matter of a kind mentioned in section 41(1)(a) of the Act, sub-section (2) of section 46 becomes relevant. There does not appear to be any doubt that an action for breach of confidence would be maintainable by the [CPA] which is an agency and that prima facie sub-section 46(2)(b) would apply to this situation if section 41(1)(a) applies to any of the material in the documents for which exemption is claimed.

...

Reference must however be made to sub-section 41(2). Matter is not exempt under sub-section (1) if it merely consists of (a) matter that appears in an agency's policy documents; or (b) factual or statistical matter; or (c) expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.

In those circumstances it may well be that none of the material contained in the documents for which exemption is claimed would be exempt under section 41(1) by virtue of the operation of section 41(2)(b) and (c). The material contained in the documents seems to be largely factual or statistical matter, and/or expert opinions or analysis by a person recognised as an expert in the field of knowledge to which the opinions or analysis relates. That is why exemption has not been claimed under section 41 of the Act in relation to any of this material. The Information Commissioner should, however, consider whether or not the material is exempt pursuant to section 41. If the Information Commissioner is of the opinion that the material is exempt pursuant to section 41, then the claim for exemption under section 46 would not be maintainable. If however the Information Commissioner is of the opinion that section 41 does not apply, then the proviso contained in section 46(2) of the Act also does not apply and there is no reason why the exemption claimed under section 46(1) would not be maintainable. The word "function" is defined in section 7 of the Act to include "a power" but it is not a very helpful definition.

*There is considerable doubt as to whether or not the material contained in the documents claimed to be exempt is opinion, advices or recommendations obtained, prepared or recorded or consultations or deliberations that have taken place in the course of or for the purposes of the deliberative processes involved in the functions of Government. The Valuer-General, in preparing and compiling this information has done so and has provided valuations sought by a private person, namely the [CPA]. In undertaking this process the Valuer-General is in no different position to a private valuer with the exception that he has a statutory duty to provide the valuation pursuant to section 27 of the **Valuation of Land Act**.*

...

*The Valuer-General's methodology is not a deliberative process involved in a power under the **Valuation of Land Act** to make a valuation, in our submission. It has been held by the Tribunal that the deliberative processes involved in the functions of an agency are its thinking processes, the process of reflection for example, upon the wisdom and expedience of the proposal or a particular decision or a course of action. Deliberations on policy matters undoubtedly come within the broad description. It is not only deliberations in connection with policy making processes or decisions which are covered, but also decision making processes and policy making processes (see **Re James & Australian National University** (1984) 2 AAR 327 at 335; **Re Walton and Minister of Education** (1990) 4 VAR 119 at 121 to 122 and **Re Toohey & Department of Prime Minister & Cabinet** (1985) 9 ALN N94). In any event it would seem that section 41(2)(b) and (c) may well apply to exclude documents and material of the type contained in the material claimed to be exempt from the operation of section 41(1)(a).*

...

Section 41 is relied upon by the [CPA] if found to be applicable by the Information Commissioner. For the reasons alluded to previously herein, the [CPA] considers that section 41 probably does not apply but that section 46(1)(a) does apply.

...

In saying that the Department has an obligation to keep the information confidential, the [CPA] is not necessarily saying that it is entitled to the information and [Cairns Shelfco] is not. In the special case (as here) where the parties to a lease agree on a valuer or other person who is to determine a matter on which the rent depends, and who, as here, acts as an expert and not an arbitrator, there is much to be said for the view that the obligation of confidence is owed to both parties. By agreeing in the lease to select such an expert, the parties may well be agreeing (i.e., it is probably an implied term of the contract/lease) that neither is entitled to know how the figure is arrived at. It would found an action by [Cairns Shelfco] for breach of confidence if the Department revealed more than its basic valuation to the [CPA], just as it would found an action by the [CPA] for breach of the Department's duty of confidentiality that it has revealed information to [Cairns Shelfco]. That is the whole point of such a provision. The parties turn the matter over to an expert who is under an obligation of confidence to both parties not to reveal his reasoning processes. And the reason for the parties doing this is to avoid any possibility of litigation or other dispute about the amount of the rent.

37. There is abundant evidence in the affidavits of Mr Woolley, Mr Coonan and Mr McFarlane to the effect that valuers regard themselves as being bound by a duty of confidence to a client in respect of a valuation prepared for that client. I have been referred to s.6 of the *Valuers Registration Regulation 1992*, made pursuant to the *Valuers Registration Act 1992*, which provides as follows:

6.(1) A registered valuer must not disclose or make use of a valuation made for a client.

(2) Sub-section (1) does not apply if -

(a) the client gives the valuer written permission to disclose the details of the valuation; or

(b) the valuer is required by law to disclose the details.

It also appears that prior to 1992, the Valuers Registration Board of Queensland had promulgated a "Code of Professional Conduct of Valuers" which stipulated in Clause 10: "A valuer shall hold his valuation as confidential until released from his obligation by his client or by due process of law". This provides some evidence of the ordinary practice and understanding as to obligations of confidence owed by a valuer to a client, and indeed Cairns Shelfco has stated that it accepts that there is a duty of confidence between valuer and client.

38. Cairns Shelfco seeks to redirect this argument in its favour by asking who is the Valuer-General's client in the context of the particular valuations in issue in this case. Cairns Shelfco also joins with the Department in asserting that the question of confidentiality is rendered irrelevant by the terms of s.46(2) of the FOI Act. As to the first issue, Cairns Shelfco's submission dated 2 December 1993 argues as follows:

... The source of the Valuer-General's engagement to carry out a valuation is the lease itself - clause 1(b). The Valuer-General performs his task as an independent

third party public official chosen by both the lessor and lessee.

...

[Cairns Shelfco] accepts that there is a duty of confidence between a valuer and his client, however the allegation of confidence has no relevance in this case as this is not a case of a person instructing a valuer to give a valuation for his own private use. As previously stated it is a valuation given under a lease on behalf of both lessor and lessee. Furthermore, the duties and obligations of the Valuer-General when performing a valuation under s.27 of the Valuation of Land Act are set out within this Act and are not subject to any independent codes.

...

The Valuer-General is appointed by both the [CPA] and [Cairns Shelfco] to carry out the valuations and [Cairns Shelfco] had equal right to request the carrying out of the valuations.

...

This case is not analogous to a person instructing a private valuer to prepare a valuation nor to the use of a valuer in negotiating a lease. This is a case of a concluded lease agreement and a valuer preparing a valuation under the terms of the lease for both parties.

39. As to the CPA's reliance, generally, on s.46(1)(a), Cairns Shelfco made the following observations in its preliminary submission dated 6 August 1993:

One will look in vain at the application for review for any attempts by the [CPA] to highlight the character of particular information voluntarily supplied to the Valuer-General beyond that which was provided because a decision was sought under the Valuation of Land Act.

...

Again, nowhere in the [CPA's] application for review does one find an indication as to what information in the Valuer-General's reports is not in the public domain. The situation of the [CPA's] premises and their ownership is clearly in the public domain. Rate searches which are able to be conducted on public registers would disclose the unimproved value of properties which might be referenced as comparable sales.

As to methodology, and for that matter the entirety of the [CPA's] claim for exemption under s.46, one must have regard to the terms of s.46(2) of the FOI Act.

...

The [CPA] is, of course, an agency and hence s.46(2)(b) has direct application to it.

...

The Valuer-General's methodology is, it is submitted, a "deliberative process" involved in a power under the Valuation of Land Act to make a valuation. It follows, it is submitted, that even if the [CPA] can show that disclosure would found an

action for breach of confidence, s.46(1) has no application at all to the [CPA] because any confidence owed by the Valuer-General to it is a confidence owed to an agency and hence excluded from the exemption given by s.46(1) per force of s.46(2)(b) of the FOI Act.

Findings on the Application of s.46 and s.41

40. At paragraph 35 of my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported), I explained that s.46(2) is generally the logical starting point for the application of s.46 of the FOI Act:
35. *FOI administrators who approach the application of s.46 should direct their attention at the outset to s.46(2) which has the effect of excluding a substantial amount of information generated within government from the potential sphere of operation of the s.46(1)(a) and s.46(1)(b) exemptions. Subsection 46(2) provides in effect that the grounds of exemption in s.46(1)(a) and s.46(1)(b) are not available in respect of matter of a kind mentioned in s.41(1)(a) (which deals with matter relating to the deliberative processes of government) unless the disclosure of matter of a kind mentioned in s.41(1)(a) would found an action for breach of confidence owed to a person or body outside of the State of Queensland, an agency (as defined for the purposes of the FOI Act), or any official thereof, in his or her capacity as such an official. Section 46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). The material that could fall within the terms of s.41(1)(a) is quite extensive (see *Re Eccleston* at paragraphs 27-31) and can include for instance, material of a kind that is mentioned in s.41(2) (a provision which prescribes that certain kinds of matter likely to fall within s.41(1)(a) are not eligible for exemption under s.41(1) itself).*
41. Section 46(2) of the FOI Act is modelled on s.45(2) of the *Freedom of Information Act 1982 Cth*, the legislative history of which is instructive as to its basic purpose (see paragraph 47 of the House of Representatives Explanatory Memorandum to the *Freedom of Information Amendment Bill 1983 Cth*). At least one of the purposes of s.46(2) of the Queensland FOI Act is to prevent the possibility of agencies attempting to circumvent the public interest component of the test for exemption of deliberative process matter under s.41(1), by purporting to attach obligations of confidence to intra-agency and inter-agency communications of deliberative process matter, in the hope of attracting exemption under s.46(1). Exemption of matter falling within the terms of s.41(1)(a) is to be determined according to whether its disclosure would be contrary to the public interest (s.41(1)(b)), or whether it is excluded from exemption under s.41(1) by s.41(2) or s.41(3).
42. In my reasons for decision in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993; now reported at (1993) 1 QAR 60), I undertook a detailed analysis of s.41 of the FOI Act, and for present purposes I draw attention to what I said at paragraphs 27-29 of *Re Eccleston*:

27. *The critical words in s.41(1)(a) are "deliberative processes involved in the functions of government". (The word "government" is given a non-exhaustive definition in s.7 of the FOI Act as follows: "'government' includes an agency and a Minister;".) A document which embodies a communication between a Minister and an official may contain matter in the nature of advice, but it will not fall within s.41(1)(a) unless the advice was obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes of government. Matter in a document can fall within this exemption even though it originated outside government, but it must relate to the deliberative processes of government.*
28. *There was some early controversy evident in the decisions of the Commonwealth Administrative Appeals Tribunal as to whether the words "deliberative processes" in s.36(1)(a) of the Commonwealth FOI Act were confined to policy forming processes. A brief history of the controversy is sketched in a later decision of the Commonwealth AAT, Re VXF and Human Rights and Equal Opportunity Commission (1989) 17 ALD 491 at pp.499-500 (paragraphs 29-31 inclusive). The position which has come to be accepted in the Commonwealth AAT is that while the term "deliberative processes" encompasses the policy forming processes of an agency, it extends to cover deliberation for the purposes of any decision-making function of an agency. It does not, however, cover the purely procedural or administrative functions of an agency. One passage in particular has come to be accepted as correctly expounding the meaning of the term "deliberative processes" involved in the functions of an agency. In Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588 at 606; 1 AAR 1 at 19-20, the Commonwealth AAT (comprising Deputy President Hall, Mr I Prowse and Professor Colin Hughes) relied on the Shorter Oxford English Dictionary meaning of "deliberation" as "the action of deliberating: careful consideration with a view to decision" and said:*

"The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play.

It by no means follows, therefore, that every document on a departmental file will fall into this category. Section 36(5) provides that the section does not apply to a document by reason only of purely factual material contained in the document (see, in this regard, the Full Court decision in Harris (1984) 51 ALR 581). See also s.36(6) relating to reports and the like. Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be

distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FOI Act is not a document to which s.36(1)(a) applies." *[For another example of a document held to relate to purely procedural or administrative functions of an agency, rather than to deliberative processes, see Re VXF and Human Rights and Equal Opportunity Commission, cited above.]*

29. *I consider that this passage should be accepted and applied in Queensland as correctly stating the meaning of the term "deliberative processes" in s.41(1)(a) of the FOI Act. In my opinion, further support for the proposition that deliberative processes extends beyond policy forming processes can be found in the wording of s.41(3)(b) (particularly sub-paragraph (iv) which has no counterpart in the Commonwealth FOI Act) which indicates Parliament's intention that deliberative processes preceding the exercise of a decision-making power under a statute or a publicly funded scheme, of the kind referred to in s.4 of the Judicial Review Act 1991, are covered by s.41(1)(a).*
43. All of the documents in issue in this case were created in the course of the deliberative processes preceding the exercise of a decision-making power under a statute, namely, the Valuer-General's power (or perhaps more correctly in the circumstances of the documents in issue in this case, the Valuer-General's statutory duty) to make a valuation of real property under s.27 of the VL Act. I am satisfied that the documents in issue were prepared in the course of, and/or for the purposes of, the deliberative processes involved in the functions of the office of the Valuer-General. There is no substance in the CPA's contention to the contrary which appears in the 11th and 12th paragraphs of the extract from the CPA's written submission which is set out at paragraph 36 above. The CPA is not, as there asserted, "a private person" and even if it were, that would not somehow transform the Valuer-General into a private valuer. Section 27(1) of the VL Act had the effect of casting a statutory obligation on the Valuer-General to provide a valuation when required to do so by a government instrumentality like the CPA. The deliberations, or pre-decisional thinking processes, which preceded and culminated in the determination and issue of the required valuation pursuant to that statutory duty, were clearly, in my view, "deliberative processes involved in the functions of government" within the terms of s.41(1)(a) of the FOI Act.
44. I note in this regard what was said by Deputy President Hall of the Commonwealth AAT in the case of *Re James and Australian National University* (1984) 2 AAR 327 at p.335:

In my view, however, there is nothing in the language of s.36(1) to require that a document must be a communication from one person to another before it can be found to fall within that paragraph. The protection s.36 potentially affords to documents relating to the deliberative process involved in the functions of an agency should not, in my view, be constrained by any attempt to construe the words of the section otherwise than according to their natural and ordinary meaning. With respect to deliberative process documents, Parliament itself cast the net very wide. It is sufficient to bring a document within s.36(1)(a) if the disclosure of the documents would disclose matter in the nature of or relating to opinion, advice or recommendations obtained, prepared or recorded or consultation or deliberation that has taken place, in the course of or for the purposes of the deliberative processes involved in the functions of the agency. The care that has been taken to

describe in the most ample terms the deliberative process documents that are to be comprehended as falling within s.36(1)(a) militates against any narrow or pedantic construction of the ambit of that paragraph.

45. While I am satisfied that the documents in issue were prepared in the course of and/or for the purposes of the deliberative processes involved in the functions of government, I am not satisfied that all of the matter contained in the documents in issue is matter of a kind mentioned in s.41(1)(a), i.e. that it is matter which answers the description of "opinion", "advice", "recommendation", "consultation" or "deliberation". I am satisfied that the following matter contained in the documents in issue does answer the description of "opinion, advice or recommendation":

- folio 49
 - on folio 50 - the last two sentences under the first heading; the last sentence under the second heading; and everything appearing below the third heading
 - the last two sentences appearing under the third heading on folio 51
 - folio 58
 - folio 59 (except for the first two sentences on folio 59)
 - the last two sentences of the paragraph which appears under the second heading on folio 60
 - the last two sentences on folio 61
 - folio 63 (except for the first two sentences on folio 63) - (note: folio 63 is a copy of folio 59)
 - folios 77-80 inclusive
 - on folio 81 - the last two typed sentences appearing under the second heading on that page, and the handwritten sentence in the margin beside them commencing with the word "this" and ending with the word "site"
 - all the writing on folio 82 below the word "gazetted"
 - folios 94-95 inclusive
 - folio 96 apart from the paragraph under the first heading on that folio
 - on folio 97 - the first sentence; and the fifth last, second last and last sentences on that folio
 - folios 166-167 inclusive
 - folio 168 except for the paragraph under the first heading on that folio
- the first sentence and the fifth last, second last and last sentences on folio 169.

46. I am satisfied that the matter particularised in the preceding paragraph is matter of a kind mentioned in s.41(1)(a), and that the balance of the matter contained in the documents in issue is not matter of a kind mentioned in s.41(1)(a). By virtue of s.46(2), s.46(1) does not apply to matter of a kind mentioned in s.41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than the persons or bodies mentioned in s.46(2)(a) and (b). The CPA's submission is that disclosure of the documents in issue by the Department would found an action for breach of confidence owed to the CPA, but the CPA is clearly an agency of the kind mentioned in s.46(2)(b) of the FOI Act. I am satisfied therefore that the CPA's case for exemption under s.46(1)(a) of the FOI Act must fail in respect of the matter in issue which I have identified in paragraph 45 above. In that event, the CPA's submission requests that I determine whether the matter is exempt under s.41 of the FOI Act, and I will now consider that issue. The balance of the matter in the documents in issue (i.e. that which is not matter of a kind mentioned in s.41(1)(a)) is not excluded from consideration for exemption under s.46(1)(a), and I deal with that issue at paragraphs 53 to 61 below.

47. In the CPA's submission quoted at paragraph 36 above, the following paragraph appears:

... it may well be that none of the material contained in the documents for which exemption is claimed would be exempt under s.41(1) by virtue of the operation of

s.41(2)(b) and (c). The material contained in the documents seems to be largely factual or statistical matter, and/or expert opinions or analysis by a person recognised as an expert in the field of knowledge to which the opinions or analysis relates. That is why exemption has not been claimed under s.41 of the Act in relation to any of this material. The Information Commissioner should, however, consider whether or not the material is exempt pursuant to s.41. If the Information Commissioner is of the opinion that the material is exempt pursuant to s.41, then the claim for exemption under s.46 would not be maintainable. If, however, the Information Commissioner is of the opinion that s.41 does not apply, then the proviso contained in s.46(2) of the Act also does not apply and there is no reason why the exemption claimed under s.46(1) would not be maintainable.

48. In my opinion, the position adopted by the CPA in the first three sentences of the passage quoted above is essentially correct. The position adopted in the last sentence of the passage quoted is, however, mistaken, and seems to proceed from a misinterpretation of the terms of s.46(2). As pointed out in the last two sentences of the passage from *Re "B"* quoted at paragraph 40 above, s.46(2) refers not to matter of a kind that would be exempt under s.41(1), but to matter of a kind mentioned in s.41(1)(a). Matter may answer the description of "matter of a kind mentioned in s.41(1)(a)", but still not be exempt under s.41(1), for example, if it is excluded from exemption under s.41(1) by virtue of s.41(2) or s.41(3). In my opinion, that is precisely the case in respect of the matter in issue particularised in paragraph 45 above. That matter merely consists of expert opinion or analysis by expert valuers employed in the office of the Valuer-General, and is not exempt matter under s.41(1), by virtue of s.41(2)(c).
49. It is not necessary for the purposes of this case to address in detail the indicators relevant to the issue of when a person will qualify (for the purposes of s.41(2)(c)) as "*a person recognised as an expert in the field of knowledge to which the [person's] opinion or analysis relates*". One relevant indicator which, when applicable, will ordinarily be determinative of this issue, is whether the person would be accepted by a court as qualified to give expert opinion evidence (in the relevant field of knowledge) on an issue requiring resolution by the court. Valuers on the staff of the Valuer-General, and certainly those of sufficient seniority and experience to hold a delegation to issue certificates of valuation and valuation reports under the signature of the Valuer-General (as occurred with the valuation reports in issue in this case) are routinely accepted in the Land Court, and other Queensland courts, as qualified to give expert opinion evidence on issues relating to the valuation of real property.
50. This is a somewhat unusual situation in that the deliberative process culminating in a decision as to a valuation figure under s.27 of the VL Act involved merely the exercise of expert opinion and analysis in respect of relevant factual material. The more usual situation involves a deliberative process acting upon "raw data" or evidentiary material, such as expert opinion or analysis (for example, engineering opinion on the best alternative routes for siting a new freeway), and factual and statistical material. That is the kind of situation which I had in mind when making the remarks recorded at paragraphs 30-32 of my reasons for decision in *Re Eccleston*.
51. It is also arguable, although I do not need to decide the point, that the final valuation reports (folios 94 to 99 inclusive, and folios 166 to 171 inclusive) also fall within s.41(3)(b) in that they consist of "*the record of, as a formal statement of the reasons for, a final decision ... given in the exercise of ... a power or ... a statutory function*". Section 41(3)(b) does not appear to me to import any requirement that there be a formal obligation for a decision-maker to produce a formal statement of the reasons for a final decision, before a document, which in fact answers the description of a formal statement of reasons for a final decision under a statutory power or function, will fall within the terms of s.41(3)(b).

52. The balance of the information contained in the documents in issue (i.e. other than the information identified in paragraph 45) is properly to be characterised as merely factual matter (as indeed is asserted in the CPA's own submission, see paragraph 47 above) which is not exempt under s.41(1) by virtue of s.41(2)(b).
53. I turn now to consider whether the information contained in the documents in issue, other than the matter which is identified at paragraph 45 as being matter of a kind mentioned in s.41(1)(a), is exempt from disclosure under s.46(1)(a) of the FOI Act. The first sentence of the extract from the CPA's submission set out at paragraph 36 above correctly notes that this is not a case where confidential information has been provided by the CPA to the Valuer-General. The CPA's evidence does not refer to any allegedly confidential information which it conveyed to the Valuer-General in connection with the preparation of the valuations. Exhibits RCM12 and RCM13 to Mr Manning's affidavit disclose that the CPA forwarded brief letters to the Valuer-General stating no more than that the CPA required a valuation of the subject land under s.27 of the VL Act. The CPA clearly relied on the Valuer-General's staff to make relevant inquiries and apply their expertise to arrive at the required valuation. This is borne out by the information contained in the documents in issue, which comprises factual information about the subject land and expert opinion and analysis by valuers on the Valuer-General's staff.
54. The CPA argues, however, that there is a fiduciary relationship between the Valuer-General and the CPA, and that there is an implied term in the contract between the CPA and the Valuer-General (under which the valuations were prepared) that the Valuer-General would keep the contents of his reports and valuations and the material relied upon in arriving at those reports and valuations secret and not disclose them to anyone else without just cause. This argument is apparently based on a contention that the relationship between valuer and client carries the same fiduciary obligations and implied contractual terms as the relationship between solicitor and client. By letter to the CPA dated 27 August 1993, I requested that it inform me of any authorities which it relies upon for the proposition that the relationship between a valuer and client is a confidential or fiduciary one. The CPA has not referred me to any decided case in which such a proposition is specifically dealt with, and my research has not discovered any.
55. In Gurry's leading text on breach of confidence (F Gurry, *Breach of Confidence*, Clarendon Press, 1984), the learned author deals at some length in Chapter 7 with obligations of confidence owed by professionals and by fiduciaries. Gurry notes at p.143:

*The nature of a number of professional relationships imposes on the professional person who is consulted, or whose services are engaged, an obligation to respect the confidentiality of disclosures made to him in his professional capacity. This obligation applies to bankers, counsel, solicitors, doctors and, most probably, dentists. While the 'under-lying principle' is the same in each of these cases, it has been pointed out that the extent of the obligation 'must vary with the special circumstances peculiar to each class of occupation' [citing *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, at p.486].*

56. Gurry notes that in respect of bankers, doctors, solicitors and barristers, the obligation of confidence extends not only to confidential information provided by the client, but also to confidential information acquired by the professional in his or her character as the client's banker, doctor, solicitor or barrister, as the case may be. At p.157-8, Gurry says:

There is scant authority on the extent to which the character of professional adviser imposes an obligation of confidence on persons in occupations outside those considered immediately above. Certainly, it is recognised that an accountant will be under an obligation of secrecy in respect of confidential information acquired by

him in his professional capacity. Generally, also, it may be said that the law exacts a high standard of conduct from all professional advisers which suggests that anyone exercising this function will be under an obligation of confidence. In Brown v Inland Revenue Commissioners [1965] AC 244, for example, Lord Upjohn stated that a 'professional adviser, whether he be solicitor, factor, stockbroker or surveyor is of course in a fiduciary relationship to his client' [at p.265]. It would also seem apparent from the character of professional adviser that any confidential information which he learns will have been imparted to him for the limited purpose of enabling him to give advice. And thus cannot be used for any extraneous purpose. These comments operate on a very general level, however, and the best approach to professional advisers outside the categories for which authority exists is to assess the circumstances of any disclosure in accordance with the general principles by which the courts have established the existence of an obligation of confidence.

57. Those general principles were discussed in detail in my reasons for decision in *Re "B"*, and I will return to them shortly. I wish to emphasise, however, that Gurry makes it quite clear in his discussion of professional obligations of confidence, and in his discussion of obligations of confidence owed by fiduciaries (at pp.158-162 of his text) that obligations of confidence can only be owed in respect of information which is confidential in nature. For example, it is well established that a company director occupies a position of trust towards the company of which he or she is a director, and owes a number of fiduciary obligations to the company by virtue of that position. Gurry refers to the case of *Baker v Gibbons* [1972] 1 WLR 693, where it was held that a company director was not liable for breach of confidence because the information which had allegedly been misused was not confidential. Pennycuik VC stated that the position was not changed "*by the fact that the plaintiff here was a director of the defendant company and as such owed a fiduciary duty to it*" (at p.702). I note that another leading text writer, R Dean in *The Law of Trade Secrets* (Law Book Co., 1990) succinctly states, at p.179: "*The existence of a fiduciary relationship cannot turn public information into confidential information*". (See also in this regard the observations which I made in *Re "B"* at paragraphs 53-54 concerning the effect which the existence of a fiduciary relationship has on the issue of whether an action for breach of confidence can be established.)
58. While I have a number of reservations about whether the engagement of the Valuer-General by the CPA to provide the particular valuations in issue in this case was capable of giving rise to a fiduciary relationship, or to an implied contractual obligation of confidence equivalent to that which applies between solicitor and client, I am prepared to assume those points in the CPA's favour, because I am satisfied that the claim for exemption under s.46(1)(a) can be disposed of by the application of the general principles as to the elements which must be established to found an action for breach of confidence. In particular, I am satisfied that the information in the documents in issue, which is not excluded from consideration by virtue of s.46(2), is not information which is confidential in nature.
59. At paragraph 64 of my reasons for decision in *Re "B"*, I noted that it is an essential element of an action in equity for breach of confidence that the information in issue must possess the "necessary quality of confidence", that is, it must possess a degree of secrecy sufficient for it to be the subject of an obligation of conscience, arising from the circumstances in or through which the information was communicated or obtained. If the information is common knowledge or publicly available, the confider cannot be said to have placed any special faith in the confidant in making the communication. The same concept was referred to by Lord Goff in the House of Lords proceedings in *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at p.282:

... The principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public

domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it.

60. Moreover, there is clear authority to the effect that for information to be the subject of an implied contractual obligation of confidence, it must possess the requisite degree of secrecy or inaccessibility that would be required in equity. In *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, Lord Greene MR said (at p.211):

If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it, some confidential matter, even though the contract is silent on the matter of confidence, the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract; but the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship.

The plaintiff can clearly, therefore, rely upon the wider principle of equity and I do not think it makes much difference which of the causes of action pleaded is considered because the same necessity arises of it being shown that the information was in fact confidential and imparted as such and that the defendant is seeking to use for his own purposes information which he obtained only on such a basis.

(See also the cases referred to at paragraph 49 of *Re "B"*.)

61. The information in the documents in issue, which is not matter of a kind mentioned in s.41(1)(a) (see paragraph 45 above) comprises information about the subject land which is certainly well known to Cairns Shelfco (which is the lessee of the subject land) but which, moreover, is readily accessible by any member of the public, either from publicly available sources, such as records held in the Land Titles Office or public records of the Cairns City Council, or by physical inspection of the subject land and observation of its physical layout. I am satisfied that disclosure of that information to Cairns Shelfco would not found an action for breach of confidence. Having regard to my findings at paragraphs 46, 48 and 52 above, I am satisfied that none of the matter contained in the documents in issue in this case is exempt matter under either s.41(1) or s.46(1)(a) of the FOI Act.

Other Reservations as to the Application of s.46(1)

62. The matter in the documents in issue which is identified at paragraph 45 above is information of a kind which would have the requisite degree of secrecy or inaccessibility for the purposes of founding an action for breach of confidence, were it not excluded from consideration for eligibility for exemption under s.46(1)(a) by virtue of s.46(2). Even if it were not so excluded from consideration under s.46(1)(a), I would still have a number of reservations as to whether its disclosure would satisfy all the elements necessary to found an action for breach of confidence. In view of the possibility of further challenge to my decision, I will state for the record the nature of those reservations.
63. Firstly, I doubt whether the particular valuation reports in issue were provided pursuant to a contractual relationship between the CPA and the Valuer-General. Exhibits RCM12 and RCM13 to Mr Manning's affidavit make it clear that the CPA merely issued formal requirements to the Valuer-General under s.27(1)(i) of the VL Act which triggered the statutory obligation imposed on the Valuer-General by that provision to make the required valuations of the subject land. Sub-section 27(2) of the VL Act cast a statutory obligation on the party requiring the valuation to pay the prescribed fee for the making of the valuation. This transaction does not seem to me to have

involved the formation of any contractual relationship between the CPA and the Valuer-General, which was capable of attracting the application of implied contractual terms. If the Valuer-General was doing no more than discharging a statutory obligation, one would normally look to the terms of the statute for any provisions governing the discharge of the statutory obligation. Section 8 of the VL Act did make provision for secrecy obligations to be imposed on the Valuer-General and his staff. I doubt whether an action for breach of a statutory duty of that kind properly answers the description "an action for breach of confidence", a term which I have said, at paragraph 43 of my reasons for decision in *Re "B"*, refers to one or more of the three causes of action there identified. In this regard, I accept the correctness of what was said by Brennan J (with whom Dawson J agreed) in *Johns v Australian Securities Commission* (1993) 67 ALJR 850 at p.857 to the effect that a duty not to use or to disclose information obtained in exercise of a statutory power except for a purpose authorised by the statute is a duty imposed by statute, not by equity, and is enforceable by an action for a declaration, or an action for an injunction to enforce a statutory duty against a public authority. In any event, the FOI Act itself makes special provision, in s.48, for dealing with statutory secrecy obligations of this kind. The effect of the secrecy provision in the VL Act, in conjunction with s.48 of the FOI Act, is considered at paragraphs 153-174 below.

64. Secondly, while it is conceivable that the discharge by a public authority of a statutory obligation could give rise to a fiduciary obligation owed to the "beneficiary" of the discharge of the statutory obligation, I doubt that any fiduciary obligations could be found in the circumstances of this case. When one construes the terms of the lease between Cairns Shelfco and the CPA dealing with calculation of rent payable, one sees that the parties had agreed in advance to certain formulae to be used for calculating the rent payable during particular years of the lease, with any rent increases to be gauged by reference to percentage increases over time in the unimproved value of the subject land. Whereas the Valuer-General would have been required under Part IV of the VL Act to undertake annual or general valuations of the subject land as at particular dates (largely to be determined by the Valuer-General), the parties to the lease also required (for the purposes of the application of the agreed formulae for calculating rent variations) valuations of the unimproved value of the subject land as at specific dates of their choosing. The Valuer-General was required to do no more than approach the valuation of the subject land in the same way as it would be approached when undertaking an annual or general valuation, but at nominated dates agreed by the parties in the terms of the lease. It is clear from the evidence that no special information or instructions were provided to the Valuer-General. All that the parties required from the Valuer-General was that his expertise and usual method of approach to valuing the unimproved value of the land for the purposes of annual or general valuations, be applied to valuing the unimproved value of the subject land at nominated dates. The valuation figures determined in the course of undertaking annual or general valuations do, of course, become matters of public record (see paragraph 20 above). In these circumstances, one must query whether there really could have been any fiduciary obligation owed by the Valuer-General, or indeed, if any fiduciary obligation was owed, whether it was owed to both the lessor and the lessee.
65. It is true that the Valuer-General dealt only with the CPA. The evidence discloses that the Valuer-General received bare requisitions under s.27(1)(i) of the VL Act, from the CPA (a government instrumentality entitled to make such a requisition) to provide valuations of the unimproved value of the subject land, as at 12 January 1990 and 12 January 1992. The evidence suggests that the Valuer-General was not even forwarded a copy of the lease agreement, and this probably was not even necessary for the task required by the parties to the lease. The Department's FOI Co-ordinator has, at my request, confirmed from the Department's records the fact that (on each occasion, and shortly after they were prepared) the Valuer-General forwarded the valuation certificates under s.27(4) of the VL Act, together with the valuation reports and invoices requesting payment of the prescribed fees, directly to the CPA which had required the valuations under s.27(1)(i) of the VL Act.

66. Paragraph 3 of Mr Woolley's affidavit sworn 17 December 1993 states that the transaction that occurred pursuant to s.27 of the VL Act was with the CPA only, which paid the fees payable for the valuation, and that no rights thereunder accrued to Cairns Shelfco in respect of that transaction. However, when one looks to the lease, one sees that Clause 14 provides that "*any ... costs, charges or expenses in any way incurred by the lessor in connection with [the lease] howsoever arising shall be borne by the lessee*". The Valuer-General's valuations of the unimproved value of the subject land were required according to terms of the lease already agreed between the lessor and the lessee. There was no conflict of interest between the lessor and the lessee with respect to the obtaining of the valuation. Although presumably the lessor hoped for a high valuation and the lessee hoped for a low valuation, only one valuer had been appointed under the terms of the agreement reached (i.e. the Valuer-General) and the basis on which that valuer was to value the subject land was made clear. Nothing in the terms of the lease suggests that the lessee would not have been equally entitled to request the s.27 valuations that were required for the valuation dates of 12 January 1990 and 12 January 1992. There were advantages in the CPA arranging for the valuations because it had the statutory right to require the Valuer-General to issue the valuations, in accordance with s.27(1)(i) of the VL Act, whereas Cairns Shelfco could only have requested the valuations, under s.27(1)(ii) of the VL Act, and the Valuer-General could have declined, in his discretion, to provide them to Cairns Shelfco. However, if Cairns Shelfco had first requested the s.27 valuations, disclosing the terms of the lease so as to explain the purpose for which the valuations were required under the lease (and pointing to its obligation to meet this necessary expense under the lease), I have difficulty in seeing any basis in principle (as opposed to reasons of administrative expediency, e.g. workload commitments and any need to give priority to government clients) on which the Valuer-General could or should have refused to supply the requested valuation to Cairns Shelfco. In particular, having regard to the terms of the lease, I have difficulty in seeing a basis for any suggestion of a conflict of interest in respect of duties owed to a regular client, in the form of the CPA.
67. I note that amendments to the present s.74 of the VL(R) Act have removed the right of a government instrumentality to require the Valuer-General to issue a special valuation. Section 74 of the VL(R) Act now empowers the chief executive to value real or personal property for any person (i.e. government or non-government) on request, and does so in terms which make it clear that the chief executive has a discretion whether or not to undertake the requested valuation. If a requested valuation is undertaken, sub-section 74(2) provides that the requester must pay the fee prescribed by the *Valuation of Land Regulation 1993 Qld*. Thus in future, the CPA will have no greater legal right than Cairns Shelfco to request the chief executive to provide the special valuations required under the terms of the lease agreement. (I do not doubt, however, that it is likely that the chief executive would adopt a policy of ordinarily accepting requests from government agencies, while being more discriminating in choosing to undertake work requested by non-government sources.)
68. In the circumstances described, there may be some substance in the argument by Cairns Shelfco (in the extract from its submission set out at paragraph 38 above) that any duty owed by the Valuer-General to its client is owed jointly to the CPA and Cairns Shelfco. It is a difficult issue, and since I do not need to decide the point in view of the findings I have already made, I do not propose to attempt to do so. If Cairns Shelfco's argument is correct, however, the ramifications in terms of the application of s.46(1)(a), even to the matter identified in paragraph 45 above (assuming it were not, as I have found it to be, excluded from eligibility for consideration under s.46(1)(a), by virtue of s.46(2)) would be that in constructing the ambit of any obligation of confidence owed by the Valuer-General, Cairns Shelfco might either be:
- (a) the Valuer-General's client (i.e. jointly with the CPA) and entitled as such to obtain the valuation and valuation report; or, alternatively (and more likely),
 - (b) a person to whom disclosure of the valuation report would be impliedly authorised, so that disclosure of the valuation reports to Cairns Shelfco would not be an unauthorised misuse of

confidential information (*cf.* paragraphs 103-106 of *Re "B"*).

69. That the true legal position according to the proper construction of the terms of the lease is a difficult issue is evidenced by the rather surprising submission (which does not sit easily with other submissions made by the CPA) that appears in the last paragraph of the extract from the CPA's final submission which is set out at paragraph 36 above. This suggested interpretation of the effect of the lease agreement appears to have been influenced by the legal analysis in Professor Duncan's statutory declaration (see paragraph 97 below), and appears to accept that the parties to the lease have agreed on a valuer who is to determine a matter on which the rent depends, acting in the capacity of an expert valuer.
70. The suggestion that neither party to the lease is entitled to know how the valuation figure is arrived at (i.e. that the Valuer-General's valuation reports should be kept confidential from both lessor and lessee) strikes me as being less persuasive than Cairns Shelfco's alternative contention that lessor and lessee are joint clients of the Valuer-General. The CPA's contention would require that specific instructions concerning confidentiality be given to the Valuer-General who would otherwise assume that valuation material was to be disclosed to a recognisable client. This suggests to me that it is difficult to read an implication of the kind contended for by the CPA into the terms of the lease, in the absence of any clear indication that this was the intention of the parties.
71. The CPA's argument is an interesting one, but the CPA does not say how it squares with the fact that the Valuer-General gave the CPA immediate access to the s.27 valuation reports for the valuation dates of 12 January 1990 and 12 January 1992 (see paragraph 65 above) and does not attempt to deal with the obvious question whether, in those circumstances, elementary fairness does not now require that Cairns Shelfco should be permitted similar access.
72. Finally, I note in passing that the application of s.46(1)(a) in this case would have to be evaluated by reference to a hypothetical action for breach of confidence brought by the CPA, a government agency, as plaintiff. At paragraph 118 of my reasons for decision in *Re "B"*, I explained that if s.46(1)(a) is to be applied by reference to a hypothetical action in equity for breach of confidence brought by the State of Queensland, or a statutory authority or local authority, as plaintiff, the plaintiff must establish that disclosure of the information in issue would cause detriment to the public interest. The CPA did not address this issue as an element of its case under s.46(1)(a), although it did make submissions going to the public interest in non-disclosure of the information in issue for the purposes of other exemption provisions relied upon. On the other hand, this could arguably be an example of a situation in which the relevant activity of the CPA has such a non-governmental or commercial character that a court would not apply the "injury to public interest" requirement, but apply the test of detriment to the plaintiff's interests, appropriate to a non-government commercial enterprise.

The Claim for Exemption under s.45(1) of the FOI Act

73. Section 45(1)(a) and s.45(1)(b) have not been relied upon by the CPA and will therefore not be considered in this decision. Section 45(1)(c) and s.45(2) provide as follows:

45.(1) Matter is exempt matter if -

...

(c) *its disclosure -*

- (i) *would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
- (ii) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*

unless its disclosure would, on balance, be in the public interest.

(2) Matter is not exempt under subsection (1) merely because it concerns the business, professional, commercial or financial affairs of the person by, or on whose behalf, an application for access to the document containing the matter is being made.

74. According to the principles which I explained at paragraphs 66-88 of my reasons for decision in *Re Cannon and Australian Quality Egg Farms Limited* (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported) matter will be exempt from disclosure, by virtue of s.45(1)(c) of the FOI Act, if I am satisfied that:

- (a) the matter in issue is properly to be characterised as information concerning the business, professional, commercial or financial affairs of an agency or another person (s.45(1)(c)(i)); and
- (b) disclosure of the matter in issue could reasonably be expected to have either of the prejudicial effects contemplated by s.45(1)(c)(ii), namely:
 - (i) an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns; or
 - (ii) prejudice to the future supply of such information to government;

unless I am also satisfied that disclosure of the matter in issue would, on balance, be in the public interest.

75. As the information in issue in this case was prepared by a government agency, there does not appear to be any scope for an argument that its disclosure would prejudice the future supply of such information to government, and the CPA has not sought to put its case on that basis.

Submissions of the Participants on the First Element of s.45(1)(c)

76. The reasons for decision of the Department's internal reviewer, Mr Holmes, on the application of s.45(1)(c) were as follows:

You [i.e. the CPA] contend that there is a probability of detriment to the [CPA] if the applicant [i.e. Cairns Shelfco] is apprised of the information used by the Department to calculate the property valuation. I understand from your comments that the actual certificate of valuation is not at issue, only the information used and calculations made.

The valuation was performed for the [CPA] by the Department using established procedures, and on a fee for service basis.

I do not believe that the documents contain matter which would disclose information not already known about the [CPA]; the documents are generated entirely by the Department. The contractual agreement between the parties is based on the valuation, however the detail of how the valuation was calculated does not disclose information on the [CPA's] affairs.

Since exemption requires all three conditions to be met i.e. disclosing information and adverse effect and unless disclosure is in the public interest, I do not think that exemption is afforded by this section.

77. It appears that the main basis of Mr Holmes' decision was that the valuation reports contain information about the CPA which is already known, and that the detail of how the valuation was calculated did not disclose information concerning the affairs of the CPA.
78. The essence of the CPA's case on this issue is stated at page 4 of its application for review as follows:

In referring to the disclosure of information "about" the [CPA] Mr Holmes appears to have misunderstood the point sought to be made. The affairs of the [CPA] include the determination of the value; and the information relied upon by the Valuer-General and the methodology of the Valuer-General therefore concerns the affairs of the [CPA] even though they may not comprise information about the [CPA].

79. The CPA expanded on this basic point, in its final submission, as follows:

There is no doubt that the [CPA] is an "Agency" as defined in section 8 of the [FOI] Act. ...

The ordinary meaning of the word "concerning" is to "relate to, be connected with, be of interest or importance to, or affect that which relates to or pertains to one's business affairs". (The Macquarie Encyclopedic Dictionary, 1992 Reprint, page 192). See also Concise Oxford Dictionary, 7th edition, page 194 where the word "concerning" is defined as "about, regarding".

...

*The [CPA's] business, professional, commercial or financial affairs include the derivation of the unimproved value of the land which is being leased for the purposes of calculation of rental pursuant to the Lease. The [CPA] is intimately concerned in this process. The process undertaken by the Valuer-General in arriving at the valuation therefore must concern the affairs of the [CPA]. The fact that the [CPA] is not the author of the reports is entirely irrelevant. The fact that the valuation methodology and reports may also concern the business or professional affairs of the Valuer-General does not preclude that material from concerning the business or professional affairs of the [CPA] as well. The fact that the Valuer-General's Department initially did not think that there was anything in the methodology warranting exemption from disclosure is entirely irrelevant. The Valuer-General's Department has released documents which it should never have released in the opinion of the [CPA]. The [CPA] and the Department of Lands and the Valuer-General clearly take a very different view of the question of claiming exemptions under the **Freedom of Information Act** in respect of this material. (But see Affidavit of Woolley which indicates that the Department regrets the information must be made available and recognises duty of confidence).*

Disclosure of the material may not have any conceivable adverse effect on the affairs of the Valuer-General and/or Department of Lands and that may well be the reason why they have not claimed any grounds of exemption. Alternatively, and more probably in light of the Affidavit of Woolley, Lands simply takes an erroneous view of the FOI Act.

... It appears to be conceded that the Valuer-General's ultimate conclusion flowing from the Application of Methodology to the facts would certainly "concern" both the Valuer-General and the [CPA]. The whole process undertaken by the Valuer-General including his methodology etc. concerns the [CPA] every bit as much as it concerns the Valuer-General.

80. Cairns Shelfco addressed this issue in its submission dated 6 August 1993:

As to the valuation reports, draft or otherwise, it may noted that none of them was authored by the [CPA]. Further, valuation methodology per se "concerns" the business or professional affairs of the Valuer-General and his officers within the Department of Lands, not the affairs of the [CPA]. That Department has not suggested there is anything in the methodology warranting exemption from disclosure. The Valuer-General's ultimate conclusion flowing from the application of that methodology to the facts would certainly "concern" both the Valuer-General and the [CPA].

But that conclusion is reflected in a figure which is disclosed to [Cairns Shelfco] in any event under the lease.

One might expect that the information in the reports would "concern" the business, commercial or financial affairs of the [CPA]. No doubt the reports note the [CPA's] ownership of the premises, the situation of the premises, the fact the [CPA] is a landlord and other notorious facts. In this regard, the reports would likewise "concern" the business, commercial or financial affairs of [Cairns Shelfco] as well. It, after all, is the tenant of the same premises which are the subject of the valuation. ... much information that concerns the affairs of the [CPA] qua landlord will necessarily equally concern the affairs of the [Cairns Shelfco] qua tenant.

As to the latter, however, s.45(2) of the FOI Act provides that a matter is not exempt

under s.45(1) merely because it concerns the affairs of the person making the FOI application, i.e. [Cairns Shelfco]. ... The reports no doubt contain much information "concerning" both the [CPA] and [Cairns Shelfco], what the [CPA] has not done is to indicate in what manner that information does more than merely concern [Cairns Shelfco's] affairs.

...

The information must, if it is submitted, still be something more than that which equally (and hence merely) concerns both [Cairns Shelfco's] and [the CPA's] affairs.

Findings on the First Element of s.45(1)(c)

81. The first element of s.45(1)(c) of the FOI Act turns on the proper characterisation of the information in issue. Although the word "concerning" can, according to the context in which it is used, be a word of fairly wide import (equivalent to "relating to", or "connected with"), I explained in my reasons for decision in *Re Cannon* (at paragraph 67) that the meaning of the word "concerning" which is appropriate to the context of s.45(1)(c) is the primary meaning given by both the Collins English Dictionary (Aust. Ed) and the Australian Concise Oxford Dictionary, that is, "about, regarding". That the narrower meaning of "concerning" is the appropriate meaning in the context of s.45(1)(c) of the FOI Act is supported by the approach of the learned judges in the authorities discussed at paragraphs 69-72 of my reasons for decision in *Re Cannon*.
82. In *Accident Compensation Commission v Croom* [1991] 2 VR 322, the information in issue comprised an investigation report and medical report relating to an employee's industrial injury claim, and was clearly connected with the business of the Accident Compensation Commission. The Full Court of the Supreme Court of Victoria, however, was not prepared to characterise the information in issue as information which "relates to ... matters of a business, commercial or financial nature" for the purposes of s.34(1)(a) of the *Freedom of Information Act 1982 Vic*. Likewise, the acoustic impact assessment report at issue before Powell J of the NSW Supreme Court in *Wittingslow Amusements Group Pty Ltd and Other v the Director General of the Environment Protection Authority of NSW* (Supreme Court of NSW, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported) clearly had a connection with the business affairs of the applicant developer which commissioned the report. Powell J, however, was not prepared to characterise the report as containing "information concerning the business, professional, commercial or financial affairs of any person" for the purposes of s.32(1)(c) of the *Freedom of Information Act 1989 NSW*. It is worth repeating what was said in the passage from the judgment of O'Bryan J (with whom Vincent J agreed) in *Croom's* case (at page 330):

Although each of the words [in s.34(1)(a) of the Freedom of Information Act 1982 Vic] employed by the legislature must be accorded its ordinary meaning that meaning must, of course, be determined by reference to the context in which it is used. It is clear, I consider, that Parliament did not intend to exempt from the operation of the Act every piece of written information which is obtained by an agency merely on the basis that it had been acquired and provided by a business undertaking in the course of its ordinary activities. ...

...

... For an exemption to be granted the information must relate to matters of a business, commercial, or financial nature and it is not sufficient that the information will be used by an agency in the course of a business undertaking.

...

Further, the use to which the information can be put by an agency does not change or extend the nature of the information.

83. Powell J made it clear in the *Wittingslow* case that he accepted and followed the approach of the Full Court of the Supreme Court of Victoria in the *Croom* case. If there were any doubt that the adoption of the narrower meaning of the word "concerning" in the context of s.45(1)(c) is the appropriate approach, I note that it is consistent with the approach to interpretation of FOI legislation endorsed by the Full Court of the Federal Court of Australia in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FLR 111; 108 ALR 163, to the effect that while it is not proper to adopt a "leaning approach" to the interpretation of words plainly expressed, the objects of FOI legislation mean that, when interpreting any ambiguities in the legislation, "... it is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information" (citing the unanimous judgement of the High Court of Australia in *Victorian Public Service Board v Wright* (1986) 160 CLR 145 at p. 153).
84. Applying the approach in the *Croom* case and the *Wittingslow* case to the characterisation of the information contained in the documents in issue, I am satisfied that most of that information is clearly information about the business or commercial affairs of the CPA, in that it is about the subject land, which is vested in the CPA and which it leases for commercial purposes (see also paragraph 8 above).
85. There is a small amount of matter in some of the documents in issue which arguably is not information about the CPA's business, professional, commercial or financial affairs; rather it is information about the market for commercial land in Cairns generally, and in particular the Valuer-General's assessment of the state of that market. It is true that the information is included in the documents in issue for the purpose of making comparisons and assessments relevant to the valuation of the subject land, which puts that information very close to the borderline. I am inclined to the view, however, that although the matter I am referring to in this paragraph has some connection with the business or commercial affairs of the CPA it cannot properly be characterised as information concerning the business or commercial (or for that matter the professional or financial) affairs of the CPA, according to the approach to characterisation adopted in the *Croom* case and the *Wittingslow* case. The matter to which I am referring in this paragraph is as follows:
- Folio 78 - the first two hand-written sentences
 - the second and third paragraphs on Folio 95
 - Folio 167 - the third, fourth and fifth paragraphs plus all the information in the second paragraph which appears after the word "million"
 - Folio 166 - the first paragraph, except for the last sentence of the first paragraph.

Apart from my reservation concerning this matter, I am satisfied that the documents in issue concern the business or commercial affairs of the CPA. (I am also satisfied that they concern the business or commercial affairs of Cairns Shelfco, as lessee of the subject land.) Cairns Shelfco would gain little from having access, in isolation, to the matter identified in this paragraph, and I propose to consider the second and third elements of s.45(1)(c) as they apply to all of the matter contained in the documents in issue.

86. The matter identified in the preceding paragraph arguably concerns the business or commercial affairs of the Valuer-General (the former Department of Valuer-General has now been subsumed within the respondent Department). However, as I noted at paragraph 80 of *Re Cannon*, the adverse effect contemplated by s.45(1)(c)(ii) must be an adverse effect on the business, professional, commercial or financial affairs of the agency (or other person) which the information in issue concerns. In this case, the Department does not contend that disclosure of the information in issue

will have an adverse effect on its business, professional, commercial or financial affairs.

87. An argument was pressed by Cairns Shelfco in its written submissions that the information which it seeks is denied exemption under s.45(1) by virtue of s.45(2), since it concerns Cairns Shelfco's affairs as much as it does the CPA's (see the third, fourth and fifth paragraphs of the submission by Cairns Shelfco set out at paragraph 80 above). This argument, however, proceeds from a misunderstanding of the proper construction of s.45(2) of the FOI Act, and in particular the effect of the word "merely" in s.45(2). The correct interpretation of s.45(2) was explained in *Re Cannon* at paragraphs 39-41, and illustrated in the same decision at paragraph 111. I am satisfied that s.45(2) cannot assist Cairns Shelfco in respect of the information in issue which concerns the business or commercial affairs of both Cairns Shelfco and the CPA, and it can of course, have no application to the information I have identified in paragraph 85 above as information which cannot be properly characterised as concerning the business or commercial affairs of either Cairns Shelfco or the CPA.
88. The crucial issues in the application of s.45(1)(c) in the present case are whether the second and third elements identified at paragraph 74 above are satisfied, i.e. whether disclosure of the documents in issue could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the agency (or other person) which the information in issue concerns; and if so, whether disclosure of the documents in issue would, on balance, be in the public interest. I will set out extracts from the evidence and submissions of the participants which go to the essence of their respective cases on the second element of s.45(1)(c), and also the third element of s.45(1)(c) (the public interest balancing test).

The Evidence and Submissions of the Participants on the Second and Third Elements of s.45(1)(c)

89. The following extracts from the affidavit of Mr Manning (the Chief Executive Officer of the CPA) explain the nature of the CPA's concerns with respect to the second and third elements of s.45(1)(c):

10. Notwithstanding that, by entering the Lease, Shelfco expressly agreed to the rent review mechanism contained therein, Shelfco has during the course of the Lease persistently sought to challenge the amount of rental properly payable thereunder. These challenges have taken various forms, and have included challenges to valuations upon which rent and licence fee reviews have been calculated.

11. Shelfco has invoked the objection/appeal procedure provided under the Valuation of Land Act 1944 to challenge valuations of the subject land performed by the Valuer-General under section 11 of the Valuation of Land Act 1944.

12. Shelfco has also, during the course of the Lease, sought to invoke the procedures provided by the Valuation of Land Act 1944 to challenge the valuations assessed by the Valuer-General in accordance with section 27 thereof as at the 12th January, 1988 and the 12th January, 1990. In response, the [CPA] obtained advice from Senior Counsel to the effect that Shelfco had no standing to object to, nor appeal against, valuations obtained by the [CPA] in accordance with that section. ...

13. Shelfco has, by its solicitors, expressly put on record that it reserves its rights to object to and contest valuations upon which rent reviews have been calculated. Now produced and shown to me and marked "RCM8" is a true copy of a letter from Shelfco's solicitors to the [CPA's] solicitors dated the 23rd October, 1991 to this

effect. By Affidavit sworn on behalf of Shelfco on the 4th November, 1991 and filed with the Supreme Court of Queensland in support of Notice of Motion No. 1860 of 1991, one Michael John Stephens deposed that :-

"Two disputes have arisen between Shelfco and the [CPA] in respect of the rental sums payable for the first successive two year periods from the 12 January 1990 to the 11 January, 1992. One of these disputes which concerns the correct application of the formula for calculating the rental for that period is currently in abeyance pending determination of Notices of Objections with regard to the Valuer-General's assessments of the land value."

...

14. In view of the history of the [CPA's] dealings with Shelfco, the [CPA] is very concerned that the sole motivation underlying Shelfco's present application for access to the Department of Lands is to further its dispute concerning the calculation of rental under the Lease. Shelfco has not, at any time, acquiesced in any of the rent reviews undertaken by the [CPA] and has quite persistently taken whatever steps have been open to it to further its capacity to challenge the rental determinations performed in accordance with the Lease. I verily believe that Shelfco's ultimate purpose in seeking access to the subject valuations is to bring proceedings against the [CPA] alleging overpayment of rental under the Lease, and seeking recovery of the allegedly overpaid rent and reduction of present and future rent payable in accordance with the Lease.

15. By section 58(1) of the Harbours Act 1955, the [CPA] is invested with responsibility for the control and management of the harbour for which it was constituted. The land, the subject of the Lease, was vested in the [CPA] by proclamation made the 15th March, 1934. The land has been designated "harbour lands" in accordance with section 62A of the Harbours Act 1955. The [CPA] is empowered, in accordance with section 64(1) of the Harbours Act 1955, to lease land vested in it upon such terms and conditions as it thinks fit. In this context, the [CPA] is vested with responsibility for the management and administration of public assets within a substantial commercial property market in Cairns. Much of the revenue which the [CPA] derives from its commercial leases is reinvested in the upgrade and development of public facilities within the [CPA's] administration. Any reduction in this source of revenue would carry with it either a reduction in the level of expenditure by the [CPA] on public facilities, or a greater burden upon Port users generally to maintain existing levels of such expenditure.

16. If access to matter of the nature sought by Shelfco were to be available to the public at large, the [CPA] is very concerned that it would be fettered in its capacity to most effectively administer assets within its control. Generally speaking, in negotiating the terms of a commercial lease with a prospective lessee, the [CPA] and the lessee act at arms length like any commercial lessor and lessee negotiating in the private sector. In the private sector, a lessor and lessee would be free to make reference to whatever information is at their disposal to further their position during the course of negotiations. In these circumstances, neither party would be under any obligation to furnish the information which is at its disposal to the other. If a party to a commercial transaction is obliged to disclose such information to the other, it would be hindered in its capacity to negotiate terms most favourable to it. If the [CPA] is compelled to disclose valuation material relative to its harbour lands

to any prospective lessee, it follows that such disclosure would put the [CPA] at a commercial disadvantage in its capacity to negotiate the most favourable terms with the prospective lessee. This is particularly of concern to the Authority because it is about to embark upon a major planning and redevelopment programme involving the land it holds between the Cairns Central Business District and Trinity Inlet. This programme will be likely to result in a number of fresh major seaport leases being negotiated and granted by the [CPA].

...

19. The [CPA] is very concerned that, if Shelfco were to be granted access to the documents, the subject of its application, it is likely that litigation will ensue at substantial cost to all parties. In view of the amount of rental potentially in jeopardy, the [CPA] would have no alternative but to rigorously defend any proceeding commenced by Shelfco seeking to challenge or set aside rent reviews performed to date, or the underlying valuations. In that event, the [CPA] would need to obtain legal advice concerning its rights of recourse against the Department of Lands for the recovery of any consequential loss or damage. To do otherwise, the [CPA] would be abdicating from its responsibilities associated with the proper administration of its public assets.

90. The affidavit of Mr Coonan is largely directed to supporting the material in paragraph 16 of Mr Manning's affidavit, and I do not think it is necessary to reproduce it here, although I have taken it into account.

91. The affidavit of Mr Treston, an experienced solicitor and a partner in the firm of solicitors which acts for the CPA, is as follows:

4. I have been requested to provide an estimate of the cost implications to the Cairns Port Authority in the event that an action was commenced by Cairns Shelfco No. 16 Pty. Ltd. against the [CPA] alleging overpayment of rental under the subject Lease, and seeking the recovery of any such overpayment and the reduction of present and future rental payable thereunder. In my experience, actions of that nature are not uncommon. Such an action would be protracted and expensive to all parties. It would delay the rental determination under the subject Lease, and payment of any consequential increase in rental to the [CPA]. In my opinion, the more information is made available to Cairns Shelfco No. 16 Pty. Ltd. concerning rent reviews which have occurred to date, the more likely it is that the company would consider itself able to mount a viable challenge.

5. The potential quantum of a claim of this nature would require the action to be determined in the Supreme Court of Queensland. The technical nature of the matters at issue would dictate that a number of expert witnesses would be required to give evidence on behalf of the Cairns Port Authority. Experts would need to be briefed to prepare reports to assist in the preparation for trial. Such an action would require the completion of interlocutory steps, including discovery and inspection of documents, the interrogation of each party, and a trial which would be likely to last at least three days before the Supreme Court and could last as long as five days.

6. The legal issues which would be associated with the determination of an action of this nature are quite complex. Indeed, the question of whether (and the extent to which) rent reviews based on valuations are amenable to challenge is an unsettled area, and almost invites litigation to obtain an authoritative determination. For these reasons, the Cairns Port Authority would be well advised to engage senior Counsel, with the assistance of an experienced junior, to represent it during the

course of such an action.

7. Whilst it is difficult to otherwise predict the exigencies of such an action (for example, it may prove necessary to join another party or parties), the actual cost to the Cairns Port Authority of the conduct of the action would range from \$48,000.00 to \$70,000.00. If the Cairns Port Authority were to prove successful in its defence, it could expect to obtain an order that the Plaintiff pay its party/party costs of and incidental to the action to be taxed. The party/party costs would in all likelihood quantify in the range from one half to two-thirds of the [CPA's] actual costs of defending the action. The balance of its costs would be borne by the [CPA] in any event.

92. The only evidence filed by Cairns Shelfco that goes to these issues is some material in the affidavit of Mr Stephens, which responds to the assertions in paragraphs 10-14 of Mr Manning's affidavit as follows:

... [Cairns Shelfco] has stated its desire to reserve its rights to object to valuations carried out by the Valuer-General under s.27 of the Valuation of Land Act, however, despite this no further steps or action have been taken by [Cairns Shelfco].

[Cairns Shelfco] has objected to a number of annual valuations carried out by the Valuer-General's Department under s.11 of the Valuation of Land Act and such objections have been amicably resolved by negotiation without the necessity of a court hearing.

93. The CPA set out brief submissions on these issues in its application for review. I will not reproduce those submissions since they are repeated, and expanded upon, in the CPA's final submission, relevant extracts of which are set out below.
94. Cairns Shelfco's submission of 6 August 1993 responded to the arguments set out in the CPA's application for review, on these issues, as follows:

When one analyses the reasons advanced by the [CPA] ... as to why disclosure "could reasonably be expected to" have an adverse effect on its affairs those reasons amount, in the end, to a fear of litigation concerning the rent fixed by reference to the valuation clause in the lease It is submitted, having regard to the contents of the application for review, that this is, in terms of the cases, nothing more than a mere possibility rather than a reasonable probability.

...

If, as the [CPA] contends, and a reading of clause 1 confirms, the lease requires that the rent be fixed by reference to a valuation prepared by the Valuer-General, no amount of litigation can alter what is in the wording of the lease.

What is ignored by the [CPA] is that the reference in the lease to the Valuer-General's valuation determining the rent is there because both parties to the lease, i.e. the [CPA] and [Cairns Shelfco] have chosen to agree to this. Accessing the reports will enable a corporate citizen, [Cairns Shelfco], to better understand how a chosen public official, the Valuer-General, came to determine a particular value in the discharge of a statutory function viz. the performance of a valuation under s.27 of the Valuation of Land Act. This is exactly in keeping with the reasons expressed by the Parliament as to why it chose to enact the FOI Act - see esp. s.5(1)(a) and 5(1)(b).

...

The [CPA] has nowhere identified in its application for review in precisely what form its rent fixing clause in the lease might be open to challenge through the questioning of the Valuer-General's valuation. In the absence of such precision, mention of the possibility of litigation can be nothing more than unfounded speculation.

...

In so far as the lease provides for rent to be varied by reference to the unimproved value of the demised premises as assessed by the Valuer-General, the Valuer-General's unimproved land valuations have never been secret. The Valuation of Land Act contains long-standing and elaborate provisions for the public external review (via the Land Court and Land Appeal Court) of the Valuer-General's unimproved land valuations made for rating and land tax purposes. Both the information in and methodology of valuations so made is exposed for scrutiny in such reviews.

It is simply not correct to assert, as does the [CPA] ... that "an ordinary commercial landlord would not be subjected to this process" (presumably an FOI application). It is submitted that the only relevant distinction to be drawn between [the CPA] and "an ordinary commercial landlord" is that the [CPA] has the right to require the Valuer-General to make a valuation under s.27 of the Valuation of Land Act whereas an ordinary commercial landlord must request him so to do: note the difference between s.27(1)(i) and s.27(2)(ii) of that Act. What gives the [CPA] the right to require a valuation under s.27 is nothing more than its status as a Crown instrumentality. Any landlord, public or private, for whom the Valuer-General makes a valuation under s.27 of the Valuation of Land Act is in an identical position for the purposes of the FOI Act. ...

To suggest, as does the [CPA] ... that there is a public interest to be served in preventing a person from exercising a prima facie right of access under the FOI Act because that might lead to that person exercising a right to air a grievance in the courts is, with respect, grotesque. It bears repeating that an applicant's motive is irrelevant in the context of access under the FOI Act. The [CPA's] submission flies in the face of the open government reasons articulated by the Parliament in s.5(1) of the FOI Act for enacting that legislation. FOI legislation is used routinely to gather information which may be of interest in deciding whether or not to institute proceedings in court. Here, of course, the [CPA] has not condescended to state what that litigation might be. Be this as it may, far from generating litigation, accessing the reports which ground a valuation may actually prevent it.

[Cairns Shelfco] also adopts, with respect, the six public interest grounds in favour of disclosure identified by the internal review officer on p.5 of his reasons.

95. It is appropriate at this stage to note the public interest considerations favouring disclosure that are identified by Mr Holmes in his internal review decision:

... the benefits which may accrue from release of the information on the grounds of public interest include:

- (1) *Disclosure of the basis for valuation could reinforce the confidence of the public in the methodologies and processes used by the Department in calculating valuations;*
- (2) *The object of the Act is to extend as far as possible the right of the community to have access to information held by the Queensland Government;*
- (3) *... [this point relates solely to the application of s.48 of the FOI Act];*
- (4) *Much of the information on which the valuation was made is available in the public domain;*
- (5) *Valuation methodologies are widely known;*
- (6) *The level of disputation over rents between lessees and the [CPA] may in fact be reduced should the documents be released.*

Mr Holmes has correctly, in my view, drawn attention to a public interest consideration favouring disclosure which (perhaps unsurprisingly) receives little or no attention in the CPA's submission, namely, the public interest in accountability of the former Valuer-General (and now the chief executive of the Department) for the discharge of their statutory functions.

96. The arguments addressed by the CPA to these issues in its final submission were extensive, but the following extract, I believe, captures the substance of them:

The [CPA] has produced evidence, none of which is controverted by [Cairns Shelfco] to show that there is a real risk of litigation in relation to this matter. The [CPA] has shown by Affidavit material that the costs of any such litigation would be very substantial and unlikely to be fully recovered by the [CPA] even if it were successful in that litigation. The ways and means in which valuations can be challenged are covered in some detail in the Statutory Declaration of Professor Duncan. We need not repeat them here although we do rely on the contents of that Statutory Declaration as part of our submissions.

Mr Treston's Affidavit deals with his experiences in relation to litigation of the type contemplated by the [CPA] and the costs associated with that litigation, a substantial proportion of which would not be recovered by the [CPA] even if it were successful in that litigation. Clearly any such litigation could reasonably be expected to have an adverse effect on the affairs of the [CPA]. Mr Manning's Affidavit also deals with this question (see paragraph 16 of Mr Manning's Affidavit). If the [CPA] is compelled to disclose valuation material relative to its harbour lands to prospective tenants the disclosure would put the [CPA] at a commercial disadvantage in its capacity to negotiate the most favourable terms with respect to

leases. This is of particular concern to the [CPA] because it is about to embark upon a major planning and redevelopment program involving the land it holds between the Cairns Central Business District and Trinity Inlet. The program will be likely to result in a number of fresh major seaport leases being negotiated and granted by the [CPA].

...

There is no doubt that [Cairns Shelfco] could challenge the valuations made by the Valuer-General under the lease (see Statutory Declaration Professor Duncan and Affidavit of Mr Treston). Its prospects of success may be poor, but as is clear from the Affidavit of Mr Treston considerable costs would still be run up, not all of which would be recoverable from [Cairns Shelfco]. It is nothing to the point to suggest that the documents may be discoverable if an action is ever commenced by [Cairns Shelfco] against the [CPA] and/or the Valuer-General challenging the valuation. [Cairns Shelfco] is really trying to have it both ways. Either they intend to commence an action or they do not. They are being particularly coy in relation to this aspect of their case. In any event, in order to commence an action it is necessary to know what is in the report. It is not possible to draw a sensible Statement of Claim after filing and serving the Writ without having had access to this material beforehand. In the normal course of civil litigation pleadings would have to be closed before there could be discovery and inspection of documents. That is why this Application for Access is being made in our submission. [Cairns Shelfco] wants the information in advance so that it can decide whether it has an arguable cause of action and if so, institute same and thereby pressure the [CPA] to settle the action in order to avoid running up costs. It will have no problems in drawing and settling the Statement of Claim because it will already have all the relevant information on **Freedom of Information** access. The [CPA] does not quibble with [Cairns Shelfco's] right to attempt to do what it is doing. It simply maintains that disclosure of these documents could reasonably be expected to have an adverse effect on the [CPA's] affairs because of the real possibility of litigation being commenced by [Cairns Shelfco].

...

... There is no material difference between the nature of the relationship vis-à-vis the [CPA] and the Valuer-General and the [CPA] and any commercial valuer. The valuation is not being obtained for any Governmental purpose but for the purposes of calculating rent under a private commercial lease between the [CPA] and a private company. Nothing about the granting of access is likely to promote open discussion of public affairs or enhance Government accountability. The operations of the Valuer-General in relation to the compilation of this information are not public in nature, but rather private in the same way as a private valuer's relationship to a client is private and confidential.

...

... if access is granted to this information, [Cairns Shelfco] will undoubtedly use it for the purpose of instituting a challenge against the [CPA]. It is true that no challenge might be instituted because [Cairns Shelfco] might form the view that such a challenge would be bound to fail. Even then, because of the amount of money involved, it may well be prepared to take a punt with litigation or it may be advised that it has better prospects of success than in reality it has. It is however very likely

that a challenge will be prosecuted otherwise [Cairns Shelfco] would not be prepared to expend the considerable amount of time, money and energy which is being expended by it and its legal advisers in endeavouring to gain access to these documents. [Cairns Shelfco] has consistently challenged the correctness of the valuations relied on by the [CPA]. Reference to these matters is made in the Affidavit of Mr Manning. (Paragraphs 13 and 14 and Exhibits RCM8, 9 and 10). Nothing in the Affidavit of Mr Stevens casts any doubt on this proposition. The reason why [Cairns Shelfco] has taken no further steps to challenge the valuations at this stage is because it has not had access to the material in the possession of the Valuer-General's Department. Once [Cairns Shelfco] has had access to that material it may well be in a position to formulate an action against the [CPA] and the Valuer-General.

...

*... The suggestion at pages 9 and 10 of the first submission that the **Valuation of Land Act** contains longstanding elaborate provisions for the public external review of the Valuer-General's valuations is entirely incorrect insofar as it is suggested that there is a right of review of a valuation under section 27 of the Act. There is no such right of review. [Cairns Shelfco] does not appear to understand the submission made by the [CPA] in relation to the nature of the relationship between the [CPA] and the Valuer-General. It is purely a coincidence that the lease provided for a valuation to be done by the Valuer-General. That is the only reason why access under the Act can be sought by [Cairns Shelfco]. The [CPA] could just as easily have specified that the valuation was to be done by a private valuer. If the valuation was done by a private valuer, [Cairns Shelfco] would have no right to access that valuation under the Act. [Cairns Shelfco] could make an application to the [CPA] for access under the Act. The [CPA] however could easily circumvent any such request simply by ensuring that it did not have in its possession any relevant information. The [CPA] does not need to obtain the working papers and material from the valuer. The point is that the working papers and material to which access is sought in the hands of the Valuer-General would not be accessible in the hands of a private valuer. It is only arguably accessible in the hands of the Valuer-General pursuant to the provisions of the Act.*

*In an ordinary commercial landlord and tenant situation, access could not be obtained unless the commercial landlord happened to use the Valuer-General. There is no logical reason why a commercial landlord would do so. The [CPA] has used the Valuer-General simply for convenience and because it has the right to require the Valuer-General to make a valuation under section 27 of the **Valuation of Land Act**. The [CPA] does not contend that [Cairns Shelfco] does not have a right to seek access under the Act and that it is not legitimate for [Cairns Shelfco] to endeavour to obtain this information with a view to instituting an action against the [CPA]. The [CPA] contends that it is not in the public interest that [Cairns Shelfco] have access to the information because if [Cairns Shelfco] institutes litigation against the [CPA] substantial costs will be incurred by the [CPA] in defending that litigation even if it is successful in so doing.*

In those circumstances, less money will be available to the [CPA] to enable it to carry out its statutory functions. Reference is made to all of these matters in the Affidavit of Mr Manning (see paragraphs 14, 15, 16 and 19 in particular). ... Although access to the information may result in [Cairns Shelfco] not instituting an action against the [CPA] and the Valuer-General, there must be a real possibility that such litigation will ensue for the reasons alluded to herein (see also paragraph 7 of the Affidavit of Coonan).

...

*When one looks at all the material filed herein by both parties including Affidavit material and submissions, the conclusion is inescapable that [Cairns Shelfco] is only seeking access to the documents for which exemption is claimed because it wishes to consider the viability of an action against the [CPA] and possibly the Valuer-General challenging the validity of valuations made by the Valuer-General under the terms of the lease and seeking to recover rental paid pursuant to the terms of the lease if the former challenge is successful. There is no other logical reason why [Cairns Shelfco] would be persisting with its request for access notwithstanding the considerable time, expense and delay incurred to date in the prosecution of that matter. The [CPA] has asserted in its Affidavit material that that is the real purpose or motive behind [Cairns Shelfco's] request for access and [Cairns Shelfco] has not denied that to be so. [Cairns Shelfco] has merely asserted that its motive is irrelevant. Its motive is clearly relevant in relation to public interest considerations and also in relation to potential adverse effects on the financial and property interests and business, professional, financial and commercial affairs of the [CPA]. When one looks at section 5 of the Act, there is no suggestion that there is any public interest to be served in a commercial tenant gaining information from the Valuer-General for the purpose of suing the landlord under a commercial lease. There is much to be said, in the public interest, that such a request for access should be unsuccessful. If the Applicant is successful in relation to its request for access, this can only encourage like minded individuals to make similar requests for access to the detriment of commercial landlords who have the misfortune to deal with the Valuer-General's Department. It is also not in the interests of the Valuer-General's Department as commercial landlords will be most unlikely to use the services of the Valuer-General in obtaining valuations if confidential information obtained by the Valuer-General in the course of preparing valuations is made available to commercial tenants. (See Affidavit Woolley para 6). It is particularly inequitable that access to such information should be available to commercial tenants pursuant to the **Freedom of Information Act** in respect of leases which were negotiated well before that Act came into existence.*

97. The relevant parts of Professor Duncan's statutory declaration, to which reference is made in the CPA's final submission, are as follows:

...

2. There has been a considerable divergence of views both in Australia and in the United Kingdom concerning the ability to challenge a rent review based upon a finding of a valuer acting as an expert. In the last 20 years or so in Australia, rent reviews have been undertaken by valuers acting as experts and not arbitrators.

3. From an historical perspective, confusion in later years started with the case of Deane v Prince [1954] Ch. 409 where Lord Denning, speaking of the impeachment

of a valuation said (at p. 427):

[the valuation] can be impeached not only for fraud but also for mistake or miscarriage ... for instance, if the expert added up his figures wrongly, or took something into account which he ought not to have taken into account, or conversely interpreted the agreement wrongly; or proceeded on some erroneous principle, in all these cases the court would interfere. Even if the court could not point to the actual error, nevertheless, the figure itself was so extravagantly large or so inadequately small that the only conclusion is that the valuer must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal would interfere with an award of damages if it is a wholly erroneous estimate.

In a later case, Campbell v Edwards (1976) 1 WLR 403 at 407, Lord Denning expressed the view that even if the valuer had made a mistake, the parties were bound by the valuation. Lord Denning justified his departure from what he had said earlier by saying that when it was thought that the valuer could not be sued for negligence, the law allowed valuations to be set aside on the grounds of mistake but now the proper position was that the valuation was binding unless affected by fraud or collusion.

This was the situation when the Queensland Full Court decision of Mayne Nickless Ltd v Solomon [1980] Qd R 171 was heard. The Court there drew a distinction between speaking valuations (i.e. valuations which showed errors on the face of the valuation) and non-speaking valuations which are simply valuations without any reasons or calculations supporting the result. It might be said that the Queensland courts have not yet conclusively settled the question whether or not and, if so, to what extent, a speaking valuation is examinable for error of a reviewable kind or the consequences of vitiating a valuation (Mayne Nickless Ltd v Solomon [1980] Qd R 171 at 178-179). The view was expressed in that case by Sheahan J. (at 179) indicating a strong preference for the view that a valuation, speaking or otherwise, conducted by a valuer chosen by the parties, was not impeachable for error and that a party adversely affected by such valuation would be left to a remedy in damages for negligence against the valuer. Subject to what appears below, this view was ultimately supported by McHugh J.A. in Legal and General Life of Australia v A. Hudson Pty Ltd [1985] 1 NSWLR 314 at 334.

Whilst the question of fraud and collusion are reasonably explicable as being reasons for upsetting any valuation, the difficulty presently facing the courts concerns the matter of an error in valuation. This concerns a distinction between "a mistake as to the process of valuation" and "a mistake sufficient for there to be no valuation in accordance with the terms of the contract". In the former case, it is believed that a mistake as to the process of valuation is not reviewable. However, if the valuation proceeded upon a fundamentally erroneous basis, the question arises as to whether this valuation accords with the terms of the contract or lease (Legal and General Life of Australia Ltd v A. Hudson Pty Ltd [1985] 1 NSWLR 314; Woolworths Ltd v Merost Pty Ltd (1988) 14 NSWLR 300). Where an obvious error, for example in mathematical calculations, appears on the face of the valuation, it is thought that this would be reviewable for error (Gollin & Co Ltd v Karenlee Nominees Pty Ltd (1983) 153 CLR 455). This is an obvious case. The real problem is determining what is merely a mistake as to the process of valuation and what is a

valuation which has proceeded on a fundamentally erroneous basis, the latter suggesting substantial error. More recently, in the United Kingdom, in Jones v Sherwood Computer Services plc [1992] 1 WLR 277 the Court of Appeal refused to permit the challenge of an expert's report unless it could be shown that the expert had departed from the instructions given in a material respect which would ultimately affect the result. It was stated by Dillon L.J. (at 284) that the real question was not what may be obtained from the valuation but whether it was possible to say from all the evidence before the Court what the valuer had done and why it was done. The less evidence available, the more difficult to draw conclusions and thus the more difficulty in challenging the ultimate result.

4. *To summarise the position in Queensland, it would appear that there is ample authority for the following propositions:*

- *A valuation would not be binding if it is not the valuation the parties had agreed to which would only be the case if the valuer had made a serious fundamental error such as the valuation of the wrong area or a totally erroneous interpretation of the lease under which the valuation occurred.*
- *This principle would hold good both in respect of speaking and non-speaking valuations although in the case of the latter, there would have to be found compelling evidence to sustain the challenge.*
- *To what extent, subject to the above, a valuation could be set aside for error of law is still an open question as a valuer would be given a deal of latitude in the interpretation of the rental review clause in a lease, or a lease itself when considering any valuation pursuant to that lease.*
- *It seems tolerably clear that a valuation could not be set aside because of the valuer making an error in judgment which is a risk that the parties would have to take having agreed for an expert to undertake the process and for that expert's opinion to be final in the circumstances.*

However, there is no authoritative statement in the High Court on these points.

...

6. *Both a lessor and a lessee would have a cause of action against a valuer who gave an erroneous valuation on the grounds of negligence (Arenson v Arenson [1977] A.C. 405 at 440). However, it is extremely difficult to successfully demonstrate a case of negligence against an expert except in those circumstances where the valuation may be subject to a successful challenge by an aggrieved party. This would only be in the case where there had been a substantial error in valuing the wrong property, a complete mistake in the interpretation of the lease, or an obvious failure in the workings of figures supporting the valuation. In other cases, where the valuer reviewing rental is acting as an expert, such a person has a sufficient ambit of operation to make a successful challenge by either party unlikely. Nevertheless, this course of action is available if such negligence can be demonstrated.*

98. Some relevant parts of Cairns Shelfco's written submission dated 2 December 1993 have already been set out at paragraph 38 above. Other relevant passages from that submission are as follows:

...

Paragraph 14 [of Mr Manning's affidavit] states [the CPA's] concern that the sole motive of [Cairns Shelfco] in bringing the application for access to the records of the Department of Lands is to further an alleged dispute in respect of the calculation of rental under the lease.

The [CPA's] concern as to what [Cairns Shelfco] might do if it receives documents it has not seen is not a valid reason for withholding the delivery of such documents.

Furthermore what [Cairns Shelfco] does with the documents when it receives them is not a reason for withholding such delivery. [Cairns Shelfco] could not possibly have any view on what it intends to do or not to do with any documents without first seeing the documents.

...

[The CPA] further alleges that the case in question is similar to the negotiation of terms of a commercial lease with a prospective lessee and further states that the lessor and lessee would be free to make reference to whatever information is at their disposal during the course of negotiation.

In this particular case it is a total misconception to compare this case to a negotiation of a lease by a prospective lessor and lessee. In the case in question the negotiations have concluded: a negotiated lease already exists. Furthermore, the source of the Valuer-General's engagement to carry out a valuation is the lease itself - Clause 1(b). The Valuer-General performs his task as an independent third party public official chosen by both the lessor and lessee. He is not retained to assist in the [CPA's] negotiations. The stance adopted by the Department of Lands in relation to [Cairns Shelfco's] application supports this view of the Valuer-General's position. ...

...

Mr Treston's affidavit in relation to litigation and its costs is an irrelevant distraction in the context of a Freedom of Information (FOI) request. The affidavit is totally hypothetical. [Cairns Shelfco] repeats its previous submission that an applicant's motive for seeking FOI access is irrelevant ... to the adjudication of the access request. This principle is well settled under Commonwealth FOI legislation. The purpose of an FOI request is to obtain information. How [Cairns Shelfco] chooses to use the information obtained beyond merely informing itself is entirely a matter for it and in any event cannot be determined without actually seeing the information.

Findings in Respect of the Second Element of s.45(1)(c)

99. In *Re Cannon*, I addressed the meaning of the phrase "could reasonably be expected to" in s.45(1)(b) of the FOI Act (that phrase has an identical meaning, although applied in a different context, in s.45(1)(c) of the FOI Act) as follows:

62. *The phrase "could reasonably be expected to" in s.45(1)(b) of the FOI Act bears the same meaning as it does in s.46(1)(b) of the FOI Act, which meaning was explained in Re "B" and Brisbane North Regional Health Authority at paragraphs 154-161. In particular, I stated at paragraph 160:*

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

63. *It is appropriate to record what was said by the Full Court of the Federal Court in Searle's case (at p.176) about the comparable test in s.43(1)(b) of the Commonwealth FOI Act:*

In the application of s.43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable. [my underlining]

In para 58 of its reasons, the Tribunal said:

A decision maker is required to make a judgment as to whether there is a "reasonable" basis for a claim that disclosure of information would destroy or diminish the commercial value of such information, as distinct from something that is "irrational, absurd or ridiculous".

However, the question under s.43(1)(b) is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant's behaviour, but with the effect of disclosure. The Administrative Appeals Tribunal failed to determine that question and erred in law in this respect.

64. *As is illustrated by the cases of Schering, Searle and Caruth referred to above, an issue which commonly arises under this aspect of the test for exemption is whether the information in issue is already in the public domain, or is a matter of common knowledge in the relevant industry, and whether, therefore, disclosure under the FOI Act could reasonably be expected to diminish its commercial value.*

100. The following remarks from paragraph 83 of *Re Cannon* are also relevant:

83. *For similar reasons to those noted in respect of s.45(1)(b) (see paragraphs 59, 60 and 64 above), if information is already in the public domain, or is common knowledge in the relevant industry, it will ordinarily be difficult to show that disclosure of that information under the FOI Act could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the agency which, or person whom, the information concerns.*

101. The CPA has stated the expected adverse effects which it asserts will follow from the disclosure of the documents in issue. It is for me to determine whether those expectations are reasonable.

102. The first of the expected adverse effects stated by the CPA is that disclosure of the documents in issue will probably lead to litigation commenced by Cairns Shelfco against the CPA (and perhaps also the Valuer-General) with a view to challenging the valuations, and hence the amount of rent paid and payable under the lease, and that the CPA will incur substantial unrecoverable solicitor/client legal costs as a result of any such litigation, even if the CPA is the successful party in that litigation. Cairns Shelfco responds to this by asserting that the motive of an applicant for seeking access to the information under the FOI Act is irrelevant. That is generally true, but Cairns Shelfco's motives are relevant to the extent that I must evaluate the motives attributed to it by the CPA for the purpose of evaluating whether the adverse effect asserted by the CPA can reasonably be expected to follow from disclosure of the documents in issue.

103. The CPA expects litigation against it to follow as a consequence of disclosure of the documents in issue. I have no doubt that most members of the community would accept that to be sued in respect of one's business, professional, commercial or financial affairs is "to have an adverse effect on those affairs" (within the terms of s.45(1)(c)(ii)) having regard to the expense, inconvenience and diversion of time and resources from more productive activities that is involved in dealing with litigation. (Of course, for some organisations, such as insurance companies, being subject to legal suits is such a regular and anticipated incident of the ordinary conduct of their business that it could scarcely qualify as an adverse effect.) There may be a legitimate issue, however, as to whether it is repugnant to public policy that a risk of litigation should be accepted as an adverse effect which is deserving of recognition for the purposes of s.45(1)(c)(ii) of the FOI Act. Litigation in the system of courts comprising the judicial branch of government is the pre-eminent means sanctioned by liberal democratic societies for the peaceful settlement of disputes concerning the assertion of legal rights, and it promotes and reinforces respect for the rule of law, which is one of the cornerstones of our tolerant, liberal democratic traditions. I sympathise with the comment by Cairns Shelfco, in the penultimate paragraph of the extract from its submission set out at paragraph 94 above, that there is something grotesque about the argument that Parliament could have intended an exemption provision to operate so as to prevent disclosure of information which would assist a person to air a grievance (or to seek to vindicate an asserted legal right) in the courts. If, for example, a member of the public was seriously injured in an accident alleged to have been caused by defective maintenance of premises owned and occupied by the CPA, should that person be denied access under the FOI Act to all documents relating to the maintenance of the premises on the basis that the expectation of litigation, damages and legal costs constitutes an adverse effect to the CPA for the

purposes of s.45(1)(c) of the FOI Act? The argument becomes more repugnant in proportion to the strength of the putative plaintiff's case for legal redress against the person or organisation claiming to be adversely affected by the risk of litigation. This is undoubtedly part of the reason why the CPA has not sought to put its case on the basis that it would have to repay money if the expected litigation by Cairns Shelfco was successful, but rather that it would incur substantial, unrecoverable solicitor-client legal costs even if it were the successful party in the expected litigation.

104. While I have reservations about whether an adverse effect of the kind claimed by the CPA should be recognised on public policy grounds, I think that is an issue which should properly be determined by a court. I am prepared to approach the application of s.45(1)(c) of the FOI Act on the basis that as a matter of ordinary language, being sued in the courts in respect of their business, professional, commercial or financial affairs will, for most persons and organisations, ordinarily constitute an adverse effect on those affairs. In respect of an adverse effect of this kind, however, there will generally be countervailing public interest considerations favouring disclosure, of the kind I have referred to in the preceding paragraph (i.e. that access to information may assist persons to determine whether they have legal rights which may be asserted, and perhaps vindicated, through the courts) which are to be taken into account in the application of the public interest balancing test incorporated within s.45(1)(c).
105. The CPA's stated expectation of an adverse effect depends upon accepting that a chain of events will follow from what it asserts Cairns Shelfco can reasonably be expected to decide to do, if it obtains access to the documents in issue. Is the CPA's case in this regard too speculative?
106. From Cairns Shelfco's point of view, it must appear that the terms of the lease governing rental variations for at least the third, fourth, fifth and sixth years of the lease have fortuitously placed the CPA in the position of receiving inflated rental payments for those years. The rental payment for the third and fourth years of the lease was to be calculated by increasing the agreed figure payable in the first and second years of the lease by the percentage increase in the unimproved value of the subject land (assessed by the Valuer-General in accordance with s.27 of the VL Act) between the valuation dates of 12 January 1988 and 12 January 1990. The percentage increase was of the order of approximately 50%, an extremely large rise in such a comparatively short period of time. Moreover, the valuation figure obtained at 12 January 1990 appears to have been obtained only shortly after the high point of a boom market for commercial property in Cairns, with its largely tourism-based economy. The effect of the lengthy airline pilots' strike of 1989, followed by a worsening recession, thereafter caused market values to move downward, but Cairns Shelfco was obliged to continue paying rent in the third and fourth years of the lease, when the unimproved value of the subject land was apparently declining, by reference to a valuation taken shortly after the high point of the boom market. (On the other hand, the CPA would doubtless point out that Cairns Shelfco was paying an agreed fixed rental in the first and second years of the lease, when the value of the subject land was apparently rising steeply).
107. From Cairns Shelfco's point of view, its ill-fortune was exacerbated by agreed terms in the lease which provided that in the fifth and subsequent years the minimum rental payable was to be no less than the previous year's rental, so that any fortuitously inflated result obtained by the application of the agreed formula for calculating the rent payable in the third and fourth years was to have a continued impact in subsequent years. Moreover the rent payable in the third and fourth years was liable to be further increased in the fifth year by a percentage reflecting the percentage increase in the unimproved value of the subject land derived from the application of either of two stipulated formula, one dependent on the s.27 valuation obtained for the valuation date of 12 January 1992, the other dependent on percentage increases in the annual or general valuations of the subject land assessed by the Valuer-General (as between specified intervals) in accordance with s.11 of the VL Act. The CPA was entitled under the lease to elect which of the two alternative formulae was to apply. The one dependent on the s.27 valuations produced no percentage increase and was rejected.

The second formula, however (again somewhat fortuitously) was to be applied by reference to an initial date when the rising market was still well short of its peak and a second date which was after the peak, but at a time not too far into the market's continuing decline. The second formula provided for a further increase of 21.74% on an arguably already inflated rental figure (for the third and fourth years) at a time when the market value of the subject land was apparently still declining.

108. Cairns Shelfco does not appear to have anything to gain (in terms of reducing the rent in the fifth and sixth years of the lease) by challenging the s.27 valuation for the valuation date of 12 January 1992, since the CPA elected not to rely on the formula which applied by reference to that valuation. Cairns Shelfco does stand to gain by successfully challenging the s.27 valuation for the valuation date of 12 January 1990. My rough calculations indicate that each reduction of \$1,000,000 in the 12 January 1990 valuation figure would correspondingly reduce the annual rent payable in each of the third and fourth years of the lease by an amount of approximately \$24,700. Moreover, any such reduction reduces the figure to which the increase of 21.74% is to apply so as to calculate the rent payable in the fifth and sixth years of the lease.
109. Cairns Shelfco cannot escape the terms of the lease to which it agreed, but it is reasonable to expect that it is concerned to ensure that the s.27 valuation for 12 January 1990 has not proceeded on a basis that has erroneously produced an exaggerated valuation figure (thereby erroneously inflating the rent which it must pay). It is also reasonable to expect that Cairns Shelfco would pursue some kind of legal challenge if it had legitimate grounds for challenging the s.27 valuation for 12 January 1990, on the basis that it had erroneously produced an exaggerated valuation figure.
110. Because of the expanded definition of "owner" in s.5 of the VL Act (paragraph (i) of which applies specifically to a lessee of land from a Harbour Board), Cairns Shelfco was entitled to exercise the rights of objection and appeal available under the VL Act in respect of the Valuer-General's annual or general valuations of the unimproved value of the subject land. Cairns Shelfco would have noticed a very large increase in the annual valuation figures for the subject land between the effective valuation dates of 30 June 1989 (\$11.5 million) and 30 June 1990 (\$16 million). I requested the Department to provide me with documents relating to any objection lodged by Cairns Shelfco against the s.11 valuation in respect of the subject land for the effective valuation date of 30 June 1990. The Department has no record of an objection having been lodged. If an objection was lodged, it was refused, since no amendment to the relevant valuation figure was made. I have independently verified with the Land Court Registry that Cairns Shelfco did not lodge an appeal to the Land Court against the s.11 valuation of the subject land for the effective valuation date of 30 June 1990.
111. When the Valuer-General issued his s.27(4) valuation certificate for the valuation date of 12 January 1990 (the certificate was not issued until 27 February 1991), it contained the same valuation figure (\$16 million) as the s.11 annual valuation figure for the effective valuation date of 30 June 1990.
112. That same figure (\$16 million) was also the figure initially published by the Valuer-General as the s.11 valuation figure assessed for the subject land for the effective valuation date of 30 June 1991. On that occasion, however, Cairns Shelfco lodged an objection, and the Valuer-General reduced the figure by \$2 million to \$14 million prior to the effective valuation date of 30 June 1991. Cairns Shelfco did not seek to challenge that decision by appeal to the Land Court in the hope of achieving a further reduction.
113. On 20 May 1992, the Valuer-General issued his s.27(4) valuation certificate for the valuation date of 12 January 1992 which assessed the unimproved market value of the subject land at \$10.5 million.
114. The figure initially published by the Valuer-General as his s.11 valuation figure for the subject land for the effective valuation date of 30 June 1992 was \$12 million. A curious thing then happened.

Cairns Shelfco objected to this valuation asking that it be increased by \$2 million to \$14 million. When the Valuer-General refused the objection, Cairns Shelfco appealed to the Land Court. I have obtained from the General Register of the Land Court a copy of the consent order made on 28 May 1993 by which the valuation of the Valuer-General was set aside, and a valuation figure of \$14 million was determined. It is not necessary for me to assess why Cairns Shelfco would have wished to have that annual valuation figure increased, although it probably has something to do with the second of the formulae set out in the lease for calculating rent increases in the fifth and subsequent years of the lease (i.e. Cairns Shelfco probably perceives that increasing this base figure will work to its advantage if and when the second formula is applied to calculate the rent payable in the seventh and eighth years).

115. From these facts, which I have confirmed directly with relevant officers of the Department (see s.72(1)(c) of the FOI Act which entitles me to inform myself on any matter in any way I consider appropriate) some relevant findings can be made and relevant inferences drawn. Firstly, Cairns Shelfco has nothing to gain by challenging the s.27 valuation for the valuation date of 12 January 1992, unless it seeks to argue that the valuation figure should be increased rather than reduced. This it cannot do in a court action to recover overpaid rent. In any event, it is clear that the s.27 valuation for 12 January 1992 was not relied on for calculating the rent payable by Cairns Shelfco in the fifth and sixth years of the lease, the CPA having elected to apply the alternative formula for rent calculation in those years. To the extent that the CPA's case for exemption of the 12 January 1992 valuation report depends on an expected adverse effect from the risk of litigation against the CPA following disclosure of the report, I am satisfied that the adverse effect stated by the CPA cannot reasonably be expected.
116. Secondly, I believe I can safely infer that Cairns Shelfco wishes to obtain access to the s.27 valuation report for the valuation date of 12 January 1990 for the purpose of evaluating its prospects of successfully challenging that valuation. Whether, as suggested by the CPA, any such challenge would take the form of a court action to recover overpaid rent, may depend on the effect of the arbitration clause (cl.23) in the lease agreement between the CPA and Cairns Shelfco.
117. Further, I believe I can safely infer from the facts referred to in paragraphs 110, 112 and 114 above, that even Cairns Shelfco would accept that the maximum reduction in the valuation figure which it could reasonably hope to gain if successful in a challenge, is \$2 million, i.e. a reduction from \$16 million to \$14 million. If the market was declining from its mid-1989 peak and Cairns Shelfco was prepared to accept (by making no further challenge when it had a right to do so) a valuation figure of \$14 million effective from 30 June 1991, it could not reasonably expect to procure a lower figure than \$14 million for the s.27 valuation date of 12 January 1990. Such a result would mean that rent was overpaid by approximately \$49,400 in each of the third and fourth years of the lease, and by approximately \$10,000 in each of the fifth and sixth years of the lease (i.e. the 21.74% increase would have applied to a figure erroneously inflated by about \$49,400) with some ongoing effect into subsequent years.
118. Mr Treston's affidavit and Professor Duncan's statutory declaration afford evidence that the means do exist for Cairns Shelfco to mount a legal challenge through court action to the 12 January 1990 valuation and to the amount of rent paid and payable by reference to that valuation. Can it reasonably be expected, however, that the adverse effects stated by the CPA will follow from disclosure of the documents in issue?
119. The CPA states that it expects litigation, but clause 23 of the lease agreement appears to prevent either party to the lease from commencing court action in respect of a dispute arising under the lease without first referring the dispute to arbitration (with any subsequent litigation to be confined to challenging the relief awarded by the arbitrator). Rather than grapple with the proper construction and effect of clause 23 (which has not been raised by either the CPA or Cairns Shelfco in their submissions) I am content to evaluate the reasonableness of the CPA's stated expectation of an

adverse effect. I note, however, that if arbitration is obligatory, and the dispute is fully canvassed and determined by an independent arbitrator, it may forestall any moves to litigation. The costs of arbitration are likely to be less than those of litigation, but otherwise the legal, strategic and commercial considerations which would apply to a decision to invoke arbitration, are comparable to those which would apply to a decision to commence a court action. Thus, if the CPA's claim were that it could reasonably be expected to suffer an adverse effect through referral to arbitration of Cairns Shelfco's dispute over rent payable, the considerations below which relate to expected litigation and the satisfaction of the second and third elements of s.45(1)(c) would for the most part be equally applicable, and would, in my opinion, require the same findings that I have ultimately reached below.

120. The dilemma which the CPA faces in attempting to satisfy the second element of s.45(1)(c) is noted at the end of paragraph 103 above. The CPA cannot really make a case on the basis that Cairns Shelfco may succeed in a legal challenge, forcing the CPA to refund overpaid rent. Even if that be an adverse effect, there would be a strong public interest in Cairns Shelfco, or any person, obtaining access to information which would assist it to vindicate its legal rights through a legal challenge. If the CPA put its case on that basis, it would appear to be seeking to withhold information that might demonstrate that Cairns Shelfco had been unfairly treated. The CPA has therefore emphasised the likelihood of financial detriment even if it is the successful party in the litigation by Cairns Shelfco, which it states can reasonably be expected to follow from disclosure of the information in issue. The CPA's hypothesis, however, is affected by many variables.
121. Firstly, Cairns Shelfco would have to make an assessment that its prospects of success in an action justified the risks and expense of commencing litigation, knowing that the unsuccessful party must normally reimburse its opponent's legal costs assessed on a party-party basis, as well as bearing its own legal costs (and if the court believes that a plaintiff has pursued litigation that never had reasonable prospects of success, the court might in its discretion order that the unsuccessful plaintiff reimburse its opponent's legal costs assessed on a solicitor-client basis). Secondly, if Cairns Shelfco's case for legal redress were a strong one, it is reasonable to expect that the CPA would adopt a commercially prudent approach and seek to negotiate a compromise in the interests of minimising legal costs. On the other hand, if Cairns Shelfco had no arguable case at all, it is reasonable to expect that the CPA would move at an early stage to obtain an order of the court suppressing the action on that basis.
122. The scenario that sits most easily with the CPA's hypothesis is one in which Cairns Shelfco has an arguable case, with prospects that may not be strong but which, in view of the large amount of money at stake, make it a worthwhile proposition to pursue the litigation to finality notwithstanding the risk of failure. In such circumstances, the CPA might incur substantial, unrecoverable legal costs even though it was the successful party in the litigation and obtained an order for costs in its favour. I note, however, that if the solicitor-client legal costs incurred by Cairns Shelfco were to match the upper point of Mr Treston's estimate (in paragraph 7 of his affidavit), an unsuccessful legal action by Cairns Shelfco resulting in an order for payment of the CPA's legal costs on a party-party basis, would quite likely cost Cairns Shelfco in the region of \$120,000. That matches the amount of rent which I have estimated (in paragraph 117 above) that Cairns Shelfco might hope to recover on its best case scenario (leaving aside some possible further effects on rent payable in the seventh and subsequent years of the lease). This suggests to me that Cairns Shelfco would have to very carefully weigh its prospects of success, against the risks of failure, in determining the commercial viability or prudence of commencing any legal action of the kind which the CPA asserts can reasonably be expected to follow from disclosure of the documents in issue.
123. As can be seen from the fifth paragraph of the extract from its final submission reproduced at paragraph 96 above, the CPA seems to be convinced that Cairns Shelfco will seek to use the information in issue (if disclosed to it) to mount a legal challenge to the valuations and to the

amount of rent paid and payable on the basis of them; but the CPA also believes that any such legal challenge has no reasonable prospects of success. That belief appears to be reasonably based having regard to the material supplied by Professor Duncan, the learned author of the most up-to-date Australian text on commercial leases. The CPA's submission therefore allows the possibility that Cairns Shelfco might form the view that such a challenge would be bound to fail, but then seems to suggest that Cairns Shelfco's pursuit of this issue to date demonstrates that it would pursue a legal challenge in any event, even if that were not a commercially prudent choice.

124. Cairns Shelfco has competent legal advisers who, in my opinion, can be expected, with access to the documents in issue, to provide honest and realistic assessments of the prospects of successfully challenging the relevant valuations. I am not prepared to accept that it is a reasonable expectation that Cairns Shelfco would pursue a legal challenge with negligible prospects of success, at significant cost to itself.
125. The material supplied by Professor Duncan indicates that the prospects of Cairns Shelfco obtaining any reduction in the valuation figures, let alone a substantial reduction, are negligible. The legal position summarised at paragraph 4 of Professor Duncan's statutory declaration (see paragraph 97 above) reinforces the views expressed in Chapter 5 of Professor Duncan's text *Commercial Leases* (esp. at pp.70-72) to which I have also had regard.
126. The valuations in issue were prepared by the valuer chosen by the parties to the lease, and if the strong (but *obiter*) views expressed by Sheahan J, giving judgment on behalf of the Full Court of the Supreme Court of Queensland in *Mayne Nickless Ltd v Solomon* [1980] Qd R 171, at p.179, are followed by the court (or arbitrator) with responsibility for determining any legal challenge mounted by Cairns Shelfco, then Cairns Shelfco would have no remedy against the CPA for any error or mistake in the valuations, but would be left to a remedy in damages for negligence (if it could be established) against the valuer. Moreover, there is nothing on the face of the valuation reports which indicates that the valuations might have proceeded on a fundamentally erroneous basis, of the kind of which examples are given by Professor Duncan, and which may (according to cases, from other jurisdictions, that are referred to by Professor Duncan) constitute a basis for a successful legal challenge. Material differences of opinion between expert valuers and the Valuer-General would afford no grounds for a successful challenge to the Valuer-General's valuations in this case.
127. There was scarcely any scope for the Valuer-General to commit any error of the kind that would permit a successful legal challenge to his valuations. The Valuer-General's task did not require any interpretation of the terms of the lease, nor the making of any calculations of the rent payable. The formula for calculation of the rent had been agreed in advance by the parties. The Valuer-General was required only to provide his valuation of the unimproved value of the subject land at a nominated date. This was a task that the Valuer-General was regularly required to undertake for the purpose of providing annual or general valuations of the subject land, and the parties simply required the same task to be undertaken as at specified dates for the purpose of applying their agreed formula.
128. I note that in paragraph 7 of his affidavit, Mr Coonan expresses the view that the valuations are "*based upon an incorrect premise, not because they have not been prepared in accordance with the conditions of the subject lease, but because they do not reflect the commercial realities of the restrictive uses imposed by the lease, nor do they take into consideration the age and obsolescence of the buildings constructed on the leased land as the term of the lease progresses*". I cannot see, however, that these are considerations which the Valuer-General would have been obliged to take into account when his clear task was to provide a valuation of the unimproved value of the subject land.
129. Based on my assessment of the evidence and the contents of the documents in issue, I am not

satisfied that disclosure of the documents in issue could reasonably be expected to have the first of the adverse effects stated by the CPA. Having regard to all of the matters referred to above, I am not satisfied that the stated expectation is a reasonable one.

130. I note that in any event, the claimed adverse effect could only be attributable to those parts of the documents in issue which comprise expert opinion or analysis by valuers employed by the Valuer-General. As stated in paragraph 61 above, the balance of the documents in issue comprise factual material well-known to the third party, and readily accessible to the public, which could not conceivably cause any adverse effect to the CPA by its disclosure under the FOI Act (*cf* paragraph 100 above).
131. I should add that if, for reasons which are not apparent to me on the face of the documents in issue, it should transpire that Cairns Shelfco has valid grounds for successfully challenging the relevant valuations, I would be satisfied that disclosure of the documents in issue was on balance in the public interest, notwithstanding any adverse effect to the affairs of the CPA. If Cairns Shelfco can establish an error in the valuations of such a serious nature as to satisfy the limited grounds for legal challenge identified in Professor Duncan's statutory declaration, then the public interest in fair treatment of Cairns Shelfco according to law, in accountability for the performance of the functions of the Valuer-General, and accountability for the adoption of fair commercial practices by state government authorities which operate on a commercial basis, would, in my opinion, cumulatively outweigh the public interest consideration favouring non-disclosure which is inherent in the satisfaction of the first two elements of s.45(1)(c).
132. There is a further basis on which I do not think that the second element of s.45(1)(c) is established in the case of the first adverse effect claimed by the CPA. An adverse effect within the terms of s.45(1)(c) must be postulated on the basis that it is causally related to the hypothesised disclosure of the matter in issue. I am inclined to the view that the claimed adverse effect is too remote to be fairly regarded as a consequence with sufficient causal connection to the disclosure of the matter in issue. The adverse effect constituted by the incurring of solicitor-client legal costs in a substantial amount that would not be recoverable by the CPA from Cairns Shelfco in the event that the CPA was the successful party in expected litigation, ought in my view to be properly regarded as a consequence of the manner in which the CPA would choose to respond to any litigation commenced by Cairns Shelfco, rather than as a necessary consequence of the disclosure of the matter in issue.
133. The second expectation of an adverse effect asserted by the CPA is that if the CPA is compelled to disclose valuation material relative to its harbour lands to prospective tenants, the disclosure would put the CPA at a commercial disadvantage in its capacity to negotiate the most favourable terms with respect to leases.
134. Paragraph 16 of Mr Manning's affidavit, and paragraphs 2-6 of Mr Coonan's affidavit are directed to this issue, and while I have no doubt that the CPA's concern is genuine, I consider that it is fundamentally misconceived. In this regard, I agree generally with the arguments put by Cairns Shelfco in the fourth and fifth paragraphs of the extract from its written submission set out at paragraph 98 above. The situation under consideration in this case is one where a negotiated lease already exists, and includes terms by which the lessor and lessee have agreed in advance that variations in the rent payable are to be calculated by reference to the increases, over specified intervals, in valuations of the unimproved value of the land which is the subject of the lease. Disclosure to the lessee of a valuation report on the subject land is at issue. That situation is materially different to one in which a landowner is in the course of attempting to negotiate the most favourable terms of a lease with a prospective tenant. The disclosure of valuation material not otherwise readily available may well be accepted as something that could reasonably be expected to have an adverse effect on the business or commercial affairs of the landowner in such circumstances, for example, by prejudicing the landowner's negotiating position while negotiations

were still ongoing. Each case must be judged on its own merits (and that applies also to the existence and relative weight of any public interest considerations favouring disclosure or non-disclosure that can be identified in the circumstances of a particular case). Any precedent value to be drawn from the result in this case would necessarily be very narrowly confined to situations where the material facts were on all fours with the material facts in this case, i.e. where a completed lease already exists with clauses for the calculation of rent which are comparable to clause 1(b) and (c) of the relevant lease in this case. The relevant valuation figures obtained under s.27 of the VL Act had to be made known to Cairns Shelfco. (In other situations, the CPA may be prejudiced by disclosure of relevant valuation figures.) I am not satisfied that disclosure of the documents in issue could reasonably be expected to have the second of the adverse effects claimed by the CPA.

135. It follows that I am not satisfied that the CPA's case that the documents in issue are exempt under s.45(1)(c) of the FOI Act can be made out, because I am not satisfied that the second element of the s.45(1)(c) exemption is established.

Findings in Respect of the Third Element of s.45(1)(c)

136. For the sake of completeness, I propose to also state my findings in respect of the third element of the s.45(1)(c) exemption, the application of the public interest balancing test. I will assume for this purpose that the CPA can establish a reasonable expectation of the claimed adverse effects on its business, commercial or financial affairs, thereby giving rise to a *prima facie* ground of justification in the public interest for non-disclosure of the documents in issue. The nature of the public interest balancing test incorporated within s.45(1)(c) of the FOI Act, and the correct approach to its application, are explained at paragraph 87 of my reasons for decision in *Re Cannon*.
137. The public interest considerations relied on by the CPA as favouring non-disclosure of the documents in issue largely duplicate the expected adverse effects which it asserts will follow from disclosure, while adding the assertions that there is no public interest to be served in a commercial tenant gaining information from the Valuer-General for the purposes of suing the landlord under a commercial lease (see the fourth paragraph and the final paragraph of the extract from the CPA's final submission at paragraph 96 above), and that any reduction in the CPA's sources of revenue from commercial leases would carry with it either a reduction in the level of expenditure by the CPA on public facilities, or a greater burden upon Port users generally to maintain existing levels of such expenditure (see paragraph 15 of Mr Manning's affidavit).
138. The suggestion by the CPA in the sixth paragraph of the extract from its final submission reproduced at paragraph 96 above, is, in some respects, a disappointing one. The suggestion is made that by choosing a private valuer, and ensuring that the valuer's working papers (disclosing the basis of the valuation) never came into the possession or control of the CPA, the CPA could have avoided, or could in future avoid, any possibility of a lessee obtaining under the FOI Act the information that might assist it to mount a legal challenge against a valuation. The unstated implication is that, even if a valuation has proceeded on a fundamentally erroneous basis, a lessor is entitled to arrange affairs so that a lessee is deprived of the means of knowing whether the lessee is paying more rent than it need pay if the relevant law was properly applied, and of mounting a legal challenge to ensure that it is dealt with fairly according to law. While the government expects its statutory authorities which operate on a commercial basis to embrace the competitive ethos of the marketplace, I think the public of Queensland has a right to expect that such authorities will always adhere to fair commercial practices.
139. It has been explained in Professor Duncan's statutory declaration (see paragraph 97 above) that in a situation where the parties to a lease have appointed a valuer to act as an independent expert for the purpose of assessing valuations on which rent variations will depend, the grounds of successful challenge to such a valuation are limited to establishing fraud or collusion, or establishing that the valuation proceeded on a fundamentally erroneous basis. I consider that elementary fairness

supports the view that the lessee should be entitled to see valuation reports for the purpose of satisfying itself that the valuation has not proceeded on a fundamentally erroneous basis. Elementary fairness also suggests that if the valuation has proceeded on a fundamentally erroneous basis, and the law permits a remedy in that regard, the lessee should not be obliged to pay rent calculated by reference to that valuation, but should have its obligation to pay rent calculated by reference to a proper valuation. I recognise that, generally speaking, if a lessee has agreed to specific terms which deprive it of a right to have access to relevant valuation reports, or if it is denied access by the operation of the law relating to breach of confidence, then the lessee will be obliged to accept those specific legal consequences. But I am here taking account of general public interest considerations favouring disclosure which weigh against the adverse effects on its business, professional, commercial or financial affairs asserted by the CPA in this case.

140. In *Re Eccleston*, I said (at paragraphs 55-56; also reported at (1993) 1 QAR 60, at p.80):

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

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

"87 In [Re Burns and Australian National University (1984) 6 ALD 193] my colleague Deputy President Todd concluded that, for the purposes of the Freedom of Information Act, the concept of public interest should be seen as embodying public concern for the rights of an individual. Referring to a decision of Morling J, sitting as the former Document Review Tribunal (Re Peters and Department of Prime Minister and Cabinet (No. 2) (1983) 5 ALN No. 218) Deputy President Todd said:

*"But what is important is that his Honour clearly considered that there was a public interest in a citizen having such access in an appropriate case, so that if the citizen's 'need to know' should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged."
(at 197)*

I respectfully agree with Mr Todd's conclusion. ... The fact that Parliament has seen fit to confer upon every person a legally enforceable right to obtain access to a document of an agency or an official document of a minister, except where those documents are exempt documents, is to my mind a recognition by Parliament that there is a public interest in the rights of individuals to have access to documents - not only

documents that may relate more broadly to the affairs of government, but also to documents that relate quite narrowly to the affairs of the individual who made the request."

141. I also note in this regard the observations made by the Commonwealth Administrative Appeals Tribunal, chaired by O'Connor J (President), in *Re Kamminga and Australian National University* (1992) 26 ALD 585 at p. 588:

"Deciding whether disclosure is contrary to the public interest requires a balancing of competing interests including the public interest in the applicant's right to know [citing Re Peters and Re Burns], which is a different thing to the applicant's personal interest in knowing."

142. I consider that there is a public interest consideration, of the kind adverted to in the quoted passages, which favours disclosure of the documents in issue to Cairns Shelfco to enable it to satisfy itself that the valuations have not proceeded on a fundamentally erroneous basis, or if they have, to take any appropriate remedial action which the law permits. (The fact that any diminution in rent payable by Cairns Shelfco to the CPA would mean that less money was available to the CPA to enable it to carry out its statutory functions, and to reinvest in the development and upgrading of harbour facilities for the benefit of the public, cannot in my opinion be accepted as a valid public interest consideration favouring non-disclosure, or at least, cannot be accepted as one deserving of any substantial weight. The public interest in having funds spent on harbour facilities could not justify those funds being obtained by unfair means, such as levying rent by reference to a valuation which proceeded on a fundamentally erroneous basis.)

143. Disclosure will also further the public interest in accountability of the staff of the former office of the Valuer-General for the discharge of their statutory functions under the VL Act (as has been properly recognised in Mr Holmes' internal review decision on behalf of the Department -see paragraph 95 above). I think that Cairns Shelfco has correctly stated the position in the following passage from its submission (reproduced at paragraph 94 above):

Accessing the reports will enable a corporate citizen, [Cairns Shelfco] to better understand how a chosen public official, the Valuer-General, came to determine a particular value in the discharge of a statutory function ... This is exactly in keeping with the reasons expressed by the Parliament as to why it chose to enact the FOI Act - see esp. s.5(1)(a) and 5(1)(b).

144. The combined weight of these public interest considerations favouring disclosure of the documents in issue, in conjunction with the public interest considerations referred to at paragraphs 103-104 above, is sufficient to satisfy me that even if disclosure of the documents in issue could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the CPA, the disclosure of the documents in issue to Cairns Shelfco would, on balance, be in the public interest.

The Claim for Exemption under s.49 of the FOI Act

145. Section 49 of the FOI Act provides as follows:

49. Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency unless its disclosure would, on balance, be in the public interest.

146. The CPA's case in respect of s.49 essentially relies on the same contentions as were advanced in support of its case in respect of s.45(1)(c). The business, commercial or financial affairs of the CPA

in respect of the lease of commercial property vested in it can just as well be described as the CPA's financial or property interests for the purposes of s.49. The key phrases from s.45(1)(c), i.e. "could reasonably be expected to" and "adverse effect" recur in s.49, though in s.49 the latter is qualified by the adjective "substantial". That part of the CPA's final submission which addresses s.49, addresses the meaning of the word "substantial", but otherwise largely repeats its reliance on the submissions made in respect of s.45(1)(c) and responds to some issues raised in Cairns Shelfco's submission dated 6 August 1993, which were of no great substance in any event.

147. As to the meaning of the word "substantial", the CPA's submission refers to the comments of Lockhart J in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 at p.444 where His Honour said:

The word "substantial" is imprecise and ambiguous. Its meaning must be taken from its context. It can mean considerable or big: Palser v Grinling [1948] AC 291 at 317 per Viscount Simon. It can also mean not merely nominal, ephemeral or minimal.

The CPA's submission also refers to the discussion by Deane J of the meaning of the word "substantial" in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 at p.348, where His Honour observed that the use of the word "substantial" can, according to its context, mean "real or of substance as distinct from ephemeral or nominal", or could also mean "large, weighty or big".

148. The CPA's submission contends that in the context of s.49 of the FOI Act, the word "substantial" means "real or actual or having substance, not illusory" (referring to the Concise Oxford Dictionary); however, the submission goes on to acknowledge that in cases interpreting the phrase "substantial adverse effect" as it appears in s.40(1)(c), (d) and (e) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act), it has been held that the word "substantial" is an indication of the degree of gravity that must exist (*Harris v ABC* (1983) 78 FLR 236 at p.249 per Beaumont J) or that the word "substantial" is best understood as meaning "serious" or "significant" (citing *Re Healy and Australian National University*, Cth AAT, No. N84/445, 23 May 1985, unreported; *Re James and Australian National University* (1984) 2 AAR 327 at p.341).

149. Inconsistent approaches to the interpretation of the word "substantial" in the phrase "substantial adverse effect" are evident in decisions of the Commonwealth AAT: contrast cases such as *Ascic v Australian Federal Police* (1986) 11 ALN N184 at p.N185 and *Re Russell Island Development Association Inc and Department of Primary Industries and Energy* (Cth AAT, Deputy President Forgie, No. Q93/270, 13 January 1994, unreported, at pp.27-29), which prefer the meaning "real or of substance and not insubstantial or nominal" with cases like *Re James and ANU* at AAR p.341, *Re Heaney and Public Service Board* (1984) 6 ALD 310 at p.321, *Re Dyrenfurth and Department of Social Security* (1987) 12 ALD 577, *Re B and ACT Medical Board of Health* (ACT AAT, Professor L J Curtis, President, C93/46, 11 April 1994, unreported) and *Re Connolly and Department of Finance* (Cth AAT, Deputy President McMahon, No. A94/50, 28 June 1994, unreported) which prefer the sense of the word "substantial" which indicates gravity or seriousness.
150. In my opinion, no such doubt attends the correct interpretation of the phrase "substantial adverse effect" where it appears in the Queensland FOI Act (notably in s.49, s.40(c), s.40(d) and s.47(1)(a)). Its meaning is made clear by its contrast with the phrase "adverse effect" in s.45(1)(c), where the adjective "substantial" does not appear. The legislature must have intended an adverse effect under s.45(1)(c) to be one that is "real" or "actual" or "having substance, not illusory". Thus, where the legislature has employed the phrase "substantial adverse effect", it must in my opinion have intended the adjective "substantial" to be used in the sense of grave, weighty, significant or serious.
151. The same kinds of adverse effect asserted for the purposes of s.45(1)(c) are asserted again by the CPA for the purposes of s.49. I do not think I even need to consider whether those adverse effects meet the higher test of being substantial adverse effects. As was the case with my findings on s.45(1)(c), I am not satisfied that s.49 applies to the documents in issue because I am not satisfied that their disclosure could reasonably be expected to have the adverse effects (substantial or otherwise) claimed by the CPA. Again, the claimed substantial adverse effect could only be attributable to those parts of the document in issue which comprise expert opinion or analysis by valuers employed by the Valuer-General. As stated in paragraph 130 above, the balance of the documents in issue comprises factual material well known to the third party, and readily accessible to the public, which could not conceivably cause any adverse effect to the CPA by its disclosure.
152. For the same reasons explained in my consideration of the public interest balancing test in s.45(1)(c), I am satisfied that, even in the event that it could be established that disclosure of the documents in issue could reasonably be expected to have a substantial adverse effect on the financial or property interests of the CPA, disclosure of the documents in issue to Cairns Shelfco would on balance be in the public interest.

The Claim for Exemption under s.48 of the FOI Act

153. Section 48 of the FOI Act provides as follows:

48.(1) *Matter is exempt matter if -*

- (a) *there is in force an enactment applying specifically to matter of that kind, and prohibiting persons mentioned in the enactment from disclosing matter of that kind (whether the prohibition is absolute or subject to exceptions or qualifications); and*
- (b) *its disclosure would, on balance, be contrary to the public interest.*

(2) *Matter is not exempt under subsection (1) if it relates to information concerning the personal affairs of the person by whom, or on whose behalf, an application for access to the document containing the matter is being made.*

(3) *This section has effect for only 2 years from the date of assent.*

154. This is the first occasion on which I have had to give detailed consideration to s.48, and I note that it has occurred only a short time before the "sunset clause" in s.48(3) is due to take effect. Section 48 will be substantially amended by the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994 Qld* which commences on 20 August 1994. The present s.48 of the FOI Act has only rarely been relied upon in cases which have proceeded to the stage of review under Part 5 of the FOI Act.

Submissions of the Participants on the Application of s.48

155. The CPA's written submissions contend that s.8 of the VL Act comprises a relevant secrecy provision for the purposes of s.48 of the FOI Act.
156. Section 8 of the VL Act has been renumbered as s.11 of the VL(R) Act and its wording has been revised in accordance with the provisions of the *Reprints Act 1992 Qld*, but not in a way which materially affects this issue.
157. Section 11 of the VL(R) Act provides as follows:

11.(1) Every person employed under this Act shall maintain and aid in maintaining the secrecy of all matters which come to the person's knowledge in the performance of the person's duty, and shall not communicate, divulge, or aid in divulging any such matters to any other person except for the purpose of carrying this Act into effect.

(2) The chief executive, or any officer duly authorised by the chief executive shall not, either directly or indirectly, except in the performance of duties under this Act, and either while the chief executive or officer is or after the chief executive or officer ceases to be an officer, make a record of or divulge or communicate to any person any such information so acquired by the chief executive or officer.

(3) The chief executive or any officer duly authorised by the chief executive, or any witness on behalf of the chief executive or officer, shall not be required to produce in Court any roll, return, notice, or any other document, or disclose to any Court, the fact that the chief executive or officer has received any information, or the nature thereof, or the name of the person who gave such information, or any matter or thing coming under the chief executive's or officer's notice in the performance of duties under this Act, except when it is necessary so to do, for the purpose of carrying into effect the provisions of this Act.

Maximum penalty - 10 penalty units.

158. The CPA's final written submission refers to the passage from *Harrigan v Department of Health & Ors* (1987) 72 ALR 293 which is set out below at paragraph 168, and argues as follows:

Section 8 of the [VL Act] clearly applies to the information for which the exemption is claimed. There is no doubt that the information contained in those documents has come to the knowledge of persons in the Valuer-General's office in the performance of their duties and it is submitted that s.8 is a provision which applies specifically to matters of the kind contained in those documents. There is no doubt that there is a prohibition contained in s.8 as to disclosure of that information. Section 8 does not prohibit the disclosure of that information identified only by reference to the capacity of the person who has received or is in possession of the information and it is not true to say that it does no more than prohibit the disclosure of information identified only as information obtained in pursuance of the enactment in which the prohibition is found. It is only the information which has come to the knowledge of the person employed under the [VL Act] in the performance of his duty which is subject to the exemption.

The CPA also submits that disclosure of information would, on balance, be contrary to the public interest for the reasons previously relied upon by the CPA.

159. For its part, Cairns Shelfco contends in its submission of 6 August 1993 that there is no relevant difference between s.48(1)(a) of the Queensland FOI Act and s.38(1) of the Commonwealth FOI Act. Cairns Shelfco submits that s.8 of the VL Act is not an enactment of the kind to which s.48(1)(a) of the Queensland FOI Act applies because:
- (a) it does no more than prohibit the disclosure of information identified only by reference to the capacity of the person who has received or is in possession of the information, (citing *News Corporation Ltd v NCSC* (1984) 1 FCR 64 at p.70); and/or
 - (b) it does no more than prohibit the disclosure of information identified only as information obtained in pursuance of the enactment in which the prohibition is found (citing *Kavvadias v Commonwealth Ombudsman* (1984) 1 FCR 80 at p.85).
160. Cairns Shelfco also submits that disclosure of the matter in issue would not, on balance, be contrary to the public interest. A number of public interest considerations favouring disclosure are advanced, but particular reliance is placed on the public interest considerations enumerated in Mr Holmes' internal review decision, as set out in paragraph 95 above (and specifically points 1, 4 and 5 thereof).
161. Six elements, all of which must be satisfied, can be identified within s.48(1). Section 48(1) provides that matter is exempt if:
- (a) *there is in force* (that is, the secrecy provision relied upon must be currently in force at the time when the application of s.48 to documents sought in an FOI access application is being decided);
 - (b) *an enactment* ("enactment" is defined in s.7 of the FOI Act to mean an Act or a statutory instrument. A "statutory instrument" is defined in s.36 of the *Acts Interpretation Act 1954 Qld* to have the meaning given by the *Statutory Instruments Act 1992 Qld*, which meaning includes an instrument such as a regulation or by-law made under an Act);
 - (c) *applying specifically to matter of that kind and;*
 - (d) *prohibiting persons mentioned in the enactment from disclosing matter of that kind;*

- (e) *(whether the prohibition is absolute or subject to exceptions or qualifications); and*

(This proviso recognises that very few secrecy provisions are cast in absolute terms, and that the presence of exceptions or qualifications to the prohibition on disclosure does not render the secrecy provision ineligible for consideration under s.48(1). By the same token, the effect of any qualifications or exceptions must be carefully considered, since it cannot have been intended that s.48 could apply to deny access to information to a person who falls within one of the very situations which the qualification or exception was intended to cover.)

- (f) *its disclosure would, on balance, be contrary to the public interest.*

162. Elements (c) and (d) will pose the most difficulty in applying the provision, but valuable assistance can be obtained from a series of decisions given by Full Courts of the Federal Court of Australia during the 1980s which considered the application of s.38 of the Commonwealth FOI Act in the form in which it was originally enacted. Section 48(1) of the Queensland FOI Act is for practical purposes virtually identical to s.38 of the Commonwealth FOI Act as it was originally enacted, except that s.38 of the Commonwealth FOI Act did not contain a public interest balancing test.
163. Section 38 of the Commonwealth FOI Act first came to the attention of the Federal Court of Australia in *News Corporation Limited and Others v National Companies and Securities Commission* (1984) 1 FCR 64. In that case, the Full Federal Court was urged to find that s.47 of the *National Companies and Securities Commission Act 1979 Cth* (the NCSC Act) was an enactment of a kind referred to in s.38 of the Commonwealth FOI Act. Section 47 of the NCSC Act provided in effect for a prohibition on officials passing on "any information" acquired by them in circumstances described in the provision.
164. The Full Court of the Federal Court considered that the crucial question was the determination of whether the secrecy provision applied specifically to the document in issue. I accept that this is also the correct approach to the application of s.48(1)(a) of the Queensland FOI Act, in its present form. I consider that the following passage from the *News Corporation* case captures the essence of the decision in that case (per Bowen CJ and Fisher J at p.68):

The crucial question is as to the kind of information which it is necessary for the document to contain before it can be elevated to the class of exempt documents. The section states it as being information in respect of which an enactment "applies specifically", which enactment prohibits persons therein referred to from disclosing it. For the purpose of deciding whether the document is exempt, the section necessarily requires that the nature of the information in the subject document first be determined. Then the question is to ascertain whether "there is in force an enactment applying specifically to information" which the subject document has been found to contain (the particular information). In this respect the legislature has stated quite explicitly that to have relevance an enactment must apply "specifically" to the particular information. It is not enough for the enactment to have general application or to be formulated in such general terms that it would encompass the particular information without expressly referring to it. The enactment must be formulated with such precision that it refers with particularity to the information.

165. Their Honours noted (at p.69) a categorisation of secrecy provisions which had been referred to in submissions made to the Court as follows:
- (a) provisions which define the kind of information by reference to the characteristics or

qualities of the information concerned;

- (b) those which rely upon the status or capacity of the person in possession of the information; and
- (c) those provisions which refer specifically to the capacity of the person in possession of the information and only generally to the characteristics of the information.

In their judgment, Bowen CJ & Fisher J considered (at p.70) that provisions which came within the first category would be enactments falling within s.38 of the Commonwealth FOI Act, but provisions which came within the second category would not. No firm view was expressed as to the third category. The other member of the Court, St John J, also referred to this categorisation of secrecy provisions and was also of the view that provisions which prohibited disclosure of information only by reference to the capacity or position of the person in possession of the information would not be within the scope of s.38 of the Commonwealth FOI Act.

166. The Full Federal Court concluded that s.47 of the NCSC Act was not a secrecy provision which applied specifically to the type of information concerned, since the provision applied to "any information" acquired by officials of the NCSC. The secrecy provision directed itself to the capacity in which the relevant persons received the information. The decision in the *News Corporation* case was followed by the Full Federal Court in *Kavvadias v Commonwealth Ombudsman* (1984) 1 FCR 80. The secrecy provision under scrutiny in that case was s.35(2) of the *Ombudsman Act 1976 Cth* which prohibited an officer from disclosing "any information acquired by him by reason of his being an officer, being information that was disclosed or obtained under the provisions of this Act". The Full Court of the Federal Court (Bowen CJ, Fox and Sheppard JJ) considered that the provision was not of a kind contemplated by s.38 of the Commonwealth FOI Act saying (at p.85):

It seems to us that s.38 requires that there be a more direct and explicit reference to the nature of the information itself. Information is the commodity being dealt with in the Act, not the discipline or integrity of officers.

167. In *Federal Commissioner of Taxation v Swiss Aluminium Australia Ltd and Others* (1986) 10 FCR 321, a majority of the Full Court of the Federal Court held that s.16 of the *Income Tax Assessment Act 1936 Cth* did meet the requirements of s.38 of the Commonwealth FOI Act. Section 16 of the *Income Tax Assessment Act* prohibited an officer from disclosing any information "*respecting the affairs of another person*". In applying the test from the *News Corporation* case as to whether the secrecy provision specifically identified the information which it sought to cover, Bowen CJ and Jackson J held that s.16 of the *Income Tax Assessment Act* did sufficiently describe the matter concerned by virtue of the words "*respecting the affairs of another person*". These words did not appear in the secrecy provisions that were in issue in the *News Corporation* case and in the *Kavvadias* case. The majority seems to have been influenced by the sensitivity of information concerning the income tax affairs of persons, obtained or disclosed under the *Income Tax Assessment Act* (see at p.325).
168. Words similar to those considered in the *Swiss Aluminium* case were considered by the Full Court of the Federal Court in *Harrigan v Department of Health and Others* (1986) 72 ALR 293. The secrecy provision in issue in that case was s.130(1) of the *Health Insurance Act 1973 Cth* which prohibited an official from disclosing "*any information with respect to the affairs of another person acquired by him in the performance of his duties*". The Full Court of the Federal Court considered those words to be relevantly indistinguishable from those considered in the *Swiss Aluminium* case and therefore could see no reason why the court should not arrive at a similar conclusion. In so doing, the court provided a neat summary of key principles to be derived from the earlier decisions

of the Full Court of the Federal Court (at p.294-5):

- (a) *An enactment does not satisfy s.38 if it does no more than prohibit the disclosure of information identified only by reference to the capacity of the person who has received or is in possession of the information [News Corporation case at p.70, per Bowen CJ & Fisher J].*
- (b) *An enactment does not satisfy s.38 if it does no more than prohibit the disclosure of information identified only as information obtained in pursuance of the enactment in which the prohibition is found [Kavvadias at p.85].*
- (c) *The two types of enactments to which we have referred do not satisfy s.38 because they do not sufficiently identify the type of information which is the subject of prohibition upon disclosure. A provision, however, which identifies the information as information "respecting the affairs of another person" will ordinarily be sufficiently specific to satisfy s.38 [FCT v Swiss Aluminium at pp.324-5 (Bowen CJ) and at pp.329-331 (Jackson J)].*

169. The *Harrigan* principles have been approved by the Victorian AAT in interpreting s.38 of the *Freedom of Information Act 1982 Vic: Re Lapidos and Ombudsman (No. 1)* (1987) 2 VAR 82 at p.90. The principles emerging from the Federal Court cases set out above were applied with approval by the Full Court of the Supreme Court of Victoria in *Department of Premier and Cabinet v Birrell (No. 2)* [1990] VR 51.
170. The public interest balancing test contained within s.48(1)(b) is analogous to that contained in s.41(1) of the FOI Act (as explained in my decision in *Re Eccleston* at paragraphs 24 to 26), and operates on slightly different principles to the public interest balancing test contained in s.46(1)(b) and s.44(1) (as explained in my decision in *Re "B"* at paragraphs 31 to 33), and in s.45(1)(c) (as explained in my decision in *Re Cannon* at paragraph 87).

Findings on the Application of s.48

171. The first step in the application of the principles from the *News Corporation* case set out at paragraph 164 above is to determine the nature of the information in the documents in issue. The documents in issue are valuation reports and draft valuation reports (comprising the facts and expert opinion which support valuation figures determined by the Valuer-General). The second step is to determine whether there is in force an enactment applying specifically to that information. It is not enough for the enactment to have general application or to be formulated in such general terms that it would encompass the particular information in the documents in issue without expressly referring to it. An assessment must be made as to whether the enactment is formulated with such precision that it refers with particularity to the information in issue.
172. Section 11 of the VL(R) Act consists of three sub-sections, each of which contains a differently worded prohibition on the disclosure of information. Sub-section 11(1) imposes an obligation to maintain the secrecy of "all matters" which "come to the person's knowledge in the performance of the person's duties". This provision is relevantly indistinguishable from the kinds of catch-all, non-specific secrecy provisions considered by Full Courts of the Federal Court of Australia in the *News Corporation* case and the *Kavvadias* case. I conclude that s.11(1) of the VL(R) Act is not a secrecy provision of a kind which satisfies the criteria stipulated in s.48(1)(a) of the FOI Act. Sub-section 11(2) of the VL(R) Act is no more specific, and I am satisfied that it, too, is not a secrecy provision of a kind which satisfies the criteria stipulated in s.48(1)(a) of the FOI Act.
173. Sub-section 11(3) of the VL(R) Act is not a secrecy provision of the kind contemplated by s.48(1)(a). It does not prohibit persons mentioned in it from disclosing information. Rather it provides that the chief executive of the Department (or a duly authorised officer) cannot be

compelled to produce in court or disclose to any court, information of the kind described in the subsection. Although that information is described with somewhat more particularity than is present in s.11(1) or (2) of the VL(R) Act, s.11(3) does not specifically refer to valuations or draft valuations.

174. Thus, I am satisfied that the CPA's submission, that s.11 of the VL(R) Act (formerly s.8 of the VL Act) can be invoked in conjunction with s.48 of the FOI Act to exempt the documents in issue, cannot be made out.
175. Although the CPA relied upon s.6 of the *Valuers Registration Regulation 1992 Qld* in support of its case that the Valuer-General owed an obligation of confidence to the CPA in respect of valuations prepared for the CPA, the CPA did not contend that s.6 of the *Valuers Registration Regulation* applied, in conjunction with s.48 of the FOI Act, to exempt the documents in issue. I do not think that such an argument was open to the CPA. Mr Woolley (who held the office of Valuer-General immediately prior to the abolition of that office, and thereafter until his recent retirement held the position of Program Director, Valuations, in the respondent Department) has deposed in paragraph 5 of his affidavit sworn 14 December 1993 to his belief that s.6 of the *Valuers Registration Regulation* applies to registered valuers employed in the Department of Lands in their carrying out of valuations pursuant to s.27 of the VL Act (now s.74 of the VL(R) Act). I am satisfied, however, that as a matter of statutory construction, s.6 of the *Valuers Registration Regulation* does not bind the chief executive of the Department in the exercise of the powers, functions and duties of the chief executive under the VL(R) Act.
176. When one looks to the entire scheme of the *Valuers Registration Act 1992 Qld* and the *Valuers Registration Regulation*, one finds that it is essentially a scheme for the protection of members of the public who wish to engage the services of a valuer who is eligible by experience and training to qualify for the status of "registered valuer". Part 2 of the *Valuers Registration Act* makes provision for a Valuers Registration Board of Queensland. A person who meets the qualifications prescribed by s.30 may apply to the Board to be registered as a valuer. Registered valuers are subject to the complaints and discipline procedures set out in Part 4 of the Act. Part 4 provides, *inter alia*, that following investigation of a complaint, if the investigator considers that a *prima facie* case is made out against a registered valuer, the investigator may charge the registered valuer with misconduct in a professional respect, or with incompetence or negligence in the person's performance as a valuer. If found guilty of the charge, a number of penalties may be imposed, but the ultimate sanction is cancellation of the valuer's registration. The key provision of the Act is s.63 which provides that a person who is not a registered valuer must not -
- (a) hold himself or herself out as being a registered valuer; or
 - (b) carry on or attempt to carry on the business of a registered valuer; or
 - (c) take, use or exhibit a name, letter, word, title, description or symbol that, either alone or in the circumstances in which it is taken -
 - (i) is capable of being reasonably understood to indicate; or
 - (ii) is intended by the person to indicate;
- that the person is a registered valuer or is entitled to carry on the business of a registered valuer.

A maximum penalty of 100 penalty units is prescribed for a contravention of s.63(1).

177. Thus, members of the public who deal with a registered valuer can have confidence that the person has met certain standards of competence and experience, and is subject to a disciplinary regime for misconduct, or incompetent or negligent performance as a valuer. This provides an incentive for

members of the public to deal with a registered valuer, rather than with a valuer who is not entitled to be, or has not sought to be, registered as a valuer, and also provides a corresponding incentive for valuers to become registered valuers in order to attract custom. The general tenor of the provisions of the *Valuers Registration Regulation* is that they are designed to regulate the conduct of valuers in private practice who undertake valuation work for clients on a fee for service basis. Neither the *Valuers Registration Act* nor the *Valuers Registration Regulation* purports to bind the Crown in right of the State of Queensland, and I note that s.13 of the *Acts Interpretation Act 1954 Qld* provides that:

No Act passed after the commencement of this Act shall be binding on the Crown ... unless express words are included in the Act for that purpose.

178. In my opinion, no indication can be found in the terms of either the *Valuers Registration Act* or the *Valuers Registration Regulation* to the effect that they were intended to bind the chief executive of the Department in performing powers, functions and duties under the VL(R) Act. There is no provision in the VL(R) Act which requires that the chief executive be a registered valuer. Nor was there any provision in the VL Act requiring that the Valuer-General be a registered valuer. In practice the Valuer-General would almost certainly have always been a registered valuer, having specialised in that vocation. It would more likely now be a matter of chance that the chief executive of the Department at any time would have had past experience as a registered valuer, as opposed to other kinds of relevant experience that might equip him or her to hold that office. In any event, the chief executive does not need the status of being a registered valuer. The chief executive's source of authority (or, in respect of Parts 3 and 4 of the VL(R) Act, statutory obligation) to carry out valuations is conferred (or imposed) by the terms of the VL(R) Act itself. Even though, under s.74 of the VL(R) Act the chief executive is conferred with a power (exercisable at the chief executive's discretion) to value real or personal property for any person, thereby putting the chief executive in a position to compete with registered valuers for valuation work from the general public, the source of the chief executive's power to undertake such work is still the VL(R) Act itself.
179. Under s.12 of the VL(R) Act, the chief executive may delegate powers to an officer or employee of the Department. Most of those officers or employees would be registered valuers, but in discharging their employment duties they would not be acting in their personal capacity as registered valuers. Rather they would be acting as delegates of the chief executive's statutory authority to carry out the valuations.
180. Since, in my opinion, s.6 of the *Valuers Registration Regulation* is not binding on the chief executive of the Department, it cannot be invoked to mount a case for exemption of the documents in issue under s.48 of the FOI Act.
181. Assuming that it could be established that either s.11 of the VL(R) Act or s.6 of the *Valuers Registration Regulation* satisfied the requirements of s.48(1)(a) of the FOI Act, I would not be satisfied in any event that disclosure of the documents in issue to Cairns Shelfco would be contrary to the public interest, as required by s.48(1)(b) of the FOI Act, for the same reasons discussed at paragraphs 136-144 above.
182. I note that the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994* will amend the FOI Act so as to list in a schedule those secrecy provisions whose effect is to be preserved by an amended s.48 of the FOI Act. Neither s.11 of the VL(R) Act nor s.6 of the *Valuers Registration Regulation* is included in the proposed schedule. Thus if s.48 were the only basis on which Cairns Shelfco could presently be denied access to the documents in issue, there would be nothing to prevent it from lodging a fresh FOI access application for the same documents after 19 August 1994, whereupon it would appear that s.48 could no longer be applied to refuse access to the documents now in issue.

General Observations

183. I note that Mr Woolley, at paragraph 6 of his affidavit of 14 December 1993, expresses concern that valuations prepared by the Department under s.74 of the VL(R) Act could be liable to disclosure to a third party under the FOI Act, without a client's consent. He notes that such a requirement is not placed on private sector operators, and expresses concern that it puts at risk client-service provider relationships, and jeopardises the Department's ability to generate revenue undertaking valuation work under s.74 of the VL(R) Act. These concerns may be somewhat overstated. My findings in this case are very specific to the particular facts of this case, notably the purpose for which the Valuer-General's valuations were required under the terms of the particular lease in issue, which stipulated an already agreed formula for calculating the rental payable by reference to valuations obtained from the Valuer-General. In a different situation, as I remarked at paragraph 134 above, the application of s.45(1)(c) may produce different results. Moreover, in this case, those parts of the valuation reports in issue which comprised information of a confidential nature did not qualify for consideration for exemption under s.46(1)(a) of the FOI Act, being excluded by virtue of s.46(2) and the fact that the CPA is an agency of the kind referred to in s.46(2). If the Department contracts under s.74 of the VL(R) Act to provide valuation services for a person who does not fall within s.46(2)(a) or (b) of the FOI Act, it will be possible to test the contention that a contractual obligation of confidence is owed by valuer to client, and that s.46(1)(a) of the FOI Act applies. Every case will of course depend on its specific facts.

Conclusion

184. For the foregoing reasons, I am satisfied that Mr Holmes' decision of 13 May 1993 was correct. In respect of each of the exemption provisions relied upon by the CPA, one or more key elements of the exemption provision cannot be established in respect of the documents in issue. Accordingly, I affirm the decision under review.

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 F N ALBIETZ
INFORMATION COMMISSIONER