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**Freedom of Information – Issues
and Recent Developments in
NSW**

by

Gareth Griffith

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Freedom of Information – Issues and Recent Developments in NSW

by

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EXECUTIVE SUMMARY

From the outset, the NSW *Freedom of Information Act 1989* [the **FOI Act**] has been subject to amendment and criticism. While its introduction was accompanied by high expectations about improved democratic accountability, for many its actual operation has proved inadequate. This paper updates Background Paper No 3/2000 - *Freedom of Information and Open Government*. It surveys the major issues in FOI debate, along with the recent developments in this area of the law, in terms of legislative reform and the relevant case law.

Exemptions for law enforcement bodies: Under the category of *Restricted Documents*, exemptions for law enforcement bodies have been expanded since 2000. For example, under the *Freedom of Information Amendment (Terrorism and Criminal Intelligence) Act 2004* additional exemptions were provided for documents created by ‘the Counter Terrorist and Co-ordination Command of NSW Police, as well as for documents created by the State Crime Command of NSW Police ‘in the exercise of its functions concerning the collection, analysis or dissemination of intelligence’. [2.9]

Disclosure of government contracts: The issue of public private partnerships and the use of ‘commercial-in-confidence’ exemptions under the FOI Act came to the fore recently in relation to the Cross City Tunnel. In the last sitting days of the 53rd Parliament (2003-07) the *Freedom of Information Amendment (Open Government – Disclosure of Contracts) Act* was passed, establishing mandatory public disclosure requirements for major contracts with the private sector. The Act provides for disclosure requirements for three classes of government contract. State owned corporations (and their subsidiaries) are excluded from the operation of the Act, as are local authorities. However, local authorities may be brought under the Act by means of regulation. [3.1-3.7]

The Ombudsman and FOI: The Ombudsman’s external review powers are only to ‘recommend’ that, for example, an agency reconsider its determination to restrict access to a particular document. They are not ‘determinative’ powers. The Ombudsman cannot change or reverse a decision. That power lies with the Administrative Decisions Tribunal (ADT). According to the NSW Ombudsman’s *2005-06 Annual Report*, a comparison of this State with other Australian jurisdictions ‘shows that NSW has the lowest rate of full release of documents and the highest rate of partial release’. [4.2] For many years, the Ombudsman has called for a review of the FOI Act, including a review of its inter-relationship with other access to information laws. [4.1] The Ombudsman is also among those advocating the establishment of an FOI Commissioner. [4.4]

Parliament and FOI: More recent FOI regimes tend to include Parliament within their scope. Examples where Parliament is covered by FOI include India, South Africa, the Republic of Ireland and the UK, although in the last case this is currently under review in the form of the FOI (Amendment) Bill. Under these newer FOI regimes, allowance is made for parliamentary privilege. In relation to the older FOI regimes, established in the 1970s and 80s, is that the Houses of Parliament are excluded from their reach. This is the case in NSW. [4.5]

Secrecy provisions and FOI: Clause 12 of Schedule 1 of the NSW FOI Act, which is headed ‘Documents the subject of secrecy provisions’ restricts an applicant’s right of access to documents, where information in a document is subject to a ‘secrecy provision’ in another piece of legislation. The meaning and the use made of this exemption has come under close scrutiny in recent years, as agency’s are claimed to have relied on the secrecy provisions exemption as a device to circumvent the FOI regime. The Appeal Panel of the ADT has suggested that there are good grounds for reviewing secrecy provisions across the board, in the context of their consistency with the objects of the FOI regime. This had been spoken about for nearly 20 years, but never acted upon. As well, there is a strong argument in favour of a review of the secrecy provisions exemption itself, to clarify and possibly restrict its meaning. Section 38 of the Victorian FOI legislation is one possible alternative model for consideration; section 38 of the Commonwealth FOI Act and s 48 of the Queensland FOI Act offer further models for reform. [4.6]

Is there a presumption in favour of disclosure under the FOI Act? The position is not entirely clear. According to Moira Paterson, one way of ensuring a more pro-disclosure approach would be to insert into the Act ‘a principle of availability which establishes the principle that information should be made available unless there is good reason for withholding it’. This suggestion is along the lines of s 5 of the New Zealand *Official Information Act 1982*. [5.1]

Does the ADT have a residual discretion to order access to exempt documents? In *University of NSW v McGuirk* [2006] NSWSC 1362 the NSW Supreme Court held that the ADT has a discretionary power to override the decision of an agency not to release an exempt document. This residual discretion applies to Cabinet documents, unless they are the subject of a Ministerial certificate. [5.2]

What is meant by documents which would disclose information ‘concerning any deliberation or decision of Cabinet’? In terms of the exemption for Cabinet documents, the most contentious is the exemption in clause 1(1)(e) – ‘matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet’. Different interpretations have been applied by the ADT. [5.7]

When will an FOI applicant be ordered to pay costs? Ordinarily the ADT does not make costs orders in proceedings for the review of a reviewable decision. However, long-running and complex FOI proceedings associated with a few applicants have raised the question of the ‘special circumstances’ in which it is appropriate for the ADT to award costs pursuant to s 88 of the *Administrative Decisions Tribunal Act 1997*. While each case will turn on its own facts, it seems that in deciding whether circumstances are ‘out of the ordinary’ the ADT will have regard to such criteria as: the appeal has no real prospect of success; the applicant’s arguments are specious or frivolous, this having regard to the applicant’s sophistication and experience in FOI matters; the level and the nature of the applicant’s FOI activity, in particular where the applicant’s conduct is ‘grossly unreasonable’; and the request is oppressive, putting the public service to unnecessary expense, by involving for example the gathering up and analysis of many documents the applicant must already have. [5.13]

1. INTRODUCTION

From the outset, the NSW *Freedom of Information Act 1989* [the **FOI Act**] has been subject to amendment and criticism. While its introduction was accompanied by high expectations about improved democratic accountability, for many its actual operation has proved inadequate. Writing in 1997, Anne Cossins, Senior Lecturer in the Faculty of Law at UNSW, commented that ‘the illusion of openness that the FOI Act gave in relation to information concerning the sensitive policy and decision-making areas of government has not been fulfilled’.¹ For Cossins, while the Act has been successful in ‘making people’s personal records available to them’, it ‘appears to have done little to increase government accountability, particularly at the higher levels of government decision-making’.² Cossins argued that only a minority of requests related to government policy development and decision-making, and these requests were more likely to be denied.³ On the other side, it is said that when the requested documents are non-contentious, agencies appear to be complying well with the letter and spirit of the FOI Act.⁴ A specific area of concern relates to the way contracting out and outsourcing can diminish access to FOI. The Ombudsman argued in 2001 that one ground justifying a review of the FOI Act was that ‘public sector agencies are increasingly contracting out their functions and activities to bodies that are not subject to the FOI Act...’.⁵

Updating this assessment in 2005, Moira Paterson, Senior Lecturer in the Faculty of Law at Monash University, wrote ‘There can be no doubt that Australian government today is considerably more open than it was when freedom of information laws were first considered during the latter part of the 1970s’. Paterson went on to say:

There is a substantial body of evidence which suggests that the Freedom of Information Acts have fallen a long way short of achieving their objective to extend as far as possible the community’s right of access to government information.⁶

¹ A Cossins, *Annotated Freedom of Information Act New South Wales*, LBC Information Services 1997. p 14.

² Cossins, n 1, p 18.

³ A Cossins, n 1, p 34. See also NSW Ombudsman, *1998/99 Annual Report*, p 109.

⁴ C Wheeler, ‘Public sector compliance with FOI in NSW’ (1999) 81 *Freedom of Information Review* 38 at 42.

⁵ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Inquiry into Access to Information*, Submission 18A, NSW Ombudsman, June 2001, p 8. On issues arising from public private partnerships see – V Sands, ‘The right to know and obligation to provide: public private partnerships, public knowledge, public accountability, public disenfranchisement and prison cases’ (2006) 29(3) *UNSW Law Journal* 334-341.

⁶ M Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State*, LexisNexis Butterworths 2005, p 493.

In essence, critics argue that the ‘right’ of individuals to access information held by the government has been frustrated by various means, notably by the assiduous use of ‘exemptions’ to the FOI regime. It could be argued that the Department of Gaming and Racing tried to use the Act in this way when the *Daily Telegraph* sought access in September 2003 to a list of the most profitable 200 hotels. Various grounds of exemption were relied on by the Department, including the claim that the Top 200 Hotels list was a ‘restricted document’ under clause 4(1)(c) of Schedule 1 of the FOI Act. This provides an exemption on the basis that disclosure could reasonably be expected ‘to endanger the life or physical safety of any person’. In the event, the Department’s decision to refuse access was overturned by the Administrative Decisions Tribunal, where Montgomery JM commented ‘Clause 4(1)(c) of the FOI Act does not seem to me to be concerned with what may be mere possibilities, but rather a recognisable potential for endangerment’.⁷ The *Daily Telegraph* submitted that

the reasons put forward by the department for its refusal to release this Top 200 list are spurious and designed to protect the State Government from political embarrassment over the impact of its reforms to the hotel and club industry, including the 1997 decision to grant the hotel industry access to poker machines. The NSW *Freedom of Information Act* was never intended to protect governments from political embarrassment.⁸

According to the NSW Ombudsman’s *2005-06 Annual Report*, a comparison of this State with other Australian jurisdictions ‘shows that NSW has the lowest rate of full release of documents and the highest rate of partial release’.⁹ In the past year NSW has been described in the media as ‘the State of secrets’,¹⁰ its FOI Act as ‘Freedom for governments to keep us ignorant’.¹¹ As part of its concerted fight for documents under freedom of information law, the *Sydney Morning Herald* has run a regular column headed ‘What They Won’t Tell You’. An editorial in May 2007 summed the paper’s views on freedom of information, stating that the laws at State and Commonwealth levels ‘contained a Trojan horse’. This referred to

the procedure by which governments can legally suppress information. That procedure was meant to be used for exceptions, but exceptions have become the

⁷ ***Bissett v Director General, Department of Gaming and Racing*** [2004] NSWADT 160 at [64].

⁸ [2004] NSWADT 160 at [5].

⁹ NSW Ombudsman, *Annual Report, 2005-06*, p 102. For a critical commentary on the operation of the Commonwealth FOI legislation see – R Snell, ‘Failing the information game’, *Public Administration Today*, January-March 2007, 5-9; C Merritt, ‘Pattern of FOI secrecy emerges’, *The Australian*, 22 March 2007 - http://theaustralian.news.com.au/story/0,20867,21423684-7582,00.html?from=public_rss

¹⁰ I Salusinszky, ‘NSW State of secrets’, *The Australian*, 26 October 2006, p 2.

¹¹ S Benson, ‘FOI: Freedom for governments to keep us ignorant’, *The Daily Telegraph*, 23 May 2006, p 15.

rule. The State Government, for example, has recently rebuffed *Herald* requests for information on which hotels attract crime, and what repairs our state schools need. This information is in no way sensitive – unless you are a politician.¹²

Perhaps this was to be expected. Speaking in the relevant Second Reading debate in December 1988, the then Leader of the Opposition, Bob Carr, commented that the FOI legislation:

will give a false impression of openness which will be dispelled through the bitter experience of applicants seeking to utilize the legislation... The bill is littered with clauses and schedules that even the most inept bureaucrat will be able to use to secrete embarrassing material from public gaze.¹³

During the 53rd Parliament (2003-2007) several Private Members' Bills were introduced with the broad object of facilitating more 'open government'. In the last sitting days of that Parliament, in November 2006, one of these bills passed through all stages in both Houses – the Freedom of Information Amendment (Open Government – Disclosure of Contracts) Bill 2006 - sponsored by the Independent MP, Clover Moore.¹⁴ For its part, should it have been victorious at the March 2007 general election, the Coalition pledged a major overhaul of FOI laws, including the creation of 'a new independent watchdog, the freedom of information commissioner, to oversee a more comprehensive release of government information to the public'.¹⁵ This proposed overhaul was to be based on a review of the legislation to be completed within six months of taking office. In a similar vein, a Private Member's Bill sponsored by the Greens MLC, Lee Rhiannon - the Freedom of Information Amendment (Improving Public Access to Information) Bill 2006 – sought to establish an independent review of the FOI Act. The Bill was not supported by the Government and lapsed in the Legislative Assembly.

FOI did not figure in Peter Debnam's Liberal Party policy speech, *Let's Fix NSW*, delivered on 25 February 2007. Nor were FOI matters dealt with directly in Morris Iemma's policy statement, *People first: better government access*, which included the promise of a single, toll-free NSW Government telephone number and a single NSW Government web portal.¹⁶ The Greens policy for the March 2007 general election, launched on 11 March 2007, included the following commitment to FOI reform:

¹² Editorial, 'The gags are getting tighter', *SMH*, 11 May 2007, p 10.

¹³ *NSWPD*, 1 December 1988, p 4301.

¹⁴ This was assented to on 4 December 2006 – Act No 115 of 2006 (Government Gazette No 175, 8/12/2006, p 10386). By s 2 of the Act, it comes into force '28 days after the date of assent'.

¹⁵ *NSWPD*, 26 October 2006, p 3591 (Peta Seaton).

¹⁶ morrisiemma.com.au For a commentary on the policies of the major parties leading into the March 2007 general election see – M Moore, 'What's really ongoing is hypocrisy and pretence', *SMH*, 22 March 2007, p 24. See also the website of the FOI specialist Peter Timmins - <http://www.foi-privacy.blogspot.com/>

Open government directive and appoint an Information Commissioner – Require government agencies to actively and routinely publish government held information on the web, with limited exceptions, thus reducing the public’s reliance on FOI requests. Establish an independent “Information Commissioner”, responsible for FOI and privacy. The Commissioner would facilitate a shift to open government, monitor compliance with FOI laws and assist individuals with complaints.¹⁷

The paper updates Background Paper No 3/2000 - *Freedom of Information and Open Government* by Abigail Rath. It surveys the major issues in FOI debate, along with the recent developments in this area of the law, in terms of legislative reform and the relevant case law.

¹⁷ <http://www.nsw.greens.org.au/media-centre/news-releases/greens-launch-nsw-election-campaign-vote-for-tomorrow-today/> The Australian Democrats also promised to reform FOI laws along the lines of New Zealand’s *Official Information Act 1982* - <http://www.nsw.democrats.org.au/policies/accountability.html>

2. THE NSW FREEDOM OF INFORMATION ACT IN SUMMARY

2.1 Objects and interpretation

The purpose of FOI legislation generally is to make public sector decision-making processes more accessible to the public, thereby promoting open government and enhancing the processes of representative democracy. As stated by the Senate Standing Committee on Constitutional and Legal Affairs:

The essence of democratic government lies in the ability of people to make choices: about who shall govern; or about which policies they support or reject. Such choices cannot be properly made unless adequate information is available. It cannot be accepted that it is the government itself which should determine what level of information is regarded as adequate.¹⁸

The basic purposes and principles of FOI legislation have been described as follows:

- to make government more accountable by making it more open to public scrutiny;
- to improve the quality of political democracy by giving the opportunity to all members of the community to access information that will permit more meaningful participation in the processes of government, including the formulation of policy;
- to enable persons to be kept informed of the functioning of the decision-making process as it affects them and to know the criteria that will be applied by government agencies in making those decisions; and
- to enable individuals to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is inaccurate, incomplete, out-of-date or misleading.¹⁹

These purposes and principles are established and protected under the legislation by: first, the creation of a legally enforceable right of access to government documents; secondly, the requirement that agencies make available information concerning their affairs; and, thirdly, the creation of a legally enforceable right to ensure that government records relating to the personal affairs of individuals ‘are not incomplete, incorrect, out of date or misleading’.²⁰ In this last respect, FOI legislation might be called a shield against government abuse of personal information. To the extent that it establishes a right ‘to obtain access to information held by the Government’²¹ it can also be described as a

¹⁸ Parliament of Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information*, 1979, p 22.

¹⁹ Queensland Information Commissioner (“Qld IC”), Submission by the Information Commissioner (Qld) to the Legal, Constitutional and Administrative Review Committee on the Review of the Freedom of Information Act 1992 (Qld), 14 May 1999.

²⁰ *FOI Act 1989*, section 5(1)(b).

²¹ *FOI Act 1989*, section 5(1)(a).

sword.²² The purpose of the FOI legislation is revealed by the long title to the Act which reads:

An Act to require information concerning documents held by the Government to be made available to the public, to enable a member of the public to obtain access to documents held by the Government and to enable a member of the public to ensure that records held by the Government concerning his or her personal affairs are not incomplete, incorrect, out of date or misleading; and to make consequential amendments to certain other Acts.

In order to further these objects, s 5(3) of the Act states:

It is the intention of Parliament:

- (a) that this Act shall be interpreted and applied so as to further the objects of this Act, and
- (b) that the discretions conferred by this Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.

It is said in this respect that the FOI Act must be interpreted broadly and with a clear ‘purposive’ approach to statutory construction.²³ Section 5 has been interpreted by the NSW Court of Appeal as requiring that the FOI Act should be approached by decision makers ‘with a general attitude favourable to the provision of the access claimed’.²⁴ Where access to a document is refused, the burden of proof lies on the agency or Minister concerned, with s 61 providing:

In any proceedings concerning a determination made under this Act by an agency or Minister, the burden of establishing that the determination is justified lies on the agency or Minister.

2.2 Right of access to documents

The Act provides that a person has a legally enforceable right to be given access to an agency’s documents, or a Minister’s documents that relate to the affairs of an agency, in accordance with the Act.²⁵ The term ‘agency’ is defined broadly to mean a Government Department, public authority, local authority or public office’.²⁶

²² Parliament of NSW, Committee on the Office of the Ombudsman and the Police Integrity Commission, *First Report on the Inquiry into Access to Information*, December 2002, p 11.

²³ MA Robinson, *NSW Administrative Law*, LawBook Co 2001, at [30.120].

²⁴ *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 at 627 (Kirby P).

²⁵ *FOI Act 1989*, s 16; and s 35 and definition of ‘Minister’s document’ in s 6.

²⁶ *FOI Act 1989*, s 6. Public authorities and public offices are defined under ss 7 and 8 respectively, in terms of bodies or offices ‘established or continued for a public purpose by or under the provisions of a legislative instrument’. Specific public authorities and public offices are listed under the FOI Regulation 2005, Schedules 3 and 4.

The right of access under the Act is defined, not in relation to information as such, but to ‘documents’. Document is defined as follows:

document includes:

- (a) any paper or other material on which there is writing or in or on which there are marks, symbols or perforations having a meaning whether or not that meaning is ascertainable only by persons qualified to interpret them, and
- (b) any disc, tape or other article from which sounds, images or messages are capable of being reproduced.²⁷

There is an unconditional right of access to government documents under the Act in the sense that an applicant does not have to provide a reason or special need for access to the documents. All members of the public have the same right of access, irrespective of the reason for applying for access. There is a right of access to all documents (subject to exemptions) regardless of the date the document came into existence.²⁸

2.3 Right to amend agencies’ records

By s 39 there is, in addition, a right to apply for the amendment of an agency’s records. This comes into play after a person has received access to relevant documents and only applies: (a) if the document contains information concerning the person’s personal affairs; and (b) if the information is available for use by the agency in connection with its administrative functions;²⁹ and (c) if the information is, in the person’s opinion, incomplete, incorrect, out of date or misleading. Conversely, by s 44 an agency may refuse to amend its records if, for example, it is satisfied that its records are not incomplete, incorrect, out of date or misleading in a material respect.³⁰

²⁷ *FOI Act 1989*, s 6.

²⁸ Previously an agency could refuse access to a document which came into existence more than five years prior to the commencement of the Act. This provision was repealed in 1992.

²⁹ What is meant by ‘administrative functions’ in the context of s 39 was considered in **Commissioner of Police (NSW) v N** (2003) 58 NSWLR 458. The Police Service denied the respondent’s application for access on the basis that, although the documents contained information concerning his personal affairs, they also contained information relating to the operational functions of the Police Service. It was held that the words ‘administrative functions’ in s 39(b) were used in a generic sense, to refer to all those functions performed by an agency that relate to the management and execution of its responsibilities as derived from common law, statute or government arrangement. It was further held that, although the personal records in issue had been created in connection with the execution by the Police Service of its key responsibility – the enforcement of the criminal law – they were not exempt.

³⁰ Sections 39 and 44 were considered in **Crewdson v Central Sydney Area Health Service** [2002] NSWCA 345. The appeal concerned an application to delete part of an interim psychiatric report prepared by Health Quest which said that Crewdson was currently unfit for work. The Court of Appeal held: (1) A medical opinion is not shown to be incorrect or misleading because the procedures followed were legally flawed or the doctor was biased. It may still be correct. (2) The Act was concerned with the accuracy of official records and not with the merits or legality of official action recorded therein. It did not provide a vehicle for

2.4 Excluded bodies and offices

By s 7 certain bodies are excluded from the definition of ‘public authority’ and therefore from the operation of the FOI legislation. These include the Legislative Council, Legislative Assembly, parliamentary committees, and Royal Commissions. By s 8 the holders of certain public offices are excluded from the Act, including the Governor and Members of the NSW Parliament. By s 10, Courts and Tribunals are also excluded in relation to their judicial functions.

In addition, s 9 of the FOI Act provides that certain agencies are exempt in relation to specified functions. These are listed in **Schedule 2** and include the complaint handling, investigative and report functions of such oversight bodies as the ICAC, the Ombudsman, the Police Integrity Commission and the Health Care Complaints Commission. The Child Death Review Team is an exempt body in respect to ‘all functions’. The full text of Schedule 2 is set out at Appendix A to this paper.

2.5 Provision of information

The Act requires agencies to publish a ‘Statement of Affairs’ every 12 months, and a ‘Summary of Affairs’ every six months.³¹ Each agency is also required to prepare an annual report to Parliament on their obligations under the Act.³² The relevant requirements are set out in Background Paper No 3/2000.³³ It is noted that Ministers’ offices are not required to publish a Statement of Affairs, Summary of Affairs or an annual report on FOI. However, each Minister must provide the Premier with such information relating to their obligations under the FOI Act as the Premier requires.³⁴ The Premier must prepare an

the collateral review of the merits or validity of official action. (3) The appellant had not established that the decision of the Appeal Panel was vitiated by legal error. The comment has been made that the decision ‘effectively confines the ways in which records can be amended to notation and does away with the spectre of portions of agency records being deleted. More broadly, the decision confirms that FOI is about access to documents and is not an opportunity to re-visit past administrative decisions’ – NSW Crown Solicitor, *Client Newsletter*, December 2002, p 5. Sections 39 and 44 were subsequently considered in **Ormonde v Chief Executive Officer, Healthquest** [2004] NSWADT 191. Acting President Hennessey observed at [33]: ‘The decision of the Court of Appeal in *Credwson*... and the Appeal Panel’s decision in *Secretary, NSW Treasury v C* (GD) [2004] NSWADTAP 6 at [103] make it clear that an expert opinion will not be incorrect unless all or some of the factual material underlying the opinion is incorrect. Mr Ormonde did not challenge the factual basis underlying the opinion, but merely asserted that other experts would disagree with him. That is not enough to make the opinion incorrect’.

³¹ *FOI Act 1989*, s 14(1).

³² *FOI Act 1989*, s 68.

³³ A Rath, *Freedom of Information and Open Government*, NSW Parliamentary Library Background Paper No 3/2000, pp 35-36.

³⁴ *FOI Act*, s 68(2).

annual report on each Minister's obligations under the Act.³⁵

2.6 Refusal of access

An agency or Minister *may* refuse access to a document for one of the following reasons:³⁶

- The document is an exempt document.
- The work involved in dealing with the request would, if carried out, substantially and unreasonably divert the agency's resources away from its functions.³⁷
- The document is already available for inspection whether or not inspection of the document is subject to a fee.
- The document is usually available for purchase.
- The document genuinely forms part of the library material held by the agency.

Access to an exempt document (including a document subject to a ministerial certificate) cannot be refused if it is practicable to give access to a copy of the document with the exempt matter deleted, and the applicant wishes to have access to the document in this form.³⁸

2.7 Ministerial certificates

An agency or Minister *must* refuse access to a document that is the subject of a ministerial certificate.³⁹ The Premier (as the Minister administering the FOI Act) can issue a ministerial certificate in relation to restricted documents, that is, Cabinet documents, Executive Council documents, documents relating to law enforcement and public safety and documents affecting counter-terrorism measures.⁴⁰ A ministerial certificate is taken to be conclusive evidence that a document is a restricted document (and therefore exempt). Each certificate lasts for 2 years. Neither the Ombudsman nor the Administrative Decisions Tribunal can review the issuing of a ministerial certificate. The only avenue of appeal is to the Supreme Court which can determine if 'there are reasonable grounds for the claim that

³⁵ *FOI Act*, s 68(3).

³⁶ *FOI Act 1989*, s 25 (1).

³⁷ Access to a document must not be refused on the ground of unreasonable diversion of resources without first consulting with the applicant to determine whether the request can be amended such that it would not create such an unreasonable diversion of resources: s 25(5).

³⁸ *FOI Act 1989*, s 25(4).

³⁹ *FOI Act 1989*, s 25(3). Paterson writes that the NSW FOI Act differs from its Commonwealth and Victorian counterparts 'in that it specifically requires an agency to refuse access to a document that is the subject of a ministerial certificate, thereby removing agencies' usual discretion as to whether to grant access to an exempt document' – Paterson, n 6, p 232.

⁴⁰ *FOI Act 1989*, s 59.

the documents is a restricted document'.⁴¹ In respect to such an order, Paterson writes that it

can be made only after the minister administering the Act has had a reasonable opportunity to appear and be heard in relation to the matter and, in the case of documents affecting law enforcement and public safety, results in the certificate ceasing to have effect immediately. In the case of Cabinet or Executive Council documents, the certificate ceases to have effect 28 days after the order is made unless the certificate is confirmed by the minister. Ministers have the power to confirm the operation of a conclusive certificate applying to an Executive Council or Cabinet document but must account to Parliament if they confirm a certificate despite an order from the Supreme Court that there are no reasonable grounds for the claim that the document is a restricted document.⁴²

2.8 Exempt documents

By s 6, an 'exempt document' is defined as:

- (a) a document referred to in Schedule 1, or
- (b) a document that relates to particular functions of specified bodies.

The exemption provisions proceed, for the most part, in two ways.⁴³ Either they:

- declare a document to be exempt by reference to the environment or process to which it belongs (for example, cl 1 – documents 'prepared for submission to Cabinet'); or
- they declare a document to be exempt by reference to whether it contains 'matter the disclosure of which' would give rise to a particular harm (for example, cl 4 – 'the disclosure of which could reasonably be expected...to endanger the life or physical safety of any person').

2.9 Exemptions under Schedule 1

Schedule 1 provides the categories of exempt documents that potentially apply to documents held by any agency or Minister. The categories are divided into three groups: (a) restricted documents; (b) documents requiring consultation; and (c) other documents.

⁴¹ *FOI Act 1989*, ss 58A and 58B.

⁴² Paterson, n 6, p 232 (footnotes omitted).

⁴³ *Commissioner for Fair Trading, Office of fair Trading v The Australian Wine Consumers Co-operative Society Limited (GD)* [2007] NSWADTAP 14 at [30].

Restricted Documents, which may be subject to a ministerial certificate, comprise:

- CI 1 Cabinet documents
- CI 2 Executive Council documents
- CI 4 Documents concerning law enforcement and public safety
- CI 4A ents affecting counter-terrorism measures⁴⁴

There is no discretion to disclose a *restricted document* that is subject to a ministerial certificate.⁴⁵ Even in the absence of a ministerial certificate, the review powers of the Administrative Decisions Tribunal would appear to be restricted to determining whether reasonable grounds exist for the claim that the document is a restricted document.⁴⁶ The implication would seem to be that full merits review is unavailable for restricted documents. But note in this respect that, in *BY v Director General, Attorney General's Department*⁴⁷ O'Connor DCJ determined that if the Tribunal finds that there are reasonable grounds for the claim, its jurisdiction remains unaffected. It may go on to ascertain whether the decision to claim the exemption is the correct and preferable decision. This is pursuant to s 63 of the *Administrative Decisions Act 1997*. As discussed in a later section of this paper, a general conferral of jurisdiction to review a reviewable decision is found under s 38 of that Act. By s 63, when acting in this capacity the Tribunal is to decide 'what the correct and preferable decision' should be, in which capacity it 'may exercise all of the functions that are conferred or imposed by any relevant enactment on the administrator who made the decision'. These powers are said to apply subject to any 'contrary provisions' in the FOI Act. On that point O'Connor DCJ observed:

It is not clear that s 57 constitutes a 'contrary provision'. One would expect that a provision ousting or limiting the jurisdiction of the Tribunal would be expressed in clear terms, not found by implication. The FOI Act is an Act designed to promote openness in government and enable citizens to understand better the basis for government actions and decisions. It is often described as promoting the democratic objective. The substantial system for review of negative agency determinations reflects the concern that such determinations be sound. There are mechanisms for internal review, review by the Ombudsman and review by the Tribunal. In the case of review by the Ombudsman there is an express limitation on the power of that office to review Ministerial certificate cases. There is no limitation on its power of review in respect of non Ministerial certificate restricted document cases. These are all reasons for expecting that had the Parliament intended to deprive the Tribunal of

⁴⁴ Inserted by the *Freedom of Information Amendment (Terrorism and Criminal Intelligence) Act 2004* (NSW).

⁴⁵ *FOI Act 1989*, s 25(3).

⁴⁶ *FOI Act 1989*, s 57.

⁴⁷ [2002] NSWADT 79; applied *Fisher v Commissioner of Police, NSW Police Service* [2002] NSWADT 267; *Chapman v Commissioner of Police, NSW* [2004] NSWADT 35; *Bissett v Director General, NSW Department of Gaming and Racing* [2004] NSWADT 160.

its ordinary merits review powers in these cases, it would have said so expressly.⁴⁸

Exemptions for law enforcement bodies have been expanded since 2000. Under the *Freedom of Information Amendment (Terrorism and Criminal Intelligence) Act 2004* additional exemptions were provided for documents created by ‘the Counter Terrorist and Co-ordination Command of NSW Police,⁴⁹ as well as for documents created by the State Crime Command of NSW Police ‘in the exercise of its functions concerning the collection, analysis or dissemination of intelligence’.⁵⁰ A specific exemption in the same terms is provided for documents created by the Corrections Intelligence Group of the Department of Corrective Services.⁵¹ A further exemption has been provided for documents created by the Drug Intelligence Unit of the Department of Juvenile Justice ‘in the exercise of its functions concerning the collection analysis or dissemination of intelligence’.⁵²

The category of *Documents requiring consultation* comprises:

- CI 5 Documents affecting intergovernmental relations
- CI 6 Documents affecting personal affairs
- CI 7 Documents affecting business affairs
- CI 8 Documents affecting the conduct of research

For documents falling within the category of ‘documents requiring consultation’, the agency or Minister is required to obtain the views of the affected third party (that is, the potentially affected government, individual, business or researcher) before deciding whether or not the documents are exempt.⁵³

Assented to on 4 December 2006, the Freedom of Information (Open Government – Disclosure of Contracts) Act amends the ‘documents affecting business’ exemption by adding an express reference to ‘commercial-in-confidence provisions of a government contract’. This legislation, which inserts s 15A into the FOI Act, is discussed separately in a later section of this paper.

⁴⁸ [2002] NSWADT 79 at [70].

⁴⁹ *FOI Act 1989*, Sch 1, cl 4(3)(b).

⁵⁰ *FOI Act 1989*, Sch 1, cl 4(3A).

⁵¹ *FOI Act 1989*, Sch 1, cl 4(3B).

⁵² *FOI Act 1989*, Sch 1, cl 4(3C). Inserted by the *Children (Detention Centres) Amendment Act 2006*, Sch 2.3.

⁵³ *FOI Act 1989*, ss 30 to 33.

The category of *Other Documents* comprises:

- CI 9 Internal working documents
- CI 10 Documents subject to legal professional privilege
- CI 11 Documents relating to judicial functions
- CI 12 Documents the subject of secrecy provisions
- CI 13 Documents containing confidential material
- CI 14 Documents affecting the economy of the State
- CI 15 Documents affecting financial or property interests
- CI 16 Documents concerning operations of agencies⁵⁴
- CI 17 Documents subject to contempt
- CI 18 Documents arising out of companies and securities legislation⁵⁵
- CI 19 Private documents in public library collections
- CI 20 Miscellaneous documents relating to adoption, whistleblower legislation, the Code of Conduct for Ministers, the policy in relation to writing off of fines and the investigation of railway or other transport accidents⁵⁶
- CI 21 Exempt documents under interstate FOI legislation

⁵⁴ This exemption was considered in ***Electoral Commissioner, State Electoral Office v McCabe*** [2003] NSWADTAP 28. The case involved the Secretary of the Restore the Workers' Rights Party, McCabe, who was seeking to register the party under the *Parliamentary Electorates and Elections Act 1912*. In order to satisfy himself of the genuineness of the party membership, the Electoral Commissioner randomly selected 300 seeking confirmation of their membership of the party. As the requirement for a 75% positive response had not been satisfied, McCabe sought to obtain access to the names of the 300 sampled persons with a view to contacting them to encourage their response. Applying cl 16(a)(i) of Schedule 1, which exempts documents integral to the integrity of 'any test, examination or audit conducted by an agency', the Appeal Panel held that the method of confidentially sampling the membership could be prejudiced by having an applicant made aware of their identity. It was held that disclosure would, on balance, be contrary to the public interest in ensuring the viability of procedures to verify that only genuine political parties receive the benefits of registration.

⁵⁵ Clauses 18(2) and (3) were inserted by the *Financial Services Reform (Consequential Amendments) Act 2002*, Sch 2.4. This extended exemption to: (a) documents relating to the Ministerial Council for Corporations, or documents that would disclose the Council's deliberations or decisions; as well as (b) to documents 'furnished' to the Australian Securities and Investments Commission by the Commonwealth or a State government and relating to its functions, or documents 'held' by the Commission and relating to the exercise of its functions under any relevant law. In his Second Reading Speech the Minister said 'The purpose of this bill is to amend State Acts and regulations which are affected by changes made to the securities and futures industry provisions in the Commonwealth corporations legislation by the Commonwealth Financial Services Reform Act 2001 and Financial Services Reform (Consequential Provisions) Act 2001' – *NSWPD*, 4 June 2002, p 2486.

⁵⁶ The exemptions in relation to the investigation or inquiry into railway or other transport accidents or incidents were inserted originally under the *Rail Safety Act 2002*, Sch 7.2 and the *Transport Legislation Amendment (Safety and Reliability) Act 2002*, Sch 5.1, then in a revised form under the *Transport Legislation Amendment (Waterfall Inquiry Recommendations) Act 2005*, Sch 4.1. The exemptions are qualified to permit access in specified circumstances, notably after a relevant report has been tabled before both Houses of Parliament.

- cl 22 Documents containing information confidential to Olympic Committees⁵⁷
- cl22A Documents containing information confidential to International Masters Games Association⁵⁸
- cl 23 Documents containing information relating to threatened species, Aboriginal objects and Aboriginal places⁵⁹
- cl 24 Documents relating to threatened species conservation⁶⁰
- cl 25 Plans of management containing information relating to places or items of Aboriginal significance⁶¹
- cl 26 Documents relating to complaints under health legislation⁶²

2.10 Discretion to grant access to exempt documents

The exemption provisions under the Act are not mandatory. Section 25(1)(a) provides that ‘An agency may refuse access to a document if it is an exempt document’. An agency therefore (or Minister)⁶³ has a discretion to disclose a document even though it falls within an exemption provision. But note that no such discretion applies to a restricted document that is the subject of a Ministerial certificate.⁶⁴

2.11 No overriding public interest test

There is no overriding public interest test in the Act. Thus, there is no public interest test applicable to many of the exemptions including Cabinet and Executive Council documents.

⁵⁷ Note that the Sydney Olympic Organising Committee for the Olympic Games (SOCOG), the Olympic Co-ordination Authority (OCA) and the Olympic Roads and Traffic Transport Authority (ORTA) appear to be subject to the FOI Act (as they appear to come within the definition of a “public authority” in section 7). However, under Schedule 1, clause 22 of the FOI Act a document is exempt if it has been prepared by or received by SOCOG, OCA or ORTA *and it contains matter that is confidential to the International Olympic Committee or the Australian Olympic Committee*: see Brabazon M, “The Legal Structure of the Sydney Olympic Games” (1999) 22(3) *The University of New South Wales Law Journal* 662.

⁵⁸ Inserted by the *Sydney 2009 World Masters Games Organising Committee Act 2005*, Sch 2.1. This exemption is modeled on that relating to Olympic Committees. It is expressed to refer to documents ‘prepared by or received by the Sydney 2009 World Masters Games Organising Committee *and contains matter that is confidential to the International Masters Games Association*’. (emphasis added)

⁵⁹ Inserted by the *National Parks and Wildlife Amendment Act 2001*, Sch 6.2.

⁶⁰ Inserted by the *Threatened Species Conservation Amendment Act 2002*, Sch 2.3.

⁶¹ Inserted by the *Local Government Amendment (Miscellaneous) Act 2002*, Sch 2.

⁶² Inserted by the *Health Legislation Amendment (Complaints) Act 2004*, Sch 4.1.

⁶³ *FOI Act*, s 38 read with s 25(1).

⁶⁴ *FOI Act*, s 25(3).

2.12 Specific public interest tests

A number of the exemption provisions include ‘public interest’ tests. Discussed in Background Paper No3/2000 were three different public interest tests in the Act.⁶⁵

2.12.1 Document not to be disclosed if contrary to public interest: This public interest test applies to six of the exemptions in Schedule 1: documents affecting inter-governmental relations (cl 5); internal working documents (cl 9); documents containing information obtained in confidence (cl 13(b)); documents affecting the economy of the State (cl 14); documents affecting financial or property interests (cl 15); and documents concerning the operations of agencies (cl 16). Under these exemptions, a document will be an exempt document if it satisfies all the conditions of the particular exemption, and a condition that disclosure of the document ‘*would, on balance, be contrary to the public interest*’. The onus lies on the agency to show that it would be ‘contrary to the public interest’ to disclose the documents.⁶⁶

As confirmed in *General Manager, WorkCover Authority of NSW v Law Society of NSW*,⁶⁷ the balancing that is to be done in this context is to fulfil the s 5(3) obligation to interpret and apply the FOI Act so as to further its objects,

bearing in mind that while the Act gives a legally enforceable right to be given access to documents held by the Government, that right is subject to such restrictions as are reasonably necessary for the proper administration of the Government.

McColl JA (Handley and Hodgson JA agreeing) went on to say:

Determining whether documents should be disclosed involves balancing these two matters. Thus...testing whether disclosure of documents would be contrary to the public interest requires the decision-maker ‘to weigh the public interest in citizens being informed of the processes of their Government and its agencies on the one hand against the public interest in the proper working of Government and its agencies on the other’.⁶⁸

According to McColl JA, the test as to whether disclosure ‘*would, on balance, be contrary to the public interest*’ is not to ‘be constrained by rigid rules’. On one side, it is not equivalent or reducible to a test of ‘tangible harm’; on the other, references by the decision-

⁶⁵ This formulation is based on Cossins, n 1, pp 43-45. For a more recent analysis of the public interest test see – Paterson, n 6, pp 219-225.

⁶⁶ *FOI Act 1989*, s 61; *Retain Beacon Hill School Committee Inc v Department of Commerce (GD)* [2006] NSWADTAP 58 at para 55.

⁶⁷ [2006] NSWCA 84.

⁶⁸ [2006] NSWCA 84 at para 151; affirming *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 at 246 (Beaumont J).

maker to ‘tangible harm’ are acceptable in the context of a government agency’s ‘obligation to demonstrate, as a factual rather than theoretical proposition, that disclosure would be contrary to the public interest’.⁶⁹

2.12.2 Public interest test and unreasonable disclosure: The second type of public interest exemption is not expressly provided for in the Act, but has been implied into exemptions which require assessment of whether disclosure would be ‘*unreasonable*’ (personal affairs exemption - Schedule 1, cl 6) or would have an ‘*unreasonable* adverse effect’ (business affairs exemption - Schedule 1, cl 7(c)(ii), and conduct of research exemption – Schedule 1, cl 8(1)(b)). It has been held that in assessing ‘unreasonableness’, the decision maker is required to balance the competing public interest factors for and against disclosure.⁷⁰ In *Vincent Neary v State Rail Authority* it was said:

An objective view must be brought to bear on an agency’s claim that release will have an adverse impact on its financial affairs. The Tribunal should approach [the] issue from the viewpoint of a reasonable administrator...All relevant factors, including public interest considerations, should be taken into account. The extent and nature of the effect will be relevant, and often decisive. It is necessary to assess what is reasonable in the circumstances.⁷¹

2.12.3 Document to be disclosed if in public interest: The third type of public interest exemption is only contained in the documents affecting law enforcement and public safety exemption (Schedule 1, cl 4). Under this exemption, specified types of law enforcement and public safety documents (see cl 4(2)) are not exempt if disclosure of the document would, on balance, be in the public interest. This public interest test ‘creates a presumption that documents covered by this exemption are considered exempt *unless* the disclosure would be in the public interest’.⁷² This differs from the first type of public interest test which suggests that documents are *not* exempt unless their disclosure would be contrary to the public interest.

The Act empowers the Ombudsman to recommend the release of a document where disclosure would be in the public interest even though access has been duly refused because it is an exempt document.⁷³ However, the Ombudsman cannot compel disclosure.

⁶⁹ [2006] NSWCA 84 at para 158.

⁷⁰ *Colokovski v Australian Telecommunications Corp* (1991) 29 FCR 429; *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 94; *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 43; *Eyes v Wyong Shire Council* [1999] NSWADT 139; *Vincent Neary v State Rail Authority* [1999] NSWADT 107; *Stephanie Raethel v Director General, Department of Education and Training* [1999] NSWADT 108.

⁷¹ *Vincent Neary v State Rail Authority* [1999] NSWADT 107 at para 35.

⁷² *Taylor v Chief Inspector, RSPCA* [1999] NSWADT 23 at para 44.

⁷³ *FOI Act 1989*, s 52(6)(a).

2.13 Public interest – irrelevant considerations

The Act provides that, for the purpose of determining whether the disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may:⁷⁴

- (a) cause embarrassment to the Government or a loss of confidence in the Government, or
- (b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

The Premier's Department and the Ombudsman have published guidelines to assist agencies in applying the public interest tests under the Act.⁷⁵

2.14 Appeals/review of decisions

The right of access includes the right to appeal decisions not to grant access to information or amend personal records. The appeal options for a person who is aggrieved by a decision of an agency under the FOI Act are: seeking internal review with the agency; making a complaint to the NSW Ombudsman; and appealing to the Administrative Decisions Tribunal. Provision is made therefore for three forms of appeal from an agency's decision:

- (a) by s 34 and s 47, internal review by the agency (where available, a pre-requisite to other appeal options);⁷⁶
- (b) by s 52, external review by the Ombudsman; and
- (c) by s 53, appeal to the Administrative Decisions Tribunal.⁷⁷

In effect, if dissatisfied with an agency's internal review of a decision, an applicant can request the Ombudsman to investigate. The Ombudsman is only empowered to make recommendations, not to change decisions. Alternatively, the applicant could request that the ADT review the agency's decision. The Tribunal is empowered to make a fresh determination. The ADT can be used either as an alternative to an external review by the Ombudsman, or after the Ombudsman has completed an external review. This three-tiered scheme relates exclusively to the review of determinations made by agencies. The only appeal option against a decision in respect to a Minister's documents is to the ADT (s 53).

⁷⁴ *FOI Act 1989*, s 59A.

⁷⁵ NSW Premier's Department, *FOI Procedure Manual*, 3rd edition 1994, pp 28, 173-178. NSW Ombudsman, *Ombudsman's FOI policies and guidelines*, 2nd ed, July 1997, ch 5.

⁷⁶ Section 34 provides for internal review in respect to an application for 'access to documents'; s 47 provides for internal review in respect to an application for 'amendment of records'.

⁷⁷ Section 38 of the *Administrative Decisions Tribunal Act 1997* also confers jurisdiction on the ADT to review a decision to which s 53 of the FOI Act applies.

The ADT's powers in respect of FOI have been summarised by the Tribunal's President, Justice Kevin O'Connor, in the following terms:

The ADT's order-making powers in relation to FOI matters are set out in the ADTA [*Administrative Decisions Tribunal Act 1997*] and are to affirm, vary or set aside the decision, or to remit to the agency with recommendations. These are the powers typically given to tribunals in Australia that are responsible for undertaking 'merits review' of administrative decisions by Ministers, agencies and officers of agencies.⁷⁸

Jurisdiction is conferred on the ADT to review the grounds on which it is claimed that a document is a restricted document. The only qualification relates to documents that are subject to a Ministerial certificate (s 57). As noted, only the Supreme Court has jurisdiction to review the grounds on which it is claimed that a document that is the subject of a Ministerial certificate is a restricted document (s 58A).

The external review powers of the Administrative Decisions Tribunal (ADT) are further expounded under the *Administrative Decisions Act 1997*. A general conferral of jurisdiction to review a reviewable decision is found under s 38. By s 63, when acting in this capacity the Tribunal is to decide 'what the correct and preferable decision' should be, in which capacity it 'may exercise all of the functions that are conferred or imposed by any relevant enactment on the administrator who made the decision'. In other words the Tribunal may stand in the shoes of the agency and do whatever it is empowered or required to do. By s 64, the Tribunal 'must give effect to any relevant Government policy' in force at the time the reviewable decision was made.

2.15 Fees

Charges fall into two categories, namely, application fees and processing fees. A \$30 fee covers applications for both personal and non-personal information. Processing fees cover time for locating the information, decision-making, consultation where necessary and any photocopying. A \$30 an hour fee covers processing for both personal and non-personal information. However, an applicant is entitled to up to 20 hours of free processing time for a request about their personal affairs. There is no upper limit on fees. Fees are subject to a 50% reduction in some circumstances, for example, for children, for pensioners with a Health Benefit Card and for non-profit organisations under financial hardship.⁷⁹

Note that, by s 21 of FOI Act, agencies are empowered to require applicants to pay advance deposits and, in some cases, further advance deposits. This is where an agency is of the opinion that the costs of dealing with the application 'are likely to exceed the amount of the

⁷⁸ K O'Connor, 'The privacy and FOI jurisdiction of the NSW Administrative Decisions Tribunal' (2002) 9 *Privacy Law and Policy Reporter* 15.

⁷⁹ NSW Premier's Department, Guidelines for Using FOI in NSW - <http://www.premiers.nsw.gov.au/NSWCommunity/FreedomOfInformation/FOIGuidelines.htm>

application fee'. Further advance deposits may be required where neither the fee nor the advance deposit is likely to cover the agency's costs (s 21(2)).⁸⁰

2.16 Time limit for determinations

An agency or Minister has 21 days to determine an application for access to documents.⁸¹ An agency or Minister that fails to make a determination within 21 days is deemed to have refused access.⁸² The 21 day period may be extended by 14 days if necessary because a third party had to be consulted, or the documents were archived.⁸³ An internal review by an agency is to be determined within 14 days.⁸⁴

2.17 Administration

The Freedom of Information Unit in the Premier's Department is responsible for providing information about the operation of the Act. The Ombudsman has a de facto oversighting role and mediates complaints about the operation of the Act. The Ombudsman's role in the investigations of complaints is set out in sections 52 and 52A of the FOI Act. These provisions are to be read in conjunction with section 26 of the *Ombudsman Act 1974*, which sets out the Ombudsman's powers to report on investigations. As explained by the Ombudsman in his Annual Report for 2000-2001, he has a role

to externally review conduct of public sector agencies in relation to FOI applications by the public for access to information held by the agency. We review how agencies handle FOI applications and the merits of the decisions they make.⁸⁵

The Ombudsman's external review powers have been interpreted broadly.⁸⁶ Nonetheless, they are only to 'recommend' that, for example, an agency reconsider its determination to restrict access to a particular document. They are not 'determinative' powers. The Ombudsman cannot change or reverse a decision. That power lies with the Administrative Decisions Tribunal (ADT).

To assist public sector officials in the implementation of the FOI Act, the Ombudsman's Office has prepared a document titled, *FOI Policies and Guidelines*, the second edition of

⁸⁰ The comments of the Ombudsman on the use made of advance deposits are discussed in a later section of this paper.

⁸¹ *FOI Act*, ss 18(3) and 37.

⁸² *FOI Act*, ss 24(2) and 38.

⁸³ *FOI Act*, s 59B.

⁸⁴ *FOI Act*, s 34.

⁸⁵ NSW Ombudsman, *Annual Report 2000-2001*, p 104.

⁸⁶ *Botany Council v The Ombudsman* (1995) 37 NSWLR 357.

which was released in 1997. This operates in addition to the *FOI Procedure Manual* prepared by the Premier's Department, the third edition of which was released in 1994. The Premier's Department and the Ombudsman's Office have been working for a number of years on a combined FOI manual to replace the current publications. This is due to be released sometime in 2007.

3. THE FREEDOM OF INFORMATION AMENDMENT (OPEN GOVERNMENT – DISCLOSURE OF CONTRACTS) ACT 2006

3.1 Public-private partnerships and commercial-in-confidence exemptions

Exemptions for ‘documents affecting business affairs’ under clause 7 of Schedule 1 of the FOI Act are commonly referred to as ‘commercial-in-confidence’ exemptions. Since the legislation was introduced in 1989 and, more especially in recent years, this had been one of the most contentious areas of FOI law in this State. In particular, with the rise of public-private partnerships (PPPs) it is argued that more and more government information is excluded from the reach of the FOI Act by reference to commercial-in-confidence claims. Writing in 1999, the then NSW Auditor General, Tony Harris, stated:

Although commercial-in-confidence material undoubtedly exists, the application of that label is seemingly becoming more prevalent as a useful way to avoid accountability.⁸⁷

The greater the need for scrutiny and transparency, it is said, the more difficult it becomes in practice to gain access to relevant information. In particular, major infrastructure projects are undertaken where the public is locked out of the precise terms under which taxpayer’s money has been spent in the construction phase, or may be spent in the event of shortfalls in the revenues flowing to private operators. The issue has come to public notice on several occasions over the past few years, most recently in connection to the building of the Cross City Tunnel in Sydney’s Eastern suburbs.⁸⁸ For the Coalition, Peta Seaton commented:

The controversy over the Government’s handling of the Cross City Tunnel highlighted the importance of public transparency of commercial relationships between the government and non-government sectors. The Coalition will require all agencies and public trading enterprises [PTEs] to lodge contractual information except for legitimate commercial-in-confidence information for significant projects, on public web sites.⁸⁹

⁸⁷ AC Harris, ‘Public Access to Information and Public Sector Performance’, *Paper presented to the Open Government Conference, Public Interest Advocacy Centre*, 10 February 1999, p 5.

⁸⁸ The background and issues are discussed in Parliament of NSW, Joint Select Committee on the Cross City Tunnel, *Cross City Tunnel – First Report*, February 2006, Chapter 8. See also Parliament of NSW, Joint Select Committee on the Cross City Tunnel, *Cross City Tunnel – Second Report*, May 2006, pp 68-70 and Parliament of NSW, Legislative Assembly, Public Accounts Committee, *Inquiry into Public Private Partnerships, Report No 16/53 (159)*, June 2006, Chapter 6.

⁸⁹ *NSWPD*, 26 October 2006, p 3589.

Speaking of the situation in Australia generally, Jack R Herman, the Executive Secretary of the Australian Press Council, said:

It has been widely acknowledged that the use of the "commercial-in-confidence" exemption has been steadily increasing for several years. This trend has been so pronounced that it has prompted at least two state auditors-general to make public their concerns that it is threatening government accountability. While the extensive use of the exemption is in itself worrying, more disturbing is the suggestion (from state Auditors-General, Ombudsmans and public accounts committees) that the inclusion of confidentiality clauses in government contracts is made, not at the request of contractors, but at the insistence of governments so that they can use the clauses as an excuse to invoke the FOI.⁹⁰

Several issues are involved. Partnerships between government and the private sector must be sufficiently transparent to permit meaningful accountability. It does not follow from this that legitimate commercial-in-confidence information should be disclosed to the public. What does follow is that governments should not use commercial-in-confidence exemptions, or indeed other exemptions, as devices to avoid proper scrutiny and accountability.

3.2 Relevant exemptions: clauses 7, 13 and 15 of Schedule 1⁹¹

In fact, prior to the passing of the *FOI Amendment (Open Government Disclosure of Contracts) Act 2006* an express 'commercial-in-confidence' exemption was not found in the NSW FOI Act, which referred instead to 'Documents affecting business affairs' (clause 7, Schedule 1), 'Documents confidential material' (cl 13, Schedule 1), and 'Documents affecting financial or property interests' (clause 15, Schedule 1).

Prior to amendment by the *FOI Amendment (Open Government Disclosure of Contracts) Act 2006* Clause 7(1)(b) provided that a document is an exempt document

if it contains matter the disclosure of which:

- (i) would disclose information (other than trade secrets) that has a commercial value to any agency or any other person, and
- (ii) could *reasonably be expected to destroy or diminish the commercial value of the information* (emphasis added).

⁹⁰ JR Herman, 'The urgent need for reform of Freedom of Information in Australia', *Speech at the Public Right to Know Conference, University of Technology, Sydney*, 21 August 2004 - <http://www.presscouncil.org.au/pcsite/fop/foi.html>

⁹¹ Further, exemptions may also be available under those clauses of Schedule 1 that relate to specific organisations, notably the Olympic Committees (cl 22) and the International Masters Games Association (cl 22A). Commercial information may also be exempt where the document relates to the exempt functions of agencies specified in Schedule 2.

Clause 15 provides:

A document is an exempt document if it contains matter the disclosure of which:

- (a) could reasonably be expected to have a *substantial adverse effect* on the financial or property interests of the State or an agency, and
- (b) would, *on balance, be contrary to the public interest*⁹² (emphasis added).

Note that clause 15 is a ‘more stringent exemption’ than clause 7 in two respects:

First the degree of ‘adverse effect’ must be ‘substantial’, not just ‘unreasonable’ as in cl 7, and, unlike the position in respect of cl 7, it must be demonstrated that disclosure ‘would, on balance, be contrary to the public interest’.⁹²

For clause 7(1)(b)(ii), the Tribunal must be satisfied, on an objective view based on the perception of a reasonable administrator, that there is more than ‘a mere risk’ that disclosure would diminish the commercial value of information. The application of this rule was explained by O’Connor DCJ in *Vincent Neary v State Rail Authority*

While the key word used in the relevant provision - ‘expect’ - carries a firmer connotation than words such as ‘anticipates’, it is not necessary that the level of risk be such that it be assessed as more probable than not. Nor is it necessary for the administrator to apply a balance of probabilities calculus similar to that used to set the burden of proof in litigation. All relevant factors, including public interest considerations, should be taken into account. The extent and nature of the effect will be relevant, and often decisive. It is necessary to assess what is reasonable in the circumstances.⁹³

Further protection for commercial information may be provided by clause 13 of Schedule 1 where information has been provided to the government in confidence. Two separate categories of exempt documents are created by the clause. Clause 13(a) exempts disclosure of information that would ‘found an action for breach of confidence’. Alternatively, clause 13(b) exempts a document if it contains matter the disclosure of which:

- would otherwise disclose information *obtained* in confidence; and
- *could reasonably be expected to prejudice* the future supply of such information to the Government or to an agency, and
- would, on balance, be *contrary* to the public interest. (emphasis added)⁹⁴

⁹² *Retain Beacon Hill High School Committee Inc v Department of Commerce (GD)* [2006] NSWADTA 58 at [34].

⁹³ [1999] NSWADT 107 at [35]; affirmed in *Cianfrano v Director General, Department of Commerce* [2005] NSWADT 282 at [30].

⁹⁴ For a commentary on clause 13 see Cossins, n 1, pp 398-430.

3.3 Government policy on disclosure of documents

The *FOI Amendment (Open Government Disclosure of Contracts) Act 2006* seeks to ensure disclosure to the public of the terms and conditions of government contracts, while at the same time preserving the confidentiality of commercially sensitive and other exempt material. As explained below, to some extent the Act formalizes arrangements previously in place under Premier's Memorandum No 2000-11 and No 2002-47, as well as in *Working with Government: Guidelines for Privately Financed Projects*, issued in November 2001 and revised in December 2006. Disclosure requirements were originally set out in the *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*, first issued in September 1995 and revised in October 1997. In December 2006 a new edition of *Working with Government: Guidelines for Privately Financed Projects* was issued, taking into account the scheme introduced by the *FOI Amendment (Open Government Disclosure of Contracts) Act 2006*.

Premier's Memorandum No 2000-11, *Disclosure of Information on Government Contracts with the Private Sector* states that it is government practice to:

- vary the disclosure of information according to the size of the project;
- limit the extent of commercial-in-confidence material to very specific areas and not disclose it unless required by law; and
- treat the information in an unsuccessful tender as commercial-in-confidence and not disclose it unless required by law.

Three Schedules are set out, in which the scope of disclosure varies depending on the value of the government contract at issue. For contracts under \$100,000 Schedule 1 items need only be released on request. For contracts over that sum Schedule 1 items are to be routinely released within 90 days of award of the contract. Whereas

For contracts over \$5 million involving private sector financing, land swaps, asset transfers and similar arrangements a summary of the main items of the contract listed in Schedule 1 is routinely released within 90 days of award of the contract.

Items not to be disclosed in summaries of contracts are:

- the contractor's financing arrangements;
- the contractor's cost structure or profit margins;
- items of the contract having an intellectual property characteristic;
- any other matters where disclosure would place the contractor at a substantial commercial disadvantage with its competitors both at the time of entering into the contract and at any later date when there could be an effect on future competitive arrangements.

Premier's Memorandum No 2002-47, *Disclosure of Information in Government Contracts with the Private Sector*, reaffirmed the disclosure scheme outlined above, clarifying that the principles set out in the earlier memorandum were applicable to all types of government contracts,⁹⁵ stating

The contract disclosure provisions of this Memorandum play a significant part in enhancing the overall probity and transparency of the NSW Government's procurement process. It is therefore important that all relevant agencies comply fully with the requirements of these guidelines.

Legally significant in this context is s 64 of the *Administrative Decisions Tribunal Act 1997* which requires that the ADT gives effect to government policy. Section 64(1) provides:

In determining an application for a review of a reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.

'Government policy' is defined to mean a policy adopted by '(a) the Cabinet; (b) the Premier or any other Minister, that is to be applied in the exercise of discretionary powers by administrators' (s 64(5)).

3.4 Joint Select Committee on the Cross-City Tunnel

The position prior to the *FOI Amendment (Open Government Disclosure of Contracts) Act 2006* was reviewed in the First Report of the Joint Select Committee on the Cross City Tunnel, published in February 2006. Its recommendations included that the Government finalise new guidelines for the public release of documents, taking into consideration the earlier recommendations of the Infrastructure Implementation Group's *Review of Future Provision of Motorways in NSW* and the Auditor-General's *Report to Parliament 2005 Volume Four* where he recommended the introduction of legislation to cover key aspects of the guidelines, particularly those relating to contract summaries and other disclosures.⁹⁶

In its Second Report, published in May 2006, the Joint Select Committee recommended that the documents to be publicly released for any Public Private Partnership (PPP) or Privately Financed Project (PFP) include:

- a full contract any material variations;
- a contract summary (verified for accuracy by the Auditor-General);
- details of the public interest evaluation conducted prior to the decision to enter into the PPP or PFP;

⁹⁵ *Retain Beacon Hill High School Committee Inc v Department of Commerce (GD)* [2006] NSWADTAP 58 at [51].

⁹⁶ Parliament of NSW, Joint Select Committee on the Cross City Tunnel, *Cross City Tunnel - First Report*, February 2006, pp 130-134.

- a summary of the Public Sector Comparator and the comparison between it and the successful project (verified for accuracy by the Auditor-General);
- the base case financial model; and
- the Public Sector Comparator.

It was further recommended that, at the request of the parties to the contract, the Auditor-General or other independent body should assess whether an exemption should be granted to any of the above documents for reasons of commercial confidentiality.⁹⁷

3.5 Legislative history of the Open Government – Disclosure of Contracts Act 2006

Many of the issues of concern to the Joint Select Committee were also raised in speeches relating to the *FOI Amendment (Open Government Disclosure of Contracts) Act 2006* and its predecessors. On 4 May 2000 Dr Arthur Chesterfield-Evans gave notice of the introduction of the Government (Open Market) Competition Bill in the Legislative Council.⁹⁸ The Bill's main purpose was explained in his Second Reading speech, where he said:

This bill seeks firstly to ensure that all government contracts and their associated tendering documents are made publicly available by all public authorities. Public authorities are defined in clause 3 of the bill as the Government of New South Wales, a statutory body representing the Crown, an authority constituted for a public purpose, a State-owned corporation or any of its subsidiaries, or a council or county council within the meaning of the Local Government Act 1993. The second object of the bill is to allow the Auditor-General to inspect and examine the accounts of persons that receive Government grants.⁹⁹

This Bill, which was introduced in the Council on 9 May 2002, was read a Second and Third time on the voices on 5 September 2002. While the Government did not formally oppose the Bill at this stage, concern was expressed about certain features, including the requirement that the Auditor-General inspect and examine the accounts of persons that receive Government grants, a provision described by the Government's Ian MacDonald, Parliamentary Secretary Assisting the Special Minister of State, as 'clearly impractical' and 'prohibitively costly'. Mr MacDonald commented that 'while the bill has some merit in its overall aims, the Government believes that it falls down very badly on the detail'.¹⁰⁰ This 2002 Bill subsequently lapsed in the Assembly on the prorogation of Parliament on 31 January 2003.

⁹⁷ Parliament of NSW, Joint Select Committee on the Cross City Tunnel, *Cross City Tunnel - Second Report*, May 2006, p 70. It also recommended that the Government 'take proactive steps to ensure that the public are made aware that these documents are publicly available'.

⁹⁸ NSWPD, 22 November 2006, p 4580.

⁹⁹ NSWPD, 9 May 2002, p 1840.

¹⁰⁰ NSWPD, 5 September 2002, pp 4645-6.

On 7 May 2003 Clover Moore gave notice of motion for the introduction in the Legislative Assembly of a Bill with the same title and in almost identical terms.¹⁰¹ This 2003 Bill was introduced in that House on 22 May 2003 and referred by the Assembly on 3 July 2003, on a motion moved by the Government's Graham West, Parliamentary Secretary Assisting the Treasurer and Minister for State Development, to the Public Accounts Committee for consideration and report. Expressing the Opposition's scepticism, Chris Hartcher commented:

Now that the House has before it a bill brought to the House by the honourable member for Bligh, and not opposed by the Government in the Legislative Council, suddenly that bill is to be deferred at the Government's behest to the Public Accounts Committee. The Public Accounts Committee was not set up as an inquiry committee; it was established to examine the accounts of government. The Public Accounts Committee's role is to scrutinise government operations; it is not to scrutinise legislation... The amendment proposes a misuse of the role of the Public Accounts Committee. The deferral motion is a device to end all discussion on what is an important bill—a bill designed to ensure transparency in the operation of government in New South Wales.¹⁰²

When the Public Accounts Committee reported in October 2004 it made four recommendations, as follows:¹⁰³

RECOMMENDATION 1: That the Committee advises the Legislative Assembly of its view that Premier's Memorandum 2000-11 should be reinforced as the standard for compliance by agencies in relation to disclosure of government contract information.

RECOMMENDATION 2: That the Audit Office conduct a compliance review of Premier's Memorandum 2000-11, in its 2004-05 program as a means of establishing a baseline of agency compliance with the provisions of the Memorandum.

RECOMMENDATION 3: That the Committee advises the Legislative Assembly of its view that there are sufficient current checks and balances in place through agencies issuing grants to satisfy auditing conditions and address any breaches of funding agreements.

RECOMMENDATION 4: That the outcomes of the Grants Administration Review be referred to New South Wales' government agencies for consideration as a model for grants administration.

¹⁰¹ The definition of 'public authority' was altered. The revised definition in the 2003 Bill was consistent with that in the *Ombudsman Act 1974*.

¹⁰² *NSWPD*, 3 July 2003, pp 2831-2.

¹⁰³ Legislative Assembly, Public Accounts Committee, *Government (Open Market Competition) Bill 2003 and Visits of Inspection*, Report No 8/53 (151) – October 2004, p 44.

On 20 October 2005 notice was given by Clover Moore of the introduction of the Freedom of Information (Open Government – Disclosure of Contracts) Bill. This was introduced on 1 December 2005. In her Second Reading speech, Ms Moore referred specifically to disclosure issues arising from the public-private partnerships (PPPs), stating:

Public disclosure of PPPs or other government contracts with the private sector is a minimum requirement, an essential part of the necessary checks and balances we need to impose to make sure they can be scrutinised and evaluated as to whether they are genuinely in the public interest. For those reasons, this bill is aimed squarely at government contracts with the private sector, including privately funded infrastructure projects.¹⁰⁴

Ms Moore continued:

In New South Wales we already have voluntary guidelines, issued by the Premier's Department, for public agencies to disclose the terms of major contracts with the private sector. This bill takes the important step of legislating to make those guidelines mandatory and to give them the force of law. I note that the Auditor-General's report to Parliament recommends that. Locating the new legislative provisions within the Freedom of Information Act is consistent with the underlying philosophy that the public has a right to access information. It is also consistent with the approach taken in other jurisdictions. Members of the public have a right to request specific documents on demand, and the Government is obligated to comply unless it can be clearly demonstrated that it is against the public interest to release the information.

This bill further promotes the objectives of the Freedom of Information Act by putting additional obligations on government agencies to publish summaries of major contracts with the private sector—making them more accessible to the public, and facilitating individual requests for specific documents. The bill includes new "commercial in confidence" definitions, to limit the scope for exemptions and clarify the obligations of government agencies. Strengthening the existing freedom of information obligations and incorporating the existing administrative guidelines ensures that this approach is practical and workable for government, and complies with the Auditor-General's recommendations. While this bill proposes modest and achievable reforms, at the same time it also represents a very significant move to improve public accountability and public confidence in the delivery of major infrastructure projects in New South Wales.¹⁰⁵

During the Second Reading debate Clover Moore further commented:

The public disclosure of major government contracts with the private sector is commonly required in many jurisdictions, including the Australian Capital

¹⁰⁴ *NSWPD*, 1 December 2005, p 20506.

¹⁰⁵ *NSWPD*, 1 December 2005, p 20506.

Territory, Victoria, New Zealand and Canada. If others can do it, we can do it in New South Wales.¹⁰⁶

A number of amendments proposed by the Government were agreed to, thereby securing Government support for the Bill. First, State-owned corporations were excluded from disclosure requirements. Secondly, in place of the original two-tiered approach to disclosure, a system based on three distinct classes of government contracts was introduced. These and other features of the legislation are discussed below.

The *FOI Amendment (Open Government Disclosure of Contracts) Act 2006* was assented to on 4 December 2006. By s 2, it commenced ‘28 days after the date of assent’.

3.6 Main provisions of the Open Government – Disclosure of Contracts Act 2006

New s 15A is inserted into Part 2 of the FOI Act which is headed ‘Publication of certain information’. Section 15A itself is headed ‘Disclosure of government contracts with the private sector’. Disclosure is to be made by the relevant ‘agency’ a term that is defined not to include a State owned corporation (or its subsidiaries), or a local authority (s 15A(14)).¹⁰⁷

3.6.1 Government contract defined: The phrase ‘government contract’ is defined to exclude contracts of employment, but to include contracts between agencies and private sector entities (any person or body who or which is not an agency) under which either party agrees: to undertake a specific project; to provide specific goods or services; or to transfer real property to the other party to the contract. Also included are leases of real property where the parties are an agency and a private sector entity.

3.6.2 Three classes of government contract: By s 15A(1), the disclosure requirements must be complied with ‘Within 60 days after a government contract becomes effective’. These requirements are then set out in relation to three classes of contracts (s 15A(14)):

- a *class 1 contract* is defined to be a government contract that is likely to be \$150,000 in value or more;
- a *class 2 contract* is of the same value as a class 1 contract *and* one to which any of the following paragraphs apply:
 - (a) there had not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor,
 - (b) the proposed contract (whether or not made publicly available) has been the subject of a tendering process and the terms and conditions of the contract have been substantially negotiated with the successful tenderer,
 - (c) the obligations of one or more parties under the contract to maintain or operate

¹⁰⁶ NSWPD, 26 October 2006, p 3592.

¹⁰⁷ This is discussed below.

- infrastructure or assets could continue for 10 years or more,
 - (d) the contract involves a privately financed project as defined by guidelines published by the Treasury,
 - (e) the contract involves a transfer of a significant asset of the agency concerned to another party to the contract in exchange for the transfer of an asset to the agency.
- a *class 3 contract* means a class 2 contract the value of which is likely to be \$5,000,000 or more.

3.6.3 Particulars to be published: In respect to these three classes of government contracts, a sliding scale of particulars must be published within the 60 day time frame. These requirements form a sliding scale in that the particulars to be disclosed for class 2 contracts are in addition to those that apply to class 1 contracts, while the particulars required for class 3 contracts are in addition to those that must be disclosed for both class 1 and 2 contracts.

By s 15A(2), as well as requiring disclosure of such basic information as the name and business address of the contractor, class 1 contracts also require publication of such things as the particulars of any ‘related body corporate’ or of any private sector entity in which the contractor has an interest and which is to be involved in fulfilling the government contract concerned, or is to receive a benefit from it.

By s 15A(3), more onerous conditions of disclosure relate to class 2 contracts, including publication of particulars of ‘any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into’.

By s 15A(4), in addition to the requirements relating to class 1 and 2 contracts, ‘a copy of a class 3 contract must be published’. Further, where on ‘commercial-in-confidence’ grounds the contract is not published in whole or part, the relevant government agency must publish: (a) the reasons why the contract or those provisions have not been published; and (b) a statement as to whether it is intended that the contract or those provisions will be published at a later date and, if so, when that is likely to be; and (c) where some provisions have not been published, a general description of the types of those provisions.

3.6.4 Publication of material variations: By s 15A(5) and (6), material variations to a contract that affect the disclosure requirements for all three classes of contracts are to be published within 60 days after the variation becomes effective.

3.6.5 Publication on website: By s 15A(7), publication is to be made on a designated Internet website. The information is to remain on the website for at least 30 days, or until the project to which the contract relates is completed – whichever is the greater period.

3.6.6 Disputes: By s 15A(8), where disputes arise about the way an agency interprets these requirements, the agency is to obtain the opinion of the Chairperson of the State Contracts Control Board. This applies to all persons, other than a member of the staff of the agency concerned.

3.6.7 State owned corporation exemption: By s 15A(14), State owned corporations (and their subsidiaries) are excluded from the definition of ‘agency’ and therefore from the coverage of the Act. This amendment to the original Bill was at the Government’s behest. Clover Moore commented in this respect:

For me, the only major sticking point with the amendments is the exclusion of State-owned corporations from disclosure requirements, which reflects the Government’s position. Under the original Premier’s memorandum, disclosure of State-owned corporations was optional.¹⁰⁸

Moore expressed the hope that State owned corporations would be ‘brought within the provisions of this legislation in the future’, stating:

I am concerned this omission may provide an avenue for evading public disclosure requirements. I would like the Government to explain why it has taken the position in relation to State-owned corporations that they should not be required to comply with public disclosure provisions imposed on other government agencies. I believe that they should. Accepting the Government’s position at this time, I would like a public explanation. I would like an undertaking that this will happen in the near future, if possible.¹⁰⁹

For the Government, Diane Beamer, Minister for Western Sydney, Minister for Fair Trading, and Minister Assisting the Minister for Commerce, responded:

In regard to State-owned corporations, they often compete with the private sector, and those competitors are not required to disclose contracts. However, the Government will support the idea of encouraging State-owned corporations to comply with the bill.¹¹⁰

3.6.8 Local government – potential inclusion under the regulations: As with State-owned corporations, by amendment to the original Bill local authorities are also excluded from the definition of ‘agency’ in s 15A(14). Local government is therefore excluded from the operation of the legislation. However, by s 15A(12) local authorities may be brought under the Act by means of regulation. The section provides:

The regulations may apply all or any of the provisions of this section to a local authority and may modify those provisions in their application to a local authority.

On this issue, Moore, commented:

Amendments to the bill provide for local government agencies to comply with disclosure requirements through the regulations. I call upon the Government to

¹⁰⁸ NSWPD, 26 October 2006, p 3597.

¹⁰⁹ NSWPD, 26 October 2006, p 3597.

¹¹⁰ NSWPD, 26 October 2006, p 3597.

prepare those regulations immediately, as I believe the benefits of public disclosure apply equally to local government. I will certainly ensure that the City of Sydney council complies with those requirements, with or without the regulations extending them to local government.¹¹¹

For the Government, Diane Beamer said that ‘The Government will meet with the Local Government and Shires Associations regarding those important changes contained in the bill’.¹¹² Relevant regulations are yet to be introduced.

3.6.9 Department of State and Regional Development exemption: A specific exemption is provided for contracts entered into by the Department of State and Regional Development that involves the provision of industry support (s 15A(10)(b)).

3.6.10 Non-retrospective application: Further, the Act does not apply retrospectively, thereby excluding government contracts made before the commencement of s 15A(10)(a).

3.6.11 Commercial-in-confidence and other exemptions: By s 15A(9), four specific categories of exemptions are provided for from the Act’s disclosure regime. These are as follows:

- the commercial-in-confidence provisions of a contract,
- details of any unsuccessful tender,
- any matter that could reasonably be expected to affect public safety or security, or
- any relevant material that would otherwise cause the document to be an exempt document.

In other words, the full range of exemptions, on Cabinet confidentiality and other grounds, still apply in respect to the disclosure of government contracts. The difference is that, with the term ‘commercial-in-confidence’ defined under s 15A(14), the scope and nature of this aspect of the exemption regime is now subject to statutory limits.

3.6.12 Commercial-in-confidence provisions defined: In respect to government contracts, by s 15A(14) the phrase ‘commercial-in-confidence provisions’ is defined to mean provisions that disclose:

- (a) the contractor’s financing arrangements, or
- (b) the contractor’s cost structure or profit margins, or
- (c) the contractor’s full base case financial model, or
- (d) any intellectual property in which the contractor has an interest, or
- (e) any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.

¹¹¹ NSWPD, 26 October 2006, pp 3596-7.

¹¹² NSWPD, 26 October 2006, p 3597.

3.6.13 Schedule 1 – exempt documents: As noted, the exemption regime under Schedule 1 of the NSW FOI Act provides for three classes of exempt documents –

- *restricted documents*, including Cabinet documents;
- *documents requiring consultation*, including documents affecting business affairs; and
- *other documents*, including internal working documents.

In respect to documents affecting business affairs, the *Open Government – Disclosure of Contracts Act 2006* inserts clause 7(1)(a1) which expressly provides that a document is an exempt document

if it contains matter the disclosure of which would disclose the commercial-in-confidence provisions of a government contract (within the meaning of section 15A).¹¹³

By this means, express exemption is provided both to documents disclosing ‘the trade secrets of any agency or any other person’ and those disclosing ‘the commercial-in-confidence provisions of a government contract’. By clause 7(1)(a1) of Schedule 1, new s 15A is brought under the general exemption regime. But note in this respect that no equivalent amendment, expressly referring to commercial-in-confidence provisions of government contracts, was made to s 32 of the FOI Act, by which an agency must obtain the views of ‘the person concerned’ as to whether or not a document is a document affecting business affairs and therefore exempt by virtue of clause 7 of Schedule 1. Presumably, such a requirement does not apply to s 15A government contracts, where time commitments for disclosure must be met.

3.6.14 Guidelines: To compliment the new legislation, in December 2006 the Government released a revised edition of *Working with Government: Guidelines for Privately Financed Projects*.

3.7 Comment

The *Open Government – Disclosure of Contracts Act 2006* has been called a ‘step in the right direction’. For Matthew Moore, writing in the *Sydney Morning Herald*, ‘it is just one step, and a very small one at that’.¹¹⁴ Clearly, to secure Government support for the measure, significant compromises had to be made, notably by the exclusion of State owned corporations (or their subsidiaries) from the scope of the legislation.¹¹⁵ Nor does the Act

¹¹³ Clauses 7(1)(b)(i) and 7(1)(c)(i) are also amended, expressly excluding ‘commercial-in-confidence’ provisions from further exemptions available to business affairs documents.

¹¹⁴ M Moore, ‘What’s really ongoing is hypocrisy and pretence’, *SMH*, 22 March 2007, p 24.

¹¹⁵ For a commentary on whether State owned corporations should be subject to the FOI Act generally see – Rath, n 33, pp 57-59. Also discussed is the question whether the FOI Act should apply to information relating to government services that have been contracted out to the private sector (page 59).

cover local authorities.¹¹⁶ Nonetheless, the transparency of NSW government contracts is placed on a formal legislative basis. If the exemption regime is undisturbed, the Act does include for the first time in an FOI context in this jurisdiction a statutory definition of what is meant by the term ‘commercial-in-confidence’. At a time when other amendments to the FOI legislation have tended to move away from the goal of more open government, the 2006 Act does at least take an important step in the opposite direction, towards transparency, away from secrecy. Clover Moore, the sponsor of the Open Government-Disclosure of Contracts Bill 2006, was of the opinion that

The importance of the Bill should not be underestimated. It is a very significant step forward in public accountability, in making government departments subject to mandatory public disclosure requirements for major contracts with the private sector.¹¹⁷

¹¹⁶ Provision is made for them to be covered under the regulations, in a modified or the same form (s 15A(12)).

¹¹⁷ *NSWPD*, 26 October 2006, p 3597.

4 ISSUES

4.1 The FOI Act and other relevant legislation

Reporting in December 2002, the Committee on the Office of the Ombudsman and the Police Integrity Commission stated:

A plethora of legislative regimes operates in relation to access to information. Their scope varies. Their objectives are similar though not identical. Clearly, it is in the interests of the public and administrators alike for these regimes to be consistent, intelligible and effectively monitored.¹¹⁸

At least four other statutes either overlap with or impact upon the FOI Act. These are as follows:

- Section 12 of the *Local Government Act 1993* provides an alternative regime, from that available under the FOI Act, to provide access to documents held by councils. Section 12 provides that, subject to limited exceptions, all local council documents must be available for inspection free of charge.¹¹⁹ Information that is to be publicly available includes: annual reports; financial reports; minutes of meetings; development applications; building applications and records of approvals granted. On the other hand, under section 12(6), documents that cannot be inspected include: ‘personnel matters concerning particular individuals’; documents that deal with personal hardship of a resident or ratepayer; or trade secrets. Section 12 (2)(8) provides that for the purposes of determining if a document is exempt on the grounds that it may be contrary to the public interest, it is irrelevant if inspection of the document may cause: (a) embarrassment to councillors or council employees; (b) loss of confidence in the council; or (c) a person to misinterpret information contained in the document because of an omission from the document or for any other reason. Under section 12A, if it is decided that access to a document is not to be granted, then the reasons why must be made public and the restriction reviewed after 3 months. The Council must remove the restriction if it finds there are no grounds for it, or if access to the document is granted under the *Freedom of Information Act 1989*. Decisions under section 12 are not reviewable by the Administrative Decisions Tribunal. Instead, a dissatisfied applicant must pursue an action in the Land and Environment Court.
- There is significant overlap between the FOI Act and the *Privacy and Personal Information Protection Act 1998* (the PPIP Act). Both Acts provide for a right of access to, and alteration of, personal information held by government agencies. The

¹¹⁸ Committee on the Office of the Ombudsman and the Police Integrity Commission, *First Report on the Inquiry into Access to Information*, December 2002, p 20.

¹¹⁹ For a commentary on this aspect of the legislation see – NSW Ombudsman, *Annual Report, 2005-06*, pp 82-83. It was recommended that s 12 should be amended to allow councils ‘to charge a reasonable fee to recover the costs they incur in retrieving non-current documents from archived storage’.

PPIP Act expressly provides that it does not affect the operation the FOI Act (s 5). Further it states that ss 13-15 do not affect any conditions or limitations in the FOI Act, and that those conditions or limitations apply as if they were part of the PPIP Act (s 20(5)). It appears that this provision means that an agency can rely on any condition or limitation in the FOI Act to refuse notification, access or correction rights under ss 13-15 of the PPIP Act.¹²⁰ The NSW Privacy Commissioner commented in June 2002 that section 20(5) 'is extremely ambiguous as to how exactly the access and correction provisions of the PPIP Act relate to the FOI Act'.¹²¹

- Likewise, by providing individuals with a means to gain access to their health information, the *Health Records and Information Privacy Act 2002* can also be said to overlap with the FOI regime. By s 22, nothing in the health records legislation affects the operation of the FOI Act. Indeed, any rights of access and correction under the FOI regime are to apply as if they were part of the proposed *Health Records and Information Privacy Act*. These arrangements mirror the relationship between the FOI Act and the PPIP Act. Note that, whereas the PPIP Act and the FOI Act operate solely in respect to the State's public sector, the health records legislation extends coverage to the private sector.
- The *State Records Act 1998* provides for the creation, management and protection of government records and archives. The obligations in the Act regarding the creation, maintenance and preservation of government records impacts on what information is potentially available to be accessed under the FOI and privacy regimes.¹²² Part 6 of the *State Records Act* provides that state records are open for access when they are at least 30 years old **and** they have been declared open by the creating agency. Records that are at least 30 years old are in the 'open access period'. Records in the open access period must be subject to an 'access direction'. An access direction states that the records are open to public access (an 'OPA direction') or are closed to public access (an 'CPA direction'). The Act provides that records may be released for public access by the relevant public office before

¹²⁰ NSW Privacy Commissioner, *Local Government and the Privacy and Personal Information Protection Act*, Issues Paper, January 2000, section 3, <www.lawlink.nsw.gov.au/pc.nsf/pages/localgovernment>.

¹²¹ NSW Privacy Commissioner, *Position paper on the Health Records and Information Privacy Bill 2002*, 14 June 2002, p 4 - www.lawlink.nsw.gov.au/pc.nsf/pages/hripcomment Note that elsewhere the Privacy Commissioner commented: 'The interaction of the access and amendment rights given by the PPIPA with those found under the Freedom of Information Act 1989...are addressed by clear provisions in PPIPA indicating that the relevant IPPs do not override the FOI Act' – C Puplick, 'Privacy and freedom of information legislation in NSW' (2002) 9 *Privacy Law and Policy Reporter* 13.

¹²² Australian Law Reform Commission and Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982*, Report No 77 (ALRC) and Report No 40 (ARC), 1995, para 5.8. The report commented on the importance of record keeping for an enforceable FOI regime. These comments were made in relation to the Commonwealth FOI Act, but apply equally to New South Wales.

they enter the open access period. Further, special access arrangements, approved by the Premier, can be made for records that are not open to public access. The Act expressly provides that the fact that a record is not open to public access does not affect any entitlement under the FOI Act (s 56).

The potential for conflict and overlap created by this complex array of statutes was considered by the Committee on the Office of the Ombudsman and the Police Integrity Commission in its *First Report on the Inquiry into Access to Information*. The issue of the inconsistency between the various access to information laws has been of long-running concern to the Ombudsman, who wrote in his 2005-06 Annual Report:

Over the years, the inconsistencies in these Acts have created considerable confusion for people seeking access to information and those responsible for administering the legislation.¹²³

As the Ombudsman acknowledged, positive steps were taken in April 2006 to address this issue, when the then Attorney General, Bob Debus, directed the Law Reform Commission to undertake an inquiry on the law relating to privacy. The terms of reference include the desirability of a consistent approach to privacy in the PPIP Act, the Health Records and Information Privacy Act, the State Records Act, the FOI Act and the Local Government Act.

4.2 The Ombudsman and FOI compliance

The role of the Ombudsman in ‘oversighting’ compliance with the FOI Act in NSW was touched upon earlier in this paper. The Ombudsman’s role in this area arises from the fact that, in NSW, there is no person or body specifically charged and resourced to monitor the implementation of the FOI Act. In Australian jurisdictions other than NSW, all State and local government bodies subject to their FOI Act must report their FOI statistics to a central government agency, such as the Attorney General, Department of Justice or State Records.

It has been said that the NSW Ombudsman’s powers in this context, unlike those of the ADT, are to ‘recommend’ that, for example, an agency reconsider its determination to restrict access to a particular document. They are not ‘determinative’ powers. The *modus operandi* adopted by the Ombudsman is set out in successive Annual Reports, as are the figures for ‘trends in FOI complaints’ and ‘trends in the release of documents’.

The Ombudsman’s 2004-05 Annual Report included the following criticisms of FOI administration:

- a downward trend in the percentage of applications where all documents requested are released in full;
- complaints about the amount of money being demanded by agencies as an advance deposit before a request will be acted upon;
- an inappropriate use of exemption clauses by agencies. The Ombudsman reported

¹²³ NSW Ombudsman, *Annual Report, 2005-06*, p 101.

that the agency ‘often just states that the documents will not be released and then cites or quotes an exemption clause’. Such an approach was said to represent both a misunderstanding of the way an agency’s discretion to refuse access to an exempt document operates and a failure to comply with the requirement to give reasons for a denial of access; and

- the sometimes inappropriate classification of documents by agencies to avoid releasing them to the public. Specific mention was made of the misuse of the legal professional privilege exemption.¹²⁴

The Ombudsman’s views on several of these issues were updated in his 2005-06 Annual Report. In terms of complaints received by the Ombudsman, the following figures were presented:

Table 1: Matters received and finalised

Matters	01-02	02-03	03-04	04-05	05-06
Formal received	138	140	139	189	188
Formal finalized	157	145	129	182	198
Informal dealt with	306	367	309	345	294

The Ombudsman reported that the FOI Act was being used more extensively by print media organizations, a finding that is consistent with the renewed interest shown by the *Sydney Morning Herald* and other newspapers in FOI matters. As an extension of this, complaints received by the Ombudsman from journalists were also on the rise, although the overall number in 2005-06 was down on the previous year. The same was true of complaints ‘from non-government members of Parliament’.¹²⁵

Of the 198 complaints finalized in 2005-06, over half were resolved either by persuading the agency to take some appropriate steps, or because no evidence of wrong conduct on the agency’s part was found.

Under the heading of ‘trends in the release of documents’ the Ombudsman reported that, over a nine-year period, the number of FOI applications reported by over 100 NSW agencies had almost doubled, from 8,328 in 1995-96 to 15,958 in 2004-05. The Ombudsman went on to comment:

There has been a significant and downward trend in the percentage of applications where all documents requested were released in full – from 81% of determinations in 1995-96 to 55% in 2004-05. Over the same period, the numbers of applications refused in part has nearly tripled (from 12% to 34% of determinations), and the number of matters refused in full has remained largely the same (only increasing

¹²⁴ NSW Ombudsman, *Annual Report, 2004-05*, Chapter 10.

¹²⁵ NSW Ombudsman, *Annual Report, 2005-06*, p 101.

from 7% to 9% of determinations).¹²⁶

According to the Ombudsman: ‘A comparison of NSW with other Australian jurisdictions shows that NSW has the lowest rate of full release of documents and the highest rate of partial release’. The relevant figures are shown in the following Table:

Table 2: Comparison of determinations between jurisdictions

	Full release	Partial release	Full refusal	Total applications
NSW(2004-05)	55%	34%	9%	16,000
WA(2004-05)	66%	27%	6%	8,600
Cth(2004-05)	72.5%	21%	6.5%	39,300
Vic(2004-05)	77%	20%	3%	22,500
Qld(2004-05)	79%	9%	12%	12,500
SA (2004-05)	83%	7.5%	9.5%	11,500

Another issue canvassed by the Ombudsman was the number of FOI applications reported to have been refused on the basis that advance deposits were not paid has increased almost fivefold in nine years (from 36 to 172). The Ombudsman commented:

We can only assume that this is primarily due to either an increase in the number of agencies charging advance deposits, or an increase in the amount charged by agencies as advance deposits. We have received a number of complaints about the amount of money charged – advance deposits are sometimes thousands of dollars.¹²⁷

The Ombudsman said he actively encouraged agencies to work with applicants ‘to find a practical way to provide access to documents without expending an unreasonable amount of resources’. As noted, by s 21 of FOI Act, agencies are empowered to require applicants to pay advance deposits and, in some cases, further advance deposits. This is where an agency is of the opinion that the costs of dealing with the application ‘are likely to exceed the amount of the application fee’. Further advance deposits may be required where neither the fee nor the advance deposit is likely to cover the agency’s costs (s 21(2)).

4.3 The Auditor General’s FOI Performance Audit

In August 2003 the Auditor General published a performance audit on FOI arrangements in three government agencies – the Ministry of Transport, the Premier’s Department and the Department of Education and Training. This audit looked at 84 FOI requests for non-personal information. It did not review the basis of individual decision. Rather, the purpose of the audit was to ‘find out whether agencies acted in accordance with the spirit of FOI legislation’. In particular, it looked at the performance of the three agencies in light of the requirement in s 5(3) of the FOI Act to ‘facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information’.

¹²⁶ NSW Ombudsman, *Annual Report, 2005-06*, p 102.

¹²⁷ NSW Ombudsman, *Annual Report, 2005-06*, p 102.

In brief, the audit found that FOI Coordinators and their staff were supportive of the legislation. However, the agencies could do ‘considerably more to fully achieve the intentions of the Act’. On the positive side, the Auditor General reported:

All three agencies had processes in place to handle requests and had made a number of changes to improve the effectiveness of the FOI process. Fees and charges had also been kept to a minimum. No processing fees were requested in the majority of cases, and if charged, were not unreasonable.¹²⁸

One question is whether this finding would be replicated today, bearing in mind the Ombudsman’s critical comments on the recent increase in the number of refusals of access on the grounds that an advanced deposit had not been paid. It may be that the increase is a by-product of the general rise in FOI applications and in the complexity of these applications, as suggested by the recent case law which is discussed in a later section of this paper.¹²⁹

4.4 An FOI Commissioner for NSW?

A major subject of debate in NSW in recent years is that, since the FOI Unit in the Premier’s Department was disbanded in 1991, there has been no body specifically charged and resourced to monitor the implementation of the FOI Act. There is no one constant, independent monitor of and advocate for FOI. Adding to the problems administratively are the overlaps between the various pieces of legislation in this area, notably between the State’s FOI and privacy regimes. A related question is whether the office of the proposed FOI Commissioner should be appended to the existing functions of the Ombudsman, or should it constitute a separate statutory entity?

4.4.1 The Public Interest Advocacy Centre’s (PIAC) case for an Information Commissioner: These related issues were discussed in various submissions to the inquiry into access to information conducted by the Committee on the Office of the Ombudsman and the Police Integrity Commission in 2002. PIAC’s comments responded in part to suggestions made by the Ombudsman : (a) that the FOI Act should be the sole avenue for access to information where an agency or public official has any discretion for the determination of such an application; and (b) that the FOI Act should be the primary avenue for amendment of records concerning personal affairs/information. If acted upon, the proposal would have increased the privacy jurisdiction of the Ombudsman, possibly to the exclusion of the existing Privacy Commissioner.

¹²⁸ NSW Auditor General, *Performance Audit – FOI: Ministry of Transport, Premier’s Department; Department of Education and Training*, August 2003, p 2 - <http://www.audit.nsw.gov.au/publications/reports/performance/2003/foi/foi-contents.html>

¹²⁹ The report’s suggested improvements and formal recommendations are set out at - <http://www.audit.nsw.gov.au/publications/reports/performance/2003/foi/foi-contents.html>

Responding to the Ombudsman's recommendations, PIAC submitted it did 'not support the suggestions that the Ombudsman have responsibility for privacy matters. The protection of privacy in the private and public sectors requires a discrete agency, the Privacy Commissioner'.¹³⁰

Instead, PIAC recorded its support for an Information Commissioner in these terms:

PIAC believes that the FOI complaints function of the Ombudsman and the FOI appeal functions of the ADT (Administrative Decisions Tribunal) should be combined and enhanced by creating an independent office of the Information Commissioner in NSW...The creation of the office of an Information Commissioner would also address other concerns that PIAC has under the current FOI regime, such as ensuring that agencies comply with their FOI obligations.¹³¹

PIAC had in fact expanded on this suggestion in an earlier submission to the Committee, in connection with the Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal. There PIAC submitted:

The need for a central monitoring and compliance unit for FOI in NSW has been stated repeatedly by the NSW Ombudsman. Since the FOI Unit in the Premier's Department was closed in 1991 there has been no one with responsibility for collecting, analysing and annually reporting on FOI statistics in NSW. While the Ombudsman's office has assumed the monitoring role to the extent that it believes there is likely to be a failure to comply with legal requirements, it does not have the resources to do so comprehensively or regularly.¹³²

PIAC went on to propose the establishment of an Information Commissioner in NSW with similar functions to those of the Privacy Commissioner. This would include the power to receive, investigate and conciliate complaints about FOI related matters, as well as broad monitoring, research, investigatory, educational and advisory functions. Certain 'determinative powers' were also proposed in the following terms:

To address time delays in the processing of FOI appeals PIAC proposes that the decisions of the Information Commissioner should be binding after 21 days, unless an appeal has been lodged.¹³³

PIAC commented that this proposed model was based in part on the powers of the New Zealand Ombudsman who acts as the external reviewer of FOI legislation as well as

¹³⁰ Submission No 17, Public Interest Advocacy Centre, 31 May 2001, p 1.

¹³¹ Submission No 17, Public Interest Advocacy Centre, 31 May 2001, p 1.

¹³² PIAC submission to the Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal, 30 August 2000, p 7.

¹³³ PIAC submission to the Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal, 30 August 2000, p 8.

performing the traditional Ombudsman role. It was explained that ‘A recommendation made by the New Zealand Ombudsman about the release of information under FOI becomes binding on the agency after 21 days unless the Governor in Council otherwise directs’. Allied to this was a proposal that appeals from the Information Commissioner would be available on matters of law to either the Appeals Panel of the Administrative Decisions Tribunal or the NSW Supreme Court. In support of the proposal, PIAC explained that appeals from the Information Commissioner in Queensland can be made on the grounds of judicial review; as well, FOI decisions of the Ombudsman in South Australia can be appealed to the District Court.

As to whether the NSW Ombudsman should assume the functions of the proposed Information Commissioner, PIAC argued that

the Information Commissioner should be clearly distinct from the Ombudsman. The practice in Queensland, South Australia, Tasmania and New Zealand has been to merge the traditional Ombudsman role with the determinative decision making function for FOI. However, in Western Australia the determinative function of the Information Commissioner has been kept entirely separate from the Ombudsman.¹³⁴

The submission continued:

The functions of the Information Commissioner as proposed by PIAC are to provide active monitoring, public education and promotion of awareness of FOI, as well as determining FOI appeals. There is a risk that the proper role of the Ombudsman will become confused if that office is required to take on such functions for FOI alone.¹³⁵

This aspect of PIAC’s submission closed with the argument that it would be important to ensure that distinct and adequate resources are allocated to the Information Commissioner and with the comment that, by establishing such an office, ‘the NSW Government would demonstrate its commitment to FOI as an essential part of open and accountable government’.

4.4.2 The Opposition’s support for an FOI Commissioner: As noted in the introduction to this paper, in the lead up to the general election of 2007 the Coalition pledged a major overhaul of FOI laws, including the creation of ‘a new independent watchdog, the freedom of information commissioner, to oversee a more comprehensive release of government information to the public’.¹³⁶

¹³⁴ PIAC submission to the Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal, 30 August 2000, p 8. As discussed below, this position in WA is now under review.

¹³⁵ PIAC submission to the Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal, 30 August 2000, p 8.

¹³⁶ *NSWPD*, 26 October 2006, p 3591 (Peta Seaton).

A similar idea was proposed in May 2000 when the then Leader of the Opposition, Kerry Chikarovski, introduced a Private Member's Bill entitled, Freedom of Information (Open and Accountable Government) Bill. One amendment proposed by the bill was for the appointment of an FOI Commissioner. A feature of the bill was that it included a provision stating that the FOI Commissioner could also hold the office of Ombudsman. The Second Reading speech made the intention clear of appointing 'the Ombudsman or Deputy Ombudsman as the Freedom of Information Commissioner, with strengthened powers to access information and deal with reviews and appeals'.¹³⁷ Unlike the PIAC model for an Information Commissioner, the Opposition's FOI Commissioner would not have 'determinative' powers, which would mean that the role of the ADT would remain unchanged. On 26 September 2002, the Bill was defeated along party lines at the Second Reading stage, 47 votes to 35.

4.4.3 The Greens' proposal for an Information Commissioner: It has been noted that the Greens policy for the March 2007 general election, launched on 11 March 2007, included a proposal to

Establish an independent 'Information Commissioner', responsible for FOI and privacy. The Commissioner would facilitate a shift to open government, monitor compliance with FOI laws and assist individuals with complaints.¹³⁸

4.4.4 The NSW Ombudsman's case for an FOI Commissioner: The review and reform of the NSW FOI Act has been the subject of debate over many years. In particular, for over a decade the Ombudsman has pressed for a comprehensive, independent and transparent review of the legislation. A focus of the Ombudsman's concerns has been on the administration of the FOI regime, in the absence of a designated person or body specifically charged and resourced to monitor the implementation of the FOI Act. In his 2005-06 Annual Report the NSW Ombudsman endorsed the recommendation of his Commonwealth counterpart for 'the creation of a statutory FOI Commissioner'. The Commonwealth Ombudsman argued that such a body would be a 'constant, independent monitor of and advocate for FOI'. This statutory FOI Commissioner would be responsible for:

- Collecting statistics on FOI requests and decisions and preparing an annual report on FOI (currently the responsibility of the Commonwealth Attorney General);
- Auditing the compliance of agencies with the Commonwealth FOI Act;
- Publicizing the Act in the community;
- Providing information, advice and assistance for FOI requests;
- Providing or overseeing FOI training to agencies;
- Setting a scale of charges for requests for access to information under the Act; and
- Providing legislative policy advice on the Act.

¹³⁷ NSWPD, 4 May 2000, p 5315.

¹³⁸ <http://www.nsw.greens.org.au/media-centre/news-releases/greens-launch-nsw-election-campaign-vote-for-tomorrow-today/> The Australian Democrats also promised to reform FOI laws along the lines of New Zealand's *Official Information Act 1982* - <http://www.nsw.democrats.org.au/policies/accountability.html>

The NSW Ombudsman commented: ‘This recommendation appears to be equally applicable to NSW’.¹³⁹

4.4.5 Commonwealth proposals for an FOI Commissioner: As noted above, in his report on *Scrutinising Government*, released in March 2006, the Commonwealth Ombudsman proposed the establishment of an FOI Commissioner. This was consistent with an earlier recommendation at the Commonwealth level, from the joint Australian Law Reform Commission/Administrative Review Council *Open Government* report produced in 1995 which argued that a significant problem with FOI administration was the lack of a designated single independent person or organisation with responsibility for overseeing the administration of the FOI Act. That report recommended the appointment of a constant, independent monitor of and advocate for FOI, stating:

The appointment of an independent person to monitor the FOI Act and its philosophy is the most effective means of improving the administration of the Act. The existence of such a person would lift the profile of FOI, both within agencies and in the community and would assist applicants to use the Act. It would give agencies the incentive to accord FOI the higher priority required to ensure its effective and efficient administration.¹⁴⁰

The ALRC/ARC report recommended that the proposed FOI Commissioner be established as a separate statutory position. Arguments for subsuming the role under existing administrative arrangements, within the Commonwealth’s Attorney General’s Office, under the Privacy Commissioner, or as part of the Ombudsman’s brief were all set aside. As for the Ombudsman, it was felt that an additional FOI role would not sit well with what was seen to be the Ombudsman’s primary role of complaint resolution. Further, it was said that the Ombudsman’s role in maintaining the integrity of government could be compromised were that office to assume responsibility for administering particular legislation, other than the Commonwealth *Ombudsman Act 1976*.

On the other hand, in April 2001 the Senate Legal and Constitutional Committee in its inquiry into the Freedom of Information Amendment (Open Government) Bill 2000 recommended that the functions of the proposed FOI Commissioner outlined in the Bill ‘be conferred on the Commonwealth Ombudsman and that a specialized unit be established within that office for the purpose of supporting the Commonwealth Ombudsman in that role’.¹⁴¹ The argument that led the Committee to reach that decision primarily centred on problems that tend to confront small, statutory agencies that are established to perform specialized functions, such as overseeing government and handling complaints. It was also acknowledged that the Commonwealth Ombudsman’s office already has the substantial infrastructure in place to support the establishment of this additional role, as

¹³⁹ NSW Ombudsman, *Annual Report, 2005-06*, p 102.

¹⁴⁰ ALRC/ARC, *Open Government, A Review of the Federal FOI Act 1982*, December 1995, para 6.29.

¹⁴¹ Senate Legal and Constitutional Committee, *Inquiry into the FOI Amendment (Open Government) Bill 2000*, April 2001, p 58.

well a close involvement with FOI across all federal government agencies.

The history of these various proposals at the federal level was canvassed by the Commonwealth Ombudsman in his 2006 review of the FOI legislation, where he concluded:

It is recommended that the Government consider establishing an FOI Commissioner, possibly as a specialized and separately funded unit in the office of the Commonwealth Ombudsman.¹⁴²

To date, no action has been taken on any of these recommendations for a Commonwealth FOI Commissioner.

4.4.6 The position in other jurisdictions: A comparative analysis of the administrative arrangements in other selected jurisdictions is provided in the 2002 report of the Committee on the Ombudsman and the Police Integrity Commission, *First Report on the Inquiry into Access to Information*. The relevant chapter is set out in full at Appendix B to this paper.

Some notable changes have occurred since that time, or are currently under consideration. In Queensland, for example, under s 61(2) of the *FOI Act 1992* it was originally the Ombudsman who acted as the Information Commissioner, wearing two hats so to speak. In this dual set up, the Ombudsman had recommendatory powers only, while the Information Commissioner had determinative review powers. The position changed in February 2005, however, when the Office of the Information Commissioner was established as an independent statutory authority, retaining powers to make determinative decisions in FOI matters. Note that Queensland has no equivalent of the Administrative Decisions Tribunal. Nor does it have a statutory privacy regime.

In Western Australia the role of the independent Information Commissioner is currently undergoing review. Until now the Commissioner has combined an external review and complaints resolution function with an advice and awareness function. This will change under the Government Freedom of Information Amendment Bill 2007, which was introduced into the Legislative Assembly on 28 March 2007. One purpose of the measure is to transfer the jurisdiction to determine complaints under the FOI Act to the newly established State Administrative Tribunal. In other words, the Bill will remove the Commissioner's determinative powers.

4.4.7 Comment: The general case on behalf of an FOI Commissioner or some equivalent is obvious enough. Without some person or body with broad powers to operate in a supervisory, advocacy and advisory role the FOI cause lacks both administrative focus and a strong voice. The case is a reasonable one. Whether the office of FOI Commissioner should be appended to the existing functions of the Ombudsman in this area is a separate issue, as is the question whether any proposed FOI Commissioner should have determinative powers. Such a development would of course complicate arrangements

¹⁴² Commonwealth Ombudsman, *Scrutinising Government: Administration of the FOI Act 1982 in Australian Government Agencies*, Report No 2/2006, March 2006, p 33.

where an Administrative Decisions Tribunal is already in place.

A further issue is whether a broadly based Information Commissioner is a better model, with responsibility for both FOI and privacy, as proposed by the Greens at the last general election. This is also the preferred model in the UK, where privacy and FOI operate under separate statutes but under an integrated administrative regime. There are arguments for and against this approach. One concern is that it may be difficult for an Information Commissioner to be an impartial advocate for openness of government one day and an advocate for privacy the next, a comment that underlines the point that FOI and privacy are not necessarily consistent values.

4.5 Parliament and FOI

One issue which has been discussed in other jurisdictions in recent times, notably in the UK, is the position of Parliament in relation to FOI laws. The general rule in Westminster parliamentary systems is that the Houses of Parliament are excluded from the relevant FOI regime. In NSW, this is achieved by s 7(1)(a)(iii) of the FOI Act which provides that references to a 'public authority' are not to include 'the Legislative Council or the Legislative Assembly or a committee of either or both of those bodies'. This position is consistent with that in other Australian jurisdictions, New Zealand and Canada.¹⁴³ It reflects the view, pervasive in the 1980s, that FOI laws are directed against Executive secrecy, to be used as a check on Executive power. This can be contrasted with the position under more recent FOI regimes. Oonagh Gay of the House of Commons Library writes:

in states where FOI legislation is a more recent phenomenon, parliaments have been included as part of the wider public sector. The emphasis has therefore changed from holding the executive to account to ensuring transparency in all public bodies.¹⁴⁴

Examples where Parliament is covered by FOI include India, South Africa, the Republic of Ireland and the UK itself. In the UK, the individual right of access under the *FOI Act 2000* was only brought into force in January 2005.¹⁴⁵ The Act applies to public bodies, including both Houses of Parliament, which are separately listed in Part 1 of Schedule 1 to the Act.¹⁴⁶ Allowance is made for parliamentary privilege. Two provisions of the UK Act allow the Speaker of the House of Commons or the Clerk of the Parliaments to certify that information is exempt. As Gay explains, such a certificate is conclusive and means that the Information Commissioner has no role to play. These provisions are as follows:

¹⁴³ For a discussion see – 'Parliamentary Applications for FOI', *The Parliamentarian*, Issue Two, 2006, pp 147-148.

¹⁴⁴ O Gay, *The Freedom of Information (Amendment) Bill, Bill 62 of 2006-07*, Research Paper 07/18, House of Commons Library, 21 February 2007, p 24 - <http://www.parliament.uk/commons/lib/research/rp2007/rp07-018.pdf>

¹⁴⁵ The Act also applied the provisions of the *Data Protection Act 1998* to Parliament.

¹⁴⁶ Individual MPs are not covered as the FOI Act only applies to public bodies.

- s 34, where an exemption is required to avoid an infringement of the privilege of either House of Parliament;
- s 36(5) and (7), where in the ‘reasonable opinion’ of the Speaker of the Commons or Clerk of the Parliaments disclosure would inhibit the free and frank provision of advice or the exchange of views, or prejudice the effective conduct of public affairs. Such a certificate may also be used to ensure that the House does not have to confirm or deny whether it holds the information sought.¹⁴⁷

As to the operation of the legislation, Gay comments:

To date, each House has received a relatively small number of requests specifically logged as applications under the Act (rather than information about the workings of Parliament). It is estimated that since January 2005 the House has logged 360 applications. The subject of the applications have included procurement, security and access to select committee papers.¹⁴⁸

The application of FOI laws to Parliament has been the subject of some debate. Indeed, an attempt has been made, in the form of the Freedom of Information (Amendment) Bill, to exclude Parliament from the scope of the legislation. This is a Private Member’s bill, introduced by David Maclean, a former Conservative Chief Whip. Basically, its purpose is to remove both Houses of Parliament from the list of public bodies in Part 1 of Schedule 1. It also seeks to make communications between MPs and public bodies exempt from the FOI Act. Having successfully negotiated its Public Bill Committee stage,¹⁴⁹ at the subsequent Report stage on 20 April 2007 the Bill’s passage was thwarted by a ‘handful of MPs from all parties’ who made sure that the debate continued for five hours. *The Guardian* reported:

This means that the bill now goes to the bottom of the queue for private member’s bills and has virtually no chance of becoming law unless it gets government backing.¹⁵⁰

In fact, the Bill was subsequently re-introduced in the House of Commons where it passed though all stages on 18 May 2007. *The Independent* stated:

Britain’s fledgling open government laws were delivered a serious blow yesterday when MPs, backed by government ministers, voted to grant themselves a blanket exemption from the legislation... The measure secured its third reading by 96 votes

¹⁴⁷ Gay, n 144, p 8.

¹⁴⁸ Gay, n 144, p 8.

¹⁴⁹ For the referral of Private Member’s bills to a second reading committee see – *Erskine May Parliamentary Practice*, 23rd edition, 2004, p 586.

¹⁵⁰ H Mulholland, ‘MPs block FOI curbs’, *Guardian Unlimited*, 20 April 2007 - http://www.guardian.co.uk/uk_news/story/0,,2061972,00.html

to 25, a majority of 71.¹⁵¹

Reports indicate that the proposal may yet be amended in the Lords, one suggestion being that the Second Chamber may exempt itself from the terms of the Bill, with the result that the Lords would continue to be subject to the FOI legislation. *The Observer* commented: 'With vigorous cross-bench support, the bill could be defeated altogether, but that would depend heavily on behind-the-scenes arm-twisting by the government'.¹⁵²

Arguments on behalf of the Bill represent it as a means of protecting the privacy of the correspondence between MPs and their constituents. In its critique of the Bill, the lobby group Campaign for Freedom of Information said:

We believe it is misleading to describe the Bill as a measure designed to protect constituents' personal information. Its main effects will be (a) to prevent requests for details of MPs' expenditure from being disclosed and (b) to protect MPs' correspondence with public authorities on matters of general policy from disclosure. We do not believe either of these changes is justified.¹⁵³

The stance taken by the House of Commons contrasts strongly with that of the Scottish Parliament

where its parliamentarians are among the most publicly accountable in the world when it comes to expenses. The detailed expenditure claims, utility bills, travel and mileage forms of all MPs are carefully logged on the Parliament's website for any constituent to see.¹⁵⁴

Whether the approach taken in the more recent FOI regimes has lessons for Australian, New Zealand or Canadian practice is something that awaits debate. A view expressed in the British context is that Parliament should be the most accountable institution in the country.¹⁵⁵ From a New Zealand standpoint, the Clerk of the House of Representatives has argued that its 'Parliament operates already in a more open way than the freedom of information legislation requires'.¹⁵⁶ On the other hand, the current Speaker, Margaret Wilson, has indicated her support for the inclusion of Parliament, with appropriate

¹⁵¹ 'Mos vote themselves exemption from Freedom of Information law', *The Independent*, 19 May 2007 - <http://news.independent.co.uk/uk/politics/article2560000.ece>

¹⁵² J Revill and P Kelbie, 'Lords to shame MPs over secrecy bill', *Guardian Unlimited*, 20 May 2007 - <http://observer.guardian.co.uk/politics/story/0,,2084025,00.html>

¹⁵³ For a critical commentary on the Bill see the briefing prepared by the Campaign for Freedom of Information - http://www.cfoi.org.uk/pdf/Report_Briefing.pdf

¹⁵⁴ J Revill and P Kelbie, 'Lords to shame MPs over secrecy bill', *Guardian Unlimited*, 20 May 2007 - <http://observer.guardian.co.uk/politics/story/0,,2084025,00.html>

¹⁵⁵ P Noorlander, 'A right to keep digging', *New Stateman*, 23 April 2007, p 16.

¹⁵⁶ 'Parliamentary Applications for FOI', *The Parliamentarian*, Issue Two, 2006, p 147.

safeguards, within the scope of New Zealand's *Official Information Act 1982*.¹⁵⁷ In a keynote address to the Information Law Conference marking 25 years of the Official Information Act, delivered in Wellington on 15 May 2007, the Speaker commented:

Let me state at the outset that I personally find it anomalous that the administration of Parliament is not subject to the OIA [Official Information Act], with suitable protections for the privacy of communications between Members of Parliament and their constituents and agencies that they petition on behalf of the public.¹⁵⁸

The Speaker continued:

I am not the first Member of Parliament to support greater disclosure of information. In 1999, a cross party committee of Members of Parliament led by former Cabinet Minister Hon Stan Rodger undertook a review of the Parliamentary Service Act 1985 for the [Parliamentary Service] Commission. It recommended extension of the OIA, with necessary protections and exclusion of information relating to Members as members or information relating to political parties and their organisation. Two years later the Parliamentary Service Commission requested a background memo covering the history and the present position of Parliament in relation to the OIA. In 2004 Green Party co-leader Rod Donald asked the Parliamentary Service Commission to reconsider the Rodger Committee recommendation. The matter was referred to Party caucuses and no further feedback was recorded as being received.¹⁵⁹

At the Commonwealth level in Australia, the Law Reform Commission recommended in 1995 that 'The parliamentary departments should be made subject to the FOI Act'. This was consistent with the submission of the Department of the Senate, but contrary to the views expressed by both the Department of Parliamentary Reporting Staff and the Department of the Parliamentary Library who argued they should remain outside the FOI Act because they do 'not have a public policy role or provide services to the public.'¹⁶⁰

¹⁵⁷ 'FOI: Westminster MPs are out of step with the Commonwealth', *The Independent*, 21 May 2007 - <http://news.independent.co.uk/uk/legal/article2556426.ece>

¹⁵⁸ 'Wilson: Parliament and Official Information' - <http://www.scoop.co.nz/stories/PA0705/S00352.htm>

¹⁵⁹ Ibid.

¹⁶⁰ ALRC/ARC, *Open Government: a Review of the federal FOI Act 1982*, Report No 77, 1995, pp 149-150.

4.6 Secrecy provisions and FOI

Clause 12 of Schedule 1, which is headed ‘Documents the subject of secrecy provisions’ restricts an applicant’s right of access to documents, where information in a document is subject to a ‘secrecy provision’ in another piece of legislation.¹⁶¹ An exemption of this kind is commonplace in all the Australian FOI regimes, although the relevant provisions ‘vary considerably in their scope and wording’.¹⁶² Clause 12 of Schedule 1 of the NSW FOI Act provides:

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exceptions.
- (2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is being made, would constitute such an offence.

The meaning and the use made of this exemption has come under close scrutiny in recent years, as agencies have appeared to rely on the secrecy provisions exemption as a device to circumvent the FOI regime.¹⁶³ For statutory interpretation, at least two issues arise. One refers to the clumsy wording of cl 12 itself. The second refers to the many secrecy provisions found in NSW legislation, which come in various forms, some of them making express reference to the FOI Act, others leaving it entirely to the courts and the ADT to decide what that relationship may be in any particular instance.

As to their prevalence, the Appeal Panel said secrecy provisions were ‘a commonplace of public service administration in Australia’.¹⁶⁴ Examples from NSW include the:

- *Co-operatives Act 1992* (s 431);
- *Workplace Injury Management and Workers’ Compensation Act 1998* (s 243);
- *Children (Detention Centres) Act 1987*, (s 37D);
- *Environmental Planning and Assessment Act 1979*, (s 148);
- *Valuation of Land Act 1916*, (s 11);
- *Mining Act 1992*, (s 365);
- *Mines Inspection Act 1901*, (s 81);
- *Community Welfare Act 1987*, (s 76);
- *Retirement Villages Act 1999*, (s 200);
- *Children and Young Persons (Care and Protection) Act 1998*, (s 254);

¹⁶¹ Cossins, n 1, pp 390-397.

¹⁶² Paterson, n 6, p 353.

¹⁶³ M Moore, ‘Foot-dragging on secrecy harming FOI laws: report’, *SMH*, 22 March 2007, p 2.

¹⁶⁴ [2005] NSWADTAP 33 at [130].

- *Casino Control Act 1992*, (s 148); and
- the *Local Government Act 1993* (s 664).

4.6.1 Meaning of secrecy provisions exemption: It has been suggested that cl 12(1) and cl 12(2) are in tension;¹⁶⁵ or it might be said that the provision as a whole is badly worded, sufficiently so to cause confusion and uncertainty as to its meaning. In her 1997 review of the NSW FOI Act, Anne Cossins commented:

There is a dispute as to whether or not cl 12 will apply where a secrecy provision which creates the offence, contains qualifications or exceptions which permit disclosure of the information in certain circumstances, since cl 12 states that the exemption will apply whether or not the secrecy provision which creates an offence ‘is subject to specified qualifications or exceptions’.¹⁶⁶

Cossins went on to discuss the differing interpretations of the Premier’s Department and the Ombudsman. The first argued that ‘if a document is specifically protected from disclosure by secrecy provisions [in other legislation], it would be inappropriate for information to be obtained through alternative means such as FOI legislation’. This view, Cossins maintained, ‘accords with the long tradition of secrecy that has been imposed on government employees through official secrecy regimes’. In contrast, the Ombudsman contended that the restrictive interpretation of cl 12 favoured by the Premier’s Department ‘amounts to the exemption of documents by virtue of the content of other legislation’, thus creating a class of exempt documents in a context where many secrecy provisions were enacted ‘long before the introduction of the concept and practice of open government’ and the enactment of the FOI Act.¹⁶⁷

Clause 12(1) appears to say that, in general, a document is exempt where it contains ‘matter’ the disclosure of which would be an offence under the secrecy provision of another Act, irrespective of whether that provision was subject to ‘specified qualifications or exceptions’. Clause 12(2) then seems to provide that a document is only exempt if its disclosure would constitute an offence under a relevant secrecy provision. In other words, where ‘specified qualifications or exceptions’ applied, an offence would not have occurred and the document would not be exempt. How are these two sub-clauses to be reconciled? In *General Manager, WorkCover Authority of NSW v Law Society of NSW* McColl JA explained:

In my view the tension between cl 12(1) and cl 12(2) which concerned the Appeal Panel is more apparent than real. Clause 12(1) is a general provision which establishes that a document is prima facie exempt if its disclosure would constitute an offence, whether or not the provision creating the offence is subject to defeasance by virtue of one or more qualifications or exceptions.

¹⁶⁵ [2006] NSWCA 84 at [178]. The view is attributed to the Appeal Panel of the ADT.

¹⁶⁶ Cossins, n 1, p 393.

¹⁶⁷ Cossins, n 1, p 393.

Clause 12(2) is a specific provision which provides that if disclosure of the documents would not constitute an offence because it would fall within some qualification, exception or excuse, they are not exempt.

This construction recognises the presumed intention of parliament that where there is a conflict between general and specific provisions, the specific provision prevails (*generalia specialibus non derogant*)...¹⁶⁸

Applying this approach, the Appeal Panel explained further:

The agency must first determine whether the ‘matter’ for which exempt status is claimed is ‘matter’ of a kind that it is an offence to disclose; and then examine whether there is any exception or qualification in the offence provision allowing for disclosure under the FOI Act.¹⁶⁹

4.6.2 Operation of secrecy provision exemption: For sub-clause (2) to be applicable, a relevant ‘qualification’ or ‘exception’ must be identified. In *General Manager, WorkCover Authority of NSW v Law Society of NSW* it was agreed that the disclosure at issue fell within the exception ‘with other lawful excuse’.¹⁷⁰ This was in the context of s 243 of the *Workplace Injury Management and Workers’ Compensation Act 1998* which, subject to certain exceptions, prevents disclosure of ‘any information obtained in connection with the administration or execution of this Act’. The upshot was that the disclosure at issue was not an offence against the statute.

On the other hand, in *Commissioner for Fair Trading, Office of fair Trading v The Australian Wine Consumers Co-operative Society Limited (GD)*,¹⁷¹ the Appeal Panel concluded that, in relation to the documents at issue in that case, no applicable exception was to be found. This was under s 431 of the *Co-operatives Act 1992* which, subject to certain exceptions, makes it an offence to disclose ‘any information’ obtained in the course of the administration of the Act. The Appeal Panel agreed with the Commissioner for Fair Trading that all but one of the exceptions in s 431 refer to quite specific situations, none of which include disclosure pursuant to the FOI Act.¹⁷² This appeal, on a question of law, concerned applications made by the Wine Co-operative to the Commissioner for access to documents held by the Commissioner relating to complaints to the Commissioner from ordinary members of the Wine Co-operative about its administration.¹⁷³

¹⁶⁸ [2006] NSWCA 84 at [178]-[180].

¹⁶⁹ [2007] NSWADTAP 14 at [38].

¹⁷⁰ [2006] NSWCA 84 at [176].

¹⁷¹ [2007] NSWADTAP 14.

¹⁷² The only possible exception that might have applied is found in s 431(4)(1) – disclosure to ‘any person, to whom, in the opinion of the Registrar, it is in the public interest that the information be divulged’ - [2007] NSWADTAP 14 at [18].

¹⁷³ For comment on the case see – M Moore, ‘Foot-dragging on secrecy harming FOI laws: report’, *SMH*, 22 March 2007, p 2.

4.6.3 Other FOI regimes compared: Clause 12 of the NSW FOI Act can be compared to s 38 of the Victorian *FOI Act 1982*, which confines the scope of operation of the secrecy provisions exemption to documents which are the subject of secrecy provisions that ‘specifically’ apply to them. Section 38 provides:

A document is an exempt document if there is in force an enactment *applying specifically to information of a kind contained in the document* and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications. (emphasis added)¹⁷⁴

As explained by Paterson, under the Victorian Act a document is an exempt document if:

- there is in force another law which applies specifically to information of the kind contained in the document;
- that law prohibits either absolutely or subject to exemptions the disclosure of information of that kind; and
- the prohibition is directed at persons who are referred to in that law.¹⁷⁵

This is very different to the position in NSW where it is open to government agencies to argue that broadly worded secrecy provisions in particular Acts apply to exempt a wide range of documents from disclosure. *Commissioner for Fair Trading, Office of fair Trading v The Australian Wine Consumers Co-operative Society Limited (GD)* is a case in point.

Section 38(1) of the Commonwealth FOI Act was originally identical to the current version of s 38 of the Victorian legislation. The Commonwealth provision now provides that a document is an exempt document if its disclosure, or the disclosure of information contained in it, is prohibited under a provision of an enactment specified in Schedule 3 or under a provision enacted after 25 October 1991 that is ‘expressly applied’ to that document or information. Section 38(1A) makes it clear that a document is exempt only to the extent that disclosure to the applicant is prohibited by the relevant enactment. Paterson goes on to explain:

The phrase ‘expressly applied’ makes it clear that to be relied upon as a basis for exemption an enactment must apply expressly to the relevant document or information (or, alternatively, another enactment must make it so apply). This means that a document is exempt only to the extent that a complying secrecy provision prohibits disclosure.¹⁷⁶

Of the equivalent provision in the Queensland *FOI Act 1992* (s 48), the Appeal Panel of the ADT commented that the section has a ‘strictly limited approach to the question of when a

¹⁷⁴ Note that, as originally enacted, s 38 of the Commonwealth FOI Act was in the same form.

¹⁷⁵ Paterson, n 6, p 356.

¹⁷⁶ Paterson, n 6, 354.

secrecy provision can be invoked as a basis for exemption, and has introduced a further control within the text of the exemption, a public interest test'.¹⁷⁷ Limiting the scope of the exemption, section 48(1) provides: 'Matter is exempt matter if its disclosure is prohibited by an enactment mentioned in Schedule 1'. The legislation listed there includes such Acts as those protecting whistleblowers, information relating to the adoption of children and the integrity of witness protection schemes. To this s 48(1) adds a public interest test, stating 'unless disclosure is required by a compelling reason in the public interest'. A further restriction is added by s 48(2), which states that the exemption provided by s 48(1) does not apply if the relevant matter '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'. A similar restriction relating to 'personal information' is found in s 38(2) of the Commonwealth *FOI Act 1982*.

4.6.4 Use made of secrecy provisions exemptions: During the course of the Second Reading debate on the FOI legislation in December 1988, the then Leader of the Opposition, Bob Carr, warned:

Clause 12 of schedule 1 will exempt any documents which are the subject of secrecy provisions in any Act. The habitual insertion of secrecy provisions to circumvent this legislation will make freedom of information almost a sham.¹⁷⁸

As to the use of the cl 12 exemption in the NSW scheme, judicial warnings have been sounded against too wide an interpretation. For example, in *Law Society of NSW v General Manager, WorkCover Authority of NSW (No 2)*,¹⁷⁹ the Appeal Panel of the ADT has observed that, if it gave cl 12 the broad and literal interpretation WorkCover advocated, the FOI Act 'would as a practical matter, cease to have any application to many parts of the NSW public service'.¹⁸⁰ Again, in *Commissioner for Fair Trading, Office of fair Trading v The Australian Wine Consumers Co-operative Society Limited (GD)*,¹⁸¹ the Appeal Panel commented:

We repeat the concern previously expressed that active reliance by agencies on secrecy provisions in their statutes could mean that the FOI Act will cease to have any application to many parts of the New South Wales public service thus undermining the very purpose of that legislation. Secrecy provisions are a commonplace of agency statutes in New South Wales. The result is an unsatisfactory one.¹⁸²

¹⁷⁷ [2005] NSWADTAP 33 at [112].

¹⁷⁸ *NSWPD*, 1 December 1988, p 4305.

¹⁷⁹ [2005] NSWADTAP 33.

¹⁸⁰ [2005] NSWADTAP 33 at [137]; cited in *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at [129]

¹⁸¹ [2007] NSWADTAP 14.

¹⁸² [2007] NSWADTAP 14 at [41].

In both the above decisions, the Appeal Panel reviewed the legislative history of cl 12. In particular, it was noted that the

the Government of the day in 1988 promised the Parliament and the community of New South Wales that the secrecy provisions exemption would be reviewed. The Premier of the day committed the Government to ensuring that all legislation containing secrecy provisions would be assessed to ascertain whether it is appropriate to remove secrecy provisions from specific Acts. The Premier of that time failed to implement the promise, and no action has been taken since.¹⁸³

The concern is that secrecy provisions are found in all kinds of legislation. Some Acts may include appropriate exceptions or qualifications in the offence provision allowing for disclosure under the FOI Act, others may not. Some statutes contain an express exception in the secrecy provision directly addressing the possibility of disclosure under the FOI legislation, as in the case of the *Casino Control Act 1992* (s 148(7))¹⁸⁴ and the *Local Government Act 1993* (s 664(1)(d)). Many do not. At present, it is left largely to the courts and the ADT to interpret each statute on a case-by-case basis, as in *General Manager, WorkCover Authority of NSW v Law Society of NSW* where it decided that a less-specifically expressed exception such as ‘with lawful excuse’ may be treated as an exception or qualification providing a basis for FOI disclosure.¹⁸⁵ As suggested by the Appeal Panel, there are good grounds for reviewing secrecy provisions across the board, in the context of their consistency with the objects of the FOI regime. This had been spoken about for nearly 20 years, but never acted upon. As well, there is a strong argument in favour of a review of the secrecy provisions exemption itself, under cl 12 of Schedule 1 of the FOI Act, to clarify and possibly restrict its meaning. Section 38 of the Victorian FOI legislation is one possible alternative model for consideration; section 38 of the Commonwealth FOI Act and s 48 of the Queensland FOI Act offer further models for reform.

¹⁸³ [2007] NSWADTAP 14 at [40]; [2005] NSWADTAP 33 at [136]. Cited is the parliamentary debate where the Greiner Government opposed a motion by the Australian Democrats in the Legislative Council for the deletion of cl 12 - *NSWPD*, 8 December 1988, p 4687.

¹⁸⁴ The provision was considered in *Chief Executive, Casino Control Authority v Preston* [2003] NSWADTAP 64. The Appeal Panel decided that s 147(b)(iii) of the Casino Control Act wholly excluded any documents to which it applied from the operation of the FOI Act. They were not therefore ‘exempt documents’ within cl 12 of Schedule 1 of the FOI Act and were not within the scope of s 25(4) of that Act, a provision that permits access to documents from which the exempt matter has been deleted. Section 147(b)(iii) of the Casino Control Act prevents access to a document the disclosure of which would disclose information ‘concerning the system of internal controls and administrative and accounting procedures for a casino’.

¹⁸⁵ [2006] NSWCA 84 at [176]; applied [2007] NSWADTAP 14 at [38].

5. QUESTIONS FROM RECENT CASE LAW

5.1 Is there a presumption in favour of disclosure?

Section 5(3) of the FOI Act provides:

It is the intention of Parliament:

(a) that this Act shall be interpreted and applied so as to further the objects of this Act, and

(b) that the discretions conferred by this Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.¹⁸⁶

As noted, it is said in this respect that the FOI Act must be interpreted broadly and with a clear ‘purposive’ approach to statutory construction.¹⁸⁷ Reflecting on the interpretation of s 5, in *Commissioner of Police v The District Court of NSW & Perrin* Kirby P stated:

I tend to favour the view that the Act, understood against its background and interpreted in conformity with the intention of parliament expressed in s.5, must be approached by decision-makers with a general attitude favourable to the provision of the access claimed. It is important that the decision-makers... should not allow their approaches to be influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of the Act and its equivalents.¹⁸⁸

However, as Paterson writes, ‘While that approach has been frequently referred to and applied by the Administrative Decisions Tribunal, s 5 has not been interpreted as going so far as to establish a presumption that “internal working documents” should generally be disclosed’.¹⁸⁹ This follows comments made by Smith MB in *Tunchon v Commissioner of Police, NSW Police Service* where he said:

¹⁸⁶ Further, by s 61 where access to a document is refused, the burden of proof lies on the agency or Minister concerned.

¹⁸⁷ MA Robinson, *NSW Administrative Law*, LawBook Co 2001, at [30.120].

¹⁸⁸ *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606 at 627. Cossins argues that “Kirby P’s approach permits the argument that the public interest question is relevant to every aspect of the interpretation of the exemption provisions, so much so that it could be said that Kirby P’s approach would permit the importation of a public interest test into every exemption”: Cossins, n 1, p 50. See also O’Connor K, *FOI Review Processes: Early Experience of FOI Review in the New South Wales Administrative Decisions Tribunal*, Paper presented at the conference AFOI and the Right to Know” held in Melbourne on 19-20 August 1999 organised by the Communications Law Centre and the International Commission of Jurists, <www.comslaw.org.au/research/Equity/19990922_oconnorfoi.html>.

¹⁸⁹ Paterson, n 6, p 42.

The general tendency of the FOI Act to promote openness is given effect by recognising that disclosure will follow unless a positive satisfaction is reached that secrecy of the document is in the public interest, and that the agency has the onus to lead evidence persuading me to this conclusion (see s 61). I also accept the submission of the respondent that it is appropriate to make a decision balancing the public interest ‘with a general attitude favourable to the provision of the access claimed’ and without being unduly ‘influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of this Act’ (citing s 5(3)(a) of the FOI Act and Kirby P in *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 627). However, I consider that these propositions should not in the context of cl 9(1)(b) be applied as if they established a presumption that “internal working documents” should generally be disclosed.¹⁹⁰

Further, in *Retain Beacon Hill High School Committee Inc v Department of Commerce (GD)* the ADT Appeal Panel said that it is not appropriate to adopt a ‘leaning approach’ in favour of disclosure going beyond any balance indicated by the terms of the FOI Act. The Appeal Panel observed that it was in any case ‘bound to adhere’ to the approach taken by McColl JA in *General Manager, WorkCover Authority of NSW v Law Society of NSW*¹⁹¹ where it was said:

This Court should follow, as a matter of judicial comity, the approach taken by the Full Federal Court; *Australian Securities Commission v Marlborough Gold Mines Limited* [1993] HCA 15; (1993) 177 CLR 480 at 482. It accords with Mahoney JA’s observation in *Commissioner of Police v District Court of New South Wales & Anor* [(1993) 31 NSWLR 606] (at 639–640) that in s 16 (which provides that a person has a legally enforceable right to be given access to an agency’s documents in accordance with *the Act*) the legislature had ‘adopted the principle that a citizen should have access to documents held by Government agencies’, but added that ‘that principle must be subject to exceptions and qualifications’ and that ‘[t]he precise terms of the [exception] clause should govern the extent of the remedy available’.

The Full Federal Court’s approach, in my view, accords with the s 5(3) obligation to interpret and apply the *FOI Act* so as to further its objects, bearing in mind that while the *Act* gives a legally enforceable right to be given access to documents held by the Government, that right is subject to such restrictions as are reasonably necessary for the proper administration of the Government: s 5(2)(a) and (b). Determining whether documents should be disclosed involves balancing those two matters. Thus, as Beaumont J said, testing whether disclosure of documents would be contrary to the public interest requires the decision-maker ‘to weigh the public interest in citizens being informed of the processes of their Government and its agencies on the one hand against the public interest in the proper working of

¹⁹⁰ [2000] NSWADT 73 at [18].

¹⁹¹ [2006] NSWCA 84.

Government and its agencies on the other': *Harris v Australian Broadcasting Corporation* [(1983) 78 FLR 236] (at 246).¹⁹²

Paterson argues that the s 5 'objects' clause is 'open to criticism' on the basis that its wording can be interpreted according to the 'more neutral stance adopted' by the NSW review bodies. 'That approach', Paterson adds, 'does little to discourage an overly broad interpretation of exemption provisions on the part of agencies'. One way of ensuring a more pro-disclosure approach would be to insert into the Act 'a principle of availability which establishes the principle that information should be made available unless there is good reason for withholding it'.¹⁹³ This suggestion is along the lines of s 5 of the New Zealand *Official Information Act 1982* which provides:

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

5.2 Does the ADT have a 'residual discretion' to order access to exempt documents?

Yes. At least, that is the position following the decision of Nicholas J of the NSW Supreme Court in *University of NSW v McGuirk*.¹⁹⁴ Nicholas J held that the ADT has a discretionary power to override the decision of an agency not to release an exempt document. This is where the ADT decides that the release of the document is 'the correct and preferable decision' in respect to 'the material then before it'. The source of this residual discretionary power is s 63 of the *Administrative Decisions Tribunal Act 1997* (NSW). Section 63 (1) and (2) provide as follows:

(1) In determining an application for review of a reviewable decision, the Tribunal is to decide what the correct and preferable decision having regard to the material then before it, including the following:

- (a) any relevant factual material,
- (b) any applicable written or unwritten law.

(2) For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed by any relevant enactment on the administrator who made the decision

¹⁹² [2006] NSWCA 84 at [150]-[151].

¹⁹³ Paterson, n 6, p 42.

¹⁹⁴ [2006] NSWSC 1362.

The nub of the argument is that, by s 63(2), the ADT has a similar power to agencies contained in s 25 of the FOI Act, permitting them to release a document even if an exemption could be relied upon (subject to the qualification in s 25(3) that an agency must refuse access to a restricted document that is the subject of a Ministerial certificate).¹⁹⁵

In arriving at this conclusion, Nicholas J disagreed with the decision of O'Connor DCJ in *Neary v The Treasurer, NSW*¹⁹⁶ where it was held that 'it is not open to applicants for review to seek an order... that a Minister or agency release an otherwise exempt document. That discretion remains entirely with the Minister or agency'.¹⁹⁷ O'Connor DCJ pointed out that, prior to the transfer of the external review jurisdiction from the District Court to the ADT, s 55(5) of the FOI Act expressly withheld from the District Court the power 'to determine that access to an exempt document is to be given'. That provision was repealed at the time of transfer in 1997.¹⁹⁸ The question was whether the NSW Parliament intended to place the ADT 'in a position similar to the Victorian Tribunal when it repealed the express bar in s 55(5) of the NSW Act and moved jurisdiction from the District Court to a specialist tribunal?'¹⁹⁹ For O'Connor DCJ, the issue was a 'major policy question – possibly the most fundamental in the formulation of FOI review schemes, and is clearly one on which express direction would be expected from Parliament'.²⁰⁰ In the absence of an express direction, O'Connor DCJ concluded that the NSW Parliament had not intended to place the ADT in a similar position to its Victorian counterpart.

Under s 50(4) of the Victorian FOI Act 1982 an express public interest override power is conferred on the Victorian Civil and Administrative Tribunal.²⁰¹ The application of this override power

¹⁹⁵ Neither s 55 of the FOI Act (Procedure for dealing with exempt matter), nor s 124 of the ADT Act (Application of Act to exempt documents under FOI Act 1989) were judged to impede this conclusion. Both those provisions, which prevent the ADT from disclosing exempt information in its decisions or elsewhere, were said to be 'procedural provisions', complimentary in nature and with a 'common purpose'. Both are directed towards the ADT's conduct in 'making disclosure', whereas s 63 of the ADT Act is concerned with conduct in 'making a decision': [2006] NSWSC 1362 at [99]-[101].

¹⁹⁶ [2002] NSWADT 261.

¹⁹⁷ [2002] NSWADT 261 at [83].

¹⁹⁸ *Administrative Decisions Legislation Amendment Act 1997* (NSW), Schedule 5.16.

¹⁹⁹ [2002] NSWADT 261 at [80] (Note that the paragraph numbering in the case is out of order).

²⁰⁰ [2002] NSWADT 261 at [82].

²⁰¹ *FOI Act 1982* (Vic), s 58(4). The section provides – 'On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in s 28, s 31(3), or in s 33) where the Tribunal is of the opinion that the public interest requires that access to the document should be granted under this Act'. For a commentary see – Paterson, n 6, pp 227-229.

depends upon *first* a finding that a document is exempt under Part IV [of the Victorian FOI Act] and *then* an opinion that the public interest is so strong as to demand that access be granted notwithstanding the factors which justify the exemption in the first place.²⁰²

In *University of NSW v McGuirk* Nicholas J rejected the reasoning in *Neary*, and applied instead *Mangoplah Pastoral Co Pty Ltd v Great Southern Energy*.²⁰³ Cited by Nicholas J was this correct statement of the position:

Consistent with this jurisprudence, absent any special limitation on the Tribunal's review function in applications under the FOI Act, it has the function by reason of s 63 of the ADT Act – indeed the duty – when reviewing a determination under ss 24 and 25 of the FOI Act to consider all issues arising in the case in relation to whether a document should be released. As indicated above, once a ground for refusal of access arises under s 25(1)(a) the issue arises whether to exercise the discretion to release an exempt document which is not a restricted document the subject of a Ministerial certificate. The decision under review must have, or must be taken to have, addressed this discretion before determining to refuse access on the ground of an exemption. The Tribunal must also address it.²⁰⁴

In February 2007 the decision in *University of NSW v McGuirk* was applied by Acting Deputy President Handley in *Retain Beacon Hill High School Committee Inc v NSW Treasury*.²⁰⁵ The case involved an application by the Committee to the NSW Treasury for documents – including all internal and administrative working documents - relating to the site of the former Beacon Hill High School and its proposed sale by the Department of Education and Training. Exemption was claimed for various documents (or parts thereof) by reference to various exemption provisions in Schedule 1 of the FOI Act, specifically clause 1 (Cabinet documents), clause 7 (Documents affecting business affairs) and clause 15 (Documents affecting financial or property interests).

In this context, following the Victorian decision in *Department of Premier and Cabinet v Hulls*, Handley ADP articulated a two-stage test for the application of the residual discretion, as follows:

First, in cases where exercise of the residual discretion is in issue, the Tribunal must first consider whether particular documents are exempt under the Act, and only if it finds documents to be exempt should it then consider whether to exercise the residual discretion. Second, the discretion should only be exercised where there are strong grounds justifying the overriding of an exemption. In NSW, the public interest is a relevant matter in determining whether there [are] strong grounds

²⁰² *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [56].

²⁰³ [1999] NSWADT 93.

²⁰⁴ [2006] NSWSC 1362 at [103] affirming [1999] NSWADT 93 at [85] (Smith JM).

²⁰⁵ [2007] NSWADT 55.

justifying exercise of the discretion, and this should be considered in the light of the objects of the FOI Act...²⁰⁶

In deciding to grant access to certain disputed documents, Handley ADP balanced the public interest in citizens being informed of the processes of their government and its agencies, on the other hand, against the public interest in the proper working of government and its agencies, on the other. His conclusion was that a ‘strong public interest’ existed in obtaining as much relevant information as possible concerning the government’s role in the closure of Beacon Hill High School and the sale of the building lot.²⁰⁷

Practically speaking, it was however something of a pyrrhic victory for the cause of open government, in as much as certain key information was already in the public domain. This included the contract price, which was revealed in papers produced to the Legislative Council and in an article appearing in the *Daily Telegraph*. Further, access was only granted to those documents relating purely to a valuation of the relevant site, ‘remembering that the period in respect of which access to documents was sought was from 11 January 2000 to 28 February 2005’. Access to exempt information relating to projected infrastructure and development costs and the estimated revenue generated by the sale of the buildings lot was denied. This was on the grounds that, if such information were released,

it could have adverse consequences for the proper administration of the Government and, in particular, for the process undertaken by Government Departments and agencies in the transfer and sale of government assets in order to achieve market value and the optimum benefit for the public.²⁰⁸

Nonetheless, the existence of the ADT’s residual discretion has been recognised, in practice as well as principle. According to the Crown Solicitor’s Office, in its analysis of the *University of NSW v McGuirk*:

The decision means that an agency will need to satisfy the Tribunal not only that a document is an exempt document...but also that the determination not to exercise the discretion to release the exempt document is the correct and preferable decision. It also means that an agency, in making the determination whether a document should be released, and in conducting an internal review, must consider whether to exercise the discretion to release an exempt document.²⁰⁹

In effect, a decision by an agency to refuse access on a relevant ground of exemption is to be subject to stricter external scrutiny. The result is that, in cases of this kind, an added step is involved in proceedings before the ADT, whereby the Tribunal must satisfy itself

²⁰⁶ [2007] NSWADT 55 at [48]; affirmed in *P v Greater Western Area Health Service* [2007] NSWADT 87 at [37] (Handley ADP).

²⁰⁷ [2007] NSWADT 55 at [55].

²⁰⁸ [2007] NSWADT 55 at [57].

²⁰⁹ Crown Solicitor’s Office NSW, *Client Newsletter*, March 2007, p 9.

whether ‘strong grounds’ exist ‘in terms of public interest or other considerations justifying exercise of the residual discretion to override’ a particular exemption.²¹⁰ It may be, for example, that the residual discretion could be used by the Tribunal to grant access to a document to which a secrecy provision applies in another law. In *Commissioner for Fair Trading, Office of Fair Trading v The Australian Wine Consumers Co-operative Society Limited (GD)*,²¹¹ a case concerning the use of the secrecy provisions exemption (cl 12, Schedule 1), the Appeal Panel observed:

The Tribunal has a residual discretion, like that of the agency under s 25(1), to order the release of an exempt document: *University of New South Wales v McGuirk* [2006] NSWSC 1362 (Nicholas J) at [81] ff. Accordingly, if the Tribunal concludes in light of these reasons that the secrecy provisions exemption is applicable to all the documents, contrary to the understanding of the parties prior to that decision that conclusion does not now dispose of the matter. It remains open to the Tribunal to consider whether to exercise the residual discretion in favour of the applicant.²¹²

The potential significance of this development should not be underestimated. For O’Connor DCJ, the issue was a ‘major policy question – possibly the most fundamental in the formulation of FOI review schemes...’²¹³

5.3 Are Cabinet documents subject to the residual discretion?

Yes, unless the documents are the subject of a Ministerial certificate. That was the view expressed by Handley ADP in *Retain Beacon Hill High School Inc v NSW Treasury* who said that an absolute exemption for Cabinet documents only applied to those for which ‘the Minister, pursuant to s 59 of the FOI Act, had signed a certificate stating that the document is a restricted document’. ‘Otherwise’, he continued, ‘a document found to be exempt under

²¹⁰ *P v Greater Western Area Health Service* [2007] NSWADT 87 at [38]. In that case, Handley ADP concluded that the strong grounds did not exist to override the personal affairs exemptions. This case involved three applications by P to review decisions of a delegate of the Greater Western Area Health Service refusing her requests made under the FOI Act for access to information held by the Health Service on the ground that this would involve the unreasonable disclosure of information concerning the personal affairs of a person. By way of example, in her first application P sought access to a report of an Internal Investigation prepared by Protocol Investigations that concerned the applicant’s request to transfer from Blayney Hospital to Orange Base Hospital. Access was refused on the ground that this was an exempt document, the disclosure of which would involve unreasonable disclosure of information concerning the personal affairs of a person (Schedule 1, cl 6(1)). In respect to this application, the Tribunal concluded that certain documents or parts of documents were not exempt and should therefore be released. On the other hand, in respect to those documents or parts thereof that were exempt, the residual discretion to override the exemption should not be applied.

²¹¹ [2007] NSWADTAP 14.

²¹² [2007] NSWADTAP 14 at [43].

²¹³ [2002] NSWADT 261 at [82].

cl 1 [of Schedule 1] is subject to the residual discretion'. However, the further qualification was added

in considering the exercise of the residual discretion in respect of such a document, account must be taken of s 5(2)(b) and whether or not such a restriction is reasonably necessary for the proper administration of government.²¹⁴

5.4 What is a Cabinet document?

The rationale behind the exemption for Cabinet documents in clause 1 of Schedule 1 was articulated by O'Connor DCJ in *Cianfrano v Director General, Department of Commerce*

This exemption finds its justification in the primacy of Cabinet in the Westminster system of democratic government. It preserves the constitutional convention of collective ministerial responsibility. It seeks to ensure that what is said in Cabinet remains in Cabinet. As with any committee process, there will often be a range of views and a wide range of material canvassed before a final decision is reached. Under the Westminster system all Ministers are bound by the final decision, and must speak with one voice in relation to it. The same is true of other decisions taken on the way to the final decision. These principles are well-known, and they find their expression in such terms as 'Cabinet solidarity'.²¹⁵

The exemption for Cabinet documents provides (emphasis added):

(1) A document is an exempt document:

- (a) if it is a document that has been *prepared for submission to Cabinet* (whether or not it has been so submitted), or
- (b) if it is a *preliminary draft* of a document referred to in paragraph (a), or
- (c) if it is a document that is *a copy of or of part of, or contains an extract from,* a document referred to in paragraph (a) or (b), or
- (d) if it is an *official record* of Cabinet, or
- (e) if it contains matter the disclosure of which would *disclose information concerning any deliberation or decision* of Cabinet.

(2) A document is not an exempt document by virtue of this clause:

- (a) if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet, or
- (b) if 10 years have passed since the end of the calendar year in which the document came into existence.

(3) Subclause (2) (b) does not apply to a document that came into existence before the commencement of this clause.

²¹⁴ [2007] NSWADT 55 at [51].

²¹⁵ [2005] NSWADT 282 at [57].

(4) In this clause, a reference to *Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.*

Clearly, a Cabinet minute would be exempt as ‘an official record of Cabinet’. So, too, would a report prepared for submission to Cabinet, or to a committee or subcommittee of Cabinet. Drafts of reports prepared for Cabinet, or a committee or subcommittee of Cabinet, or copies or parts of such a report are also exempt.

Legally and politically, however, the exemption for Cabinet documents can be controversial. The underlying issue is whether it is used by the Executive as a device to avoid proper scrutiny, especially in politically sensitive areas. Tony Harris, the then NSW Auditor General commented in 1999:

Because all Cabinet documents attract protection, there is a discernible move by governments to invoke that protection by classifying politically sensitive documents as Cabinet documents.²¹⁶

5.5 When is a document one that is ‘prepared for submission’ to Cabinet?

It has been held that is not necessary for the document to be exclusively for the purpose of submission to Cabinet. In *Simos v Wilkins* the NSW District Court stated:

If a document was in fact prepared for submission to Cabinet then that is, subject to other paragraphs in Clause 1 of the Schedule, an end to the matter. It does not matter that there may have been other purposes.²¹⁷

Confirming this interpretation and expounding further on the exemption for documents prepared for submission to Cabinet, in *National Parks Association of NSW Inc v Department of Lands* the ADT commented:

The Department [of Lands] rightly pointed out that it is not necessary for a claim under cl 1(1)(a) that the document go before Cabinet. It is sufficient if it was prepared for that purpose. We also agree that the document does not have to be prepared for the sole purpose of going before Cabinet. It is enough if submission to Cabinet is one of the purposes for which it was prepared.²¹⁸

²¹⁶ AC Harris, ‘Public Access to Information and Public Sector Performance’, *Paper presented to the Open Government Conference, Public Interest Advocacy Centre*, 10 February 1999, p 4.

²¹⁷ (15 May 1996, unreported); quoted in Paterson, n 6, p 336; *National Parks Association of NSW Inc v Department of Lands* [2005] NSWADT 124 at [26]; *Cianfrano v Director General, NSW Treasury* [2005] NSWADT 7 at [35]; *Cianfrano v Director General, Department of Commerce* [2005] NSWADT 282 at [85].

²¹⁸ [2005] NSWADT 124 at [26].

In that case the ADT rejected a Cabinet document exemption claim based on cl 1(1)(a). By reference to relevant case law in Queensland, it was decided that the question whether a document was prepared for submission to Cabinet ‘must be determined as at the time the document was prepared’.²¹⁹ The Tribunal held that there was insufficient evidence that a report prepared by Pricewaterhouse Coopers was prepared for submission to Cabinet noting the absence of first-hand evidence from the report writer and absence of a disclaimer at the front of the paper.²²⁰ The report had been prepared for the Department of Lands as part of a review of ‘all policies, strategies and legislation to improve the cost-effectiveness and sustainability of Crown land’. Subsequently, Cabinet considered the subject matter of the report and legislation based on the report’s findings was passed in July 2004. In October a further minute was presented to Cabinet containing a summary of previous Cabinet minutes on the subject of Crown land reforms and annexing a copy of the executive summary of the Report. The National Parks Association maintained that the inclusion of the executive summary of the Report was a tactic by the Department to bolster its submission that the Report falls within the ‘Cabinet documents’ exemption under the FOI Act.

In support of its decision the ADT referred to the comparable Victorian case of *Asher MP v Department of Infrastructure (General)*,²²¹ stating:

Asher’s case concerned a report which the relevant agency said was to be used for the purpose of informing the Treasurer and a Minister in the preparation of a submission to Cabinet. Parts of the report were directly referred to in a cabinet submission, and the entire report was attached to another Cabinet submission. The applicant argued that the report was to provide information which the Treasurer and Minister could decide whether to use for the purposes of preparing submissions to Cabinet. Judge Bowman VP held that the purpose of the report was to provide information to the Treasurer and relevant Minister and the requirements of s 28(1)(b) and (d) [of the Victorian FOI Act] had not been satisfied.²²²

²¹⁹ [2005] NSWADT 124 at [29] citing *Re Hudson and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 (Albietz J).

²²⁰ [2005] NSWADT 124 at para 33.

²²¹ [2005] VCAT 410. The case involved an application by Louise Asher MP for access to the Lewinsky Report on funding arrangements for the controversial Federation Square Project. At issue were comparable provisions in the Victorian *FOI Act* (s 28(1) (b) and (d)), the first exempting documents ‘prepared’ for submission to Cabinet, the second exempting documents the disclosure of which would disclose ‘any deliberation or decision of the Cabinet’.

²²² [2005] NSWADT 124 at [31].

5.6 What constitutes a committee or subcommittee of Cabinet?

In *Cianfrano v Director General, Department of Commerce*²²³ exemption was claimed (among other things) for documents relating to a Taskforce comprised of high level public servants and created by a sub-committee of Cabinet in respect of the lease and sale of the Flemington Markets to Sydney Markets Limited. The main issue was the status of the above Taskforce, bearing in mind that, by cl 1(1)(4) of the *FOI Act*, ‘a reference to Cabinet includes a reference to a committee of Cabinet and to a sub-committee of a committee of Cabinet’. The question was whether this extended to cover the Taskforce? O’Connor DCJ held that it did not, arguing that the expressions ‘Committee of Cabinet’ and ‘sub-committee of Cabinet’ were confined to entities made up of Cabinet Ministers, or at least Ministers if there is a structure which differentiates Cabinet from the outer Ministry. He observed that the appointment of high level officers of the public service to assist Cabinet was a well-established practice and that Parliament would have been aware of this practice when it decided to confine the scope of the Cabinet documents exemption to Cabinet itself or its committees or sub-committees.²²⁴ The exemption, based solely on the claim that the document was written by the Taskforce or one of its members, did not apply therefore. O’Connor DCJ concluded:

The Cabinet documents exemption could, as I have already stated, only apply to many of the documents in this case if the radical proposition is accepted that a committee of public servants appointed by a Cabinet Committee itself forms part of the Committee while it is engaged in a task given to it by the Cabinet Committee. The submission is, in my view, without precedent. It is inimical to the objectives of freedom of information legislation.²²⁵

5.7 What is meant by documents which would disclose information ‘concerning any deliberation or decision of Cabinet’?²²⁶

Most contentious and problematic from an interpretive standpoint is the exemption in clause 1(1)(e) - ‘matter the disclosure of which would *disclose information concerning any deliberation or decision* of Cabinet’. Note at the outset that the relevant question is not whether a document contains any deliberations or decision of Cabinet, but whether the contents of a document ‘contains information “concerning” any such deliberations or decisions’.²²⁷ It has also been said that ‘in most circumstances’ clause 1(1)(a) is ‘mutually

²²³ [2005] NSWADT 282 (O’Connor DCJ).

²²⁴ [2005] NSWADT 282 at para 80.

²²⁵ [2005] NSWADT 282 at [96].

²²⁶ The relationship between this area of FOI law and the making of orders and addresses for papers in the NSW Legislative Council is discussed in Background Paper No 1/207, *Parliamentary Privilege: Major Developments and Current Issues*.

²²⁷ *National Parks Association of NSW Inc v Department of Lands* [2005] NSWADT 124 at [35].

exclusive’ with clause 1(1)(e):

The former refers to the preparation of the document and requires consideration of the facts and circumstances and purposes of the preparation which by definition must take place before a Cabinet meeting. Such a document, therefore, would not normally contain matters the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.

On the other hand, cl 1(1)(e) appears to refer to a document which contains matter which came into existence either during or after a meeting of Cabinet so that it can disclose the information referred to therein.²²⁸

As for what is meant by ‘deliberation’ in this context, differing views exist in the case law. One view is more restrictive and therefore tends to limit the scope of exemption available under clause 1(e), contrasted with a wider view that tends to broaden the scope of exemption. A more restrictive interpretation was adopted by Hennessey DP in *National Parks Association of NSW Inc v Department of Lands* where it was observed:

The main difference in the two approaches has to do with the extent to which it is necessary to prove in order to establish the exemption that Cabinet actually deliberated or made a decision in relation to the information which is the subject of the claim for exemption.²²⁹

Hennessey DP held that the mere fact that a document, or part of a document, went before Cabinet or was considered by Cabinet or was considered by Cabinet when deliberating or reaching a decision did not make the information in the document information ‘concerning’ any deliberation or decision of Cabinet – only documents created contemporaneously with or subsequent to an active discussion and debate within Cabinet are capable of disclosing Cabinet deliberations. It was held by Hennessey DP that a broader interpretation would not be consistent with ‘the ordinary meaning of the words and would allow agencies to abuse the exemption by attaching documents to Cabinet submissions in an effort to avoid disclosure under the *FOI Act*’.²³⁰

Against the more restrictive interpretation favoured by Hennessey DP of what constitute ‘Cabinet documents’ for the purposes of cl 1(1)(e) of the *NSW FOI Act 1989*, in *Cianfrano v Director General, NSW Treasury*²³¹ O’Connor DCJ preferred a wider interpretation. On this view, to gain the exemption for ‘matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet’, it is sufficient to ‘*show that the information related to a matter of concern to the Cabinet, even if neither the information nor the matter was ultimately the subject of discussion, careful consideration*

²²⁸ [2005] NSWADT 124 at [36].

²²⁹ [2005] NSWADT 124 at [35].

²³⁰ [2005] NSWADT 124 at para 43.

²³¹ [2005] NSWADT 7 (O’Connor DCJ).

or *decision-making*' (emphasis added).²³² In arriving at this view, O'Connor DCJ considered the contrasting approaches in the case law of other jurisdictions, in particular Victoria and Queensland, in regard to which he stated:

The main difference in the two approaches has to do with the extent to which it is necessary to prove in order to establish the exemption that Cabinet actually deliberated or made a decision in relation to the information which is the subject of the claim for exemption.²³³

In December 2005 O'Connor DCJ revisited this question in *Cianfrano v Director General, Department of Commerce*²³⁴, an unusual case where, as discussed above, exemption was claimed for documents relating to a Taskforce comprised of high level public servants and created by a sub-committee of Cabinet in respect of the lease and sale of the Flemington Markets to Sydney Markets Limited. By refusing this specific claim for exemption O'Connor DCJ did not adopt the more restrictive interpretation of 'Cabinet documents' suggested in *National Parks Association of NSW Inc v Department of Lands*. He commented that the exemption in cl 1(1)(e), which is the most important in terms of the convention of collective ministerial responsibility, 'goes beyond seeking simply to secure the protection of the formal documentation of Cabinet'. For O'Connor DCJ the focus of the exemptions 'is the Cabinet discussion environment', in which context the concept of 'deliberations' is a 'wide one'. Adopted was this statement of Forgie DP in *Re Toomer and Department of Agriculture, Fisheries and Forestry*:

[Cabinet's] deliberations are its thinking processes be they directed to gathering information, analyzing information or discussing strategies. They remain its deliberations whether or not a decision is reached. Its decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed.²³⁵

Re Toomer is significant for its decision that briefings and other documents prepared before a meeting of Cabinet would disclose deliberations of Cabinet where they had been the subject of active debate in Cabinet or would have been referred to by Ministers in Cabinet.

Expressly rejected was the restrictive view that Cabinet documents refer only to documents 'created contemporaneously with, or subsequent to active discussion and debate within Cabinet', a view associated with *Re Hudson and Department of the Premier, Economic*

²³² [2005] NSWADT 7 at [46].

²³³ [2005] NSWADT 7 at para 44. O'Connor DCJ said it was not necessary 'to form a concluded view on the difference in the approaches found in the case law of other jurisdictions with exemptions equivalent to sub-category (e)' (para 47).

²³⁴ [2005] NSWADT 282 (O'Connor DCJ).

²³⁵ (2003) 78 ALD 645 at [88].

and Trade Development.²³⁶ O'Connor DCJ said that view was criticized in *Re Toomer* because of its focus on 'decisions'. Quoted with approval was this further statement by Forgie DP:

...the principles to be applied in answering that question are the same in both [FOI legislation and public interest immunity claims]. The documents must be examined to determine whether they do in fact disclose deliberations or decisions of Cabinet. Whether they were prepared before or after the meeting of Cabinet at which they were discussed is not determinative of the issue. The whole of the evidence, of which the disclosures are only part, must be examined to make that determination.²³⁷

This last evidentiary question was returned to by O'Connor DCJ in *Cianfrano v Director General, Attorney General's Department*²³⁸ where the 'Cabinet documents' exemption was relied upon in relation to two documents, one of these under cl 1(1)(e). By s 61 of the *FOI Act*, where an exemption is claimed, the burden of proof rests with the agency or Minister, a burden which, in the opinion of O'Connor DCJ, had not been met in this instance. He concluded:

The evidence for this submission is found in the confidential statement, and involves in turn an assertion, without corroborating documentation or material, found in an email from an officer of another agency of government. In my view this is an insufficient basis to justify application of this exemption.²³⁹

The evidentiary question was also referred to in the NSW Ombudsman's 2005-06 Annual Report. There the emphasis was on the problems facing the agency and the applicant alike in arriving at an informed view on the 'evidence'. Note in this respect, however, that the Ombudsman is in a different position to the ADT, as s 22 of the *Ombudsman Act 1974* expressly denies power to the Ombudsman to look behind the reasons for declaring a Cabinet document an exempt document. The Ombudsman commented:

In practice, it is unlikely that Cabinet records would be sufficiently detailed to indicate which particular documents were, or were to be, the subject of deliberation at a meeting. It is therefore unclear how, in practice, sufficient evidence would be available to the decision-maker unless they are given relevant information by the person present during Cabinet deliberations. Apart from certain Cabinet Office staff and occasionally senior public officials, the only people at Cabinet meeting are Ministers. It is possible that some Ministers may not be strong supporters of FOI and could see the FOI Act as imposing an unwarranted fetter on their ability to manage their portfolios, which might tend to influence their views as to whether

²³⁶ (2003) 78 ALD 645 at [89]; (1993) 1 QAR 124 at 141.

²³⁷ [2005] NSWADT 282 at [89]; (2003) 78 ALD 645 at [96].

²³⁸ [2005] NSWADT 303 (O'Connor DCJ).

²³⁹ [2005] NSWADT 303 at para 31.

documents should be exempt (schedule 1 and s 22 of the Ombudsman Act prevent us from reviewing any such advice by a Minister to an FOI decision-maker). These problems pose difficulties for agencies attempting to rely on cl (1)(1)(e) to refuse access to documents.²⁴⁰

This is one perspective on what is a problematical area of FOI law, one that gives rise to serious questions of a practical and more theoretical nature.

5.8 Is the possibility that a document may mislead the public at large relevant when deciding whether disclosure would be contrary to the public interest?

As discussed earlier in this paper, s 59A of the FOI Act provides that, for the purpose of determining whether the disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may.²⁴¹

- (a) cause embarrassment to the Government or a loss of confidence in the Government, or
- (b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

Note that the FOI Act states that it is irrelevant that disclosure may cause *the applicant* to misinterpret or misunderstand the information. It leaves open the possibility that exemption may be granted to documents that may mislead or be misunderstood by the public at large. Specifically in relation to the disclosure of internal working documents further to clause 9 of Schedule 1 of the FOI Act, this proposition was part of the arguments submitted by Margaret Allars in her capacity as counsel for the appellant in *General Manager, WorkCover Authority of NSW v Law Society of NSW*.²⁴² While this was rejected on the facts of the case, the proposition was not discounted out of hand. McColl JA (Handley and Hodgson JA agreeing) recognised that

The question of the potential of a document to mislead must be weighed in the balance in determining whether a document is exempt, as too, must the potential to correct any misleading impression.²⁴³

²⁴⁰ NSW Ombudsman, *Annual Report, 2005-06*, p 103. The Ombudsman suggested that s 22 be amended to give his office the same external review powers as the ADT in relation to Cabinet documents.

²⁴¹ *FOI Act 1989*, s 59A.

²⁴² [2006] NSWCA 84 at [162].

²⁴³ [2006] NSWCA 84 at [167].

McColl JA added:

Moreover s 59A demonstrates a legislative intention that disclosure of incomplete or possibly misleading documents does not detract from the public interest in disclosure.²⁴⁴

While the Commonwealth FOI Act does not have an equivalent of s 59A, the comments of McColl JA do bear some comparison with the High Court's controversial ruling in *McKinnon v Secretary, Department of Treasury*.²⁴⁵ In that case the FOI editor of *The Australian* sought the disclosure of internal working documents concerning the impact of bracket creep on the collection of income tax, along with documents on the level of fraud associated with the First Home Buyer Scheme. The question of law at issue was whether the Administrative Appeals Tribunal had not misdirected itself when considering, further to s 58(5) of the Commonwealth FOI Act, whether there existed reasonable grounds for the claim that disclosure would be contrary to the public interest. In respect to the relevant documents a conclusive Ministerial certificate was issued based on seven distinct grounds. These included grounds (c) and (d) which referred to material that would tend to be 'misleading or confusing in view of its provisional nature'. Ground (g) referred to the technical nature of the material, stating

(g) The release of documents that are intended for a specific audience familiar with the technical terms and jargon used, has the potential for public misunderstanding in that the contents of the documents could be misinterpreted. These documents were not intended for publication and publication would be misleading as the documents do not contain sufficient information for an uninformed audience to interpret them correctly and reasonably.²⁴⁶

Callinan and Heydon JJ, who were in the majority, found that the AAT was entitled to hold that a number of grounds were reasonable to justify the issuing of the Ministerial certificate. These included the 'provisional' grounds set out in (c) and (d), about which it was said:

The third ground raises an issue of tentativeness, that is to say, that the documents were concerned with matters that were not settled and recommendations that were not adopted. This too, on its face, is a cogent ground. It is difficult to see how it would not be reasonable for a Minister to take the view that the release of material of that kind would not make a valuable contribution to public debate.

The fourth ground has so much in common with the third that nothing further need be said about it.²⁴⁷

²⁴⁴ [2006] NSWCA 84 at [167].

²⁴⁵ (2006) 229 ALR 187.

²⁴⁶ (2006) 229 ALR 187 at [80].

²⁴⁷ (2006) 229 ALR 187 at [122]-[123].

Callinan and Heydon JJ rejected the ‘technical’ ground (g), stating:

The seventh ground is at least arguably not reasonable, in effect, that the public may not be trusted to understand the technicalities of, and the jargon used in otherwise revealable documents. It is not as if the public is unaided by experts and others who can, including, for example, an informed journalist such as Mr Harris.²⁴⁸

While the different statutory contexts must be acknowledged, *McKinnon v Secretary, Department of Treasury* suggests that, irrespective of s 59A, the ‘technical’ argument in ground (g) would not be a relevant factor in NSW in deciding whether disclosure to the public at large would be contrary to the public interest. On the other hand, *McKinnon* also suggests that information of the kind discussed under grounds (c) and (d) - that is, material that would tend to be misleading or confusing to the public at large ‘in view of its provisional nature’ - may be relevant in NSW in deciding whether disclosure would be contrary to the public interest. It would of course depend on the facts of the case. The hurdles presented by s 59A would also have to be overcome. That disclosure may cause embarrassment to the Government or a loss of confidence in the Government is declared irrelevant. In McColl JA’s words there is the added consideration that s 59A ‘demonstrates a legislative intention that disclosure of incomplete or possibly misleading documents does not detract from the public interest in disclosure’.²⁴⁹ As noted, this legislative intention relates to disclosure to the ‘applicant’ and not to the public at large.

5.9 Does the ADT have jurisdiction to review determinations by the ICAC and similar Schedule 2 bodies in respect of exempt functions?

A limited jurisdiction exists as confirmed on appeal to the Supreme Court by Simpson J in *ICAC v McGuirk*.²⁵⁰ To summarise, overturning the earlier decision of the Appeal Panel of the ADT it was held that, where documents are categorized as s 9 documents, the FOI Act has no further application to the relevant functions of a Schedule 2 body or office. This exclusion extends to s24 which means that such a body or office need not comply with the s 24 requirements when determining whether to grant access in whole or part to a document. However, according to Simpson J, the exclusion does not apply to s 53 of the FOI Act, by which jurisdiction is conferred on the ADT to review determinations made by an agency or a Minister. Simpson J concluded, ‘As I read s 53, it would be open to the applicant to challenge that determination in the ADT’²⁵¹ – the determination in this context refers to the decision to categorise a document a s 9/Schedule 2 document. The Tribunal has a limited jurisdiction therefore to decide this matter of fact.

The legislative context to this issue is complex and has been the subject of varying judicial opinion in recent years. Schedule 2 of the FOI Act lists ‘exempt bodies and offices’. In

²⁴⁸ (2006) 229 ALR 187 at [126].

²⁴⁹ [2006] NSWCA 84 at [167].

²⁵⁰ [2007] NSWSC 147.

²⁵¹ [2007] NSWSC 147 at [20].

most cases the exemption is in relation to specific ‘functions’ of a particular body, with s 9 providing that

Any body or office specified or described in Schedule 2 is, in relation to such of the functions of the body or office as are so specified or described, *exempt from the operation of this Act*. (emphasis added)

In the case of the ICAC, the specified exempt functions refer to ‘corruption prevention, complaint handling, investigative and report functions’. The question arose in *McGuirk v ICAC*²⁵² whether, as a result of s 9, key provisions of the FOI legislation did not apply to Schedule 2 bodies such as ICAC. In particular, it was maintained by ICAC that, as the report in question – the Madgwick Report prepared by an officer of ICAC for presentation to its Operations Review Committee - related to one of its specified functions, it was not required or empowered to make a determination under s 24 about an application for access to documents. As a result, it was argued, the ADT’s jurisdiction under s 53 to review such a determination does not arise. This was the interpretation previously favoured in *Waite v Director General, Attorney General’s Department*,²⁵³ a decision that was followed by the ADT in *McGuirk v ICAC*.²⁵⁴

In rejecting that argument, the Appeal Panel concluded that s 9 was not the appropriate starting point for analysis. By starting from s 9, it was explained, a Schedule 2 body was treated previously as if it were not an ‘agency’ for the purposes of the FOI legislation and therefore excluded from its operation. That is not the case, at least in respect to the ICAC and similar bodies. Analysis should start instead, it was said, from the definition of ‘agency’ in s 6, which provides:

agency means a Government Department, public authority, local authority or public office, but does not include a body or office that is, by virtue of section 9, exempt from the operation of this Act in relation to all of its functions.

By this definition, only those bodies or offices that are exempt in respect to ‘all’ of their functions are not agencies for the purposes of the FOI Act and therefore excluded from its operation. Of all the bodies and offices listed in Schedule 2, only the Child Death Review Team is excluded in this way, where all its functions are exempt. The other bodies and offices, for which specific exemptions apply, are not excluded by this means and are consequently to be treated as agencies for FOI purposes. The Appeal Panel of the ADT explained:

Section 9 is a general provision which exempts ICAC from the operation of the FOI Act in relation to certain functions. However, because ICAC is an ‘agency’, it is subject to every provision in the FOI Act that relates to agencies. Section 24 is one of those provisions. The use of the word ‘shall’ in s 24 indicates that an agency is

²⁵² [2006] NSWADT 19; [2006] NSWADTAP 17.

²⁵³ [2004] NSWADT 109.

²⁵⁴ [2006] NSWADT 19.

under a duty to make a determination after considering an application for access to a document. ICAC has received an application for access to the Madgwick Report. As an agency, it must determine whether access to that document is to be given or refused. One ground of refusal is that it is an exempt document. Exempt documents include a document that contains matter relating to functions in relation to which ICAC is, by virtue of section 9, exempt from the operation of this Act.²⁵⁵

The Appeal Panel added:

As each of the requirements in s 53 has been fulfilled, the Tribunal has jurisdiction to review ICAC's determination. The Tribunal erred in deciding to the contrary.²⁵⁶

As noted, on appeal to the Supreme Court, Simpson J did not agree with the logical steps taken by the Appeal Panel in arriving at this conclusion. Indeed, as explained below, his conclusion that the ADT had jurisdiction under s 53 is much narrower in scope to that proposed by the Appeal Panel. Commenting on the decision of the Appeal Panel, Simpson J said:

If the Appeal Panel were correct then any body, office or agency that received a s17 application would be obliged, even where it determined that the document(s) in question were of the kind specified in Schedule 2, nevertheless to consider and determine the application under s24.

That is not in my opinion, consistent with the terms of s9. What s9 does is (in relation to the functions specified in Schedule 2) exempt the body or office from 'the operation of [the *FOI Act*']'. That is, once the documents are categorised as s9 documents, the *FOI Act* has no further application to that body or office. That includes s24.²⁵⁷

Simpson J continued:

I was initially concerned that such a conclusion might mean that a ruling that the documents sought were s9/Schedule 2 documents was unreviewable. But that is not the case. As I read s53, it would be open to the applicant to challenge that determination in the ADT.²⁵⁸

Precisely how Simpson J arrived at this conclusion is not explained. Section 53(1) confers jurisdiction on the ADT specifically in respect to persons aggrieved by a determination made under either s 24 or s 43. By his own reasoning, however, neither section would apply where s 9 was successfully invoked. What seems to be envisaged by Simpson J is

²⁵⁵ [2006] NSWADTAP 17 at [13].

²⁵⁶ [2006] NSWADTAP 17 at [14].

²⁵⁷ [2007] NSWSC 147 at [19].

²⁵⁸ [2007] NSWSC 147 at [20].

jurisdiction to decide whether, as a matter of fact, the documents sought did in fact relate to the ICAC's Schedule 2 functions. Essentially the same construction was adopted earlier by the Tribunal, where Montgomery JM stated:

I agree with the submission that a decision by ICAC that it is exempt from the operation of the Act does not preclude Mr McGuirk from seeking internal or external review. I also agree that the initial approach is to determine whether or not there is the power or jurisdiction to determine the matter. The approach adopted by the Judicial Member in *Waite* was to make a finding on the question of whether the documents sought in fact relate to the respondent's Schedule 2 functions. This seems to me to be the correct approach.²⁵⁹

In the later proceedings, Simpson J explained that this factual issue did not arise, as 'Mr McGuirk accepted that the document was of the relevant character'. At any rate, the case shows that the power of the ICAC and other Schedule 2 bodies to declare that certain documents are exempt by reason of s 9 of the FOI Act is not at large. The factual question of whether a document can be categorised as a s 9/Schedule 2 document is subject to external review by the ADT. To that extent, a limited jurisdiction is conferred on the Tribunal. Whether its source has been fully articulated is another matter.

5.10 When can an agency refuse access on the s 25(1)(a1) grounds that the work involved would 'substantially and unreasonably' divert the agency's resources?

The issue arose in *Cianfrano v Director-General, Premier's Department*.²⁶⁰ O'Connor DCJ upheld the Department's decision that processing Cianfrano's very general FOI application for all documents relevant to the Premier, Bob Carr, and Sydney Markets or Flemington Markets would involve a substantial and unreasonable diversion of the Department's resources. Section 25(1)(a1) provides that an agency may refuse access to a document:

if the work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions.

In arriving at his decision, O'Connor DCJ provided a non-exhaustive list of the factors relevant to an assessment required in a case of this kind. It is said that the above factors fall into three categories: (a) the application itself; (b) the agency's estimate; and (c) the agency's resources.²⁶¹ They are as follows:

- the terms of the request, especially whether it is of a global kind or generally expressed request; and in that regard do the terms of the request offer a

²⁵⁹ [2006] NSWADT 19 at [29].

²⁶⁰ [2006] NSWADT 137.

²⁶¹ *Crown Solicitor's Newsletter*, August 2006, p 5.

‘sufficiently precise description to permit an agency, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort’.

- the demonstrable importance of the document or documents to the applicant may be a factor in determining what in the particular case is a reasonable time and a reasonable effort.
- more generally whether the request is a reasonably manageable one giving due, but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with FOI applications.
- the agency estimate as to the number of documents affected by the request, and by extension the number of pages and the amount of officer time, and the salary cost.
- the reasonableness or otherwise of the agency’s initial assessment and whether the applicant has taken a co-operative approach in redrawing the boundaries of the application.
- the time lines binding on the agency (in New South Wales as compared to other jurisdictions they are quite tight, for example, 21 days to respond to a request, 14 days to respond to an internal review request, as compared to 45 days and 14 days respectively in Victoria).
- the indication that is found in the Annual Report reporting requirements suggesting that requests involving more than 40 hours’ work are seen as lying at the upper end of the range; suggesting at least that the view of government administrators is that a processing time that goes well beyond 40 hours may properly raise concerns.
- regard needs to be had to the degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made.
- possibly, the extent to which the applicant is a repeat applicant to the agency in respect of applications of the same kind, or a repeat applicant across government in respect of applications of the same kind, and the extent to which the present application may have been adequately met by those previous applications.²⁶²

On appeal,²⁶³ Cianfrano was successful on one ground only, namely, that the Tribunal had failed to give effect to Government policy as required by s 64 of the ADT Act. This referred to the policy set out in *Memorandum No 91-30 – FOI Requests: Substantial and Unreasonable Diversion of Resources*. The Appeal Panel commented:

²⁶² [2006] NSWADT 137 at [62].

²⁶³ *Cianfrano v Director General, Premier’s Department (GD)* [2006] NSWADTAP 48.

The policy says that where an agency has tried to assist an applicant to amend a large request but the request would still come within the resources exception, the agency should try to negotiate a longer time frame within which to comply with the request, including the possibility of dealing with the request in stages, before refusing to process it. The way in which the Tribunal should have given effect to the policy was to remit the decision to the agency under s 65 of the *ADT Act* with a recommendation that it apply the policy set out in the Memorandum.²⁶⁴

However, this finding did not substantially challenge the cogency of O'Connor's DCJ's formulation of the factors relevant to the interpretation of s 25(1)(a1).

5.11 Does the ADT have jurisdiction to conduct an 'adequacy of search' review?

The issue is in doubt and subject to an appeal to the Supreme Court. Specifically, the Appeal Panel of the ADT has referred the following question of law to the Supreme Court:

Is a notification under s 28(1)(b) of the FOI Act 1989, that an agency does not hold a document, a determination which the ADT has jurisdiction to review?

Section 28(1) provides:

- (1) An agency shall cause written notice to be given to the applicant:
 - (a) of its determination of his or her application, or
 - (b) if the application relates to a document that is not held by the agency—of the fact that the agency does not hold such a document.

In brief, the issue is whether s 28(1), read as a whole, distinguishes between the making of a 'determination' and the giving of a notice that the agency 'does not hold' a document. The point is that the ADT only has jurisdiction under the FOI Act to review determinations. If a notice that an agency 'does not hold' a document is a not a determination, it would seem to follow that the Tribunal is not vested with the power to review whether the agency conducted an adequate search. This was one argument submitted by the Department of Commerce in *Cianfrano v Director General, Department of Commerce and anor (No 2)*.²⁶⁵ The Department contended that the exclusive forum provided for by the Act for this purpose is the Ombudsman not the Tribunal.

In the event, the Department's submission was rejected by O'Connor DCJ who confirmed that that the ADT does have jurisdiction to conduct an 'adequacy of search' review in certain circumstances. At the same time, however, he also cast doubt on much of the reasoning in *Beesley v Commissioner of Police, NSW Police Service*,²⁶⁶ the authority

²⁶⁴ [2006] NSWADTAP 48 at [45].

²⁶⁵ [2006] NSWADT 195 at [17].

²⁶⁶ [2000] NSWADT 52.

previously relied upon by the ADT in exercising the power to examine the sufficiency of an agency's search. His reliance on *Beesley* appears to have been restricted to the proposition that s 24(2) of the FOI Act (the deemed refusal provision) applies 'to put the agency to proof that it has fully responded to the request'.²⁶⁷ The matter awaits definitive interpretation.

Note that, at the Commonwealth level, the *FOI Act 1982* has been amended to put the matter beyond doubt. Section 24A of the legislation provides that requests may be refused if documents cannot be found or do not exist; where access is refused on one or other of these grounds, s 55(5) provides the Administrative Appeals Tribunal with the 'power to require the agency or Minister concerned to conduct further searches for the document'.²⁶⁸

5.12 Does litigation privilege apply to FOI proceedings before the ADT?

Probably, but again the question is in some doubt.²⁶⁹ The question was reviewed recently by the ADT in *Cianfrano v Director General, Attorney General's Department*.²⁷⁰ The case concerned applications made by Cianfrano for access to documents relating to two earlier applications he had made for review of determinations by the Premier's Department. The Crown Solicitor was instructed to act for the Premier's Department in respect to both applications. Cianfrano now sought access, in one application, to 'all working and internal administrative documents to all instructions to and from the Crown Solicitor's Office',²⁷¹ and in the other application, access was sought to both the relevant 'internal administrative documents' of the Attorney General's Department and to 'all working instructions to and from the Crown Solicitor's Office'. The documents were to include: all phone call records; all file notes; all diary notes; all faxes transmission records; all memos records; all email records; and all bits of paper etc.

For the Attorney General's Department, exemption was claimed on a number of grounds, including legal professional privilege. Clause 10 of Schedule I of the FOI Act provides:

(1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.

²⁶⁷ [2006] NSWADT 195 at [63]. For O'Connor DCJ, s 28(1)(b) was merely 'ancillary to the process of determination' [33].

²⁶⁸ The legislative position in other Australian jurisdictions was reviewed by O'Connor DCJ – [2006] NSWADT 195 at [9]-[15].

²⁶⁹ Note that the question is the subject of an appeal to the Appeal Board of the ADT.

²⁷⁰ [2007] NSWADT 8.

²⁷¹ Documents relating to three named solicitors working for the Crown Solicitor's Office were specifically requested.

Cianfrano’s arguments advanced on a number of fronts, including:

- further to the Premier’s Memorandum 95-39 dated 12 October, 1995 and titled *Arrangements For Seeking Legal Advice From The Crown Solicitor's Office*, that the CSO was engaged to undertake Core Work. The CSO was acting as an officer of the Crown and giving expert advice to the Government and this is to be distinguished from the usual client-solicitor relationship. This is akin to advice given by an in-house lawyer given to assist the government in the purely executive function of decision-making. This relationship does not attract privilege.
- that the decision in *Ingot Capital Investments Pty. Ltd. v Macquarie Equity Capital Markets Ltd*²⁷² is authority for the proposition that litigation privilege does not apply to proceedings before the Tribunal. In *Ingot* Justice Bergin considered that proceedings in the federal Administrative Appeals Tribunal were ‘non adversarial’ proceedings and consequently, communications prepared for the purpose of providing professional legal services in relation to the proceedings were not privileged under the ‘litigation privilege’ limb of legal professional privilege. Cianfrano contended that this decision restricts the availability of litigation privilege in proceedings in New South Wales before the ADT. Accordingly, he argued that legal professional privilege did not apply to the documents in dispute.

Neither of Cianfrano’s arguments was accepted by Montgomery JM. In the first place, he was satisfied that a solicitor-client relationship existed between the Crown Solicitor’s Office and the Premier’s Department and ‘in the circumstances any confidential communication between them in that capacity falls within the exemption’.²⁷³ Secondly, after lengthy analysis of the case law, Montgomery JM rejected the view that *Ingot* is authority for the proposition that litigation privilege does not apply to proceedings before the ADT.²⁷⁴ Cited in support of the argument that FOI proceedings before the ADT are adversarial was the observation of Nicholas J in *University of NSW v McGuirk*.²⁷⁵ In summary, Montgomery JM noted:

that while the Administrative Appeals Tribunal and the ADT shared some similarities, there were significant differences between the two Tribunals. Both Tribunals could conduct proceedings in an inquisitorial way, but, in a FOI context, proceedings were adversarial...with the agency bearing the onus of proof. In the Administrative Appeals Tribunal, an agency had a positive obligation to help the Tribunal. However, in proceedings before the ADT, agencies had the same obligations and responsibilities as any other party and in, indeed, the Tribunal regularly dealt with matters to which a Government agency was not a party at all.²⁷⁶

²⁷² [2006] NSWSC 530.

²⁷³ [2007] NSWADT 8 at [76].

²⁷⁴ [2007] NSWADT 8 at [93].

²⁷⁵ [2006] NSWCS 1362 at [61].

²⁷⁶ *Crown Solicitor’s Client Newsletter*, March 2007, p 8.

Cianfrano has filed an appeal in this matter with the Appeal Panel of the ADT.

5.13 When will an FOI applicant be ordered to pay costs?

Ordinarily the ADT does not make costs orders in proceedings for the review of a reviewable decision.²⁷⁷ However, long-running and complex FOI proceedings associated with a few applicants, most notably Robert Cianfrano, have raised the question of the ‘special circumstances’ in which it is appropriate for the ADT to award costs pursuant to s 88 of the *Administrative Decisions Tribunal Act 1997*. Section 88(1) provides:

Subject to the rules of the Tribunal and any other Act or law, the Tribunal may award costs in relation to proceedings before it, but only if it is satisfied that there are *special circumstances* warranting an award of costs. (emphasis added)

Again, the relevant case law was recently reviewed in *Cianfrano v Director General, Attorney General’s Department*.²⁷⁸ It was noted that the Court of Appeal in *Cripps v G & M Dawson Pty Ltd*²⁷⁹ considered what might amount to ‘special circumstances’ justifying a costs order under section 88. Santow JA (with whom Mason P and Brownie AJA agreed) said

unreasonable conduct that is out of the ordinary and conduct which is grossly unreasonable can attract exercise of the Tribunal's power under s. 88 to award costs.²⁸⁰

Santow J went on to find:

[I]t suffices that the circumstances are out of the ordinary. They do not have to be extraordinary or exceptional. While a finding of ‘serious unfairness’ is not prerequisite to determining that there are special circumstances, it is nonetheless a highly relevant consideration.²⁸¹

Prior to that Court of Appeal decision in *Cripps*, costs had been awarded by the ADT against the FOI applicant in *Cianfrano v Department of Commerce*,²⁸² where Cianfrano applied for review of a determination requiring him to pay an advance deposit further to s 21 of the FOI Act and refusing to reduce the fees on public interest grounds. In finding that the circumstances amounted to ‘special circumstances’ justifying an order of costs, the Tribunal’s President took account of the level and the nature of the applicant’s FOI activity,

²⁷⁷ *Cianfrano v Department of Commerce* [2005] NSWADT 297 at [31].

²⁷⁸ [2007] NSWADT 8 at [50]-[55].

²⁷⁹ [2006] NSWCA 81.

²⁸⁰ [2006] NSWCA 81 at [55].

²⁸¹ [2006] NSWCA 81 at [60].

²⁸² [2005] NSWADT 297.

stating:

Some account should, it seems to me, be taken of the level of activity of the FOI applicant. The present applicant has made, clearly, quite voluminous and wide-ranging requests addressed to a number of agencies seeking to dig out the entire documentary history of the Flemington Markets sale. That is his right. Complex government activities may well attract complex and relatively voluminous access requests. But the FOI system depends for its effective operation on a measure of common sense and co-operation both on the part of agencies and applicants. This is particularly so where an applicant is engaged in the kind of complex process I have described. I made a similar observation in another recent decision relating to the applicant: *Cianfrano v Director General, NSW Department of Commerce* [2005] NSWADT 283 at [16]. The kind of request that has given rise to these proceedings is one that the applicant is entitled to make, but it is an oppressive request in many ways. I agree with the agency that it will inevitably involve the gathering up and analysis of many documents the applicant must already have. The claims that the applicant makes that his request is one to do with his ‘personal affairs’ was in my view quite specious, and that would have been apparent to an applicant of the applicant’s sophistication and experience in FOI matters. The same applies to the public interest claim. In my view a request on a request would rarely, if ever, have any connection with the public interest.

The outcome in *Cianfrano v Department of Commerce* is contrasted with that in *Saggers v Director General, Attorney General (GD)*²⁸³ where the applicant successfully resisted a costs order. There the Appeal Panel held:

Although Mr Saggers has been unsuccessful in this appeal, it cannot be said that the appeal had no real prospect of success. Nor do any of the circumstances described by the Attorney General’s Department, either alone or in combination, amount to ‘special circumstances warranting an award of costs’. We agree that Mr Saggers and Mr Cianfrano are familiar with the ADT’s FOI jurisdiction. However, they are not lawyers and cannot be expected to articulate grounds of appeal in a way which a lawyer could. They have not made claims which have no tenable basis, nor have they put the Attorney General’s Department to unnecessary expense. Apart from the ground of appeal based on Government policy, which was a very minor aspect of the appeal, Mr Saggers has done his best to put forward arguable grounds of appeal. The mere expression of intention on the part of the Attorney General’s Department to apply for a costs order does not mean that such an order should be made in circumstances where Mr Saggers’ appeal was unsuccessful.²⁸⁴

The applicant also successfully resisted a costs order in *Cianfrano v Director General, Attorney General’s Department*.²⁸⁵ Among other things, it was argued by the Attorney

²⁸³ [2006] NSWADTAP 11.

²⁸⁴ [2006] NSWADTAP 11 at [38].

²⁸⁵ [2007] NSWADT 8 at [50]-[55].

General's Department that Cianfrano's appeal against a determination to refuse access to documents on grounds on legal professional privilege (Schedule 1, cl 10) had no merit. The Department claimed that the application was vexatious, expensive and a 'classic example of the abuse of the FOI process'. In finding that an order for costs was not warranted in the circumstances, Montgomery JM concluded:

Although Mr Cianfrano has been unsuccessful in this application, it cannot be said that the application had no real prospect of success. The issue of litigation privilege is a significant one and is by no means frivolous.²⁸⁶

While each case will turn on its own facts, it seems that in deciding whether circumstances are 'out of the ordinary' the ADT will have regard to such criteria as:

- the appeal has no real prospect of success;
- the applicant's arguments are specious or frivolous,²⁸⁷ this having regard to the applicant's sophistication and experience in FOI matters;
- the level and the nature of the applicant's FOI activity, in particular where the applicant's conduct is 'grossly unreasonable',²⁸⁸ and
- the request is oppressive, putting the public service to unnecessary expense, by involving for example the gathering up and analysis of many documents the applicant must already have.

²⁸⁶ [2007] NSWADT 8 at [101].

²⁸⁷ *Cianfrano v Department of Commerce* [2005] NSWADT 297 - Cianfrano's claim that the request was one to do with his personal affairs and in the public interest was 'quite specious'. See also *Miriani v Commissioner for Fair Trading* [2005] NSWADT 99 at [39], an FOI case, where O'Connor DCJ imposed costs in special circumstances where 'the applicant had enough understanding of the Act to appreciate that the application was an empty one'. While the decision was set aside on procedural grounds, in *PC v University of NSW (No 2)* [2005] NSWADT 264 at [51] O'Connor DCJ affirmed the statements of principle he had made in *Miriami*.

²⁸⁸ In *PC v University of NSW (No 2)* [2005] NSWADT 264, a case involving the State's privacy legislation, costs were awarded against the applicant by O'Connor DCJ where the applicant, a senior academic, had not taken steps to inform herself of the requirements attached to the making of applications and it had been pointed out to her by the ADT that there was a real issue as to whether she had satisfied the 'internal review' preconditions to jurisdiction. An appeal was dismissed in *PC v University of NSW* [2005] NSWADTAP 72.

6. CONCLUSION

The achievements of the FOI Act in attaining its objectives have been the subject of considerable and varied comment. One view, expressed consistently by the NSW Ombudsman and others, is that the Act is in need of review. There is also the argument that the administrative arrangements under the legislation need to be altered, with the case being made for the establishment of either an FOI Commissioner or an Information Commissioner, possibly with jurisdiction over privacy and FOI matters. What is clear from the case law is that attempts to gain access to more sensitive or contentious information held by government agencies are vigorously contested. The use by agencies of the secrecy provisions exemption is one particular area of controversy, in respect to which the need for reform has been expressed on several occasions. On the other hand, significant reform has been achieved in the transparency of government contracts, by the passing of the *FOI Amendment (Open Government Disclosure of Contracts) Act 2006* in the last days of the 53rd Parliament. Many would argue this should be seen as a first step in an area of the law that is in need of comprehensive re-appraisal.

The reason why freedom of information is so central to the current political debate is clear enough. In effect, it encapsulates the key tension in representative democracy, between the right of individual voters and the public at large to be informed about the workings of government, set against the Executive's claims for confidentiality in those areas where it is required for the effective conduct of government business. The question is how broadly are these claims to be drawn? Where does the legitimate concern to protect government confidentiality end and an unjustifiable level of secrecy begin? Where and how is the balance to be struck between the competing claims and tendencies involved? Does the State's FOI Act, in its present form, offer the best available answer to that question?

APPENDIX A

SCHEDULE 2 – EXEMPT BODIES AND OFFICES

FREEDOM OF INFORMATION ACT 1989 (NSW)

Freedom of Information Act 1989 No 5

Schedule 2 Exempt bodies and offices

(Section 9)

The office of Auditor-General—investigative, audit and report functions.

The office of Director of Public Prosecutions—prosecuting functions.

The Independent Commission Against Corruption—corruption prevention, complaint handling, investigative and report functions.

The office of Inspector of the Independent Commission Against Corruption—operational auditing, complaint handling, investigative and report functions.

The office of Public Trustee—functions exercised in the Public Trustee’s capacity as executor, administrator or trustee.

The Treasury Corporation—borrowing, investment and liability and asset management functions.

The office of Ombudsman—the complaint handling, investigative and reporting functions of that office.

The office of Legal Services Commissioner—the complaint handling, investigative, review and reporting functions of that office.

The Health Care Complaints Commission—complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry).

The Child Death Review Team—all functions.

The Police Integrity Commission—corruption prevention, complaint handling, investigative and report functions.

The office of Inspector of the Police Integrity Commission—operational auditing, complaint handling, investigative and report functions.

The SAS Trustee Corporation—investment functions.

The Axiom Funds Management Corporation—investment functions exercised on behalf of trustees of superannuation funds.

The Department of Training and Education Co-ordination—functions relating to the storing of, reporting on or analysis of information with respect to the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions.

Universities—functions relating to dealing with information with respect to the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions.

Any body or office that exercises functions under the *National Electricity (NSW) Law* (including functions under the *National Electricity Code* referred to in that Law) on behalf of NECA (the company established under the *Corporations Law* under the corporate name of National Electricity Code Administrator Limited (ACN 073 942 775)) or NEMMCO (the company established under the *Corporations Law* under the corporate name National Electricity Market Management Company Limited (ACN 072 010 327))—those functions.

The office of Privacy Commissioner—the complaint handling, investigative and reporting functions of that office.

The Corporation constituted under the *Superannuation Administration Authority Corporatisation Act 1999*—functions exercised in the provision of superannuation scheme administration services, and related services, in respect of any superannuation scheme that is not a State public sector superannuation scheme.

The Independent Pricing and Regulatory Tribunal—complaint handling, investigative and reporting functions of the Tribunal in relation to competitive neutrality complaints.

The State Contracts Control Board—complaint handling, investigative and reporting functions of the Board in relation to competitive neutrality complaints.

The New South Wales Crime Commission—investigative and reporting functions.

The President of the Anti-Discrimination Board—complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the President.

The Workers Compensation Nominal Insurer established under the *Workers Compensation Act 1987*—functions relating to the issuing of policies of insurance to employers and the calculation of premiums (but only in relation to individual employers), the management of specific claims and to asset and funds management and investment.

The Department of Local Government (including the Director-General and other Departmental representatives)—complaint handling and investigative functions conferred by or under any Act on that Department.

APPENDIX B

***ALTERNATIVE SUPERVISORY MODELS – EXPERIENCE IN OTHER
SELECTED JURISDICTIONS***

***CHAPTER 5, FIRST REPORT OF THE INQUIRY INTO ACCESS TO
INFORMATION***

***COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE
INTEGRITY COMMISSION, DECEMBER 2002***

Chapter 5

Alternative supervisory models – experience in other selected jurisdictions

The Committee does not intend the following review of alternative supervisory models to be comprehensive either in scope or detail. Rather, its purpose is to present, in summary form, the major alternative approaches adopted in other selected jurisdictions. Nor, it should be stressed, does this overview intended to suggest that any alternative model should be imported into NSW.

5.1 Other selected Australian jurisdictions⁶⁸

5.1.1 Victoria

In broad terms the jurisdiction most comparable to NSW at present is Victoria. As here, there is a Victorian FOI Act which uses the Ombudsman as its compliance monitor in the absence of any more formal arrangement.⁶⁹ There is, too, privacy legislation, covering the public sector, which established a Privacy Commissioner with similar powers and functions to its NSW counterpart. In addition, Victoria already has a *Health Records Act 2001*, covering the public and private sectors and which, unlike the NSW Health Records Act (not yet commenced), established a Health Services Commissioner to handle the monitoring and related functions. The relevant external review body with determinative powers for all these pieces of legislation is a general appeals tribunal established under the *Victorian Civil and Administrative Appeals Tribunal Act 1998*.

5.1.2 The Commonwealth

Much the same applies in respect to the Commonwealth. At this level of government it is the Attorney General's Department that reports annually on the administration of the FOI Act. Under section 57 of the Act, a complaint to the Ombudsman can be made as an alternative, or preliminary, to Administrative Appeals Tribunal review. Nonetheless, the Ombudsman's powers are recommendatory only. There is no power to set aside a decision and substitute another decision.⁷⁰

A major difference between the Commonwealth, on one side, and NSW and Victoria, on the other, is that the federal *Privacy Act 1988* applies to both the public and private sectors. If nothing else, this would make the establishment of a single Information and Privacy Commissioner more difficult than at the State level. The issue of a combined office was in fact considered in 1995 by the ARC and ALRC in their joint report, *Open Government: a review of the federal Freedom of Information Act 1982*. The proposal was rejected in part because, at that stage, it was envisaged that the privacy regime would be extended to cover the private sector. Other considerations also applied. The report commented:

⁶⁸ For a review of recent developments in FOI legislation at the State level see – R Snell, 'Freedom of information: the experience of the Australian States – an epiphany?' (2001) 29 *Federal Law Review* 343.

⁶⁹ *Freedom of Information Act 1982* (Vic). The Act was amended in 1999 to include a definition of 'personal information'.

⁷⁰ Australian Law Reform Commission and Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982*, Report No.77 (ALRC) and Report No.40 (ARC), 1995, p. 176.

There is a need to ensure that the principles of openness and privacy each have a clearly identifiable and unambiguous advocate. The balance between FOI and privacy can sometimes be a fine one and it may be difficult for an individual not to develop, or be perceived to have developed, a stronger allegiance to one over the other which could leave to accusations of bias in favour of either openness or privacy. It is particularly important that the benefits of openness, not only for public accountability but for creativity and commercial exploitation, not be diminished by an overemphasis on privacy. Given the tendency to date for agencies to favour secretiveness over openness and the fact that the overwhelming majority of FOI requests are for applicants' personal information, there is a risk that FOI would become the 'poor cousin' if the Privacy Commissioner were given responsibility for the role of FOI Commissioner...The Privacy Commissioner agrees.⁷¹

The joint ALRC/ARC report recommended the establishment of a Commonwealth FOI Commissioner as a separate statutory position. In doing so, it also set aside suggestions that the powers and resources of the Commonwealth Ombudsman could be expanded to perform the role proposed for the FOI Commissioner. The report commented:

The role proposed for the FOI Commissioner is different from that of the Ombudsman in several respects, the most significant of which is that the former does not involve individual complaint resolution. This aspect of the Ombudsman's work could reduce the effectiveness of the proposed advice and assistance role because of a perceived conflict of interests. In addition, the Ombudsman's role makes it important that he or she not become involved in policy development.⁷²

These and other issues were revisited recently in the report of the Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*. The bill was introduced in the Senate on 5 September 2000 by Senator Andrew Murray as a private member's bill and included provision for the establishment of a Commonwealth FOI Commissioner along the lines proposed by the ALRC/ARC report. Among other things, the Senate Committee's report allowed the opportunity for the ALRC to update its position on the need for allocating responsibility for FOI in an independent agency. In effect the ALRC remained committed to the view that there should be one officer with primary responsibility for FOI. However, bearing in mind the cost implications of establishing an independent statutory office, the ALRC accepted that the function could be 'subsumed' either within the Commonwealth Ombudsman's office or the federal Privacy Commissioner's office. At the same time the Commonwealth Ombudsman submitted that the functions of an FOI Commissioner 'should be placed within an existing entity such as his own', thereby avoiding the resource and other problems encountered by small and specialised agencies.

Basically, the Senate Committee accepted this view and recommended:

That the functions to be conferred on the FOI Commissioner under the Bill be conferred on the Commonwealth Ombudsman and that a specialised unit be established within that office for the purpose of supporting the Commonwealth Ombudsman in that role.⁷³

⁷¹ Australian Law Reform Commission and Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982*, Report No 77 (ALRC) and Report No.40 (ARC), 1995, pp. 77-8.

⁷² *ibid.*, p. 76.

⁷³ Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, April 2001, pp. 41-50.

If nothing else, the debate at the Commonwealth level highlights the difficulty involved in securing legislative change in the FOI field, as well as the resource and other implications at issue.

5.1.3 Queensland

It has been noted that Queensland has neither a statutory privacy regime nor a generalist administrative appeals tribunal. What it does have is an Information Commissioner, with determinative powers to conduct external review, as established under Part 5 of the *FOI Act 1992* (Qld). A valid application for external review must be preceded by an internal agency review (except when a matter involves a decisions by a Minister or the Principle Officer of an agency).

Under section 61 (2) of that Act the Ombudsman is to be the Information Commissioner unless another person is appointed as Information Commissioner. As a matter of practice, the same person has always held both posts. The Ombudsman has recommendatory powers only; the Information Commissioner has determinative review powers. The decision to establish this combined approach was based in part on New Zealand experience, but also on consideration that the establishment of an additional independent Commissioner could 'lead to a confusing plethora of bodies facing a member of the public with a grievance against the administration'.⁷⁴

The rationale behind the establishment of the Office of the Information Commissioner, which commenced operations in January 1993, has been explained in the following terms:

The Office of the Information Commissioner...was intended to perform the external review functions provided for by part 5 of this Act (the *FOI Act 1992*) as a specialised and expert dispute resolution service, which was speedier, cheaper for participants, more informal and user friendly than the court system, or tribunals which follow court like procedures.⁷⁵

The appropriateness of this model, notably the role the Ombudsman plays as Queensland's Information Commissioner, was discussed as part of the comprehensive review of the FOI legislation undertaken by the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament. It expressed its concern 'about the perception that the two roles are not entirely independent' and recommended that a dedicated Information Commissioner should be appointed, separate from the Ombudsman. The Committee stated that while it had:

no difficulty with the offices of the Ombudsman and Information Commissioner sharing corporate services for efficiency reasons, the offices should not share allocated funding and should therefore have separate budgets.⁷⁶

Other recommendations made by the Committee included the expansion of the Information Commissioner's functions to incorporate a monitor, advice and

⁷⁴ Parliamentary Committee for Electoral and Administrative Review Report, *Freedom of Information for Queensland*, 1991, para 3.11.10.

⁷⁵ The Consultancy Bureau, *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner, Volume 2 – Office of the Information Commissioner*, June 2000, p. i. Note that the Deputy Ombudsman informed the Review Team that the role and responsibilities of the Information Commissioner are 'in essence those of a specialist tribunal' (p. 32).

⁷⁶ Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report No.32, December 2001, p. 135.

awareness role. In effect, this would bring it in line with the Western Australian model.

The Committee had earlier considered the question of the relationship between FOI and privacy as part of its 1998 report *Privacy in Queensland*. There the Committee recommended that a Privacy Commissioner be established under a Queensland Privacy Act. It recommended against combining this proposed office with that of the Information Commissioner, bearing in mind the different purposes served by FOI and privacy legislation, the one concerned with maintaining the privacy of personal information, the other with releasing information into the public arena, unless there are good reasons for not doing so. Agreeing with the views in the joint ALRC/ARC report, the Committee said it did not believe that:

A combined FOI and privacy office is appropriate given the different focus of the regimes administered by each. The committee fears that it would be difficult for an Information Commissioner to be an impartial advocate for openness of government one day and an advocate for privacy the next.⁷⁷

In 2000 a major review of the operation of the Offices of the Queensland Ombudsman and the Information Commissioner was conducted by the Consultancy Bureau Pty Ltd. The review contains detailed analysis of the actual working of the Information Commissioner's Office, including comparisons with its counterparts in New Zealand and Western Australia.⁷⁸ As noted, this was followed in December 2001 by the report of the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament which believed that a 'separate, dedicated Queensland Information Commissioner should be appointed'.

5.1.4 Western Australia

The main difference between the Queensland and Western Australian models is that the latter's Information Commissioner is completely independent and separate from any other office. It also is the case that the WA Information Commissioner, which was established under the *FOI Act 1992 (WA)* and commenced operation in 1993, has a broad public awareness function. The Commissioner has said that her office has two distinct statutory responsibilities: those dealing with complaints about decisions made by agencies in respect of FOI applications – the external review and complaint resolution functions; and educating and informing the public and agencies in WA about their respective rights and obligations under the legislation – the advice and awareness functions.⁷⁹ Detailed statistical commentary on the operation of these functions is set out in the Commissioner's annual reports.

In a recent speech the WA Information Commissioner commented on the interaction between FOI, State records legislation and privacy principles (albeit not in statutory form in WA). Basically, her view was that the problems encountered in NSW had not arisen in WA 'because of the model used to establish a State Records Commission', a body reporting to parliament and, with some limits, independent of Ministerial direction. This Commission has four members, the Auditor General, the

⁷⁷ Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Privacy in Queensland*, Report No 9, April 1998, pp. 116-9.

⁷⁸ The Consultancy Bureau, *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner, Volume 2 – Office of the Information Commissioner*, June 2000.

⁷⁹ WA Information Commissioner, 'FOI', *Paper presented at the Past, present and future conference*, Hobart, 30 November 1999.

Ombudsman, the Information Commissioner and a record keeping professional. Reflecting on the reported difficulties encountered in NSW, the WA Information Commissioner had this to say:

I suspect that part of the reason for the problem identified by the NSW Privacy Commissioner may be that in NSW at least, the responsibility for privacy, FOI and archives is vested in different bodies, each having its own views and perspectives of the relevant importance of its own area.⁸⁰

The WA FOI model has been described as a 'comparative success story'.⁸¹ Nonetheless, the WA Information Commissioner has herself advocated a fundamental reformulation of the design principles associated with access laws.⁸²

Note, too, that the WA Law Reform Committee, in its October 1999 report, *Review of the Criminal and Civil Justice System*, recommended that a new WA Civil and Administrative Tribunal be established with jurisdiction including the adjudicative functions of the Information Commissioner.⁸³

5.1.5 The Northern Territory

In October 2001 the NT Attorney General tabled in the Legislative Assembly a *Discussion Draft for a Proposed Information Act*. Based on advice from consultants and influenced by experience in certain Canadian Provinces,⁸⁴ the draft Act would incorporate FOI, privacy and archives legislation under a single statute. An Information Commissioner would be established with broadly defined functions, including promotional, advice, audit and awareness functions across the FOI and privacy fields (but not in relation to records management). Under Part 7 of the proposed Act the Commissioner would also have a complaints jurisdiction, which would include determinative powers of external review over FOI and privacy related matters. Provision is made for appeals from the decisions of the Information Commissioner to the NT Supreme Court. The proposed Information Commissioner would operate alongside and in addition to the Territory Ombudsman who would continue to have only recommendatory powers.

The 'objects' of the draft Act are defined as follows:

- to encourage the widespread publication of government information;
- to encourage accountability in government by providing the public with a right of access to government information;
- to balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information; and
- to promote efficient and accountable government through improved record keeping and records management.

Clearly, any philosophical and other qualms about the incompatibility of FOI and

⁸⁰ WA Information Commissioner, *Address to the Australian Society of Archivists AGM*, Perth, 10 July 2002.

⁸¹ R Snell, n 68, p. 356.

⁸² See for example – WA Information Commissioner, n 79; R Snell, n 68, p. 356.

⁸³ Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report No 32, December 2001, p. 133 at fn 383.

⁸⁴ Information based on telephone advice from the NT Attorney General's Department.

privacy legislation, and any conflict of interest that might arise from their joint administration, have been set aside in this proposed model in favour of a single, streamlined access to information regime.

5.2 New Zealand

The situation in New Zealand is an interesting counterpoint to that in the various Australian jurisdictions. Separate FOI and privacy regimes operate under the *Official Information Act 1982* and the *Privacy Act 1993* respectively. There is, in addition, a *Local Government Official Information and Meetings Act 1987* containing relevant FOI provisions.

A Privacy Commissioner was established by the *Privacy Commissioner Act 1991*. Two years later the Privacy Act was passed to regulate privacy in the public and private sector and to establish the current Office of the Privacy Commissioner. The Commissioner has broad powers to investigate complaints and monitor compliance. As explained by the New Zealand Law Commission:

The Commissioner must investigate, conciliate and attempt to secure a settlement. If a settlement cannot be secured, the Commissioner must refer the matter to the Director of Human Rights Proceedings to determine whether proceedings should be taken before the Human Rights Review Tribunal...If the Director of Human Rights Proceedings decides that the matter does not have substance and declines to refer it to the Human Rights Review Tribunal, the aggrieved complainant may herself or himself bring proceedings before the Tribunal.⁸⁵

FOI matters are dealt with by the Ombudsman who operates as an external reviewer with determinative powers in this context. A recommendation made by the Ombudsman regarding the release of official information becomes binding on the agency after 21 working days unless the Governor-in-Council by Order-in-Council otherwise directs. These and other provisions were reviewed by the New Zealand Law Commission in its 1997 report, *Review of the Official Information Act 1982*. No major changes were recommended at that time. The model begs the question of the propriety, as a matter of constitutional principle, of the Ombudsman possessing more than recommendatory powers. As a matter of practice, this does seem to have been a problem in New Zealand.

The current New Zealand Law Commission inquiry into the privacy legislation does not appear to be dealing with the interaction between the various access to information regimes. The fact that the Privacy Act covers the public and private sectors places it in a different category to the legislative regime operating at present in NSW.

5.3 Canada

The situation in Canada is more complex, with different regimes operating at the national and various provincial levels. These can be outlined separately. Basically, a key difference is that, whereas nationally, the Information Commissioner and the Privacy Commissioner are distinct entities, in most of the Provinces these offices are established under a single, integrated piece of legislation. On the other hand, a

⁸⁵ NZ Law Commission, *Protecting Personal Information from Disclosure: A Discussion Paper*, Preliminary Paper 49, February 2002, p. 6.

common feature of the Canadian regimes considered by the Committee is that they do not require internal review by an agency as a preliminary to external review by the relevant Commissioner.

5.3.1 The federal level

At the federal level FOI is covered by the *Access to Information Act 1982*. This was passed in conjunction with the Privacy Act, with both coming into force on 1 July 1983. Both Acts regulate access to government information. More specifically the Access to Information Act provides a right of access to general government information, while personal information held by the government is governed by the provisions of the Privacy Act.⁸⁶ There is, in addition, the Personal Information Protection and Electronic Documents Act which came into force on 1 January 2001 and which sets out how the private sector may collect, use or disclose personal information. Oversight of both these privacy statutes rests with the Privacy Commissioner of Canada. Under the Access to Information Act an Information Commissioner is established to supervise the operation of FOI at the federal level. Note that section 55 of the Privacy Act would permit the appointment of the Information Commissioner as Privacy Commissioner. In fact, the two positions have remained separate.

The prevailing Canadian view appears to be that FOI and privacy legislation are complementary, not conflicting, undertakings. The current Information Commissioner, John Reid, has said in this respect:

At the federal level, "openness" and "privacy" are complementary, not adversarial, values. The two statutes, which serve these values--the Access to Information Act and the Privacy Act-- were debated and passed by Parliament at the same time and came into force on the same day. They were drafted to fit together like two halves of a whole. I like to think of these two statutes as the Yin and Yang of governmental information policy, which, together, create a harmonious, unified system for dealing with governmental information holdings. The Supreme Court of Canada has made it clear when these values come into conflict, the conflict should be resolved in a way which least infringes both values.⁸⁷

Section 19 of the Access to Information Act recognises privacy as an important human value by requiring the exemption of personal information from any disclosures made under the Act. The Privacy Act's definition of personal information is also that of the Access to Information Act. Explaining the relationship between the two legislative schemes, the Information Commissioner of Canada commented:

The Access to Information Act takes as its guiding principle that: '...government information should be available to the public, that necessary exceptions to the right of access should be limited and specific...'. Thus the norm is access to governmental information. Not to have access is the exception. Yes, it is true that the Access to Information Act contains a 'notwithstanding any other Act of Parliament' clause and thus, is paramount over all other acts of Parliament, including the Privacy Act. However, the access law contains a very broad, strongly worded exemption which makes it mandatory that personal information be kept

⁸⁶ Government of Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, June 2002, p. 13.

⁸⁷ Information Commissioner of Canada, *Remarks to security and privacy for government on-line conference*, Ottawa, 18 April 2001. The leading case is *Dagg v The Minister of Finance (and the Privacy Commissioner of Canada and the Public Service Alliance of Canada)* [1997] 2 SCR 403.

secret except in very carefully defined situations.⁸⁸

He added that 'In some 18 years of experience since these Acts were passed, it has not proved very difficult to determine when a privacy invasion is justified and when it is not'. The key to bear in mind, according to the Information Commissioner, is that 'both rights are designed to shift the balance of power from the state to the individual'. He explained:

Whenever access and privacy rights appear to be in conflict, an understanding of what I call the 'accountability pay offs' almost always leads to a sensible resolution of the apparent conflict. For example, the privacy interests of public officials must, in a free and democratic society, be given less weight (in balance with openness) than the privacy interests of private citizens.⁸⁹

All the same, the FOI and privacy regimes are not integrated at the federal level, either legislatively or for supervisory and administrative purposes. At this level, both the Information and Privacy Commissioners are Ombudsmen and, as such, have only recommendatory powers in relation to the complaints they investigate. Both investigate complaints on behalf of individuals (corporations may also make requests under the Access to Information Act) seeking their full rights of access, either to their own records (privacy) or to non-personal records (access to information). Where their recommendations are not followed there is a right of appeal to the federal court.

The mandate of the Information Commissioner was considered recently as part of the comprehensive review of the Access to Information Act. The report of the Review Task Force commented:

The Act simply stipulates that the Information Commissioner shall receive, investigate and report on complaints and make annual reports (and, where appropriate, special reports) to Parliament. Although the Act does not prohibit the Information Commissioner from performing other functions, such as educating the public, neither does it authorise them. This may have led the Office of the Information Commissioner to define itself, at times, solely as an investigative body with strong coercive powers.⁹⁰

A broader mandate was recommended for the Information Commissioner, to include a public education function. Still, it was recognised that the Commissioner's main function would remain the investigation of complaints. On this issue, the Review Task Force asked whether the Ombudsman model, under which the Information Commissioner has the power to investigate and recommend, but not to decide, is the best model for the future. Recommended was the adoption of an Information Commissioner with determinative powers. However, the need to consider the interaction with the privacy regime was recognised, with the report commenting that the impact of any change 'on the powers of the Privacy Commissioner would have to be studied carefully in the context of the interrelationship between the Access to Information Act and the Privacy Act'.⁹¹ In summary, the connection between privacy and FOI has always been to the fore in the Canadian debate.

⁸⁸ Information Commissioner of Canada, *Remarks to security and privacy for government on-line conference*, Ottawa, 18 April 2001.

⁸⁹ *ibid.*

⁹⁰ Government of Canada, n 86, p. 92.

⁹¹ *ibid.*, p. 114.

5.3.2 The Provinces

Integrated FOI and privacy regimes are the norm in the Canadian Provinces. For example, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan all have statutes titled the Freedom of Information and Protection of Privacy Act. In Quebec the relevant legislation is titled 'An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information'.⁹² Two Provinces also have special legislation covering local government: the Ontario Municipal Freedom of Information and Protection of Privacy Act and the Saskatchewan Local Authority Freedom of Information and Protection of Privacy Act. Specific health privacy law exists in two other Provinces: in Alberta where the Health Information Act came into force on 25 April 2001; and in Manitoba under the Personal Health Information Act.

Ontario is an instance of where the legislation is supervised by an Information and Privacy Commissioner, appointed by the Legislature and therefore independent of the government of the day, with determinative external review powers over government decisions concerning access and privacy. Broadly, the Commissioner's mandate is to resolve appeals, investigate privacy complaints, ensure compliance, research access and privacy issues and educate the public about the relevant laws. The Office was established in 1988 and acquired supervisory jurisdiction over the municipal level of government in 1991, under the Municipal Freedom of Information and Protection of Privacy Act.⁹³ The Commissioner's annual reports set out the details of the complaints handled by the Office. Also presented is an analytical overview of the judicial review of the Commissioner's orders. The 2001 Annual Report noted that, as at 31 December 2001, there were 36 judicial reviews outstanding; further, 13 judicial reviews had been closed and/or heard in 2001 (7 were subject to appeal; 3 had been abandoned; 1 had been dismissed for delay; and in 2 cases the Commissioner's order had been upheld).⁹⁴

Comparable arrangements are in place in British Columbia where the Office of the Information and Privacy Commissioner was established in 1993, with jurisdiction over the provincial public sector, including local government. Complainants have a right to appeal access and privacy decisions to the Commissioner who is empowered to make orders confirming or setting aside, in whole or in part, a decision of the head of a public body to give or refuse access to information. Section 59 (1) of the Act provides that a public body must comply with a Commissioner's order within 30 days, unless an application for judicial review has been made.

In Alberta the Office of Information and Privacy Commissioner was created in 1995. The Commissioner's powers to make orders are provided for under the Province's Freedom of Information and Protection of Privacy Act, with section 74 of the Act providing that the public body concerned must comply within 50 days, unless an

⁹² Quebec also has private sector privacy legislation in the form of *An Act Respecting the Protection of Personal Information in the Private Sector*.

⁹³ The Ontario Government has released a draft *Privacy of Personal Information Act 2002*, which will cover the private sector, including health information held in that sector. This follows the introduction in December 2000 of Bill 159, the Personal Health Information Privacy Act, which lapsed when the Legislature was prorogued in early 2001.

⁹⁴ Note that judicial review is not expressly provided for under the Ontario legislation. It is the common law tradition which permits judicial oversight of administrative tribunals. There is, in addition, a Judicial Review Procedure Act which permits the courts to set aside decisions for errors of law. Judicial review would be expressly provided for under proposed section 70 of the draft *Privacy of Personal Information Act 2002*.

application for judicial review has been made. The Commissioner also acts as the external review body for the new Health Information Act, section 80 of which sets out the power to make orders, with section 82 stipulating that the 'custodian' of the health information must comply within 50 days. Again, this rule is made subject to an application for judicial review.

5.4 The United Kingdom

A peculiarity of the United Kingdom, at least in the context of those jurisdictions considered by the Committee, is that it established a statutory privacy regime – the *Data Protection Act 1998* - before it had an FOI Act.

A feature of the Data Protection Act, which applies to both the public and private sector, is that it created the Office of the Data Protection Commissioner, with the power to issue enforcement and other notices arising from complaints about privacy matters. Section 48 of the Act provided for appeals from the Commissioner's notices to the Data Protection Tribunal. Judicial review on a point of law from a ruling by the Tribunal was also available under the Act.

The *Freedom of Information Act 2000* received Royal Assent on 30 November 2000. However, in keeping with the Lord Chancellor's implementation timetable its provisions must only be fully implemented by January 2005. This staged approach involves, for example, the application of the Act to local government (except police authorities) by February 2003. Schools and universities are to be covered by February 2004.

After much deliberation the decision was taken to integrate the enforcement mechanism for the FOI Act with that applying to privacy. For this purpose, the Office of the Information Commissioner was established under section 18 of the FOI Act, as an independent authority reporting directly to Parliament, to supervise and enforce the data protection and FOI legislation. This new Office replaced the Data Protection Commissioner; as well, an Information Tribunal was established in place of the former Data Protection Tribunal. In this way, comparable review and appeals processes to those still operative under the Data Protection Act are in place under Parts IV and V respectively of the FOI Act. All privacy and FOI complaints are now to be handled by the Information Commissioner, with all appeals being heard by the Information Tribunal.

Thus, although the statutes remain separate, their enforcement is integrated. According to the Commissioner, Elizabeth France:

Both the Freedom of Information Act and the Data Protection Act relate to information handling and her dual role will allow the Commissioner to provide an integrated and coherent approach.⁹⁵

5.5 Comment

The above survey shows that many alternative supervisory models operate in the broadly comparable jurisdictions considered by the Committee. Like NSW, all these jurisdictions belong to the Westminster system of parliamentary government. In that sense, the same underlying questions about the operation of accountability and

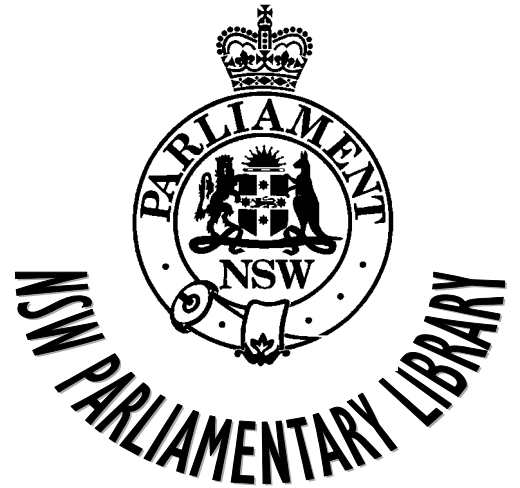
⁹⁵ <http://www.dataprotection.gov.uk/commissioner.htm>

privacy laws and mechanisms apply. The question whether the Ombudsman should have only recommendatory powers, for example, is one that resonates across all the jurisdictions we have discussed. That said, the Committee also recognises that each model is the product of a distinctive legislative and political history and cannot be understood in isolation from that history. For instance, both the Queensland and Western Australian Information Commissioners have determinative powers, but then neither of those States has a comparable generalist appeals tribunal as exists in NSW under the *Administrative Decisions Tribunal Act 1997*. It is also the case that, of the Australian States, only NSW and Victoria have a legislative privacy scheme in place. The Committee further notes that the NSW Privacy Commissioner does not have 'determinative powers' under the PPIP Act.

At the level of detail, apparently comparable systems can be very different. Jurisdictions have arrived at contrasting answers to the question of how best to achieve effective, independent external review of administrative decisions. In this context meaningful comparisons across jurisdictions are difficult.

The critical issue, in this regard, is to decide what principles and objectives are to be served by access to information legislation and, with this in mind, what administrative arrangements can best achieve those objectives in the NSW context.

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