No 01

Kalinga Wooloowin Residents' Association

17 November 2011

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Legal Affairs, Police, Corrective Services and Emergency Services Committee

Research Director
Legal Affairs, Police, Corrective Services
and Emergency Services Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Sir/Madam

Right to Information (Government-related Entities) Amendment Bill 2011

Thank you for the invitation to make a submission to your committee on the above topic.

Background

The Kalinga Wooloowin Residents' Association (KWRA) was formed in 2009 as a result of the actions of the QLD Government in deciding to permit Thiess John Holland to take over a parcel of land in our suburb for the purpose of regaining lost time on the Airport Link Project. In so doing, these actions have enabled the various management within the Airport Link consortium to potentially realise their substantial financial bonuses at the expense of the quiet and peace-loving residents of Kalinga and Wooloowin.

In the process of the KWRA's investigations into what had transpired, we came across an entity known as City North Infrastructure (CNI) which we came to learn was a Special Purpose Vehicle (SPV) set up to manage the Airport Link project amongst others. When the KWRA legitimately requested information which was known to be possessed by CNI, for the purpose of providing supporting information to our submissions to Government, we were effectively blocked from access. The primary reason given for refusing access was that SPVs were created by the Commonwealth Corporations Act and as such were not subject to the Queensland RTI Act 2009. This view has been supported by the Supreme Court of Queensland in Davis vs City North Infrastructure, although it should be noted that the Supreme Court did not go so far as to state that CNI was "not an Agency" and specifically refused to give this ruling.

In dealing with SPVs, the KWRA has only had reason to deal with CNI. No other SPVs have been engaged by this organisation and as such, our experience and therefore our commentary is primarily focused on the nature of CNI.

The Solomon Report

In the report entitled The Right to Information – Reviewing Queensland's Freedom of Information Act, written by the FOI Independent Review Panel of June 2008, chaired by Dr David Solomon AM (the Solomon Report) there is much discussion regarding the role of Government Business Enterprises (GBE) which encompasses company Government Owned Corporations.

For correspondence, please reply to:
The Kalinga Wooloowin Residents' Association, PO Box 866 Lutwyche QLD 4030

The Queensland Government submitted to the review panel:

> While the FOI Act defines "public authority" broadly, the issue raised by the Panel at p.64 of the Discussion Paper relating to the application of the Act to public authorities which have been created under the *Corporations Act 2001* and not under a Queensland enactment – is noted. The Government's intention is that generally, bodies established on Government initiative and for a public purpose should fall within the ambit of the FOI Act, unless expressly excluded by the Act.[1]

The Queensland Ombudsman submitted to the review panel:

> I consider that all GOCs should be subject to the FOI Act. I am strongly of the view that private entities that carry out public functions using public funds are accountable to the public for the way in which they perform those services and spend those funds, and should be subject to all the usual accountability measures, including the application of the FOI Act, and scrutiny by the Crime and Misconduct Commission, the Ombudsman and the Auditor-General. The commercial interests of GOCs are adequately protected by the exemptions available to agencies which are subject to the FOI Act. For example, documents that relate to their competitive commercial activities may qualify for exemption under s.45(1)(c) of the FOI Act.

He goes on to write:

> In terms of defining which bodies exercise government functions and should therefore be subject to the FOI Act, I support the analysis set out in ALRC Report 77 which identified government control as the most important characteristic. If the body is controlled by the government and spends public funds, then I consider it should be subject to the FOI Act. Government control will be established if the government has an ownership interest in the body of at least 50%. In the case of a body corporate, the government has a controlling interest if it is able to:
>
> - control (whether directly of (sic) through its ownership interest in other bodies) the composition of the board of directors;
> - cast (or control casting of) more than one half of the maximum number of votes that might be cast at a general meeting of the body;
> - control more than one half of the issued share capital of the body.
>
> If the government does not have a controlling interest in the body, then it should not be subject to the FOI Act.[2]

Other relevant submissions support the points made by Queensland Government and the Queensland Ombudsman and I would encourage the committee to study the Solomon Report in detail.

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[1] The Right to Information – Reviewing Queensland's Freedom of Information Act, written by the FOI Independent Review Panel of June 2008, p 85

[2] The Right to Information – Reviewing Queensland's Freedom of Information Act, written by the FOI Independent Review Panel of June 2008, p 93

The Solomon Report when tabled, included Recommendation 24:

> The definition of "public authority" in s.9 of the Act should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.[3]

Queensland Government Response to The Solomon Report

In response to the Solomon Report, the Queensland Government stated:

24 (p.90)	The definition of "public authority" in s. 9 of the Act should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory.	**Supported** The government supports this recommendation which is intended to ensure that Government bodies incorporated under the *Corporations Act 2001* (Cth) (such as company GOCs) are included in the operation of the proposed Right to Information Bill. The impact of changes to the definition of a "public authority" on other legislation, such as the *Public Records Act 2002*, will be considered. The advice of the Queensland Parliamentary Counsel will be sought as to the appropriate form of drafting for the proposed provision.[4]

Summary of The Solomon Report

It is apparent from the submissions made to the review panel by the Queensland Government, coupled with the formal response made to the Solomon Report that the intent of the Queensland Government is that entities set up under the Commonwealth Corporations Act for a public purpose and whose funding is substantially received from Government, should be subject to the proposed RTI Act 2009.

The KWRA is unable to reconcile this acceptance by the Queensland Government with the obvious omission of this undertaking, in the RTI Act 2009 as passed by the Legislative Council.

We submit that this omission be remedied by the proposed bill.

[3] The Right to Information – Reviewing Queensland's Freedom of Information Act, written by the FOI Independent Review Panel of June 2008, p 97

[4] A response to the review of Queensland's Freedom of Information Act, Queensland Government 2008, p 18

The Office of the Information Commissioner

The Queensland Information Commissioner, is currently conducting an External Review of an RTI request submitted by the KWRA to the Brisbane City Council. In a Preliminary View released by the Information Commissioner, she refers to the *Fairfax Doctrine* which was explained by Senior Member (SM) Bayne of the Administrative Appeals Tribunal (AAT) in *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd.*

It is clear that the Information Commissioner considers CNI to be a public body:

> It is my preliminary view that CNI, as a corporate entity wholly owned by government with a board the majority of whom are public servants, is a 'public body' for the purposed of the *Fairfax* Doctrine.[5]

The public has a right and proper expectation that they may have transparency of an agency which is procuring a vast public infrastructure project. As the Information Commissioner states, the public interest considerations outweigh any such harms, namely:

- enhancing the transparency of CNI's operations, an entity wholly-owned and controlled by the State,
- permitting better public scrutiny of the performance of CNI as a vehicle for government action,
- allowing the community to assess whether the 'special purpose vehicle' model delivers better outcomes and value for money as against public infrastructure development by government agencies,
- revealing background and contextual information that informed various government decisions on significant infrastructure projects,
- advancing the public interest in ensuring both CNI and the government participants in CNI are accountable for the manner in which CNI discharges its functions in delivering public infrastructure, including disbursement of significant amounts of taxpayer funds.[6]

I would encourage the Committee to read the Fairfax Doctrine case, particularly paras 25 to 29.

Government Owned Entities Should Be Subject to Right To Information

CNI wields significant power on behalf of the State. The Project Deed which governs the construction of the Airport Link project specifically empowers the CEO of CNI as the State Representative and declares that he acts on behalf of the State at all times.

It is the KWRA's understanding that CNI in tandem with the special powers given to its CEO, made the specific decisions of recommending which homes of north Brisbane residents were to be resumed and which were to remain. CNI holds itself out to be the public interface for interaction with the Project.

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[5] Preliminary Review of External review of decision under the *Right to Information Act 2009*, dated 11 November 2011, p 3.
[6] Preliminary Review of External review of decision under the *Right to Information Act 2009*, dated 11 November 2011, p 3.

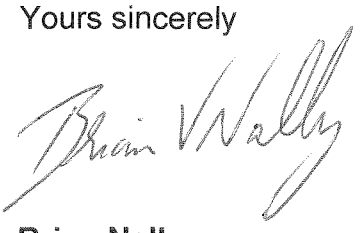
At no stage are the internal processes of CNI open and accountable. It is not possible for a resident to demand the reasons why their home was demolished, with the simple statement that CNI is not subject to RTI, being the only response.

CNI seek to withhold their board minutes, claim the public servants on their board do not hold such positions in a public capacity, respond to correspondence at their whim if at all and refuse to provide any justification on the decisions they make on behalf of the Government.

In a truly democratic society, this is an untenable practice. CNI, wholly Government owned, wholly Government funded, majority public service appointed Board members, majority shareholding in the name of the State of Queensland and responsible for the procurement of multi-billion dollar infrastructure investments by the State, should be subject to the same stringent standard of openness and accountability as any other Government Department.

The KWRA submits that all Government entities, owned or funded by the State, should be subject to the Right To Information legislation in order to allow the public to decide if these vehicles are providing a valid benefit to the State of Queensland. More simply, these corporations should be accountable to allow parents with small children to understand the reasons why their family home had to be resumed and their memories and dreams demolished.

Yours sincerely



Brian Nally
President
Kalinga Wooloowin Residents Association

Encl:

1. Information Commissioner - Preliminary View dated 11 November, 2011
2. Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd.

For correspondence, please reply to:
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~~10~~ 16 November 2011

Mr Brian Nally
Kalinga Wooloowin Residents Association Inc
PO Box 866
LUTWYCHE QLD 4030

Dear Mr Nally

External review of decision under the *Right to Information Act 2009*
Agency: Brisbane City Council

I refer to your recent telephone conversation with Jim Forbes of this Office. The purpose of this letter is to update you on progress in this external review, and inform you of my preliminary view.

Information in issue

The information in issue consists of 1016 documents, comprising City North Infrastructure Pty Ltd (**CNI**) board papers.

As Mr Forbes explained to you, there are certain segments of information appearing across these documents that may arguably comprise exempt information or information the disclosure of which would, on balance, be contrary to the public interest. This information comprises:

- various references to Cabinet Budget Review Committee deliberations and decisions (which may qualify for exemption under section 48 and schedule 3, section 1 of the *Right to Information Act 2009* (Qld) (**RTI Act**)), and
- personal information including names and residential addresses of various individuals, and summaries of individuals' dealings with government.

I confirm your advice to Mr Forbes that KWRA does not seek access to information of this kind. Accordingly, it is not in issue in this review.

Grounds for refusal of access

As you are aware, Brisbane City Council (**the Council**) refused access to the documents in issue in this review on the basis

- the documents comprise exempt information under section 48 of the RTI Act, as documents the disclosure of which would found an action for a breach of confidence[1] and/or

[1] In accordance with schedule 3 section 8 of the RTI Act.

- disclosure of the documents would, on balance, be contrary to the public interest under section 49 of the RTI Act.[2]

City North Infrastructure Pty Ltd (**CNI**) also objects[3] to disclosure of the documents on the same grounds as the Council. Additionally, CNI also contends that:

- the documents are not 'documents of an agency' within the meaning of section 12 of the *Right to Information Act 2009* (Qld) (**RTI Act**) and therefore not subject to the Act
- the Council 'should have refused to deal with the application' under section 41(2) of the RTI Act, on the basis to do so comprises a substantial and unreasonable diversion of the Council's and CNI's resources.

Preliminary view

I have today written to each of the Council and CNI setting out my preliminary view that:

- the documents are subject to the RTI Act
- the information contained in the documents does not meet the requirements for exemption under schedule 3 section 8 of the RTI Act
- based on the information currently before me, disclosure of relevant the documents would not, on balance, be contrary to the public interest, and
- CNI's reliance on section 41 of the RTI Act is misconceived.

My letters to each of the Council and CNI contain references to information claimed to be exempt. Accordingly, I am unable to provide you with copies of that correspondence.[4] I have, however, summarised my preliminary view for your information below.

Documents of an agency

Section 12 of the RTI Act simply requires physical possession by an agency of relevant documents. Council is clearly in possession of the requested documents. Accordingly, I have advised CNI of my preliminary view the documents are subject to the Act.

Breach of confidence exemption.

The requirements for establishing the breach of confidence exemption consist of five cumulative criteria.[5] In this case I am of the preliminary view that not all of the information possesses the necessary quality of confidence.[6]

More significantly, however, is my preliminary view that disclosure of the information would not be likely to cause the particular detriment required in the circumstances of this case.[7] This is because it is my preliminary view that the '*Fairfax* Doctrine' applies in the circumstances of this case.[8]

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[2] And should therefore be refused under section 47(3)(b) of the RTI Act.
[3] I consulted with CNI in relation to the documents in issue by letter dated 20 April 2011. Please note CNI also applied for and has been granted third party participant status in this review.
[4] In accordance with the restrictions imposed on me by section 108 of the RTI Act.
[5] *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279, at paragraphs 57-58 ff.
[6] 'Requirement (b)', ibid, paragraphs 64 -75.
[7] 'Requirement (e)', ibid, paragraphs 107 – 118 and see the analysis of Deputy President Forgie in *Callejo and Department of Immigration and Citizenship* [2010] AATA 244, at paragraph 170.
[8] That is, the principles relating to claims of confidence by government actors as set out in *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39 and *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995)

The Fairfax Doctrine was explained by Senior Member (**SM**) Bayne of the Administrative Appeals Tribunal (**AAT**) in *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd*.[9] SM Bayne considered whether disclosure by a Department of information relating to a proprietary company largely owned by the Commonwealth could qualify for exemption.[10] I have **enclosed** a copy of the decision for your reference, and direct your attention particularly to paragraphs 25-29.

The *Fairfax* Doctrine requires that public bodies claiming that information is subject to an equitable obligation of confidence must demonstrate disclosure of the information would be detrimental to the public interest.[11]

The doctrine requires me to consider whether:

- CNI is a 'public body', and, if so
- the public interest requires nondisclosure of the documents in issue.

Is CNI a 'public body'?

Yes. It is my preliminary view that CNI, as a corporate entity wholly owned by government with a board the majority of whom are public servants, is a 'public body' for the purposes of the *Fairfax* Doctrine.[12]

Does the public interest require nondisclosure of the documents in issue?

In my preliminary view, no.

I have explained to the Council and CNI that, on the information currently before me, I am unable to identify how disclosure of the documents would result in any specific and tangible harm to an identifiable public interest. I have also explained that, even if public interest harms could be identified, it is my preliminary view there are significant public interest considerations in this case which would outweigh any such harms, namely:

- enhancing the transparency of CNI's operations, an entity wholly-owned and controlled by the State,
- permitting better public scrutiny of the performance of CNI as a vehicle for government action,
- allowing the community to assess whether the 'special purpose vehicle' model delivers better outcomes and value for money as against public infrastructure development by government agencies,
- revealing background and contextual information that informed various government decisions on significant infrastructure projects,
- advancing the public interest in ensuring both CNI and the government participants in CNI are accountable for the manner in which CNI discharges its functions in delivering public infrastructure, including disbursement of significant amounts of taxpayer funds.

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183 CLR 10, relevantly applied in *Sullivan v Department of Industry, Science and Technology and Australian Technology Group Pty Ltd* [1997] AATA 192, at paragraphs 25-40, and which were set out in some detail in my letter dated 28 September 2011 concerning external review no. 310542.

[9] [1997] AATA 192.

[10] Under the provision of the *Freedom of Information Act 1982* (Cth) equivalent to schedule 3, section 8 of the RTI Act.

[11] *Callejo*, at paragraphs 170-172.

[12] In accordance with the requirements canvassed in *Sullivan*, at paragraphs 27-29.

In summary, it is my preliminary view that it cannot be said the public interest requires nondisclosure of the documents in issue, and that accordingly the information does not comprise exempt information as claimed by CNI and the Council.

Section 41(2) of the RTI Act – substantial and unreasonable diversion of resources

I have explained to CNI my preliminary view that its reliance on section 41(2) is misconceived. Section 41(2) is not a basis for objection to disclosure by a third party. The discretion conferred by the section is only open to be exercised, relevantly, by an **agency**, not a third party such as CNI.

Contrary to public interest information

Both CNI and Council have also claimed that disclosure of the information would be contrary to the public interest, relying on various public interest nondisclosure and harm factors in support of these claims.

I have explained to each my preliminary view that, on the information presently before me, neither CNI nor the Council have demonstrated that any of these factors arise for consideration in this case. I have also explained that, in any event, even if the various public interest factors and harms cited by Council could be demonstrated to arise for consideration in this case, there are competing public interest factors favouring disclosure of the information in issue (as noted above) deserving of substantial weight. In my preliminary view these factors favouring disclosure would outweigh the factors raised by either CNI or the Council.

Accordingly, on the information currently before me it is my preliminary view that disclosure of the information in issue[13] would not, on balance, be contrary to the public interest.

Next Steps

In view of the number of documents in issue in this review, I have asked Council and CNI to respond to my letters by 8 December 2011.

Given the nature of the documents, I will also write to the following agencies (who as I understand held shares in CNI and/or supplied directors to the CNI board during the period in which the relevant documents were created), seeking their views as to possible disclosure:

- the Department of Transport and Main Roads
- the Department of Employment, Economic Development and Innovation, and
- Queensland Treasury.

I will advise you of each agency's position in due course.

Please note I do not require a response from KWRA to this letter. If you do wish to lodge any submissions, then I ask that you do so by 8 December 2011. As a matter of

[13] That is, information other than the personal information and potentially exempt matter mentioned at the outset of this letter.

fairness, copies of submissions or relevant parts of submissions are provided to each of the other parties participating in an external review.

If you have any questions, you can contact the Office by writing to the above address, emailing administration@oic.qld.gov.au or telephoning Mr Jim Forbes, Special Review Officer, on 07 3405 1111.

Yours sincerely

Julie Kinross
Information Commissioner

Administrative Appeals Tribunal of Australia

⇦ Noel John Sullivan ⇨ and Department of Industry, Science and Technology and Australian Technology Group Pty Ltd [1997] AATA 192 (6 June 1997)

ADMINISTRATIVE APPEALS TRIBUNAL

⇦ NOEL JOHN SULLIVAN ⇨ v DEPARTMENT OF INDUSTRY, SCIENCE AND TECHNOLOGY AND AUSTRALIAN TECHNOLOGY GROUP PTY LTD

No. A95/157
AAT No.
10889A
Number of pages - 25
Freedom of Information

COURT

ADMINISTRATIVE APPEALS TRIBUNAL

GENERAL ADMINISTRATIVE DIVISION

P BAYNE (Senior Member)

CATCHWORDS

Freedom of Information - accessible documents - "documents of an agency" -confidentiality exemption s42 - privilege exemption s45 - sole purpose test - waiver -

Evidence Act 1995

Freedom of Information Act 1982 s11, ss42(1), (2),ss45(1), (2)

Attorney General's Department and Australian Iron and steel Pty Ltd v Cockcroft (1986) 10 FCR 180

Attorney General (NSW) v Quin (1990) 170 CLR 1

Attorney-general (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475

Baker v Campbell [1983] HCA 39; (1983) 153 CLR 52

British Steel Corporation v GranadaTelevision Ltd [1981] AC 1096

Chapmans Ltd v Australian Stock Exchange Ltd (Federal Court, NG 20 of 1994, Tamberlin J, 25 August 1995)

Coco v A N Clark (Engineers) Ltd [1989] RPC 41

Commonwealth v John Fairfax and Sons Ltd [1980] HCA 44; (1980) 147 CLR 39

Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662

Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) [1987] FCA 266; (1987) 14 FCR 434

Department of Health v Jephcott [1985] FCA 370; (1985) 9 ALD 35

Eltran Pty Ltd v Westpac Banking Corporation (1990) 25 FCR 322

Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10

Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83

Grant v Downs [1976] HCA 63; (1976) 135 CLR 674

Harman v Secretary of State for the Home Department [1983] AC 280

Jamieson v GIO (NSW) (1988) 7 MVR 209

Joint Coal Board v Cameron [1989] FCA 437; (1989) 19 ALD 329

O'Brien v Komesaroff 91982) [1982] HCA 33; 150 CLR 310

Quad consulting Pty Ltd v David R Bleakley & Associates 91991) 2f7 FCR 86

Re Burns and Australian National University (1984) 1 AAR 456

Re Clarkson and Attorney-General's Department (1990) 4 VAR 197

Re Colonial Mutual Life Assurance society Ltd and Department of Resources and Energy (1987) 6 AAR 80

Re Dwyer and Department of Finance (1985) 8 ALD 474

Re Geary and Australian Wool Corporation (AAT No 3842 16 October 1987)

Re Griffin (1878) 8 LR (NSW) 132

Re Kamminga and Australian National University [1992] AATA 84; (1992) 15 AAR 297

Re Peters and Department of Prime Minister and Cabinet (No 2) (1984) 5 ALN N306

Re Ralkon Agricultural Company Pty Ltd and Aboriginal Development Commission (1986) 10 ALD

380

Re Smith and Administrative Services Department [1993] QICmr 3; (1993) 1 QAR 22

Re Sullivan and Department of Industry, science and Technology (1996) 23 AAR 59

Re The Fallon Group Pty Ltd and Commissioner of Taxation (AAT, No 10341, 8 August 1995)

Ricegrowers Co-Operative Mills Ltd v Bannerman [1981] FCA 211; (1981) 38 ALR 535

Russell v Russell [1976] HCA 23; (1976) 134 CLR 495

Saltman Engineering Co Ltd v Campbell Engineering Co (1948) 65 RPC 203

Sinclair v Mining Warden of Maryborough [1975] HCA 17; (1975) 132 CLR 473

Sparnon v Apard Pty Ltd (1996) 140 ALR 268

State Bank of South Australia v Smoothdale Ltd (No 2) [1995] SASC 5070; 64 SASR 224

State Government Insurance Commission v Paneros (1988) 48 SASR 349

Trade Practices Commission v Port Adelaide Wool Co Pty Ltd (1995) 132 ALR 645

Trade Practices Commission v Sterling (1979) 26 FLR 244

United States Surgical Corp v Hospital Products International Pty Ltd (Supreme Court, NSW, McLelland J 7 May 1982, ED No. 2094/81)

Waterford v Commonwealth of Australia [1987] HCA 25; (1987) 163 CLR 54

HEARING

CANBERRA, 30 October 1996 (hearing), 6 June 1997 (decision)

6:6:1997

Appearances

The Applicant was self-represented.

Counsel for the Respondent: R R S Tracey QC

Solicitor for the Respondent: Mallesons Stephen Jacques

Counsel for the Party joined: R R S Tracey QC

Solicitor for the Party joined: Mallesons Stephen Jacques

ORDER

In accordance with section 43 the Administrative Appeals Tribunal Act 1975:

1. The decisions under review in relation to the documents described as documents 9, 10 and 13 are affirmed.

2. The decisions under review in relation to the documents 1,4,5,6,7,8,11,16 and 17, are set aside, and in substitution therefore, the Tribunal decides that these documents are not exempt documents.

DECISION

P BAYNE

1. This is an application for review of a decision made on 26 May 1995 by Mr N Hurst, an officer of the Respondent. The background to the request and to the decision made by Mr Hurst is explained in the ruling I made on 26 April 1996 that at the time the Applicant made the freedom of information request which has led to these proceedings, the documents in issue were "documents of an agency" (the agency being the first Respondent); see Re Sullivan and Department of Industry, Science and Technology (1996) 23 AAR 59 at 60-64.

2. It need be said here only that Mr Hurst's decision related to a request made on 19 January 1995 by Dr Sullivan, the Applicant in this matter. Under s 11 of the Freedom of Information Act 1982 (henceforth "the FOI Act", or "the Act") Dr Sullivan sought access to documents which were specified in a schedule to that request; (see T-16 to 18). These documents, some of which contained attachments, were numbered 1 to 18, and this numerical reference system has been adhered to by all concerned in the processing of this request. Some of these documents are no longer in issue and will not be referred to in these reasons.

3. It may make the reading of these reasons easier if I refer to the second Respondent, Australian Technology Group Pty Ltd, simply as ATG. I should add that the two Respondents were represented by Mr Tracey QC, and all of his submissions were made on behalf of both Respondents. The predecessor to the first Respondent was the Department of Industry, Technology and Regional Development (DITARD).

DOCUMENT 1

4. Document 1 comprises copies of minutes of meetings of the directors of ATG held on 14 September 1992, 1 October 1992 and 9 October 1992. These Minutes will, respectively, be referred to as documents 1(i), 1(ii) and 1(iii). They were prepared by Dr Read in his capacity and as part of his duties as a Director and Secretary of ATG, and as a part of his duties pursuant to his full time secondment from the first Respondent to ATG. Copies of this document were made by Dr Read as part of his duties pursuant to his full time secondment to ATG and, in particular, his duties for and on behalf of ATG relating to the conduct of arbitration proceedings involving the Applicant and ATG; see Affidavit of Jeffrey Maxwell Read, sworn 23 January 1996 ("Read affidavit") paras 20 and 21.

DOCUMENT 1(I) - THE MINUTES OF 14 SEPTEMBER 1992

5. In respect of document 1(i) - the minutes of 14 September 1992 - it is only paragraph 8 that is in issue. The Respondents argue that this matter is exempt under section 45 of the Act. Section 45 provides that:

(1) A document is an exempt document if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence.

(2) Subsection (1) does not apply to any document to the disclosure of which paragraph

> 36(1)(a) applies or would apply, but for the operation of subsection 36(2), (5) or (6), being a document prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his or her duties, or by a prescribed authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure would constitute a breach of confidence owed to a person or body other than -
>
> (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency: or
>
> (b) an agency or the Commonwealth.

6. In essence, the Respondents argued that the disclosure of the document by the first Respondent under the Act would "found an action" by ATG "for breach of confidence". Both parties addressed this issue in terms of the analysis by the Tribunal in Re Kamminga and Australian National University [1992] AATA 84; (1992) 15 AAR 297 at 304ff. Justice O'Connor, then the President of the Tribunal, adopted (at 304) the approach stated by Gummow J in Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) [1987] FCA 266; (1987) 14 FCR 434 at 443:

> It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information: Saltman Engineering Co Ltd v Campbell Engineering Co (1948) 65 RPC 203 at 215; [1963] 3 All ER 413n, at 415; The Commonwealth v John Fairfax and Sons Ltd [1980] HCA 44; (1980) 147 CLR 39 at 50-51; O'Brien v Komesaroff [1982] HCA 33; (1982) 150 CLR 310 at 326-328. It may also be necessary, as Megarry J thought probably was the case (Coco v A N Clark (Engineers) Ltd [1969] RPC 41 at 48), and as Mason J (as he then was) accepted in the Fairfax decision was the case (at least for confidences reposed within government), that unauthorised use would be to the detriment of the plaintiff.

7. I am satisfied from a reading of the matter in issue in document 1(i) that it contains information which has the requisite degree of specificity.

8. The debate has centred on whether the matter now possesses the quality of confidentiality. I am satisfied that it did so at the time it was created; (see Read affidavit paras 21 and 22.) The difficulty with the application of s 45 arises because the document was produced on the arbitration between the Applicant and ATG pursuant to a subpoena obtained by the Applicant (Dr Sullivan) addressed to ATG; (see para 7 of the affidavit in these proceedings of Robert Harbour dated 24 January 1996 and table "G" thereto). The Applicant was permitted to inspect the document upon his legal representatives giving the "usual undertaking". In evidence to the Tribunal, the Applicant accepted that he later came to understand that this undertaking had the effect that he could not make use of the document except for purposes connected with the arbitration; (see Transcript of 1 February 1996, at 95). The document was then tendered in evidence by both parties in the arbitration proceeding. This tender occurred in two ways, firstly, by virtue of the fact that the document was part of Exhibit 3 to the affidavit in the arbitration proceedings of Dr Read dated 17 October 1993; (see para 9 of the affidavit in these proceedings of Robert Harbour dated 24 January 1996 and table "H" thereto). Secondly, by virtue of the fact that the document was annexed to an affidavit in the arbitration proceedings of Dr Sullivan dated 14 September 1993; (see para 9 of the affidavit in these proceedings of Robert Harbour dated 24 January 1996 and table "H" thereto, and noting that errors in

table "H" were corrected by counsel for the Respondents in this matter at Transcript of 31 January 1996, at page 20). There was no dispute between the parties that the various affidavits which were prepared for the arbitration proceedings had been put into evidence in those proceedings. The Applicant made several statements to that effect, and these statements were not challenged by the Respondents. In addition, there was no evidence before me (and neither Respondent sought to maintain) that the arbitrator required ATG to produce the documents which were appended to the affidavits, or that ATG sought from the arbitrator any order limiting the further disclosure of the documents.

9. As I have noted, the Applicant was permitted to inspect document 1(i) upon his legal representatives giving the "usual undertaking". This is also true in respect of the other documents in issue which were produced in the arbitration proceedings upon a return of a subpoena. I should add that at the hearing of this matter on 31 January and 1 February 1996 evidence was given by Dr Read and by the Applicant as to the circumstances in which the latter gave an undertaking in respect of his use of the documents produced upon a return of a subpoena. Their evidence was in conflict. The evidence was directed to providing the factual basis upon which I could evaluate an application by the Applicant that his counsel should be permitted to look at the documents in issue. This application was made because it was clear that the Applicant and his solicitors were aware of the contents of the documents. The application was strongly opposed by the Respondents, who argued that if granted there would be involved a breach of the undertakings given by the Applicant. In the end, the Applicant withdrew the application, and I was not called upon to make a ruling. I have however reviewed this evidence. Given its inconclusive nature, I find that it does not enable me to find any more than that the Applicant's counsel gave the verbal undertaking which the Applicant accepts was given.

10. The Applicant argued that in these circumstances, the document had lost the quality of being confidential. The Applicant referred to a number of cases in which the courts have addressed in a number of contexts the general question of the confidentiality which attaches to documents produced and tendered into evidence in a private arbitration. The starting point is the decision of the High Court in Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10 (and I have been guided in my understanding of this decision by the analysis of it by Kirby P in Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662). In Plowman, Mason CJ said that

> It is well settled that when parties submit their dispute to a private arbitral Tribunal of their choice, in the absence of some manifestation of a contrary intention, they confer upon that Tribunal a discretion as to the procedure to be adopted in reaching its decision. ... No doubt the conferral of that power upon the Tribunal is incidental to the power which it is given to determine the dispute submitted to the Tribunal. .... [I]ndependently of statute, arbitrators had authority to exercise that power.
>
> There is no reason to doubt that an arbitrator in the exercise of power with respect to procedural matters, can decide who shall be present at the hearing of the arbitration. ... But that power is not a free-standing power; it is a power to decide who is entitled to attend, having regard to the provisions of the relevant contract.

11. In Cockatoo Dockyard, (at 678-679) Kirby P pointed out that in Plowman Mason CJ drew

> a distinction between the privacy of the arbitration (which sustained its conduct in private, "strangers" being excluded) and the confidentiality of material submitted in the course of the arbitration. Mason CJ was careful [at CLR 29-30] to chart the limits:
>
> "An obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a

> provision to that effect in their arbitration agreement. Importantly, such a provision would bind the parties and the arbitrator, but not others. Witnesses, for example, would be under no obligation of confidentiality. Absent such provision, it is difficult to resist the conclusion that, historically, an agreement to arbitrate gave rise to an arbitration which was private in the sense that strangers were not entitled to attend the hearing. Privacy in that sense went some distance to bringing about confidentiality ... (t)hat confidentiality, though it was not grounded initially in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution. There is, accordingly, a case for saying that, in the course of evolution, the private arbitration has advanced to the stage where confidentiality has become one of its essential attributes so that confidentiality is a characteristic or quality that inheres in arbitration.
>
> Despite the view taken in Dolling-Baker [v Merrett (1990) 1 WLR 1205], and subsequently by Coleman J in [Hassneh Insurance (v Mew (1993) 2 Lloyd's Rep 243)], I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purpose of the arbitration."

12. The Respondents argued that in as much as document 1(i) was produced in the arbitration in answer to a subpoena to produce and upon the "usual undertaking" by the Applicant (through his counsel), the confidential quality of the matter in the document was preserved.

13. Before me, there was discussion of decisions which have addressed the consequences which follow when a document produced in answer to a subpoena is then tendered in a curial proceeding; (in what follows, I have drawn upon the analysis in Chapmans Ltd v Australian Stock Exchange Ltd (Federal Court, NG 20 of 1994, Tamberlin J, 25 August 1995). In Eltran Pty Ltd v Westpac Banking Corporation (1990) 25 FCR 322, Pincus J held that when documents are subpoenaed and go into evidence in legal proceedings, they can be used in later legal proceedings unconnected with the earlier proceedings (at 325). In that case the Respondent sought orders to strike out parts of a statement of claim as an abuse of process because they had been prepared on information from documents obtained by subpoena in earlier criminal proceedings. His Honour refused the application and distinguished Harman v Secretary of State for the Home Department [1983] AC 280 on the ground that it involved a situation where documents obtained by compulsory court process were read out in open court but later excluded from evidence ((1990) 25 FCR 322 at 324). Justice Pincus considered that it would have been contrary to the fundamental principle of open justice to hold a person in contempt for using documents admitted into evidence in other proceedings (ibid, citing Russell v Russell [1976] HCA 23; (1976) 134 CLR 495 at 520 per Gibbs J).

14. Justice Pincus also referred to the decision of McLelland J in United States Surgical Corp v Hospital Products International Pty Ltd (Supreme Court, NSW, McLelland J, 7 May 1982, ED No. 2094/81 - reported in NSW Supreme Court Procedure at 8571) in which the latter held that, as between the parties, documents obtained by compulsory court process lose their confidentiality when they are admitted in evidence in a court. Justice McLelland said that

> As between the parties such documents have lost their confidentiality by being admitted in evidence in open court in the (at least notional) presence of the public and of the plaintiff, and there is every reason why in such circumstances they should be available for the purpose of the related litigation in the United States; (quoted in Chapman's Ltd v Australian Stock Exchange, above)

15. In the matter before me however, the issue is whether documents obtained by compulsory process lose any quality of confidentiality they might possess at the time when they are admitted in

evidence in an arbitration proceeding. The principles applied in cases such as Eltran Pty Ltd do not apply directly to an arbitration proceeding which is private in the sense indicated by Mason CJ. But, as Mason CJ said in Plowman, it does not follow from the principle that "strangers" are excluded from the proceeding that material submitted in the course of the arbitration remains confidential. The Chief Justice said that "if the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement": 183 CLR 10 at 29. He added that such a provision would not bind others such as witnesses.

16. Turning now to s 45 and the facts, it is true that the Applicant was permitted to inspect the document for the purposes of the arbitration upon his legal representatives giving an undertaking to the effect that he could not make use of the document except for purposes connected with the arbitration. So far as concerns the disclosure pursuant to the subpoena, it may well be that there was an obligation in confidence upon Dr Sullivan not to disclose the document. But this undertaking did not bind any others. Nor did it apply to any documents or oral evidence adduced in evidence. There was no evidence before me on the score of just who may have become aware of the contents of document 1(i), although it may be presumed that upon its introduction into evidence the arbitrator and any reporters became so aware. It may well be the case that one or more witnesses were made aware of the contents of the document. (I should note that in freedom of information proceedings, a party who maintains that a document is exempt carries the onus of proof in that respect; see s 61 of the FOI Act.)

17. An arbitration proceeding is private in the sense that it is not open to the public. But, subject to the effect of any agreements to the contrary, any information adduced in evidence in the course of the arbitration is not impressed with the quality of being confidential. Once adduced in evidence, the communication is no longer secret and thus no longer confidential. It is true that disclosure is not in the notional presence of the public, but it is still a disclosure which removes the confidential quality of the document because the disclosure must have been made to persons who were not obliged to maintain that confidential quality.

18. In this connection it is useful to have regard by way of analogy to the circumstances in which a communication which is of such a nature as to attract legal professional privilege may lose that quality by reason that it loses the quality of confidentiality. In the words of Wigmore, the reason for prohibiting the disclosure of a communication which attracts the privilege

> ceases when the client does not appear to have been desirous of secrecy. "The moment confidence ceases," says Lord Eldon, "privilege ceases." [Parkhurst v Lowten [1819] EngR 598; (1819) 36 ER 589 at 596] ... One of the circumstances by which it is commonly apparent that the communication is not confidential is the presence of a third person who is not the agent of either the client or the attorney [footnote omitted] (Wigmore on Evidence (McNaughton rev, 1961) at 599-602, and see Re Griffin (1878) 8 LR (NSW) 132 at 143 per Innes J).

19. The situation here is that a body (the first Respondent) which is subject to the FOI Act has come into possession of a document which was tendered in evidence. I find that the document lost its confidential quality upon its being tendered in evidence by the person entitled to maintain that quality. Thus, it would not be a breach of confidence were the first Respondent to disclose the document pursuant to a request under the Act. Section 45 is therefore not applicable.

20. In order to avoid repetition below, I note here that this analysis is relevant to the question whether s 42 of the Act exempts those documents in issue which were adduced in evidence on the arbitration. By reason that upon such a document being tendered in evidence it lost its confidential quality, and any legal professional privilege which attached to the document was also lost by reason of being waived.

21. I leave aside as irrelevant the fact that the disclosure under the Act will be to the Applicant. The undertaking he entered into upon the return of the subpoena operates only in respect of documents thereby disclosed to him. It cannot operate in respect of his use of the FOI Act to obtain disclosure.

22. I should add that I considered whether s 45 was not applicable by virtue only of the fact that the document had been provided to the Applicant in response to the subpoena. In this connection, I had regard to Joint Coal Board v Cameron [1989] FCA 437; (1989) 19 ALD 329, a unanimous decision of the Full Court of the Federal Court. The court held that s 45 did not apply where the person to whom the information in the document was to be disclosed pursuant to the request under the Act was a person who had in the first place supplied the information to the confider. (The situation before the court was one in which the confider had then later provided the information to the confidee in circumstances which impressed an obligation of confidence upon the confidee). The court reasoned that in the application of s 45 was necessary to ask both (i) whether the information in question had the quality of confidentiality at the time it was communicated, and (ii) whether "the confidentiality [was] intended to be absolute or limited only?" (at 339). The answers to these questions were essentially ones of fact, and depended upon "an analysis of all relevant circumstances: see Department of Health v Jephcott [1985] FCA 370; (1985) 9 ALD 35; 62 ALR 421 at 425" (ibid). The court said that the second question should be answered in terms of whether it was of "the intention of the parties at the time of the communication of the information that the recipient should be at liberty, consistently with the confidence reposed, to divulge the information to a limited class of persons: see Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180 at 191-2)" (at 339). In the case before me however, I could not conclude that it was the intention of ATG when it disclosed the document to the first Respondent that the latter be at liberty to disclose the document to Dr Sullivan.

23. The Applicant also argued that, having regard to the circumstances in which document 1 was provided by ATG to the first Respondent (or its predecessor), it was not communicated in a manner which impressed upon the first Respondent an obligation to treat it as confidential. In this respect the Applicant relied on my ruling that all relevant parts of documents 1, 3, 9, 10, 11 and 16 were "received in the agency" (Tribunal ruling of 26 April 1996, (1996) 23 AAR 59 at 78). In particular, he submitted that it was clear from paragraph 15 of Dr Read's affidavit, and from an examination of the file request forms and file covers, that the provision of these documents to the first Respondent by ATG in about January/February 1994 was not associated with any confidentiality limitation. The files on which the documents were placed were requested to be, and were, "UNCLASSIFIED" departmental files. These files were made available in April 1994 to Mr Meadowcroft who in his oral evidence stated that he would, if requested, have made them available to the Secretary of the Department. He argued that as unclassified departmental files they would be available to any departmental officer who requested them. Thus, the Applicant submitted that ATG made each of these documents available to the first Respondent under conditions involving no confidentiality restrictions, and accordingly ATG could not found an action for breach of confidence consequent upon disclosure of these documents under the FOI Act.

24. I do not accept these submissions. Having regard to the circumstances under which these documents were placed in the files of the predecessor to the first Respondent (see (1996) 23 AAR 59 at 75-76), I infer that both ATG and the first Respondent would have assumed that the documents retained their quality of confidentiality.

25. Should I be in error in the conclusion reached at paragraph 19, I turn now to consider another basis upon which I might find that disclosure under the Act by the first Respondent could not found an action for breach of confidence by ATG against the first Respondent. In Plowman, Mason CJ indicated that in respect of matter provided in and for the purposes of arbitration to which an obligation of confidence attaches

> there may be circumstances, in which third parties and the public have a legitimate

> interest in knowing what has transpired in an arbitration, which would give rise to a "public interest" exception. The precise scope of this exception remains unclear.
>
> The courts have consistently viewed governmental secrets differently from personal and commercial secrets [A-G v Jonathan Cape Ltd (1976) QB 752; The Commonwealth of Australia v John Fairfax and Sons Ltd [1980] HCA 44; (1980) 147 CLR 39, A-G (UK) v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86, A-G v Guardian Newspapers (No 2) [1990] 1 AC 109]. As I stated in The Commonwealth of Australia v John Fairfax and Sons Ltd [(1980) 147 CLR at 51], the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure [ibid at 52].
>
> This approach was not adopted by the majority of the House of Lords in British Steel Corporation v. Granada Television Ltd [[1981] AC 1096], where the confidential documents in question revealed the internal mismanagement of a statutory authority. In passing, the majority attributed to the public interest exception a very narrow scope, stating that, although disclosure was of public interest, it was not in the public interest [ibid at 1168-1169]. I would not accept this view. The approach outlined in John Fairfax should be adopted when the information relates to statutory authorities or public utilities because, as Professor [sic] Finn notes, [Finn, "Confidentiality and the 'Public Interest'", (1984) 58 Australian Law Journal 497 at 505] in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?

The Chief Justice further observed that in British Steel Corporation v. Granada Television Ltd [1981] AC 1096 at 1185

> Lord Salmon, in a strong dissent, highlighted the sharp distinction between a statutory authority and a private company: "there are no shareholders, and (the authority's) losses are borne by the public which does not have anything like the same safeguards as shareholders". His Lordship concluded that the public was "morally entitled" to know why the statutory authority was in such a parlous condition.

26. Thus, if ATG is a public body for the purposes of the Fairfax doctrine, the question will be whether I am satisfied that the public interest requires that any matter in document 1(i) which otherwise would found an action for breach of confidence should not be disclosed.

27. I turn first to whether ATG should be regarded as a public body for the purposes of the Fairfax doctrine. A number of matters are relevant in this respect. In his oral evidence (Transcript 32ff) Mr Harbour deposed that ATG is "99% plus" owned by the Commonwealth, and that the Commonwealth has been the sole source of shareholder funds for the ATG. He conceded that the Commonwealth could wind up ATG without any difficulty. Mr Harbour said that the ATG's auditor is the Commonwealth Auditor-General. This by itself is some indication of the public status of ATG. Furthermore, the "Statement" at annexure B to Dr Read's affidavit included documents called "Draft ATG Guidelines" and "Public Interest Safeguards", and the latter in particular indicates the extent of Commonwealth control over ATG's activities.

28. On the other hand, the Respondent pointed to evidence from Mr Harbour that while a public servant and a Senator were directors of this company incorporated under the Corporations Law, the Commonwealth had appointed a majority of the directors from the private sector. Other than through the two non-private sector directors, the Commonwealth had not sought to influence decisions made

by the Board of ATG.

29. There is very little guidance in the case-law as to what bodies may be regarded as sufficiently public in nature as to be affected by the Fairfax doctrine. What was said above by Mason CJ in Plowman indicates that the doctrine applies to "statutory authorities or public utilities". A body such as ATG, albeit that it is a public company almost wholly owned by the Commonwealth, might not in ordinary usage be regarded as a statutory authority or a public utility. But I do not take Mason CJ's reference to "statutory authorities or public utilities" as exhausting the range of bodies beyond government Departments which are affected by the Fairfax doctrine. The Chief Justice approved of the observation of Professor Finn that in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". In a functional sense, ATG is a public sector body.

30. In this connection I have also had regard to the report of the Industry Commission titled Competitive Tendering and Contracting by Public Sector Agencies (report No 48, 24 January 1996 AGPS, Melbourne). The character of public administration has in recent years been altered significantly as a consequence of the growth of the use of competitive tendering and contracting (CTC) as a means for the discharge by government of its functions and obligations. This Industry Commission report is a valuable and authoritative review of this phenomenon and it is appropriate that a body such as this Tribunal should pay regard to its analysis in so far as it bears on the issue under analysis.

31. A 'key message' of the report is that CTC "is about helping public sector managers get best value for money by ensuring that the best provider is chosen for the task at hand" (ibid at 1). It accepted however that "while responsibility to do certain things can be transferred, accountability for the results cannot" (ibid at 4), and it said that "[w]hatever the method of service delivery, a government agency must remain accountable for the efficient performance of the functions delegated to it by government ..." (ibid).

32. The Commission identified a number of means by which accountability might be enhanced through creative use of the contract with the non-government person or body who performs services for or on behalf of government. It also emphasised however that "[a] change from direct to contracted provision ought not to undermine the ability of individuals or organisations to seek redress for decisions or actions for which governments are accountable" (ibid at 6). In a comment of relevance to the law concerning freedom of information in all of its aspects, the Commission said:

> [t]here is sometimes tension between making information on contracting decisions public and protecting confidentiality. While the obligation of the government to be open and accountable may legitimately give way to conflicting considerations of 'commercial sensitivity' in some cases (for example where information contains valuable intellectual property), there should be a preference for disclosure (ibid at 6).

33. It later identified as a "key aspect of accountability"

> ...the transparency of both decision-making by public administrators and the performance of the service provider (whether internal or external). The importance of public access to information was highlighted in a discussion paper released in May 1995 as part of a joint review of the Freedom of Information legislation by the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC):
>
> "Access to government information is a prerequisite to the proper functioning of a democratic society. Without information, people cannot exercise their rights and responsibilities or make informed choices. Information is necessary for government accountability. Limited information can distort the accountability process: governments are questioned about the wrong issues and programs are incorrectly evaluated. Without

> information people cannot make an informed choice at the ballot box and members of Parliament cannot supervise the Executive. [ALRC Freedom of Information, Discussion Paper 59 (AGPS, 1995 pp. 6-7)]" (ibid at 89-90).

34. The Fairfax doctrine rests upon the same premises as an FOI Act, and the Commission's analysis and views support a broad application of the Fairfax doctrine.

35. Having regard to all the matters just specified, I find that ATG is a public body for the purposes of the Fairfax doctrine. The question now is whether I am satisfied that the public interest requires the non-disclosure of document 1(i). Mr Harbour described the functions of ATG in these words:

> ... the company was set up as a private company, with a private board of directors and private staff, to invest the Government's money on behalf of the Government and early stage technology based companies by taking between 20 and 49 per cent equity in those companies by and large and seeking to earn a return over a period of time. It would not only allow us to pay the Commonwealth Government back, but to give them a return on their money and in the same time develop a track record so that we could attract private investors then to come in and carry on the mission of the company.

36. I accept that it is in the public interest that ATG be able to perform these functions efficiently and profitably. It does not follow however that any confidential information directly related to these functions must necessarily not be disclosed. There is still a public interest in ATG being accountable for how it exercises these functions. In this case, the information in the documents relates not to any particular arrangement ATG has made with any "early stage technology based companies" but to the establishment of ATG as a potential partner with such companies. There is nothing in the evidence before me to suggest that ATG's ability to carry out its commercial functions will be compromised if these documents are disclosed.

37. It is also relevant to have regard to the public interest in the disclosure of the documents. This seems to me to be strong. The public has an interest in ascertaining whether ATG has been established on a satisfactory basis and in this respect to hold ATG accountable for its past conduct in this regard. Disclosure of these documents would facilitate such accountability.

38. I should add that I had regard to whether any personal interest of the Applicant should be an added factor in favour of disclosure of the documents. This appears to be relevant, for, as a matter of general principle, the courts have recognised that "the public interest necessarily comprehends an element of justice to the individual": Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 18, per Mason CJ; see too Sinclair v Mining Warden of Maryborough [1975] HCA 17; (1975) 132 CLR 473 at 487 per Jacobs J and at 480 per Barwick CJ. This theory has been applied to the Act. In Re Kamminga and Australian National University [1992] AATA 84; (1992) 15 AAR 297 at 300 it was said that

> [d]eciding whether disclosure is contrary to the public interest requires a balancing of competing interests including the public interest in the Applicant's right to know (Re Peters and Department of Prime Minister and Cabinet (No 2) (1984) 5 ALN N306; Re Burns and Australian National University [(1984) 1 AAR 456], which is a different thing to the Applicant's personal interest in knowing.

39. On the evidence however, I cannot find that there is an argument of any weight that disclosure of the documents to the Applicant will serve his interests in obtaining justice.

40. On balance, I find that the Respondents have not made out a case for saying that there is a public interest in the non-disclosure of the document. Thus, by reason of the application of the Fairfax doctrine, the document is not exempt under s 45.

DOCUMENT 1(II) - THE MINUTES OF 1 OCTOBER 1992

41. Apart of course from its contents, the nature of document 1(ii) is not materially different to document 1(i). Nor are the circumstances in which the Applicant obtained a copy of document 1(ii). This document was tendered in evidence on the arbitration in the same manner as document 1(i). For the reasons given in respect of document 1(i), document 1(ii) is not exempt under s 45.

DOCUMENT 1(III) - THE MINUTES OF 9 OCTOBER 1992

42. In respect of document 1(iii) - being the minutes of the meeting held on 9 October 1992 - exemption is claimed for all of the matter under the heading "4. Finalisation of Guidelines/State Briefing".

43. This document was tendered in evidence in the arbitration proceedings by virtue of the fact that the document was part of Exhibit 3 to the affidavit in the arbitration proceedings of Dr Read dated 17 October 1993; (see para 9 of the affidavit in these proceedings of Robert Harbour dated 24 January 1996 and table "H" thereto). For the reasons given in respect of document 1(i), document 1(iii) is not exempt under s 45.

44. The Respondent also argued however that the matter at the first three dot points under the heading "4. Finalisation of Guidelines/State Briefing" was exempt pursuant to s 42 of the Act. This section provides:

> (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
>
> (2) A document of the kind referred to in subsection 9(1) is not an exempt document by virtue of subsection (1) of this section by reason only of the inclusion in the document of matter that is used or to be used for the purpose of making of decisions or recommendations referred to in subsection 9(1).

45. This exemption is to be applied by reference to the general law concerning the scope of this privilege. As stated by the Tribunal in Re The Fallon Group Pty Ltd and Commissioner of Taxation (AAT, No 10341, 8 August 1995) at para 85

> Subsection 42(1) of the Act requires the Tribunal to hypothesise the existence of legal proceedings, in the course of which legal proceedings production is sought of the document(s) in respect of which a claim for exemption is being made under the Act. The Tribunal then asks itself whether the document(s) or some part thereof would have been privileged from production in those hypothetical legal proceedings on the ground of legal professional privilege.

46. But what body of law should guide decision-makers and this Tribunal? Is it the common law, or is it the provisions concerning client legal privilege found in the Evidence Act 1995 (Cth)? In some respects, these provisions alter the common law, and the question is one of some general significance.

47. Of course, those who drafted s 42, and the members of the Parliament who passed the draft into law, could not have had in mind the provisions of the Evidence Act. This difficulty might be overcome by saying that the connotation of general law concepts (and of concepts of the public interest and the like) should vary over time. Given the constitutional quality of the Act, this is sensible. But this does not answer the questions posed above because the Evidence Act provisions do not apply to all kinds of legal proceedings. They apply only to evidence which is sought to be

"adduced" in a court. Production in pre-trial contexts is governed by the common law. (This has been accepted by the Federal Court, although it has found a means to resolve the difficulty that a document which might be required to be produced pre-trial might not be admissible on the trial; see Trade Practices Commission v Port Adelaide Wool Co Pty Ltd (1995) 132 ALR 645; Sparnon v Apard Pty Ltd (1996) 138 ALR 735; and BT Australasia Pty Ltd v State of NSW (1996) 140 ALR 268.) On the other hand, s 42 does not distinguish between disclosure pre-trial and disclosure at trial. It refers simply to "legal proceedings". Moreover, at common law, the privilege is not confined to judicial or quasi-judicial proceedings: Baker v Campbell [1983] HCA 39; (1983) 153 CLR 52.

48. It is difficult to justify one choice over the other. In terms of the convenience of the use and administration of the Act, it will be no easier for laypersons to ascertain and understand the case-law under the Evidence Act than is that task under the common law. In Re The Fallon Group (above, at para 85), the Tribunal may have assumed that the provisions of the Evidence Act now governed the application of s 42. With respect however, there seems to me to be a good reason to take a different approach and to find that s 42 should continue to be applied with reference to the common law. This reason is that the disclosure of a document under the FOI Act is more closely analogous to pre-trial disclosure, or to disclosure in an administrative process - in which contexts the common law applies - than to disclosure in the course of a trial. (I have noted that the Administrative Appeals Tribunal of the ACT has concluded that the scope of s 42 under the ACT FOI Act - which parallels s 42 of the Act - is not affected by the Evidence Act; see Re Spier and ACT Electoral Commissioner (ACT AAT, No C95/38, 24 October 1995) at paragraph 19).

49. Thus, to apply s 42, it must first be postulated that it is sought to adduce evidence of the contents of the document in issue in some legal proceeding or context in which a person who is a client may claim legal professional privilege. Then it must be postulated that the client makes a claim that the document is of such a nature that it would be protected from disclosure by the common law doctrines of legal professional privilege. Then, thirdly, that claim must be evaluated.

50. The critical question of fact is whether document 1(iii) is of such a nature that it would be protected from disclosure by the common law doctrines of legal professional privilege. The Respondent argued that the relevant paragraphs of document 1(iii) contained a record of legal advice provided by ATG's solicitors in relation to the Sultech dispute. That advice was provided in a confidential communication made between ATG and its lawyers, for the sole purpose of providing legal advice to ATG in respect of anticipated arbitral proceedings. Thus, it was submitted that the relevant parts of the Minutes would be privileged from production in legal proceedings on the ground of legal professional privilege: Trade Practices Commission v Sterling (1979) 26 FLR 244 at 246. I accept these submissions.

51. The Applicant conceded as much but submitted that ATG did not claim privilege for this document in its discovery in the arbitration. The Applicant referred to Annexure H to Mr Harbour's affidavit and Annexure J to Mr Meadowcroft's affidavit. He further submitted that there had been a general waiver of any privilege attaching to this document by virtue of either or both of (i) ATG's tendering of this document into evidence in the arbitration, and (ii) ATG's provision of this document to the first Respondent. He thus argued that the document was no longer of such a nature that it would be privileged from production in legal proceedings and was not an exempt document pursuant to s 42.

52. There is in the first place a question of whether it is at all relevant in the context of s 42 to consider whether the client has in some fashion waived her or his ability to claim the privilege.

53. The Applicant submitted that s 42(1) of the FOI Act refers to the status of the document at the time an exemption claim pursuant to s 42 is being determined. Thus, a document originally subject to a claim of privilege at the time of its creation would not retain that status if the client had waived her or his ability to make the claim. In these circumstances the document would no longer be of such a

nature that it would be privileged from production in legal proceedings, and not exempt pursuant to s 42. On the other hand, the Respondents argued that it was not relevant in the context of s 42 to consider whether the client has in some fashion waived her or his ability to claim the privilege. They relied upon the decision of the Tribunal in Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy (1987) 6 AAR 80 (see below).

54. The Tribunal has considered this issue on a number of occasions. In Re Dwyer and Department of Finance (1985) 8 ALD 474 at 480 the Tribunal said, with reference to the circumstances in that case, that "it is necessary to consider whether, by virtue of the disclosure of the documents to Mr Monaghan, to the Department and to the Auditor-General and otherwise in the manner described above, the documents have, for the purposes of the FOI Act, lost their privileged nature". In Re Geary and Australian Wool Corporation (AAT, No 3842, 16 October 1987) the Tribunal again considered the issue of waiver of privilege in relation to s 42(1) of the FOI Act. It referred (at 9) to the circumstances in which documents may lose their privileged status and quoted Re Dwyer as the relevant authority. In Re Dwyer and in Re Geary the Tribunal decided however that the documents in issue had been sent and received in circumstances of obligation and had been maintained in confidence by the recipients.

55. But in Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy (1987) 6 AAR 80 at 83 the Tribunal said that the operation of s 42(1) was unaffected by any conduct which in legal proceedings would be regarded as having constituted waiver of legal professional privilege. Nevertheless, the Tribunal went on to consider the extent and nature of waiver that had occurred in that particular matter in making a decision on the s 42 exemption claim before it.

56. There are passages in the decisions of the High Court and the Federal Court which appear to have accepted that it is relevant to address waiver issues in the context of s 42. In Waterford v Department of the Treasury [1985] FCA 29; (1985) 5 FCR 76 the Full Court rejected a proposition that it was necessary to consider whether the disclosure of a document would be contrary to some general public interest. It was in this context that their Honours said that "once it is established that the document falls squarely within the limits of the privilege properly ascertained, the document is protected from disclosure in the absence of waiver" (ibid at 81). It is probably the case that the Court was not required to consider whether or not the absence of waiver was relevant to the application of s 42, but given that in their short judgment their Honours addressed a number of issues surrounding the scope of s 42, it is fair to read the judgment as accepting the view that it is relevant to address waiver issues in the context of s 42. The same may be said concerning the observations of Mason and Wilson JJ in Waterford v Commonwealth [1987] HCA 25; (1987) 163 CLR 54. Again, their Honours were concerned with the scope of s 42, and they addressed an argument that in circumstances where in respect of a document the client might claim public interest immunity as well as legal professional privilege, the limitations of the former doctrine applied to the latter as well. This argument was rejected, and in this context their Honours said: "If the conditions giving rise to legal professional privilege are satisfied, and the privilege is not waived, then the document is not disclosed" (ibid at 64).

57. I should note also that the Information Commissioner of Queensland has accepted that it is relevant to address waiver issues in the application of the similar exemption in the Queensland legislation: Re Smith and Administrative Services Department [1993] QICmr 3; (1993) 1 QAR 22 at 56-57. The same position has been taken in relation to the Victorian legislation: Re Clarkson and Attorney-General's Department (1990) 4 VAR 197 at 198.

58. This body of case-law suggests that it is relevant to address waiver issues in the context of s 42. It is hard to see any policy which would justify reading s 42 in a contrary way. This exemption is designed to ensure that the Act is not a vehicle for causing the disclosure of matter which is of such a nature that the relevant client might make a successful claim of privilege in some other context. It has been said that "[T]he primary rationale for the privilege is to enhance the functioning of the

adversarial system of litigation" (S Odgers, Uniform Evidence Law (2nd ed, 1997) at 201; and see Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475 at 480 per Gibbs CJ. The FOI Act should not be used to undermine the workings of the adversarial system in this respect, but once the client has waived the privilege, s 42 has no purpose to serve.

59. The next question is whether the client, ATG, waived its privilege in respect of document 1(iii). (It is to be noted that this document was not one of the documents produced on the arbitration between the Applicant and ATG pursuant to a subpoena obtained by the Applicant (Dr Sullivan) addressed to ATG - see para 7 of the affidavit in these proceedings of Robert Harbour dated 24 January 1996 and table "G" thereto - and in respect of which the Applicant was permitted to inspect upon his legal representatives giving the "usual undertaking".)

60. Waiver may be express. In the words of Mason and Brennan JJ in Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475 at 487, "[a] litigant can of course waive his privilege directly through intentionally disclosing protected material". In relation to document 1(iii), I find that there was an express and general waiver when the document was tendered in evidence during the arbitration proceedings. Document 1(iii) was tendered in evidence by virtue of the fact that it was part of Exhibit 3 to the affidavit in the arbitration proceedings of Dr Read dated 17 October 1993; (see para 9 of the affidavit in these proceedings of Robert Harbour dated 24 January 1996 and table "H" thereto). "If disclosure is incompatible with the retention of confidentiality, there will ordinarily be a general waiver of privilege [State Bank of South Australia v Smoothdale No 2 Ltd [1995] SASC 5070; (1995) 64 SASR 224 at 228, per King CJ (Mullighan and Nyland JJ agreeing)]": Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83 at 106 per Toohey J. For the reasons given above (at paras 10 to 20) in relation to the law concerning breach of confidence in circumstances where a document is tendered in evidence in an arbitration proceeding, I find that the disclosure which occurred upon the tender of the document in evidence was incompatible with the retention of confidentiality in the document. Once put in evidence, the communication was no longer secret and thus the privilege was waived; cf Grant v Downs [1976] HCA 63; (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ. I thus conclude that document 1(iii) is not exempt under s 42 of the Act.

61. Before turning to the other documents in issue, I should deal here with a submission of the Applicant based on the fact that all of the documents subject to the claim of exemption under s 42 were received by the then Department of Industry, Technology and Regional Development (DITARD) in January/February 1994. The Applicant submitted that ATG was under no obligation or duty to so provide these documents. Nor was that Department under any obligation or duty to receive them. Furthermore, the documents were provided to registry staff in DITARD with no instruction that they should be treated as confidential, but rather with a request that they be placed on unclassified departmental files. Thereafter the files containing these documents would have been generally accessible to any departmental officer, including the Secretary of the Department. The Applicant relied upon Mr Meadowcroft's oral evidence.

62. Thereby, the Applicant submitted, there had been a general waiver of the privilege and that all these documents are no longer of such a nature that they would be privileged from production in legal proceedings. I do not accept these submissions. Having regard to the circumstances under which these documents were placed in the files of the predecessor to the first Respondent (see (1996) 23 AAR 59 at 75-76), I infer that both ATG and the first Respondent would have assumed that the documents retained their quality of confidentiality.

DOCUMENT 3

63. Document 3 is a letter from Dr Read to Mr Peter Tanner, a Director of British Technology Group Ltd. It is dated 26 February 1993. It was created by Dr Read in the course of performing his duties pursuant to his secondment to ATG. Mr Tanner had acted as a consultant for ATG in the State briefing programme. The Respondents submitted that the purpose of the letter was to obtain

information to submit to ATG's lawyers concerning the amount of the fee for Mr Tanner's participation in the ATG State briefing programme. This was one of the issues in dispute between the parties and the subject of claims and counterclaims by the parties in the arbitration proceedings. Dr Read deposed that Mr Tanner was a potential witness in the arbitration proceedings but was not called because of the cost involved in bringing him to Australia. He further deposed that the information that was provided by Mr Tanner in response to Dr Read's letter was used by ATG in the arbitration proceedings. (See generally the Read affidavit, paras 24 and 25.)

64. Access was refused to the passage between the words "fourthly" and "finally" on page 2 of the document, and exemption is claimed under ss 42 and 45 of the Act.

65. The Respondent argued that the relevant passage was written in order to elicit information from Mr Tanner for the sole purpose of passing that information to ATG's lawyers in order that it might be used in the arbitration proceedings. The passage would, therefore, be privileged from production in legal proceedings on the ground of legal professional privilege: Sterling, above at 246.

66. This submission, focussed as it is on parts only of the document, raises a complex issue. To attract the privilege, a document "must be called into being for use in litigation or for advice", and must be one which was "brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings": Grant v Downs [1976] HCA 63; (1976) 135 CLR 674 at 688, per Stephen, Mason and Murphy JJ. (Of course, the privilege may attach to any form of communication, but in the context of the Act, we are concerned with documents.) The sole purpose test "looks to the reason why the document was brought into existence": Waterford v Commonwealth of Australia [1987] HCA 25; (1987) 163 CLR 54 at 66 per Mason and Wilson JJ. It is the motive of the client or legal adviser in the sending or the obtaining of the document which is decisive. A document will not satisfy the test "if it "would have been brought into existence ... in any event" for purposes other than that which attracts legal professional privilege": Waterford at 85 per Deane J, and see Grant v Downs [1976] HCA 63; (1976) 135 CLR 674 at 688 per Stephen, Mason and Murphy JJ. The sole purpose test may be satisfied notwithstanding that the document may contain matter extraneous to the purpose of the communication which attracts the privilege. "The presence of a matter other than legal advice may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact": Waterford at 66 per Mason and Wilson JJ.

67. Extraneous matter might nevertheless be deleted from the document for the purpose of Freedom of Information Act disclosure. There has been some uncertainty about this issue. It was on the basis that the document as a whole must have a relevant sole purpose that the Tribunal has held that deletion under s 22 of the Act is not possible: Re Ralkon Agricultural Company Pty Ltd and Aboriginal Development Commission (1986) 10 ALD 380 at 392-393. Subsequently, the High Court held that there may be deletion of "extraneous matter" in a distinct part of a document to which s 42 applies: Waterford at 66 per Mason and Wilson JJ, at 85 per Deane J and at 103 per Dawson J. I mention all this because I do not think that these passages from Waterford are authority for a proposition that a document is exempt under s 42 even though only part of it would be privileged from production in legal proceedings; (although Re The Fallon Group Pty Ltd and Commissioner of Taxation (AAT, No 10341, 8 August 1995) at para 80 appears to have decided otherwise). Thus, it is not sufficient to focus only upon the purpose behind the inclusion in the document of the matter claimed to be exempt. Rather, the question is why the document was created.

68. On the facts, I find that document 3 was not created for the sole purpose of ATG obtaining information to be passed to ATG's lawyers for use in the arbitration proceedings. Quite clearly, the letter deals with several matters, only the fourth of which appears to be related to the subject of the anticipated litigation. The other three matters are not ancillary to or related to that purpose. Document 3 is not exempt under s 42.

69. If the finding just made were wrong in some respect, I would find, on the same basis as I did in relation to document 1(iii), that there was an express waiver of the privilege when document 3 was tendered in evidence during the arbitration proceedings. Document 3 was tendered in evidence by virtue of the fact that it was Exhibit 24 to the affidavit in the arbitration proceedings of Dr Read dated 17 October 1993; (see para 9 of the affidavit in these proceedings of Robert Harbour dated 24 January 1996 and table "H" thereto). The document was also Annexure 2 to the Applicant's second affidavit in those proceedings of 15 November 1993.

70. In relation to the exemption claim pursuant to s 45, the Respondent argued that the letter was given and received in confidence. I accept this, but for the reasons given in respect of document 1(i), I find that document 3 is not exempt under s 45.

DOCUMENT 4

71. Document 4 is what has been referred to in these proceedings as the "Draft Statement" of 2 April 1993. It is a document which set out and explained ATG's position as of that date in relation to its dispute with Sultech. I accept that it was prepared by Dr Read solely as part of his duties pursuant to his secondment to ATG. Exemption is claimed under s 42 of the Act in respect of the whole of the document.

72. Subject to waiver, the document would be exempt. The draft statement was prepared at an early stage of the arbitration proceedings for and at the request of ATG's lawyers for the purpose of providing them with instructions as to the background and circumstances relating to the dispute between ATG and Sultech. See Sterling, above at 246, and see Dr Read's affidavit, paras 30 and 31. The Applicant argued that this was not however the sole purpose:

> The evidence is that this "draft statement" was also provided to Mr Ferris (T documents at 64) on the day of its creation and shortly thereafter to Mr de Plater of Price Waterhouse (T documents at 89) solely for their "information and records", to Mr Tanner (T documents at 90) for the claimed purpose of soliciting information, and to Mr McLucas (T documents at 94) without any associated request for information relating to this document. I submit that the evidence is that this "draft statement" was not prepared for any sole purpose, but rather was created and used for a multiplicity of purposes some of which would not be circumstances such as to attract legal professional privilege.

73. I do not accept this submission. In the letter to Mr Ferris (T documents at 64), which, as the Applicant says, was created on the same day as the creation of the "Draft Statement" of 2 April 1993, Dr Read wrote that he enclosed a "Copy of a draft Statement I have prepared as input for preparation of ATG's Counter Claim and Statement" and added "('For Your Eyes Only')". This is evidence which supports the claims made in Dr Read's affidavit, paras 30 and 31.

74. So far as concerns waiver, I find that there was no waiver based on the fact that it was sent to Mr Tanner and the other recipients. Based on the circumstances in which the "Draft Statement" of 2 April 1993 was sent, and the contents of the relevant letters, these disclosures amounted only to a limited waiver.

75. The Applicant argued in another way that the privilege otherwise attaching to the document had been waived. He argued that the substance of the "Draft Statement" of 2 April 1993 had been incorporated in either or both of ATG's arbitration pleadings (which are found in the T documents at 77-88) and in a statement in an affidavit of Dr Read which was in evidence in the arbitration. This argument raises the issue of whether there has been an imputed waiver of the document. In Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83 at 96-96 Deane, Dawson and Gaudron JJ said that

> The circumstances in which a waiver of legal professional privilege will be imputed by

> operation of law cannot be precisely defined in advance. The most that can be done is to identify a number of general propositions. Necessarily, the basis of such an imputed waiver will be some act or omission of the persons entitled to the benefit of the privilege. Ordinarily, that act or omission will involve or relate to a limited or purported disclosure of the contents of the privileged material.

76. Their Honours quoted the following passage from the judgment of Mason and Brennan JJ in Maurice at 487-488:

> An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. Professor Wigmore explains:
>
> "[W]hen his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder." [Wigmore, Evidence in Trials at Common Law (1961) vol 8, par 2327, p 636]
>
> In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication of that subject matter: see Great Atlantic Insurance Co v Home Insurance Commonwealth [[1981] 1 WLR 529; [1981] 2 All ER 485]. Hence, the implied waiver inquiry is at bottom focused on the fairness of imputing such a waiver

77. In this matter, there has been no partial disclosure of the "Draft Statement" of 2 April 1993 and I can see no basis upon which any other conduct of ATG would make it unfair that ATG be able to maintain a claim of privilege against any person in some legal proceeding. The document may have been a source of material upon which the arbitration pleadings and the affidavit of Dr Read were prepared, but this use cannot amount to a waiver: see Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475.

78. The Applicant argued that there mere fact that the draft was discovered in the arbitration proceeding constitutes an imputed waiver of the privilege attaching to the documents. I do not accept this submission. A reference to a privileged document in a pleading or in some other document such as a discovery affidavit is not enough to amount to a waiver of the privilege. It is otherwise if there is a reference to the content of the privileged communication; see Quad Consulting Pty Ltd v David R Bleakley & Associates (1991) 27 FCR 86 at 94ff.

79. I find however that for other reasons there has been a general waiver of the privilege which attached to the "Draft Statement" of 2 April 1993. The document was tendered in evidence in the arbitration proceedings by virtue of its being part of an annexure to the Applicant's second affidavit of 15 November 1993 (see para 9 and table "H" of the affidavit of Robert Harbour dated 24 January). Thus, I find that Document 4 is not an exempt document pursuant to s 42 of the Act.

80. In relation to the exemption claim pursuant to s 45, the Respondent argued that the document was created in confidence. I accept this, but for the reasons given in respect of document 1(i), I find that document 4 is not exempt under s 45.

DOCUMENT 5

81. Document 5 comprises a letter dated 2 April 1993 from Dr Read to Mr Peter Ferris, who was Dr Read's successor as Secretary of ATG, and the "Draft Statement" of 2 April 1993. See the affidavit

of Dr Read in these proceedings at paras 28-31. Access was refused to paragraph 4 of the letter and to the "Draft Statement". On this hearing, the Respondent did not advance arguments in support of the claim made for exemption in relation to paragraph 4 of the letter beyond those dealt with by the Tribunal in its earlier decision. In respect of the "Draft Statement", exemption was claimed pursuant to ss 42 and 45 of the Act, and in these respects all of the parties adopted the submissions made in relation to the same "Draft Statement" which is part of document 4. I have found that this document is not exempt.

DOCUMENT 6

82. Document 6 is a Minute paper prepared by Dr Read and forwarded to Drs Bell and Williamson (fellow Directors of ATG) on 22 April 1993. It was sent with a copy of ATG's points of defence and counterclaim in the arbitration. The latter document has been released. On this hearing, the Respondent did not advance further arguments in support of the claim made for exemption in relation to this document beyond those dealt with by the Tribunal in its earlier decision.

DOCUMENT 7

83. Document 7 comprises a letter dated 5 April 1993 from Dr Read to Mr J De Plater, a partner in the firm of Price Waterhouse. It has attached to it the "Draft Statement" of 2 April 1993. See the affidavit of Dr Read in these proceedings at paras 28-31. Access was refused to the letter and to the "Draft Statement". On this hearing, the Respondent did not advance arguments in support of the claim made for exemption in relation to the letter beyond those dealt with by the Tribunal in its earlier decision. In respect of the "Draft Statement", exemption was claimed pursuant to s 42 and s 45 of the Act, and in these respects all of the parties adopted the submissions made in relation to the same "Draft Statement" which is part of document 4. I have found that this document is not exempt.

84. The Applicant also submitted that the Respondent was precluded from claiming any exemption for the attachment part of document 7 by virtue of its exclusion from the Respondent's list of exempt documents in its decisions of 30 March 1995 and 2 May 1995 specifying accessible and exempt documents. This submission raises the matter I mentioned in my ruling of 26 April 1996, and I will repeat here the pertinent facts.

85. On 30 March 1995, Mr Meadowcroft, an officer of the first Respondent, granted access to some of these documents, but refused access in whole or in part to other documents; (see T-19). On 19 April 1995 the Applicant sought internal review of this decision (T-22).

86. On 2 May 1995, Mr Meadowcroft wrote to the Applicant (through the latter's solicitor) to advise the Applicant that, upon the lapse of the period in which a third party (ATG) could have sought review of his decision of 30 March 1995, he, Mr Meadowcroft, had now decided to grant Dr Sullivan access to those documents.

87. This letter was apparently taken by the Applicant as an invitation to inspect those documents (see T-2), and on 4 May 1995 the Applicant attended the offices of the first Respondent for this purpose. This inspection revealed to Mr Meadowcroft that he had, in his decision of 30 March 1995, inadvertently omitted to deal with a number of attachments to some of the documents in issue (T-27). These were the attachments to documents 7, 8, 9 and 12. Thus, by a letter to the Applicant of 4 May 1995 (T-27), Mr Meadowcroft advised the Applicant that he had earlier decided to claim exemption for those attachments and specified why in his view they were exempt. Mr Meadowcroft also proposed that this aspect of his decision of 30 March 1995 be the subject of the internal review which had been sought by the Applicant on 19 April 1995.

88. I cannot find that the first Respondent made a decision that the Applicant have access to these documents. It is enough to refer to what was said by Northrop J in Ricegrowers Co-operative Mills

Ltd v Bannerman [1981] FCA 211; (1981) 38 ALR 535 at 544:

> The mere thought processes taking place in the mind of the person when considering whether or how to exercise a power or to perform a duty of an administrative character under an enactment do not, in my opinion, constitute a decision. In addition to thought processes, there must be some overt act by which the conclusions reached as a result of those thought processes are manifested.

89. In this matter, I am not satisfied that the decision-maker thought that the documents were not exempt and that access should be granted to them under the Act. Indeed, he appears to have thought to the contrary and simply made an error in his letters of 30 March and 2 May 1995. I do not accept the Applicant's submission that the Respondent is precluded from claiming any exemption for the attachment part of document 7.

DOCUMENT 8

90. Document 8 is a letter from Dr Read to Mr Tanner of 6 April 1993. Attached to it is the "Draft Statement" of 2 April 1993. Most of the letter is claimed to be exempt under ss 42 and 45. I will deal with the letter first.

91. By adopting arguments made in relation to document 3, the Respondent argued that the sole purpose lying behind creation of the letter was to elicit information from Mr Tanner for the sole purpose of passing that information to ATG's lawyers in order that it might be used in the arbitration proceedings. In relation to this letter, I find upon inspecting it that this was its sole purpose. Thus, subject to waiver, the document is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege: Sterling, above at 246.

92. I find however, on the same basis as I did in relation to document 1(iii), that there was an express waiver of the privilege when document 8 was tendered in evidence during the arbitration proceedings. Document 8 was tendered in evidence by virtue of the fact that it was Annexure 4 to the Applicant's second affidavit in those proceedings of 15 November; (see para 9 and table "H" of the affidavit in these proceedings of Robert Harbour dated 24 January 1996).

93. In respect of the "Draft Statement", exemption was claimed pursuant to s 42 and s 45 of the Act, and in these respects all of the parties adopted the submissions made in relation to the same "Draft Statement" which is part of document 4. I have found that this document is not exempt.

94. The Applicant also submitted that the Respondent is precluded from claiming any exemption for the attachment part of document 8 by virtue of its exclusion from the Respondent's list of exempt documents in its decisions of 30 March 1995 and 2 May 1995 specifying accessible and exempt documents. I reject this submission for the reasons stated above in relation to the attachment part of document 7.

DOCUMENT 9

95. Document 9 is a letter from Dr Read to Mr John Quinn, a Director of Capital Public Relations, and is dated 7 April 1993. It has attached to it a document entitled "Confidential Communication - Losses Consequent on Failure to Mitigate Losses". Exemption under ss 42 and 45 of the Act is claimed in relation to the 2nd to 5th paragraphs of the letter and the whole of the attachment.

96. The letter was written by Dr Read in the discharge of his duties pursuant to his secondment to ATG. Mr Quinn was a Director of Capital Public Relations which was subcontracted to ATG to provide public relations services. Those services included carrying out some of the tasks that were to have been carried out by Dr Sullivan but for the termination of the performance of Dr Sullivan's

contract; See Read affidavit, paras 39-41. Dr Read deposed that the documents were sent to Mr Quinn in his capacity as a potential witness in the arbitration proceeding for the sole purpose of eliciting information from him concerning an issue in the arbitration, namely mitigation of loss. The information was sought so that it could be passed on to ATG's lawyers for the purpose of the arbitration proceedings. The Respondent submitted that both parts of the document would, therefore, be privileged from production in legal proceedings on the ground of legal professional privilege: Sterling, above at 246.

97. The Applicant disputed the contention that this letter and attachment were sent to Mr Quinn for the sole purpose of eliciting information from him concerning the mitigation of loss claim brought by ATG in the arbitration. He argued that if this were the sole purpose of this communication then the attachment would need to be restricted to matters on which this claimed potential witness could provide information. Even if this argument is correct, it is not possible for me to assess on the state of the evidence whether the attachment was so restricted. There was no cross-examination of Dr Read on this point. I see no reason not to accept Dr Read's evidence as to his intentions in sending these documents to Mr Quinn. Dr Read's oral evidence before the Tribunal that ATG never sought any affidavit from Mr Quinn nor requested him to be a witness for ATG in the arbitration proceedings does not undermine his evidence as to his intentions at the time the documents were created.

98. The Applicant submitted that there has been a general waiver of any privilege which attached to this document by virtue of the provision of this document to the then Department of Industry, Technology and Regional Development. I have rejected this argument (refer paragraphs 61 and 62 above).

99. The Applicant also argued that the substance of the attachment to the letter had been incorporated in either or both of ATG's arbitration pleadings (which are found in the T documents at 77-88) and in a statement in an affidavit of Dr Read which was in evidence in the arbitration. I have rejected this argument that there has been an imputed waiver in relation to the "Draft Statement" of 2 April 1993 (refer paragraphs 75 to 78 above) and for the same general reasons I reject it in relation to this attachment.

100. I thus find that the document is exempt pursuant to s 42, and it is not necessary to explore whether the document is also exempt under s 45.

101. The Applicant also submitted that the Respondent is precluded from claiming any exemption for the attachment part of document 9 by virtue of its exclusion from the Respondent's list of exempt documents in its decisions of 30 March 1995 and 2 May 1995 specifying accessible and exempt documents. I reject this submission for the reasons stated above in relation to the attachment part of document 7.

DOCUMENT 10

102. Document 10 is a letter dated 7 April 1993 from Dr Read to Mr Scott Williams, the Managing Director of Bizvid Pty Ltd. Attached to it is the same document which was attached to document 9. Exemption pursuant to ss 42 and 45 of the Act is claimed in respect of the 2nd to 6th paragraphs of the letter and to the whole of the attachment.

103. The letter was written by Dr Read in the discharge of his duties pursuant to his secondment to ATG. Bizvid was a contractor to Sultech. After the termination of the Sultech contract Bizvid was contracted by ATG to carry out some of the tasks that were to have been carried out by Dr Sullivan. Mr Williams was a potential witness in the arbitration proceedings. He was in a position to give evidence in support of ATG's counterclaim in the proceedings that Sultech failed to mitigate its losses. The letter was written to Mr Williams for the purpose of eliciting information from him in

relation to an issue arising in the arbitration, namely mitigation of loss. The purpose of obtaining the information was so that it could be passed on to ATG's lawyers to assist in the conduct of the arbitration proceedings. The Respondent submitted that both the letter and the attachment would be privileged from production in legal proceedings on the ground of legal professional privilege: Sterling, above at 246. See Read affidavit, paras 43 and 44.

104. In relation to the exemption claim pursuant to s 42, the Applicant made substantially the same submissions (although based on a different factual basis) as he made in relation to document 9 and the attachment. For the reasons given in respect of document 9, I find that document 10 and the attachment are exempt under s 42. For reasons given above at paragraph 78, the fact that ATG did not claim privilege for this letter and its attachment in its discovery in the arbitration proceedings does not amount to a waiver of the privilege. It is not necessary to explore whether the document is also exempt under s 45.

DOCUMENT 11

105. Document 11 is a letter of 3 May 1993 from Dr Read to Mr John McLucas, a Counsellor at the Australian High Commission in London. Attached to that letter was the "Draft Statement" of 2 April 1993. Access was granted to the letter but refused in respect of the statement. I have found above that the statement is not exempt.

106. The Applicant also submitted that the Respondent is precluded from claiming any exemption for the attachment part of document 11 by virtue of its exclusion from the Respondent's list of exempt documents in its decisions of 30 March 1995 and 2 May 1995 specifying accessible and exempt documents. I reject this submission for the reasons stated above in relation to the attachment part of document 7.

DOCUMENT 13

107. Document 13 comprises three parts. The first is a cover sheet dated 22 June 1993 under which Dr Read faxed two documents to Mr McLucas in London. Access was refused to this cover sheet, but in final submissions, the Respondent did not advance arguments in support of this refusal beyond those dealt with by the Tribunal in its earlier decision. The second document is a letter dated 16 June 1993 from Dr Sullivan's solicitors to the solicitors then acting for ATG. Access has been granted to this letter. The third document is a letter dated 21 June 1993 and is from Dr Read to Mr David Toole, a solicitor acting on ATG's behalf, and in this respect exemption is claimed under ss 42 and 45 of the Act.

108. The Applicant conceded, properly in my view, that at the time of its creation the letter of 21 June 1993 from Dr Read to Mr Toole would have attracted legal professional privilege. However he submitted that there has been a general waiver of this privilege by virtue of this letter having been sent to Mr McLucas in circumstances which did not impose an obligation in confidence upon Mr McLucas. Apart from the fact that it was sent to Mr McLucas, there was little direct evidence on this point. Dr Read gave evidence (see his affidavit at para 25) that he believed on legal advice that his communications with potential witnesses would be in confidence. This is of little probative value, as there must be a mutual understanding of confidentiality. The Respondents invoked a public service culture of confidentiality in dealings between the agencies of government. I take notice of this culture, and find that Dr Read and Mr McLucas would have expected that the communication was in confidence.

109. It was also argued (see para 55 of Dr Read's affidavit) "that as the major shareholder of ATG, the Commonwealth (acting through DIST's counsellor, Mr McLucas) had a common interest in relation to the arbitration proceedings". This submission emphasises the close connection between ATG and the Commonwealth, and it provides further support for a finding that an obligation in

confidence was imposed upon or undertaken by Mr McLucas. I am satisfied that there has not been a general waiver of the privilege which attached to the letter of 21 June 1993 from Dr Read to Mr Toole. It is exempt under s 42. There is no need to consider whether it is exempt under s 45.

110. The Applicant also submitted that the Respondent was precluded from claiming any exemption for the attachment part of document 13 by virtue of its exclusion from the Respondent's list of exempt documents in its decisions of 30 March 1995 and 2 May 1995 specifying accessible and exempt documents. I reject this submission for the reasons stated above in relation to the attachment part of document 7.

DOCUMENT 16

111. Document 16 comprises a letter dated 14 July 1993 from Dr Read to Ms Amanda Gorely, a lawyer employed within the Department of Foreign Affairs & Trade. It has attached to it a letter dated 9 July 1993 sent to Dr Read from the then solicitors for ATG. Access was denied to the first sentence of the second paragraph of Dr Read's letter, but on this hearing, the Respondent did not advance further arguments in support of this refusal beyond those dealt with by the Tribunal in its earlier decision. In respect of the letter from the solicitors for ATG to Dr Read, exemption is claimed under ss 42 and 45 of the Act.

112. The Respondents argued that the letter from the solicitors was sent to Dr Read in his capacity as an officer responsible for assisting and instructing in the arbitration proceedings on ATG's behalf. I find that apart from the question of waiver, this letter would be privileged from production in legal proceedings on the ground of legal professional privilege: Sterling, above at 246. The Respondents argued that this letter was sent to Ms Gorely in confidence, for the purpose of passing on legal advice provided by ATG's lawyers to ATG to enable her to respond (i) to the subpoena that had been issued on the Department of Foreign Affairs and Trade, and (ii) to any other problems that may have arisen in her dealing with Dr Sullivan's solicitors in connection with the dispute between ATG and Dr Sullivan.

113. In relation to the claim for exemption under s 42, the Applicant conceded that at the time of its creation the letter from ATG's solicitors to Dr Read was a privileged communication. But he submitted that the letter to Ms Gorely (expurgated extracts from which are at the T documents at 102) makes clear that the transmission of this letter to DFAT was not concerned with any advice from Dr Read as to how DFAT should respond to a subpoena issued on the Applicant's behalf. Rather, it was concerned solely with alleged actions of the Applicant's solicitors combined with an invitation to Ms Gorely to make further use of the document on other occasions. There was no obligation to maintain confidentiality associated with the transmission of this letter to Ms Gorely, and indeed the invitation to make further use of the letter is not consistent with a claim that the letter was sent and received in confidence. He submitted that the transmission of the document for this purpose and under these circumstances constituted a general waiver of any privilege previously attaching to this letter and that the letter was no longer of such a nature that it would be privileged from production in legal proceedings. I accept these submissions.

114. In this respect, the Respondents relied on the same kinds of arguments as they did in relation to the letter from Dr Read to Mr Toole which is part of document 13. In relation to the letter dated 9 July 1993 sent to Dr Read from the then solicitors for ATG, I find that Ms Gorely was not under any obligation to maintain its confidentiality, and by reason of its being sent to her, there was a general waiver of legal professional privilege. The letter is not exempt under s 42.

115. I also find that the document is not exempt under s 45. The letter from Dr Read to Ms Gorely was created in confidence, but its secrecy was lost when it was sent to Ms Gorely in circumstances which did not impose an obligation in confidence upon her.

116. The Applicant also submitted that the Respondent is precluded from claiming any exemption for the attachment part of document 16 by virtue of its exclusion from the Respondent's list of exempt documents in its decisions of 30 March 1995 and 2 May 1995 specifying accessible and exempt documents. I reject this submission for the reasons stated above in relation to the attachment part of document 7.

DOCUMENT 17

117. Document 17 is a letter dated 15 July 1993 from Dr Read to Mr J C H Bond of the Legal Department of the British Technology Group. Access was denied to the first sentence of the second paragraph of Dr Read's letter under s 42, but on this hearing, the Respondent did not advance further arguments in support of this refusal beyond those dealt with by the Tribunal in its earlier decision.

118. The Applicant is at liberty to make an application in relation to costs under s 66 of the FOI Act.
