RECENT DEVELOPMENTS

Katherine Cook

Royal Commission: banks and financial services

The Turnbull government will establish a Royal Commission into the alleged misconduct of Australia's banks and other financial services entities.

All Australians have the right to be treated honestly and fairly in their dealings with banking, superannuation and financial services providers. The highest standards of conduct are critical to the good governance and corporate culture of those providers.

We have one of the strongest and most stable banking, superannuation and financial services industries in the world, performing a critical role in underpinning the Australian economy. Our banking system is systemically strong, with internationally recognised, world's best prudential regulation and oversight.

Ongoing speculation and fear-mongering about a banking inquiry or Royal Commission is disruptive and risks undermining the reputation of Australia's world-class financial system.

The government has decided to establish this Royal Commission to further ensure our financial system is working efficiently and effectively.

Instead of the inquisition into capitalism that some have called for, the Royal Commission will take a conventional, focused approach. It will not be a never-ending lawyers' picnic.

Our approach to banking and financial services reform has focused on ensuring that our financial system is resilient, efficient and fair.

We have moved to establish a new one-stop shop to resolve customer complaints; significantly bolstered the Australian Securities and Investments Commission's powers and resources; created a framework to hold banking executives accountable for their actions; and acted to boost banking and financial services competition for the benefit of customers.

We will ensure that the inquiry will not defer, delay or limit, in any way, any proposed or announced policy, legislation or regulation that we are currently implementing.

The inquiry will consider the conduct of banks, insurers, financial services providers and superannuation funds (not including self-managed superannuation funds). It will also consider how well equipped regulators are to identify and address misconduct. It will not inquire into other matters such as financial stability or the resilience of our banks.

This will be a sensible, efficient and focused inquiry into misconduct and practices falling below community standards and expectations. Most Australians are consumers of banking and financial services, and we all have the right to be treated honestly and fairly by banking and financial services providers.

Trust in a well-functioning banking and financial services industry promotes financial system stability, growth, efficiency and innovation over the long term.

The proposed terms of reference will form the basis of the Letters Patent, terms of which will be recommended to His Excellency, pursuant to the *Royal Commissions Act 1902* (Cth).

<https://www.pm.gov.au/media/royal-commission-banks-and-financial-services>

Final report of Royal Commission into the Protection and Detention of Children in the Northern Territory

On 17 November 2017, the Australian Government welcomed the final report of the Royal Commission into the Protection and Detention of Children in the Northern Territory.

The Commonwealth acted swiftly to establish this Royal Commission in July 2016 following concerns over the treatment of children at the Don Dale Youth Detention Centre.

While most of the recommendations of this Royal Commission are matters for the Northern Territory, the Australian Government will now carefully consider those findings directed to the Commonwealth. Importantly, many of the recommendations have wider implications for all jurisdictions.

The Australian Government thanks the Commissioners, the Hon Margaret White AO and Mr Mick Gooda, as well as their staff, for their work over the past 16 months. We also acknowledge the individuals, expert witnesses and government and non-government representatives who came forward to give evidence.

The government particularly recognises the courage of the children and young people and their families and communities who have shared their views, experiences and personal stories that have been so critical to informing the Royal Commission's findings.

This is a serious report and the government is committed to ensuring that it carefully, comprehensively and appropriately responds to the substantial work of the Royal Commission.

The Royal Commission's final report is available at the Royal Commission into the Protection and Detention of Children in the Northern Territory website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Final-Report-of-Royal-Commission-into-the-Protection-and-Detention-of-Children-in-the-Northern-Territory-17-November-2017.aspx>

Appointments of new Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court

On 10 October 2017, the Commonwealth Attorney-General announced the appointment of the new Chief Justice of the Family Court and the new Chief Judge of the Federal Circuit Court.

Chief Justice of the Family Court of Australia

The new Chief Justice of the Family Court will be the Hon John Pascoe AC CVO, the current Chief Judge of the Federal Circuit Court.

With Chief Judge Pascoe's elevation, Mr William Alstergren QC will become the new Chief Judge of the Federal Circuit Court. Mr Alstergren is the current President of the Australian Bar Association.

Chief Judge Pascoe has served as the Chief Judge of the Federal Circuit Court of Australia since 2004. He will bring to the Family Court a wealth of experience as the head of jurisdiction of the Commonwealth's busiest trial court, which is also the court which deals with most family law matters. The Federal Circuit Court is the largest Commonwealth court, with a current complement of 67 judges. It deals with more than 85 per cent of all federal family law matters.

Chief Judge Pascoe's eminent service to the law and to the judiciary was recognised by his appointment as a Companion of the Order of Australia in January 2016.

Chief Judge of the Federal Circuit Court of Australia

With the appointment of Chief Judge Pascoe as Chief Justice of the Family Court, Mr William Alstergren QC will become the next Chief Judge of the Federal Circuit Court.

Mr Alstergren has practised as a barrister in Melbourne since 1991 and took silk in 2012. His principal areas of practice have included commercial law, tax law, industrial law and family law.

As well as being the current President of the Australian Bar Association, he is a former Chairman of the Victorian Bar. He will bring to the Commonwealth's busiest trial court formidable leadership and legal and administrative skills.

Mr Alstergren has also been issued a joint commission as a Justice of the Family Court of Australia.

Both appointments will commence on 13 October 2017.

On behalf of the government, I congratulate both Chief Judge Pascoe and Mr Alstergren on their appointments.

I also take the opportunity to express my gratitude to the retiring Chief Justice of the Family Court, the Hon Diana Bryant AO, for her lifelong service to the law as solicitor, barrister, senior counsel, Chief Federal Magistrate and Chief Justice of the Family Court.

MR JOHN PASCOE AC CVO

Current office	Chief Judge, Federal Circuit Court of Australia
Previous office	Australian representative to the Hague Conference on Private International Law Experts' Group on Parentage
Education	Bachelor of Laws (Honours), Australian National University
	Bachelor of Arts, Australian National University

MR WILLIAM ALSTERGREN QC

Current office	Queen's Counsel, Victorian Bar President, Australian Bar Association
Previous office	Past Chairman, Victorian Bar
Education	Masters of Laws, University of Melbourne
	Bachelor of Laws, University of Melbourne
	Bachelor of Arts, University of Melbourne

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Appointments-of-new-Chief-Justice-of-the-Family-Court-and-Chief-Judge-of-the-Federal-Circuit-Court-10-October-2017.aspx>

Oversight of the Public Interest Disclosures Act

On 22 November 2017, the Acting NSW Ombudsman, Professor John McMillan, tabled in Parliament his annual report on his oversight of the *Public Interest Disclosures Act 1994* (NSW) (the PID Act).

'The focus of this year's annual report is the operational challenges faced by public authorities', said Professor McMillan.

'We listened to the experience of practitioners and unsurprisingly, their most difficult challenge is to manage the human elements — such as creating an ethical climate that welcomes staff speaking up, and dealing with the heightened emotions of the parties involved in the internal reporting process.'

Authorities come to the Ombudsman for advice and assistance on these issues.

We advise that robust public interest disclosure practices within authorities must be underpinned by clear policies and formal reporting systems.

Throughout the report, we highlight examples of the advice we have given to both public officials and public authorities. 'If contacted at an early stage, we can advise public officials on how to make a report, and practitioners on how to respond to reports, in a way that minimises risks', said Professor McMillan. 'We also provide guidance on whether a report meets the criteria of a public interest disclosure as set out in the legislation.'

In many respects, the technicalities and complexities of the PID Act only heighten the challenges faced by both reporters and practitioners.

The Acting Ombudsman welcomes the Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission Committee's recommendations — in a report tabled on 23 October 2017 — to simplify the legislation so that it better achieves its objective to encourage and facilitate disclosures of public interest wrongdoing and provide broad protection to those who make them.

<https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0011/50321/Media-release-Oversight-of-the-Public-Interest-Disclosures-Act-1994-Annual-Report-2016-17.pdf>

Management of public housing maintenance claims unfair and unreasonable: Victorian Ombudsman

The Department of Health and Human Services is failing to live up to its commitment as a 'social landlord' and wasting public resources through its inept management of maintenance claims at the end of public housing tenancies.

Disadvantaged Victorians are being charged thousands of dollars for the repair of damaged public housing, even when there is no evidence they caused the damage, Victorian Ombudsman Ms Deborah Glass has found.

'The effect on the lives of already disadvantaged people caught up in the department's egregiously unfair processes cannot be overstated', Ms Glass said. 'The stress of a huge debt which could arrive at random, years after the end of a tenancy often comes on top of the social, economic and other challenges already faced by those dealing with disadvantage. There is the powerlessness of the already powerless, pitted against the State: the refusal of services until they enter a payment plan must be one of the most unconscionable acts of a government department I have encountered.'

Ms Glass said her office had uncovered systemic problems in the way the department manages and pursues maintenance claims against former public housing tenants. This included:

- a default practice of raising maintenance claims against former tenants for almost the entire cost of repairing a vacated property, failing to take into account:
    - special circumstances (such as family violence, mental and physical illness or evidence of third party damage); and
    - fair wear and tear and depreciation, which can add up to thousands of dollars;
- sending letters advising former tenants of claims against them to addresses the department knows they have left;
- failing to negotiate with tenants or their advocates;
- in effect, outsourcing to the Victorian Civil and Administrative Tribunal (VCAT) its responsibility to determine a debt, wasting public resources and breaching its responsibility as a model litigant; and
- withholding future housing from former tenants until a payment plan is agreed to.

'The evidence of this investigation is that department staff wrongly assess debts beyond a tenant's liability, send correspondence to an address they know the tenant has left and routinely use VCAT to determine a debt — in breach of their requirement to be a Model Litigant', Ms Glass said.

The department is the highest sole litigant on the VCAT Residential Tenancies List, and more than 80 per cent of claims proceed uncontested. VCAT rarely awards the full amount claimed; in many cases, compensation awarded to the department is half the original claim.

Public resources are also wasted by the department's pursuit of debts against public housing tenants who are 'judgment proof' (where an order for compensation cannot be enforced due to the debtor's financial situation).

The department has accepted all 18 of the Ombudsman's recommendations, committing to many measures, including:

- removing the requirement for applicants to make a debt repayment plan prior to an offer of public housing where the claim is in dispute;

- implementing a change management package to equip department staff with the necessary knowledge, skills and resources so they engage with former tenants when determining the cause of any damage and liability for the repair costs; and
- establishing a high-level user group for public housing services to monitor the implementation of new and improved guidance.

Ms Glass thanked all parties who contributed to the investigation, including public housing tenants, the Tenants Union of Victoria, Justice Connect Homeless Law, the Victorian Public Tenants Association, Victoria Legal Aid, West Heidelberg Community Legal Service, Inner Melbourne Community Legal, VCAT President the Hon Justice Greg Garde, VCAT CEO Ms Keryn Negri, former VCAT President the Hon Justice Kevin Bell and Department of Health and Human Services staff.

<https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Mgt-of-public-housing-maintenance-claims-unfair>

Australians continue to exercise information rights: OAIC Annual Report 2016–17 released

The Office of the Australian Information Commissioner (OAIC) has released its annual report for 2016–17 — highlighting its proactive and engaged approach to privacy and freedom of information (FOI) regulation.

The OAIC continued to deal with a significant workload in its privacy regulator activities, ensuring that businesses and agencies are better placed to meet their responsibilities to communities.

'Developments in technological, social, commercial and government service delivery environments continue to drive increasing community and professional interest in privacy and privacy governance', said Mr Timothy Pilgrim, the Australian Information and Privacy Commissioner.

'This is reflected in the office receiving 17 per cent more privacy complaints than last year.'

But there was also a noticeable increase in businesses showing a commitment to privacy, with a record 369 businesses and agencies signing up to be Privacy Awareness Week Partners — a 49 per cent increase on 2016. Mainstream media attention for Privacy Week has more than tripled compared with 2016, and this also demonstrated privacy as a mainstream community and consumer concern.

Australians continue to be early adopters of new technologies, many of which are reliant on personal information. But Australians also perceive greater risks in interacting with businesses online, and transparency is central to building their trust — as shown in the 2017 Australian Community Attitudes to Privacy Survey.

'That Survey shows 58 per cent of Australians have avoided a business because of privacy concerns and 44 per cent said they had chosen not to use a mobile app for the same reason. These findings reinforce the view that a successful data-driven economy needs a strong foundation in privacy', said Mr Pilgrim.

The office also made progress in resolving more FOI matters, receiving 24 per cent more Information Commissioner reviews — the largest number of applications received by the office since its establishment in November 2010 — and increasing the number of reviews finalised by 13 per cent compared with last year.

'It is interesting to note that 82 per cent of FOI matters received by government departments and agencies are dominated by requests from individuals to access their own information', said Mr Pilgrim.

'While I acknowledge that some are complex cases, it is in the interest, and the efficiency, of agencies to promote and support the right to access one's own personal information held by the agency and to handle these requests administratively where at all possible.'

The report also outlined how the OAIC has been preparing businesses and agencies for the 2018 implementation of both the Australian Public Service (APS) Privacy Governance Code and the Notifiable Data Breaches (NDB) scheme.

'These two important measures will jointly strengthen Australia's privacy governance in both public and private sectors — and represent the most significant updates to our national privacy regulation since 2014.'

For further information about the OAIC, please visit www.oaic.gov.au or follow @OAICgov.

<https://www.oaic.gov.au/media-and-speeches/media-releases/australians-continue-to-exercise-information-rights-oaic-annual-report-2016-17-released>

New QCAT President appointed

The Queensland Attorney-General and Minister for Justice, the Hon Yvette D'Ath, has announced that Supreme Court Justice Martin Daubney will be the new President of the Queensland Civil and Administrative Tribunal (QCAT).

Mrs D'Ath said the three-year appointment would start on 16 October 2017.

'QCAT plays an important role in our justice system, as a way to actively resolve disputes in a fair, accessible, quick and inexpensive manner.

'I thank Justice Daubney for taking on this significant role.'

Justice Daubney was appointed to the Supreme Court in 2007. At the time he was the President of the Bar Association of Queensland.

He was admitted to the Bar in 1988 and appointed Senior Counsel in 2000.

Justice Daubney replaces Justice David Thomas, who resigned as QCAT President in June to become President of the Commonwealth Administrative Appeals Tribunal.

'My thanks to QCAT Deputy President Judge Suzanne Sheridan for her work as Acting President in the past few months', Mrs D'Ath said.

<http://statements.qld.gov.au/Statement/2017/10/6/new-qcat-president-appointed>

Recent cases

Appeal as of right?

BRF038 v The Republic of Nauru [2017] HCA 44 (18 October 2017) (Keane, Nettle and Edelman JJ)

The appellant is from the Awdal province in Somaliland — an autonomous region in Somalia. He is a Sunni Muslim and a member of the Gabooye tribe. In September 2013, he arrived by boat at Christmas Island. He was subsequently transferred to the Republic of Nauru under arrangements between Nauru and Australia.

On 26 February 2014, after arriving in Nauru, he applied to the Secretary of the Department of Justice and Border Control of Nauru (the Secretary) for refugee status. As part of that application, the appellant claimed, among other things, that the Somalian authorities were unwilling to assist him and his family due to their ethnicity. He claimed that there was nowhere in Somalia where he would be safe, as racism, discrimination and militant groups existed across the country. His application was refused by the Secretary.

The appellant then applied to the Refugee Status Review Tribunal (the Tribunal) for a review of the Secretary's decision. On 15 March 2015, the Tribunal affirmed the Secretary's decision. While directly addressing the question whether the appellant had a well-founded fear of persecution because of his membership of the Gabooye tribe, the Tribunal observed that there was country information indicating that there are 'police from every tribe in Somaliland, so [the appellant] would have some redress from the acts of others'.

The appellant 'appealed' to the Supreme Court of Nauru (the Supreme Court) pursuant to s 43(1) of the *Refugees Convention Act* 2012 (Nr) (the Refugees Act). Justice Crulci dismissed his appeal.

The appellant subsequently appealed to the High Court. The appellant contended, among other things, that the Supreme Court erred in failing to hold that the Tribunal's failure to put the substance of the country information relating to the tribal composition of the Somaliland police to him constituted a breach of the requirements of procedural fairness contemplated by s 22 of the Refugees Act. While the respondent accepted that procedural fairness requires a person to be given an opportunity to deal with all information that was 'credible, relevant and significant' to the decision, it also argued that disclosure of such information was only required in relation to 'the critical issue or factor on which the administrative decision is likely to turn'. In this case, the information as to the tribal composition of the Somaliland police was not a factor on which the Tribunal's decision was likely to turn.

Initially, an issue was raised as to whether leave to appeal was required in the High Court, on the basis that the order of the Supreme Court was made in the exercise of its appellate rather than original jurisdiction.

The High Court found that appeals to that Court from the Supreme Court are governed by the *Appeals Act 1972* (Nr) and the *Nauru (High Court Appeals) Act 1976* (Cth). Relevantly, s 44 of the Appeals Act 1972 provides that 'an appeal shall lie to the High Court: (a) against any final judgment, decree or order of the Supreme Court in any cause or matter, not being a criminal proceeding or an appeal from any other Court or tribunal; … and (c) with the leave of the High Court, against any judgment, decree or order of the Supreme Court in the exercise of its appellate jurisdiction'.

The High Court held that the Supreme Court was exercising its original jurisdiction in conducting judicial review of the Tribunal's decision. Notwithstanding the use of the word 'appeal' in s 43(1) of the Refugees Act, it is apparent that the Supreme Court was exercising its original jurisdiction in conducting judicial review of the Tribunal's decision. The Tribunal did not exercise judicial power in conducting its review of the Secretary's decision. Rather, the Tribunal conducted an administrative review of the merits of the case. The decision of the Supreme Court, on appeal from the Tribunal, was therefore an exercise by the Supreme Court of its original jurisdiction. Accordingly, the appeal to the High Court lay as of right.

The High Court unanimously held that the Tribunal's reliance on the tribal composition of the Somaliland police force was integral to the Tribunal's reasons for its conclusion; therefore, its failure to bring the country information to the appellant's attention amounted to a failure to accord him procedural fairness.

The High Court allowed the appeal, set aside the order of the Supreme Court and ordered that the decision of the Tribunal be quashed and the matter be remitted to the Tribunal for reconsideration according to law.

Are the decisions of NSW Ombudsman immune from judicial review?

Kaldas v Barbour [2017] NSWCA 275 (24 October 2017) (Bathurst CJ, Basten JA and Macfarlan JA)

On 6 December 2016, the plaintiff (Naguib (Nick) Kaldas, a former New South Wales Deputy Police Commissioner) commenced proceedings in the Supreme Court of New South Wales before Garling J seeking declaratory and injunctive relief against the defendants (the former NSW Ombudsman and Deputy Ombudsman). The claim arose out of an Ombudsman's report resulting from an investigation known as Operation Prospect. Operation Prospect commenced in October 2012 and four years later culminated in a report which was the subject of these proceedings. The operation was the largest of its kind undertaken by an Ombudsman in Australia. It investigated allegations concerning a broad range of conduct connected to operations of the New South Wales Crime Commission and an operation of the Police Integrity Commission. The allegations included, among other things, the use of false and misleading information in warrant applications and the improper targeting or investigations of individuals.

The plaintiff alleged, among other things, that the Ombudsman failed to accord him natural justice in relation to the adverse findings against him in the report.

The defendants challenged the jurisdiction of the Supreme Court to hear the claims made by the plaintiff, primarily on the basis that the Ombudsman and its officers were immune from the proceedings. Section 35A(1) of the *Ombudsman Act 1974* (NSW) relevantly provides that the Ombudsman 'shall not … be liable whether on the ground of want of jurisdiction … to any civil or criminal proceedings' except in cases involving bad faith. Section 35A(2) similarly provides that such proceedings could not be brought without the leave of the Supreme Court.

Justice Garling referred a number of questions of law to the NSW Court of Appeal, including, but not limited to, whether the plaintiff's claims were precluded by s 35A(1) of the Ombudsman Act.

The Court held that the applicant's claims were wholly precluded by s 35A(1) of the Ombudsman Act.

The Court opined that s 35A is a form of privative clause, which limits the circumstances in which proceedings can be brought against the Ombudsman. However, it is not in the form of a standard privative clause provision, which precludes review of a decision of a specified authority. Rather, it is closer to protective provisions that prevent civil actions against individual officers or authorities.

The Court held that the immunity granted by s 35A of the Ombudsman Act extends to judicial review proceedings in the supervisory jurisdiction of the Supreme Court. The words 'want of jurisdiction' demonstrate an intention by the legislature to exclude personal, and public law, remedies, including those alleging jurisdictional errors. Further, if s 35A did not extend to judicial review proceedings, the power of the Supreme Court to grant leave in s 35B would be unnecessary.

The Court further found that this interpretation is consistent with the Ombudsman's role. The Ombudsman's role is to investigate complaints and make recommendations to the Minister or public authority in question. It recommends rather than adjudicates. This interpretation is also consistent with Parliament's intention that a parliamentary committee, rather than the courts, should oversee the Ombudsman.

Neither confirm nor deny: section 25 of the FOI Act

Re Brooks and Secretary, Department of Defence (Freedom of Information) [2017] AATA 258 (14 February 2017) (Constance DP)

In 2014, Ms Brooks made a request to the Secretary of the Department of Defence (the Secretary) under the *Freedom of Information Act 1982* (Cth) (the FOI Act) for, among other things:

- briefs or correspondence to the Chief of the Defence Force or Minister that outline any aspect of United States Joint Special Operations Group (JSOC) presence or activities in Australia, including but not limited to Swan Island, Darwin and other bases or training facilities, from 1 January 2005 onwards; and
- any documents regarding the training of SAS 4 Squadron by JSOC in interrogation or other intelligence-gathering techniques, whether on Australian soil or elsewhere (including Africa or the US).

In response, the Secretary notified Ms Brooks that, pursuant to s 25 of the FOI Act, 'the mere acknowledgement that a particular document [such as those sought by her] exists, or denying it exists, will ... cause damage similar to disclosing the document itself'. The Secretary claimed that a document setting out such an acknowledgement or denial would be a document exempted from production under s 33 of the FOI Act. Section 33 refers to the exemption of documents affecting national security, defence or international relations.

Ms Brooks has applied to the Administrative Appeals Tribunal (the Tribunal) for a review of the Secretary's decision.

Ms Brooks contended that, in deciding this issue, the Tribunal must engage in a two-step process:

1. It must be determined that Ms Brooks' 'request related to documents that were, or would be if they existed, exempt from disclosure pursuant to s 33'.
2. If it did, would 'the disclosure of the existence or non-existence of certain documents ... of itself cause the Respondent's response to be exempt by virtue of s 33 of the Act'?

The Secretary contended that the FOI Act does not require a decision-maker to make the first determination set out above and that the only inquiry which should be undertaken is that set out in step 2.

In support of this contention, before the Tribunal, the Secretary filed an affidavit of Brigadier Khan. He also gave oral evidence.

In the opinion of Brigadier Khan, the possible consequences of confirming or denying the documents requested by Ms Brooks must be considered in the context of the current threat environment to Australia. In his opinion, the sources of such threats include military forces, foreign intelligence services, violent extremist groups, domestic terrorism, issue-motivated groups and criminal organisations. The level of threat has materially increased in recent years.

Brigadier Khan also gave evidence that the United States is Australia's most important ally in matters of defence and security and has given Australia privileged access to its sensitive and important military and security assets, capabilities and intelligence. The United States is extremely diligent and sensitive about maintaining the confidentiality of its classified information, capabilities and activities. The manner of the handling of sensitive information between the two countries has been formalised by an agreement. As to the consequences of a breach of the requirements of this agreement, Brigadier Khan said, 'Australia's military and security relationship with the US is built on trust that has been developed over many years. That trust, which has been hard won, could be seriously undermined if Defence were to fail to meet, or be perceived it may not meet, its US counterparts'.

The Tribunal found that it is the fact of denial or confirmation of the existence of documents, if that confirmation or denial was itself recorded in a document, which must meet the requirements of s 33 of the FOI Act to be an exempt document. If the requirements of s 33 are met in these circumstances, the agency or Minister is empowered to give the subject notice. At no stage of this process is the agency or Minister required to consider whether there are, in fact, documents which themselves are exempt under s 33 (*Secretary, Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Ltd* [2010] FCA 1442, Forester J). Furthermore, s 25(2) does not require that a 'document' be assumed to exist and then be subjected to the requirements of s 33.

Based on the evidence of Brigadier Khan, the Tribunal was satisfied that documents of such a kind as described above could reasonably be expected to cause damage to the security of the Commonwealth; the defence of the Commonwealth; and the international relations of the Commonwealth. The Tribunal held that on this basis the document would be an 'exempt document' in accordance with s 33 of the FOI Act, and it affirmed the decision under review.