

# FEDERAL FOI DECISIONS

## Administrative Appeals Tribunal

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### KEANE and AUSTRALIAN BROADCASTING CORPORATION (ABC) (No. W93/182)

**D cid d:** 27 May 1994 by T.E. Barnett and R.D. Fayle (Senior Members) and J.G. Billings (Member).

#### Abstract

*Section 7(2) — exemption of documents 'in relation to . . . program material' of the ABC (Part II, Schedule 2) — definition of term 'program material' — application to documents relating to development of drama series.*

*Section 41(1) — 'unreasonable' disclosure of 'personal information' — exemption of first three paragraphs of letter concerning change of script writers.*

#### Issues

Whether documents relating to development of a television drama series were exempt as 'program material' under s.7(2) and Part II, Schedule 2. Whether unreasonable to disclose details of script writers.

#### Facts

The documents at issue before the Tribunal included 'the development proposal and six treatments' concerning the Brides of Christ television program and an August 1988 letter to the then head of ABC television drama concerning the script writers.

#### Decision

The Tribunal denied access to the 'proposal' and 'treatments', finding that they comprised 'program material'. Access to an edited version of the letter was granted, with deletion of the first three paragraphs, and of certain names in the balance of the letter.

#### *Section 7(2) and Part II, Schedule 2 — 'program material'*

The Tribunal found no precedents for the definition of 'program material', and observed that the phrase is not a term of art in the industry. The Tribunal turned to the ordinary meanings of 'program' as 'a particular item or production', and material as 'information, ideas or the like on which a report, thesis, etc. is based' or 'something which can be worked up or elaborated'. On the evidence of the present head of ABC drama, Ms Chapman, who had made the original proposal, the Tribunal concluded that the 'proposal' and 'treatments' related to 'program material' since they 'constitute vital steps in the production of a television production program and that they make up important elements in that process'. The Tribunal noted that the exemption was for 'documents relating to program material' and not merely for program material itself. However, a letter concerning the script writers did not, in the Tribunal's view, relate to such material.

#### *Section 41(1) — 'personal information'*

Regarding the letter, the Tribunal found that the first three paragraphs concerning the change of script writers comprised 'personal information' about those persons, concluding that, 'having taken account of the public interest and the individual right to privacy . . . it would be unreasonable to disclose that information'. The applicant, Mr Keane, did not want access to the names of persons recorded in later paragraphs of the letter which were not exempt, and those names were accordingly deleted.

As it had made the decision on other grounds, the Tribunal found it unnecessary to make formal findings on exemption claims under ss.43 (business affairs) and 45 (breach of confidence), but it indicated its views on the application of those exemptions to the documents in question. It took the view that the proposal and treatments had commercial value to Ms Chapman's company which produced them (see s.43(1)(b)). The

value would be diminished because (a) the documents contained material which had not been broadcast and (b) to disclose the details of Ms Chapman's methods could affect her ability to obtain future contracts by giving her rivals the benefit of using those methods. The Tribunal also accepted that there was a convention of confidentiality regarding unauthorised disclosure of program material and that disclosure of such material might found an action for breach of confidence.

#### Comments

1. This is the first decision which discusses the meaning of the exemption for documents relating to 'program material' of the ABC and the Special Broadcasting Service Corporation. See also the discussion of the reason for the exemption in para. 12.13 of the 1979 Report of the Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information*.

2. In relation to s.41, the Tribunal implicitly found that the professional or work-related details of the script writers could constitute 'personal information' about them. This is consistent with other decisions of the Tribunal following the amendment of s.41 in October 1991 (see *Re Slezankiewicz and Australian and Overseas Telecommunications Corporation (No. 2)*, unreported, 1 July 1992; (1993) 47 *FoI Review* 67 and *Re Stewart and Telstra Corporation*, unreported, 15 April 1994; (1995) 56 *FoI Review* 26). The Tribunal's approach of balancing privacy interests against the public interest in disclosure is the appropriate one (see e.g. *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257 at N259).

**BIRCH and ATTORNEY-GENERAL'S DEPARTMENT (No. W93/193)**

**D cid d:** 3 June 1994 by K.L. Beddoe (Senior Member).

**Abstract**

*Section 32 — each exemption to be given its own meaning, unrestricted by other exemptions.*

*Section 33A(1)(a) — documents relating to extradition proceedings — disclosure could not reasonably be expected to cause damage to relations between the Commonwealth and the States where application to Commonwealth Attorney-General under Extradition Act is the only avenue for States to proceed.*

*Section 33(1)(b) — nature of documents and their subject/matter, 'extradition', lead to conclusion that documents were exchanged in confidence — high level of communication does not necessarily lead to confidentiality — administration of justice is normally a matter of public record.*

*Section 33A(5) — applicant's entitlement to see complaints and arrest warrants issued against him and to know the basis of the extradition proceedings was an over-riding public interest favouring the disclosure of the complaints and arrest warrants but not of the State Attorney-General's letter and the other attachments.*

**Issues**

Whether disclosure of letter with attached complaints, warrants and a summary of the applicant's criminal history from the Western Australian Attorney-General to the Commonwealth Attorney-General seeking extradition of the applicant could reasonably be expected to cause damage to Commonwealth and State relations, s.33A(1)(a). Whether disclosure of confidential communications between those Attorneys-General is in the public interest, s.33A(1)(b) and s.33A(5). Applicant's right to see complaints and warrants against him and to ensure legality of proceedings as a public interest, s.33A(5).

**Facts**

Mr Birch sought access to a letter from the Attorney-General for Western Australia (WA) to the Commonwealth Attorney-General seeking his

extradition from the United Kingdom. He sought these documents to assist him in contesting the validity of his conviction in Australia for the offences for which he had been extradited. In accordance with s.26A of the *FoI Act* the Commonwealth consulted the WA Attorney-General's office which opposed release of the documents contending:

- the documents were confidential communications between the Attorney-General of the State and the Attorney-General of the Commonwealth;
- the letter was to seek the Attorney-General's assistance in respect of the administration of criminal justice; and
- nothing had occurred since to alter its confidential nature — it was important that the State and Commonwealth Attorneys-General be able to communicate freely.

No application was made by WA under s.58F of the Act and WA was not joined as a party to the proceedings.

**Decision**

The Tribunal set aside the decision under review in part. Access was granted under s.33A(5) to copies of complaints and arrest warrants issued in the course of the extradition proceedings. The remaining documents including the letter written by the Attorney-General for Western Australia were held exempt under s.33A(1)(b).

*Section 32 — 'operation of exemption provisions'*

The Tribunal noted that s.32 ensures that each exemption is to be given the meaning its own terms fairly convey and excludes any restrictive implication from the terms of any other exemption (*Austin v Attorney-General's Department* (1986) 67 ALR 585 at 589).

*Section 33A(1)(a) — 'damage to Commonwealth/State relations'*

Section 33A(1)(a) does not require a finding that disclosure would cause damage to relations between the Commonwealth and the States. The paragraph includes the alternative 'or could reasonably be expected to cause such damage'. It is now established that this does not require a probability, though a possibility which fails to meet the level of probability, must be sufficiently tangible to answer to the notion of a 'reasonable

capacity to be expected' (*Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 at 106, *Arnold v State of Queensland* (1987) 13 ALD 195 at 204 and 215).

An application by a State Attorney-General to the Attorney-General of the Commonwealth for the extradition of a person does not involve issues of government policy. The only damage which would result from the public disclosure of the documents would be damage to the case for the prosecution in any trial of a person following their extradition. This was not a factor which was likely to disrupt harmony between the States and the Commonwealth such that it could reasonably be expected to cause damage to their relations (*Arnold v State of Queensland* (1987) 13 ALD 195). The statutory provisions are such that whatever damage may occur or may be perceived to be likely to occur by public disclosure, this cannot change the way in which a State Attorney-General must apply to the Commonwealth Attorney-General for the extradition of a person under the *Extradition Act 1988*. There is no other avenue by which the State can proceed. No issue of relations between the Commonwealth and the State are raised in such an application.

*Section 33A(1)(b) — 'information provided in confidence'*

The Tribunal found that the nature of the documents and the subject/matter (extradition proceedings) led beyond doubt to the conclusion that the Western Australian Attorney-General wrote to the Commonwealth Attorney-General in confidence, and there was nothing in the material to suggest the contrary. The Tribunal applied *Re Mickelberg and the AFP* (1986) 11 ALN 21; (1986) 6 *FoI Review* 79, *Re Reithmuller and the AFP* (1985) 8 ALN 92 and *Re Fryar and the AFP* (1988) 17 ALD 25; (1989) 20 *FoI Review* 21 which made it clear that where documents are exchanged in confidence by a State Government and a Commonwealth agency, the provisions of s.33A(1)(b) apply subject to s.33A(5). However, the Tribunal rejected the validity of an argument that the high level at which the communications had taken place between the Attorneys-General for the Commonwealth and Western Australia also coloured the requirement that the communication was made in confidence. The Tribunal also rejected the proposition that the

administration of justice required that matters be kept in confidence saying that the administration of justice is normally a matter of public record and the day to day workings of the criminal courts are in fact on the public record. What is not on the public record is the preparation of the prosecution's case.

*Section 33A(5) — 'public interest in disclosure'*

The Tribunal noted that it is well established that where a document comes within the exemption in s.33A(1)(b), the primary public interest will be that the document is exempt from disclosure within the terms of the Act. However, where the document is of such a character that in the ordinary course of events, it would have come into the possession of the applicant, or at least would have been seen by the applicant, the Tribunal found there to be an overriding public interest on the following basis :

the complaints and warrants were documents which the applicant would have seen or come into possession of, if he had been residing in Perth at the time and his whereabouts were known to the police;

the applicant was entitled, as a matter of procedural fairness, to see the complaints and warrants and be satisfied that the extradition proceedings were initiated on a basis consistent with his subsequent prosecution as is required by the *Extradition Act*, and

the applicant is entitled to know the basis on which the application for his extradition proceeded.

### Comments

1. The decision does not contain any description of the content of the material in the letter or the remaining attachments held to be exempt, other than the general statement that they contained the evidence relied on for the application for extradition made in the Bow Street Magistrates Court at London, United Kingdom. Without knowing more of the nature of the content, it is difficult to know whether there was material other than that which formed the basis on which the application for his extradition proceeded. No weight appears to have been given to the fact that Mr

Birch had already been tried and convicted of the offences.

2. Western Australia was not a party to these proceedings, nor did WA officials give evidence before the Tribunal. This substantially detracts from the comprehensiveness of the proceedings, as WA had asserted the s.33A exemption particularly strongly and its presence may have resulted in more extensive arguments being put to the Tribunal and consequently a decision which explored more fully the boundaries of this exemption, which is little used nowadays.

3. Mr Birch has lodged an appeal with the Federal Court, against this decision.

### CONNOLLY and DEPARTMENT OF FINANCE (No. A94/50)

**Decided:** 28 June 1994 Deputy President B.J. McMahon.

### Abstract

- *Section 25 — refusal to confirm or deny existence of document — use of provision inappropriate other than in relation to ss.33, 33A or 37(1).*
- *Section 26(2) — held to have been used mistakenly.*
- *Section 39 — 'substantial adverse effect' on 'financial or property interests of the Commonwealth or of an agency' — section satisfied in relation to documents concerning sale of Commonwealth uranium stockpile — harm outweighed public interest in disclosure.*

### Issues

Whether s.25 can properly be applied in relation to ss.39 or 43. Whether effect on 'financial and property interests' 'substantial' and 'adverse'. Whether public interest nonetheless dictated disclosure.

### Facts

Mr David Connolly, MP, Shadow Minister for Privatisation, sought access to documents about arrangements for sale of the Commonwealth's uranium stockpile. These documents included tenders, disposal strategies, and commercial agreements with third parties. The respondent denied access to most documents under ss.36, 39 and 43(1)(c)(i); as to the latter provisions, the respondent cited s.26(2) and refused to confirm

or deny the existence of related documents. The respondent noted that three categories of documents could not be found on file.

### Decision

The Tribunal rejected the purported use of s.26(2) in relation to ss.39 and 43; as to those documents, a reviewable deemed refusal existed under s.56. The Tribunal upheld s.24A in relation to the documents not found. (However, see Comment in para. 1 below.) The Tribunal then affirmed all of the documents remaining at issue as exempt under s.39.

### *Section 25 — refusal to confirm or deny existence of documents*

The Tribunal noted that the respondent, in refusing to confirm or deny the existence of certain documents, had presumably intended to rely on s.25 rather than s.26(2) (concerning non-inclusion of exempt matter in a notice of decision). The Tribunal found, however, that use of s.25 is not open unless the exemptions contained in ss.33, 33A or 37(1) are implicated. The Tribunal found that access to those documents not subject to a proper s.25 claim could be reviewed by the Tribunal under the terms of s.56.

### *Section 39 — financial or property interests of Commonwealth*

The Tribunal considered exemption of all disputed documents under s.39. The Tribunal received evidence concerning the spot market for uranium, the volatility of that market and the implications of spot market prices for contracts obtained by long term suppliers. Given the impact of even a small movement in the spot market on the price to be obtained for the Commonwealth stockpile, the Tribunal found that disclosure would have a 'substantial adverse effect' on the property interests of the Commonwealth. The Tribunal acknowledged the public interest supporting Mr Connolly's request for access, namely the prima facie right of the public to know in general terms how the Government was planning to realise public assets, but found that the preponderant public interest was in the stability of the market price for publicly and privately owned uranium.

### Comments

1. The Tribunal's views on s.25 are correct, and consistent with 'New Fol

Memorandum No. 26' 'Section 26, Notices: Statements of Reasons' (June 1993), paras 88 to 93 (noting that para. 93 suggests an appropriate, but strictly limited, use of s.26(2) in relation to 'confirm or deny' situations). However, the Tribunal assumed that the respondent's use of s.26(2) (a statement of reasons is not required to contain exempt material) was mistaken, whereas in fact it was using it to neither confirm nor deny the existence of documents where to disclose the existence or non-existence of such documents would itself constitute exempt material (as discussed in para. 93 of New Memo 26). In the absence of specific rejection by the Tribunal of this use of s.26(2), its use in those limited circumstances may still be justified.

2. This is the first decision which considers s.39. This is a case involving the property interests, rather than the commercial interests, of the Commonwealth. The stockpile sale is characterised as an asset sale, not an ongoing commercial venture. This is significant, since s.39 would appear to have a more narrow role to play in relation to commercial ventures than does s.7(2), coupled with Part II, Schedule 2, of the Act (see also *FoI Memorandum 39*, paras 4 to 6). The broad range of commercial and quasi-commercial activities in which agencies now engage are more appropriately addressed by means of s.7 and the Schedule.

3. In paras 26 and 27 of its decision, the Tribunal briefly considers the public interest test in s.39(2), which is phrased in the same terms as the similar test in s.40(2). As the s.39 claim is upheld as to all documents, the Tribunal did not consider the other exemption claims made, for example under s.43(1)(c)(i).

#### **WILSON and AUSTRALIAN POSTAL CORPORATION (No. N93/800)**

**Decided:** 11 July 1994 by Deputy President B.J. McMahon.

#### **Abstract**

- *Section 40(1)(c) — application to statements made by employees about an incident concerning fellow employee.*

*Relevance of previous disclosure of documents to applicant under *FoI Act*.*

#### **Issues**

Whether the unauthorised disclosure of documents affects the assessment of the application of exemption provisions under the *FoI Act* — whether the disclosure of statements to management by employees of an agency about a fellow worker would or could reasonably be expected to have an adverse effect on the management or assessment of personnel by the agency — consideration of the public interest in relation to ss.40(1)(c) (s. 40(2)).

#### **Facts**

The applicant, Mr Wilson, sought access to documents relating to an incident which occurred at his place of work, the Northern Suburbs Mail Centre, Australia Post (Sydney). The documents included a number of statements made by employees and supervisors from the Centre concerning the conduct of Mr Wilson and a fellow employee, Mr Mason, on a particular evening. In his application Mr Wilson indicated that he required access to the documents to appeal against a decision by Comcare to cancel a Provisional Improvement Notice. This decision required Mr Wilson's supervisor to withdraw the compulsory counselling Mr Wilson had been given as a result of this incident.

Australia Post granted access to a number of documents identified in the request, but claimed that each of the statements made by employees concerning the incident were exempt under ss.40(1)(c), 41(1) and 45(1) of the *FoI Act*. Australia Post also refused to disclose an additional two statements on the grounds that they did not exist.

Prior to the hearing, Australia Post sought to amend the list of documents originally filed to include a further statement and a memorandum by Mr Hill (Mr Wilson's supervisor) and to remove a statement by another employee on the grounds that it did not fall within the terms of the request.

Prior to the hearing, Mr Wilson was given copies of all of the documents by his colleague, Mr Mason, who had received them as part of evidence in a disciplinary proceeding against him but on condition they be used for no other purpose. As a result Mr Wilson had unauthorised access to the documents prior to the hearing.

#### **Decision**

The Tribunal affirmed the decision of Australia Post to refuse Mr Wilson access to the statements made by employees in relation to the incident at his workplace.

#### **Unauthorised disclosure**

The Tribunal held that the fact the applicant had already had copies of the documents did not assist in characterising the documents for the purposes of exemption claims under the *FoI Act*. It stated that disclosure under the *FoI Act* was different to knowledge of the documents by Mr Wilson, as the former would allow Mr Wilson to rely on the authenticity of the documents and to publish them widely (but see Comment in para. 2 below). The Tribunal then proceeded to consider whether the exemptions claimed by Australia Post had been made out.

#### *Section 40(1)(c)*

The Tribunal noted that before s.40(1)(c) operates to exempt documents, the section requires that the disclosure of a document would (or could reasonably be expected to) have a substantial adverse effect on the management or assessment of personnel by the agency. The Tribunal referred to the decision of the AAT in *Re Dyki and the Commissioner for Taxation* (1990) 12 AAR 544 at 549; (1991) 33 *FoI Review* 34 that the onus of establishing a substantial adverse effect is a heavy one. The Tribunal found that the very generalised evidence provided by one witness and the largely uncontested evidence of another was sufficient to warrant their exemption under s.40(1)(c). In particular, the Tribunal accepted the following claims by Australia Post in support of the exemption under s.40(1)(c):

- the disclosure of the documents would create a reluctance on the part of staff members at the Mail Centre to provide statements in respect of future misconduct or inappropriate behaviour;
- as a consequence, serious incidents would go unreported and management would not be in a position to rectify work-related problems;  
disclosure of such documents would impact detrimentally on the morale of staff members and aggravate feelings of hostility at the Centre and staff would lose trust in the ability of management to

protect their safety and welfare; and

suggestions that some staff may have been threatened for writing about the incident — which indicated the effect disclosure of the documents could have on the Centre.

The Tribunal found that ss.40(2) which removed the possibility of a claim for exemption under s.40 if disclosure, on balance, would be in the public interest, was not satisfied in this case. The Tribunal stated that there was nothing in the documents to suggest that the content of the documents fell within that section.

#### Section 45

The Tribunal found it unnecessary to examine the claim for exemption made under s.45 in light of its decision that ss.40(1)(c) applied to exempt the documents.

#### Comments

1. The Tribunal was correct in continuing to consider the application of the exemption provisions despite the unauthorised disclosure of the document. However, previous authority suggests that the effect of such disclosure should be taken into account when the Tribunal is considering the application of these provisions (*Re Gerald Gold and the Department of Prime Minister and Cabinet* unreported 26 and 27 April 1993). It is suggested that many of the factors identified by Australia Post would have been of lesser effect or would have occurred regardless of the decision to disclose the document, in light of their previous unauthorised release to Mr Wilson.

2. Whilst it is correct that disclosure under the *Fol Act* is said to be 'disclosure to the whole world', this does not mean that the applicant's use of the documents is unrestricted. Use by the applicant is still subject to the general law of maintaining confidences, copyright, defamation etc.

3. The decision of the Tribunal does not refer to the recent AAT decision of *Re Marr and Telstra Corporation Ltd* unreported, 29 October 1993, in which the Tribunal held that statements lodged by the applicant's fellow employees and supervisor about him were not all exempt under s.40(1)(c) and that it was in the public interest to release some of these documents. The reasoning of the Tribunal in *Re Marr and Telstra Corporation Ltd* is in conflict with the

present decision, particularly in light of the similarity between the documents in both cases.

4. In considering the application of s.40(1), the Tribunal refers to the term 'substantial' as discussed in *Re Dyki and the Commissioner for Taxation*, but then accepts unquestioningly that the evidence before it fulfilled the requirements of that term. In *Re Marr and Telstra Corporation Ltd*, the AAT explained that the term 'substantial' 'indicates a degree of gravity must exist' and that 'there is a difference between there being some undesirable effects of disclosure, on the one hand, and a substantial adverse effect on the other'. In the present case the Tribunal does not appear to have made this distinction.

5. Finally, it is suggested that the Tribunal could have examined the documents more closely to see whether the documents could have been released with deletions rather than simply allowing the exemption of entire documents as part of a class (refer to decision of the Tribunal in *Re Marr and Telstra Corporation Ltd*).

#### CYCLISTS' RIGHTS ACTION GROUP and DEPARTMENT OF TRANSPORT (No. A93/108)

**Decided:** 29 July 1994 by K.L. Beddoe (Senior Member).

#### Abstract

- *Section 33A(1)(a) — damage to Commonwealth/State relations — evidence of damage equivocal — disclosure of document could not reasonably be expected to cause damage to relations between the Commonwealth and a State.*
- *Section 33(1)(b) — information communicated in confidence — inter-Ministerial Council meeting conducted in confidence for the purpose of communicating information in confidence from the State Governments to the Commonwealth.*
- *Section 33A(5) — public interest — no overriding public interest in disclosure of documents — public interest in maintenance of confidentiality of council meetings.*

*Section 36(1) (a) and (b) — deliberative process documents — s.36(1)(a) applied to the record of the Council's deliberations of which the Commonwealth input*

*was a part — public interest favoured non-disclosure (s.36(1)(b)).*

#### Issues

Whether information had been communicated in confidence by States and Territories (s.33A(1)(b)), and whether its disclosure would damage Commonwealth-State relations (s.33A(1)(a)). Whether disclosure was in the public interest (ss.33A(5) and 36(1)(b)).

#### Facts

The applicant (Cyclists' Rights) sought access to two pages of the verbatim transcript of proceedings of the 80th meeting of the Australian Transport Advisory Council (the Council). The Council, established to discuss and develop policies on transport matters, is comprised of Commonwealth, State and Territory Ministers with responsibility for transport. The extract from the transcript concerned the compulsory wearing of bicycle helmets. Cyclists' Rights opposed the Australia-wide introduction of laws requiring the wearing of helmets by cyclists, basing its opposition on various grounds including civil libertarian ones. It believed that the introduction of compulsory bicycle helmet legislation by State and Territory Governments was part of a package in which the Commonwealth Government required such legislation before providing additional funding for so-called 'black spots'. The request had been transferred from the ACT Department of Urban Services to the Department of Transport (the Department) under s.33 of the *ACT Freedom of Information Act 1989*. Section 33 provides for transfers of documents reasonably believed to be exempt under the *Commonwealth Fol Act*.

The Department consulted State and Territory Governments concerning the request. The South Australian and Western Australia Governments had no objection to the release of the document. The New South Wales Government, while concerned to maintain the confidentiality of Council discussions and with the possible effect of disclosure on Commonwealth-State relations, was prepared to release the specific document to Cyclists' Rights. The Victorian, Queensland, Tasmanian, Northern Territory and Australian Capital Territory Governments objected to the release of the extract. It may be noted that verbatim transcripts had since

been replaced by minutes of decisions of the Council.

### Governments

The Tribunal affirmed the Department's decision that the extract from the transcript was exempt under s.33A(1)(b) and s.36(1) of the Act.

#### *Section 33A(1)(b) — information communicated in confidence by State Governments — s.33A(1)(a) — damage to Commonwealth-State relations*

In broad terms the views of those States and Territories objecting to disclosure were based on the need to maintain confidentiality in order to ensure frank discussion between the States and Territories and the Commonwealth at Council meetings, and at inter-governmental ministerial meetings generally. Some jurisdictions suggested that disclosure would have an adverse effect on relations between the Commonwealth and the States and Territories.

The Senior Member who constituted the Tribunal recalled seeing the document in question in proceedings in 1989 in the ACT Administrative Appeals Tribunal, but did not inspect the document at this hearing and could not recall its contents. The Tribunal found that the Council's meeting was conducted in confidence for the purpose of communicating information in confidence from the governments of the States to the Commonwealth Government (s.33A(1)(b)).

The evidence on damage to Commonwealth-State relations was equivocal and did not satisfy the Tribunal that disclosure of the document could reasonably be expected to cause damage to relations between the Commonwealth and a State (s.33A(1)(a)).

#### *Section 33A(5) — public interest*

Cyclists' Rights sought to establish under s.33A(5) that there was an overriding public interest in disclosure of the extract based on such factors as interference of helmet legislation with democratic rights and the alleged lack of scientific basis for the view that helmets were effective in preventing injury to cyclists. Evidence was given as a private citizen by the Speaker of the ACT Legislative Assembly, Ms McCrae, that the ACT legislation had been influenced by the desire of the ACT Government for uniformity of road safety legisla-

tion and the need to adopt the Commonwealth's plan. Cyclists' Rights referred to the treatment of public interest considerations by the Queensland Information Commissioner in *Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs*, unreported, 30 June 1993.

The Tribunal accepted that, while there might be considerable public concern about the freedom of the individual, that was a matter which depended on the action of the legislatures and not on the discussions between Ministers and their advisers at the Council. There was no overriding public interest in disclosure of the detail of the Council's discussions. The public interest was in the maintenance of the confidentiality of the deliberations of the Council because the evidence showed it was an essential ingredient in the effectiveness of the deliberations of the Council.

#### *Section 36(1)(a) and (b) — deliberative process documents — public interest*

To the extent that information communicated by the Commonwealth to the States and Territories did not come within s.33(1)(b), s.36(1)(a) also applied to the record of the Council's deliberations as the Commonwealth's input was part of the consultative process. The public interest was the same as in the case of s.33A(5).

### Comments

1. The Tribunal's reasoning raises a number of questions. Notwithstanding that the Tribunal was aware of the general content of the document, through affidavit material, oral evidence and the ambit of the applicant's FoI request, it stated specifically that it could not recall the contents of the document from a previous inspection. Because of the Tribunal's non-inspection of the document it was impossible for it to determine whether some at least of the information was purely factual material, in which case it would not have been exempt under s.36(1) (see s.36(5)) (compare *Re Bracken and Minister for Education and Youth Affairs* (1985) 7 ALD 243) where some of the material in minutes of a Ministerial Council was either public or purely factual). The Tribunal did not examine the s.36(1)(b) claim separately from the public interest

issues arising under s.33A(5). The claim that there was a public interest in the maintenance of the confidentiality of the deliberations of the Council and that disclosure of material from this confidential ministerial meeting would reduce the frankness of exchanges between Ministers should have been examined in greater depth.

2. The Tribunal's reasoning on the public interest arguments put forward by Cyclists' Rights is confusing. The question was whether, despite the fact that the information satisfied the provisions of s.33A(1)(b), there was on balance a public interest in the disclosure of the document. This issue is not determined by saying that it is the actions of legislatures that are being objected to by certain members of the public and that 'there was no public interest in the discussions of the Council'. The Tribunal seems here to be confusing the balancing of the public interest factors for and against disclosure with the question whether the public is actually interested in something. There was no reference by the Tribunal to any public interest factor favouring disclosure, such as the light the information may have shed on legislative actions. The Tribunal could only have assessed the pro-disclosure public interest claims by reference to the contents of the document itself. Compare the Tribunal's decision to release minutes, though not a verbatim transcript, of the Australian Educational Council (AEC), a council consisting of Commonwealth, State and Territory Education Ministers, in *Re Bracken* (above), where the Tribunal said there was a strong and legitimate public interest in disclosure of the reasons for a decision of the AEC. Note also that the practice of making a verbatim transcript had since been abandoned, so that (apart from the question of specific contents) disclosure might not have affected preparedness to speak frankly in the future.