Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2008] AATA 288

ADMINISTRATIVE APPEALS TRIBUNAL	)	
	)	**No 2007/2752**
GENERAL ADMINISTRATIVE DIVISION	)	

Re **Brent FISSE**

Applicant

And **Department of Treasury**

Respondent

DECISION

Tribunal Professor GD Walker, Deputy President

Date 10 April 2008

Place Sydney

Decision The decision under review is affirmed.

.....[sgd].....
Professor GD Walker
Deputy President

CATCHWORDS – Freedom of Information – executive summary of a working party report attached to a cabinet submission – body of report not attached – exemption under section 34 requires the document to have been submitted to cabinet or proposed to be submitted and that its creation was for the purpose of submission to cabinet – executive summary satisfies the requirements for exemption – body of working party report – public interest requirement under section 36 – respondent bears the onus of showing that disclosure would be contrary to the public interest - notion of public interest is not a static concept and it carries a very broad meaning – when the tribunal is determining where the balance lies, there is no leaning in favour of disclosure of non-disclosure – working party report found to be a deliberative document and inextricably linked to the cabinet submission – disclosure would breach the convention of cabinet confidentiality - disclosure found to be contrary to the public interest – decision under review affirmed.

…

RELEVANT ACT/S:

Trade Practices Act 1974 (Cth)

Freedom of Information Act 1982 (Cth): ss 3, 4, 11, 34, 36, 61

Archives Act 1983

CITATIONS

Re Toomer and Department of Agriculture, Fisheries and Forestry (2003) 78 ALD 645

Whitlam v Australian Consolidated Press (1985) 73 FLR 414

Re Aldred and Department of Foreign Affairs and Trade (1990) 20 ALD 264

Re Hudson and Department of the Premier, Economic and Trade Development (1993) 1 QAR 123

Commonwealth v Construction, Forestry, Mining and Energy Union (CFMEU) (2000) 98 FCR 31

Commonwealth v Northern Land Council (1993) 176 CLR 604

Jones v Dunkel (1959) 101 CLR 298

Green v Minister for Immigration and Citizenship [2008] FCA 125

Re Waterford and Department of the Treasury No 2) (1984) 5 ALD 588

Re James and Australian National University (1984) 6 ALD 687

Re Richardson and Commissioner of Taxation (2004) 81 ALD 486

Re Bartl and Secretary, Department of Employment, Education, Training and Youth Affairs (1998) 54 ALD 509

Re Kamminga and Australian National University (1992) 26 ALD 585

News Corporation Limited v National Companies and Securities Commission (1984) 1 FCR 64

Re McKinnon and Secretary, Department of Prime Minister and Cabinet [2007] AATA 1969

Harris v Australian Broadcasting Corporation (1983) 50 ALR 551

Re Dunn and Department of Defence [2004] AATA 1040

Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health (1995) 56 FCR 50

Re Howard and Treasurer of the Commonwealth (1985) 7 ALD 626

Re Chapman and another and Minister for Aboriginal and Torres Strait Islander Affairs (1996) 43 ALD 139

McKinnon v Secretary, Department of Treasury (2006) 228 CLR 423

Re Peatling and Department of Employment and Workplace Relations [2007] AATA 1011

Re Porter and Department of Community Services and Health (1988) 14 ALD 403

Re Reith and Attorney-General's Department (1986) 11 ALD 345

Re Reith and Minister of State for Aboriginal Affairs (1988) 16 ALD 709

REASONS FOR DECISION

10 April 2008 Professor GD Walker, Deputy President

Basic facts

1. On 15 October 2001 the then prime minister, the Honourable JW Howard MP (the Prime Minister), announced that there would be an independent review of the competition provisions of the *Trade Practices Act 1974* (Cth) (the Act) and their administration. In May 2002, the federal Treasurer appointed a committee, known as the Dawson Committee (the committee), to undertake the review. The committee reported to the government in January 2003 and its report was released in April 2003.

2. The committee recommended that criminal sanctions be introduced for serious cartel conduct, subject to solutions being found to various problems it identified. Those problems included developing a satisfactory definition of "serious cartel behaviour" and implementing an effective leniency or immunity policy in the Australian context.

3. In October 2003, the Treasurer publicly announced the terms of reference of an official working party to consider the issues identified by the committee. The press release to that effect is annexure WBF2 to the affidavit of W Brent Fisse (Exhibit A1) in this application. The working party comprised officials from the Treasury Department (Treasury), the Attorney-General's Department, the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Director of Public Prosecutions (CDPP).

4. By an exchange of correspondence in 2003, the prime minister and the Treasurer agreed that the working party would report to the Treasurer by the end of 2003 and that the Treasurer would bring the issue to Cabinet early in the new year (annexure MC3 to the affidavit of Myra Patricia Croke, Exhibit R2).

5. The working party submitted its report in April 2004. The redacted version of that report provided to the applicant is reproduced in annexure WBF3 to Exhibit A1. The report included an executive summary, which was dealt with separately in these

proceedings because different considerations apply to it. In the redacted version of the report provided to the applicant, most of the executive summary is deleted, whereas on my estimate about 15 percent of the main part of the report has been deleted.

6. It is not disputed that the executive summary of the report was attached to a Cabinet submission that was presented to Cabinet for its consideration on 21 June 2004 (Exhibit R2, para 15).

7. On 2 February 2005, the Treasurer publicly announced that the federal government would seek amendments to the Act to introduce criminal penalties for serious cartel conduct. Treasury press release No 4 of 2005 (T pp12-22) spelt out the government's position on the major elements of the proposed changes.

8. The government subsequently announced that the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill would be introduced into parliament in 2007. That bill was not, however, tabled before parliament was dissolved for the 2007 federal election. In January 2008, the newly elected government published an exposure draft of a bill containing relevant amendments to the Act. It was accompanied by an explanatory abstract, a discussion paper and a draft memorandum of understanding between the ACCC and CDPP. The exposure draft is set out as annexure KH3 to the affidavit of Kim Nicole Hansen, Exhibit R3. The discussion paper is annexure KH2 to that affidavit and the draft memorandum of understanding is KH4.

9. Mr Fisse and the company of which he is managing director and a shareholder, Lexpert Publications Pty Limited of Paddington, New South Wales (Lexpert), submitted on 13 March 2007 a request under the *Freedom of Information Act 1982* (Cth) (the FoI Act) for access to certain documents, including "All documents comprising or constituting reports prepared by the working party referred to in the press release from the Treasurer dated 2 February 2005 and provided to either the Dawson Committee or the Department of Treasury" (T3).

10. On 12 April 2007, the respondent wrote to the applicant identifying one relevant document, the working party report, which was determined to be partially exempt pursuant to s 36 of the FoI Act (T7, pp31-33). The applicant sought an internal review

of the decision partially to deny access (T8, pp35-37). An internal review decided on 7 June 2007 to vary the initial decision in part so as to release additional parts of the report. The remainder of the report was determined to be exempt under s 36 (T10). Since then the respondent has released further material that it considers to be purely factual.

11. On 27 June 2007, Mr Fisse (but not his company, Lexpert) applied to this tribunal for review of the decision resulting from the internal review (T1). He thus seeks access to the full report of the working party, including the executive summary.

12. At the hearing, the applicant was represented by Mr Stephen Gageler SC and Ms Kathryn Richardson of counsel, instructed by Mr Steven Glass and Ms Amanda Kempton, solicitors, Gilbert & Tobin, while the respondent was represented by Mr Peter Hanks SC and Ms Reg Graycar of counsel, instructed by Mr Justin Davidson of the Australian Government Solicitor. The documents before the tribunal comprised the documents produced pursuant to s 37 of the *Administrative Appeals Tribunal Act* 1975 (the T documents), taken into evidence as Exhibit R1, together with the other documents tendered by the parties at the hearing. The applicant did not give oral evidence at the hearing. Ms Myra Croke was cross-examined but the remainder of the evidence was by way of affidavit. The parties agreed that as the respondent bears the statutory onus of proof pursuant to s 61 of the FoI Act, the respondent would lead its evidence first and present its submissions first.

Issues

13. The issues for determination in this application are:

(a) Whether the executive summary of the working party report (other than those parts already released) is exempt from release under s 34(1)(c) of the FoI Act; and

(b) Whether the entire working party report (other than those parts already released), including the executive summary, is exempt from release under s 36 of the FoI Act.

Relevant legislation

14. The respondent claims that the document in issue is exempt from disclosure pursuant to ss 34(1) and 36(1) of the FoI Act reading as follows:

> …
>
> ***34. Cabinet documents***
>
> *(1) A document is an exempt document if it is:*
>
> *(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;*
>
> *(b) an official record of the Cabinet;*
>
> *(c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or*
>
> *(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.*
>
> …
>
> ***36. Internal working documents***
>
> *(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:*
>
> *(a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and*
>
> *(b) would be contrary to the public interest.*
>
> …

Evidence for the respondent

15. The affidavit of Kim Hansen (Exhibit R3) was largely a formal one serving to bring into evidence some documents, including the ones already referred to.

16. Ms Croke's affidavit (Exhibit R2) constituted a substantial part of the evidence for the respondent. Ms Croke is an assistant secretary, head of the Cabinet Secretariat in the Cabinet division of the Department of Prime Minister and Cabinet (PM&C). She has held that position since September 2003 and has been a

notetaker at many Cabinet and Cabinet committee meetings since then. She has also previously held a number of relevant positions.

17. Ms Croke states that for over 20 years, successive federal governments have from time to time published editions of the Cabinet Handbook, which sets out the principles and procedures by which the Cabinet system of executive government operates. When the document in issue in these proceedings, the working party report, was created, the current edition was the fifth edition as amended to March 2004 (annexure MC1).

18. The applicant did not suggest that the 2004 edition was in any material respect different from earlier editions published by other governments.

19. The Cabinet Handbook, Ms Croke said, outlines procedures for the preparation and handling of Cabinet submissions. Detailed guidance in relation to those matters is contained in *The Drafter's Guide – Preparation of Cabinet Submissions and Memoranda* (annexure MC2). The notetaking system that assists in the production of cabinet minutes was described in an affidavit sworn in 1990 by the then acting director of the Cabinet Office, Ms Anthea Tinney. That evidence was quoted at length by Toohey J in *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 624-627. It accurately describes the system as it operates today. Ms Croke agreed with Ms Tinney's views about the potential harm to the public interest that could result from disclosure of entries in Cabinet notebooks and the effects on the conventions of Cabinet confidentiality and collective responsibility. Legislation gives public access to Cabinet notebooks after 50 years. They are expressly excluded from the definition of "document" in s 4(1) of the FoI Act.

20. Ms Croke did not attend the Cabinet meeting that discussed the report, but had had full access to the records of the meeting, including the Cabinet notebooks, and is able to confirm that the executive summary formed part of a submission to the Cabinet, which was in fact considered by Cabinet. This was the meeting of 21 June 2004 during which Cabinet considered a submission sponsored by the then Treasurer that related to the review of the cartel conduct provisions of the Act. The executive summary was an attachment to that submission.

21. Ms Croke read the 2003 exchange of correspondence between the Treasurer and the prime minister (annexure MC3) as indicating an intention that the working party report be brought into existence for the purpose of forming the basis of a submission by the Treasurer for consideration by Cabinet. In accordance with usual practice, the executive summary would be attached to, and form part of, the Cabinet submission. The Treasurer's statement that he would bring the issue to Cabinet showed that he intended the report to support the submission to Cabinet. That inference is also indicated by the prime minister's response that he looked forward to Cabinet consideration of the matter.

22. Commenting on the email of 1 June 2007 from Angelo Anagnostis, PM&C's FoI contact officer, to Bronwen Urban of the Treasury Department in which Mr Anagnostis expressed the view that there might not be a strong case for exempting the executive summary from release under s 34(1)(c), Ms Croke pointed out that Mr Anagnostis had noted that a claim could be made if the Treasury could satisfy itself that the report was brought into existence for the purpose of submission for consideration by Cabinet.

23. In her view there is another preferable interpretation that better reflects the way in which matters are in fact dealt with by Cabinet. In her experience, ministers often use indirect language to indicate that a document is intended to be submitted to Cabinet, or may not even express that they have such an intention. In her opinion, the exchange between the prime minister and the Treasurer did not indicate an intention that the report be created merely for the purpose of consideration by the Treasurer. Rather, it indicated an intention that the report would canvass a range of options to support a submission by the Treasurer to Cabinet.

24. In Ms Croke's experience, ministers often seek a detailed examination of complex matters by a working group to help canvass all the options and refine proposals to be taken forward to Cabinet. It is usual in such cases to attach the executive summary of the working group's report to the Cabinet submission, regardless of whether or not the minister supports all the working group's proposals. The full report is available to Cabinet ministers but is not usually attached to the Cabinet submission.

25. The issue with which the report was concerned was initially the subject of Cabinet discussion at the meeting of 15 April 2003. At that meeting Cabinet agreed that a working group would consider the issue. The detailed arrangements for the group would be settled by an exchange of letters, the correspondence in MC3. It was clear that the issue was to return for Cabinet's further consideration, and that occurred at the meeting of 21 June 2004. Ms Croke considered that the sequence of events supported her view that the executive summary was brought into existence for Cabinet's consideration.

26. Only the executive summary of the report was actually submitted to Cabinet. The remainder of the report has, however, a close connection with the Cabinet process and, while not actually submitted, it provides the detailed information that formed the basis for the executive summary.

27. As regards the public interest in protecting the confidentiality of Cabinet documents, Ms Croke stated that the convention of collective responsibility requires that not only the deliberations of Cabinet, but also the documents that support the deliberations ofCabinet, remain confidential. It was very important that ministers be able to consider a range of proposals and options with complete freedom in order to come to the preferred collective position. If the deliberations of Cabinet and the documents supporting them were not kept confidential, the confidentiality of the Cabinet process would be undermined. Under the *Archives Act 1983*, material relating to Cabinet deliberations can be disclosed after 30 years. The 30-year rule is observed strictly by those involved in Cabinet deliberations. A breach of the confidentiality of Cabinet documents within the 30-year period would be inconsistent with the current practice of confidentiality.

28. Disclosing the body of the working party report would have the practical effect of disclosing the substance of the executive summary. It would interfere with Cabinet confidentiality because disclosure would indirectly disclose the substance of a document that was part of a Cabinet submission.

29. The Cabinet Handbook also states (annexure MC1, para 7.34) that successive governments do not seek access to documents recording the deliberations of

ministers in previous governments and that Cabinet documents are considered confidential to the government that created them. Ms Croke therefore considered that it would be inconsistent with the convention described in the Handbook for any part of the report to be provided to the current government. If the present government wished to bring forward any policy changes in relation to the same subject matter, Cabinet government conventions would require that the relevant departments provide current advice to the government.

30. In cross-examination Ms Croke said that while it was the practice to mark documents prepared for consideration by Cabinet with the endorsement "Cabinet-in-confidence", in this case only the executive summary was so marked, not the full report. The full report included the executive summary which was, therefore, marked. The author of a particular document decides if it will receive a "protected" marking. If an officer later reviewing the document considers it inappropriately classified, the document may be referred to back to the author for reclassification.

31. The copy of the report that she had seen was marked "protected", and that marking had not been struck out. On the redacted version released to the applicant (annexure WBF3), the marking had been struck out, but it was common practice to remove the classification when the document was prepared for release.

32. Asked whether it was rare for a Cabinet document to contain an imprint page bearing a copyright notice, Ms Croke said she did not know why that was done, but the usual reason is that the document may be intended for later publication.

33. In re-examination, Ms Croke said the fact that the notation "Cabinet-in-confidence" appeared only on the executive summary, not on the whole report, was not a relevant circumstance as documents are often incorrectly classified.

Evidence for the applicant

34. The applicant, Mr Fisse, has a distinguished record as an academic, writer and practitioner in competition law, among other fields. In his affidavit (Exhibit A1), he stated that he applied for access to the working party report because he believed

it contained information highly relevant to understanding and assessing the former government's proposals to introduce criminal liability for serious cartel conduct. The report is referred to in the 2005 press release but has never been made publicly available.

35. The press release raises many questions about the nature and scope of the former government's proposals on this topic. Mr Fisse had reviewed those questions in a published article (annexure WBF1), and they included the difficulties that would arise from the proposal to make dishonesty an element of the offence, the uncertain significance of the proposed requirement of an intention to obtain a gain and the need to define the mental element of the offence more narrowly, and in the existing civil penalty provisions of the Act relating to price fixing and exclusionary provisions.

36. The parts of the working party report released to date are limited to factual material and do not include any of the material discussion that the report may contain concerning major questions of law and policy arising from the criminalisation proposal. They do not, for example, discuss the questions referred to above, among others. Nor does the discussion paper released by Treasury on 11 January 2008 for the purposes of public consultation. It seeks views on several questions relating to the dishonesty element, but the discussion is limited and highly selective. The questions on which views are sought are not accompanied by any statement or assessment of the different positions that have been taken or may be taken on those questions.

37. The discussion does not identify all the objections to the proposed dishonesty element that have been raised, nor does it indicate whether or not the ACCC and the CDPP support inclusion of that element. The discussion paper contends that there is an international precedent for including dishonesty as an element, but does not make it clear that such an approach is highly unusual. Dishonesty is an element of a cartel offence only in the United Kingdom, while fraud is an element of cartel offence only in France, where the offences are tried summarily, usually by a panel of three judges. Neither dishonesty nor fraud is an element of the cartel offences adopted in the overwhelming majority of jurisdictions, including the United States, Canada,

Ireland, Germany, Japan and Korea, where serious cartel conduct has been criminalised.

38. The discussion paper seeks comments on the question of whether or not the power to intercept telecommunications should be available as a means of investigating cartel offences, but does not discuss the use made of it in the United States or the lessons that emerge from the experience of the US Department of Justice.

39. The exposure draft bill is not accompanied by a commentary explaining the reasons for its particular provisions, and raises many questions of law and policy. They include the absence of any explanation for not narrowing the civil penalty prohibition against exclusionary provisions under s 45 of the Act, while the civil penalty prohibition against price fixing is more narrowly defined under the exposure draft bill than in s 45A(1) of the Act. The fault elements applying to the new cartel offences are complex and likely to confuse juries. The reason vicarious criminal responsibility has been imposed on individual defendants and why the criminal code principles of corporate criminal responsibility have been excluded is not explained. There is no joint venture defence and no power to intercept telecommunications.

40. The draft memorandum of understanding also fails to deal with important questions, such as whether there should be a seamless “one-stop” avenue for applying for immunity, the origin of the $1,000,000 threshold, and in what circumstances the CDPP will seek to invoke the *Proceeds of Crime Act 2002* (Cth) in situations where accused persons are charged with a cartel offence or have been convicted and sentenced.

41. Mr Fisse considered that the working party report is likely to contain a discussion relevant to the questions of law and policy that he identifies, including those I have specifically mentioned above. Those matters are centrally relevant to the public assessment of the discussion paper, the exposure draft bill and the draft memorandum of understanding, as well as to the further policy formulation that will determine the nature of the amendments to be made to the Act to criminalise serious cartel conduct.

42. The exposure draft materials released by Treasury on 11 January 2008 were accompanied by an explanatory abstract, which makes it clear that public submissions are being sought to assist further policy formulation. The issues raised by the exposure draft bill are the subject of much public debate and interest, as can be seen by the range of newspaper articles dealing with it.

43. The working party report is relevant to public discussion also because the ACCC has at various times expressed conflicting views about whether dishonesty should be an element of such an offence. The ACCC's views, as reconsidered in light of the Dawson Committee report, are likely to be discussed in the working party report. They are important to public debate and the formulation of policy in relation to the exposure draft bill.

44. Professor Robert Baxt AO, a former chairman of the Trade Practices Commission (the predecessor of the ACCC) is also the chairman of the Law Council of Australia's Trade Practices Committee, which is regularly asked to assist the government in relation to proposed changes to the Act. The committee has not, however, been made aware at any stage of the working party's reasoning or been provided with a copy of its report. In his affidavit dated 13 February 2008 (Exhibit A3), Professor Baxt says he considers it important and relevant for the Trade Practices Committee, whose members represent the leading practitioners, economists and academics in the field, to be made aware of the working party's reasoning for adopting its approach to various matters, including the dishonesty element.

45. He was surprised by the amount of material deleted from the working party report in the redacted form released to the applicant. It appeared to him that most, if not all, of the analysis on important issues, such as whether dishonesty should be an element of the offence, has been deleted. Providing the public with a copy of the working party report might therefore promote confidence in the proposed legislation, as it would illustrate the government's thinking on important topics, such as the dishonesty element or the appropriateness of statutory exceptions.

46. It was his view that the ACCC may have been opposed to dishonesty being an element of the offence. If such a view is expressed in the working party report, he considers that it is in the public interest for the public to be made aware of it.

47. Dr Caron Beaton-Wells is director of studies in competition law and a senior lecturer at the University of Melbourne Law School. She has extensive experience as a practitioner, researcher and teacher in the field of competition law.

48. In Dr Beaton-Wells's opinion (Exhibit A2), release of the working party report is in the public interest for a number of reasons, which may be summarised as follows:

- The criminalisation of serious cartel conduct is a significant development in competition law enforcement and has the potential substantially to reduce the prevalence of conduct that has adverse economic and social effects on Australian businesses and consumers;

- It is also a highly complex and potentially controversial development. The design and administration of the new criminal regime should therefore be subject to close examination by a range of interested parties and groups in order to maximise the prospects of its effectiveness;

- Criminalisation is of considerable interest and concern to the general public, the business sector and the legal profession. Those groups would be better informed if the working party report were released;

- Release of the report would facilitate and inform academic research in relation to criminalisation and thereby assist academics in making a substantive contribution to the various issues arising out of this major reform;

- The release of a redacted version does not satisfy the public interest in release of the full report; and

- The release of the draft exposure bill, discussion paper and draft memorandum of understanding does not diminish the public interest in the release of the working party report, and indeed strengthens it.

49. Much of Dr Beaton-Wells's affidavit describes the substantial extent of public interest in the subject matter of the report. As the respondent very properly conceded that point, it is not necessary to go into detail about those parts of the affidavit.

50. The deponent goes further, however, and advances the view that failure to release the working paper report has placed substantial limitations on academic research. That failure may be contrasted with the approach taken by the Treasury in other areas, and by other government bodies such as the Australian Law Reform Commission.

51. The release of the draft exposure bill and accompanying documents in January 2008 can only increase public interest in the release of the working party report in as much as the January 2008 materials provide no insight into the government's thinking in relation to key issues such as offence design, enforcement policy and leniency policy.

Applicant's submissions

52. The applicant relied on the arguments advanced in his statement of facts and contentions, as amplified by counsel at the hearing.

53. The proper test in relation to s 34(1) of the Act, the applicant submitted, is whether the report was submitted to Cabinet for its consideration, or was proposed by a minister to be so submitted and whether it had been brought into existence for the purpose of submission or consideration by Cabinet. Then the question became whether the executive summary is an extract from, or a copy of, that document.

54. The respondent, however, had argued that the executive summary is exempt because, as a copy or extract, it was presented to Cabinet. But that element of the

test applies only to the document itself, and not to the extract or copy. The respondent does not claim that the report itself was either submitted to Cabinet or proposed by a minister for submission.

55. Further, the applicant disputes that the report or the summary was created for the purpose of submission for consideration by Cabinet. It was actually prepared to enable the Treasurer to make recommendations to Cabinet in relation to the proposed cartel offence.

56. Whether a document has been prepared for submission to Cabinet is to be ascertained at the time the document was created. Nothing in the 2005 press release gave any indication that the report had been created for the purpose of submission to Cabinet. That was consistent with the Treasury's 2003 press release, which stated that the working party was "expected to report to the Treasurer" by the end of 2003. Further, in June 2007 a PM&C officer agreed that the report might have been brought into existence for the purpose of consideration by the Treasurer.

57. Even if the summary was presented to Cabinet, it was presented only as an attachment to a Cabinet submission for the purpose of "assisting Cabinet deliberations". Consequently, it was put to Cabinet, not for its consideration, but only for its information.

58. In *Secretary to the Department of Infrastructure v Asher* [2007] VSCA 272, the Victorian Court of Appeal had to consider certain quarterly reports to the Victorian Department of Treasury and Finance that were required from other departments of the state government dealing with their performance and appropriation of revenue. The quarterly reports were required for use as the basis of a quarterly report by the Treasurer to the expenditure review committee on major issues relating to departmental performance and risk assessment. The appellant had submitted that the Victorian equivalent of s 34 exempted the reports as "the official record of any deliberation or decision of Cabinet", arguing that every document placed before the Cabinet is exempt.

59. Rejecting the claim, the court declined to take the word "deliberation" so as to cover the topic that produces Cabinet deliberations. As the word is coupled with "decision", that is an action taken by Cabinet in respect of a subject matter, "deliberate" refers to Cabinet's treatment of a subject matter. The appellant's proposed construction was also inconsistent with the objects of the Act. Buchanan J noted that in *Commonwealth v Construction, Forestry, Mining and Energy Union* (CFMEU) (2000) 98 FCR 31, the Full Court of the Federal Court had held that a letter from a minister to the prime minister seeking the latter's agreement to raise particular matters in Cabinet, was protected by public interest immunity, not because it revealed a matter placed before Cabinet, but because it revealed the position taken by the minister in Cabinet:

> *….*
>
> *Disclosure of the contents of a letter would, in our view, operate to reveal the nature of the matters considered by Cabinet and at least part of the Cabinet's deliberation of those matters. On the evidence it can reasonably be assumed, in the circumstances of this case, that the minister would have attended the meeting and put before Cabinet the position and arguments as set out in the letter. Disclosure of the contents of the letter would therefore disclose the position of the minister, the arguments he wished to advance, and the topic which in all probability was discussed at the meeting … the position taken by the minister in Cabinet is part of the Cabinet's deliberation.*
>
> *…*

60. In *Asher*, the court concluded that as the departmental reports were prepared in order to enable the creation of another and quite separate document, and it was the latter that was to be submitted to Cabinet for consideration, they could not be characterised as having been brought into existence for the purpose of submission for consideration by Cabinet. The exemption should be confined to the particular documents which, it was contemplated, would be placed before Cabinet for its consideration. Preliminary or preparatory material, not constituting a draft or copy, would accordingly not be encompassed (at paras 35 to 40),

61. While the executive summary in his case had been submitted to Cabinet, no part of the working party report (including the summary) was created for that purpose. It was only to inform the Treasurer, who was to take the issue to Cabinet, and was thus purely preliminary material. As there was no evidence before the tribunal from members of the working party, it could be assumed that such evidence

would not assist the respondent, especially in light of the comment by Mr Anagnostis in his email of 1 June 2007 that "PM&C is not satisfied that this exchange between the Treasurer and the Prime Minister sufficiently indicates a clear intention that the report (including the executive summary) was to be 'brought into existence for the purpose of submission for consideration by the Cabinet'" (T8, p38A). The respondent now seeks to rely on Ms Croke's different interpretation of that email, not on the evidence of the persons who created the document.

62. If created for submission to Cabinet, the report should have been stamped "Cabinet-in-confidence". To fail to do so would be a serious mistake. Further, the imprint page showed that the report was prepared with the possibility of publication, which is unusual for a document prepared for submission to Cabinet.

63. The exchange of correspondence in annexure MC3 shows that the report was to go to the Treasurer, who would then bring the "issue" to Cabinet. The October 2003 press release (annexure WBF2) supported that interpretation, stating that "The working party is expected to report to the Treasurer by the end of 2003". Ms Croke's evidence showed no more than that the report was to go to the Treasurer, who would then make a submission, and the executive summary was not necessarily to go to Cabinet itself.

64. As regards the exemption claimed for the whole report under s 36(1)(b), Mr Gageler submitted that in *Northern Land Council*, the High Court had contrasted documents recording the actual deliberations of Cabinet with documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet (at p614).

65. Ms Croke's evidence that the executive summary of a report is usually attached to the Cabinet submission whether or not the minister supports all the working group's proposals showed that the mere attachment to the submission would not disclose the position of the minister within the meaning of *Asher* and *CFMEU*. Nor was there any evidence that the report was actually adopted by Cabinet, a critical aspect.

66. The subject matter was a matter of keen public interest and the evidence showed that the absence of the full report from the public domain was inhibiting debate on that subject.

67. As the High Court had pointed out in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, judgments concerning where the public interest lies in the context of s 36 of the Act are not made in a normative vacuum. They are made in the context of, and for the purposes of, legislation that has the object of serving the public right of access to official documents, and which acknowledges a qualification of that right in the case of *necessity* for the protection of essential public interests (s 33(1)(b)) (Gleeson CJ and Kirby J, at p428; also Hayne J at p433).

68. As regards the convention that ministers do not seek access to the deliberative documents of their predecessors, Deputy President Todd had expressed the view in *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659 that it was hard to see how such a convention could be given any weight under the FoI Act. That legislation had placed the convention under considerable strain. "Given the existence of the FoI Act, it is, with respect, hard to predict how much life the convention could have left. For present purposes it is enough to say that in my opinion the existence of the convention does not constitute reasonable grounds for a claim that disclosure of the present documents would be contrary to the public interest" (at p666).

The executive summary – claim under ss 34(1)(a) and (c)

69. The respondent initially argued that both the working party report and the executive summary that formed part of it were exempt from disclosure under s 34(1). In written submissions and at the hearing, however, the respondent confined the claim under s 34(1) to the executive summary.

70. It is not disputed that the executive summary was in fact submitted to Cabinet, nor is it claimed that the document contains purely factual material within the meaning of s 34(1A).

71. The concept of collective Cabinet responsibility and the workings of federal Cabinet are well described by Deputy President Forgie in *Re Toomer and Department of Agriculture, Fisheries and Forestry* (2003) 78 ALD 645 at 658 to 664. There is no need to rehearse that background here.

72. There is unchallenged authority for the proposition that Cabinet secrecy is an essential part of the structure of government. In *Whitlam v Australian Consolidated Press* (1985) 73 FLR 414, Blackburn CJ described it as:

> *… part of the machinery of government of the country … Cabinet secrecy is an essential part of the structure of government which centuries of political experience have created. To impair it without a very strong reason would be vandalism, the wanton rejection of the fruits of civilization.*
>
> *…*

73. The principles applicable to the protection of Cabinet secrecy in public interest immunity cases also apply to the consideration of the same issues in the context of s 34(1), except that public interest immunity requires a balancing process as against the competing public interest in the proper administration of justice, whereas s 34 is absolute and does not provide for any weighing process (*Toomer* at p680).

74. For a document to be exempt under s 34(1)(a), two requirements must be satisfied:

- The document must have been submitted to Cabinet, or proposed by a minister to be so submitted; and

- The documents must have been brought into existence for the purpose of submission for consideration by the Cabinet.

75. I respectfully agree with Deputy President Forgie's view as expressed in *Toomer*, that the requirement of "purpose" applies both to documents that have been submitted to Cabinet and to those that have been proposed by a minister to be so submitted. The prior interpretation that would confine the purpose requirement to the latter category does not appear to be sustainable (*Toomer* at p670).

76. As was noted above, it is not disputed that the executive summary was in fact submitted to Cabinet. The area of controversy is whether it was "brought into existence for the purpose of submission for consideration by the Cabinet". The applicant also contends that the summary was not put to Cabinet "for its consideration", but only for its information.

77. The time at which the document was brought into existence is the time at which the purpose must be ascertained: *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264 at 265-266. Consequently, if it was originally created for a different purpose, the fact that it was subsequently decided to submit it to Cabinet does not bring it within the exemption: *Re Hudson and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at 135.

78. The applicant submits that the 2005 press release gave no indication that the report had been created for the purpose of submission to Cabinet, nor did the 2003 press release, which spoke of the working party being "expected to report to the Treasurer by the end of 2003". Further, Mr Anagnostis's email of 1 June 2007 (T8, pp38A-38B) stated that PM&C was not satisfied that the exchange of correspondence between the Treasurer and the Prime Minister (annexure MC3) sufficiently indicated a clear intention that the report, including the executive summary, was to be brought into existence for the purpose of submission for consideration by the Cabinet.

79. As to whether the executive summary was submitted to Cabinet for its consideration rather than merely for its information as argued by the applicant, the evidence of Ms Croke, who had examined the records, was that the executive summary of the report formed part of a submission to Cabinet that was in fact considered by Cabinet. On 21 June 2004, the Cabinet considered a submission sponsored by the then Treasurer that related to the review of the cartel conduct provisions, and the executive summary was an attachment to that submission (Exhibit R2, para 15).

80. The evidence provides no basis for an inference that the summary was provided merely for Cabinet's information. On the contrary, it consisted of material that was

central to Cabinet's discussion. The fact that it was incorporated as an attachment, rather than in the body of the submission, may represent a purely stylistic expedient that can be adopted for a variety of reasons, such as not incorporating matters of detail that might hinder the flow of the argument and make it harder to understand.

81. As regards the purpose for which the summary was created, while the Treasurer's letter of 24 July 2003 does seek the prime minister's approval to establish a working party that would report to the Treasurer himself, part of the arrangements for which approval is sought is the proposal that the issue be brought to Cabinet, together with any necessary expressions of support from the justice minister or any recommendations put forward for Cabinet's endorsement.

82. In his reply of 4 September 2003 (MC3), the prime minister notes that the working group is to report to the Treasurer by the end of 2003 and proceeds to say "I look forward to Cabinet considering the recommendations early in 2004". The word "recommendations" appears to refer to the working party's report on the topics listed in its terms of reference, or at least those of them which the Treasurer, in consultation with the justice minister, has decided to support. Ms Croke's evidence interprets the correspondence in the same way and adds that in accordance with usual practice, the executive summary would be attached to, and form part of, the Cabinet submission.

83. Ms Croke noted the view expressed by Mr Anagnostis, PM&C's FoI contact officer but pointed out that the author prefaced his remarks with the proposition that:

> *…*
>
> *If the Treasury can satisfy itself that the report (of which the Executive Summary is a part) 'was brought into existence for the purpose of submission for consideration by the Cabinet' (as required by paragraph 34(1)(a)), a claim for exemption for the Executive Summary could be made under paragraph 34(1)(c), subject to the application of subsection 34(1A) of the FoI Act.*
>
> *…*

The email was apparently created in Ms Croke's absence on two months' leave.

84. In her view, the language used in the exchange of correspondence (annexure MC3) exemplifies the tendency of ministers to use indirect language to indicate that a document is intended to be submitted to Cabinet, or even not to express that they have such an intention. Rather, it showed an intention that the report would canvass a range of options to support a submission by the Treasurer to the Cabinet (Exhibit R2, para 24).

85. Her experience was that a minister will seek a detailed examination of complex matters by a working group to assist the minister in canvassing all the options and refining proposals to take forward to the Cabinet. The executive summary would be attached to the Cabinet's submission regardless of whether the minister supported all the working group's recommendations or not.

86. Ms Croke's oral evidence that the executive summary was marked "Cabinet-in-confidence" in accordance with paragraph 7.4 of the Cabinet Handbook was not challenged.

87. Also material, as Ms Croke pointed out, is the fact that the establishment of the working group was itself discussed at a Cabinet meeting on 15 April 2003. That adds cogency to her interpretation that the issue was clearly intended to return for Cabinet's further consideration, as in fact happened on 21 June 2004. She considers that the sequence of events itself supports the view that the executive summary was brought into existence for Cabinet's consideration.

88. As Cabinet had itself sanctioned the establishment of a working group to consider implementation of the Dawson Committee recommendations, it would be most unlikely that Cabinet would not expect to see at least the executive summary when the issue was brought back to it in the manner contemplated.

89. The executive summary was part of the subject matter of the Cabinet meeting's discussions on that topic and cannot be said merely to have been placed before Cabinet for its information. The Treasurer was not bringing the "issue" of criminal penalties before Cabinet in a general or abstract way, but was putting forward concrete proposals developed following a working group or "workshopping"

approach that Cabinet had itself discussed and approved. Further, even though the Treasurer may not have supported all the working group's recommendations as set out in the executive summary, the course of events and the language of the various communications make it highly probable that the Treasurer's expressed position on the criminal penalties issue would have been structured in accordance with the recommendations in the executive summary. To that extent, it could disclose the minister's position in the manner discussed in *CFMEU*.

90. The copyright notice on the imprint page clearly implies that the working party, at least, envisaged that its report might in due course be published. That, however, is not inconsistent with a purpose of submitting the report, or the executive summary, to Cabinet for its consideration. Publication might or might not follow later.

91. While the High Court in *Northern Land Council* did draw a distinction between documents recording the actual deliberations of Cabinet and documents prepared outside the Cabinet, such as reports or submissions (176 CLR at p614), it did not suggest that documents in the latter class could not attract public interest immunity. On the contrary, it appeared to indicate that they could, depending on their particular contents:

> *…*
>
> *They are not documents prepared outside Cabinet such as reports or submissions, for the assistance of Cabinet. Documents of that kind are often referred to as Cabinet documents. When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour … (at pp614-615).*

92. There is no evidence that the executive summary was actually adopted by Cabinet, but I do not think that is "a critical aspect" as the applicant submitted, given that the focus is on the purpose at the time the document was created.

93. As the applicant pointed out, there is no evidence before the tribunal from any of the members of the working party, and the failure to call such evidence has not been explained. The Federal Court has recently held, however, that the principle in *Jones v Dunkel* (1959) 101 CLR 298 at 308 does not apply to this tribunal's proceedings, which are inquisitorial in nature: *Green v Minister for Immigration and*

Citizenship [2008] FCA 125 at para 41. Further, the evidence as it stands is sufficient to support the conclusion that the executive summary was brought into being for the requisite purpose, and I so find.

94. The executive summary thus satisfies the requirements for exemption in s 34(1)(a). It is not disputed that the copy that is in the possession of the respondent is a copy of that document, and the requirements of s 34(1)(c) are therefore also satisfied.

The whole working party report – claim under s 36(1) of the FoI Act

95. The meaning of "deliberation" and "deliberative processes" in s 36(1)(a) has been characterised as referring to the "thinking processes" of government, "the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action": *Re Waterford and Department of the Treasury No 2)* (1984) 5 ALD 588 at para 58; *Re James and Australian National University* (1984) 6 ALD 687 at para 63.

96. In *James*, Deputy President Hall remarked on the great width of the language used in paragraph (a) and concluded that the care taken to describe in the most ample terms the deliberative process documents covered "militates against any narrow or pedantic construction of the ambit of that paragraph" (at para 65). Deputy President Forgie expressed agreement with that proposition as formulated in *James* and several other cases to a similar effect in *Re Richardson and Commissioner of Taxation* (2004) 81 ALD 486 at para 13. The language applies to documents concerned with both decision-making and policy-making processes: *Re Bartl and Secretary, Department of Employment, Education, Training and Youth Affairs* (1998) 54 ALD 509 at para 17. The documents in that case were drafts of an agreement which in its final form was later released to the public.

97. The evidence shows that the working party report was created for the purpose of assisting the government to deliberate on the question of criminalising serious cartel conduct and indeed was actually called for by Cabinet for that purpose at the meeting of 15 April 2003.

98. I therefore find that the working party report was prepared in the course of, or for the purposes of, the deliberative processes of a minister, or of a commonwealth agency, namely the Treasury. It therefore satisfies the requirements of s 36(1)(a).

99. The other requirement is that disclosing the document "would be contrary to the public interest" (s 36(1)(b)). This element was the main focus of the applicant's submissions on s 36(1).

100. The approach that the tribunal should take in reaching a conclusion in relation to that ingredient has been expounded in a number of cases. In *Re Kamminga and Australian National University* (1992) 26 ALD 585, the tribunal, with President O'Connor J presiding, pointed out that it is necessary if paragraph (b) is to apply for the tribunal to find that disclosure would be contrary to the public interest. "It is not the case that the tribunal has to be satisfied that disclosure is in the public interest …" (at p588).

101. That approach requires a balancing process:

> …
> *Deciding whether disclosure is contrary to the public interest requires a balancing of competing interests including the public interest in the Applicant's right to know … (ibid)*

102. When the tribunal is determining where the balance lies, there is no leaning in favour of disclosure or of non-disclosure. Each exemption is to be construed according to its own terms: *News Corporation Limited v National Companies and Securities Commission* (1984) 1 FCR 64 at 66; *Re McKinnon and Secretary, Department of Prime Minister and Cabinet* [2007] AATA 1969 at para 139.

103. The notion of public interest is not a static concept: Beaumont J in *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 563; *Re Dunn and Department of Defence* [2004] AATA 1040 at para 134. It also carries a very broad meaning:

> …

> *The public interest is a concept of wide meaning and not readily delimited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest* (Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health *(1995) 56 FCR 50 at 59*).

104. No doubt because context and matters of opinion play such a large part in debates over the public interest, the cases do not attempt an all-purpose definition but rather indicate the intellectual processes to be followed and the kinds of considerations to which it is appropriate to give weight. In *Re Howard and Treasurer of the Commonwealth* (1985) 7 ALD 626 at 634-635, Davies J set out a list of factors that he considered relevant, such as whether the communications were between high officials and whether they were made in the course of developing and promulgating policy.

105. Deputy President McDonald in *Re Chapman and another and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139 at paras 27-28 added a number of additional considerations as suggested by the Law Reform Commission report on the FoI Act, including the general public interest in government information being accessible, whether the document would disclose the reasons for a decision and whether disclosure would contribute to debate on a matter of public interest.

106. The respondent bears the onus of showing that disclosure would be contrary to the public interest: *Bartl* at para 23.

107. As Callinan and Heydon JJ pointed out in *McKinnon v Treasury*, the paragraph is concerned with documents, not with the topic or subject matter. Referring to the evidence of one of the witnesses, their Honours said:

> *…*
>
> *[The witness] failed to make the important distinction between a topic of public interest and documents on or in relation to the topic. It could hardly be denied that the topics with which the documents in issue are concerned were matters of public interest* (at para 113).

108. It was common ground here that three factors tended to favour disclosure of the report. They were that there is a general right of access to government

information recognised by ss 3 and 11 of the Act, and upholding that right is in the public interest (subject to the statutory exceptions). Secondly, disclosure of government information helps individuals to participate meaningfully in the democratic process through discussions on matters of public policy and law. Thirdly, there is a public interest in promoting transparent and accountable decision-making in government. It was also agreed that proposals to criminalise serious cartel conduct, and the ability of interested parties to participate in free and open discussion of it, are matters of public interest.

109. The respondent argued that the large number of publications dealing with the subject referred to in the applicant's evidence suggested that failure to release the report had not constrained high level policy debate and research about these important policy questions. I do not think it can be doubted, however, that release of the full report would generate a considerable amount of new comment and policy debate, given the keen interest that published commentators have already shown in the subject.

110. Further, as I observed in *Re Peatling and Department of Employment and Workplace Relations* [2007] AATA 1011, there is no basis on which the tribunal could conclude that there has been enough public discussion of a particular topic. To find otherwise would amount to proclaiming an official truth.

111. The respondent very properly conceded that the possible criminalisation of serious cartel conduct is a matter of interest to the public. The evidence of Mr Fisse, Professor Baxt and Dr Beaton-Wells further satisfies me that there are significant public interest considerations favouring the release of the full working party report to which proper weight must be given.

112. The main public interest factor advanced by the respondent in support of the proposition that disclosure would be contrary to the public interest is that release of the report would disclose the content of material prepared to support a recommendation to Cabinet and formulated for the purpose of assisting Cabinet deliberations and a Cabinet decision. Disclosure would breach the convention of Cabinet confidentiality, which is pivotal to the proper functioning of the executive and

the parliament of the Commonwealth. Even though the full report does not fall within the terms of s 34(1), the public interest would not be served by interfering with the convention of confidentiality, as Deputy President Todd had explained in *Re Porter and Department of Community Services and Health* (1988) 14 ALD 403 at para 14:

> *… [W]hile a document does not fall within the terms of s.34(1) of the FOI Act, information may nevertheless be contained in it the disclosure of which would be contrary to the public interest on the footing that to do so would … breach the necessary confidentiality applying to the deliberations and processes of Cabinet.*
>
> *…*

113. The current issue of the Protective Security Manual (Exhibit A4) states in paragraph 6.65 that "Documents used by Cabinet to formulate policy and make decisions require special protective measures. These measures are detailed in the Cabinet Handbook …" .

114. The working party report was prepared at the request of Cabinet for the purpose of assisting Cabinet to define its policy position. The report is a deliberative document that canvasses the options open to Cabinet.

115. The applicant submitted that disclosing the report could not infringe Cabinet confidentiality because it was not provided to Cabinet, considered by it, or adopted by it. But that does not necessarily weaken the claim, as Deputy President Hall pointed out in *Re Reith and Attorney-General's Department* (1986) 11 ALD 345, when he concluded it would be against the public interest to release drafts of Cabinet submissions which, although not themselves exempt under s 34 because they had not been submitted to Cabinet, were "inextricably interwoven with the submissions ultimately placed before Cabinet" (at para 32). The tribunal also had this to say about Cabinet confidentiality:

> *… Thus, the FOI Act itself recognises a paramount public interest in preserving the confidentiality and secrecy of Cabinet submissions. Although the exemption in s.34 does not extend to draft Cabinet submissions, and thus it is necessary, as the respondent has done, to claim exemption for such drafts under s.36, the policy underlying s.34 seems to me to militate strongly in favour of the conclusion that the public interest in preserving Cabinet secrecy should extend to drafts of submissions that have gone to Cabinet. Particularly is that so where, as in the present case, the drafts are identical or very nearly identical with the document submitted to Cabinet. The important principle of Cabinet secrecy would be undermined if access to an*

> *exempt Cabinet submission could be obtained in this way. In my view, therefore, it suffices to say that the disclosure of the draft submissions would be contrary to the public interest recognised by the Act in preserving the secrecy of Cabinet deliberations. I find it unnecessary to consider the other grounds relied upon, as none of the draft documents canvass issues that go beyond, in any material respect, the matters put to Cabinet* (at para 31).
>
> …

116. Hartigan J also concluded that release of a draft Cabinet submission would be contrary to the public interest in Cabinet confidentiality: *Re Reith and Minister of State for Aboriginal Affairs* (1988) 16 ALD 709 at para 21.

117. For the reasons given above, I conclude that the working party report is inextricably involved with the Cabinet submission. The fact that no deliberations of Cabinet would be directly disclosed and that the report itself did not go to Cabinet (although it was available to Cabinet and was summarised for Cabinet's benefit) is immaterial. It is a deliberative document. It is also immaterial that the report is self-contained, as that may well be true of many highly confidential Cabinet documents. The applicant seeks only the final version of the working party report, not drafts or other internal records of the working party. Nevertheless, the final report itself remains a deliberative document that provided the foundation for the Cabinet submission and in particular for the executive summary.

118. The fact that later publication may have been contemplated is also of no moment. The timing of the disclosure of a document can be all-important, such as in relation to the federal budget and accompanying budget papers.

119. The applicant submitted that the subject matter of the report was not such as to necessitate confidentiality, unlike documents on such topics and defence, security or foreign relations. But, whatever the subject matter, how and when policy initiatives are to be announced is a matter that a government is entitled to decide. The authorities do not suggest that evaluating the public interest for the purposes of s 36(1)(b) turns predominantly on the tribunal's assessment of the inherent sensitivity of particular subject matters. As their Honours observed in *McKinnon v Treasury*, the primary focus is on documents. In this case, as in *Reith and Attorney General's*, the document in issue played "an integral part in the formulation of the submission ultimately put to

Cabinet" (11 ALD at para 32). That it was prepared outside Cabinet is immaterial, as in relation to the s 34 claim.

120. In determining where the public interest balance lies, the tribunal must have regard to the fact that s 34 exempts any document, regardless of its content, if it was submitted to Cabinet after having been brought into existence for that purpose. Thus, as Deputy President Hall pointed out in *Reith* (11 ALD 345 at para 31), the FoI Act itself recognises a paramount public interest in preserving the confidentiality and secrecy of Cabinet submissions (at para 31).

121. That public interest is unaffected by the lapse of time since the report was prepared. If compromising Cabinet confidentiality is adverse to the public interest, it remains adverse for as long as that confidentiality endures. As Ms Croke made clear in her evidence, the statutory 30-year period before disclosure of Cabinet documents is strictly observed.

122. Similarly, the change of government since the report was commissioned and prepared does not alter the preponderant weight of the public interest in confidentiality. Indeed, it may reinforce it. The convention described by Ms Croke that ministers in a new government do not seek access to documents recording the deliberations of ministers in previous governments is widely known. What may not be so widely known, however, is the thoroughness of the procedures put in place by the Cabinet Handbook for implementing that convention. It provides in paragraph 7.35 that before each House of Representatives election, departments are to ensure that all Cabinet documents held by them are accounted for and stored so that access can be controlled appropriately. If there is a change of government, Cabinet documents of the previous government must be destroyed.

123. Departments can provide ministers of a new government with summaries of relevant facts and of operative decisions necessary for understanding current issues, including, if essential to that understanding, summaries of the previous government's Cabinet minutes but not the minutes themselves (para 7.36). Further safeguards are provided in paragraph 7.37 of the handbook.

124. Ms Croke explained that if the present government intends to move forward with policy changes relating to criminalising cartel conduct, the convention would require that the relevant departments provide current advice to the government. It is therefore unlikely that ministers in the present government have had access to the working party report themselves.

125. In my view the public interest in the preservation of Cabinet confidentiality, a fundamental principle in the operation of the Australian political institution of the collective, indirectly elected executive outweighs the other public interest considerations in this case. I find that disclosure of the working party report would be contrary to the public interest.

126. It follows that paras (a) and (b) of s 36(1) are met and the document in issue is exempt.

127. The decision under review is affirmed.

I certify that the 127 preceding paragraphs are a true copy of the reasons for the decision herein of Professor GD Walker, Deputy President

Signed: .....[sgd].....

R. Wallace, Associate

Date/s of Hearing:	19 February 2008
Date of Decision:	10 April 2008
Solicitor for the Applicant:	Mr S Glass and Ms A Kempton, Gilbert & Tobin
Counsel for the Applicant:	Mr S Gageler SC and Ms K Richardson
Solicitor for the Respondent:	Mr J Davidson, AGS
Counsel for the Respondent:	Mr P Hanks SC and Ms R Graycar