HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND KIEFEL JJ

MARJORIE HEATHER OSLAND APPELLANT

AND

SECRETARY TO THE DEPARTMENT OF JUSTICE RESPONDENT

Osland v Secretary to the Department of Justice [2008] HCA 37
7 August 2008
M3/2008

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 17 May 2007.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for further hearing in accordance with the reasons of this Court.*

4. *Respondent to pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Victoria

Representation

J B R Beach QC with R H M Attiwill and J D Pizer for the appellant (instructed by Hunt & Hunt)

P M Tate SC, Solicitor-General for the State of Victoria with S B McNicol and M J Richards for the respondent (instructed by FOI Solutions)

CATCHWORDS

Osland v Secretary to the Department of Justice

Administrative law – Freedom of information – Exempt documents – *Freedom of Information Act* 1982 (Vic), s 50(4) empowered Tribunal to decide access should be granted to exempt documents if of opinion that public interest required access to be granted – Whether, in circumstances of this matter, Court of Appeal erred in concluding no basis for Tribunal to exercise power, when Court of Appeal did not examine documents.

Practice and procedure – Legal professional privilege – Waiver – Legal advice obtained in relation to petition for exercise of prerogative of mercy – Whether issue of press release disclosing existence and effect of advice inconsistent with maintenance of confidentiality in content of advice.

Words and phrases – "legal professional privilege", "mercy", "pardon", "public interest", "public interest override", "waiver".

Freedom of Information Act 1982 (Vic), ss 30, 32, 50(4).

1 GLEESON CJ, GUMMOW, HEYDON AND KIEFEL JJ. The appellant applied, under the *Freedom of Information Act* 1982 (Vic) ("the Act"), for access to certain documents in the possession of the Department of Justice of the Government of Victoria. The documents were prepared by lawyers and departmental officials. They contain advice about a request by the appellant (who was convicted of murder) that she be granted an executive pardon. Access to all but two of 265 pages was refused by the Department, both initially and upon internal review. The documents were said to be exempt from disclosure by reason of s 30 (which relates to internal working documents) and s 32 (which relates to legal professional privilege) of the Act.

2 Pursuant to s 50 of the Act, the appellant applied to the Victorian Civil and Administrative Tribunal ("the Tribunal") for review of the decision. The Tribunal is established by s 8 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ("the VCAT Act") and has two types of jurisdiction, "original jurisdiction" and "review jurisdiction" (s 40). The application was heard by the President of the Tribunal, Morris J, who agreed that the documents fell within s 32, but applied in favour of the appellant what is described as the "public interest override" provided by s 50(4) of the Act. He ordered that the appellant be given access to the documents[1]. On appeal to the Court of Appeal of the Supreme Court of Victoria, the decision of the Tribunal was reversed[2]. The Tribunal is empowered by s 80(3) of the VCAT Act to direct the production of documents by a party in a proceeding for review of a decision despite, among other things, "any rule of law relating to privilege or the public interest in relation to the production of documents."

3 The Tribunal, after inspecting the documents, found that they were all the subject of legal professional privilege. It did not deal with the additional claim for exemption under s 30. In the Court of Appeal, the only ground of challenge to the Tribunal's conclusion that the documents were the subject of legal professional privilege was a contention that the privilege had been waived in relation to one of the documents, a joint advice of three senior counsel (referred to as document 9). There was no challenge to the conclusion that the other documents in question were covered by s 32, although the present respondent complained that the Tribunal should also have dealt with the s 30 ground of exemption. The Court of Appeal held that the Tribunal had been correct to decide that legal professional privilege had not been waived in respect of

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1 *Re Osland and Department of Justice* (2005) 23 VAR 378.

2 *Secretary, Department of Justice v Osland* (2007) 95 ALD 380.

document 9. The Court of Appeal also held that the Tribunal had erred in law in dealing with the public interest override and, further, that there could be no basis on which, on the material before the Tribunal, an opinion could be formed that the public interest required access to the documents (including document 9). It made that decision without itself having inspected the documents.

The issues in this appeal

4 Following a limited grant of special leave to appeal, the appellant propounded the following grounds of appeal:

> "1. The Court [of Appeal] erred in law in:
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> (a) finding that the Victorian Attorney-General did not waive and thereby lose legal professional privilege in respect of the joint memorandum of advice of Susan Crennan QC (as she then was), Jack Rush QC and Paul Holdenson QC to the Attorney-General dated 3 September 2001 being Document 9 ('the joint advice') by publishing a press release on 6 September 2001 ('the press release') that disclosed the substance and gist of the joint advice and the conclusions reached in it; and
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> (b) ordering that the decision of the Respondent to deny the Appellant access to the joint advice be affirmed.
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> 2. The Court erred in law in finding that the learned President of the Victorian Civil and Administrative Tribunal ('the Tribunal') correctly concluded that the Attorney-General did not waive legal professional privilege in respect of the joint advice.
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> 3. The Court, without considering the content of Documents 1, 3, 4, 5, 6, 7, 8, 9 and 11 (which were inspected by the Tribunal but not the Court), erred in law in concluding that there could be no basis upon which, on the material before the Tribunal, an opinion could be formed under s 50(4) of the Freedom of Information Act 1982 (Vic) that the public interest requires that access to the said documents be granted under the Act."

5 Grounds 1 and 2 relate only to document 9, and only to the question of waiver of privilege. As in the Court of Appeal, there is in this Court no challenge to the Tribunal's conclusion that the other documents were covered by s 32, and as to document 9 the only challenge is to the Tribunal's conclusion that privilege in that particular document was not waived.

6 Ground 3 relates to all the documents in dispute, and challenges the Court of Appeal's conclusion that there was no basis for applying the public interest override, bearing in mind that the Court of Appeal did not examine the documents for itself.

The petition to the Governor of Victoria and the consideration of the petition

7 On 2 October 1996, following a trial by jury in the Supreme Court of Victoria, the appellant was convicted of murdering her husband, who was beaten to death with an iron bar. The prosecution case, accepted by the jury, was that the appellant planned and assisted in the killing. The appellant had been subjected to violence by her husband, and relied, unsuccessfully, upon defences of self-defence and provocation. She was sentenced to imprisonment for fourteen and a half years, with a non-parole period of nine and a half years. She is now on parole. An application to the Court of Appeal for leave to appeal against conviction and sentence failed[3]. A further appeal to this Court failed[4].

8 Having exhausted her rights of appeal, the appellant invoked the power of the Governor of Victoria to grant a pardon. Morris J gave the following account of the legal basis of that power, and the practice that is followed in matters where the power is invoked. This account was not disputed in argument, and may be accepted as accurate and sufficient for present purposes.

> "A petition for the exercise of the prerogative of mercy is a request made to the Crown by an individual seeking release from the effects of a conviction in circumstances where all avenues of appeal to the courts have been exhausted or where the courts have no jurisdiction. The Governor of Victoria has the power to exercise the prerogative of mercy as a representative of Her Majesty the Queen. The power derives from section 7 of the *Australia Act* 1986 (Commonwealth) which provides that the powers and functions of the Queen in respect of a State are exercisable only by the Governor of the State (subject to exceptions which are not presently relevant). Section 7(5) of that Act provides that advice to the Queen (and her representative) in relation to the exercise of the powers and functions of the Queen in respect of a State shall be tendered by the Premier of the State.

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3 *R v Osland* [1998] 2 VR 636.

4 *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75.

On 14 February 1986 the Queen issued Letters Patent relating to the Office of the Governor of Victoria. Clause III of the Letters Patent states, among other things, that the Premier shall tender advice to the Governor in relation to the exercise of powers and functions of the Governor not permitted or required to be exercised in Council. By convention, the accepted practice is and has been that the Premier seeks the advice of the Attorney-General in relation to whether the prerogative should be exercised. In turn, when the advice of the Attorney-General is sought, it is practice for the Attorney-General to ask his or her department to consider, evaluate and make recommendations in relation to the petition. Sometimes the advice of the Victorian Government Solicitor is sought. To the extent that a petition of mercy raises non-legal grounds (for example, compassionate grounds, meritorious conduct grounds, or other special grounds) the assessment of the petition on those other grounds is usually conducted within the department. Clearly enough, though, there will often be an overlap between what might be described as legal grounds and what might be described as non-legal grounds.

Before tendering his advice to the Premier, the Attorney-General may wish to follow up the advice he or she has received in relation to the matter. Generally the Attorney-General advises the Premier and it is then a matter for the Premier to proffer advice to the Governor. On rare occasions the Attorney-General's advice may be considered by Cabinet before the Premier makes a recommendation to the Governor. However this did not apply in the present case."

9 The appellant's petition was lodged with the Attorney-General for Victoria on 5 July 1999. The arguments advanced in support of the petition were summarised as follows:

"1. There is strong evidence that with appropriate law reform which acknowledged gender difference in provocation and self defence, Mrs Osland would have been found to have acted in self defence when Frank Osland was killed.

2. Additional and new evidence strongly supports Mrs Osland's claim that she acted in self defence when her husband died.

3. Mrs Osland's sentence is very severe when weighed in the context of her life experience and, if served in full, will significantly exceed the terms served by women in recent comparable cases which we have been able to identify. Mrs Osland lived in a prison of domestic violence for 13 years before entering her current

prison. Her cumulative suffering has been and continues to be so profound that executive intervention is now warranted in ending it.

4. Even if it is accepted that Mrs Osland committed an offence, she and her family were so offended against by the wider community in its failure to protect her and her children from sustained torture, terror and trauma, that it is appropriate that the community's representative should now temper Mrs Osland's justice with compassion.

5. None of the reasons for which we as a community imprison people – to punish, to reform, to deter others from offending – apply in her case any longer.

6. Mrs Osland's continuing imprisonment is corrosive of people's faith in the justice system because it shows the law failing."

10 While the petition was being considered, there was a State election and a change in Attorneys-General. In the course of consideration of the petition, the documents the subject of these proceedings were brought into existence. The general nature of the documents and the circumstances in which they were produced may be seen from the following edited extract from the Tribunal's reasons that was included by Maxwell P as a schedule to his reasons for judgment.

"At the time of the State election in 1999 the petition for mercy was still being considered by the then Attorney-General, the Honourable Jan Wade MP. By that time Document 1 had been created, being a memorandum of legal advice dated 17 August 1999 from the Victorian Government Solicitor to the Attorney-General ('the first VGS advice').

Following the election, and the appointment of a new Attorney-General (the Honourable Rob Hulls MP), Document 2 was created. This is a memorandum of advice from Mr W H Morgan-Payler QC and Mr Boris Kayser, both Crown prosecutors, to the Director of Public Prosecutions. This document ('the Crown prosecutors' advice') is dated 2 December 1999, and provides advice that the petition be rejected. (It transpired, on the eve of the Tribunal hearing, that the applicant had already received a copy of the Crown prosecutors' advice; and, as a result, the respondent no longer maintained that this document was an exempt document.)

Following the preparation of the Crown prosecutors' advice, Document 3 was created: this is a memorandum of advice, dated

8 December 1999, from the Victorian Government Solicitor to the Attorney-General ('the second VGS advice'). This memorandum provided further advice to the Attorney-General in relation to the petition and made a recommendation in the light of the advice received from the Crown prosecutors.

Document 4 is a memorandum of advice dated 22 February 2000 from the then Acting Director of Legal Policy to the Attorney-General and the Deputy Secretary, Legal, of the department. This document, which is in the form of a short briefing note, also contains a hand written notation by the Attorney-General.

Document 5 is a memorandum of advice from the then Director of Legal Policy to the Attorney-General, the Secretary to the department and the Deputy Secretary, Legal, of the department. This memorandum includes a summary of the legal advice which had been obtained at the time of that memorandum. Although this memorandum made certain recommendations, it would appear that no final decision was made as a result of these recommendations.

On 9 May 2000 a meeting was held between, among others, the Attorney-General, former Premier Joan Kirner, and representatives of the applicant. During that meeting the Attorney-General stated that an opinion would be obtained from senior counsel on the merits of the petition. The name Robert Redlich QC was mentioned as a member of counsel who may be engaged to provide the advice. Document 6, which is a memorandum dated 10 May 2000 from the Director of the Legal Policy Unit of the department to the Attorney-General and Deputy Secretary, Legal, of the department, sets out issues upon which the opinion from senior counsel was to be obtained.

Document 7 is a letter dated 25 August 2000 and a lengthy and detailed memorandum of advice of the same date prepared by Robert Redlich QC and a junior barrister. The memorandum contains very detailed advice in relation to the petition and includes a number of annexures.

On 6 December 2000 Document 8 was created. This is a memorandum of advice from the then Director of Legal Policy to the Attorney-General and the Acting Deputy Secretary, Legal, of the department. This memorandum summarises the Redlich advice and sets out options available to the Attorney-General in the light of that advice.

After Document 8 was prepared discussions were held between the Attorney-General and the Premier. Following these discussions the Attorney-General requested his department to obtain a further joint advice from three senior counsel. The senior counsel asked to give that advice were Ms Susan Crennan QC, Mr Jack Rush QC and Mr Paul Holdenson QC. Document 9, which is dated 3 September 2001, is a memorandum of joint advice from these three barristers ('the joint advice'). The joint advice is a comprehensive memorandum which canvasses essentially the same issues as those canvassed in the Redlich advice.

After receipt of the joint advice the department prepared Document 10. This is a memorandum dated 5 September 2001 from the Director of Legal Policy to the Deputy Secretary, Legal and Equity and the Attorney-General in which it is recommended that a letter be signed recommending that the petition be denied. A copy of this memorandum has already been released. Three draft letters were attached to this memorandum, generally giving effect to the recommendation in the memorandum. (The applicant no longer pursues her request in relation to these draft letters.)

Document 11 is a copy of a letter of advice which is undated and which was sent from the Attorney-General to the Premier in relation to the applicant's petition of mercy. This letter enclosed a draft letter of advice from the Premier to the Governor and a draft letter of advice from the Governor to Mrs Osland."

11 By the time of the Tribunal's decision, documents 2 and 10 were no longer the subject of dispute.

12 For the purpose of consideration of the issues to be decided by this Court, it is unnecessary to go into further detail about the nature of the petition. As Morris J recognised, and as is evident from the above summary of the matters relied upon by the appellant, reliance was placed on legal argument, wider questions of justice and public policy, including possible law reform, and compassionate grounds personal to the appellant and arising from the particular circumstances of her case. Although petitions of this kind ordinarily are considered by lawyers within the Department of Justice, or external lawyers retained for the purpose, they need not be, and frequently are not, limited to questions of strict law. In various contexts, legal professionals advise on matters of policy, their legal expertise being relevant to the weight to be attached to their opinions. The circumstance that a petition such as that of the appellant was put before lawyers within and outside the Department of Justice for their opinion is

neither surprising nor unusual. As Morris J also observed, this Court has held that legal professional privilege may attach to advice given by lawyers, even though it includes advice on matters of policy as well as law[5].

13 In the course of explaining his reasons for deciding that all the disputed documents were the subject of legal professional privilege, Morris J dealt with the fact that some of them covered matters that went beyond purely legal issues. He also found that it was not practicable to provide an edited version of any of the documents. These aspects of his decision were not the subject of any ground of appeal or contention in the Court of Appeal or in this Court.

14 On 6 September 2001, the Attorney-General announced that the Governor had denied the appellant's petition.

The press release

15 The announcement of the denial of the petition was accompanied by a press release which said:

> "On July 5, 1999, Mrs Osland submitted a petition for mercy to the then Attorney-General Jan Wade. That petition set out six grounds on which the petition should be granted.
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> Following consultation with the State Opposition, I appointed a panel of three senior counsel, Susan Crennan QC, Jack Rush QC and Paul Holdenson QC, to consider Mrs Osland's petition.
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> This week I received a memorandum of joint advice from the panel in relation to the petition. The joint advice recommends on every ground that the petition should be denied.
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> After carefully considering the joint advice, I have recommended to the Premier that the Governor be advised to deny the petition.
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> The Governor has accepted this advice and denied the petition."

16 The appellant's argument about waiver of privilege in respect of document 9 turns upon the second sentence in the third paragraph of the press release. It was acknowledged that, without that sentence, there would probably be no issue of waiver. Morris J said:

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5 *Waterford v The Commonwealth* (1987) 163 CLR 54; [1987] HCA 25.

> "The reason why the Attorney-General took this course seems clear enough. He wished to demonstrate to the public that the petition of mercy had been taken seriously and that the Government had taken high level advice before recommending that the petition be denied. Further, by naming the counsel and stating that the joint advice recommended on every ground that the petition should be denied, the Attorney-General was seeking to rely upon the reputation of the senior counsel to support the reasonableness of the Government's decision. I find that this was totally legitimate."

17 Morris J found as a fact that the press release did not distort the joint advice or create a misleading impression, by which, having regard to the context, he evidently meant a misleading impression about the contents of the joint advice.

The legislation

18 The Act is described in its long title as: "An Act to give the Members of the Public Rights of Access to Official Documents of the Government of Victoria and of its Agencies and for other purposes". Section 13, which is in Pt III, provides that, subject to the Act, every person has a legally enforceable right to obtain access in accordance with the Act to a document of an agency, or an official document of a Minister, other than an exempt document. Part IV identifies exempt documents. It includes ss 30 and 32. Section 30 covers certain kinds of "internal working documents" (which, having regard to the definition of "officer" in s 5, includes documents that might not ordinarily be regarded as purely "internal") if their disclosure would be contrary to the public interest. Section 32 covers a document that "would be privileged from production in legal proceedings on the ground of legal professional privilege." The case has been conducted on the basis that s 32 would cease to apply to a document in respect of which privilege was waived. There appears to be no reason to doubt that premise.

19 Part VI of the Act deals with review, including review by the Tribunal, of decisions to refuse access to documents. It includes the following provision (the "public interest override") in s 50(4):

> "On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 29A, section 31(3), or in section 33) where the

> Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act."

20 Several points concerning the construction of s 50(4) and its place in the Act may be made forthwith. First, the sub-section to some degree is a legislative response to considerations of the nature explored by Lord Wilberforce in *British Steel Corporation v Granada Television Ltd*[6]:

> "Then there is the alleged right to a free flow of information, or the right to know. Your Lordships will perceive without any demonstration from me that use of the word 'right' here will not conduce to an understanding of the legal position. As to a free flow of information, it may be said that, in a general sense, it is in the public interest that this should be maintained and not curtailed. Investigatory journalism too in some cases may bring benefits to the public. But, granting this, one is a long way from establishing a right which the law will recognise in a particular case. Before then it is necessary to take account of the legitimate interest which others may have in limiting disclosure of information of a particular kind."

Secondly, the specific exclusions from the operation of s 50(4) – Cabinet documents (s 28), documents affecting security, defence or international relations (s 29A), certain law enforcement documents (s 31(3)), and documents affecting personal privacy (s 33) – indicate what otherwise is the scope of s 50(4). Thirdly, that a ground of general exemption, such as that exempting documents privileged from production on the ground of legal professional privilege (s 32), is not made good in a particular case does not deny the possible operation of s 50(4) in the circumstances of that case.

21 Section 50(4) is a unique provision in Australian freedom of information legislation. The *Freedom of Information Act* 2000 (UK)[7] provides for general rights with respect to access to information (s 1(1)) and for information which may be exempt. Some exemptions are absolute (s 2(3)). They include exemptions of the kind which the Victorian Act excludes from the operation of s 50(4)[8]. Other exemptions, such as that relating to information the subject of

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6 [1981] AC 1096 at 1168.

7 The relevant provisions of which came into effect on 1 January 2005.

8 See s 2(3) and, for example, s 23 (corresponding, in part, to s 29A of the Act) and s 40 (corresponding, in part, to s 33 of the Act).

legal professional privilege, are not treated as absolute[9]. Whether such an exemption is maintained depends upon whether the public interest in maintaining it outweighs the public interest in disclosing the information (s 2(2)(b)). A point which arises from the United Kingdom Act, as relevant to s 50(4), is that it is not possible to approach an exemption such as that provided in s 32 with respect to documents subject to legal professional privilege as if it were absolute. To do so would deny the intended operation and effect of s 50(4).

22 The VCAT Act, in Pt 5, provides for appeals from the Tribunal. So far as presently relevant, it provides, in s 148(1), that a party to a proceeding may appeal, on a question of law, from an order of the Tribunal to the Court of Appeal. Section 148(7) provides that the Court of Appeal may make any of the following orders:

> "(a) an order affirming, varying or setting aside the order of the Tribunal;
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> (b) an order that the Tribunal could have made in the proceeding;
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> (c) an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the court;
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> (d) any other order the court thinks appropriate."

The decision of the Tribunal

23 Having concluded (for reasons that are not presently in issue) that all the disputed documents were the subject of legal professional privilege within s 32, Morris J went on to deal with the argument that, in relation to document 9, privilege had been waived by the disclosure, in the Attorney-General's press release, not only that advice had been taken from the authors of the joint advice, but also, and critically, that the advice "recommend[ed] on every ground that the petition should be denied." Applying what was said in this Court in *Mann v Carnell*[10], concerning implied or imputed waiver (it was not suggested that the present was a case of express waiver), Morris J held that such disclosure as was made in the press release was not inconsistent with the maintenance of the confidentiality which the privilege protects, and that there was no waiver.

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9 See s 2(3) and s 42.

10 (1999) 201 CLR 1 at 13 [28]-[29]; [1999] HCA 66.

24 As to s 30, Morris J said: "I cannot see how the documents could be exempt under section 30 if I was to form the opinion that the public interest requires that access be given to the documents; and if I was not to form such an opinion, it is unnecessary to determine this question as I intend to uphold the claim under section 32." He went on to consider s 50(4).

25 Morris J commenced what he described as a balancing process by making some observations about the general importance of maintaining legal professional privilege. In that context, he distinguished between "historical documents" and documents likely to be relevant to a future government decision. The documents in question, he said, fell into the former category. By "historical" he meant relating to a past decision as distinct from relating to a future decision. The decision in question was made in September 2001, about four years before the Tribunal's decision. However, as appears from other parts of the reasons of Morris J, there was an ongoing public controversy about the appellant's conviction and sentence, and about the refusal of the petition. In assessing the proposition that the documents were historical it is necessary to keep in mind the sense in which that term was being used.

26 Included in public interest factors favouring release, as they appeared to Morris J, were the public interest in free availability of information and democratic discussion of government decisions, and the public interest in the operation of the criminal justice system. The Osland case, he said, was unique because of the publicity and concern it generated.

27 Having remarked that it was "totally legitimate" for the Attorney-General to refer to the joint advice, Morris J went on:

> "However in circumstances where a government decision is made in relation to a petition of mercy, relying upon particular advice which is specifically referred to, there will be a strong public interest in also making available any other advice that has been obtained in relation to the same question. If a decision maker obtains advice from two sources and receives different advice, the public might be misled if it is told that a decision has been made on the basis of advice (specifying the advice) without reference to the fact that there was also different advice. If only one advice is specified in such circumstances an impression may be created that the decision maker really had no choice; whereas if the two different advices are specified the public might think that there was a choice to be made by the decision maker and wish to know why a particular choice was made.

> In my opinion, there are powerful reasons why the conclusions contained in the VGS advices and the Redlich advice should be made available to the public. It is only if these conclusions are publicly available that citizens will be in a position to put these conclusions beside the conclusions in the joint advice; and to assess the merits of the Government's decision to deny the petition of mercy. However the provision of access to just the *conclusions* contained in the VGS advice and the Redlich advice is likely to raise even more questions about the consideration of the petition of mercy, without answers. Are the reasons given in the joint advice more cogent than the reasons given in the Redlich advice? Was the same information available to each advisor? And so on. In order to clear the air and properly inform the public it would be necessary for the whole of these documents, not just the conclusions, to be made available." (emphasis in original)

28 It is difficult to know exactly what to make of the references to "different advice". Morris J examined the documents in question. From his description of document 2 (which was made available to the appellant) we know that it recommended that the petition be rejected. On the other hand, we do not know what document 7 recommended. For understandable reasons, Morris J was circumspect in what he said about the contested documents. Their availability was (and still is) the subject of dispute. They have not been seen by the appellant or by her lawyers. They do not know in what, if any, respects the advices are different. Morris J made no finding that they were materially different, but after referring to the potential significance of difference he spoke of "powerful reasons" for making the conclusions of the VGS advices and the Redlich advice available to the public. It is difficult (and would have been difficult for the Court of Appeal) to know whether he was merely referring to possible speculation by members of the public that there may have been significant differences, or whether he was indicating that his own examination of the documents revealed such differences. The reasoning in these two paragraphs is far from clear, but that may be the consequence of a desire not to say too much about the contents of the documents and thereby pre-empt the outcome of the entire dispute.

29 Morris J applied s 50(4) and ordered that access be given to documents 1, 3, 4, 5, 6, 7, 8, 9 and 11.

The decision of the Court of Appeal

30 The Secretary to the Department of Justice appealed to the Court of Appeal, claiming a number of errors of law in the Tribunal's approach to the exercise of the power conferred by s 50(4). The orders sought included an order that Mrs Osland be refused access to the documents in question or, alternatively,

that the matter be remitted to the Tribunal to be heard and determined according to law. Mrs Osland filed a notice of contention which related only to document 9, and claimed that the order for access to that document should be affirmed on the further ground that privilege had been waived.

31 Maxwell P, with whom Ashley JA and Bongiorno AJA agreed on this point, dealt first with waiver. He recorded that there was no challenge to the Tribunal's conclusion that (subject to waiver in relation to document 9) all documents were within the scope of s 32.

32 He began by referring to the statement in *Mann v Carnell*[11]:

> "Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects [an implied or imputed] waiver of the privilege".

33 The present, of course, was not said to be a case of express waiver. Maxwell P referred, as an example of inconsistency, to *Benecke v National Australia Bank*[12]. That case also exemplifies the fact that a person can waive privilege without intending that consequence. Mrs Benecke, in her pleadings and evidence in certain proceedings, asserted that her lawyer had compromised a claim without her consent. She attempted to rely on privilege to prevent the lawyer giving the lawyer's version of her instructions. Nobody suggested that Mrs Benecke intended a waiver of privilege to be the result of her conduct. It was quite likely that she never thought about the matter. As was said in the judgment in *Mann v Carnell*[13]: "[T]he law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege."

34 Maxwell P considered a number of decisions dealing with the question whether a particular disclosure gave rise to a waiver of legal professional privilege. He compared the formulations of Gyles J and Tamberlin J (who were otherwise in agreement as to the outcome) in the Federal Court in *Bennett v Chief*

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11 (1999) 201 CLR 1 at 13 [28].

12 (1993) 35 NSWLR 110.

13 (1999) 201 CLR 1 at 13 [29].

Executive Officer of the Australian Customs Service[14], and expressed the view that, although what Gyles J said may have been apposite to the facts of the particular case, it did not express a rule of general application. Maxwell P considered that it was more accurate to say, as Tamberlin J said, that disclosure of a conclusion expressed in legal advice, without disclosing the reasons, may or may not result in waiver of privilege depending upon a consideration of the whole of the context in which that occurs.

35 After a discussion of a number of cases argued by the parties to be analogous, Maxwell P expressed his conclusion that the Tribunal's decision on waiver was not only open but was clearly correct. He gave his reasons as follows:

> "Amongst the circumstances relevant to determining inconsistency, it is clear from *Carnell* and *Bennett* that the purpose for which the privilege-holder made the disclosure is highly relevant. The question here was whether the use made by the Minister of the disclosed portion of the privileged communication – more particularly, the purpose for which the conclusion was disclosed – was inconsistent with the maintenance of confidentiality in respect of the content of the advice.
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> First it is necessary to restate the purpose of the confidentiality which the privilege preserves. In *Grant v Downs*, Stephen, Mason and Murphy JJ said:
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> > 'The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.'[15]
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> Later, in *Baker v Campbell*, Mason J noted that the underlying policy of the privilege covering legal advice –

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14 (2004) 140 FCR 101.

15 (1976) 135 CLR 674 at 685; [1976] HCA 63.

> 'involved the promotion of freedom of consultation generally between lawyer and client.'[16]

In the same case, Deane J said that the principle underlying the privilege was that –

> 'a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by the subsequent disclosure of confidential communications.'[17]

The evident purpose of the Attorney-General's disclosure was to inform the public that the recommendation he had made to the Governor – that the petition for mercy be denied – was based on independent legal advice, advice which recommended that each ground advanced in the petition should be rejected. The Attorney-General evidently wished it to be known that, in considering whether or not the prerogative of mercy should be exercised, he had taken independent advice and was making a recommendation which accorded with that advice. In the language of *Carnell*, this was a disclosure 'for the purpose of explaining or justifying' the Attorney-General's actions. The purpose was similar to that of the disclosure in *Carnell* itself, where the Chief Minister wished to satisfy the relevant member of Parliament that the ACT Government 'had acted responsibly and in accordance with legal advice'.[18]

In my opinion, there was no inconsistency between disclosing the fact of, and the conclusions of, the independent advice for that purpose, and wishing to maintain the confidentiality of the advice itself. This was not a case of a party to litigation 'deploying' a partial disclosure for forensic advantage, while seeking unfairly to deny the other party an opportunity to see the full text of the privileged communication. Nor was it 'the laying open of the confidential communication to necessary scrutiny'.[19]"

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16 (1983) 153 CLR 52 at 74; [1983] HCA 39.

17 (1983) 153 CLR 52 at 115-116.

18 (1999) 201 CLR 1 at 8 [14].

19 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 at 519 [58], 520 [61].

36 As to s 50(4), Maxwell P said that the way in which the Tribunal had dealt (or, rather, failed to deal) with the claim for exemption under s 30 (relating to internal working documents) involved an error of law, relevant to the public interest override, which alone would have been sufficient to justify allowing the Secretary's appeal. Section 30 treats a document as an exempt document if two conditions are satisfied. First, the document must answer a certain description. The second condition is that disclosure would be contrary to the public interest. The Tribunal had put the s 30 claim for exemption to one side, saying that if the Tribunal were to form an opinion, under s 50(4), that the public interest required that access be given to the documents, then the documents could not be exempt under s 30, because the second condition could not be satisfied. Maxwell P pointed out that, in the result, when the Tribunal dealt with s 50(4), it failed to take into account the particular public interest considerations underlying the exemption for internal working documents, including the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of government and in relation to sensitive issues, and the preservation of confidentiality so as to promote the giving of full and frank advice. Ashley JA agreed, as did Bongiorno AJA.

37 All three members of the Court of Appeal went on to consider what Maxwell P described as "the other grounds of attack on the Tribunal's conclusion that the public interest required that access be granted to the documents."

38 Maxwell P found legal error in the Tribunal's distinction between advice that was of historical interest only (in the sense earlier explained) and advice relating to action that was yet to be taken, and in the application of that distinction to the present case. He referred to the statement of Stevenson J in *Hobbs v Hobbs and Cousens*[20] to which McHugh J referred in *Giannarelli v Wraith [No 2]*[21]:

> "[O]nce legal professional privilege attaches to a document ... that privilege attaches for all time and in all circumstances."

39 That observation, of course, is subject to the possibility of waiver. In the context of s 50(4), it is also subject to the possibility of supervening circumstances relevant to the public interest.

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20 [1960] P 112 at 117.

21 (1991) 171 CLR 592 at 601; [1991] HCA 2.

40 Maxwell P also concluded that the Tribunal, in discussing the public interest, had taken into account an irrelevant consideration, that is to say, the Tribunal's perception of the public's wish to know the reasons for denying the petition.

41 He then went on to consider whether, in the circumstances of this case, the test imposed by s 50(4) could have been satisfied, that is, whether it was *open* to the Tribunal to conclude that the public interest *required* that access to the documents be granted. He answered that question in the negative. He was prepared to leave unresolved the question whether there could be proceedings for judicial review of a decision to refuse a petition, pointing out that the proceedings before the Tribunal, and the Court of Appeal, were not of that character. It was, he said, outside the scope of s 50(4) for the Tribunal to consider, as a matter of principle, whether decisions made in the exercise of the prerogative of mercy should be open to public scrutiny. It was not open to the Tribunal to decide that, although legal professional privilege, and the Parliament's recognition of it in s 32, itself strikes a balance in favour of confidentiality of legal advice, there was an overriding public interest in exposing to public scrutiny decisions made in the exercise of the prerogative of mercy. He concluded:

> "In my view, the circumstances of the present case give rise to no public interest consideration which would be capable of satisfying the test in s 50(4) so as to require disclosure of the legal advices. It follows that the Tribunal's decision granting access should be quashed and, in its place, there should be substituted an order that the original decision refusing access be affirmed."

42 Ashley JA and Bongiorno AJA both agreed with what Maxwell P said about further errors in the reasoning of the Tribunal on the s 50(4) issue. Bongiorno AJA, with whom Ashley JA agreed, gave somewhat different reasons for concluding that s 50(4) did not operate in favour of Mrs Osland, and that "[t]here could be no justification, on any of the material before the Tribunal or before [the Court of Appeal], for an opinion that the public interest required that access to the documents … be given".

43 Bongiorno AJA said that, in Victoria, the exercise of the prerogative of mercy was not subject to judicial review. He said:

> "If the prerogative of mercy is indeed part of the criminal justice system at all, it is a part distinct in function and process from all that goes before it – from the filing of a charge in the Magistrates' Court to the dismissal of an appeal by the High Court. The function of the criminal

justice system is to determine guilt or non-guilt, and, if applicable, to impose sentence; its process is open, public and examinable at almost every point. It is only when that process is complete that the Sovereign can be petitioned to extend mercy to the person convicted. Whether the prerogative is exercised or not is entirely within the province of the Sovereign advised by the executive government. No question of legal rights is involved. No reasons need be given for the decision taken, whether that decision is to exercise or not exercise the prerogative or to invoke or not invoke s 584 of the *Crimes Act* 1958 to involve [the Court of Appeal] or the Trial Division of the Supreme Court in the process. The decision itself is not reviewable, nor are the reasons, motives, or intentions of the Crown's representative. Why then should the advice the Attorney-General received before advising the Crown's representative to deny the petition be placed in the public domain?

If, in this case, the opinions received by the Attorney-General were not all in agreement or they, or some of them, advised a course other than that which the Attorney-General finally took, the release of those opinions would enable a political collateral attack on the exercise of the prerogative of mercy which would have the effect of changing its fundamental nature. It would cease to be the exercise of the unexaminable power of the Sovereign to pardon or not (or to take any other course) but would become merely another administrative decision of government, which the Attorney-General would have to defend in the public arena. If Parliament had intended that the exercise of the prerogative of mercy should be so fundamentally altered it could replace it with a statutory scheme with any review or appeal procedures it considered appropriate. It has not done so. Until it does there is no public interest, let alone a compelling public interest, in permitting access to the documents sought by [Mrs Osland].

The general proposition as to the desirability of information being made available to inform public discussion of the actions of the executive has no application in the case of the prerogative of mercy. Although the legal nature, boundaries and historical origins of the prerogatives of the Crown (of which the prerogative of mercy is but one) may not be susceptible of precise analysis, for present purposes it is sufficient to recognise that the prerogative of mercy, at least in this country, is not susceptible to judicial review. Why then should there be any public interest in the provision of access to legal opinions obtained by the relevant Minister before he advised the representative of the Crown to refuse [Mrs Osland's] petition? In this case, if the Attorney-General wished to publish the opinions he obtained before advising the Governor to reject [Mrs Osland's] petition he was, and remains, at liberty to do so.

No public interest requires that he now make available those opinions to [Mrs Osland].

The second matter which the Tribunal referred to as justifying the application of the public interest override in this case, was that the case was 'unique' because of the large amount of publicity it has generated. But even if publicity suggests that the matter publicised is one in which the public is interested it does not, *per se*, demonstrate public interest in the sense that term is used in s 50(4) of the Act. It is in this respect that the Tribunal made the error of law to which the President has referred in his judgment. Even if the case is unique, which I take leave to doubt, that factor does not compel disclosure in the public interest.

In concluding its analysis of the public interest factors which it considered favoured release of the documents in question the Tribunal again referred to the desirability of transparency in decision-making in the context of the public's right to compare the opinions obtained by the Attorney-General before recommending that [Mrs Osland's] petition be denied. But this proposition advances the case no further. It is erroneous because it commenced from the erroneous position that the function being performed by the Attorney-General involved a decision in the criminal justice process, rather than one of advising the Sovereign as to the exercise of an unexaminable prerogative of the Crown." (footnotes omitted)

Waiver of privilege

44 On the issue of waiver of privilege in document 9, an issue resolved adversely to the appellant by both the Tribunal and the Court of Appeal, both parties accepted that the principles to be applied were those stated in the joint reasons of four members of this Court[22] in *Mann v Carnell*[23]. The difference between the parties concerned their application to the circumstances of the present case.

45 Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver "imputed by operation of law"[24]. It

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22 Gleeson CJ, Gaudron, Gummow and Callinan JJ.

23 (1999) 201 CLR 1.

24 *Goldberg v Ng* (1995) 185 CLR 83 at 95, 109, 116; [1995] HCA 39; *Mann v Carnell* (1999) 201 CLR 1 at 13 [29].

reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances. In the case of *Benecke*, referred to in *Mann v Carnell*, and discussed by Maxwell P in the present case, an appreciation of the unfairness if Mrs Benecke could give her version of her communications with her lawyer and at the same time prevent the lawyer from giving her own version was one aspect of the inconsistency between her conduct in making certain kinds of allegation against her lawyer and holding her lawyer to obligations of confidentiality. In the present case counsel for the appellant acknowledged that, if the press release had not included the sentence earlier identified as critical, privilege probably would not have been waived. This is undoubtedly correct, even though, upon that hypothesis, the press release would have made some disclosure concerning legal advice taken by the Department.

46 The conduct of the Attorney-General in issuing the press release and including in it certain information about the joint legal advice is to be considered in context, which includes the nature of the matter in respect of which the advice was received, the evident purpose of the Attorney-General in making the disclosure that was made, and the legal and practical consequences of limited rather than complete disclosure.

47 It is not necessary for present purposes to decide a question about which there was some division of opinion in the Court of Appeal, that is to say, whether it is possible to obtain judicial review of a decision to refuse an executive pardon, or the related question whether it is possible to compel reasons for such a decision[25]. Although the topic was raised, it was not the subject of substantial argument. The Victorian practice was described in a passage from the Tribunal's reasons set out above, and it is clear that the general practice is that reasons for such decisions are not made public. By hypothesis, a petitioner has exhausted his or her legal rights. The terms "pardon" and "mercy" may create a misleading impression. The power may be invoked in a case where it is alleged that there has been a miscarriage of justice, or in a case where the grounds relied upon are

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25 cf *Horwitz v Connor* (1908) 6 CLR 38; [1908] HCA 33; *Flynn v The King* (1949) 79 CLR 1 at 7-9; [1949] HCA 38; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 261; [1981] HCA 74; *Von Einem v Griffin* (1998) 72 SASR 110; *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349; *Reckley v Minister of Public Safety and Immigration (No 2)* [1996] AC 527; *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.

purely compassionate, or in some intermediate situation. The person in question may, or may not, claim to be technically and/or morally innocent. An application for a pardon does not imply an admission of guilt; on the contrary, it may be accompanied by an assertion that there has been a wrongful conviction. Nor does it necessarily imply an assertion of innocence; it may be based upon a contention that the law is unduly harsh either generally or in its application to the particular case, or that there are personal grounds for compassion. The pardon, if granted, may be absolute or conditional. In every case, however, the petition is based, not upon a claim of legal right, but upon an appeal to an executive discretion originating in the royal prerogative. The practice is not to give reasons for such a decision. Whether or not, in the circumstances of a particular case, or more generally, that practice is open to challenge is beside the present point. The practice formed part of the context in which the Attorney-General acted. If the appellant has a legal right to seek review of the Governor's decision, or to obtain the reasons for that decision, these present proceedings are not appropriately constituted to vindicate such a right. They are proceedings for review, and consequent appeal, in respect of a decision under the Act; and the point in question is whether the Attorney-General, being otherwise entitled to maintain the confidentiality of certain legal advice, waived that entitlement by his conduct. Whether the practice ought to be different, and whether it could be challenged in judicial review proceedings or otherwise, is not relevant to whether the Attorney-General waived privilege.

48 The evident purpose of what was said in the press release was to satisfy the public that due process had been followed in the consideration of the petition, and that the decision was not based on political considerations. The three eminent lawyers who gave the advice were appointed following consultation with the State Opposition. They were external to the Department. Their advice covered all the grounds upon which the petition was based. They recommended denial of the petition. Their advice was carefully considered, and the petition was denied. The Attorney-General was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not involve inconsistency; and it involved no unfairness to the appellant. If she had a legal right to reasons for the decision, then she still has it. If she had no such right, the press release did not deprive her of anything to which she was entitled. What the Attorney-General said did not prevent the appellant from making public her petition, or any part of it, as and when she desired.

49 Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. As Tamberlin J

said in *Nine Films and Television Pty Ltd v Ninox Television Ltd*[26], questions of waiver are matters of fact and degree. It should be added that we are here concerned with the common law principle of waiver, not with the application of s 122 of the *Evidence Act* 1995 (Cth) which, as was said in *Mann v Carnell*[27], has the effect that privilege may be lost in circumstances which are not identical to the circumstances in which privilege may be lost at common law[28].

50 The reasoning of Maxwell P was correct.

Section 50(4)

51 Although there was an unsuccessful attempt to obtain special leave to appeal on wider grounds, the appellant's third ground of appeal is directed to a specific aspect of the way in which the Court of Appeal dealt with the "public interest override". Counsel for the appellant explained the ground as follows:

> "Our short point is that the Court of Appeal, in the absence of reviewing these specific documents, could not have formed the view that necessarily section 50(4) could not apply."

52 It appears that the Court of Appeal was not invited by either party to inspect the documents in dispute. We were told in the course of argument that, at least on the appellant's side of the record, it was understood that, if the Court of Appeal found legal error in the Tribunal's decision on s 50(4), it would remit the proceedings to the Tribunal. This understanding was said to be supported by an announcement at the commencement of the proceedings in the Court of Appeal that the present respondent did not seek to have the Court of Appeal make a substantive order in relation to the application for access. In the events that occurred, the Court of Appeal made orders denying access, and it did so for the reasons recounted above. The question for this Court is whether, not having seen the documents, the Court of Appeal erred in deciding that, in the circumstances of the case, there was no basis upon which it could have been concluded that the case was one for the application of s 50(4).

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26 (2005) 65 IPR 442 at 447 [26].

27 (1999) 201 CLR 1 at 11 [23].

28 See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67.

53 The Court of Appeal had available to it the Tribunal's description of the documents and the Tribunal's reasons for applying s 50(4). The legal errors which the Court of Appeal found in the Tribunal's reasons (which are not presently in contest) did not turn upon the particular contents of the documents. The Court of Appeal was able to identify those errors without inspecting the documents. The same applies to the greater part of the Court of Appeal's reasoning on its own approach to the application of s 50(4). The public interest considerations in play were canvassed in the reasons of the Tribunal and the arguments of the parties. The appellant did not rely upon public interest considerations additional to those relied upon by Morris J. Save in one respect Morris J did not say, or suggest, that his decision concerning s 50(4) turned upon any aspect of the contents of the documents apart from their general character as outlined in his reasons.

54 The qualification to what is said in the previous sentence arises from the two paragraphs in the reasons of Morris J quoted above under the heading: "The decision of the Tribunal". As was noted, it is not clear from those paragraphs whether Morris J was saying, or suggesting, that there was some material inconsistency between the joint advice and the other advices received by the Attorney-General, or between the factual bases upon which the various advices were given. Yet he appeared to raise, as a matter for serious consideration, the possibility that there was some "difference" between the joint advice and other advices.

55 Bongiorno AJA, with whom Ashley JA agreed, took up the point directly, although without looking at the documents to see whether there was any factual foundation for it. He dealt with the matter by saying that, if the opinions received by the Attorney-General were in some material respects different, then that was a reason against, rather than in favour of, releasing them. On that factual hypothesis, "the release of those opinions would enable a political collateral attack on the exercise of the prerogative of mercy which would have the effect of changing its fundamental nature."

56 Regardless of whether the advice given by the Attorney-General to the Governor was legally unexaminable, the conduct of the Attorney-General was not unaccountable. The very exercise in which the Attorney-General was engaged in putting out his press release assumed political accountability. Political attack on a decision not to exercise the prerogative of mercy in a particular case, or at least on the process leading to such a decision, is not alien to the process. That does not mean abrogating legal professional privilege and other statutorily recognised grounds of confidentiality. What it means, however, is that the risk of political criticism is not of itself a public interest argument

against disclosure. This aspect of the reasoning of two members of the Court of Appeal was erroneous.

57 There are obvious difficulties in giving the phrase "public interest" as it appears in s 50(4) a fixed and precise content. It is sufficient to say here that the assumption by the Attorney-General of political accountability by the putting out of the press release may, in the circumstances, enliven s 50(4). If there were nothing more to it than that Morris J was saying that the very existence of a number of advices meant that, in order to "clear the air" and dispel any speculation about possible inconsistency, they should all be released then the Court of Appeal should have rejected that reasoning. If, however, there were some material difference in the advices, or the facts on which they were based, then, depending on the nature and extent of that difference, it is not impossible that an aspect of the public interest could require its revelation. If Morris J had said nothing about the matter, there was no particular reason why the Court of Appeal should have set out itself to look for such a problem. However, in the light of what Morris J said, the Court of Appeal should have looked at the documents. Its failure to do so was an error of principle in the exercise of a discretion. It could not be said that, as a matter of principle, no inconsistency between the various advices could possibly have required the disclosure of all or any of them. The Attorney-General, in his press release, referred, for an obvious and legitimate purpose, to certain legal advice as recommending the course that was finally taken. If it had been the case that the Government had received other and materially different legal advice then, depending on the nature and extent of the difference, it is possible that this could have been a relevant consideration in deciding the requirements of the public interest under s 50(4). This is not to say that the existence of differences would necessarily require disclosure. Rather, the existence of such differences as might require disclosure, having been raised obliquely by Morris J, could not be disregarded as legally impossible. The ground upon which Bongiorno AJA discarded the possibility as legally irrelevant was incorrect.

58 The Court of Appeal was not obliged to remit the matter to the Tribunal. It was empowered to deal with the s 50(4) issue itself. In doing so, because of what Morris J had said about the possibility of inconsistency, the Court of Appeal should have examined the documents for itself. Having done so, it may well have concluded that the public interest did not require access to the documents and that either there were no material differences or that such differences did not require disclosure of the documents. However, this Court cannot predict the outcome. We have not seen the documents. The matter should be remitted to the Court of Appeal to enable it to inspect the documents. Whether, following such inspection, the Court of Appeal disposes of the matter

finally, or remits it to the Tribunal, will be a matter for the Court of Appeal to decide.

Orders

59 The appeal should be allowed. The orders of the Court of Appeal made on 17 May 2007 should be set aside. The matter should be remitted to the Court of Appeal for further hearing in accordance with the reasons of this Court. The respondent should pay the appellant's costs of the appeal to this Court.

60 KIRBY J. The *Freedom of Information Act* 1982 (Vic) ("the FOI Act") introduced to Victoria (as like statutes have introduced elsewhere) an important change in public administration. Australian public administration inherited a culture of secrecy traceable to the traditions of the counsellors of the Crown dating to the Norman Kings of England. Those traditions were reinforced in later dangerous Tudor times by officials such as Sir Francis Walsingham[29]. They were then strengthened by the enactment throughout the British Empire of official secrets legislation[30]. A pervasive attitude developed "that government 'owned' official information"[31]. This found reflection in a strong public service convention of secrecy. The attitude behind this convention was caricatured in the popular television series *Yes Minister* in an aphorism ascribed to the fictitious Cabinet Secretary, Sir Arnold Robinson: "Open Government is a contradiction in terms. You can be open – or you can have government."[32] The ensuing laughter has helped to break the spell of the tradition by revealing its presumption when viewed in the contemporary age with its more democratic values.

61 In Australia, the culture of governmental secrecy was sustained both by statute and by common law[33]. In 1966, inspired by the example of legislation in Scandinavian countries, the Congress of the United States of America adopted a *Freedom of Information Act*[34]. This, in turn, enlivened discussion about reform elsewhere. In 1982, an Australian federal *Freedom of Information Act* was enacted[35]. This stimulated initiatives in the State sphere, where, because the public service dated to colonial times, it was sometimes more traditional and more secretive in its procedures than the federal service, dating as it did only to 1901.

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29 Walsingham was Principal Secretary of State to Elizabeth I. See *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 127; cf Hogge, *God's Secret Agents*, (2005) at 6, 115, 124-125, 276.

30 See eg *Official Secrets Act* 1911 (UK). See *Heinemann* (1987) 10 NSWLR 86 at 129; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 37-38; [1988] HCA 25.

31 Lane and Young, *Administrative Law in Australia*, (2007) at 294.

32 Lynn and Jay, *The Complete Yes Minister*, (1989) at 21.

33 *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 611.

34 5 USC §552.

35 *Freedom of Information Act* 1982 (Cth).

62 The basic purpose of the introduction of freedom of information ("FOI") legislation is the same in all jurisdictions. It is to reinforce "the three basic principles of democratic government, namely, openness, accountability and responsibility"[36]. The central objective is to strengthen constitutional principles of governance not always translated into reality because of a lack of material information available to electors. Fundamentally, the idea behind such legislation is to flesh out the constitutional provisions establishing the system of representative government; to increase citizen participation in government beyond a fleeting involvement on election days; and to reduce the degree of apathy and cynicism sometimes arising from a lack of real elector knowledge about, or influence upon, what is going on in government.

63 Several of the themes prominent in the debates preceding the introduction of Australian FOI legislation resonate with what was said by this Court not long after in declaring the existence of constitutional limitations upon the restriction of discussion of matters of political concern on the basis that such restriction could impede the effective operation of the democratic norms of the Constitution[37]. As the decisions of this Court upon that subject reveal, judicial responses to such shifts in legal doctrine have often been divided.

64 Although intermediate courts in Australia have generally embraced the innovations of FOI legislation[38], there have been sharp divisions in this Court about the implications of such laws. Thus, for example, *McKinnon v Secretary, Department of Treasury*[39] revealed strongly divergent views with respect to the operation of the federal FOI statute.

65 The starting point for resolving the issues presented by the present appeal is an appreciation of the duty of this Court, in this context, to do what we are constantly instructing other courts to do in giving effect to legislation. This is to read the legislative text in its context (including against the background of the

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36 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 June 1988 at 1399 cited *Commissioner of Police* (1993) 31 NSWLR 606 at 612.

37 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; [1994] HCA 46; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25; *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39.

38 See eg *Director of Public Prosecutions v Smith* [1991] 1 VR 63; *Commissioner of Police* (1993) 31 NSWLR 606; *Botany Council v The Ombudsman* (1995) 37 NSWLR 357.

39 (2006) 228 CLR 423; [2006] HCA 45. See also *Waterford v The Commonwealth* (1987) 163 CLR 54; [1987] HCA 25.

significant change that the legislation introduces) and, so far as the text and context permit, to give effect to the legislative purpose[40].

66 In the present setting, that purpose is a radical one. It assigns very high importance to a public interest in greater openness and transparency in public administration[41]. Given the historical background, the attitudinal shift that FOI legislation demanded of Ministers, departments, agencies and the public service is nothing short of revolutionary. The courts ought not to obstruct that shift. On the contrary, they should strive to interpret FOI legislation in a manner harmonious with its objectives, doing so to the fullest extent that the text allows.

The facts and legislation

67 *The background facts*: The factual background to this appeal is explained in the reasons of Gleeson CJ, Gummow, Heydon and Kiefel JJ ("the joint reasons"). Forming part of the background is the decision of this Court in *Osland v The Queen*[42] ("the criminal appeal"). There, I was a member of the majority that rejected the appeal of Mrs Marjorie Osland ("the appellant"), who had challenged her conviction of murder upon several bases. One of her grounds of appeal sought to introduce into the Australian law of provocation and self-defence a recognition of so-called "battered wife syndrome" or "battered woman syndrome" ("BWS")[43]. Neither party objected to my participation in the present appeal.

68 The reasons of this Court in the criminal appeal demonstrate that considerable attention was paid in argument to the suggested need to adopt a new legal approach to BWS; to whether such adoption would be compatible with basic legal principle; to whether the issue of BWS arose on the evidence adduced in the appellant's trial; and to whether giving weight to BWS might be seen as encouraging resort to violent behaviour.

69 At the conclusion of my discussion of these issues in the criminal appeal, I expressed my opinion on the central question of legal policy presented by the

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40 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; [1990] HCA 24; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]; [1998] HCA 28.

41 See FOI Act, s 3; reasons of Hayne J at [134].

42 (1998) 197 CLR 316; [1998] HCA 75.

43 (1998) 197 CLR 316 at 369 [155(5)], 370-380 [158]-[171]; cf at 335-338 [50]-[60].

case. I did so by reference to what I had earlier written in *Green v The Queen*[44] (a case of so-called "homosexual advance" defence). I endorsed the observation of Gleeson CJ that "[t]he law is not intended to encourage resort to self-help through violence"[45].

70 Justice McHugh relevantly agreed in the criminal appeal with my reasons and orders[46]. The reasons of Callinan J (the other member of the majority) were to similar effect[47]. Two members of the Court (Gaudron and Gummow JJ) dissented. Because of the nature of the submissions advanced on the appellant's behalf, a considerable part of this Court's reasoning was addressed to public policy questions concerning the content of the criminal law as it affected the appellant, and to the desirability or undesirability of re-expressing that law. The discussion was extensive. It was contested. But the entirety of the debate is on the public record.

71 The appellant subsequently addressed a petition for mercy to the Governor of Victoria. As described in the reasons of the Victorian Civil and Administrative Tribunal ("the Tribunal")[48], the petition contained grounds that (with the exclusion of ground 2, referring to "additional and new evidence") were substantially concerned with matters of law reform and public policy, many or most of which were considered by this Court in the criminal appeal.

72 These grounds do not appear to relate to considerations arising by the application of the present law of Victoria, as such. Thus, ground 1 refers to "appropriate law reform"; ground 3 concerns the suggested hardship of the sentence passed upon the appellant in light of her earlier suffering because of domestic violence; ground 4 suggests that even if the appellant committed an offence there is a need for compassion towards her; ground 5 refers to the general public policy purposes of criminal punishment; and ground 6 relates to public confidence in the justice system in circumstances where (it is said) the appellant's imprisonment "shows the law failing". None of these grounds appears to concern matters that might be the subject of legal advice, as between solicitor and client, of a conventional kind. It is difficult to imagine that any of the barristers, or

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44 (1997) 191 CLR 334 at 415-416; [1997] HCA 50 cited *Osland* (1998) 197 CLR 316 at 380 [170].

45 *Chhay* (1994) 72 A Crim R 1 at 13 cited *Osland* (1998) 197 CLR 316 at 380 [170].

46 *Osland* (1998) 197 CLR 316 at 339 [63].

47 *Osland* (1998) 197 CLR 316 at 408-409 [239].

48 *Re Osland and Department of Justice* (2005) 23 VAR 378 at 381-382 [8]. See also joint reasons at [9].

senior officials or even the Ministers involved would be inhibited or embarrassed in the slightest by disclosure of any conclusions and recommendations they may have expressed about such issues. Most of the topics had been thoroughly, candidly and forcefully explored in the divergent opinions in this Court in the criminal appeal.

73 *The legislation*: The relevant provisions of the FOI Act and the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) are set out in other reasons[49]. I agree with Hayne J that the object and purpose of the FOI Act are central to the resolution of the present appeal. In part, these may be derived from the overall design of that Act, read against the background of what preceded it. But, in part, they are evident from the short and long titles of the FOI Act and from s 3.

74 The long title of the FOI Act declares that it is: "An Act to give the Members of the Public Rights of Access to Official Documents of the Government of Victoria and of its Agencies and for other purposes". Section 3(1) is worth reproducing in full:

> "The object of this Act is to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for certain public purposes by –
>
> (a) making available to the public information about the operations of agencies and, in particular, ensuring that rules and practices affecting members of the public in their dealings with agencies are readily available to persons affected by those rules and practices; and
>
> (b) creating a general right of access to information in documentary form in the possession of Ministers and agencies limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies."

75 Apparently concerned that Ministers, departments, agencies and courts might conceivably adhere, or return, to the old ways of governmental secrecy, the Victorian Parliament spoke directly to all of those actors. It declared its intention as to how the FOI Act should be interpreted. Section 3(2) of that Act states that such interpretation is to be adopted as would "further the object set out in sub-section (1) [of s 3]". It further requires any discretions conferred by the Act to be exercised "as far as possible so as to facilitate and promote … the disclosure of information".

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49 Joint reasons at [18]-[22]. See also reasons of Hayne J at [133]-[135].

76 It is difficult to know how the Parliament of Victoria could have been more emphatic, forthright or clear in indicating the commencement of a new legal era. Courts that construe an Act such as the FOI Act, attentive to preserve the *status quo ante*, avid to find exceptions, and generous in discerning documents exempt from disclosure, are not being faithful to Parliament's purposes and the declared objects of the Act. An approach hostile to the disclosure of information in documentary form will frustrate the imputed intention of Parliament. To the extent that past rules deriving from the royal prerogative, the common law or earlier inconsistent legislation suggest otherwise, those rules must now be adapted to the provisions, objects and realities of the FOI Act. The duty of the courts, including this Court, is to ensure that this occurs.

The issues

77 The appellant's grounds of appeal raise three issues:

(1) *The waiver issue*: Is the Attorney-General by his press release to be taken, impliedly or by imputation of law[50], to have waived the entitlement of the respondent to rely on legal professional privilege in respect of document 9, the joint advice of senior counsel concerning the appellant's petition ("the joint advice")?

(2) *The public interest override issue*: Was it open to the Court of Appeal, having found relevant error in the reasoning of the Tribunal, but not having inspected all of the contested documents for itself, to conclude that no possible "public interest" could compel the application of s 50(4) of the FOI Act, and on that basis to substitute its own decision for that of the Tribunal?

(3) *The proper order issue*: Taking into account the course of the proceedings to this point, what order should this Court make in disposing of the present appeal?

78 A preliminary question also arises as to whether all of the documents requested by the appellant were truly "exempt" by reason of legal professional privilege. This is not an issue in this appeal in a strict sense, nor was it a subject of contention in the Court of Appeal[51]. However, because, in my opinion, the proceedings must be returned for reconsideration, it is appropriate to mention this matter because there is potential in a rehearing to revisit it.

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50 Joint reasons at [23], [45].

51 Joint reasons at [13].

The ambit of legal professional privilege

79 *Section 32 of the FOI Act*: Section 32 of the FOI Act appears under the heading "Documents affecting legal proceedings". The appellant having exhausted her legal options for challenging her conviction, there are no relevant "legal proceedings" to which any legal advice given to the Government of Victoria would seem to relate.

80 There are, of course, the present proceedings under the FOI Act. However, all of the documents demanded by the appellant were prepared well before these proceedings were commenced. It appears unlikely in the extreme that any legal advice contained in these documents was addressed to the issues now presented. It is true that there was at least the potential for an application for judicial review of decisions of Ministers and possibly of the Governor in respect of the appellant's petition[52]. However, as described, the advices were addressed to the contents of the appellant's petition to the Governor. Save perhaps for ground 2, the petition accepted the appellant's conviction and addressed issues of law reform, individual hardship and public policy.

81 Notwithstanding the heading to s 32 of the FOI Act, the provisions of s 32(1) extend beyond "legal proceedings" in a strict sense and deal with "legal professional privilege" in general. This Court has affirmed that such privilege is an important civic right. It is a substantive right and not simply the consequence of a rule of evidence law[53]. It protects a very important entitlement in our society by which anybody may seek, and obtain, legal counsel in the confidence that communications with a lawyer, and documents produced for or in consequence of such communications, will not normally be disclosed without the affected client's consent.

82 In the case of natural persons, legal professional privilege has been described as a basic human right[54]. Legal persons, such as a constitutional State, a department or agency of a State, or a corporation, are not human beings. They are thus not entitled to the protection of human rights law as such. Nonetheless,

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52 The availability of such judicial review does not need to be decided; cf *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; [1982] HCA 26; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; [1990] HCA 21.

53 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 575-576 [85]; [2002] HCA 49.

54 See *Campbell v United Kingdom* (1993) 15 EHRR 137; *Foxley v United Kingdom* (2001) 31 EHRR 25.

they are, in my view, entitled to the benefit of the ample and protective approach which the common law adopts in respect of legal professional privilege.

83 The privilege belongs to the client, not to the lawyer. A client concerned about a legal question is protected in seeking advice on that question. The protection extends to communications between the client and the lawyer. It upholds the facility of candid, confidential exchanges, essential to the provision of accurate and effective legal counsel.

84 *Ambit of legal professional privilege*: In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[55], a case concerning the interpretation of s 155(1) of the *Trade Practices Act* 1974 (Cth) said to require the production of documents and the giving of evidence for important public purposes, I agreed with the other members of this Court. I accepted that the general language of s 155(1) was insufficient to override an entitlement to legal professional privilege[56]. However, in reaching that conclusion, I noted an important qualification to which I adhere[57]:

> "[This] does not mean that a mere claim of legal professional privilege will be sufficient to attract the privilege. In the case of each communication alleged to be privileged the party making the claim must bring it within the applicable principles[58]. Legal professional privilege will not be available where a conclusion is reached that particular communications were not prepared for the dominant purpose of giving or receiving legal advice. Similarly, legal professional privilege may not apply where an ulterior purpose for the communication is demonstrated[59], for example, where the communication was made in furtherance of a criminal or fraudulent purpose[60]. The extent to which the privilege would extend to a joint practice of lawyers and non-lawyers (where that is

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55 (2002) 213 CLR 543.

56 (2002) 213 CLR 543 at 584 [111]-[113].

57 (2002) 213 CLR 543 at 585 [114]. See also *Mann v Carnell* (1999) 201 CLR 1 at 46 [148]; [1999] HCA 66.

58 Now stated in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 and the *Uniform Evidence Acts*, eg *Evidence Act* 1995 (Cth), ss 118, 119.

59 *Esso* (1999) 201 CLR 49 at 80 [81]-[82].

60 cf *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447 at 455-456.

permissible) has not been considered. Various other matters of detail remain for the future[61]."

85 The present case is one with the potential to present a new "matter of detail". Whilst I accept that legal professional privilege is not confined to advice given by lawyers in respect of actual or apprehended litigation, or solely to advice on questions of law narrowly defined (to distinguish them from questions of policy, prudence or appropriate action in given circumstances)[62], there has to be a limit. Simply addressing questions or documents to lawyers does not necessarily cloak all of the matters discussed, or all of the documents then produced, with immunity from later production to a court on the basis of legal professional privilege. To permit that would be to ignore the important claims to information that sometimes compete with legal professional privilege. For example, such information may be critical to the lawful and just determination of disputes on the basis of the best available evidence.

86 In determining the ambit of the privilege, regard must be had to the dominant purpose of the creation of the document or communication in question. It is also essential to bear in mind the purpose of the privilege, namely to protect candid communications between a client and a lawyer, untroubled by a risk that such communications (and documents created to facilitate them) will later be produced to work against the interests of the client.

87 *Conclusion: defining the ambit*: None of the foregoing considerations appears to have been given sufficient attention by the Tribunal. Looking at the subject matters of the appellant's petition, at least in respect of grounds 1, 3, 4, 5 and 6[63], it is difficult to see any *legal* interests of the respondent or the State of Victoria, as client, such as would attract legal professional privilege, for the purpose for which that privilege is afforded. Had advice on such matters been obtained from a social scientist, a professor of law, a law reform body or a panel of relevant experts (as might have been done) it would not have attracted legal professional privilege. The thought that senior governmental employees, and the State or a Minister, need to be protected from disclosure of discussions about law reform concerning BWS, the contention of hardship affecting the appellant or the issues of public policy raised by the petition seems quite unconvincing. Arguably, "legal professional privilege", when that phrase is deployed to claim an exemption to a statute having the purposes of the FOI Act, would not extend

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61 *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 148 [95] per Lindgren J.

62 *Waterford* (1987) 163 CLR 54 at 77. See also *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 389 [30].

63 Joint reasons at [9].

to communications of such generality. It would be different when the issues might relate to existing or potential rights and liabilities of a legal character (such as those mentioned in ground 2).

88 I have mentioned this issue because it arose during argument and because it indicates a need for closer attention to questions of this kind in the context of a statute having the reformatory purposes of the FOI Act. The issue cannot be taken further in this appeal. First, it is not presented by a ground of appeal. Secondly, it was not explored at any length by the President of the Tribunal (Morris J) and he was the only judge in these proceedings to inspect all of the contested documents. Thirdly, although Morris J did specifically turn his attention to whether, by editing the documents, some part of them might be disclosed and other parts withheld[64], he concluded that this course was not feasible.

89 The ambit of legal professional privilege needs to be defined in the proper context. The privilege referred to in s 32 of the FOI Act is necessarily that of a governmental party. At least in the case of a Minister, it concerns documents of a kind to which the FOI Act is intended to be applicable, unless such documents are "exempt". It would be a mistake to assume that all communications with government lawyers, no matter what their origins, purpose and subject matter, fall within the ambit of the State's legal professional privilege. Advice taken from lawyers on issues of law reform and public policy does not necessarily attract the privilege. Especially in the context of the FOI Act, and legal advice to government, courts need to be on their guard against any inclination of lawyers to expand the ambit of legal professional privilege beyond what is necessary and justifiable to fulfil its legal purposes.

The privilege was not waived

90 *Principle of waiver*: It was common ground that the extent of any waiver of legal professional privilege, and the effect of such waiver, were, in this case, to be decided according to the common law. This distinguishes the present appeal from other cases in which the issue of waiver has arisen in the context of application of the *Uniform Evidence Acts*[65].

91 The issue of waiver arises in this appeal in relation to one document only, namely the joint advice. The question, to be decided by reference to the principle of imputed waiver, is whether, whatever the subjective intention of the Attorney-

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64 Joint reasons at [27]; cf *Osland* (2005) 23 VAR 378 at 389 [38] referring to the FOI Act, s 25.

65 cf *Mann* (1999) 201 CLR 1 at 15 [34].

General in publishing the press release upon which the appellant relies, the objective fact of that publication was incompatible with a continued insistence by the respondent on legal professional privilege, and made such insistence unwarranted and unfair in the circumstances.

92 Each of these words is important. "Unwarranted" signifies a legal conclusion, namely that enough has been disclosed of the subject communication to evince conduct "inconsistent with the maintenance of the confidentiality which the privilege is intended to protect"[66]. Effectively, the client cannot have it both ways. It cannot provide part of the confidential information (inferentially that part which favours its position) to others, whilst demanding that everything else (which may reveal that position in a different light) be treated as confidential. The use of the word "unfair" does not mean that all that the decision-maker has to do is to weigh up the respective "fairness" of the positions of the client and its opponent and decide the question of waiver according to such generalised considerations. But considerations of "fairness" may be relevant to whether there is an inconsistency between the conduct said to amount to waiver and the maintenance of the privilege[67].

93 In deciding what the law requires, a court considers the supposed waiver in the context of all of the relevant circumstances. What is normally involved (as here) is a question of fact and degree[68]. The search is not for the actual or imputed intention of the party said to have waived its privilege. It is a search for the objective consequence of that party's conduct in revealing some, but not all, of the particular legal advice.

94 *Arguments for waiver*: When the foregoing principles are applied, I am prepared to accept that the appellant's submissions on this issue are not without a certain merit:

- The focus of the press release was the joint advice. This narrows the issue to one document, which neither the Court of Appeal nor this Court has seen;

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66 *Mann* (1999) 201 CLR 1 at 13 [29].

67 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 481 per Gibbs CJ, 488 per Mason and Brennan JJ, 493 per Deane J; [1986] HCA 80; *Mann* (1999) 201 CLR 1 at 15 [34]; cf *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87 at 93-95.

68 cf joint reasons at [49].

- The press release made it known that there were six grounds on which it was said that the appellant's petition should be granted;

- The general issues to which the appellant's case gave rise (and to which, it could be inferred, the advice might have related) were notorious as a result of the earlier criminal appeal and the debate that followed. I would be prepared to take judicial notice of the discussion of those issues in the general media, as well as in specialised journals. The Tribunal itself accepted that those issues had attracted a great deal of public attention, taking note of a public address given by the then Chief Justice of Victoria[69], the publication of an issues paper and report by the Victorian Law Reform Commission on *Defences to Homicide* which considered the subject[70] and publicity in the general media indicating community attention to, and discussion about, the state of the law as declared by this Court;

- The press release identified by name the three senior, independent legal counsel who gave the joint advice. Presumably this was done in order to emphasise its quality and acceptability; and

- The press release went on to indicate that the advice had recommended "on every ground that the petition should be denied". That statement necessarily opened a window into the contents of the advice. It affirmed that (by inference unanimously) the joint advice had dismissed each and every ground relied on by the appellant in her petition. It withheld the reasons for the opinions of counsel whilst claiming the advantage, before the public eye, of the fact that the opinions on the identified grounds were wholly negative.

95 In these circumstances, the appellant's argument for waiver becomes easier to understand. Her counsel pointed out that she had the highest possible interest in access to the joint advice because it was the foundation of the recommendation, ultimately accepted by the Governor, that her petition for mercy should be refused. That refusal confirmed the appellant's conviction and resulting sentence of imprisonment, with the attendant parole order that continues to affect her liberty. In making her demand, the appellant was not just a member of the "public". She had a serious personal interest to defend.

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69 See Brown, "Memorial oration seeks provocation review", (1999) 73(6) *Law Institute Journal* 33 cited *Osland* (2005) 23 VAR 378 at 385 [26].

70 Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper, (2002); Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004). See *Osland* (2005) 23 VAR 378 at 386 [27].

96 Moreover, it was the appellant's submission that contextual considerations helped to demonstrate the importance of the waiver on which she relied. Although her petition presented general questions, as well as matters personal to her, the appellant argued that the Attorney-General was seeking to hide behind the rejection of her general contentions by three lawyers. Such advisers, she argued, however distinguished, could not have the last word upon such topics. Nor could their legal qualifications insulate their advice from public consideration or criticism. To the extent that the Attorney-General had placed their names and their conclusions in the public domain, he had entered into a public debate about the merits of the joint advice. He could not, then, fairly refuse to reveal any of the reasoning that it contained.

97 *Conclusion: no waiver*: I have explained the appellant's arguments on waiver as best I can because I consider that they are by no means baseless. Nevertheless, I am not prepared to dissent from the conclusion that has been reached on this issue at every level in these proceedings. The main considerations that sustain a conclusion that the press release did not entail implied or imputed waiver are as follows:

- The press release revealed very little about the actual content of the joint advice, aside from the names of its authors and their adverse conclusions;

- The purpose of issuing the press release was not, as such, to secure some advantage for the State in legal proceedings affecting the appellant. Rather, the purpose was to show, as far as was compatible with non-disclosure, that the State had taken a proper course in obtaining and considering advice from appropriate persons[71]. To that extent, the Attorney-General had endeavoured to fulfil obligations to interested members of the public to whom, through Parliament, he was accountable. He had done so whilst reserving the entitlement of the State to receive advice to which legal professional privilege attached. The substance of the advice remained confidential; and

- Given the purpose of the FOI Act to encourage greater openness in public administration, it would be undesirable, in effect, to require the Attorney-General to reveal nothing at all about procedures that had been followed, lest a description of them might result in loss of privilege. In earlier times, no press release would have been issued in respect of a petition to the Governor, save perhaps one containing an announcement of its rejection. I would not want to say anything in this appeal that would discourage the public revelation of the general course followed in such matters.

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71 See joint reasons at [48].

98 In the end, therefore, assuming that legal professional privilege extended to the joint advice (a matter not now in issue), the maintenance by the Attorney-General of a claim to legal professional privilege was neither unwarranted nor unfair to the appellant in the circumstances. The waiver issue must therefore be decided adversely to her submissions.

The "public interest" override applies

99 *Public interest override*: I now reach the issue upon which the Court of Appeal differed from the Tribunal[72], and in respect of which a difference has emerged in this Court. On this issue I agree, in general, with the joint reasons. I disagree with what Hayne J has written.

100 It is essential, once again, to view s 50(4) of the FOI Act in the context of the Act as a whole, with its radical purpose to change past practices at the forefront of attention. The power that s 50(4) grants to the Tribunal (subject to exclusions) to override a ministerial claim to exemption on the basis that "the public interest requires that access to [a] document should be granted under this Act" is significant and exceptional. It is for this reason that s 50(4) has been described, rightly, as a "most extraordinary provision"[73]. The power must be interpreted and applied with this in mind.

101 The specific exclusions from this novel power are not applicable in the present case. It does not concern a Cabinet document (s 28 of the FOI Act), a prescribed law enforcement document (s 31(3)) or a document affecting personal privacy (s 33)[74]. The particularity of these exclusions further emphasises the breadth of the power of the Tribunal to override a ministerial decision in respect of other documents said to be exempt (including under s 32).

102 There is an additional consideration, deriving from the purpose, objects and structure of the FOI Act, that sheds light on the power of override afforded under s 50(4). It is not uncommon for tribunals nowadays to enjoy a power to overturn decisions of officials and agencies on the merits. However, it remains unusual and exceptional in our society for tribunals (as distinct from courts) to be given a power to substitute their determinations for those of Ministers.

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72 *Osland* (2007) 95 ALD 380 at 405 [103].

73 *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at 341 [28] per Phillips JA.

74 See also the FOI Act, s 29A (documents affecting national security, defence or international relations), which came into operation on 16 April 2003.

103 By definition, Ministers are accountable to Parliament. It is commonly considered that Ministers (and the Parliaments to which they are accountable) will be at least as able to determine questions about the "public interest" as courts and, still more, tribunals of mixed membership[75]. The fact that (specific exclusions aside) the FOI Act empowers the Tribunal effectively to step into the shoes of a Minister and decide that access should be allowed to an otherwise exempt document is a powerful indication of the radical purpose of the Victorian Parliament to permit independent and non-political judgments about the "public interest" to prevail.

104 By inference, the s 50(4) override was enacted because of a concern on the part of Parliament that, in particular cases, Ministers (and officials advising them) might not be in as good, or as independent, a position to evaluate the "public interest" as the Tribunal (in this case, the President of the Tribunal, a judge having Supreme Court status). So radical and unusual are the terms of s 50(4) that a court should hesitate before frustrating the exercise of the power that it affords or taking a narrower view of the "public interest" than the Tribunal to which that power has been entrusted.

105 Before interfering with Tribunal decisions for supposed error of law, the general courts, including the Court of Appeal and this Court, must be very sure that such error has been demonstrated as to justify such interference. It would be wrong for this Court to substitute its own opinion on where the "public interest" lies simply because members of this Court might attach more importance to legal professional privilege than they feel the Tribunal has done.

106 Given the structure and language of the FOI Act, it would be even more erroneous, in my view, to treat the legal professional privilege exemption in s 32 as incorporating its own internal balance between private rights and the public interest, so as in effect to shield documents covered by s 32 from the "public interest" override afforded to the Tribunal. Such an approach would be incompatible with the language of s 50(4) of the FOI Act. It would amount, in effect, to this Court's performing a legislative act. It would involve adding to the express exclusions from s 50(4) a reference to s 32, despite the fact that the Victorian Parliament obviously decided not to do this.

107 My own initial reading of the reasons of the Tribunal did not persuade me that it had erred in its general approach to its powers under s 50(4). However, having regard to the way in which the appeal to this Court has been argued, I am prepared to accept, for present purposes, that the omissions and suggested errors

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75 cf *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 504 [336]; [2001] HCA 51.

of emphasis found by Maxwell P in the Court of Appeal constitute an error of law warranting correction[76].

108 Consequential questions then arise. Was the Court of Appeal authorised and required to substitute its own decision on s 50(4)? If so, was the only conclusion available that the invocation of the public interest override was bound to fail? Or, having regard to the advantages which the Tribunal had, having inspected all of the documents, and the still outstanding issue presented by the State's reliance on s 30 of the FOI Act, was the correct disposition to return the matter to the Tribunal for hearing and determination?

109 *Override is available*: I cannot agree that the present case *could not* give rise to a "public interest" consideration capable of enlivening s 50(4) of the FOI Act[77]. In my respectful opinion, such a conclusion pays insufficient attention to the text and structure of the FOI Act. It fails to reflect the stated purpose and objects of the Act, read against the background of its history. It persists with approaches to the disclosure of official documents that predate the Act. It ignores the advantages which the Tribunal had, having alone inspected all of the relevant documents.

110 I certainly agree with Hayne J that it is impossible to define the "public interest" precisely, in language that will have universal application[78]. So much would have been known to Parliament when it enacted s 50(4). Nonetheless, the FOI Act commits decisions upon the "public interest" to the Tribunal. Parliament has taken the unusual step of entrusting the Tribunal with a power to displace a ministerial claim of legal professional privilege by reference to its own opinion of what the "public interest" requires. Courts must respect that choice. It would be an error of law for courts, confined to correcting legal error, simply to bypass the Tribunal's decisions as to the "public interest" and to substitute their own opinions as though the Tribunal does not exist. That would involve the courts in usurping the repository of the power selected by Parliament.

111 The fact that, in general, "legal professional privilege represents a particular balancing of public interests"[79] must not be permitted to disguise the fact that, in enacting s 50(4) of the FOI Act, the Victorian Parliament committed to the Tribunal the estimation of where the "public interest" ultimately lay. It

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76 cf joint reasons at [36]-[40], [52]-[53].

77 Reasons of Hayne J at [156] citing *Osland* (2007) 95 ALD 380 at 405 [103] per Maxwell P.

78 cf reasons of Hayne J at [137].

79 Reasons of Hayne J at [141].

would be to amend the Act, and not to apply it, for this Court to conclude that legal professional privilege involves such important "public interests" that the requisite balance had already been struck by the law, effectively quarantining documents in respect of which legal professional privilege arises from the public interest override in s 50(4). This is not what the FOI Act provides.

112 Recourse to the general language of this Court in *Daniels*[80], arising in a different statutory context in relation to different legislative purposes, ought not to alter the focus of present attention. The importance of legal professional privilege, recognised in s 32 of the FOI Act, may be fully accepted. But it is not insulated from the power that Parliament has entrusted to the Tribunal to override the privilege where the "public interest requires that access to the document should be granted". Judicial statements about the significance of legal professional privilege at common law or in other contexts cannot displace the express instruction of s 50(4).

113 A conclusion that the reasoning of the Tribunal "pays insufficient regard to the public interest considerations which inform and support a client's legal professional privilege"[81] amounts, with respect, to little more than the substitution by a court of its own opinion of the "public interest" for that of the body designated by Parliament, namely the Tribunal. The only warrant for a court's intervention upon the Tribunal's exercise of its jurisdiction and power is established error of law. The Tribunal's ample acknowledgment of the importance of legal professional privilege is evident from the ambit which it accorded to the privilege, and from its rejection of the appellant's contentions on waiver. The Tribunal stressed that legal professional privilege protected communications "made in connection with giving or obtaining legal advice or the provision of legal services"[82]. There is no merit in the claim that the Tribunal neglected the public interest element of legal professional privilege.

114 *Approach to transparency*: Repeated disparagement of the expression "transparency in government"[83] suggests an approach to the FOI Act that I cannot share. In so far as the Tribunal made reference to considerations of transparency, it was correct to do so. As the short title of the FOI Act suggests, as its long title affirms, and as its stated objects demonstrate, the public purpose of the FOI Act is precisely to enhance transparency in government to the extent provided. That

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80 (2002) 213 CLR 543 at 552-553 [9]-[11].

81 Reasons of Hayne J at [146].

82 *Osland* (2005) 23 VAR 378 at 386-387 [29] citing *Esso* (1999) 201 CLR 49 and *Daniels* (2002) 213 CLR 543.

83 Reasons of Hayne J at [147]-[150].

object is critical given the oft-repeated instruction of this Court that statutes should be read, so far as their language permits, so as to fulfil their evident purposes[84]. The Tribunal and the courts must bear in mind the distinctive and radical purposes of the FOI Act, and take particular care when reaching conclusions that appear to frustrate them.

115 Likewise, the Tribunal's reference to the release of the requested documents having the potential to "clear the air"[85] with regard to the appellant's situation ought not to be seized upon as indicating a misapprehension that the FOI Act is premised on "a notion of universal access to documents"[86]. The desirability of "clear[ing] the air" was not mentioned by the Tribunal as though, of itself, it justified a determination that the contested documents should be released pursuant to s 50(4). Rather, that expression appeared in the final sentence of a section of the Tribunal's reasons headed "Public interest factors favouring release"[87], which dealt not only with abstract considerations, but also with matters peculiar to the appellant's case. In particular, the Tribunal placed considerable emphasis on the press release's selective revelation of the advice by which the Governor's decision was informed.

116 As the joint reasons demonstrate, the Tribunal's reasons disclose a possibility of material inconsistency between the joint advice and an advice prepared in August 2000 by Mr Robert Redlich QC and his junior ("the Redlich advice")[88]. In so far as the Tribunal is criticised for a failure to particularise the suggestion of divergence[89], I agree with the joint reasons that it is not possible for this Court to exclude the prospect that the Tribunal member was constrained by "a desire not to say too much about the contents of the documents and thereby pre-empt the outcome of the entire dispute"[90]. By referring to the possibility of inconsistency, an unusual aspect of the present case, and one said to provide "powerful reasons" favouring disclosure of the Redlich advice and other

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84 cf *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; [1997] HCA 53; *Project Blue Sky* (1998) 194 CLR 355 at 381 [69], 384 [78].

85 *Osland* (2005) 23 VAR 378 at 393 [53].

86 Reasons of Hayne J at [149].

87 *Osland* (2005) 23 VAR 378 at 391-393 [48]-[53].

88 Joint reasons at [27] referring to *Osland* (2005) 23 VAR 378 at 392-393 [52]-[53].

89 cf reasons of Hayne J at [145].

90 Joint reasons at [28].

contested documents[91], the Tribunal demonstrated its recognition of the need for exceptional circumstances if s 50(4) of the FOI Act were to be applied.

117 There is thus no evidence that the Tribunal misapprehended that the FOI Act provided "that *all* documents to which a Minister or agency has regard in reaching a decision should be publicly available"[92]. Such would indeed have evidenced legal error. However, the Tribunal acknowledged the existence of the exemption in respect of legal professional privilege. It afforded a wide ambit to that privilege. It sustained the claim of privilege. But it overrode that claim, as the Act permitted, in the exercise of its exceptional powers under s 50(4). It did so not out of an abstract and general concern to ensure "transparency", but by reference to the unique features of the particular case[93]. The text and structure of the Tribunal's reasons demonstrate that it fell into no error of the suggested kind.

118 The Tribunal prefaced its consideration of what the "public interest" required in this case by referring to the decision of the Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith*[94]. The Appeal Division had there remarked that the formation of an opinion under s 50(4) might involve the "resolution of conflicting public interests"[95]. It went on[96]:

> "There are many areas of national and community activities which may be the subject of the public interest. The statute does not contain any definition of the public interest. Nevertheless, used in the context of this statute it does not mean that which gratifies curiosity or merely provides information or amusement. Similarly it is necessary to distinguish between 'what is in the public interest and what is of interest to know'. On the other hand, 'one feature and one facet of the public interest is that justice should always be done and should be seen to be done'. It is this feature of the public interest, namely the appearance of justice having been done, which is inherent in the proper administration of justice."

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91 *Osland* (2005) 23 VAR 378 at 392 [53].

92 Reasons of Hayne J at [149] (emphasis in original).

93 cf reasons of Hayne J at [152].

94 [1991] 1 VR 63.

95 [1991] 1 VR 63 at 72.

96 [1991] 1 VR 63 at 73-74 (citations omitted).

119 I agree with these observations. I also agree with the additional statement that "[t]he [public] interest is … the interest of the public as distinct from the interest of an individual or individuals"[97]. The Solicitor-General for Victoria did not contest, but on the contrary accepted, the reasoning in *Smith*. Its application was properly at the forefront of the Tribunal's attention[98]. Against this background, it is impossible to accept that the Tribunal failed to give consideration to the particular requirements of the public interest concerning the disclosure of documents in respect of which legal professional privilege had been found and maintained[99]. The Tribunal's reasons demonstrate precisely the opposite.

120 The conclusion that no "countervailing interest" sufficient to attract s 50(4) was identified in the present case[100] does not do justice to the reasoning of the Tribunal. As noted above, that reasoning suggests that there may have been material inconsistency between the joint advice and the Redlich advice. If, as was held in *Smith*, and as I would accept, there is an important public interest in manifestly just outcomes in the administration of criminal justice, it was open to the Tribunal to conclude that the public interest to which it should ultimately give precedence was the making public of any such inconsistency. In particular, it would have been open to the Tribunal to do so given the high generality of most of the grounds of the petition for mercy; their ostensible focus on broad questions of public interest involving law reform and public policy rather than individual legal rights as such; and the public debate that had taken place following the decision of this Court concerning the ambit and operation of the present law.

121 *Producing controversy is legitimate*: With respect, the reasons of Bongiorno AJA (with whom Ashley JA relevantly agreed[101]) in the Court of Appeal reflect, in my view, a superseded approach to the secrecy of internal governmental communications. It is true that, in earlier times, advice to the Governor on a petition for mercy (and virtually everything else) was not susceptible of legal scrutiny. This was, in part, because the documents incorporating the advice were inaccessible and, in part, because of views then held about the "unexaminable prerogative of the Crown"[102].

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97 [1991] 1 VR 63 at 75.

98 See *Osland* (2005) 23 VAR 378 at 390 [42].

99 cf reasons of Hayne J at [152].

100 cf reasons of Hayne J at [152].

101 *Osland* (2007) 95 ALD 380 at 408-409 [116].

102 *Osland* (2007) 95 ALD 380 at 410-411 [126], 412 [130].

122 Following the enactment of the FOI Act, however, it is seriously erroneous to persist with this old law. The FOI Act creates a "right of access" in respect of documents of "agencies" such as the Department of Justice[103]. It makes exhaustive provision for the classes of document exempt from this regime. Thus, exemptions must derive from the enacted categories. Those that were invoked in this case were, relevantly, legal professional privilege (s 32) and "internal working documents" (s 30). There is no specific exemption for documents prepared in anticipation of submission to the Governor. Nor are documents in the possession of the Department of Justice relevant to a petition for mercy expressly protected. The extension of the categories of exemption to such documents, as such, cannot be reconciled with the language and scheme of the FOI Act. The suggestion that documents submitted to the Governor should, of their nature, be exempt discloses error on the part of at least two of the three members of the Court of Appeal, requiring the intervention of this Court. It indicates that they reached their conclusion by reference to an irrelevant consideration, and not by the application of the terms of the statute as was their legal duty[104].

123 Reinforcing this conclusion, it is evident from the reasons of Bongiorno AJA that, in his Honour's opinion, to release the documents claimed would not be in the "public interest" because it "would enable a political collateral attack on the exercise of the prerogative of mercy which would have the effect of changing its fundamental nature"[105]. Upon this point, I agree with Hayne J that enabling such "attacks" (whether in court, in Parliament, in the media or in the general community) is one of the very purposes of the enactment of such legislation as the FOI Act[106]. To conceive otherwise is, with respect, to demonstrate a misunderstanding of why the FOI Act was enacted by Parliament. The FOI Act was passed precisely to enhance "transparency in government" in Victoria – just as the Tribunal indicated.

124 *Conclusions on override*: Given the basis upon which this appeal has been argued, I accept that error attended some parts of the Tribunal's reasoning. However, I do not accept that the appellant's case could give rise to no "public interest" capable of enlivening s 50(4) of the FOI Act. In particular, I note that it was the Tribunal that had the advantage of inspecting all of the relevant documents to reach its conclusion. The Court of Appeal (and this Court) did not

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103 FOI Act, s 13. See also ss 3, 5.

104 cf joint reasons at [43].

105 *Osland* (2007) 95 ALD 380 at 411 [127].

106 Reasons of Hayne J at [153].

have such an advantage. I therefore do not accept that it was open to the Court of Appeal to conclude as it did in relation to the "public interest" override.

The proper order

125 Once the foregoing conclusion is reached[107], the proper course, on the face of things, is for this Court to remit the entire matter to the Tribunal. That course would have the advantage of permitting the Tribunal, if it were still relevant, to consider the outstanding issue of the claim for exemption based on s 30 of the FOI Act.

126 Because s 30 is also subject to the public interest override in s 50(4), the Tribunal did not consider it separately. In my view, this involved a legal error. It is at least possible that, if the exemption under s 30 were made good and s 50(4) were found to be inapplicable to that ground of exemption, that conclusion could affect the final decision on the "public interest" claimed in respect of legal professional privilege. The one, at least conceivably, might impinge on the decision upon the other.

127 However, as the joint reasons point out[108], the Court of Appeal was not obliged to remit the proceedings to the Tribunal. It was empowered to deal with the s 50(4) issue for itself. I will not press my own preference for a general remittal to the Tribunal by proposing orders to that effect. The Court of Appeal could still decide that a general remittal is the appropriate course for it to adopt. It might do so in order to maintain the correct relationship between itself and the Tribunal, and out of recognition of, and respect for, Parliament's choice of the Tribunal as the primary repository of the override power afforded by s 50(4) of the FOI Act.

128 As the Tribunal reached its conclusion on the "balance" of the public interest having inspected the relevant documents, I do not consider that the Court of Appeal could reach a contrary conclusion, at least without examining the documents for itself. Having done so, and having put to one side the supposed exclusion of documents material to the exercise of the prerogative of mercy from the s 50(4) override, it is possible that the Court of Appeal might reconsider both the additional claim for exemption based on s 30 of the FOI Act and the suggestion (rejected by the Tribunal) of providing an edited version of the documents[109].

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107 cf joint reasons at [58].

108 Joint reasons at [58].

109 See *Osland* (2005) 23 VAR 378 at 389 [38].

129 Given the high generality of most of the stated grounds in the appellant's petition, it seems most unlikely to me that it would be against the public interest to disclose *any* of the contents of the documents to the appellant, and thus to her supporters, the media and the community generally. The fact that their disclosure might enliven more public debate, or even possibly lead on to further legal process, is not a reason for withholding the documents. The promotion of informed discussion on matters of public importance is exactly what the FOI Act was generally intended to secure. With that fact reaffirmed by this Court, the final order in the Court of Appeal may be left to that Court.

Orders

130 The orders proposed in the joint reasons should be made.

131 HAYNE J. For the reasons given by Gleeson CJ, Gummow, Heydon and Kiefel JJ, the appellant's contention that the press release issued by the Attorney-General for Victoria on 6 September 2001 waived legal professional privilege in respect of the Joint Memorandum of Advice of Senior Counsel to which the appellant sought access should be rejected.

132 These reasons are directed to the appellant's argument that the Court of Appeal erred in holding that there was no basis upon which, on the material before the Victorian Civil and Administrative Tribunal ("the Tribunal"), the Tribunal could conclude that the public interest required that access be granted under s 50(4) of the *Freedom of Information Act* 1982 (Vic) ("the FOI Act") to documents identified as otherwise subject to legal professional privilege. The appellant's argument about the application of s 50(4) in this case should be rejected. On the material before the Tribunal it was not open to the Tribunal to find that the public interest required that the appellant be granted access to the documents in question.

133 At the time of the hearing before the Tribunal, s 50(4) of the FOI Act provided that:

> "On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 29A, section 31(3), or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act."

This provision was referred to in argument as the "public interest override provision" and it is convenient to adopt that description. Before dealing with its application in this matter, however, it is necessary to say something about other provisions of the FOI Act.

134 Section 3 of the FOI Act provided that the object of the Act "is to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria", and certain other bodies, by the particular means identified in s 3(1)(a) and (b). It is the second of those stated means (described in s 3(1)(b)) that is of present relevance. That paragraph spoke of:

> "creating a general right of access to information in documentary form in the possession of Ministers and agencies limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies".

Section 3(2) provided that:

> "It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in sub-section (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

135 The right of access to documents created by the FOI Act was identified in s 13. That section provided that:

> "Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to –
>
> (a) a document of an agency, other than an exempt document; or
>
> (b) an official document of a Minister, other than an exempt document."

It is to be noted that the right is stated to be "[s]ubject to this Act" and further that the right is to obtain access to a document "other than an exempt document". It follows that the premise for the operation of s 50(4), the public interest override provision, is that the document in question is one to which the applicant has no *right* to access. The applicant has no right to access because, by hypothesis, the document is an exempt document and the right which is created by s 13 is a right to obtain access to certain documents "other than an exempt document".

136 Section 50(4) could be engaged only on an application for review by the Tribunal and only in respect of a review of a kind referred to in s 50(2). Those reviews included, but were not limited to, the review of "a decision refusing to grant access to a document in accordance with a request"[110]. Section 50(4) provided that, on the hearing of such an application for review, "the Tribunal shall have ... the same powers as an agency or a Minister in respect of a request". Those powers included the power to decide that access should be granted to an exempt document unless the document was one referred to in s 28 (which dealt with Cabinet documents), s 29A (which dealt with documents affecting national security, defence, or international relations), s 31(3) (which dealt with documents created by the Bureau of Criminal Intelligence), or s 33 (which dealt with documents affecting personal privacy).

137 The condition stated in s 50(4) for the exercise of the power to decide that access should be granted to an exempt document was "where the Tribunal is of opinion that the *public interest requires* that access to the document should be

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110 s 50(2)(a).

granted under this Act" (emphasis added). The power of decision thus given to the Tribunal "is neither arbitrary nor completely unlimited"[111]. But the only definition of the content of the power lies in the expression "the public interest requires". As was pointed out in *O'Sullivan v Farrer*[112]:

> "[T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'[113]."

It may also be accepted that questions about what is in "the public interest" will ordinarily require consideration of a number of competing arguments about, or features or "facets" of, the public interest[114]. And as was pointed out in *McKinnon v Secretary, Department of Treasury*[115], "a question about 'the public interest' will seldom be properly seen as having only one dimension".

138 The reference in s 50(4) to what the public interest requires is not susceptible of definition by charting the metes and bounds of "public interest" or by providing a list of considerations that may properly bear upon that interest. The question for a court considering a conclusion reached by the Tribunal that the public interest requires that access to certain documents should be granted under the FOI Act will in many, perhaps most, cases focus upon whether a consideration taken into account by the Tribunal is extraneous to the power conferred by s 50(4)[116]. But because the Tribunal must state its reasons for decision it will also be possible to determine whether the reasons given were such as *could* support the conclusion that the public interest required disclosure of the documents.

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111 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21.

112 (1989) 168 CLR 210 at 216; [1989] HCA 61.

113 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

114 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443 [55]; [2006] HCA 45.

115 (2006) 228 CLR 423 at 444 [55].

116 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

139 The particular species of exempt documents which had to be considered in the present matter was identified by s 32(1) of the FOI Act. Each of the documents in issue was "of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege"[117].

140 Although, as noted earlier, the public interest override provision of the FOI Act excluded some species of exempt documents from its operation, s 32(1) was not among the exclusions. That is, s 50(4) did not exclude from its field of possible operation documents to which legal professional privilege attaches. Section 50(4) may thus be seen to have been framed on the assumption that there might be cases in which the public interest would require disclosure of a document to which legal professional privilege attached.

141 In deciding whether the public interest requires that access be granted to documents that otherwise are exempt from production under the FOI Act because the client has and maintains legal professional privilege in respect of those documents, it is of the very first importance to begin from the recognition that legal professional privilege represents a particular balancing of public interests. The privilege strikes the balance by providing that, absent statutory provision to the contrary, it is for the client, and only the client, to decide whether the privilege should be waived and the documents made available for inspection under otherwise compulsory processes. That is, despite the general public interest "which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available"[118], the public interest which underpins the client's legal professional privilege is given paramountcy, and the documents "would be privileged from production in legal proceedings".

142 It would be wrong, however, to attach undue importance to the reference in s 32(1) to production of documents in legal proceedings. In particular, it would be wrong to construe or apply the relevant provisions of the FOI Act on an assumption that s 32(1) is directed only to a rule of evidence in litigation. The course of decisions in this Court shows that legal professional privilege is not just a rule of evidence. As the reasons of the plurality in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* pointed out[119]:

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117 s 32(1).

118 *Grant v Downs* (1976) 135 CLR 674 at 685; [1976] HCA 63.

119 (2002) 213 CLR 543 at 552-553 [9]-[11]; [2002] HCA 49.

> "It is now settled that legal professional privilege is a rule of substantive law[120] which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. ...
>
> Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection[121] and the giving of evidence in judicial proceedings[122]. Rather and in the absence of provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the [*Trade Practices Act* 1974 (Cth)] provides. ...
>
> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity."

It is thus to be observed that the balance which legal professional privilege strikes in favour of maintaining confidentiality of certain communications is fixed despite not only a competing public interest in the fair trial of litigation (civil and criminal), but also the competing public interests which underpin particular statutorily created processes for compulsory disclosure of documents or information.

143 In the present case, the Tribunal made some observations in its reasons for decision[123] about "the importance of maintaining legal professional privilege generally" and referred to this Court's decision in *Daniels Corporation*[124]. The

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120 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J; [1986] HCA 80.

121 See, with respect to discovery and inspection, *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66.

122 See *Baker v Campbell* (1983) 153 CLR 52 at 115-116 per Deane J; [1983] HCA 39; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 55 [4] per Gleeson CJ, Gaudron and Gummow JJ; [1999] HCA 67; *Mann v Carnell* (1999) 201 CLR 1 at 10-11 [19] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

123 *Osland v Department of Justice* (2005) 23 VAR 378 at 390 [43].

124 (2002) 213 CLR 543.

Tribunal went on to say[125], however, that "the nature and strength of the factors that warrant the non-disclosure of a document on the ground of legal professional privilege will vary from case to case" and that:

> "[a]lthough the maintenance of legal professional privilege will generally be a public interest of high order (and will also involve important matters of private interest), the strength of those interests will be greater in some cases than others".

144 The reasons of the Tribunal show that one consideration was identified as dominating other relevant considerations. The dominant consideration was[126] that:

> "[a]s a general proposition it can be said that there is a public interest in information being freely available to enable members of the public to intelligently consider and discuss decisions of the executive branch of government".

More particularly[127]:

> "where a government decision is made in relation to a petition of mercy, relying upon particular advice which is specifically referred to, there will be a strong public interest in also making available any other advice that has been obtained in relation to the same question. If a decision-maker obtains advice from two sources and receives different advice, the public might be misled if it is told that a decision has been made on the basis of advice (specifying the advice) without reference to the fact that there was also different advice. If only one advice is specified in such circumstances an impression may be created that the decision-maker really had no choice; whereas if the two different advices are specified the public might think that there was a choice to be made by the decision-maker and wish to know why a particular choice was made."

It was on this footing that the Tribunal concluded[128] that "[i]n order to clear the air and properly inform the public" all of the documents in respect of which legal professional privilege was maintained should be made available.

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125 (2005) 23 VAR 378 at 390-391 [44].

126 (2005) 23 VAR 378 at 391 [48].

127 (2005) 23 VAR 378 at 392 [52].

128 (2005) 23 VAR 378 at 393 [53].

145 The Tribunal did not found its conclusion that the public interest required disclosure of all of the documents for which legal professional privilege was maintained on any perceived contrariety or discordance between the content of the several documents. Although the Tribunal referred to the possibility that the decision-maker (here, the Attorney-General) had obtained different, even conflicting, legal advice about an issue, the Tribunal did not make any finding that the documents which it had inspected showed this to be such a case. Rather, the Tribunal founded its decision in a stated need to "clear the air", and in the conclusion that this could be done only by making all documents touching or concerning the appellant's petition for mercy available for public examination.

146 This reasoning, if it is not circular, pays insufficient regard to the public interest considerations which inform and support a client's legal professional privilege.

147 References to clearing the air, or more general references of the kind made in oral argument in this Court to a need for "transparency" in government are, at best, statements of the values that are to be understood as informing the structure and operation of the FOI Act. Neither reference to clearing the air, nor reference to a need for transparency in government, reveals the reasoning that supports a conclusion that the public interest requires disclosure of what otherwise is privileged from compulsory disclosure.

148 It is convenient to illustrate the difficulties just described by reference to the idea of transparency in government. The expression "transparency in government" appeared to be used in the oral argument of the present matter in a way that presupposed that *all* documents to which the person or agency subject to the FOI Act has regard in reaching a decision should be available for public examination. Only if that is so was it said that decision-making could be "fully transparent".

149 Understood in those terms, references to "transparency" proceed from a premise that is contradicted by the express terms of the FOI Act. The FOI Act does not provide that *all* documents to which a Minister or agency has regard in reaching a decision should be publicly available. Some documents (including documents in respect of which legal professional privilege is maintained) are exempt documents. Likewise, references to "clearing the air" may embrace a notion of universal access to documents and, if that is so, these references, too, proceed from a premise that is contradicted by the express provisions of the FOI Act.

150 To the extent to which expressions like "clearing the air" or "transparency" do not assume that there should be public access to *all* documents available to a decision-maker, they do not provide useful guidance in answering the relevant statutory question: does the public interest *require* that access to the documents should be granted? In particular, the use of these expressions serves

only to mask what it is that underpins a conclusion that the public interest override provision applies.

151 Legal professional privilege gives effect to a particular balancing of public interests. The balance is struck in favour of confidentiality unless the client waives the privilege. A government client, whether a Minister or some other agency, obtaining legal advice to which legal professional privilege attaches is not in any different position from any other client[129] except to the extent provided for by the FOI Act.

152 Unless particular considerations are identified as supporting the conclusion that the public interest requires disclosure of particular documents in respect of which legal professional privilege is maintained, the public interest in the maintenance of the client's privilege is not to be set aside. It is to be expected (at least in all but the most exceptional case) that any such countervailing consideration could be described with particularity and that it would be an interest of weight and substance. So much follows from the considerations of public interest that underpin the privilege, and from the fact that s 50(4) is not engaged unless the Tribunal is of the opinion that the public interest *requires* disclosure of the documents in question. But no countervailing interest was identified in the present case beyond the invocation of a general proposition about the desirability of clearing the air and a general assertion that there is a public interest in information being fully available.

153 In the Court of Appeal, Bongiorno AJA approached the question of public interest by examining whether an exercise of the prerogative of mercy was judicially reviewable. Having concluded that it was not, Bongiorno AJA held[130] that to release the documents now in question was not in the public interest because it "would enable a political collateral attack on the exercise of the prerogative of mercy which would have the effect of changing its fundamental nature". It is not necessary to decide whether, or to what extent, the exercise of the prerogative of mercy may be subject to judicial review. It is sufficient to say that using documents to which access is obtained under the FOI Act to bring public or other forms of political pressure to bear upon the Executive Government will often be a purpose underpinning the making of a request under the Act. The possibility of such use of documents obtained under the FOI Act is not foreign to the purposes of the FOI Act; it is not a reason that weighs against disclosure of particular documents under the FOI Act, whether in exercise of the power given by s 50(4) or otherwise.

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129 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; [1985] HCA 60; *Waterford v The Commonwealth* (1987) 163 CLR 54; [1987] HCA 25.

130 *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 411 [127].

154 In so far as the Tribunal's reasons in this case are to be understood as suggesting that there may have been some contrariety between the separate pieces of legal advice made available to the Attorney-General in relation to the appellant's petition for mercy, two points must be made. First, as noted earlier, the Tribunal made no finding that there was any contrariety. Secondly, if there were, that fact, standing alone, would not support the conclusion that the public interest required disclosure of some or all of the advices in question. It would not support that conclusion because legal professional privilege is not confined to such advice as appears, on later examination, to be legally or factually sound and well-based. And if conflicting advice was proffered to the Attorney-General in the present matter, his adoption of one strand of advice, in preference to one or more different views, does not present any issue about public interest.

155 Whether questions of public interest could arise if there were some suggestion that the accuracy of what was said publicly about a matter could be disputed if access were to be provided to otherwise exempt documents is not a question that now arises. No suggestion of that kind was made in the Tribunal, or in the Court of Appeal, and there was no foundation for a suggestion of that kind. There was no foundation for such a suggestion because the little that was said publicly about the appellant's petition for mercy did no more than refer to the taking of the joint advice of senior counsel. No mention was made of any other advice.

156 It follows that Maxwell P was right to conclude[131] that "the circumstances of the present case give rise to no public interest consideration which would be capable of satisfying the test in s 50(4) so as to require disclosure of the legal advices". Apart from references to "clearing the air" and to "transparency", no consideration was identified, whether in the reasons of the Tribunal or in argument in this Court or below, which could be put against maintenance of the legal professional privilege found to attach to these documents. That being so, regardless of the particular contents of the documents in question, s 50(4) was not engaged. It also follows that, contrary to the appellant's submissions, it was not necessary in these circumstances for the Court of Appeal to examine the documents that were in issue.

157 It is not necessary to consider the further questions touched on in oral argument in this Court about the ambit of the operation of the provisions of s 30 of the FOI Act concerning internal working documents.

158 The appeal to this Court should be dismissed. The respondent sought no order as to costs.

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131 (2007) 95 ALD 380 at 405 [103].

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