# HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, KIEFEL AND BELL JJ

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HEATHER MARJORIE OSLAND APPELLANT

AND

SECRETARY TO THE DEPARTMENT OF JUSTICE RESPONDENT

*Osland v Secretary to the Department of Justice* [2010] HCA 24
*23 June 2010*
M11/2010

**ORDER**

1. *The appeal be allowed with costs.*

2. *The order of the Court of Appeal of the Supreme Court of Victoria made on 7 April 2009 be set aside and, in lieu thereof, it be ordered that the appeal from the order of the Victorian Civil and Administrative Tribunal made on 16 August 2005 be dismissed.*

3. *The following orders of this Court be vacated:*

   (a) *par 6 of the orders made by Hayne J on 27 October 2009;*

   (b) *par 2 of the orders made by Kiefel J on 4 February 2010; and*

   (c) *par 6 of the orders made by Hayne J on 18 March 2010.*

4. *The appellant's counsel and solicitor and senior counsel's secretaries be released from the written undertakings they provided to the respondent in relation to this appeal.*

On appeal from the Supreme Court of Victoria

**Representation**

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

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

**Intervener**

S J Gageler SC, Solicitor-General of the Commonwealth with D F O'Leary intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

## CATCHWORDS

### Osland v Secretary to the Department of Justice

Administrative law – Freedom of information – Exempt documents – Petition for mercy denied by Governor acting on advice of Attorney-General – Attorney-General had received legal advice from various sources – Attorney-General issued press release mentioning advice from one source that petition should be denied but did not mention advice from other sources – Freedom of information request by petitioner for all advices granted upon review by Victorian Civil and Administrative Tribunal ("VCAT") – VCAT of opinion that public interest required access to all advices to be granted – Whether open to VCAT to form opinion that public interest required access to be granted – Relevance of differences between advices.

Administrative law – Judicial review – Where *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ("Act") provided for appeal to Court of Appeal on a question of law and empowered Court of Appeal to make orders on appeal including orders VCAT "could have made" – VCAT of opinion that public interest required disclosure of all advices – Court of Appeal examined advices and formed own view, without considering the correctness of VCAT's analysis, that public interest did not require access to be granted – Nature of "appeal" under Act – Whether VCAT decision attended by error of law.

Words and phrases – "appeal", "exempt documents", "public interest".

*Freedom of Information Act* 1982 (Vic), ss 32, 50(4).
*Victorian Civil and Administrative Tribunal Act* 1998 (Vic), ss 148(1), 148(7).

FRENCH CJ, GUMMOW AND BELL JJ.

Introduction

1 On 2 October 1996, the appellant, Mrs Osland, was convicted in the Supreme Court of Victoria of the murder of her husband. On 12 November 1996, she was sentenced to a term of 14½ years imprisonment with a non-parole period of nine and a half years. Applications for leave to appeal against her conviction and sentence were dismissed by the Court of Appeal of the Supreme Court of Victoria on 1 August 1997[1]. An appeal to this Court was dismissed on 10 December 1998[2].

2 On 5 July 1999, Mrs Osland petitioned the Attorney-General for Victoria seeking a pardon in the exercise of the royal prerogative of mercy. That is a prerogative vested in the Queen and exercisable by the Governor of Victoria, acting on the advice of the Premier[3]. As a matter of practice, the Premier acts on the advice of the Attorney-General[4]. While the petition was under consideration there was a State election and a change of government with a new Attorney-General[5]. In Mrs Osland's case, advice was received from, inter alia, the Victorian Government Solicitor (VGS), the Crown Prosecutors in the case, the Department of Justice, a senior counsel, Robert Redlich QC[6], and a panel of three senior counsel, Susan Crennan QC, Jack Rush QC and Paul Holdenson QC.

3 On 6 September 2001, the Attorney-General issued a press release in the following terms:

> "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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**1** *R v Osland* [1998] 2 VR 636.

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

**3** *Australia Act* 1986 (Cth), s 7(2) and (5); *Constitution Act* 1975 (Vic), s 87E(b). See Taylor, *The Constitution of Victoria*, (2006) at 103-104, 115-120.

**4** Taylor, *The Constitution of Victoria*, (2006) at 104.

**5** See *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 284 [10]; [2008] HCA 37.

**6** Who was assisted by junior counsel, Trish Riddell.

> 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.
>
> 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.
>
> 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."

4 Mrs Osland applied under the *Freedom of Information Act* 1982 (Vic) ("the FOI Act") for access to all of the advices provided to the Attorney-General and associated departmental correspondence. On 2 January 2002, access was denied by an officer of the Department of Justice and again, on 8 February 2002, by an authorised delegate of the Secretary to the Department of Justice ("the Secretary") making a fresh decision pursuant to an internal review[7]. Access was denied on the basis, inter alia, that the documents attracted legal professional privilege[8].

5 Mrs Osland applied for review of the delegate's decision to the Victorian Civil and Administrative Tribunal ("the Tribunal"). On 16 August 2005, the Tribunal, constituted by its President (Morris J), set aside the delegate's decision and ordered that Mrs Osland be given access to the relevant documents[9]. In so doing, his Honour referred to the possible existence of differences between the advices[10]. He did not, however, decide the case on the basis of those differences[11]. The Secretary applied to the Court of Appeal, under s 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ("the VCAT Act"), for leave to appeal on questions of law from the order of the Tribunal. Leave was granted on 14 October 2005, the appeal heard on 5 June 2006 and judgment

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**7** FOI Act, s 51.

**8** A category of exempt documents pursuant to s 32(1) of the FOI Act.

**9** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 393 [55].

**10** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392 [52].

**11** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392-393 [53].

delivered on 17 May 2007[12]. The Court of Appeal set aside the order of the Tribunal and affirmed the decision of the delegate. It did so without examining the disputed documents[13]. Special leave to appeal to this Court against that decision was granted on 14 December 2007. On 7 August 2008, this Court allowed the appeal against the decision of the Court of Appeal, set aside the orders of the Court of Appeal and remitted the matter to that Court for further hearing in accordance with the reasons of this Court[14]. It did so on the basis that the Court of Appeal had erred in holding, without examining the disputed documents, that differences between the advices could not support the application of s 50(4) of the FOI Act, which provides for the grant of access to documents otherwise exempt from disclosure where, in the opinion of the Tribunal, the public interest so requires[15]. This provision establishes what has come to be known as the "public interest override"[16].

6 On 7 April 2009, the Court of Appeal (Maxwell ACJ, Ashley JA and Bongiorno AJA) again allowed the appeal from the order of the Tribunal, directed that the order of the Tribunal be set aside and in lieu thereof ordered that the decision of the delegate be affirmed[17]. Special leave to appeal against the decision of the Court of Appeal was granted by this Court on 12 February 2010. The appeal raises the question whether the Court of Appeal did what was required of it on the remitter. For the reasons that follow, that question must be answered in the negative and the appeal allowed. In essence, the Court of Appeal's reasoning on the remitter was independent of the actual contents of the disputed documents. It is necessary, before considering the nature of that Court's task on the remitter, to refer to the relevant statutory context.

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

**13** See *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 299 [52].

**14** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275.

**15** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300-301 [57] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

**16** See *Re Hulls and Victorian Casino and Gaming Authority* (1997) 11 VAR 213 at 220; *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at 340 [26] per Phillips JA.

**17** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590.

The *Freedom of Information Act* 1982 (Vic)

7 The FOI Act creates a general, legally enforceable right to obtain access to documents of agencies and official documents of Ministers[18]. The right does not extend to "exempt" documents.

8 The stated object of the FOI Act, in s 3(1), 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". In s 3(2) it is said to be "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)". Section 16(1) requires Ministers and agencies to administer the FOI Act with a view to making the maximum amount of government information available to the public. And, by s 16(2), nothing in the FOI Act is intended to prevent or discourage Ministers or agencies from publishing or giving access to documents, including exempt documents, otherwise than as required by the FOI Act, where they can properly do so or are required by law to do so[19].

9 Where a request is made by a person to an agency or a Minister for access to a document of the agency or an official document of the Minister and the relevant charge is paid, the person requesting shall be given access to the document in accordance with the FOI Act. But the obligation thus imposed on the agency or Minister does not extend to giving access to an exempt document[20].

10 The FOI Act sets out various classes of exempt documents. One such class is specified in s 32(1):

> "A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege."

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**18** FOI Act, s 13.

**19** An example relevant to the present case is the capacity of a Minister to waive legal professional privilege in relation to a document containing legal advice.

**20** FOI Act, s 20(1) and (2).

Another class, defined in s 30, comprises internal working documents whose disclosure "would be contrary to the public interest".

11 Where a decision to grant access to a document in accordance with a request is refused, the applicant for access may apply to the Tribunal for a review of that decision[21]. Section 50(4) provides:

> "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."

12 Relevantly to this appeal, the exercise of the power conferred by s 50(4) requires satisfaction of two conditions. The first is the condition that, as a matter of law, the material before the Tribunal is capable of supporting the formation by it of an opinion that the public interest requires that access to the documents should be granted. That condition may also be expressed as a limitation, namely, that the opinion referred to by the sub-section is an opinion which is such that it can be formed by a reasonable decision-maker who correctly understands the meaning of the law under which that decision-maker acts[22]. The second

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**21** FOI Act, s 50(2)(a).

**22** *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430-432 per Latham CJ; [1944] HCA 42; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J; [1949] HCA 26. See also *Buck v Bavone* (1976) 135 CLR 110 at 118-119 per Gibbs J; [1976] HCA 24; *Foley v Padley* (1984) 154 CLR 349 at 353 per Gibbs CJ, 369-370 per Brennan J; [1984] HCA 50; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-276 per Brennan CJ, Toohey, McHugh and Gummow JJ; [1996] HCA 6; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 652-654 [133]-[137] per Gummow J; [1999] HCA 21; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [31] per Gleeson CJ, Gaudron and Hayne JJ (who observed that the Full Bench of the Commission would have committed jurisdictional error if it misunderstood the nature of the opinion it was to form); [2000] HCA 47; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 [73] per Gleeson CJ and Gummow J; [2001] HCA 17; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 419 [82] per

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condition is that the Tribunal actually forms the opinion that the public interest requires that access to the documents should be granted. This is an evaluative and essentially factual judgment. If the Tribunal forms the requisite opinion, its power to grant access is enlivened. In the ordinary case, the exercise of the power will be subsumed in the formation of the necessary opinion.

13 The FOI Act neither defines nor expressly limits the range of matters relevant to the "public interest" which may require that access should be granted. As was said in the joint judgment in this Court on the first appeal, "[t]here are obvious difficulties in giving the phrase 'public interest' as it appears in s 50(4) a fixed and precise content"[23]. The nature of "public interest" determinations in the exercise of statutory powers was described in *O'Sullivan v Farrer*[24]:

> "the 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'".

14 The power to grant access on public interest grounds is not, in terms, vested in the relevant Minister or agency. By virtue of s 16 they retain their freedom to grant access to exempt documents[25]. Rather, it is a power included in the powers conferred on the Tribunal[26]. In this respect it is unique in freedom of information legislation in Australia[27]. It has been called a "significant and

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Gaudron J, 446-447 [167] per Gummow and Hayne JJ, 502 [329] per Kirby J; [2001] HCA 51.

**23** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300 [57] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

**24** (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ; [1989] HCA 61 quoting Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21 (editing in original).

**25** FOI Act, s 16(2).

**26** *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at 339 [23] per Phillips JA, Tadgell and Batt JJA agreeing.

**27** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 288 [21] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

exceptional" power[28] and "a most extraordinary provision"[29]. These epithets do not justify its characterisation, propounded by the Secretary, as a power to be exercised only in "exceptional circumstances"[30]. Those words are not in the statutory text. Their use may misdirect the inquiry required by s 50(4). They may be taken erroneously to limit the range of matters relevant to the public interest. Nor do they sit easily with the proper approach to the construction of the FOI Act, which is to "further, rather than hinder, free access to information" under it[31]. Having said that, it must be accepted that the word "requires" which appears in s 50(4) directs the decision-maker to identify a high-threshold public interest before the power can be exercised. It is not enough that access to the documents could be justified in the public interest. The terminology of the sub-section does not define a rule so much as an evaluative standard requiring restraint in the exercise of the power. It is, like many common law standards, "predicated on fact-value complexes, not on mere facts"[32], to be applied by the decision-maker.

The reasoning in the Tribunal

15 The President began by rejecting a contention advanced on behalf of Mrs Osland that the Attorney-General had waived legal professional privilege in the joint advice by his reference to it in the press release[33]. The exempt status of the documents therefore stood, and he turned next to the public interest override in s 50(4), making reference to general considerations of transparency in government, public confidence in the criminal justice system, particularly the exercise of the prerogative of mercy, and the unique character of the Osland case[34]. He also referred to the irrelevance of the disputed documents to current or

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**28** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 313 [100] per Kirby J.

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

**30** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 317 [116] per Kirby J.

**31** *Victorian Public Service Board v Wright* (1986) 160 CLR 145 at 153; [1986] HCA 16.

**32** Stone, *Legal System and Lawyers' Reasonings*, (1964) at 264.

**33** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 388-389 [36]-[37].

**34** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 391-392 [48]-[50].

prospective government decision-making and the attenuation, by passage of time, of the weight to be given to legal professional privilege attaching to them[35]. His reasons were summarised in the joint judgment of this Court on the first appeal[36]. It is not necessary to repeat that summary here. In his reasons the President also referred, albeit obliquely and in rather hypothetical language, to the case of a decision-maker who has been provided with differing advices[37]. As was said in the joint judgment in this Court, he[38]:

> "made no finding that [the advices] 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."

16 As appears from the President's reasons for decision, the Secretary had advanced a secondary claim for exemption based on s 30 of the FOI Act by characterising the documents as internal working documents. The President said he could not uphold that claim for exemption if he were to form the opinion pursuant to s 50(4) that the public interest required access to be given notwithstanding the exempt status of the documents by virtue of s 32[39].

The jurisdiction and powers of the Court of Appeal

17 It is necessary to refer to the nature of the jurisdiction and powers of the Court of Appeal in an appeal from an order of the Tribunal. That jurisdiction and those powers continued to define the functions of the Court on the remitter of the appeal for further hearing. The relevant jurisdiction and powers are set out in s 148 of the VCAT Act, which provides, inter alia:

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**35** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 391 [46].

**36** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 289-290 [25]-[27].

**37** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392-393 [52]-[53].

**38** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 290-291 [28].

**39** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 386 [28].

"**Appeals from the Tribunal**

(1) A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding—

(a) to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or

(b) to the Trial Division of the Supreme Court in any other case—

if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal.

…

(7) The Court of Appeal or the Trial Division, as the case requires, may make any of the following orders on an appeal—

(a) an order affirming, varying or setting aside the order of the Tribunal;

(b) an order that the Tribunal could have made in the proceeding;

(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;

(d) any other order the court thinks appropriate."

18 Section 148 confers "judicial power to examine for legal error what has been done in an administrative tribunal"[40]. Despite the description of proceedings under the section as an "appeal", it confers original not appellate jurisdiction; the proceedings are "in the nature of judicial review"[41].

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**40** *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 79 [15] per Gaudron, Gummow, Hayne and Callinan JJ; [2001] HCA 49.

**41** *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 79 [15] per Gaudron, Gummow, Hayne and Callinan JJ.

19 The jurisdiction conferred by s 148(1) is confined to appeals on questions of law. Section 148(7) does not enlarge that jurisdiction. It confers powers on the court in aid of its exercise[42]. That feature of s 148 resembles s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the Commonwealth AAT Act"), which defines the analogous jurisdiction of the Federal Court to hear appeals on questions of law against decisions of the Administrative Appeals Tribunal (AAT). Under s 44(4) of the Commonwealth AAT Act, the Federal Court, in determining an appeal, may "make such order as it thinks appropriate by reason of its decision". But wide as that power may be, the Court "should not usurp the fact-finding function of the AAT"[43]. Those observations turn upon the text of s 44. They do not depend upon the separation of judicial and executive powers, which limits the functions that can be conferred upon federal courts. They have application to the jurisdiction conferred upon the Court of Appeal by s 148 of the VCAT Act, which is, in concept and in terms, modelled on, although not identical to, s 44[44].

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**42** The distinction between jurisdiction and power has been made repeatedly in this Court: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161-162 per Gibbs CJ, Stephen, Mason and Wilson JJ; [1981] HCA 48; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616 per Mason CJ, 619 per Wilson and Dawson JJ, 627-628 per Toohey J; [1987] HCA 23; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 29 [27]-[28], 32 [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 30; *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78] per Gaudron, Gummow and Hayne JJ; [1999] HCA 65; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64]-[65] per Gleeson CJ, Gaudron and Gummow JJ; [2001] HCA 1; *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36] per French CJ; [2009] HCA 18.

**43** *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 430 per Gibbs CJ, Wilson and Dawson JJ; [1985] HCA 10. See also *Harris v Director-General of Social Security* (1985) 59 ALJR 194 at 198 per Gibbs CJ, Brennan, Deane and Dawson JJ; 57 ALR 729 at 735-736; [1985] HCA 1; cf *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at 126 [28] per McHugh, Gummow, Callinan and Heydon JJ, 146 [101] per Kirby J; [2005] HCA 40.

**44** The VCAT Act replaced the *Administrative Appeals Tribunal Act* 1984 (Vic), which was inspired by the Commonwealth AAT Act, as appears from the Second Reading Speech for the Administrative Appeals Tribunal Bill 1984: Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 September 1984 at

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20 The Court of Appeal, in the exercise of its jurisdiction under s 148 of the VCAT Act, may make substitutive orders where only one conclusion is open on the correct application of the law to the facts found by the Tribunal. Such a case arises when no other conclusion could reasonably be entertained[45]. In that event, the Court can make the order that the Tribunal should have made. The language of s 148(7) is also wide enough to allow the Court of Appeal to make substitutive orders in other circumstances. But its powers must, as with the equivalent powers of the Federal Court in relation to the AAT, be exercised having regard to the limited nature of the appeal. Absent such restraint, a question of law would open the door to an appeal by way of rehearing. Where there is a factual matter that has to be determined as a consequence of the appeal, it may be that it is able conveniently to be determined by the Court of Appeal upon uncontested evidence or primary facts already found by the Tribunal. When the outstanding issue involves the formation of an opinion which is, as in this case, based upon considerations of public interest, then it should in the ordinary case be remitted to the body established for the purpose of making that essentially factual, evaluative and ministerial judgment.

The first decision of the Court of Appeal

21 There is a need for better definition of the questions of law upon an appeal to the Court of Appeal under s 148 of the VCAT Act than appeared in these proceedings. The questions of law are not to be distilled from the grounds of appeal[46]. What Gummow J said of s 44 of the Commonwealth AAT Act in *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* is true also of s 148[47]:

> "The existence of a question of law is … not merely a qualifying condition to ground the appeal, but also the subject matter of the appeal itself".

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664-665. Section 52 of the *Administrative Appeals Tribunal Act* 1984 (Vic) resembled s 44 of the Commonwealth AAT Act.

**45** *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 430 per Gibbs CJ, Wilson and Dawson JJ.

**46** *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290 at 301-302 [47]-[48] per Branson J, 313 [108] per Jacobson and Bennett JJ.

**47** (1988) 82 ALR 175 at 178.

The relevant question of law brought to the Court of Appeal was formulated in the notice of appeal from the Tribunal in the following uninformative terms:

> "Was the Judge correct in articulating the contents of the public interest for the purposes of s 50(4) of the *Freedom of Information Act* 1982 (Vic)"?

22 The Court first rejected a notice of contention asserting waiver by the Attorney-General of the legal professional privilege attaching to the joint advice mentioned in the press release. Separate reasons for decision were published by Maxwell P, Ashley JA and Bongiorno AJA. After disposing of the notice of contention, the Court focussed upon the Tribunal's approach to the term "the public interest requires" in s 50(4)[48]. It held, inter alia, that the "public interest" to which the sub-section referred did not extend to "questions of general policy" or "abstract policy considerations"[49]. It also held that the President of the Tribunal erred in his disposition of the Secretary's argument based on s 30, which asserted an exempt status for the documents deriving from their character as internal working documents. Maxwell P said[50]:

> "That point alone would be sufficient to justify upholding the secretary's appeal."

In the event, the appeal to the Court of Appeal succeeded on three grounds:

1. The Tribunal erred in distinguishing, in the application of s 50(4), the stringency of legal professional privilege attaching to the disputed documents depending upon whether the legal advices therein contained were "'of historical interest' only" or of matters "under active consideration"[51].

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**48** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 403-405 [92]-[103] per Maxwell P (with whose analysis on this point Ashley JA agreed at 408 [113]), 409-410 [121]-[122] per Bongiorno AJA.

**49** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 402 [88], 403 [94] per Maxwell P, 408 [114] per Ashley JA, 409 [120] per Bongiorno AJA.

**50** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 400 [78].

**51** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 400 [81], 401 [84] per Maxwell P (with whom, on this point, Ashley JA agreed at 408 [113]).

2. The Tribunal conflated "matters of public interest" with the phrase "in the public interest"[52].

3. The Tribunal failed to determine whether the disputed documents were exempt under s 30(1) of the FOI Act before proceeding to determine whether the public interest required that access should be granted under s 50(4)[53].

As appears from the preceding, the legal errors which the Court of Appeal identified did not depend upon a consideration of the contents of the disputed documents.

23 As to the possible existence of differences between the advices adverted to by the Tribunal's President, Bongiorno AJA said that the existence of such differences was a reason against, rather than in favour of, releasing the documents. Their release would enable a political collateral attack on the exercise of the prerogative of mercy, which would have the effect of changing its fundamental nature[54].

24 Each of the judges in the Court of Appeal, for somewhat different reasons, concluded that the circumstances of the case gave rise to no public interest consideration capable of satisfying the test in s 50(4)[55]. A fuller account of the reasoning of the Court of Appeal is found in the judgment of this Court on appeal from the Court of Appeal's first decision[56].

25 Instead of remitting the matter to the Tribunal, the Court of Appeal set aside its decision and affirmed the decision of the delegate without any

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**52** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 402-403 [90]-[91] per Maxwell P (with whom, on this point, Ashley JA agreed at 408 [113]), 411 [129] per Bongiorno AJA.

**53** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 399-400 [73]-[78] per Maxwell P. His Honour identified the relevant error at 399 [77], with which Ashley JA agreed at 408 [113].

**54** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 411 [127]-[128].

**55** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 405 [103] per Maxwell P, 409 [119] per Ashley JA, 409 [120] per Bongiorno AJA.

**56** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 294-296 [41]-[43] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

consideration of the possible operation of s 50(4) in light of the contents of the disputed documents. It was that omission which led to the first appeal to this Court.

This Court's reasons on the first appeal

26 On the first appeal from the Court of Appeal, this Court rejected a challenge by Mrs Osland to the conclusion by the Court of Appeal, supportive of the Tribunal's finding, that the Attorney-General had not waived legal professional privilege in relation to the joint advice referred to in the press release. The remaining ground of appeal before this Court was "directed to a specific aspect of the way in which the Court of Appeal dealt with the 'public interest override'"[57]. As set out in the notice of appeal, it was expressed thus:

> "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."[58]

The ground so framed did not call into question the errors of law attributed to the Tribunal by the Court of Appeal. Whether and to what extent, having regard to the range of matters that might be considered under s 50(4), the first of them was in truth an error of law is questionable but, in any event, was not in issue. The joint judgment of Gleeson CJ, Gummow, Heydon and Kiefel JJ posed the question for decision thus[59]:

> "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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**57** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 299 [51] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

**58** The numbered documents referred to the advices received by the Attorney-General and associated departmental correspondence.

**59** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 299 [52].

That question was a question of law: was s 50(4) capable of application in light of the Attorney-General's press release and the contents of the disputed documents?

27 As to the possibility, discussed by Bongiorno AJA, that disclosure of differing advices could lead to collateral political attack on the Attorney-General's decision, the majority in this Court said[60]:

> "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."

Their Honours added that it would have been appropriate for the Court of Appeal to reject reasoning along the line that the very existence of a number of advices meant that they should all be released in order to "clear the air" and dispel speculation[61]. They said[62]:

> "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."

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**60** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300 [56].

**61** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300 [57].

**62** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300-301 [57].

As indicated by that passage, differences between the advices could, depending upon their nature and extent, support, as a matter of law, the formation of an opinion, under s 50(4), that the public interest required that Mrs Osland be granted access to the documents.

28 The majority observed that the Court of Appeal was not obliged to remit the matter to the Tribunal; it had the power to deal with the s 50(4) issue itself. It should have examined the documents, and then, having done so, it might well have concluded that the public interest did not require access to them to be granted and that either there were no material differences between the advices or such differences did not require disclosure of the documents[63]. Their Honours concluded[64]:

> "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."

It was not said, and it should not have been necessary to say, that the decision by the Court of Appeal whether to dispose of the matter finally or remit it to the Tribunal was to be made having regard to the nature and limits of its jurisdiction and its powers under s 148 of the VCAT Act.

29 The orders of this Court were in the following terms:

> "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."

30 By the orders set aside by par 2 of the orders of this Court, the Court of Appeal had allowed the appeal against the decision of the Tribunal, set aside

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**63** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 301 [58].

**64** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 301 [58].

par 1 of the Tribunal's orders and in lieu thereof substituted an order that "[t]he decision of the respondent be affirmed"[65]. The effect of par 2 of the orders made by this Court was to reinstate the orders of the Tribunal setting aside the decision of the delegate and ordering that Mrs Osland be given access to the documents[66].

31 It is necessary to turn to the nature of the task which confronted the Court of Appeal on the remitter and how it approached that task.

What the Court of Appeal should have done on the remitter

32 The effect of the decision of this Court in the first appeal from the Court of Appeal was to set aside the orders of that Court. That was a final decision of this Court, not an interlocutory decision which left in place elements of the reasoning of the Court of Appeal which had not been challenged. The Court of Appeal, however, proceeded on the basis that its conclusion that the Tribunal had erred in law continued in effect. There was, it said, "no appeal from that part of the decision"[67]. In so reasoning, the Court appears to have misconceived the effect of this Court's decision. However, there was nothing in the grounds of appeal to this Court on this occasion to raise that error, notwithstanding it was the subject of oral submissions by counsel for Mrs Osland.

33 Accepting that the Tribunal's decision was affected by what the Court of Appeal had said in its first decision, and effectively restated in its second decision, were errors of law, its task on the remitter was to consider how it should dispose of the appeal in the exercise of its powers under s 148(7) of the VCAT Act. That task required its application of the ruling by this Court that it was not impossible that, if there were material differences between the advices or their factual bases, an aspect of the public interest could require their disclosure. The task would have been discharged had the Court of Appeal, following an examination of the disputed documents, taken the following steps:

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**65** The Secretary was the respondent in the Court of Appeal. The decision affirmed had in fact been made by the Secretary's delegate.

**66** The orders of this Court, as sealed, erroneously omitted par 2. However, they were not presented for sealing until after the decision of the Court of Appeal on the remitter had been handed down. The error therefore had no bearing upon that decision.

**67** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 593 [12].

1. Determine the legal question whether, in the circumstances of the case, the actual differences that existed between the advices provided to the Attorney-General could support the formation of an opinion under s 50(4) of the FOI Act that the public interest required that access be granted.

2. If question 1 were answered in the negative, then allow the appeal and set aside the Tribunal's decision, there being no remaining basis for the exercise of the discretion under s 50(4).

3. If question 1 were answered in the affirmative, then:

   3.1 set aside the decision of the Tribunal on the basis that it could have been affected by the errors of law identified in the first decision[68] and remit the matter to the Tribunal for reconsideration in the light of the actual differences between the advices, as to which the Tribunal had made no findings of fact; or

   3.2 having regard to the protracted nature of the proceedings and the undisputed primary facts, take the course of considering for itself whether, by reason of the actual differences between the advices in the circumstances of this case, the public interest required that access be granted to the documents. In the event that access was required to be granted, it could have allowed the Tribunal's reinstated decision to stand[69]. An alternative to this course, to the same practical effect, would have been for the Court of Appeal to set aside the Tribunal's decision and substitute its own decision granting access.

What the Court of Appeal did on the remitter

34 The Court of Appeal in a unanimous judgment characterised its previous decision as holding that the public interest override in s 50(4) of the FOI Act "was *not capable* of applying in these circumstances"[70] (emphasis added). That amounted to a conclusion that, save for what might emerge from an examination

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**68** *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 519 per Burchett J and authorities cited therein.

**69** See *Director-General of Social Services v Hales* (1983) 47 ALR 281 at 310 per Lockhart J for an example of such an approach to an AAT decision.

**70** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 593 [10].

of the disputed documents, the circumstances upon which the Tribunal had previously relied could not, as a matter of law, attract the application of s 50(4). The Court treated its task on the remitter as a reconsideration of the question whether s 50(4) "could or would" apply following an inspection of the documents[71]. The question whether s 50(4) "could" apply reduced to the question whether, having regard to the contents of the documents, it was open to the Tribunal to form an opinion that the public interest required access to the documents to be granted. The question whether s 50(4) "would" apply depended upon whether the decision-maker actually formed the opinion that the public interest required that access should be granted.

35 On the remitter, the Secretary abandoned reliance upon the legal error previously found by the Court of Appeal in relation to the Tribunal's disposition of the argument based upon a s 30 exemption. This removed a possible obstacle to an argument by the Secretary that the Court of Appeal should finally determine for itself whether to exercise the discretion under s 50(4). Partly in the light of the Secretary's concession, the Court rejected a submission by counsel for Mrs Osland that it should remit the s 50(4) question to the Tribunal for determination. It said[72]:

> "We rejected that submission, for the following reasons. First, the tribunal has already exercised the s 50(4) discretion. For reasons given by this court on the last occasion, that exercise of discretion was vitiated by error. There was no appeal from that part of the decision, and we see no particular reason why the tribunal should be called on to consider the exercise of the discretion for a second time. The appellant's abandonment of the other ground of exemption originally relied on (s 30(1) of the Act) means that there is no longer any 'unfinished business' in the tribunal."

The Tribunal had previously exercised its discretion on a footing different from that in issue before the Court of Appeal on the remitter. Contrary to the reasoning of the Court of Appeal, there was "unfinished business" before the Tribunal if the contents of the disputed documents were such that s 50(4) could be applied. This aspect of the reasoning of the Court of Appeal did not support the conclusion that it should not remit the matter to the Tribunal.

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**71** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 593 [10].

**72** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 593 [12].

36 The Court also took the view that having completed the task of inspecting the documents, there was no difficulty in its considering and deciding the s 50(4) question. It said[73]:

> "Finally, and in any event, there must be an end of litigation. The original decision on Mrs Osland's request for access to the documents was made 7½ years ago. The remaining issue is clear and it should be decided here and now."

The "remaining issue" comprised a question of law and, if that were answered favourably to Mrs Osland, the factual and evaluative question whether the public interest required a grant of access to the documents.

37 The Secretary pointed to passages in the judgment of the Court of Appeal indicating that it had considered the nature and content of the differences between the advices. The Court had referred to "material differences of opinion between the Redlich advice and the joint advice" albeit it did so because it thought it "important … to put an end to the speculation on that aspect of the matter"[74]. It characterised the material differences as differences of opinion[75]. It identified one of the issues considered by the advices as whether Mrs Osland's circumstances exemplified what it referred to as "battered wives syndrome"[76]. It referred to "different shades of opinion" within and between advices[77]. It said[78]:

> "A reading of the advices confirms that the decision whether or not to exercise mercy – and, if so, how it should be exercised – is informed, but not governed, by legal considerations. … The ultimate decision is a matter of judgment, not of law. It involves a range of questions, on some or all of which reasonable minds may well differ". (footnote omitted)

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**73** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 594 [13].

**74** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 595 [18] (footnote omitted).

**75** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 595 [18].

**76** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 602 [44].

**77** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 595 [18].

**78** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 603 [46].

The Secretary also made the point that the Court expressly referred to the fact that the advices were obtained "sequentially, rather than simultaneously"[79] and were "successive"[80] in the sense that a later advice dealt with observations in an earlier advice. These matters, however, are of considerably diminished significance when the Court's reasons are considered.

38 The Court referred to the public interest against access inherent in the exemption of the documents from disclosure by reason of legal professional privilege. It acknowledged that there might be public interest factors favouring access. In the event it identified none. Nevertheless, it said that the task confronting it involved "a balancing process"[81]. What was balanced against what did not emerge. It was common ground that the power to grant access under s 50(4) was exercisable "only if the tribunal (or, in this case, the court) concluded that the public interest required that access be granted"[82]. The Court held that nothing in the language of the press release warranted a finding that the Attorney-General had represented to the public either that the joint advice was the only advice he received on the topic or that he had received no advice to the contrary[83]. The announcement was intended to convey, and in fact conveyed, no more than that the decision had been based on, and accorded with, independent legal advice from eminent counsel[84]. Mrs Osland's alternative argument, that the Attorney-General's "assumption" of political accountability for his decision required that the documents be released in the public interest, was also rejected[85].

39 The Court referred to the nature and extent of ministerial accountability as "a large topic" involving questions of political theory and constitutional law and practice[86]. That topic was consigned to the category of "abstract policy

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**79** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 603 [46].

**80** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 603 [46].

**81** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 596 [21].

**82** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 596 [22].

**83** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 598-599 [31].

**84** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 599 [31].

**85** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 599 [32]-[34].

**86** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 600 [38].

considerations" which have "no place in the s 50(4) analysis"[87]. The Court then said[88]:

> "It is, accordingly, *outside the scope of s 50(4)* for this court to decide, as a matter of generality, whether there should be public scrutiny of legal advices received by a Minister in connection with the making of an executive decision. That is so whether the public interest is said to reside in greater transparency or in greater accountability. … Whether ministerial accountability entails the production of legal advices relied on by ministers in making decisions, and if so in what circumstances, is a policy question which will fall to be considered, if and when it arises, by the executive or by the legislature." (emphasis added)

The conclusion so expressed was a conclusion of law. It was logically independent of the actual contents of and differences between the advices.

40 The Court considered what it described as the critical question which arises when an exercise of discretion under s 50(4) is sought, namely, "whether the particular circumstances of the case require disclosure of the exempt document(s) in the public interest"[89]. Having read the advices, it was satisfied that there was nothing about the petition, or the advices, or the process of decision-making, or the announcement of the decision, which compelled disclosure of the documents in the public interest[90]. But the justification offered for that conclusion did not depend upon actual differences between the advices received by the Attorney-General. For, in reasoning to the conclusion, the Court held:

1. The context of Mrs Osland's case, namely, public concern and controversy about what it referred to as "battered wives syndrome", did not create or impose on the Attorney-General any new or different obligation of accountability which s 50(4) could be invoked to enforce[91].

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**87** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 601 [40].

**88** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 601 [41].

**89** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 602 [43].

**90** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 602 [44].

**91** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 602 [44].

2. The sequence of advices, both external and departmental, confirmed that a proper process was followed from start to finish. There was nothing unusual in the Attorney-General obtaining multiple opinions or in the fact that there might be differences of opinion. There was no inference of impropriety or malpractice emerging from such differences[92].

3. The question on which the Attorney-General obtained successive advices was "of high importance and of considerable complexity". The ultimate decision was a matter of judgment, not of law. It involved questions on some or all of which reasonable minds might differ. The existence of differences did not compel disclosure in the public interest[93].

4. Unlike the position in *Director of Public Prosecutions v Smith*[94], there was no public concern that the administration of the criminal justice system had been perverted[95].

41 The foregoing reasons were limited to the propriety of the process undertaken by the Attorney-General and the importance and complexity of the questions he had to decide. The proposition that the existence of differences did not compel disclosure in the public interest was, in the context in which it appeared, a general statement about the effect of the existence of differences and not based upon consideration of the actual differences. The reference to *Director of Public Prosecutions v Smith* was irrelevant to the content of the documents as no argument had been advanced that their contents suggested that the administration of criminal justice had been perverted. The generality of the Court's reasoning indicated it was really addressing a question of law precluded by the terms of the remitter from this Court, namely, whether the evaluation of differences (of any kind or degree) could attract the operation of the discretion under s 50(4).

Grounds of appeal

42 The grounds of appeal on which special leave was granted were:

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**92** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 602 [45].

**93** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 603 [46].

**94** [1991] 1 VR 63.

**95** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 603 [47]-[48].

"(a) The Court of Appeal did not perform the task required of it in accordance with the High Court's remittal in that it failed to determine that, in the circumstances of the present case, s 50(4) of the Freedom of Information Act 1982 (Vic) ('the FOI Act') was enlivened as a result of those material differences [sic].

(b) The Court of Appeal erred in concluding that, notwithstanding the content of the press release, there was nothing in the content of the legal advices provided to the Attorney-General, and nothing in the revealed differences between those advices, and their extent, that attracted the operation of s 50(4) of the FOI Act.

(c) The Court of Appeal ought to have found that the press release was misleading, lacked candour or was otherwise materially inaccurate or incomplete and, as a consequence, s 50(4) was enlivened."

Conclusions and disposition

43 In the course of the hearing of the appeal, this Court posed the following questions to the parties:

(a) whether on remitter the Court of Appeal performed the task required of it, namely, to determine whether, in the circumstances found by the Tribunal, s 50(4) of the FOI Act was incapable of application;

(b) whether, if the Court of Appeal did not perform that task, the respondent in this Court now asserts that error of law is nonetheless demonstrated in the decision of the Tribunal in the application of s 50(4);

(c) what orders, including as to costs, should be made by this Court in the light of the answers to questions (a) and (b)?

44 The Secretary submitted that, given her withdrawal, on the remitter, of reliance upon the Tribunal's failure to consider the s 30 exemption before applying the public interest override, there was no need for the matter to be further remitted to the Tribunal to hear evidence in support of the s 30 exemption. The "error of law jurisdiction" of the Court of Appeal remained because the errors previously identified remained. The question before the Court of Appeal on the remitter was whether, in the circumstances of the case, the public interest required the release of the documents. She submitted that it was not necessary for the Court of Appeal to determine that s 50(4) was incapable of application because on the remitter it was not identifying further error in the Tribunal's decision, having already concluded that the Tribunal's decision was

vitiated by error, but rather exercising the power conferred on it under s 148(7) of the VCAT Act, including the power under s 50(4).

45 The submissions made on behalf of the Secretary as to the process followed by the Court of Appeal, in answer to the questions posed by this Court, do not meet the difficulty that the Court of Appeal did not do, on the remitter, what this Court had required it to do. Putting to one side the debate about whether it could justify its exercise of power under s 148(7) by reference to errors of law identified in its first decision, the Court of Appeal did not consider the question of law raised by s 50(4), nor did it consider the exercise of the discretion under that sub-section, by reference to the content of the disputed documents and the differences between them. Nor did it appear to give any real consideration to the limited nature of its jurisdiction under s 148. The question which then arises is how this appeal should be disposed of.

46 This Court, in the course of the present appeal, has looked at the disputed documents and received detailed written submissions respecting the terms in which they were expressed. A consideration of the content of the disputed documents in light of the terms of the press release indicates that important elements of the differences between the advices were not based upon different views of the applicable law. The substance of the most important differences turned upon normative judgments on matters which the authors of the advices thought relevant to the exercise of the prerogative of mercy.

47 The exercise of the prerogative of mercy in relation to a person convicted of murder engages the public interest at a high level of importance. That importance is all the greater when, as was accepted by all of the authors of the advices in this case, the legal correctness of the conviction is not in issue, nor is it able to be put in issue. A decision for or against the exercise of the prerogative in such a case involves considerations of fundamental importance to the whole community relating to the right to life and the community's treatment of those who violate that right by killing another without legal justification or excuse. In this case, the Attorney-General recognised the importance of that public interest by disclosing, in his press release, that the recommendation which he made to the Premier was based upon independent advice from persons of high standing and reputation in the legal profession and in the wider community. The press release did not, however, disclose that the joint advice was based substantially upon normative judgments about the desirability of exercising the prerogative of mercy on grounds which did not impugn the correctness of the conviction. It did not disclose that differing judgments had also been proffered.

48 The nature of the differences between the advices, throwing up opinions about the fairness and authority of the criminal justice system, the circumstances of Mrs Osland's situation, and asserted inadequacies in the law in relation to

chronic domestic violence, was such as to be capable of supporting the formation of an opinion that the public interest required the disclosure of the documents. It was, at the very least, arguable, in the circumstances of the case, that the high-threshold public interest standard was met and that the public interest required disclosure of the contending, essentially normative propositions which the Attorney-General had before him when he recommended that Mrs Osland's petition be denied. The differences between the authors of the advices were on questions readily comprehensible by members of the public. They did not turn upon arcane disagreements, likely to be misunderstood, about the interpretation of the relevant law. Against the weight of such considerations, in applying s 50(4) of the FOI Act the interests protected by legal professional privilege, and recognised by s 32(1) of that Act, in the particular case were arguably of diminished importance. When the Attorney-General received the advices which he did from various members of the legal profession, he did so on behalf of the public and not as a private citizen. Such continuing public interest as there was in the privilege attaching to the documents in the circumstances of this case was capable of being put to one side against the public interest in disclosure.

49 The preceding conclusions are sufficient to answer the question of law implicit in s 50(4) in favour of Mrs Osland. That question having been answered in the affirmative by reference to the nature and scope of the differences between the advices, the appeal should be allowed. The question then arises as to what further orders should be made. While it would be open to this Court to remit the matter again to the Court of Appeal for further hearing or to substitute for that Court's orders a remitter to the Tribunal for consideration on the merits, such remitters would generate unacceptable additional delay in a process already unduly protracted.

50 The order made by the Tribunal is supportable as a matter of law, even though it was not expressly based upon the differences between the advices. Having regard to the basis upon which the Tribunal's decision can be supported by reference to the contents of the documents in the circumstances of this case, there is little room left for the exercise of the discretion adversely to Mrs Osland. In the circumstances, the most appropriate disposition is to set aside the orders of the Court of Appeal, thus reinstating the Tribunal's order granting access to the documents.

51 It was submitted for the Secretary that there should be no order for costs in favour of Mrs Osland as it was common ground in the Court of Appeal that the task facing that Court was a "balancing exercise" rather than the determination of a question of law. However, the orders now proposed turn upon the failure of the Court of Appeal to undertake the task it was required to undertake. That was in issue on the grounds of appeal in this Court. While the significance of the question of law to be determined emerged in the course of argument, that does

not warrant a departure from the usual order as to costs in this Court. However, having regard to the course taken in the Court of Appeal, Mrs Osland should not have an order for her costs in that Court. The orders of the Court should be:

1. The appeal be allowed with costs.

2. The order of the Court of Appeal made on 7 April 2009 be set aside and, in lieu thereof, it be ordered that the appeal from the order of the Tribunal made on 16 August 2005 be dismissed.

3. The following orders of this Court be vacated:

   (a) par 6 of the orders made by Hayne J on 27 October 2009;

   (b) par 2 of the orders made by Kiefel J on 4 February 2010; and

   (c) par 6 of the orders made by Hayne J on 18 March 2010.

4. The appellant's counsel and solicitor and senior counsel's secretaries be released from the written undertakings they provided to the respondent in relation to this appeal.

The setting aside of the orders made by Hayne J and Kiefel J will have the effect that, inter alia, the disputed documents, which are contained in a confidential appeal book filed in this Court, will be available for inspection and copying pursuant to the High Court Rules 2004.

52 HAYNE AND KIEFEL JJ. The background to this matter is referred to in the earlier decision of this Court[96]. It commences with the appellant's petition to the Governor of Victoria in 1999 for the grant of a pardon for the murder of her husband of which she had been convicted. The petition was lodged with the then Attorney-General for Victoria. The Attorney-General, in September 2001, made a press release in which he said that he had recommended that the Governor deny the petition and that the Governor had accepted that advice. The Attorney-General said that he had made that recommendation on the joint advice of three Queen's Counsel[97].

53 In her application under the *Freedom of Information Act* 1982 (Vic) ("the FOI Act"), Mrs Osland sought access to a number of documents in the possession of the Department of Justice which contained legal advice, both internal and external to the Department. They included the joint advice to which the Attorney-General had referred and an advice by another Queen's Counsel[98].

54 The matter came before the Victorian Civil and Administrative Tribunal ("the Tribunal") for review of the decision, of the delegate of the Secretary, that the documents were the subject of legal professional privilege and exempt from disclosure under s 32 of the FOI Act. The President of the Tribunal, Morris J, ordered that the documents be released to Mrs Osland[99].

55 In determining that the documents should be released, notwithstanding that privilege attached to the documents, Morris J applied s 50(4) of the FOI Act, which provides the Tribunal with a special power. It is in these terms:

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

56 Section 50(4) has been referred to throughout the proceedings as the "public interest override" provision. As was observed in the joint reasons on the earlier appeal to this Court, it "is a unique provision in Australian freedom of

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**96** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275; [2008] HCA 37.

**97** S Crennan QC, J Rush QC and P Holdenson QC.

**98** R Redlich QC.

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

information legislation."[100] Section 50(4) has the effect that it is not possible to approach an exemption such as that provided in s 32 as if it were absolute, for to do so would deny the intended operation and effect of s 50(4)[101].

57 The decision of Morris J had regard to the press release made by the Attorney-General and what it conveyed about the advice which the Attorney-General had received. The press release was in these terms:

> "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.
>
> 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.
>
> 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.
>
> After carefully considering the joint advice, I have recommended to the Premier that the Governor be advised to deny the petition.
>
> The Governor has accepted this advice and denied the petition."

58 His Honour was of the opinion that the Attorney-General named the three Queen's Counsel who had given the joint advice because he wished to demonstrate that high-level advice was taken before recommending that the petition be denied, and was seeking to rely upon the reputation of those counsel to support the reasonableness of the decision[102]. His Honour considered that course to be legitimate, but expressed concern that the public might be misled if told that a decision had been made on the basis of one specified advice, without reference to the fact that there was also different advice. His Honour was referring in particular to an advice which had earlier been provided by Mr Redlich QC in relation to the petition. His Honour said that where a decision-maker refers to only one advice, "an impression may be created that the decision-maker really had no choice"[103]. His Honour concluded that these

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**100** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 288 [21].

**101** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 288 [21].

**102** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392 [51].

**103** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392 [52].

considerations provided "powerful reasons" why access should be provided[104]. Because they were powerful, in his Honour's opinion they overrode the otherwise exempt status of the documents[105].

59 The Court of Appeal (Maxwell P, Ashley JA and Bongiorno AJA) allowed the Secretary's appeal from the decision of Morris J. It found errors, which it considered qualified as errors of law, in his Honour's reasons.

60 His Honour had put to one side the Secretary's claim for exemption of the documents under s 30 of the FOI Act, because his Honour was of the opinion that any such exemption would be subject to the overriding public interest provisions of s 50(4). Section 30 provides for an exemption relating to internal working documents. Maxwell P considered that his Honour had failed to take into account the relevance of public interest considerations underlying that exemption[106]. The correctness of this view is not presently relevant.

61 Another error identified by Maxwell P concerned the view expressed by Morris J that, although legal professional privilege attached to the documents, there might be a distinction drawn between advice which was historical, and advice with respect to action to be taken[107]. However, Morris J went on to say that access provided on this basis might create an undesirable precedent[108] and did not proceed to a conclusion on this basis.

62 Morris J then discussed factors relating to the public interest which might favour the release of the documents. His Honour referred to the public's desire to know the reasons for denial of the petition[109]. Maxwell P considered that this conflated matters which might be of interest to the public with what was in the public interest, the latter being the question raised by s 50(4)[110].

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**104** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392 [53].

**105** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 393 [54].

**106** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 399-400 [77].

**107** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 391 [44].

**108** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 391 [47].

**109** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392 [50].

**110** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 403 [91].

63 Morris J acknowledged that a decision of the executive might not be amenable to judicial review, but spoke of the public interest, in a democracy, in such decisions[111] and in transparency of processes[112]. Maxwell P did not take up the question of the reviewability of the decision to refuse a petition, pointing out that the subject proceedings were not of that kind[113]. However, Bongiorno AJA, with whom Ashley JA agreed, considered that issue as relevant to the question whether the advices received by the Attorney-General should be placed in the public domain[114].

64 It is in this connection that Bongiorno AJA made reference to the possible difference in the legal advices provided to the Attorney-General, which Morris J had alluded to in his conclusion as to the application of s 50(4). Bongiorno AJA said that any difference between the advices provided a reason against, not for, disclosure, because their release would enable a "political collateral attack on the exercise of the prerogative of mercy"[115]. But as was pointed out in the joint reasons on the earlier appeal to this Court, such a political attack is not alien to that process, and the exercise in which the Attorney-General was engaged, in putting out his press release, assumed political accountability[116].

65 As was observed in the joint reasons, legal errors were identified by the Court of Appeal without inspecting the legal advices. The question concerning s 50(4), as identified in the joint reasons, was[117]:

> "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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**111** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 391 [48].

**112** *Re Osland and Department of Justice* (2005) 23 VAR 378 at 392 [49].

**113** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 404 [97].

**114** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 411 [128].

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

**116** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300 [56].

**117** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 299 [52].

66 Implicit in this statement, of the issue then before the Court, was that no member of the Court of Appeal had considered the opinion expressed by Morris J at the conclusion of his Honour's reasons. This opinion related to the possible differences between the legal advices received by the Attorney-General and the prospect that the public might be misled by the press release's reference only to the joint advice as the basis for the decision not to recommend a pardon. Had they done so, they may have been alert to the need to have regard to the advices. As was said in the joint reasons, "because of what Morris J had said about the possibility of inconsistency, the Court of Appeal should have examined the documents for itself."[118]

67 Maxwell P had concluded 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."[119] Bongiorno AJA, with whom Ashley JA agreed, had determined the issue concerning s 50(4) on the basis referred to earlier in these reasons. The joint reasons in this Court concluded:

> "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 A-JA discarded the possibility as legally irrelevant was incorrect."[120]

68 The reasons of Morris J did not make clear whether his Honour's conclusion about the application of s 50(4) was based upon there being a real inconsistency between the advices. His Honour gave this only as a possibility. In the joint reasons it was said that the Court of Appeal had not been obliged to remit the matter to the Tribunal, in order to clarify the matter, but ought to have viewed the advices itself. The prospect that it might consider any difference not to be material, such as might warrant disclosure, was adverted to[121].

69 Excluding the order as to costs, the orders made by this Court on that appeal were:

> "1. Appeal allowed.

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**118** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 301 [58].

**119** *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at 405 [103].

**120** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 301 [57], Kirby J agreeing at 313 [99].

**121** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 301 [58].

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."

70 The effect of the second order was that the decision of Morris J stood. The task of the Court of Appeal on remitter was to determine the Secretary's appeal from that decision, on the grounds then current, pursuant to the jurisdiction given by the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ("the VCAT Act"). In doing so it was to have regard to the content of the advices and the conclusion stated by Morris J as to the differences between them as necessitating the provision of access to them in the public interest. So much was required by the reasons given by this Court on the earlier appeal and the terms of the remitter.

71 Section 148(1) of the VCAT Act provides that there is an appeal to the Court of Appeal from an order of the Tribunal[122]. It is limited to questions of law. In *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)*[123] it was said:

> "Section 148 of the VCAT Act is concerned with the invocation of judicial power to examine for legal error what has been done in an administrative tribunal. Although s 148 uses the word 'appeal', it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review."

72 When the matter again came before the Court of Appeal on remitter, the only ground which remained concerned the application of s 50(4). The ground which relied upon an exemption provided by s 30 was not pursued. The task of the Court of Appeal was to determine whether there was error of law in the decision of Morris J to apply s 50(4).

73 It is true that in examining the legal advices to ascertain whether there was a material difference, or inconsistency, between them, the Court of Appeal was to engage in something of a factual inquiry, but it was limited. It was necessary to ascertain whether the factual substratum for the opinion of Morris J existed and

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**122** And also to the Trial Division pursuant to s 148(1)(b).

**123** (2001) 207 CLR 72 at 79 [15] per Gaudron, Gummow, Hayne and Callinan JJ; [2001] HCA 49.

whether, as his Honour had implied, the differences were significant. The former was a necessary condition for his Honour's application of s 50(4). The latter was necessary to a proper understanding of his Honour's reasoning to that conclusion. But consistent with the VCAT Act, the Court of Appeal could not assume the function of the Tribunal and determine for itself whether the public interest required disclosure of the advices.

74 The Court of Appeal did look at the advices and found that "there were material differences of opinion between the Redlich advice and the joint advice, and that there were different shades of opinion within the two [internal] advices"[124]. Now appreciating that what Morris J spoke of were indeed differences of significance in the legal advices, the Court of Appeal should have proceeded to consider whether his Honour's reasoning, in conclusion, about the requirements of the public interest, manifested an error of law. The content of that public interest was identified by his Honour by reference to the prospect that the public might be misled, unless the advices were disclosed and the basis upon which the Attorney-General had made his recommendation thereby revealed.

75 The task which the Court of Appeal set for itself on remitter may be seen from the first question it posed for determination following its findings that there were material differences in the advices: "Does the public interest require that access be given?" This was followed by a consideration of "The public interest in accountability". The Court concluded with an inquiry as to whether "the particular circumstances of the case require disclosure"[125]. By posing the question it did and undertaking the inquiries identified, the Court of Appeal did not review what the Tribunal had done, and had said in its reasons, for error of law. Rather, it impermissibly assumed the role of the Tribunal and substituted its own decision[126].

76 In its conclusion the Court of Appeal said that the existence of differences in the advices did not compel disclosure. It did not consider the view of Morris J, that the differences were such as to be apt to mislead, in the context of what the public interest required. The Court of Appeal considered only whether the terms of the Attorney-General's press release, examined in isolation, were misleading and concluded that they were not. It said that there was nothing in

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**124** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 595 [18] (footnote omitted).

**125** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 602 [43].

**126** *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41; [1986] HCA 40.

the language of the press release which represented to the public that the joint advice was the only advice that he had received, or that he had received no advice to the contrary[127].

77 It may be accepted that the press release did not contain such express representations, but the point made by Morris J was that it was implied in what the Attorney-General had said that he had received only the joint advice and had acted consistently with it in making the recommendation that the petition be denied. It was implied that his course of action was limited to that advice. This view of what the press release conveyed was not discussed by the Court of Appeal. It was a conclusion that was plainly open to Morris J and neither the conclusion nor the reasons given for it revealed legal errors.

78 It appears from the reasons of the Court of Appeal that counsel for Mrs Osland accepted that the Court had power to determine the question as to the application of s 50(4) for itself[128]. The Court of Appeal referred in that regard to s 148(7)(b) of the VCAT Act, as did the Solicitor-General for Victoria on the hearing of this appeal. Section 148(7) is concerned with the orders which might be made on an appeal to the Court of Appeal under s 148(1)(a). Paragraph (b) of s 148(7) provides that the Court may make an order that the Tribunal could have made in the proceeding. The power to make such an order, or the other orders listed in s 148(7), arises only following review of the Tribunal's decision for legal error. Section 148(7) does not operate to expand the jurisdiction given by s 148(1)(a). Although expressed in wide language, the powers given by s 148(7) are only to be exercised as a remedial consequence of dealing with an error of law[129].

79 On this appeal the Solicitor-General submitted that the Court of Appeal was able to exercise the power given by s 148(7)(b) because it had found jurisdictional errors in the reasons of Morris J in its earlier decision concerning s 50(4). The fact that some such errors had not been the subject of the earlier

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**127** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 598-599 [31].

**128** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 593 [11].

**129** *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298 at 304 [7] per Allsop P (referring to s 57(2) of the *Land and Environment Court Act* 1979 (NSW)); see also *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209 at 220-221 per Sheppard J (concerning s 44(4) of the *Administrative Appeals Tribunal Act* 1975 (Cth)).

appeal to this Court was also mentioned by the Court of Appeal[130]. Such an approach incorrectly views the proceedings before the Court of Appeal, on remitter, as a continuation of the previous appeal to that Court. The reasons given by the Court of Appeal on the first appeal fell with the orders of this Court setting aside the Court of Appeal's orders.

80 For completeness, however, it should be noted that the errors identified in the earlier reasons of the Court of Appeal, in any event, did not provide a basis for a rejection of the conclusion reached by Morris J, as not authorised by s 50(4). Any error in the approach to the exemption provided by s 30 was not relevant to an extant ground of appeal. Morris J had not given effect to his views that some documents subject to legal professional privilege might be regarded as "historical".

81 As was observed in the joint reasons in the earlier appeal to this Court, the legal errors identified by the Court of Appeal in connection with s 50(4), which were not then in contention before this Court, did not concern the contents of the legal advices[131]. It was the differences contained in those advices and the potential for the public to be misled which provided the "powerful reasons", to which Morris J referred, for requiring access to the documents in the public interest. This conclusion reached by his Honour stood apart from other factors to which he had referred as possibly favouring access in the public interest. It fell to the Court of Appeal to determine whether the reasons given for that conclusion were attended by error of law.

82 In order to apply s 50(4), it was necessary for Morris J to form the opinion that the public interest required access to the documents, given the circumstances surrounding the making of the press release. Whether access was required might depend, to a large extent, on the nature of the public interest identified by his Honour. It was recognised in the joint reasons on the earlier appeal to this Court that "there are obvious difficulties in giving the phrase 'public interest' as it appears in s 50(4) a fixed and precise content."[132] Nevertheless it was said that the assumption by the Attorney-General of political accountability, by putting out the press release, might be sufficient to enliven s 50(4). There is no reason why, given the inconsistency in the advices, this should not be so and the view expressed by Morris J as to the public interest seen as one within the purview of the sub-section.

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**130** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 593 [12].

**131** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 299 [53].

**132** *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300 [57].

Conclusion and orders

83 The Court of Appeal did not undertake the task required by s 148(1) of the VCAT Act and determine whether the conclusion reached by Morris J, and the reasons for it, were attended by error of law. The matter does not warrant further remitter for it to undertake that task and it is appropriate for this Court to conclude that question for itself. As the Court of Appeal itself said, there is a need to end this litigation[133]. In the result, no error of law is disclosed.

84 The appeal should be allowed, the orders of the Court of Appeal set aside and in lieu it be ordered that the appeal to that Court from the decision of the Victorian Civil and Administrative Tribunal of 16 August 2005 be dismissed.

85 Consequential orders are necessary to be made with respect to interim orders made pending this appeal and to provide for release from undertakings. They are agreed between the parties as:

1. The following orders of this Court be vacated:

   (a) paragraph 6 of the orders made by Justice Hayne on 27 October 2009;

   (b) paragraph 2 of the orders made by Justice Kiefel on 4 February 2010;

   (c) paragraph 6 of the orders made by Justice Hayne on 18 March 2010.

2. The appellant's counsel and solicitor and senior counsel's secretaries be released from the written undertakings they provided to the respondent in relation to this appeal.

86 So far as concerns costs, the appellant should have an order for her costs on this appeal, but not those with respect to the hearing before the Court of Appeal, given the submissions made concerning the approach to be taken by that Court on the appeal.

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**133** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 594 [13].

87 HEYDON J. I dissent in relation to costs.

88 As Hayne and Kiefel JJ explain, when this matter was remitted to the Court of Appeal of the Supreme Court of Victoria by this Court, the Court of Appeal had two tasks to perform. The first task, pursuant to s 148(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), was to examine the decision of the Victorian Civil and Administrative Tribunal to see whether it had fallen into any error of law. The second task would only have arisen if the Tribunal had fallen into any error of law. That task, pursuant to s 148(7)(b) of the Act, was to decide for itself, if it chose to, whether the public interest required access to be given to the relevant documents pursuant to s 50(4) of the *Freedom of Information Act* 1982 (Vic). The Court of Appeal was not at liberty to go directly to the second task without having completed the first. The Court of Appeal did go directly to the second task without having completed the first because it assumed that the proceedings remitted to it were simply a continuation of the previous appeal to it.

89 This error on the Court of Appeal's part appears to have arisen for two reasons. The first is that, as the Court of Appeal remarked, it was "common ground" between the parties that the only task that had to be performed was the second[134]. The second is that the formal orders of this Court were not taken out until 4 May 2009, after the Court of Appeal had decided the remitted proceedings on 7 April 2009. When the formal orders were in fact taken out, they omitted an order that had been pronounced in open court on 7 August 2008, namely: "Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 17 May 2007." That deficiency indicates an understanding of the remitter which explains why the appellant shared the "common ground" to which the Court of Appeal referred, and which had led the Court of Appeal not to embark on the first task.

90 The present appellant was also the appellant on the previous occasion when the matter was before this Court. It is the responsibility of both parties to ensure that, where an appeal is remitted to another court for further hearing, the precise orders made by the remitting court are taken out, properly sealed in the Registry, and made available to the court to which the proceedings have been remitted. But it is the primary responsibility of the successful moving party to do so, here the appellant. The absence of any orders taken out in proper form may have led the Court of Appeal into the erroneous belief that the appeal to this Court which resulted in the remitter was only an interlocutory appeal, that no final order had been made, that the Court of Appeal's orders of 17 May 2007 (which rested on findings of errors of law) remained on foot, and that the Tribunal's orders were no longer on foot. This in turn may have led the Court of

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**134** *Secretary, Department of Justice v Osland (No 2)* (2009) 254 ALR 590 at 596 [21].

Appeal into the belief that its only duty was to perform the second task and not the first. In contrast, the fact was that the Court of Appeal's orders of 17 May 2007 had been set aside, the Tribunal's orders remained on foot, and those orders could not be impugned until the Court of Appeal undertook the first of the tasks before it.

91 This is an unusual case. The terms of orders as to costs in unusual cases must depend on the particular circumstances of each case. If the successful appellant in this Court had not adopted a particular approach in the Court of Appeal, and had ensured that the correct orders were taken out before the argument in that Court took place on 30 March 2009, she may have been successful in the Court of Appeal (as she has been here), in which case her appeal to this Court would not have been necessary. For those reasons no orders as to costs should be made in relation to the remitted proceedings in the Court of Appeal or the appeal from them to this Court.

92 I agree with the orders, other than as to costs, proposed by Hayne and Kiefel JJ and with the reasons they give for them.