HIGH COURT OF AUSTRALIA

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

MARJORIE HEATHER OSLAND APPELLANT

AND

SECRETARY TO THE DEPARTMENT OF JUSTICE RESPONDENT

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

ORDER

1. *Appeal allowed.*

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

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

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

On appeal from the Supreme Court of Victoria

Representation

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

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

CATCHWORDS

Osland v Secretary to the Department of Justice

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

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

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

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

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

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

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

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

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

Tribunal, an opinion could be formed that the public interest required access to the documents (including document 9). It made that decision without itself having inspected the documents.

The issues in this appeal

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

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

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

6 Ground 3 relates to all the documents in dispute, and challenges the Court of Appeal's conclusion that there was no basis for applying the public interest

override, bearing in mind that the Court of Appeal did not examine the documents for itself.

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

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

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

> "A petition for the exercise of the prerogative of mercy is a request made to the Crown by an individual seeking release from the effects of a conviction in circumstances where all avenues of appeal to the courts have been exhausted or where the courts have no jurisdiction. The Governor of Victoria has the power to exercise the prerogative of mercy as a representative of Her Majesty the Queen. The power derives from section 7 of the *Australia Act* 1986 (Commonwealth) which provides that the powers and functions of the Queen in respect of a State are exercisable only by the Governor of the State (subject to exceptions which are not presently relevant). Section 7(5) of that Act provides that advice to the Queen (and her representative) in relation to the exercise of the powers and functions of the Queen in respect of a State shall be tendered by the Premier of the State.
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> On 14 February 1986 the Queen issued Letters Patent relating to the Office of the Governor of Victoria. Clause III of the Letters Patent states, among other things, that the Premier shall tender advice to the Governor in relation to the exercise of powers and functions of the Governor not permitted or

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

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

required to be exercised in Council. By convention, the accepted practice is and has been that the Premier seeks the advice of the Attorney-General in relation to whether the prerogative should be exercised. In turn, when the advice of the Attorney-General is sought, it is practice for the Attorney-General to ask his or her department to consider, evaluate and make recommendations in relation to the petition. Sometimes the advice of the Victorian Government Solicitor is sought. To the extent that a petition of mercy raises non-legal grounds (for example, compassionate grounds, meritorious conduct grounds, or other special grounds) the assessment of the petition on those other grounds is usually conducted within the department. Clearly enough, though, there will often be an overlap between what might be described as legal grounds and what might be described as non-legal grounds.

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

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

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

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

3. Mrs Osland's sentence is very severe when weighed in the context of her life experience and, if served in full, will significantly exceed the terms served by women in recent comparable cases which we have been able to identify. Mrs Osland lived in a prison of domestic violence for 13 years before entering her current prison. Her cumulative suffering has been and continues to be so profound that executive intervention is now warranted in ending it.

4. Even if it is accepted that Mrs Osland committed an offence, she and her family were so offended against by the wider community in its

failure to protect her and her children from sustained torture, terror and trauma, that it is appropriate that the community's representative should now temper Mrs Osland's justice with compassion.

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

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

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

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

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

Following the preparation of the Crown prosecutors' advice, Document 3 was created: this is a memorandum of advice, dated 8 December 1999, from the Victorian Government Solicitor to the Attorney-General ('the second VGS advice'). This memorandum provided further advice to the Attorney-General in relation to the petition and made a recommendation in the light of the advice received from the Crown prosecutors.

Document 4 is a memorandum of advice dated 22 February 2000 from the then Acting Director of Legal Policy to the Attorney-General and

the Deputy Secretary, Legal, of the department. This document, which is in the form of a short briefing note, also contains a hand written notation by the Attorney-General.

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

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

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

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

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

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

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

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

12 For the purpose of consideration of the issues to be decided by this Court, it is unnecessary to go into further detail about the nature of the petition. As Morris J recognised, and as is evident from the above summary of the matters relied upon by the appellant, reliance was placed on legal argument, wider questions of justice and public policy, including possible law reform, and compassionate grounds personal to the appellant and arising from the particular circumstances of her case. Although petitions of this kind ordinarily are considered by lawyers within the Department of Justice, or external lawyers retained for the purpose, they need not be, and frequently are not, limited to questions of strict law. In various contexts, legal professionals advise on matters of policy, their legal expertise being relevant to the weight to be attached to their opinions. The circumstance that a petition such as that of the appellant was put before lawyers within and outside the Department of Justice for their opinion is neither surprising nor unusual. As Morris J also observed, this Court has held that legal professional privilege may attach to advice given by lawyers, even though it includes advice on matters of policy as well as law[5].

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

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

documents. These aspects of his decision were not the subject of any ground of appeal or contention in the Court of Appeal or in this Court.

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

The press release

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

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

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

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

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

The legislation

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

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

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

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

> "Then there is the alleged right to a free flow of information, or the right to know. Your Lordships will perceive without any demonstration

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6 [1981] AC 1096 at 1168.

> from me that use of the word 'right' here will not conduce to an understanding of the legal position. As to a free flow of information, it may be said that, in a general sense, it is in the public interest that this should be maintained and not curtailed. Investigatory journalism too in some cases may bring benefits to the public. But, granting this, one is a long way from establishing a right which the law will recognise in a particular case. Before then it is necessary to take account of the legitimate interest which others may have in limiting disclosure of information of a particular kind."

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

21 Section 50(4) is a unique provision in Australian freedom of information legislation. The *Freedom of Information Act* 2000 (UK)[7] provides for general rights with respect to access to information (s 1(1)) and for information which may be exempt. Some exemptions are absolute (s 2(3)). They include exemptions of the kind which the Victorian Act excludes from the operation of s 50(4)[8]. Other exemptions, such as that relating to information the subject of legal professional privilege, are not treated as absolute[9]. Whether such an exemption is maintained depends upon whether the public interest in maintaining it outweighs the public interest in disclosing the information (s 2(2)(b)). A point which arises from the United Kingdom Act, as relevant to s 50(4), is that it is not possible to approach an exemption such as that provided in s 32 with respect to documents subject to legal professional privilege as if it were absolute. To do so would deny the intended operation and effect of s 50(4).

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

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

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

9 See s 2(3) and s 42.

Section 148(7) provides that the Court of Appeal may make any of the following orders:

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

(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."

The decision of the Tribunal

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

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

25 Morris J commenced what he described as a balancing process by making some observations about the general importance of maintaining legal professional privilege. In that context, he distinguished between "historical documents" and documents likely to be relevant to a future government decision. The documents in question, he said, fell into the former category. By "historical" he meant relating to a past decision as distinct from relating to a future decision. The decision in question was made in September 2001, about four years before the Tribunal's decision. However, as appears from other parts of the reasons of Morris J, there

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

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

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

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

interest under s 50(4). This is not to say that the existence of differences would necessarily require disclosure. Rather, the existence of such differences as might require disclosure, having been raised obliquely by Morris J, could not be disregarded as legally impossible. The ground upon which Bongiorno AJA discarded the possibility as legally irrelevant was incorrect.

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

Orders

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

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

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

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

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

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

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

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

34 5 USC §552.

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

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

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

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

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

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

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

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

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

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

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

The facts and legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76 It is difficult to know how the Parliament of Victoria could have been more emphatic, forthright or clear in indicating the commencement of a new legal era.

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

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

The issues

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

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

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

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

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

The ambit of legal professional privilege

79 *Section 32 of the FOI Act*: Section 32 of the FOI Act appears under the heading "Documents affecting legal proceedings". The appellant having

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

51 Joint reasons at [13].

The "public interest" override applies

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

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

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

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

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

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

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

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

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

document is a powerful indication of the radical purpose of the Victorian Parliament to permit independent and non-political judgments about the "public interest" to prevail.

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

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

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

107 My own initial reading of the reasons of the Tribunal did not persuade me that it had erred in its general approach to its powers under s 50(4). However, having regard to the way in which the appeal to this Court has been argued, I am prepared to accept, for present purposes, that the omissions and suggested errors of emphasis found by Maxwell P in the Court of Appeal constitute an error of law warranting correction[76].

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

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

State's reliance on s 30 of the FOI Act, was the correct disposition to return the matter to the Tribunal for hearing and determination?

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

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

111 The fact that, in general, "legal professional privilege represents a particular balancing of public interests"[79] must not be permitted to disguise the fact that, in enacting s 50(4) of the FOI Act, the Victorian Parliament committed to the Tribunal the estimation of where the "public interest" ultimately lay. It would be to amend the Act, and not to apply it, for this Court to conclude that legal professional privilege involves such important "public interests" that the requisite balance had already been struck by the law, effectively quarantining documents in respect of which legal professional privilege arises from the public interest override in s 50(4). This is not what the FOI Act provides.

112 Recourse to the general language of this Court in *Daniels*[80], arising in a different statutory context in relation to different legislative purposes, ought not to alter the focus of present attention. The importance of legal professional privilege,

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

78 cf reasons of Hayne J at [137].

79 Reasons of Hayne J at [141].

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

recognised in s 32 of the FOI Act, may be fully accepted. But it is not insulated from the power that Parliament has entrusted to the Tribunal to override the privilege where the "public interest requires that access to the document should be granted". Judicial statements about the significance of legal professional privilege at common law or in other contexts cannot displace the express instruction of s 50(4).

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

114 *Approach to transparency*: Repeated disparagement of the expression "transparency in government"[83] suggests an approach to the FOI Act that I cannot share. In so far as the Tribunal made reference to considerations of transparency, it was correct to do so. As the short title of the FOI Act suggests, as its long title affirms, and as its stated objects demonstrate, the public purpose of the FOI Act is precisely to enhance transparency in government to the extent provided. That object is critical given the oft-repeated instruction of this Court that statutes should be read, so far as their language permits, so as to fulfil their evident purposes[84]. The Tribunal and the courts must bear in mind the distinctive and radical purposes of the FOI Act, and take particular care when reaching conclusions that appear to frustrate them.

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81 Reasons of Hayne J at [146].

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

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

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

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

116 As the joint reasons demonstrate, the Tribunal's reasons disclose a possibility of material inconsistency between the joint advice and an advice prepared in August 2000 by Mr Robert Redlich QC and his junior ("the Redlich advice")[88]. In so far as the Tribunal is criticised for a failure to particularise the suggestion of divergence[89], I agree with the joint reasons that it is not possible for this Court to exclude the prospect that the Tribunal member was constrained by "a desire not to say too much about the contents of the documents and thereby pre-empt the outcome of the entire dispute"[90]. By referring to the possibility of inconsistency, an unusual aspect of the present case, and one said to provide "powerful reasons" favouring disclosure of the Redlich advice and other contested documents[91], the Tribunal demonstrated its recognition of the need for exceptional circumstances if s 50(4) of the FOI Act were to be applied.

117 There is thus no evidence that the Tribunal misapprehended that the FOI Act provided "that *all* documents to which a Minister or agency has regard in reaching a decision should be publicly available"[92]. Such would indeed have evidenced legal error. However, the Tribunal acknowledged the existence of the

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

86 Reasons of Hayne J at [149].

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

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

89 cf reasons of Hayne J at [145].

90 Joint reasons at [28].

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

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

exemption in respect of legal professional privilege. It afforded a wide ambit to that privilege. It sustained the claim of privilege. But it overrode that claim, as the Act permitted, in the exercise of its exceptional powers under s 50(4). It did so not out of an abstract and general concern to ensure "transparency", but by reference to the unique features of the particular case[93]. The text and structure of the Tribunal's reasons demonstrate that it fell into no error of the suggested kind.

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

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

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

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93 cf reasons of Hayne J at [152].

94 [1991] 1 VR 63.

95 [1991] 1 VR 63 at 72.

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

97 [1991] 1 VR 63 at 75.

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

documents in respect of which legal professional privilege had been found and maintained[99]. The Tribunal's reasons demonstrate precisely the opposite.

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

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

122 Following the enactment of the FOI Act, however, it is seriously erroneous to persist with this old law. The FOI Act creates a "right of access" in respect of documents of "agencies" such as the Department of Justice[103]. It makes exhaustive provision for the classes of document exempt from this regime. Thus, exemptions must derive from the enacted categories. Those that were invoked in this case were, relevantly, legal professional privilege (s 32) and "internal working documents" (s 30). There is no specific exemption for documents prepared in anticipation of submission to the Governor. Nor are documents in the possession of the Department of Justice relevant to a petition for mercy expressly protected.

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99 cf reasons of Hayne J at [152].

100 cf reasons of Hayne J at [152].

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

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

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

The extension of the categories of exemption to such documents, as such, cannot be reconciled with the language and scheme of the FOI Act. The suggestion that documents submitted to the Governor should, of their nature, be exempt discloses error on the part of at least two of the three members of the Court of Appeal, requiring the intervention of this Court. It indicates that they reached their conclusion by reference to an irrelevant consideration, and not by the application of the terms of the statute as was their legal duty[104].

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

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

The proper order

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

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104 cf joint reasons at [43].

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

106 Reasons of Hayne J at [153].

107 cf joint reasons at [58].

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

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

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

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

Orders

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

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108 Joint reasons at [58].

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

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

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

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

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

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

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

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

Section 3(2) provided that:

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

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

"Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to –

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document."

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

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

137 The condition stated in s 50(4) for the exercise of the power to decide that access should be granted to an exempt document was "where the Tribunal is of opinion that the *public interest requires* that access to the document should be granted under this Act" (emphasis added). The power of decision thus given to the

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110 s 50(2)(a).

Tribunal "is neither arbitrary nor completely unlimited"[111]. But the only definition of the content of the power lies in the expression "the public interest requires". As was pointed out in *O'Sullivan v Farrer*[112]:

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

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

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

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

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

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

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

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

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

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

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

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

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

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117 s 32(1).

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

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

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

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

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

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

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

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

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

124 (2002) 213 CLR 543.

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

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

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

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

More particularly[127]:

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

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

145 The Tribunal did not found its conclusion that the public interest required disclosure of all of the documents for which legal professional privilege was

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

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

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

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

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

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

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

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

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

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

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

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

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

154 In so far as the Tribunal's reasons in this case are to be understood as suggesting that there may have been some contrariety between the separate pieces

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

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

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

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

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

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

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

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