CHAPTER 11

INTERNAL WORKING DOCUMENTS

11.1 In 1979, the Committee approved of the internal working documents exemption 'reluctantly'.[1] The Committee commented that '[s]ome reform to the wording' would be desirable, but that it was difficult to postulate a precise suggestion.[2]

11.2 Section 36 is intended to balance the public interest in disclosure against the protection and promotion of frank policy advice and criticism. In 1979, several witnesses warned the Committee of the dangers of disclosing internal working documents. Essentially, these dangers were that advice papers may be written more slowly, contain less critical comment and be couched in the guarded language which characterises public reports; that individual public servants could become identified with particular points of view; that the position of public servants vis-a-vis their Ministers might be improperly enhanced by placing upon the public record the views of public servants and perhaps disclosing the fact that the Minister had acted contrary to advice; and that the likelihood that sensitive matters would be discussed orally rather than in writing would be increased.[3]

11.3 The question whether these results have eventuated was discussed in chapter 2 (paragraphs 2.65 to 2.72) above. The conclusion was that, by and large, they have not. It follows that both the Act in general and section 36 is particular are adequate to protect agencies in respect of the concerns voiced in 1979.

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1. 1979 Report, para. 19.16.
2. 1979 Report, para. 19.18.
3. 1979 Report, para. 19.4-19.7.

11.4 The converse concern was also voiced in 1979: that the wording of what is now section 36 would give agencies too great an opportunity to withhold documents.[4] Similar criticism was received during this inquiry.[5]

11.5 In general, the criticism is not justified in the Committee's view because of the inclusion of a public interest test in section 36 and the way in which that test has been applied by the Administrative Appeals Tribunal. For example, the Tribunal has rejected claims of exemption under section 36 made on the basis of unsubstantiated assertions that release would inhibit candour.[6]

11.6 In general, the Committee is satisfied by the way the public interest test has been applied. However, the Committee regards one aspect with concern. In Re Howard and Treasurer of Commonwealth of Australia, Justice Davies extracted from earlier cases a number of guidelines as to when disclosure will not be in the public interest.[7] One of these was that 'disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest'.[8]

11.7 In commenting upon this guideline, the Committee does not seek to second guess the Tribunal's decision. The Committee recognises that selecting one of a list of five factors to which the Tribunal adverted in its decision may distort the significance attributed by the the Tribunal to that factor.

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4. See generally 1979 Report paras. 19.10 ff.
5. Evidence, p. 915 (Public Interest Advocacy Centre).
6. E.g. Re Murtagh and Commissioner of Taxation (1984) 6 ALD 112; Re Bartlett and Department of Prime Minister and Cabinet (31 July 1987); and Re Fewster and Department of Prime Minister and Cabinet (No. 2) (31 July 1987) para. 12.
7. (1985) 7 ALD 626, pp. 634-35.
8. Ibid., p. 635.

11.8 However, this guideline has been adopted in subsequent cases,[9] and appears to be gaining currency amongst decision-makers. The Committee is concerned that, under this guideline, FOI decision-makers may take it upon themselves to decide what will and will not confuse the public and what is an 'unnecessary debate' in a democratic society.

11.9 In one case in which the guideline was applied, access was sought to a document prepared for a senior policy advising committee. The Tribunal (composed of B.J. McMahon (Senior Member), H.C. Trenick and G. Brewer (Members)) said on this point:

> If it were possible to put together all the written and oral submissions made to the committee, the discussions of those submissions and any other element that led to the making of the final decision, and to make all that material available to one who was qualified to understand it and debate it, perhaps confusion could be avoided. That is not however the situation with which we are confronted at the moment. We have only one ingredient in the debate the disclosure of which could possibly distort the validity of the final decision that was made.[10]

11.10 The Committee regards with some concern the implication that access to material would be given to 'one who was qualified to understand it and debate it', but not to a member of the general public or, as in this case, a journalist.[11]

11.11 In Re Howard, the documents concerned possible taxation options. With respect to the particular guideline, the Tribunal said: 'disclosure of the documents could lead to confusion and debate about taxation proposals which were not in fact adopted by

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9. E.g. Re Sunderland and Department of Defence (1986) 11 ALD 258; and Re Doohan and Australian Telecommunications Commission (2 May 1986).
10. Re Sunderland, (1986) 11 ALD 258, p. 266.
11. Ibid., p. 266.

the Government'.[12] The implication is that the Australian community lacks the sophistication to distinguish between a proposal canvassed as an option and a proposal actually adopted. Debate after the event on an option that was not adopted is presumably 'unnecessary debate'.

11.12 The Committee regard the Australian community as more sophisticated and robust than the guideline assumes. The Committee acknowledges that documents relating to policy proposals considered but not adopted can be used to attempt to confuse and mislead the public.[13] But the Committee considers that such attempts, if made, will be exposed. The process of doing so will lead to a better public understanding of the policy formation process.[14]

11.13 Consistent with its attitude to the basis on which deletions should be able to be made,[15] the Committee records its conclusion that possible confusion and unnecessary debate not be factors to be considered in calculating where the public interest lies.

11.14 The IDC recommended provision of an exemption for 'draft documents', that is documents which have not been brought into final form for the purpose for which they are intended.[16] The IDC considered that such an exemption would result in savings which 'are not quantifiable but are likely to be substantial'.[17] The

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12. (1985) 7 ALD 626, p. 635. The Committee emphasises that in discussing this case and Re Sunderland it is only concerned with the particular guideline. It makes no comment on the availability and use of other grounds for withholding the documents.
13. E.g. see the submission from the Great Barrier Reef Marine Park Authority, p. 1.
14. Cf Evidence, pp. 914-19 (Public Interest Advocacy Centre).
15. See above para. 7.29.
16. IDC Report, p. 37 (Option B2).
17. Ibid., p. F12.

integrity of freedom of information would not be affected, in the IDC's view, because the proposed exemption would not prevent access to documents on which decisions were based.[18]

11.15 The Committee does not support this recommendation. The Committee regards access to drafts as valuable in assisting public understanding of agencies' policy development and 'thinking' processes. In addition, the Committee considers that the need to distinguish draft from other documents would prove expensive in many cases.

11.16 As the IDC acknowledges,[19] it would not be appropriate to grant exemption to a document simply on the basis that it was marked 'draft'. It would be necessary to have regard to all the circumstances in order to determine if a document was genuinely a draft. Difficulties would arise in determining the status of documents relating to proposals in the course of development or proposals which have been abandoned. Only where a decision is made is it possible to determine upon which documents the decision rested.

Paragraph 36(1)(b) disclosure 'contrary to the public interest'

11.17 It is the Committee's view, as in 1979, that the section 36 exemption should contain an appealable public interest test so as to permit a gradual change (and ideally development) in the ideas about the way in which the government should relate to the community at large.[20] In the Committee's view, this is possible only where an external body, such as the Administrative Appeals Tribunal, is able to determine whether the public interest is better served by the disclosure or exemption of a document.

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18. Ibid., p. F13.
19. Ibid.
20. 1979 Report, para. 19.27.

11.18 The Committee does have some reservations about the structure of section 36. The conjunctive nature of the public interest test in sub-section 36(1) poses problems for some agencies.[21]

11.19 The Department of Local Government and Administrative Services (DOLGAS) suggested that paragraph 36(1)(b) should be repealed and a new public interest test be substituted along the lines of the section 39 public interest test. The resulting text would be:

> 36(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -
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> (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth.
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> (b) ...
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> (1A) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest. [Committee Draft]

11.20 Amending section 36 in this manner may change the effect of the exemption. The existing text casts upon the agency the onus to demonstrate that the disclosure would be 'contrary to the public interest'. However, the DOLGAS suggestion would place upon the agency the onus to rebut the suggestion that disclosure of the document would, on balance, be in the public interest. This may be a more difficult task. Alternatively, it is possible, at least in theory, that it would not be 'contrary to the public

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21. Submission from the Department of Local Government and Administrative Services, pp. 14-15.

interest' to disclose a document without its disclosure being, 'on balance, in the public interest'.

11.21 If the Department of Local Government and Administrative Services' suggestion were to be adopted, it would be necessary to amend sub-section 36(3) which provides that the fact of issue of a conclusive certificate 'establishes conclusively that the disclosure of ... [a] document would be contrary to the public interest'.

11.22 Amending sub-section 36(3) so as to make the certificate conclusive only of the nature of the document would introduce into section 36 the uncertainty which presently affects section 33A. In the Committee's view, this is undesirable.

11.23 Consequently, the Committee considers that if sub-section 36(1) is amended in the manner suggested above in paragraph 11.19, sub-section 36(3) should also be amended so as to ensure that the certificate is conclusive of both the type of the document under sub-section 36(1) and the balance of the public interest under proposed sub-section 36(1A).

Factual material

11.24 Sub-sections 36(5) and 36(6) provide respectively:

> (5) This section does not apply to a document by reason only of purely factual material contained in the document.
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> (6) This section does not apply to -
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> (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a prescribed body or organisation established within an agency; or

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

11.25 This creates something of a catch-22 if a conclusive certificate is in fact issued in respect of a document to which either sub-section 36(5) or sub-section 36(6) might apply. Once a certificate has been issued, the ability of either the applicant or the Administrative Appeals Tribunal to determine whether sub-section 36(5) or 36(6) applies is constrained by the limitations on the review of conclusive certificate decisions.[22] However, in practice, this does not appear to present great difficulty.

11.26 **The Committee recommends: (i) that the more specific, and arguably narrower, public interest test of whether the disclosure of the document would, 'on balance, be in the public interest' be adopted in section 36; (ii) the public interest test be imposed by a discrete sub-section (along the lines of the section 39 public interest test); and (iii) a conclusive certificate issued under section 36 be conclusive of both the type of the document (under sub-section 36(1)) and the balance of the public interest.**

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22. Submissions from Dr Frank Peters, p. 4 (Evidence, p. 501); the the Administrative Review Council, p. 45.