Footnotes

1. Adam Smith, *The Wealth of Nations* (originally published 1776), ed. Andre Skinner, Penguin, Harmondsworth, 1970.
2. The fallacies in the human capital view of education are outside the scope of an article of this length, but are examined in Simon Marginson, 'Are students human capital? the free market theory of education.' *ATF Research papers 15,* Australian Teachers Federation, Melbourne, 27 October, 1986. See also Barbara Preston, 'Schooling and work — untangling the web', *The Victorian Teacher*, April-May 1986, pp. 6-8 and Carol O'Donnell, *The Basis of the Bargain*, George Allen and Unwin, Sydney, 1984. A useful discussion of human capital theory, albeit from a neo-classical economic perspective, is provided in Mark Blaug, *An introduction to the Economics of Education*, Penguin, Harmondsworth, 1970.
3. Marginson, *op cit*, pp. 4, 11 and 25-26.
4. Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, Chicago, 1962, pp. 100-101.
5. Ibid, pp. 102-106.
6. Ibid, p. 107.
7. Ibid, p. 86.
8. Ibid, p. 93.
9. Milton Friedman and Rose Friedman, *Free to Choose*, Macmillan, Melbourne, 1980, p. 162.
10. Friedman, *Capitalism and Freedom*, op cit, p. 87.
11. Ibid, p. 89.
12. Ibid, pp. 91-95 and *Free to Choose*, p. 163.
13. For an account of the privatisation of schooling in the 1974 to 1983 period, fostered by Government policies, see Simon Marginson, 'The collapse of the 1973 Karmel consensus', *ATF Research papers 9*, Australian Teachers' Federation, Canberra December 1985 and Feodora Fomin and Richard Teese, 'Public finance to private schools: The argument of the Karmel Report and later policy', *Melbourne Working Papers 1981*, University of Melbourne Faculty of Education, pp. 184-200.
14. Richard Blandy, 'A liberal strategy for reform of education and training', Appendix E, Volume 2, *Report of the National Inquiry into Education and Training* (the Williams Report), Australian Government Publishing Service, Canberra March 1979, pp. 146 and 157-158.
15. George Fane, 'Education Policy in Australia', Office of the Economic Planning Advisory Council, *EPAC Discussion Paper 85/08*, Canberra, pp. 6 and 15-21.
16. Ibid, p. 66.
17. Ibid, p. 110.
18. Ibid, pp. 68-74.
19. Ibid, p. 21.
20. Committee for Economic Development of Australia (CEDA), *Education for Development*, Report of the CEDA Strategic Issues Forum, July 1985.
21. Liberal Party and National Party, *Coalition Education Policy Draft for Schools*, leaked to media 27 May 1986, unpublished.
22. A useful outline of present privatisation developments in higher education is provided in Grahame McCulloch, *Background paper on the Privatisation of Higher Education*, unpublished draft, Federation of College Academics, Canberra, August 1986.
23. Ted Murphy, 'The business of education', *Socialist Labour*, August-September 1986, pp. 12-13.
24. Fane, op cit, pp. 99-100 (my emphasis — SM).
25. Blaug, op cit, p. 316.
26. Peter Wilenski (Chairman of the Commonwealth Public Service Board), *Occasional Address* to the Graduation Ceremony for students of the School of Social and Industrial Administration, Griffith University, Brisbane, 12 April 1985.

***This paper was first presented at the Australian and New Zealand Comparative Education Society Conference held at St. Leo's College, University of Queensland, 1-5 December 1986. It is partly drawn from 'Are students human capital? The free market theory of education', *ATF Research Notes 15*, October 1986.**

Freedom of information and universities — in the courts[1]

Graham Greenleaf
Faculty of Law,
University of New South Wales

Implicit in the views expressed . . . is a fundamental assumption that, if any change in the University's Ph.D. examination system is to be made, it should not be imposed upon the University from outside but result from the University's free choice after it has fully considered the matter. That assumption is . . . inconsistent with the requirements of the *FOI Act*. (The Administrative Appeals Tribunal in *Healy and ANU*).

The days when universities could be seen as . . . independent fiefdoms of opinionated academics are drawing to a close. (The Hon. Justice M.D. Kirby CMG, Chancellor of Macquarie University)

Universities and colleges in Australia are beginning to appreciate the implications of freedom of informatiou legislation for their operations, prompted in part by a number of cases concerning universities under Commonwealth and Victorian freedom of information legislation. Similar legislation has been proposed in other States. The Commonwealth *Privacy Bill 1986* and associated legislation, if enacted, will introduce substantial new rights and amend existing freedom of information legislation. Of the elements of the 'new administrative law', these are the newest.

The Commonwealth enacted Australia's first freedom of information (FoI) legislation, the *Freedom of Information Act* 1982 (hereinafter *FOIA*)[2]. Victoria is the only State to have introduced FoI legislation (hereinafter Vic. *FOIA*)[3], although the New South Wales Government introduced a Bill in 1983 (hereinafter NSW *FOIB*[4]).

Tertiary education institutions have reasons for concern regarding this legislation, because it is drafted with government Departments and government trading corporations primarily in mind, not teaching or research institutions. Uuiversities and colleges have many functions common to other agencies subject to FoI: management of property; recruitment and supervision of administrative staff; health and safety concerns; financial matters etc. All of these functions may result in the creation of documents which are subject to FoI requests. The problems that such requests raise will be little different from those faced by any large instrumentality, and just as various.

However, there are certain functions of universities and colleges which, while certaiuly not unique, are unusual enough to deserve special consideration. These include the maintenance of student educational records, student assessment methods, the promotion system for academic staff, the organs of academic government at all levels, and research activities (both applications and work in progress).

This article surveys the main FoI cases in which institutions of higher education have been parties, to illustrate the effect that FoI is having on some of these activities of academics and academic administrators. Such a case-oriented approach will not provide comprehensive coverage of all the FoI issues, or cases, which could be relevant to academic institutions, but should serve to give those unfamiliar with FoI an insight into the approach that tribunals and Courts have taken toward academic institutions in the implementation of FoI. The discussion concentrates on the Commonwealth *FOIA*, with references to Victorian developments where appropriate.

The following aspects of the activities of academic institutions are discussed: *Student records; Assessment methods; Academic promotions; Research applications; Research in progress; Academic government; Amendment of personal records; 'Documents of an agency'; and The deliberative process exemption.*

The main FoI cases which have involved academic institutions are discussed under the aspect of academic activities to which they are most relevant. These cases include: *Re James and the Australian National University; Re Healy and the Australian National University; Hart v Monash University; Re Ascic and Australian Federal Police; Re Wertheim and the Department of Health; Re Baueris and Commonwealth Schools Commission, Department of Education; Re Burns and the Australian National University (No 2); Re Setterfield and Chisholm Institute of Technology; Re Horesh and Ministry of Education; and Re Burns and the Australian National University (No 1).*

Basic principles of freedom of information

For those unfamiliar with FoI, a summary of basic principles and principal sections follows. Much of the subsequent discussion of cases assumes recognition of the different exemptions under the *FOIA* and Victorian *FOIA*.

The basic concept of freedom of information is that every person should have a right to obtain access to all documents of government agencies, without having to show a reason or interest which justifies their obtaining such access, unless there is good reason to deny them access. In other words, the onus is on the government to show why access should be denied. Such an approach to government documents was foreign to Anglo-Australian law and administration until the Commonwealth *FOIA* of 1982, which was partly inspired by United States precedent[5]. The Act was soon amended by the incoming Labor government, implementing some of the recommendations of a 1979 *Report*[6] of the Senate Standing Committee on Constitutional and Legal Affairs, particularly in reducing the scope of some of the exemptions to access. At present, that Committee is re-reviewing the Act after its first three years of operation. It has concluded its hearings and is finalising its Report.

Right to access Every person has a legally enforceable right to obtain access to a document of an agency, other than an exempt document[7]. Such a *prima facie* right does not depend upon the person having an interest in obtaining access, or a reason for so desiring[8]. This contrasts with other legal rights the enforcement of which may incidentally provide a person with access to documents, but only because access to the document is necessary for the protection of some other right or interest[9].

'Agencies' Universities and colleges of advanced education are included among the agencies covered by the Commonwealth and Victorian Acts, as well as the NSW Bill[10]. The *FOIA* only covers the Australian National University and the Canberra College of Advanced Education, as only they are established by Commonwealth legislation[11].

'Documents' Access is limited to 'documents'[12], but a request may relate to all documents of a specified class, kind, or subject-matter if its satisfaction would not substantially and unreasonably divert the resources of the agency from its other operations[13].

'Document of an agency' Only a 'document of an agency' is accessible, which means a document in the possession of the agency 'whether created in the agency or received in the agency'[14].

Old documents A document is exempt if it became a document of an agency more than five years before the *FOIA* commenced (i.e. before 1 December 1977), unless it contains information relating to the personal affairs of the applicant, in which case there is no time limit[15].

Exempt documents Of the categories of exempt documents specified in the *FOIA*, ss33-47, the following exemptions are most likely to be applicable to universities and colleges:

- *Deliberative process* If documents contain opinion or advice for, or record the deliberations of, the deliberative processes involved in the functions of an agency (s36)[16]. Such documents are often referred to as 'internal working documents';
- *Property interests* If disclosure would have a substantial adverse effect on the financial or property interests of the agency (s39)[17];
- *Examination methods* If disclosure would prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits, or the attainment of their objects (s40(1)(a) and (b))[18];
- *Personnel management* If disclosure would have a substantial adverse effect on the management or assessment of personnel, or the conduct of industrial relations, by the agency (s40(1)(c) and (e))[19];
- *Agency operations* If disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (s40(1)(d))[20];
- *Privacy* If disclosure would involve the unreasonable disclosure of another person's personal affairs (s41)[21];
- *Commercial information* If a document would disclose (a) trade secrets or (b) information with commercial value which would be diminished by disclosure or (c) information which would unreasonably adversely affect a person in his business and professional affairs, or an organisation's business, commercial or financial affairs[22], or prejudice the future supply of information to the agency. The person or organisation referred to is most likely to be a third party other than the agency (s43)[23];
- *Confidentiality* If disclosure would be a breach of confidence (s45)[24].

For a document to be exempt under ss36, 39 and 40 its disclosure must also be contrary to the public interest[25]. There is no explicit[26] public interest requirement in ss41, 43 and 45. This difference is vital, because, while it is often relatively easy to establish that documents come within one of the exempt categories, it is often far more difficult to establish that disclosure would not be in the public interest. The uuiversity or college has the onus of establishing this[27]. There are roughly similar public interest requirements in the Vic. *FOIA*, including the confidentiality exemption. In addition, s50(4) allows the Tribunal to override any of the above exemptions (other than the privacy exemption) if the public interest so requires. The NSW *FOIB* has no relevant public interest requirements.

Other classes of exemptions could occasionally be relevant, for example in defence-related research, or in relation to a university's legal advice[28].

While the exemptions obviously have significant overlaps, one exemption may not be construed as being limited by any other exemption: they stand independently[29].

Amendment of personal records A person may request amendment of a document to which access has been granted under the

FOIA, if it contains information relating to his or her personal affairs that is incomplete, incorrect, out of date or misleading[30]. A person has no right to seek alteration of records that do not relate to his or her personal affairs.

Rights of review and appeal A person seeking access to or amendment of a document, or a person objecting to a claim for access under reverse FoI procedures, may seek a review of a decision. An 'internal review' by the principal officer of the agency is normally required before the matter can be taken to the Administrative Appeals Tribunal (AAT)[31]. The AAT can review most aspects of whether a document is exempt[32]. Judicial review by the Federal Court is also available. The Commonwealth Ombudsman also has jurisdiction to review complaints about the operation of the *FOIA*, and may represent applicants before the AAT.

Information about agency operations As well as allowing access to and alteration of particular documents, the *FOIA* requires agencies to publish information about their operations. An agency must publish a statement (a 'FoI Statement') outlining its organisation and functions, arrangements for public participation in policy formulation, categories of documents held, categories of documents normally available to the public, and access arrangement[33]. It must also make available for public inspection all documents which constitute its 'internal law' — manuals, guidelines, procedures, precedents etc[34]. Failure to do so means that a person not aware of that 'internal law' cannot be prejudiced because of failure to observe it[35].

Tertiary education institutions and FoI: special features and decided cases

Student records

'Student records' covers a wide range of materials, possibly including[36]: applications for admission and enrolment, and supporting documentation (including academic records, references etc); enrolment and academic progress information; details of grades, marks and honours awarded; the raw material on which these grades etc were awarded, including notes of academic staff and reports by outside examiners; materials supplied by the student (and third parties) in support of supplementary examinations, non-exclusion or other forms of special consideration; other material (eg parental letters) concerning the personal or academic situation of a student; disciplinary records; and complaints by students against staff.

The exemptions most likely to be relevant are those concerning deliberative process (s36), examination methods (s40(1)(a),(b)), agency operations (s40(1)(d)) and confidentiality (s45).

James and the Australian National University

In *James and the Australian National University* (1984) 6 ALD 687 the first three of these grounds were tested[37]. Three students who had graduated from the ANU in history in 1983 had subsequently applied for access to five categories of documents relating to their Honours year in history; Record Sheets which included comments by lecturers on the student's performance; Marks or grades awarded in one unit; the Honours thesis supervisor's Certificate, which commented on the topic suggested examiners, etc; The examiners' reports, which had already been disclosed to the students by the Department, except for the name of the examiner and the mark or grade that examiner had suggested; the Grade Compilation Sheet which showed (a) the raw grades suggested by thesis examiners, (b) the final grades for each component unit (including the thesis) which had been arrived at a by a process of moderation by the examiners and perhaps the Head of School, and (c) the final grade for the whole Honours year, decided by discussion within the Department.

The s36 claim The Tribunal held that all such documents were part of the 'deliberative processes' of the university referred to in s36, and meaning 'its thinking processes'[38]. They were therefore exempt from disclosure, subject to public interest considerations. Section 36 did not require a communication from one person to another.

The applicants argued that the documents fell within the exceptions to s36 in s36(5) and (6). Their s36(5) claim that the documents contained 'purely factual material' was rejected (except for some parts of the certificate), with the Tribunal considering that lecturer's comments on the Record Sheets, and supervisor's comments on the certificate were a summary of conclusions involving opinions[39]. Their s36(6)(a) claim that the documents were 'reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts . . . including reports expressing the opinions of such experts on scientific or technical matters' was also rejected. The Tribunal considered that these words were 'intended to describe experts in the mechanical arts and applied sciences generally'[40]. Social 'sciences' including history, economics[41] and law[42] are excluded. At first sight this might indicate that it will be easier to bring documents from scientific faculties within an exception to s36, but this should not be exaggerated. While, say, an examiner's report on a scientific thesis may contain much that may be characterised as 'opinions . . . on scientific or technical matters', this should be distinguishable from opinions on academic matters, such as the adequacy of research, understanding shown and presentation.

The s40(1)(d) claim ANU argued that to disclose the documents would have a 'substantial adverse effect on the proper and efficient conduct of [its] operations', namely the fundamental function of assessing student performance. The applicants' claim that this exemption only applied to administrative functions, and not academic functions, was rejected[43]. This is significant for any FoI claims faced by academic institutions.

However, the Tribunal was not satisfied that any adverse effect on the university would be 'substantial', which was taken to mean 'serious' or 'significant'[44]. The deciding factor here was the differences of opinion on this matter revealed by the evidence for applicant and respondent. A number of academics, including some from the History Department itself, gave evidence that they would welcome such disclosure and a more open assessment system and 'would see such a system as enhancing the proper and efficient conduct of the operations of the University'. While other academics disagreed, the Tribunal concluded that 'such adverse effects as may occur are likely to be variable in their impact' and 'these differing reactions should have a leavening effect and tend to minimize any adverse impact that may result from openness'[45]. Universities will obviously face some difficulties in attempting to come within s40(1)(d): universities cannot prevent academics giving evidence in such cases, nor attempt to dictate what evidence will be given; and academics are unlikely to possess 'corporate loyalty' to a central university administration (or even to their own Faculty or Department) to the extent that could be expected in government agencies, so a *de facto* agreed approach is just as unlikely.

The s40(1)(a) and (b) claim ANU's third line of argument was that to disclose any of the documents could reasonably be expected to prejudice examination procedures. 'Prejudice' was considered to require a lesser impact than 'substantial adverse effect', and the Tribunal was satisfied that the disclosures sought could be expected to have some prejudicial effect 'to the extent that under a system of fuller disclosure some academics may feel more inhibited than they presently do in the discharge . . . of their functions in assessing student performance'.

The public interest Having established a *prima facie* case for exemption under s36 and s40(1)(a) and (b), ANU still had the onus[46] of establishing that such disclosure would be contrary to the public interest[47]. The ANU's argument was that the disclosure would be contrary to the public interest because

> *that disclosure would prejudice or limit the exchange of opinions between examiners and because the comments made by examiners would not be likely to be as full or frank in the future. As a consequence, the moderating process which was dependent on the frank exchange of views would be inhibited.*
>
> . . .
>
> *to disclose the information sought would allow students to exert pressure to reconsider or review their position and that this was an undesirable factor in the assessment process. There was a danger that examiners would be classified by reputation as hard or soft markers . . .*[48]

The first two arguments may be called 'candor' and 'undue pressure' arguments.

ANU also argued that the applicants' interest in obtaining information about themselves 'was a private or personal interest and not truly a public or community interest'. It argued that the only public interest was in the *process* by which a university makes such decisions as assessment, and in 'knowing whether in respect of a particular person that *process* was properly applied', but not in knowing the details of an individual's personal affairs. The Tribunal felt that such arguments "fail to accord proper weight to the 'right to know' established by the Act itself". The fact that the Act gives every person a legally enforceable right of access to government documents is clear Parliamentary recognition of a public interest in such access. It was equated with the public interest that the course of justice not be impeded in public interest immunity cases. That such a public interest extends 'to documents that relate quite narrowly to the affairs of the individual who made the request', is seen as confirmed by the fact that the *FOIA* in Part V 'authorizes a request to be made for amendment of information relating to the personal affairs of a claimant contained in a document of an agency *to which access has been provided under the Act*'[49].

The Tribunal is, in effect, recognising a public interest in the protection of individual privacy by the means of access to and alteration of one's own record. It is true that snch a public interest in respect of alteration is recognised in Part V, and that such recognition implies that there is also such a public interest in access to individual records for privacy protection. It is, however, unnecessary to emphasise that the right of alteration is dependent on the right of access to sustain this argument. The limitation of any right of alteration to 'accessible' records is one of the major flaws of the *FOIA* as a privacy protection measure, not one of its virtues[50].

Deputy President Hall went further, agreeing with Deputy President Todd in *Re Burns and the Australian National University* (1984) 6 ALD 193 that "if the citizen's 'need to know' should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged"[51]. In other words, the public interest is proportional to the private interest involved.

Consequently, the Tribunal felt able to weigh the following matters against the ANU's concerns:

- That each applicant's statutory right of access 'is sustained by a legitimate interest on the part of each of the applicants to know information presently withheld, for purposes that are relevant to their respective future careers.'
- '. . . an academic in assessing the work of a student must be prepared to make judgments honestly and impartially and be prepared to stand by those judgments'.
- 'Given that there are already, within other Faculties or Departments of the University, more open assessment procedures than those currently followed in the History Department, I would have thought that if the fears and concerns to which I have referred are likely to be borne out in practice, there would be evidence available to the University of the damaging consequences of greater openness. When it comes to the question as to the weight that should be given to those fears and concerns, therefore, the absence of any evidence of actual harm from more open assessment procedures is a fact to which, I think, I am entitled to have regard.'[52]

He concluded that the question of the public interest here was a 'finely balanced situation' but that 'the principle of openness enshrined in the [*FOIA*] tilts the balance in favour of disclosure'[53]. So the applicants succeeded.

A most open common denominator? Given the importance that the variability of practices within the university played in the assessment of both whether a 'substantial adverse effect' would be likely, and whether disclosure would be contrary to the public interest, it appears that departments[54] could be forced by *FOIA* requests to adopt what could be called 'the most open common denominator' of other departments at their university, or perhaps even at other universities, unless they can satisfy a very high onus of proof as to why they require a special degree of secrecy. Educational institutions are in a particularly vulnerable position in their attempts to gain exemptions because the multitude of academic institutions makes it possible for Courts and Tribunals to point to other academic institutions which have adopted more open practices without apparent ill effect.

Re Healy and the Australian National University

The confidentiality exemption was not pursued in *James*, but was crucial in *Re Healy and the Australian National University*[55]. Some of the documents sought by the applicant were examiners' reports on the applicant's doctoral thesis. The evidence was that examiners were always asked to provide reports in confidence, but sometimes waived confidentiality. ANU sought exemption under s36 (deliberative process), s41(1)(d) (agency operations) and s45 (confidentiality). There was no doubt that the reports were internal working documents within s36, and that the provisions concerning purely factual material and reports of technical experts were not applicable[56]. The Tribunal did not decide whether a requirement that the University revise its Ph.D. examination system so that reports would no longer be received in confidence would be a 'substantial adverse effect', because its finding concerning the public interest made this unnecessary.

Public interest The Tribunal decided, in relation to both s36 and s40, that such disclosure would nevertheless not be contrary to the public interest. The Tribunal agreed that there was a considerable public interest in a university applying examination procedures which would maintain the academic standard of its doctorates. However, the Tribunal did not accept that this public interest was advanced by maintaining a system of confidentiality of examiners' reports. They regarded it as a matter of common knowledge that the career structure of academics in Australia and elsewhere is such that prospects are advanced by participation in doctoral examinations. Consequently, they tended to discount the claimed risk that academics would not participate in such assessment if confidentiality was not offered because of fears of 'protracted arguments with candidates', or would be less candid. While they recognised that it would cause some additional problem if one university such as ANU had to 'go it alone' with open references, this was obviously not given much weight. They also considered that one way in which a university may be 'kept on its mettle' concerning academic standards 'is by subjecting its Ph.D. examination to the scrutiny of persons outside it'[57]. Further-

more, they saw another public interest, the advancement of scholarship, being supported by disclosure of reports[58].

Confidentiality ANU's position was only saved by the confidentiality exemption (s45), because that exemption was not seen as subject to a public interest requirement[59]. There was no evidence here that the specific examiners had waived confidentiality. The examiner's reports were therefore considered exempt.

Supervisor's report Disclosure of the supervisor's report was also sought, and on this point the applicant succeeded. The confidentiality exemption does not apply to internal working documents prepared by an officer of an agency in the course of his duty[60]. The public interest test meant that the s36 and s40 exemptions did not apply, simply because the supervisor's report

> *discloses the processes followed by the University in evaluating the applicant's thesis and assessing his academic calibre. Its disclosure would enable persons outside the University to scrutinize these processes . . . [and] . . . is likely to be conducive to the maintenance of proper academic standards by the University[61].*

Conclusions Other than on the question of confidentiality, the university's submissions were roundly rejected, even when there was no evidence presented contrary to that of the University administration[62], unlike in *James*. At least in so far as student records and assessment is concerned, it appears that academic institutions will have great difficulties in succeeding under any head of exemption other than that of confidentiality.

Hart v Monash University

In *James* the Tribunal stressed at various places that this decision was limited to 'cases such as the present where the assessment process is completed', implying that some factors may have different weight in relation to currently enrolled students[63]. In a case under the Victorian *FOIA, Hart v Monash University*[64], the applicant was currently enrolled in the Faculty of Economics and Politics and applied for access to his percentage marks in six subjects. Monash practice was that the chief examiner in each subject initially determined grades, but it was the responsibility of each Faculty's board of examiners to determine the final grades, which may differ. Mouash claimed that the marks fell within the deliberative process exemption[65]. The applicant submitted that this exemption was inapplicable because the document fell under s34(4)(c)[66] which provides that a document is exempt if

> *(c) it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document and the use or uses for which the document was prepared have not been completed.* [emphasis added]

Hogg J found that the marks were not an examiner's report or similar document.

He also rejected the argument that the marks were 'purely factual material', and therefore not exempt because of s30(3)[67], because the marks are 'in the form of a recommendation made by the Chief Examiner to the Board of Examiners and . . . the Board uses the percentage marks in the course of or for the purpose of the deliberative process involved in its function'[68]. The percentage marks were therefore *prima facie* exempt under s30.

However, Monash failed to establish that disclosure of the marks would be contrary to the public interest. Hogg J's reasons for rejecting Monash's arguments were[69]:

(i) The first argument was that it would be against the public interest if members of the public or other students were misled and confused by the fact that percentage marks are not as precise as grades because of variations between assistant examiners. Monash advanced no answer to His Honour's suggestion that an explanatory note could be attached to the marks.

(ii) The second argument, that undue pressure could be put on academics, was similarly met by His Honour's suggestion that 'Monash could introduce . . . a system . . . whereby the officer who corrects any particular examination paper, can remain anonymous'. Whatever the position may be at Monash, this will often be an impractical suggestion, at least in the common situation of small optional subjects where one lecturer teaches and assesses everyone doing the subject. Fortunately, more substantial grounds were also offered, as in *James*: 'Most positions of responsibility in the community involve pressures of some degree, and giving an honest and accurate percentage mark . . . is what the community should expect from University examiners.'

(iii) As in *James*, the deciding factor was a precedent of openness in another Faculty (Law) and the failure of Monash to lead any evidence of any problems in its implementation in Law, or of problems peculiar to the Faculty of Economics and Politics.

In ANU's submission to the Senate Committee it indicates that it would seek exemption from disclosure of 'raw scores' under ss36 and 40[70]. Although the Victorian *FOIA* provisions are different in some respects, both these sections are subject to a public interest test. If *Hart v Monash* is an indication of the approach that the Commonwealth AAT would take, ANU would not succeed.

Assessment methods

Assessment methods cannot be severed from student records. As *James* illustrates, the disclosure of records of particular students may, by implication, reveal much about such assessment procedures as the moderation of marks by differing examiners. The aspects of assessment procedures which could give rise to concern include processes of moderating marks, and the structure and content of multiple-choice assessment, or other forms of assessment which could be prejudiced by disclosure of past examples.

Re Barrell and Australian Broadcasting Commission

Barrell (1985)[71] is relevant to this last concern. The applicant was an ABC employee who was required to create a sound accompaniment for a number of film shots, and to write a critical film appreciation, as part of a television producer's training course run by the ABC. The Tribunal exempted from disclosure the answers to the audio test, and part of the answer to the critical test, applying s40(1)(a)-(d). It considered that the answers, if disclosed, could allow prospective candidates to piece together the questions (or at least the style of answers which did and did not find favour), resulting in likely erroneous estimates of candidates' abilities, and substantial costs to the ABC if it was forced to abandon all testing procedures after using them once.

Re Ascic and Australian Federal Police

Ascic (1986)[72] provides some amusing and disconcerting insights into the goings-on at a lesser known academic institution, the Australian Federal Police Training College. A disgruntled constable who had dropped out of a promotion course sought access to various exam papers previously used in the course, which included various 'true or false' and multiple choice questions. Evidence from the AFP was that 'a secure examination question bank' of such questions was kept in a room with only one key, examinees were not allowed to copy or remove papers, and questions were regularly recycled from course to course. They explained that this was necessary because it was impracticable to come up with new questions for each course, because of the relatively narrow range of the syllabus. The applicant's evidence was that virtually all the Police Officers participating in the course were engaged in a well-organised attempt, in the AAT's words, 'to cheat the system', by dividing up the questions to be surreptitiously copied during the exam. These would then be collated and passed onto the next intake. So each group of fresh 'officer material' was greeted with a portfolio of answers to memorise.

The Tribunal, in what appears to be a determined effort to deny the applicant any relief, accepted that 'in such a narrow field it would be difficult indeed to produce other differing sets of questions and answers', and that furthermore, to do so 'could reasonably be expected to require the [College] to incur substantial expense by way of providing a number of alternative examinations', and perhaps to do so regularly. It found *each* of s40(1)(a)-(d) satisfied. Not surprisingly, it found that there was little to be gained in the public interest by releasing the documents. An appeal to the Federal Court failed[73].

Examination method exemptions

The examination methods exemption (s40(1)(a),(b)) is likely to be relied on here, but the internal working document (s36) and agency operation (s40(1)(d)) exemptions could also be relevant.

The examination methods exemptions in the *FOIA* s40(1) exempt from disclosure (subject to the public interest test) documents which could reasonably be expected to

(a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by the agency; [or]

(b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency.

In the Victorian *FOIA* s34(4)(c), a document is exempt (without any public interest test) if

(c) it is an examination paper, a paper submitted by a studeut in the course of an examination, an examiner's report or similar document *and* the use or uses for which the document was prepared have not been completed. [emphasis added]

The Victorian provision would prevent the disclosure of multiple-choice papers if the same exam paper was to be re-used. But if it was only the underlying structure of the paper — the types of questions asked — which was repeated, then it can be argued that a specific paper would not be exempt because the use of that document would be 'completed'. Such matters could be considered under the Commonwealth provision, which although less certain is more flexible, and enables the interests of both parties to be considered. However, it does raise the possibility of judicial decisions on what types of academic assessment are fair.

Academic promotions

The internal working document (s36), personnel management (s40(1)(c),(e)), agency operations (s40(1)(d)), privacy (s41) and confidentiality (s45) exemptions could all be relevant.

Healy and ANU: references

In *Healy*, access to two types of references for academic appointments was sought:

(i) a purely 'internal' reference given by an academic at ANU to the ANU, in relation to the applicant's application for a position as a Research Fellow at ANU; and

(ii) 'external' references, given by academics at ANU to other universities and institutions, in reference to the applicant's applications for positions with those institutions.

The 'internal' references were clearly 'document(s) of an agency', if not in the hands of the academics giving them, then at least when received by the Board. It was accepted that these references were requested and given on a confidential basis. The Tribunal's decision to exempt the references was based on the deliberative process exemption (s36)[74]. The only issue was whether disclosure would be contrary to the public interest. The Tribunal considered that the principal public interest factor against disclosure was the interest in the University having procedures allowing it to select the most suitable applicants, and that 'the obtaining of reports given by referees in confidence is a necessary part of those procedures'[75]. Against this was weighed 'the public interest in a citizen having access, wherever possible, to documents which relate to him, particularly where such documents may be having a continuing effect on his career'. The Tribunal considered it relevant to this factor that the applicant was actually appointed to the position to which this reference related[76], presumably in the sense that this showed that this reference had never had any adverse effect on his career. The public interest that procedures such as university appointments be open to public scrutiny to ensure they are not being abused was also recognised, but discounted here on the basis that the Tribunal had inspected the documents, and they showed no such abuse.

While the Tribunal considered that the public interest in selection of suitable applicants 'clearly outweighed' the other interests here, it cannot be assumed that this would be so in all situations. If an applicant applied for access to a reference which had detrimentally affected his or her current applicatiou, and was likely to do so in future, his or her interest (and the public interest) in obtaining access would be correspondingly enlarged. Similarly, if documents inspected did show possible abuse of selection procedures, disclosure would probably be regarded as in the public interest.

In such situations the availability of the confidentiality exemption (s45) would be crucial, as it is not subject to an explicit[77] public interest test, except in Victoria. In *Healy* the Tribunal commented in *dicta* that s45 applied[78], but without considering s45(2), which would exclude s45's application if such references are made by an academic 'in the course of his duties'. The Tribunal's view was that when academics give references to other universities, then they do so on their own behalf, and not on behalf of their employing university[79], and we must assume that they are taking the same approach to this question. However, the position seems more arguable in relation to an 'internal' reference.

Turning to the 'external' references, the reasons for exemption were quite different. References given to other universities were clearly not internal working documents of the ANU. However, it was accepted that their disclosure would have a substantial adverse effect on the operations of ANU and that they were therefore exempt under s40. The Tribunal's logic was that such disclosure might prevent ANU academics giving such references, which would consequently endanger the reciprocal receipt of such references by ANU. The argument was accepted that confidential references were more valuable because 'it is not in accordance with human experience generally that open reports are as frank and explicit as confidential reports'[80]. The public interest question was apparently so obvious that the Tribunal did not bother to address it. Furthermore, the references were considered to be 'undoubtedly' under the s45 confidentiality exemption[81].

The position of a third class of reference, those 'external' references originating from academics outside the ANU but received by the ANU, was not in issue, but there is little doubt that the Tribunal would consider such references as 'documents of an agency', having been received by the agency, and as exempt under ss36, 40(1)(d) and 45.

Conclusion The contrast between the Tribunal's approach to the public interest issues in relation to examiner's reports and appointment references is stark. It indicates that, even if there was a public interest element added to the confidentiality exemption in the *FOIA*[82], it might make little difference iu such cases.

Research applications

The most likely relevant exemptions here are those concerning deliberative process (s36), confidentiality (s45) and commercial information (s43).

Re Wertheim and Department of Health

In *Re Wertheim and Department of Health*[83], Dr Wertheim, an academic at Monash, sought access to three categories of information held by the National Health and Medical Research Council (NH&MRC). These were in relation to her

successful funding applications in 1976 and 1979, and unsuccessful application in 1982. The AAT held that the MH&MRC was not an 'agency' for the purposes of the *FOIA*[84]. Consequently, the *FOIA* only gave right of access to documents in the possession of the Department's NH&MRC Division. Dr Wertheim sought access to documents concerning: (i) the ratings by external assessors of her 1982 application, contained in their reports to the Regional Grants Interviewing Committees (RGICs) (She already had edited reports of the assessor's comments, and she did not seek to know their identities.) and (ii) the final rating given by the RGICs in respect of each of the three applications, contained in records made of the RGIC decisions by Departmental officers at the RGIC meetings[85].

The Department sought exemption on three grounds: deliberative process (s36), confidentiality (s45) and agency operations (s40). Both types of ratings were held to relate to 'the deliberative processes involved in the functions of an agency' (the Department) as required by s36(1)(a), even though they were prepared by outside advisers, and, in the case of the external assessors, recorded by them. However, both types of ratings were 'reports . . . of scientific or technical experts . . . expressing the opinions of such experts on scientific or technical matters' and therefore, by s36(6), the s36 exemption did not apply[86].

Because the ratings came within s36(1)(a), it was also possible that the confidentiality exemption (s45) would not apply because of s45(2)[87]. This depended on whether the documents were 'prepared by . . . an officer or employee of an agency, in the course of his duties, . . . for purposes relating to the affairs of an agency or a Department'. The final ratings were clearly so prepared because, although the rating was a decision of the RGIC, the documents were prepared by the Committee secretary, a Departmental officer. Therefore, they came within s45(2), and the confidentiality exemption (s45) did not apply.

The external assessors would not normally be Departmental officers, so 45(2) would not apply, but in some situations they could be. The Tribunal did not need to decide which situation applied here, because it decided that s45 had no application anyway. The meaning of 'breach of confidence' in s45 had been the subject of previous decisions which said that it did not have exactly the same scope as in the equitable duty of confidence[88]. In *Low*[89] the Tribunal said that 's45 is concerned with information which would not have been disclosed but for the existence of a confidential relationship'[90]. Furthermore, the labelling of documents or transactions as 'confidential' was in no way conclusive:

> *Plainly, relevant confidentiality cannot, after the commencement of the Act, be conferred upon documents by the mere institution of a system of confidentiality* ***within an agency****. Section 45 cannot be made to apply by the labelling of a document as 'Strictly Confidential' or by its filing away under rules as to confidentiality established by an agency. The FOI Act overrides such confidential systems* ***within an agency****. And, in our view, the FOI Act overrides them not merely prospectively but also retrospectively in so far as the FOI Act applies with respect to documents which came into existence prior to the date of the commencement of the Act. [emphasis added]*

Wertheim adopts and develops the *Low* approach. After considering the way in which public interest factors were taken into account under s41, the Tribunal concluded

> *It is similarly necessary to take into account, in considering s45, the public interest recognised in the Act in disclosure of such information and to weigh that public interest against the public interest in not disclosing material if its disclosure under the Act would constitute a breach of confidence*[91].

The Tribunal was, in effect, saying that the meaning of 'breach of confidence' in s45, given that it does not have its equitable meaning, includes consideration of whether disclosure is against the public interest.

In *Wertheim* the Tribunal, in assessing the public interest against disclosure, considered evidence from one outside assessor that he would object to his ratings being given to the applicant with his report because (a) in a small field, an anonymous report could still be identified by writing style or word processor appearance; and (b) the difference between the polite wordings of his reports and the bluntless of a low rating could, if disclosed, lead to embarrassment and personal confrontation. Other assessors giving evidence were not concerned[92]. The Tribunal was 'not impressed' by the first witness's 'procedure of saying one thing in words, which he knows will [be] disclosed, and another thing in figures, which he believes will not be disclosed'[93]. It adopted the view of Hogg J in *Hart v Monash* that 'Most positions of responsibility in the community involve pressures of some degree, and giving an honest and accurate percentage mark . . . is what the community should expect from University examiners'. It concluded that the evidence indicated that it was ***not*** the case that assessors would refuse to provide reports unless the ratings alone ('as opposed to the identifying material alone or the ratings and identifying material together') would be kept confidential. The practices of other grant-giving bodies, particularly the Australian Research Grants Scheme, indicated this was not so. On the other hand, the public interest in disclosure was in 'applicants knowing both for their own sake, and for the sake of improving the general quality of medical research, why their applications were rejected', and the Tribunal explicitly adopted the reasoning of *James* in this regard[94].

Not surprisingly, the Tribunal rejected a claimed agency operations exemption (s40) on similar public interest grounds[95], stressing again that the openness of ARGS grant procedures was sufficient evidence in itself. Once again, the 'most open common denominator' can easily be fatal to academic and research bodies attempting to claim exemptions.

So Dr Wertheim's application succeeded, largely on the basis of an implied public interest requirement in s45.

The confidentiality exemption (s45)

A 'public interest test' in s45?

If *Wertheim* was followed then s45 would require that the information be given on an understanding of confidence, and that the maintenance of such understanding be in the public interest. Deputy President Thompson took a similar approach to *Wertheim* in *Re Wolsley* (1985)[96], and said he was satisfied

> *that the protection from disclosure provided by s45 does not extend to information given under the cloak of confidentiality unless . . . it was in the public interest that it should be received in confidence . . .*[97]

The *Wertheim* approach to s45 has subsequently been rejected by a differently constituted AAT in *Maher*[98], *Baueris*[99], and *Corrs Pavey Whiting & Byrne and Alphapharm and Collector of Customs*[100], and by the Federal Court in *Boots v Department of Immigration and Ethnic Affairs*[101].

In *Maher*, the Tribunal's interpretation of the settled principle that s45 confidentiality did not have the same scope as the equitable duty of confidence was, essentially, that although it might not be *necessary* to show a breach of confidence in equity to come within s45, it was *sufficient*[102]. The reasons for rejecting *Wertheim*, *Wolsley* and similar s41 and s43 cases were[103]:

(i) Section 3(b), which sets out the object of the *FOIA*, cannot be called in aid to argue for a public interest test because it is specifically stated that the exemptions in the Act are necessary for the protection of the public interest;

(ii) The inclusion of explicit public interest tests in ss36, 39, 40 and 44 implies that no such tests are relevant to other exemptions;

(iii) Such an approach was contrary to decisions of the Full Federal Court such as *Waterford*[104] which had rejected any suggestion that rights of access should be construed broadly, exemptions narrowly;

(iv) *Wertheim* confuses the limited scope which the notion of public interest has in determining whether equitable *remedies* are available[105] with the question of whether a duty of confidence exists or is breached, where public interest is not a consideration.

The Tribunal suggests that *Wertheim* and *Wolsley* may be distinguishable on the basis that they 'were concerned with an individual's right to know information concerning himself/herself'[106], but such an approach to s45 has since been rejected by the Federal Court in *Boots*.

In *Baueris* the Tribunal adopted the reasoning in *Maher* that s45 did not of itself require the application of a public interest test. It divided breaches of confidence into two categories: those which were 'non-actionable', by which it means that they fall within s45 even though no action would lie in equity; and those which would be actionable in equity. In relation to 'non-actionable' breaches it concluded that it 'should not take account of public interest where no action in equity lies'. However, in situations where an equitable action for confidence would lie, the Tribunal admitted that public interest considerations could be considered and 'may prevail if the public-interest case is strong or powerful enough'. The Tribunal noted that the High Court had stated that Government claims to confidentiality would be determined by reference to the public interest, and that '(u)nless disclosure is likely to injure the public interest, it will not be protected'[107].

Here, however, the information in question had not been produced by the Government, but by 'parties beyond the Government' (a Catholic School) who had entrusted it to the Government (the Commonwealth Schools Commission) for a limited purpose (a funding application) in confidence.

As to whether there could be circumstances other than information produced by the Government which might allow the public interest to be considered, the Tribunal merely noted that '(w)ere non-disclosure to amount to the concealment of iniquity, there might be a case for so doing (if the doctrine were available)'. This merely begs the question of whether public interest grounds which are recognised in equity will be considered under s45.

In *Boots*, Beaumont J in the Federal Court regarded it as settled that, in applying s45(1), the Tribunal 'was not bound to take into account the suggested "countervailing public interest" ', and referred to the authorities collected in *Maher*.

In *Corrs Pavey Whiting & Byrne*[108] the Tribunal followed *Boots* and other Federal Court cases, and the reasoning in *Maher*. It held that

> *The public interest . . . cannot be taken into account in construing s45. The mere fact that information in a document might relate to . . . an infringement of patent does not prevent an obligation to observe confidentiality arising in respect of that information or destroy any such obligation which has arisen.*

The Tribunal did not mention any distinction such as that made in *Baueris*, and did not consider whether the maintenance of confidentiality here might constitute 'the concealment of inquity'.

From these decisions it seems settled that s45 does not involve any general application of a public interest test by virtue of s45 itself. The approach taken in *Wertheim* has been rejected. However, to the extent that the meaning of 'breach of confidence' may involve public interest considerations in equity, it is still uncertain to what extent these public interest considerations will be taken into account under s45.

If *Baueris* is followed, it reintroduces public interest considerations into s45, but to what extent is uncertain. If a breach of confidence action in equity would fail becausc of public interest considerations, why cannot it be argued that this is a 'non-actionable' confidence which is still protected under s45, thus making the distinction meaningless? It could also be argued that the special status of Government-produced documents, which the law of confidence deals with under the heading of public interest[109], is already provided for in the s45(2) exclusion of Government 'internal working documents' from s45 protection.

Reform?

The Australian Law Reform Commission recommended that records concerning an applicant's personal information should only be exempt from access on the grounds of confidentiality if 'the disclosure would, in the circumstances, be unreasonable'[110]. The Government has not included such an amendment to the *FOIA* in its 1986 privacy Bills, although it was once considering doing so[111].

The Victorian *FOIA* already limits exemptions on the grounds of confidentiality to where:

> *(a) the information would be exempt matter if it were generated by an agency or a Minister; or*
> *(b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the agency or the Minister to obtain similar information in the future*[112].

One interest which does not seem to have been adequately taken into account in either the public interest test proposed in *Wertheim*, or in the Victorian *FOIA*, is the interest of the discloser of the information. The possibility that disclosure might cause the discloser to be embarrassed, harassed or otherwise inconvenienced, can only be taken into account indirectly, in the manner envisaged by sub-para (b) of the Victorian provision. There is no specific provision for the views of the discloser to be obtained by the agency before deciding to breach the confidence, nor for the discloser to object to the breach under the *FOIA*[113], unless the matter comes within the 'reverse FoI' rights of a person whose business or professional affairs may be infringed by an FoI disclosure under s43. If any public interest test is added to s45, it would seem only fair that, in considering the public interest, the interests of the person whose confidence would be breached should also be considered, and that that person should be specifically informed of any application which, if acceded to, would breach their confidence.

Research in progress

Access to research materials is one of the main untested areas of the *FOIA*. As an illustration of the types of applications that may be made, Monash University found itself the recipient of a request for access to all records concerning an experiment in which 115 volunteers had a substance resembling snake bite venom injected into them and 46 (including the applicant) were administered excessive doses[114]. The application failed on procedural grounds, but it is not hard to imagine that the applicant would otherwise have received a sympathetic hearing if questions of public interests in favour of disclosure had come into issue, because of the public interest in persons having access to information concerning themselves.

More problematic are the type of applications which are almost certain to arise where, in contrast to the above case, the applicants are not in any way the subjects of the documents to which access is sought. This is most likely to occur where

the research involves some controversial area such as *in vitro* fertilisation, experimentation involving live animals, or 'Star Wars' research. In such cases the applicants must rely solely on the public interest in outside scrutiny of the way in which public funds are used to subsidise research, both in terms of the content of the research and its administration.

The effectiveness of exemptions in this area is yet untested. The same exemptions relevant to research applications are likely to be relevant. It may well be that the most significant 'exemption' is simply that most research materials are not 'documents of an agency'[115]. ANU has commented that it 'would probably not consider it had an automatic right of access to unpublished material by a University staff member unless (as in the case of recombinant DNA research) the area of work itself is circumscribed by legal requirements'[116]. Another exemption which may be of considerable significance here is that concerning commercial information (s43), particularly in relation to organisations established by or within Universities to exploit commercially inventions made within the University.

Victorian FOIA s34(4)(b)

The Victorian *FOIA* contains a specific exemption for research, s34(4)(b), which provides that a document is exempt if

(b) it contains the results of scientific or technical research undertaken by an officer of the agency, and —
(i) the research could lead to a patentable invention;
(ii) the disclosure of the results of [in?] an incomplete state under this Act would be reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or
(iii) the disclosure of the results before the completion of the research would be reasonably likely to expose the agency or the officer of the agency unreasonably to disadvantage.

The Victorian Tertiary Education Consultative Group has recommended amendments to this exemption so that it also covers research proposals in exactly the same terms as it now covers research in progress. ANU has not recommended any such changes, either concerning work in progress or research proposals, in its Submission to the Senate Committee.

It should also be noted that the subclauses (ii) and (iii) above appear to give no protection to the research once it is completed. Concerns have been expressed that where a university evaluates some product for a company then, once the evaluation is complete, there may be no way to prevent competitors from obtaining the evaluation results. The information concerned would not have been received from the company, so s34(1), the commercial information exemption would not apply. It may be, however, that the agency operations exemption would be applicable here.

Academic government

The deliberative process (s36), personnel management (s40(1)(c),(e)), agency operations (s40(1)(d)), privacy (s41), confidentiality (s45) and commercial information (s43) exemptions could all be relevant.

Re Burns and the Australian National University (No 2)

In *Burns (No 2)* (1985) 7 ALD 425 access was denied to two classes of documents:
(i) A 'strictly confidential report' by a committee of academics from outside the ANU to the Vice-Chancellor, reviewing the operations of the Research School of Social Sciences (RSSS), of which the applicant had been a Professor before his appointment was terminated by the University on grounds of incapacity;
(ii) Those parts of the tape recordings of five University Council meetings at which his position was discussed in light of the 'strictly confidential report'.

The tapes Deputy President Todd concluded that the 'reasonable grounds' which supported the claim that it was against the public interest to allow access to the tapes was that the Council may be 'seriously impeded in their decision-making processes if the free-flow of debate and deliberations at Council meetings were impeded by making that debate and deliberation public'. He recognises that this 'candour argument' receives a favourable reception by Courts far less often than it once did[117], but apparently takes the view that it is not 'unreasonable' even if it rarely succeeds. There are other questionable aspects of this finding. The public interest in the applicant obtaining disclosure is not outlined, even in abstract, even though the Vice-Chancellor's failure to consider this was the reason for the applicant's success in *Burns (No 1)*[118]. It is simply said that the Council gave his case 'substantial and anxious consideration'.

The Report This contrasts with the Tribunal's attitude toward the public interests involved in relation to the report. On the one hand there was 'a very great public interest in the university being able to conduct, in confidence, soul-searching review of its academic standards', but 'the strictly confidential report contained a statement of a fundamental character about the applicant, and it would take a great deal for the demands of public interest based on the general interest of the community in the good government of universities to outweigh the public interest in the rights of the applicant as an individual'. The Tribunal therefore doubted, but did not decide, whether there were 'reasonable grounds' in relation to the report[119]. This is rather like saying that the applicant had a compelling interest in knowing the charge, but very little in knowing the manner in which it was disposed of.

The report was instead held exempt under the confidentiality exemption (s45). It was sufficient to make out the exemption that the reviewers were asked to report in confidence, did so, and the confidence was since maintained.

The most open common denominator If a case arises where the question of access to records of a university governing body or senior academic body depends upon the application of a public interest test, evidence may then become relevant as to whether other academic institutions have allowed such access without harm. Justice M.D. Kirby, Chancellor of Macquarie University and an advocate of more open university government, has recently noted that meetings of the University Councils at Newcastle and Macquarie Universities are, for the most part, open to members of the university[120]. Perhaps they would not be in a matter such as that in *Burns*.

Amendment of personal records

A person may request amendment of a document to which access has been granted under the *FOIA*, if it contains information relating to his or her personal affairs that is incomplete, incorrect, out of date or misleading[121]. The agency (or, on appeal, the AAT) 'may, in its discretion, make the amendment either by altering the record or by adding an appropriate notation to the record'[122]. Even if amendment is refused by the AAT, a person may insist that a notation should be added to the file setting out their version of the situation, and communicated to all subsequent recipients of information[123].

These Part V rights of alteration are the principal privacy protections in the *FOIA*. Organisations which keep large personal record systems, such as student and staff records, may find that, over time, this right of amendment is as important as the right of access for which the *FOIA* is better known.

Other information privacy principles such as restrictions on the use and disclosure of information to the purpose for which it was originally collected, are included in the proposed Commonwealth *Privacy Bill 1986*. When enacted, such principles will apply to the ANU and to other educational bodies established for a public purpose by Commonwealth Acts[124]. The implications of information privacy legislation for higher educational institutions will be as substantial as the impact of FoI, but cannot be assessed in this article[125].

Alteration or addition? In a survey of Part V cases, the AAT in *Re Wiseman and the Department of Transport* (1985)[126] expressed a preference for additions rather than alterations:

> *The alteration of a record in a file changes what has become a historical record. It will be remembered that the duty of George Orwell's Winston Smith, as an officer in the Records Department of the Ministry of Truth of Oceania in Nineteen Eighty-Four, was to carry out the 'process of continuous alteration' whereby 'day by day and almost minute by minute the past was brought up to date'. Activity as extensive as that described by Orwell cannot have been contemplated by Parliament in the enactment of Part V. What was written is what was written, and that fact may have its own significance.*
> . . .
> *The amendment of government records is a serious matter, which Parliament cannot have intended to be lightly undertaken. The addition of a notation, on the other hand, does not give rise to these difficulties, and may well be, in most cases, the appropriate way of giving effect to the interest of the individual in the accuracy of records*[127].

A similar conservatism is shown in *Corbett and Australian Federal Police*[128] where the Tribunal was not willing to delete or alter an opinion expressed in a document because the applicant had not sought to completely discredit all the facts underlying the opinion, or the author's *bona fides*.

While such caution about 'rewriting history' is understandable, the importance of alteration in appropriate situations should not be discounted. In the first case on this point under the equivalent provisions in the United States *Privacy Act*, Judge Abner Mikva warned that

> *The individual's right to accuracy and the government's corresponding duty of responsibility cannot be vindicated by mere compilation of conflicting reports. To hold otherwise would be to open files of government wide to unsubstantiated rumours and character assassination of the most damaging sort. The Privacy Act leaves no room for the retention of records that will have a highly damaging effect on individuals — unless, of course, they are accurate. Assuring that only when the government stands behind the material in its files will that material be retained is an important safeguard against abuse and is mandated by the Privacy Act*[129].

What may be amended? Under the *FOIA*, decisions involving amendment of or alteration to a person's record have concerned a request by an employee of an agency concerning the agency's personnel files[130], including a doctor's report[131], a minute paper of the applicant's work history[132], a certificate of service issued on resignation[133], and a report recommending a promotion[134]. Under similar provisions in the Victorian *FOIA*, records of a charge made against the applicant and investigated by police, recorded in the employer's files, were amended[135].

All of these matters have close analogies in the files of academic institutions. One unknown area as yet is whether the powers of alteration under Pt V will extend to student marks and grades. Such alterations would not merely constitute providing access to information or amending a record of information, but instead substituting the decision of the AAT for the decision of the institution. It is very unlikely that a Court would go this far. Official records of marks and grades are the result of a recognised means of determination, the examination process. To change such records would be analogous to using the *FOIA* to attempt to change a person's criminal record on the basis that the Court that tried a case came to the wrong result. In both instances, the right of alteration is likely to be limited to ensuring that the official determination is accurately recorded, and perhaps a right to have comments added to the record, to the effect that the person concerned disagrees with the result. It has recently been noted that 'courts historically have adopted a non-interventionist approach in educational cases'[136], including cases involving alleged negligent marking of papers or conduct of examinations[137].

Cases confirm that such alterations are unlikely as a result of FoI. In *Setterfield and Chisholm Institute of Technology*[138], the applicant sought to amend the minutes of a resolution of the Council of the Institute, not by deleting anything from it, but by the addition of the words 'this document is inaccurate, incomplete or misleading insofar as it gives the impression that the resolutions contained herein are valid'. The Victorian AAT considered that the applicant was 'attempting to alter the legal consequence of a document while ignoring the accuracy of the wording upon which those legal consequences are based'. However, it concluded that

> *. . . Section 39*[139] *is not concerned with anything more than recalling accurately what occurred and if the resolution to dismiss Mrs Setterfield was recorded accurately, whether it was an unlawful resolution or not, has got nothing to do with Section 39 . . .*
> *. . . it is inarguable that s39 is about words, not legal rights or actions which have stemmed from the recording of discussions or proceedings . . .*

Similarly, in *Olsson and Public Service Board*[140], the applicant sought the 'amendment' of a Certificate of Retirement in such a way that would in effect rescind it. The AAT considered that it was not open to it 'to consider what is in effect an appeal against the decision taken, put in the guise of an application for amendment of record'.

Meaning of 'personal affairs' 'Personal affairs' is used in three contexts in the *FOIA*[141]: in allowing access to documents created before 1 December 1977 if they relate to a person's personal affairs (s12); to the exemption of documents which would unreasonably disclose another person's personal affairs (s41); and in allowing amendment of information relating to a person's personal affairs (s48). It would normally be given the same interpretation in all three sections unless the context indicates otherwise. The meaning of 'personal affairs' has given rise to considerable differences of opinion in decided cases, but has not yet been resolved.

In *News Corporation*[142] the Federal Court considered, in the context of s12(2), that the use of 'personal affairs' indicated a dichotomy 'between business and non-business affairs', and held that a corporation could not have 'personal affairs'. A narrow interpretation of *News Corporation* could see all information other than that concerning a person's domestic life excluded from 'personal affairs'.

Some AAT decisions have not interpreted *News Corporation* so strictly[143], and while not involving any close analysis of the meaning of 'personal affairs'[144], have related it in some way to a person's activities as an employee, and not purely domestic matters. In *Re Wiseman and Department of Transport*[145] the Tribunal held that, in s48, 'personal affairs' extends to include the applicant's work performance and capacity for employment whether or not the respondent agency is an employer of the applicant'[146]. They concluded that *News Corporation* does not mean that matters concerning the affairs of a natural person as an employee are 'business affairs' and therefore not 'personal affairs'[147].

Against this broad interpretation are a number of decisions reached before *News Corporation*, and a decision on s48 in *Williams* by Beaumont J., Deputy President that 'the reference in the Act to the "personal affairs" of a person was intended to have its ordinary dictionary meaning, that is to say to refer to matters

of private concern to an individual' and that 'information as to the work capacity and performance of a person is not private in that sense'[148]. This approach was again adopted by Beaumont J. in the Federal Court in *Young v Wicks*[149], and by the Tribunal in *Telfer and Australian Telecommunications Commission*[150].

The creation of a dichotomy between 'business affairs' and 'personal affairs' may cause problems with the privacy protection aspects of the *FOIA*. It implies that the exemptions concerning privacy (s41) and business affairs (s43) do not overlap, which may do no harm. But should a person's right to seek amendment to information depend on such an artificial distinction? It will be a difficult distinction to implement in many cases. It also bears no relation to the damage which may be done to a person by inaccurate information.

Proposed reforms As recommended by the Australian Law Reform Commission[151], the Commonwealth *Privacy Bill 1986* defines 'personal information' to mean 'information or an opinion, whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion'[152]. If enacted the result will be that 'personal information' has a very broad definition for the purposes of the *Privacy Act*, but 'personal affairs' may have a far narrower meaning under the *FOIA*. This is unlikely to assist in the development of sensible privacy principles in our law. One solution would be to amend the *FOIA* to define 'personal affairs' in the same fashion.

Documents of an agency

The *FOIA* only applies to a 'document of an agency', meaning 'a document in the possession of an agency . . . whether created in the agency or received in the agency'[153]. In *Healy* it was held that 'documents which belong to a private person and are not in the control of an agency are not documents of that agency unless they were created in it by officers as part of their duties'. Applying this to references prepared by academics at the request of other universities, the Tribunal considered that these are

> *supplied by academics on their own personal behalf, and not by or on behalf of their employing universities. They are therefore not 'created in' the university. If the academics concerned retained copies among their own private records, even if they keep those records on the University's premises, the copies are not documents of the agency. However, where the academics who wrote them have caused, or acquiesced in, copies of them being placed among the University's records by officers of the University in the performance of their duties, and so brought under the control of the University, then they have been 'received in' the agency.*[154]

Re Horesh and Ministry of Education[155], a Victorian AAT decision, also provides useful guidelines. The applicant, a former school teacher, sought access to notes taken at a Departmental inquiry which arose from a complaint against him by the school principal, Dr Reid. The notes were taken, at Dr Reid's request, by a Union official. Dr Reid argued that he subsequently received and retained the notes in a private capacity, and that they were therefore not a 'document of an agency'. The Tribunal noted that, in attending the inquiry, Dr Reid had an apprehension about his own standing, reputation and career, matters distinct from the inquiry being conducted. The union official was present, and took notes, to assist him in relation to these apprehensions. In upholding his contention, the Tribunal

> *did not consider that the investigating inspectors or the Director of Secondary Education could have required Dr Reid to furnish them with a copy of the notes. . . . The notes were not a document such as school records or reports that Dr Reid had a duty as an employee of the Ministry to keep. They were not physically located at the School or in any premises of the Ministry. They were not in the control of the Ministry or entered in the files of the Ministry. They were not brought into existence for any administrative or other purpose of the Ministry, and were not used by the Ministry for any purpose*[156].

The Legal Officer at Monash has suggested an 'actionable destruction' test: 'would the agency be entitled to object, or to discipline the staff member, if any such document was misplaced or deliberately destroyed?'[157]. As a rule of thumb, such a test seems consistent with *Healy* and *Horesh*.

Examiners' reports prepared for another university seem to be on all fours with appointment references. So do referees' reports on research proposals, which resemble both appointment references and examiners' reports. These documents, therefore, will probably not fall under the *FOIA* insofar as they remain in the hands of the academic who wrote them. However, if the institution receiving them is an agency under some *FOIA*, they may be accessible there.

Examiners' reports prepared for the academic's own university were considered to be documents of an agency in *James*. In *Healy* there was a *dictum* that appointment reports were not, criticised above.

An academic's notes and research materials raise more difficult issues. An academic is not personally an 'agency' to whom the *FOIA* applies[158]. The approach taken in *Healy* and *Horesh* is consistent with such notes and research materials being regarded as part of an academic's private records, even though they assist the academic in teaching or preparing research for publication. ANU's comments quoted earlier take the same approach. However, if copies of such documents become part of the University's records in the way described in *Healy*, they may then become 'documents of an agency' and subject to the *FOIA*. This could occur with documents submitted to obtain internal University research funding, to support proposals for new courses, to assist the University obtaining funding from outside sources, and for many other reasons. If academics wish to prevent such documents becoming accessible under FoI, it may be wise to mark them 'confidential' before providing them to Faculty or University committees[159]. This is an area of considerable uncertainty.

The deliberative process exemption (s36)

Conclusive certificates Section 36 is the only exemption with which we are principally concerned which allows the Minister (or his delegate) to sign a certificate to the effect that disclosure would be contrary to the public interest[160]. Such a certificate is conclusive to the extent that the AAT's only power of review is to determine under s58 whether s36(1)(a) does apply to the document, and to determine, in relation to s36(2), whether there exist reasonable grounds for the claim that disclosure would be contrary to the public interest[161]. In *Re Burns and ANU (No 1)* (1984) 6 ALD 193 the Vice-Chancellor of ANU, as the Minister's delegate, had signed such a certificate. The Tribunal was not, however, satisfied that the certificate or evidence showed 'reasonable grounds', simply because the certificate, in stating the public interest on which it was based, only mentioned the public interests in maintenance of confidentiality and candid discussion, which were against disclosure, and made no mention of the public interest in the applicant obtaining information which affected his private interests, let alone did it attempt to balance these competing public interests. The Tribunal therefore required the documents to be produced for inspection[162].

Summary: Exemptions and academic institutions

If we review the success which academic institutions have had in seeking exemptions from the operation of the *FOIA* and the Victorian *FOIA*, and some other aspects of interpretation of the legislation, few decisions seem to have been contrary to the interests of academics and academic institutions.

The confidentiality exemption (s45) The confidentiality exemption succeeded in *Healy* (examiners' reports). It has only failed in *Wertheim* (research application assessor's reports), and the attempt in that case to 'read in' a general public interest test into s45 has been rejected in subsequent cases. The circumstances under which 'public interest' considerations may overcome confidentiality under the *FOIA* are likely to be very limited. Even under the Victorian *FOIA*, where there is an explicit requirement that the public interest be considered, there has as yet been little harm to academic institutions.

The agency operations exemption (s40(1)(d) The requirement that disclosure could reasonably be expected to have a 'substantial adverse effect' on the proper and efficient conduct of the operations of an agency has proven to be a difficult standard for academic institutions. This exemption was rejected in *James* (raw grades), *Healy* (examiner's reports), and *Wertheim* (research proposal assessor's grades), but succeeded in the two cases concerning examination procedures, *Barrell* and *Ascic*.

The privacy exemption (s41) The privacy exemption has not featured in cases concerning educational institutions, but should not be ignored. It exempts documents the disclosure of which would involve the unreasonable disclosure of information relating to the personal affairs of a person other than the applicant. There is no 'reverse FoI' provision in relation to s41, in contrast with s43, although such a provision is included in the *Privacy (Consequential Amendments) Bill 1986*[163], as recommended[164].

The commercial information exemption (s43) Nor has the commercial information exemption featured in cases concerning educational institutions, despite its potential relevance, particularly to applications for access to materials concerning research.

Amendment to 'personal information' (Pt V) FOIA s48 and Vic. *FOIA* have been interpreted in *Olsson* and *Setterfield* in such a way that these sections are unlikely to be able to be used as a vehicle for challenging assessments.

'Documents of an agency' The interpretation of these words in *Healy* and *Horesh* make it less likely that the teaching and research materials of academics would be subject to FoI requests in most circumstances, and that there may be many other documents prepared by academics for their own private purposes which would also not be subject to FoI.

Conclusion: A good idea for everyone else?

In its submission to the Senate Committee reviewing the *FOIA*[165], ANU concluded that, while 'the University supports the principles of Freedom of Information', nevertheless

> *Given the evolving case law, the University now holds greater concern about the effect of the FoI legislation on the future conduct of its academic operations than it did before the enactment in 1982.*
>
> *While the University has not proceeded formally to seek exemption from the Act, we continue to hold grave reservations about the Act's impact on the work of the University. Our view is that the University should be exempt from the Act insofar as its academic activities (as opposed to its administrative functions) are concerned.*

ANU's main reasons for reaching this conclusion were:

(i) There are 'relatively high' compliance costs, including time of senior officers, exacerbated by some 'repeated vexatious requests', and by litigation costs;

(ii) The need for the university to prove the validity, in terms of public interest, of 'many of its longstanding, well-proven practices', 'each time some aspect of those practices is challenged';

(iii) The danger that disclosure of 'raw scores' of students who are still enrolled will be required;

(iv) The 'constant concern' that disclosure of academic references for appointments will be required;

(v) The possibility that disclosure of research material may be required.

These arguments do not justify any wholesale exemption of 'academic functions' from freedom of information legislation. If compliance costs are high, then this is a problem common to all agencies. ANU noted in its verbal evidence to the Committee that it had only received 69 requests, which it admitted was not a particularly large number, and that the annual number had declined in the previous year[166].

If universities have to expose their longstanding practices to external review, this may be very valuable. The test should be more whether the reviewing bodies (the AAT and the Courts) are proving themselves unsuited to the task by repeated bad decisions. There is no evidence of this, and ANU itself claims that the Tribunal has substantially upheld almost all of its claims for exemption. Besides, such disputed cases are only the tip of an iceberg of requests which are granted (or if refused, not contested). Unprompted by freedom of information legislation, universities and colleges would not have voluntarily adopted open access policies in relation to much of the information to which uncontested access is now given, any more than most other government agencies would have.

If there is evidence, as opposed to assertion, that disclosure of raw scores or referees' reports is *always* against the public interest, then there is little reason to believe that academic institutions will not get a fair hearing. The problem concerning research material is still only a possibility, but surely it would be more sensible to propose a specific exemption for the types of material that should not be disclosed. Even such issues as whether there should be a public interest test in the confidentiality exemption are issues which are not unique to academic institutions but should be resolved for public institutions generally.

Despite some statements to the contrary, academic institutions such as ANU and in Victoria have managed to accommodate freedom of information legislation. When the Chairman of the Senate Committee suggested to ANU representatives that they could live within the framework of the *FOIA*, the answer was 'cautiously, so far'[167]. There are long-term benefits to academic institutions in doing so. Like many other public institutions, academic institutions are increasingly required to demonstrate their public accountability as the price of continued public support: a willing (if cautious) compliance with freedom of information legislation is one way in which to do this.

References

1. A revised version of a paper presented at a Continuing Education Seminar on Higher Education and Administrative Law at Macquarie University School of Law, June 27, 1986.
2. The most comprehensive commentary on Australian law is P. Bayne *Freedom of Information* Sydney, Law Book Co, 1984 (hereinafter *Bayne*).
3. *Freedom of Information Act* 1982; see *Bayne* pp 304-33 for a summary; also E. Proust 'Exemptions Under the Victorian Freedom of Information Act 1982' (1983)

14 F.L. Rev. 143; M. Paterson 'Freedom of Information and the County Court' (1985) 59(5) *Law Institute Journal* 439; Wortley, R. 'Behind the FoI Desk at Monash' [1986] 3 *FoI Review* 30

4. Freedom of Information Bill, 1983 (NSW). There is no current indication that the New South Wales Government intends to proceed with the Bill.
5. Freedom of Information Act of 1966; for a brief history of the FOIA, see *Bayne* pp4-6.
6. *Freedom of Information*, AGPS, 1979
7. *FOIA* s11
8. Such interests or reasons may, however, be necessary to overcome a claim for exemption: see later.
9. For example, this may occur in relation to anti-discrimination, privacy and ombudsman legislation, or in the discovery of documents in litigation.
10. 'a body corporate . . . established for a public purpose by, or in accordance with the provisions of, an enactment': see the definitions of 'agency' and 'prescribed authority' in each.
11. See G. Warburton 'Taking Student Rights Seriously: Rights of Inspection and Challenge' (1985) 8 UNSWLJ 362
12. *FOIA* s11; The application of the FOIA to information held in computer media is uncertain: see s17, *Bayne* pp40-48, and G. Greenleaf 'Computerised Information and the Freedom of Information Act' (1986), unpublished Submission to Senate Constitutional and Legal Affairs Committee.
13. *FOIA* s24
14. *FOIA* s11 and s4(1) definition 'document of an agency'
15. *FOIA* s12; 'Personal affairs' applies only to natural persons: *Re News Corporation Limited & NCSC* (1983) 1 AAR 511; see *Amendment of Personal Records* below concerning the meaning of 'personal affairs'
16. Vic. *FOIA* s30; NSW *FOIB* cl.34
17. Or of the Commonwealth, or, under state laws, the relevant State; NSW *FOIB* cl.37
18. see Vic. *FOIA* s34(4)(c); NSW *FOIB* cl. 38(a)(b)
19. see Vic. *FOIA* s36(b) in part; NSW *FOIB* cl. 38(c)(e)
20. see Vic. *FOIA* s34(4)(a) in part; NSW *FOIB* cl.38(d)
21. Vic. *FOIA* s33; NSW *FOIB* cl.39
22. If it appears that the person or organisation might reasonably wish to contend that s43 applies, he or she must be given a reasonable opportunity to do so, a procedure known as 'reverse FoI': ss27, 59 *FOIA*. There is as yet no equivalent procedure in relation to personal affairs.
23. Vic. *FOIA* s34(1),(4); NSW *FOIB* cl.42
24. Vic. *FOIA* s35; NSW *FOIB* cl.41
25. This is a matter for judgment by the Court or Tribunal reviewing the matter. It is also possible under s36 that the Minister or the Minister's delegate (eg the Vice-Chancellor of a university) could sign a conclusive certificate to that effect: see later.
26. see later as to possible implied requirements
27. *FOIA* s61
28. The other classes of exemptions are: documents affecting national security, defence, and international relations (s33); documents affecting Commonwealth-State relations (s33A); Cabinet documents (s34); Executive Council documents (s35); documents affecting enforcement of the law and protection of public safety (s37); documents to which specific secrecy provisions of other Acts apply (s38); documents subject to legal professional privilege (s42); documents affecting the national economy (s44); documents disclosure of which would be contempt of Parliament or contempt of Court (s46); and certain documents arising out of companies and securities legislation (s47).
29. *FOIA* s32; NSW *FOIB* cl.30
30. *FOIA* s48; Vic. s39; NSW *FOIB* cl.46
31. Vic. *FOIA* s51(4) also provides for internal review by the University Visitor: see *Bayne* p329.
32. There are exceptions where conclusive certificates have been issued by a Minister.
33. *FOIA* s8.
34. *FOIA* s9.
35. *FOIA* s10.
36. Based on a list compiled by Andrew Byrnes, University of Sydney Faculty of Law.
37. ANU claimed the confidentiality exemption as well, but did not pursue the matter at the hearing.
38. p693, following *Re Waterford and Department of the Treasury (No 2)* (1984) 5ALD 588; 1 AAR 1; but see now *Public Service Board v Scrivanich* (1985) 1 AAR 487 which has revived the argument that s36 is limited to policy-forming processes.
39. pp695-6.
40. following Beaumont J in *Harris* 5 ALD 556, 563-4; 2 AAR 266.
41. *Waterford (No 1)*.
42. *Harris* 5 ALD 556, 563-4; 2 AAR 266.
43. pp698-9; The scope of s40(1)(d) was not clear from the Explanatory Memorandum, but a broad interpretation was aided by the 'independence' of exemptions provided for in s32.
44. See *Ascic v Australian Federal Police* (1986) 6 *FoI Review* 84 (noted), for subsequent discussion of the meaning of 'substantial'.
45. pp698-99.
46. *FOIA* s61; It was accepted by both sides that the public interest factors were the same for both sections here.
47. *FOIA* s36(1)(b); in this case the slightly different wording in s40(2) was considered of no account.
48. p700.
49. pp700-701; emphasis in original.
50. See G. Greenleaf and R. Clarke 'Aspects of the Australian Law Reform Commission's Information Privacy Principles' *Journal of Law & Information Science*, Vol.2 No.1, 1986.
51. p197, following Morling J. sitting as the Document Review Tribunal in *Re Peters and the Department of Prime Minister and Cabinet (No 2)* (1983) 5 ALN No 218.
52. pp702-4.
53. p704.
54. or Schools or Faculties, whichever is appropriate.
55. unreported, AAT (Deputy President I.R. Thompson, Sir Ernest Coates and H.E. Hallowes, Members) 23/5/1985.
56. [45].
57. [48].
58. [46].
59. but see the discussion of s45 below.
60. *FOIA* s45(2).
61. [58].
62. [40].
63. p704 cf p702.
64. unreported, Hogg J., Victorian County Court, 30/7/1984
65. s30 Vic. *FOIA*, equivalent to s36 *FOIA*
66. In entertaining this submission the Court was presumably applying the presumption of interpretation against surplusage. Such arguments are unlikely to succeed under the *FOIA* because of s32, the 'independent exemptions' section, which has no equivalent in the Vic. *FOIA*.
67. identical to *FOIA* s30(5): 'This section does not apply to a document *by reason only* of purely factual material contained in the document'.
68. p10.
69. pp.14-15.
70. Senate Standing Committee on Constitutional and Legal Affairs *Official Hansard Report* (Proof) 28/9/1986, pp1292-98.
71. 7 ALN N129
72. *Re Ascic and Australian Federal Police* (1986) unreported, AAT No. W85/112, 18/4/1986.
73. *Ascic v Australian Federal Police* (1986) 6 FoI Review 84 (noted).
74. with dicta that s40 and s45 exemptions also applied: [43].
75. [42].
76. [42].
77. see below re s45.
78. [42].
79. [17].
80. [64].
81. [65] Although there was some doubt about one reference where the referee had since died.
82. assuming that there is not already; see *Wertheim*, discussed below.
83. (1983) 7 ALD 121.
84. It had not been declared to be a 'prescribed authority', and neither was it 'established . . . by, or in accordance with the provisions of, an enactment': s4(1). It was established by an order-in-council.
85. Other information was also sought out but, for various reasons, was not the subject of a decision.
86. pp142-3.
87. as documents 'to the disclosure of which paragraph 36(1)(a) . . . would apply'
88. see *Re Witheford and the Department of Foreign Affairs* (1983) 5 ALD 534, *Re Keay and Chief of Naval Staff* (1983) 5 ALN N350, and *Re Low and Department of Defence* (1984) 6 ALN N280; *Bayne* 207-11 argues for the contrary view.
89. *Re Low and Department of Defence* (1984) 6 ALN N280.
90. In that case a distinction was made between information provided to an agency by a person (whether from outside or within the agency) who provides information that they are not bound to disclose, and a member of the agency who provides it under a duty to do so. In the latter case, disclosure by the agency under the *FOIA* will not breach any duty or relationship of confidence, irrespective of what the members believed.
91. p.148.
92. p.147.
93. p.148.
94. see pp148-50 for all the above.
95. pp.150-53.
96. *Re Wolsley and Department of Immigration and Ethnic Affairs* (1985) ADMN 80-014.
97. referring to circumstances discussed in *Re Witheford*.
98. *Re Maher and Attorney General's Department* (1986) 4 AAR 266.
99. *Baueris and Commonwealth Schools Commission, Department of Education* [1986] 5 FoI Review 68 (noted); unreported.
100. *Corrs Pavey Whiting & Byrne and Alphapharm and Collector of Customs* [1987] 7 FoI Review 10 (noted); unreported.
101. [1986] 6 FoI Review 84 (noted).
102. p41.
103. pp20-21, 48.
104. *Waterford v Department of the Treasury* (1985) 7 ALD 93.
105. *see A v Hayden (No 1)* (1984) 56 ALR 82.
106. p50.
107. *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39, 51 per Mason J.
108. (1987) FoI Review 10; decided 23/12/1986.
109. as in *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39.
110. *Privacy* ALRC22, Draft Privacy Bill cl.64(1)(b); see also para. [1358].
111. ANU Submission to Senate Standing Committee; see the *Privacy (Consequential Amendments) Bill 1986*.
112. s35(1)(b).
113. The discloser could, of course, commence an action for breach of confidence.
114. *Evans v Martin* (1984) unreported, Rendit J., County Court, 27/7/1984; the respondent should have been Monash.
115. see below Documents of an Agency.
116. ANU Submission, 18/2/1986, Senate Standing Committee on Constitutional and Legal Affairs *Official Hansard Report* (Proof) 28/9/1986, pp1292-98.
117. see cases cited p440.
118. discussed below.
119. see pp439-441 for the above.
120. M.D. Kirby 'The Last of the Fiefdoms?', speech to Australian Institute of Tertiary Education Administrators, University of Queensland, 30/8/1985.
121. *FOIA* s48.
122. *FOIA* ss50, 58.
123. *FOIA* s51(2).
124. *Privacy Bill 1986*, Cl.4, def. 'agency', Cl.7.
125. For the history of development of privacy principles in Australia see Australian Law Reform Commission *Privacy*, Report No 22, AGPS 1983.
126. 4 AAR 83.
127. pp18-19.
128. (1986) 6 *FoI Review* 82 (noted).
129. *Doe v US*, No 84-5613, 17/1/1986, CA DC; noted in *United States Law Week* 21/1/86 and in *Privacy Times*, V6 No 1, 22/1/86.
130. as summarised in *Wiseman* p21.
131. *Re Scrivanich and Australian Taxation Office* (1983) 5 ALN N299.
132. *Re Bleiccher and Capital Territory Health Commission* (1984) 5 ALN N521.
133. *Re Page and Director General of Social Security* (1984) 6 ALN N171.
134. *Re Leverett and Australian Telecommunications Commission* (1985) 8 ALN 135.
135. *G v Health Commission of Victoria* unreported, 27/7/1984, County Court, Rendit J.
136. Warburton op cit p363.
137. *Thorne v University of London* [1966] 2 QB 237; *Ex parte McFayden* (1945) 45 SR(NSW) 200; cited ibid p364.
138. [1986] 4 *FoI Review* 48 (noted).
139. equivalent to *FOIA* s48.
140. [1986] 4 *FoI Review* 53 (noted).
141. see *Wiseman* pp17-30 for a detailed analysis of 'personal affairs', as summarised below.
142. *News Corporation v National Companies and Securities Commission* (1984) 52 ALR 277; 1 AAR 511.
143. *See re Boehm and Department of Industry, Technology and Commerce* (1985) ADMN 80-016; *Re Wolsley and Department of Immigration and Ethnic Affairs* (1985) ADMN 80-014; *Re Wong and Department of Immigration and Ethnic Affairs* (1984) ADMN 92-033; 2 AAR 208; *Re Corkin and Department of Immigration and Ethnic Affairs* (1984) ADMN 92-029; *Re Kahn and Australian Federal Police* (1985) ADMN 80-015; *Re Mr Z and Australian Taxation Office* (1984) ADMN 92-031; 2 AAR 190; *Re Properzi and Department of Immigration and Ethnic Affairs* (1984) ADMN 92-035; *Re Hudson and Director General of Social Security* (1984) ADMN 92-036; *Re Lianos and Secretary to the Department of Social Security* (1985) 2 AAR 503.
144. *Wiseman*, p21.
145. (1986) 4 AAR 83.
146. p29.
147. p29.
148. *Re Williams and Registrar of the Federal Court of Australia* (1985) 3 AAR 529.
149. [1986] 5 FoI Review 71 (noted).
150. [1987] 1 FoI Review 8 (noted).
151. *Privacy*, Report 22, AGPS, 1983: Draft Privacy Bill cl.8.
152. Cl.6 def. 'personal information'; the ALRC recommendation said 'readily', not 'reasonably'.
153. *FOIA* s4(1); Vic. s4; NSW cl.6.
154. p13.
155. (1986) 1 VAR 143.
156. *ibid* p147.
157. R. Wortley 'Behind the FoI Desk at Monash' [1986] 3 *FoI Review* 30, 31.
158. see definitions of 'agency' and 'prescribed authority'.
159. *Low* refers to 'confidential systems within an agency', whereas here it would be argued that the documents are only provided to the agency by the academic on the understanding that they remain confidential.
160. *FOIA* s36(3).
161. *FOIA* s58(2),(5).
162. *FOIA* s58E.
163. Cl.5, inserting a new *FOIA* Cl.27A.
164. Australian Law Reform Commission *Privacy*, ALRC22, Draft Privacy Bill cl. 63 & 78(1)(a).
165. Senate Standing Committee on Constitutional and Legal Affairs *Official Hansard Report* (Proof) 28/9/1986, pp1292-98.
166. *ibid*, 1304-6.
167. *ibid*, 1304.