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A Matter of Balance?

Freedom of Information and Deliberative Documents

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Contents

1 Introduction 1

2 Method 2

2.1 UK as comparator 3

2.2 Advantages of this approach 5

2.3 Limits of this approach 6

3 Background 7

3.1 The original *FOI Act 1982* 7

3.2 The 2009/2010 reforms 8

3.3 Deliberative documents — definition 10

4 The rise of transparency 11

4.1 Transparency as an instrumental value 11

4.2 Access to information as a human right 13

5 The objects of the legislation 15

5.1 The original *FOI Act 1982* 16

5.2 The amended *FOI Act 1982* 19

5.3 Comparison with the UK 19

5.4 Conclusion — the changing purpose of FOI law 21

6 The exemption for deliberative documents and the public interest test 21

6.1 The original *FOI Act 1982* 22

6.2 The amended *FOI Act 1982* 24

6.2.1 Certain factors cannot be taken into account 25

6.2.2 The weight attributed to relevant facts 27

6.3 Comparison with the UK 29

6.3.1 Engagement of exemption 29

6.3.2 Application of the public interest test 31

6.4 Conclusion 33

7 Conclusive certificates 34

7.1 The original *FOI Act 1982* 34
7.2 The amended *FOI Act 1982* 36
7.3 Comparison with the UK 37
7.4 Conclusion 39
8 Practical refusal and fees 42
8.1 Fees 43
Original *Charges Regulations* 43
8.1.2 Amended *Charges Regulations* 44
8.1.3 Comparison with the UK 45
8.2 Practical Refusal 46
8.2.1 Original *FOI Act 1982* 46
8.2.2 Amended *FOI Act 1982* 47
8.2.3 Comparison with UK 47
8.3 Conclusion 49
9 Conclusion 50
Annex A — OAIC cases 53
Annex B — Fees and practical refusal 60
BIBLIOGRAPHY 64

Abstract

The elevation of access to government-held information to the status of a human right has driven a pro-disclosure discourse around freedom of information law. However rights of access do not exist in a vacuum and must be balanced against the need to protect competing rights and interests. The true purpose of Freedom of Information law, therefore, is not to promote disclosure but to promote the greatest possible disclosure that is consistent with the protection of competing rights and interests. Taking this as a starting point this thesis examines a number of amendments that were made to the *Freedom of Information Act 1982* in 2009-10 and considers their impact upon the disclosure of deliberative documents. It concludes that in some areas—the addition of a new objects clause and some changes to the public interest test — the legislation promotes disclosure to a greater extent than is consistent with the protection of competing rights and interests. However in other areas — the abolition of conclusive certificates and the reduction of fees and other procedural barriers to access — it is not clear that the changes to the legislation promote disclosure to the greatest extent possible consistent with the protection of other rights and interests.

I certify that this work has not been submitted for a higher degree to any other university or institution.

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1 Introduction

In the 50 years since the introduction of freedom of information ('FOI') legislation in America,[1] the idea of access to government-held information has shifted from being a novel concept to an internationally recognized human right.[2] This shift has had a fundamental impact upon disclosure of government-held information. Although a plethora of secrecy provisions still restrict access to government-held information in Australia,[3] the *Freedom of Information Act 1982* ('*FOI Act 1982*')[4] represented a significant shift towards more open government.

Despite this shift, the government approach to applying the public interest in relation to the disclosure of deliberative documents was the subject of considerable criticism.[5] In 2009-2010, a number of amendments to the *FOI Act 1982* were made with the purpose of increasing transparency, accountability and public participation in government. On the face these amendments removed a number of barriers to disclosure by inserting a new objects clause,[6] changing the public interest test[7] and abolishing conclusive certificates.[8] In addition, a number of financial barriers to access were removed,[9] and the Office of the Australian Information Commissioner ('OAIC') was established, offering a cheaper, less formal avenue of external review.[10]

These amendments have largely escaped scrutiny. Where the amendments have been considered the critique has been largely positive,[11] or argues that the amendments did not go far enough towards promoting disclosure.[12] This is possibly because, as Hazel et al note, FOI is generally assumed to be a 'good thing'.[13] Certainly the political rhetoric around the changes was concerned with describing the positive effect that the changes were expected to have on transparency, accountability and public participation.

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1 *Freedom of Information Act* 5 U.S. Code § 552 (1966).

2 Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (UNESCO, 2nd ed, 2008) 3.

3 See, for example, the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), which identified over 500 provisions in 176 pieces of legislation that imposed some obligation of secrecy.

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

5 See section 6 below for details.

6 *Freedom of Information Amendment (Reform) Act 2010* (Cth) sch 1, inserting new section 3 and 3A into the *FOI Act 1982*.

7 Ibid, Schedule 3, Part 2, inserting new sections 11A-B into the *FOI Act 1982*.

8 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth)

9 *Freedom of Information (Fees and Charges) Amendment Regulations 2010 (No. 1)* (Cth).

10 *Australian Information Commissioner Act 2010* (Cth).

11 See for example Simon Murray, 'Freedom of Information Reform: Does the New Public Interest Test for Conditionally Exempt Documents Signal the Death of "the Howard Factors"?' (2012) 31(1) *The University of Tasmania Law Review* 58.

12 Moira Paterson, Submission to the Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010,* 2012.

13 Robert Hazell, Ben Worthy and Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI work?* (Palgrave Macmillan, 2010) 4.

This thesis seeks to bring a new, more balanced perspective to the analysis of the amendments. It challenges the commonly held view that the purpose of FOI legislation is to promote disclosure. The right of access and the value of transparency do not exist in a vacuum: they must be balanced against other rights and values, such as the public interest in effective government. The purpose of FOI legislation must therefore be to achieve the greatest degree of transparency possible consistent with the need to protect competing rights and values. Only if it does so can it be said to strike the correct balance. This thesis therefore sets out to examine the effect of the amendments upon the disclosure of deliberative documents by asking whether:

1) they promote the greatest possible level of disclosure; and
2) the level of disclosure promoted is consistent with the protection of competing rights and values.

The thesis begins with an overview of the original, or pre-amendment, *FOI Act 1982* and the exemption for deliberative documents, and explains the background to a number of key changes in 2009-10. It considers the rise of transparency, and how access to government-held information is increasingly viewed as a human right, arguing that caution must be exercised in ensuring that this approach does not result in the right of access to information being protected at the expense of the broader public interest. It then moves on to consider the amendments. It finds that the new objects clause and public interest test promote disclosure over the protection of other interests. An examination of the abolition of conclusive certificates suggests that whilst this has reduced government control of information, this might paradoxically have reduced overall disclosure in the way that it impacted on other legislative choices and government behaviour. Finally, it explores some of the procedural and financial provisions of the legislation and argues that more could have been done to remove barriers to disclosure. Overall the thesis concludes that the 2009-10 amendments do not promote the correct balance and that fundamental, evidence-based review of the legislation is necessary.

2 Method

In 2009-10 a series of amendments were made to the *FOI Act 1982* with the stated intention of improving accountability, transparency and public participation in democratic society.[14] These changes have had a particular impact on the disclosure of deliberative documents, but appear to have been based largely on political rhetoric. Judith Bannister has noted that much FOI reform is

14 See section 3.2 below.

prompted by 'scepticism and knee-jerk reactions'.[15] Similarly, Hazell et al found that 'FOI is the subject of many anecdotes and myths... They can develop into unshakeable beliefs which people are reluctant to question.'[16] Donald and Schuck have said that a similar problem in the field of judicial review means that 'the subject matter remains a matter for uninformed speculation.'[17] A similar statement could be made of FOI law, where this same 'uniformed speculation' has plagued both sides of the debate about the disclosure of deliberative documents.

This thesis is intended to provide the foundation for a more extensive empirical project which will evaluate the effect of these measures on the disclosure of deliberative documents. This thesis seeks, as a first step, to critique the new legislative framework in which disclosure obligations operate, and to consider the extent to which the framework can be said to promote the greatest possible access to information that is consistent with the protection of other rights and values. It does this by analysing key provisions of the original *FOI Act 1982* that were perceived as creating barriers to disclosure, and considering the ways in which the amendments in 2009-10 sought to remove those barriers. It also compares the provisions of the amended *FOI Act 1982* with the United Kingdom *Freedom of Information Act 2000* (*FOI Act 2000 (*UK))[18] in order to consider whether, following amendment, the Australian legislation strikes the optimum balance. An extensive literature search has been conducted but there is limited literature that is directly on point. That which exists is reflected throughout the body of this thesis, rather than in a separate literature review.

2.1 UK as comparator

The purpose of this approach is not to evaluate the legal framework in the UK, but to use it to shine a light on aspects of the Australian federal legislative framework. Savage and Hyde note that FOI laws in the UK and Australia are appropriate comparators.[19] Both originate in a Westminster-style democracy and both operate within a common law framework. Further, the scheme and structure of FOI legislation is broadly similar — in both countries exemptions are separated into similar categories; a single public interest test is applied to 'qualified' or 'conditional' exemptions; both countries have an Information Commissioner with powers of merits review; and the legislation in

15 Judith Bannister, 'The Last Word on the Public Interest in FOI: Australia and the United Kingdom Compared' (2015) *Australian Public Law* <http://auspublaw.org/2015/06/the-last-word-on-the-public-interest-in-FOI/>.

16 Hazell, Worthy and Glover, above n 13, 12.

17 Peter H. Shuck and E. Donald Elliott, 'Studying Administrative Law: A Methodology for, and Report on, New Empirical Research' (1990) *Yale Law School Faculty Scholarship Series* 519, 520.

18 *Freedom of Information Act 2000* (UK) c 36; Ibid.

19 Ashley Savage and Richard Hyde, 'Using Freedom of Information Requests to Facilitate Research' (2014) 17(3) *International Journal of Social Research Methodology* 303, 314-315. Ben Worthy also suggests that the jurisdictions share a number of similar problems in Ben Worthy, 'Freedom of Information in Britain: Lessons from Australia' (2007) 32 *Alternative Law Journal* 229.

both places promotes a 'push' model of disclosure in addition to the 'compelled disclosure'[20] that is the focus of this thesis.

On the other hand there are a number of key differences: UK government agencies retain a power of 'veto' that is comparable (although not identical) to the power to issue conclusive certificates that was abolished by the Commonwealth legislation; there is no 'umbrella' exemption for all deliberative material; and there is no attempt in the UK legislation to determine the relevance or weight of factors in conducting the public interest test. The UK approach to fees and procedure also suggests that in the UK the costs of complying with FOI are largely borne by government, whilst the Australian legislation favours a more 'user pays' approach. The *FOI Act 2000* (UK) therefore provides a more illustrative comparison than the legislation in the various states and territories of Australia, which take a similar approach to the federal legislation in several respects.[21]

Caution ought still be exercised when drawing conclusions. For example, in order to draw a comparison with Australian federal legislation as opposed to that which applies in the Australian states and territories, this thesis focuses on the exemptions in the UK legislation that apply to deliberative documents held by Central Government (s 35 and s 36).[22] However the comparison is not exact as in Australia, the exemption for deliberative material (s 47C) applies to all agencies to which the legislation applies, not just to Central Government departments. Further, whilst Australian legislation was part of the 'second wave' of FOI legislation, the UK did not follow until the 'third wave';[23] when access to information had begun to be regarded as an international norm. This context may have influenced the motives for, and content of the legislation.[24] However the amendments to the Australian legislation that are the subject of this thesis were made after this international norm had been established, and so whilst note must be taken of the 'local political struggles' shaped the legislation, the comparison is still illustrative as a 'starting point for an exploration of the contrasting approaches taken by individual jurisdictions'.[25]

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20 This is the term used by Judith Bannister to describe disclosure that results from FOI requests. See Judith Bannister, 'Thinking Spaces; the Exclusion of Deliberative Matter from FOI Disclosure' (Lecture delivered at the Institute of Advanced Legal Studies, London, 17 June 2015).

21 See for example *Freedom of Information Act 1989* (NSW) s 59A lists factors that are 'irrelevant' to the public interest balancing test; *Information Act 2002*(NT) s 50(2) lists factors that are 'irrelevant' to the public interest balancing test; *Freedom of Information Act 2009* (QLD) sch 4 lists factors that are irrelevant, factors that are in favour of disclosure and factors that are in favour of non-disclosure.

22 In relation to local government and other agencies, the only relevant exemption for deliberative material is s 36. See section 6 below for further details.

23 Andrew McDonald, 'What Hope for Freedom of Information in the UK?' in Christopher Hood and David Heald (eds), *Tranparency: The Key to Better Governance?* (Oxford University Press and the British Academy, 2006) 129; Hazell, Worthy and Glover, above n 13, 3.

24 McDonald, above n 23, 129.

25 Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3rd Edition ed, 2010), 131.

2.2 Advantages of this approach

Doctrinal legal research can be classified as qualitative research because it is 'a process of selecting and weighting materials taking into account hierarchy and authority as well as understanding social context and interpretation.'[26] It is seen as an 'internal method' using 'reason, logic and argument' compared with external methods which study 'the law in practice'.[27]

One advantage of this approach is that it enables an analysis of the objectives of the amendments, and how these either fit into or alter the context of the legislation as a whole. It also provides a basis for considering the extent to which legislative failures were responsible for the perceived problems with the *FOI Act 1982* prior to amendment, and allows for critical reflection on the legislative changes that were made to address those problems. Such analysis of the law and its objectives provides a rich foundation for subsequent research into the 'law in practice' in considering whether the law has met those objectives and what the impact has been.

It has a further advantage in that it allows for an analysis of whether those objectives are appropriate. This approach is not commonly adopted by those seeking to evaluate FOI legislation. Negative effects are often attributed to the failure to meet objectives,[28] or to external factors such as general political apathy.[29] A doctrinal analysis which considers not just what the objectives are, but also whether the objectives are what they ought to be, provides a richer foundation for further work, enabling a consideration of whether the legislation might have met with more success if different objectives had been pursued.

The comparative approach adds richness and depth to the conclusions that could be drawn from a doctrinal analysis of Australian legislation in isolation. This thesis does not seek to consider whether the UK legislation strikes the correct balance, but rather to use the UK legislation as a point of comparison to reflect on the Australian approach. An examination of the Australian legislation alone would have restricted the analysis to considering whether the legislation as it exists now is internally consistent, the extent to which it promotes a greater degree of disclosure following amendment, and whether it protects competing rights and interests. A comparison with the UK shines an extra light: it provides a tool for reflecting not only on what the impact of FOI law is, but also what it might have been if a different approach had been taken. This assists in drawing out the conclusion that there are different ways of achieving balance in FOI, and provides a foundation for considering the elements of

26 Ibid, 37.
27 Ibid.
28 Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis Butterworths, 2005) 495.
29 See, for example, Deirdre Curtin and Albert Jacob Meijer, 'Does Transparency Strengthen Legitimacy: A Critical Analysis of European Union Policy Documents' (2006) *Information Polity* 109.

the legislation that do this most appropriately. It also enables us to consider whether the legislative choices match the political rhetoric.

2.3 Limits of this approach

There are a number of limits to this study. First, it considers only the Australian federal legislation, not that which applies to the individual states and territories. Second, although much of the analysis can be applied to other exemptions it is concerned primarily with the provisions relating to deliberative documents. The reason for this is partly to ensure that the subject matter is sufficiently narrow to be considered in reasonable depth and to provide a point of comparison with the UK legislation and partly because the exemption relating to deliberative documents was one of the most contested prior to amendment. Third, it focuses only on information that is disclosed or withheld following an FOI request; it does not consider the provisions that relate to a 'push' model of disclosure, for example disclosure under a publication scheme, voluntary disclosure, or Open Data.[30] Fourth it focuses on the law as it is now, and does not consider in depth the potential impact of some proposed changes.[31]

This thesis focuses on the legislative framework; it does not look at how the legislation is being interpreted and applied in practice, through case-law or otherwise, or at the effects of the legislation on those seeking or those providing information. Whilst a case study that describes the experience of seeking deliberative documents in Australia is used to illustrate some of the conclusions about the financial and procedural provisions, and some statistics on OAIC decisions are discussed in the context of conclusive certificates, both are too limited in scope to support generalized conclusions.[32] That being the case, a consideration of whether the amendments are meeting their objectives is beyond the scope of the thesis. What this thesis does seek to do is consider the extent to which the objectives of the legislation were changed as a result of the 2009-10 amendments, and whether that change is consistent with the proper purpose of FOI legislation: to strike the correct balance between access and other interests. In doing so it provides the foundation for future research on the impact of such a change, which the author hopes to pursue as part of her doctoral studies.

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30 For a discussion of the latter, see Ben Worthy, 'The Impact of Open Data in the UK: Complex, Unpredictable and Political' (2015) 93(3) *Public Administration* 788.

31 For example, the proposed abolition of the role of OAIC in the Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth).

32 The case study does suggest that the use of FOI requests as a method for future research might be valuable. Savage and Hyde used FOI requests in such a way, but the focus of their research was not on FOI itself but on whistleblowing in relation to health and safety. See Savage and Hyde, above n 19. Similarly, Johan Lidberg used FOI requests as a methodology in Johan Lidberg, 'The International Freedom of Information Index: A Watchdog of Transparency in Practice' (2009) 30 *Nordicom Review* 167. Hazell et al note that the use of FOI requests as rigorous methodology has been used only by the Soros Open Society Justice Initiative – see Robert Hazell and Ben Worthy, 'Assessing the Performance of Freedom of Information' (2010) 27 *Government Information Quarterly* 352, 352.

3 Background

3.1 The original *FOI Act 1982*

> If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?[33]

Australia was one of the first Westminster-style democracies to enact FOI legislation in 1982, following a decade of discussion and reviews about its contents and importance. It was in part motivated by the introduction of similar legislation in the United States of America in 1966,[34] but whilst that legislation had been motivated initially by a desire to ensure a flow of information between the different branches of government,[35] the Australian legislation was more firmly rooted in the notion of the flow of information from government to citizen. The underlying rationale for FOI legislation is to facilitate debate about government.[36] The legislation had three broad aims:

- To act as a mechanism for individuals to access, and have corrected, any information the government held about them.
- To enhance the transparency and accountability of policy making, administrative decision making, and service delivery.
- To encourage participation in the democratic process.[37]

The legislation was part of a package of measures[38] intended to create more open and accountable government.[39] It sought to achieve this by giving individuals a right to access government information. Whilst this represented a fundamental shift, the right was not unlimited: a series of exemptions set out the circumstances in which government could legally refuse to grant access to

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33 Malcolm Fraser, *The Canberra Times,* 23 September 1976, 2.

34 *Freedom of Information Act* 5 U.S. Code § 552 (1966).

35 Michael Schudson, 'A Surprisingly Short History of the 'Right to Know' (Paper presented at The University of Sydney, 12 March 2015). The origins of FOI legislation, however, were in Sweden: see Stephen Lamble, 'Freedom of Information: A Finnish Clergyman's Gift to Democracy' (2002) 97 *Freedom of Information Review* 2. Ben Worthy discusses the potential to use the UK legislation in the same way in Ben Worthy, 'A Powerful Weapon in the Right Hands? How Members of Parliament have used the Freedom of Information Act' (2014) 67(4) *Parliamentary Affairs* 783.

36 David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 3rd ed, 2010) 354.

37 See Australian Law Reform Commission and Administrative Review Council, '*Open Government: a Review of the Federal Freedom of Information Act 1982'* Report No 77 (1995) [2.2].

38 Including the *Administrative Appeals Tribunal Act 1975* (Cth), the *Ombudsman Act 1976* (Cth) ,the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and the *Federal Court of Australia Act 1976* (Cth). Hazell et al have noted that simultaneous introduction of a number of measures with similar aims can make it difficult to assess the effectiveness of FOI. See Hazell, Worthy and Glover, above n 13, 16.

39 Office of the Australian Information Commissioner, *Guide to the Freedom of Information Act 1982* (2011) 17.

information. A number of these exemptions provided that government could only refuse if disclosure would be contrary to the public interest. Such refusal was subject to review by the Administrative Appeals Tribunal ('AAT'). However the ultimate power to prevent release of information covered by some exemptions rested with the government, which had power to issue a certificate that conclusively determined that disclosure would be contrary to the public interest. Thus both the structure and language of the legislation required a balance to be struck between the right of access to information and the need to protect competing rights and interests. However a number of reforms in 2009-10 changed the balance established by the original legislation, tipping it more towards disclosure.

3.2 The 2009/2010 reforms

In 2007 the Australian Labor Party placed FOI reform at the heart of their election platform, undertaking to implement the key findings of a joint report by the Australian Law Reform Commission and the Administrative Review Council : *Open Government, a Review of the Federal Freedom of Information Act 1982* ('the ALRC Report').[40] In particular they promised:

- Revision of the FOI Act to promote a culture of disclosure and transparency.
- Appointment of a statutory Freedom of Information Commissioner.
- Rationalisation of the exemption provisions, and publication of guidelines, so that information is only withheld where this is in the public interest.
- Review of FOI charges to ensure they are not incompatible with the objects of disclosure and transparency.[41]

This election commitment led, in turn, to the series of legislative amendments that are at the heart of this thesis. The *Freedom of Information (Reform) Act 2010* (Cth) ('*FOI (Reform) Act 2010*')[42] amended the *FOI Act 1982*, separating exemptions into two categories: absolute exemptions[43] and

40 Australian Law Reform Commission and Administrative Review Council, above n 37.

41 Australian Labor Party policy statement, *Government Information: Restoring Trust and Integrity* (2007).

42 *FOI (Reform) Act 2010*.

43 The absolute exemptions are ss 33 (documents affecting national security, defence or international relations); 34 (Cabinet documents); 37 (documents affecting enforcement of law and protection of public safety); 38 (documents to which secrecy provisions of enactments apply); 42 (documents subject to legal professional privilege); 45 (documents containing material obtained in confidence); 45A (Parliamentary Budget Office documents); 46 (documents disclosure of which would be contempt of Parliament or contempt of court); 47 (documents disclosing trade secrets or commercially valuable information); 47A (electoral rolls and related documents).

'conditional' exemptions.[44] The 'deliberative documents' exemption previously found in s 36 of the original *FOI Act 1982* was re-cast as a conditional exemption in s 47C of the amended Act as follows:

> **47C Public interest conditional exemptions—deliberative processes**
>
> **General rule**
>
> (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
>
> (a) an agency; or
>
> (b) a Minister; or
>
> (c) the Government of the Commonwealth; or
>
> (d) the Government of Norfolk Island.

A single public interest was applied to this, and all other, conditional exemptions, requiring that information covered by conditional exemptions be disclosed unless this would 'on balance, be contrary to the public interest'.[45] For reasons that will be explained, this change, combined with the substitution of a new objects clause[46] and the abolition of conclusive certificates,[47] had a particular impact upon the disclosure of deliberative documents. Alongside these amendments, fees were removed in some circumstances,[48] and the OAIC was established,[49] with powers to conduct merits review of Australian Government FOI decisions. The Government's stated intention was to 'promote representative democracy by increasing public participation in government processes by increasing scrutiny, discussion, comment and review of the Government's activities.'[50] The purpose of this thesis is to examine the effects of these changes on the legislative framework in order to consider whether they strike the correct balance by promoting disclosure to the greatest extent consistent with the protection of competing interests. First, however, it is necessary to explain what is meant by deliberative documents.

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44 The conditional exemptions are ss 47B (Commonwealth-State relations); 47C (deliberative processes); 47D (financial or property interests of the Commonwealth or Norfolk Island); 47E (certain operations of agencies); 47F (personal privacy); 47G (business); 47H (research); 47J (the Economy).

45 *FOI Act 1982* s 11A.

46 ibid ss 3-3A.

47 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth).

48 *Freedom of Information (Fees and Charges) Amendment Regulations 2010 (No. 1)* (Cth).

49 *Australian Information Commissioner Act 2010* (Cth).

50 Commonwealth, *Parliamentary Debates,* House of Representatives, 11 May 2010, 3124-6 (Mark Dreyfus), 3125.

3.3 Deliberative documents — definition

This thesis focuses on the exemption relating to deliberative documents. Under the original *FOI Act 1982* documents that showed the 'deliberative processes' of Government were exempt under s 36, but 'deliberative process' was not defined, either in the original *FOI Act 1982*[51] or subsequently. According to the explanatory memorandum the exemption was 'intended to cover all documents that reflect the deliberative or policy-forming processes of an agency or of Government' including

> communications between Ministers; communications between Ministers and their Departmental and other advisers, including the briefing of Ministers on Cabinet Submissions; communications between officers of Departments, whether within the same Department or between Departments; and communications between Ministers or officers and persons outside Government with respect to advice or opinions given to Ministers or officers.[52]

The leading case of *Re JE Waterford and Department of Treasury (No 2)* ('*Waterford*') further clarified that the exemption covered a department's 'thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action'.[53] It also determined that the exemption was not restricted to the formation of policy, a conclusion that was supported by several other cases.[54]

Section 36 of the original *FOI Act 1982* was revised and recast as s 47C by the *FOI (Reform) Act 2010*, but the category of information covered by the exemption remained largely unchanged.[55] Guidelines published by the OAIC under s 93A of the FOI Act echoed the language in *Waterford*: 'the deliberative processes involved in the functions of an agency are its thinking processes — the processes of reflection, for example upon the expediency or wisdom of a proposal, a particular decision or a course of action.'[56]

The changes effected by the reform, then, relate not to the category of information that is exempt, as the definition of deliberative material did not change, but to the public interest test: namely what is said to be in the public interest, and who is the final arbiter of that decision. These changes are

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51 References to the 'original *FOI Act 1982*' are to the legislation as it existed prior to the 2009-10 amendments; references to the 'amended *FOI Act 1982*' are to the legislation as it exists following those amendments.

52 Explanatory Memorandum, Freedom of Information Bill 1981 (Cth) [107].

53 *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 (14 March 1984) , 58.

54 The exemption has been held to cover, amongst other things, documents relating to employment matters (*Re Murtagh and Federal Commissioner of Taxation* [1984] AATA 249; (1984) 6 ALD 112 and *Re Reith and Attorney-General's Department* (1986) 11 ALD 345); documents relating to a claim about sexual harassment (*Re Zacek and Australian Postal Corporation* [2002] AATA 473 (18 June 2002)); and information about how an information request had been dealt with (*Waterford*).

55 *Crowe and Department of the Treasury* [2013] AICmr 69 (29 August 2013) [76]. The ICO cited *Waterford* as giving the 'accepted definition' of the deliberative process .

56 Office of the Australian Information Commissioner, 'Guidelines Issued by the Australian Information Commissioner under s 93A of the *Freedom of Information Act 1982*' (2014) [6.62].

explained in detail below. First, however, it is useful to consider the changing role of transparency in a democratic society to understand the context in which the amendments were made.

4 The rise of transparency

In a relatively short space of time the thinking around transparency and access to government-held information has undergone a major shift. In early years of FOI legislation, transparency was conceived primarily as an instrumental value, with the optimum level of transparency being that which could be achieved without compromising competing values.[57] Over time access to information has begun to be seen as a human right with its own intrinsic value. The contention of this thesis is that even viewed as a human right, the right of access to government-held information requires disclosure only to the extent that is consistent with the protection of competing public interests, and that this should be reflected in domestic FOI legislation.

4.1 Transparency as an instrumental value

A fundamental tenet of modern democracy is that government ought to be accountable. Traditionally in Westminster-style governments, the expectation is that parliament holds government accountable, the electorate holds parliament accountable, and the judiciary ensure that the power of each branch of government is exercised within appropriate bounds.[58] As Rhys Stubbs points out, 'historically, representatives have held the right to withhold information from the public under notions of parliamentary sovereignty and responsible government whereby elections and parliamentary rules constitute accountability'.[59] Other accountability mechanisms include external audit and independent reviews, and scrutiny by the media. Whilst Toby Mendel has said that 'effective participation at all of these levels depends, in fairly obvious ways, on access to information, including information held by public bodies,'[60] restricted public access to government-held information was not necessarily equated with a lack of accountability.

Over time, however, increasing importance has been placed on the notion that 'access to information is closely related to the notion of a healthy democracy',[61] possibly because the more traditional accountability mechanisms are 'somewhat undermined by the strong party system in

57 David Heald, 'Transparency as an Instrumental Value' in Christopher Hood and David Heald (eds), *Transparency: the Key to Better Governance?* (Oxford University Press and the British Academy, 2006) 59, 61.

58 Paterson, above n 28, 9-10.

59 Rhys Stubbs, 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43(4) *Australian Journal of Political Science* 667, 671.

60 Mendel, above n 2, 4.

61 Australian Law Reform Commission and Administrative Review Council, above n 40, [2.2].

contemporary Australian politics that severely restricts parliament's control over the Executive'.[62] Greater access to information is said to lead to greater accountability and to assist in combatting corruption.[63] Further, as the concept of deliberative democracy which 'emphasises the importance of continuous citizen input into political decision-making'[64] has gained currency, so too has the pressure for access to information. Ben Worthy points to the Enlightenment idea that information is the oxygen of democracy,[65] and the Commonwealth Ombudsman has noted that 'information is the currency that we all require to participate in the life and governance of our society.'[66]

These themes are reflected in FOI legislation around the world. Toby Mendel's 2008 study found that the desire to promote transparent, accountable and effective government, control corruption, foster public participation, enhance the ability of the public to scrutinise the exercise of public power, and build public understanding and an informed citizenry are common goals of FOI legislation.[67] This is consistent with the findings of Cain, Fabbrini, and Egan's study of access legislation in Italy, France and the United States,[68] and with the six most frequently measured objectives noted by Simon James.[69] It is also consistent with the findings of Hazell et al on the objectives of the *FOI Act 2000* (UK).[70] Thus, during the second and third wave of FOI legislation around the world,[71] the discourse about transparency was primarily instrumental, focussing on its importance as an underpinning for democratic society. Access to information was seen as a governance tool; an instrument for positive change towards more accountable, engaged government, rather than as an end in itself.[72] FOI legislation is one of the ways in which this was achieved, giving rights to access information where

62 Clark, Bamford and Bannister, above n 36, 353.

63 See, for example, Paterson, above n 28, 9, and Judith Bannister, 'Open Government: From Crown Copyright to Creative Commons' (2011) 34(3) *University of New South Wales Law Journal* 1080, 1080.

64 Judith Bannister et al, *Government Accountability* (Cambridge University Press, 2014), 14.

65 Ben Worthy, 'More Open But Not More Trusted: The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government' (2010) 23(4) *Governance: An International Journal of Policy, Administration, and Institutions* 561, 562.

66 Commonwealth Ombudsman, *Annual Report 1994-95* (1995) 33.

67 Mendel, above n 2, 141.

68 Bruce Cain, Sergio Fabbrini and Patrick Egan, 'Towards More Open Democracies: The Expansion of FOI Laws' in Bruce Cain, Russell Dalton and Simon Scarrow (eds), *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies* (Oxford University Press, 2003) 115, 116.

69 Simon James, 'The Potential Benefits of Freedom of Information' in R.A. Chapman and M. Hunt. (eds), *Open Government in a Theoretical and Practical Context* (Ashgate Publishing, 2006), 19-29.

70 See section 5.3 below for further details.

71 Hazell and Worthy, above n 32, 353, note that Australia, Canada and New Zealand passed Acts in 1982 in the 'second wave' of FOI reforms after the US FOI Act of 1966, and Ireland passed an FOI Act in 1997 as part of the third wave, slightly ahead of the UK in 2000.

72 Although Christopher Hood notes that the instrumental value of transparency is 'easier to assert than to prove', particularly in the context of complex public organizations. See Christopher Hood, 'Beyond Exchanging First Principles? Some Closing Comments' in Christopher Hood and David Heald (eds), *Transparency: the Key to Better Governance?* (Oxford University Press and the British Academy, 2006) 211.

none had existed before. Certainly in Australia the original *FOI Act 1982* was conceived as part of a package of administrative governance reforms.[73]

However, those who consider transparency to be an instrumental value do not necessarily consider that greater transparency should be sought at all costs. David Heald, for example, says that although greater transparency can bring great benefits to society and government, it can also bring costs. He notes that the optimal level of transparency is not the greatest level possible, but 'the result of the trade-off between transparency and the seven other objects' which are 'effectiveness; trust; accountability; autonomy and control; confidentiality, privacy, and anonymity; fairness; and legitimacy.'[74] Of these, the trade-off between transparency and effectiveness is of particular relevance to this thesis. Heald recognises that being exposed to public view is commonly viewed as a stimulus to better performance, but notes that 'excessive' transparency can disrupt organizational functioning or affect behaviour in unanticipated ways. In particular he notes that the policy-making process is hampered if policy decisions 'have to be taken under the constant gaze of continuous news and media comments, with the result that 'real policy-making shifts backwards into secret confines, with proposals less subject to challenge...and poorly documented'. As noted below, this risk was managed in the original *FOI Act 1982* by the inclusion of an exemption for deliberative documents that was intended to strike a balance between the public interest in granting access to information, and the public interest in effective government policy and decision-making.

In more recent years, however, Toby Mendel has noted that access to information 'is increasingly being seen as a fundamental human right.'[75] The contention of this thesis is that viewing transparency as having intrinsic value in this way does not mean that when conducting a public interest balancing test, the public interest in transparency should automatically be weighted more heavily than competing values.

4.2 Access to information as a human right

Although Mendel expected some resistance to the idea that access to information is a human right,[76] it has gained considerable traction. In 2010 Hazell and Worthy wrote 'there is increasing legal recognition from national courts and from international bodies that freedom of information is a human right.'[77] Carolyn Adams went further still in 2014, saying that the notion that access to information is a human right was 'well established', with such rights being protected directly in

73 See above n 38.
74 Heald, above n 57, 60-61.
75 Mendel, above n 2, 3.
76 Ibid.
77 Hazell and Worthy, above n 71, 352.

federal legislation.[78] Similarly, OAIC guidance from 2011 refers to access to information as an 'internationally recognised right'.[79]

The foundations for such an approach have long been in place. Mendel notes that it is surprising that it has taken so long for it to be recognised as such given that in 1946, during its first session, the UN General Assembly adopted Resolution 59(1), which stated:

> Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated.[80]

It is only more recently, however, that a right to FOI has been recognised by bodies such as the Inter-American Court of Human Rights,[81] the UN,[82] the Council of Europe[83] and the African Union.[84] Such recognition has rested primarily upon the notion that access to information is a necessary pre-condition to the exercise of the rights to freedom of expression that are established both in the Universal Declaration of Human Rights[85] and the International Covenant on Civil and Political Rights.[86] Maeve McDonagh notes that it also plays a role in the right to take part in public affairs, the right to respect for private life, the right to a fair trial and the right to life.[87] Others have argued, though, that 'not only is FOI instrumentally important in realising other human rights such as freedom of speech and access to justice, or other desiderata such as accountability; it is intrinsically important: the right to know how government operates on our behalf.'[88]

This elevation of access to the stature of a human right places great emphasis on transparency and drives a political discourse that is very pro-disclosure. Alistair Roberts noted that there is a political

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78, Carolyn Adams, 'One Office, Three Champions? Structural Integration in the Office of the Australian Information Commissioner' (2014) 21 *Australian Journal of Administrative Law* 77, 80.

79 Office of the Australian Information Commissioner, above n 39, 7.

80 *Calling of an International Conference on Freedom of Information*, GA Res 59(1), UN GAOR, 65th plen mtg (14 December 1946).

81 *Claude Reyes and Others v Chile* (Inter-American Court of Human Rights, Case No Series C/151, 19 September 2006)[77].

82 Abid Hussain, Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc E/CN.4/1998/40 (28 January 1998) [14].

83 *Recommendation of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities*, Council of Europe, Recommendation No (81) Meeting No 340 (adopted on 25th November 1981).

84 African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session (17 - 23 October 2002) Chapter IV.

85 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 19.

86 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 19.

87 Maeve McDonagh, 'The Right to Information in International Human Rights Law' (2013) 13(1) (2013) *Human Rights Law Review* 25.

88 Patrick Birkenshaw, 'Transparency as a Human Right' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press and The British Academy, 2006), 47.

cost associated with measures that openly restrict transparency.[89] It follows that there is likely to be a political gain associated with measures that promotes transparency, and that politicians might be inclined to rhetoric that emphasises rights of access rather than the need to balance rights of access against other human rights and values.

Defining access to information as a human right does not, however, mean that it is without limits. Patrick Birkenshaw notes that 'No human right... is absolute. Rights to information must inevitably be balanced against other human rights'. Mendel states:

> A key underlying principle governing the right to information is the principle of maximum disclosure, which flows directly from the primary international guarantees of the right to information. This principle involves a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only where there is an overriding risk of harm to a legitimate public or private interest.[90]

This suggests that access to information ought to be balanced not just against other rights but against other public interests. The key idea here is that the 'principle of maximum disclosure' creates a presumption of disclosure, but that this presumption may be overcome by legitimate competing interests. Thus even when access to information is viewed as having intrinsic value, the principle of maximum disclosure requires disclosure only to the extent that it is compatible with the protection of legitimate competing public (and private) interests. As domestic FOI legislation is one of the ways that governments give effect to rights of access, it follows that domestic legislation should incorporate such a principle by ensuring that decision-makers have the tools necessary to assess where the public interest lies in any given case. The contention of this thesis is that following the amendments in 2009-10 some of the Australian legislative provisions go further than is required by the principle of maximum disclosure and that in relation to the disclosure of deliberative documents greater protection is granted to the public interest in access to information than is granted to competing rights and values.

5 The objects of the legislation

There is a commonly held view that the purpose of FOI legislation is to promote disclosure. However there is a difference between legislation which promotes *greater* disclosure than was hitherto permitted, and legislation which promotes disclosure as an end in itself. As noted in the previous section, the right of access and the value of transparency do not exist in a vacuum: they must be

89 Alasdair Roberts, 'Dashed Expectations: Government Adaptation to Transparency Rules' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance* (The British Academy and Oxford University Press, 2006) 107, 109.

90 Mendel, above n 2, 30.

balanced against other rights and values. The principle of maximum disclosure requires that there be a presumption of disclosure, but that this may be overcome by competing rights and interests. The purpose of FOI legislation must therefore be to enable decision-makers to achieve the greatest degree of disclosure that consistent with the protection of competing rights and values. Changes to legislation to remove barriers to disclosure might be legitimate in some circumstances. But changes to the legislative framework that result in a degree of transparency that is *inconsistent* with the protection of competing interests does not strike the correct balance. The following section argues that whilst the original *FOI Act 1982* recognised the importance of balance, the objects clause in the amended *FOI Act 1982* shifts the purpose of the legislation: it now no longer seeks to reach the correct balance, but to promote disclosure.

5.1 The original *FOI Act 1982*

Even prior to the amendments, the *FOI Act 1982* contained a presumption of disclosure limited only by competing interests as follows:

> 3(1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by—
>
> ...
>
> (b) creating a general **right of access** to information in documentary form in the possession of Ministers, departments and public authorities, **limited only by exceptions and exemptions** necessary for the protection of **essential public interests** and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities. ...
>
> 11 Subject to this Act, every person has a **legally enforceable right to obtain access** in accordance with this Act to—
>
> (a) a document of an agency, other than an exempt document; or
>
> (b) an official document of a Minister, other than an exempt document. [Emphasis added]

The effect of these provisions was to establish disclosure as the default position unless the Government could demonstrate the application of an exemption which protected competing interests. However Hazell et al noted that the clause did not 'clearly set[s] out differing political objectives. Instead it asserts citizens' rights to information. What the Act is actually for has therefore been the subject of debate even after implementation.'[91]

The Office of Parliamentary Council has said that 'legislation that is not effective in communicating its purpose and operation cannot be said to be legally effective', and that objects clauses are one way of

91 Hazell, Worthy and Glover, above n 13, 28.

making the purpose clear.[92] Some objects clauses give a general understanding of the purpose of the legislation; others 'set out general aims or principles that help the reader to interpret the detailed provisions of the legislation'.[93] Objects clauses may therefore assist the courts and others in the interpretation of legislation.[94] Section 15AA of the *Acts Interpretation Act 1901* (Cth)[95] provides that

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

This means that the legislative purpose or object is taken into account in statutory interpretation even if the meaning of the words in their context is clear.[96]

In 1995 the *ALRC (Open Government) Report* considered the wording of the objects clause in the original *FOI Act 1982*, and noted that some had argued that it promoted a construction of the Act that would 'lean' towards disclosure.[97] Rick Snell, for example, has advocated a leaning approach and noted that interpretation in the courts had already begun to shift in that direction.[98] The *ALRC (Open Government) Report* acknowledged that a 'balance needs to be struck' but said that 'that the purpose of the FOI Act is, first and foremost, to provide access to information'. They suggested that the objects clause of the Act be amended to

> include a statement to the effect that the right of access provided by the Act is a basic underpinning of Australia's constitutionally guaranteed representative democracy which enables people to participate in the policy and decision making processes of government, opens the government's activities to scrutiny, discussion, review and criticism and enhances the accountability of the Executive.[99]

The fact that the objects clause did not originally refer to these matters does not necessarily, however, lead to a conclusion that the original objects clause did not reflect the objectives of the legislation. It is possible that the express reference to exemptions reflected a Parliamentary intention to strike a balance between access to information and other public interests. Moira Paterson, for

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92 Office of Parliamentary Counsel, *OPC's Drafting Services: a Guide for Clients* (4th ed, 2012) [135].

93 Ibid [146].

94 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* Report No 108 (2008).

95 *Acts Interpration Act 1901* (Cth).

96 D.C Pearce and R.S. Geddes, *Statutory Interpretation In Australia* (6th ed, 2006), 30, [2.13].

97 Despite the lack of reference to political objectives in the objects clause, Hazell noted in 1999 that the objects clause 'has been a useful aid to interpretation in Australia and New Zealand, where it has helped officials when applying exemptions and enabled the appeal authorities to say to departments that in cases of doubt they should lean in favour of disclosure'. See Robert Hazell, *Commentary on the Draft Freedom of Information Bill* (Constitution Unit, 1999), para 4.1.

98 Rick Snell, 'The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited' (1995) 2 *Australian Journal of Administrative Law* 197. The courts had initially rejected such an approach. See *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64, 66; Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111, 114-5; *Jorgensen v ASIC* (2004) 208 ALR 73, 79.

99 Australian Law Reform Commission and Administrative Review Council, above n 40, [4.6].

example, recognised that the reference to the exemptions in the objects clause 'made possible an interpretation which required a neutral (as opposed to a pro disclosure) stance to the interpretation of exemption provisions'.[100] Similarly, Peter Bayne stated that 'a literal reading of the other clauses in s 3 can lead to the view that it is as much an object to create exemptions as it is to create a right of access.'[101]

Viewing FOI legislation as having the purpose of promoting openness is not uncommon. Moira Paterson divides the laws that touch upon disclosure issues into two categories. She notes some laws — including FOI laws, laws requiring reasons for decisions, and whistle-blower protection laws— as 'contributing to the objective of transparency'. She notes others — including public interest immunity, and official secrecy requirements — as detracting from transparency. [102] This approach is understandable in view of the historical context in which access to government-held information was not permitted by law,[103] and in the current context of a plethora of secrecy laws.[104] In fact, in trying to understand whether there is a culture of secrecy within government, and the way in which this has arisen, it can be helpful to categorise laws in this way.

Considering, however, that a large part of the *FOI Act 1982* is concerned with establishing carve-outs from the general right of access, a better approach perhaps is to consider FOI legislation as a tool for achieving the balance between the disclosure of too much and too little information. As Beaumont J said in *Harris v Australian Broadcasting Corporation*,

> in evaluating where the public interest ultimately lies ... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other.[105]

Such an approach was consistent with the original objects clause, which referenced both the right of access and exemptions. Following the amendments, however, the introduction of a new objects clause is more likely to result in a leaning approach towards disclosure.

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100 Moira Paterson, Submission to the Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010,* 2012, 2.

101 Peter Bayne, 'Freedom of Information: Democracy and the Protection of the Processes and Decisions of Government' (1988) 62 *Australian Law Journal* 538, 543.

102 Paterson, above n 28, 2.

103 See, for example, Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978*, (1979), 7, which states that at the time the 'present legal position [is] that generally speaking a person is not entitled to access to information or documents in the hands of the executive government'.

104 For a full examination of the secrecy provisions in Australia, see Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

105 *Re Jennifer May Mcdonald Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell and Michael H Cosb*y [1983] FCA 242; (1983) 78 FLR 236 (4 October 1983).

5.2 The amended *FOI Act 1982*

One of the effects of the *FOI (Reform) Act 2010* was to substitute a new objects clause, which provides in part:

> 3 Objects—general
>
> (1) The objects of this Act are to give the Australian community access to information held by the Government...
>
> (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
>
> (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
>
> (b) increasing scrutiny, discussion, comment and review of the Government's activities ….

This clause follows the recommendation of the ALRC as outlined above, adding references to the democratic purposes to which the legislation is intended to contribute. It goes further than this however: it removes the express reference to the fact that the right of access to information is limited where necessary for the protection of essential public interests. The exemptions themselves still exist, but it seems likely that the removal of the references to exemptions in the objects clause will encourage a 'leaning' approach in favour of disclosure.

5.3 Comparison with the UK

As was the case in Australia,[106] the introduction of FOI legislation in the UK took place within the context of a broader program modernisation.[107] One of the stated purposes of the *FOI Act 2000* (UK) was to create a culture of openness. Jack Straw was of the view that it would 'transform the default setting from "this should be kept quiet unless" to "this should be published unless". By doing so, it should raise public confidence in the processes of Government, and enhance the quality of decision making by the Government.'[108]

Like the *FOI Act 1982*, the UK legislation provides for a general right of access to information. Section 1 of the *FOI Act 2000* (UK) states:

> (1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

106 See section 3.1 above.
107 Cabinet Office, *Modernizing Government Cm 4310* (The Stationary Office, 1999).
108 United Kingdom, *Parliamentary Debates*, House of Commons, 7 December 1999, col 714 (Jack Straw).

(b) if that is the case, to have that information communicated to him.

By contrast with the Australian legislation, however, the *FOI Act 2000* (UK) contains no objects clause.

The omission of an objects clause was fairly common in legislation at this time.[109] Hazell, Worthy and Glover suggest, however, that the omission in the FOI context was because 'it was assumed that FOI was a good thing, which required no separate justification.'[110] They viewed this lack of clearly stated objects as a disadvantage to those interpreting and applying the FOI legislation.[111] In seeking to establish the objectives of the legislation in order to evaluate its success, it was necessary for them to consider extrinsic sources, including the Explanatory Notes[112] and the White Paper, *Your Right to Know, the Government's Proposals for a Freedom of Information Act* ('the White Paper').[113] Of the six most frequently occurring objectives they found that transparency and accountability were the two 'core' aims.[114] These aims, they suggested, were supported by the Information Commissioner interpretation of the legislation in two key cases.[115]

The consideration of such material to establish the objectives of the legislation is useful in the context of assessing its impact. In the context of statutory interpretation, however, extrinsic material is likely to be given less weight than an objects clause.[116] With that caveat in mind, however, it is useful to note that alongside the objectives noted by Hazell et al, the Explanatory Notes gave equal prominence to the existence of exemptions from the duty to disclose.[117] Likewise, the White Paper devotes a section to the situations in which withholding information might be in the public

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109 See, for example, *Data Protection Act 1998* UK c 29, *Human Rights Act 1998* UK c 42 , *Registration of Political Parties Act 1998* (UK) c 48 , *Representation of the People Act 2000* UK c 2.

110 Hazell, Worthy and Glover, above n 13, 7.

111 Ibid, 17.

112 *FOI Act 2000 (UK)*, Explanatory Notes.

113 Cabinet Office (UK), *Your Right to Know: The Government's Proposals for a Freedom of Information Act,* (The Stationary Office, 1997).

114 According to Hazell, Worthy and Glover, above n 13, 18, the six most frequently mentioned in the official British literature were: increasing the openness and transparency of government; increasing the accountability of government; improving the quality of government decision-making; improving public understanding of government; increasing public trust in government; increasing public participation in government.

115 UK Information Commissioner *Decision FS50074589 (Department for Education and Skills)* 4 January 2006 and UK Information Commissioner *Decision FS50083603 (Department for Culture, Media and Sport)* 11 July 2006.

116 In the Australian context, for example, R.S. Geddes notes that whilst s 15 AA of the *Acts Interpration Act 1901* (Cth) required the purpose of the legislation to be taken into account the outset and not just in the case of ambiguity, section 15AB allowed the consideration of extrinsic material only to confirm the ordinary meaning of the statute or to determine the meaning where the ordinary words are ambiguous or lead to unreasonable conclusions. See R.S Geddes, 'Purpose and Context in Statutory Interpretation' in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission for New South Wales, 2007) 127, 129-133.

117 *FOI Act 2000 (UK)*, Explanatory Notes, ss1–2.

interest,[118] and makes particular reference to 'the importance of internal discussion and advice being able to take place on a free and frank basis'.[119] Thus it might be argued that such material lends itself towards a construction of the legislation that requires all competing interests to be balanced, rather than one which leans in favour of disclosure.

5.4 Conclusion — the changing purpose of FOI law

Notwithstanding a commonly held view that the purpose of FOI legislation is to promote transparency, both the original *FOI Act 1982* and the *FOI Act 2000* (UK), in different ways, expressly reflected the need to balance competing interests. The original *FOI Act 1982* contained an objects clause that gave equal prominence to the right of access and the exemptions that were intended to protect competing rights and public interests. The *FOI Act 2000* (UK) contained no objects clause, but extrinsic background material discusses rights of access and exemptions in parallel.

The amended *FOI Act 1982* takes a different approach. The original objects clause was replaced by one which contained reference to the values that the legislation is intended to promote, a course of action that had been recommended in the *ALRC (Open Government) Report.* It went further than that recommendation, however, in removing the reference to exemptions. In doing so it changed the emphasis from the need to strike the correct balance, towards promoting disclosure. This change of emphasis is also evidenced in the changes that were made to the public interest test, as described below.

6 The exemption for deliberative documents and the public interest test

> *[*N]otions of the public interest constitute the basic rationale for the enactment of, as well as the unifying thread running through the provisions of, the FOI Act.[120]

This quote from the case of *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* relates to the Queensland legislation but applies just as neatly to the Australian federal legislation. The 'basic rationale' is that it is in the public interest for government to be as open as possible; the 'unifying thread' is that exemptions from disclosure are based either expressly or impliedly on public interest concerns. If the primary purpose of FOI legislation is to strike a balance between rights of access and other interests, then one of the key tools it uses to do so is the public interest test. It can therefore be said that the public interest in access to information plays a dual

118 Cabinet Office (UK), above n 113, chapter 3.
119 Ibid, 20.
120 *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr 2; (1993) 1 QAR 60 (30 June 1993), 74.

role: it is one of the underlying principles of the legislation and it is also one of the factors to be weighed in the balance when deciding whether the public interest requires disclosure.

As described above deliberative documents were exempt from release under s 36 of the original *FOI Act 1982*, and under s 47C of the amended Act. Simon Murray has noted that this exemption is 'concerned with instances where public disclosure of a document would prejudice the integrity and viability of the decision making process'.[121] The task before decision-makers in applying this exemption is to decide whether the public interest in effective policy and decision-making outweighs the public interest in access to information. The following sections explain how the 2010 amendment changed the public interest test, and argue that whilst this may result in greater disclosure, it may be at the expense of the protection of the broader public interest.

6.1 The original *FOI Act 1982*

Section 11 of the original *FOI Act 1982* established a legally enforceable right to information.[122] The onus was on Government to show why, in particular cases, an exemption applied and that disclosure would be contrary to the public interest. In relation to deliberative documents, the relevant exemption was set out in s 36:

> **Internal working documents**
>
> 36(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—
>
> (a) would disclose matter in the nature of, or relating to, opinion advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
>
> (b) would be contrary to the public interest.

The concept of public interest was not defined in the legislation. In other contexts it has been described as something that is of serious concern or benefit to the public, not merely of individual interest,[123] Public interest does not mean of interest to the public, but in the interest of the public.[124] In the FOI context the 1979 Senate Standing Committee described the concept of public interest as 'a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general — as opposed to merely private — concern.'[125] It is an

121 Murray, above n 11, 64.
122 See section 3.1 above.
123 *British Steel Corporation v Granada Television Ltd* (1980) 3 WLR 780.
124 *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.
125 Senate Standing Committee on Constitutional and Legal Affairs, above n 103 [5.25].

amorphous concept, although Richard Mulgan says that the difficulty is not so much with defining it as with applying it, because it is most commonly used 'in contexts where opinions are divided or balances must be struck'.[126] That is certainly the case in the FOI context.

The lack of definition of the public interest in the original *FOI Act 1982* can therefore be seen either as a strength or a weakness. It was a strength because it allowed all relevant factors to be taken into account and given appropriate weight, making it highly adaptable to circumstances and changes over time. But it was a weakness because it left open two questions:

- what public interest concerns might outweigh the interest in disclosure, and
- what weight ought to be given to those public interests?

In the first decades of FOI decision making in Australia, s 36 case law exposed significant differences of opinion between the Government and others as to when the release of deliberative material was in the public interest, and around who should be the final arbiter of such decisions. A key Government concern was that disclosure of information would, in some cases, prejudice the effectiveness of the decision-making process. The argument echoed similar arguments in the public interest immunity context: that at least a certain level of 'secrecy is necessary to candour, that candour is necessary to effective decision making by the executive, and that enhancing the effectiveness of executive decision making serves the public interest.'[127] The AAT was initially sympathetic to such arguments,[128] and in *Howard v Treasury*[129] identified 5 factors ('The Howard Factors') which weighed against disclosure under s 36:

(i) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;

(ii) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

(iii) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

(iv) disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;

126 Richard Mulgan, 'Perspectives on the Public Interest' (2000) 95 (March 2000) *Canberra Bulletin of Public Information* 5, 5.

127 Gerard Wetlaufer, 'Justifying Secrecy: An Objection to the General Deliberative Privilege' (1990) 65 *Indiana Law Journal* 845, 849.

128 The approach of the AAT is explored in Spencer Zifcak, 'Freedom of Information: Torchlight but not Searchlight' (1991) 66 *Canberra Bulletin of Public Administration,* 162.

129 *Re Howard and the Treasurer* (1985) 7 ALD 626, [1985] AATA 100 (29 April 1985).

(v) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision maker and may prejudice the integrity of the decision-making process.[130]

Subsequent Government reliance on these factors led to academic criticism, however.[131] Many were uncomfortable with the notion that transparency and effective decision-making are mutually exclusive and suggested that Government's ability objectively to assess the public interest in this context is compromised by an adversarial culture of secrecy. Rhys Stubbs referred to 'Australia's antagonistic environment of public administration'[132] and Gerard Craddock spoke of a 'longstanding battle between the courts and Ministers and their bureaucracies for control over the release of Government information'.[133] Although the AAT had started to take a more critical approach to Government public interest arguments prior to the amendments,[134] these criticisms, along with the criticism of conclusive certificates (see below) formed the backdrop to the legislative amendments of 2009-10.

6.2 The amended *FOI Act 1982*

The *FOI (Reform) Act 2010* separated exemptions into two categories. 'Absolute' exemptions' are those which require no separate consideration of the public interest.[135] 'Conditional' exemptions are those which require the application of a separate, additional, public interest test; even where a document falls within the exemption, it will be released unless the Government can demonstrate that to do so would be contrary to the public interest. The 'deliberative documents' exemption previously found in s 36 was re-cast as a conditional exemption in s 47C,[136] and a single public interest test was applied to all conditional exemptions by s 11A(5):

> The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

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130 Ibid, [20].

131 The criticism was particularly acute in relation to arguments around the impact of disclosure upon the willingness of public servants to give frank and candid advice See for example, Roman Tomasic, 'Administrative Law Reform: Who Benefits?' (1987) 12 *Legal Service Bulletin* 262 and, following the reforms, Rick Snell, Submission to the Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010,* 2012.

132 Stubbs, above n 59, 672.

133 Gerard Craddock, 'The Freedom of Information Act 1982 and Review on the Merits' (1985) 8 *University of New South Wales Law Journal* 313, 314.

134 In *Bartlett and Department of Prime Minister and Cabinet* [1987] AATA 728 (31 July 1987;)12 ALD 659) the AAT found that to accept a class-claim argument would be to undermine the purpose of the Act. The cases of *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589; and *Fewster and Department of Prime Minister and Cabinet (No 2)* [1987] AATA 722 (31 July 1987) cast doubt on the appropriateness of relying on 'frankness and candour' arguments. Rick Snell pointed to similar developments in Queensland in Snell, above n 98.

135 See above n 43 and 44 for lists of absolute and conditional exemptions.

136 See section 3.2 for text of s 47C.

The requirement to apply a public interest test when considering the release of deliberative documents has been in place since 1982; what is striking about the amendments is the attempt, if not to define the public interest, then to determine which factors may and may not be taken into account when considering the public interest. Although this can be seen as a response to the perceived problems with the Government application of the public interest test, this thesis contends that it has compromised the ability of decision-makers to protect the broader public interest.

6.2.1 Certain factors cannot be taken into account

Section 11B lists factors that may, and may not, be taken into account when conducting the public interest balancing test. These are divided into 'factors favouring access' and 'irrelevant factors'. As a result of the insertion of s 11B the following factors 'must not be taken into account when deciding whether access to the document would, on balance, be contrary to the public interest':[137]

> (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
> (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
> (b) access to the document could result in any person misinterpreting or misunderstanding the document;
> (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
> (d) access to the document could result in confusion or unnecessary debate.

Simon Murray has confirmed that the effect of this approach is to prohibit reliance on two of the Howard Factors (the seniority of the author of the document and the fact that disclosure might result in confusion or debate), and to cast doubt on the appropriateness of relying on the remaining Howard Factors.[138] Indeed, Antony Byrne indicated an express intention to reduce reliance upon 'arguments ordinarily associated with the deliberative documents exemption.'[139]As noted above, reliance upon these factors under the original *FOI Act 1982* had in any case increasingly been seen as inappropriate.[140] What the legislative change means, however, is that these factors move from being

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137 *FOI Act 1982* s 11B(4).

138 Murray, above n 11. This receives support from the *Guidelines* published by the *OAIC*, which state that arguments that disclosure will inhibit free and frank debate are not 'consistent with the new objects clause of the FOI Act (s 3) and the list of public interest factors favouring access in s 11B(3).' Office of the Australian Information Commissioner, above n 39 [6.77]. Although frankness and candour arguments have been accepted as a reason for non-disclosure in a number of cases, for example *Crowe and Department of the Treasury* [2013] AICmr 69 (29 August 2013) and in *Parnell and Dreyfus and Attorney-General's Departmen*t [2014] AICmr 71 (30 July 2014).

139 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 2009, 12971–3 (Anthony Byrne, Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade).

140 See above n 134 for cases in which reliance on these factors had not been accepted.

something that ought not *ordinarily* be taken into account, to factors that can never be taken into account, in any circumstances, at any time.

This approach appears to rest on the assumption that reliance on these factors can never be in the public interest. It is certainly possible that Government may rely on some of the factors in s 11B out of self-interest —for example the information might be withheld to protect the Government from criticism. But there may be situations in which reliance on the factors listed in s 11B is necessary to protect the *public* interest. For example Judith Bannister has noted that a common answer to arguments that the release of information might cause confusion is to disclose more information that puts the matter in context.[141] However there may be exceptional cases in which this would not be possible, for example where the time limits in the legislation require the release of information immediately prior to a referendum or election in circumstances where there was insufficient time for background information material to be released and digested before polls opened. It is difficult to see how legislation which prevents the possibility of confusion in these circumstances even being considered can be in the public interest. Thus whilst the amendment may have reduced the risk of Government acting in self-interest, it may also prevent decision-makers from relying on these factors to properly protect the public interest.

The problems around rigid rules on the public interest were noted by the *ALRC (Open Government) Report* which stated that the public interest 'will change over time and according to the circumstances of each situation. It would be impossible to define the public interest yet allow the necessary flexibility'.[142] It went on to say that 'just as what constitutes the public interest will change over time, so too may the relevant factors. For this reason, the Review considers that administrative guidelines issued pursuant to the Act are generally preferable to legislative guidelines.'[143] This is consistent with Richard Mulgan's view that judgements about the public interest are essentially political in nature: that what constitutes the public interest shifts with time, circumstances and changing political views. [144]

It is unclear why the amendments went against the recommendations of the *ALRC (Open Government) Report* by incorporating a list of factors in the legislation.[145] If it was an attempt to prevent Government from acting in a self-interested way, it was misguided. First, whilst it may reduce self-interested reliance on the factors in s11B, it also prevents reliance on such factors even

141 Judith Bannister, 'Thinking Spaces; the Exclusion of Deliberative Matter from FOI Disclosure' (Lecture delivered at the Institute of Advanced Legal Studies, London, 17 June 2015).

142 Australian Law Reform Commission and Administrative Review Council, above n 40 [8.13] .

143 Ibid [8.14] The only exception was a recommendation that the legislation should make clear to decision makers that 'potential (or actual) embarrassment is not a valid criterion against which to balance the public interest in disclosure of information.'

144 Mulgan, above n 126, 9.

145 An FOI request has submitted to the Attorney General's Department seeking documents that show the background to the decision to include these factors in the legislation. See details in Annex B.

where that would be in the public interest. Second, it tackles the means (reliance on particular factors) rather than the ends (avoiding self-interested behaviour). If there is an evidence-based concern that Government is routinely acting in a self-interested way, then the causes of this behaviour needs to be addressed; the list of factors in 11B may prevent some of the effects of such behaviour but it is unlikely to address the cause. Whatever the reason for this approach, the result is that decision-makers may find that they can no longer take all relevant factors against disclosure into account in all cases. In that respect, the decision making process in individual cases is tilted towards disclosure.

6.2.2 The weight attributed to relevant facts

The relevance of factors is one of the aspects to balancing the public interest test. The other element is the weight that ought to be attributed to those factors. The original public interest test in s 36 provided a high degree of flexibility in this respect. The amended legislation has changed this. The *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* ('*Hawke Review*') said:

> The test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making. It is not enough to withhold access to a document if it meets the criteria for a conditional exemption. Where a document meets the initial threshold of being conditionally exempt, it is then necessary for a decision-maker to apply the public interest test.[146]

This is essentially a restatement of the principle of maximum disclosure: that disclosure ought to be the default position, which can be resisted only where to disclose is contrary to the public interest. However the legislation goes further than this, promoting disclosure by making it easier to make a case for the public interest in transparency, and more difficult to make a case for competing public interests. It does this by including a list of factors that support disclosure, but omitting to include a list of factors that support withholding information.

6.2.2.1 List of factors supporting disclosure

Section 11B sets out a list of factors that will support disclosure of information when conducting the public interest balancing exercise:

> **Factors favouring access**
>
> (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
>
> (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
>
> (b) inform debate on a matter of public importance;
>
> (c) promote effective oversight of public expenditure;

146 Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (2013), 42.

(d) allow a person to access his or her own personal information.

The way in which the list is framed, however, does not simply ensure equal protection for the public interest in access to information; it gives greater protection to the public interest in disclosure than to those public interests which might be protected by non-disclosure. It does this by drafting the factors in favour of disclosure so broadly that it is probable that at least one will be present in every case. Even if the particular disclosure in question does not relate to a matter of public importance or expenditure, the reference to the objects of the legislation means that all that needs to be made out is that the disclosure will contribute to 'increasing public participation in Government processes', or to 'increasing scrutiny, discussion, comment and review of the Government's activities'.[147] As the legislation is 'requestor blind' — that is, the Government is unable to take account of the likely use to which the information will be put[148] — it does not matter whether the release of information will actually contribute to these objects, only that it could potentially do so. By contrast, Government arguments about the harm that might result from disclosure of deliberative documents are generally required to be specific and to be accompanied by persuasive evidence.[149] The effect of this amendment is that whilst specific evidence is required in order to withhold information, generic arguments are likely to be sufficient to support disclosing information. This results in a 'tilting' towards disclosure.

6.2.2.2 No list of factors to support withholding

This 'tilting' effect of the amendments is intensified by the fact that s 11B contains no list of factors that may be used to support non-disclosure. In his second reading speech, Anthony Byrne said that this was 'in keeping with the intention of the reforms to promote disclosure'.[150] The Explanatory Memorandum[151] and the *Hawke Review* suggest a slightly different explanation:

> Factors favouring non-disclosure are not listed because most conditional exemptions include a harm threshold, for example, that disclosure would, or could be reasonably expected to, cause damage to or have a substantial adverse effect on certain interests. Where a decision-maker is satisfied that an initial harm threshold is met that is in itself a factor against disclosure.[152]

147 See objects clause as set out above at section 5.2.

148 Maeve McDonagh and Moira Paterson, 'Freedom of Information: Taking Account of the Circumstances of Individual Applicants' (2010) (Jul) *Public Law* 505.

149 See, for example, *Re Cleary and Department of the Treasury* (1993) 31 ALD 214 at 221–arguments about the provision of free and frank advice 'will not be accepted 'in the absence of compelling evidence'; likewise in *Fewster and Department of Prime Minister and Cabinet (No 2)* [1987] AATA 722 (31 July 1987),11, such arguments will not be accepted 'unless a very particular factual basis is laid for the making of the claim'.

150 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 2009, 12971–3 (Anthony Byrne, Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade).

151 Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009 (Cth), 13.

152 Hawke, above n 146, 42.

This analysis does not assist in relation to the exemption for deliberative documents as s 47C does not include a harm threshold: it exempts from disclosure any 'deliberative matter'. This places those seeking to demonstrate the application of the exemption in a difficult position; there is no legislative list of factors that may support non-disclosure, and although there is an understanding that the exemption relates to effective decision-making, the exemption itself provides no guidance. The OIAC guidance lists factors for and against disclosure but makes no specific reference to potential harm to the deliberative process.[153]The *Hawke Review* acknowledged this and took the view that the 'absence of a clear indication of the harm that the exemption is designed to protect results in the exemption being subject to differing interpretations and difficult to apply.'[154]

The absence of a list of factors favouring non-disclosure and a 'harm threshold' in the exemption itself, combined with the generic factors that may be used to support disclosure, mean that decisions about the release of deliberative documents are likely to be weighted in favour of disclosure. This can be contrasted with the approach in the UK.

6.3 Comparison with the UK

There are broad similarities between the amended *FOI Act 1982* and the *FOI Act 2000* (UK). Both grant a right of access that is not unlimited: both establish a number of broadly comparable exemptions, which are divided into two categories. *FOI Act 2000* (UK) designates a number of exemptions as 'absolute exemptions.'[155] If a document falls under an absolute exemption, it is exempt with no separate consideration of the public interest. Those exemptions that are not listed as absolute are 'qualified' exemptions to which a single public interest test applies. Qualified exemptions will only be maintained if 'the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'[156] They are therefore comparable with conditional exemptions in the Australian federal legislation.

In relation to the treatment of deliberative documents, however, there are some key differences which mean that the exemption is less likely to be engaged, but that decision-makers have greater flexibility in applying the public interest test.

6.3.1 Engagement of exemption

A combination of factors mean the exemption for deliberative material is less likely to be engaged in the UK. First, there is no single UK exemption covering all deliberative material that can be compared

153 Office of the Australian Information Commissioner, above n 39, Part 6—Conditional Exemptions [6.29].
154 Hawke, above n 146, 48.
155 *FOI Act 2000 (UK)* s 2(3).
156 Ibid s2(2)(b).

directly with s 47C of the *FOI Act 1982*.[157] Rather, such material is likely to fall under either s 35 or s 36, both of which are intended to 'protect the delivery of effective central Government.'[158] Section 35 is a 'class based' exemption that 'preserves a safe space to consider policy options in private': [159]

> **s 35 Formulation of government policy, etc.**
>
> (1) Information held by a government department ... is exempt information if it relates to—
>
> (a) the formulation or development of government policy,[160]
>
> (b)...

Section 36 is a 'harm based' exemption that 'is intended primarily to safeguard the 'safe space' in which advice is provided to Ministers or views exchanged by officials in relation to departmental business'.[161] Section 36 applies to information that is not exempt under s 35 (that is, they must be used in the alternative) where disclosure would, or would be likely to inhibit

> (2)(b) (i) the free and frank provision of advice, or
>
> (ii) the free and frank exchange of views for the purposes of deliberation, or
>
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. [162]

The UK exemptions are therefore narrower than s 47C of the *FOI Act 1982*: deliberative material unrelated to policy would not be exempt under s 35. Nor would it be exempt under s 36, unless disclosure would adversely affect the delivery of effective government in one of the specified ways.[163]

A second difference is that s 36 applies only when a 'qualified person' determines that such harm or prejudice exists, in his or her reasonable opinion. In the case of Government departments, that person is a Minister of the Crown. This function cannot be delegated and s 36 is the only exemption in the UK legislation to take this approach. This is likely to ensure engagement of senior staff, for example by requiring that '[b]efore consulting a Minister, MOD policy requires that where there are grounds to withhold information..., this must be confirmed at 1* (SCS or military equivalent) level or

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157 It also covers ministerial communications, provision of advice by any of the Law Officers, and the operation of ministerial private offices.

158 UK Ministry of Defence, 'FOI Exemptions: Section 36 (Prejudice to Effective Conduct of Government Affairs)' (2013), 2.

159 UK Information Commissioner, 'Government Policy (section 35) version 2.0' [6].

160 Note that s 35 relates only to policy of a government department; policy of local government or other bodies to which *FOI Act 2000* (UK) relates is covered by s 36.

161 UK Ministry of Defence, above n 158, 2.

162 Section 36 also covers cabinet communications; this category of documents is not relevant for present purposes.

163 Philip Coppel, 'The FOI Act 1982 and the FOI Act 2000 (UK) : Are There Lessons We Can Learn From Each Other? ' (July 2006) 49 *Australian Institute of Administrative Law Forum* 1, 7.

above.'[164] It also appears that the requirement for the Minister personally to decide that the exemption applies is taken seriously:

> The Minister must have sight of all the information within scope of the exemption.... The Minister must be fully informed of all the circumstances of the case in order to make a decision whether or not disclosure would have the consequences claimed. It is not sufficient to offer to provide the information if the Minister wishes to see it.[165]

It seems likely that the requirement to get personal sign-off from the Minister will narrow the range of cases in which the exemption is applied.

6.3.2 Application of the public interest test

The next key difference relates to the application of the public interest test.

Both s 35 and s 36 are qualified exemptions to which the public interest test applies.[166] The effect is to establish a principle of maximum disclosure, with the onus on Government to demonstrate that the exemption applies. To this extent the approach is in line with s 47C of the *FOI Act 1982*. Lord Falconer has noted that this 'put beyond doubt the [UK] Government's resolve that information must be disclosed except where there is an overriding public interest in keeping specific information confidential.'[167]At this stage, however, the approach of the two countries begins to diverge.

First, the *FOI Act 2000* (UK) contains no lists of factors that may not be taken into account when considering the public interest, and no list of factors that support disclosure.[168]

Second, the exemption in s 36 is framed differently. As the following table illustrates, in both the UK and Australia, exemptions take a number of different forms: they may be prejudice-based or class based, and may or may not require the application of a public interest test.

Type of Exemption	**UK**	**Australia**
Class-Based, No Public Interest Test	Section 30 Investigations and Proceedings conducted by public authorities	S 34 Cabinet Documents
Prejudice-based, no public interest test	Section 27 —prejudice to foreign relations	S 33 prejudice to national security,

164 UK Ministry of Defence, above n 158, 2.
165 Ibid, 2.
166 Although s 36 is an absolute exemption insofar as it relates to information held by Parliament.
167 United Kingdom, *Parliamentary Debates*, House of Lords, 14 November 2000, col 143 (Lord Falconer of Thoroton, Minister of State for the Cabinet Office).
168 Although s 35 requires government to be mindful of the particularly strong public interest in providing factual background material.

		defence or international relations
Class-based, with public interest test	Section 35 — policy formulation	S 47C Deliberative Material
Prejudice-based, with public interest test.	Section 36 — Prejudice to effective conduct of government affairs	S 47B(a) Prejudice to Commonwealth State Relations

As noted above, s 47C of the *FOI Act 1982* is a class based, conditional exemption. By contrast s 36 of the *FOI Act 2000* (UK) is a prejudice-based qualified exemption. The effect of this is twofold.

First, the prejudice test gives an indication of the public interest considerations likely to be engaged. It was noted above that one of the key problems with s 47C is that there is an absence of a clear indication of the harm that the exemption is designed to prevent.[169] The UK approach suggests that the addition of a prejudice test to s 47C of the *FOI Act 1982* might have gone some way to meeting this difficulty.

Second whilst in both the UK and Australia central government policy information would be protected under a 'class based, public interest test' exemption, in order to withhold non-policy documents under s 36 of the *FOI Act 2000* (UK) the Government must show *both* prejudice to the effective conduct of government affairs *and* that disclosure is contrary to the public interest. The implication is that prejudice to the effective conduct of affairs is one of the anticipated effects of the FOI legislation, and that this is not, in itself, a sufficient argument for withholding information. As a result, the public interest test is potentially more difficult to satisfy in the UK notwithstanding the absence of lists of irrelevant factors and factors supporting disclosure comparable with those in s11B of the *FOI Act 1982*. Indeed Savage and Hyde have noted that

> a class-based exemption subject to a public interest test will be more easily satisfied than a harm-based exemption which is subject to a public interest test, as the public authority does not have to show prejudicial effect, merely that the information fell within the prescribed category of information.[170]

This suggests that it will be more difficult for central government to withhold non-policy documents than policy documents in the UK. This is not a distinction that appears in Australia, where all deliberative material receives the same, higher, level of protection.

169 See above section 6.2.2.2.

170 Ashley Savage and Richard Hyde, 'Local Authority Handling of Freedom of Information Requests: Lessons from a Research Project' (2013) 19(2) *Web Journal of Current Legal Issues* 5.

6.4 Conclusion

The aim of this research is to consider whether the new Australian FOI legislative framework promotes the greatest level of access to information that is consistent with the protection of other rights and public interests. This thesis contends that it does not.

The amended *FOI Act 1982* includes a list of factors in s 11B that interfere with the public interest balancing exercise. The amendments make it easier for decision makers to demonstrate the public interest in disclosure than the public interest in non-disclosure, by removing from consideration a number of potentially relevant factors, and listing a number of factors in favour of disclosure, which are likely to apply to every case. This constrains the power of the decision maker to draw his or her own conclusions on the relevance and weight of factors in an attempt to promote disclosure. The result is a legislative framework which does promote greater disclosure, but which is not necessarily consistent with the protection of competing rights and interests.

The UK legislation offers an alternative, promoting disclosure by narrowing the scope of the exemptions and requiring Ministerial sign-off. At the same time, it protects competing rights and interests by giving broad discretion to decision-makers to determine the factors that are relevant to public interest decisions in individual cases, and the weight that should be attributed to those factors. This prejudice requirement offers some guidance on the public interest, but stops short of 'tilting' individual decisions in favour of disclosure.

The UK approach is not without difficulties. There is an argument that the 'reasonable' opinion threshold in s 36 is too low, and too subjective. Philip Coppel has argued that this means that 'the most powerful exemption in the Act has the crudest form of review'.[171] There are also questions about why no prejudice test applies to the disclosure of policy documents under s 35, particularly in a context where many MP's 'believed that one of the main purposes of the FOIA was to provide access to information used by ministers and senior civil servants to decide policy'.[172] Nor does the UK approach offer a solution to the perceived problem of Government self-interest. These factors suggest that the UK may not have the balance quite right either.

The purpose of this thesis is not, however, to consider whether the UK legislation could be improved, but to consider whether the Australian legislation strikes the right balance. In reaching a conclusion it is important not to overstate the significance of the reforms. As noted, AAT case-law had already in practice restricted the range of relevant factors, and in many cases these factors would not be determinative. But it is also important to note that prior to the amendments the AAT

171 Coppel, above n 163.

172 The World Bank, *Implementing Right to Information: A Case Study of the United Kingdom* (The World Bank, 2012), 6.

was open to at least considering all public interest argument. Following the amendments, some of these arguments cannot be considered in any circumstances.

The Australian approach implies that because the right of access to information is one of the reasons for the legislation's existence, then the public interest in disclosure ought to be weighted more heavily than other rights and interests. This is a flawed approach. The proper purpose of the legislation is to strike the right balance between competing rights and interests. The Australian approach, which tips the scales towards disclosure in individual cases, is inconsistent with that purpose.

7 Conclusive certificates

The previous section focussed on the new approach to balancing public interest considerations. Another change — the change in final arbiter on public interest decisions —is equally important in considering the impact of the amendments upon the release of deliberative documents. The contention of this thesis is that it should not be assumed that removal of conclusive certificates has resulted in the 'greatest possible disclosure' and that further research should be done to establish whether greater disclosure might result from re-introducing a tightly constrained power of veto.

7.1 The original *FOI Act 1982*

Prior to amendment s 36(3) enabled Ministers to conclusively certify that disclosure of a deliberative document would be contrary to the public interest.[173] Government use of this power in individual cases was the subject of considerable debate.[174] But it was the High Court case of *McKinnon v Secretary, Department of Treasury*[175] ('McKinnon'), a case which Judith Bannister notes was 'fundamentally about who decides what is in the public interest', [176] that provided the impetus for change.

In that case, the FOI editor of *The Australian* newspaper, had appealed to the AAT against two decisions of the Treasury denying him access to documents relating to income tax 'bracket creep'

173 Such a power also existed under ss 33 (documents affecting national security), 33A (documents affecting relations with states), 34 (cabinet documents), and 35 (executive council documents).

174 See, for example the AAT discussion of Government arguments in *Fewster and Department of Prime Minister and Cabinet (No 2)* [1987] AATA 722 (31 July 1987); *Bartlett and Department of Prime Minister and Cabinet* [1987] AATA 728 (31 July 1987;)12 ALD 659 and *Re Howard and the Treasurer* (1985) 7 ALD 626, [1985] AATA 100 (29 April 1985).

175 *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 229 ALR 187; (2006) 80 ALJR 1549 (6 September 2006).

176 Judith Bannister, 'McKinnon v Secretary, Department of Treasury. The Sir Humphrey Clause - Review of Conclusive Certificates in Freedom of Information Applications' (2006) 30 *Melbourne University Law Review* 691, 962. It is interesting to note that in the context of public interest immunity, the courts had determined in 1978 that it was for the court, not the executive, to decide whether the public interest lay in withholding the particular document in issue. See *Sankey v Whitlam* (1978) 142 CLR 1.

under s 36 of the original *FOI Act 1982*. Shortly before the appeals were listed for hearing, the Treasurer issued a conclusive certificate. The AAT upheld the Government refusal to disclose, and held that 'there remains a legitimate potential public interest in letting Government get on with its role without unnecessary intrusion and distractions. Provided the latter view is a reasonable view it will be difficult to upset a conclusive certificate based on it.'[177]On appeal, the High Court rejected an argument that the AAT must conduct a balancing exercise in determining where the public interest lies, and decided that 'if one reasonable ground for the claim of contrariety to public interest exists, even though there may be reasonable grounds the other way, the conclusiveness will be beyond review.'[178]

This conclusion caused concern, in political circles and mainstream journalism [179] as well as in academic circles. Judith Bannister noted that the decision in McKinnon effectively precluded any real review.[180] Anthony Grey agreed, saying that it will always be possible to find 'one reasonable ground' for the issue of a Conclusive Certificate.[181] There was also a concern that conclusive certificates were used to avoid the full scrutiny of merits review rather than to protect the public interest,[182] and that they were being used in non-exceptional cases. According to George Brandis in '11½ years of the Howard government only 12 conclusive certificates were issued. Records for previous Labor governments are very difficult to locate; however, it appears that 55 were issued in the period between 1982 and 1986 alone.'[183]

These statistics do not of themselves demonstrate that conclusive certificates were being used improperly, or that one political party has a greater tendency towards secrecy than another. Ben Worthy noted, for example, that '[s]uccessive governments have made "significant use" of the power of veto preventing the disclosure of information relating to ID cards, government revenue and internal documents relating to immigration and taxation.'[184] Whilst it may be true that more certificates were issued in the four years following the introduction of *FOI Act 1982*, this may have reflected an early caution about how the legislation would operate, which relaxed as time went on.

177 *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, 151.

178 *McKinnon v Secretary, Department of Treasur*y [2006] HCA 45; (2006) 229 ALR 187; (2006) 80 ALJR 1549 (6 September 2006), 222.

179 See, for example, Nicola Roxon, 'Freedom of Information Under Attack', *The Advertiser* (Adelaide), 8 September 2006, 22; 'Calls for Urgent Reform of FOI', *Canberra Times* (Canberra), 7 September 2006 .

180 Bannister, above n176, 971 in which Judith Bannister agreed that the decision in McKinnon effectively precluded any real review. She said that the argument that the Tribunal must balance competing facets of the public interest before determining whether the grounds for the conclusive certificate were reasonable had left open some scope for independent assessment of the public interest in these cases, but that this approach had now been rejected by the Court.

181 Anthony Gray, 'FOI and the Freedom of Political Communication' (2007) 12(1) *Deakin Law Review* 193, 210.

182 Frank Devine, 'Captain Ahab and the Bureaucrats', *Quadrant* 2006, 48, 49.

183 Commonwealth, *Parliamentary Debates*, Senate, 13 August 2009, 4848-9 (George Brandis),4848.

184 Worthy, above n 19, 229.

Further, whilst these statistics suggest that the proper use of conclusive certificates was open to interpretation this does not of itself lead to a conclusion that abolition was the only way forward.

In fact, the *ALRC (Open Government) Report* considered the issue of conclusive certificates in 1995, and whilst it was one of the few measures upon which the joint reviewing bodies did not agree, neither advised abolition.[185] The Australian Law Reform Commission ('ALRC') were of the view that there should be no conclusive certificates for deliberative documents whilst the Administrative Review Council ('ARC') considered that conclusive certificates might sometimes be justified, especially where documents related to Cabinet material. The ARC view was that special conditions might be used to alleviate concerns of misuse, for example requiring the Minister to specify reasons for the certificate and to limit its duration, and to advise the OAIC[186] that the certificate had been issued. The *ALRC (Open Government) Report* also considered the limited capacity of the AAT to review conclusive certificates, and found that the obligation to 'advise Parliament by tabling a notice in both Houses and then reading it in the House in which he or she sits … imposes a considerable and sufficient discipline on Ministers'[187] and that improper practices could be curbed by granting oversight of such matters to the OAIC.[188] In light of these recommendations it is interesting to note that the approach of the 2009 reforms was to abolish conclusive certificates entirely.

7.2 The amended *FOI Act 1982*

The *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) repealed the power to issue conclusive certificates, and granted jurisdiction to the AAT to undertake full merits review of any exemption claim brought before the AAT. This measure 'reduced the determinative powers of Government in withholding documents from public disclosure, enabling independent review to occur throughout the FOI process.'[189] The OAIC was also granted full powers of merits review on the creation of the office in 2010.[190] This means that final arbiter of public interest decisions in relation to deliberative documents is the OAIC, AAT or, in cases where there is an appeal on a point of law, the courts.

The repeal of conclusive certificates in 2009 has largely escaped detailed academic scrutiny. Evidence of the reasons behind this measure is difficult to find; rather a general consensus seems to have arisen that conclusive certificates have no place in modern government. From the information available, reforms appear to have been based primarily on four main factors:

185 Australian Law Reform Commission and Administrative Review Council, above n 40, [8.18].
186 The report also recommended the establishment of the office of OAIC. Ibid, chapter 6.
187 Ibid [8.19].
188 Ibid [8.20].
189 Hawke, above n 146, 11.
190 *Australian Information Commissioner Act 2010* (Cth).

- the need to make Government more 'open, accountable and transparent'.[191]
- The historic 'abuse' of conclusive certificates,[192] although no examples are cited in the Parliamentary debates, nor other options for tackling potential abuse considered (for example those suggested by the *ALRC (Open Government) Report*).[193]
- Greater confidence in the independent review process.[194]
- A commitment to implement the *ALRC (Open Government) Report*, although as stated above the *ALRC (Open Government) Report* did not recommend wholesale abolition.[195]

Whatever the reasons for the reform, the effect was to change the final arbiter on questions of public interest in relation to deliberative documents. As Judith Bannister has noted, 'rational minds can disagree' on the question of public interest.[196] As Government is obliged to comply with decisions of the OAIC,[197] it appears likely that this measure will result in the disclosure of information which could previously have been protected by conclusive certificates.

7.3 Comparison with the UK

Under s 53 of the *FOI Act 2000 UK* Government has a right of 'veto' over orders requiring them to disclose information under the legislation: an 'accountable person' (a Minister of the Crown or a Law Officer) may issue a certificate stating that he or she 'has on reasonable grounds formed the opinion that' the government had not breached its duty to disclose information.[198] The effect of the certificate is that the 'accountable person' can substitute his or her view for that of the UK Information Commissioner or the UK Information Tribunal as to where the public interest lies in a particular case.[199] Even compared with the original *FOI Act 1982*, which allowed for the issue of conclusive certificates, the UK power was broader in that it covers all of the exemptions, whilst conclusive certificates in Australia applied only to specified exemptions. When compared to the amended *FOI Act 1982* in which no power exists to issue conclusive certificates at all, the difference is striking.[200]On the face of it, it might seem that the existence of such a power would result in less

191 Commonwealth, *Parliamentary Debates*, Senate, 13 August 2009, 4852 (Joe Ludwig). See also Commonwealth, *Parliamentary Debates*, Senate, 26 November 2008, 7293-4 (John Faulkner), 7293.
192 Commonwealth, *Parliamentary Debates*, Senate, 13 August 2009, 4852 (Nick Xenaphon).
193 Australian Law Reform Commission and Administrative Review Council, above n 40, 8.20.
194 Commonwealth, *Parliamentary Debates*, Senate, 26 November 2008, 7293-4 (John Faulkner), 7293.
195 Ibid.
196 Bannister, above n 15.
197 *FOI Act 1982*, s55N
198 *FOI Act 2000 (UK)*, s53 (2).
199 UK Ministry of Justice, *Statement of HMG Policy: Use of the Executive Override under the Freedom of Information Act 2000 as it Relates to Information Falling Within the Scope of Section 35(1)* .
200 It is even more striking when considering that options are being considered for strengthening the veto in the UK following the outcome of a recent case in which the UK Supreme Court cast doubt on the extent of the veto power, see *R (on the application of Evans) and another v Her Majesty's Attorney General* [2015] UKSC 21. The impact of this case is discussed by Judith Bannister in Bannister, above n

disclosure of deliberative documents in the UK than in Australia. When considering the potential impact of the veto power, however, it is important to consider both the safeguards that have been put in place in order to constrain its use.

The safeguards on the use of the veto take two primary forms: some are legislative, others take the form of policy or Parliamentary commitments. One legislative safeguard is that vetos can be issued only following an order by the Information Commissioner or Information Tribunal that information must be released.[201] Interestingly the issue of a Conclusive Certificate upon review application was considered as an abuse of the power in Australia. The important difference in the UK is that the Government cannot issue a veto on application for review in order to avoid merits scrutiny: it can do so only after full merits review has been conducted and disclosure has been ordered. It may be asked why, if it is minded to issue a veto, the Government is required to go through the review process especially given that, as the Information Commissioner has noted, the process of review costs a considerable amount of public money.[202] What this requirement means, however, is that the Government's public interest arguments will be open to scrutiny even in cases where it exercises the power of veto. This assists the Information Commissioner in the exercise of his power to lay reports before Parliament, a power that he has exercised to critique the Government's use of the veto:[203] Further legislative safeguards exist in the form of the requirement on the relevant Minister to lay a copy of the veto certificate before both Houses of Parliament, enabling direct Parliamentary scrutiny of the decision,[204] and the requirement to set out reasons for the decision when informing the person who sought access to the information.[205]

There are also a number of non-legislative safeguards. During the passage of the Bill, both the Home Secretary and the Lord Chancellor made a commitment that the veto would only be used following agreement with Cabinet Colleagues.[206] This commitment is reflected in the policy statement on the use of the veto in relation to the exemption in s 35, which also states that the veto will be used only in 'exceptional circumstances'.[207] Although policy cannot bind future Governments, in practice this policy has remained largely unchanged despite changes in administration. Thus whilst opposition amendments introducing a 'serious harm' test and enhancing Parliamentary scrutiny were

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15, where she notes that although the UK government has said that it will respond by strengthening the veto, it is not yet clear how this might be achieved.

201 By contrast, issuing a certificate only following an application for appeal has been criticised as an 'abuse' of the Australian system- see section 7.1 above.

202 House of Commons Justice Committee 'Post-Legislative Scrutiny of the Freedom of Information Act 2000 ' (96-1, 3 July 2012)[176].

203 Ibid [172].

204 *FOI Act 2000 (UK)*, s 53(3).

205 Ibid, s 53(6).

206 United Kingdom, *Parliamentary Debates*, House of Commons, 4 April 2000, col 922.and United Kingdom, *Parliamentary Debates*, House of Lords, 25 October 2000, col 433, 441-443.

207 UK Ministry of Justice, above n 199, 6.

rejected,[208] veto decisions in the UK are nevertheless taken seriously and sparingly; the veto power has been used only seven times between 2005 (when the legislation came into force) and 2014.[209]

The use of the veto in the UK has not been without criticism. The UK Information Commissioner has expressed his concern that it is being used in cases that are not truly exceptional, and that if the current approach is maintained it is difficult to see how cabinet minutes will ever be released under the legislation.[210] To that extent, the strength of the non-legislative safeguards might be questioned. Likewise, the use of the veto for 'operational matters of domestic policy', rather than Cabinet discussions, has been criticised as 'a major step backwards towards secrecy and closed government'.[211] However, in other cases, the use of the veto was supported by the Opposition[212] and in several cases the Attorney General has exercised the veto to protect papers of the previous administration.[213] Despite criticism of its use in individual cases, there remains a belief that the 'ministerial veto is a necessary backstop to protect highly sensitive material'[214] and that in relation to the question of what is in the public interest, the ministerial view should prevail over that of the Information Commissioner or Tribunal.

7.4 Conclusion

The difference in approach between Australia and the UK in relation to the final arbiter of public interest decisions is striking. In the UK, Government is able to substitute its judgement of the public interest for that of the Information Commissioner or Information Tribunal. In Australia, the Government is no longer the final arbiter of the public interest. This represents a greater constraint on Government power than was recommended by the *ALRC (Open Government) Report.* The question posed by this thesis, however, is whether this promotes the greatest disclosure possible consistent with the protection of competing rights and interests. To answer this question it is

208 United Kingdom, *Parliamentary Debates*, House of Lords, 14 November 2000col 258. There were similar debates on Lords third reading United Kingdom, *Parliamentary Debates*, House of Lords, 22 November 2000 col 84.

209 Vetos have been issued to prevent the release of (1) the legal advice on military action against Iraq (2) communications on devolution issues (two separate vetos) (3) the National Health Service Transitional Risk Register (5) extracts from Cabinet minutes on the military action against Iraq in 2003.(5) correspondence from Prince Charles to Government departments. (6) HS2 documents. For further details, see Oonagh Gay and Ed Potton, *FoI and Ministerial Vetos* (House of Commons Library, Parliament and Constitution Centre, 19 March 2014).

210 UK Information Commissioner, *Freedom of Information Act 2000. Ministerial Veto on Disclosure of Parts of the Minutes of Cabinet meetings in March 2003: Information Commissioner's Report to Parliament* (3 September 2012).

211 United Kingdom, *Parliamentary Debates*, House of Commons, 10 May 2012, (Andy Burnham) col 156.

212 First veto relating to Cabinet minutes on the military action against Iraq. See Gay and Potton, above n 209, for details.

213 The Attorney General is the only Minister to have access to papers of the previous administration and so the decision on whether to exercise the veto fell to him in the following cases: Devolution Cabinet Minutes; Cabinet Minutes relating to hostilities against Iraq; Correspondence from Prince Charles.

214 House of Commons Justice Committee above n 202, 179.

necessary to consider the potential effect of transferring the power of final decision-making to external review bodies, the first of which is the OAIC.

The *ARLC Report* recommended against giving the OAIC the dual functions of reviewing Government decisions and providing guidance and policy advice on the basis that it might give rise to 'a conflict of interest and a perception of a lack of independence.'[215] The OAIC does not claim to be objective; it promotes a pro-disclosure culture:

> The Australian Information Commissioner, supported by the Freedom of Information Commissioner, works to promote awareness and understanding of the FOI Act among both agencies and the public, **promote a pro-disclosure culture** across government and provide external merits review of FOI decisions made by agencies and ministers.[216] (Emphasis added)

There is some evidence to suggest that the OAIC is more likely to decide that the public interest is in favour of disclosure of deliberative documents than the Government, with the OAIC ordering full or partial disclosure in 66% of s 47C cases from 2011-14.[217] The fact that the OAIC is more likely to order disclosure than Government, however, does not necessarily mean that the abolition of conclusive certificates is in itself likely to lead to significantly greater disclosure. First, the OAIC is not the final avenue of review; if the Government is dissatisfied with the OAIC review, it can apply to the AAT for review under s 57A, and can appeal to the courts on a point of law. Second, because there was no requirement under the original *FOI Act 1982* for cases to undergo merits review before conclusive certificates were issued, it is not possible to say whether the AAT would have disagreed with the Government's interpretation of the public interest test in cases in which conclusive certificates were issued under the original *FOI Act 1982*. This can be contrasted with the UK position, in that vetos are, by definition, issued in cases where the Government and Information Commissioner or Information Tribunal disagree over whether information ought to be released. So the fact that the OAIC or other review bodies might be more likely to order disclosure provides no evidence, in itself, upon which to base a conclusion that the abolition of conclusive certificates will to lead to greater disclosure.

In fact, it is necessary to consider whether the converse might be true. Whilst the statistics in Annex A cannot support any conclusions about the effect of the abolition of conclusive certificates, they do suggest that the Australian Government and the OAIC will not always concur in their application of s 47C. It is therefore possible that in the absence of a power to issue conclusive certificates, the Government might seek other ways to control disclosure. Until such potential effects have been

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215 Australian Law Reform Commission and Administrative Review Council, above n 40, [6.20].

216 Office of the Australian Information Commissioner, *About Freedom of Information: The OAIC's Role in Freedom of Information* <http://www.oaic.gov.au/freedom-of-information/about-freedom-of-information>.

217 See Annex A for details.

considered and measured, it cannot be assumed that the abolition of conclusive certificates has resulted in greater disclosure.

For example, Alasdair Roberts has suggested that FOI legislation motivates a 'doctrine of resistance'[218] and notes a range of mechanisms which Government might use to resist disclosure, including a decline in candour and changes in record-keeping practices.[219] Such practices are often referred to when describing the 'chilling effect' that is said to result from disclosure obligations under FOI legislation.[220] Roberts notes that there is little good research on the effect of transparency on record keeping and quality of advice. It seems possible that its existence may depend on the specific legislative framework and political context. For example, whilst Ben Worthy found no evidence of a 'chilling effect' on frank and candid advice in the UK,[221] Roberts notes (albeit on the basis of a smaller-scale study) that such an effect has been observed in Canada.[222] There were early findings that no such effect had been experienced in Australia,[223] but is possible that this may have changed following reforms that remove government control. Limited attempts have been made to discover the impact of the reforms, with one of the terms of reference of the *Hawke Review* being to consider whether there has been an impact on frank and candid advice. However its conclusion 'that officials should be happy to publicly defend any advice given to a minister and if they are not happy to do so then they should rethink the advice'[224] is overly simplistic and does not engage with the possibility that officials might stand by the quality of their advice without considering its release to be in the public interest. The evidence upon which this conclusion was based was also questionable. The Review simply stated that it 'preferred the view' of a single submission,[225] which is at odds with subsequent statements from the Secretary to the Treasury, that

> open policy debate means people have got to be candid. And at the moment a lot of it is done orally, which is a pity. It's a pity for history and it's a pity because I'm not smart enough to think quickly on my feet. And writing something down is a great discipline.[226]

It is important, therefore, that systematic evaluation of the legislation takes place in order to establish whether an increase in disclosure avoidance has been experienced following the

218 Roberts, above n 89, 118.
219 Ibid, 112-13.
220 House of Commons Justice Committee above n 202 [145].
221 Worthy, above n 65, 571.
222 Roberts, above n 89, 112.
223 Robert Hazell had noted that there was no such evidence in 1989 under the original *FOI Act 1982*. See Robert Hazell, 'Freedom of Information in Australia, Canada and New Zealand' (1989) 67(Summer 1989) *Public Administration* 189, 204-5.
224 Hawke, above n 146, 48.
225 John T Woods, Submission to the Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010,* 2012.
226 John Fraser (Secretary to the Treasury), quoted in Stephen Easton, 'FOI Laws: Fixing the Chilling Effect on Frank Advice' (18 June 2015) *The Mandarin* http://www.themandarin.com.au/40043-abbott-takes-secrecy-new-heights-public-servants-care/?pgnc=1.

amendments. Until this has been done it cannot be assumed that the abolition of conclusive certificates led to greater overall levels of disclosure.

Further, even if greater disclosure has resulted from the abolition of conclusive certificates, it is possible that still greater disclosure might have resulted from allowing a limited power of veto to remain in return for a more pro-disclosure approach to other elements of the legislation. In the UK, for example, whilst the power of veto remains, Cabinet documents are subject to a qualified instead of an absolute exemption, and national security documents are included within the ambit of the Act. Jack Straw has stated that during the negotiations that preceded the *FOI Act 2000* UK being passed, 'a deal was struck' to strengthen some of its provisions, and that this was possible due to the inclusion of the veto; without the veto the legislation would have been dropped.[227] It is possible that had a limited power of veto been allowed to remain a similar 'deal' might have been possible in Australia, where Cabinet documents are absolute exemptions, and where the same legislation that abolished conclusive certificates also excluded from the ambit of the legislation a significant range of national security documents.[228]

In conclusion, the rhetoric that surrounded the abolition of conclusive certificates suggested that opening Government decisions to merits review by the OAIC, AAT and the courts would automatically increase disclosure. This thesis contends that the analysis and available evidence does not support such a conclusion. Further, even if the abolition of conclusive certificates has resulted in greater disclosure, it does not necessarily mean that it is the greatest possible disclosure that might have been achieved. Comparison with the UK suggests that greater overall disclosure might result from allowing a more limited power of veto to remain, but taking a more pro-disclosure approach to other exemptions. The contention of this thesis is therefore that it should not be assumed that removal of conclusive certificates has resulted in the 'greatest possible disclosure' and that further research should be done to establish whether greater disclosure might result from re-introducing a tightly constrained power of veto.

8 Practical refusal and fees

This thesis set out to establish to whether the amended *FOI Act 1982* promotes disclosure to the greatest extent possible consistent with the protection of competing rights and interests. The primary focus is the substantive provisions—the objects clause, the exemption for deliberative documents and the power to issue conclusive certificates. However procedural and financial provisions can also operate either to promote or discourage disclosure. This thesis therefore

227 House of Commons Justice Committee above n 202, [169].

228 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth), sch 1, s 2.

concludes with a brief consideration of the provisions relating to access fees and the 'practical refusal' exemption. It concludes that the legislative framework in this respect does not promote the greatest possible levels of disclosure.

8.1 Fees

According to Moira Paterson the 'requirement to pay charges for accessing documents is a common feature of FOI legislation' as a way of reducing the overall costs of administering the legislation.[229] The OAIC has acknowledged that 'access charges are a way of controlling and managing demand for documents,'[230] although the way it does so is perhaps less transparent than the application of substantive exemptions. Charges that are too high, however, have the potential to undermine the objects of the legislation. In 2009 Joe Ludwig (then Cabinet Secretary and Special Minister of State) acknowledged that 'prohibitive costs and delays' were major impediments to the success of the original *FOI Act 1982*.[231] Paterson agreed that costs of access were problematic.[232] Such concerns formed the backdrop to the Labor Party election commitment 'to ensure that charges were 'not incompatible with the objects of disclosure and transparency'.[233] The following section considers whether the amendments made in response to these concerns ensured the greatest possible levels of disclosure.

8.1.1 Original *Charges Regulations*

The charges payable prior to the amendments were set out in the *Freedom of Information (Charges) Regulations 1982* (Cth)[234] ('*Charges Regulations'*), which provided that Government should facilitate public access to Government information promptly and at the' 'lowest reasonable cost'.[235] In furtherance of this aim the regulations provided that charges could not be inflated as a result of a document being filed incorrectly.[236]

The *Charges Regulations* made provision for two types of charge. First, there were a number of standard application fees that applied to all applications. Second, additional charges were calculated on the basis of the time taken to deal with individual requests. A Schedule set out the charges that could be imposed, including a $30 application fee and a fee of $40 fee for internal reviews, and a charge of $20 per hour for decision-making time. Charges could be levied irrespective of whether

229 Paterson, above n 28, 138.
230 Office of the Australian Information Commissioner, *Review of Charges Under the Freedom of Information Act 1982 : Report to the Attorney General* (February 2012) (foreword).
231 Joe Ludwig, 'The Freedom of Information Act: No Longer a Substantial Disappointment' (2010) 59 *Admin Review* 5, 12.
232 Paterson, above n 28, 139.
233 Office of the Australian Information Commissioner, above n 230, foreword.
234 *Freedom of Information (Charges) Regulations 198*2 (Cth)
235 Ibid, reg 3(4).
236 Ibid, reg 2(2).

access was ultimately granted but Ministers had a discretion to remit the application fee[237] and other charges.[238] In deciding whether to exercise this discretion Ministers were required to take into account whether the fee or charge would cause financial hardship, and whether access to the information was in the public interest.

These charges received relatively little academic attention, although Moira Paterson noted that 'to the extent that they make the cost of access prohibitive, they frustrate the objects which the legislation is intended to achieve'.[239] She noted that the primary barrier to access was not the application fee but the other charges for access, due to the fact that the 'factors used to calculate them may result in figures that are not only very substantial but also difficult to estimate accurately in advance' which creates the potential for large estimates to be used as a deterrent to access.[240] The Commonwealth Ombudsman has also suggested that the discrepancy between the charges estimated and those actually collected suggests that some agencies may be giving unreasonably high estimates.[241] It is noteworthy, then, that the 2010 revisions to the *Charges Regulations* were focussed primarily on application fees, rather than the way in which other charges are calculated.

8.1.2 Amended *Charges Regulations*

The *FOI (Reform) Act 2010* inserted s 11A(1)(b) into *FOI Act 1982,* which provided that the right of access only applies if 'any charge that, under the regulations, is required to be paid before access is given has been paid'. This in itself suggests a shift in approach; that following the amendment the right of access does not arise until specified charges have been paid, although the new objects clause provides

> S 3 (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

The charges, as before, are set out in the Schedule to the *Charges Regulations*. However the *Freedom of Information (Fees and Charges) Amendment Regulations 2010 (No. 1)* (Cth) made a number of changes, removing the application and internal review fees and providing that the first 5 hours of decision making time is free. There is no longer any fee for accessing personal information, or in cases where no answer is provided within the timeframe of the Act.[242] It was anticipated that these changes would bring about improvements to access.[243]

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237 *FOI Act 1982*, s 30A.
238 Ibid, s 29(4).
239 Paterson, above n 28, 139.
240 Ibid, 139.
241 Commonwealth Ombudsman, *Needs to Know: Own Motion Investigation into the Adminsitration of the Freedom of Information Act 1982 by Commonwealth Agencies* (1999), [4.14].
242 *Freedom of Information (Fees and Charges) Amendment Regulations 2010 (No. 1)* (Cth)
243 Ashley Tsacalos and Catherine Kelso, 'Australia: Changes to Commonwealth FOI Fees and Charges' (21 November 2010) *Mondaq*

However, the provisions relating to the calculation of charges, which Paterson had noted as the key barrier to access prior to amendment, remained largely unchanged, with departments still able to charge for 'thinking time' . Although making the first five hours of decision-making time free will have gone some way to reducing charges, a comparison with the UK illustrates that more could have been done to ensure greater levels of access.

8.1.3 Comparison with the UK

In the UK the factors which may be considered when charging fees are strictly limited. Section 9 of *FOI Act 2000* (UK) provides that fees may be charged in accordance with regulations. The Regulations in turn provide that the maximum fee is the total cost the public authority reasonably expects to incur in—

> (a) informing the person making the request whether it holds the information, and
>
> (b) communicating the information to the person making the request. [244]

When calculating the time taken to respond to a request authorities can include searching for the information and drawing it together[245] but not reading it to see if exemptions apply, redacting data[246]or deciding whether it can be released. Importantly, decision-making time — that is, time taken in deciding whether exemptions apply or in considering questions of public interest — may not be taken into account. The effect of this is that significantly higher fees can be charged in Australia than in the UK.

This can be illustrated by considering an example. As part of the research for this thesis an FOI request was submitted to the Attorney General's department, seeking information on the policy background to the amendments to the public interest test. Having initially refused under s 24AA on the basis that answering the request would substantially and unreasonably divert the resources of the Department (see below) the Department then sought to charge a fee of $263.25 before it would proceed with the request, of which $200 related to 'examination of documents'.[247] This aspect of the fee relates to 'thinking time', which could not have been charged under UK regulations, where the maximum fee chargeable on the basis of the information provided by the Department would therefore have been $63.25 — that is 24% of the fee charged in Australia. This suggests that whilst some of the fees were removed as a result of the 2009-10 amendments, the ability to charge for thinking time represents a potentially significant barrier to access.

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http://www.mondaq.com/australia/x/115994/Federal+Law/Changes+to+Commonwealth+FOI+fees+and+charges.

244 *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (UK) SI 2004/3244 ,reg 7.

245 *Charges Regulations 1982*, reg 4(3).

246 *Chief Constable of South Yorkshire v Information Commissioner* [2011] EWHC 44 (Admin).

247 This charge was reduced by 75% on review, on grounds of public interest and financial hardship.

8.2 Practical Refusal

Another way in which access may be restricted under FOI legislation is by providing that departments can refuse to give access where it would be too resource-intensive. Moira Paterson notes that this is 'an attempt to balance applicants' access rights with efficient government.'[248] However this thesis contends that there are insufficient constraints on practical refusals under the *FOI Act 1982*, and that there is a risk that this power could be used to undermine rights of access.

8.2.1 Original *FOI Act 1982*

Section 24(1) of the original *FOI Act 1982* provided that access could be refused on practical grounds where the work involved would 'substantially and unreasonably divert resources of the agency, or interfere with the performance of the Minister's functions.'

Bruce Chen has noted of similar provisions in the Victorian legislation[249] that the difficulty with these grounds is that the terms 'substantially and unreasonably divert' are vague and undefined; there is no objectively definable upper limit, either in terms of time taken or cost.[250] Application of this exemption therefore depends upon the resources of the department and upon a subjective judgement about how resources ought to be used. Indeed, following an AAT decision that the resources to be considered are those of the relevant section of an agency rather than the agency as a whole,[251] the same request made to two different parts of the same agency could meet with entirely different responses, depending on the resources available and the view of those responsible for allocating those resources.

Further, in deciding whether the practical refusal ground is made out, s 24(2) requires consideration to be given to both the time taken to identify and collate the documents and the time taken to decide whether to 'grant, refuse, or defer' access.[252] This provision has been interpreted as applying in relation to single applications and to a series of requests covering similar information.[253] The same difficulty arises that arises in relation to charges and fees, as described above; the ability to take thinking time into account means that even relatively narrow requests might relatively quickly reach a threshold beyond which it might be said to be a substantial and unreasonable diversion of resources to continue with the request.

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248 Paterson, above n 28, 127.

249 *Freedom of Information Act 1982* (Vic) , s 25A.

250 Bruce Chen, 'Refusing to Process Voluminous Requests: Contrary to the Spirit of Freedom of Information?' (2011) 37(3) *Monash University Law Review* 132, 140-144.

251 *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171.

252 *FOI Act 1982*, s 24(2).

253 *Re Shewcroft and Australian Broadcasting Corporation* (1985) 7 ALN N307, N308.

8.2.2 Amended *FOI Act 1982*

The provisions in the amended *FOI Act 1982* are broadly the same as in the original. Section 24AA sets out the same test, providing that there is an exemption for answering requests where to do so 'substantially and unreasonably divert resources' and that in assessing the application of the exemption time taken to decide whether to 'grant, refuse, or defer' must be taken into account.[254] The reforms made no attempt to apply more objective criteria, or to reduce the number of cases in which such an exemption might apply by restricting the type of costs that can be taken into account when deciding that the exemption applies. In fact the primary change that was made as a result of the amendments was the addition of a further ground for exemption —access can be refused if there the procedural requirements of s 15 are not complied with.

Some of these are problems were acknowledged by the Australian Information Commissioner in his 2012 review of fees. The reforms suggested in that review would bring the provisions somewhat into line with UK, by imposing a time ceiling in place of the 'practical refusal' mechanism.[255] But even if these measures were implemented the fact that decision making time can be taken into account would still put Australian applicants at a disadvantage compared with their UK counterparts.

8.2.3 Comparison with UK

Section 12 of the *FOI Act 2000* (UK) sets out an exemption to the duty to provide information where the cost of doing so would exceed the 'appropriate limit' set out in regulations. The regulations[256] set the 'appropriate limit' for central Government agencies at £600, calculated at £25 per hour. The activities that can be taken into account in determining the fee charged are: (a) determining whether the department holds the information, (b) locating the information, (c) retrieving the information, and (d) extracting the information.[257]

As with the Australian practical refusal exemption, this limit has the potential to undermine disclosure, particularly where the reason for the costs limit being exceeded is inadequate record keeping. Ashley Savage and Richard Hyde, for example, have noted in the context of making FOI requests to local authorities in the UK that 'the refusals ...received were based on the inability to fulfil the request within the statutory cost limit, rather than any of the specific statutory exceptions. The cost of complying with our request was linked to the ways in which data was classified and

254 *FOI Act 1982*, (s 24AA(2)(b)).

255 Office of the Australian Information Commissioner, *Review of charges under the Freedom of Information Act 1982 – Report to the Attorney-General* (February 2012) http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/review-of-charges-under-the-freedom-of-information-act-1982.

256 *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (UK) SI 2004/3244, reg 3(2).

257 Ibid, reg 4(3).

stored.'[258] Despite this, however, the UK approach is less likely to lead to the withholding of information, because of the way in which the costs limit is calculated.

In Australia, as described above, the legislation leaves it up to Government to decide whether the diversion of resources involved in answering an FOI request is unreasonable or substantial. By contrast the UK regulations set out a more objective[259] mechanism of calculating how the limit is to be applied, with the application of a standardised cost per hour for specified activities, and an upper costs limit. It might be thought that such a fixed costs cap might result in more refusals to disclose than the Australian legislation, which has no such cap, and where the costs per hour ($15 search and retrieval, $25 per hour decision making) are lower. However there is provision in the *FOI Act 2000* (UK) to charge additional costs where the request exceeds the upper costs limit, so that the costs limit doesn't necessarily act as an absolute bar to disclosure.[260]

Further the prohibition on taking into account 'thinking time' for the purpose of calculating whether the cost limit is reached means that it is less likely to prove a barrier to access than the Australian federal legislation. As with the calculation of fees, the range of factors that may be taken into account when calculating whether the costs limit has been reached is strictly limited in the UK. As described above, in deciding to rely on the practical refusal exemption, an Australian agency *must* take account of thinking time. By contrast, in deciding whether the appropriate limit has been reached, the UK agency *may not* take into consideration the time taken in deciding whether an exemption applies, including consideration of the public interest. In fact, a proposal to amend the regulations to allow thinking time to be taken into account was rejected in the UK, with the post-legislative scrutiny committee noting that allowing 'thinking time' to be considered took insufficient account of the public interest in access to information, and of the fact that it is very difficult to assess such activities in any objective way.[261]

The difference can be illustrated by reference to the FOI request to the Attorney General's Department (see Annex B), which was initially rejected on 'practical refusal' grounds. The Department estimated that it would take over 50 hours to comply with the request; 29 hours would have been spent considering whether the exemption applies. In order to avoid practical refusal, the request was narrowed to cover only 4 of the 19 relevant files. By contrast, in the UK, only the 21 hours spent retrieving the information could have been taken into account, at a total cost £525, below the costs limit. As a result it would have been possible to proceed with the whole request, covering all 19 files. This suggests that even if the Australian arrangement in principle allows greater

258 Savage and Hyde, above n 170, 14.

259 Even this mechanism is not completely objective, in that it does not guard against the fact that some people work more slowly than others, for example.

260 *FOI Act 2000 (UK)*, s 13. Although this is at the discretion of the decision-maker and should not be regarded as a safeguard in all cases.

261 House of Commons Justice Committee above n 202 [58].

scope for 'big' requests to proceed due to the lack of upper limit, it also allows greater scope for 'smaller' requests to be rejected on practical grounds.

8.3 Conclusion

This thesis sought to explore whether the amended *FOI Act 1982* promotes disclosure to the greatest extent possible consistent with the protection of other rights and interests. The competing rights and interests that might be protected by the imposition of fees and procedural barriers are not an issue that has received much academic attention. However Moira Paterson has noted that practical refusal measures may be seen as an attempt to balance the rights of individual access with efficient Government. On one view, then, it is possible to say that charging fees and refusing on practical grounds are a way of balancing competing interests.

On another view, however, the Australian approach is not entirely consistent with the public interest rationale of the legislation. In the UK it is accepted that responding to FOI requests is part of the work of the department, to be covered as part of the departmental budget:

> The Commissioner also noted it was "part of a public authority's job to be accountable and to be answerable, and the Freedom of Information Act is the way they do it."...
>
> There is a cost involved—of course there is—but that is the cost of democracy. That is inherent in the fact that, hopefully, we have a system where informed citizens are able to make choices—certainly in the future as public services arguably become more marketised—about the way that services are provided to them through having access to a freedom of information inquiry.[262]

By contrast, the Australian approach to calculating fees implies a more 'user pays' approach,[263] suggesting that responding to FOI requests is not regarded as part of the ordinary work of government, and ought not be funded as such. The *ALRC (Open Government) Report* criticised the Australian approach, on this basis, arguing that 'the cost to agencies of administering the Act must be viewed in the context of the legislation's role in furthering democratic accountability'.[264] Further there are insufficient constraints on the power to refuse access on practical grounds. Vague terminology lends itself to subjective interpretation, and the failure to restrict the tasks that may be taken into account in determining costs means that even narrow requests can fairly quickly reach a threshold which may be considered to be an 'unreasonable and substantial' diversion of resources. A comparison with the UK illustrates a more objective way of balancing competing interests which is likely to lead to greater disclosure over all. As a result, notwithstanding the Government rhetoric

262 Above n 202 [75].
263 Paterson, above n 28, 138-9.
264 Australian Law Reform Commission and Administrative Review Council, above n 37, [14.2].

surrounding the reforms, the reforms did not go as far as they might have done in promoting greater disclosure consistent with the protection of competing interests.

9 Conclusion

The increasing acceptance that access to government-held information is a human right, in addition to having instrumental value, drives a discourse that is very pro-disclosure. But a pro-disclosure approach does not necessarily mean that the right of access should be protected and promoted at the expense of other rights and interests. The true purpose of FOI legislation is not to promote access to information, but to ensure the greatest possible level of access that is consistent with the proper protection of competing rights and interests. The conclusion that this thesis has reached is that following amendment the *FOI Act 1982* does not strike this balance correctly. In some areas it has promoted greater disclosure but at the expense of competing interests. In others it has not gone far enough to promote disclosure. In that respect the amended *FOI Act 1982* is internally inconsistent and while it might have appeased critics of individual aspects of the legislation, and gained political credibility for the Government in a pro-disclosure landscape, it may also have resulted in legislation that is both internally inconsistent and inconsistent with the need to promote greatest possible disclosure that is consistent with other rights and interests.

In the changes to the objects clause and the public interest test the 2009-10 reforms promote greater disclosure, but do so at expense of other interests. The new objects clause changes the emphasis of the legislation so that it now promotes a particular outcome — disclosure — over a balance between interests. The exemption for deliberative documents, combined with the amended public interest test, makes it easier to make a case for disclosure than it is to make a case for withholding information. The approach of listing relevant and irrelevant factors gives greater weight to the interest in disclosure than to other interests. The difficulty with this approach is that drafters of legislation cannot foresee the circumstances of every potential case and should not therefore seek to pre-determine the factors that may be relevant. In relation to the determination of individual cases, what the legislation must do to is to ensure that decision-makers — both Government and review bodies — have at their disposal the tools that enable the correct balance to be struck. If there are concerns about how these tools are used — if, for example, there are concerns that the Government is applying the public interest test in a self-interested way — it does not necessarily follow that the tools are the wrong ones and that legislative measures are necessary to change them. One approach might have been to encourage proper use of the tools. Instead, the amendments blunted the tools to reduce the risk of them causing harm. The result is legislation which makes it more difficult for decision-makers to strike the correct balance.

In other respects, however the Australian legislation does not go far enough to promote disclosure. Conclusive certificates were abolished with no apparent consideration of the impact that this might have on Government behaviour, and no explanation of whether this decision had an impact on the way in which the rest of the amendments took shape. This might have been a reaction to criticism of the use conclusive certificates that followed the *McKinnon* case, but it is possible that greater overall disclosure would have resulted if a limited power of veto, with safeguards, had been allowed to remain. This might have reduced the risk that Government would turn to other measures to avoid disclosure. Further, leaving a veto in place might have allowed the exemptions to be shaped differently. For example if Government was able to rely on a veto power in exceptional cases, it might have been possible to include Cabinet papers within the category of conditional exemptions subject to a public interest test (as they are in the UK), or to take a different approach to national security documents, which are currently broadly excluded from the operation of the Act. If consideration was not given to these matters, it ought to be given now, so that the position of veto can be considered from an evidence base, and to ensure that disclosure is promoted to the greatest possible extent consistent with the protection of other interests.

Finally, the amendments to key financial and procedural provisions did not go far enough to ensure that disclosure takes place to the greatest extent possible. The fact that all activities may be taken into account and charged for leads to a 'user pays' model. If access to information is genuinely considered to be in the public interest, not just as a right but also as a mechanism for securing greater accountability and public participation, it unclear why the costs of that ought to be borne by individual rather than the public.

The situation in Australian can be contrasted with that in the UK. Although the UK framework is not without problems, it is broadly internally consistent, and reflects an intention to strike a balance between the greatest possible access and the need to protect competing rights and interests. The legislative context, including the Explanatory Notes and White Paper — suggested an intention to strike such a balance, an approach which is consistent with the structure of the exemptions and the public interest test, which promote disclosure without doing so at the expense of other interests. Although the limited power of veto can sometimes operate to frustrate disclosure in exceptional cases, strong safeguards have ensured that it has been used only a handful of times in the 10 years since implementation. Further, it appears that the inclusion of this power as part of the legislative framework influenced the legislation in other ways which overall led to potentially greater disclosure. Finally, in the UK an applicant for information is less likely to be refused on procedural or financial grounds as there is a sense that providing access to information under the *FOI Act 2000* (UK) is cost of democracy and as such should be borne primarily by the public purse, rather than by individuals. Thus although the situation will need to be carefully monitored in light of the recent announcement

of a commission to consider the UK legislation[265] at present the UK strikes a better balance than Australia.

One of the key problems around FOI is that it is difficult to strike this balance, and it is difficult to assess whether it has been struck in the right place. It is made even more difficult by the suspicion that Government self-interest is served by withholding information, and the fact that political capital can be made from pointing out cases in which this has occurred That does not necessarily mean, however, that making it more difficult to withhold information will be in the public interest. What it does mean is that it is important that FOI reforms are based on rigorous analysis and evidence, rather than political rhetoric. That analysis and evidence ought to consider how to promote disclosure, but also how to protect competing rights and interests. It ought also to ensure that legislative schemes are internally consistent, so that all of the various elements of the legislation pull in the same direction. The conclusion of this thesis is that at present the Australian legislative framework governing disclosure of deliberative documents does not promote the greatest possible disclosure, does not ensure the protection of competing rights and interests in all cases and is not internally consistent. Further evidence-based reform is therefore needed.

265 Parliamentary Secretary for the Cabinet Office (UK), *Written statement to Parliament on Freedom of information: New Commission* (17 July 2015) .

Annex A — OAIC cases

OAIC decision notices were reviewed to establish the number of cases in which the application of s 47C was reviewed. Those in which s 47C was applied are noted below. Next to each decision it is noted whether disclosure was ordered, and if so whether this was on the basis that the exemption did not apply because the documents did not contain deliberative material, or on the basis that the public interest favoured disclosure. Following the table is a summary of the number of cases in which disclosure was ordered, and the reasons for disclosure. First there is a summary of all cases from 2011-2014. Second, in light of the fact that the number of decisions in 2014 was significantly higher than the total number of decisions in the previous 3 years, the results were further broken down into (1) 2011-2013 cases and (2) 2014 cases. The results are as follows:

Number/Year	**Case name**	**Disclosure ordered of documents claimed to be exempt under s 47C?**
1. 2011	*Carver and Fair Work Ombudsman* [2011] AICmr 5 (27 July 2011)	Yes, on public interest grounds.
2. 2012	*British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19 (30 July 2012)	Yes, of documents found not to contain deliberative matter. Yes, of remainder of s 47C documents on public interest grounds.
3. 2012	*Briggs and Department of the Treasury* (No. 3) [2012] AICmr 22 (20 August 2012)	Yes, documents found not to contain deliberative matter.
4. 2103	*Besser and Department of Infrastructure and Transport* [2013] AICmr 19 (6 March 2013)	Yes, found not to contain deliberative matter.
5. 2013	*Australian Broadcasting Corporation and Australian Sports Commission* [2013] AICmr 28 (20 March 2013)	No, on public interest grounds.

6. 2013	*Dreamsafe Recycling Pty Ltd and Department of Education, Employment and Workplace Relations* [2013] AICmr 34 (27 March 2013)	Yes of documents found not to contain deliberative matter. No of remainder of s 47C documents on public interest grounds.
7. 2103	*'AF' and Department of Immigration and Citizenship* [2013] AICmr 54 (26 April 2013)	Yes, on public interest grounds.
8. 2013	*Hunt and Australian Federal Police* [2013] AICmr 66 (23 August 2013)	Yes of documents found not to contain deliberative matter. No of remainder of s 47C documents on public interest grounds.
9. 2013	*Crowe and Department of the Treasury* [2013] AICmr 69 (29 August 2013)	No, on public interest grounds.
10. 2013	*Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70 (3 September 2013)	Yes, on public interest grounds.
11. 2013	*National Australia Bank Ltd and Australian Competition and Consumer Commission* [2013] AICmr 84 (11 December 2013)	Yes of documents found not to contain deliberative matter. No of remainder of s 47C documents on public interest grounds.
12. 2013	*He and Department of the Prime Minister and Cabinet* [2013] AICmr 89 (17 December 2013)	Yes, on public interest grounds.
13. 2014	*Australian Private Hospitals Association and Department of the Treasury* [2014] AICmr 4 (16 January 2014)	Yes, on public interest grounds.
14. 2014	*'BD' and Australian Federal*	No, on public interest grounds.

	Police [2014] AICmr 13 (11 February 2014)	
15. 2014	*'BJ' and Australian Taxation Office* [2014] AICmr 22 (26 February 2014)	No, on public interest grounds.
16. 2014	*Philip Morris Ltd and Department of Finance* [2014] AICmr 27 (14 March 2014)	Yes, on public interest grounds.
17. 2014	*Philip Morris Ltd and IP Australia* [2014] AICmr 28 (18 March 2014)	Yes, on public interest grounds.
18. 2014	*Mentink and Department of Foreign Affairs and Trade* [2014] AICmr 38 (20 May 2014)	No, on public interest grounds.
19. 2014	*Mentink and Australian Federal Police* [2014] AICmr 64 (25 June 2014)	No, on public interest grounds.
20. 2014	*Sanderson and Department of Infrastructure and Regional Development* [2014] AICmr 66 (30 June 2014)	Yes, on public interest grounds.
21. 2014	*Mentink and Australian Federal Police* [2014] AICmr 67 (30 June 2014)	No, on public interest grounds.
22. 2014	*Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 (30 July 2014)	Yes of documents found not to contain deliberative matter. No of remainder of s 47C documents on public interest grounds.
23. 2014	*Crowe and Department of Prime Minister and Cabinet* [2014] AICmr 72 (30 July 2014)	No, on public interest grounds.
24. 2014	*Greenlife Oil Pty Ltd and Australian Trade Commission* [2014] AICmr 96 (16 September 2014)	Yes, of documents found not to contain deliberative matter. Yes, of remainder of s 47C documents on public interest grounds.

25. 2014	*'DB' and Australian Federal Police* [2014] AICmr 105 (30 September 2014)	Yes, of documents found not to contain deliberative matter. Yes, of remainder of s 47C documents on public interest grounds.
26. 2014	*'DM' and Australian Federal Police* [2014] AICmr 120 (7 November 2014)	Yes, on public interest grounds.
27. 2014	*'DX' and National Offshore Petroleum Safety and Environmental Management Authority* [2014] AICmr 132 (24 November 2014)	No, on public interest grounds.
28. 2014	*Robert Leonard and Commonwealth Ombudsman (No 1)* [2014] AICmr 134 (25 November 2014)	No, on public interest grounds.
29. 2014	*Robert Leonard and Commonwealth Ombudsman (No 2)* [2014] AICmr 135 (25 November 2014)	No, on public interest grounds.
30. 2014	*Greenpeace Australia Pacific and Department of Industry* [2014] AICmr 140 (26 November 2014)	Yes of documents found not to contain deliberative matter. No of remainder of s 47C documents on public interest grounds.
31. 2014	*The Age and Department of the Treasury* [2014] AICmr 141 (27 November 2014)	Yes, of some conditionally exempt documents on public interest grounds. No of some conditionally exempt documents on public interest grounds.
32. 2014	*Wood and Department of the Prime Minister and Cabinet* [2014] AICmr 150 (19 December 2014)	Yes, of documents found not to contain deliberative matter. Yes, of remainder of s 47C documents on public interest grounds.

Total number of case: 32

- Number of cases in which **disclosure ordered** of documents that government had withheld under s 47C: **21 (66%).**
- Number of cases in which disclosure ordered of some or all of the material claimed to be exempt under s 47C on the basis that the **documents were not 'deliberative matter'** for the purposes of s 47C: **10 (31 %).**
- Number of cases in which disclosure ordered of some or all of the material claimed to be exempt under s 47C on the basis that **the disclosure of conditionally exempt material was in the public interest: 14 (44%)**.

This suggests that the OAIC is significantly more likely to order disclosure than government, and that the OAIC strikes the public interest differently from government in a significant proportion of cases. However there are differences between the first three years of decision-making, and the approach taken in 2014. In the first three years of decision-making, the OAIC was even more likely to disagree with the government application of the exemption in s 47 C, as follows:

Total number of cases between 2011-2013: 12

- Number of cases in which disclosure ordered of documents that government had sought to withhold under s 47C: **10 (83%).**
- Number of cases in which disclosure ordered of some or all of the material claimed to be exempt under s 47C on the basis that the **documents were not 'deliberative matter' for the purposes of s 47C: 6 (50%).**
- Number of cases in which disclosure ordered of some or all of the material claimed to be exempt under s 47C on the basis that the **disclosure of conditionally exempt material was in the public interest: 5 (42%).**

However in 2014, the approach of the OAIC and government was more in line, with the percentage of cases in which disclosure was ordered decreasing. The main difference appears to have been in the percentage of cases in which the OAIC found that the documents did not contain deliberative material, as follows:

Total number of cases in 2014: 20

- Number of cases in which **disclosure ordered** of documents that government had sought to withhold under s 47C: **11 (55%).**
- Number of cases in which disclosure ordered of some or all of the material claimed to be exempt under s 47C on the basis that the **documents were not 'deliberative matter' for the purposes of s 47C: 5 (25%)**

- Number of cases in which disclosure ordered of some or all of the material claimed to be exempt under s 47C on the basis that the **disclosure of conditionally exempt material was in the public interest: 7 (35%)**

The author of this thesis hopes to pursue this analysis as part of her doctoral studies in order to understand the reasons behind this shift, and to consider whether it is part of an ongoing pattern or can be explained by the facts of particular cases. For the purpose of this thesis, it is sufficient to note that taken together, these statistics suggest that the OAIC has, in the significant majority of cases to date, disagreed with the government on the scope of s 47C, both in relation to documents covered, and the application of the public interest test.

Comparison with UK

A detailed analysis of UK Information Commissioner cases is beyond the scope of this thesis, which focuses on the legislative framework. However in light of the information above, which suggests that the OAIC is likely to disagree with the government's application of s 47C, a preliminary search was undertaken, using the search function on the UK Information Commissioner's website,[266] in order to determine whether the same appears to be true in the UK. The search parameters were as follows:

- Date – decision notices published between 1st January 2011 and 31 December 2014.
- By section- FOI 35 and FOI 36 (separate searches).
- By sector – Central Government.

The results of the search are set out in the following table, alongside comparable figures for Australia.

Period 2011-2014	**UK s 35**	**UK s 36**	**Australia**
No. of cases in which exemption cited in cases before Information Commissioner	145	140	32
Not upheld	82 (57%)	72 (51%)	15 (47%)
Upheld	48 (33 %)	53 (38 %)	11 (34%)
Partly upheld	15 (10 %)	15 (11%)	6 (19%)

There are a number of significant limitations to this comparison.

266 UK Information Commissioner's Office, *Action We've Taken: Decision Notices* <http://search.ico.org.uk/ico/search/decisionnotice>.

First, in order to make a comparison it was necessary to determine the percentage of cases in which Australian government decisions had been upheld or partly upheld by the OAIC. For the purpose of comparison an Australian decision was taken to be 'upheld' if none of the information was disclosed following review. A decision was taken to be 'partly upheld' where some of the information, but not all of it, was disclosed following review. A decision is taken to be 'not upheld' where all of the information was disclosed following review. However the basis upon which cases are so categorised in the UK is not clear, and so it is not possible to be certain that the comparison is exact. Second, in relation to the cases that were not upheld, the UK search function does not distinguish between those cases in which the material was found not to fall within the scope of the exemption and those cases where the public interest was found to be in favour of disclosure. Third, difficulties arise from the fact that the search results indicate the total number of cases in which s 35 was applied is 115, and the total number of cases in which s 36 applied was 111. However an addition of the numbers of upheld, partly upheld and not upheld cases totals not 115 and 111 but 145 and 140 respectively. For the purpose of this exercise, 145 and 140 are taken to be the correct numbers of total cases, as this allows for better comparison on a percentage basis, but caution should be exercised in extrapolating from these results. Fourth, in relation to s 36 it is not possible to separate the different parts of the exemption, so these figures include cases that relate to Cabinet documents that would be exempt under s 34 of the FOI Act 1982, as well as s 47 C of the FOI Act 1982. Fifth, the statistics for Australia relate to all agencies covered by the Australian federal legislation, which is broader than the 'Central Government' search parameter. Finally, it is necessary to take account of the fact that the decisions of the OAIC and UK Information Commissioner focus upon different points in time: the OAIC asks whether the material under discussion is exempt, with the focus on the date on which the OAIC reviews the decision. By contrast, the UK Information Commissioner considers whether the decision of the Government department was correct at the time it was taken. It would be necessary to conduct further research to determine whether any difference in outcome was attributable to the different points in time upon which the review was focussed.

These problems make a comparison with the decisions of the OAIC difficult, and robust conclusions cannot therefore be drawn. What does appear, however, is that in the UK as in Australia, the Information Commissioner is likely to differ from government in relation to the exemptions for deliberative material in a significant percentage of cases. The author hopes to pursue this comparison as part of her doctoral studies, in particular to consider whether any link can be established between the likelihood of disclosure being ordered, the availability of a power of veto, and the extent to which alternative disclosure avoidance techniques are observed.

Annex B — Fees and practical refusal

As part of the research for this thesis, a FOI request was submitted to the Attorney General's Department for

> documents that provide background to the development of s 11B of the *FOI Act 1982*, which was inserted by the Freedom of Information (Reform) Act 2010 (Cth). I am particularly interested in the basis on which the factors set out in s 11B (Public Interest Exemptions — Factors) were chosen, and the basis on which other factors were excluded. This includes the background to any decision not to include a list of factors which might support withholding information.

It was anticipated that this information would contain deliberative material and therefore be covered by s 47C. The primary reason for the request was to ascertain the reasons for the approach taken to the public interest test, although it was anticipated that it might also demonstrate how the exemption was being applied in practice.

On Monday 1 June, the department was contacted with this request, and was asked whether it was necessary to submit a formal FOI request. On 5 June the department responded requesting a formal FOI request. A formal request was submitted on 7 June. The only difference was that it stated that it was a formal request. According to the time-limits in the legislation, as confirmed by the correspondence, a reply was due by 7 July.

On Thursday 25 June a reply was received indicating an intention to refuse on the basis that responding would involve "a substantial and unreasonable diversion of resources ('practical refusal' reason)". The preliminary decision noted that 19 files had been identified, and that they had calculated that the time it would take to. A response was requested within 14 days, by 9 July.

On Monday 29 June the department was contacted to discuss ways in which the request might be narrowed within reasonable bounds. A number of options were suggested by the author, including restricting the request to (a) advice to Ministers on the subject of the request and (b) documents showing the decisions made following that advice — e.g. written response or note of meeting. All were rejected on the basis that they would still require all of the files to be searched, and this would be the most time-consuming element. The only option offered was that of requesting four files, going through the process, and then requesting four more, and to repeat that until all 19 files had been examined. The department confirmed that these requests would not be amalgamated and treated as a single request if they were made consecutively so that the outcome of one request had been determined before the next was made. Guidance was requested on how to identify the four files that would be likely to contain most of the relevant information. This was said to be impossible, as the information was likely to be 'scattered through the files'.

The date of the first of the 19 files was July 2008-2009. The date of the last file was July 2010-September 2010. On 29 June a request was made to narrow the original request to 4 files 2, 3, 4 and 5. File 2 related to December 2008-June 2009; Files 3, 4 and 5 all related to May 2009-June2009. These files were selected by estimating how long in advance the policy might have needed to be settled in order to instruct drafters to draft legislation, working back from the date that the legislation was introduced into Parliament. Even if these files capture a significant portion of the policy debate, they will not show whether other considerations were taken into account at a later stage, and it will still be necessary to ask for the information in the other files in order to obtain the full picture of how the policy developed. The official handling the request acknowledged that this might not be the most efficient approach, but stated that for resource reasons this approach was necessary, as it allowed them to spread their resources over a period of time.

On 6 July a reply was received stating that the request to narrow had been accepted. It noted that a response was due by 11 July, and requested a 30 day extension to deal with the request. This request was granted, so that the new deadline for response was 10 August.

On 21 July a further decision was received from the Attorney General's Department, stating that had identified 16 documents, amounting to 482 pages, and that they had decided to impose a fee of $263.25 and requesting a deposit before proceeding. This fee relates the anticipated time that it would take to consider whether to release the information, in addition to the time it would take to find the relevant information. It does not relate to any charges for copying or communicating the information; it is unknown whether further charges would be imposed to cover these costs, should the department decide that disclosure is required. The letter set out a number of grounds of appeal, and required a response by 21 August — that is, 11 days after the expiry of the revised deadline for dealing with the request.

On 31 July a letter was written to the Attorney General's Department asking them to reconsider the imposition of the fees on the basis of financial hardship (the requestor being a full time-student, making the request for the purpose of her studies , taking into account both this charge and the charges anticipated for searching all 19 files over a period of time) and public interest (the subject of the request being the public interest test that had been imposed in relation to the release of conditionally exempt documents). This information had been clear from the initial request for information. On 6 August a reply was received saying that a response in relation to the fee issue would be due by 30 August, 20 days after the original deadline for dealing with the request, and almost 3 months after the original request was sent.

On 26 August, the department confirmed that following the appeal, they would reduce the fees by 75% on the dual grounds of financial hardship and public interest. The official asked for confirmation

that the fees would be paid in order to send an invoice. This confirmation was provided on 31 August (following discussion with university authorities). This invoice was provided on 8 September and paid on 25 September. It was confirmed as paid by the Department on 30 September, at which time the Department set a new response date of 6 October. At the same time they sought consent to redact the names of individuals and organisations from the information, and said that if consent was not given it would be necessary to extend the deadline for response by a further 30 days. On 1 October the author confirmed that it would be helpful to her research to know the identity of those who had been consulted, and requesting the Department to seek their consent to having their identities disclosed.

At the time of writing, this is how matters stand.

A number of points arise from this correspondence:

- The original deadline stands only insofar as the department do not impose procedural steps: in the present case four months have elapsed without the department having communicated whether any exemption applies;
- Resources are a key aspect of the way in which the department chooses to respond to requests;
- Correspondence with the department noted that failure to respond in the ways directed or within the required time-frame would be construed as a decision by the requestor *not* to proceed with the request.
- There is an inconsistency between the reasons given for the practical refusal request (most time taken locating information) and the fee schedule (most time taken considering information) that may expose weaknesses in the departments duty to assist applicants to narrow the scope of requests in order to avoid a practical refusal.
- There is a question about the way in which records are created and made available for search. The practical refusal suggested that the primary focus was paper files; however the fee schedule refers to electronic records. It seems likely that in 2009, the majority of records would have been held by electronic means. An electronic search should enable departments to more quickly identify relevant documents. This begs the question of why reliance is still placed on more time-consuming paper files for FOI purposes, if that is the case.
- The fees imposed for complying with this request in full are potentially very high. This request relates to only 4 of 19 files, for which a fee of $263.25 was sought to be imposed (although the Department later reduced the fee by 75%). If the same approach is taken to the other files, combined fees could be significant.
- Likewise the time take to comply with the procedural steps is significant; if this approach is taken in relation to all 19 files, 20 months might be taken to resolve procedural questions

> alone, without any consideration of exemptions or public interest. That is without entertaining the possibility that some of the information may be refused, and that it may be necessary to seek review from the Information Commissioner or AAT. As the department will only consider a request for the next four files as a separate request if it is not concurrent with the current request, it may be after the completion of a doctoral thesis before all information is provided (assuming it is not exempt), rendering the right of access to the information effectively worthless to the purpose for which it is sought. As Savage and Hyde found, 'delays can frustrate the FOIA regime. This has a particular impact when the information requested or indeed the project in which the information was intended is of a time sensitive nature.'[267]

The extent of these financial procedural hurdles, and the effect that they have had to date on the time-frame for response, seems to be at odds with the pro-disclosure approach to deliberative documents in the substantive requirements of the legislation.

267 Savage and Hyde, above n 19, 6.

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