FOI SOLUTIONS

CLIENT NEWSLETTER
Volume 6, Issue 1 2006

RECENT CASES (VIC)

Valid requests – form, interpretation and fees

In *Re Vaughan and Department of Sustainability and Environment*, the Tribunal confirmed that a request must be "in writing" – that is, "everything that properly pertains to it, must be within the four corners of the writing" – and sufficiently clear.

In interpreting a request, agencies should concentrate on the written words and not get too distracted by the factual context in which the request was made, or clarified, by the applicant. An agency may refer to the surrounding circumstances to supplement or clarify the meaning of a request. However, where the words are quite clear, the meaning of a request should not be modified by reference to the surrounding circumstances, i.e. a conversation between the FOI officer and the applicant.

An agency may reject a request that is insufficiently clear or precise to enable the agency to undertake meaningful searches. Yet, once an agency accepts a request, it waives the right to object to it and is not entitled effectively to re-write the request in a form which it finds more convenient and acceptable than the original.

In Re *Gordon and Mornington Shire Council*, the Tribunal confirmed that a request for access will not be valid unless, and until, the application fee is paid, or a decision to waive or reduce the fee has been made. Further, the Tribunal has no power to review a decision by an agency to refuse to waive the fee.

Form of access

In *Re Williams and Victoria Police*, the Tribunal held that, once access has been granted to a document, it is only in the limited circumstances listed in section 23(3) that an agency can refuse to provide access in the form requested. In that case, the applicant had already been given access to video footage outside the Act, in the form of an opportunity to view the footage under supervision. It was held that the fact that the footage might have been exempt under section 33(1) was irrelevant to the question of whether access should have been provided in the form requested by the applicant. As none of the circumstances listed in section 23(3) applied, the applicant was entitled to access in the form of a CD-ROM copy.

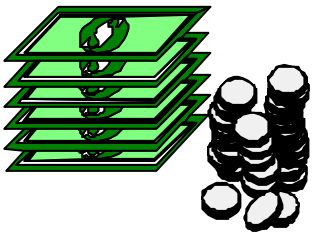
Amendment of personal records – onus, importance of accuracy and guidance regarding amendment

In *Re Connell and Department of Justice*, the Tribunal confirmed that the applicant bears the onus of showing why an agency record should be amended.

The Tribunal also discussed the amendment of records where opinion evidence is involved. In such cases, the applicant's opinions will not necessarily be substituted for the opinions contained in the record. Nor should amendment occur where it would cause the record to be illogical, disjointed, ungrammatical and confusing. A record containing opinion might be amended in four situations, namely, where:

- the facts underlying the opinion have been thoroughly discredited or demonstrated to be totally inadequate;
- the person giving the opinion was tainted by bias or ill will, incompetence or lack of balance or necessary experience;
- the facts underlying the opinion were so trivial as to render the opinion dangerous to rely on and likely to result in error; or

Contents



Solicitors & Consultants
Level 5
105 Queen Street
Melbourne Victoria 3000

DX 345
Melbourne VIC
Email mick@foisolutions.com.au
www.foisolutions.com.au

Telephone (03) 9601 4111
Facsimile (03) 9601 4101
(03) 9601 4121
Mobile 0417 100 796

- the facts on which the opinion was based were misapprehended.

Notwithstanding that the applicant bears the onus in amendment cases, where an agency stores personal information on a database, the information must be accurate, up-to-date and not misleading.

This was emphasised in *Re JF and Victoria Police*, where the Tribunal held that the fact that a

database is subject to stringent information security measures, or that access is confined to officers within the agency, is not a reason to refuse to correct or amend information that does not meet these standards.

However, in that case, the Tribunal held that Victoria Police were not obliged to make a particular amendment that would have involved complex computer programming and cost a significant sum, on the understanding that the amendment would be made in the course of the next periodic review of the LEAP database. This suggests that practicability and cost are relevant factors in responding to requests for the correction or amendment of personal information.

An agency may amend a record in a manner that enables important information to be retained, where its retention is necessary to maintain the integrity or usefulness of the database (i.e. information about dismissed criminal charges in the LEAP database).

Cabinet documents exemption – reminders about scope

In *Re Asher and Department of Infrastructure*, the applicant sought access to the report of an independent adviser concerning the funding arrangements for the Federation Square Project ("report"). The Department claimed that the report was exempt on the grounds that it was prepared for the purpose of submission for consideration by Cabinet (section 28(1)(b)) or its disclosure would involve the disclosure of a deliberation or decision of Cabinet (section 28(1)(d)). The Tribunal found that the report was not exempt.

In coming to this conclusion, the Tribunal emphasised that the purpose of a document is the important factor to be considered in determining whether it is exempt under section 28(1)(b). Here, the evidence showed that the purpose of the report was to inform the Treasurer and Minister for Major Projects as to the financial position of the Project. Preparation of the report was not dependent on, and did not relate to, any potential consideration by Cabinet. Thus, the report was quite different from a submission prepared for consideration by Cabinet.

The Tribunal took the view that there was no clear evidence that the report was ever actually considered by Cabinet. On this basis, it also held that disclosure would not involve disclosure of a deliberation or decision of Cabinet for the purposes of section 28(1)(d). However, this seems to contradict the Tribunal's own summary of the facts, in which it stated that the entire report was attached to a submission made to and *considered* by the Expenditure Review Committee of Cabinet. As such, the correctness of the Tribunal's conclusion could be doubted. This decision also flies in the face of earlier cases suggesting that it is sufficient, for a document to attract exemption under section 28(1)(d), that it merely show what Cabinet or a Cabinet committee "had on its mind".

Re Dalla Riva and Department of Treasury and Finance was also a case in which the Cabinet documents exemption was claimed, this time in respect of documents concerning the Mitcham Frankston Freeway project. The Tribunal held that some of the documents were exempt.

The Tribunal stressed that Parliament would not have intended that virtually any document prepared by a department could be made exempt simply by placing it before Cabinet or a minister, or forming an intention when it was prepared that it be placed before Cabinet or a minister.

The Tribunal stated that a document will only be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared was submission for consideration by Cabinet. The exemption will not (necessarily) cover:

- documents created to assist in the preparation of a submission;
- documents merely circulated to every minister "for information";
- documents that, although they were physically submitted to Cabinet, were created for the purpose of preparing other documents to be considered by Cabinet rather than for the purpose of being considered by Cabinet itself;
- a draft document that was not intended to be submitted to Cabinet and was subsequently revised.

However, a document does not lose its exempt status where it is summarised, the summary is submitted to Cabinet and the complete document is simply made available to Cabinet ministers wanting to read it. How-

ever, if the document is a newly created document containing analysis based upon primary facts contained in a prior document, then it is not a summary of the prior document and the prior document will not be exempt.

In order to attract exemption under section 28(1)(ba), a document must have the character of briefing material. That is, it must contain information and advice, and needs to have been prepared for the purpose of instructing or informing a minister in advance, whether orally or in writing, in relation to issues that are intended or expected to be considered by Cabinet. It is not enough that the document was prepared for the purpose of being placed before a minister.

Where these conditions are satisfied, the exemption is made out irrespective of whether the document was in fact used to brief the minister or the issues were ultimately considered by Cabinet.

Covering letters and facsimile sheets may not fall within the exemption, even though the attached documents are found to have been prepared for the purpose of briefing a minister.

Whether a document was prepared before or after the meeting of Cabinet at which deliberations occurred or decisions were made is not determinative of its status under section 28(1)(d).

"Deliberation" means more than mere receipt of information in the Cabinet room, and connotes careful consideration with a view to the making of a decision. It also includes mere disclosure of material that would reveal what the ministers in Cabinet "had on their minds". A document disclosing the subject matter of deliberations in Cabinet, and what was on the Cabinet agenda, in a particular week would be exempt. Similarly, letters expressing a desire to raise matters in Cabinet might also be exempt if it was circulated and discussed at a Cabinet meeting.

"Decision" means any conclusions as to courses of action adopted by Cabinet, whether the conclusions concern final strategy or the manner in which a matter is to proceed.

Legal professional privilege exemption – scope and the public interest override

In *Re Osland and Department of Justice*, the Tribunal held that a document containing legal advice (here, barristers' advice regarding the applicant's petition of mercy) or containing a summary of such advice, is exempt under section 32. This is so, even where the advice is confined to matters of law reform or legal policy.

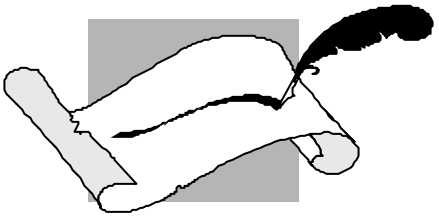
Although, a document will not be exempt under section 32 where an agency (the client) has waived privilege, a client will not be taken to have waived privilege simply by revealing the fact that legal advice has been obtained, that it has been obtained from a particular lawyer or that it contains certain conclusions. However, disclosure of the fact that advice has been obtained and the conclusions of that advice, in a manner which distorts the advice or creates a misleading impression may amount to waiver of privilege. (It is notable that, in respect of this latter point, the Tribunal relied on legal authority which had been rejected in a subsequent case that was not brought to the Tribunal's attention.)

The Tribunal held that, where a document is exempt under section 32, it is unlikely that editing under section 25 will be practicable as it is unlikely that a document containing legal advice could be edited in a sensible way so as to make it not an exempt document.

Despite finding the documents were privileged, so exempt under section 32, the Tribunal exercised the public interest override (s50(4)), holding that the public interest required that access be granted. The Tribunal based this conclusion on its view that a privileged document that is now of historical interest only, and not under active consideration in relation to any legal or other decision, should be given less weight than other privileged documents, when it comes to applying the public interest override. This approach appears to be inconsistent with the established legal principle that once legal professional privilege attaches to a document, it attaches for all time and in all circumstances. The Tribunal did not address this principle.

The Tribunal's decision to exercise the override was also based on a finding that the public had an interest in the applicant's conviction for murder and petition for mercy. This was apparent from the publicity and public concern that her case had generated.

The Tribunal's decision to grant access to privileged documents is currently on appeal in the Court of Appeal. We will keep you posted.



The approach taken to the release of privileged documents in Re Osland should be contrasted with that taken in *Re Conyers and Monash University*. In the latter case, the Tribunal

confirmed that, as client legal privilege is a fundamental human right, it can only be displaced, through exercise of the public interest override, "by other public interest factors of the highest order". No such interest was thought to exist in that case.

Personal privacy exemption – confidential material, professional opinion and error

In *Re Conyers*, the Tribunal also dealt with the personal affairs exemption. It held that the mere fact that information was obtained in confidence from a person does not make it information about his or her personal affairs. Similarly, an opinion provided by a person in a professional capacity does not necessarily relate to his or her personal affairs; such an opinion is part of the person's public, not private, life. So, while the personal details of the person giving an opinion will constitute personal information, the opinion may not.

Where a document is held to contain personal information, the fact that the document contains, or is alleged by the applicant to contain, errors of fact may weigh against disclosure. Disclosure to the world at large may be unreasonable because it would "[compound] the impact of such errors".

Law enforcement exemption – actual and potential cases, and showing a likelihood of prejudice or impartiality

The decision in *Re Mond and Department of Justice* suggests that it may not be necessary, in order to claim exemption under section 31(1)(b), to show that there is a case currently going through a court, tribunal or other formal process. It may be enough to show that there is *potential* for a case to arise in future.

However, even where there is a case on foot, or potential for a case to arise, it must still be shown that disclosure of the document would create a risk of prejudice to a fair trial or impartial adjudication of the case. Where a document contains allegations about quite formal matters that are easily dealt with by simple evidence, such that no adjudicator is likely to be led astray, and no opponent given an unfair advantage, by their disclosure, it will be difficult to show that prejudice to a fair trial or impartial adjudication of a case is likely to flow from disclosure.

Establishing endangerment to life or physical safety

Both the law enforcement and personal affairs exemptions call for consideration of whether disclosure of a document under the Act "would, or would be reasonably likely to, endanger the life or physical safety" of a person. In *Re O'Sullivan and Victoria Police*, the Tribunal observed that the approach that must be taken in applying this consideration is so similar in each context that, where the facts are the same, the same consequence must follow.

In each case, what has to be reasonably likely is the *endangerment* of a person's life or physical safety. There is no need to establish that there is a reasonable likelihood of actual harm. Further, 'physical safety' is not just about actual safety; it is also about the *perception* that one is safe. Thus, disclosure may endanger a person's physical safety, within the meaning of the Act, by making them feel less safe.

In most cases, a claim of endangerment will be based on the past conduct of the applicant or a third person. In *Re O'Sullivan* and, later, *Re Streater and Bayside Health – Alfred Hospital*, the Tribunal held that that the test to be applied in order to assess whether there is a reasonable likelihood of endangerment is an objective one. That is, an agency must consider the effect that the conduct would be likely to have on "the average man or woman on the street", not the intentions behind that conduct. For example, it was held in *Re O'Sullivan*, that while the applicant's intention, in making remarks to the police, had been to "take the mickey out of" particular police officers, what was relevant was that the remarks actually intimidated those officers.

When assessing whether there is a reasonable likelihood of endangerment in the personal affairs context, it is also necessary to consider the stated wishes (if any) regarding disclosure of the person whose personal information is contained in the document.

Trade secrets etc exemption – obligation to consult, and substantial and unreasonable diversion of resources

In *Re Asher and Department of Innovation, Industry and Regional Development*, the Department claimed that its consultation obligations under the trade secrets and business affairs exemption was likely to result in disruption or delay in the processing of other FOI requests and lead to a substantial and unreasonable diversion of departmental resources. In response, the Tribunal warned that, although agencies have finite resources, claims that the section 34(3) consultation process is likely to result in disruption or delay in the processing of other FOI requests may be regarded, by the Tribunal, as

indicating that the agency "is under-resourced and not serious about its FOI obligations".
In order to fulfil their obligations under section 34(3), agencies need to send, by certified mail, "a standard letter to each entity setting out the information in question that is sought to be released".

RECENT CASES (COMMONWEALTH)

Amendment of personal records – jurisdiction of the Tribunal

In *Francis v Department of Defence* the Tribunal had found, pursuant to section 55(6) of the Commonwealth FOI Act, that it had no jurisdiction to require an amendment to be made to a medical record concerning the applicant held by the Royal Australian Navy. The applicant claimed that the record was incomplete, incorrect or misleading.

The Federal Court held, in order for the Tribunal to have found that it had no jurisdiction to require that the record be amended, the Tribunal needed to have been satisfied that the record was a record of an opinion which was not based on a mistake of fact, and the author of which was not biased or unqualified and did not act improperly in conducting his inquiries.

No mistake of fact could be shown in this case. The possibility that the doctor may have failed to do something that was relevant to the formation of his opinion did not constitute a mistake of fact. Also, the possibility that an element of the doctor's opinion was erroneous did not, of itself, show a mistake of fact. Nor could it be shown in this case that the doctor had acted improperly in conducting his factual inquiries leading to the formation of his opinion. Even if the doctor did not carry out his tests in accordance with the relevant rules and requirements, that did not constitute 'acting improperly'.

As an aside, the Court suggested that an agency ought to determine whether a personal record should be amended under section 48 by assessing the accuracy of the information in the context of the information available now, rather than that available when the record was created.

Sufficiency of searches – the meaning of "all reasonable steps"

In *Re Bui and Department of Foreign Affairs and Trade*, the Tribunal followed the 2004 decision in *Re Chu and Telstra*. In doing so, it confirmed that section 24A of the Commonwealth FOI Act only requires an agency to take "all reasonable steps" to locate documents relevant to a request. That means, "such steps … to discover the requested documents as are appropriate in [the] circumstances". It does not require the searches conducted to be exhaustive.

In assessing whether the searches that have been made are "reasonable" in the circumstances, the following factors must be considered:

- the subject matter of the documents sought;
- the documents that one would expect to exist and their expected location;
- the record-keeping system of an agency and the likely places where the documents would have been stored;
- the practices and procedures of the agency in relation to the destruction or removal of documents;
- the steps already taken to locate the documents, and whether further searches would be reasonably likely to locate relevant documents;
- whether there are persons in the agency with relevant experience who have not been consulted; and
- the other commitments of the agency in dealing with FOI requests.

It will be recalled that in *Re Chu*, the Tribunal also noted the following as factors that should be considered:

- the age of the documents;
- the willingness or otherwise of the applicant to provide further information to facilitate searches for the documents; and
- the purpose(s) for which the request for access was

made.

In that case, the Tribunal noted that, in assessing what is reasonable, "it is not [the Tribunal's] role to conduct an inquiry into the adequacy or otherwise of an agency's record keeping". It is sufficient that the agency has met the requirements of section 24A, within the limitations set by its practices and procedures in respect of the collection and storing of information.

However, in 2005, the applicant sought review of the Tribunal's decision in *Re Chu* in the Federal Court. The Federal Court's decision in *Chu v Telstra Corporation Limited* now represents the highest legal authority on the interpretation and application of section 24A.

As a preliminary point, the Court held that the question of whether or not "all reasonable steps have been taken" to find a document is a matter for the agency, and, on review, for the Tribunal, to determine. It is not a matter, as to the existence of which it is for the Court ultimately to be satisfied. The effect of this is that the Commonwealth FOI Act makes the agency or Minister, and ultimately the Tribunal, the judge of whether or not all reasonable steps have been taken. The Court cannot substitute its own judgment for that of the Tribunal; rather its role is limited to determining whether or not any error of law was committed by the Tribunal when it made that judgment, so as to require the Tribunal's decision to be set aside.

It was the Court's view, in this case, that the Tribunal had, in fact, made an error of law, when determining whether Telstra had taken all reasonable steps to locate documents relevant to the applicant's request. The error was in the Tribunal's interpretation of the requirement that "all reasonable steps have been taken".

In the Court's view, the Tribunal failed to ask itself what section 24A required of it, that is, to determine whether all reasonable steps had been taken. Instead, the Tribunal focussed on the notion that the section does not require exhaustive searches to be performed and, in the Court's view, essentially applied a lesser test of "reasonable steps". The Court emphasised the fundamentally important difference between "all reasonable steps" and "reasonable steps", and stated that the Tribunal's failure to appreciate the significance of "all" led it to adopt a tempered and erroneous view of what is required to satisfy section 24A(a). Presumably, the Court would have made the same criticisms of the Tribunal's interpretation in *Re Bui*, that is, "such steps … to discover the requested documents as are appropriate in [the] circumstances".

The Court then sought to explain how the requirement of "all reasonable steps" should be applied. It stated that an applicant for access to a document of an agency or Minister should only be denied access on section 24A grounds where the agency:

[I]s properly satisfied that it has done all that could reasonably be required of it to find the document in question. Taking steps necessary to do this may in some circumstances require the agency or Minister to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered and disorganised.

This suggests that, contrary to previous statements by the Tribunal, it is not necessarily sufficient for an agency to meet the requirements of section 24A, within the limitations set by its data collection and retention practices and procedures. Thus, agencies should not longer simply assume that the limitations imposed on their capacity to locate documents by internal data collection and retention practices and procedures mean that they need to do less to satisfy section 24A(a). Rather, each agency will need to consider, in the circumstances of each case, whether doing "all that could reasonably be required of it" actually involves taking measures to confront and overcome the limitations imposed by such practices and procedures. Where it does, the agency will need to do more, not less, in order to meet the requirement of "all reasonable steps".

To the extent that the implications of an agency's internal

data practices and procedures will need to be actively considered in order to determine what constitutes "all reasonable steps", the Court's decision limits the degree of reliance that agencies and the Tribunal will be able to place on the proposition that, in determining whether all reasonable steps have been taken, it is not the Tribunal's role to "conduct an inquiry into the adequacy or otherwise of [the agency's] investigatory process or record keeping".

While it is still true that the adequacy or otherwise of an agency's processes is not, and should not become, the focus of decision-making under section 24A, it is clearly a relevant consideration.

The Court noted that, in applying the requirement of all reasonable steps, that fact that the applicant is unable to suggest any further areas that may be searched should not be held against the applicant. Such a fact is not relevant to the question of what constitutes all reasonable steps in the circumstances of a particular case.

Similarly, a person's right of access should not be adversely affected because no reason, or satisfactory reason, is given for seeking access. That is, the applicant's failure to state a reason or reasons for seeking access to a document provides "no justification at all for not taking all reasonable steps" to find a document. This, too, is an irrelevant consideration.

Notwithstanding the above, it is important to note that the Court's decision does not alter the fact that the moderating standard of "reasonableness" constitutes a critical part of the requirement of "all reasonable steps". As a result, the requirement is less stringent than, for example, the test of "all possible steps" or "all conceivable steps". This is confirmed by the fact that nothing in the Court's judgment appears to disturb the notion that section 24A(a) does not, generally, require "exhaustive steps" to be taken.

Personal privacy exemption – inferred expectation of confidentiality

In *Ward v Centrelink*, the applicant had requested access to a Centrelink computer file containing the names and contact details of the carers of the applicant's estranged children, and information concerning social security payments made to those carers.

The Federal Court held that, in determining whether disclosure of personal information about a person other than the applicant would be "unreasonable" for the purposes of section 41 of the Commonwealth FOI Act, it is not improper for an agency to consider an 'inferred expectation of confidence'. That is, an agency may take into account the fact that it can be inferred from the circumstances that the person to whom the information relates would have expected it to remain confidential.

The Court was of the view that it may be reasonable to infer an expectation of confidence even where, as here, information has been compulsorily acquired by an agency. The fact that an agency faces statutory sanctions for using protected information without authorisation will also support an inference of an expectation of confidence.

The Court also held that disclosure of information regarding social security payments paid to third parties is not necessarily unreasonable. The reasonableness of disclosure of such information must be considered separately from that of the names and contact details of the recipients of payments. The fact that it is a matter of general community interest that social security benefits are properly administered by Centrelink is a factor relevant to this determination.

Privacy

In the VCAT decision in *WL v LaTrobe University*, the Tribunal considered that whether information is 'personal information' under section 3 of the Act depends on whether either the applicant's identity is 'apparent' from the information, or the applicant's identity 'can reasonably be ascertained' from the information.

The Tribunal observed that "[f]or the applicant's identity to be *apparent*, one would need to be able to look at the information collected and know or perceive plainly and clearly that it was information about the applicant" (Tribunal's emphasis).

Information including an individual's name or photograph would make the individual's identity ap-

parent, as would information that is of such a singular nature "that it could be no one else but a particular person". As an example of information of such a singular nature, the Tribunal proffered that "if the information was about 'the lady who wears a crown and rules the British Empire', one would know plainly from the information that it was a reference to Queen Elizabeth II".

The question of whether the phrase 'can reasonably be ascertained' in section 3 includes resort to extraneous material appears to still be open.

The Tribunal ultimately found that "[e]ven allowing for the use of external information, the legislation requires an element of reasonableness about whether a person's identity can be ascertained from the information and this will depend upon all the circumstances in each particular case".

FOI Solutions acted for the University in this case.

Web site

Be sure to visit our web site at *www.foisolutions.com.au*. We would love to hear any comments or feedback, positive or negative, about it. Any suggestions for improvement would also be welcome. It will be updated on a regular basis, so don't forget to come back often.

FOI and Privacy Q&A

This will be the home of a new regular feature for our newsletters where we invite you to write to FOI Solutions with any freedom of information or privacy query and, if your query is chosen, we will answer the query directly to you free of charge and publish your question and our answer in the newsletter. *Please note that by submitting a query you will be taken to consent to your name, organisation and query being published in a future newsletter*.

Forthcoming Training

FOI Solutions will soon be publishing its training and seminar timetable for the first half of 2006. Be sure to keep a look out for it. It will also be available on our web site: *www.foisolutions.com.au*

Future Newsletters

Future editions of the newsletter will be available to clients by email (as a pdf attachment) or as a hard copy or both. In order to ensure that we provide this newsletter to you, our valued client, in the form most accessible to you, could you please take a few minutes to complete the insert in this newsletter and return it to us at:

FOI Solutions
Level 5, 105 Queen Street
MELBOURNE VIC 3000 *or* DX 345 MELBOURNE VIC *or* scan it in and email it to:
mick@foisolutions.com.au

Further Information

If you would like any further information about the matters raised in this Newsletter or any assistance with FOI matters generally, please do not hesitate to contact Mick Batskos on tel: 9601 4111 or mobile: 0417 100 796 or fax: 9601 4101 or email: *mick@foisolutions.com.au*

Your feedback about the Newsletter would be most welcome, as would suggestions about what you would like to see covered in future Newsletters.

Don't forget our FOI and Privacy VCAT decision summaries are available to keep you up to date with developments in this area.

Best of luck with your FOI & Privacy work in 2006!!

Solicitors & Consultants
Level 5
105 Queen Street
Melbourne Victoria 3000

DX 345
Melbourne VIC
Email mick@foisolutions.com.au
www.foisolutions.com.au

Telephone (03) 9601 4111
Facsimile (03) 9601 4101
(03) 9601 4121
Mobile 0417 100 796