Freedom of Information and the Public Interest

The High Court's decision in *McKinnon v Secretary of the Department of Treasury (2006)229 ALR 187* was the first consideration by that Court of exemption provisions in Freedom of Information legislation.

While the practical effect of the decision might be to limit the effectiveness of the federal *Freedom of Information Act 1982* **(FOI Act)** in requiring disclosure of politically sensitive documents, the reasoning may herald substantial liberalization of the administration of State and Territory FOI laws.

The McKinnon decision

Michael McKinnon is the Freedom of Information editor of the Australian newspaper.

He requested access under the FOI Act to documents which would disclose Treasury's calculations of the effect of bracket creep. Bracket creep is the amount by which income-tax collections increase due to the interaction of wage inflation and progressive tax scales.

Treasury claimed that the documents McKinnon had requested were exempt documents under s36 of the FOI Act.

That section exempts from disclosure documents which are "internal working documents" the disclosure of which is contrary to the public interest.

The issues in the case narrowed to whether disclosure of the documents was contrary to the public interest.

The Treasurer issued a "conclusive certificate" stating that disclosure of the documents was contrary to the public interest. McKinnon sought review by the Administrative Appeals Tribunal which has a special and narrow review function when conclusive certificates have been issued.

The principal issue before the High Court was the scope of that review function. The Court split 3 ways on that question:

- Chief Justice Gleeson and Justice Kirby in a joint judgment held that the Tribunal was obliged to consider all relevant facts and opinions bearing on the public interest served by disclosure on the one hand and non disclosure on the other and determine whether the conclusion that disclosure was contrary to the public interest was reasonable. [1]

[1] McKinnon at 229 ALR at 191 [12]

- Justice Hayne formulated a test very similar to that of the Chief Justice and Justice Kirby : whether the conclusion that the disclosure would be contrary to the public interest was supported by logical arguments which are open on the facts (presumably as found by the Tribunal) and which when taken *all together* support the conclusion.[2]

- Justices Callinan and Heydon in a joint judgment held that the review function was limited to assessing whether the individual ground or grounds cited by the Minister in his certificate was a reasonable ground for deciding that disclosure would be contrary to the public interest, and to deciding whether the ground cited in fact related to the documents in issue.[3]

Justice Hayne found that the Tribunal had applied the correct test and that the appeal should therefore be dismissed.

Justices Callinan and Heydon found that the Tribunal had applied the test formulated in their judgment and that the appeal should therefore be dismissed.

The Chief Justice and Justice Kirby dissented.

The result was that the appeal was dismissed by majority.

The impact of McKinnon in the federal sphere

The McKinnon decision confirms the scope for Tribunal review of a decision under the FOI Act is limited where a Minister has issued a conclusive certificate.

That scope is broader in internal working document cases than had previously been thought (the previous law is found in *Australian Doctors Fund Ltd v Commonwealth* (1994) 49 FCR 478). Nevertheless it will be extremely difficult for an applicant to succeed before the Tribunal in any case in which a conclusive certificate has issued.

Now that the High Court has provided a degree of clarity about the test to be applied in such cases there is a risk that Ministers will be prepared to issue certificates in cases where the previous uncertainty in the law would have operated as a constraint. The practical effect may well be to make it more difficult for applicants to obtain access to documents where a Minister has sufficient political interest to issue a conclusive certificate.

The broader impacts of McKinnon – impacts in all jurisdictions

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[2] McKinnon at 229 ALR at 203 [56]
[3] McKinnon at 229 ALR at 221 [129]

The broader implications of the McKinnon v Treasury decision arise from the Court's consideration of the concept of "the public interest" in Freedom of Information legislation.

Those impacts extend across all Australian jurisdictions.

The Commonwealth FOI Act provided the template used by each of the States and Territories of Australia in the drafting of their respective freedom of information legislation.[4]

Only South Australia and the ACT have provisions like the Commonwealth provision for conclusive certificates in internal working document cases.

It is accepted that judicial decisions on the FOI legislation of each jurisdiction is relevant to interpretation of the FOI legislation of other jurisdictions. For example, in *General Manager, Workcover Authority of NSW v Law Society of NSW [2006] NSWCA 84* the NSW Court of Appeal dealt with an internal working documents case and cited and relied on decisions dealing with the internal working documents provisions of the federal, NSW, Victorian and Queensland FOI Acts.

In the Commonwealth, South Australia and ACT the Court's consideration of "the public interest" will impact on cases which do not come to the attention of Ministers.

In all other jurisdictions the decision will affect all cases involving an internal working document exemption.

The public interest in FOI exemption provisions – what is it?

In his work *Official Information (Integrity in Government Project: Interim Report 1) (Canberra , 1991)* Professor Paul Finn [now Justice Finn of the Federal Court] describes three ways of thinking about the "public interest" and government's management of information(at pp.92-94):

"The manner in which government manages - and is lawfully allowed to manage - information in its hands has a marked bearing both on the quality of the citizen-State relationship and on the vitality of the democracy in which it governs. In the 200 years of our legal and governmental history, the latitude given to government in this has been variable. To the extent that it is possible to make broad generalisations and disregarding the very early colonial period, one can discern three overlapping phases in our law's governing of information management

[4] Freedom of Information Act 1982 (Vic); Freedom of Information Act 1989 (NSW); Freedom of Information Act 1991 (SA); Freedom of Information Act 1991 (Tas); Freedom of Information Act 1992 (WA); Freedom of Information Act 1992 (Qld); Information Act 2002 (NT). In addition the Commonwealth Act as then in force became an Act of the ACT on self government (Freedom of Information Act 1989 (ACT))

generally and of official secrecy in particular. Each, as will be seen, reflects rather different assumptions about the nature and proper working of our constitutional system. Each, for a period, has been the predominant influence in our law ... While the impact of these phases has been variable in our nine governmental systems, and while the pace of legal development in them is by no means uniform, the following discussion will proceed on a broad national basis, emphasising the change in constitutional and democratic principles which are embodied in our law, and particularly in the emerging law of the last decade.

*Assigning labels to the three phases, the first can be described as one of "public interest paternalism" ... While using the "public interest" to set the legal limits to the protection of official information, deference to the Crown and its advisers left it very much to the Crown to determine both what constituted the public interest and what and when official information should be made publicly available. The second phase, and much the most influential in Australia, has been that of "governmental authoritarism" ... In it neither official secrecy nor the public availability of information was made to depend upon the "public interest". It allowed government to elevate its interests over all others; to regulate at its discretion the public dissemination of information; and, formally at least, to coerce subservience from its officials through stringent official secrecy regimes. The third and much the most recent phase, can be designated the liberal-democratic one. Its manifestations are various: in Freedom of Information and in Privacy legislation; in the common law's "public interest" test for protecting governmental information; and in the now less deferential attitude taken to government in privilege cases. While accepting that official secrecy has a proper and necessary province, the guiding ideas here are that: "the interests of government ... do not exhaust the public interest" (*Glasgow Corporation v Central Land Board *[1956] S.C. (HL) 1 at 18-19, endorsed by Stephen J in* Sankey v Whitlam *(1978) 142 CLR 1 at 59); that the public availability of information is an important value to be promoted in a democratic society especially where this enables "the public to discuss, review and criticize government action" (*Commonwealth of Australia v John Fairfax and Sons Limited *(1981) 55 ALJR 45 at 49; (1980) 32 ALR 485 at 493 per Mason J) (the democratic theme); and that persons and bodies who supply confidential information to government about their own affairs have a legitimate interest in having the integrity and confidentiality of that information respected (the liberal theme).*

The scheme of each jurisdiction's FOI legislation is to confer on members of the public a right of access to official information, and to make that right of access subject to exemption provisions.

The conferral of that right on members of the public stems from the liberal democratic theme to which Professor Finn refers, which was also articulated in

the unanimous report of the Senate Committee which provides the foundation of the Commonwealth Act[5]:

"It seems to us that there are three quite specific justifications for having effective freedom of information legislation in Australia, each of which arises out of the principles upon which democratic government claims to be based. The first of these touches upon the issue of the rights of the individual. With certain national security exemptions to which we refer elsewhere, we believe that every individual has a right to know what information is held in government records about him [or her] personally … Secondly, we believe that when government is more open to public scrutiny, it in fact becomes more accountable. As a result there is a greater need for it to be seen as efficient and competent … Thirdly we believe that if people are adequately informed, and have access to information, this in turn will lead to an increasing level of public participation in the processes of policy making and government itself."

In broad terms, four categories of "public interest" treatment have been recognized in FOI exemption provisions. In the analysis that follows I refer to the Commonwealth Act, but similar provisions are found in State and Territory laws.

1. Closed categories of specific forms of harm

A number of provisions reflect interests which would generally be recognized as class claims in cases dealing with public interest immunity. Those provisions do "not provide any basis for a public interest criterion extending beyond the terms of the section. Either a document is within the section, in which case it is exempt, or it is not" (Commonwealth v Hittich (1994) 53 FCR 152 at 154):

a) section 33 which deals with documents, disclosure of which may cause damage to national security defence or international relations;
b) section 34 which deals with records of the Cabinet;
c) section 35 which deals with records of the Executive Council
d) section 37 which deals with documents, disclosure of which may prejudice the enforcement of the law.

2. Specific form of harm plus open public interest test

A number of provisions reflect categories by which a particular injury to a defined aspect of the public interest would be done by release of the document, but which also require a consideration of the public interest over all:

a) section 33A which deals with documents disclosure of which would affect relationships between the Commonwealth and a State

[5] Parliament of Australia: Freedom of Information, Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978 (AGPS 1979) at paras 3.3 – 3.5

b) section 39 which deals with documents disclosure of which would adversely affect the Commonwealth's commercial interests
a) section 40 which deals with documents disclosure of which is expected to prejudice the operations of government agencies in specified ways.

*Here, once the respondent agency has satisfied the grounds enumerated in ss33A(1), 39(1) and 40(1) respectively, that should ordinarily be enough by itself to make the document an exempt document. …… the terms in which these sub-sections are couched will require an applicant in some circumstances to raise matters which, being relevant to the public interest, weigh in favour of disclosure. (*Re Mann and Australian Taxation Office (1985) 7 ALD 698 at [24])

3. No harm specified but open public interest test

Section 36 deals with internal working documents. The section does not require any injury to any separately articulated aspect of public interest, but applies only where release of the document would be contrary to the public interest.

4. Public interest content to protection of private interests

To the extent that exemption provisions concerned with protection of private interests, operate by reference to disclosure being "unreasonable", an open public interest test is imported to the provision:

a) section 41 protects documents disclosure of which would constitute "unreasonable" disclosure of information relating to a person's personal affairs
b) section 43(1)(c)(i) protects business affairs documents disclosure of which would or could reasonably be expected to unreasonably affect a person's business or commercial affairs.

The public interest, for and against disclosure, is relevant to the assessment of whether the disclosure would be "unreasonable".

In Colakovski v Australian Telecommunications Corporation (1991) 23 ALD 1 at 9 Lockhart J. (Jenkinson J. agreeing) commented

"What is "unreasonable" disclosure of information for purposes of s 41(1) must have as its core public interest considerations. The exemptions necessary for the protection of "personal affairs" (s 41) and "business or professional affairs" (s 43) are themselves, in my opinion, public interest considerations.

A similar approach was adopted in *Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 36 FCR 111 at 125* in assessing whether an adverse

effect on business or commercial affairs is "unreasonable" for the purposes of section 43(1)(c)(i):

"If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be unreasonably affected by the disclosure; the effect, though great, may be reasonable under the circumstances. To give two examples: if the relevant information showed that a business practice or product posed a threat to public safety or involved serious criminality, a judgment might be made that it was not unreasonable to inflict that result though the effect on the person concerned would be serious. Of course, the extent and nature of the effect will always be relevant, often decisive. Whether the effect of the disclosure is unreasonable cannot be assessed without taking into account all relevant factors.

The Federal Court and the Administrative Appeals Tribunal, from the commencement of the Commonwealth Act, proceeded on the basis that assessment under the open “public interest” tests required a balancing of "the public interest in citizens being informed of the processes of the government and its agencies on the one hand against public interest in the proper workings of government and its agencies on the other hand". (Harris v Australian Broadcasting Corporation (1983) 5ALD 545 at 554)

The approach adopted was directly analogous to the balancing undertaken in public interest immunity cases like Sankey v Whitlam (178) 142 CLR 1 and Commonwealth v Northern Land Council (1993)176 CLR 604. Courts and tribunals in all jurisdictions accepted that this "requires a determination of the specific ways in which disclosure of a document will benefit the public interest and the specific ways in which it will harm the proper working of an agency having regard to the contents of each document."[6]

In McKinnon a majority of the Court relying on the Objects Provision of the FOI Act, has endorsed an approach to application of the open public interest tests based on the liberal democratic theme to which professor Finn refers.

Gleeson CJ and Kirby J commented of the balancing approach[7]:

We have avoided reference to “balancing”. This is a concept that assumes prominence in a different context, in which courts are required to deal with claims of public interest immunity advanced in opposition to the production of documents, for example under subpoena, in civil or criminal litigation. …. The image of the scales of justice is pervasive in legal thinking, and it is natural to talk of taking account of competing considerations in those terms. Under the FOI Act, however, the matter of disclosure or non-disclosure is not approached on the

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[6] M. Paterson: Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State (Butterworths, 2005) at Paragraph 7.10

[7] McKinnon at 229 ALR at 193 [19]

basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other. There is a "general right of access to information … limited only by exceptions and exemptions necessary for the protection of essential public interests [and other matters not presently material]": s 3(1)(b). …. References to "balancing" create a danger of losing sight of that context.... To lose sight of that would be to lose sight of the principal object of the FOI Act.

Hayne J commented [8]:

Exceptions and exemptions, including the exception or exemption for which s 36(1) provides, are to be limited to those necessary for the protection of <u>*essential*</u> *public interests.*[His Honour's emphasis]

Thus, a majority of the High Court has indicated that in applying the open public interest tests under FOI legislation it is not a matter of weighing aspects of harm to public administration against a right of access. Rather, the right of access is to be effective unless it is shown that disclosure of the particular document would cause damage to an <u>essential</u> public interest, and that non disclosure is <u>necessary</u> to protect against that damage.

Previous court and tribunal decisions have not addressed what is, or is not, an <u>essential</u> public interest. Nor have they addressed the content of the necessity which would result in non disclosure. Those questions may fall to be determined in future cases. The result may be that the exemptions based on open public interest tests will be narrower than the current law which permits and requires consideration of every aspect of harm that might be done by disclosure.

Further Justices Callinan and Heydon indicated that the Courts and Tribunals should shift the administration of FOI legislation at least some way toward the liberal democratic theme.

Their Honours considered the specific grounds specified by the Treasurer in his conclusive certificate. Consistent with Professor Finn's government authoritarism theme, their Honours found that the grounds which asserted some damage to the way government agencies operate were proper grounds for denying the right to access. However, consistent with the liberal democratic theme, their Honours rejected grounds dealing with the confusion that may be caused to the public or in political debate by release of the documents.

Conclusion

In those jurisdictions which permit conclusive certificates in internal working document cases the decision in McKinnon v Treasury may lead to a tightening of access to politically sensitive documents.

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[8] McKinnon at 229 ALR at 201 [53]

However, in the majority of jurisdictions, and in all cases where Ministers are unlikely to have any interest, the decision provides the basis for significant narrowing of the operation of exemption provisions based on open public interest tests – and a consequent significant expansion in individuals' rights of access to information in the possession of government.

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