CLOUDY with a silver lining

McKINNON AND FREEDOM OF INFORMATION

By Moira Paterson

High Court decisions concerning freedom of information (FOI) laws are rare, so the decision in *McKinnon v Treasury*[1] was awaited with much anticipation.

The appeal by the FOI editor of the *Australian* newspaper against a decision denying him access to Treasury policy documents offered the court a unique opportunity to reinvigorate the Commonwealth *Freedom of Information Act* 1982 (FOI Act) as a mechanism for accessing documents that shed light on executive decision-making. However, the majority decision regrettably failed either to circumscribe the ministerial power to prevent access to such information, or to encourage criteria that promote the objective of open government. Nevertheless, a close examination of the judgments suggests majority support for a more pro-disclosure approach to the interpretation of exemption provisions. Moreover, by highlighting the very limited nature of the Administrative Appeals Tribunal's (AAT's) power to review conclusive certificates, the decision has the potential to promote long-overdue statutory reforms of the FOI Act.

THE CONCLUSIVE CERTIFICATE MECHANISM IN SECTION 36

A key rationale for FOI is that it enhances the democratic process by making more transparent the process and decisions of the executive branch of government. For it to be able to function effectively, journalists and others must be able to use it to shed light on the processes that form the basis for government decision-making. The so-called 'internal working document' exemption in s36(1) has the potential to frustrate that goal by allowing agencies to withhold a wide range of documents that illuminate their 'thinking' and policy-forming processes.

The test for exemption in s36(1) is made up of two parts; a broad definition that encompasses most of an agency's decision-making documents and an additional public interest test. The additional public interest test in s36(1)(b) was included so as to require consideration of 'many factors favouring disclosure that might otherwise be ignored'.[2] Interpreted as requiring a balancing of the competing interests for and against disclosure of any specific document,[3] it plays a pivotal role in ensuring that documents are withheld from access only where it can be proved that any harmful consequences that might reasonably flow from their disclosure outweigh the competing public interests favouring transparency.

Most decisions to deny access to documents based on the exemption in s36(1) are subject to full review on the merits by the AAT, which makes its own assessment of the strengths of the arguments for and against disclosure and grants access in those cases where it cannot be demonstrated that the factors favouring non-disclosure outweigh those favouring transparency. However, the position is quite different where a claim for exemption is supported by a ministerial certificate issued under s36(3). Under these circumstances, the AAT's task is limited under s58(5) to assessing the reasonableness of the claims made in the certificate and deciding whether to recommend that the certificate should be withdrawn. Even if the tribunal finds in favour of an applicant, the minister may decline to revoke a certificate provided that s/he tables in Parliament an explanation for refusing to do so.

The ability of ministers to issue conclusive certificates to support claims for exemption has been criticised for undermining the universal right of access – a core feature of the legislation – by subjecting those rights to a discretionary power of veto. However, it is especially problematic in the context of an exemption that has the potential to embrace the very documents that shed light on government decision-making. The FOI Act is unique in providing for a conclusive certificate mechanism in relation to the internal working document exemption. That mechanism was criticised by the Australian Law Reform Commission (ALRC) in its *Open Government* report on the operation of the Act, on the basis that 'decisions to withhold documents revealing deliberative processes, which are in the majority of cases the decisions of officials, should always be reviewable'.[4]

The potential for the conclusive certificate mechanism to undercut transparency would be reduced if the AAT's task of assessing the reasonableness of the claims made in a certificate were construed as requiring it to assess the cogency and weight of the competing factors for and against the disclosure of the documents to which it relates. However, the wording of s58(5) lacks clarity when it comes to defining exactly how a certificate issued under s36(3) should be reviewed.

The majority in *McKinnon* (Hayne, Callinan and Heydon JJ) concluded that the AAT had not made any legal error in accepting as reasonable the claims made in the certificate issued by the Treasurer, despite the existence of evidence that disputed their factual underpinnings (and therefore supported disclosure in the public interest).

The most troubling aspect of the Court's decision is the acceptance by Callinan and Heydon JJ that 'if one reasonable ground for the claim of contrariety to the public interest exists, even though there may be reasonable grounds the other way, the conclusiveness will be beyond review'.[5] That test suggests that a claim could potentially qualify as reasonable even if it is of trivial weight when compared

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with competing factors favouring disclosure. Coupled with their acceptance of the validity of claims based solely on the minister's assessment of the potential for disclosure to impact adversely on the candour of written communications, their Honours' approach effectively confers an unrestricted right of veto over deliberative processes documents.

The very narrow legalistic approach adopted by Callinan and Heydon JJ contrasts with that of Hayne J, who not only accepted that that there might be competing interests relevant to the assessment of the statutory test, but also that the task imposed on the AAT might require an assessment of factors for and against disclosure.[6] However, the test ultimately applied by him was 'whether the conclusion expressed in the certificate (that disclosure of particular documents would be contrary to the public interest) can be supported by logical arguments which, *taken together*, are reasonably open to be adopted, and which, if adopted, would support the conclusion expressed in the certificate'.[7]

Gleeson CJ and Kirby J in the minority unequivocally accepted the need to consider all relevant factors, including factors favouring disclosure. They commented that:

> 'It is undoubtedly correct that the tribunal's function under s58(5) is not to decide whether the tribunal is satisfied that disclosure would be contrary to the public interest; just as an appellate court's function on an appeal from a jury in a negligence case is not to decide whether it finds that the defendant was negligent. It does not follow, however, that the tribunal is not required to take account of all relevant considerations, or that the circumstance that there is something relevant to be put against disclosure is the end of the matter. It is not the end; it is the beginning.'[8]

THE BASIS FOR THE AAT'S DECISION

Another unfortunate aspect of the High Court's judgment was its failure to take the opportunity to question the factors that the AAT accepted as justifying the claim that disclosure would be contrary to the public interest. Its assessment of what constituted 'public interest' for the purposes of s36(1)(b) involved accepting and applying a number of factors that it had originally identified in *Re Howard and the Treasurer*[9] as supporting non-disclosure on public interest grounds. In the absence of statutory guidance as to the types of harm that the legislators had in mind when enacting s36, there has been an unfortunate tendency for those factors to be used as a *de facto* list of guidelines, sometimes without sufficient attention to the evidence on which specific claims are based.[10]

Arguments based on candour and frankness are especially problematic because of the danger that documents will be withheld on a class basis without regard to their own specific contents.[11] The specific argument put by the Treasury was that disclosure would not affect the supply of information *per se* but, rather, that it would lead to information being provided orally, instead of in writing. This claim was accepted as not irrational on the basis of evidence that the AAT considered, but did not specifically discuss, in its decision due to confidentiality orders. As the evidence was received in the absence of the applicant, there was no opportunity for cross-examination. With respect, it is difficult to believe that a minister would in reality be prepared to run the risk of acting on the basis of undocumented advice or that public servants would be prepared to act contrary to their statutory obligation to provide 'frank, honest, comprehensive, accurate and timely advice'.[12]

Also problematic was the AAT's acceptance of an argument that it would be contrary to the public interest to disclose documents prepared for an expert audience on the basis that they contained jargon and technical terms that could easily be misinterpreted. It specifically rejected arguments that the Treasury had adequate facilities to explain documents or put them in context, because the Act did not provide that an exempt document can cease to be exempt for that reason.

Shortly before the *McKinnon* appeal was heard by the High Court, the NSW Court of Appeal handed down a decision that considered the use of the *Re Howard* factors in relation to an equivalent provision in the NSW *Freedom of Information Act* 1989. Significantly, it emphasised the need for arguments that disclosure is contrary to the public interest to have a 'demonstrated factual basis'.[13] However, there was no reference to this decision in any of the judgments of the High Court in *McKinnon*.

The only two members of the High Court in *McKinnon* who specifically discussed the grounds relied upon in the certificate, Callinan and Heydon JJ, criticised the minister's claims that it was difficult to put financial data into context; they considered it unrealistic for any minister to believe that s/he could control the manner, or dictate the context, in which matters of public interest were debated.[14] However, they were prepared to accept the validity of arguments to the effect that disclosure would diminish the candour of written advice provided by public servants, stating that this was a matter on which a minister's opinion and experience were likely to be as well-informed and valuable as those of anyone else, including senior officials.[15]

THE OBJECTS CLAUSE IN SECTION 3

A more positive aspect of the *McKinnon* case is its endorsement of a more pro-disclosure approach to interpretation of exemption provisions.

The purpose clause in s3(1) refers to the broad objective of increasing 'as far as possible the right of the Australian community to access information in the possession of the government of the Commonwealth'. That objective is further expanded in three paragraphs, including paragraph (b), which spells out the function of providing a general right of access to documents subject to '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'. Unfortunately, the reference to exceptions and exemptions in s3(1)(b) makes it unclear whether s3 requires exemption provisions to be interpreted from a pro-disclosure stance of the type that has been adopted by the US Supreme Court in relation to the US *Freedom of Information Act*.[16]

In considering this issue, it is important to bear in mind that the FOI Act was enacted in the context of a long-standing tradition of official secrecy and a natural tendency

for agencies not to wish to expose their activities to public scrutiny. Arguably, therefore, there are sound policy reasons for adopting a pro-disclosure stance that reinforces the democratic rationale for the legislation. That rationale suggests that the subsidiary object of creating a right of access referred to in s3(1)(b) should be understood as intended to implement the general object of increasing the Australian community's right of access to information; s3 therefore requires that exceptions and exemptions in the Act be interpreted narrowly so as to extend that right of access.[17]

However, the full court of the Federal Court has instead held that:

> 'The rights of access and the exemptions are designed to give a correct balance of the competing public interests involved. Each is to be interpreted according to the words used, bearing in mind the stated object of the Act.'[18]

That approach contrasts with the pro-disclosure approach favoured by the Victorian Supreme Court in relation to a similarly worded objects clause in s3 of the *Freedom of Information Act* 1982 (Vic),[19] and *obiter dicta* of the High Court in *Victorian Public Service Board v Wright*.[20]

The joint judgment of Callinan and Heydon JJ in *McKinnon* stressed the qualified nature of the object in s3(1)(b), implicitly endorsing the approach taken by the Federal Court in the same case.[21] However, the minority explicitly supported a pro-disclosure stance, commenting that:

> '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 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].'[22]

Although Hayne J acknowledged the qualified nature of the object in s3(1)(b),[23] it is significant that he emphasised that exemptions such as s36 were to be limited to 'those necessary for the protection of *essential* public interests'.[24]

FUTURE DEVELOPMENTS

Another positive outcome of the case is that comments by Callinan and Heydon JJ concerning the potential availability of judicial review[25] have reignited interest in this as an alternative avenue for reviewing conclusive certificates. Although it generally offers fewer advantages for applicants than merits review, the limited nature of the AAT's review function under s58(5) makes judicial review more attractive in cases where claims for exemption are supported by conclusive certificates.

In addition, criticism of the *McKinnon* decision has increased political pressure for long-overdue statutory reforms. The ALRC's 1995 *Open Government* report, which continues to provide an invaluable template for the reforms that are required to reinvigorate the FOI Act's open government dimension, recommends, among other things, that the conclusive certificate mechanism be totally abolished.[26] By prompting a renewed interest in FOI and a renewed commitment on the part of the Opposition to abolish conclusive certificates and to strengthen the objects clause in s3,[27] the High Court's decision has added to the pressure for much-needed reforms to the Act.

CONCLUSION

If the public is to be able to make any meaningful contribution to government policy- and decision-making, it must have access to pre-decisional documents. The executive should not have an unrestricted discretion to withhold such documents on public interest grounds. The approach taken by the majority in *McKinnon* to the AAT's review powers has unfortunately done little to prevent the government from hiding from scrutiny the true basis on which its decisions are made. However, interpreted with sufficient attention to the commonalities between the approach of Hayne J and that of Gleeson CJ and Kirby J, the case has the potential to bring about a more pro-disclosure stance to interpretation of exemption provisions. It is also possible that, by highlighting the existing deficiencies in the Act and the potential for judicial review, the High Court may achieve indirectly what it failed to achieve via its interpretation of the AAT's review function. ■

Notes: **1** [2006] HCA 45. **2** Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978* and *Aspects of the Archives Bill 1978*, 1979 [5.23]. **3** *Harris v Australian Broadcasting Commission* (1983) 5 ALD 545, 554. **4** Administrative Review Council/Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No. 77, Australian Law Reform Commission, Canberra, 1995 [9.19]. **5** [2006] HCA 45, [131]. **6** [2006] HCA 45, [55], [56]. **7** *Ibid.* **8** [2006] HCA 45, [17]. **9** (1985) 7 ALD 645. For a more detailed discussion see Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (2005) 295-8. **10** *Ibid*, [7.12]. **11** Rick Snell 'The Ballad of Frank and Candour: Trying to Shake the Secrecy Blues from the Heart of Government' (1995) 57 *Freedom of Information Review* 34. **12** See Australian Public Service Values as set out in s10 of the *Public Service Act* 1999 (Cth). **13** *WorkCover Authority of New South Wales v the Law Society of New South Wales* [2006] NSWCA 84, [156]. **14** [2006] HCA 45, [124]. **15** [2006] HCA 45, [121]. **16** See, for example, *Department of Air Force v Rose* 425 US 352 (1976) at 361; *United States Dept of Justice v Julian* 486 US 1 (1988). **17** See P Bayne, *Freedom of Information*, (1984) 20. **18** *News Corporation Ltd v National Companies and Securities Commission* (1984) 52 ALR 277, 279 per Bowen CJ and Fisher J. See also *Austin v Deputy Secretary, Attorney-General's Department* (1986) 67 ALR 585; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111. **19** See *Accident Compensation Commission v Croom* [1991] 2 VR 322; *Sobh v Police Force of Victoria* [1994] 1 VR 4. **20** (1986) 160 CLR 145, 153. **21** [2006] HCA 45, [111]. **22** [2006] HCA 45, [19], per Gleeson CJ and Kirby J. **23** [2006] HCA 45, [25]. **24** [2006] HCA 45, [53]. **25** [2006] HCA 45, [131]. **26** See above Note 4. **27** See M McKinnon, 'Secrets and Lies' at http://www.theaustralian.news.com.au/wireless/story/0,8262,9-20638918,00.html concerning the introduction of a private member's bill abolishing conclusive certificates and Labor's commitment to amend the objects clause in s3.

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