

The FOI landscape after McKinnon

Text of an address by Prof. John McMillan, Commonwealth Ombudsman, to a seminar of the Australian Institute of Administrative Law, Canberra, October 2006

1. Introduction

There have always been two ways of viewing the debate on freedom of information (FOI) laws in Australia.

Many commentators laud the *Freedom of Information Act 1982* (FOI Act) in majestic terms as a law of fundamental democratic importance that can illuminate dark corners in government and ensure transparency and accountability. On the other hand, as experienced FOI practitioners well know, processing an FOI request in government can be grindingly dull and distracting from other tasks that at the time seem more important in the public interest.

Or another contrast: FOI champions in Australia customarily focus on the need for transparency in policy formulation and decision-making on matters of public interest. Yet the large majority of FOI requests are from individuals seeking access to their own personal records, who are invariably granted full or substantial access.

Or again: A common complaint about FOI laws is that it can be difficult and expensive for journalists to make FOI requests. Yet the statutory access procedures that are necessarily part of the FOI Act will forever mean that it is a cumbersome mechanism for journalistic access, and unlikely ever to compete with the leak or the friendly inside contact as the preferred pathway for journalistic enterprise.

That duality, where ideal and reality compete, provides the context for analysing the High Court's decision in *McKinnon v Secretary, Department of Treasury*¹. On the one hand, many FOI advocates and commentators looked to the High Court to become an FOI champion in an eternal battle to combat executive secrecy and political dominance. On the other hand, the specific task of the High Court was to rule upon whether the Administrative Appeals Tribunal had made an error of law in the way it had gone about applying a particular provision of the FOI Act.

2. Summary of the High Court decision

Mr McKinnon, the Freedom of Information Editor for *The Australian*, had appealed to the AAT against two decisions of the Treasury denying him access to documents under s 36 of the FOI Act. Section 36 is the internal working documents exemption, and provides that a document is exempt from disclosure under the FOI Act if two conditions are satisfied: the document contains opinion or the like forming part of the deliberative processes of government; and disclosure of the document would be contrary to the public interest.

One group of 36 documents to which Mr McKinnon was denied access related to 'bracket creep' in the federal income taxation system; the other group of 13 documents related to the

¹ [2006] HCA 45

First Home Owners Scheme. All documents, created in 2001-02, related to discussions about those matters occurring at senior and ministerial levels in the Treasury.

Shortly before the McKinnon appeals were listed for hearing in the AAT, the Treasurer issued a conclusive certificate applying to the documents. Under s 36(3) of the FOI Act, a certificate that is in force ‘establishes conclusively that the disclosure of [a] document would be contrary to the public interest’.

The Treasurer listed seven grounds for each certificate, which can be distilled to two themes:

- Disclosure of the documents would undermine confidentiality in discussion of policy options, between ministers and advisers, particularly on controversial issues.
- Disclosure of policy options and provisional ideas that were not necessarily adopted by government and were not intended for publication could be misleading and confusing.

When a s 36 claim is made without the support of a certificate, the AAT can undertake full merit review of the claim that disclosure of a document would be contrary to the public interest². That is, after receiving evidence and hearing argument, the AAT can override the agency view that disclosure would be contrary to the public interest. By contrast, when a conclusive certificate is issued the AAT has a more limited task under s 58(5) of the FOI Act, to ‘determine the question whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest’.

What does it mean for the AAT to determine if there are ‘reasonable grounds’ for a certificate claim? The Full Federal Court and the High Court were both divided on that issue, with a majority in each court reaching the same decision, that the AAT (constituted by the President, Downes J) had approached the task correctly. Though of the same decision, the Federal Court and High Court both differed in their approach to the issue. That difference was probably more pronounced than the difference between the majority and the minority in the High Court.

The issue before the courts was narrowly framed as a legal issue: to define how the Administrative Appeals Tribunal should go about the task of deciding if there were reasonable grounds for a conclusive certificate claim. The Tribunal had approached the task by inspecting all the exempt documents, and hearing the evidence of witnesses for each side, who were cross-examined by the other side. The witnesses for the Treasurer were four senior Treasury officers who gave evidence both in open session and in a private hearing. The reasoning of the Tribunal was in two stages. It firstly held that the grounds claimed by the Treasurer in the two certificates were rational and permissible grounds designed to safeguard the deliberative processes of government. Secondly, on the basis of the evidence and its inspection of the documents, the Tribunal held that there was a substantial factual basis for concluding that the documents fell within those grounds.

The majority in the High Court held that this was a correct approach for the Tribunal to adopt. The Tribunal had rightly inspected the documents and received evidence. The issue of reasonable grounds should not ordinarily be decided by reference alone to the claims made in a certificate. Those claims must be grounded in both fact and reason. Beyond that, it was not

² For example, *Re Lianos and Department of Social Security* (1985) 7 ALD 475.

the task of the Tribunal to make its own assessment of the public interest, or to decide if the evidence or arguments for disclosure were more reasonable or persuasive than those preferred by the Treasurer. Callinan and Heydon JJ, in the majority, went so far as to add that a conclusive certificate should be upheld if it contains one reasonable ground, with evidentiary support, for a claim that disclosure would be contrary to the public interest, even though there may be reasonable grounds to support disclosure³.

The other majority judge, Hayne J, took a stricter approach. He held that it is not enough for the Tribunal to decide if one of the considerations advanced in support of a certificate claim is based in reason: 'the Tribunal's task is to decide whether the conclusion expressed in the certificate ... can be supported by logical arguments which, taken together, are reasonably open to be adopted and ... support the conclusion expressed in the certificate'⁴. Hayne J went on to conclude that the Tribunal had properly taken that approach.

The joint decision of the minority, Gleeson CJ and Kirby, was different more in emphasis than in any test they enunciated. Their Honours emphasised that the Tribunal must do more than decide that a particular ground or proposition could persuade a reasonable person. The Tribunal's task is to look at whether, having regard to all relevant considerations available and known to the Tribunal, a reasonable person could be satisfied that disclosure of a document would be contrary to the public interest⁵. They stressed this is not a balancing test; it is a question of whether there are reasonable grounds to support a certificate.

It is doubtful that that different emphasis would have produced a different practical outcome in *McKinnon*. It is foreseeable that if the case had been remitted to the AAT to be reconsidered according to the test enunciated by Gleeson CJ and Kirby J, the same substantive result would have been reached with little change in the reasoning of the Tribunal. Indeed, their Honours acknowledged that there were passages in Downes J's judgment that are consistent with the approach they outlined. Their ostensible reason for allowing the appeal and remitting the matter to the AAT was to correct an approach taken by the majority in the Full Court, which the Full Court had claimed described Downes J's approach.

In particular, Gleeson CJ and Kirby J rejected the view of Tamberlin J in the Federal Court, who said that the test is whether a certificate claim is 'not irrational, absurd or ridiculous'⁶. Interestingly, the majority in the High Court disagreed that Downes J had in fact applied such an approach. They noted that Downes J had inspected the documents, received evidence and argument from both sides, and satisfied himself that the facts established in evidence were (in Downes J's words) 'sufficient to support the claim that disclosure would be contrary to the public interest in the mind of a person guided by reason'⁷. Downes J had considered all of the grounds in the Treasurer's certificates, rather than confining himself to the sufficiency of one ground alone. In summary, Downes J had applied the statutory test of whether there were reasonable grounds to support a certificate, not whether there was one non-absurd reason to support it.

³ [2006] HCA 45 at para [131].

⁴ [2006] HCA 45 at [56] (emphasis in original).

⁵ [2006] HCA 45 at [13].

⁶ (2005) 145 FCR 70 at 74[4].

⁷ (2004) 86 ALD 138 at 142[16]; noted by Hayne J at [2006] HCA 45 at [68], and by Callinan and Heydon JJ at [131].

3. Significance of the ruling - for FOI law

The history of the *McKinnon* litigation illustrates that a conclusive certificate will be hard to overturn. As *McKinnon* itself shows, a certificate claim can be made in generalised or class terms, along the lines that disclosure of a group of documents could undermine the integrity of government deliberative processes for a specified reason. Though there must be facts to ground each claim in the certificate, a challenge to the certificate by a person who has not seen the documents will, as Hayne J observed, be ‘argued at a high level of abstraction’⁸.

In short, the test of whether a certificate claim constitutes a reasonable ground for denial of access is not an overly demanding test. To that extent the High Court merely confirmed what had been known about the FOI Act since 1982, and that attracted great debate during its enactment.

Even if those hurdles can be overcome, and the AAT can be persuaded that there do not exist reasonable grounds to support a certificate claim, the FOI Act erects another obstacle. Section 58A(1) provides that the Minister can decide not to revoke a certificate by tabling a statement to that effect in the Parliament. In effect, the AAT’s decision has the status only of a recommendation to the Minister.

There are considerations that work the other way. A certificate under s 36 can be signed only by a Minister or principal officer of the agency (s 36(8)). If requested, the Minister must provide a statement of reasons for the certificate under s 13 of the *Administrative Decisions (Judicial Review) Act 1977*. *McKinnon* illustrates that a claim in a certificate is unlikely to be accepted by the Tribunal as providing a reasonable ground for non-disclosure, unless evidence can be led in support of it, almost necessarily from senior officials in the Department.

Those processes potentially expose senior officials and the Minister to discomfort and exposure if there is a legal challenge to a conclusive certificate. The evidence they provide to the Tribunal must rise above the generalised language in the certificate. As Callinan and Heydon JJ noted, ‘The real issue will ... be whether the document in question, having regard to its date, its author, the position of its author, and its contents, is one in respect of which the Minister can hold the requisite opinion’⁹.

Moreover, and consistently with the normal principle of merit review, the issue of reasonable grounds to support a certificate is to be determined at the time of the AAT’s review of a certificate, and not at the time the certificate was issued¹⁰. The AAT undertakes contemporaneous, not historical review. It is therefore possible that the support for a certificate will erode over time. A certificate claim that would have withstood challenge at the time it was made will not necessarily be as cogent at the time it is reviewed by the AAT.

This is a more demanding process than commentators had hitherto thought to be the case. For example, a leading Australian FOI text summarised the law thus: ‘A finding that reasonable grounds for the issuing of a certificate do not exist will generally be made only where there

⁸ [2006] HCA 45 at [38].

⁹ [2006] HCA 45 at [129].

¹⁰ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419.

has been a misunderstanding about the nature or contents of a document, or where the grounds stated are opportunistic, frivolous or trivial'¹¹.

A few other minor comforts in the judgments provide slender hope for reinvigorating FOI jurisprudence. For example, Gleeson CJ and Kirby J comment that FOI should not be approached as a balancing exercise, in which 'empty scales in equilibrium' are filled by competing arguments¹². Rather, the context for deciding FOI issues is declared in the objects clause in s 3, that the Act confers a 'general right of access to information ... limited only by exceptions and exemptions necessary for the protection of essential public interests'. Elsewhere, too, their Honours emphasised the importance of the language in the FOI Act - it confers a 'right', which is limited only as 'necessary' for the protection of 'essential' public interests¹³.

But against those considerations is a great disappointment in the judgments: they do not provide strong guidance on the meaning of 'public interest' in s 36. Federal FOI jurisprudence has long been held back by generalised public interest claims for denying access to internal working documents, that have been accepted by the AAT in cases such as *Re Howard and the Treasurer* in 1985¹⁴, and never fully exposed to judicial appraisal. There is a strong echo of the earlier AAT jurisprudence and the 'Howard factors' in the Treasurer's certificate accepted by the AAT in *McKinnon*. Downes J noted that claims similar to those made by the Treasurer had been upheld in earlier tribunal decisions and that their authority prevails¹⁵.

There was no serious appraisal by the High Court in *McKinnon* of the public interest jurisprudence. At most, Callinan and Heydon JJ were critical of some of the reasoning in the Treasurer's certificates. For example, they doubted that the controversial and sensitive nature of a topic under discussion would of itself provide a reasonable ground for confidentiality, or that the difficulty faced by the public in understanding jargon and technical detail in a document would justify non-disclosure¹⁶.

It is disappointing that the High Court did not take the opportunity to provide guidance on the meaning of public interest - whatever that guidance happens to be. There has for some time been debate and uncertainty as to what qualifies as a public interest ground for non-disclosure of documents relating to the policy processes of government. There was mention by Downes J of some of the differing approaches, in a helpful discussion by his Honour that sought to clarify the AAT jurisprudence on public interest.

Nor is the AAT jurisprudence the only or the final word on the issue. FOI legislation in much the same form applies in all Australian jurisdictions, and the courts and tribunals of other Australian jurisdictions have both grappled with the meaning of public interest and sometimes taken a different approach.

¹¹ Moira Patterson, *Freedom of Information and Privacy in Australia* (2005) at [9.63].

¹² [2006] HCA 45 at [19]

¹³ [2006] HCA 45 at [4] - [5].

¹⁴ (1985) 7 ALD 645; see Patterson, above n 13, at 295-9.

¹⁵ (2004) 86 ALD 138 at 149[46] (although Downes J expressly avoided any discussion or endorsement of Howard).

¹⁶ [2006] HCA 45 at [120] - [126]

An apt contrast to *McKinnon* is the decision of the NSW Court of Appeal in *General Manager, WorkCover Authority of NSW v Law Society of NSW*¹⁷, delivered five months before *McKinnon*. The Court of Appeal ruled that it was not contrary to the public interest to release a draft report on legal costs prepared for WorkCover by an independent consultant. The Court noted that the exemption claim had been modelled on the ‘Howard factors’. In a general discussion of the public interest test in the context of the NSW FOI Act, the Court observed that the *Howard* decision, decided twenty years earlier, was based on a view of the law that had probably changed in the interim: ‘Freedom of information legislation ... was intended to cast aside the era of closed government and principles developed in that era may, with the benefit of twenty or more years of experience, be seen as anachronisms’¹⁸.

4. Significance of the ruling - beyond the courtroom

The debate beyond the courtroom following *McKinnon* was more colourful and strident. The chorus of criticism in Australian newspapers the day following the High Court’s decision was harmonious. The *Canberra Times* editorialised that ‘FOI is now effectively a dead letter whenever ministers want to conceal information from the public’; the *Courier Mail*, that ‘Freedom of Information laws are now effectively lost as an avenue for making governments open, transparent and accountable’; and the *Sydney Morning Herald*, that ‘The ruling is an effective death sentence for the ground-breaking FOI legislation ... Australia’s democracy is diminished by the Court’s decision’¹⁹.

As an exercise in legal analysis those editorial assessments of the *McKinnon* decision and its impact on the tens of thousands of FOI requests that are processed each year are not altogether balanced! Yet, as this paper noted at the outset, the FOI debate in Australia occurs at many levels. It is not purely a legal debate. FOI has a symbolism that reaches far deeper into our concern as a society to enhance democracy and to ensure transparency and accountability. To that extent the debate about FOI has to be approached with a subtlety of mind and tolerance for journalistic flourish.

The underlying message in the newspaper and public assessment of the *McKinnon* judgments is that FOI does not have a champion within national government. There is no FOI Commissioner; Ministers and agency heads have power to issue conclusive certificates; rarely a word is heard from senior government officials lauding the FOI Act as a democratic cornerstone; and the experience of many people is that it can be procedurally frustrating and arduous to use the FOI Act.

Rightly or wrongly, many people looked to the High Court to become a champion of FOI in opposition to government. The principle of open government strikes a chord with constitutional values that courts safeguard, notably separation of powers, representative democracy and the rule of law. By and large, the *McKinnon* judgments deal only with legal

¹⁷ [2006] NSWCA 84. See also, in Victoria, *Re Halls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483; and in Queensland, *Re Eccleston and Department of Family Services, Aboriginal & Islander Affairs* [1993] 1QAR 60.

¹⁸ [2006] NSWCA 84 at [154] per McColl JA, Handley & Hodgson JJA agreeing.

¹⁹ Respectively: ‘Law is little more than a Privacy Act’, Editorial, *Canberra Times*, 7 September 2006; ‘High Court backs Treasurer on FOI’, *The Courier Mail*, 7 September 2006; and ‘Dead end for FOI laws’, Editorial, *Sydney Morning Herald*, 7 September 2006.

principle construed narrowly and do not extol a broader jurisprudential platform for open government.

The debate has had to move elsewhere. Others have stepped forward to play a more vigorous role in FOI leadership. Notably this has occurred in the media, with two newspapers, *The Australian* and the *Sydney Morning Herald*, now having FOI editors. Generally, too, the media has become more energised about FOI and secrecy than previously. They have been living out their own cry, that 'Australian democracy ... sorely needs reinvigorated freedom of information laws'²⁰. The *McKinnon* dispute also triggered a much greater degree of public interest in FOI discussion, in the form of seminars, articles and letters to the editor.

The debate is occurring in other quarters also. The office of the Commonwealth Ombudsman issued a report on FOI administration in early 2006²¹. The thrust of that report is that there is an uneven culture of support for FOI among Australian Government agencies; and that the vitality and success of the FOI scheme will depend heavily on the way the Act is administered in agencies. The report urged the creation of an office of Information Commissioner, possibly based in the Ombudsman's office. Some State Ombudsman offices have likewise taken increasing interest in FOI administration and reform²².

Another initiative that shows promise was the subject of an Australian National Audit Office report in September 2006. The ANAO reported that Commonwealth agencies are showing a higher level of compliance with the Senate Order on Departmental and Agency Contracts, made in 2001, that sought to combat 'commercial-in-confidence' claims in government contracts by requiring that government contracts be listed on the internet²³. The ANAO reported a progressive reduction in the number of contracts reported as including specific confidential provisions, to less than twenty per cent of contracts.

The *McKinnon* decision also triggered renewed interest in legislative reform of the FOI Act. Shortly after the decision the Labor Shadow Attorney-General, Ms Nicola Roxon, introduced a Private Members Bill to abolish conclusive certificates²⁴. Every exemption claim would be subject to full merits review by the AAT. This goes further than a proposal made in a report on FOI in 1995 by the Australian Law Reform Commission²⁵, to abolish conclusive certificates for the internal working documents exemption but not for the national security, international relations and Cabinet documents exemptions.

It is, of course, not unprecedented for an Opposition to promise FOI reform. But if Labor's proposed reform is implemented at a time when it is in government, it will provide an interesting finale to the *McKinnon* litigation. The proposed amendment would constitute a more substantial change to the FOI Act than any decision the High Court could have given.

²⁰ 'The truth gets locked up', *Sydney Morning Herald*, 12 September 2006.

²¹ Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, Report No 2/2006.

²² For example, Victorian Ombudsman, Review of the Freedom of Information Act (2006); NSW Ombudsman, Annual Report 2005 - 2006 Chapter 12.

²³ ANAO, *The Senate Order of the Departmental and Agency Contracts (Calendar Year 2005 Compliance)*, Audit Report No 5 2006 - 2007.

²⁴ Freedom of Information (Abolition of Conclusive Certificates) Bill 2006, introduced 9 October 2006.

²⁵ Australian Law Reform Commission/Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77, ARC Report No 40 (1995) at 99

In effect, the FOI cause will have been advanced more through a defeat in the courtroom than by a success.

This phenomenon of political reform is not unknown. Australian electoral laws were substantially reformed by Parliament after the High Court declined to read a ‘one vote, one value’ principle into the Constitution in the *McKinlay* case in 1975²⁶. Path-breaking native title legislation was enacted in Australia after the initial loss in the Gove Land Rights case in 1971²⁷. In a similar vein, the office of the Commonwealth Ombudsman prepared an influential report on one aspect of long-term immigration detention, prompted in part by the decision of the High Court in *Al Kateb* that Parliament could authorise mandatory and indefinite immigration detention²⁸.

Many similar examples could be given, of political change that was effectively triggered by a defeat in a court battle. In short, for those who looked to the High Court to deliver more in *McKinnon*, paradoxically that might eventually be the outcome.

²⁶ *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

²⁷ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; see the *Aboriginal Land Rights (Northern Territory) Act 1976*.

²⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562; see Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents*, Report No 1/2006.