ers by a more general belief in the inviolability of copyright. Their campaign, through such high-profile writers as Thomas Keneally and Peter Carey, carried weight with some Hawke ministers.

Cabinet's decision

In the CLRC and the PSA proposals, cabinet might be said to have been given a choice between a lawyer's approach and an economist's. The first enshrined property rights, the second market forces. In the cabinet too, where Mr. Bowen took a lawyer's approach, other ministers are understood to have argued for the economist's.

Cabinet's decision reflects the lawyer's view, with a dash of free-market economics for a certain range of books. The lawyer's wish to preserve property rights is shown in the way previously-published (or "black-list") titles are dealt with: if they can be made available in Australia within 90 days by the closed-market system, they may not be imported direct.

The glimmer of open-market applies to titles published after the Act is changed. They are subject to a 30-day rule - short enough to loosen the British publisher's grip over most American titles, without costing Australian authors their territorial copyright.

So what will happen? I believe that just as the unworkability of Australia's partly-open market is becoming apparent, two international changes will force a re-think. The first is the creation, after European economic integration in 1992, of the biggest open market for English language books in the world, one which will include the U.K. The second is new technology for storing, transmitting and printing words.

CAMLA Office Bearers For 1990

Elected At A.G.M.

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Vice-president: Julia Madden
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Martin Cooper	J.A. Morgan
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Graham Dethridge	T. O'Connor
Gareth Evans	Russell Patrick
Dominique Fisher	Richard Phillips
Kate Harrison	Jonquil Ritter
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Peter Hohnen	Bruce Slane
Yvette Lamont	Doug Spence

F.O.I.: The promise & the reality

Peter Bayne, of the Australian National University, examines the scope for exploitation of the various F.O.I. acts by journalists and others

The notion that citizens have a right to obtain information in documentary form in the possession of the government stands legal and administrative traditions on their heads. This explains in good part the reason for the long and difficult gestation period of the Freedom of Information Act 1982 (Cth) in the face of opposition of the senior levels of the public service. But the Commonwealth Act was followed soon by the more generous Victorian Freedom of Information Act 1982 and, more recently, the Freedom of Information Act 1989 (NSW). The Queensland Electoral and Administrative Review Commission may well recommend an Act, and one was promised in the Governor's recent speech to the South Australian Parliament. In the past, the Tasmanian MP Bob Brown has introduced Bills to provide for FOI.

There is a great deal of similarity between the three existing Acts (or four if the ACT Act, which is almost identical to the Commonwealth is included). There are some vital differences, which where relevant will be noted below. Otherwise fine detail will be omitted, and the references which follow are, unless otherwise indicated, to the Commonwealth Act.

The promise

The Acts begin boldly enough, providing at s.11 that "every person has a legally enforceable right to obtain access" to documents of Ministers, Departments and agencies (notice that it is only information in documents which may be obtained). The right does not however extend to an "exempt document", and this of course is where the argument with government usually starts. Nevertheless, the manner in which the politicians, from all sides, justified the introduction of the legislation gave rise to an expectation that the right would be seen generously.

Take for example what was said in the Parliament of New South Wales by Mr. Wal Murray in June of 1988:

"This bill is one of the most important to come before this House because it will enshrine and protect the three basic principles of democratic government, namely, openness, accountability and responsibility. It has become commonplace to remark upon the degree of apathy and cynicism which the typical citizen feels about the democratic process. This feeling of powerlessness stems from the fact electors know that many of the decisions which vitally affect their lives are made by, or on advice from, anonymous public officials, and are frequently based on information which is not available to the public. The government is committed to remedying this situation."

At the forefront then is the democratic rationale for the Acts - that they will enable any member of the public - including the merely curious - to find out what its government has done, and furthermore to participate in what is proposes to do. "Government" is moreover seen as both the Ministry and the public service. There is also a privacy rationale for the Acts, but it was not prominent in the parliamentary debates.

The role of journalists

The introduction of the Commonwealth Act was supported by journalists, and some, such as Jack Waterford in Canberra and Paul Chadwick in Melbourne were early users of this Act (and in Chadwick's case, of the Victorian Act). For reasons which will be apparent from what is said below, enthusiasm for the Commonwealth Act has waned, but the Victorian Act remains a valuable asset to the 'investigative' reporter. The opposition parties at both the Commonwealth and Victorian levels have lately begun to use the legislation to some effect. A point which journalists might note is that it is safer for the whistleblower to let it be known that a document exists than to actually leak it.

Rather than illustrate use by journalists, this brief comment will outline the major kinds of exemptions in the Acts, and in particular those which may be invoked where the documents concern the development of policy on some matter. In this way, the reader can form her or his own view as to just what difficulties the public interest requester will face.

Exemptions

While the politicians proclaimed the democratic aims of the Acts, the fine detail of the drafting of the exemptions reveals that the interests of government and those with whom they deal are well protected. The inter-

ests of government are reflected in exemptions for documents which, if disclosed:

- would reveal Cabinet and Executive Council decisions and deliberations (classes which are widely defined but which do not pick up any document submitted to these bodies);
- might damage Commonwealth/State, Commonwealth/Foreign government (or State/State) relations, or reveal information communicated in confidence between them;
- might prejudice national security, defence or international relations;
- might prejudice law enforcement; or
- in the case of a 'deliberative process' document, would be contrary to the public interest. This category potentially picks up all manner of advices and policy proposals, whether intra-agency, inter-agency, or agency/outside.

The interests of those with whom the government deals are protected by exemptions for documents which, if disclosed:

- would be an unreasonable disclosure of someone's personal affairs;
- would reveal trade secrets, other valuable commercial information, would lead to a reduction in the supply of information to government, or would unreasonably affect someone's business affairs; or
- would breach a confidence.

The exemptions are so broad that some system of external review of agency decisions to refuse access was imperative. The Commonwealth and Victorian Acts provide for AAT review; in NSW it is currently the District Court. Under the Commonwealth and NSW Acts, the review body must uphold any exemption claim it finds satisfied. But in this circumstance in Victoria, the AAT may, on public interest grounds, nevertheless grant disclosure. This vital difference makes the Victorian Act much more attractive.

In many cases, where say a journalist or an MP seeks documents, the exemption for the 'deliberative process' documents will be sought, and argument will then concern what matters are relevant to both disclosure and non-disclosure in the public interest. In the early case, Harris v Australian Broadcasting Corporation (1983) Justice Beaumont stated that

"in evaluating where the public interest lies in the present case it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other ...".

The reality

The Commonwealth AAT has, however, generally weighted the scales towards non-disclosure. Agencies have come to rely on the five factors specified in Re Howard and The Treasurer of the C/W of Aust. (1985) (in which Mr. John Howard, then Leader of the Opposition, sought documents about ACTU/government budget negotiations). These factors suggest that it is not in the public interest to disclose high level communications on sensitive issues, or concerned with the development of policy. An agency may argue that disclosure of the documents in issue is contrary to the public interest by reason that those called upon to produce similar documents in the future would, if disclosure occurred, be inhibited from being candid and frank. An agency may also argue that disclosure could cause confusion and unnecessary debate in circles outside the agency, or that the document does not fairly disclose the reasons for a subsequent decision. Some AAT members will also give weight as favouring non-disclosure to the extent of confidentiality which surrounds the document, and further find that policy development at the senior levels of the bureaucracy is necessarily conducted in confidence.

"Great weight is given to agency claims of damage, and inter-governmental communications are readily accepted to have been confidential."

There is however another line of AAT cases which take a much more limited view of the weight to be given to the factors just mentioned. Some seem to reject the possibility that public servants, (and particularly senior ones), would not be candid or frank. Some give little or no weight to the extent of confidentiality. The Senate Standing Committee on Legal and Constitutional Affairs which reported on the operation of the Act disapproved of the argument for non-disclosure to the effect that the public might be confused and thus speculate unprofitably about the information; but some AAT panels nevertheless continue to uphold the argument.

The AAT has taken a generous view of inter-governmental relations exemptions. Great weight is given to agency claims of damage, and inter-governmental communications are readily accepted to have been confidential. It is most unlikely that a claim will be rejected where the foreign or State government objects to disclosure. Whether or not a conclusive certificate has been issued seems to make little difference.

Conclusive certificates

Under all the Acts, the problem for applicants is compounded by the fact that some kinds of claim of exemption can be supported by a conclusive certificate. The Victorian Act protects only cabinet documents and in any event is largely ineffective; this is another matter which makes that Act attractive to users. But in the Commonwealth and in NSW, the effect of a conclusive certificate is that while an appeal from a decision not to disclose the document may be heard by the AAT (or District Court), it may determine only whether there were "reasonable grounds" for the certificate, and ultimately the Minister has a discretion whether or not to revoke the certificate. In any event, the Commonwealth AAT has virtually yielded up any meaningful review of the conclusive certificates.

But there is a critical difference between the Commonwealth and NSW Acts. In the Commonwealth, a conclusive certificate can protect documents concerning Commonwealth/State relations, and the deliberative process documents. From the point of view of a journalist, these exemptions are often the barriers to access. But under the NSW Act, these exemptions cannot be fortified by a conclusive certificate.

A final matter of significance is the matter of charges. In 1986 the Commonwealth Act was amended such that if it is so minded an agency can, even in relation to a request for a small number of easily accessible policy documents, run up a bill for several hundred dollars. The NSW charges regime follows the Commonwealth scheme. Again, the Victorian Act is more user friendly in that it sets a low upper limit to charges.

Enough has been said to show just what barriers face the journalist requester in the Commonwealth and in NSW. But FOI is in its infancy and for reasons which may seem hard to grasp still seems a popular measure of reform. In time, the Acts may be administered by agencies, and interpreted by review bodies and the courts in a way which will fulfil the promise of a better informed public.