through the ethical regulation of the legal profession. Special dangers posed by class actions or the way in which settlements are procured should be dealt with in the rules that govern those matters. They do not justify a general rule of public policy that saves the other party from answering the claim.

The court was not dealing with the question of whether a funding agreement is unenforceable for maintenance or champerty. Section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) expressly preserves the rules relating to when contracts are treated as against public policy or illegal. That is a matter between the funder and the funded party. It is not a ground to stay proceedings. The effect of their Honours' comments on the enforceability of litigation funding agreements is a question for the future.

Callinan and Heydon JJ were firmly of the view that there was an abuse of process. Since the majority on the disposition of the case was Gummow, Hayne, Callinan, Heydon and Crennan JJ, the 'majority' comments on abuse of process have no precedential value. However, they have the support of five out of the seven justices. They are likely to be relied on by litigants and are likely to be regarded as persuasive.

Numerous persons having the same interest

The holding which disposed of the appeal was that Pt 8 r 13(1) of the Supreme Court Rules was not engaged. That sub-rule permits representative actions on behalf of 'numerous persons [having] the same interest in [the] proceedings'. Part 7 r 4 of the UCPR and O 7 r 13 of the Federal Court Rules use the same words. (The Federal Court also has separate and detailed provision for large-scale representative proceedings in Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA).) The words can be traced back to Chancery practice before the *Judicature Act 1873* (UK).

In *Fostif,* a summons was filed on behalf of a lead plaintiff, purportedly representing other relevant (unidentified) plaintiffs. The summons only sought remedies for the lead plaintiff. According to the majority, this meant other potential plaintiffs had no 'interest in [the] proceedings', as required by the sub-rule.

The position was different in an earlier case considering Pt 8 r 13(1), *Carnie v Esanda Finance Corporation* (1995) 182 CLR 398 *(Carnie)*. *Carnie* involved loan arrangements said to be unlawful. Representative proceedings were commenced against lenders on behalf of all relevant debtors. The High Court held that Pt 8 r 13 was engaged. Crucially, the lead plaintiff sought not only a money sum, but also a declaration that no represented debtor was obliged to pay for charges of a particular kind. All potential plaintiffs had an interest in that declaration.

In Callinan and Heydon JJ's view, seeking a declaration could not have saved the summons in *Fostif*. The action was only for a money sum, and a declaration would have been surplusage. Moreover, each plaintiff's right to be paid depended on the particular arrangements between that plaintiff and the wholesaler. Until that right was alleged, a declaration would go beyond the pleadings.

The availability of a declaration in *Carnie* was, in a sense, fortuitous. A declaration in favour of all plaintiffs would be surplusage, or would depend on the particular facts of each plaintiff's case, in many potential representative proceedings.

The rules now appear to fall between two stools. If the view is taken that class actions should be available before the class of potential plaintiffs has been exhaustively identified, then the rules ought to provide for it, as does Pt IVA of the FCA. It is difficult to see the reason for an additional hurdle that the lead plaintiff be able to shape its claim to include a remedy on behalf of all potential plaintiffs. If, on the other hand, such actions are felt to be so dangerous that they cannot be controlled by judicial supervision, or by a more detailed regime in the rules of court, then there is no reason to permit them simply because a such a remedy can be devised. There is something to be said for revisiting the form of the rules.

Discovery as to potential plaintiffs

A third issue, which arose in the courts below, is the availability of discovery to identify potential plaintiffs. Einstein J at first instance and Mason P, Sheller and Hodgson JJA in the Court of Appeal would have permitted it if the claims proceeded.

Discovery must be necessary before it is ordered. Special considerations presumably apply to discovery sought for the benefit of unknown plaintiffs. It remains for future litigation or legislation to give further guidance on when it will be available and how it should be controlled.

By James Emmett

Freedom of information

McKinnon v Secretary, Department of Treasury (2006) 229 ALR 187

The appellant, Michael McKinnon, is the freedom of information editor of *The Australian*. In 2002 McKinnon made two applications to the Treasury Department under the *Freedom of Information Act 1982* (Cth) ('FOI Act') seeking access to documents relating to bracket creep and the level of fraud associated with the First Home Buyers Scheme. The department denied access to a number of documents on the basis that they were exempt documents under s36(1) of the FOI Act. A document is exempt from disclosure under s36 if two conditions are satisfied. First, the document must be an internal working document according to the objective criteria in s36(1)(a).

Broadly, internal working documents are those which contain or relate to opinions, advice, recommendations, consultations or deliberations within the Commonwealth Government. The second condition is that disclosure of the document would be contrary to the public interest (s36(1)(b)).

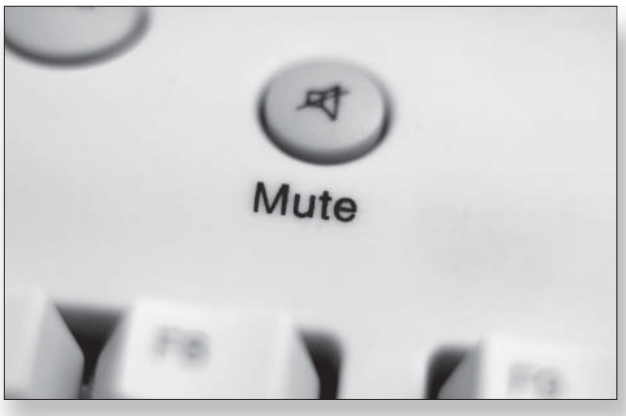
McKinnon sought a review of the department's decision in the Administrative Appeals Tribunal ('AAT'). Prior to the hearing of the review, the treasurer issued certificates under s36(3) of the Act identifying seven grounds on which disclosure of the documents was contrary to the public interest. The various grounds described in the certificates fell broadly into two categories. First, the certificate asserted that disclosure of the documents would compromise necessary confidentiality and candour within government. Secondly, the certificates stated that disclosure would be apt to mislead the public because the material contained in the documents was provisional, incomplete or comprised of technical terms and jargon that were only intended for a specific audience.

The AAT was satisfied that the documents in dispute were internal working documents within the meaning of s36(1)(a) and this issue was not pursued on appeal. The key issue in dispute was the validity of the certificates issued by the treasurer in determining the public interest question. Although the certificates were referred to in the proceedings as 'conclusive certificates', this is something of a misnomer as the Act did allow for limited review of the certificates. The AAT was not empowered to perform its usual merits review function in the sense of determining whether the department, in refusing the application, or the treasurer, in issuing the certificates, had made the correct or preferable decision. Instead, in reviewing the certificates the AAT was required under s58(5) of the FOI Act to determine 'whether there exist reasonable grounds for the claim that the disclosure of the document[s] would be contrary to the public interest'.

After inspecting the documents and taking evidence on the question of the public interest, including evidence given in the absence of the applicant and his representatives regarding the grounds relied upon by the treasurer, the AAT held that there did exist reasonable grounds for the claim that disclosure of the documents would be contrary to the public interest.

McKinnon appealed unsuccessfully, on a question of law only, to the full court of the Federal Court (Tamberlin and Jacobson JJ, Conti J dissenting). Jacobson J, with whom Tamberlin J agreed, held that the determination of whether reasonable grounds existed for the particular claim described in the certificates was a question of fact for the AAT. On the question of the proper construction of the requirement that reasonable grounds exist for the claim, Jacobson J rejected the appellant's argument that the AAT was required to balance all aspects of the public interest.

McKinnon appealed to the High Court, where he argued that the AAT and the majority of the full court had effectively reduced the test of whether reasonable grounds exist for the claim to a test of whether there was a ground for the claim that was 'not irrational, absurd or ridiculous'. The appellant argued that this set the bar for conclusive certificates too low and was inconsistent with the object of the FOI Act, being 'to extend as far as possible the right of the Australian



community to access to information'. The central question in the High Court was whether the AAT was required under s58(5) of the Act to consider competing aspects of the public interest and to give weight to those considerations which favoured disclosure. In the AAT the appellant had led evidence from a number of witnesses, including former public servants, to raise alternative arguments about the public interest and to challenge the basis of the claims contained in the certificates, including the propositions that release of information would impede necessary candour between public servants and was apt to mislead the public.

The High Court dismissed the appeal by a majority of three (Hayne, Callinan and Heydon JJ) to two (Gleeson CJ and Kirby J). Callinan and Heydon JJ, in a joint judgment, held that it was sufficient if one reasonable ground for the claim of public interest existed, even if there were competing reasonable grounds in favour of disclosure of the information. Hayne J, in contrast, held that the AAT was not confined in its inquiry to considering whether one of the considerations advanced in support of the claim can be said to be based in reason. Rather, the AAT was required to consider whether the claim that disclosure 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'. Hayne J agreed with the appellant that the expression 'not irrational, absurd or ridiculous' is not synonymous with 'reasonable grounds', but did not agree that the AAT had applied the former test. Hayne J also rejected the submission that the AAT was required to balance competing facets of the public interest and determine which view of the public interest is to be preferred. Instead the AAT must consider the grounds relied upon by the minister for the determination that disclosure was contrary to the public interest and determine whether those were reasonable grounds.

Gleeson CJ and Kirby J, in a dissenting joint judgment, held that the AAT was required to take account of all relevant considerations bearing on the question of whether disclosure was contrary to the public interest. As their Honours were not satisfied that the AAT had taken into account all such considerations, they would have remitted the matter to the AAT for reconsideration. Gleeson CJ and Kirby J placed particular reliance on the objects of the FOI Act and the 'right'

of access which the Act confers. Because of the stated objects of the FOI Act, the dissenting judges considered that it was misleading to describe the minister's decision under s36(3) as involving a 'balancing' of public interest factors. Instead, the minister's decision on the public interest and the question of reasonableness that is considered by the AAT must operate in the context of the legislature's clear intention to confer on the public a general right of access.

The decision of the majority leaves little scope for challenging a certificate issued by a minister under s36(3). A certificate may be set aside by the AAT if it can be established that there are in fact no reasonable grounds to support the asserted claim, but otherwise it will not suffice to point to countervailing factors in favour of disclosure. Alternatively, as suggested by the majority judges in the High Court, a certificate may be challenged in judicial review proceedings. It is possible that the latter course will provide a more fruitful avenue of attack for those faced with a conclusive certificate, despite the usual limitations of judicial review.

By Stephen Free

Post employment restraints

By Arthur Moses and Tony Saunders

In 2006 the Supreme Court has been called upon to deal with an increasing number of applications for interlocutory injunctions to enforce post employment restraints contained in contracts of employment. Four such recent cases are summarised below.

Cactus Imaging Pty Limited v Peters [2006] NSWSC 717

Cactus Imaging Pty Limited's (*Cactus*) former New South Wales Sales Manager, Mr Peters, commenced employment with its chief competitor, Metro Media Technologies Inc (MMI), approximately six months after resigning from his employment with Cactus.

Cactus did not seek to prevent Mr Peters from remaining in the employment of MMI, notwithstanding that the contractual restraint, if enforced, would do so. Instead, Cactus sought to have Mr Peters restrained from disclosing Cactus's confidential information; and, for a period of twelve months following the end of his employment, from canvassing soliciting or endeavouring to entice away from Cactus any persons who were its clients or customers during the year before Mr Peters' departure, from soliciting or enticing away from Cactus any employee consultant or contractor of Cactus, and from counseling, procuring or otherwise assisting any person to do any of those acts. An interlocutory injunction to that effect was granted, by Gzell J, on 22 March 2006, and the hearing was expedited.

At the final hearing, Brereton J emphasised that a plaintiff who seeks to restrain a former employee from using confidential information must be able to identify with specificity, and not merely in global terms, the relevant information.[1] One reason for this is that an injunction in general terms restraining a former employee from using the employer's 'confidential information', would inappropriately leave, to an application for contempt, determination of whether particular information was or was not confidential.

Brereton J held that Mr Peters had access to Cactus's confidential information, including information as to internal costs and pricing rates, optimal operating speeds of Cactus's printing equipment and the functions and details of the production scheduling software used by Cactus.

By reason of Mr Peters' knowledge of Cactus's New South Wales clientele, their needs and idiosyncrasies, Brereton J held that Cactus had a legitimate protectable interest in its customer connection.[2]

Brereton J concluded that the contractual provision prohibiting Mr Peters from canvassing, soliciting or endeavouring to entice away from Cactus any of its clients was supported, not only by protection of customer connection, but also by protection of confidential information.[3] Those legitimate protectable interests would have also supported the provision prohibiting Mr Peters from working for a competitor, had Cactus sought to enforce it.[4]

As to the duration of the restraint, Brereton J relied upon the following factors in finding that the period of twelve months was not excessive: first, that is what the parties agreed; secondly, at least for lower volume customers, it would probably take 12 months for a replacement to prove his or her competence and establish a rapport with the customer; thirdly, insofar as the restraint protects confidential information, knowledge of Cactus's pricing parameters and marketing strategies might well afford the employee an unfair advantage for as long as twelve months after separation; and fourthly, albeit slightly, that one of Mr Peters' fellow employees at Cactus had a similar restraint.[5]

Brereton J reviewed the authorities on non-recruitment covenants and concluded that although the more recent cases tended to support such covenants on the basis of protection of confidential information, they were also supported by staff connection, which constitutes part of the intangible benefits that may give a business value over and above the value of the assets employed in it, and thus comprises part of its goodwill.[6] Because the non-recruitment covenant was supported by both staff connection and confidential information, Brereton J held that a restraint period of twelve months was reasonable.[7]