RECENT DEVELOPMENTS IN FREEDOM OF INFORMATION LAW

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An invitation to speak on 'recent developments' allows a broad discretion. I have read my present invitation as a request to review recent decisions of Australian tribunals and courts, and to use this as a launching pad for some comments on the current position of Freedom of Information (FOI).

My short impression is that activity on FOI in courts and tribunals since 2000 has been neither great in volume nor of general significance. However, I shall comment on the fourth FOI case to reach the High Court in twenty years of FOI. That case, *Shergold v Tanner,* is also the first for twelve years.[1]

In the Federal Court, I shall comment on the *Staff Development Case*. The other cases in that court which I located concerned:

- The interrelation of FOI and litigation in a court. In one case, it was accepted that a freedom of information request can be pursued concurrently with litigation without being an interference with the administration of justice.[2] Another case showed that it may be less easy to use in FOI proceedings material which was obtained during court proceedings.[3]

- An extension to legal professional privilege provided under the Extradition Act.[4] It was accepted in the Full Court that the concept of privilege embodied in s 42(1) of the FOI Act is that developed by the common law, ie with the current ambit set by a 'dominant' rather than 'sole' purpose test.

- The exemption for matter communicated in confidence by a foreign authority.[5] Wilcox J rejected an argument that the motives of the supplier might be relevant.

- The duty of agencies to search all data bases to which they have rights of access.[6] Beaumont J followed Victorian authorities and held that 'a document in the possession of the agency' embraced legal or constructive possession: a right and power to deal with the document in question, and was not confined to actual or physical possession.

- The ambit of a secrecy provision in the Migration Act.[7] The Full Court held that it did not prevent the Secretary divulging the name of the law enforcement agency in China which had supplied information leading to the applicant being refused a visa nor the words used in its request for confidentiality 'exclusive of their content'.

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In the State courts, no judgments on FOI have emerged from the NSW Supreme Court on appeal from the ADT, notwithstanding considerable activity in that Tribunal since it commenced in 1999.[8] Outside the Act:

- The Court of Appeal's cases exploring parliamentarians' rights of access to documents are of interest in their balancing of government secrecy against accountability.[9]

- An interesting recent judgment of Simpson J gave a broad effect to the FOI Act's protection against liability for defamation of suppliers of information to government.[10]

- Several judgments show plaintiffs using FOI legislation to investigate their claims before commencing litigation. In one of these, the plaintiff's case against the Commonwealth needed to rely entirely on documents obtained through FOI, due to Centrelink's policy of destruction after two years.[11]

In the Queensland Supreme Court, I found three FOI cases:

- A ruling that a communication from a local council was not from 'another government'.[12]

- Consideration of an exemption which applied unless 'disclosure is required by a compelling reason in the public interest'. [13]

- A ruling that the Local Government Association of Queensland was a 'body established for a public purpose by an enactment' and therefore subject to the Act. Atkinson J followed the approach that the Queensland FOI Act was directed towards opening to public scrutiny the information relating to public affairs held by agencies of the government and should not be given a restrictive reading.[14]

In South Australia a right of external appeal is to the District Court, but this jurisdiction seems seldom to be exercised and I found no recent decisions interpreting the legislation in that court or on appeal to the Supreme Court.

I found no decisions on the Tasmanian FOI Act.

In Victoria, I shall refer below to an important discussion in the Court of Appeal on the VCAT's 'override discretion'. I shall not attempt to assess the recent decision-making of that Tribunal, but in the Supreme Court I noted:

- A strong defence of a Tribunal decision which was not persuaded by the opinions of two witnesses called by the agency. Hedigan J said:

  > In my view, the Tribunal rightly stood against devising a principle by which persons exercising the statutory right to information might be so easily cut off from it, by a wide construction of the likelihood of impairment, supported by not much more than the statements of two persons who in effect work in conjunction with medical practitioners and not the members of the public.[15]

- Litigation over FOI requests concerning tendering processes for the Ambulance Service, and a Royal Commission into the handling of those requests. I have not attempted to explain any of this, but there is obviously an interesting narrative to be told by someone who is following it.

- A ruling allowing 321 FOI requests made by Esso arising out the Longford gas explosion to be aggregated when deciding whether their determination would substantially and unreasonably divert resources.[16]

In the Western Australian Supreme Court, I found:

- Two cases holding that physical possession is enough for a document to be a 'document of an agency'.[17]

- A ruling that an incorporated TV station run by three universities, a trotting club and the State government was not an 'agency' covered by the Act.[18]

In the Commonwealth AAT, FOI has continued to be a regular but minor part of its work. My impressions from the AAT decisions which pass in front of me as editor of the Administrative Appeals Reports are that:

- The FOI jurisdiction has been shrinking, and that cases deal mostly with the obsessions of private citizens and almost never with documents of much importance to government accountability.

- There has been a surge in 'adequacy of search' cases, which suggests increasing distrust of agencies, but the outcomes do not usually give foundation for this.

- The recent period of instability for that Tribunal arising from the long gestation of the ART does not seem to have adversely affected its work in FOI.

- Although the current members of the Tribunal seldom face novel points of interpretation of the Act, I think that recent cases show them evolving a more rigorous approach to the balancing of public interest which lies at the heart of many FOI cases. I shall return to this thought further below.

Finally, I shall return to an aspect of FOI which interested me during a short tenure on the NSW Administrative Decisions Tribunal,[19] and which continues to confront the current members of that Tribunal with awkward issues.[20] This is the power given to first instance FOI decision-makers under the NSW, Queensland, South Australian and Western Australian Acts and to the review bodies in Victoria and possibly also in South Australia and NSW, to decide to release documents notwithstanding that they may fall within a defined class of exemption. I shall refer to this as 'the override discretion'. My thesis proposed in the present paper is that this discretion is an important aspect of FOI legislation, and that it has been unfortunate that the Commonwealth Act has obscured its existence and has prevented the AAT and Federal Court giving it the emphasis and exploration which it deserves.

Shergold v Tanner

In this case,[21] an applicant sought access to consultants' reports concerning waterfront reform, but was presented in the AAT with the Principal Officer's certificate under s 36(2) that disclosure of the documents would be contrary to the public interest.[22] As a consequence, the AAT was confined by s 58(5) to considering whether 'there exist reasonable grounds' for that claim.

The issue for the High Court was whether the applicant could seek judicial review of the decision to sign the certificate. The Principal Officer argued that the Act implicitly foreclosed the Federal Court's jurisdiction under the ADJR Act or s 39B of the Judiciary Act through its provision that 'such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest'. The High Court rejected this contention in a short, unanimous, judgment.

I doubt whether this ruling will have general practical significance. There are significant hurdles of evidence, legal principle and costs which would seem to make judicial review of a conclusive certificate unattractive to most FOI litigants. Even assuming that evidence revealing the reasoning of the Principal Officer were discoverable without impermissible 'fishing', the litigant would then have to find reviewable error in this reasoning. As the judgment warns at [40]:

> It may be that various of the ground specified in s 5 [of the ADJR Act] can have but limited or no operation with respect to applications such as the present brought under the ADJR Act. For example, the range of relevant considerations may be very wide and the range of irrelevant considerations very narrow. The content of a requirement to provide natural justice to the person aggrieved by the decision may be very limited.

Beyond FOI, the judgment contains a useful recognition of 'the public law regime comprising the AAT Act, the Ombudsman Act and the ADJR Act',[23] under which the Federal Court usually exercises a jurisdiction over decisions overlapping the review powers of the AAT and Ombudsman, but in which its role is confined to considering 'whether the decision or action is lawful'.

In this respect, an interesting aspect of the judgment is the proposition at [27][24] that 'it is to be expected that the Parliament will clearly state its will … where the Parliament, by redefining the jurisdiction of a federal court, withdraws rights and liabilities from what otherwise would be the engagement of Ch III' of the Constitution, and the suggestion at [33] that s 77(i) of the Constitution requires 'specificity' in a law defining the jurisdiction of a federal court. We might see elaboration of this reasoning, when the High Court considers the effect of the privative clauses inserted in the Migration Act by the 'Tampa' judicial review amendments.

The High Court did not find it necessary to reason from an appreciation of the objects of the FOI Act and its role in democratic government, and the judgment contains no reference to this. This is a pity, since it meant that the Court did not address a strong dissenting judgment of Burchett J in the Full Federal Court.

Burchett J thought that the object of the Act was to strike 'a balance between competing public interests' of secrecy and openness, and that taking a neutral approach to interpreting the Act was supported by previous dicta in the Federal Court against taking constructions leaning in favour of openness and accountability. He then confidently concluded that 'the manifest object of the provision for a conclusive certificate was to provide a ready means of establishing the existence of the exemption, or of an ingredient of it, and avoiding an inquiry upon legal evidence into the facts out of which it arose.'[25]

This reasoning proceeded from what I suggest below is a basic weakness in the Commonwealth FOI Act: that it is an Act which empowers only the release of documents which are not exempt, and leaves obscure and unregulated a discretion outside the Act to release documents where there is an overriding public interest in openness in relation to a particular document. These limitations mean that the Commonwealth Act can be characterised in its legal effect, not as an expression of Parliament's object generally to promote open government, but as an Act conferring only a limited right of access defined by exemption provisions which may be construed in accordance with their object of protecting secrecy. In legal terms, therefore, it is impossible to say that the Act 'promotes' either openness or secrecy as a general value of good government.

The reasoning of the other judges in the Court did not adopt reasoning inconsistent with such a 'neutral' or 'balanced' view of the Act. Black CJ avoided the topic by following reasoning similar to that taken by the High Court, drawing on the need for clarity if limitations on judicial review are intended. Finkelstein J approached the meaning of the phrase

'establishes conclusively' from the historical development of the common law of public interest immunity in judicial proceedings, rather than from an analysis of the stated or implicit objects of the Act.[26]

I suggest, in the light of all the judgments in this case and the previous judgments cited by Burchett J, that it is now clear that, without further reform of the Act, we cannot expect the Federal Court to adopt a general approach to the interpretation of the Commonwealth Act which favours government accountability. I suggest below that reforms would need to bring the override discretion under the Act, and to provide a clear statement that all documents are intended to be released where there is an overriding public interest in the promotion of open government.

Moreover, absent such reforms, it cannot be confidently predicted that the High Court would overrule the Federal Court's approach to construction of the Commonwealth Act[27] if it ever accepts another FOI case.

Staff Development Case

This line of cases with dauntingly long names[28] resulted from the failure of an apparently very sound business in 1998 to obtain further contracts under the Job Network program. It then tried to discover the criteria for financial viability which had been applied by the decision-makers. The Secretary resisted revealing under FOI not only the relevant parts of the Tender Assessment Operations Manual but also the particular assessment made of the applicant.

In the AAT the Secretary claimed exemptions under s 36 (for 'internal working documents'), s 39 (for 'documents affecting financial or property interests of the Commonwealth'), s 40 (for 'documents concerning certain operations of agencies'), s 43 (for 'documents relating to business affairs, etc'), and s 45 ('documents containing material obtained in confidence'). Some of these sections themselves contain various permutations which were separately argued. The Secretary was represented by Mr Peter Hanks QC and the proprietors of the business appeared in person.

The AAT's decision provides a mine of interesting information on the privatisation of government employment services and on how secrecy may or may not be beneficial to its operations. Deputy President Forgie identified and dealt with a multitude of issues arising under the exemptions claimed, and decided that none of them applied. It would be dangerous for me to attempt to summarise her reasoning shortly, both due to the convolutions of the statutory language and because the Federal Court has ordered the AAT to do the exercise again. However, I shall comment on the aspects of the Tribunal's reasoning which attracted attention in the Federal Court.

The first aspect concerns the Deputy President's rejection of the claim for exemption under s 36. Section 36 applies to a document which would 'disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency…'. I leave it to others to count how many sub-categories of documents this encompasses.

In the present case, the Deputy President concluded that the Operations Manual did not come within 'the category of documents described in s 36(1)(a)' because it 'does not contain any matter which, if disclosed, would disclose any consideration, in the sense of a consultation or deliberation, that has taken place. A consultation or deliberation may take place within the framework set out by the Operations Manual but the Operations Manual does not reveal it.'[29]

The Full Court thought that this revealed error of law 'in failing to consider whether or not disclosure of the documents would disclose matter **relating to**, as distinct from matter **in the nature of**, opinion, advice or recommendation or consultation or deliberation'.[30] It sent the matter back to allow the Tribunal to address this aspect of the definition, and then, if necessary, to consider the public interest under s 36(1)(b).

My comment is that this illustrates the pitfalls facing even the most meticulous Tribunal when FOI exemptions are framed with verbose definitions with rolled-up alternatives. The lesson might appear to be that the Deputy President would have been on safer territory if she had based her decision under s 36 on an assessment of public interests, particularly since this was the basis on which she excluded other claims for exemption. However, as I shall describe, the Court thought error of law had been made in this respect also.

The Secretary had mixed success in his attack on the Deputy President's rejection of the claim for exemption under s 43. That exemption covers documents which would disclose one of three classes of information:

(a) 'trade secrets';

(b) 'other information having a commercial value that would be, or could reasonably be expected to be destroyed or diminished if the information were disclosed'; and

(c) (attempting a paraphrase): information concerning business, professional commercial or financial affairs of a person, organization or undertaking if the disclosure either would 'reasonably be expected to unreasonably affect' that body's 'lawful business, commercial or financial affairs' or 'could reasonably be expected to prejudice the future supply of information' to the Commonwealth or an agency.

In the present case, a key finding of the Deputy President was that the Department was not engaged in any trade, business or commercial activity but in the provision of government services through the agency of others. She held that the information in the Operations manual did not disclose a 'trade secret' within (a), nor 'other information having a commercial value' within (b), nor information concerning business or commercial affairs within (c). Although she thought that there would be disclosure of 'financial affairs' within (c), she thought that the balance of public interests favoured disclosure and that therefore disclosure would not unreasonably affect those affairs.

The Full Court supported reasoning by the judge at first instance, Drummond J, who upheld the Tribunal's conclusions in relation to paragraphs 43(1)(a) and (b). This, essentially, was that the information could not qualify as a 'trade' secret nor have a 'commercial' value because the Department's activities of procuring private service providers could not be said to bear a commercial, as opposed to an administrative or governmental, character. This is an important distinction in relation to government procurement decisions, and it is pleasing to see it being kept alive by the Court.

However, the Full Court seems to have assumed that the tendering activities might relate to 'financial affairs' within paragraph 43(1)(c), since it remitted this aspect for further consideration. It differed from Drummond J in relation to this paragraph, by finding error of law vitiating the Tribunal's reasoning that disclosure would not unreasonably affect the Commonwealth. It found the same error in the Tribunal's reasoning in relation to ss 39(1) and 40(1)(d) which refused to find a 'substantial adverse effect' from disclosure of the Operations Manual.

The Full Court held that the Tribunal's conclusions on these exemptions were dependent upon two positive factual findings:

(i) that even without disclosure it was open to a tenderer to manipulate the information given in its application; and

(ii) that if the criteria were known the Department would continue to have the same opportunities to identify any attempt to manipulate information.

The Court held that there was no evidence before the Tribunal which supported the making of these findings, so that the Tribunal's conclusions were therefore the result of an error of law and had to be set aside.[31]

As Drummond J's judgment makes clear, the Department's case in the Tribunal involved a 'paucity of proof as to the existence of a real risk of manipulation if the documents were disclosed',[32] and it might have been possible for the Tribunal to have rejected the claimed exemptions by going no further than to be unpersuaded by the mere assertion by the Department's witness that this would be the effect of disclosure. However, this was not the Tribunal's reasoning, and the Full Court could not uphold the decision on this basis.

As a precedent, this aspect of the case may seem to have slight importance, since it turns on particular reasoning by the Tribunal on the particular evidence presented in the case. However, I think that it and several other recent AAT cases can be used to illuminate several general points concerning the assessment of countervailing public interests under the FOI Act.

Assessing public interests bearing on the release of information

Such assessments are required under the Act through various phrases which define the categories of exemption and also, as I shall suggest below, when a decision-maker is given an ultimate discretion not to claim an exemption. For my present purposes, it is not necessary to dwell on differences between asking whether 'disclosure would be contrary to the public interest',[33] or 'disclosure would, on balance, be in the public interest',[34] or there would be 'unreasonable disclosure',[35] or 'unreasonably affect that person adversely',[36] or 'undue disturbance'.[37]

Generally, in relation to these assessments, recent cases suggest the following points:

(i) Each of these phrases invites, in the context of the particular interests protected by the exemption in which they occur, a judgment by the decision-maker in which the threat to the protected interests is measured and weighed against the interests of openness. The decision-maker then must make a value judgment which is informed by the objects of the legislation. So much is obvious, but not very helpful. General judicial expositions of 'the public interest' in FOI or other contexts describe this process,[38] but are of limited assistance since they only reveal the protean nature of public interest considerations and the need to address the particular circumstances of the case and the precise words in which a public interest test is expressed.

(ii) Recent assessments by review tribunals and information commissioners have accepted that general criteria favouring secrecy which were confidently proposed in the past have lost weight over the years.[39] One reason for this, I suggest, is that they have come to appear more in the nature of incantations than predictions which are verified by experience.[40] Recent cases show an appreciation that it is necessary to examine the reality of general predictions as to the effects of disclosure: both harmful and beneficial, and to do so with as much particularity as possible to the circumstances of the document in question.[41]

(iii) The Full Federal Court's insistence in the *Staff Development case* that positive findings on the effect of disclosure must be supported by evidence will reinforce this trend. When these issues are litigated in a review Tribunal, it is no longer sufficient to propose findings of adverse consequences from the advocate's table, and both parties need to attempt to locate and qualify the best available witnesses, armed with pertinent experience or reasoned opinion.[42] The Tribunal must then make its judgment on the evidence produced. Given the speculative nature of predictive opinions, the Tribunal will seldom be *bound* to be persuaded by such opinions.[43] If the evidence fails to persuade it of some anticipated danger or benefit then it may need to fall back on the statutory onus of proof.[44]

(iv) Another lesson from *Staff Development* is that there is a danger that the focus of a public interest assessment may be lost sight of where an agency distracts a Tribunal with a multitude of alternative claims for exemption. It is common that a single concern will dominate an agency's resistance to disclosure. In my view, that concern is likely to be better focused and proven to a review Tribunal if the advocate attempts to refine and formulate as precisely as possible the need for secrecy perceived by his or her client in relation to the particular document. Often, in my experience, if this is done, a single most applicable exemption can be located, other distracting issues of law and fact can be abandoned, and everyone in the proceedings will benefit from the isolation of real rather than meretricious issues. Even where multiple public interest 'factors' are identified, I suggest that the assessment of their strength will be greatly assisted if they are formulated with as much specificity to the particular case as possible, and then ranked in order of weight on each side of the balance. The outcome *may* then appear both obvious and satisfying. At times it seems to me that agency representatives - and even review Tribunals - lose sight of the ball when chasing ingeniously devised arguments for multiple alternative exemptions. Unfortunately, FOI legislation gives many opportunities for such a game to be played, but it is most unattractive to the spectators!

The 'override' discretion

A concern that FOI decision-making at all levels should be able to focus on the secrecy/openness balance which may justify a decision to refuse access to a particular document brings me to the end of my paper: where observations on recent developments overlap with discussion of the past and of future reform.

The 1979 Senate Committee report on the Commonwealth FOI Bill thought that the provisions which became ss 11, 14, and 18 of the Act demonstrated 'the bias in the Bill in favour of disclosure', and that s 14:

> makes it clear that even if the decision-maker is satisfied that a particular document comes within one or other of the exemptions specified by the Bill, that is by no means the end of the matter. The absolute duty to disclose a non-exempt document is not accompanied by the duty not to disclose a document which is exempt. The decision-maker still has a residual discretion to disclose, conferred upon him [by s 14][45] … 'Properly' here is not a term of legal art: we read it rather as an invitation, which we wholly support, for decision-makers to apply a commonsense rather than narrowly technical approach to the application of the Bill's exemption provisions, and to confine their refusals to disclose only to those cases where there would be almost universal consensus that good government demanded it.[46]

However, the Committee decided to recommend the incorporation of reviewable public interest criteria in only some selected exemptions, and not to accept a proposal

> to confer upon the Tribunal power to order that access be granted to an exempt document where the Tribunal is of the opinion that the public interest requires that access to the document should be granted. In effect, this would amount to conferring upon the Tribunal the same discretionary power conferred upon an agency to release an exempt document.[47]

The Committee accepted that the Commonwealth Act should expressly direct that 'the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted',[48] and that it should leave this crucial area of discretion unreviewable in the hands of the agencies. This was notwithstanding the Senate Committee's own opinion that 'public interest' in releasing a document is a test:

> which should be susceptible to application in any individual case by an adjudicator, skilled at weighing and balancing competing interests, who has had presented to him differing views as to what result the public interest requires in any given case. It is naïve to expect that a phrase such as 'public interest' can be administered properly by public servants, who clearly have an interest in non-disclosure.[49]

Unfortunately, as I have noted above, the Federal Court has not detected in the Act a general bias in favour of disclosure, but has emphasised the cold legal fact that the Act confers only a right to access *non-exempt* documents and imposes only a duty to release documents which cannot be brought within the exemption definitions when construed with their full amplitude. Moreover, it is clear in my opinion that the agencies' discretion to release exempt documents is *not* found in the Commonwealth FOI Act, but is only *assumed* by the Act to be *possibly* found elsewhere. [50] When the discretion is sought elsewhere, a host of difficulties facing its exercise can be pointed to: starting with concerns about the Crimes Act, a plethora of special secrecy provisions in other legislation, the confined nature of the protections given by ss 91 and 92 of the FOI Act which are only available for '*access required by this Act to be given*', and, recently, a concern about the effect of the Privacy Act on non-statutory discretions to release information.[51]

There seems to be general agreement that the net result of 20 years FOI experience under the Commonwealth Act is, as was noted in the 1995 ALRC/ARC report, that the Act has fallen short of achieving the hope that it would generate a culture of open and accountable government.[52] That report, and subsequent reformers, propose various measures to induce this culture.

However, in my view, these measures will be deficient unless they:

(i) bring the discretion to release exempt documents into the scheme of the FOI Act, imbue it with the objectives identified by the 1979 Senate Committee, and extend to it the protections of the Act; and

(ii) allow the exercise of that discretion in the hands of the agency decision-makers to be subject to the discipline of external merits review.

I found particularly unconvincing the ALRC/ARC's opinion when recommending against the latter of these reforms: 'In those few situations in which a document is technically exempt but its disclosure would not have an adverse consequence, it is sufficient to exhort agencies not to claim the exemption'.[53] Such exhortations were given by the 1979 Senate Committee, and failed in a government environment less legalistic than the present.

Moreover, recent experience in Victoria and NSW gives no evidence that my opinions are dangerous for good government.

The Victorian FOI Act contains provisions identical to those in the Commonwealth Act which leave an agency's discretion to release exempt documents to be found, if at all, outside the Act.[54] The effective exercise of that discretion is, however, brought to the centre of the Act by investing the review tribunal, the Victorian Civil and Administrative Tribunal, with:

> the power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 31(3), or in section 33[55]) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.[56]

There is an extensive case-law on this provision,[57] and it is difficult to avoid the impression that it is responsible for the Victorian Act serving a more significant role in assisting government accountability to the public on important issues than has the Commonwealth Act.

In a recent discussion of the discretion in the Victorian Court of Appeal, it was said that:

> the tribunal must determine whether considerations of 'the public interest' are so strong as to outweigh, or override, those factors by which the documents are exempt documents, whether those factors derive simply from the public interest or more immediately from 'the private and business affairs' of those persons from whom information was gathered in the first place.[58]

Emphasis was given to the use of the word 'requires', and it was said:

> How strong the prevailing considerations of 'the public interest' must be in any given case will depend, as I have said, upon the nature and strength of the factors by reference to which the tribunal is empowered to grant access to a document which otherwise is exempt under Pt IV. The concept of tussle and victory itself suggests that 'requires' means 'demands' or 'necessitates', and that is what I think it means. How else could s 50(4) work sensibly?[59]

The NSW Act took an approach to the override discretion which differed from both the Commonwealth and Victorian Acts. It included its exercise within the right of access and the power to release conferred by the FOI Act.[60] Thus, the right is 'to be given access to an agency's documents in accordance with this Act',[61] and the fact that a document is an 'exempt document' allows, but does not require, a decision-maker to exercise the Act's power to refuse to release the document. The power to rely on the exemption is discretionary unless it is 'a restricted document that is the subject of a Ministerial certificate', in which case refusal of access is mandatory.[62]

Unlike the Commonwealth Act, where the relevant statutory object is described as 'creating a general right of access … limited only by exceptions and exemptions …', the NSW Act's object is not confined to releasing non-exempt documents, but is more general: 'conferring …a legally enforceable right to be given access to documents held by the government, subject only to such restrictions as are reasonably necessary for the proper administration of the Government'. The legislative protections are then framed so as to cover any decision where 'access to a document is given pursuant to a determination under this Act', which would include a decision to release an exempt document taken in response to a request under the Act.[63]

The significance of this different structure of the NSW Act seems to have lain dormant while the right of appeal lay to the District Court, aided perhaps by the low volume of appeals and a provision which expressly excluded from the Court's consideration the exercise of the Act's override discretion. That provision was, however, repealed when in 1999 the jurisdiction was given to the Administrative Decisions Tribunal.[64] As a member of that new Tribunal, I thought:

(i) that primary decision-makers under the Act clearly had a discretion under the Act to release an exempt document unless it was a restricted document the subject of a Ministerial certificate; and, less confidently:

(ii) that the Tribunal also had this power under its duty to 'decide what the correct and preferable decision is'.[65]

I then attempted to describe how the override discretion could be approached at all levels of decision:

> [90] In general, whether there is occasion to exercise the override discretion must depend upon the particular exemption and the circumstances of the case. The statutory criteria for some exemptions themselves bring into balance all public interest considerations which could favour release or justify withholding. Other exemptions have more limited criteria. For these, satisfaction of the criteria provides a justification for withholding the document, but does not complete the decision-making. The decision-maker must decide whether there is something about the information itself or the surrounding circumstances which, bearing in mind the objects of the FOI Act and the rationale for any exemption which has been satisfied, persuades him or her that the exemption should not be claimed. The touchstone is whether withholding the document is 'reasonably necessary for the proper administration of the Government' (s 5(2)(b)).
>
> [91] Framing the question in this way produces a need to locate special or overriding circumstances or interests before an exempt document is released, but only in the sense that some reason particular to the circumstances should be found for not claiming the exemption. I would not see the question as necessarily suggesting that such a release would be rare, unusual or exceptional. In some areas of government, there may be many documents which fall within an exemption but, for example, whose public interest in release is overwhelming, or whose potential for relevant damage is so obviously remote as to leave disclosure totally innocuous.

My reasoning has been applied with varying degrees of enthusiasm in subsequent decisions of the Tribunal in its General Division and in its Appeal Panel,[66] but has not yet been examined by the Supreme Court. Recently, the President of the Tribunal suggested that:

> the Victorian tribunal has adopted a conservative test as to the circumstances in which it will consider submissions that the public interest override discretion be exercised. Similar caution should be adopted in this Tribunal pending further consideration of the question of whether the *Mangoplah* line of cases is correctly decided.[67]

The Tribunal has indeed been cautious in its use of this discretion, and I am aware of only two cases where it was exercised in favour of releasing an exempt document.[68] Almost invariably, the Tribunal has been able to say shortly that public interests were already balanced when an exemption was found to arise, or (where an exemption is 'one-sided') that the circumstances plainly justified invoking the exemption. Whether, the *Mangoplah* line of cases has encouraged agencies to release documents without a ruling by the Tribunal, is something which I would hope, but cannot verify.[69]

In my view, the fact that a review Tribunal should exercise a discretion to release exempt documents cautiously does not detract from the utility of conferring that power. To exercise it in this manner still provides a reassurance to the public that the FOI Act truly intends the release of every document significantly important to the public accountability of government unless a Minister has intervened with a 'conclusive certificate'. It also reassures an agency that a serious defence of secrecy in terms of one of the statutory exemptions will usually be upheld.

The existence of the discretion in the hands of both primary and review decision-makers is, in my opinion, essential to ensuring that the legislation will be applied by agencies according to the spirit which the 1979 Senate Committee anticipated and which the 1995 ALRC/ARC report found too often to have been ignored.

Endnotes

1 The three previous cases are: *Public Service Board v Wright* (1986) 160 CLR 145; *Waterford v Commonwealth of Australia* (1986) 163 CLR 54; *Swiss Aluminium Australia Ltd v Commissioner of Taxation* (1987) 163 CLR 421.

2 *Johnson Tiles Pty Ltd v Esso Australia Ltd (No3)* (2000) 98 FCR 311.

3 See *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2000) 96 FCR 317.
4 *Commonwealth of Australia v Dutton* (2000) 102 FCR 168, on appeal from (2000) 31 AAR 223.
5 *Gersten v Minister for Immigration and Multicultural Affairs* (2000) 61 ALD 445. An appeal was dismissed: see [2001] FCA 159.
6 *Beesley v Australian Federal Police* (2001) 111 FCR 1.
7 *NAAO v Secretary, Department of Immigration and Multicultural Affairs* (2002) 34 AAR 508, on appeal from *Kwok v Minister for Immigration and Multicultural Affairs* (2001) 112 FCR 94.
8 Noting that there is an internal right of appeal to an Appeal Panel. In *Dakin v SAS Trustee Corporation* (2001) 51 NSWLR 328, Dunford J addressed whether an appeal from the ADT Appeal Panel in *Chief Executive, SAS Trustee Corporation v Daykin* [2000] NSWADTAP 20 (on appeal from the decision cited below) should go direct to the Court of Appeal. The appeal itself does not seem to have proceeded.
9 Cf *Egan v Chadwick* (1999) 46 NSWLR 563 at [80-88] and [143].
10 *Ainsworth v Burden* [2002] NSWSC 620, applying obiter in *Morgan v Mallard* [2001] SASC 364.
11 Eg *Firth v Centrelink* [2002] NSWSC 564.
12 *Brisbane City Council v Albietz* [2001] QSC 160.
13 *Whittaker v Information Commissioner* [2001] QSC 325.
14 *Local Government Association of Queensland Inc v Information Commissioner* [2001] QSR 052.
15 *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33 at [21].
16 *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246.
17 *Minister of Transport v Edwards* [2000] WASCA 349; *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3.
18 *Channel 31 Community Educational Television Ltd v Inglis* [2001] WASCA 401.
19 In *Mangoplah Pastoral Company Pty Ltd v Great Southern Energy* [1999] NSWADT 93; *Watkins v Chief Executive, Roads and Traffic Authority* [2000] NSWADT 11, and *Daykin v SAS Trustee Corporation* [2000] NSWADT 51.
20 In particular, following some observations I made in *Watkins*, above, differences have emerged as to the effect of s 57 of the NSW FOI Act on the review of claims for exemption for 'restricted documents' (see *BY v Director-General, Attorney General's Department* [2002] NSWADT 79 and cases cited therein).
21 23 May 2002, [2002] HCA 19, 76 ALJR 808, on appeal from *Shergold v Tanner* (2000) 102 FCR 215 and *Tanner v Shergold* (2000) 171 ALR 672. For a more extensive discussion of this case and the *Staff Development Case,* see Ron Fraser: *Freedom of Information: Testing the Limits of FOI Access – Some Recent Commonwealth Decisions* (2002) 9 AJ Admin L 207.
22 Another conclusive certificate was also signed under s 33A(2), in relation to a claim for exemption under that section. It was dealt with similarly in the judgments, and I shall ignore it in this paper.
23 See [20], [28-9], [36-9], and cf Black CJ below in 102 FCR 215 at 218, and Finkelstein J at 252.
24 See also [34] and [42].
25 102 FCR 215 at 229 and 244.
26 See 102 FCR 215 at 247-9.
27 Although in *Public Service Board v Wright* (1986) 160 CLR 145 at 153 the court had said that 'in the light of' an objects provision in the same terms as s s 3(1)(b) 'it is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information', this was in the context of the Victorian Act which contains an override discretion (see below). Moreover, it should not be assumed that, absent an expression of clear legislative intent, the considerations discussed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 will be translated into the application of the FOI Act: cf the AAT discussion on this in *Re Herald and Weekly Times and Secretary, Department of Finance and Administration* (2000) 31 AAR 251 at 267.
28 Starting in the AAT with *Re The Staff Development and Training Centre and Secretary, Department of Employment, Workplace Relations and Small Business* (2000) 30 AAR 330, and then on appeals by the Secretary before Drummond J at (2001) 32 AAR 531, and before the Full Court at (2001) 114 FCR 301.
29 30 AAR at 354.
30 114 FCR 301 at 309 [30], their Honour's emphasis.
31 Above at 308 [23].
32 See 32 AAR at 541.
33 Cf s 36(1)(b).
34 Cf s 39(2), 40(2).
35 Cf s 41(1).
36 Cf 43(1)(c)(i).
37 Cf s 44(1)(b).
38 These were usefully collected recently by Senior Member Dwyer in *Re Zacek and Australian Postal Corporation* [2002] AATA 473 (18 June 2002) at [65] and ff; and by Deputy President Forgie in *Re Robinson and Department of Employment and Workplace Relations* [2002] AATA 715 (22 August 2002) at [38] ff.
39 Cf the decline of the '*Howard*' factors: see *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affair* (1996) 43 ALD 139; 23 AAR 142 at 155, *Re Mijares and Minister for Immigration and Multicultural Affairs* [2000] AATA 214 at [18].
40 A recent examples of the AAT's current scepticism: 'Furthermore, the clear trend and preponderance of modern thought is away from those Howard principles which act as a shield against disclosure based upon the status and supposed discomfiture of public servants, and I find the proposition that an early draft of a

submission proposed for Cabinet but not actually submitted, should be exempt from disclosure because it may mislead and provoke captious public debate, is one which is difficult to justify'. (*Re Sutherland Shire Council and Department of Industry, Science and Resources* (2001) 33 AAR 508 at [38]).
Note also the robust assessment made in *Re McKinnon and Commissioner of Taxation* (2001) 34 AAR 194 at [89], in particular that 'deliberative processes may be enhanced by any public debate that may arise as a result of publication' of a consultant's report on tax reform.
Similarly, the assessment in *Re Wegner and National Registration Authority for Agricultural and Veterinary Chemicals* (2002) 34 AAR 344 at [23-27] that 'the public interest would be served by it knowing the credentials of experts called upon to review, independently, a request to register a product, which by its very nature, may have an unintended environmental impact', giving this greater weight than unsubstantiated concerns that revealing the name of the External Reviewer would cause personal difficulties.
Similarly in *Re Robinson and Department of Employment and Workplace Relations* [2002] AATA 715 at [65]: 'I am not satisfied that access [to a Federal Court judges' submission] would hinder the Remuneration Tribunal to any significant degree in carrying out its functions in a timely, efficient way at a reasonable cost to the community, that there would be public confusion or misleading of the public or that the frankness and candour of those making submissions to the Remuneration Tribunal would be significantly hindered.'

41 I attempted to describe such a process of reasoning in *Tunchon v Commissioner of Police* [2000] NSWADT 73 at [13] ff.

42 Recent examples where such evidence was found persuasive are *Re Meschino and Centrelink* [2002] AATA 627, and *Re Electonic Frontiers Australia Inc and Australian Broadcasting Authority* [2002] AATA 449 (12 June 2002).

43 Cf *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33 at [16]: 'The estimation of whether the particular disclosure would be contrary to the public interest on the basis that it might be reasonably likely to impair the capacity of the Board to obtain similar information in the future is not a matter susceptible of proof as though it were a fact.'

44 In the Commonwealth Act, s 61.

45 It provides: 'Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.'

46 *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978* at [9.2], see also [8.2], [15.2].

47 Above at [15.9(c)] and [15.10].

48 s 58(2).

49 Above at [19.24].

50 The object in s 3(2) 'that any discretions *conferred by this Act* shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information' therefore rings somewhat hollow. Particularly so, when the statutory tests of public interest and of harmful effects are not regarded as 'discretions'.

51 Cf the prohibition under Principle 11 of disclosure of personal information unless '(d) the disclosure is required or authorised by or under law'.

52 *Open government: a review of the federal Freedom of Information Act 1982*, especially at [4.12] and ff.

53 Above at [8.5].

54 Arguably, however, its protection under s 62 is broader, since it covers access which 'was required *or permitted* by this Act'. See the discussion on this in Kyrou & Pizer *Victorian Administrative Law* at [2591/2].

55 Which concern the exemptions for cabinet documents, documents created by the Bureau of Criminal Intelligence, and documents affecting personal privacy.

56 S 50(4).

57 Set out in Kyrou & Pizer, above, at [2497] and ff.

58 *Secretary, Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 per Phillips JA at 340.

59 Above at 342.

60 The Queensland Act is similarly structured (see especially ss 21 and 28(1), and note the broad objects and reasons for enactment in ss 4 and 5). However, the external review body, an Information Commissioner, is expressly prevented from exercising the primary decision-maker's discretion to release exempt documents (see s 88(2)).
The Western Australian Act follows the Queensland Act with strong objects provisions and a discretion in the primary decision-maker to release all documents, but with the Information Commissioner expressly excluded from that power (see s 76(4)).
The South Australian Act is structured like the NSW Act, and includes rights of merits appeal to the Ombudsman and District Court. Both these bodies appear to have power to exercise the override discretion unless there is a Ministerial certificate, but a curious provision in s 42(2) directs the District Court that 'Where it appears that the determination subject to appeal has been made on grounds of public interest, and the Minister administering this Act or, if the agency concerned is a council, the council makes known to the District Court the Minister's or the council's assessment of what the public interest requires in the circumstances of the case subject to the appeal, the Court must uphold that assessment unless satisfied that there are cogent reasons for not doing so.'

The Tasmanian Act follows the scheme of the Commonwealth Act, with neither the primary decision-maker nor the external review body, the Ombudsman, having power under the Act to release an exempt document (see ss 3, 7, 12, 15, 48(4), 53).

61 S 16.

62 S 25(1) and (3).

63 See ss 64, 65 and 66.

64 The Ombudsman in 1992 was expressly given the power in s 52(6)(a) to *recommend* 'that the public release of the document concerned would, on balance, be in the public interest even though access has been duly refused because it is an exempt document.'

65 See *Mangoplah Pastoral Company Pty Ltd v Great Southern Energy* [1999] NSWADT 93 at [12-19] and [76-89].

66 Eg recently in the Appeal Panel: *Neary v Treasurer of NSW* [2002] NSWADTAP 4; and *N (No 4) v Commissioner of Police* [2002] NSWADTAP 10.

67 *BY v Director General, Attorney General's Department* [2002] NSWADT 79 at [80].

68 By the President in *X v Director-General, Department of Community Services* [1999] NSWADT 141 at [73-76], and by myself in *Daykin v SAS Trustee Corporation* [2000] NSWADT 51 at [56-72] - a decision set aside by the Appeal Panel on other grounds in [2000] NSWADTAP 20.

69 The ADT, like other Tribunals, has an active pre-hearing conferencing FOI procedure which encourages parties to isolate and reduce the documents and issues which deserve to be ruled upon judicially.