FREEDOM FROM DISCLOSURE OF INFORMATION

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Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them. The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.[1]

Freedom of information (or 'FOI') legislation creates a legally enforceable right for members of the public to access government information. It purports to promote open and accountable government, and to facilitate participative democracy. For example, the Commonwealth *Freedom of Information Act* (1982) promises 'to give members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies'.

However, in practice, the Act creates a scheme where the Government can escape the application of its own laws. As the recent High Court decision of *McKinnon v Secretary, Department of Treasury*[2] ('*McKinnon*') illustrates, the Government can restrict access to documents by means of an 'exemption certificate'. As long as it can point to one legitimate consideration in support of the certificate, that is enough. It need not consider the factors in favour of disclosure, no matter how strong they may be.

McKinnon enlarges an already existing loophole for
government departments wishing to avoid the application of FOI laws, potentially depriving the public of information to which they would otherwise be entitled.

The moral and political arguments against the case have been aired extensively in the media following the *McKinnon* decision. In this article, I suggest the legal reasoning of majority joint judgment in *McKinnon* can also be criticised. The reasoning of the majority in *McKinnon* turned on a question of statutory interpretation. This article argues that the majority judges Callinan and Heydon JJ were not bound to interpret the legislation in such a way as to enlarge the loophole. Their judgment could have placed greater weight on the objects of the legislation, and the right to freedom of political communication that is implicit in the Constitution.

The *McKinnon* case

Mr McKinnon, an editor of *The Australian* newspaper, requested information from the Department of Treasury regarding tax bracket creep and the government's first home owners' scheme. The Department of Treasury responded with an 'exemption certificate' issued under s 36 of the *FOI Act*. Before he could issue the certificate, the Treasurer had to be satisfied that the document:

> (a) contained matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded or deliberation that has taken place, in the course of deliberative process involving an agency or Minister; and
>
> (b) disclosure would be contrary to the public interest.

McKinnon responded by taking his case to the Administrative Appeals Tribunal (the 'AAT'), which he was entitled to do under s 58(5) of the *FOI Act*. The AAT is empowered by that section only to 'determine the question whether there exists reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest.' McKinnon argued that the public interest in understanding the Government's intentions and options with respect to important economic policies far outweighed any potential confusion that might be caused by the complexity and provisional nature of the documents.

By contrast, the government argued that it had valid reasons for issuing the exemption certificate. Section 58(5) did not empower the AAT to take into account the factors in favour of disclosure. The AAT was only entitled to examine the government's claim that disclosure was not in the public interest and determine whether the reasons advanced to prevent disclosure were valid — not to weigh their merits against factors in favour of disclosure.

The government claimed the documents were drafts that included options not settled at the time of drafting, and that these might be mistaken for a final position. The thrust of their submission was that to release such 'working documents' would compromise the necessary confidentiality of the public sector, 'threatening the Westminster-based system of government'.

By a 3:2 majority, the High Court found that the AAT had correctly decided the matter, and there was no legal basis for disputing the exemption certificate had been issued on reasonable grounds.

The crucial question was whether s 58(5) empowers the AAT to determine the factors for and against disclosure and therefore decide on balance whether the certificate was issued on 'reasonable grounds'? Alternatively, does the wording of the section limit the AAT to examining the reasons for the government's claim that disclosure is not in the public interest and determining whether those claims have any reasonable factual basis?

The majority joint judgment

The joint judgment of Callinan and Heydon JJ concluded that, so long as there was one reasonable ground to support the government's claim that disclosure would not be in the public interest, the conclusiveness of the certificate would be beyond administrative or judicial review. In reaching this conclusion, the joint judges acknowledged that their approach may lead to the 'practical consequence … that one or more of the stated objects of the Act are thereby defeated'.[3] Nevertheless, they argued that the wording of the legislation provided for no more, and the language of the statute should not be paraphrased into another test.

Callinan and Heydon JJ accepted Treasury's argument that disclosure might jeopardise candour and discourage written communication within government was reasonable. They accepted that documents prepared to respond to questions in Parliament should remain confidential 'because their exposure would threaten the Westminster system of government, that is to say responsible government'. They also accepted that the documents protected by the certificate were interim in nature, involving some recommendations that were not adopted, and they concluded it would be difficult to see how it would not be reasonable for a minister to take the view that the release of material of that kind would not make a

valuable contribution to public debate.

The minority joint judgment

Gleeson CJ and Kirby J delivered a joint judgment that displayed considerable concern at limiting administrative and judicial review of FOI to this extent. Following the argument through to its practical conclusion, they observed it would mean that:

> [S]o long as there is anything relevant to be said in support of the view that disclosure would be contrary to the public interest, an applicant for review under s 58(5) must fail. We cannot accept that. … [T]he preservation of confidentiality of intra-governmental communications prior to making a decision could always be advanced, in the case of internal working documents of the kind with which we are concerned, as a relevant consideration. How could that facet of the public interest ever be served by disclosure? How, then, could an applicant ever succeed?

The minority joint judgment stated that the public interest was a multi-faceted concept. The Tribunal was required to take into account all relevant considerations, including those in favour of disclosure, in order to determine whether reasonable grounds existed.

The judgment then went even further and found that facilitating disclosure of information was the principal object of the Act, and what was a reasonable decision had to be evaluated in that context:

> Under the FOI Act, however, the matter of disclosure or non-disclosure is not approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other. There is a 'general right of access to information ... limited only by exceptions and exemptions necessary for the protection of essential public interests [and other matters not presently material]' … That is the context in which the question of reasonableness raised by s 58(5) is to be addressed. To lose sight of that would be to lose sight of the principal object of the FOI Act.[4]

The judgment of Hayne J

Hayne J delivered a separate majority judgment that upheld the validity of the exemption certificate. However, in contrast to the majority joint judgment, Hayne J stated:

> the Tribunal's task is to decide whether the conclusion expressed in the certificate (that disclosure of particular documents would be contrary to the public interest) can be supported by logical arguments which, taken together, are reasonably open to be adopted and which, if adopted, would support the conclusion expressed in the certificate. The focus of the Tribunal must be upon the grounds for the conclusion. Are those grounds ' reasonable grounds'?

Nevertheless, on the evidence before him, Hayne J found that an examination of the AAT proceedings pointed to the conclusion that, in this case, all logical arguments had been taken into account and reasonable grounds had been properly established.

Analysis of *McKinnon*

The damaging practical effect of the majority joint judgment in *McKinnon* is that it strips reviewing bodies of any real power to provide applicants with access to government information. As the minority point out, confidentiality of governmental deliberations is *always* arguably a reasonable consideration. If this reason can be blandly asserted each time a minister does not find it convenient for information to be disclosed, freedom of information legislation is effectively undermined.

The result is a ministerial discretion with no real checks and balances, leaving it open to be exercised in an inappropriate way. The courts have fought to impose restraints on the exercise of what might appear to be very broad ministerial discretions in other contexts, and have held firm against attempts by the legislature to intrude on judicial review of executive action.[5] The principle of separation of powers requires no less and it is a fundamental aspect of our constitutional arrangements.

The 'unmistakeably clear language'

Callinan and Heydon JJ were concerned to avoid creating a de facto 'merits review' that was not supported by what they described as the 'unmistakeably clear language of the sections'. For this reason they were not willing to infer a balancing test that included competing considerations in favour of disclosure.

It is difficult to appreciate that the language of the legislation is unmistakeably clear in view of the narrow majority, the vehement dissenting judgment, and the fact that Hayne J's reasoning makes it clear that he also accepted the public interest is a multi-faceted concept that requires a consideration of all logical arguments, not just those against disclosure. In addition, section 15AA of the *Acts Interpretation Act* 1901 (Cth) makes clear, and s 3(2) of the *Freedom of Information Act* 1982 (Cth) reinforces, that Commonwealth legislation must be interpreted in a manner consistent with the objects for which the law was passed. It is therefore curious that Callinan and Heydon JJ expressly acknowledge that their interpretation 'may' practically lead to the consequence that one or more of the stated objects of the Act is thereby defeated.

The language of the section requires the AAT to determine:

> whether there exists reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest.

Determining whether something is 'contrary to the public interest' necessarily requires an interpretation of the term 'public interest'. The term is not defined by the *FOI Act*. The Australian Senate Committee on Constitutional and Legal Affairs[6] has noted that the meaning of the 'public interest' is inherently not suitable for precise definition.

The High Court considered the meaning of the 'public interest' in the context of the common law principle of Crown immunity in *Sankey v Whitlam*.[7] In that case, Mason J noted that

> In considering an objection to production on the ground of Crown privilege the court must evaluate the respective public interests and determine whether on balance the public interest which calls for non-disclosure outweighs the public interest in (favour of disclosure) … In determining this question the court, though it will give weight to the Minister's opinion that the documents should not be produced, is entitled to inspect the documents and form its own conclusion upon the question whether the public interest will be better served by production or non-production.[8]

Stephen J stated that it was 'the task of a court, in dealing with a claim to Crown privilege, to weigh competing public interests'.[9] *Sankey v Whitlam* suggests that the 'public interest' is not a static concept, but rather an evaluative judgment that measures and compares a bundle of 'competing public interests' on a case-by-case basis.[10]

It is significant that the language of s 58(5) does not limit the AAT to considering the factors that are contrary to the public interest, but rather empowers the AAT to review the claim that disclosure of a document is contrary to the public interest. Evaluation of the claim requires consideration of the factors both for and against disclosure.

To employ a balancing test is not the same as conducting a merits review. The AAT does not have the power to override the minister's discretion

merely because, upon balancing the factors, it would have come to a different result. It can only determine whether the minister's evaluation of the factors for and against disclosure gives rise to reasonable grounds for issuing the certificate, or whether the evaluation is so flawed that reasonable grounds for issuing the certificate do not exist and the minister has acted outside the scope of his discretion.

Arguably, one analysis of the majority joint judgment is that Callinan and Heydon JJ began with the assumption that they must avoid a merits review, and then read down the wording of the relevant sections in view of that assumption.

Representative government and the Constitution

One argument accepted as reasonable by the majority judges was the Government's assertion that documents prepared for possible responses by ministers in Parliament should remain confidential because their exposure would 'threaten the Westminster system of government, that is to say responsible government'.[11]

It is questionable whether disclosure of government information actually threatens responsible government. Our elected representatives will always be subject to interrogation and criticism for their decisions. There is no reason to think that providing the public with greater information as to the nature and factors involved in their decision-making would increase the quantity of the criticism to the point it would be detrimental to responsible government. On the other hand, it might make the criticisms more accurate.

While responsible government is certainly one important feature of the Westminster system of government, representative government and participatory democracy are equally essential. Representative government has been described by Mill as a system where:

> Sovereignty … is vested in the entire aggregate of the community, every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government by the personal discharge of some public function, local or general[12]

The system of representative government contemplated by the Australian Constitution can only work effectively if citizens have a right to communicate about political issues. As a result, the High Court has repeatedly confirmed that Australians enjoy an implied constitutional right to freedom of communication.[13] Mason CJ in the *Australian Capital Television* case expressed the rationale for the right in these terms:

> Elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose,[14]

Mason CJ concluded that the court should be astute enough not to accept at face value claims by the legislature and executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.[15] McHugh J in the same case agreed that voters had a constitutional right to convey and receive opinions, arguments and information concerning matter likely or intended to affect voting in an election.[16] This was said to be so that representative and responsible government could operate effectively and as the *Constitution* intended. Brennan J agreed that freedom of political discussion was essential to the democratic process.[17]

In *Theophanous v Herald and Weekly Times Ltd*, Deane J agreed that

> The freedom of the citizen to examine, discuss and criticise the suitability for office of the elected members of the Parliament and the manner in which they discharge their functions and duties as such lies at the very heart of the freedom which the implication of freedom of communication protects.[18]

The documents sought by the applicant in *McKinnon* were undoubtedly political in nature. The fact that documents of this nature can be exempted from disclosure cripples the public's ability to analyse the manner in which our elected representatives are discharging their functions and duties with respect to key government policies. It stops us from participating fully in our democracy.

How can we exercise our democratic sovereignty and evaluate whether our representatives are making responsible decisions if we are not allowed to see the information and reasoning that forms the basis of those decisions? It would surely be to turn representative government on its head to say that the representatives of the people should mandate the information to which the sovereign people have access when informing their exercise of sovereign rights.[19]

The right to political communication has not been expressed by the High Court as a right to *access* information, but rather a right to disseminate it. Nevertheless, the rationale for reading the right into the *Constitution* is, as a matter of logic, equally applicable to determining the public interest in accessing political documents.

In *Re Eccleston*, the Queensland Information Commissioner noted that the enhancement of public participation in government was not an explicit purpose of the FOI law, but was implicit in some of its concepts. This point has also been made by other tribunals,[20] government ministers introducing FOI laws in some states,[21] and academics.[22] In a 1994 FOI matter, Owen J from the Supreme Court of Western Australia stated:

> The implied (right to freedom of expression) was a manifestation of the concept of representative democracy and the rationale upon which it rested was a relevant consideration that the Commissioner was obliged to take into account in determining the public interest (in disclosure).[23]

It is questionable whether the High Court would go so far as to find that the Constitution contains an implied right to access government information.[24] However, the constitutional implications of withholding information ought to be considered when construing the test for establishing 'reasonable grounds' on which an exemption certificate is based. They lend greater weight to the objectives of the FOI Act, and to factors which favour the public's right to access political information.

Conclusion

The majority joint judgment in *McKinnon* gives an unduly narrow scope to the federal *Freedom of Information Act*. It allows ministers to avoid compliance with the Act by merely issuing a certificate that the disclosure of the material would be contrary to the public interest. The judgment is an unwarranted reading down of the review powers provided by the legislation, making FOI legislation an easy accountability mechanism to circumvent. In the absence of clear language limiting the determination of the public interest to consideration of 'factors contrary to disclosure', factors both for and against disclosure should be considered. The Constitution and its principles of representative government require no less.

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REFERENCES

1. *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr 2, para 71

2. *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 ('*McKinnon*')

3. *McKinnon*, para 131

4. *McKinnon*, para 19

5. Refer for example to *Chu Kheng Lim and Another v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1, and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Refer to Caron Beaton-Wells 'Judicial Review of Migration Decisions: Life After S157' (2005) 33 FLR 141. The concerns raised in this article should not be taken to imply that the author believes the discretion here has been exercised more outrageously than discretions in other contexts. This is certainly not the case.

6. Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Act 1978* (1979) [66]; to like effect Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Operation and Administration of the Freedom of Information Legislation* (1987) [155].

7. *Sankey v Whitlam* (1978) 142 CLR 1.

8. Ibid at 96

9. Ibid at 58

10. *Sankey v Whitlam* is not itself an FOI case, although its public interest 'balancing test' model has been followed in significant FOI cases, such as *Re John Howard v The Treasurer of the Commonwealth of Australia* (1985) 7 ALD 626

11. *McKinnon*, above n 2, para 125

12. John Stuart Mill, *Considerations on Representative Government* (1861) 42

13. eg *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

14. (1992) 177 CLR 106 at 139

15. Ibid.

16. Ibid at 232

17. Ibid at 159

18. (1994) 124 ALR 1, 58; refer also to *ACT v Cth* (1992) 177 CLR 106 per Mason CJ at 140 and McHugh J at 231.

19. For a similar argument, see Peter Bayne 'Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act' (1996) 24 *Federal Law Review* 287 at 290.

20. *Re Cleary and Department of the Treasury* (1993) 18 AAR 83; *Re Veale and Town of Bassendean*, unreported Information Commissioner of Western Australia, 1994, Decision Ref D00494

21. See the Second Reading Speeches of NSW (*Legislative Assembly Debates* NSW 2 June1988 p 1399) and Queensland (*Parliamentary Debates*, 5 December 1991, p 3849).

22. Peter Bayne 'Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act' (1996) 24 Federal Law Review 287 at 288; Peter Bayne 'Freedom of Information and Democracy: A Return to the Basics?' (1994) 1 *Australian Journal of Administrative Law* 107; 'Freedom of Information and Political Free Speech' in T Campbell and W Sadurski eds *Freedom of Communication* (1994) at 199; Anne Cossins 'Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law' (1995) 23 *Federal Law Review* 226

23. *Manly v Minister of Premier and Cabinet, unreported Supreme Court of Western Australia*, 15 June 1995.

24. Although see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 where the High Court talks of an interest not only in disseminating information but in receiving it.