The "new" FOI – a clash of civilisations or just the same old clash of cultures?

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Since commencement of the *Freedom of Information Act* in the Commonwealth in 1982 there have been clashes and tensions – between Ministers and departments on the one hand - concerned to protect government confidences for various reasons and to manage the costs incurred in considering requests for access - and applicants and the Administrative Appeals Tribunal (AAT) and courts on the other - focussed on enforcement of the right to access conferred by the Act.

The new FOI regime was implemented through two tranches of amendments which substantially strengthen that right to access – and consequently create the risk of substantially increasing those tensions and magnifying those clashes.

The first amendment, the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* abolished Conclusive Certificates by which Ministers were empowered to determine that documents were exempt under various provisions of the FOI Act.

Second, the *Freedom of Information Amendment (Reform) Act 2010*, together with the *Australian Information Commissioner Act 2010* effected four principal changes:

(a) the insertion of a new objects clause;

(b) the imposition of a positive duty on agencies and Ministers to give access to documents;

(c) for those exemption provisions an element of which is an open ended public interest assessment, the clearer articulation of a framework for the assessment of the public interest, with the starting point being one that leans towards disclosure; and

(d) the creation of the offices of Information Commissioner and Freedom of Information Commissioner and substantial changes to the administrative arrangements affecting FOI, and in particular merits review.

The FOI Culture Clash

Lawyers who have worked within the Commonwealth for any period in the last 90 years have been imbued with that notion of Commonwealth executive government that it "possesses capacities, in common with other legal persons, including the capacity to obtain information" and that its rights to use and control that information are, subject to the constraints of political accountability and express legislative provision, to be equated with those of a natural person.[1]

As the majority judgments in the School Chaplain's case indicate, that view of Executive Capacity had been consistently taken by Commonwealth Solicitors General since 1908.[2] As that decision also shows, that view is wrong.

When considering questions of the publication or other disclosure of information held by Government the analysis within Government usually focuses on matters which are internal to Government. Questions of Government policy, and of the information management and publication practices of particular agencies carry significant weight. The analysis assumes the capacity of the Executive to choose what to publish and addresses the principled basis for making choices about publication. In that context there are many Government agencies whose managers are rightly proud of the abundant quantity and significant quality of information published by them.

In contrast to that view, it has been established for many years that special rules apply when courts deal with information in the possession of Government. The courts reject any anthropomorphic view of Executive Government.[3] Executive Government is not equated with a natural person or a corporation sole, and its capacities are limited.

In the field of governmental information those limits are better established and clearer than in government contracting, which was the subject of the School Chaplain's Case. Thus, it has been long established that in actions for breach of confidence, in respect

[1] *Williams v the Commonwealth* [2012] HCA 23 at 35 (School Chaplain's case).
[2] See French CJ at [35]; Gummow and Bell JJ at [125] and following.
[3] See Hayne J in School Chaplain's Case at [194].

of governmental information it is usually necessary to establish that the particular use or disclosure said to constitute breach would be contrary to the public interest.[4]

Further the power of the Executive Government of the Commonwealth to give or require an undertaking to keep information confidential is limited by the implied freedom of political communication to be found in the Constitution.[5] Consequently, a public service regulation which required APS employees not to disclose information about public business of which the employee had official knowledge was beyond power. While it was aimed towards the legitimate end of the effective working of Government, the regulation was not reasonably appropriate and adopted to furthering that end without unnecessarily and unreasonably impairing the constitutional freedom of political communication.[6]

A proscription on APS employees disclosing such information was within power when it was "reasonably foreseeable that the disclosure could be prejudicial to the effective working of Government".[7]

It is against that background that the courts come to deal with the *Freedom of Information Act*.

The Act is unusual in Australian jurisprudence in that it expressly confers a positive right. Section 11 commences with the words "subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act".

In *McKinnon v Department of Treasury* the High Court considered the old FOI Act. Gleeson CJ and Kirby J observed[8] that the declared object of the FOI Act was at that time to extend as far as possible the right of the Australian community to access to information in the possession of the Commonwealth Government by creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests.

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[4] *Commonwealth v John Fairfax & Sons Limited* (1980) 147 CLR 39; *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10.
[5] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; Brennan T: *Undertakings of Confidence by the Commonwealth: Are there limits?* (AIAL Forum, 2000)
[6] *Bennett v President, Human Rights & Equal Opportunity Commission & Anor* (2003) 134 FCR 334.
[7] *R v Goreng Goreng* (2008) 220 FLR 21.
[8] (2006) 228 CLR 423 at [4].

> "*We emphasise the repeated use of the word "right". Included in the exemptions and exceptions which qualify that right are those created by s.36 of the FOI Act which deals with what are described as internal working documents …*
>
> *A conclusion that disclosure of an internal working document would be contrary to the public interest may or may not turn upon contestable facts: either primary facts, or inferences to be drawn from those facts. It may or may not turn upon contestable matters of opinion. Inevitably it will involve a judgment as to where the public interest lies. Such judgment, however, is not made in a normative vacuum. It is made in the context of, and for the purposes of, legislation which has the object described above, which begins from the premise of a public right of access to official documents, and which acknowledges a qualification of that right in the case of a <u>necessity</u> for the protection of <u>essential</u> public interests."* [emphasis in the original]

Thus the public interest in non-disclosure of internal working documents was to be assessed in the context of a right that was constrained by specific exemptions[9]:

> *"The image of the scales of justice is pervasive in legal thinking, and it is natural to talk of taking account of competing considerations in those terms. Under the FOI Act, however, the matter of disclosure or non-disclosure is not approached on the basis that there are empty scales and 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 …." References to "balancing" create a danger of losing sight of that context. … to lose sight of that would be to lose sight of the principal object of the FOI Act."*

Similarly Hayne J said that all provisions of the Act:

> *"Must be construed in a way that promotes the object of the Act. In particular, … in a way that promotes access to documents in the possession of a Minister or department. Exceptions and exemptions, … are to be limited to those necessary for the protection of <u>essential</u> public interests."* [emphasis in original][10]

The operation of the old FOI Act was comprehensively reviewed by the Australian Law Reform Commission and the Administrative Review Council in a report entitled "Open Government" in 2006. In that report the authors set out the myriad of ways in which Government information is made available and accessible to the public. They said[11]:

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[9] [19].
[10] [53].
[11] 2.7.

> *"Clearly then, the FOI Act is not, and should not be, the only, or even the primary, way of gaining access to Government information. Nor was it ever intended to be.*
>
> > *"The Act is not a code of access to information and does not prevent or discourage the giving of access. It sets a minimum not a maximum standard."* [Extracted from the Annual Report on the Operation of the FOI Act for 1982/83]
>
> *Accordingly, it is not the only mechanism by which the objectives of Government openness and accountability, dissemination of information and protection of privacy can be achieved. Its importance lies in the fact it provides an enforceable right of access to Government held information. It enables members of the public to obtain access under the law to documents that may otherwise be available only at the discretion of the Government.* [emphasis added]
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> *The predominance of requests for the applicant's personal information means that requests relating to policy development and general Government decision making represent a small minority of FOI requests. Yet it could be said that these requests provide the real test of whether the Act is serving its purpose of keeping the Government accountable and facilitating participation in Government."* [emphasis added] [12]

The clash of cultures in the administration of FOI legislation is to be found in the administration of requests for documents concerning policy development and general Government decision making and in particular those which bear directly upon Government accountability and participation in Government processes.

I turn now to address each of the five main changes made by the legislation of 2009 and 2010 which constitute the new FOI. The first four make clearer the individual right to access information. The final change, the establishment of the Information Commissioner, is more diffuse.

Abolition of Conclusive Certificates

The case of *McKinnon v Department of Treasury* to which I have already referred was the high point in the use of Conclusive Certificates. The Treasurer had issued a Certificate which established that it was contrary to the public interest to disclose a range of documents including apparently simple spreadsheets which had been created within the Treasury to calculate the impact of bracket creep within the income tax

[12] At 2.11.

system. The AAT had held that reasonable grounds existed for the claim that the disclosure of those documents was contrary to the public interest and consequently the Certificate stood. The Full Federal Court by majority and the High Court by majority held that there was no error of law in the Tribunal's reasoning.

The first tranche of implementation of the new FOI was the abolition of Conclusive Certificates.

Two cases, both involving a claim of exemption of what was said to be Cabinet documents, illustrate the significance of that legislative change.

Professor Brent Fisse is a legal academic specialising in the regulation of business cartels in Australia. He sought access to an executive summary of the report of a working party to the Federal Treasurer on the introduction of criminal sanctions for serious cartel conduct.

The Treasury refused the request, on the basis that the executive summary was a Cabinet document. Consistent with government policy, which was later to be legislated, no Minister issued a conclusive certificate.

Mr Fisse appealed against that decision to the AAT. The AAT upheld the decision.

On further appeal to the Federal Court the Treasury was again successful.[13] However the reasons for decision particularly of Buchanan and Flick JJ, highlighted the significance of the abolition of Conclusive Certificates.

To be exempt the executive summary needed to be shown to meet two criteria then specified in s.34(1)(a) of the FOI Act:

(a) that it had been submitted to the Cabinet for its consideration; and

(b) that it was brought into existence for the purpose of submission for consideration by the Cabinet.

There was no question that the executive summary had in fact been submitted to Cabinet. The question of fact for the AAT was whether the executive summary "was

[13] (2008) 172 FCR 513

brought into existence for the purpose of submission for consideration by the Cabinet".

Buchanan J reasoned:

> *"Section 61 of the FOI Act imposed the onus on the respondent to either justify the decision of the reviewing officer or persuade the AAT to give a decision adverse to the appellant. … The respondent therefore bore the onus of establishing, for the first time, that the executive summary was an exempt document in its own right. It bore the onus of establishing that it was brought into existence for the particular purpose contemplated by s.34(1)(a). Correspondingly, the AAT was bound by s.61 of the FOI Act to evaluate the respondent's contention upon a proper approach to the question of proof. That approach could accommodate the circumstance that the AAT is not bound by the rules of evidence (s.33 of the Administrative Appeals Tribunal Act 1975 (Cth)) but it could not substitute, for the necessity of making out a case on the preponderance of probabilities, some lesser test."*[14]

The Treasury had relied in the AAT upon the Affidavit of the then Assistant Secretary of the Cabinet Secretariat, who had expressed an opinion of the kind which had routinely been found to be sufficient to support Conclusive Certificates in cases involving the Cabinet documents exemption in the past. Relevantly the Assistant Secretary (Ms Croke) opined:

> *"It is generally the practice in such cases that the executive summary of the report is attached to the Cabinet submission regardless of whether or not the proposing Minister supports all the proposals of the working group …*
>
> *I consider that [a sequence of events set out in her Affidavit] supports my view that the executive summary was brought into existence for the Cabinet's consideration.*
>
> *Only the executive summary of the report was actually submitted to the Cabinet."*[15]

His Honour dealt with that opinion evidence as follows:[16]

> *"In my view Ms Croke's opinion about the matter which the AAT had to decide should not be regarded as evidence providing support for that conclusion … she very properly identified the matters upon which the opinion was based but they were inadequate to sustain it. She gave no evidence that she was privy to, or had even indirect knowledge of any requisite intent. Her*

[14] [30].
[15] See the reasons of Buchanan J at [64].
[16] [71].

> *opinion was based, as she said, on a preference for one reading of the correspondence over another, earlier, interpretation of it. The other evidence she gave of general practice was equally consistent with either interpretation on the facts of this case. Even allowing the AAT was not bound by the rules of evidence I do not think Ms Croke's opinion should be regarded as any evidence at all on the question."*

Buchanan J dismissed the appeal, finding that there was some evidence, in the correspondence between the Treasurer and the Prime Minister, which could support the finding of fact by the Tribunal that a purpose for the creation of the executive summary was its submission to Cabinet. His Honour said of the AAT's conclusions:[17]

> *"Although, in my view, the interpretation placed on the correspondence is too strained to be accepted as correct, and although it did not, contrary to the AAT's statement, receive support from Ms Croke, that interpretation may not be dismissed as one incapable of being reached. Although, in my view, the AAT's conclusion about its meaning was erroneous I could not say that it was an inference so unreasonable that it could not be drawn or the correspondence necessitated the opposite conclusion. As a result, slender though in my view the support was, there was some support for the AAT's conclusion that the executive summary was prepared for the purpose of consideration by cabinet. My exploration of the issue has done no more, ultimately, than identify a question about the sufficiency, rather than the absence, of evidence. On the authorities that is not a question of law. The AAT's conclusion must be regarded as raising only a factual question. It follows that the conclusion reached by the AAT is not reviewable in the present proceedings."*

Flick J agreed with Buchanan J but for different reasons. He found Ms Croke's opinion evidence was sufficient to support the finding of fact. In doing so his Honour set out the task of the Tribunal and the Court.[18]

> *"It nevertheless remains the task of the Tribunal, and of this Court on appeal, to apply the terms of the 1982 Act to the facts as found. That Act … fundamentally confers a right of access, subject only to those exemptions defined by those statutory provisions in Part IV. Given the legislative object of ensuring openness in Government it is of fundamental importance that the terms of the 1982 Act providing for exemptions are construed according to their terms."*

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[17] [76].
[18] [101].

His Honour referred to the nature of evidence before the AAT. He alluded to a major theme of his doctoral thesis, which remains a leading text on the nature of proof acceptable in administrative decision making.[19] He said:[20]

> *"In the present appeal, it may have been open to the Tribunal to have rejected the evidence of Ms Croke, especially that part of her evidence as to the very matter upon which the Tribunal was called to decide."*

His Honour then quoted from the reasoning of Davies J when sitting as President of the Tribunal:[21]

> *"In informing itself of any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that that material is not the best evidence of the matter which it tends to prove. But the Tribunal does not lightly receive into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a right to appear and be represented carries with it an implication that, so far as is possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided the testing of the evidence seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits."*

Flick J held:

> *"Clearly in the present proceeding there was 'better evidence' as to the purpose for which the executive summary was prepared. But, for whatever reason, the present applicant chose not to object to the tender of the Affidavit evidence of Ms Croke and advanced no submission that the tender of her Affidavit deprived the applicant of the opportunity to properly 'test the evidence tendered against him'. In such circumstances, the course which the Tribunal pursued in the present proceeding of placing reliance upon the Affidavit and oral evidence of Ms Croke was a course open to it."*

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[19] Flick G.A.: *Natural Justice: Principles and Practical Application* Butterworths 1984.
[20] [130].
[21] In *Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at [5].

In *McKinnon v Department of Finance and Deregulation (No. 2)*[22] the AAT dealt with a claim that the executive summary of the reports of three "Strategic Reviews" were Cabinet documents within the meaning of s.34. As in *Fisse*, the respondent agency relied only upon some correspondence and upon an Affidavit from the Assistant Secretary of the Cabinet Secretariat. No officer of the respondent agency was called.

However Mr McKinnon, a journalist, had the benefit of the Court's reasoning in *Fisse*. He adduced substantial evidence of his own of published material bearing upon the nature of the strategic reviews, whose reports were in issue. The Tribunal found:[23]

> *"In the absence of any direct evidence of these matters from officials of the Department (and absent any objection to the receipt of the evidence) we consider it appropriate to have regard to published material that describes the program of strategic reviews."*

On the basis of that published material the Tribunal found that the strategic reviews relevantly reported not to the Cabinet, but rather to the Minister for Finance and Deregulation with copies to the Prime Minister, Treasurer and relevant portfolio Minister, the terms of reference of each such review were determined by officials and not Ministers and that the identity of the reviewer was again determined by officials and not Ministers.

The Tribunal concluded:[24]

> *"We are then left in the position where we are well short of being satisfied that the executive summaries of the three reports and attachment "C" of the Johnston report were brought into existence for the purpose of submission for consideration by the cabinet. There is no direct evidence of that being the purpose for which the documents were brought into existence and such evidence as there is, especially the notion of further consultation with affected agencies, is quite inconsistent with such a purpose."*

Fisse and *McKinnon* taken together highlight that a great deal of FOI decision making is "fact rich". As Flick J observed in *Fisse* the task of a decision maker under the FOI Act is to apply the terms of that Act to the facts of each individual case as found.

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[22] (2011) AATA 469.
[23] At [25].
[24] At [30].

With the abolition of Conclusive Certificates, exemptions can only be sustained when evidence establishes each element of an exemption as defined.

The Objects Clause

The FOI Act has always contained an objects clause.

The new FOI Act contains a revised objects clause which reads:

> *"**Objects--general***
>
> *(1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:*
>
> *(a) requiring agencies to publish the information; and*
>
> *(b) providing for a right of access to documents.*
>
> *(2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:*
>
> *(a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;*
>
> *(b) increasing scrutiny, discussion, comment and review of the Government's activities.*
>
> *(3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.*
>
> *(4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost."*

The Parliament's intention in enacting that objects clause goes squarely to the heart of the conflict identified earlier. One of the objects of the Act is to provide for a right of access to documents. The Parliament's express intention in providing for that right of access to documents is to increase public participation in Government processes with a view to promoting better informed decision making and increasing scrutiny, discussion, comment and review of the Government's activities. By achieving those outcomes the Parliament has expressed the intention that the conferral of the right of access will "promote Australia's representative democracy".

It remains to be seen what effect the objects clause has on the construction of provisions of the new FOI Act and upon the exercise of powers and discretions conferred by that Act. In accordance with principle the following propositions are likely to emerge.

First, the objects clause will not operate to alter the meaning of clear and unambiguous operative provisions.

Second, the objects may throw light on the statutory purpose and object of a provision which is not clear and unambiguous.[25]

Third, the statutory objects may be regarded as giving practical content to the terms of operative provisions which prescribe tests involving broad evaluative judgments.[26] One such broad evaluative judgment is the application of the open ended public interest test in the case of conditionally exempt documents. The reasons of Gleeson CJ, Kirby and Hayne JJ in *McKinnon v Department of Treasury* quoted earlier indicate that under the old FOI Act regard was to be had to the objects in giving practical content to the "public interest". There is no reason to doubt that a closely analogous approach is required by the amendment of the objects clause, and by the terms of s.11B of the new Act to which I will return.

Fourth, it will be arguable that the objects set out in sub-sections 3(1) to (3) will be relevant to the exercise of powers and discretions under the Act. However there are a number of difficulties with that argument.

Sub-section (4) expressly provides a statement of those matters which are mandatory relevant considerations in the exercise of powers and discretions under the Act. They are to be exercised *as far as possible to facilitate and promote public access to information, promptly and at the lowest reasonable cost*.

The breadth of the mandatory relevant considerations set out in sub-section (4) is significant. There are three elements to the statement of parliamentary intention:

(a) facilitation and promotion of public access to information;

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[25] Per Mason J in *Wacando v Commonwealth* (1981) 148 CLR 1 at 23.
[26] Per Gleeson CJ in *Russo v Aiello* (2003) 215 CLR 643; and Gleeson CJ, Haydon and Crennan JJ in *Eastern Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at [24].

(b) that the public access to information should be prompt; and

(c) that the public access to information should be at the lowest reasonable cost.

The content of those considerations arguably contrasts with that which existed under the counterpart provision within the old objects clause which was found in sub-section 3(2). That old provision referred to any discretions conferred by the Act being exercised *"as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information"*.

The "disclosure of information" to which the old Act referred is a function performed by Government. In contrast the new clause refers to the thing which is to be facilitated and promoted, done promptly and at the lowest reasonable cost as being "public access" to information.

There is room for an argument that by the amendment the Parliament has stated its intention that what is prompt and what is the "lowest reasonable cost" are each now to be assessed by reference to those who seek access, and not by reference to those who would provide disclosure. If that be right then practical content to what is a "reasonable" cost in that section is likely to be found in the objects stated in sub-sections (1) and (2). On that construction, the imposition of costs that would impede access to information that would contribute to the objects in s.3(1) or (2) would not be reasonable.

The Duty to Give Access to Documents

The FOI Act has always provided for a right to access documents.

Under the old Act there was some lack of clarity as to the nature of the co-relative duty. Section 18 of the old Act relevantly provided:-

> *"(1) Subject to this Act, where:*
>
> *(a) a request is made … by a person to an agency or Minister for access to a document of the agency or an official document of the Minister …*
>
> *the person shall be given access to the document in accordance with this Act.*

> *(2) An agency or Minister is not required by this Act to give access to a document at the time when the document is an exempt document."*

That provision has now been replaced by express duties imposed upon agencies and Ministers.

Section 11A of the new Act reads in part:

> *"3. The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.*
>
> *4. The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.*
>
> *5. The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances), access to the document at that time would, on balance, be contrary to the public interest."*

On its terms the new s.11A imposes a legal duty on each agency and Minister. There seems no reason why such duty would not be enforceable by mandamus.[27] While the duty is imposed upon an "agency" s.23 of the Act operates so that the principal officer of the "agency" has the power to make any decision required in order for the agency to comply with that duty. If the duty in s.11A is to be given content, s.23 needs to be read as facultative – enabling performance of that duty. It follows that if the duty to give access exists there is a duty to exercise the powers conferred by s.23 to give that access.[28]

If it be relevant, there are judicial precedents for mandamus issuing to require the provision of access to documents in the possession of Governmental authorities.[29]

If mandamus is available to compel performance of the duty to give access the further and separate question arises whether the exempt status of a document is a jurisdictional fact.

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[27] Pursuant to the jurisdiction conferred by s.75(v) of the Constitution and s.39B of the *Judiciary Act 1903*.
[28] *Julius v Bishop of Oxford* (1880) 5 App Cas 214 at 222 – 223; *Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106 at [134].
[29] *Drummoyne Municipal Council v Marshall* (1989) 68 LGRA 258.

By jurisdictional fact is meant a criterion the satisfaction of which would be required to avoid the enforcement of the duty to give access. If the criterion is in fact not satisfied, so that the document is in fact not exempt, then any decision by an administrative decision maker that it is exempt will have been made without the necessary statutory authority.[30]

As a matter of construction it is difficult to avoid the conclusion that the Parliament has intended by the inclusion of s.11A to make three questions jurisdictional facts:

(a) whether a document is an exempt document;

(b) whether a document is a conditionally exempt document; and

(c) in the case of a conditionally exempt document whether access would on balance be contrary to the public interest.

If those facts are jurisdictional, on an application for mandamus to enforce the duty to give access, or on an applicaion by an affected third party for prohibition or an injunction to restrain the giving of access, a court would be entitled to enter upon and consider the existence of that fact itself.[31]

Prior to the enactment of s.11A only one case had considered whether the exemption provisions in the FOI Act prescribed jurisdictional facts. [32]

In that case Paul Finn J was dealing not with an exemption provision but with a refusal of a request for access on the basis that "all reasonable steps had been taken to find the document" and that the agency was satisfied that the document could not be found or did not exist.

The applicant was unrepresented. His Honour recorded:

> *"At the hearing I raised a preliminary question with counsel for Telstra relating to the proper construction of s.24A of the FOI Act, that question going to the extent of my jurisdiction in this matter. It was whether the reference in s.24A(a) to "all reasonable steps have been taken" was to a*

[30] See *Gedeon v Commissioner of the New South Wales Crimes Commission* (2009) 236 CLR 120 at [43] and [44].
[31] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [22].
[32] *Chu v Telstra Corporation Limited* (2005) 42 AAR 100.

> *jurisdictional matter as to the existence of which it was ultimately for the Court to be satisfied …*
>
> *The text of this provision, considered in isolation, does suggest that the Parliament was intending the question of "all reasonable steps" to be one ultimately for the Court."*

Nevertheless, having compendiously reviewed the history of the enactment of s.24A his Honour held that in the context of the old FOI Act the assessment of whether "all reasonable steps" were taken was one for administrative decision makers and not for the Court.

Finn J left open the question of whether some or all of the exemption provisions in the old FOI Act were in fact jurisdictional.

In the new Act, in addition to the terms of s.11A there are three other matters which were not in the old Act considered by Finn J and which provide some support for the conclusion that the elements of each exemption provision constitute jurisdictional facts.

First, with the exception of s.47F which concerns conditional exemptions because of personal privacy each of the exemption and conditional exemption provisions in the new Act is drafted in purely objective terms. That is, none of them refer to an agency or Minister deciding or considering anything.

Second, the structure of the Act is to set out "exemptions" in Part 4 Division 2. In each case exemptions operate by reference to objective facts of the kind routinely considered by courts in claims for public interest immunity. Then in Part 4 Division 3 there is set out a set of "conditional exemptions" each of which are with the exception of s.47F as referred to above drafted in objective terms. While some of those conditional exemptions raise factual questions a little broader than courts ordinarily deal with, none of them are facts of a kind which would present particular difficulty to a court's consideration.

Third, in the case of conditional exemptions a general public interest test is also required to be satisfied. Section 11B arguable tightly constrains and structures the consideration of public interest by specifying four discrete objective matters which favour access to the document and specifying in sub-section (4) five discrete matters

which cannot be taken into account in assessing whether provision of access will be contrary to the public interest.

Importantly sub-section 11B(5) provides:

> *"In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this sub-section under s.93A."*

That provision is ambivalent when it comes to working out whether the requirement in s.11A(5) that provision of access would be contrary to the public interest is a jurisdictional fact.

The argument is open that the sub-section indicates an intention that it is for agencies and Ministers to make that decision. That would indicate an intention that the balance of the public interest not be jurisdictional.

On the other hand the argument is equally open that the sub-section makes clear that while agencies and Ministers are bound to have regard to guidelines issued by the Information Commissioner, the courts (and possibly the AAT and the Information Commissioner himself) are free to disregard those guidelines when deciding the question of fact of whether the provision of access would be contrary to the public interest. On that construction the sub-section does not assist in working out whether the location of the balance of the public interest is a jurisdictional fact.

There is the prospect that in cases where access to documents is denied by reason of the finding that the documents are exempt, the factual questions of whether those documents are exempt are now able to be put in issue by proceedings by way of judicial review.

In any such proceedings the applicant will be faced with the question of whether relief should be denied in the exercise of discretion:

> *"The writ may not be granted if a more convenient and satisfactory remedy exists, ... the Court's discretion is judicial and if the refusal of a definite*

> *public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld."*[33]

Under the old Act there was an administrative system whereby departments and agencies had strict time limits within which to make decisions. If decisions were made adverse to applicants or third parties, the adversely affected party had a right of merits review before the AAT. If decisions were not made within the prescribed time limits applicants similarly had a right of review before the AAT. In those circumstances it is very likely that on any application for mandamus the discretion to refuse relief on the basis that a more convenient and satisfactory remedy existed would have been exercised.

However under the new Act one of the important changes in the administrative system is the insertion of Information Commissioner review in between agency and ministerial decision making on the one hand and AAT review on the other. Unlike agencies and Ministers, the Information Commissioner has no time limit upon his decision making. Consequently applicants who are faced with delay in decision making by the Information Commissioner have no right of recourse to the AAT.

In that context there is the real prospect that applicants seeking enforcement of their right of access through judicial review will succeed in avoiding the exercise of a discretion denying relief if delays with Information Commissioner review mean it, and the AAT Review, are not a more convenient and satisfactory remedy. On the other hand, affected third parties might be shut out of judicial review – because delay in the Information Commissioner's reviews would not result in any adverse consequence for them.

The New Public Interest Test

Section 11B of the new Act provides:

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[33] *R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Limited* (1949) 78 CLR 389 at [400] cited with approval by Gaudron and Gummow JJ in *Re Refugee Review Tribunal ex parte AALA* (2000) 204 CLR 82 at [56].

Public interest exemptions--factors

Scope

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

(b) inform debate on a matter of public importance;

(c) promote effective oversight of public expenditure;

(d) allow a person to access his or her own personal information.

Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A."

In applying that section primary regard should be had to sub-section (2). That is the section does not limit the question of fact raised by s.11A(5) – whether *access to the document at that time would, on balance, be contrary to the public interest*. That *involves a matter of judgement, not calculation or observation*[34]. Only in circumstances where that fact is judged to exist is access to a conditionally exempt document to be refused for that reason.

Sub-section (3) seems to mean that before a decision maker can lawfully conclude that provision of access to a document is contrary to the public interest the decision maker must take into account any of the matters listed in that sub-section which, on the evidence, are relevant.

It would, at a minimum, be good practice for decision makers to ensure that each of the matters there listed which is relevant on the evidence is expressly addressed in any statement of reasons.

That having been said the section does not provide for the application of checklists or the dissection of "the public interest" into discrete factors for and against disclosure. The evaluation to be made is where the balance of the public interest lies in the context of an act which has the objects set out in s.3. The assessment is not undertaken in a normative vacuum, but focuses on the objects of the Act and the other matters listed in s.11B(3). It is made on the basis of the facts in each case.[35]

The Information Commissioner

The *Australian Information Commissioner Act 2010* creates the offices of Information Commissioner and Freedom of Information Commissioner. The creation of the office

[34] Per Hayne J in *McKinnon v Treasury* (2006) 228 CLR 423 at [57]
[35] See Hayne J in *McKinnon v Treasury* at [55] and [56]

of Freedom of Information Commissioner had been recommended in the Open Government report.

The review recommended that the Commissioner have roles of:

(a) monitoring agencies' administration of the FOI Act;

(b) promoting the objectives of the Act and providing advice and assistance to applicants and potential applicants;

(c) providing an information, advice and facilitation function which would assist informal and non-adversarial resolution of FOI requests;

(d) providing legislative policy advice and participating in broader information policy.

The reviewers considered whether the Information Commissioner should have a merits review role. The review rejected that role.[36]

> *"There are several reasons, however, why the review does not recommend that the FOI Commissioner replace the AAT as determinative reviewer of FOI decisions. First, determinative powers are not compatible with the role proposed for the Commissioner. It is not usual for an institution responsible for formulating guidelines on the administration of legislation to have individual case dispute resolution powers. Providing advice and assistance to both parties and, perhaps, facilitating a request could give rise to a conflict of interest and a perception of a lack of independence if the FOI Commissioner were to have determinative powers. Second, there is no need to create another merits review mechanism. The existence of the AAT makes the consideration of review mechanisms at the Federal level different from that in Queensland and Western Australia [which each have a determinative FOI Commissioner] neither of which jurisdiction [had at that time] an Administrative Appeals Tribunal. Third, the review is confident that the AAT can adjust its current practices where necessary in order to provide effective review of FOI decisions."*

The Government and the Parliament must be taken to have rejected that recommendation. The FOI Commissioner and the Information Commissioner have the full range of functions recommended for them in the Open Government Report together with the function of merits review.

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[36] 6.20.

Further, the function of merits review has been conferred without the imposition of any time limits for its exercise. The consequence is that an applicant usually has no access to the AAT until after the Information Commissioner has completed the review exercise.

Relatively quickly that has emerged as a major difficulty.

Delay in merits review

In a letter to the Secretary of the Department of Finance and Deregulation tabled at the Senate Legal and Constitutional Affairs Committee on 14 February 2012 the Information Commissioner said:

> *"We are already experiencing difficulty in dealing with the complaints and IC reviews that we are receiving. For example, as at November 2011 the OAIC had completed 89 IC review applications (including 8 published decisions) and had an unresolved backlog of 259 cases. I believe it will be embarrassing both to the reputation of the office and the success of the new open government measures if we are unable through staff pressures to reduce the backlog."*

Some of you will be aware that the Information Commissioner and the Freedom of Information Commissioner meet regularly with Government officials in a forum known as "ICON". I understand that is an acronym for Information Contact Officers Network, and that that network is constituted by officials of agencies responsible for FOI administration.

Material provided by the Freedom of Information Commissioner to the ICON network meetings indicates that the backlog has continued to grow. By 16 March 2012 the office had received 504 applications for review of which 162 had been finalised. Of the 162 finalised reviews some 140 were finalised by the applicant withdrawing or by the exercise of summary dismissal powers by the Commissioner. Only 3 matters had been resolved by agreement between the applicant and the agency concerned or by the variation of decision and 19 matters had been resolved on the merits.

In the six weeks following, until 31 May 2012 a further 100 applications were received. In that period 76 applications were finalised, of which 69 were dealt with through withdrawal or summary dismissal and 7 were resolved on the merits. None were resolved by agreement or variation of decision.

In total between 1 November 2010 and 31 May 2012 some 604 applications for review had been received. Of those, 209 have been dealt with through withdrawal or summary dismissal. That is a very high number and large proportion. Three matters were resolved by agreement or variation of the decision and 26 had been resolved on the merits. They are both low numbers and very low proportions. The backlog of unresolved review applications had grown to some 366. That is a very high number and constitutes 60% of applications received.

In an interview in *The Age* on April 9, 2012 the Information Commissioner is reported as stating that applicants for FOI reviews can expect a 6 week wait before any response and a delay of 6 months or longer before a matter is progressed.

Whatever the causes of delays of that kind, their existence is incompatible with the objects of the FOI Act. When contested applications are not even progressed for more than six months after the initial month or two usually taken in Departmental decision making the Government processes in which public participation might have been increased are more than likely going to be over, with the opportunity for better informing decision making or contributing to topical discussion, comment or review of government action past.

The fact that delays of this magnitude or greater appear to be entrenched and structural raises the real risk that a court will not be satisfied that Information Commissioner review, or AAT review which can only be accessed following the completion of Information Commissioner review, provides a convenient or satisfactory remedy.

The Commissioner's Guidelines

In his annual report for 2010/2011 the Information Commissioner said:

> *"The Australian Information Commissioner issued guidelines under s.93A of the FOI Act to which Ministers and agencies must have regard when performing functions and exercising powers under the FOI Act. The guidelines outline the important amendments that were made to the FOI Act in 2010 and provide guidance to agencies and Ministers on FOI administration.*
> *…*
>
> *Consultation drafts were made available to agencies for comment via www.govdex.gov.au."*

The website *govdex.gov.au* states that it is a secure, private web based space that helps Government agencies to manage projects and share documents and information.

There are difficulties when a merits reviewer consults in a private forum with respondents but not applicants on guidelines which will later be taken into account by that merits reviewer in the conduct of reviews.

That is particularly so with those parts of the Guidelines which specify how the merits reviewer will conduct merits review.

Section 55 of the Act provides for the Information Commissioner to conduct a review, on the papers and without holding a hearing if three conditions are met:

(a) it appears to the Information Commissioner that the issues for determination on the IC review can be adequately determined in the absence of the review parties; and

(b) the Information Commissioner is satisfied that there are no unusual circumstances that would warrant the Information Commissioner holding a hearing; and

(c) none of the review parties have applied for a hearing under s.55B.

That provision makes it passably clear that the power to conduct a review without the holding of a hearing is conditioned upon the determination, on facts of each individual case, that the issues raised for determination can be adequately determined in the absence of the review parties. Earlier I quoted the reasoning of Justice Davies from *Barbaro and the Minister for Immigration and Ethnic Affairs*. In that case his Honour indicated that where there was a dispute of fact, and that dispute fell to be determined according to contested evidence, it would ordinarily be necessary to accord to each party the opportunity to test the evidence adduced by the other party. Each of the legislative matters to which his Honour pointed in that case as requiring that course are present in the conduct of an Information Commissioner review. For that reason it seems unlikely that the Information Commissioner could lawfully determine that contested factual issues which fall for determination by reference to contested

evidence can ever be adequately determined in the absence of the review parties. Yet the Commissioner's guidelines state:

> *"IC reviews are intended to be a simple, practical and cost efficient method of external merit review. Most matters will be reviewed on the papers rather than through formal hearings. This is consistent with the objects of the FOI Act, which provides that functions and powers are to be performed and exercised, as far as possible, to facilitate and to promote public access to information, promptly and at the lowest reasonable cost."*[37]

That general proposition is inconsistent with the specificity of decision making required by s.55(1)(a) which I have just discussed.

Further the assertion that that general proposition is consistent with the object of the FOI Act begs the question.

There will be cases where the adoption of the process of review on papers will be neutral as to the facilitation and promotion of public access to information. There will be others where in the circumstances of a particular case the adoption of that process will be detrimental to the facilitation and promotion of public access to information. A process that fails to facilitate and promote public access cannot be consistent with the objects of the Act no matter how prompt and low cost it might be.

Further, the distinction drawn in the Guidelines between review on the papers on the one hand, and the holding of hearings, on the other, is a false distinction. It is commonplace for various courts to conduct hearings in which there are no disputed questions of fact but to do so "on the papers". For example, the appeals call-over in the New South Wales District Registry of the Federal Court is now done almost exclusively through e-Court. Similarly numerous, often vigorously contested, motions are heard and determined in the revenue list of the Supreme Court of New South Wales exclusively by use of e-Court.

In e-Court hearings all parties and the court communicate in writing, on line and in a forum which is accessed by all parties and the court.

Those processes have the advantage of avoiding the delays inherent in any merits reviewer receiving communications in the absence of one party and then being

[37] At paragraph 10.14.

required, because of the demands of natural justice, to forward the material, or the substance of it, to the other party. When all parties are present in the e-Court context delays of that kind do not occur.

Further, in the context of a decision-making framework, like FOI, where one party carries a formal onus, a hearing can have the distinct advantage of providing a fixed point in time by which the party carrying the onus must produce any material upon which it will rely to make out its case.

These considerations indicate that it is far from clear that in any particular case "review on the papers rather than a formal hearing" will produce any more prompt or lower cost outcome.

The decision making record of the Information Commissioner to date might indicate that the contrary is the case.

The Guidelines engage with these matters in more detail:

> *"Implicit in that procedure is a presumption that an IC review will be conducted on the papers unless there is a special reason to warrant a hearing.*
>
> *Any party may apply to the Information Commissioner for a hearing at any time before a decision is made. The Information Commissioner will only decide to hold a hearing if satisfied that there is a special reason to warrant a hearing."*[38]

The matter stated to be implicit in the legislation is simply not. The reference in section 55(1)(b) to unusual circumstances cannot lead to that conclusion – because s.55(1) can have no role once a request for a hearing has been made. Indeed s.55B expressly confers a right on any party at any stage of an Information Commissioner review to request a hearing and imposes upon the Information Commissioner a duty, when he receives such a request, to give all parties to the review a reasonable opportunity to make submissions on the request and having received and considered those submissions to decide, in the circumstances of the individual case, whether or not to hold a hearing.

[38] Paragraphs 10.46 and 10.47.

The articulation by way of guidelines of the requirement for a "special reason" to exist before there will be a hearing, and without ever having dealt with an application for a hearing let alone received and considered submissions on the question and published reasons with the benefit of that consideration, is quite extraordinary conduct of an independent merits review entity. It is also arguably an unlawful fettering of the discretion conferred by s.55B which arguably requires principle weight in the exercise of that discretion to be given to the matters specified in s.55(4) which in summary are:

(a) that the review should be conducted with as little formality and technicality as is possible given the particular provisions of the Act which are to be considered in the review and the particular matters which require determination in the review;

(b) ensuring that each review party is given a reasonable opportunity not merely to make submissions, but to present his or her case, including where there is a contested question of fact by presenting evidence and testing any evidence to the contrary;[39]

(c) conducting the review in as timely a manner as is possible while giving proper consideration to the matters to be determined in the individual case.

These and other difficulties with the Guidelines may further contribute to the difficulties in establishing that Information Commissioner review provides a convenient and satisfactory alternative remedy to mandamus.

Conclusion

The substantive changes to FOI law made by the legislation in 2009 and 2010 strengthen the individual right to access to governmental information, particularly in cases in which the information to which access is sought has some relevance to Government policy development or decision making or to the scrutiny, discussion, comment or review of Government's activities.

It is precisely in that field in which tensions and the "clash of cultures" has been most acutely felt under the old FOI Act. There is every reason to think that those tensions

[39] See earlier references to *Re Barbaro and the Minister for Immigration and Ethnic Affairs*.

and clashes will continue, possibly at a heightened level, by reason of the strengthening of substantive rights under the new FOI Act.

However by mixing an independent merits review function with the other incompatible functions of the Information Commissioner there is a real risk that the Parliament has created a structure which will be unable to deliver a sustainable quality merits review function in the context of those increased tensions and clashes. For whatever reason, the performance of that function over its first 19 months has fallen well short of the standard required to deliver the objects stated in the new objects clause.

That conferral of the merits review function on the Information Commissioner and the performance of that function to date combine to risk rendering nugatory the strengthening of the right to access made by the other changes in the new FOI laws.

Over the next year or two it will be seen whether that results in the focus of dispute resolution over questions of the exemption of documents moving out of merits review bodies into the courts. If that occurs, it will be through applicants, particularly for sensitive policy-related documents, applying for orders in the nature of mandamus, or otherwise by way of judicial review to directly review decisions of respondent agencies.

Where that occurs respondent agencies will be in the position of seeking to defeat such a claim by arguing for the exercise of a discretion on the basis that Information Commissioner review provides a convenient and satisfactory alternative remedy to judicial review. If agencies fail to establish that fact it will be by reason of the performance of the Office of the Australian Information Commissioner.

Possibly with the exception of those agencies responsible for decisions on resourcing levels of that office, each agency will be in the invidious position of having had no role in influencing the very matters which are likely to be determinative of those court proceedings.

The performance of merits review functions under the new FOI requires urgent review.

It is in the joint interests of respondent agencies and applicants that such a review either fixes the failure of the Information Commissioner to keep up with demand or removes the merits review function from the Information Commissioner and returns it to the AAT.

Experience to date with the Commissioner's guidelines function, and with his broader policy advisory role[40] also suggests that it was an error to reject the Open Government Report's conclusions that those functions are incompatible with the merits review function.

These issues require serious consideration by respondent agencies and applicants alike. They can be addressed in the review of the new FOI which I understand is to be commenced later this year.

[40] In his presentation to the ICON meeting on 5 June 2012 the Commissioner expressed disappointment in stakeholder (principally applicant) responses to his report on FOI Charging. Whatever might be said about that in the context of a policy debate about FOI charging, it was a statement likely to be productive of difficulties for the office charged with merits review of discretionary charging decisions.