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Title A tale of two tax stories; Freedom of Information and determining the public interest in Australia and the United Kingdom.

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Abstract

In February 2005 *The Times* newspaper applied to the United Kingdom Treasury for access to documents prepared for Ministers on the expected loss of revenue by pension funds from the removal of the right to claim tax credits on UK dividends. More than two years earlier *The Australian* newspaper sought access to information from the Australian Federal Treasury on 'bracket creep' in taxation. In this article the author contrasts these two applications and the tribunal and court cases that ensued. She uses the case studies to critique the provisions in the Australian legislation that enable Ministers and Department Heads to issue conclusive certificates to protect their decisions to refuse access to internal working documents from independent merits review. The treasuries in both jurisdictions resisted the freedom of information applications, arguing that disclosure would not be in the public interest. The documents in the UK case were eventually disclosed to *The Times*. The application by *The Australian* took the newspaper all the way to the High Court of Australia with no tax story to publish in the end. The paper was left with only a tale of freedom of information failure. The author concludes with an overview of proposals for FoI reform in the wake of the Australian High Court decision and the recent election of a Labor Government in Australia.

Keywords

Conclusive certificates; policy documents; deliberative documents; public interest test; external review; comparative; United Kingdom; Australia.

Introduction

On 31 March 2007 *The Times* newspaper reported details of Treasury advice given to the then Chancellor of the Exchequer, Gordon Brown, before he decided to remove tax relief on dividends paid into pension funds (Nugent 2007a). This was a major story that *The Times* broke after obtaining documents under freedom of information. The freedom of information application was a story in its own right, described by *The Times* as a “two-year battle” (Nugent 2007b). Treasury initially refused to release the documents, arguing that the advice given by government officials to the Chancellor was exempt and disclosure was not in the public interest. The Information Commissioner reversed that decision and the Government abandoned an appeal to the Information Tribunal (Information Commissioner 2006b; White 2007). Two years to obtain documents about a decision on taxation policy might seem less than ideal for a newspaper. Pensions are a matter of ongoing public concern and the Chancellor’s leadership ambitions that came to fruition later in the year added to the impact of the story when it finally emerged (White 2007). Other stories might be irrelevant after a two year hiatus. Nevertheless, the disclosure of the documents in *The Times* case sets a significant precedent, one that would be envied by Australian journalists.

More than two years before *The Times* began its battle to obtain the Treasury advice on taxation of pension funds, *The Australian* newspaper sought access to information from the Australian Federal Government on ‘bracket creep’ in taxation. Provisions in the Australian legislation that enable Ministers and Department Heads to issue conclusive certificates in relation to internal working documents took *The Australian* newspaper all the way to the High Court of Australia with no tax story to publish in the end, only a tale of freedom of information failure (Merritt 2006; McKinnon 2006a). In September 2006 the High Court dismissed the appeal. This account of these two tax

stories highlights an important difference in the legislation of the two jurisdictions. In Australia, Ministers get the last word on whether disclosure of deliberative documents is contrary to the public interest before there is any option of external merits review of the public interest. In the United Kingdom the Information Commissioner is given the opportunity to consider and balance the competing public interests and although a Ministerial certificate (under s. 53) can then overturn his or her decision, that power was not exercised in *The Times* case. There is a strategic difference between issuing a certificate that contradicts merits review and one that pre-empts it. In Australia, Federal freedom of information procedures are currently the subject of a law reform review. It is imperative that the use of Ministerial certificates be carefully considered in that process.

The Australian “bracket creep” story

In October and December 2002 Michael McKinnon, Freedom of Information Editor at *The Australian* newspaper, sought access under the Australian *Freedom of Information Act 1982* (Cth) to Treasury documents concerning “bracket creep” in income tax and possible misuse of a First Home Owners’ Grant scheme. The bracket creep documents concerned the increased burden on taxpayers caused by movement into higher tax brackets because of gradual increases in income and government projections for increased revenue collection arising from this phenomenon. The Treasury refused access to most of the documents, relying predominantly upon the exemption for internal working documents (s. 36).

Under s. 36(1) of the *Freedom of Information Act 1982* (Cth) internal working documents are exempt if they:

- (a) 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 or Minister or of the Government of the Commonwealth; and

- (b) would be contrary to the public interest.

Not all internal working documents are exempt under this section and access will only be refused if disclosure would be contrary to the public interest. If access to a document is refused under this exemption the applicant may appeal to the Administrative Appeals Tribunal (AAT). The Tribunal has the power to decide whether a document falls within the exemption, including the public interest element, and substitute its decision for that of the Department in a full merits review. But, the scope of review by the AAT can be limited significantly if a Minister decides to issue a conclusive certificate. Under s. 36(3) if a Minister is satisfied that disclosure of an internal working document would be contrary to the public interest, he or she may sign a certificate that establishes that "conclusively". The Minister must give notice of the grounds of public interest that the decision is based upon (s. 36(7)).

Ministers and Department Heads may issue conclusive certificates in relation to a number of exemptions in the Australian FOI Act. These include Cabinet or Executive Council documents (s. 34(2), 35(2)) and documents that could reasonably be expected to cause damage to national security, defence, and international relations (s. 33(2)). Certificates may also be issued for documents that could reasonably be expected to cause damage to inter-governmental relations if the Minister is satisfied that disclosure would not, on balance, be in the public interest (s. 33A(2)). The provision at issue in *The Australian's* application allowed the Treasurer to issue conclusive certificates for internal working documents if he was satisfied that disclosure would be contrary to the public interest (36(3)). Faced with such a conclusive certificate, the Administrative Appeals Tribunal has the limited role of determining

whether reasonable grounds exist for the claims made in the certificate (s. 58(5)).

Michael McKinnon from *The Australian* newspaper first sought an internal review of the decision that the bracket creep and First Home Owners' Grant documents were exempt from freedom of information and the then Treasurer, Peter Costello, then signed a certificate that established "conclusively" that disclosure of the documents would be contrary to the public interest. McKinnon took the matter to the Administrative Appeals Tribunal (AAT), the Federal Court and the High Court. His appeals were dismissed at all levels.

In the AAT, President Downes J held that he was not required to decide which of the competing views of the public interest presented by the applicant and respondent was preferable. McKinnon argued before the High Court that when faced with a conclusive certificate, the AAT is required to undertake a balancing exercise and that the approach adopted by the Tribunal, and upheld by the Federal Court, rendered the review process essentially meaningless. The High Court dismissed the appeal and all judges rejected the approach of balancing the various facets of the public interest (*McKinnon v Secretary, Department of Treasury* 2006).

Majority High Court judges Callinan and Heydon JJ emphasised that the AAT must avoid balancing competing public interests. They acknowledged that this meant:

'that if one reasonable ground for the claim of contrariety to the public interest exists, even though there may be reasonable grounds the other way, the conclusiveness will be beyond review. It is important to notice that the statutory language does not give an entitlement to access if there are, as often there may very well be, reasonable grounds for the revelation of the document in the public interest.' (*McKinnon v Secretary, Department of Treasury* 2006, p. 468)

Justice Hayne, in the majority on the outcome of the case, did not accept that the existence of one “non-absurd” reason necessarily meant that there are reasonable grounds supporting a conclusive certificate:

‘Rather, 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.’ (*McKinnon v Secretary, Department of Treasury* 2006, p. 444)

While there are subtle differences between the various judgments, the likely outcome of this decision is that the only practical means of challenging a conclusive certificate issued under the Australian Commonwealth Act will be to demonstrate that there are in fact no reasonable grounds, or that the grounds are so unreasonable that no reasonable person could accept them (Bannister 2006).

There were a number of grounds that High Court Justices Callinan and Heydon thought the AAT could have found to be reasonable in the *McKinnon* case. These included: that government officials should be able to communicate candidly with Ministers and be encouraged to record those communications; that release of documents when issues are not settled may lead to confusion and mislead the public; and that release of documents prepared as possible responses to questions in Parliament could threaten the Westminster system of government. Their Honours were not persuaded by all the claims made by the Treasurer. The claims that the public would find it difficult to put financial data into context and might be misled or confused by the material, and that material intended for a specific qualified audience might mislead the general public, were not convincing. Greater disclosure can resolve possible confusion. Government Ministers can explain the context of documents disclosed under

freedom of information, and the public can be assisted by experts and informed journalists who can interpret the material. While there may be some variations in the wording of certificates in the future, the High Court decision in *McKinnon v Secretary, Department of Treasury* (2006) leaves FOI applicants facing conclusive certificates that will effectively preclude external merits review if they are accompanied by carefully drafted grounds.

Indeed such a case came before the Administrative Appeals Tribunal in the week before the November 2007 Australian Federal Election. The Secretary of the Department of Prime Minister and Cabinet issued a certificate preventing access to documents about highly controversial workplace law reforms that were central to the election campaign. The documents dating from 2005 included options for reform that had not been implemented and the Secretary concluded that it was not in the public interest to disclose them. The Tribunal followed the High Court *McKinnon* case and affirmed the certificates on the basis that there were reasonable grounds for that claim. (*McKinnon and Secretary, Department of Prime Minister and Cabinet* 2007).

The UK pension funds story

In the United Kingdom *The Times* application for tax documents from the Treasury had a very different outcome. The comparable exemptions relevant to documents that disclose deliberative processes or policy are to be found in sections 35 and 36 of the United Kingdom Act. Section 35 concerns information relating to the formulation of government policy, Ministerial communications, advice from Law Officers or the operation of Ministerial private offices. Section 36 concerns information, not covered by s. 35, that would, or would be likely to, prejudice the convention of the collective responsibility of Ministers, or inhibit the free and frank provision of advice or

exchange of views for the purposes of deliberation. Both are qualified exemptions and subject to a public interest test.

Cabinet Ministers in the United Kingdom are granted the power to issue conclusive certificates under the *Freedom of Information Act 2000* (UK) for exempt documents relating to bodies dealing with national security (s. 23(2)) or where exemption is required for the purpose of safeguarding national security (s. 24(3)). There is also provision for conclusive certificates for information held by either House of Parliament that would, in the reasonable opinion of the Speaker of the House of Commons or the Clerk of the Parliaments, prejudice the effective conduct of public affairs (s. 36(7)). Significantly, there is no equivalent to the Australian provision for Ministerial certificates relating to matter that discloses deliberative processes or policy documents of the executive: a different approach has been adopted. A Minister or the Attorney-General may issue certificates exempting departments or public authorities from complying with a decision of the Information Commissioner (s. 53). The certificate is issued to the Commissioner and must be laid before Parliament. There is a critical difference in the sequences of events between the Australian and United Kingdom approaches. The Australian certificates pre-empt external merits review while a certificate under the UK Act would contradict a published decision of the Information Commissioner that had expressly weighed the relevant public interests in maintaining the exemption against the public interest in disclosure.

The disclosure to *The Times* of the Treasury documents on taxation of pension funds demonstrated this difference in the operation of the UK and Australian Acts. In February 2005 *The Times* applied to the Treasury for access to estimates on the expected loss of revenue by pension funds in 1997 and subsequent years due to the removal of the right to claim tax credits on UK dividends. *The Times* also sought information on what consideration was given by the Government to the impact of this reform. The Treasury resisted *The*

Times' FOI application and argued that the documents related to the formulation of government policy and so were exempt under s. 35(1)(a) of the *Freedom of Information Act 2000* (UK). The documents sought by *The Times* were generated as part of the 1997 pre-budget policy making process. Section 35 is subject to a public interest test. Applicants are not entitled to access information if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"(s. 2(2)(b)). The public interest for and against disclosure must be weighed when considering this exemption.

The grounds identified by the Treasury were that disclosure would damage the confidentiality of the budget process and affect the advice given, would undermine the policy process, and that the information was incomplete and would not materially add to the pensions debate. *The Times* applied to the Information Commissioner who decided that the documents would involve disclosure of tax policy and so fell within the scope of s. 35(1)(a). On the public interest test, the Commissioner took into account the importance of maintaining confidence in the budget process, but decided that the sensitivity of the information diminishes over time. The Commissioner was not satisfied that disclosure of 1997 Budget information would affect the candour of official advice on future budgets or on future policy options. On the other side, there were public interests that favoured disclosure. The Commissioner commented:

"[the] greater the impact of a particular policy upon public revenues and upon the wider debate in relation to pensions, the greater the public interest in disclosure of information to promote accountability and the transparency of the decision making process." (Information Commissioner 2006b, p. 6)

The Commissioner acknowledged that there is a public interest in comprehensive government record keeping but did not accept that disclosure of this material would lead to oral briefings in the future and a reduction in

record keeping. Nor did the Commissioner accept the Treasury's arguments that the information ought to be withheld because it might be taken out of context and misunderstood. While there was the potential for misunderstanding, the Commissioner argued: "the withholding of information could of itself contribute to suspicion and misunderstanding of the issues" (Information Commissioner 2006b, p. 8). Background information about the decision-making process and policy objectives could be published to ameliorate public understanding.

The Commissioner concluded with an important statement that favoured the principle of transparency:

"Having weighed the competing public interest considerations, the Commissioner concludes in all the circumstances, that the public interest in good governance which requires transparency in the decision making process, is stronger than the public interest in maintaining the exemption" (Information Commissioner 2006b, p. 8)

The Treasury commenced an appeal to the Information Tribunal but abandoned it after the Tribunal decided against the Department for Education and Skills (White, 2007) in a separate case concerning internal minutes sought by the *Evening Standard* that addressed similar issues and interpreted the s. 35 exemption concerning documents relating to policy development

In January 2005 the *Evening Standard* newspaper sought minutes of senior management meetings dealing with the setting of school budgets in England from the Department for Education and Skills (DfES). The DfES refused access under the s. 35 exemption on the basis that the information related to the formulation or development of government policy. The *Evening Standard* complained to the Information Commissioner who decided that the public interest in maintaining the exemption did not outweigh the public interest in disclosing it and required the Department to release the information

(Information Commissioner 2006a). The Information Commissioner substituted its own decision on the public interest for that of the Department.

The DfES appealed to the Information Tribunal (*The Department for Education and Skills v Information Commissioner and the Evening Standard* 2007). That decision, promulgated 19th February 2007, was the first case in which the Tribunal had interpreted s. 35. The Tribunal applied the public interest test in a way that severely restricted the Government's reliance upon the s. 35 exemption to protect information concerning policy development when some time has elapsed since the policy was formulated. The decision was an unwelcome precedent for the Treasury dealing with the appeal to the Tribunal in *The Times* application.

The Government's arguments in the DfES case included the following adverse effects on policy deliberations that might result from disclosure of such information:

- Loss of frankness and candour;
- The danger of government by Cabal;
- The damaging effect of disclosure on difficult policy decisions;
- The impact on record – keeping;
- Damage to relations between civil servants and ministers and to the role of civil servants in the formation of policy. (*The Department for Education and Skills v Information Commissioner and the Evening Standard* 2007, para 35).

The DfES cited the Australian High Court decision in *McKinnon v Secretary, Department of Treasury* (2006) as authority for the importance of preserving frankness and candour and the need to encourage good record keeping.

The Tribunal rejected an interpretation of the exemption that would start from the position that disclosure of information in this “class” is inherently damaging and should be released only if in the public interest to do so. In the Tribunal’s view, for the information to be exempt the public interest in withholding information must outweigh the public interest in disclosure. “If the scales are level, it must disclose” (*The Department for Education and Skills v Information Commissioner and the Evening Standard* 2007, para 64).

The Tribunal accepted that Ministers and their departmental officials need “time and space” to consider policy options in confidence and that premature publicity may be damaging. In this case, the Tribunal considered it very relevant that internal minutes from June 2002 to June 2003 were sought in January 2005 (*The Department for Education and Skills v Information Commissioner and the Evening Standard* 2007, para 75). Had the documents been sought in June 2003 the public interest against disclosure would have carried far greater weight. Once a policy has been finalised and announced, arguments against disclosure of documents that explain that process become much harder to maintain under the UK Act. Weighed against this are public interest arguments for disclosure based upon transparency and a legitimate interest in understanding how the policy was developed (*The Department for Education and Skills v Information Commissioner and Evening Standard* 2007, para 86).

The decision of the Information Commissioner in *The Times* case was under appeal to the Information Tribunal when the Tribunal handed down its decision in the *Department for Education and Skills* case on 19th February 2007. The Times’ solicitors wrote to the Treasury on 12th March inviting the department to abandon the appeal in its case. On 30th March 2007 the Treasury disclosed the requested information on its website. The Times applied for costs but this was refused. The Treasury’s conduct had not been so “unreasonable” as to warrant a costs award against it. (*HM Treasury v Information Commissioner*

and Times Newspapers Ltd, 2007). It took longer than journalists would have wanted, but the story was published.

Merits review and the last word

In both jurisdictions a Minister can use certificates to have the last word with an ultimate obligation to report to parliament. But there is a significant strategic difference in the sequence of events. The Australian Administrative Appeals Tribunal is denied the independent weighing of the public interest undertaken by the UK Information Commissioner. Once a Minister issues a conclusive certificate under the Australian Federal Act review on the merits is obviated. The matter then proceeds only on whether the Minister had reasonable grounds for the claims made in the certificate. If the AAT decided there was no reasonable grounds the Minister might still decide not to revoke the certificate and instead report that decision to parliament (s. 58A(3)). By contrast, in the United Kingdom if a Minister issued a certificate it would be to contradict a published decision of the Commissioner that would have expressly weighed the relevant public interests in maintaining the exemption against the public interest in disclosure.

The UK Treasurer did not issue a s. 53 certificate in *The Times* case but Australian Federal Ministers have not been so averse to issuing certificates over the years. In the lead up to the High Court decision in the *McKinnon* case, the then Labor Opposition took an interest in conclusive certificates. Information about conclusive certificates is not kept for the freedom of information annual reports and so the information was elicited through parliamentary questions. In June 2006 Labor Senator Kerry O'Brien asked a series of Questions on Notice addressed to government Ministers to disclose how many conclusive certificates had been issued in the past 10 years. The conservative Liberal National Party Coalition government had been in power at

a Federal level since March 1996. Thirteen certificates were disclosed in response to the Senator's questions for the period dating from October 1996. The Departments that had issued certificates were: 5 from the Treasury and Tax Office; 3 from the Prime Minister and Cabinet; 2 from employment and workplace relations; and 1 each from Agriculture, Foreign Affairs and Veterans Affairs. In addition to the applications by *The Australian* newspaper that were the subject of the High Court case, FOI applications for information on political controversies that were refused with conclusive certificates included applications for information on the detention of the Australian, David Hicks, by the United States Government in Guantanamo Bay and the Federal Government's workplace reforms.

Labor criticisms of the former Coalition government's use of conclusive certificates over that decade ought to be placed into context with a little history. No statistics have been kept for the annual reports and so precise figures are not available, but a search of the decisions of the Administrative Appeals Tribunal discloses 29 cases that involved conclusive certificates from 1983 to 1996 under Labor Governments. It is a trite observation that politicians favour freedom of information while in opposition and regret that position when in power. The recently elected Labor Government has promised reform for Australia.

Proposed Reform for Australian FOI

Removal of conclusive certificates for the internal working documents exemption has been proposed in the past. In 1995 the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) jointly conducted a review of Commonwealth freedom of information. The Review issued a discussion paper that proposed removal of s. 36 conclusive certificates. The majority of submissions in response supported the proposal,

but Treasury and the Department of Prime Minister and Cabinet (in a then Labor Government) opposed it (ALRC and ARC 1995, p. 117). The ALRC and ARC took different positions on this issue in their final report. The ALRC recommended that the s. 36 conclusive certificates should be removed and that the assessment of the public interest element in the exemption thereby be opened up to external review. The ARC would not have gone so far but proposed that certificates have a maximum duration of five years, and that the (proposed) FOI Commissioner be advised that the certificate had been issued (ALRC and ARC 1995, p. 117 – 118). Neither the ALRC nor ARC proposals were implemented, and nor was a Commonwealth statutory office of FOI Commissioner created.

Freedom of information law reform is again a political issue in Australia. The Coalition government's use of conclusive certificates and broader failures in the FOI process were severely criticised in the wake of the High Court *McKinnon* case and major media proprietors launched a Right to Know Campaign. The Federal Attorney-General responded by referring another inquiry into freedom of information to the Australian Law Reform Commission. The focus of the inquiry was harmonisation of State and Federal laws and there was only an oblique reference to conclusive certificates in the terms of reference expressed as: "the legitimate interests of governments and their ability to obtain forthright advice from agencies" (Australian Law Reform Commission, 2007).

On November 24th 2007 Australia elected a new Labor government. When in opposition, Labor issued a policy document committing to freedom of information reform and specifically to implementing the 1996 ALRC recommendations including abolition of conclusive certificates and creation of an independent statutory Information Commissioner (Australian Labor Party (2007) p. 5). There is an opportunity to guarantee full external merits review in Australia that balances all relevant public interests without Ministers issuing certificates as a trump card.

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