EXEMPTIONS UNDER THE FREEDOM OF INFORMATION ACT: AN OFFICIAL'S VIEWPOINT

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Mr Bayne in addressing the topic of the exemptions under the Freedom of Information Act 1982 ("FOI Act") has concentrated his analysis on and dealt at some length with, the provisions of Part IV — Exempt Documents.

To achieve a balanced understanding of the role and significance of the exemptions I believe one needs in addition to see how the FOI Act fits into the broader context of arrangements for access to official information.

There are other qualifications and limits set on the application of the "legally enforceable right" in s 11 which might also be considered usefully in the context of exemptions.

It is in addition important as Mr Bayne has indicated in dealing with, for example, s 36 to take account of the requirements of ss 8 and 9 of the FOI Act if the application of Part IV is to be seen in proper context.

I propose therefore to address these matters before commenting on selected issues raised by Mr Bayne with respect to particular exemptions in Part IV.

The Broader Context

The FOI Act forms part of but does not replace other voluntary and compulsory arrangements for making available official information through executive, administrative, judicial and parliamentary processes as s 14 makes clear.

It is the distinctive combination of features — compulsory process, lack of any need to establish a special interest in those seeking access and the ability for final decisions in many cases to be made outside the Executive which sets the FOI Act apart from the other processes for obtaining access to official information within the closed archival period. It is this combination which sets the FOI Act apart as a radical innovation.

Other parts of the regime involve compulsory processes, for example, provision of information to the Parliament in the exercise of its powers, in judicial proceedings and before executive inquiries such as royal commisions. In each of these circumstances final decisions about the provision of information lie beyond the control of Ministers and officials. But in each case particular interests need to be established before access to official information is obtained. And access is obtained to advance particular lines of relevant argument or inquiry.

The FOI Act is, however, predicated on a lack of any requirement to establish a particular interest in the applicant. Nor has any particular purpose to be established. The potential is therefore raised immediately, if the right of access were to remain unqualified, to disrupt effective political decision-making and for administration to be made far more difficult than under existing traditional arrangements through:—

- removing the issue of relevance;

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- loss of control of the time at which knowledge of particular information becomes available generally;
- having created at random issues for official consideration which demand attention at ministerial and the highest official level; and
- the uninvited intervention in or disruption of the deliberative process of government by those bearing no responsibility for decisions that need to be taken; or
- interrupting or preventing the flow of information to government from those individuals and groups within and outside the Australian community necessary for the proper functioning of the government's decision-making processes.

The essence of the difficulty faced by officials is how to balance a legally enforceable right to access in the hands of a person with no more than a general curiosity in official information or a desire to participate in the processes of government, and with no particular standing or existing responsibility relationship, against the claims of a range of recognised public interests and the private and business affairs of persons and organisations outside of government.

By contrast, the provisions of Part II — Publication of Certain Documents and Information — are an attempt to come to grips with the valid criticism made over a number of years that too much official decision-making in individual cases is in accordance with internal guidelines, the so called "secret law", and advance the interests of those with real disputes with the bureaucracy.

The effect of sub-s 9(4) is to ensure that the Australian community is not denied access to guidelines and manuals merely on the ground that a particular document contains some exempt matter. If it is practicable, the manual must be re-written so as to exclude exempt matter and the re-written manual made public.

Other Qualifications and Limitations

The main provisions of the FOI Act apart from Part IV which set limits on the general curiosity right are:—

- *Section 4*
  The definition of "exempt document" and "official document of a (the) Minister" confine the right of access to those documents in a Minister's possession that relate to the affairs of an agency or of a "Department" of State which is defined to exclude the Parliamentary Departments.
- *Section 5*
  Requests for access to documents held by the courts are restricted to those documents which relate to matters of an administrative nature. The FOI Act does not apply to the Judges.
- *Section 6*
  Requests for access to the documents of the Australian Conciliation and Arbitration Commission and certain other arbitral tribunals and authorities are limited to documents which relate to matters of an administrative nature. The FOI Act does not apply to members of the tribunals.
- *Section 7*
  Sub-Section (1) provides that the FOI Act does not apply to the bodies

listed in Part I of Schedule 2 and to the person holding the office specified in that Part.

Sub-Section (2) provides that the agencies listed in Part II of Schedule 2 are exempt from the operation of the FOI Act in relation to the documents referred to in that Part in relation to them. These documents are exempt irrespective of their contents.

- *Section 12*

Sub-Section (1) provides in effect that where statutory provisions or other arrangements exist that already provide for other means of access to particular documents (archival material in the open access period, public registers and official material offered for sale) it would be inappropriate for access to be granted under the FOI Act rather than under those other arrangements.

Sub-Section (2) limits the right of access to those documents that were created after 1 December 1982 with two exceptions:

— those relating to the personal affairs of the applicant when the time limit is 5 years before 1 December 1982; and

— a document which is reasonably necessary to enable a proper understanding of another document to which the applicant lawfully has had access. The provisions of sub-s 12(2) may be modified by regulations to permit greater access to prior documents.

- *Section 13*

Sub-Section (1) provides that documents in the collections of the Australian War Memorial, the National Library, the Museum of Australia and the Australian Archives are not documents subject to the provisions of the FOI Act if they were placed in those collections by or on behalf of a person (including a Minister or former Minister) other than an agency.

- *Section 17*

Sub-Section (2) enables an agency to refuse a request which would require the production of a document using a computer or other equipment where that production would interfere unreasonably with the operations of the agency.

- *Section 21*

Sub-Section (1) provides that access may be deferred where:

— publication is required by law, or

— the document has been prepared for presentation to Parliament or its being made available to a particular person or body, or

— premature release would be contrary to the public interest, or

— a Minister considers that because the document is of general public interest the Parliament should be informed of the contents before the document is otherwise made available.

- *Section 24*

Sub-Section (1) provides that access to documents identified only by general subject matter references may be refused if the work involved in giving access would substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by a Minister or agency of his (its) functions.

Sub-Section (2) allows refusal of a request without a search for or identi-

fication of the documents to which the request is directed if the request relates to a substantial number of documents and the nature of them as described in the request is such that each would be an exempt document.

- *Section 25*
  Sub-Section (1) allows the withholding of information as to the existence or non-existence of a document if disclosure would be prejudicial to the public interest for a reason specified in s 33 or would affect law enforcement for a reason specified in s 27(1).

  Sub-Section (2) permits an applicant for a document which is or if it existed would be of a kind that information about its existence might be withheld under sub-s (1) to be notified that the existence of the document is neither confirmed nor denied but that, if the document existed it would be an exempt document.
- *Section 27*
  This Section provides a procedure by means of which the person to whom or the undertaking to which documents relating to business, professional, commercial or financial affairs relates may object to access being given to those documents. The Section also provides a procedure for informing persons and undertakings of decisions made to give access to those documents and allowing appeals to the Administrative Appeals Tribunal against such decisions.

These provisions show a clear legislative intention to offset against the general curiosity right the public interests in maintaining effective public administration (executive and judicial) and the protection of particular private and business interests.

Part IV

From an official's point of view the important features of Part IV are:—

- the special interpretation provisions:
  — the effect of s 32 is to ensure that the scope of any one exemption provision does not limit the operation of another and that one or more exemption provisions may apply to the same document;
- the exemption provisions on the whole are "creative high technology" drawn broadly, enabling discretion to be exercised in balancing the general curiosity right against nominated public interests subject in the majority of cases to final decisions being taken on the merits by the Administrative Appeals Tribunal, but as the extent of Mr Bayne's commentary shows, the exact limits of the majority are as yet legally uncertain being designed for clarification and settling in a quasi-judicial or judicial forum; and
- the provisions allowing conclusive certificates to be issued with respect to the exemption provisions in ss 33, 34, 35 and 36 thereby indicating that at the end of the day the decision of where the balance should lie between general curiosity and the public interest on these matters must rest formally with the Executive.

It is likely that in all cases where access is refused on the basis of the Cabinet and Executive Council exemptions (ss 34 and 35) and possibly in the majority of cases where exemptions are claimed under ss 33 and 36 conclusive certificates will be issued at the time of finalising internal reviews (s 54).

Selected issues which call specifically for comment are concerned with the exemptions provided by ss 33 and 36.

Section 33

In the commentary on s 33, Mr Bayne has raised a fundamental attitudinal difficulty which is faced by all officials who approach administration of the FOI Act for the first time. The Protective Security Handbook and other guidance on the custody, access to, storage and retrieval of official information have been developed over considerable periods with a view to advancing, especially in policy Departments, the interests of effective administration and political decision-making. As has already been indicated the commencement of the FOI Act was not intended to compromise either of these two objectives. So, while there is a disjunction this is more in the realm of attitudes rather than between the "need to know" principle and the general curiosity right under the FOI Act.

With respect to s 33 there is no question that the judgments that need to be made are contemporary judgments of the officers concerned with the handling of particular requests. But, apart from dealing with those requests, the FOI Act does not require, nor would it be appropriate for officials to behave otherwise than in accordance with the Protective Security Handbook, *etcetera*. I might note in passing that the requirement for automatically classifying Cabinet documents at one of the first three national security classifications has been replaced by the "Cabinet-In-Confidence" classification.

Section 36

The public interest test in s 36 is probably the one major remaining area of some contention as well as difficulty. I should say at the outset that I disagree with Mr Bayne's conclusion that:

> The interests of the public in evaluating the performance of the Government and its advisers, and of participation in the decision-making process, are, it could be argued, of equal and probably greater importance than the public interest in maintaining the relationship between Government and its advisers.[1]

It seems to me that the essence of the public interest for the protection of internal working documents is the preservation of an effective relationship between Ministers and their senior civil service advisers. While I would not argue against consideration of any of the factors listed by Mr Bayne[2] as relevant to deciding whether or not the release of a particular internal working document would be against the public interest, it seems to me to be missing the point not to recognise that it is essential both for the Minister concerned and his advisers that their relationship be effective.

Effectiveness depends, as much as anything else, on the development and maintenance of confidence and trust. The release of deliberative documents has considerable potential to affect detrimentally that confidence and trust, by the Minister in his advisers, by one Minister in another and among Ministers collectively. Such destabilisation could not be in the public interest.

It seems to me to be unreal to suggest that greater priority should be placed on effective evaluation of the performance of government than is given to maintaining the effectiveness of government. It also seems to me strange to suggest that the fostering of close relationships between Ministers and their

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[1] (1983) 14 FL Rev 67, 86-87.
[2] *Ibid* 85-86.

advisers is not essential to the maintenance of effective government. It is one thing to hold the formal position of adviser; it is quite another to be listened to and have one's advice accepted. The standing and authority of an official in a political decison-making environment and his effectiveness — his persuasive qualities, can from time to time depend more on judgments made about his loyalty, his soundness and integrity than on his perceived knowledge and grasp of the facts and arguments.

Conclusion

The exemptions in the FOI Act, those within and outside of Part IV, although in large measure uncertain in exact effect (and only a period of administration and judicial pronouncement will overcome this shortcoming) are the necessary minimum counterbalance to the radical innovation of granting a general curiosity right of access to official information to the whole Australian community. To neglect such a counterbalance would be to ignore the importance of effective government.