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FREEDOM OF INFORMATION
Balancing the Public Interest

BY MEGAN CARTER AND ANDREW BOURIS

SECOND EDITION

MAY 2006

FOREWORD

The Hon Justice Michael Kirby AC CMG

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The publication of the second edition of this book could not be more timely. In September 2006, the High Court of Australia delivered its decision in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45. It was a decision concerned with the subject matter of this book. It addressed the operation of the *Freedom of Information Act* 1982 (Cth) and, more specifically, the reviewability of a ministerial certificate that disclosure of certain documents in accordance with the Act would be contrary to the public interest. The question for decision in the High Court was whether reasonable grounds existed for the Minister's claim that disclosure was contrary to the public interest. A majority of the Court (Hayne J and, in joint reasons, Callinan and Heydon JJ)

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* Justice of the High Court of Australia.

decided that the Administrative Appeals Tribunal had made no error involving that the Minister's Certificate was final and conclusive. In the absence of a demonstration that there were no reasonable grounds in fact (or that the grounds relied on were so unreasonable that no reasonable person could hold the opinions upon which they were based) it was not competent under the Act for the Tribunal to override the Certificate. Access was therefore denied.

Also in joint reasons, Gleeson CJ and I reached the opposite conclusion. For us, it was not sufficient for the Minister to point to the preservation of confidentiality of intra-governmental communication in the case of internal working documents of the kind involved in the proceedings. If that "one facet of the public interest" were sufficient, in every case, to warrant non-disclosure the certificate would always be effectively unreviewable. But the Chief Justice and I pointed out that:

> "Under the FOI Act ... the matter of disclosure or non-disclosure is not approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other. There is a 'general right of access to information ... limited only by exceptions and exemptions necessary for the protection of essential public interests ... that is the context in which a Minister makes a decision ... and in which such a decision is reviewed ...".

It was the context of a statutory scheme "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

necessity for the protection of *essential* public interests" that persuaded the minority that the appeal should be allowed and the proceedings remitted to the Tribunal for reconsideration.

A foreword is not an occasion to reargue, or to elaborate upon, reasons that have been published in a closely divided case. Just as the High Court was divided in *McKinnon*, so had been the Full Court of the Federal Court. Of their nature, questions of statutory interpretation are disputable. Language is ambiguous. Few languages are as ambiguous as the English language, because of its mixture of linguistic sources. But perhaps as important as the contest over the words of statutes in cases of this kind is the contest over values. Such values (sometimes described as legal principle or legal policy) inform judicial choices in hard-fought cases. Sometimes the values are spelt out in detail. On other occasions, they are left to implication, inference and informed guess-work.

At the heart of freedom of information legislation is an idea about the form of one's government. Initially, in the history of English-speaking peoples, government was comprised of the great and powerful men of the Crown, of the Church and of the leading families who gathered around the King and were sworn to defend his power and aggrandise the glory of the State. In these circumstances, the Crown's secrets were carefully safeguarded by great officials, such as Woolsey, More and Walsingham. In this

tradition, the culture of secrecy was born. It flourished because knowledge was power and the Crown liked to control access to it.

The American and French revolutions and governmental developments in Scandinavia gave birth to a radically different notion. This was that power resided in a composite notion as elusive as the Crown - the People. They should govern themselves democratically. But if that process was to be more than a symbolic charade, the people would need access to information.

For two hundred years, in our tradition, these polar concepts have been struggling for ascendency. The Crown (or its modern manifestation in Presidents, Prime Ministers and Premiers) seek to maintain firm government and to retain at least some degree of confidentiality in the name of candid and uninhibited exchanges of opinion at the highest level. But the people, in their multiple manifestations and with growing insistence, demand transparency, accountability and the reduction of secrecy so as to maximise true democracy.

The debates and solutions recounted in this book describe the ways in which these contesting theories of government are played out in contemporary circumstances. The book traces the enactment of freedom of information laws in eleven English-speaking democracies. In their differing ways, the laws proclaim the introduction of a new culture of openness, promising access to

official information. But at the same time, they exclude a zone where access may be denied. The mechanisms for denial and for review of that denial vary between jurisdictions. *McKinnon* is simply the latest case in the federal jurisdiction of Australia. The mechanism of each Act for resolving the clash between the competing principles of governance may differ. But it always proclaims an overall purpose - the attainment of the public interest. Alas, different people see the public interest in different ways. Some are more, and some less, sympathetic to the objectives of openness and transparency. Some are more, and some are less, convinced about the needs for particular exceptions and the essentiality of secret communication withheld from the people in whose name governance is now performed.

The value of this book is that it demonstrates that different office-holders, different review mechanisms, and different statutory formulae exist in and out of Australia for resolving the issues debated in *McKinnon*. In the wake of that decision, the need for reform of the Australian federal Act has been debated. Years ago, the Australian Law Reform Commission recommended changes to that Act. The recommendations have not been implemented. It is often said that the only time political parties are enthusiastic for freedom of information is when they are in Opposition or in the first euphoric weeks on the Treasury Benches. However that may be, the essential question presented by the outcome in the *McKinnon* case is whether that outcome best serves the public interest of the

people whose government it is. Defenders will brush aside the media wailing as self-interested and insufficiently attentive to the needs of strong government advised by officials free from the harassment of media and politics hell-bent on conflict and entertainment. The critics will assert that the decision is one more sign of the imperfections of Westminster democracy as it is now practised and the absurdity of reducing the democratic system to a single triennial vote, particularly if that vote is based on imperfect information.

There can be few issues of governance in the contemporary world that are more important to the theory and practice of democracy than the resolution of these questions. That is why this book tackles a very important subject and does so at a time when its importance has been squarely placed on the public agenda. Great court cases are often concerned about a clash of values. That is why citizens should not be surprised that judges divide in their resolution of them. But, in our form of society, the ultimate resolution belongs to the people themselves. Judges say what the law is. But what it should be is ultimately in the gift of the people. This book is an important contribution to the debate. It demonstrates that the decision in *McKinnon* is not the last word. It is simply the latest word in Australia in a controversy as old as modern government itself.

High Court of Australia
Canberra

Michael Kirby
1 October 2006