

FREEDOM OF INFORMATION DEVELOPMENTS

*Alice Mantel**

Federal law reform program announced

Cabinet Secretary, Senator John Faulkner has announced the first step in broad-ranging Freedom of Information (FOI) law reform.

'The Government is committed to reforming the Commonwealth FOI Act and to promoting a pro-disclosure culture across the Government', Senator Faulkner said.

Proposed reforms include the abolition of conclusive certificates which removes the power of Ministers to use conclusive certificates to refuse access to documents despite a decision by the AAT that the documents should be released. The AAT will now be able to undertake full merits review of a decision to claim an exemption.

The legislation abolishing conclusive certificates will be introduced into the Parliament this year.

'Abolishing conclusive certificates is a step towards restoring trust and integrity in the handling of Government information, as all decisions refusing access will now be subject to full independent merits review,' Senator Faulkner said.

Other reforms include a plan to release an exposure draft of FOI reform legislation for public comment and consultation later this year which will include the establishment of an FOI Commissioner and measures to improve and streamline the FOI Act.

'The consultation process will allow the Government to seek a range of views on how we should be improving FOI and implementing the 2007 FOI election commitments. This will be the most significant overhaul of the FOI Act since its inception in 1982', Senator Faulkner said. 'The FOI Act is complex and we want to get the new laws right.'

The Attorney-General will ask the Australian Law Reform Commission (ALRC) not to proceed with its inquiry into FOI laws at this time and the ALRC has agreed to review the FOI Act after the Government's reforms have come into operation rather than proceed with its current FOI review.

MR 25/2008, 22 July 2008

FOI developments in NSW and other States

The New South Wales Ombudsman, Mr Bruce Barbour has announced a comprehensive review of the NSW *Freedom of Information Act 1989*. A discussion paper is due to be released in the coming months.

There have been a number of developments in other jurisdictions in recent months.

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- In Victoria, the Government has introduced a Bill in the Victorian Parliament to make a number of changes to the FOI Act, including the removal of conclusive certificates as well as application fees.
- In Western Australia, a Bill is before Parliament that would amend the WA FOI Act in a number of respects, including giving the WA State Administrative Tribunal power to review agency FOI decision, a power currently exercised by the WA Information Commissioner.

QLD Premier welcomes independent FOI Report

Premier Anna Bligh has welcomed the 400 page report 'The Right to Information: Reviewing Queensland's Freedom of Information Act' which proposes a fundamental shift in Queensland's 15 year old FOI legislation.

Describing the report as 'a bold and comprehensive reform of one of the most important pieces of legislation in our State,' Ms Bligh indicated that the Queensland Cabinet would prepare a response to the report's 141 recommendations and would expect that the community would be able to comment on an exposure bill of the new laws before the end of 2008, with legislation to be debated in the Parliament in the first half of 2009.

MR 10/6/2008

Recent cases

Bienstein and Attorney General (Commonwealth of Australia) and anor [2008] AATA 7 (4 January 2008)

This matter came to the Tribunal as a deemed refusal under s 56 of the FOI Act. That provision allows for review of decisions where the agency or, in this case, Minister, does not make a decision within the statutory timeframe. In this case, the failure to make a decision was occasioned when the Federal Court ruled the Ministers' transfers of the requests to the departments were unlawful and therefore invalid (see *Bienstein v Attorney-General (Commonwealth) and Minister for Justice and Customs (Commonwealth)* (2007) 162 FCR 405).

During a directions hearing the applicant sought a directions that the Ministers be directed to make a decision on the requests by a specified date. The issue for the Tribunal was whether it had power to so direct.

Deputy President Forgie found that the Tribunal has no power to require a respondent agency or Minister to make a decision on a deemed refusal. Whilst it is common for the respondent to offer to make a decision, and though this is to be encouraged, a respondent that does not wish to make a decision cannot be compelled to do so. Once the matter is before the Tribunal it is for the Tribunal to make a decision.

The Tribunal's reasons for decision contain a discussion of the principles of delegation and authorisation of FOI decision-making power under s 23 arrangements. The practical effect of this is that delegates are granted a decision-making power which they exercise in their own right and in their own name, rather than merely exercising someone else's power as that other person's alter ego.

Encel & Secretary, Department of Broadband, Communications & the Digital Economy [2008] AATA 72 (25 January 2008)

The applicant sought remission of the charge for production of FOI documents on the grounds that the giving of access was in the general public interest or in the interest of a substantial section of the public (FOI s 29(5)). The documents sought concerned the Government's expenditure on supporting digital and analogue television.

The Tribunal had to consider whether the subject matter of the documents related to an important public issue which would facilitate the public's ability to discuss and review valuable material to public debate and whether the benefit from release of the documents to the applicant would flow to the public at large or a substantial section of the public such that the charge ought not be imposed or reduced.

The Tribunal also considered such factors as the work needed to process the request, the complexity of the request, the cost of processing, whether there was a commercial advantage to the applicant and whether the documents were freely available through other means and held that the charge should not be imposed. While the applicant conceded that the charge would not cause him financial hardship, the Tribunal also appeared to consider that the applicant would not gain any commercial advantage in gaining access to the documents. The fact that there were similar documents already in the public domain would not detract from such a claim.

Cianfrano v Department of Premier and Cabinet [2008] NSWADT 141 (16 May 2008)

This matter involved an application for the review of a decision of the Director General of the Department of Premier and Cabinet ('the Department') dated 5 October 2007 made under the FOI Act to refuse access to the whole or part of seven documents relating to Sydney markets on the ground that the documents are either wholly or partly 'exempt'.

The Tribunal recognised that the proper administration of the Government required a degree of confidentiality for Cabinet documents, and that the unauthorised and/or premature disclosure of Government documents undermines the process of government but that the policy must be read subject to the legally enforceable public right of access to information held by the Government, 'subject only to such restrictions as are reasonably necessary for the proper administration of the Government' (s 5(2)(b)).

While the decision to sell the Sydney Markets was clearly one of public importance, the Tribunal was not satisfied by Mr Cianfrano's submissions that there were special, overriding or strong reasons sufficient to displace the assumption that the exemptions have become any less sensitive so as to warrant exercise of the residual discretion. The specific limitation of 10 years has been imposed on exemptions claimed for Cabinet and Executive Council documents and the Tribunal was satisfied that the exemption was justified and reasonably necessary for the proper administration of the Government.