

## **THE PUBLIC INTEREST REVISITED – WE KNOW IT'S IMPORTANT BUT DO WE KNOW WHAT IT MEANS?**

*Chris Wheeler\**

This is an updated and expanded version of an article first published in *AIAL Forum* No. 48 in April 2006.

Acting in the public interest is a concept that is fundamental to a representative democratic system of government and to good public administration. However, this commonly used concept is also, in practice, particularly complex.

There are at least three major obstacles to public officials acting in the public interest:

- firstly, while it is one of the most used terms in the lexicon of public administration, it is arguably the least defined and least understood – few public officials would have any clear idea what the term actually means and what its ramifications are in practice;
- secondly, identifying or determining the appropriate public interest in any particular case is often no easy task; and
- thirdly, while some have argued that it is relatively easy to do the right thing once you have identified what the right thing is,<sup>1</sup> in practice people often do not have the will or courage to do the right thing, for example to argue with their political masters or senior managers, or to apologise when at fault.

### **The concept – acting in the public interest**

Public officials have an overarching obligation to act in the public interest. They must perform their official functions and duties, and exercise any discretionary powers, in a way that promotes the public interest that is applicable to their official functions.

The primary purpose of (non-elected) public officials is to serve. This primary purpose can be seen as having four dimensions:

- to serve the public interest;
- to serve the Parliament and the government of the day (not applicable to all public officials);
- to serve their employing agency (where applicable); and
- to serve the public as customers or clients.

Associated with each of these four dimensions of service are various standards of conduct with which public officials in democratic countries are commonly expected to comply, each

---

*Chris Wheeler is Deputy NSW Ombudsman, he has over 25 years experience in investigations and extensive experience in management and public administration. He has worked in State and local government organisations in NSW and Victoria, and in private legal practice.*

---

with its own objective(s). Experience has shown that there will be times when a public official will need to balance conflicting or incompatible conduct standards or objectives – where the public official has to make a decision that will serve one objective, but not another, or one more than another. While there is some flexibility inherent in the various conduct standards with which public officials are commonly expected to comply, the fundamental principle must be that public officials must resolve any such conflicts or incompatibilities in ways that do not breach their obligation to act in the public interest – the overarching obligation.

The importance of acting in the public interest was emphasised by the Royal Commission into the commercial activities of the government sector in Western Australia (the WA Inc. Royal Commission). In its report the WA Inc. Royal Commission said that one of the two fundamental principles<sup>2</sup> and assumptions upon which representative and responsible government is based is that '[t]he institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public'.<sup>3</sup>

The Royal Commission noted that this principle (the 'trust principle') '...expresses the condition upon which power is given to the institutions of government, and to officials, elected and appointed alike'. Later in its report, it noted that '[g]overnment is constitutionally obliged to act in the public interest'.<sup>4</sup> This mirrored a statement made in a 1987 judgment of the NSW Supreme Court, Court of Appeal that '...governments act, or at all events are constitutionally required to act, in the public interest',<sup>5</sup> and a statement made in a 1981 judgment of the High Court of Australia that '...executive Government...acts, or is supposed to act, ... in the public interest'.<sup>6</sup>

This does not mean, of course, that what is in the interest of executive government should automatically be considered to be in the public interest.<sup>7</sup>

### **The meaning – trying to define the 'public interest'**

#### ***Can the 'public interest' be defined?***

Equivalent concepts to the public interest have been discussed since at least the time of Aristotle (*common interest*), including by Aquinas and Rousseau (*common good*) and Locke (*public good*).

Although the term is a central concept to a democratic system of government, it has never been definitively defined either in legislation<sup>8</sup> or by the courts. Academics have also been unable to give the term a clear and precise definition. While there has been no clear interpretation, there has been general agreement in most societies that the concept is valid and embodies a fundamental principle that should guide and inform the actions of public officials.

The public interest has been described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as being for the benefit of society, the public or the community as a whole.

In its 1979 report on the then draft Commonwealth Freedom of Information Bill, the Australian Senate Committee on Constitutional and Legal Affairs described the public interest as, '...a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern'.<sup>9</sup>

The Committee also said that the:

... 'public interest' is a phrase that does not need to be, indeed could not usefully, be defined... Yet it is a useful concept because it provides a balancing test by which any number of relevant interests may be weighed one against another. ...the relevant public interest factors may vary from case to case – or in the oft quoted dictum of Lord Hailsham of Marylebone 'the categories of the public interest are not closed'.<sup>10</sup>

The meaning of the term has been looked at by the Australian courts in various contexts. In one case the Supreme Court of Victoria said:

[t]he public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...<sup>11</sup>

In another case the Federal Court of Australia said:

The expression 'in the public interest' directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances...

The expression 'the public interest' is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...

The indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination...<sup>12</sup>

In the context of a statutory public interest test, the High Court described the term as:

...classically import[ing] a discretionary value judgement to be made by reference to undefined factual matters, confined only 'insofar as the subject matter and the scope and purpose of the statutory enactments may enable...given reasons (to be pronounced) definitely extraneous to any objects the legislature could have had in view'...<sup>13</sup>

The dilemma faced by those trying to define the public interest was summed up in another case as follows:

The public interest is a concept of wide meaning and not readily limited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest.<sup>14</sup>

The term was referred to in the following more colourful, but pragmatic, terms by an American commentator:

Plainly the 'public interest' phrase is one of those atmospheric commands whose content is as rich and variable as the legal imagination can make it according to the circumstances that present themselves to the policy maker (under the supervision of the courts of course).<sup>15</sup>

### ***What is not in the public interest?***

In some ways it is easier to distinguish what is in the public interest from what is not. For example the public interest can be distinguished from:

- the *private interests* of particular individuals – public interest is distinguishable from private interest because it extends beyond the interests of an individual (or possibly even a group of individuals) to the interests of the community as whole, or at least to a particular group, sector or geographical division of the community. However, even such a statement must be qualified because there are some circumstances where an individual's private interests – in privacy and procedural fairness for example – are regarded as being in the public interest;
- the *personal interests* of the decision-maker (including the interests of members of their families, relatives, business associates, etc) – public officials must always act in the public interest ahead of their personal interests and must avoid situations where their private interests conflict, might potentially conflict, or might reasonably be seen to conflict with the impartial fulfilment of their official duties;
- *personal curiosity* – ie what is of interest to know, that which gratifies curiosity or merely provides information or amusement<sup>16</sup> (to be distinguished from something that is of interest to the public in general);<sup>17</sup>
- *personal preferences* - for example, the political or philosophical views of the decision-maker, or considerations of friendship or enmity;
- *parochial interests* – ie the interests of a small or narrowly defined group of people with whom the decision-maker shares an interest or concern; and
- *partisan political interests* - for example the avoidance of political/government or agency embarrassment.<sup>18</sup>

These can be categorised as 'motivation' type issues that focus on the private, personal or partisan interests of the decision-maker (and possibly also those of third parties).

### ***What does the 'public' mean?***

Most attempts to describe what is meant by the 'public interest' refer to the 'community', 'common' good or welfare, 'general' welfare, 'society', 'public', or the 'nation'. However, the issue of what constitutes the 'public' in 'public interest' has largely been unexplored.

When addressing this issue, academic commentators and judicial officers have taken it as a given that the 'public interest' relates to the interests of members of the community as a whole, or at least to a substantial segment of them - that it should be distinguished from individual, sectional or regional interests.<sup>19</sup> At the other end of the spectrum it is also widely accepted that the 'public interest' can extend to certain private rights of individuals – rights that in many societies are regarded as being so important or fundamental that their protection is seen as being in the public interest, for example privacy, procedural fairness<sup>20</sup> and the right to silence.

However this conceptualisation of the public interest fails to identify and address an important implication. In my view the public interest must also be able to apply to the interests of groups, classes or sections of a population between those two ends of the spectrum. The 'public' whose interests are to be considered can in practice validly consist of a relatively small group, class or section of a total population.

The size and composition of the 'public' whose interests should in practice be considered in relation to any particular decision or outcome will be dependent on, or at least be strongly influenced by, such factors as the:

- *legal context* – the jurisdiction and role of the decision-maker;

- *operational context* – the particular issues to be addressed and the decision to be made;
- *political context* – whether the decision-maker is a representative of a group, class or section of the public that has, or is perceived by the decision-maker to have, a particular interest in and views about the decision to be made, eg the decision-maker's political party and/or electorate (maybe better described as the political 'reality'); and
- *personal context* – whether the decision-maker has strong personal, philosophical or political preferences on the issue, or is subject to the direction of, or whose continued employment or career prospects are dependent on, the support of a person with such views on the issue.

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might be geographically based, ie the residents of a particular area. This can be seen most clearly in a federal system of government such as Australia. For example:

- in relation to the exercise of a discretionary power at the national level, the 'public' could refer to all residents of Australia (or a particular part of Australia or segment of the Australian population);
- for a state public official, the 'public' whose interests are relevant will primarily be the residents of that state (or some particular part of the State or segment of the State's population); and
- for a local public official, the 'public' would primarily be the residents of the local area (or some particular locality or neighbourhood).

Decision-makers at different levels of government, or in equivalent but separate levels of government (eg separate states or local councils), will therefore have different views as to the 'public' that is relevant to their decision. One consequence of this is that they can have very different, but possibly equally valid, views as to what constitutes the 'public interest' in relation to the same issue.

In the local government context another consequence is that decisions made by elected local councils relating to the development of their area can be expected to be largely based on a perception of the public interest, which is focussed primarily on the interests of the people who own land, live and/or work in that area. While legislation could require local elected decision-makers to consider a broader public interest extending beyond their council boundaries, given that their electorate is the local residents, it is arguable that such a requirement may have little effect in practice. In recognition of this parochial approach by local councils, over recent years a system has been introduced to ensure that state and regionally significant planning and development proposals are considered and/or determined by bodies that include both local government and the state government representatives (eg the Planning Assessment Commission, Joint Regional Planning Panels, the Local Planning Panel and the Central Sydney Planning Committee).

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might also include groups or classes of the general population. For example, indigenous people, farmers, school students, first home buyers, residents of an area (particularly objectors) close to a proposed development, etc: certain decisions made for the benefit of such groups could be seen as being in the 'public interest'. As another example, while anti-discrimination legislation would be in the general public interest, the inclusion of each category of discrimination or each requirement to prevent a particular type of discrimination, that affects a specific group of the population, could be argued to be primarily in the interests of that group.

The possibility of an interest of a section of the public being 'in the public interest' was acknowledged in at least one court case, where the High Court of Australia said that:

[t]he interest of a section of the public is a public interest but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by [another public interest]. It does not, however, affect the quality of that interest.<sup>21</sup>

Apart from this weight issue, in practice, the interests of a small section or sector of the public may not be considered to be in the public interest if they are seen as being contrary to the interests of the broader public. Conversely, certain basic rights or interests of minorities are seen in many societies as sufficiently important for their protection to be seen as in the public interest, even if the protection of those interests does not directly advance the interests of the majority.

While decision-makers can be expected to be significantly influenced by their perception of the group, class, or section of the population that constitutes the 'public' whose interests they must consider, this does not mean that broader or higher public interests will be ignored. In practice it can be seen that there is in effect a hierarchy of interests, for example the high level shared *values* of a society<sup>22</sup> would, where relevant, be the foundation for decision-making by public officials at all levels of that society. These shared values would include respect for significant private rights.

The next level down of the hierarchy would be general public interest (for example the protection of the urban environment, the interests of the residents of a local government area, or the provision of social welfare for persons in need). At the base of the hierarchy would be private interests (for example the interests of an objector to a local development proposal or issues about a person's entitlement to social welfare benefits).<sup>23</sup> It could be argued that the decision-making process in the public interest would involve decisions made at each level of the hierarchy not being contrary to an interest ranked at any higher level.

### ***So what does the term mean?***

In my view, in relation to the decision-making in particular, the meaning of the term, or the objective of or approach indicated by the use of the term, is to direct consideration towards matters of broad public concern and away from private, personal, parochial or partisan interests.

In trying to find a meaning for the term, it is important to draw a distinction between the question and its application – between what '*is*' the public interest as a concept, and what is '*in*' the public interest in any particular circumstance.

While the meaning of the 'public interest' stays the same, the answer to the question what is '*in*' the public interest will depend almost entirely on the circumstances in which the question arises. In fact it is this 'rich and variable'<sup>24</sup> content which is what makes the term so useful as a guide for decision-makers.

It is actually possible to determine what is meant by the '*public interest*' if a distinction is drawn between the concept and its application. The public interest might best be seen as the approach to be adopted in decision-making rather than a specific and immutable outcome to be achieved.

## **The application – identifying and assessing relevant public interests**

### ***What are the dimensions of the public interest?***

In relation to the application of the ‘public interest’ concept to public administration, in my view it is helpful to look at the requirement on public officials to act in the public interest as comprising four separate dimensions. These dimensions are:

- *outcomes* – ie the objectives and the substance of the decisions made by the decision-makers, as well as the advice given to decision-makers, are in the public interest;
- *inputs* – ie the matters considered by the decision-maker in making decisions are in the public interest;
- *process* – ie the processes, procedures and practices followed by the decision-maker are in the public interest; and
- *conduct* – ie the conduct or approach of the decision-maker is in the public interest.

Most discussion and debate about public interest issues focuses on the outcome dimension – about whether the outcome of decisions and the decision-making procedure, including the advice given to decision-makers, was in the public interest. In relation to outcomes, the meaning of the term, or the approach indicated by the use of the term, is to direct consideration away from private, personal or partisan interests towards matters of broader concern.

It is equally important that the inputs – the matters considered by the decision-maker – also reflect the public interest. Relevant inputs would include:

- considering relevant matters and not considering irrelevant matters;
- exercising powers for the proper purpose;
- giving appropriate weight to matters based on their relative importance/significance;
- complying with government and agency policy; and
- avoiding bias.

In relation to the process or procedure dimension, there is also a public interest that those involved:

- comply with legal requirements;
- act impartially, including the absence of discrimination, or acting apolitically in the performance of official functions (of course this is not applicable to elected public officials);
- demonstrate fairness in the exercise of discretionary powers, including procedural fairness, the giving of reasons, etc;
- act reasonably, including with proportionality;
- ensure confidentiality, where this is appropriate; and
- demonstrate proper accountability and transparency, including making appropriate records, accepting proper scrutiny, facilitating public access to information, etc.

In relation to the conduct or approach of public officials, there is a public interest in those involved being perceived to be:

- acting in good faith (ie honestly, within power and for the proper purpose);
- avoiding or properly managing situations where private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of official duties; and
- showing respect for individuals (eg courtesy, consideration, respect for rights such as civil liberties, privacy, etc).

### ***How can the public interest be identified?***

#### *Assessment of the public interest – inputs, process, and conduct*

Identifying how the public interest applies to inputs, procedures and conduct is a relatively clear cut process. The rules that guide such assessments are set out in detail in such things as statutory statements of values,<sup>25</sup> standards of conduct and/or criteria, in the principles of administrative law, codes of conduct, and expositions of the requirements of good administrative practice set out in integrity agency guidelines.

#### *Assessment of the public interest – outcomes*

##### *a) A three stage process*

Identifying how the public interest applies to outcomes, ie objectives and decision-making, can be a much more complicated and uncertain process than in relation to inputs, process and conduct. While it is generally accepted that the term cannot be given a fixed and precise content, this does not mean that public officials have an unfettered discretion in their assessment of what is in the public interest in any given circumstance. In nearly all cases they must be guided by factors such as applicable legal obligations, government and organisational policies, and lawful directions from Ministers or management.

The assessment as to how the public interest applies in any particular circumstance can be thought of as a three stage process (although depending on the circumstances the first and second stages might overlap):

- firstly, identification of the relevant population – the ‘public’ whose interests are to be considered in making the decision;
- secondly, identification of the relevant public interests applicable to an issue or decision; and
- thirdly, an assessment and weighing of each relevant public interest, including the balancing of conflicting or competing public interests.

##### *b) Identifying the relevant public*

The **first step** for the decision-maker is to be clear about which people, or which group, class or section of the general population is the relevant ‘public’ (or ‘publics’ if several different groups, classes or sections are involved) whose best interests must be considered in making the decision.



c) *Identifying the relevant public interests*

The **second step** for the decision-maker is to identify the public interests that should guide the exercise of his/her discretionary powers. In other words, (non-elected) public officials exercising discretionary powers must determine the specific public interest objective(s), criteria and/or other obligations that apply. This can be done by reference to three sources of information:

- *Primary sources:*
  - *the objects clauses in legislation or, in the absence of such provisions the spirit (intention) of legislation identified from the terms or provisions that establish either the agency or its functions, from explanatory memoranda or from relevant second reading speeches;*
  - *the terms of legislation that establish the agency and/or give it functions and powers; or*
  - *any regulations that set out the functions and powers of an agency.*
- *Secondary sources:*
  - *government policy (including council policy where relevant);<sup>26</sup>*
  - *plans or policies made by or under statutory authority, approved by the Governor and/or published in the Government Gazette, approved by Cabinet or a Minister;*
  - *Ministerial directions; or*
  - *plans or policies approved by the agency or a particular authorised public official.*
- *Tertiary sources:*
  - *agency strategic/corporate/management plans; or*
  - *agency procedure manuals and delegations of authority.*

If all else fails (ie there are no primary, secondary or tertiary sources), perhaps as a last resort consideration could be given to the statements of duties of the decision-maker's position.

d) *Assessing and weighing public interest objectives*

The **third step** for a decision-maker is to assess and apply weightings/levels of importance to the identified public interest objectives (over and above the three sources of information referred to earlier). Options available for making assessments as to what is in the public interest and the relative weightings to be given to competing or conflicting public interests would include: the revealed majority views or opinions of the public; the views of the elected representatives of the people (eg the Parliament or a local council); the views of the responsible Minister; or an objective assessment by an impartial person of the public interests likely to apply.

In practice, basing assessments and decisions as to what is in the 'public interest' on the revealed majority opinion of the 'public' is not a workable option as:

- often the public does not have the full picture or may be misinformed; a matter could be in the public interest even if it is not reflected by the revealed preferences or opinions of the majority, eg an issue about which the public is unaware or unconcerned, a matter could

be in the public interest even if it is contrary to the revealed preferences or opinions of the majority, eg tax increases for public purposes; and

- there are matters where the ‘ends’ are clearly supported by the majority (eg improved defence), but the means are not (eg increased taxation), particularly where both may validly be considered to be in the public interest.

Basing assessments on the views of the elected representatives of the people is a far more appropriate and workable option. One way of looking at a democratic system of government is that it provides a process through which conflicting points of view of what constitutes the ‘public interest’ can be identified and considered in the development of policy and the making of decisions. A fundamental rationale for the Parliamentary process of debate, for example, is to allow the community’s elected representatives to assess competing interests and make informed decisions that are in the public interest.

At the risk of oversimplification, a complicating factor is that while the starting point for public officials to assess the public interest would usually be to identify what the public ‘needs’ (ie what is in the general interest of the public), the starting point for many politicians would usually be to identify what the public ‘wants’ (ie what are the likely views of the electorate). However, in a world of increasingly professionalised party-politics, parties and governments place increasing resources and effort behind attempting to shape and influence what the public might appear to want, in ways that are conducive to their own electoral prospects. The theory of democratic responsiveness has to be reconciled with the reality of the ways in which legislators generally, and Ministers in particular, can shape conceptions of the public interest to suit what might also be their own short term or more private interests.

Unfortunately, in practice open public debate is often hampered by a number of factors, including excessive (if not obsessive) government secrecy; news media not always acting responsibly; contract employment of senior public officials and the ease with which some can be removed, which does not foster the giving of frank and candid advice to Ministers; and the fact that the growth over time in influence (and numbers) of the personal staff of Ministers has not been balanced by increased levels of accountability.

In an ideal world, decisions as to what is in the public interest might be made by a decision-maker who is rational, dispassionate/disinterested and altruistic<sup>27</sup> (although in the real world we can only hope to approximate this ideal). This may be achieved through such means as healthy, open public debate on issues of genuine ‘public interest’ contention; effective use of academic and non-government expertise in transparent processes that throw light on issues of contention; and the contributions of an independent but responsible news media. Most important, however, is an apolitical and professional public service prepared to formulate reasoned interpretations of the public interest and present these back to government and then see its role as acting in accordance with the lawful instructions issued by (and being guided by the views of) the relevant Minister and/or Cabinet.

In practice the views of public officials about what is in the public interest can be influenced (either consciously or subconsciously) by factors such as:

- self-interest – for example, continued employment by keeping the Minister happy;
- organisational interest – for example, viewing the public interest through the narrow lens of their organisation’s interests rather than a whole-of-government perspective; and
- political interest – for example, a blanket acceptance that whatever their Minister wants must be in the public interest.

There can also be a temporal dimension to many assessments of what is in the public interest:

- the present – considerations including current environmental, organisational, political, economic and/or social priorities; and
- the future – considerations relating to long term viability, environmental sustainability, flexibility (eg keeping options open), including protecting historical works, artefacts and records of official business.

Clearly there is no simple answer. As Professor Geoff Gallop said in a 13 July 2010 article in *WA Today*:

...the public interest can't be found by way of mathematical or political calculation. It is an aspiration to find the mix of policy that best represents the interests of the whole community.

e) *Balancing conflicting or competing public interests*

In practice, a decision-maker will often be confronted by a range of conflicting or competing public interest objectives or considerations. As part of the third step, decision-makers need to balance any such conflicting or competing public interests. Such a weighing up and balancing exercise is usually based on questions of fact and degree.<sup>28</sup>

As was noted in the *McKinnon* case:

The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where **the** public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that 'the public interest' can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or international obligations may be of overriding significance when compared with other considerations.<sup>29</sup>

Where there are conflicting or competing public interests, it may be possible to address them through compromise or prioritisation. Sometimes it may be more appropriate to choose the 'least worst' option – the decision that causes the least harm rather than the most good. While there may be circumstances where public interest objectives are entirely incompatible, where one must be chosen at the expense of the other, in practice it is more likely that there will be degrees of incompatibility between various objectives.

Every policy decision, such as a decision to build a road or to approve a development application, requires a weighing up and balancing of interests, at least to some extent. Most cases will not have a win/win outcome – there will be winners and losers. The decision-maker needs to consider all of those who may be affected as individuals, but more importantly how the community at large may be affected.

The kinds of conflicts or incompatibilities that often arise include:

- where a decision would advance the interests of one group, sector or geographical division of the community at the expense of the interests of another – such a decision can be in the public interest in certain circumstances, for example, granting resident parking permits near popular destinations may be in the public interest even though it

inconveniences non-residents, because it helps to ensure residents are not overly inconvenienced by people visiting nearby areas;

- where a decision may affect people beneficially and detrimentally at the same time – for example a decision to improve public safety by operating CCTVs on every street corner may improve security but also may restrict the privacy of individuals. Where two government organisations are responsible for advancing different causes which both provide some benefit to the public – for example, it is likely that in many respects a body responsible for protecting the natural environment and a body responsible for harvesting forestry products have equally valid but conflicting views about the public interest; and
- where a decision requires a balancing of one public interest consideration over another – for example in the *NSW Government Information (Public Access) Act 2009 (GIPA Act)* there are balancing tests that the Parliament has seen fit to impose in relation to certain exemption clauses, ie that public interest considerations against disclosure, on balance, outweigh the public interest considerations in favour of disclosure (s 13).

### ***Who is obliged to act in the public interest?***

A wide range of people and organisations have public official functions or are obliged to act in a public official capacity.

No longer can it be said that it is only public officials who are obliged to act in the public interest. More and more public functions have been contracted out to outside of government, for example:

- professionals (eg lawyers, private certifiers, etc);
- contractors (eg to operate correctional centres or immigration detention centres, etc); or
- NGOs (eg for the provision of a range of ‘community services’, etc).

Any person or organisation exercising public official functions or obliged to act in a public official capacity is, for the purpose of and while doing so, obliged to act in the public interest. Which dimensions of the public interest apply to such persons or organisations, and to what extent, will depend on the precise nature of the public official roles performed and particularly whether any statutory powers are being exercised.

One example that illustrates this point relates to private sector lawyers retained to advise or represent public sector agencies or officials. Just like their public sector counterparts, in performing such roles private sector lawyers are obliged to consider the broader public interest (not just any narrow or personal interests of their client) and to give advice that promotes or preserves the public interest. Lawyers acting for the public sector must act and advise their client/employer to act ethically, and within both the letter and the spirit of the law. In this regard, the obligation to act in the public interest may at times require the lawyers acting for the public sector to give advice that is unpalatable or disadvantageous to their client/employer agency.

Another example is private sector contractors, including NGOs, who perform public official functions or who act in a public official capacity. The public interest outcomes they are to achieve and other public interest considerations, should largely be addressed (either explicitly or implicitly) in the terms of the contract, MOU, licence, or relevant statutory provisions, that govern the performance of their role. They are also expected to comply with relevant process and perform their public interest obligations (for example, complying with legal requirements, acting impartially, demonstrating fairness, ensuring confidentiality, acting in good faith, avoiding conflicts of interests and showing respect for individuals).

### ***Complying with statutory public interest tests***

The situations addressed through legislation are often so complex that it is not possible for the legislature to comprehensively cover all matters that should be taken into account by decision-makers. In such circumstances it is not uncommon for legislation to identify a number of public interest type issues or matters to be considered by decision-makers in exercising their discretionary powers, and then to add a general ‘catch-all’ public interest test. As the majority in the High Court of Australia said:

...the expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable...’.<sup>30</sup>

In NSW, nearly 190 Acts require that the public interest be considered when implementing the Act or in making particular administrative decisions under the Act.<sup>31</sup> The form of words used in Acts includes the ‘*the public interest*’, ‘*in the public interest*’, ‘*contrary to the public interest*’, ‘*inconsistent with the public interest*’, and ‘*necessary in the public interest*’.

Statutory public interest tests usually fall into one of the following four categories:

1. whether something should be done (ie whether something is ‘in’ the public interest);
2. whether something should be permitted to be done (ie is permissible in the public interest);
3. whether something should not be done or is not permitted to be done (ie whether something is ‘contrary’ to the public interest); or
4. a catch-all consideration over and above various specific considerations set out in the statute (ie decision-makers must ‘consider the public interest’).

As noted earlier, in practice the nature and scope of the public interest considered relevant by a decision-maker in complying with such a statutory test will be significantly influenced by the nature and scope of the decision-maker’s powers, jurisdiction, etc.

Section 15 of the NSW *GIPA Act* is designed to assist decision-makers in determining whether certain actions would be contrary to the public interest. Given the impossibility of properly defining the public interest, this Act does so by specifying matters that are considered to be irrelevant to such an assessment, for example, that disclosure of documents:

- could cause embarrassment to or a loss of confidence in the government;<sup>32</sup> or
- could be misinterpreted or misunderstood by any person.

While most statutory public interest tests relate to regulatory or approval provisions or schemes, another type relates to the availability of rights or protections. For example, most of the whistleblower legislation in Australasia contains public interest type tests for determining whether a disclosure is protected. These Acts either refer specifically to ‘public interest disclosures’<sup>33</sup> or state that disclosures that comply with the Act are made in the ‘public interest’.<sup>34</sup> In relation to each of these Acts, the agency or person who receives a disclosure must make a decision as to whether or not it is protected by the Act (ie a disclosure made in the public interest). Whether or not such protection is available can have serious implications for the person making the disclosure. One difficulty associated with the public interest tests in whistleblower legislation is that, given the different contexts in which they are operating, whistleblowers and the recipients of their disclosures can and often do

have very different conceptions of how important or significant a matter must be to be in the public interest.

***Distinguishing between the public interest and the merits of the case***

A clear distinction must be drawn between whether on the one hand a decision was made in the public interest and on the other the merits of the decision. Alternatives open to a decision-maker could all be in the public interest, but one might have greater merit. This assessment of merit could be validly based on a range of criteria including any set out in statutes, the policies or priorities of the government of the day or the agency concerned, the availability of resources, public pressure, etc.

In practice, in a number of circumstances the issue will not be whether a decision-maker has correctly identified the public interest, or has made an error in balancing competing public interests, as there will not be any clearly 'right' or 'wrong' answer. The relevant questions will actually be whether a decision was the 'best' decision in terms of the merits, ie the correct (when there is only one decision) or preferable (when a range of decisions is available) decision based on the information available to the decision-maker. For example, in deciding how to allocate government funds between two or more options, each of which is in the public interest (eg between health, education or law and order), whatever decision is made will be 'in' the public interest. In this context, the primary questions that could arise might relate to things such as the merits of the decision to put extra funding into one area and not another (or more funding into one area than another), and/or the appropriateness of the decision-making process.

**The proof – demonstrating that the correct decision has been made**

In many circumstances public discourse will focus on whether the appropriate public interest has been correctly identified or whether there has been an appropriate balancing of conflicting public interests. At one end of the spectrum will be circumstances where the appropriate public interest considerations are clear from the terms of the relevant legislation. At the other end of the spectrum will be circumstances where there are conflicting public interests that are either very finely balanced or where the appropriate weighting to be applied to each is unclear.

As a generalisation it can be said that decisions made at either end of the spectrum are more easily supportable or defensible than decisions made in the grey area in between – at one end because the 'right' answer is clear and at the other end because there is clearly no 'right' answer and therefore the decision-maker has far more room to move.

Where a decision is contentious or otherwise significant, it should be expected that it is likely to lead to the expression of contrary views and active debate as to the merits. Such an outcome does not mean that the decision was wrong, only that the merits of the decision are being tested in ways that are entirely appropriate in our society. In such circumstances it is important to ensure that any such debate focuses on the merits of the decision and not the conduct or propriety of the decision-maker or the decision-making process. Where decisions are being made in this grey area, it is particularly important for public officials to be able to demonstrate that their decision was made on reasonable grounds, including which public interest issues were considered and the reasons why a particular interest was given precedence.

The more significant or contentious an issue the greater the importance of ensuring that the basis for the decision is properly documented. For example, where a decision or a course of action is being considered by some third party, be it an interest group, opposition MPs,

journalists, regulators, watchdog bodies, tribunals or courts, if the basis for a decision is properly documented this supports the credibility of the decision-maker and the decision-making process in the eyes of that third party, even if there is disagreement with the merits of the decision made. This generally increases the chances that any debate will focus on the merits of the decision and not the conduct of the decision-maker.

Proper documentation also helps to achieve a second important goal in this context. Properly documenting a decision helps ensure that there is adequate rigour in the assessment process, for example, helping to ensure that all relevant factors are taken into consideration and helping to highlight circumstances where decision-makers find themselves wanting to skate over certain difficult or inconvenient issues, or where they are experiencing some difficulty in explaining (or rationalising) the basis on which a decision was made.

## **Conclusion**

Most commentators appear to have taken the view that it is not possible to effectively define the concept of the public interest. In my view, it is possible to determine what is meant by the public interest if a distinction is drawn between the concept and its application.

The public interest is best seen as the objective of, or the approach to be adopted in, decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term, or the approach indicated by the use of the term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (ie more 'public') concern. The application of the concept is a separate issue and the answer to the question 'what is in the public interest?' will vary depending on the particular circumstances in which the question arises.

There are two separate components of the public interest – the process/ procedure component and the objectives/ outcomes component. In relation to the objectives/ outcome component, identifying what is in the public interest in any given situation is a primary obligation on public officials who are exercising discretionary powers. This is not a simple task and in practice involves an assessment as to:

- who should be considered to be the relevant public?
- what are the relevant public interest issues that apply?
- what relative weightings should be given to various identified public interests and how should conflicting or competing public interests be addressed?

While in many cases there will be no clear answer to these questions, it is important that a conscientious attempt is made to find appropriate answers, and that the decision-maker is able to demonstrate that the appropriate approach was followed and all relevant matters were considered.

## **Endnotes**

- 1 For example, Lyndon B Johnson is often quoted as saying: 'Doing what's right isn't the problem. It's knowing what's right'.
- 2 The other fundamental principle was: 'It is for the people of the State to determine by whom they are to be represented and governed'.
- 3 In Volume 1, Chapter 1, at 1.2.5.
- 4 In Volume 1, Chapter 1, at 3.1.5.
- 5 Per McHugh JA in *Attorney General (NT) v Heinemann Publishers Pty Limited* (1987) 10 SLWLR 86 (at p 191) – the Spycatcher Case.
- 6 Mason J in *Commonwealth of Australia v John Fairfax and Sons Ltd & Ors* (1981) ALJR 45 (at p 49).

- 7 See Note 5.
- 8 Attempts have been made in some Acts to define public interest, eg s 24 *Surveillance Devices Act 1998* (WA) states that the public interest 'includes the interests of national security, public safety, the economic wellbeing of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens'. In some Acts there are also definitions of public interest information, eg SA *Whistleblowers Protection Act 1993*.
- 9 At 5.25.
- 10 At 5.28.
- 11 Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at 75), per Kaye, Fullagar and Ormiston JJ.
- 12 Full Court of the Federal Court of Australia in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 per Tamberlin J (at 245).
- 13 *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 (at para 13), quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 (at 505); most recently quoted by the High Court in *Plaintiff S10/2011 & others v Minister for Immigration and Citizenship & Anor* [2012] HCA 31.
- 14 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 per Lockhart J.
- 15 Glen O Robinson, 'The Federal Communications Act: an Essay on Origins and Regulatory Purpose', in M Paglan (ed) *A Legislative History of the Communications Act of 1934*, (Oxford University Press, 1989) (at 16).
- 16 *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at pp 73-75), *R v Inhabitants of the County of Bedfordshire* (1855) 24 LJQB 81 at (p 84) and *Lion Laboratories Limited v Evans* [1985] QB 526 (at p 537).
- 17 *Re Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113 (at 114).
- 18 A specific factor referred to in some NSW legislation, for example, the *Government Information (Public Access) Act 2009*, s 15, and the *Local Government Act*, s 12(8) and a matter referred to by Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd and Ors* (1981) 55 ALJR 45 at (p 49).
- 19 *Assessing the Public Interest in the 21st Century: a Framework*, Leslie A Pal and Judith Maxwell, December 2005, External Advisory Committee on Smart Regulation.
- 20 Per Mason CJ in *Attorney General (NSW) v Quin* (1990) 64 ALJR 627 and Lord Keith in *Glasgow Corporation v Central Land Board* [2956] SC(HL) 1 at p 25.
- 21 In *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 (at p 487) per Jacobs J.
- 22 For example, those relating to freedom, fairness, justice, health, safety, security, etc.
- 23 From a societal perspective, such a hierarchy could be seen in some ways as almost the reverse of Maslow's Hierarchy of Needs pyramid.
- 24 See note 11.
- 25 See for example s 3B, *Public Sector Employment and Management Act 2002* (NSW).
- 26 Or, in the Australian Federal context, Statements of Expectation and Intent approved by the relevant Minister (in the Commonwealth context per Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*).
- 27 'The public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently', per Lippman, Walter, *Essays in the Public Philosophy* (Little Brown, 1955).
- 28 Per Mason CJ, Wilson and Dawson JJ said in the *Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393.
- 29 Per Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC142.
- 30 *O'Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson & Gaudron JJ (at 217).
- 31 Such Acts include the *Defamation Act 2005*, *Evidence Act 1995*, *Environmental Planning and Assessment Act 1979*, *Government Information (Public Access) Act 2009*, *Local Government Act 1993*, *Ombudsman Act 1974*, *Police Act 1990*, *Privacy and Personal Information Protection Act 1998*, *Public Interest Disclosures Act 1994*, *Public Sector Employment and Management Act 2002*, and *Teaching Service Act 1980*.
- 32 Reflecting the view expressed by the majority of the High Court in *Osland v Secretary of the Department of Justice* [2008] HCA 37 that '...the risk of political criticism is not of itself a public interest argument against disclosure [...of a document] (at para 56).
- 33 *Public Interest Disclosure Act 2012* (ACT), *Public Interest Disclosure Act 2008* (NT), *Public Interest Disclosure Act 2010* (Qld), *Whistleblowers Protection Act 1993* (SA), *Public Interest Disclosures Act 2002* (Tas), *Public Interest Disclosure Act 2003* (WA), and *Public Interest Disclosures Act 1994* (NSW).
- 34 *Protected Disclosures Act 2000* (NZ).