FOCUS ARTICLE

Summary of Administrative Review Council Report No. 40 and Australian Law Reform Commission Report No. 77 *Open Government: a review of the federal Freedom of Information Act 1982* (January 1996)

Gabrielle Mackey*

Introduction

In July 1994 the then acting Attorney-General, the Hon Duncan Kerr MP, asked the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) (jointly referred to in this article as 'the Review') to conduct a comprehensive inquiry into the federal *Freedom of Information Act 1982* (the FOI Act).

The FOI Act was the first legislation in Australia providing access to information held by the government. While controversy accompanied its enactment, by 1994 a legislative mechanism for seeking access to government information had become an accepted and expected part of government administration in Australia. All States and the ACT have FOI legislation and the more recently enacted State FOI legislation has sought to improve on the federal FOI Act. The operation and administration of the FOI Act was the subject of a review in 1987 by the Senate Standing Committee on Legal and Constitutional Affairs and the Act was substantially amended in 1983, 1986 and 1991 as well as many lesser procedural amendments in other years. The questions considered by the Review included whether the basic purposes and principles of the FOI Act had been satisfied, could those purposes be achieved better and should the scope of the FOI Act be extended.

The Review published an issues paper and a discussion paper for extensive public consultation in September 1994 and June 1995 respectively. The final report *Open Government: a review of the federal Freedom of Information Act 1982*, was tabled in January 1996. In the report the Review examined broad issues relating to access to government-held information including the philosophy behind such rights of access and the legislative framework for recordkeeping and access. The report also focused on practical aspects of the administration of the FOI Act. A number of deficiencies in the FOI Act and its administration are identified and recommendations made to improve that administration. A full list of the Review's recommendations is reproduced at the end of this article. To make the recommendations more self-contained some explanatory material [in brackets] has been added.

FOI, Archives and Privacy

The Review concluded that information collected and created by public officials is a national resource which should be maintained carefully and, in general, be accessible by the public. The FOI Act, the *Archives Act 1983* (Cth) (the Archives Act) and the *Privacy Act 1988* (Cth) (the Privacy Act) are the principal federal statutes dealing with access to information held in the public sector. The Review examined the interrelationship of these three Acts. It considered whether they should be consolidated into a single Act or, alternatively, whether the FOI and Privacy Acts should be combined. Although some submissions supported the combining of the Acts, other submissions expressed concern that each Act had a distinct purpose that justified keeping them separate notwithstanding their common aspects. The Review concluded that the Acts should remain separate but that amendments should be made to ensure that the three Acts provide 'a cohesive and consistent package' of government records legislation.

The Review noted that the Archives Act provides access only to documents that are more than 30 years old and the FOI Act

* Project Officer, Administrative Review Council secretariat

provides access only to documents created after 1977. The result is that documents coming into existence less than 30 years ago but before 1977 are not accessible under either Act, creating what the Review described as an 'access gap'. The Review recommended that the FOI Act be amended to close this 'access gap'. The Review also recommended that good recordkeeping practices should be monitored under the Archives Act and that the Archives Act should be reviewed.

Is the FOI Act working?

The Review noted that the Act has had a marked impact on the way government agencies make decisions and record the decision making process and information generally. It concluded that on the whole people are satisfied with the way the Act works in providing access to their personal information. Requests relating to policy development and general government decision making were found to be much less common than requests for personal information. The Review noted that the reasons for this are not clear but that consultations and submissions suggest that cost is a deterrent and that applications for non-personal information 'bear insufficient fruit' to encourage further use of the Act. The Review identified a number of deficiencies in the FOI system. Deficiencies which affect users of the Act include the fees and charges imposed to get access to information, the prominence of and lack of clarity in the exemption provisions, and the fact that applications can develop into legal and adversarial contests.

Pro-disclosure approach to FOI administration

The Review considered that agencies should approach an FOI request with a presumption in favour of disclosure. Several amendments to the Act's objects clause are recommended to reflect the Act's primary objective of ensuring open and accountable government to personal information. According to the report, agency culture and acceptance of the philosophy of FOI by agencies and their officers play a significant part in FOI administration and whether the Act achieves its objectives. While many individual officers have a positive attitude to FOI the Review suggested that some agencies operated under a 'secrecy regime' which was perpetuated by the continued existence of a myriad of secrecy provisions in federal legislation. The Review recommended that these provisions be reviewed.

Commissioner to oversee FOI administration

The Review suggested that the lack of a person or body with responsibility for its administration had limited the Act's effectiveness. The Review considered that FOI administration would benefit from having an independent person actively promoting the Act, overseeing its administration and providing guidance and advice to agencies and the public. It considered that no existing organisation could perform this role and recommended the creation of a new statutory office of FOI Commissioner. The FOI Commissioner would not have any formal investigative or determinative review powers, so that his or her role would be different from the role of the Information Commissioners established under FOI legislation in Western Australia and Queensland.

Applying the exemption provisions

Four chapters of the report are devoted to exemptions to disclosure. These cover general principles, specific exemptions concerning the responsibilities and operations of government, specific exemptions covering third party information and other exemptions not fitting these specific categories. The Review sought to rationalise the number of exemptions in the FOI Act and to clarify their interpretation. It recommended the repeal of some and amendments to others. Only some of the Review's recommendations are mentioned in this article. For a fuller picture of the recommended changes the reader should consult the list of recommendations at the end of the article.

Weighing-up competing public interests

Prima facie, an applicant under the legislation has a right to obtain a requested document.

However, the Review acknowledged that the public interest in the general availability of government information will, at times, be outweighed by the public interest in protecting information from disclosure. The exemptions provide for situations where there are good policy reasons for not disclosing the requested document. The Review noted that even though a document may technically be an exempt document agencies have a discretion to disclose and should do so where no adverse consequences would flow from a document's release. It recommended that the FOI Commissioner should have power to issue guidelines on how to apply a public interest test and considered that agencies should include in their statements of reasons, where relevant, the factors taken into account in applying the public interest test.

More limited role for conclusive certificates

Where a Minister issues a conclusive certificate in respect of a document, the document is exempt from release while the certificate is in force. In effect, a 'ministerial veto' is imposed on release of the document. Conclusive certificates can only be issued for documents that fall within certain specified exemption provisions, for example, exemptions covering documents that affect national security, defence or international relations. The Review recommended that conclusive certificates should have a more limited role in the future. It recommended that, except for certificates concerning documents protecting national security and defence and Cabinet documents, the certificates should last for two years. After that time a fresh FOI request could be made and, if still appropriate, a new conclusive certificate issued. The report indicates that the ALRC and the ARC held a different view on the use of conclusive certificates in respect of internal working documents (which the Review recommended be renamed as documents revealing deliberative processes). The ALRC considered that conclusive certificates should not be able to be issued under this exemption. The ARC considered that the use of a conclusive certificate may still be warranted and provision for them should remain but be subject to special conditions including a maximum duration of five years.

Documents containing personal information

A number of recommendations concern exemption for documents containing another person's personal information. The Review recommended that the exemption provision be redrafted to provide that a document is exempt from release if it contains personal information, if its disclosure would constitute a breach of Information Privacy Principle 11 of the Privacy Act [which specifies circumstances in which a record-keeper may disclose personal information without breaching the *Privacy Act 1988*] and if its disclosure would not, on balance, be in the public interest. In weighing the public interest in disclosure the Review considered that the agency should be able to have regard to any special relationship between the applicant and the person who is the subject of the personal information.

Amendment and annotation of personal information

The Review noted the existence of an overlap between the FOI and Privacy Acts which both provide for correction of personal information records held by the government. It made recommendations for improving these provisions in the FOI Act. In particular, it recommended that if an agency considers information to be incorrect, it should be obliged to acknowledge this and to take reasonable steps, in the circumstances, to amend the document.

Fees and charges

The Review noted that the cost of obtaining information under the FOI Act 'is one of the most controversial aspects of the legislation.' The Review's view was that applicants should make some contribution to the cost of provid-

ing the information but that this should not be so high that it deters people from using the Act. It said

The fees and charges regime should reflect the fact that the FOI Act is primarily about improving government accountability and the public's participation in decision making processes, not about generating revenue or ensuring cost recovery. (para 14.2)

The Review recommended that access to an applicant's personal information should be free. It also recommended a new fees and charges regime for information other than personal information of the applicant. A major departure from the current regime is the recommendation that agencies should impose charges only in respect of documents that are released and that charges should be assessed in accordance with a fixed scale developed by the FOI Commissioner. The Review also recommended the abolition of the $40 fee for internal review by the decision making agency.

No change to review system

The Review examined the current mechanisms for reviewing FOI decisions, including internal review and external review by the Administrative Appeals Tribunal (AAT) and investigation by the Ombudsman. The Review considered alternate mechanisms but concluded that no fundamental change to the current system is necessary. Nevertheless, the Review considered that the current mechanisms could be improved and made several recommendations to improve the current system including removing internal review as a prerequisite for external review by the AAT.

No extension of FOI to private sector

The Review's terms of reference asked it to consider whether the FOI Act should be extended to cover private sector bodies. The Review did not support a general extension of the FOI Act to the private sector. Its view was that 'the democratic accountability and openness required of the public sector under the FOI Act should not be required of the private sector.' However, it recommended that if there is a need for greater disclosure of particular information in a particular area of the private sector this need should be met by the most appropriate means. The identified need may be for disclosure to the relevant regulator, to the public on request or possibly to the public at large by means of a public register or other automatic disclosure mechanism. Meeting this need may require that the legislation regulating that industry be amended or new legislation introduced, to require greater disclosure of that information. It also recommended that FOI rights should not be lost in the trend towards government contracting and should be taken into account in the contracting process. The Review made a number of recommendations to assist agencies in this regard.

FOI application to GBEs

The Review also examined whether the FOI Act should apply to government business enterprises (GBEs). The Review recommended that GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act even when the GBE has some regulatory functions or community service obligations. The ALRC and ARC differed in their views on whether Telstra Corporation Limited (Telstra) should remain subject to the Act and made separate recommendations on this point. The ALRC considered that Telstra should not be subject to the Act. The ARC view was that Telstra should remain subject to the Act until such time as alternative satisfactory information disclosure requirements applying to the entire telecommunications industry are put in place.

Support for national privacy scheme

Although the Review did not support a general extension of FOI to the private sector it considered that the public should have rights of access to their personal information held by the private sector. It recommended that acomprehensive, national scheme for information privacy protection be introduced in Australia.

How to get a copy of the Report

The Report is available for $10 from the Australian Government Publishing Service bookshops or directly from the ALRC.

Relevant details for ordering purposes are as follows:

Open Government: a review of the federal Freedom of Information Act 1982

Australian Law Reform Commission Report No 77

Administrative Review Council Report No 40

ISBN 0 642 24477 4

Requests can be made to either the ALRC's main office in Sydney or the Canberra office.

Australian Law Reform Commission
Level 10, 133 Castlereagh Street
(GPO Box 3708)
Sydney, NSW, 2000 Australia
☎(02)284 6333

8th Floor, CFM Centre
12 Moore Street
(GPO Box 1995)
Canberra ACT 2601 Australia
☎(06)257 7029

List of recommendations

Chapter 4 — Giving effect to the objectives of FOI

1. The object clause of the FOI Act (s 3) should be amended to explain that the purpose of the Act is to provide a right of access which will

   - enable people to participate in the policy, accountability and decision making processes of government
   - open the government's activities to scrutiny, discussion, comment and review
   - increase the accountability of the Executive

   and that Parliament's intention in providing that right is to underpin Australia's constitutionally guaranteed representative democracy.

2. Section 3(1)(a) of the FOI Act should be deleted [on the basis that it does not contribute significantly to the understanding of the object clause and that the object clause would be simpler and more focussed without it.]

3. The reference in the object clause to the limitations on the general right of access imposed by exceptions and exemptions should be deleted.

4. The object clause should acknowledge that the information collected and created by public officials is a national resource.

5. The object clause should state the right of access to personal information of the applicant separately from the general right of access to government-held information.

6. The FOI Act should be amended to provide that if a document contains personal information of the applicant that fact is to be taken into account in considering the effect disclosure might have and in determining whether it is in the public interest to grant access to the applicant.

7. Agencies should review their current arrangements to ensure that they have sufficient officers authorised under s 23 of the FOI Act to make FOI decisions.

8. Performance agreements of all senior officers should be required to impose a responsibility to ensure efficient and effective practices and performance in respect of access to government-held information, including FOI requests.

9. Agencies should regularly examine the types of requests for information they receive to determine whether there are particular categories that could be dealt with independently of the FOI Act. If there are, this should be made clear to potential applicants and to staff.

10. Section 91 of the FOI Act should be amended to extend the indemnity against

action for defamation, breach of confidence or infringement of copyright to an authorised officer who releases a document other than under the FOI Act provided the document would not have been exempt had it been requested under the FOI Act.

11. Section 91 of the FOI Act should be amended to extend the indemnity against action for defamation, breach of confidence or infringement of copyright to an authorised officer who

(i) releases an exempt document under the FOI Act pursuant to a bona fide exercise of discretion not to claim the exemption or

(ii) releases a document other than under the FOI Act and the release, had it been made under the FOI Act, would have been a bona fide exercise of discretion not to claim an applicable exemption.

12. The recommendations of the Gibbs Committee should be implemented as soon as possible.

13. A thorough review of all federal legislative provisions that prohibit disclosure by public servants of government-held information should be conducted as soon as possible to ensure that they do not prevent the disclosure of information that would not be exempt under the FOI Act.

Chapter 5 — FOI, archives and privacy

14. The FOI Act should be amended so that it applies to documents that are less than 30 years old, regardless of when they were created. [This would effectively close the 'access gap' referred to in the above article under the heading **FOI, Archives and Privacy**.]

15. The Archives Act should be reviewed. In the interim, it should be amended to

- require the chief executive officer of an agency to ensure the creation of such records as are necessary to document adequately government functions, policies, decisions, procedures and transactions and to ensure that records in the possession of the agency are appropriately maintained and accessible
- authorise the Director General of Archives to issue recordkeeping standards, to audit records and recordkeeping practices and to report to the Minister on inadequate practices.

16. The FOI Act should require the FOI Commissioner to consult with the Privacy Commissioner before issuing guidelines on access to, and amendment of, individuals' own personal information.

17. The Privacy Act should be amended to provide that the Privacy Commissioner cannot find that an agency has breached IPP 6 or 7 in respect of a decision made under the FOI Act, unless that decision has been found on external review by the AAT or the Federal Court to be incorrect.

Chapter 6 — An FOI Commissioner

18. A statutory office of FOI Commissioner should be created.

19. The functions of the FOI Commissioner should include

- auditing agencies' FOI performance
- preparing an annual report on FOI
- collecting statistics on FOI requests and decisions
- publicising the Act in the community
- issuing guidelines on how to administer the Act
- providing FOI training to agencies
- providing information, advice and assistance in respect of FOI requests

  — at any stage of an FOI request

  — at the request of the applicant, the agency or a third party
- providing legislative policy advice on the FOI Act.

20. The FOI Commissioner should be given power to require agencies to provide statistics on their FOI administration.

21. If an agency claims that a document is exempt it should be required to give to the applicant a copy of the relevant guidelines in addition to its statement of reasons.

22. The FOI Act should require both agencies and the AAT to take into account the guidelines issued by the FOI Commissioner.

23. Information in plain language about how to use the FOI Act should be available at all government departments and agencies and at public libraries.

24. The FOI Commissioner should encourage agencies to make full use of advances in information technology to provide better access, for example, online access, to government information.

25. The FOI Commissioner should monitor the practices of agencies regarding the sale of documents with a view to ensuring that their pricing policies do not impose unreasonable barriers to the accessibility of government information.

26. There should be a standing arrangement for consultation between the FOI Commissioner, the Director-General of Archives, the Chief Government Information Officer, the head of the AGPS, the Privacy Commissioner and the Ombudsman.

27. The need for, and the role of, the FOI Commissioner should be reviewed by the Administrative Review Council after five years.

Chapter 7 — Using the FOI Act

28. The definition of document should be amended to clarify that it includes data.

29. Agencies should no longer be required to deposit a list of their decision making documents with the Australian Archives. These lists should instead be available for inspection at all AGPS shops, public libraries and branches of the relevant agency.

30. Compliance with obligations under sections 8 and 9 should be overseen by the FOI Commissioner.

31. In three years the time limit for processing FOI requests should be reduced to 14 days.

32. Section 24 of the FOI Act should be re-drafted to emphasise the importance of agencies consulting with applicants about their requests.

33. Section 24(5) of the FOI Act should be repealed [requiring each document covered by a request to be assessed on its individual merits rather than enabling access to be refused on the basis of an assessment of the documents as a group.]

34. If an agency refuses under s 24 of the FOI Act to process a request it should remit the application fee once it is clear the applicant does not intend to challenge the s 24 decision.

35. The FOI Act should be amended to provide that an agency may refuse to process a repeat request for material to which the applicant has already been refused access, provided there are no reasonable grounds for the request being made again.

36. The FOI Commissioner should monitor the quality of agencies' statements of reasons and name agencies that have performed poorly in this respect in the FOI annual report.

Chapter 8 — Exemptions — general principles

37. The FOI Commissioner should issue guidelines on how to apply a public interest test. The guidelines should list factors that are relevant and factors that are irrelevant when weighing the public interest.

38. The FOI Act should be amended to provide that, for the purpose of determining whether release of a document would be contrary to the public interest, it is irrelevant that the disclosure may cause embarrassment to the government.

39. Section 26(1)(a) of the FOI Act should be amended to require an agency to include in its statement of reasons, where relevant, the factors it took into account in applying the public interest test.

40A (ALRC) Regulations should be made under s 36A of the FOI Act prescribing two years as the maximum duration of conclusive certificates.

40B (ARC) Conclusive certificates issued under s 33 and s 34 should remain unlimited in duration. Certificates issued under s 36 should be limited to a maximum of five years.

41. The FOI Commissioner should monitor the use of conclusive certificates and include in his or her annual FOI report details about their use and any failure of a Minister to revoke a certificate despite a finding by the AAT that there are no reasonable grounds for the exemption claim.

42. The FOI Act should be amended so that a 'neither confirm nor deny' response under s 25 is not available in respect of documents information about the existence or non-existence of which would be exempt under s 33A (Commonwealth/State relations).

43. The FOI Commissioner should educate agencies about the correct use of s 25 and monitor their practices to ensure that agencies do not claim it when it is the contents of a document, rather than its existence, that warrant protection.

Chapter 9 — Specific exemptions — responsibilities and operations of government

44. Section 33(1)(b) of the FOI Act should be subdivided and the exemption for information communicated in confidence by an international organisation made subject to a public interest test.

45. Provision for a conclusive certificate in s 33A of the FOI Act should be removed.

46. Section 34(1)(a) of the FOI Act should be re-drafted to make abundantly clear that it applies only to documents that have been brought into existence for the purpose of submission for consideration by Cabinet.

47. Section 34(1)(d) of the FOI Act should be amended to make it clear that it does not apply to a document that discloses a decision of the Cabinet if that decision has already been officially published.

48. The term 'officially published' should be defined in the FOI Act.

49. Section 34 of the FOI Act should be amended so that Cabinet documents are only exempt for 20 years after the date on which they were created.

50. Section 35 of the FOI Act [which exempts Executive Council documents] should be repealed [on the basis that Executive Council documents warranting exemption can be withheld under other exemption provisions].

51. Section 36 of the FOI Act should be retitled 'Documents revealing deliberative processes'.

52. Section 36 of the FOI Act should be amended to exclude purely statistical information. [Exclusion of such material from the section means that its availability under the FOI Act is beyond doubt.]

53A (ALRC) Provision for a conclusive certificate in respect of s 36 of the FOI Act should be removed.

53B (ARC) The FOI Act should be amended to provide that when a Minister issues a conclusive certificate under s 36 he or she must

- provide the applicant with detailed reasons for issuing the certificate
- specify the duration of the certificate, up to a maximum of five years, and give reasons for choosing that period
- advise the FOI Commissioner that the certificate has been issued.

54. Section 37 of the FOI Act should be expanded to cover documents the disclosure of which would prejudice the security of a place of lawful detention.

55. Section 37 of the FOI Act should be amended to provide that specified documents (those described in FOI Act (NSW) Sch 1 cl 4(2)) are not exempt if their disclosure would, on balance, be in the public interest.

56. Section 40(1)(d) of the FOI Act should be redrafted to exempt documents the disclosure of which would prejudice the conduct of an internal or administrative investigation.

57. Section 40(1)(e) of the FOI Act [which currently exempts documents the disclosure of which would have a substantial adverse effect on the conduct of industrial relations by or on behalf of the Commonwealth or an agency] should be repealed [as other exemptions will adequately protect the sort of information that may give rise to industrial concerns].

58. Section 44 of the FOI Act [which currently exempts documents if their disclosure would have a substantial adverse effect on the national economy] should be repealed [on the basis that the exemption is superfluous — other exemption provisions will adequately cover any such documents that warrant exemption].

Chapter 10 — Specific exemptions — third party information

59. Section 41 of the FOI Act should be redrafted to provide that a document is exempt if

    (i) it contains personal information

    (ii) its disclosure would constitute a breach of IPP 11 of the Privacy Act and

    (iii) its disclosure would not, on balance, be in the public interest.

60. The FOI Act should require the FOI Commissioner to consult the Privacy Commissioner before issuing guidelines on the interpretation and application of s 41.

61. Section 41 of the FOI Act should be amended to provide that in weighing the public interest in disclosure an agency may have regard to any special relationship between the applicant and the third party.

62. The guidelines on consultation should provide that

    (i) agencies should, where suitable, advise the applicant that the consent of the third party would expedite their request for third party personal information

    (ii) if it is not clear from the nature or circumstances of the request whether the applicant really wants the third party personal information covered by the request, agencies should make as much effort as possible to ascertain from the applicant whether he or she is interested in obtaining that information before starting to consult.

63. Section 41(3) of the FOI Act should be amended to provide that if an agency reasonably apprehends that the applicant, upon receiving a document requested under the FOI Act which includes information about the applicant, is likely to cause serious injury to himself or herself, the agency must disclose the information in a way that minimises that risk

64. Section 41(4) of the FOI Act [requiring agencies to advise persons who prepared a medical or psychiatric report of the release of the report under the FOI Act] should be repealed [as there is no need for it].

65. The Privacy Act should be amended to provide that a release of personal information under the FOI Act is deemed to be disclosure that was 'required or authorised by law' for the purposes of IPP 11 1(d), provided the consultation requirements in the FOI Act were complied with.

66. Section 42(1) of the FOI Act should be redrafted to provide that a document is ex-

empt if it was created for the sole purpose of

(i) seeking or providing legal advice or

(ii) use in legal proceedings.

67. The FOI Act should be amended to make it clear that s 42 does not apply if the client has waived legal professional privilege at common law.

68. Section 43 of the FOI Act should be amended to make clear that it applies to documents that contain information about the competitive commercial activities of agencies.

69. Section 47A of the FOI Act [exempting electoral rolls and related documents from disclosure under the FOI Act] should be repealed [as it does not achieve its intended purpose].

Chapter 11— Other exemptions and exclusions

70. Section 38 of the FOI Act [exempting a document if its disclosure is prohibited by a secrecy provision] should be repealed [because some secrecy provisions are too broad and repeal of this provision would promote a more pro-disclosure culture in agencies].

71. Section 43A of the FOI Act [exempting documents relating to research] should be repealed [as any such documents that should be withheld will be covered by other exemption provisions].

72. Section 47 of the FOI Act [exempting certain documents prepared in accordance with companies and securities legislation] should be repealed [as any such documents that should be withheld will be covered by other exemption provisions].

73. The parliamentary departments should be made subject to the FOI Act.

74. The intelligence agencies should remain in Schedule 2 Part I. All other agencies currently listed (other than GBEs) should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the Act. If they do not do this within 12 months, they should be removed from Schedule 2 Part I.

75. If s 43 of the FOI Act is amended as recommended by the Review, the exemptions in Schedule 2 Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II.

76. Schedule 2 Part III should be repealed provided s 43 of the FOI Act is amended, as recommended by the Review, to apply to documents that relate to agencies' competitive commercial activities.

Chapter 12 — Amendment and annotation of personal information

77. The words 'to which access has been lawfully provided to the person, whether under this Act or otherwise' should be deleted from s 48 of the FOI Act.

78. If Recommendation 77 is implemented, s 35 of the Privacy Act should be repealed [as it will no longer be necessary].

79. Section 48 of the FOI Act should be amended to provide that amendment or annotation of personal information may be sought on the ground that, having regard to the purpose for which the information was collected or is to be used, it is not relevant.

80. Section 50(1) of the FOI Act should be amended to provide that if, on an application for amendment of a document containing personal information, an agency considers that the information is incorrect or, having regard to the purpose for which the information was collected or is to be used, out of date, incomplete, not relevant or misleading, it must acknowledge this clearly and take steps that are, in the cir-

cumstances, reasonable to amend the document.

81. The FOI Commissioner should issue guidelines on when it might be appropriate to amend a document by deleting information.

82. Section 55(6) of the FOI Act, which places restrictions on the AAT's ability to require a record to be amended, should be redrafted so that its meaning is clearer.

Chapter 13 — Review mechanisms

83. Internal review should not be a prerequisite to AAT review of an FOI decision.

84. The AAT should remain the sole external determinative reviewer of FOI decisions.

85. Section 64 of the FOI Act should be amended to make it clear that the AAT can, at any time after the date by which an agency must have complied with s 37 of the AAT Act, require production to the AAT of documents claimed by the agency to be exempt.

86. The FOI Act should be amended to prohibit the AAT from disclosing to any person, including the applicant's legal representative, documents that are claimed to be exempt, whether they were provided to the AAT under s 64 or not.

Chapter 14 — The cost of seeking access to information under the FOI Act

87. Access to an applicant's personal information should be free.

88. Agencies should only be able to impose charges in respect of documents that are released. Charges should be assessed in accordance with a fixed scale that has been determined on the basis of a realistic assessment of what information technology and record management systems an agency could reasonably be expected to be using. The scale should be developed by the FOI Commissioner in consultation with the Chief Government Information Officer and reviewed annually.

89. The $30 application fee should remain and be used as credit towards any charges imposed.

90. The FOI Commissioner should set photocopying and transcribing charges.

91. The regulation that prescribes a charge for supervising inspection of documents should be repealed.

92. The $40 fee for internal review should be abolished.

93. Section 30A(1)(b)(i) and (ii) of the FOI Act should be repealed so as to clarify that agencies have a general discretion to remit fees.

94. Section 29(5) of the FOI Act should be repealed so as to clarify that agencies have a general discretion to waive or reduce charges.

95. The FOI Commissioner should publicise the existence of s 66 of the FOI Act which empowers the AAT to recommend to the Attorney-General that an applicant's costs be paid by the Commonwealth where he or she is successful or substantially successful.

96. The FOI Act should be amended to allow the AAT to recommend to the Attorney-General that the costs incurred by the applicant in applying for review to the AAT be paid by the Commonwealth where

- an agency issues a conclusive certificate after the application for review is filed in the AAT or
- the agency claims an additional ground of exemption after the application for review is filed with the AAT and the original ground for exemption is dismissed.

Chapter 15 — Private sector

97. The FOI Act should not be extended to apply generally to private sector bodies.

98. If there is a need for greater disclosure of particular information in a particular area of the private sector, the legislation regu-

lating that industry should be amended, or new legislation introduced, to require greater disclosure of that information. Depending on the identified need, disclosure might be to the relevant regulator, to the public on request or, in appropriate cases, to the public at large by means of public register or other automatic disclosure mechanisms.

99. If an agency contracts with a private sector body to provide a service or perform a function on behalf of the government, the agency should ensure that suitable arrangements are made for the provision of public information access rights.

100. Where a statutory scheme provides for private sector bodies to be contracted to provide services or functions to the public on behalf of the government, information access rights should generally be provided by applying the FOI Act to those private sector bodies, but only in respect of documents that relate to the provision of those services or functions.

101A.(ALRC) Where there is no statutory scheme, the contracting agency should determine the most suitable way to provide relevant information access rights, bearing in mind the guidelines issued by the FOI Commissioner.

101B.(ARC) Where there is no statutory scheme, the contracting agency should generally preserve information access rights by ensuring that documents in the possession of the private sector body are deemed to be in the possession of the contracting agency.

102. The FOI Commissioner should provide guidance to agencies on what arrangements are advisable in a particular contracting out or funding situation. The Commissioner should also monitor the contracting out of government services and functions, and the funding of private sector bodies to provide services to the public, and report on whether in all of these situations satisfactory arrangements are being made with respect to the accessibility of relevant information.

103. A comprehensive, national legislative scheme should be introduced to provide information privacy protection in all sectors, including the private sector and those parts of the federal public sector that are not currently subject to the Privacy Act.

104. The Attorney-General should raise the need for national information privacy protection at a meeting of the Standing Committee of Attorneys-General at the earliest possible opportunity.

Chapter 16 — GBEs

105. GBEs that are engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act. If they are currently subject to the Act, they should be excluded- from the definition of 'prescribed authority'. Other GBEs should be subject to the Act. They should not be given a general exemption in respect of documents that relate to their competitive commercial activities, that is, they should not be placed in Schedule 2 Part II.

106A.(ALRC) Telstra, like other GBEs that are engaged predominantly in commercial activities in a competitive market, should not be subject to the FOI Act.

106B.(ARC) Telstra should retain its current status under the FOI Act until such time as alternative satisfactory disclosure requirements applying to the entire telecommunications industry are put in place.

American Administrative Law: An Overview

Bernard Schwartz *

Like Julius Caesar describing the ancient geographical area, American administrative lawyers also divide their subject into three parts. In the American, as in the British conception, administrative law is concerned with powers and remedies and answers the following questions: (1) What powers may be vested in administrative agencies? (2) What are the limits of those powers? (3) What are the ways in which agencies are kept within those limits?[1]

In answering these questions American administrative law deals with the delegation of powers to administrative agencies; the manner in which those powers must be exercised (emphasising almost exclusively the procedural requirements imposed on agencies); and judicial review of administrative action. These form the three basic divisions of American administrative law: (1) delegation of powers, (2) administrative procedure, and (3) judicial review. This article will seek to present a synoptic survey of these three subjects. Its aim is to present an overview of American administrative law to the Australian jurist, enabling them to understand the essentials of a system that is, at the same time, similar to and yet so different from their own.

Delegation

Administrative power is as old as American government itself. The very first session of the First Congress enacted three statutes conferring important administrative powers. Well before the setting up of the Interstate Commerce Commission (ICC) in 1887 – the date usually considered the beginning of American administrative law – agencies were established which possessed the rule-making and/or adjudicatory powers that are usually considered to be characteristic of the administrative agency. Modern American administrative law, nevertheless, may be said to start with the Interstate Commerce Commission, the archetype of the contemporary administrative agency in the United States. It has served as the model for a host of federal and state agencies vested with delegated powers patterned after those conferred upon the first federal regulatory commission.

Conscious use of the law to regulate society has required the creation of an evergrowing administrative bureaucracy. The ICC has spawned a progeny that has threatened to exhaust the alphabet in the use of initials to characterise the new bodies. Nor has the expansion of administrative power been limited to the ICC-type economic regulation. A trend toward extension into areas of social welfare began with the Social Security Act passed by Congress in 1935. Disability benefits, welfare, aid to dependent children, health care, and a growing list of social services have since come under the guardianship of the administrative process. The increasing concern with environmental matters has also given rise to new agencies with expanded powers. The traditional area of regulation is now dwarfed by the growing fields of social welfare and environmental concern.

The first prime task of American administrative law was to legitimise the vast delegations of power that had been made to administrative agencies, particularly at the time of President Franklin D. Roosevelt's New Deal. Two 1935 US Supreme Court decisions struck down the most important early New Deal statute on the ground that it contained excessive delegations of power because the authority granted under it was not restricted by what the American courts call a defined standard.[2] The requirement of a defined standard in enabling legislation was imposed by the American courts in order to ensure against excessive delegations. The delegation of power must be limited – limited either by legislative prescription of ends and means, or even of details, or by limitations upon the area of power delegated.

* Chapman Distinguished Professor of Law, The University of Tulsa College of Law