

# Note—The Right to Information Illuminated in *Gun Control Australia Inc v Hodgman and Archer*

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## I INTRODUCTION

The *Right to Information Act 2009* ('the Act') faces persistent challenges in cultivating agency compliance and government accountability. *Gun Control v Hodgman*<sup>1</sup> provides judicial clarification of the operation of the public interest test in the Act, a critical tool in maximising the disclosure of information.

Several observations can be made about the significance of this decision. The judgement in *Gun Control v Hodgman* speaks to the statutory obligation to consider relevant matters and to provide reasons for decisions. Brett J outlines clear guidelines for application of the public interest test and presents a helpful standard for administrative decision-making. Given subsequent amendment granting the Ombudsman with the power to review decisions made by Ministers, *Gun Control v Hodgman* also offers an opportunity for examination of the benefit of the Ombudsman in holding government to account.

This case note will demonstrate that the standard put forth by Brett J in the judgment is largely consistent with longstanding guidelines released by the Ombudsman. This begs a question of the efficacy of articulating standards in order to generate compliance. With this in mind, this case note concludes by examining the potential value of the decision in *Gun Control v Hodgman* within a challenging compliancy landscape.

## II THE CASE

*Gun Control v Hodgman* concerned an application for external review of a decision made by a delegate of then Tasmanian Premier, Will Hodgman ('the Premier'). In March 2018, the Premier made two public statements refuting suggestions that potential changes to firearms legislation could breach the National Firearms Agreement. The Premier cited advice he had

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<sup>1</sup> *Gun Control Australia Inc v Hodgman and Archer* [2019] TASSC 3 ('*Gun Control v Hodgman*').

received from the Police Minister ('the advice') to qualify his position. Gun Control Australia Inc ('the applicant'), an anti-gun lobbying group, made an application for assessed disclosure,<sup>2</sup> requesting a copy of the advice used to inform the Premier's public response to criticism over the potential legislative changes. The decision-maker, a delegate of the Premier ('the delegate'), confirmed the existence of information relevant to the request but claimed the information to be exempt in full because it contained 'internal deliberations concerning the response to a media query' that were contrary to the public interest to disclose.<sup>3</sup> The applicant applied for review of this decision the grounds that the delegate failed to take into account mandatory relevant public interest matters. The applicant initially applied for external review by the Ombudsman, however the Ombudsman indicated that the Office did not have jurisdiction because the decision was made by a delegate of a Minister. An appeal was then made to the Supreme Court pursuant to s 17 of the *Judicial Review Act 2000*.

### III THE RIGHT TO INFORMATION CONTEXT

*Gun Control v Hodgman* was decided in a context already experiencing challenges achieving compliance and efficiency. The overarching purpose of the Act is to improve democratic government in Tasmania, by 'facilitat[ing] promptly and at the lowest reasonable cost, the provision of the maximum amount of official information'.<sup>4</sup> The Tasmanian Ombudsman 2018-19 Annual Report highlighted government agencies' increasing failure to consider the objects of the Act, 'which work on a push model with a strong focus on active disclosure of information'.<sup>5</sup> The Report also noted that the public interest test is 'consistently misapplied, if it is considered at all'.<sup>6</sup>

In 2019, Freedom of Information Expert, and Associate Professor at the University of Tasmania, Rick Snell, described a 'culture of resistance to the release of information' at the heart of inefficiencies in the operation of the Act.<sup>7</sup> The Tasmanian experience accords with difficulties identified with Freedom of Information regimes more broadly. These difficulties stem from varied interpretations of the relevant state or Commonwealth

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<sup>2</sup> *Right to Information Act 2009* (Tas) s 13(1).

<sup>3</sup> *Gun Control v Hodgman* (n 1) [2].

<sup>4</sup> *Right to Information Act 2009* (Tas) s 3(4)(b).

<sup>5</sup> Ombudsman Tasmania, *Annual Report 2018-2019* (Report, 20 November 2019) 19.

<sup>6</sup> *Ibid* 20.

<sup>7</sup> Loretta Lohberger, 'Tasmania's Right to Information law are operating within a culture of resistance to releasing information, a legal expert says', *The Mercury* (online, 21 October 2019) <<https://www.themercury.com.au/news/tasmania/tasmanias-right-to-information-laws-are-operating-within-a-culture-of-resistance-to-releasing-information-a-legal-expert-says>>.

legislation and the intended benchmarks.<sup>8</sup> Despite this, the 2019-2020 Ombudsman Annual Report states that the proportion of Tasmanian public authorities that refuse to disclose any information ‘vastly exceeds all mainland jurisdictions and has been increasing since 2016-17’.<sup>9</sup> The decision in *Gun Control v Hodgman* should therefore be understood in light of the particular difficulties of promoting proactive disclosure from government agencies in a Tasmanian context.

#### IV GROUNDS OF REVIEW: FAILURE TO CONSIDER A MANDATORY CONSIDERATION

The judgement of Brett J in *Gun Control v Hodgman* provides important clarification of agency best practice when applying the public interest test. The applicant appealed the decision on the grounds that the delegate failed take a relevant consideration into account, founding an improper exercise of power.<sup>10</sup> The delegate decided that it was contrary to the public interest test to disclose the advice primarily because ‘it would inhibit the frank exchange of views and deliberative processes between ministerial staff in the future’. While this is not a mandatory consideration, Brett J found that when read together, ss 33(1) and 33(2) of the Act create a requirement for the decision-maker to take into consideration *all* relevant matters. This includes the matters outlined in Schedule 1 of the Act but is not limited to these matters.<sup>11</sup>

Judicial review of administrative decisions is confined to review of questions of law.<sup>12</sup> In *Gun Control v Hodgman*, Brett J makes three significant inferences about the mental process of the delegate that enable the conclusion that there had been a jurisdictional error. Consistent with the applicant’s grounds of appeal, Brett J examines the broader context in which the information in question existed to find that its prominence within the public debate for the proposed legislation determined matters (b), (c) and (d) relevant to the public interest test.<sup>13</sup> These matters are whether the disclosure would contribute to or hinder debate on a matter of public interest; whether the disclosure would inform a person about the reasons for a decision; whether the disclosure would provide the contextual information to aid in the understanding of government decisions.<sup>14</sup>

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<sup>8</sup> Maureen Heninger, ‘Freedom of Information and the right to know: tensions between openness and secrecy’ (2017) 22(4) *Information Research* 1; Danielle Moon, ‘Freedom of Information: user pays (and still faces delays)’ 43(3) *Alternative Law Journal* 192; Moira Paterson and Maeve McDonagh, ‘Freedom of Information: the Commonwealth Experience’ (2017) 17(2) *Oxford University Commonwealth Law Journal* 189.

<sup>9</sup> Ombudsman Tasmania, *Annual Report 2019-2020* (Report, 20 October 2020) 32.

<sup>10</sup> *Judicial Review Act 2000* (Tas) ss 17(2)(e), 20(b).

<sup>11</sup> *Right to Information Act 2009* (Tas) s 33(2).

<sup>12</sup> *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

<sup>13</sup> *Right to Information Act 2009* (Tas) s 33; sch 1 cl 1.

<sup>14</sup> *Ibid* sch 1 cl 1.

Secondly, Brett J was able to infer from the wording of the delegate's reasoning, and his mention of some irrelevant matters, that the delegate was aware of his obligation to make a finding on *all* relevant matters.<sup>15</sup> The combination of these inferences led to a strong inference that the delegate's failure to mention relevant matters, paired with his mentioning of other matters he deemed irrelevant, meant that he did not consider all relevant matters where he was required to.<sup>16</sup>

The judgment can be examined in three parts: examining the formulation of the matters relevant to the public interest; determining the relevance of certain matters; and the process of actively considering relevant matters.

#### *A The formulation of the relevant matters for consideration*

*Gun Control v Hodgman* highlights how the matters outlined in Schedule 1 of the Act are designed to promote a balancing of public interest factors. In applying the public interest test, the delegate considered that the 'release of the information would not, in this instance, enhance the scrutiny of government administrative processes'.<sup>17</sup> Brett J drew attention to the formulation of relevant matters for consideration, noting that this particular consideration was expressed in the Act in the affirmative, ie 'whether the disclosure *would* enhance scrutiny of government administrative processes'.<sup>18</sup> Brett J found that as a result of this wording, 'the fact that the information would not enhance the scrutiny of government administrative processes has a neutral effect on the application of the public interest test'.<sup>19</sup> This observation is consistent with the direction in the Ombudsman's 2010 Manual which differentiates matters listed in Schedule 1 on the basis of their positive, negative or neutral focus.<sup>20</sup>

The judgement in *Gun Control v Hodgman* is consistent with an interpretation of the Act communicated to public authorities by the Ombudsman for the last decade. This decision encourages a balancing exercise in the application of the public interest test. It reflects the Ombudsman's concern that only factors that support an exemption are often considered and supports a call for 'a more balanced and considered approach'.<sup>21</sup>

#### *B The relevance of certain matters*

The applicant's appeal was founded on the broader context of the Premier's public statements in relation to the National Firearms Agreement. By

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<sup>15</sup> *Gun Control v Hodgman* (n 1) [42].

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* [30].

<sup>18</sup> *Right to Information Act 2009* (Tas) sch 1 cl 1(g).

<sup>19</sup> *Gun Control v Hodgman* (n 1) [31].

<sup>20</sup> Ombudsman Tasmania, *Right to Information Act: Ombudsman's Manual* (Manual, July 2010) 37 ('Ombudsman's Manual').

<sup>21</sup> Ombudsman Tasmania (n 5) 20.

making reference to the Police Minister's advice in informing the Minister's support of the proposal, the Applicant submitted that the Premier situated the advice within the sphere of public debate. Resultingly, cls 1(b), 1(c) and 1(d) of sch 1, which focus on the benefit of public debate, were deemed relevant to assessing whether release of the advice would be contrary to the public interest test.

Brett J found that 'because the Premier referred to this advice in partial justification of the Government's position, it is impossible for the public to assess that question and legitimately oppose or support the Government's position in a debate without being privy to that advice'.<sup>22</sup> The relevance of these matters could be inferred from context in which the Premier was seen to use the advice, and therefore the delegate was required to consider them.

The judgement in *Gun Control v Hodgman* closely examines the reasoning process of the delegate, situated within the factual circumstance of the case. Carroll and Sibley argue that this type of judicial inquiry has promoted the development of clear expectations for administrative decision-makers.<sup>23</sup> Drawing on relevant case law, Carroll and Sibley suggest that judicial review of administrative reasoning has generated standards for decision-makers dictating engagement with relevant considerations and balancing conflicting matters.<sup>24</sup>

Examination of the delegates reasoning process has enabled a robust analysis that closely aligns with the Ombudsman's directions for decision-making pursuant to the Act. To this effect, the judgement supports and qualifies the position of the Ombudsman.

### C *The process of 'actively considering'*

*Gun Control v Hodgman* speaks to an important intersect between the process of decision-making and the requirement to give reasons. McDonald highlights that reasons statements can form the basis of evidence that a mandatory relevant consideration has not been considered.<sup>25</sup> The Act contains a statutory obligation to provide reasons for decisions, and where the public interest test applies, there is an obligation to state the considerations on which that decision is based.<sup>26</sup> Brett J applied *He v Minister for Immigration and Border Protection*,<sup>27</sup> citing that the term 'consider' manifests a requirement to make a finding about each of the

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<sup>22</sup> *Gun Control v Hodgman* (n 1) [33].

<sup>23</sup> John Carroll and Cain Sibley, 'The Impact of the Emerging 'Reasoning' Ground of Review' (2014) 78 *Australian Institute Administrative Law Forum* 44, 44.

<sup>24</sup> *Ibid* 45.

<sup>25</sup> Leighton McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' (2015) 37 *Sydney Law Review* 467, 469.

<sup>26</sup> *Right to Information Act 2009* (Tas) s 22(2)(d).

<sup>27</sup> (2017) 255 FCR 41.

prescribed matters.<sup>28</sup> In the absence of evidence of certain relevant matters, Brett J was able to infer that the delegate failed to consider those matters.

The Ombudsman 2018–19 Annual Report notes that often there is a lack of analysis of the considerations relevant to the application of a particular exemption.<sup>29</sup> This is despite clear guidelines about the standard of reasons to be given when the public interest test is considered in the Ombudsman’s Manual. The Ombudsman’s Manual states that reasons for a decision should ‘specify all of the matters which have been taken into account in the consideration of that issue and should explain the process of reasoning which has led the decision maker to the final outcome on that issue’.<sup>30</sup>

This case therefore affirms the importance of providing comprehensive reasons for a decision. It also sheds light on the critical interaction between the statutory requirements to consider mandatory relevant matters, and to provide reasons. The standard of decision-making that Brett J delineates coincides with and complements the standard put forth consistently by the Ombudsman.

## V THE JURISDICTION OF THE OMBUDSMAN

The most significant outcome arising from *Gun Control v Hodgman* is the amendment that makes external review by the Ombudsman available for decisions made by a Minister.<sup>31</sup> Despite the Ombudsman’s long-held assertion that he does not have the jurisdiction to review decisions made by Ministers,<sup>32</sup> the contentiousness surrounding his jurisdiction is evidenced by the Attorney-General’s intervention in the case asserting the contrary.<sup>33</sup> Brett J found that the interaction of the provisions for internal review and external review contained within ss 43–45 of the Act exclude the possibility of review by the Ombudsman where an application has been made to a Minister for information in possession of the Minister.<sup>34</sup> The opportunity for judicial review of the decision arose in this context only because there was no alternative remedy available.<sup>35</sup>

The Ombudsman has broad powers under the Act when considering an application for review.<sup>36</sup> While judicial review is limited to questions of law, the Ombudsman is able to make a decision with respect to the merit of an application for assessed disclosure, and direct a public authority to

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<sup>28</sup> *Gun Control v Hodgman* (n 1) [36].

<sup>29</sup> Ombudsman Tasmania (n 5) 20.

<sup>30</sup> Ombudsman’s Manual (n 20) 56.

<sup>31</sup> *Right to Information Act 2009* (Tas) 45(1)(ab).

<sup>32</sup> *The Hon Cassy O’Connor MHA and the Hon Matthew Groom MHA* (Right to Information Review Decision, Tasmanian Ombudsman, 27 April 2007).

<sup>33</sup> *Gun Control v Hodgman* (n 1) [5].

<sup>34</sup> *Ibid* [24].

<sup>35</sup> *Judicial Review Act 2000* (Tas) s 38.

<sup>36</sup> See *Right to Information Act 2009* (Tas) s 47.

implement that decision.<sup>37</sup> In the case that the public authority fails to comply with the direction, then the Ombudsman is able to make report to the Tasmanian Parliamentary Joint Standing Committee on Integrity.<sup>38</sup> Importantly, the Ombudsman retains the power to refer question of law to the Supreme Court for decision.<sup>39</sup>

When the Bill was tabled 2009, former Premier Lara Giddings noted the role of the Ombudsman as the review body for the Act, and the importance of greater flexibility and powers in determining reviews.<sup>40</sup> John McMillan, former Commonwealth Ombudsman, advocates for greater recognition of the vital role that independent mechanisms, like the Ombudsman, play in upholding accountable government. He argues that the conception accountability in Australia often fails to acknowledge the complementary role of the Ombudsman to the judiciary as a fourth integrity branch of government.<sup>41</sup> Despite disparities in the Ombudsman's enforcement capacity, the independence, cost-effectiveness and investigative power of the Ombudsman provide a distinctly valuable facility for promoting integrity.

The insertion of s 45(1)(ab) in the Act now provides that in accordance with s 13, a person may apply to the Ombudsman for a review of a decision if the decision relates to an application made to a Minister and is in relation to a notice issued under s 22. This decision represents a departure from the general position that Ombudsman review of Ministerial decisions is not available.<sup>42</sup> This amendment bolsters the role of the Ombudsman and brings the Act in line with public expectations of Ministerial accountability.

## VI LOOKING FORWARD

*Gun Control and Hodgman* was decided in a climate characterised by ongoing challenges to agency compliance and the promotion of government transparency.<sup>43</sup> The fact that this judgment so closely aligns with the Ombudsman's enduring direction regarding the correct application of the public interest test raises questions about the power of standard setting to enhance the operation of the Act. It resonates with an established perception that agency compliance is multi-dimensional,<sup>44</sup> and

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<sup>37</sup> *Ibid* s 47(1)(p).

<sup>38</sup> *Ibid* s 47(7).

<sup>39</sup> *Ibid* s 47(2)(b).

<sup>40</sup> Ella Haddad (MP), 'Right to Information Amendment Bill 2019' (Fact Sheet, Parliament of Australia, 2019).

<sup>41</sup> John McMillan, 'The Ombudsman and the Rule of Law' 44 *ALIAL Forum* 1, 13.

<sup>42</sup> *Ombudsman Act 1978* (Tas) s 12(5)(a).

<sup>43</sup> Loretta Lohberger (n 7).

<sup>44</sup> Rick Snell, 'Fol and the Delivery of Diminishing Returns, or How Spin-Doctors and Journalists have mistreated a Volatile Reform' (2002) 2(3) *The Drawing Board: An Australian Review of Public Affairs* 203.

that clear expectations are only part of a broader suite of action necessary to foster a stronger culture of proactive disclosure. Education of public authorities, for example, has proven to reflect positively on administrative decision-making.<sup>45</sup> Importantly, the Ombudsman has noted that historical under-resourcing has limited the ability for the office to implement training comprehensively.<sup>46</sup>

Despite these limitations, judicial review of administrative decision-making in this context offers a distinct opportunity to set a legally binding standard. The decision draws public attention to an important tool in maintaining administrative accountability in Tasmania and the challenges it faces. Adjunct Professor Rick Snell describes the decision as a ‘rejuvenation’ of the public interest test.<sup>47</sup>

*Gun Control v Hodgman* and the subsequent legislative amendment has importantly led to an increase in the annual budget which will enable the Ombudsman to engage in education, training and to review guidelines to tackle entrenched compliancy issues.<sup>48</sup>

## VII CONCLUSION

*Gun Control v Hodgman* has generated meaningful outcomes for the Right to Information landscape in Tasmania. In addition to clarifying the scope of the Ombudsman’s jurisdiction through subsequent reform, the decision provides a timely indication of agency best practice. This decision is useful in bringing to attention some of the challenges in the operation of the Act. This case note compares the judgment in *Gun Control v Hodgman* with some of the continuing advice by the Ombudsman to demonstrate how the difficulties raised in this case are complex and persistent. The increase in funding for the Tasmanian Ombudsman Office that parallels recognition of the importance of the Ombudsman role has potential to enhance the operation of the Act and provide opportunities to improve compliancy culture.

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<sup>45</sup> Ombudsman Tasmania (n 5) 19.

<sup>46</sup> Ibid 3.

<sup>47</sup> Adam Holmes, ‘Public Interest Test boosted for RTI applications after Supreme court obtaining gun laws advice’, *The Examiner* (online, 9 February 2019) <<https://www.examiner.com.au/story/5895767/public-interest-test-boosted-for-rti-applications/>>.

<sup>48</sup> Ombudsman Tasmania (n 5) 18.