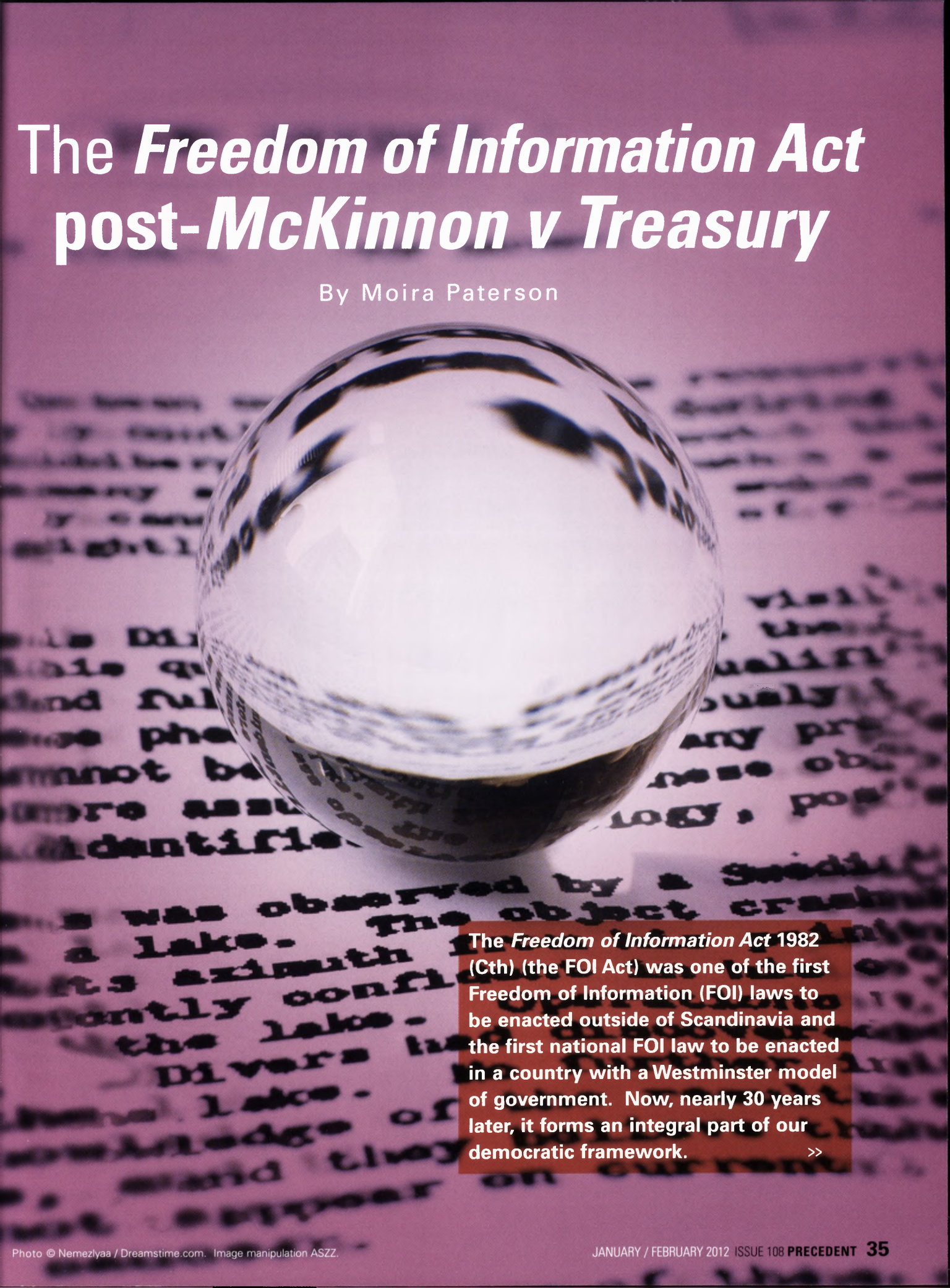
# The *Freedom of Information Act* post-*McKinnon v Treasury*

By Moira Paterson



**The *Freedom of Information Act* 1982 (Cth) (the FOI Act) was one of the first Freedom of Information (FOI) laws to be enacted outside of Scandinavia and the first national FOI law to be enacted in a country with a Westminster model of government. Now, nearly 30 years later, it forms an integral part of our democratic framework.** >>

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However, while the FOI Act has without doubt played an important role in eroding a long-established tradition of government secrecy, it has also attracted a growing body of criticism due to deficiencies in its governance, design and operation.

Confidence in the FOI regime reached an all-time low following the decision of the High Court in *McKinnon v Treasury*[1] to uphold a decision to refuse documents that shed light on key Treasury policies.[2] That decision highlighted the problematic nature of the conclusive certificate system (effectively a right of ministerial veto over access to specified documents, including decision-making and policy documents), and the problems arising from a restrictive approach to the interpretation of the deliberative processes exemption provision.

In the five years since, however, Australia has experienced what has been described as its 'most active phase of freedom of information reforms to have occurred in over two decades'.[3] In 2007, the Labor government was elected on a platform that included reforms to the FOI Act.[4] It initially amended the FOI Act in 2009 to remove the conclusive certificate mechanism, thereby allowing for independent merits review of all claims for exemption.[5] More recently, the government has implemented a reform package that includes other major changes to the FOI Act, as well the creation of new offices of the Australian Information Commissioner and Freedom of Information Commissioner.[6]

This article analyses the reforms to the FOI Act, with a specific focus on the amendments to the objects clause and exemption provisions.

## OBJECTS CLAUSE

A key feature of the amended FOI Act is that it contains a new objects statement.[7] Prior to its amendment, s3 referred to a function of providing a general right of access to documents, subject to 'exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities'.[8] The reference to exceptions and exemptions left unclear whether it required a pro-disclosure stance in relation to the interpretation of exemption provisions and it was accordingly interpreted by the Federal Court as requiring only a neutral stance.[9]

Section 3 as amended refers, without qualification, to Parliament's intention to promote Australia's representative democracy by contributing towards increasing public participation in government processes, with a view to promoting better-informed decision-making and to increasing scrutiny, discussion, comment and review of the government's activities.[10] It also refers to increasing recognition that information held by the government is to be managed for public purposes, and is a national resource.[11]

## DISCLOSURE TO THE WORLD

Less positively, there has been no change to s11(2), which states that an applicant's right of access is not affected by any reasons that he or she gives for seeking access or by a decision-maker's belief as to what those reasons might be. This is a feature which is not found in other Australian FOI laws, although they are all premised on the notion of universal access.

As previously explained, s11(2) is problematic for the reason that:

> 'There is a general public interest in promoting the public disclosure of government information, but its weight will vary according to the context, which may include the personal circumstances of the individual. Arguably, therefore, an individual's interest should be taken into account to the extent that it adds to the overall interest in disclosure. To allow it to operate as a negative factor, however, arguably threatens to undermine the basic principle of universal access.'[12]

It is possible that this issue will become less significant if and when access to an applicant's own personal records is administered via the privacy regime.[13] However, there may be situations where an applicant requires access to records that do not qualify as his or her own personal records, but which shed light on a matter personal to that applicant.[14] Moreover, there would be advantages in aligning the two regimes as far as possible (for example, to deal with the situation where the documents to which an applicant requires access contain a mixture of personal documents and non-personal documents).

## EXEMPTIONS

The redesign of the exemption regime involves a simplification and clarification of the public interest test in those exemption provisions which require a balancing of the interests for and against disclosure.

The exemption provisions are now grouped into two different categories: public interest exemptions, and other exemptions.[15] Public interest exemptions differ from other exemptions in that they operate subject to a common public interest balancing test while the others do not. Access is required to be given to a document that is conditionally exempt, unless it would be contrary to the public interest.[16]

In contrast to the position previously – where there was no legislative guidance as to the application of public interest tests – the FOI Act now includes a section that sets out some of the factors relevant to working out whether access to a conditionally exempt document is contrary to the public interest.

Section 11B contains an inclusive list of factors that favour disclosure.[17] These include whether disclosure of the document would promote the objects of the FOI Act, inform debate on a matter of public importance, promote effective oversight of public expenditure or allow a person to access his or her own personal information.

It also contains a list of factors that cannot be taken into account as favouring non-disclosure. These are that access to a document could result in embarrassment to or loss of confidence in the government, result in any person misinterpreting or misunderstanding the document, the author of the document was or is of high seniority,

or access to the document could result in confusion or unnecessary debate.

Subject to the comments below concerning potential negative implications for the personal privacy and business affairs exemptions, the simplification and clarification of the public interest test is a positive development which adds clarity to the Act by mandating a single clear approach to the balancing exercise required. In addition, the requirement to assess whether a document is conditionally exempt *at the time* of the decision concerning access arguably provides a worthwhile reminder that the status of a document as conditionally exempt may change with the passage of time. The inclusive list of factors favouring disclosure is also a positive step, insofar as it reinforces the objects clause but without limiting the range of factors that may potentially be relied upon.

More significantly, the inclusion of a list of factors that cannot be taken into account as favouring non-disclosure puts to rest several of the more problematic of the so-called 'Howard factors' which have commonly been relied upon to argue that disclosure is contrary to the public interest in relation to the deliberative processes exemption.[18] Arguably, this will have most application in relation to s47C (the deliberative processes exemption), but it also serves to reinforce the irrelevance of these factors in relation to other provisions such as s47E (certain operations of agencies).

However, an important omission from the list of factors in s11B(4) is the potential for inhibition of candour in the provision of advice. While it is admittedly the case that issues of inhibition of candour lie at the heart of the deliberative processes exemption, it is arguably important to adapt the scope of the public interest test so that it cannot be used to justify non-disclosure simply on the basis that some public servants might feel less comfortable if their deliberations were subjected to public scrutiny. To allow it to operate in this way has the consequence of removing from scrutiny the very documents to which members of the public need to have access in order to be able to participate meaningfully in, or to be able to understand and evaluate, the decision-making of government agencies. Public officials are generally required to provide reasons on request for decisions that affect individuals; arguably, it is not unreasonable to expect them to account more generally for their decision-making. It is similarly arguable that disclosure of policy documents is consistent with the objectives of the FOI Act.

The list of factors that may not be taken into account also makes no reference to whether documents would disclose the development and subsequent promulgation of policy or the fact that a document relates to policy development. Again, that is an important issue if the FOI Act is to achieve its objective of 'increasing public participation in government processes'.[19]

It may be that these omissions will not be problematic given the stance adopted by the Office of the Australian Information Commissioner in its FOI Guidelines. These note that these 'other two Howard factors (disclosure of policy development, and inhibition of candour and frankness) are not, in those terms, consistent with the new objects clause of the FOI Act (s3) and the list of factors favouring access in s11B(3)'.[20]

### Cabinet documents

An important change to the Cabinet documents exemption[21] is that paragraph (a) has been amended so that it provides that a document is an exempt document if it has *both* been submitted to Cabinet for its consideration (or is proposed to be submitted for Cabinet consideration) and was brought into existence for the dominant purpose of submission for Cabinet consideration. This rewording effectively addresses a deficiency in its previous wording, which allowed it to be interpreted as covering documents not initially created for Cabinet submission.[22]

While this is an important improvement, the exemption should ideally be subject to some form of public interest test (as is the case in New Zealand)[23] in order to ensure that documents are not withheld for longer than necessary to protect the mechanism of collective responsibility. Failing that, it should arguably include some time limit along the lines of the ten-year limit that has always existed in the Victorian FOI Act.[24] The lack of evidence suggesting that the ten-year time limit in that Act has caused any harm to Cabinet government in Victoria suggests that a *de facto* time limit of 20 years resulting from changes to the open access period in the *Archives Act*[25] is excessively long. >>

A final shortcoming is that the exemption provision which protects trade secrets and information is not included in the public interest conditional category.

### Documents subject to legal professional advice

Another important reform is the inclusion of a new sub-section concerning the legal professional privilege exemption,[26] which makes it clear that the exemption does not apply if the client has waived legal professional privilege. That change has addressed a problem arising from the wording in the primary test, which refers to a document that is of 'such a nature' as would be privileged and its interpretation by some review bodies as requiring an assessment based on the initial nature of the documents.[27]

However, the amendments to the FOI Act have failed to address the fact that the scope of s42 has expanded due to a change in the common law from a test of sole purpose to one of dominant purpose.[28] This is potentially problematic, due to the potentially large number of documents that contain general policy advice, as well as specific advice in relation to ongoing legal matters, and those which may qualify for exemption under a dominant purpose test.

### Breach of confidence

Another shortcoming is that the government's reforms have not extended to the breach of confidence exemption,[29] a provision that does not fall within the conditionally exempt category of exemptions. The current wording of s45(1), which is based on whether a document would found an action for breach of confidence, is open to criticism on the basis that it requires decision-makers to apply a test established in case law which is both complex and difficult to understand. The Queensland Information Commissioner commented in respect of the common law test that:

> 'Its complexity is compounded by the fact that uncertainty still attends some aspects of its modern development, such that not only leading academic writers but also many judges seem to disagree on some points of principle or on methods of approach to some issues.'[30]

A second problem is that the formulation of the test in terms of whether disclosure 'would found' an action for breach of confidence leaves it unclear as to what extent the common law public interest exceptions apply. There are a number of cases where defendants have successfully defended actions for breach of confidence by non-governmental plaintiffs on the basis that disclosure was in the public interest because it revealed some wrongdoing. However, the exact nature of this limited public interest test remains unclear.[31] It has variously been categorised as a matter that operates to deny the existence of a duty of confidence, a defence and a discretionary bar to obtaining equitable relief.[32] As currently worded, s45(1) is open to interpretation as allowing for a consideration of public interest only if this constitutes an element of the action.[33]

Finally, assuming that s45(1) does not contain a public interest test, its wording leaves open to agencies and third parties the opportunity to structure their dealings in ways that allow for the exemption to be claimed, thereby shielding their commercial dealings from public scrutiny.[34] For example, it is common practice to include confidentiality clauses in government contracts and for agencies to set up processes that create legitimate expectations of confidentiality on the part of third parties.[35]

### Personal privacy

A curious aspect of the amendments is that the personal privacy exemption has been included in the new category of public interest conditional exemption provisions without any change to the primary test for exemption (which still requires 'unreasonable' disclosure).[36] This is potentially confusing given that the test of unreasonableness in the former s41 was interpreted as requiring a balancing of public interests for and against disclosure.[37]

It seems that the requirement for disclosure to be unreasonable may have been retained to allow for the inclusion of an comprehensive list of facts that must be taken into account in assessing whether a document qualifies for exemption. (Section 47F(2) contains a list of factors that must be taken into account in assessing whether or not disclosure would be unreasonable, including the extent to which the information is already known or capable of being ascertained from publicly available documents.)

It is possible that this redrafting may have the unintended effect of reducing privacy protection for information that is to some extent known or publicly ascertainable. Under s41 these factors were relevant also but taken into account in the overall balancing process. Under s47F, they are required to be judged before this takes place and therefore without regard to the weight of any countervailing factors in favour of non-disclosure.

### Business affairs

Similar issues arise in relation to the business affairs provision in s47G, which has likewise been included in the category of public interest conditional exemptions while retaining its original wording, including (in the case of the paragraph protecting business affairs information) the words 'unreasonably affect that person adversely'.[38] The expression 'unreasonably affect' has been interpreted similarly to the unreasonableness requirement in the personal privacy exemption (that is, as containing a public interest test).[39]

### Trade secrets and commercial value

A final shortcoming is that the exemption provision which protects trade secrets and information is not included in the public interest conditional category. This has the consequence

that information will be exempt even where the likely harm to the information subject is of a minimal nature, and there are strong public interest factors favouring transparency.[40]

The fact that trade secrets have been broadly interpreted as extending beyond purely technical data leaves it open to businesses to argue that a wide range of matters that are kept secret and which might cause some competitive disadvantage if disclosed to trade rivals are 'trade secrets' and do not therefore need to satisfy the requirement of 'unreasonableness'. Such matters may extend beyond the categories of information which are traditionally regarded as being of a business nature to information such as statistics relating to suicides in a private prison. While there can be no doubt that there is a public interest in protecting trade secrets,[41] it is difficult to see why this should automatically take precedence over all countervailing interests in favour of disclosure.

Similarly, the category that protects information having commercial value which could reasonably be expected to be destroyed or diminished does not establish any minimum threshold. It therefore follows that a document will qualify for exemption even where any diminution in commercial value is very minimal, and even where there are strong countervailing factors favouring disclosure.

## CONCLUSION

The 2010 amendments to the FOI Act have addressed a number of important weaknesses, including deficiencies in the drafting of its objects clause and the wording of a number of exemptions provisions. These changes are a vast improvement but arguably do not go far enough, and may also have unintentionally reduced the protection for personal and business affairs information. Back in 2008, when the government announced that it had withdrawn a new FOI reference from the ALRC, it did so on the basis that it would be 'more sensible and appropriate that the ALRC review the FOI Act after the government's reforms have come into operation'.[42] A renewed reference to the ALRC would provide it with an opportunity to assess the impact of the recent reform and to address any continuing shortcomings in the FOI Act. ■

**Notes:** **1** [2006] HCA 45. **2** See Moira Paterson, 'Cloudy with a silver lining: McKinnon and freedom of information' (2007) 78 *Precedent* 39-41. **3** John McMillan, 'Freedom of Information Reforms and Cultural Change' (2010) 23 *Public Administration Today* 43. **4** See Senator John Faulkner (then Cabinet Secretary and Special Minister of State), *Freedom of information reform*, media release, 22 July 2008 accessed at < http://senatorjohnfaulkner.com.au/file.php?file=/news/SMKPDGCRSD/index.html>. **5** *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act* 2009 (Cth). **6** *Freedom of Information Amendment (Reform) Act* 2010 (Cth). **7** *Freedom of Information Act* 1982 (Cth), s3. Cases which discuss the relevance of the objects statement in an FOI Act to interpreting other provisions in that Act include *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 11 and, in the case of the *Freedom of Information Act 1989* (NSW) and *Freedom of Information Act 1982* (Vic), *Commissioner of Police v District Court* (1993) 31 NSWLR 606 and *Sobh v Victoria Police* [1994] 1 VR 41, respectively. **8** *Freedom of Information Act 1982* (Cth), s3(1)(b). **9** *News Corporation Ltd v National Companies and Securities Commission* (1984) 52 ALR 277, 279 per Bowen CJ and Fisher J. See also *Austin v Deputy Secretary, Attorney-General's Department* (1986) 67 ALR 585; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111. **10** *Freedom of Information Act* 1982 (Cth), s3(2). **11** *Ibid*, s3(3). **12** Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis/Butterworths, 2005) [5.34]. **13** See Cabinet Secretary, *Australian Privacy Principles Companion Guide* (2010) 18 accessed at < http://www.aph.gov.au/Senate/committee/fapa_ctte/priv_exp_drafts/guide/companion_guide.pdf>. **14** For an extended discussion of this issue, see Maeve McDonagh and Moira Paterson, 'Freedom of Information: Taking Account of the Circumstances of Individual Applicants' [2010] *Public Law* 505. **15** These are found in Part IV, Divisions 2 and 3, respectively. **16** See *Freedom of Information Act* 1982 (Cth), ss11A and 31A. **17** *Freedom of Information Act* 1982 (Cth), s11B(3). **18** These factors derive from an early decision of the Commonwealth Administrative Appeals Tribunal in *Re Howard and the Treasurer* (1985) 7 ALD 645 and are further discussed in Moira Paterson, see note 2 above. **19** *Freedom of Information Act* 1982 (Cth), s3(2)(a). **20** Office of the Australian Information Commissioner, *Freedom of Information Guidelines*, Part 6 – Conditional Exemptions at [6.77] accessed at < http://www.oaic.gov.au/publications/guidelines/guidelines-s93A-foi-act_Part6_Conditional-exemptions.html>. **21** *Freedom of Information Act* 1982 (Cth), s34(1). **22** See, for example, *Re Porter and the Department of Community Services and Health* (1988) 14 ALD 403. **23** *Official Information Act* 1982 (NZ), s9. **24** See *Freedom of Information Act* 1982 (Vic), s28(2). **25** See *Archives Act* 1983 (Cth), s3(7). This would allow access to Cabinet documents after 20 years. **26** *Freedom of Information Act* 1982 (Cth), s42(1). **27** *Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy* (1987) 12 ALD 251 at 252; *Re Prescott and Auditor-General* (1987) 2 VAR 93 at 100. **28** See *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 674. **29** *Freedom of Information Act* 1982 (Cth), s45. **30** *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [23]. **31** For a useful discussion of this issue and of the relevant case law see the decision of the New South Wales Supreme Court in *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464 at [76]–[223]. **32** See Jason Pfizer, 'Public Interest Exception to Breach of Confidence Action: Are the Lights About to Change?' (1994) 20 *Monash University Law Review* 67, 90–1. **33** See *Corrs Pavey Whiting and Byrne v Collector of Customs and Alphapharm* (1987) 14 FCR 434 at 451. **34** See Moira Paterson, 'Commercial in Confidence Claims, Freedom of Information and Government Accountability: A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing' in *Administrative Justice: The Core and the Fringe* (eds R Creyke and J McMillan), Australian Institute of Administrative Law, Canberra, 2001. **35** Victorian Parliament, Public Accounts and Estimates Committee, *Commercial in Confidence Material and the Public Interest*, 35th Report to Parliament, Melbourne, 2000, key finding 1.1 at p1. See also M Paterson, 'Commercial in Confidence and Public Accountability: Achieving a New Balance in the Contract State' (2004) 32 *Australian Business Law Review* 31. **36** See *Freedom of Information Act* 1982 (Cth), s47F(1). **37** See *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 436. **38** See *Freedom of Information Act* 1982 (Cth),s47G(1)(a). **39** See *Searle Australia v Public Interest Advocacy Centre* (1992) 36 FCR 111. **40** See Moira Paterson, note 34 above. **41** Furthermore, as pointed out in Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act* 1982, Report No. 77, Australian Law Reform Commission, Canberra, 1995 at [10.29], if the trade secrets are not protected under the *Freedom of Information Act* 1982 (Cth), the Commonwealth may have a constitutional obligation to compensate owners for that loss: Constitution of Australia s51(xxxi). **42** See note 4 above.

**Moira Paterson** *is associate professor in the Faculty of Law, Monash University, Melbourne.* **PHONE** *(03) 9905 3343* **EMAIL** *moira.paterson@monash.edu.*