CHAPTER 9

PART IV: EXEMPTIONS - GENERAL ISSUES

Conclusive certificates

9.1 Some submissions to this inquiry suggested that provision for the issue of certificates should be abolished,[1] or at least critically examined with a view to abolition.[2] By contrast, the IDC supported extension. It recommended the amendment of section 37 to provide for the issue of a conclusive certificate where disclosure could reasonably be expected to endanger the life or prejudice the physical safety of a person.[3]

9.2 Only 55 conclusive certificates were issued between 1 December 1982 and 30 June 1986. Of these, 23 were issued by the Treasurer or the Treasury. In October 1984, the Treasury revised its internal procedures for responding to FOI requests.[4] Since then it has issued only 2 certificates.

9.3 Up until 30 June 1987, it appears that less than 20 applications relating to conclusive certificates had come before the Administrative Appeals Tribunal. In only five of these did the Tribunal find that reasonable grounds did not exist to support fully the claim made in the certificate. Only one

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1. Submissions from the Library Association of Australia, p. 9; 'The Age', p. 32 (Evidence, p. 217).
2. Submissions from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 25, (Evidence, p. 874); the New South Wales Law Society, p. 5; the Law Institute of Victoria, p. 6, (Evidence, p. 379). See also Re Association of Mouth and Foot Painting Artists Pty Ltd and Commissioner of Taxation (29 July 1987) para. 53, where two members of the Administrative Appeals Tribunal, B.J. McMahon and C.J. Stevens, said there appeared to be little if any need for a conclusive certificate provision in section 33. The third member of the Tribunal, G.P. Nicholls, agreed: paras. 1 and 9.
3. IDC Report, p. 46 (Option B14).
4. Evidence, pp. 631-32.

Minister, the Treasurer, has elected not to revoke a certificate in the face of an adverse finding by the Tribunal.[5]

9.4 In general, the Committee has been favourably impressed by the restraint with which conclusive certificates have been issued. The position was summarised by Mr Lindsay Curtis of the Attorney-General's Department:

> Perhaps if one sets aside one department which has contributed almost 50 per cent of the total number of conclusive certificates there has on our view been a very restrained use of conclusive certificates.[6]

9.5 The submission from the Attorney-General's Department reviewed the types of documents to which conclusive certificates related. It concluded:

> On balance, it would seem that the relatively small number of conclusive certificates issued have been to protect documents containing what appears to be undoubtedly sensitive information ...[7]

9.6 The Committee shares this view. The Act, as amended in 1983, strikes an appropriate balance between the executive, and the courts and tribunals.

9.7 The Committee is aware of the potential for abuse implicit in a system in which the executive is judge in its own cause.[8] Nonetheless, the Committee considers it appropriate that

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5. Notice under FOI Act, s.58A tabled in the Senate on 22 August 1986; Senate, Hansard, p. 409.
6. Evidence, p. 144.
7. Submission from the Attorney-General's Department, p. 41 (Evidence, p. 46). For a contrary view see Evidence, pp. 548-50 (Mr H. Selby).
8. In 1983, the then Minister for Trade, the Hon. Lionel Bowen, commented 'the Government has not abandoned the idea of phasing out the system of conclusive certificates, if possible, ... the question of conclusive certificates should be considered in the context of the three-year review to be conducted by the Senate Standing Committee on Constitutional and Legal Affairs': House of Representatives, Hansard, 20 October 1983 p. 2000.

a Minister should have the final word in some circumstances. Whenever a Minister elects not to abide by a decision of the Administrative Appeals Tribunal in respect of the issue of a conclusive certificate, the Minister is required to report to the Parliament.

9.8 The Committee takes the view, supported by experience to date, that this reporting requirement is sufficient to ensure that the ability to issue conclusive certificates is unlikely to be abused. The Committee considers that it is preferable to run the small risk of ministerial abuse rather than to confer greater review powers upon tribunals at the expense of Ministers and ministerial responsibility to Parliament.

9.9 While the Committee regards the general tenor of the conclusive certificate provisions as satisfactory, there are a number of matters of detail which require attention.

Parliamentary accountability for the issue of certificates

9.10 The Committee's acceptance of the existence of conclusive certificates rests upon the accountability of Ministers to the Parliament. However, there is no requirement that Ministers inform the Parliament of the issue of conclusive certificates. The Committee does not consider that this is satisfactory, particularly as one effect of the 1986 Amendments is that statistics on the use of conclusive certificates are no longer issued.

9.11 The Committee recommends that a Minister be obliged to report to the Parliament within five sitting days whenever a conclusive certificate has been issued, regardless of whether the certificate has been signed by the Minister, an authorised delegate, or an officer for whose actions the Minister is accountable to the Parliament.

9.12 The five day period is chosen to parallel the requirement for reporting Ministerial decisions not to revoke certificates provided in paragraph 58A(3)(b) of the FOI Act.

9.13 **The Committee further recommends that the report to Parliament should, at a minimum, identify the issuing agency or Minister, and the claim made in the certificate.**

9.14 Senator Stone dissents from the recommendations contained in paragraphs 9.11 and 9.13, and the views expressed in the final sentence of paragraph 9.10.

Notice of non-compliance with AAT decision

9.15 Paragraph 58A(3)(b) does not require that the Minister table the reasons for the non-revocation of a conclusive certificate. It requires that the Minister shall 'cause a copy of the notice to be laid before each House'.

9.16 In place of this obligation, **the Committee recommends that the responsible Minister be required to table in each House of Parliament the notice of non-revocation of a conclusive certificate.**

Multiple exemptions

9.17 Occasionally, agencies refuse to grant access to documents under the FOI Act on the basis of a multiplicity of exemptions, one of which is supported by a conclusive certificate. In these circumstances, the Administrative Appeals Tribunal's ability to request the production of the documents is complicated by the fact that different provisions govern production, according to whether the claim of exemption is supported by a conclusive certificate. This is discussed in chapter 18 below.

9.18 Additionally, the composition of the Tribunal may vary. The Tribunal must be specially constituted in order to deal with matters relating to conclusive certificates.[9] The Committee does not consider that there is any reason why the Tribunal should be differently constituted for the purposes of reviewing conclusive certificates from the way in which it is constituted for the purpose of exercising its jurisdiction in respect of other freedom of information matters.

9.19 Accordingly, **the Committee recommends that section 58B be repealed.**

Duration of conclusive certificates

9.20 The FOI Act makes no provision for the expiry of certificates.[10] The Committee is of the view that it is unreasonable for a conclusive certificate to remain in force indefinitely. One submission suggested that 'an applicant should be able to apply for a review of a conclusive certificate after a period of time, say three years after the decision' to issue it.[11] Another suggestion was that a certificate should remain in force for only two years, or perhaps until there was a change of Minister.[12]

9.21 **The Committee recommends that conclusive certificates remain in force for only two years from the date of issue.** However, the Committee does not consider that documents should be released automatically upon the lapse of a conclusive certificate.

9.22 The lapse of a conclusive certificate should merely entitle the FOI applicant (or any other person) to lodge a fresh application for access to that document. That application should

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9. FOI Act, s.58B.
10. Re Peters and Public Service Board (1986) 11 ALN 33, p. 36.
11. Submission from Dr Frank Peters, p. 5 (Evidence, p. 502).
12. Evidence, p. 550 (Mr H. Selby).

be considered as a fresh application for all purposes, including the ability to issue a new conclusive certificate.

9.23 Senator Stone dissents from the recommendation in paragraph 9.21 and the views in paragraphs 9.20 and 9.22.

Revocation of conclusive certificates

9.24 There are no express provisions for the revocation of conclusive certificates in the FOI Act. However, the Committee is of the view that section 33 of the Acts Interpretation Act 1901 may be relied upon to provide any person who has the authority to issue a conclusive certificate with the power to revoke that certificate. Sub-section 33(3) provides that:

> Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

9.25 If the Attorney-General's Department does not agree with this view, or is of the opinion that the law on the point is unclear, the Committee considers that the FOI Act should be amended so as clearly to provide a power to revoke.

9.26 There is, therefore, no reason why a freedom of information applicant may not approach the officer or Minister who has issued a conclusive certificate and request the revocation of that certificate.[13] The Committee wishes to emphasise that the automatic expiry of conclusive certificates

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13. Evidence, p. 633 (Department of the Treasury - such approaches would be considered on their merits).

after two years (recommended above) should not be viewed as exclusive of any informal review during the life of the certificate.

Conclusive certificates and the public interest

9.27 In its 1979 Report, the Committee opposed the availability of conclusive certificates in the area of Commonwealth-State relations (now section 33A). Rather, the Committee favoured a test of whether the disclosure of the document (a) would be prejudicial to Commonwealth-State relations; and (b) would be contrary to the public interest.[14]

9.28 Sub-section 33A(1) establishes the criteria according to which conclusive certificates may be issued under sub-section 33A(2). Sub-section 33A(5) provides that section 33A

> does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

9.29 In its submission to the Committee, the Attorney-General's Department noted the drafting deficiency with respect to these provisions that

> emerges from the Tribunal's decision in Re Rae and Department of Prime Minister and Cabinet (4 March 1986). There, the Tribunal decided that a s.33A(2) conclusive certificate establishes conclusively that the document in issue is a document of a kind referred to in s.33A(1), but does not conclusively determine that disclosure would be contrary to the public interest, unlike a s.36(2) certificate. Thus an applicant may be able to defeat a certificate by making a positive case under s.33A(5). Indeed the Minister's power to issue a certificate under s.33A(2) may itself be negated.

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14. 1979 Report, para. 17.09.

> The result is that a s.33A(2) conclusive certificate may be of very limited effect. The public interest issue is not conclusively determined as it is with a s.36(2) certificate. This unintended effect appears to result from the Commonwealth/State relations exemption being moved from s.33 by the 1983 Amendment Act, with the draftsman simply duplicating the wording of s.33(2) in s.33A(2) without regard to the implications of the introduction of the public interest test in s.33A(5). Similar unintended effects may also have resulted from the insertion of s.34(1A) and s.35(1A) by the 1983 Amendment Act, without consequential amendments to s.34(2) and s.35(2).[15]

9.30 The Committee accepts that these effects were not intended.

9.31 **The Committee recommends that section 33A be re-drafted so as to make it clear that any certificate issued under sub-section 33A(2) is conclusive of both the type of document and whether disclosure is in the public interest.**

9.32 This will go some way to meeting agency concerns that the public interest test prevents them from giving an assurance to a State in appropriate circumstances that documents will not be disclosed.[16]

9.33 Analogous drafting problems also arise in sections 34 and 35 of the FOI Act as a result of the deficient drafting of sub-sections 34(1A) and 35(1A). Sections 34 and 35 are substantially similar, exempting respectively Cabinet and

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15. Submission from the Attorney-General's Department, pp. 42-43 (Evidence, pp. 47-48). In addition to the decision in <u>Re Rae</u>, see <u>Arnold v State of Queensland</u> (1987) 73 ALR 607, and the alternative interpretation adopted in <u>Re Fewster and Department of Prime Minister and Cabinet (No. 2)</u> (31 July 1987).

16. E.g. Evidence, p. 1273 (Department of Health).

Executive Council documents. In both cases, the scope of matters which may be the subject of a conclusive certificate is narrower than had been intended.[17]

9.34 The Committee is not aware that practical problems have ensued. However, the Committee considers that sections 34 and 35 should be amended to remove the unintended results.

9.35 **The Committee recommends that sections 34 and 35 be re-drafted to clarify that the respective conclusive certificates be conclusive of both the type of documents and whether disclosure would be in the public interest.**

Public interest

9.36 A number of exemption provisions contain as an independent element the requirement that the public interest be considered before access can be denied under the provision. The Commonwealth Ombudsman informed the Committee that there are many cases in which

> there is no evidence that agencies have considered the countervailing public interest that would be served by release and, consequently, no evidence of any proper assessment of the balance of public interest.[18]

9.37 Both the Department of Local Government and Administrative Services (DOLGAS) and the Department of Territories commented upon the difficulties which agencies face in applying the public interest tests.[19] DOLGAS said that

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17. See the quotation from the submission of the Attorney-General's Department set out at para. 9.29 above.
18. Submission from the Commonwealth Ombudsman, p. 11 (Evidence, p. 1318).
19. Submissions from the Department of Local Government and Administrative Services, p. 14; the Department of Territories, p. 13.

interpretation of 'public interest' has proved to be 'arguably the most difficult aspect of FOI decision-making'.[20]

9.38 The concept of the public interest is, as the Committee recognised in 1979, somewhat amorphous.[21] The Committee then said it favoured using the public interest concept because by so doing it would be possible to

> require both an agency and the Tribunal to consider many factors favouring disclosure that might otherwise be ignored. This opinion has been strengthened by the decision in the Sankey case in which their Honours individually identified aspects of the public interest that supported the case for non-disclosure on the one hand and disclosure on the other.[22]

9.39 The Committee notes that the IDC canvassed the option of removing all public interest tests from the Act.[23] The IDC noted that removal would provide considerable savings by simplifying the decision-making process. But the IDC did not recommend this option. The IDC observed that removal of public interest tests would result in a major limitation of existing access rights and would constitute a fundamental change in the policy balance of the Act.[24] Rather the IDC recommended providing a '"check list" of some of the considerations relevant to a finding of public interest'.[25]

9.40 The Committee remains of the view that the public interest is a convenient and useful concept by which to aggregate a number of issues which may bear upon a decision whether to release a document under the FOI Act. However, the Committee

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20. Submission from the Department of Local Government and Administrative Services, p. 14.
21. 1979 Report, para. 5.21-22.
22. 1979 Report, para. 5.23.
23. IDC Report, pp. F11-12.
24. IDC Report, pp. F11-12.
25. IDC Report, para. 6.2.2.

recognises that there is one disadvantage which may flow from the adoption of this balancing criterion.

9.41 This disadvantage was noted by the Committee in its 1979 Report:

> 'Public interest' ... is a test that must be weighed by an adjudicator who has no interest in the outcome of the proceeding and who is skilled by professional experience in weighing factors one against another.[26]

9.42 It is thus of more assistance to the reviewing Tribunal or court as a measure by which to assess the effects of the disclosure of a document than it is to the agency which is required to decide upon the release of a document in the first instance.

9.43 According to the Administrative Appeals Tribunal, the balance of public interest is determined by examining the effects of the disclosure of a document:

> Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be 'misunderstood or misapplied by all ill-informed public'; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the

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26. 1979 Report, para. 5.29.

> extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned.[27]

9.44 The Committee recognises the difficulties inherent in determining where the balance of public interest lies. At the very least, this involves a careful balancing of the public interest in citizens being informed of the processes of the government against the public interest in the proper functioning of government.[28] This is not an easy process, and it is not susceptible to clear rules or simple formulae. Rather, each document must be carefully scrutinised and a decision made upon the merits of each individual case. Consequently, the Committee rejects the IDC's recommendation, which was noted above at paragraph 9.39, for the inclusion of a 'check list' of public interest considerations.

Prescriptive public interest provisions

9.45 Although sections 33 and 44 refer to the public interest, these sections do not impose public interest tests as such.[29] In 1979, the Committee noted that this type of reference to the public interest was superfluous.[30] The Committee recommended that the references to the public interest should be deleted from the international relations, security or defence exemption - now section 33.[31] (It did not make a similar recommendation in respect of what is now section 44. The Committee recommended that the original exemption should be deleted in entirety.[32])

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27. Re Lianos and Secretary to Department of Social Security (1985) 7 ALD 475, p. 497.
28. Harris v Australian Broadcasting Corporation (1983) 50 ALR 551, p. 561 (Beaumont J).
29. E.g. see Re Mann and Australian Taxation Office (1984) 7 ALD 698, p. 710.
30. 1979 Report, para. 15.23.
31. 1979 Report, para. 16.32.
32. 1979 Report, para. 26.13.

9.46 The Committee recognises that deleting the superfluous public interest test in section 33 will not change the exemption provision, and such an amendment is itself superfluous. Nonetheless, the Committee reiterates its 1979 recommendation in respect of section 33. In the interests of legislative clarity, the redundant public interest reference should be deleted.

9.47 **The Committee recommends that the reference to the public interest in sub-section 33(1) be deleted, and the appropriate consequential amendment be made to sub-section 33(2).**

9.48 The public interest test in section 44, however, is in a different position. It is, as it stands, redundant. However, the Committee is not convinced that the public interest should be superfluous in respect of the disclosure of documents affecting the national economy.

9.49 For the reasons discussed below, **the Committee recommends that section 44 be amended so as to introduce into section 44 a public interest test of the same type as is contained in sub-section 39(2).**