UNDERTAKINGS OF CONFIDENCE BY THE COMMONWEALTH - ARE THERE LIMITS?

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Introduction

With the expansion of government outsourcing into major areas of information technology infrastructure and government service delivery much legal policy debate has focussed on the desirability or otherwise of the application of public law instruments to the entities to which the service delivery has been outsourced.[1]

Much of that policy discussion has focussed on questions of the accountability of government for its conduct in outsourcing and the accountability of government in the commercial environments created by outsourcing.

Some more recent analysis has focussed on the need for a reappraisal of the policy basis or the judicial interpretation of key exemption provisions in freedom of information legislation to ensure accountability of government in an outsourcing environment.[2]

These debates and analyses largely predate the High Court's decision in *Lange's* case.[3] This paper argues that the decision in that case will compel fundamental reconsideration of accountability and public law remedies in outsourcing contexts.

Lange's case takes its place within a series of High Court decisions on the constitutional consequences of implications of responsible and representative government.

From these cases it appears:

(a) there are constitutional implications in relation to responsible and representative government;

(b) those implications limit the legislative power of the Commonwealth;

(c) those limitations also limit the legislative powers of the states; and

(d) the common law of Australia is informed by and developed in accordance with those implications.

To date there has been scant attention paid to the consequences of the implications for the executive power of the Commonwealth or the States.

This paper explores some of those implications.

The paper concludes that:

(a) the Commonwealth's capacity to enter into binding obligations of confidence most likely is limited;

(b) if the Commonwealth's capacity is so limited, the limitation affects undertakings purportedly given by Ministers, departments of state, public servants, statutory authorities and corporations created by the Commonwealth (at least for so long

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as those corporations are owned by the Commonwealth);

(c) the basis upon which ministers, departments and other government instrumentalities relate to the Parliament in matters of outsourcing and general commercial activities of the Commonwealth requires reconsideration in light of these recent High Court cases on responsible and representative government; and

(d) parties dealing with the federal government or agencies cannot rely on maintenance of confidentiality of information provided to government instrumentalities except to the extent that it can be demonstrated that it would be contrary to the public interest for that confidentiality to be breached.

There are grounds for those dealing with state governments to be concerned about the legal capacity of those governments to maintain the confidentiality of those dealings. The paper concludes that on the current state of authority it is impossible to say how far the consequences of the implications might reach for the executive power of the states.

Constitutional implications apply to Executive Government

> Those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and *executive* power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament. Moreover, the conduct of the executive branch is not confined to ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to the Minister who is responsible to the legislature.[4]

These references to limitations on executive power by the Court in *Lange* appear to have been unnecessary to reach the decision in that case. Nevertheless, this is a statement by a unanimous Court of seven Justices.

It is also consistent with the reasoning of the Court in earlier decisions.

In *Davis v Commonwealth*[5] there was a challenge to the establishment of the Australian Bicentennial Authority as a corporation by the Commonwealth, and to legislation which prohibited the use of certain terms connected with the Bicentennial except with the consent of the Bicentennial Authority.

In this case it was established that the executive power of the Commonwealth extends to the incorporation of a company (at least within a Territory) which has as its object the performance of a matter within the executive power. The case is also an example of the incidental legislative power being validly exercised in the support of the executive power of the Commonwealth.

The case held, however, that legislation which prohibited the use of certain terms, for example "200 years" without the consent of the Authority was invalid.

The leading judgment in the case (by Mason CJ, Deane and Gaudron JJ) proceeded on the basis that the effect of the legislation was "to give the Authority an extraordinary power to regulate the use of expressions in everyday use in this country.....In arming the Authority with this extraordinary power the Act provides for a regime of protection which is grossly disproportionate to the need to protect the commemoration" of the Bicentennial. Thus it was the impact on the freedom of expression with respect to terms in ordinary use in the community which took the legislation outside the scope of the incidental power.

Brennan J, as he then was, held:

> Freedom of speech may sometimes be a casualty of a law of the Commonwealth made under a specific head of power – for example, wartime censorship - or a law designed to protect the nation – for example, a law against seditious utterances - but freedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive Government to advance a nation which boasts of its freedom.[6]

The Court was unanimous in holding that the invalidity of the legislation could not be saved by the conferral of a power on the Bicentennial Authority to approve the use of the expressions in question:

> Nor is freedom of speech restored by creating a discretionary authority to allow it.[7]

Nationwide News v Wills[8] was a case concerned with the validity of a provision of the then *Industrial Relations Act 1988* (Cth) which made it a criminal offence to utter words calculated to bring a member of the Industrial Relations Commission into disrepute in his or her capacity as a member of the Commission.

Thus the case is squarely one as to the adequacy of legislative power rather than executive power. The legislative power in question was the conciliation and arbitration power. The issue was whether protection of an instrument of the executive (the Industrial Relations Commission) as affected by the provision was a matter incidental to the subject matter of the conciliation and arbitration power.

In his judgment Mason CJ referred to freedom of expression as a fundamental value traditionally protected by the common law. In a footnote he noted "the fundamental importance of the freedom of expression in modern democratic society"[9] had been recognised in his decision in *John Fairfax*[10] where he had said:

> It is unacceptable in a democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.[11]

Consistent with the lead judgment in the *Bicentennial Authority* case, Mason CJ decided *Nationwide News* on the basis that the legislation in question affected the "fundamental freedom of expression" so far that the legislation was disproportionate to the object it sought to serve. In so doing he referred to the need for:

> The Court [to] take account of and scrutinise with great anxiety the adverse impact, if any, of the impugned law on such fundamental freedom as freedom of expression, particularly when that impact impairs freedom of expression in relation to public affairs and freedom to criticise public institutions.[12]

Brennan J articulated the principle as follows:

> [T]he Constitution prohibits any legislative or executive infringement of the freedom to discuss governments and governmental institutions and political matters except to the extent necessary to protect other legitimate interests and, in any event, not to an extent which substantially impairs the capacity of, or opportunity for, the Australian people to form a political judgment required for the exercise of their constitutional functions.[13]

Deane and Toohey JJ similarly decided *Nationwide News* on the basis of constitutional implications derived from the doctrine of representative government. They held that:

> The Constitution's adoption of [the] doctrine of representative government was qualified in the areas of executive and judicial powers.[14]

With respect to executive powers they held:

> The combined effect of the nature of the British constitutional monarchy and of the development of the concept of the

> Crown as an Australian sovereign who acts, in relation to Commonwealth matters (including the appointment of a Governor-General), on the advice of Commonwealth Ministers who are dependent on the support of the Commonwealth Parliament is, however, that the limitations of the adoption of representative government in relation to the repository of executive power are now mainly of formal significance.[15]

Their Honours proceeded to find that the doctrine of representative government was the basis for the implication of freedom of expression as further developed in *Lange*.

Thus their Honours appear to have held that the substantive aspects of executive power are limited by constitutional implications of representative government, including freedom of expression.

On the same day as the decision in *Nationwide News* the Court decided the *Political Broadcasting Ban* case.[16]

Apart from the reasoning of McHugh J, the judgments in the case do not directly bear on the question of the application of implications to executive power. McHugh J, however, stated:

> If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed.[17]

His Honour's reasoning appears to apply to executive power as well as to legislative power.

In light of the unanimity of reasoning in *Lange* and that judgment's consistency with earlier decisions of the Court, it should be treated as settled law that executive power is limited by the implications of responsible and representative government just as legislative power is limited.

Levy's case[18] demonstrates why this must be so. There the Court considered the validity of Victorian regulations one of the effects of which was to prevent Mr Levy, a political activist opposed to duck shooting, conducting certain forms of protest in duck shooting areas on public lands in Victoria.

The Court held the regulations valid because they did not infringe the constitutional freedom of expression any more than was required to achieve the legitimate end of protecting life and personal safety. All members of the Court held that had the regulations not served that legitimate purpose they would have been invalid for infringing Mr Levy's freedom of expression on political matters.

Legislation with such an effect would be no more repugnant to the constitutionally protected principles of responsible government than would executive action with the effect of preventing protesters from entering duck shooting areas on public land. Indeed the executive action would be arguably more repugnant because of the lack of any of the aspects of public accountability inherent in the making of legislation.[19]

The content of the freedom of political communication

While the cases to date have been concerned with legislative power the following propositions appear to be established law.

1 The constitutionally protected freedom of communication operates vertically – in both directions between electors and elected and electors and

candidates for election; and horizontally – between electors.[20]

2 The freedom operates at all times and is not confined to election periods.[21]

3 The freedom operates with respect to "political or government matters".[22]

4 The freedom is not absolute but:

> Is limited to what is necessary for the effective operation of that system of responsible and representative government provided for by the Constitution.[23]

In the case of the exercise of legislative power this relative or limited freedom results in the application of a two stage test of constitutional validity of a law:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect. Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[24]

It appears then that it is beyond the executive power of the Commonwealth for a constituent part of the executive government to obtain and seek to enforce obligations of confidentiality in relation to government or political matters unless the obligation serves a legitimate end. If that were not so, the executive through commercial conduct could achieve a result antithetical to the basic constitutional structures which create it and which the courts have held the legislature could not achieve.

Of perhaps greater practical importance, the Court's reasoning in *Lange* goes further. The executive or a constituent part of it cannot have the capacity to enter into undertakings of confidentiality to another party where the enforcement of those undertakings by the other party could deny free flow of information which is secured by the Constitution to either the parliament or electors.

This paper now deals with some of the circumstances in which these broadly stated propositions might apply and explores the legal mechanisms which might be used.

Accountability to the parliament

Secrecy provisions

The principle of responsible government is a "cardinal feature of our political system which [is] interwoven in its texture". Under this principle, "the Executive is directly responsible to.....the legislature."[25]

The full and complete accountability of the executive to the houses of parliament and their committees has generally been addressed as a matter of the law of parliamentary privilege.[26]

While the matter is not free from doubt, Lindell strongly argues that the parliament's power to require information from the executive is not, as a matter of law, limited by public interest immunity - but rather public interest immunity is a matter to be taken into account by the Parliament in determining whether to require the attendance of witnesses, the answering of questions or provision of documentation.

A related issue which has been addressed thus far as a matter of parliamentary privilege law is the operation of secrecy provisions (such as in the Income Tax Assessment Act) in the face of requirements of the parliament for officials to provide information otherwise affected by such statutory provisions. Odgers compendiously deals with certain disputes on this issue between the executive and its legal advisers on the one hand and the Senate and its Clerk on the other.[27] To summarise the position taken by the Senate:

(a) the privileges of the Senate would prevent prosecution of any person for providing any information to the Senate in conformance with the requirement of the Senate;

(b) there is therefore no room for the operation of secrecy provisions creating offences or other causes of action in relation to the disclosure of information; and

(c) such secrecy provisions do not limit the privileges of the House because those privileges can be limited only by express resolution or legislation.

The position of the executive has been more equivocal. Essentially the executive's position is that the question is to be resolved by interpretation of the particular secrecy provision in order to determine whether it necessarily requires the information not to be disclosed to the Parliament.

It should be noted, however, that the key opinion provided by the executive on the question is qualified at its commencement by "whatever may be the constitutional position".[28]

There is the argument that the operation of a secrecy provision to prevent the disclosure of information to the parliament cannot be inconsistent with notions of responsible government - because it is the parliament itself which has chosen to enact the secrecy provision in terms which have such effect.

That is not an argument that is likely to succeed. The implications drawn from responsible and representative government by the Court relate not only to upward vertical communications from electors or government instrumentalities to the Parliament but also to downward vertical communications from the Parliament to electors and to horizontal communications. A secrecy provision which infringes the notions of freedom of communication implied by responsible and representative government would have the effect of denying to members of the public access to information on political matters which the Constitution implies cannot be denied to them.

The result is that the disputes of the early 1990s between the Senate and the executive over the operation of secrecy provisions will need to be revisited. That revisitation will need to take into account the implications of the freedom of expression cases. The issues to be considered will be the constitutional validity of legislated secrecy provisions in the light of responsible and representative government.

In applying the two stage test set down in *Lange*, where a secrecy provision operates to prevent communication about government or political matters, the answer to the first question will be "Yes" - the law burdens freedom of communication about government.

In many cases the end sought to be achieved by secrecy provisions will without doubt be found to be legitimate. Secrecy provisions in taxation or social security legislation seek to enable citizens to deal with government agencies with security that their personal information will not be disclosed. However, to the extent that the provisions in such legislation have a wider effect, they must be at risk. To the extent that any such provision would operate to prevent a house of the parliament understanding and reviewing the conduct of a branch of the executive, there must be a very high risk that the provision would be found to be incompatible with the maintenance of the constitutionally prescribed system of responsible government, or not to be reasonably adapted to protection of the legitimate purpose it seeks to serve.

"Commercial-in-confidence"

The second consequence relates to a circumstance which arises much more regularly. This is the circumstance in which ministers or officials decline to provide information to the Parliament or its committees because that information is said to be "commercial in confidence". I understand the claim to mean that if the information were to be disclosed, the Commonwealth or the minister or official concerned would breach an obligation of confidence to some third party.

However, at least in the circumstance where the information concerned is material to the operation of government, it is inconsistent with the responsibility of the executive to the parliament for the executive to enter into enforceable obligations of confidence which would prevent such disclosures to the parliament. If this position is right, the executive does not have the power to enter into an obligation with such an effect.

In much government outsourcing, it is assumed by Australian governments and business that the resultant commercial transactions (whether they be tenders, contracts, due diligence documentation or otherwise) will be confidential.[29] In support of this understanding it is common practice for officials and ministers when asked in parliamentary committees or the parliament for details of such transactions to claim that the information cannot be provided because it is "commercial in confidence".

If this is a claim that the Commonwealth would breach an undertaking of confidence it had entered into if such a disclosure were made, it would appear to be on a constitutionally insecure foundation.

It is arguable that the maintenance or enhancement of business efficacy in the Commonwealth's dealings will be a legitimate end which will be weighed against the damaged freedom of communication that confidentiality provisions in government contracts would otherwise evoke. However, with possible exceptions in the most special circumstances, for such a provision to be entered into without parliamentary authority and with the effect that the provision of information to the Parliament was thereby precluded would not be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Parliamentary privilege law would suggest that the executive could not refuse to comply with a requirement of either house that such information be provided. The implications of *Lange's* case go further. It flows from *Lange* that the executive needs to reconsider the basis upon which it chooses to decline to provide such information to the parliament in non-compulsory settings such as parliamentary questions and Senate estimates hearings.

A possible test would be whether, in the executive's judgment, the business efficacy of the Commonwealth's dealings would be enhanced by the executive choosing not to disclose the information which has been sought. However, that will be a significantly more complex and subtle judgment than those usually involved in determination that a matter is "commercial in confidence".

If that be so, tenderers to and contractors with the Commonwealth need to consider their position carefully. Undertakings by officers of the executive branch of government to maintain the confidentiality of commercial relationships are probably not legally sustainable within the parliamentary setting. The confidentiality of those relationships and their details might in fact depend predominantly on political judgments.

Undertakings of confidence in government contracts

In the *Hughes Aircraft* case[30], the Civil Aviation Authority had undertaken obligations of confidence with respect to a tender process. The Court considered whether two separate disclosures to ministers constituted breaches of those undertakings.

The first was by the chief executive officer of the Civil Aviation Authority in briefing the Minister for Transport on a tender process subject to obligations of confidence. The second was by an officer of the public service department in briefing her minister.

With respect to the actions of the chief executive officer of the Civil Aviation Authority, Finn J held:

> The CAA, no less than the minister, operated in the constitutional environment of responsible government. This necessarily entails that it was accountable in some measure to the public.....
>
> One manifestation of that accountability was the CAA's subjection to audit by the Auditor-General under the *Audit Act 1901* (Cth). Another.....was to Parliament and particularly its relevant committees.....but central to the public accountability of statutory corporations so circumscribed under the legislation as was the CAA. was - and is - their accountability first to the Executive government through their respective minister, and then to Parliament via that minister. It is the minister to whom questions in Parliament are directed; it is the minister who, within the Government, is given portfolio responsibility for the corporation and its legislation; it is the minister who, in the CAA Act itself, is given both specific oversight powers and a general and specific direction powers. In such a setting - statutory and constitutional - the Minister should be taken as having a general right to obtain information from the CAA by virtue both of his relationship to parliament and to the authority, and its accountability to Government, the parliament and the public via the minister.....Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and systems of government confer on others.[31]

Nevertheless his Honour held that there was a breach of the obligation of confidence in the chief executive officer briefing the minister. That is because the chief executive officer volunteered the information. Had the minister required the information there would have been no breach.

In respect of the disclosures by the public servant, putting aside other issues, His Honour indicated that disclosures of material matters to the secretary of a department or to a minister will not constitute breaches of obligations of confidence by reason of the constitutional responsibilities of the minister and the position of the Secretary under subsection 25(2) of the Public Service Act.[32]

Hughes Aircraft Systems provides an example of what I suggest is compelled by the reasoning of the Court in *Lange*. That is the executive power of the Commonwealth does not extend to the entering into of enforceable obligations which in terms, operation or effect impede accountability of the executive branch of government to the parliament.

In the 1930s the courts were faced with resolution of the relationship between the legislature and the executive with regard to appropriation of moneys. The position arrived at was that the executive had power without parliamentary authority to enter into routine contracts. However no moneys could be paid over under any such contract except with parliamentary appropriation of such moneys. The courts would then imply into any government contract requiring the government to pay over moneys a term that such moneys would not be paid over in the absence of an appropriation to support them.[33]

An analogous approach is implicit in the reasoning of Finn J in *Hughes Aircraft Systems*. That is the implications of responsible and representative government limit the contractual capacity of the Commonwealth to enter into undertakings of confidentiality in government contracts. The way in which such a limitation will be effected by the Courts will be that:

> Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agencies' hands as our laws and systems of government confer on others.[34]

By way of vertical communication, our systems of government confer rights of access to any information on the business of government to ministers and the parliament and through the parliament to the public.

Further our laws confer extensive rights of access to such information on the Auditor-General with obligations that the Auditor-General report any such material matter to the parliament subject to his exercise of judgment as to whether some matters might be kept confidential.[35]

Other laws impose substantial obligations on public officials, authorities and corporations to provide information to ministers to enable ministers to perform their constitutional roles.[36] A consequence of the enactment of such legislation is that the executive power of the Commonwealth is limited so that it cannot enter into any obligation of confidence inconsistent with the obligations in the particular legislation.[37]

A more difficult set of questions arises where the Commonwealth enters into an obligation of confidence which in terms, operation or effect restricts the free flow of information about government matters to electors (as most obligations of confidence entered into by the Commonwealth must do). Where that obligation is compatible with the maintenance of responsible and representative government, when will it be secure?

In the case of legislation the court has laid down a test of "reasonably and appropriately adapted to serve a legitimate end".[38]

In applying that test to legislation the Court has adopted differing approaches. In *Levy*[39] handed down some 3 weeks after *Lange*, Brennan CJ said:

> Under our Constitution the courts do not assume the power to determine that some more limited restriction than that imposed by the impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law maker's power to determine the sufficiency of the means of achieving the legitimate purpose.[40]

In the same case Toohey and Gummow JJ applied the test of whether the impugned laws imposed any greater curtailment than was "reasonably necessary to serve the public interest".[41] Gaudron J indicated that as the laws in question did no more than was necessary to protect public safety, on any test they were valid. McHugh J adapted a test along the lines applied by Brennan CJ while Kirby J appeared to indicate a preference for a test of "proportionality" of the public interest with the impact on freedom of communication.

Application of analogous tests to the exercise of executive power could result in a variety of approaches.

The reserve of Brennan CJ could be applied – so that executive undertakings of confidence will not be outside of power if they achieve a legitimate end and are reasonable and appropriate so to do.

On the other hand the reasoning of Brennan CJ is based upon a view of relationships between the judicial and

legislative arms of government. The same considerations might not apply to dealings by the executive.[42]

The greater willingness of Toohey and Gummow JJ to enter into judicial review might command broader support where the object of review is executive and not legislative action. If that were so, undertakings of confidence by the Commonwealth which limit the free flow of information to electors would be ineffective except to the extent that they were demonstrated to be necessary for the achievement of some "legitimate public purpose".

That in turn would take constitutional law to a point very close to that to which the Court appeared to be moving the law of equity in any event.

In the *John Fairfax* case[43] Mason J, as he was then, held that in an action by government, disclosure of confidential information will not be restrained except where it appears that it would be inimical to the public interest by reason of national security, relations with foreign countries or the ordinary business of government being prejudiced by the disclosure.

The *John Fairfax* case was one of the confidentiality being "owned" by the government. The decision was based on equity restricting the availability of the remedy when government sought equity's assistance.

In *Esso v Plowman*[44] Mason CJ with Dawson and McHugh JJ agreeing said:

> The courts have consistently viewed governmental secrets differently from personal and commercial secrets. As I stated in John Fairfax, the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non disclosure.....
>
> The approach outlined in John Fairfax should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn [as he then was] notes, in the public sector "the need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle.

However, *Esso v Plowman* was a case where the confidence was owned by a private party – Esso. The government parties were the respondents seeking to deny the existence of the duties of confidence. Thus the majority of the Court in *Esso v Plowman* greatly expanded the operation of the *John Fairfax* principle, from cases in which the government sought relief to cases which concerned the protection of information about government, statutory authorities or public utilities.

In all such cases it appears that the test will be whether it is proved that it would be contrary to the public interest for the disclosure to occur. If that is not done equity will not protect a confidence – whether for the benefit of the government or a private party.

Returning then to the constitutional issue, where an obligation of confidence would restrict the free flow of information to electors about a political or government matter, it will fall foul of the constitutionally protected freedoms unless it be established that it serves a legitimate end.

By analogy with *Lange* it will be open to the courts to develop the law as laid down in *Esso v Plowman* so that.

- no obligation of confidence with respect to government or political matter will be enforceable unless it is demonstrated that it would be contrary to the public interest for the information to be disclosed;

- legislative powers will be limited so that laws cannot provide for the enforcement of obligations of confidence in respect of government or political matter where it is not

demonstrated that it would be contrary to the public interest.

Information management within government agencies

The constitutional implications cannot lead to an outcome that government employees will be free of any obligation of confidence with respect to information in their possession provided the individual employee concludes that it would not be contrary to the public interest to disclose the information.

On the other hand, the *John Fairfax* case was about attempts by the government to protect confidential information which had been disclosed, it seemed, by such a government employee. The government failed in that endeavour because the Court was not satisfied that it would be contrary to the public interest for the information to be disclosed.

The limits of the effect of the constitutionally protected freedom of communication on internal management of government agencies will depend largely on resolution of the difference within the Court on the extent to which the courts ought engage in judicial review of government action, by reason of its limitation on the free flow of information on political or governmental matters.

It will be recalled that in *Levy*[45] Brennan CJ articulated a most restrained test. Provided there was a legitimate end to the exercise of power impugned and provided the mechanism chosen was reasonable and appropriate to achievement of that end, it was not for a court to consider whether a lesser limitation on freedom of expression might have achieved the same end.[46]

On the other hand, Toohey and Gummow JJ in *Levy* appeared to apply a test of whether the exercise of power impugned was the minimum necessary infringement upon the freedom of political communication to achieve the legitimate end.

In this context there can be little doubt that ensuring the effective functioning and accountability of governmental agencies will be a legitimate end.

It might well be that the Australian jurisprudence will come to be informed by American jurisprudence on this issue. In the US, the Supreme Court has found in a series of cases a legitimate public interest which operates to limit the freedom of expression in the effective conduct and management of the public sector. On the other hand the cases seem also to indicate that the use or exploitation of the proprietary interests of government will not of themselves provide a countervailing interest to the freedom of communication.[47]

There are three sources of obligation on officers of the Commonwealth not to disclose information obtained by the officer by virtue of being a Commonwealth officer:

(a) the *Crimes Act 1914* (Cth) section 70;

(b) Public Service Regulation 7;

(c) specific legislation relating to particular agencies or functions.

The Crimes Act, section 70, creates an offence of disclosure of certain information. An element of that offence is that it is the duty of the officer concerned not to disclose the information.

Where the freedom of communication of such information is constitutionally protected, it will not be the duty of an officer not to communicate that information.

Public Service Regulation 7(13) provides that:

> An APS employee must not, except in the course of his or her duties as an APS

> employee or with the agency head's express authority, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

Under the test articulated by Brennan CJ in *Levy*, Public Service Regulation 7(13) is probably constitutionally valid. That is because there is a legitimate end to be served in the maintenance of the efficacy and integrity of Commonwealth administration. The regulation prescribes a regime for the achievement of that legitimate end and the regulation is appropriate or adapted to the achievement of that end.

That is not to say that the effect of the regulation would be to excuse an agency from implementing formal processes for consideration by the agency head or senior management of the question of whether or not particular information should be disclosed. Indeed the subregulation would appear to be sufficient to provide to an APS employee in possession of such information (or any other person affected by a view that the information could not be disclosed because of that regulation) standing to seek a declaration of right that such information might be lawfully disclosed.[48]

On such an application if it were demonstrated that senior management had not adequately considered the balance of competing public interests, it would follow that the actions of the executive branch pursuant to the regulation were inconsistent with the constitutionally protected freedom of communication.

On the test postulated by Toohey and Gummow JJ there is a real issue as to the constitutional validity of Public Service Regulation 7(13). The minimum steps necessary to protect the public interest in the efficacy and integrity of public administration would limit the duty of APS employees not to disclose information to those circumstances in which a legislated process for the balancing of the competing public interests was in place. It would no doubt be arguable on such a test that that legislative process would require some form of independent merits review of the public interest balancing to be undertaken.

The minimalist consequence of the freedom of political communication cases would appear to be that public sector agencies need to review their internal information management practices - in order to be able to demonstrate adequate and structured balancing of the competing public interests whenever a question of disclosure of information arises.

The expansive view would suggest that government needs to fundamentally reconsider the legislative and administrative regimes under which information management in the public sector occurs.

Freedom of Information legislation

Freedom of information legislation anticipated the logic of the freedom of political communication cases.[49]

Thus fundamental to the logic of freedom of information legislation is that it underpins our representative and responsible government by providing to electors legally enforceable rights of access to government information.

The legislation provides such rights subject to various exemption provisions.

The first exemption provision to consider is that relating to breach of confidence.[50] This exemption as most recently amended is not made out unless it be established that disclosure of the information in question would constitute an actionable breach of confidence.

The consequence is that the exemption will not be made out where the free flow of

information in question is protected by the constitutional implications.

The second exemption to consider in an outsourcing context is the business affairs exemption. While each of the freedom of information Acts varies to some extent I will concentrate on the Commonwealth exemption which exempts from disclosure[51]:

> (a) trade secrets;
>
> (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
>
> (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking being information:
>
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs;
> .....

Working back through this exemption the freedom of communication cases provide a base for an argument that paragraph (c) does not exempt from disclosure information about political or government matters except where nondisclosure achieves some other legitimate end and the other elements set out above are satisfied.

That argument will proceed on the basis that "unreasonably" in paragraph (c) is to be understood by reference to the constitutional implications. Where information is about the business of government, it is a public interest which must be demonstrated to render a disclosure unreasonable. Thus significant adverse effects on private business or professional affairs may well be "not unreasonable" viewed in the constitutional context of responsible and representative government. This approach is consistent with that already taken by the Full Federal Court. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre* the Court held:

> If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be unreasonably affected by the disclosure; the effect, though great, may be reasonable under the circumstances.[52]

Paragraphs (a) and (b) of the Commonwealth exemption in subsection 43(1) do not expressly permit any consideration of public interest matters. However, by necessity the Act applies only in respect of information in the possession of public officials. If it be right (see above) that those public officials cannot be lawfully constrained from disclosure of information within their possession, except where such disclosure is determined to be contrary to the public interest, it will be arguable that no information in the possession of government officials can be a trade secret or otherwise have commercial value unless it be properly determined that disclosure of the information would be contrary to the public interest.

If the arguments outlined above were to find favour with the courts the practical operation of the Commonwealth Freedom of Information Act in cases relating to outsourcing of government services would move very close to that of the Victorian Freedom of Information Act.

The Victorian Act differs from all other Australian freedom of information Acts in providing that the Administrative Appeals Tribunal (AAT) has power to order disclosure even though a document falls within an exemption provision. This power can be exercised where, in the opinion of

the AAT, the public interest requires disclosure.

In a series of decisions relating to outsourcing and government competitive tendering processes, the Victorian AAT has ordered disclosure of tender documentation, due diligence documentation, full outsourcing contracts and information relating to monitoring of contractual performance.[53]

If an equivalent test as applied by the Victorian AAT were applied in the Commonwealth context there would be a dramatic change to the practices and expectations of parties dealing with the Commonwealth.

Yet that would appear to be the minimum impact of the *Lange* and *Levy* decisions. The Victorian test applies only where the Tribunal positively concludes that the public interest requires disclosure. Where such a conclusion is reached, it is difficult to conceptualise any test under which it might be concluded that an officer of the Commonwealth could be constitutionally required not to disclose the information. If the officer in whose possession the information is placed could not be required to keep the information confidential, it is difficult to conclude that the information retains the status of a trade secret or otherwise has a commercial value.

To put the matter another way, if the officers of the Commonwealth with the information could lawfully choose to disclose it voluntarily, there would be little room for operation of exemption provisions which depend on their terms on the capacity of the "owner" of the information to control access to that information.

Extent of the constitutional implications

It follows that the issues outlined in this paper are issues not merely for departments of state but for statutory authorities and for corporations established by government.

The reasoning of the Court in *Lange* indicates that the constitutional implications apply not merely to ministers and departments of state but also to statutory authorities and government owned corporations.

That reasoning is consistent with the reasoning of the majority[54] and of Brennan J in *Esso v Plowman*.[55] In *Esso v Plowman* the majority referred to the public interest test in respect of information relating to the business of government applying to information relating to the business of statutory authorities and public utilities.

The reasoning is also consistent with that of the majority in the *Bicentennial Authority* case.[56] That case proceeded on the basis that the Bicentennial Authority, a company limited by guarantee and incorporated under the ACT Corporations Law, could not have any greater capacity than that enjoyed by the executive government of the Commonwealth.

Lange and *Levy* further demonstrate that at least in some circumstances, the constitutional implications operate to restrict not merely Commonwealth but also state legislative powers. The conclusion would seem to follow that the implications will operate to limit not merely Commonwealth but also state executive powers.

Thus the issues raised in this paper are issues not merely for Commonwealth administration but also for that of States and potentially local government as a creature of the states.

As *Levy* demonstrates, the extent of the impact on State governments cannot be reliably assessed on the current state of authority.

Endnotes

1 Australian Law Reform Commission: *Open Government: A Review of the Freedom of Information Act 1982* (ALRC 1995)
Tongue S: 'Protection of Information Rights' *Canberra Bulletin of Public Administration* (87) February 1998, 66-67
Waterford J: 'Protection of Information Rights' - Commentary; *Canberra Bulletin of Public Administration* (87) February 1998, 77-9
Allars M: Private Law But Public Power: Removing Administrative Law from Government Business Enterprises; *Public Law Review* (1995) 6, 44-76

2 Finn, C: "Getting the Good Oil: Freedom of Information and Contracting Out" (1998) 5 *AJAL* 113

3 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96

4 per the Court in *Lange* at 107

5 The *Bicentennial Authority* case (1988) 166 CLR 79

6 at 116

7 per Brennan J at 116

8 (1992) 177 CLR 1

9 per Mason CJ at 31

10 (1980) 147 CLR 39

11 p. 52 Mason CJ further quoted the *Attorney-General v Times Newspaper* 1974 AC 273, *Smith v Daily Mail Publishing Company* 1979 443 US 97

12 per Mason CJ at 34

13 per Brennan J at 51

14 p.70

15 p.71

16 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 172 CLR 106

17 per McHugh J at 231

18 *Levy v Victoria* (1997) 146 ALR 24

19 Note, however, that McHugh J appears to contemplate that it would be permissible for the Crown to achieve this result through exercise of its proprietary rights to land. See *Levy* at 276.

20 *Lange* at 106

21 *Lange* at 107

22 *Lange* at 107

23 *Lange* at 108

24 *Lange* at 112

25 *Engineers* case 28 CLR 129 at 146-147

26 For a comprehensive discussion of which see Geoffrey Lindell, "Parliamentary Enquiries and Government Witnesses" in *AIAL Forum* No 8 page 1

27 See Odgers *Australian Senate Practice* (7th Edition) pages 43-47

28 See Odgers page 44

29 In the Commonwealth context it is expected that the price paid by the Commonwealth will be advertised in the electronic successor to the Government Gazette but that other information will be kept confidential.

30 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1

31 146 ALR at 88-89

32 146 ALR at 97

33 *NSW v Bardolph* 1934 52 CLR 455

34 146 ALR 1 at 89

35 *Auditor-General Act 1997* (C'th) see especially ss 37, 38, 48

36 See for example the *Financial Management and Accountability Act 1997* (C'th) and the *Commonwealth Authorities and Companies Act 1997* (C'th)

37 *Brown v West* (1990) 169 CLR 195, see also Brennan J in *Esso v Plowman* (1994) 128 ALR 391 at 407 "It is the duty of the SECV to furnish the Minister with the information...and that duty cannot be defeated by any contractual duty"

38 *Lange* at 112

39 *Levy* (1997) 146 ALR 248

40 *Levy* at 254-255

41 *Levy* at 267-268

42 In other contexts parliamentary scrutiny of executive policy or action has been a key determinant of the degree of constraint found on judicial review. See eg, *Drake v Minister for Immigration* 24 ALR 577

43 *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39

44 (1995) 128 ALR 391 at 402-403

45 *Levy v Victoria* (1997) 146 ALR 248

46 146 ALR 254-255

47 *Perry Education Association v Perry Local Educators Association* 460 US 37; *Cornelius v NAACP Legal Defense and Education Fund, Inc.* 473 US 788

48 See for example *Telstra Corporation Limited v Australian Telecommunications Authority and Optus Networks Pty Limited* 1995 133 ALR 417

49 As noted by Bayne P: "Recurring Themes and The Interpretation of the Commonwealth Freedom of Information Act" 1996 24 *FLR* 287 at 288

50 See for example section 45 *Freedom of Information Act 1992* (C'th)

51 See subsection 43(1) *Freedom of Information Act 1992* (C'th)

52 *Searle Australia Pty Ltd v Public Interest Advocacy Centre* 1992 108 ALR 163 at 178

53 For a full discussion of these cases see Finn, C: "Getting the Good Oil: Freedom of Information and Contracting Out" 1998 5 *AJAL* 113 at 116-118

54 Mason CJ Dawson and McHugh JJ

55 *Esso v Plowman* (1994) 128 ALR 391

56 (1988) 166 CLR 79