decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. [at 703]

McHugh J followed a similar line stating that:

> 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 elected candidates for election. Before they cast an effective vote at election time, they must have access to information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation . . . Only by the spread of information, opinions and arguments can electors make an effective and responsible choice in determining whether or not they should vote for a particular candidate or the party which that person represents. Few voters have the time or the capacity to make their own examination of the raw material concerning the business of government, the policies of candidates or the issues in elections even if they have access to that material. As Lord Simon of Glaisdale pointed out in *Attorney-General v Times Newspapers* [1974] AC 273 at 315: 'People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.'

Is it such a big step from arguing that people need and have the right to information to enable them to make informed judgments and influence the political processes of government, to the need for information to be able to make judgments about other matters which have a significant impact on their lives, often much more directly than a change of government? It may be that the High Court in the future will be willing to find in the Constitution an implied right to personal information whether held in the public sector or in the private sector, particularly in respect of information necessary for the individual to make an informed decision on some matter of vital concern such as health or employment.

We believe that the time has come to re-examine and re-evaluate the current restrictions on FoI legislation throughout Australia. The application of FoI to the public sector has not resulted in the ruination of government but, as we have seen, has had a positive effect on the operations of government. The public's right to know should no longer be restrained by artificial distinctions as to the character of the holder of information. The distinction between public and private sectors cannot be sustained in regard to information access issues. Decisions impacting on individuals are not limited to the public sector. Many instances can be cited where private organisations exercising considerable power make decisions which directly impact on individuals. The effect of those decisions is out of proportion to the degree of access those individuals have to the underlying information. We should not shirk from endeavouring to extend the individual's right to access information in the private sector. The precedents in the credit reporting industry and the banking industry provide examples for future extension. Access to all relevant information, whatever the source, is required to enable people to make choices in their lives and to decide upon what course of action most suits their needs.

Madeline Campbell and John Ey rs

Madeline Campbell and John Eyers are legal officers with the Commonwealth Attorney-General's Department.

The views expressed in this article are the views of the authors and are not to be taken to be representative of the Commonwealth Attorney-General's Department.

This article was presented at the 'Info One' Conference on Freedom of Information, Adelaide, September 1993.

References

1. Airo-Farulla, G., 'Public and Private Law in Australian Administrative Law', (1992) 3 *PLR* 186; Sampford, C., 'Law, Institutions and the Public/Private Divide', (1991) 20 *FLR* 185; Harlow, C., 'Public and Private Law: Definition without Distinction', (1980) 43 *Mod Law Rev* 241; Woolf, H., 'Public Law - Private Law: Why the Divide?', (1986) *Pub Law* 220.
2. Sampford, above, p. 198.
3. Sampford, above, p. 219.
4. Bayne, P., 'The Ambit of Judicial Review': the ARC Report', (1989) 63 *ALJ* 627.
5. Barnes, J., 'Is Administrative Law the Corporate Future?' (1993) 21(1) *Aust Bus Law Rev* 66.
6. Douglas, R. and Jones M., *Administrative Law: Cases and Materials,* Federation Press, Sydney, 1993.
7. *Australian Capital Territory Pty Ltd v The Commonwealth* (1992) 66 ALJR 695 (the *Political Broadcasts case).*
8. *R v Trade Practices Tribunal; Ex Parte St George County Council* (1974) 130 CLR 533, per Barwick CJ at 543; *Actors and Announcers Equity v Fontana Films Pty Ltd* (1982) 150 CLR 169, per Mason J at 207-8; and *Commonwealth v Tasmania* (the *Dams case)* (1983) 46 ALR 625, per Mason J at 713-4 and per Deane J at 813-4, but cf. Brennan J at 790.
9. *R v Federal Court of Australia; Ex Parte WA National Football League (Inc) (Adamson)* (1979) 143 CLR 190; *Re Kuring-gai Co-operative Building Society (No 12)* Ltd (1978) 36 FLR 134, 22 ALR 621; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.
10. *Fencott v Muller* (1983) 152 CLR 570 at 601-2.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

DICKSON and VICTORIA POLICE FORCE
(No. 92/1522)

D cided: on 20 August 1993 by Deputy President Rizkalla.

Section 35 and s.50(4) of the FoI Act: Information about the Solicitors' Guarantee Fund.

Ms Dickson sought access to documents: a letter compiled by the Secretary of the Law Institute of Victoria and an opinion of Hartog Berkeley, QC, delivered to the Law Institute in 1978. The application concentrated on the advice of Hartog Berkeley, QC. The documents were held by Victoria Police and it denied access on the basis of s.35 of the *FoI Act.* Ms Dickson was represented by Mr Little who had made a similar application which he had abandoned with the view of pursuing it with Ms Dickson's application.

The Tribunal rejected an initial matter raised by the applicant which questioned whether the advice fell under s.35 at all as it could be determined that the advice came under s.35(2) in that it contained information relating to commercial or finan-

cial business. The Tribunal then considered the broader submission that on the grounds of equity the confidentiality provisions of the *Fol Act* do not apply to government or public bodies when they relate to public issues of areas which concern dealings with public moneys. In arguing this the applicant referred to a decision of Mason CJ in *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* 32 ALR 484. The Tribunal held that the decision was not relevant to the application of the *Fol Act* and did not have the effect submitted by the applicant.

The Tribunal was satisfied on the evidence that the material had been communicated in confidence. It then considered whether the information would be contrary to the public interest in impairing the ability of the police to obtain similar information in the future. In relation to the information from the Law Institute the Tribunal held that there was no reasonable likelihood that such advice would not be provided to the respondent by the Law Institute in the future. The respondent then argued that if it affected other persons in the position of the Law Institute then that was sufficient to find that it would impair the ability of the respondent in the future. On considering the authorities, the Tribunal held that the likelihood of a public body such as the Law Institute being affected by this disclosure was remote and thus not sufficient for the test under s.35(1)(b) of the Act.

The Tribunal then considered the public interest in the event that it was wrong on the above point and held that there was a greater public interest in having information available about the Solicitors' Guarantee Fund than in the ability of the Police Force to collect similar information in the future. The Tribunal therefore set aside the respondent's decision and directed the release of the advice of Hartog Berkeley, QC, dated 22 February 1978.

[K.R.]

REILLY and KILMORE AND DISTRICT HOSPITAL (No. 92/53034)

Decided: 26 August 1993 by Mrs Bretherton (Presiding Member).

Sections 33(1) and 35(1): employment-related documents.

The applicant sought access to four documents relating to her employment at the Kilmore and District Hospital ('the hospital') where she had been the Director of Nursing.

The hospital had decided to appraise itself of staff morale problems after the issue had been raised at a Board meeting. The Board then opened up a meeting for members of staff, other than the applicant, at which the Board was informed that the staff had held a no-confidence vote in respect of the applicant as director of nursing. This was submitted to the Board with an attachment. These were two of the four documents.

The Board then received a letter from Dr Janis Baker (Document 3) and the Board resolved to meet with the applicant to discuss the content of that letter and the no-confidence motion. As the applicant went on sick leave the meeting did not take place. The Board then received a letter from another person (Document 4). The applicant did not resume her duties and her position was eventually terminated.

In relation to the no-confidence document the Tribunal was not satisfied that the document was handed to the Board in confidence, and even if it had been, the Tribunal was not satisfied that it would be reasonably likely to impair the ability of the respondent to obtain similar information in the future. As such the document did not satisfy exemption under s.35(1) and was released to the applicant.

In contrast, the Tribunal held that the attachment to the no-confidence motion and the letter of Dr Baker had been provided in confidence and it was satisfied that there was a reasonable likelihood that it would impair the ability of the respondent to obtain similar information in the future 'to more than a trifling or minimal degree'. As such, the applicant was not entitled to access to that document.

The last document relied on s.33(1) and the Tribunal considered the balancing exercise involved with unreasonable disclosure of personal information. On reading the letter the Tribunal held that it would involve an unreasonable disclosure of information in that it dealt with personal matters of a type that if released would lead to that third person being identified and may well result in that person suffering stress and anxiety.

[K.R.]

NEW SOUTH WALES FoI DECISIONS

Court of Appeal

THE COMMISSIONER OF POLICE v THE DISTRICT COURT OF NSW AND PERRIN

(NSW Court of Appeal, Kirby P, Mahoney and Clarke JJA, 2 S pt mb r 1993)

There is no right of appeal to the Supreme Court of New South Wales on the merits or on questions of law from a decision of the District Court given under the *Freedom of Information Act* 1989. The court in this matter was asked to exercise the jurisdiction conferred by s.69 of the *Supreme Court Act* 1970 and grant relief which in former times had been effected by way of the prerogative writ of *certiorari.* Under s.69 the same type of relief is afforded by the court but by way of judgment or order made under the *Supreme Court Act.*

To obtain the order sought it required the Commissioner — the party seeking the relief — to establish that there was an error of law on the face of the record. Essentially, the Commissioner's case was that the District Court had misconstrued the *Fol Act* in an appeal before it and in doing so had committed an error of law which was apparent on the face of the record, namely, in the reasons for judgment published by the court (H.H. Bell J).

The proceedings involved the meaning of cl. in Schedule 1 to the *Fol Act* — the personal affairs exemption. The Commissioner had deleted the names and identifying particulars of certain police officers and public servants from documents