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### Court favours Government on FoI *The Age* September 6, 2006

In a decision described as a "terrible blow for accountability", the High Court has upheld a decision to deny public access to sensitive Treasury documents. The court upheld a decision by the Administrative Appeals Tribunal (AAT), which ruled that *The Australian* newspaper's freedom of information editor, Michael McKinnon, was not entitled to access certain Treasury documents under the Freedom of Information Act. At the centre of the case is sensitive Treasury information relating to personal taxation bracket creep and the number of wealthy people claiming the first home buyer's grant.

Mr McKinnon sought access to the documents in 2002, but his request was denied by Treasurer Peter Costello. Mr Costello issued a certificate over the documents that barred their release and he argued that to reveal the documents would be contrary to the public interest. Mr McKinnon appealed to the High Court after the Federal Court dismissed his appeal against the AAT decision. He argued that the AAT should have considered competing facets of the public interest.

The High Court ruled 3-2 the AAT was not permitted to do that but was instead required to find whether there were reasonable grounds for the claim that disclosure would contradict the public interest, and that it had not made any error in this case.

Democrats senator Andrew Murray said the decision was a "terrible blow for accountability".

"The upholding the right of the executive to withhold matters from the public which are of great public interest and which do not affect our national security and safety is regrettable," he said.

He warned the decision could lead to increased secrecy of Government documents.

"There is a danger that the Cabinet will use the majority decision of the High Court as an imprimatur for further unwarranted secrecy and concealment." Labor's legal affairs spokeswoman Nicola Roxon said the decision was "a loss for the public."

"The whole community, not just *The Australian* newspaper, who took this case, are the losers today, as the Government has been given more encouragement to keep flouting the basic tenets of democracy," Ms Roxon said. She said the decision showed the Freedom of Information Act needed urgent reform.

"FoI has become a joke under this arrogant, out-of-touch government, but the law will clearly allow this to continue unless it is changed."

## ADR and The Australian Press Council

The Australian Press Council is the self-regulatory body of the print media whose aim is to help preserve the traditional freedom of the press within Australia and ensure that the free press acts responsibly and ethically. An advocate of Freedom of Information (FoI) and the reform of the FoI Act 1982, it made news of its own when it lodged an *amicus curiae* brief in support of *The Australian* newspaper's request to access treasury documents relating to taxation bracket creep and the first home buyer's grant, *Michael McKinnon v Secretary Department of Treasury*, only to see the High Court uphold the AAT's decision to deny such access. We asked Deb Kirkman how the Council resolves disputes lodged by aggrieved readers.

There is an old proverb that suggests a bird in the hand is worth two in the bush. This applies to readers of newspapers and magazines who come to the Australian Press Council seeking redress. It offers a quick, economic and inclusive alternative dispute resolution to aggrieved readers when compared with the slow, costly and impersonal slog of the courts.

The Australian Press Council was established in 1976. The Australian Journalists Association had been advocating such a body for decades. The press proprietors finally agreed, jumped rather, in reaction to a discussion paper issued by the then Minister for the Media. Five options had been appended to the paper for debate only, the last of which suggested instituting a system of newspaper licences that could be granted, suspended, or withdrawn on the basis of community satisfaction with newspaper performance. The proprietors were forced into action, realising it was better to regulate themselves than be regulated by government.

Based mainly on the British Press Council model, its charter is to promote a free and responsible press. Liberty does not mean licence. The Australian Press Council was given dual, interdependent, roles – to maintain the character of the Australian press in accordance with the highest journalistic standards, and to preserve its established freedom. It has brought together 22 representatives of the owners of the means of information, the journalists who inform, and the citizens who have the right to be informed.

The Press Council accepts complaints about mainstream Australian publications, including the ethnic press, together with the websites of its constituent members. It receives about five inquiries, by email or telephone, for every formal written complaint, of which there are about 400 each year. Forty percent of these are either refused as they do not breach any of the statement of principles, referred to a more appropriate body, not followed up by the complainant, or are withdrawn for legal reasons. The remainder are handled by mediation or adjudication.

Mediation is not an obligatory step in the Press Council's complaints process. It is, however, strongly endorsed and actively promoted. The result is that both parties have ownership of the process and will be the active participants in reaching a satisfactory resolution of the complaint. Mediations are handled by direct contact with the publication concerned, or by a face-to-face mediation conducted by the executive secretary, case manager or a public member of the Press Council. All have been trained in mediation.

Often, a published letter to the editor is all that is needed. And there have been countless corrections, clarifications and apologies published, all promptly without cost and without the need for a lawyer.

There are no rules of settlement. Solutions are often found outside the square.

- One paper, for example, offered a peak health organisation the opportunity to address each year's new intake of journalism cadets.
- A government department's complaint was settled by a published apology, and a news feature on its work.
- A broken embargo was redressed through an op/ed piece submitted by the complainant.
- A bylined humorous column that backfired was met with a personal apology of the writer.
- A briefing note, circulated to all reporters and sub-editors, amended an incorrect description of the cause of Meningococcal Disease.
- One complainant rejected an offered correction and apology, and was happy that the paper agreed to his counter-suggestion of a donation to the Australian Cancer Research Foundation.
- A couple which had their privacy invaded did not wish further publicity. The parties agreed that the paper would write articles covering events to be held by two associations with which the complainants were affiliated.

These mediated complaints are a win for both the complainant and the publication. They have agreed on the outcome of a complaint.

If a mediation is unsuccessful, or if a complainant has chosen not to pursue mediation, s/he can refer the matter to the Complaints Committee. Twenty per cent of complaints reach this final stage.

The seven member committee has a majority of public members. Briefs on the complaints are sent out to Press Council members three weeks prior to hearings. Both the complainant and the publication are invited to attend, but there is no onus on either party to do so. The hearings are informal, no legal representation is allowed and no recordings are made. They take the form of a round-table discussion where both parties are given the opportunity of an opening address, answering any questions of the committee, and offering concluding comments. Each is given ample time to put their point across.

After a hearing the committee decides on a recommendation on the complaint. The recommendation is then considered by the full Council, which meets the following day. Sometimes a decision is clear cut – a definite breach of one of the statement of principles, or no breach at all. These are the easy complaints, but there are not many of them. Most of the complaints that reach the adjudication stage are those that raise ethical issues that are not so black or white. There is no voting along blocks. In my 13 years with the Press Council I cannot recall a single occasion when the constituent members have voted en-masse to dismiss, and the remainder of the Council to uphold. The complaints are very carefully considered, debated, and voted upon. When a majority has been reached, an adjudication on a complaint is finalised. It will outline the complaint, the publication's response, whether the complaint has been upheld in

**Judgement Days**

**Andrew Clark**  
*The Australian Financial Review*  
 28 April 2006

*Andrew Clark on the battle for the soul of Australia's highest court*

... The Mason court also found a guarantee of political free speech in the constitution, after decades of newspapers being inhibited by costly, and at times capricious, defamation cases. In a series of decisions from 1992 to 1995 (*Nationwide News v Wills*, *Australian Capital Television v Commonwealth*, *Theophanous v Herald & Weekly Times*), judges threw out cases where they restricted the right of journalists and others to engage in robust analysis of issues, institutions and public figures.

Mason says, "One of the features in the thinking of that time is that the old defamation law had a chilling impact on what journalists would write. That is vitally important!"

"Much as we might be disposed to criticise the media for a lot of the things the media does, at bottom one of the fundamental foundations of our democracy is the capacity and the willingness of the media to probe into what is happening in public life. It may ultimately be as important a protection as any other we have, perhaps the most important protection."

"To that extent the decision in the *ACT TV* and subsequent cases of defamation, and ultimately taking shape in the *Lange* decision, were vitally important for Australian democracy and vitally important for the freedom of the press in this country!" ... [afr.com.au](http://afr.com.au)

whole or in part, or dismissed, and the reasons why.

The Press Council has no punitive powers. Its authority rests solely on the co-operation of the Australian print media. When an adjudication is issued, the Press Council expects it to be printed in the publication concerned.

That isn't to say that publications always agree with adverse determinations. Nor, of course, are complainants delighted when their matter is dismissed. This is the risk

of placing a matter for adjudication – the final decision is no longer in your hands.

My advice to complainants and publications is to take the leap, give mediation a try.

*Deb Kirkman is the Case Manager for the Australian Press Council. She holds a Master of Arts Degree (in History) from the University of Sydney and has completed a commercial mediation course conducted by the ACDC.*



**We gratefully acknowledge the kind permission of Jenny Coopes and Justinian to reproduce the above illustration. Jenny Coopes is a triple-Walkley award winner and much lauded illustrator and cartoonist whose work has been published in major newspapers and books.**

## Bench Press Justice Bruce Debelles

**Congratulations to IAMA Fellow, the Hon Bruce Debelles, Justice of the Supreme Court of South Australia, who was recently appointed Chairman of the Judicial Conference of Australia.**

**Push to get politics off bench**  
**Marcus Priest**

*The Australian Financial Review*  
 10 October 2006

Judges are considering a radical plan to dramatically improve the transparency of judicial appointments by demanding that all candidates apply and be subjected to scrutiny by an independent appointments commission. The plan would end the practice of attorneys-general selecting judges on the basis of informal consultation with senior members of the judiciary and legal profession, which has led to concerns that political factors outweigh merit. The plan would also curtail the "secret soundings" of senior judges about potential appointees and instead require all applicants to provide their own list of referees. Under the proposal, a nine-member commission would be established to interview and test judicial candidates in order to recommend a shortlist of three candidates for government.

**All candidates for positions – from the High Court through to state and territory magistrates courts – would need to apply and be vetted by the commission.**

A commission would be established federally and in each state and territory, but it could be serviced by a single secretariat under the plan, which was devised by two senior Australian legal academics and presented to the Judicial Conference of Australia on Sunday. The JCA consists of judges and magistrates drawn from all jurisdictions and levels of the Australian court system. If a government rejected the commission's first shortlist, it would need to provide public reasons for doing so and would need to choose a candidate from a second

shortlist provided by the commission. "Transparency is a key means to provide greater accountability in the appointments process," the paper says. "One of the consequences of the current lack of formal and articulated processes and standards is that it leads to disingenuous statements by attorneys-general when announcing its appointment."

The paper, *Appointing Australian Judges: A New Model*, was written by JCA secretary John Williams of Adelaide University and Simon Evans of Melbourne University.

It was commissioned by the JCA after concern about recent appointments and growing support among judges for a more transparent process. It has not been adopted as official policy and judges are expected to consider the paper's recommendations in coming months before finalising a position on the issue. "There is a real view that something better than the current system ought to be considered," JCA chairman Bruce Debelles said. "But opinion is divided on whether all aspects of the proposal ought to be accepted. One factor which could hold up presentation of an overall position is whether there should be included in the proposal [for a commission] the ability to deal with complaints against judges." ...

Shadow attorney-general Nicola Roxon supported the "general thrust of the proposed change, but was not wedded to it as the only option".

Attorney-General Philip Ruddock said he had full confidence in the present system of appointments. "Few would disagree that the system of appointments – made by different political parties over a long period of time – has delivered good outcomes," Mr Ruddock said. ... Read more: [afr.com.au](http://afr.com.au)



**JUSTICE BRUCE DEBELLES**  
 Fellow

**STOP PRESS**

Justice Debelles will deliver a plenary address, **'Should Judges Conduct Mediations?'** at the 2007 IAMA Conference, *New Horizons In ADR*.



**MALCOLM HOLMES QC**  
 Associate Member

## Appointment Malcolm Holmes QC

**Congratulations to Malcolm Holmes QC who was appointed President of the Chartered Institute of Arbitrators (Australia) Ltd in October 2006. A profile of the Sydney-based barrister and academic is published in CIArb's October 2006 newsletter, *The ADR Reporter*, at [www.arbitrators.org.au](http://www.arbitrators.org.au)**