Public Access to the Records of The Australian Security Intelligence Organisation under the Archives Act *1983 (Cth)*

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1. *Introduction*

If one were to assess the importance of the *Archives Act* 1983 (Cth) ("the Act")[1] solely on the basis of the attention it has received from both legal commentators and the Commonwealth Government, one would be led to believe that it is one of the least important Acts enacted by the Commonwealth Parliament. In fact, the Act has been largely ignored in legal literature[2] and the Commonwealth Government has yet to commission a review of the operation of the Act[3] despite recommendations for such a review being made, on two separate occasions, by the Senate Standing Committee on Legal and Constitutional Affairs[4] and despite an undertaking given in May 1985 by Bob Hawke, the then Prime Minister, that a "review of the Archives Act [was] scheduled for 1987".[5]

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1 The Act received the Royal Assent on 3 November 1983. It came into effect on 6 June 1984.

2 For a notable exception see Cremean, D J, "What is and is not an Exempt Archival Record?: AAT sets out its views on Access" (1989) 24 (9) *ALN* 16.

3 The recent inquiry conducted by the Parliamentary Joint Committee on the Australian Security Intelligence Organisation does not fit this description. As was indicated by the Committee itself, "the present Review is not the proposed review of the Archives Act. The Committee has been concerned in this Inquiry with those operations of the Australian Archives relevant to the question posed to the Committee. That is to say, how the activities of ASIO only are affected by the operations of the Archives Act": Parliamentary Joint Committee on the Australian Security Intelligence Organisation, *ASIO and the Archives Act: The Effect on ASIO of the Operation of the Access Provisions of the Archives Act* (1992) at 5 (Joint Committee).

4 See Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information — Report on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* (1979) at 357 (First Senate Committee) and Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Operation and Administration of the Freedom of Information Legislation* (1987) at 6 (Second Senate Committee).

5 *Cth Parl Deb*, House of Representatives, 22 May 1985 at 2889. In July 1994, Duncan Kerr, the Acting Attorney-General, asked the Australian Law Reform Commission and the Administrative Review Council to "determine whether the *Freedom of Information Act* 1982 (Cth) (FOI Act) has achieved the purposes and objectives it was designed to achieve

This state of affairs is quite surprising when one bears in mind that the Act was seen, when it was first introduced in Parliament in June 1978, as sharing, with the *Freedom of Information Act* 1982 (Cth) (FOI Act), the aim of establishing "for members of the public legally enforceable rights of access to information in documentary form held by ministers and government agencies except where an overriding interest may require confidentiality to be maintained".[6]

Furthermore, in relation to documents dealing with matters affecting national security, the Act plays a more prominent role than the FOI Act as it allows, subject to a number of exceptions, access to those records of the Australian Security Intelligence Organisation (ASIO) and of Australia's other intelligence agencies,[7] which are at least thirty years old. The FOI Act, on the other hand, does not apply to documents which are either held by, or relate to, the intelligence agencies[8] or which have "originated with or ... have been received from" such agencies.[9]

It is the aim of this article to explore the issue of whether the Act strikes a satisfactory balance between the needs of national security and the democratic goals which are attained through public access to documents concerning ASIO.

2. *Time for a More Liberal Approach towards Public Access to ASIO Records*

The FOI Act does not provide access to pre-December 1977 documents.[10] To obtain access to such documents one must rely on the Act pursuant to which

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and, if it has not, to recommend changes to improve its effectiveness": Australian Law Reform Commission, *Freedom of Information Issues Paper 12* (September 1994), par1.1 (ALRC). Despite the similarity of the access regimes established under the Act and the FOI Act, there is no reference to the Act in the "terms of reference" of this review.

6 Senator Durack (the then Commonwealth Attorney-General), *Cth Parl Deb*, Senate, 9 June 1978 at 2693. See also Stokes, H J W, "The Evaluation of Commonwealth Access Policy" in McKemmish, S and Piggott, M, (eds), *The Records Continuum Ian Maclean and Australian Archives First Fifty Years* (1994) 49 at 61. ("Ironically the *Archives Act*, which in some ways was the poor relation of the *Freedom of Information Act*, has had much greater success in bringing important groups of records into the public domain.") This is, of course, not the sole purpose of the Act. In relation to the other goals which the Commonwealth Government sought to achieve, through the enactment of the Act, see *Explanatory Memorandum: Archives Bill 1983* at 2.

7 Australian Secret Intelligence Service (ASIS), the Defence Signals Directorate (DSD), the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA).

8 Section 7(1) of the FOI Act, in combination with Part I of Schedule 2, removes ASIS, ASIO and ONA from the category of "prescribed authorities" for the purposes of the Act. Accordingly, these bodies are not subject to the FOI Act. Section 7(2), in combination with Part II of Schedule 2, exempts Defence Department "documents in respect of the activities of" DIO and DSD from the FOI Act. For a discussion of the arguments for and against this blanket exemption see First Senate Committee, above n4 at 156; Second Senate Committee, above n4 at 66-7; and ALRC, above n5 at par 12.3.

9 Section 7(2A). It is interesting to note that Senator Haines was fearful that the ultimate effect of s7(2A) "could well be, ... that other agencies or individuals would ensure exemption of a document that they do not want released, but which would otherwise be released under the Act, by sending it first to one of the mentioned security organizations": *Cth Parl Deb*, Senate, 7 October 1983 at 1336.

10 Section 12(2) of the FOI Act. (A number of exceptions, not relevant for present purposes, are however provided in s12(2)).

access is allowed to records which have been in existence for at least thirty years.[11]

Section 31 places upon the Australian Archives the obligation to cause "all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access". Pursuant to section 3(7), a record is in the open access period if a period of 30 years has elapsed since the end of the year ending on 31 December in which the record came into existence.[12] "Records" are defined as including not only documents[13] but also sound recordings, coded storage devices, magnetic tape and discs, microform, photograph, film, map, plan or model, or a painting or other pictorial or graphic work.[14] The term "Commonwealth records" encompasses the records of ASIO as it is defined, in section 3(1), as including "a record that is the property of the Commonwealth or of a Commonwealth institution".

A. Conceptual Framework

Attention can now be turned to the development of a conceptual framework pursuant to which the Act's treatment of ASIO records can be analysed. A convenient starting point is the First Senate Committee's exposition of the goals which public access to government documents fulfil.

The first justification for public access legislation is the right of each individual to know what information is held about him/her in government records.[15] The second rationale is based upon the belief that "the accountability of the government to the electorate, and indeed to each individual elector, is the corner-stone of democracy and unless people are provided with sufficient information accountability disappears".[16]

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11 This means, of course, that government documents created between 1965 and November 1977 are currently not available to the public. The First Senate Committee was of the view that "it is quite undesirable that this gap [between the FOI Act and the Act] should exist. When enacted the Freedom of Information and Archives Bills should provide a continuum.": First Senate Committee, above n4 at 172. Once this gap closes, in 2008, it will be necessary to decide whether access to 30-year old documents should be regulated by the FOI Act or by the Act: see Public Records Support Group, "Access to public records in Victoria — the 30 year rule" (1992) 37 *FOI R* 4 at 5.

12 Section 56 does, however, confer a discretion on "the Minister ... in accordance with arrangements approved by the Prime Minister" to release documents in advance of the 30-year rule: see Stokes, above n6 at 60–1.

13 However, for reasons of convenience, the terms records and documents are used interchangeably in this article.

14 Section 3(1).

15 First Senate Committee, above n4 at 21. "There is a public interest in the rights of individuals to have access to documents ... that relate quite narrowly to the affairs of the person who made the request": *Re James and Australian National University* (1984) 2 AAR 327 at 343.

16 First Senate Committee, above n4 at 22. See also "Submission of the Australian Council of Archives to the Joint Committee", *Submissions authorised for publication* (1992) at 23. "This Act, together with Freedom of Information and other legislation, forms part of a body of law designed to enhance the public accountability of Commonwealth administration"; Minority Report of the Royal Commission on Australian Government Administration, *Appendix-Volume Two*, Parl Paper 187/1976 at 4–5 (Minority Report); Birrell, M, "'D Day' for open government laws in Queensland" (1991) 34 *FOI R* 39: "Put simply, the

The final benefit flowing from greater public access to information about the executive, highlighted by the First Senate Committee, is that it "will lead to an increasing level of public participation in the processes of policy making and government itself".[17]

Two other major justifications for "freedom of information" are worth mentioning. The first concerns the proposition that the relationship between public access to information and freedom of expression is a symbiotic one, one nourishing the other. As Weeramantry J noted: "the right to communicate and the right to know are opposite sides of the same coin".[18] The second justification revolves around the notion that "in a system where disclosure is more nearly the norm, errors are less likely to occur".[19] In light of the considerations above, it is not surprising that "the right to know [has] the status of a human right in international law".[20]

Consequently, it is reasonable to conclude that, from a conceptual perspective, there is a strong presumption that disclosure of information concerning governments is always in the public interest.[21] Being a presumption it can, of course, be rebutted. Such a result can only be accepted, however, where the agency in question is able to demonstrate that the interests served by non-disclosure of the documents concerned are, on balance, of greater importance than the benefits attained through disclosure.[22] To put it differently, the philosophy

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Westminster system of Parliament needs the support that open government laws provide"; and Birkinshaw, P, *Freedom of Information: the Law, the Practice and the Ideal* (1988) at 18: "A lack of information facilitates a lack of accountability for the exercise of power and influence".

17 First Senate Committee, above n4 at 22. See also Minority Report, above n16 at 5: "Protection of the public's right not only to scrutinise the exercise of political power but also to participate in the administrative processes by which decisions are made is a critical need"; and Austin, R, "Freedom of Information: The Constitutional Impact" in Jowell, J and Oliver, D (eds), *The Changing Constitution* (1985) 332 at 340: "Denial of information ... impedes the main goal and *raison d'être* of participatory democracy, namely self-government by the people".

18 Weeramantry, C, "Access to Information: A New Human Right: The Right to Know", paper presented to the 10th Commonwealth Law Conference; Nicosia (1993) at 3. See also, Boyle, A, "Freedom of Expression as a Public Interest in English Law" [1982] *Public L* 574 at 577: "Information is the basis of all freedom of expression: without access to relevant and important information, a right to publish opinions becomes vacuous" and Mo, J S, "Freedom of speech, freedom of information and open government in Queensland" (1991) 36 *FOI R* 58: "Both freedom of speech and principles of open government suggest the necessity of a public right of access to government information".

19 Editorial of the *Sunday Times* quoted in Polomka, P, "Open Government and the IDC Report", in Royal Commission on Australian Government Administration, *Appendix Volume Two*, Parl Paper 187/1976, 171 at 174. See also ALRC, above n5 at par 3.2.

20 Weeramantry, above n18 at 8.

21 It is interesting to note that "in October 1993 the US Attorney-General issued a memorandum requiring agencies to apply a presumption of disclosure and instructing agencies to apply the exemptions [under the FOI Act] only where there is a reasonable expectation of harm from disclosure": ALRC, above n5 at par 2.19. Similarly, the ALRC has indicated that since the FOI Act "was intended to foster an attitude of openness in government, it may be considered that the Act should lean towards disclosure and that the objectives of the Act should have an overriding influence on the interpretation of the entire Act": ALRC, above n5 at par 3.5.

22 "The tribunal should be empowered in all cases to balance the public interests which the exemptions seek to protect against the public interest in disclosure. If the legislation is to

underlying public access statutes requires that the public interest in disclosure be balanced against the public interest in secrecy when considering whether or not to allow public access to particular documents.[23]

The next crucial issue that needs to be canvassed is whether there is anything about ASIO which renders the reasoning above partially, or totally, inapplicable, to public access to ASIO records under the Act. When he appeared before the Joint Committee, John Moten, the then Director-General of ASIO, argued that:

> Since the passage of the Archives Act measures have been taken to provide for the political accountability of the Organisation by the creation of the office of the Inspector-General of Intelligence and Security and the appointment of the Parliamentary Committee. ASIO regards these subsequent events as disposing of the argument that the Archives Act should be regarded as a means of making ASIO accountable.[24]

The passage above nicely displays the inability, or perhaps unwillingness, of ASIO to comprehend, and thus accept, the important and independent role played in a democratic society by statutes which confer upon members of the public rights of access to documents held by governments and their agencies.[25] This unsatisfactory approach is reflected in ASIO's "Guidelines for Assessing Records" which advises assessing officers (that is, the officers who determine whether or not to accept requests for public access to particular records held by ASIO) that "as a general rule, when doubt exists as to whether material should be deleted, a conservative policy should be followed and exemption sought".[26]

While an analysis of the system of political accountability that has been established in relation to ASIO is beyond the scope of this article, it is worth highlighting its main features and weaknesses.[27]

Pursuant to the *Inspector-General of Intelligence and Security Act* 1986 (Cth), one of the functions of the Inspector-General is to inquire into any matter that relates to, among other things, the compliance by ASIO with the law

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allow the legal system to adjust to changes in community expectations and community attitudes then it should make some provision for choosing between conflicting public interests": Spigelman, J J, "Open government in the Seventies" in Royal Commission on Australian Government Administration, *Appendix Volume Two*, Parl Paper 187/1976, 157 at 162. See also Fox, R, "Protecting the Whistleblower" (1993) 15 *Adel LR* 137 at 138.

23 This ensures that "when documents are withheld, they are only withheld for good and sufficient reasons": First Senate Committee, above n4 at 29. It also enhances the credibility of public access regimes as their "credibility is dependent on a public appreciation that the competing public interests are, in fact, being judicially balanced": *Gold v Canada* (1986) 64 NR 260 at 266.

24 Quoted in Joint Committee, above n3 at 7.

25 The argument that the advent of a system of political accountability for ASIO has resulted in the Act having no role to play in making ASIO accountable fails to recognise "that experience of government has shown that accountability has to be expanded by providing for some right of citizen access to government documents": statement of Mark Brogan, reproduced in Joint Committee, *Transcript of Evidence* (1992) at 407 (Evidence).

26 Inspector-General of Intelligence and Security, *Complaints by Dr G. Pemberton and Mr D. McKnight Against the Australian Security Intelligence Organisation* (1992) at 9.

27 For a fuller account see Lee, H P, Hanks, P J and Morabito, V, *In the Name of National Security — The Legal Dimensions* (1995) at ch 8.

and the directions or guidelines given to ASIO by the Attorney-General, the propriety of particular activities of ASIO and any act or practice of ASIO that is inconsistent with any human right.[28] The only power which has been conferred on the Inspector-General, in relation to any illegality or impropriety that his investigations uncover, is that of making recommendations, including the power to recommend that compensation be paid to any person who "has been adversely affected by action taken by an agency".[29] The Attorney-General is under no obligation to implement the Inspector-General's recommendations or to take any action in relation to the Inspector-General's findings.

The Joint Committee was established in 1987 as a result of the introduction of a new Part IVA into the *Australian Security Intelligence Organisation Act* 1979 (Cth).[30] Hanks has argued that

> this committee should be recognised as very much a token gesture from the government to the critics of ASIO within the Labor Party, for in reality the committee has very little in the way of effective review powers; and is placed firmly under government control in its membership, its agenda and its investigative powers.[31]

The cogency of this analysis becomes clear when one considers provisions such as section 92C which restricts the powers of the Joint Committee only to those matters that are referred to it by the Attorney-General or by either House of Parliament.[32]

Furthermore, the conduct, in Parliament, of the members of the Joint Committee following the tabling of its report on the Act did nothing to inspire confidence in bipartisan parliamentary committees. McGauran, the National Party member of the Joint Committee, accused the government members of the Joint Committee of releasing information, ascertained in the course of the review of the Act, in order to veto the promotion of the Deputy Director-General of ASIO.[33] These accusations were met by vigorous denials and expressions of resentment by the Labor members who accused McGauran of "actually politicising this debate to an incredible degree"[34] and of being the person who released "information about the Romanian Government and drug deals"![35]

McGauran was correct in asserting that the Joint Committee's "accountability function will be better served if ASIO is confident that members of the Committee are genuinely serious about its work and not running their own political campaigns about the Organisation and not using the Committee as an outlet for their own political agenda".[36] Unfortunately, the performance of the Joint Committee members in this "exchange" demonstrates that members of

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28 Section 8(1)(a).
29 Section 22.
30 *Australian Security Intelligence Organisation Amendment Act* 1986 (Cth).
31 Hanks, P J, "Accountability for Security Intelligence Agencies in Australia" in Hanks, P J and McCamus, J D, *National Security: Surveillance and Accountability in a Democratic Society* (1989) 43 at 48.
32 See also ss92B and 92K.
33 *Cth Parl Deb*, House of Rep, 2 April 1992 at 1669.
34 Id at 1670.
35 Id at 1671.
36 Id at 1670.

parliamentary committees are more likely to give priority to their "own political agenda" than to the task at hand.

For present purposes, the crucial point to note about the deficiencies of the system of accountability for ASIO,[37] as outlined above, is that the need for public access to government documents, as a means of making the executive accountable, is far greater in relation to ASIO than it is in relation to most other government agencies.

This conclusion is fortified by the covert nature of the activities of ASIO.[38] It cannot be denied that this secrecy renders it more difficult for those engaged in espionage, sabotage, subversion, terrorism or similar activities to resist attempts by ASIO to obtain information about their activities. But this ability of ASIO to operate away from public scrutiny, to a degree which is not enjoyed by any other entity in our society, increases considerably the potential for abuse of power. In light of the conclusions above, and as a result of the FOI Act's blanket exemption for ASIO, the access provisions of the Act play a fundamental role, as they provide the only mechanism to enable "public scrutiny of ASIO's information handling practices".[39]

B. The Thirty-Year Rule

Another crucial issue that needs to be addressed is whether the significant time gap of 30 years, that exists between the creation of a document and the public's access to it under the Act, renders the benefits achievable under the FOI Act, such as accountability, unattainable under the Act. Moten appears to believe that this is in fact the case, as he argued that "the Archives Act should not be confused with the Freedom of Information Act. It is not an instrument of accountability and contains no major provisions for altering records in which inaccuracies exist".[40]

The reasoning above is unacceptable. The ability to scrutinise only documents which are 30 years of age does not render the Act's contribution to the accountability of ASIO insignificant. The existence of a 30-year rule simply means that accountability takes on a different dimension. Access to both current and old government documents allows us to determine, inter alia, whether government officials have acted arbitrarily or in excess of their power. This information, when derived from current documents, enables informed public debate to take place as to what action, if any, should be taken against either the officials in question or those who were in a position to prevent or detect such improprieties. A similar debate is unlikely to follow a discovery of executive

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37 In October 1993, the Prime Minister, Paul Keating, announced a wide-ranging inquiry into national security following the alleged theft of secret documents from ASIO. It is also interesting to note that in February 1994, the Commonwealth Government established a Royal Commission to consider the structure, management and activities of ASIS. This Royal Commission was commissioned shortly after a number of adverse revelations were made about ASIS by two former ASIS officers, on the ABC program *Four Corners*.

38 One of the functions of ASIO is to obtain, correlate and evaluate intelligence relevant to security: see s17(1) of the ASIO Act 1979.

39 Submission of O'Connor, the Privacy Commissioner, to the Joint Committee: Evidence, above n25 at 157.

40 Quoted in Joint Committee, above n3 at 7.

impropriety made through access to documents under the Act, as a result of the "30 year gap". However, the ability to "expose" injustices which were perpetrated by the executive 30 years ago can still play a valuable role in the enhancement of the accountability of the executive. In fact, this knowledge will enable an analysis to be conducted as to whether the identified improprieties were isolated instances or were instead symptomatic of a wider problem inherent in the way in which the functions of the agency have traditionally been carried out. Once this analysis is undertaken, society will be in a better position to prevent the recurrence of similar problems in the future.[41]

Consequently, discovering, and learning from, the past mistakes of our governments is an indispensable feature of an effective system of accountability. As Macintyre argued, "[u]ltimate accountability is through historical accountability. The ability of historians to get in and look at what the organisation was doing is an important safeguard in that organisation".[42]

Furthermore, the absence of provisions for altering incorrect records does not prevent the Act from conceptually recognising, and giving practical effect to, the principle that there is a public interest in an individual having access to documents relating to the individual's personal affairs. This is, of course, achieved by allowing individuals, who have been the subject of security surveillance, access to the relevant ASIO files so that they may ascertain how their lives have, in fact, been affected by ASIO's activities.[43]

The Act can also be seen as having a limited role to play in improving decision-making by the executive. As McMillan noted:

> some believe that if these [defence and security intelligence] agencies and other agencies are forced to reveal their past iniquity they might thereafter feel purged, or encumbered by psychological millstones, and able once again to act in the public interest.[44]

The 30-year rule provides some insight into the issue of whether a liberal approach towards disclosure is, in fact, in accordance with the philosophy underlying archives systems. The First Senate Committee endorsed the 30-year rule[45] despite conceding that "thirty years is a lengthy period (and in

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41 "In the US ... the greatest number of requests have been directed to the defence, security intelligence and law enforcement agencies, and many requests seek access to documents which pre-date the Act. In part the purpose has been to review the past operations of these agencies to see whether they have operated in a manner that is either illegal or odious and thus whether new mechanisms for control and supervision of the agencies is [sic] required": McMillan, J, "Freedom of Information in Australia: Issue Closed" (1977) 8 *Fed LR* 379 at 419–20.

42 Evidence, above n25 at 366.

43 Australian Archives have recently "established a procedure under which subjects of ASIO files who wish to contest material on the file may add a statement to the file; however they are not permitted to alter or delete information from the file in any way": Correspondence I received, dated 4/11/94, from Stokes, National Director, Records Evaluation and Disposal, Australian Archives. The Joint Committee had recommended that "in relation to current intelligence records, a person who wishes to ensure that information concerning himself/herself is accurate, may bring that information to the attention of the Inspector-General of Intelligence and Security who will bring it to the attention of the responsible Intelligence Agency for appropriate action": Joint Committee, above n3 at 55.

44 McMillan, above n41 at 421.

45 "The introduction of the thirty-year rule was ... very much a response to British initiatives.

fact would preclude people from learning the full story about many events which happened during their life as electors)".[46] It justified its conclusion on the basis that "an open access period really should operate as such; the public should be able to expect that most documents will be available for perusal when they have reached a predetermined age".[47]

It can, therefore, be said that the adoption of the 30-year rule represents a clear recognition that the benefits which are secured by the disclosure of documents which have been in existence for at least 30 years will, in most cases, outweigh the interests which are served by secrecy.[48] To put it differently, the inability to obtain documents concerning our "contemporary history" is the price members of the public have been asked to pay in order to be in a position, at some distant point in time, to make a fully informed assessment of past events concerning our government and/or its agencies. The concept of an open access period thus provides support for the view that a liberal approach should be taken in relation to the disclosure of documents which have been in existence for at least 30 years.

In conclusion, it can be said that a strong case exists for expecting that a liberal approach be taken by the Commonwealth Parliament in relation to public access to ASIO records under the Act. Unfortunately, a separate regime, which places substantial obstacles in the path of those who wish to be allowed access to ASIO records, has been created under the Act in relation to national security documents.

This access regime is virtually identical to that established under the FOI Act. This wholesale adoption of the FOI mechanism strongly brings home the lack of thought that accompanied the drafting of the Act. In fact, it indicates that no consideration was apparently given to the fact that the safeguards which are thought to be necessary in relation to recent national security documents are, to a significant extent, inappropriate and unnecessary for documents which have been in existence for 30 years.

It was not until 1978 that the Senate Standing Committee on Constitutional and Legal Affairs, in the course of considering the Archives Bill, made the first attempt to look at the 30 year rule from an Australian perspective.": "Submission of the Australian Archives to the Queensland Electoral and Administrative Review Commission", *Archives Legislation — Public Submissions* (1991), Appendix B at 2 (Archives Submission).

46 First Senate Committee, above n4 at 337. The 30-year rule has been described as "offensive because it prevents useful research into contemporary history": Minority Report, above n16 at 109.

47 First Senate Committee, above n4 at 337. See also Legal and Constitutional Committee of Victoria, *A Report to Parliament Upon Freedom of Information in Victoria* (1989) at 122–4; Queensland Electoral and Administrative Review Commission, *Report on Review of Archives Legislation* (June 1992) at 65-6; and Queensland Electoral and Administrative Review Commission, *Issues Paper No 16 — Archives Legislation* (September 1991) at 48–49.

48 "A thirty year period is now the standard adopted by the countries of the European Community. Those countries which, until recently, have withheld records for longer initial periods are moving towards 30 years as the acceptable minimum": White Paper presented to the UK Parliament by the Chancellor of the Duchy of Lancaster, *Open Government* (Cm 2290; 1993) at 62.

C. *Access to ASIO Records*

An important aspect of this special regime is section 29 which exempts ASIO and the other intelligence agencies from the requirement, which the Act imposes on Commonwealth agencies, of transferring to the Australian Archives those records which are either no longer needed by the organisation or which are 25 years old.[49] ASIO is thus able to maintain control over its records until a request is made by members of the public, to the Australian Archives, for the release of particular records.[50]

The practical effect of this regime is that "the Director-General of ASIO can withhold records from Archives without the knowledge of the Director-General of the Archives or the ministers responsible for ASIO or the Archives".[51]

The rationale for conferring such a broad power on ASIO has been described in the following terms by the Senate Standing Committee on Education and the Arts:

> It has been suggested that ASIO records are of an exceedingly personal and sensitive nature and that the number of people who need to have access to them is strictly limited. It was therefore a policy decision, no doubt based on considerations of national security, that the Director-General of the Archives or the responsible minister need not have access to ASIO records in order to agree or disagree on whether or not records should be transferred to archival custody.[52]

The reasoning set out above is far from convincing.[53] There are a number of institutions and government departments such as the Department of Defence which, like ASIO, are in possession of very sensitive material concerning national security.[54] It is difficult to accept that ASIO records warrant greater

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49 Section 27.

50 The respective functions of ASIO and the Australian Archives in relation to requests for access to documents held by ASIO were described as follows by Stokes of the Australian Archives: "We [the Australian Archives] ... register that application and transfer it to ASIO ... It [ASIO] transfers to us all folios that are either suitable for release in their entirety or are suitable for release subject to certain security — related exemptions. Those come into us, together with a list from ASIO of the exemptions it wishes to be applied to them. We then go through and apply those exemptions. We also examine the records to see whether there are any extra exemptions we might wish to claim on personal sensitivity grounds, and the remainder is then released to the applicant": Evidence, above n25 at 54.

51 Senate Standing Committee on Education and the Arts, *Inquiry into the Archives Bill 1978*, Parl Paper 219/1979 at 22 (Arts Committee). The accuracy of this description was confirmed by Stokes when appearing before the Joint Committee. When asked by the Presiding Member, "how does one guarantee that the request is being honoured and followed through if the individual making the application cannot depend on your capacity to go to those files or the indexes to test the availability or presence of that document?", he replied: "I cannot swear that there is not material that ASIO does not acknowledge the existence of to us ... It is really a matter of trust ... There is a limit to how far you can check the whole process": Evidence, above n25 at 59.

52 Arts Committee, id at 22.

53 The Arts Committee, itself, was of "the opinion that the discretionary power given to the Director-General of ASIO in the disposal of the records of his organisation under the provisions of sub-clause 28(8) should be removed": Ibid.

54 "[The Department of] Defence does have concerns for the protection of security records because of sources and the identity of staff although perhaps not to the same extent as ASIO. Defence deals with a substantial volume of foreign sourced and ASIS material":

protection than documents affecting national security held by these other entities. Furthermore, members of the Australian Archives do have access to ASIO records when they consider applications for "internal reconsideration"[55] of the decisions of ASIO not to release requested documents.[56] It is difficult to comprehend why considerations of national security require the exclusion of Archives staff from ASIO documents at the "initial" stage but not at the internal reconsideration stage. In relation to the argument that ASIO records are of "an exceedingly personal ... nature", it must be borne in mind that the responsibility for determining what documents, or parts of documents, should be withheld from disclosure on the basis of privacy considerations has been placed, by the Act, on the Australian Archives.[57] Hence, the most competent entity in the area of privacy exemptions is the Australian Archives, not ASIO.[58]

D. Conclusive Certificates

But, perhaps, the most unsatisfactory feature of the access regime established under the Act is the system of conclusive Ministerial certificates which has been created in relation to documents affecting, inter alia, security, defence or international relations. The Minister has been vested with the discretion to issue a certificate to the effect that he/she "is satisfied that a record contains information or a matter of a kind referred to in paragraph 33(1)(a) or (b)".[59] Section 33(1)(a) constitutes the "national security exemption" as it exempts records containing "information or matter the disclosure of which under the Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth". The effect of a certificate is to establish conclusively, so long as it remains in force, that the record in question is an exempt record.

A legislative scheme pursuant to which the executive decides what documents concerning its activities are to be made available to the public is clearly anti-democratic.[60] If public access to complete and reliable information concerning

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above n26 at 19.

55 Section 42(1) provides that "where a person ... is dissatisfied with the decision on the application, he may ... apply in writing to the Archives for a reconsideration of the decision".

56 As was revealed by Stokes, "I see every document involved once we get to the internal reconsideration": Evidence, above n25 at 56.

57 Section 33(1) (g) of the Act provides that a record is exempt from public access if it would involve the unreasonable disclosure of information about the personal affairs of any person.

58 Both the Inspector-General and the Joint Committee rejected ASIO's argument that ASIO should be authorised to exclude records from public access on the grounds of privacy: see, respectively, above n26 at 21 and Joint Committee, above n3 at 32–3. ASIO's concern with the privacy aspects of making its records available has been described by Pemberton as "a little belated, ironic and perhaps even hypocritical and self-serving": above n26 at 3.

59 Section 34(1). The scheme, under the Act, of conclusive certificates is almost identical to that set up under the FOI Act. Conclusive certificates are also employed under the New Zealand archives scheme: see ss8(2)(c) and 20 of the *Archives Act* 1957 (NZ).

60 "No democratic policy should rely upon the executive to police itself, no matter how dedicated, well-intentioned, honest and hard-working its public officials ... If medical practitioners bury their mistakes, public officials hide theirs under the cloak of secrecy and anonymity": "Toward a More Efficient Government Administration", Efficiency Task Force Working Paper (1975) at 199. See also First Senate Committee, above n4 at 28 and 179–81 and Parker, R, "Freedom of Expression vs. National Security: The Pivotal Role of

the executive is an integral part of the process of making the executive accountable, it logically follows that the executive itself should not be the ultimate adjudicator of what information about its operations should be disclosed to the public.[61]

The problems created by the inability of an independent body, such as the Administrative Appeals Tribunal (Tribunal/AAT), to make a ruling as to whether a document is in fact exempt were highlighted by the First Senate Committee:

> The lack of appeal against a determination made pursuant to an exemption is inconsistent with the dual notions that the Bill confers rights upon the public and that the onus is upon the government to justify secrecy to some body other than itself. It is clearly desirable in any system of administrative justice that disputed questions of law or fact be subject to settlement by an adjudicative process. This ensures fairness, it produces better decisions on the part of the Executive, and it enhances acceptance of the law and respect for official decisions.[62]

A superficial analysis of the Act might lead to the conclusion that most of the benefits articulated above can be attained under the Act as persons wishing to be allowed access to documents covered by a certificate can ask the Tribunal to determine "whether there exist reasonable grounds" for the claim for an exemption.[63] But such analysis, like most superficial analyses, would be misleading. In fact, it must be borne in mind that the AAT, in dealing with certificates, asks itself "not whether it considers a document exempt but whether reasonable grounds exist for such a claim. It is a 'supervisory' jurisdiction because the Tribunal simply asks whether such grounds 'exist', and whether they are 'reasonable'".[64]

Furthermore, the criterion of "reasonable grounds" is quite easy to satisfy:

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the Freedom of Information Act" (1990) 28 *Free Speech Ybk* 132 at 142.

61 "Those exercising power cannot be held accountable and responsible if they have exclusive possession and control of the information upon which their decisions, policies, and actions are based": Austin, above n17 at 333. See also ALRC, above n5 at par 5.30 ("the need for conclusive certificates to protect sensitive documents has been questioned, as has the effect of a certificate in reducing the Administrative Appeals Tribunal (AAT) to a recommendatory role").

62 First Senate Committee, above n4 at 181. See also Report by Kaye Lamb, W, *Development of the National Archives*, Parl Paper 16/1974 at 14: "The National Archives Act should provide for a Public Access Tribunal to which persons who feel that access to certain records is being wrongly or unnecessarily denied to them can appeal ... The tribunal should have power to order the disclosure of records and its decisions should be final" and Administrative Review Council, *Review of Commonwealth Merits Review Tribunals Discussion Paper* (September 1994) par 2.124: "The underlying reason for independent merits review is to ensure that in any particular case, the person dealing with government receives a correct decision according to the law, and, if there is a choice of more than one correct decision, the one that represents the most appropriate exercise of the discretion vested in the decision maker".

63 Section 44(5).

64 *Re Slater and Director-General, Australian Archives* (1988) 8 AAR 403 at 410. This should be contrasted with s44(1) which, in cases not involving conclusive certificates, confers upon the AAT the power "to decide any matter in relation to that application that, under this Act, could have been or could be decided by the Archives, and any decision of the Tribunal under this section has the same effect as a decision of the Archives".

> to be "reasonable" it is requisite only that they [the grounds for the exemption] be not fanciful, imaginary or contrived, but rather that they be reasonable: that is to say based on reason, namely agreeable to reason, not irrational absurd or ridiculous.[65]

Even if a finding is made against the issuer of the certificate, an event which has yet to occur under the Act,[66] the Tribunal cannot order the release of the documents nor can it set aside the certificate.[67] The original decision-maker is left free to reaffirm the appropriateness of his/her decision to issue the certificate, notwithstanding a contrary finding by an independent body such as the AAT.[68]

The high probability of a ruling by the AAT in favour of the issuer of the certificate, as a result of the relative ease with which the test of "reasonable grounds" can be satisfied,[69] and the non-binding nature of the AAT's findings, make one suspect that the government's aim in conferring a supervisory role upon the AAT in cases involving certificates was, not to provide effective safeguards against abuses in the use of certificates, but instead to use the AAT to create the illusion that allowing the executive to have the final say in matters concerning national security does not create any problems at all.[70]

The non-binding nature of the Tribunal's decisions in cases involving conclusive certificates is not reconcilable with the principles upon which the important doctrine of natural justice/procedural fairness has been formulated. As was vigorously argued by L'Heureux — Dubé J of the Supreme Court of Canada, in relation to the advisory role of a Canadian Committee in disputes concerning security clearances:

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65 Ibid. As was conceded by Deputy President Todd of the AAT, "it follows that it is a heavy thing for the Tribunal to reject a certificated claim": ibid.

66 See, eg, *Re Slater; Re Throssell and Australian Archives* (1986) 10 ALD 403; and *Re Throssell and Australian Archives (No 2)* (1987) 14 ALD 296. Therefore, Deputy President Todd's fear, that "it would not be too difficult, and could be tempting for the Tribunal, its role being only recommendatory anyway, to slide from 'certificate' review into disguised 'merit' review", was misplaced: above n64 at 410.

67 Therefore, the powers of the AAT, in relation to conclusive certificates, are even more limited than those of judges when reviewing administrative decisions. In fact, if the court makes a ruling in favour of the person aggrieved by the administrative decision in question, it may quash the decision. This state of affairs is somewhat ironic, given that the philosophy underlying the "new administrative law" was to deal with the inadequacy of judicial review, as a safeguard against abuses by the executive, by creating an administrative Tribunal and conferring upon the Tribunal all the powers and discretions conferred on the original decision-maker.

68 See s45(1) which requires the "appropriate Minister", within 28 days of the Tribunal's ruling, to decide whether to revoke the certificate.

69 As it will be shown later, the difficulties faced by those wishing to be allowed access to documents covered by conclusive certificates are increased further by (a) the absence of a public interest test, (b) the deferential approach of the AAT in relation to matters concerning national security and (c) the poorly drafted national security exemption.

70 It is interesting to note that under the Archives Bill 1978 and the FOI Bill 1978, the powers of the AAT in relation to conclusive certificates were even more limited than those it currently possesses. In fact, its powers did not extend to reviewing the decision to give the certificate or the existence of proper grounds for the giving of the certificate. This provision was based on a recommendation made by the Interdepartmental Committee: Interdepartmental Committee, *Policy Proposals for Freedom of Information Legislation*, Parl Paper 400/1976 at 25 (IDC).

> to conclude that, following the Committee hearings to which he [the original decision-maker] has been a party, he may, without any other reasons than those he expressed at the hearings reverse a decision [of the Committee] which goes against his personal judgment, contradicts one of the fundamental tenets of natural justice.[71]

In light of the various difficulties created by the use of conclusive ministerial certificates, it would be reasonable to expect that the decision to introduce such certificates under the Act be supported by the expected attainment of benefits which are reasonably regarded, on balance, as of greater importance than the interests which are adversely affected by the employment of conclusive certificates. Sadly this is not the case as reliance has been placed, first, on a distorted and outdated view of the principle of ministerial responsibility and, second, on the "myth"[72] that matters pertaining to the nation's security require special expertise possessed only by the executive.[73]

The first rationale was articulated by Viner when introducing the FOI Bill in the House of Representatives in August 1981:

> It would be inconsistent with the responsibility of Ministers to the Parliament for the proper conduct of government that final decisions on the public release of documents damaging to vital public interests should be in the hands of tribunals not accountable to the Parliament.[74]

The inadequacy of the reasoning above was effectively exposed by McMillan:

> The only interest which could be damaged by depriving Ministers of the adjudicative authority to be judges in their own cases is the political interests of Ministers themselves. It is hardly necessary to add that the constitutionally based principle of ministerial responsibility was never designed to protect such venal interests. To the contrary, that principle was the centre point of a system of political accountability — a system which has long been ineffective due to the rise of an omnipotent executive that controls the flow of information and can operate free from outside scrutiny.[75]

Even if the assumption is made that Parliament is an effective forum for scrutinising the conduct of the Government, the Act does not, in relation to

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71 *Thomson v The Queen* (1992) 89 DLR (4th) 218 at 229. Pursuant to s50(b) of the Act, the Minister in question "shall, upon application to the Tribunal, be entitled to be a party to the proceedings."

72 An American Senator referred to "the outworn myth that only those in possession of military and diplomatic confidences can have the expertise to decide with whom and where to share their knowledge": Congressional Record, vol 20 (1974) at 17,002.

73 The approach of the Labor government in relation to conclusive certificates provides strong evidence to substantiate David Dale's conclusion that "Politicians talk about FOI laws when they're in opposition and it all fades away when they get into government": Dale, D, "A psychology of secrecy". (1991) 34 *FOI R* 41 at 42. In fact, Senator Evans, as the Shadow Attorney-General, put forward amendments to the FOI Bill to ensure "that there be no absolute discretion vested in Ministers to deny access to any class of documents however sensitive, on the face of it, those documents might be": *Cth Parl Deb*, Senate, 29 May 1981 at 2377. As the Attorney-General, he revealed that " the Government has considered it premature to take the further step of abolishing the system of conclusive certificates": *Cth Parl Deb*, Senate, 2 June 1983 at 1180.

74 *Cth Parl Deb*, House of Rep, 18 August 1981 at 42. See also Second Senate Committee, above n4 at 147 and IDC, above n70 at 25.

75 McMillan, above n41 at 402–3. See also First Senate Committee, above n4 at 179–81; Minority Report, above n16 at 10–1; and Polomka, above n19 at 171–6.

ministerial certificates, provide Parliament with adequate means to fulfil this function. As was pointed out by the Second Senate Committee, "there is no requirement that Ministers inform the Parliament of the issue of conclusive certificates".[76] The obligation imposed on the Minister to "report" to Parliament arises only once a decision is made by the issuer of the certificate not to revoke the certificate, following a finding by the Tribunal that there were no "reasonable grounds" for the claim that the documents in dispute are exempt.[77] The inability of most applicants to persuade the Tribunal that the onerous test of lack of "reasonable grounds" has been satisfied in their particular case[78] has relegated the supervisory role of Parliament, in relation to ministerial certificates, to the realm of theory rather than practice. Even where the obstacles adverted to above are surpassed, the Act does not prescribe any procedure pursuant to which the refusal to revoke the certificate is to be reviewed by a Parliamentary committee.[79]

The second argument that has commonly been put forward in support of conclusive certificates is that decisions concerning the disclosure of documents dealing with matters pertaining to security

> ought properly to be made by a Minister or the most senior officials of Government. Only they are in the position to make such a judgment. An administrative body, such as the Administrative Appeals Tribunal or a court, is not in a position to make such a judgment.[80]

As it will be shown below, the scheme for dealing with challenges to the withholding of documents which are alleged to fall within s33(1)(a), and which are not covered by a conclusive certificate, provides clear evidence that the government, itself, does not regard this justification for conclusive certificates convincing.

Where a claim for a s33(1)(a) exemption is not supported by a conclusive certificate, the unsuccessful applicant is left with two options. The first option is to apply to the Australian Archives for an "internal reconsideration" of the

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76 Second Senate Committee, above n4 at 147. It should be noted that the original version of the FOI Act, as enacted in 1982, did not require the issuer of the conclusive certificate, in a case where the Tribunal has found that there are no reasonable grounds for claiming that a document is exempt, positively to decide whether to revoke the certificate or not. There was also no requirement to advise Parliament of the decision not to revoke the certificate. These omissions were rectified in 1983: see s34 of the *Freedom of Information Amendment Act* 1983.

77 See s45(1) of the Act. "If the minister cannot be required to disclose information, then he is not in reality answerable, let alone responsible, to Parliament": Austin, above n17 at 335.

78 In relation to the FOI Act, the Second Senate Committee revealed that: "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": Second Senate Committee, above n4 at 145.

79 An instance of a refusal to revoke a certificate, following an adverse finding by the AAT, was provided by the Treasurer in 1986. There was no discussion or scrutiny, in Parliament, of the Treasurer's decision. All that appears in the Senate Hansard is a two line entry (under the sub-heading of "Papers") : "Freedom of Information Act — Notice by the Treasurer under section 58A": *Cth Parl Deb*, Senate, 22 August 1986 at 409.

80 Attorney General's Department, *Freedom of Information Bill 1978: Background Notes* (1978) at 5.

decision.[81] When appearing before the Joint Committee, Stokes of the Australian Archives, made it clear that

> at the internal reconsideration stage, the decision is ultimately for the Director-General of Australian Archives or his delegate which, in the case of ASIO records, is me. There is close consultation with ASIO on that decision, but the decision is ultimately one for the Archives and not for ASIO.[82]

The second option is to apply to the AAT instead of applying for, or following the unsuccessful completion of, an internal reconsideration. The Tribunal can determine whether the record is exempt. A negative finding by the Tribunal can result in the release of the record.[83] It is thus difficult to take seriously the argument that national security is beyond the expertise of persons other than Ministers and high-level officials given that for the past 11 years the Act has conferred upon the Australian Archives and the AAT the power to make legally binding determinations as to whether documents, which could have been, but were not, made exempt through the issue of conclusive certificates, are in fact exempt.[84] Another flaw in the reasoning in support of conclusive certificates was exposed by Parker:

> We must realize that jurists are no less qualified to evaluate the evidence and the reasons for accepting or rejecting claims in national security cases, than they are in such sophisticated fields as engineering, patents, medicine, social policy-making, and the like.[85]

The absurd results which stem from the existence of two fundamentally different regimes in relation to the same kind of documents, namely documents the release of which is regarded by the executive as prejudicial to national security, were evident in *Re Throssell (No 2)*.[86] This case concerned a request made by Throssell for access to documents of ASIO relating to him and his mother. Release of these documents was denied on the basis of a number of exceptions, including s33(1)(a). A conclusive certificate was not signed until after the Tribunal had commenced to hear the application. As a result of the issue of the certificate the Tribunal could no longer review the decision to withhold access "on the merits but ... [was] limited to determining ... the question

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81 See s42 of the *Archives Act*.

82 Evidence, above n25 at 56.

83 Above n81 ss44(1) and (2).

84 It is also important to remember that under the US *Freedom of Information Act* (1966), the final decision as to whether a document falls within the national security exemption, s552(b)(1), is left to the courts.

85 Parker, above n60 at 142. This reduction of the powers of the AAT, in relation to conclusive certificates, "is also curious on doctrinal grounds. The very foundation of the Tribunal's function in the other areas of its jurisdiction is its ability to review the discretion of an agency": McMillan, above n41 at 428. See also ALRC, above n5 at par 5.30.

86 Above n66. The differences between cases involving certificates and those not involving certificates are not limited to the adjudicating powers of the AAT. Section 46, for instance, requires, in cases concerning conclusive certificates, the AAT to be comprised of presidential members. See also s47 which requires "certificate cases" to be held in private. This last provision has been criticised because "in some cases the Archives and the agency controlling the records would be satisfied for only part of their evidence and submissions to be given in private. However, s47 as presently drafted grants no discretion in the matter": Archives Submission, above n45 at 14.

[of] whether there exist reasonable grounds for the claim that the records are exempt".[87]

This drastic reduction of the powers of the AAT, and consequently of the applicant's chances of success, occurred without there being any change in the nature of the documents in dispute or in the statutory exemptions relied upon. A simple signature on a document was enough to radically change the level of protection from disclosure which could be conferred upon the documents in question under the Act.

Needless to say, a system which allows the executive, at any time before the completion of a Tribunal hearing,[88] to make the final ruling of the Tribunal non-binding, simply through the production of a certificate, is clearly open to abuse. In relation to ASIO records the problems are exacerbated as a result of the delegation to the Director-General of ASIO of the power to issue conclusive certificates.[89] The absence, under the Act, of a blanket exemption for ASIO records similar to that contained under the FOI Act has been the subject of constant and vigorous criticism by ASIO since 1984.[90] ASIO's unwillingness to accept the notion of "open government" is further illustrated by its recommendation that the right of applicants to appeal from decisions of ASIO to the AAT should be abolished[91] and by the Inspector-General's finding that ASIO "allowed the resources assigned to archives work to remain depleted and so obviously insufficient to the task".[92] It is thus not difficult to agree

87 Above n66 at 294.

88 In fact, Neaves J was of the view that a certificate should be accepted by the AAT at any time "before the Tribunal adjudicates upon the application for review of the decision to refuse access to the records": ibid.

89 Evidence, above n25 at 401 and Joint Committee, above n3 at 11. The authorisation to delegate the power to issue conclusive certificates is contained in s34(8). For criticisms of this provision, see First Senate Committee, above n4 at 180; McMillan, above n41 at 400; and Second Senate Committee, *Transcript of Evidence* at 550 (Selby: "[with delegation], there is in fact no accountability for the decisions that are made").

90 "Unlike virtually all countries with which ASIO exchanges information, Australia's Archives legislation does not provide a mechanism for the class exemption of the documents of security and intelligence agencies from public access": ASIO, *Annual Report: 1986-87* at 29. See also ASIO, *Annual Report: 1988–89* at 34. In the UK, the records of the security and intelligence agencies are, with the Lord Chancellor's approval, exempted from the public access regime established under the *Public Records Acts* 1958 and 1967: see Open Government, above n48 at 69. In New Zealand, no similar blanket exemption is available to the New Zealand Security Intelligence Service under the *Archives Act* 1957. In Canada and the US, FOI legislation regulates public access to both current and old records. Section 16(1)(a)(iii) of the *Access to Information Act* 1982 (Can) allows the head of an agency to refuse to disclose any record which contains information obtained or prepared by a specified investigative body "in the course of lawful investigations pertaining to ... activities suspected of constituting threats to the security of Canada ...". However, this provision does not apply to records more than twenty years of age. In the US, the *Central Intelligence Agency Information Act* 1984 authorises the Director of Central Intelligence to exempt the "operational files" of the Central Intelligence Agency from the provisions of the FOI Act. "Operational files" are defined to include files relating to foreign intelligence and counter-intelligence.

91 Evidence, above n25 at 117.

92 Above n26 at 16. The opposite view of Stokes should, however, be noted: "in the course of the last decade there has been a significant liberalisation of ASIO access policy ...": Stokes, above n6 at 60. He has also pointed out that "in the early cases [concerning ASIO records] ministerial certificates were applied extensively ... in more recent cases ministerial certificates have been notably absent": ibid.

with Whitaker that "secrecy is both an endemic condition and a fervent aspiration of security agencies".[93] In light of this "almost metaphysical" belief in secrecy by those who run intelligence agencies,[94] a statutory scheme which allows the head of ASIO to make "conclusive" decisions as to whether documents held by ASIO should be released to the public is clearly unacceptable as it does not place sufficient importance on the interests which are served by public access to ASIO records. As has been noted by Xanders in relation to the American classification system, "without independent review, interest balancing will remain skewed by the propensity of government officials to overclassify and exaggerate security interests and to cover up illegal or embarrassing government activities".[95]

In light of the analysis above it is reasonable to conclude that there is

> no justification for a system of conclusive certificates in a public access statute. There should be less justification for restricting the right of appeal, so basic in our legal system, to a dissatisfied applicant for a document that is thirty years of age.[96]

E. Absolutist Approach

The independent review of the decisions of ASIO not to release documents requested by the public, which the Act allows, in cases not involving ministerial certificates, through the internal reconsideration conducted by the Australian Archives and the review "on the merits" conducted by the AAT, has not resulted in a significant increase in the records of ASIO which have been made available to the public under the Act.[97] The reasons for this undesirable state of affairs will now be considered.

A major contributing factor has been the "absolutist" approach that the Act's national security exemption adheres to. An absolutist approach is an approach pursuant to which certain interests, in this case the security of the nation, are regarded as being *always* superior to other competing interests.[98]

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93 Whitaker, R, "Access To Information and Research on Security and Intelligence: The Canadian Situation": in Hanks and McCamus, above n31 at 184.

94 Powers, T, *The Man Who Kept the Secrets: Richard Helms and the CIA* (1981) at 297.

95 Xanders, E L, "A Handyman's Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information" *(1989) 5 JL & Politics* 759 at 797. See also *Church of Scientology v Woodward* (1982) 43 ALR 587 at 609 per Murphy J.

96 First Senate Committee, above n4 at 348.

97 In relation to "internal reconsideration", Stokes has indicated that "there has never been a situation in which we [ASIO and Archives] have not been able to resolve any differences and agree on a decision"; consequently, "internal reconsideration in general does not substantially alter the original decision. Occasionally there may be a reasonably substantial change but that tends to be the exception": Evidence, above n25 at 75 and 76. See also Archives Submission, above n45 at 11. When appearing before the Joint Committee, on 15 October 1990, Jacobi, Chairman of the Advisory Council on Australian Archives, indicated that "the Council understands that the total number of AAT directed releases [of ASIO records] to date constitute only 21 folios. Of these only two folios were ordered to be wholly released": Evidence, above n25 at 85. To this list one must add the material released by Deputy President Johnston in *Re McKnight and Australian Archives* (1992) 28 ALD 95 at 121–2.

98 "By drafting the Bill in this way, it is intended to emphasise the need to justify any denial

The practical effect of this principle is that when the AAT is asked to make a ruling, in relation to a claim by ASIO (not supported by a ministerial certificate) that particular records are "exempt records" under the national security exemption, its function is limited to determining whether the records in question are, in fact, exempt. If the AAT makes a ruling in favour of ASIO, by holding that the records are exempt under the national security exemption, ASIO is no longer under a legal duty to release the records.[99] Therefore, the Tribunal has not been vested with the power to order that public access be granted to documents which fall within the national security exemption where the Tribunal forms the view that the public interest in disclosure outweighs the public interest that the exemption seeks to protect.[100]

National security is, undoubtedly, an important interest which may, on some occasions, justify the refusal to allow public access to particular government records.[101] But to elevate, as it has been done under the Act and the FOI Act, matters pertaining to security to a status of "overriding" importance is totally unjustified, as it contradicts the fundamental need of public access statutes to strike "a balance between the public interest served by access to information against the public interest in maintaining the confidentiality necessary for the operation of government".[102] Section 58 of the Act itself provides strong support for this assessment as it allows Ministers and Commonwealth agencies to give access to exempt records, including records falling within section 33(1)(a) where the Minister or agency "can properly do so or is required by law to do so".[103] Hence, section 58 recognises that there may be circumstances where disclosure is justified despite the fact that it adversely affects some of the interests protected by the Act's exemptions.[104]

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of access by reference to a public interest that *must, in the particular case, be preferred* to the public interest in access to the information in the document" (emphasis added): Senator Durack, *Cth Parl Deb*, Senate, 9 June 1978 at 2696.

99 "Where in proceedings before the Tribunal ... it is established that a record is an exempt record, the Tribunal does not ... have power to decide that access is to be granted to the record": s44(3) of the Act. The same approach to national security documents is followed under the FOI Act: see s33(1)(a).

100 The AAT has rejected the argument that an element of "public interest" ought to be implied in relation to s33(1)(a): *Re Throssell*, above n66; *Re Slater*, above n64 at 411; and *Re Aarons and Australian Archives (No 2)* (Decision No A90/180; 31 August 1992) at 20. Some hope is, however, provided by the following concluding remarks of Deputy President Johnston in *Re McKnight*, above n97 at 117: "[t]hough no public interest test is to be read into s.33 of the Act, a sense of proportion should nevertheless be maintained in relation to records that fall within the open record period".

101 "The disclosure of intricate technical defense information, such as that regarding cryptography or weapons systems, especially nuclear weapons, does not further policy discussion, and, in fact, hinders policy execution and poses a significant direct threat to national security": Xanders, above n95 at 791. See also the facts in *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624 and *United States v Reynolds* (1953) 345 US 1.

102 Viner, *Cth Parl Deb*, House of Rep, 18 August 1981 at 41.

103 "The Bill contains provisions to protect ... vital national interests such as security and defence ... But even in these cases the Bill does not prohibit information being made available. The Bill emphasises that ministers and agencies are free to make information available or to give access to documents in any case where this may properly be done": Id at 39–40.

104 "This highlights the fact that none of the interests sought to be protected are absolute values, to be protected at all costs": Spigelman, above n22 at 161.

The conferral of the discretion to release exempt documents upon the executive only is also contrary to one of the principles underlying the establishment of the AAT, namely that "the Tribunal ... may exercise all the powers and discretions conferred on the original decision-maker".[105]

An absolutist approach in relation to matters pertaining to the security of the nation fails to recognise that there are various degrees of harm, ranging from minor to very serious, which may be caused to national security as a result of the disclosure of particular documents. The very existence of classification systems in Australia and overseas pursuant to which security-related documents are classified as either "restricted", "confidential", "secret" or "top secret",[106] is predicated upon the ability to determine, in general terms, the extent of harm expected to flow from disclosure of documents.[107] It is difficult to comprehend why the avoidance of minor damage to security should be presumed to outweigh, at all times and regardless of the particular circumstances, the public benefits attained through public access to particular documents.[108]

Furthermore, the concept of "damage to the national security" encompasses a wide range of activities and not simply the violent overthrow of governments or invasion by foreign enemies. A good example of the breadth of the concept of national security is furnished by section 4(5) of the FOI Act which provides that "security of the Commonwealth" is to be taken as extending to:

(a) matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and

(b) the security of any communications system or cryptographic system of the Commonwealth or of any other country used for

  (i) the defence of the Commonwealth or of any country allied or associated with the Commonwealth; or

  (ii) the conduct of the international relations of the Commonwealth.[109]

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105 First Senate Committee, above n4 at 287.

106 See Parliamentary Joint Committee on the Australian Security Intelligence Organisation, *A Review of Security Assessment Procedures*, (May 1994) at 10–1, and Lustgarten, L and Leigh, I, *In From the Cold — National Security and Parliamentary Democracy* (1994) at 110.

107 In the US, President Reagan's Executive Order No 12,356 provides for three categories of classified information: "top secret", "secret" and "confidential": s1.1(a). It is interesting to note that the definition of the "confidential" category of documents is very similar to the Act's national security exemption as it provides that "'Confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security": s1.1(a)(3).

108 In the US, it has been argued that "the 'Confidential' category encompasses information which does not sufficiently threaten harm to the national security to outweigh the public interest in disclosure of such information": Goldston, J A, Granholm J M, and Robinson, R J, "A Nation Less Secure: Diminished Public Access to Information" (1986) 21 *Harv CR–CL LR* 409 at 474.

109 See also "Scope and content of concept of 'national security' " (1984) 58 *ALJ* 67; Hanks, P, "National Security — A Political Concept" (1988) 14 *Mon ULR* 114; Royal Commission on Intelligence and Security, *Intelligence and Security*, Fourth Report (1977),

The open-ended and subjective nature of key concepts such as "subversive",[110] "hostile", and "interests of the Commonwealth" makes it difficult to draw a clear distinction between what is, in fact, in the interests of Australia, on the one hand, and what is politically beneficial to the executive, on the other.[111] As Goldston, Granholm and Robinson argued, "the term 'national security' is politically charged. Its definition and scope vary with the changing policies of the administration in power".[112] This intrinsic vagueness and elasticity of the standard of "damage to the national security"[113] renders an absolutist approach highly unsatisfactory, as it results in the denial of public access to numerous government records, in circumstances where access would not have been, on balance, contrary to the public interest.

The criticisms of the absence of a public interest test assume an even more persuasive dimension when considered in the context of access to ASIO records under the Act. An approach pursuant to which the public benefits achieved through disclosure of government records are considered irrelevant when determining whether to allow disclosure of a particular record is totally inconsistent with the concept of an open access period as embodied in the thirty-year rule. It also nullifies, to a significant extent, the Act's ability to provide much-needed public scrutiny of ASIO. Moreover, a strong anti-disclosure stance is unnecessary in relation to ASIO records of 30 years of age as "nothing really gets stale quicker than intelligence".[114]

The difficulties faced by those wishing to be allowed access to ASIO records are intensified by, first, the broadly drafted security exemption and, second, the unwillingness of the Tribunal to disagree with ASIO's assessment of the adverse consequences which will flow from disclosure of their records.[115]

Section 33(1)(a) does not require ASIO to demonstrate that the damage to the national security produced by the disclosure is identifiable or detectable.[116] All that is required is that the expectation entertained by ASIO as to the harmful effect of disclosure be "reasonable".[117] ASIO's assessment will be

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vol 1 at 16–7; and McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report (1981) at 39–40.

110 See Gill, P, "Defining Subversion: the Canadian experience since 1977" [1989] *Public L* 617.

111 In *Chandler v Director of Public Prosecutions* Lord Pearce expressed the view that the phrase "prejudicial to the safety or interests of the State", which appears in s1(1) of the *Official Secrets Act* 1911 (UK), referred to: "the interests of the state according to the policies laid down for it by its recognised organs of government and authority, the policies of the state as they are, not as they ought, in the opinion of the jury, to be": [1964] AC 763 at 813.

112 Golston,et al, above n108 at 409.

113 Note, "National Security and the Amended Freedom of Information Act" (1976) 85 *Yale LJ* 401 at 411–2.

114 "National Security Decision Directive 84: Hearings Before the Senate Committee on Governmental Affairs", 98th Congress, First Session at 18 (1984).

115 "The AAT has upheld all substantial decisions concerning ASIO files challenged before it": above n26 at 17.

116 In the US, President Carter's Executive Order No 12,065 directed that information was to be classified only if disclosure could reasonably be expected to cause "at least identifiable damage to national security": s1302.

117 The existing national security exemption compares unfavourably with the exemption contained in the Archives Bill 1978 (Cth). Clause 31(a) exempted documents containing "information or matter the disclosure of which under this Division would prejudice the

regarded as reasonable as long as it is "based on reason ... and [is] not irrational, absurd or ridiculous".[118] It is difficult to see how applicants, who do not have access to the records concerned,[119] can be in a position to successfully argue that the decision was wrong, let alone "irrational, absurd or ridiculous".[120]

The extensive protection which has been conferred on ASIO records by the Act has been strengthened by the reluctance which the Tribunal has evinced in questioning ASIO's judgment on matters relating to national security. Representative of this deferential attitude is the Tribunal's acceptance of the mosaic theory. Pursuant to this theory, access to documents containing innocuous information can be prevented because "the gradual accumulation of small items of information, apparently trivial in themselves, could eventually create a risk for the safety of an individual or constitute a serious threat to the interests of the nation as a whole".[121]

The wide ambit of this theory was illustrated by the ruling in *Re McKnight*. In that case, Deputy President Johnston upheld ASIO's decision not to release certain documents by relying on the mosaic theory. This ruling was made notwithstanding ASIO's inability "to verify or identify the other circumstance which, when put with information to which access is sought, may reveal either a source of information or a particular method for collecting such information ...".[122]

Deputy President Johnston justified his decision by drawing attention to the fact that "the mosaic theory does not depend ... simply upon information within the possession or knowledge of a security organisation".[123] Consequently, all that ASIO needs to do, in order to successfully "defend" its decision not to release documents containing "innocuous" information, is to raise the possibility that an informed researcher may, one day, use this information in conjunction with other information (information which is not within the possession or knowledge of ASIO and the existence of which is, therefore, in the sphere of speculation), to make discoveries which may, in some unknown way, cause damage to our nation's security.[124]

The unsoundness of this theory was colourfully exposed by McKnight:

> Maybe there will be this mythical person who will put the mosaic together and find out, lo and behold, after years of work what will probably turn out

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defence, security or international relations of the Commonwealth".

118 *Re McKnight*, above n97 at 111. See also *Re Slater*, above n64 at 411; and *Attorney-General's Department v Cockroft* (1986) 12 ALD 468.

119 See, eg, *Re Slater*, above n64 at 404: "Most of the hearing had to take place in the absence of the applicant and not even the identity of the witnesses could be revealed to him" and *Re McKnight*, above n97 at 98: "Dr Flick ... objected to his exclusion, as the applicant's legal representative, from each of the two sessions in which sensitive evidence was given in confidence by a senior officer of ASIO. He submitted that his exclusion would deprive the applicant of a reasonable opportunity to respond to the evidence led in closed session".

120 "Parties seeking access to information are ... in a position of considerable disadvantage in arguing their claims to such access before a court or tribunal": Nettheim, G, "Open Justice and State Secrets" (1986) 10 *Adel LR* 281 at 293.

121 UK White Paper, *Reform of Section 2 of the Official Secrets Act 1911* (Cmnd 7205; 1978) at par 31.

122 *Re McKnight*, above n97 at 112.

123 Ibid.

124 "In practice, the categories of documents which may form part of a mosaic ... are not susceptible to precise definition" : Second Senate Committee, above n4 at 176.

> to be a pretty innocuous bit of material that is supposed to damage national security.[125]

The mosaic theory displays the same disregard for the public's legitimate need to have access to government records, which underlies the absolutist approach.

The feasibility of an approach that requires a balancing task to be undertaken when matters of national security are at stake is unambiguously demonstrated by the approach of Australian courts to claims of Crown privilege or public interest immunity that are based on grounds of national security.[126] The public interest served by secrecy has been weighed, by courts, against any competing public interest such as the interest in the administration of justice.[127] This judicial technique has also been applied in cases where the executive's claim for public interest immunity related to documents held by ASIO.[128] It is highly ironic that statutes, such as the FOI Act and the Act, that are intended to confer upon members of the public legally enforceable rights of access to government documents follow a more restrictive approach to access than that which is adopted by conservative courts.

Mention should also be made of President Carter's Executive Order No 12,065 which governed, between 1978 and 1982, the United States security classification system.[129] This Order established a public interest test which allowed the classifier to declassify documents when the public interest in disclosure outweighed the government's interest in maintaining secrecy.[130]

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125 Evidence, above n25 at 296.

126 A similar judicial approach has been taken in cases where the executive seeks to prevent, through injunctions, the publication of documents affecting national security: see *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 and *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 44. See, generally, Lee, et al, above n27, ch 6.

127 See *Alister v The Queen* (1984) 154 CLR 404. In Canada, ss37 and 38 of the *Canada Evidence Act* (1985) provide that, where ministerial objection to disclosure is made to a court on the "grounds that disclosure would be injurious to international relations or national defence or security", the Federal Court can order disclosure of the information if it concludes that the public interest in disclosure outweighs the public interest in confidentiality. See, generally, Lee et al, above n27, ch 5.

128 See *R* v *Bebic* (Unreported, Supreme Court of New South Wales, Maxwell J, 26 May 1980) and *Haj-Ismail v Madigan* (1982) 45 ALR 379.

129 Section 552(b)(1) of the US *Freedom ofInformation Act* (1966) exempts from disclosure: "matters that are- (A)specifically authorised under the criteria established by an executive order to be kept secret in the interest of national defence or foreign policy and (B)are in fact properly classified pursuant to such executive order". In 1991 Senator Patrick Leahy proposed changes to certain provisions of the US *Freedom of Information Act* (1966), including the exemption above. Had his proposed amendments been enacted, s552(b)(1) would have required the executive to show that disclosure "could reasonably be expected to cause identifiable damage to national defense or foreign policy" and that "the need to protect the information outweighs the public interest in disclosure": "Overseas Developments", (1991) 36 *FOI R* 66.

130 Section 3–303. The existing Executive Order (No 12,356) does not contain a public interest test.

3. *The Government's Proposed Changes to the Act — More of the Same*

An Archives Amendment Bill is scheduled to be introduced in Parliament in 1995. The Bill will adopt, with minor changes, the recommendations of the Joint Committee.[131]

Guidelines will be required to be issued by the relevant Minister to the intelligence agencies requiring the exemption from disclosure of foreign material received in confidence for such period as that material is restricted from public access in the country of origin.[132] The Act will be amended to preclude any appeal to the AAT from a certification by the Inspector-General that the guidelines issued by the Minister respecting protection of foreign derived material have been properly observed.[133]

The Joint Committee justified the amendment set out above with the following reasoning:

> It would appear that unwanted information has never been released. The concern is that the potential is perceived to exist and that this perception is sufficient to undermine the confidence of some supplying nations that their material is absolutely protected from disclosure.[134]

It is difficult to comprehend how such "concern" can exist given the extensive protection conferred on ASIO records by the Act including the ability of ASIO to conclusively determine whether its records are exempt. Furthermore, "foreign originated intelligence material is already withheld from public access for as long as the originating government wishes".[135]

The exemption of particular classes of documents for specified periods of time is unacceptable as it "would remove the discretion to release information in those classes even where it was clearly innocuous. Such a provision would result in a substantial increase in the amount of information exempted".[136]

This new exemption reflects the same pro-secrecy philosophy that underlies the absolutist approach adopted by the Act. As was persuasively argued by the First Senate Committee, "the fact that disclosure of particular information may be reasonably likely to impair the ability of an agency to obtain similar information in the future should not invariably give rise to an exemption of the relevant class of documents".[137]

The Bill will also guarantee the suppression of the identity of sources, agents and operatives in guidelines for a period of 30 years from the death of the agent, source or operative.[138] The question whether the release of a particular

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131 The Government response to the report of the Joint Committee is reproduced in *Cth Parl Deb*, Senate, 20 August 1992 at 379–82 (Government response).

132 Id at 379 and above n3 at 25.

133 Joint Committee, above n3 at 25 and Government response, above n131 at 380.

134 Above n3 at 24.

135 Correspondence I received, dated 18/8/94, from Sue Rosly, Assistant Director, Access and Information Services, Australian Archives.

136 Archives Submission, above n45 at 5.

137 First Senate Committee, above n4 at 157.

138 Joint Committee, above n3 at 28 and Government response, above n131 at 380. "The identity of ASIO operatives and agents are already withheld from public access": above n135.

record would be likely to lead to the disclosure of the identity of an agent will be subject to appeal to the AAT. [139]

While it may be accepted that agents and operatives should be fully protected by the suppression of their identities during their lifetimes,[140] it is difficult to see why such suppression should extend to the lifetimes of their families.[141] Why should this perceived need for secrecy be allowed to always take precedence over the right, of the people whose lives have been influenced by the activities of ASIO, to learn the truth? In fact, it is vital to bear in mind that

> while it does not necessarily follow that the suppression of the identities of sources and agents should always result in the suppression of the reports and records with which they were associated, it is recognised that this is likely to be the outcome in many cases.[142]

Another proposed change that is worth noting concerns the process of internal reconsideration. The Director-General of the Australian Archives will review the initial decision in consultation with ASIO. Where the Australian Archives and ASIO cannot agree, the Attorney-General will resolve the dispute after seeking, where necessary, the advice of the Inspector-General.[143] In light of the consultation that already takes place between the Australian Archives and ASIO and the ability of ASIO to reverse any contrary decision made by the Australian Archives, through the issue of a conclusive certificate, the proposed changes are totally unnecessary.

On a more positive note, conclusive certificates will lapse after five years from the day they came into effect.[144] Prior to the expiry of the five years,[145]

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139 Government response, above n131 at 380: "Where the agent is no longer in contact with ASIO and it is unknown whether he is still alive, a practice of assuming a life-span of 75 years will be followed".

140 "The effort to identify ... intelligence officers and agents in countries throughout the world and expose their identities repeatedly ... serves no legitimate purpose. It does not alert to abuses; it does not further civil liberties; it does not enlighten public debate ... Instead, it reflects a total disregard for the consequences that may jeopardize the lives and safety of individuals": Berman, P and Halperin, M H, "The Agents Identities Protection Act: a Preliminary Analysis of the Legislative History" in *The First Amendment and National Security* (1984) at 50.

141 The Joint Committee was of the view that "the issues at stake here include ... the safety of their families": above n3 at 26. While it is possible that "victims" of ASIO would be willing to endanger the lives of members of the "guilty" agent's family, such a scenario would surely constitute the exception rather than the rule. This remote contingency should be one of the factors to be taken into account when considering a request under the Act; but it should not lead to a blanket exemption.

142 Id at 27.

143 Government response, above n131 at 380. The decision of the Minister can be appealed to the AAT. The government also proposes to create a Security Division of the AAT with jurisdiction over matters concerning ASIO: Government response, above n131 at 381.

144 The proposed change does not, however, deal with a more fundamental problem, namely, the absence of a mechanism pursuant to which periodic reviews are conducted to ascertain whether documents which have been found to be exempt in the past, can still be regarded as exempt today.

145 Government response, above n131 at 380. The Second Senate Committee had recommended two years while the Joint Committee had put forward three years, as the relevant period: see, respectively, Second Senate Committee, above n4 at 149 and Joint Committee, above n3 at 45.

they will be reviewed and, if necessary, renewed. Furthermore, the government has accepted the Joint Committee's recommendation that ASIO should allocate additional resources to the processing of requests made under the Act.[146] But perhaps the most positive aspect of the new "package" is the absence of the measures which had been recommended by Hope J in 1984. He had recommended that

> the Archives Act be amended to remove ASIO's operational records, not administrative records, from the requirement to hand over to the Archives after thirty years and from the application of the thirty-year rule in regard to public access while allowing the Director-General a discretion to hand over to the Archives for public access records of thirty or more years old when he considers that this can be done consistently with the interests of security and personal privacy.[147]

Bob Hawke, the then Prime Minister, rejected Hope J's recommendation on the following grounds:

> The Government ... believes that safeguards in the Archives Act have been appropriately designed and have not been shown to be deficient. The provisions of section 29 of the Archives Act were developed to have the effect of exempting the intelligence agencies from the "mandatory transfer" provision ... and beyond this, in the event of a request for access, the Act provides a range of exemption provisions and for conclusive ministerial certificates to protect security sensitive information.[148]

It is unfortunate that the current government did not implement the reasoning above to reject some of the restrictions on public access to ASIO records recommended by the Joint Committee.

4. *Conclusion*

The Act fails to strike an appropriate balance between the needs of national security and the democratic goals that are attained through public access to, and scrutiny of, documents concerning the manner in which ASIO has discharged its functions.

This unsatisfactory state of affairs stems largely from the Act's adherence to a number of unsound principles. One such principle is that national security should always be regarded as being more important than the benefits attained by disclosure of government documents. The other essential feature of the

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146 ASIO, *Annual Report: 1993-94* at 119: "ASIO responded in the last review period by establishing a new 'public research' work unit to process requests, with a threefold increase in staff".

147 Royal Commission on Australia's Security Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (1984) at 156. The practical effect of Hope J's recommendation would have been to "make ASIO self-regulating and able to determine the extent to which it chose to be bound by the access provisions of the Archives Act. Under this proposal the citizen would have no right of access to a record once it was characterised by the Director-General as an operational record. Theoretically a right to access would extend to 'administrative records'. But there is no mechanism provided to supervise the discretion of the Director-General of Security in his/her determination of that question": Joint Committee, above n3 at 34.

148 *Cth Parl Deb*, House of Rep, 22 May 1985 at 2889.

philosophy underlying the Act is the unshakeable belief that whenever a dispute involves matters affecting national security, the executive must be allowed to be the ultimate adjudicator.

The recommendations of Hope J, the forthcoming changes to the Act and the Joint Committee's recommendations upon which those changes are based, demonstrate that continued adherence to those unsound principles will not only preclude changes aimed at redressing the existing imbalance but will also result in greater restrictions being placed upon public access to ASIO records and will eventually lead to a blanket exemption for ASIO records similar to that which they enjoy under the FOI Act.