Court has secrecy in spotlight

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THE media's ability to report on the nation's most secretive government - the commonwealth - is at a turning point as judges at federal and state level back stronger freedom of information laws.

Government secrecy is in retreat in NSW after a ruling last week by the state's top court.

Next week, the focus will shift to Canberra for the latest round in The Australian's marathon battle to extract documents from the federal Government.

Despite objections from the Government, the High Court has agreed to decide for itself whether there were legal flaws in the processes that kept those documents from this newspaper's freedom of information editor, Michael McKinnon.

Legal academics say the outcome will reveal whether federal ministers and public servants - like their colleagues in NSW - will be forced to accept greater public scrutiny.

"We are at a critical juncture," said freedom of information lawyer Rick Snell. "The High Court has the ability to overcome decades of statutory inertia."

Despite the act's title, the Government has used its procedures to deflect McKinnon's attempts to obtain documents from the Australian Taxation Office and Treasury. The documents concern income tax bracket creep and the first home owner scheme.

In February, when the High Court was deciding whether to hear McKinnon's appeal, judge Michael Kirby said the documents "do not leap out as ... very secret sort of documents".

"I mean, I know it is not for the court to make the ultimate decision, but this is not, as it were, national secrets of that kind," he said.

He said he wanted the High Court to hear the appeal because he viewed it as a test case. "This is a delicate balance that parliament has created in the act which is protective of that small zone to which the [Freedom of Information] Act will not penetrate. But that small zone, in an accountable democracy, is an important matter to define correctly."

The appeal is taking place against the background of a ruling by the NSW Court of Appeal in favour of open government. In a case known as WorkCover v Law Society of NSW, judge Ruth McColl, with the endorsement of her colleagues, ruled that the NSW FOI Act operates on the premise that there is public interest in the public having access to government information. This is because it allows the public to discuss, review and criticise government action, subject to those restrictions that are reasonably necessary for the proper administration of government.

For the media, the McColl ruling on the NSW FOI legislation is good news. But when it comes to the federal act, the problems extend far beyond the formal definition of that "small zone" of government that must remain beyond public scrutiny.

Mr Snell said the commonwealth FOI Act was the nation's most antiquated and restrictive. Ten years ago the Law Reform Commission recommended 106 changes. None has been made. But Mr Snell said it was not beyond redemption.

"We are at a tipping point. It is unlikely there is going to be legislative change in the near future at the commonwealth level, but a ringing High Court endorsement of the general principles - and taking up McColl's call [for] leaning towards the public interest in release - could well change the way the Government responds to FOI applications."

One of the biggest problems was the way the procedures under the federal act could be manipulated to delay disclosure and increase costs in the hope that journalists would lose interest, Mr Snell said.

In the McKinnon case, both applications under the FOI legislation were filed in December 2002. It was not until December 1, 2003, that Treasurer Peter Costello issued a "conclusive certificate" refusing access to the bracket-creep documents. He took another year to issue a second certificate refusing access to the documents on the first home owner scheme. Since then, the battle has been to the Administrative Appeals Tribunal and the Full Federal Court.

If the High Court prepares a prompt judgment after next week's hearing, it will hand down its ruling almost four years after this newspaper first sought access to the documents.

If McKinnon loses in the High Court, the fight will be over. But even if he wins the Government will not be obliged to hand over the documents. The case will simply go back to the Administrative Appeals Tribunal to be reheard under the High Court's reformulation of the law.

If McKinnon were to win in the tribunal, it would simply mean the tribunal would make a finding that it believes Mr Costello does not have reasonable grounds for refusing to release the documents.

That would not require Mr Costello to give the documents to McKinnon, but it would require him to inform parliament of what had taken place. At that point, politics might take over.

The key problem with the act is not just its drawn-out procedures but the unusual method of decision-making that it has forced on judges and tribunal members.

Several witnesses gave evidence to the Administrative Appeals Tribunal supporting the release of the government documents. They were The Australian's editor Michael Stutchbury; a former secretary of the attorney-general's department, Alan Rose; journalist and former NSW auditor-general Tony Harris; and leading economist Peter Dixon.

The tribunal ruled in favour of the Government after hearing evidence from four treasury officials.

But when the case went to the Full Federal Court on appeal, dissenting judge Richard Conti said the tribunal had decided in favour of the Government without weighing the evidence in favour of disclosure.

Justice Conti's dissenting judgment said: "That decision was accordingly made by the tribunal upon the footing of the departmental testimonies alone, irrespective of the cogency of the competing testimonies or the appellant's highly qualified witnesses."

That procedure, according to MrSnell, is "absurd and irrational".

While it is consistent with the view of the majority in the Full Federal Court who again ruled for the Government, it is at odds with the approach outlined last week by Justice McColl. She ruled that decisions on disclosure of government documents must weigh the public interest in citizens being informed.

The merits of these two approaches will form the core of the argument thatwill come before the High Court next week.

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