DISCLOSURE in the public interest?

Nathan Hancock

Is full disclosure of secrets required by current heritage legislation?

> If Aboriginal people want the protection of this legislation . . . then they must be prepared to come forward and reveal sufficient about their sites to bring themselves within its umbrella. And, in my opinion, given the extent of protection afforded by the Act to such sites, it is not tenable that Aboriginal people may [withhold sacred and secret information] for the purpose of enabling the Authority to do what, in effect, may amount to holding *in terrorem* persons who have a legitimate interest in the area claimed to be a site.[1]

In the context of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the *Heritage Act*), it is clear that the authority for the nature and significance of a sacred site must rest with Aboriginal law. Yet the desire to prove this authority may intrude on the secrecy which often surrounds the meaning of sites in Aboriginal law. So, while the right to possess and dispose of such information may be protected by Aboriginal law, it may be infringed in order to satisfy the legislative scheme and the holders of competing interests. As one claimant said, the process of protection 'amounts to being forced to break our Law to prove to Europeans that our Law still exists'.[2] Just how important is proof and how far must disclosure extend before claims can be accepted?

In the *Broome Crocodile Farm* case[3] and the *Hindmarsh Island Bridge* case[4] two judges of the Federal Court rejected the implication that traditional Aboriginal 'law' could obstruct the decision-making process and the course of judicial review. It was suggested that, according to the terms of the *Heritage Act*, the public interest in the administration of justice and the requirements of procedural fairness, confidential traditional information had to be disclosed by Aboriginal claimants to the reporter appointed under the Act, to the Minister for Aboriginal and Torres Strait Islander Affairs and ultimately to the people who may be affected by a decision to make a permanent declaration. In the course of hearing the proceedings for judicial review it was suggested that such information had to be disclosed to enable an effective challenge to the Minister's decision.

It seems that while the protection of Aboriginal cultural heritage may be predicated on the existence of Aboriginal law, the significance of this law is being reduced to mere evidentiary status. In these cases the need to respond to assertions that claims are the subject of 'recent invention' or 'conspiracy' has become paramount, at the cost of protecting aspects of the culture which the *Heritage Act* was intended to preserve. In the process, the need for proof has become a need for disclosure, despite the fact that the procedures established under the *Heritage Act* are poorly suited to the task of proof and that the concepts which the process would seek to establish may 'not necessarily fit with categories or concerns in Aboriginal culture'.[5] It has been said that '[p]eople in the broader community are not interested in the reasons why Aboriginal people wish to protect particular places but only in the impact of protection upon non-Aboriginal interests'.[6] If this is true, one

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must question the value of exposing such 'evidence' and the current emphasis on proof in the heritage protection scheme.

While there must be broad community acceptance of the process of identification and assessment and an opportunity for people affected to address concerns over the impact of protection, there may be no need for wholesale disclosure of confidential material. Notwithstanding the potential significance of such information, there is scope to protect the confidentiality of secret and sacred material at all stages of the administrative inquiry established by the *Heritage Act*. The decision-making process may not require complete disclosure to the Minister and the content of procedural fairness may not require disclosure to people affected by the Minister's decision. In fact, the public interest in protecting the rights and spiritual beliefs of minorities may require that confidentiality be preserved not only in the conduct of the inquiry but also in the conduct of judicial review proceedings. With a small amount of adjustment and reinterpretation, it may be possible *within the current system* to establish cultural heritage claims without trespassing on the very Aboriginal laws, customs and traditions which the *Heritage Act* was intended to protect.

The statutory context

Section 10 of the *Heritage Act* empowers the Minister for Aboriginal and Torres Strait Islander Affairs to make permanent declarations preventing prescribed activities over land which the Minister is satisfied constitutes a 'significant Aboriginal area' and which the Minister is satisfied is 'under threat of injury or desecration'. In order to make such a declaration, the Minister must first obtain a report the principal object of which is to ascertain the existence of any significant areas and of any threat of injury or desecration. In addition, the report must address the results of a public consultation process, incorporating the representations of people affected by the decision and representations of the general public for the Minister's consideration.

In light of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*), Carr J suggested, in the *Broome Crocodile Farm* case, that the requirement for the Minister to be 'satisfied' of the significance of an area amounted to a requirement that the significance be 'established'. This implies that the Minister cannot rely on his or her opinion and that the significance of areas must be proven. Moreover, there is a requirement that the Minister be personally involved in the decision-making process.[7] Under the *Heritage Act*, the Minister is required to consider the report and representations and is unable to delegate his or her powers and functions with respect to declarations. This implies that issues of significance must be proven before the Minister. Indeed, in the *Hindmarsh Island Bridge* case O'Loughlin J found it 'essential that the Minister have *full details* of the claims so that he might appropriately consider their efficacy and the weight that he should give to them' (emphasis added).

The obligation to accord procedural fairness

The most significant limitation on respect for confidentiality is found in the duty to accord procedural fairness. It obliges the Minister to disclose relevant material to the people who may be affected by his or her declaration. As such it is the most immediate and perhaps least justifiable threat to confidentiality in the heritage protection scheme, because it threatens the confidentiality of information between claimants and the holders of competing interests. Fortunately, there are some recognised limitations on the content of the obligation to accord procedural fairness which may be exploited in the present context in order to protect secret and sacred material from disclosure.

In considering this issue, Carr J in the *Broome Crocodile Farm* case pointed to the need for the Minister to have information and the effect which a declaration would have on the applicants' interests. His Honour suggested that 'the procedure prescribed by the Commonwealth Act is intended to ensure . . . that the Commonwealth Minister is provided with comprehensive information on both sides before a declaration is made' and that '*for that intention to be fulfilled* the material on each side should be disclosed to the other side' (emphasis added). Apart from these statutory considerations, his Honour considered that procedural fairness required the disclosure of confidential information to people directly affected by the declaration.

In contrast, while considering the need to provide the Minister with information, O'Loughlin J emphasised in the *Hindmarsh Island Bridge* case the presence of the statutory public consultation process. In his Honour's view, the procedure prescribed by the *Heritage Act* was intended to provide all with 'an effective opportunity to provide information and express opinions concerning the important issues involved'.[8] This opportunity was considered to satisfy the need to provide the Minister with 'sufficient information' but also satisfied the requirements of procedural fairness in respect of people affected. This was the case at least where the reporter offered '*some detail* of the existence of the women's business so that meaningful submissions could be made' (emphasis added).

Clearly there is a difference of opinion as to the level of disclosure required, based on the importance of proof and the significance attached to the public consultation process. For Carr J, if comprehensive information is to be obtained, it must be open to challenge. At the same time, people affected must be given an opportunity to respond to the 'case against them'. Both objectives point to complete disclosure of confidential material. For O'Loughlin J, if the Minister is to balance the competing interests fairly, she or he must consult the public and obtain information on all the issues involved. At the same time, those affected must be given an opportunity to put forward their case and assert their interests. These objectives point to a degree of disclosure sufficient to allow people to assess the effects on their interests and to ensure the relevance of the representations provided.

While the presence of a statutory process may be relevant to the implication of a duty to accord procedural fairness,[9] there may be other considerations which restrict the content of the obligation to accord procedural fairness and the duty to disclose confidential information. In the present context, the desirability of preserving the confidentiality of representations and the secure flow of information may suggest limitations on the duty to disclose. Moreover, the nature of the obligation itself points to far less disclosure than Carr J seems to have contemplated.

The obligation to disclose relevant material

The obligation to accord procedural fairness is described as 'a common law duty to act fairly . . . in the making of administrative decisions which affect rights, interests and legitimate expectations'.[10] Obviously, as a principle of 'fairness', the content of the obligation is flexible, taking account

of what is fair in the circumstances. But it often obliges the decision maker to provide a hearing and an opportunity for individuals to deal with adverse information that is 'credible, relevant and significant to the decision to be made'.[11] Clearly, the ultimate decision under the heritage protection scheme has the capacity to affect the rights and interests of land holders and developers and it is obvious that the principles of procedural fairness will apply at some stage of the decision to make a declaration. But there is no clear answer as to the proper content of the obligation in the circumstances.

The obligation to accord procedural fairness is based on the capacity of the decision maker to 'adversely and *directly* affect the rights, interests, status or legitimate expectations of another in his, her or its individual capacity'.[12] It follows that the obligation to disclose information will not be applied 'to every decision which disadvantages individuals',[13] and will not extend to every aspect which is adverse to a person's interests. There is thus a notion of directness or *proximity* which may qualify the duty to disclose.[14]

On the other hand, there is a duty to disclose information regarding matters *personal* to the individual whose interests are affected by the decision.[15] This consideration is central to an individual's right to information, based on fundamental principles of fairness.[16]

The problem of proximity is particularly evident in the context of a decision-making process where the stages of inquiry and final decision are separated. While a report may constitute a decision for the purposes of judicial review,[17] there may be no obligation to disclose information at this stage. It only arises where the report itself adversely affects the reputation etc. of the individual concerned or where the inquirer proposes to hear evidence personal to the individual or which might expose him or her to personal liability.[18]

It may be argued that the relevant degree of 'proximity' does not exist in relation to the inquiry under the *Heritage Act* because the identification of cultural heritage does not by itself affect non-Aboriginal interests. While the ultimate decision to make a declaration may have a direct adverse effect, the preliminary determination as to the existence of a 'significant Aboriginal area' is strictly neutral. Its 'real effect', to use the phrase of Wilcox J in *Peko-Wallsend*, may be to adversely affect a person's chances of a favourable decision but it may not be one to which the obligation attaches. It is difficult to comprehend how information relating to the significance of an area in Aboriginal tradition may by itself have a direct adverse effect on the holders of legal and commercial interests in land. It certainly does not involve considerations personal to these individuals and therefore does not expose them to the sort of liability contemplated above.[19]

In addition to the problem of proximity, there may be other considerations based on the nature of the procedural fairness which may limit the obligation to disclose. It may be the case that fairness requires the decision maker to maintain confidentiality by withholding information from individuals, notwithstanding the effect that the ultimate decision might have on their interests.[20] It is not always necessary to offer applicants an opportunity to 'deal with' confidential material — there may be no denial of procedural fairness if such information is withheld.[21]

A stronger argument may be made according to the effective administration of justice. It has been said that the principle of procedural fairness is 'only a means to an end' and that if 'the observance of a principle of this sort does not serve the ends of justice, it must be dismissed'.[22] And it is accepted that, in some circumstances, the content of the obligation to accord procedural fairness 'may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred'.[23] Such an approach has been applied to eliminate the duty to disclose confidential information in other proceedings,[24] and may be thought to apply readily in the current context. Indeed, the approach has special application where 'the knowledge that the court will treat the information in strict confidence greatly increases the probability that it will be forthcoming'.[25] It is an approach which is particularly relevant to those inquiries under the *Heritage Act* where claimants 'prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed'.[26]

Having examined the nature of the duty to disclose information and the importance attached to confidentiality, it is necessary to question the approach taken by Carr J in the *Broome Crocodile Farm* case. The discussion suggests that the boundaries of procedural fairness are being stretched to accommodate the objective of proof. Perhaps the bottom line is that a duty to disclose confidential material will not be implied merely to provide individuals with an opportunity to test their 'underlying assumptions' and make further submissions to a decision maker.[27] So, while the objective of obtaining comprehensive information may be facilitated by full disclosure, it is not justifiable in this context on the basis of ensuring procedural fairness.

The decision-making process and the desire to preserve confidentiality are most vulnerable in an application for judicial review. It is in this context that the desire for proof is most visible, as applicants have an opportunity to challenge the evidential bases of the decision-making process. Yet it may not be the most appropriate forum for this to be done. In such an application, the court's discretion to order discovery and inspection and the application of public interest immunity may be used to prevent the unnecessary disclosure of confidential information. Moreover, disclosure may be shown to be unnecessary according to the very nature of the grounds of judicial review available.

Public interest immunity

The court's capacity to save claimants from disclosing secret and sacred material is limited indeed. There may be scope to protect such information against discovery and inspection where that would involve a 'breach of confidence',[28] but generally there is no obligation of confidentiality which can 'stand in the way of the imperative necessity of revealing the truth in the witness box'.[29] Although there is a limited range of evidential privileges which serve to protect certain types of communication, none apply directly to traditional Aboriginal laws and practices and although it has been suggested that new privileges be created for this purpose,[30] the categories appear to be closed. In the context of judicial review this 'imperative necessity' might seem to pose a serious threat to the confidentiality of secret and sacred material.

There is one category of 'privilege' which may serve to protect such material from disclosure in the course of judicial review. The public interest immunity attaches to certain categories of information and serves to protect such information on the basis that the confidentiality of such information is required by public interest.

By virtue of the immunity, it is open to the court to exclude counsel from inspection of sensitive material, at least until it

is *clear* that the documents will assist that party in the conduct of their case.[31] In certain cases it may be appropriate for the court itself to avoid viewing such material until it is satisfied that it will become important to the facts in issue,[32] and then it may decide only to inspect the material *in camera*.[33]

More importantly, while the categories of privilege are probably closed, the categories of public interest are somewhat open. In *Aboriginal Sacred Sites Protection Authority v Maurice* Woodward J suggested that 'the proper protection of minority rights is very much in the public interest, as is respect for deeply held spiritual beliefs' and that a fresh class of public interest be recognised 'covering secret and sacred Aboriginal information and beliefs'. So, while confidentiality alone may be insufficient to attract the protection of the 'immunity',[34] it is accepted that it may be sufficient if it derives from Aboriginal tradition.

The matter of public interest immunity places the need for proof squarely in conflict with the need to protect the confidentiality of secret and sacred material. The immunity provides considerable scope for the protection of this material, both in respect of judicial review proceedings and as a template for the issues discussed above regarding the decision-making process. It is significant therefore that the matter was discussed in both of the recent cases before the Federal Court.

In an interlocutory judgment,[35] Carr J took account of the public interest in the administration of justice, and the question of discrimination and equal opportunity in the context of gender specific material. His Honour found that these considerations outweighed the public interest in maintaining confidentiality in judicial review proceedings. In the process, his Honour had anticipated that the documents in question would be 'redolent with detailed discriptions of initiation ceremonies and the like' and expressed disappointment that the material fell 'far short of what [he] was expecting'. His Honour seemed to take the view that secret and sacred material was significant only for its probative value, rejecting the implication that its status in Aboriginal 'law' could challenge the public interest in favour of proof. The truth, he said, 'is that it is Australian law for all Australians regardless of their colour'.

In the *Hindmarsh Island Bridge* case O'Loughlin J was prepared to accept that 'Aboriginal law insists on certain subjects being kept secret' and that a case could be made for the claim to be upheld. In the circumstances, not having seen the secret material, his Honour considered it 'important to avoid speculating as to what they might say' but assumed that it might contain a narrative of the significance of the area in Aboriginal tradition. In the end, his Honour considered that 'as the law presently stands, a time will necessarily come when there must be *some disclosure* [to the reporter or Minister] so that the claim can be tested' (emphasis added). In so doing, his Honour seemed to place equal weight on the nature and probative value of the material, in contrast to the view taken by Carr J.

While these statements relate to different stages in the course of decision making and judicial review, there is a common thread which can be drawn based on the importance of confidential information to the Minister's decision and the role of adminstrative law in factual review. It is a question as to the degree of information required before the 'particular significance' of an area can safely be determined. For Carr J, the public interest in the administration of justice is served only by complete disclosure. For O'Loughlin J, the public interest is served by disclosure sufficient for the claim to be tested. Like the discussion of procedural fairness, the answer depends in large part on the significance which is attached to the public consultation process as a mechanism of proving the authority of claims. However, there are also wider considerations regarding the nature of the process which may determine the issue. Ultimately, if the Minister's decision is challenged, it is a question of what the administration of justice requires in the circumstances.

The focus of the grounds of judicial review at common law and in the *ADJR Act* is not on the factual bases of decision making, but on the procedure followed by the decision maker. A judicial review court is reluctant to intervene in factual determinations and while evidence is required before a decision can be said to be valid, the standard of proof is set at a threshold level. Thus, the probative evidence rule of procedural fairness, the no evidence ground in the *ADJR Act* and the notion of reasonableness[36] require that a decision be based on the existence of *some* evidence which is capable of sustaining it, rather than on the balance of the evidence itself.

In substance, the court is not required to examine the evidence before the reporter or the Minister, but rather to be satisfied that a modicum of rationally probative evidence exists and has been used in order to reach a decision as to the 'particular significance' of the area in question. It may only be necessary to disclose the existence of *some* information which could reasonably form the basis of the Minister's determination in relation to the signficance of an area or its connection with Aboriginal tradition. In this respect it may be questioned whether, in light of the *ADJR Act* and the requirement that significance be *established*, there can ever be an implication that claims must be *proven*.

Conclusion

It is open to conclude that the desire to prove the authority of Aboriginal law and the veracity of claimants is inconsistent with the process established under the *Heritage Act* and the grounds of review provided under the *ADJR Act*. While the public interest in the administration of justice may require that relevant information be disclosed by claimants to the reporter, and perhaps to the Minister, it does not require disclosure beyond that which is necesssary to have the claims tested in the process of public consultation. While procedural fairness may require that affected people be given some form of hearing before the Minister's decision is made, it does not require the disclosure of confidential material relevant only to the establishment of a connection between Aboriginal tradition and the claim area.

Clearly, the authority for the nature and significance of an Aboriginal site must rest with Aboriginal 'law', but the process established by the *Heritage Act* and reviewed by the *ADJR Act* is ill suited to the role of contesting and proving these claims. As O'Loughlin J recognised, it is a role more suited to 'an independent committee of inquiry, with the power of subpoena, the power to administer oaths and the like' than the position of the reporter or the Minister under the *Heritage Act*. While the desire for proof may be fulfilled by the establishment of royal commissions, the pursuit of these avenues could hardly be said to be consistent with the objectives of broad community acceptance for the process of protection and respect for Aboriginal cultural heritage or, indeed, the purposes of the *Heritage Act* itself.

If the desire for proof is to remain, it will be necessary to alter or adjust the decision-making process, both to improve

the broad community acceptance of the claims and the procedure under the Act and to ensure that respect is given to the confidentiality which may be required under Aboriginal law. What is needed is an inquiry process which both establishes the existence of Aboriginal customs, traditions and observances, and respects the confidentiality which they disclose. If this cannot be done, the significance of this material will be reduced to mere evidentiary status.

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