

Public Servants Speaking Publicly: The *Bennett* Case

What should a public servant be able to say publicly about government matters? In August 2001, both civilian and military arms of Defence issued new instructions severely restricting staff contact with the media. Even tighter restrictions were imposed on Operation Relex, which interdicted people-smuggling operations on Australia's northern borders.

Concern was expressed at the time that the new restrictions were not appropriate in a liberal democracy.¹ They were relaxed in February 2002, to the apparent relief of some within the defence forces,² as well as more broadly.

Establishing appropriate levels of control of public comment by public servants is a controversial area. In [Bennett v President, Human Rights and Equal Opportunity Commission](#)³ (December 2003) the Federal Court has handed down a decision with significant bearing on the legal and policy framework within which these issues are managed.

The *Bennett* Case

Mr Bennett is a public servant with the Australian Customs Service. As President of the Customs Officers Association (COA) he made comments in the media about various matters, including a proposal to create a single Border Protection Agency. The head of Customs drew Mr Bennett's attention to Reg 7(13) [now Reg 2.1] of the Public Service Regulations which stated:

an APS employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or

disclose, directly or indirectly, to any person any information about public business or anything of which the employee has official knowledge.

Based on Reg 7(13), Customs directed Mr Bennett to cease talking to the media. When Mr Bennett continued to do so, charges were laid and his salary reduced. Customs then refused to allow him to speak to the media about this penalty or the charges. He was also reassigned to new duties within Customs against his wishes. Mr Bennett complained to HREOC alleging interference by Customs with legitimate trade union activities and denial of his right to express opinions on political matters. HREOC declined to investigate stating that Mr Bennett had an obligation not to impede the operations of Customs and to obey relevant legislation such as Reg 7(13). Mr Bennett sought review of HREOC's decision in the Federal Court.

The Judgment

The case came before Justice Finn, a leading authority on the concept of 'public service' and its associated legal responsibilities.

Justice Finn held that Reg 7(13) contravened the implied constitutional freedom of political communication.⁴ In a series of cases in the 1990s the High Court declared that it is an inherent requirement of the system of representative democracy established by the Constitution that the Australian people are able to communicate about political and other matters that could influence their choice of government.

Justice Finn said Reg 7(13) was 'draconian', prohibiting any release of information without authority on 'all and any aspect' of public administration. There was no consideration of whether the information was 'confidential' in any way or was already publicly available, or whether there may have been a public interest in its disclosure. In Justice Finn's view, Reg 7(13):

impedes quite unreasonably the possible flow of information to the community—information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of executive government.

The judge said that the provision was not substantially different from its 19th century predecessors that were designed for the needs of the infant Australian colonies but which were out of place in an era when the danger of excessive government secrecy is a prominent issue.

Finding that Reg 7(13) was invalid, however, was not the end of the story for Mr Bennett. Every public servant has an implied duty of 'fidelity and loyalty' to their employer. If what Mr Bennett did in speaking to the media amounted to 'disloyalty' to the Commonwealth then the actions of Customs could be justified.

Justice Finn sent the matter back to HREOC so it could properly consider this issue. However he noted that the Commonwealth had allowed Mr Bennett to 'serve two masters'. He was an official of an industrial

organisation registered under the Workplace Relations Act, which Customs knew at the time it continued to employ him. Justice Finn suggested strongly that in such circumstances, conduct by Mr Bennett consistent with his lawful responsibilities as President of the COA could hardly amount to 'disloyalty' to his employer (a situation accepted, for example, in the UK's Civil Service Code).⁵

Issues Raised by *Bennett*

Justice Finn noted that if Reg 7(13) was invalid, 'an important part of Australia's official secrecy regime will be thrown into some uncertainty'. As he said, provisions in s70 of the *Crimes Act 1914* making it an offence for public servants to release official information 'presuppose the validity of Reg 7(13) and its present successor'.

As a 1991 Commonwealth report by former Chief Justice Sir Harry Gibbs on disclosure of official information⁶ noted, s70 of the Crimes Act only applies if a Commonwealth officer has 'a duty not to disclose' such information. 'Duty' in this sense involves a *legal* and not merely a *moral* obligation. Reg 7(13) was the clearest way such a legal duty could arise. If this is no longer available, the Commonwealth would have to rely on the common law duty of fidelity and loyalty. As Justice Finn said, however, there is little law in Australia on what exactly the duty of loyalty involves for public servants, and it could only be applied within constitutional constraints, including the freedom of political communication. There is also a general legal duty preventing release of information obtained in confidence. In relation to government information, however, the High Court has said that 'unless disclosure is likely to injure the public interest, it will not be protected'.⁷ Beyond this, legislation such as the *Income Tax Assessment Act 1936*, the *Social Security Act 1947*, the *Intelligence Services Act 2001* and the [Commonwealth](#)

[Criminal Code](#)⁸ may create a relevant duty in the case of particular categories of public servant.

A duty could also arise under the 'APS Code of Conduct' enshrined in the *Public Service Act 1999*, but the Code itself depends heavily on Reg 2.1 [i.e. the old Reg 7(13)] in prohibiting improper disclosure of information. So invalidity of Reg 2.1 causes a double problem: it may be difficult for the Commonwealth either to obtain a conviction under s70 of the Crimes Act or to penalise a public servant for breach of the Code.

The Commonwealth may seek other sanctions against a public servant outside the Crimes Act or the Code of Conduct. However such laws—as Justice Finn pointed out—cannot 'unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires'.

In the light of *Bennett*, it may be prudent for the Commonwealth to revise the non-disclosure provisions in the Public Service Regulations. Justice Finn indicated that the 'catch-all' regulation could be replaced by a more narrowly worded provision. He said the Commonwealth could legitimately prevent release of information for, e.g. privacy protection, national security, Cabinet secrecy, or the 'maintenance of an impartial and effective public service'. Examples exist in the UK Civil Service Management Code and South Australia's *Public Sector Management Act 1995*.

Bennett indicates that a public servant's duty of loyalty to the Commonwealth might be modified by holding another position, e.g. as a union official. Public servants with other dual roles might also be affected. HREOC's (re)consideration of this aspect of Mr Bennett's case could therefore be significant.

Bennett may have even broader implications. Concerns have been raised about the limited protection

for whistleblowers under the Public Service Act.⁹ This covers only current employees, and only if they speak to certain authorised people in the public service.¹⁰ *Bennett* indicates that whistleblowers may receive constitutional protection, allowing them to divulge 'official' information beyond the restricted circumstances in the Act.

Endnotes

1. See, e.g., Geoffrey Barker, 'Defence censorship absurd in peacetime', *Australian Financial Review*, 3 September 2001.
2. Remarks of Rear Admiral Ritchie, Senate Select Committee on a Certain Maritime Incident, *Committee Hansard*, [4 April 2002](#), p. 406.
3. [2003] FCA 1433.
4. For a prescient discussion of this exact issue, see Richard Jolly, 'The implied freedom of political communication and disclosure of government information', *Federal Law Review*, vol. 28, 2000, pp. 41–59.
5. [Civil Service Management Code](#) section 4.2.9.
6. Review of Commonwealth Criminal Law, Final Report, Dec 1991, Part V.
7. [Commonwealth v John Fairfax & Sons Ltd](#) (1980) 147 CLR at 51/52 (per Mason J).
8. Section 91.
9. See, e.g., Paul Bluck, 'Band-aids for amputees: whistleblowing in the Commonwealth', *AIAL Forum*, vol. 33, 2002, pp. 22–9.
10. Section 16.

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