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32. *Scitech*, 7, 5, May 1987
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37. The Report of the Steering Committee to Review Commonwealth Special Research Centres and the Future of the Program, CTEC, November 1986
38. *Ibid*, Appendix: Assessment Panel Reports
39. N. Dunbar, personal communication; R.H. Symons, personal communication
40. Department of Science, op cit (reference 5)
41. Department of Science/OECD, Policies and Directions for Science and Research, Interim Conference Summary, Canberra, November 1986

## Free market education

### The new free market orthodoxy

Recent years have seen the emergence of a new free market orthodoxy in the economics of education.

This free market orthodoxy stands for selling education in the market place, for private universities, for tuition fees in tertiary education, for private training rather than Technical and Further Education, for the continued privatisation of schooling and for a radical reduction in direct public funding of education — although it

We have recommended that students at universities, CAEs and TAFEs should be charged fees equal to the estimated marginal social costs of their places. We have argued that the external benefits (i.e. the benefits not captured by the students themselves) from tertiary education are probably negligible so that the appropriate fees are roughly equal to the estimated direct budgetary marginal cost of places; we have recommended that student assistance schemes be terminated and that subsidised loan schemes not be introduced. Critics may reply that if these policies were implemented most tertiary students would abandon their studies. We certainly expect that many would respond in just this way; however, we see this not as a defect of our recommendations but as their chief merit.

— George Fane,  
'Education policy in Australia', Office of the Economic Planning Advisory Council,  
*EPAC Discussion Paper 85/08*, Canberra,  
Pages 99-100.

is generally not opposed to taxpayer subsidisation of private ventures.

While strictly speaking education is a service rather than a material commodity, the point is that the new free market orthodoxy wants education to be produced according to the laws of the marketplace that govern unregulated commodity production.

The new orthodoxy has gained many adherents.

It is supported by most academic economists and business organisations, and well publicised in the media. It has a growing influence in Canberra.

Free market assumptions about the desirability of competition, the individual (rather than social) nature of the benefits of education, and the alleged inefficiencies and inequalities arising from public provision are entering the language of education debate as a sort of new common sense that all parties to the debate are meant to take for granted.

But orthodoxies are not always right. A close examination of the policies of some leading free market thinkers shows just how disastrous they would be if fully applied to the education system.

### Adam Smith and the origins of the freemarket line

The free market theory of education has its origins in the work of Adam Smith, whose book *The Wealth of Nations* (1776) is relied on as a sort of bible by the new right.

It was Adam Smith who first conceived of education as a process of individual investment in *human capital*, and argued that the social benefits of education were equivalent to the sum of the private monetary benefits accruing to individuals — the increased earnings resulting from education and training.<sup>1</sup>

In Smith's view, social prosperity was maximized when individuals were free to compete against each other without state interference. The 'invisible hand' of the market guaranteed the optimal outcome.

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Hence Smith favoured private education, which in any case was the dominant form of education provision in this day — one hundred years before the first systems of universal public primary education were established.

The ideas that education is a process of individual investment in human capital and that its social value could be reduced to its economic value, measured by adding up the increased earnings to educated individuals,<sup>2</sup> lay largely dormant until the 1950s.

They were then revived by economists of education such as G.S. Becker who sought to explain the unprecedented period of post-war economic growth through exaggerated claims about the effects of education. Many educationists seized on these claims as a useful argument for increased resources (an argument that fell flat after the world-wide recession of 1974 and 1975).<sup>3</sup>

Although many of the economists advocating a human capital line were Keynesian advocates of the role of government rather than neo-classical free marketeers, at heart the human capital theory always was uncompromisingly individualist and was most consistent with a free market 'neo-classical' approach to economics.

### Milton Friedman on education

The modern guru of the new right, Chicago-school economist Milton Friedman, was the first to systematise the free market human capital view of education. Friedman argued that:

*Vocational and professional schooling . . . is a form of investment in human capital precisely analogous to investment in machinery, buildings, or other forms of non-human capital. Its function is to raise the economic productivity of the human being. If it does so, the individual is rewarded in a free enterprise society by receiving a higher return for his (sic) services than he would otherwise be able to command. This difference in return is the economic incentive to invest capital*

*whether in the form of a machine or a human being.*

*In both cases, an individual presumably regards the investment as desirable if the extra returns, as he views them, exceed the extra costs, as he views them. In both cases, if the individual undertakes the investment and if the state neither subsidizes the investment nor taxes the return, the individual (or his parents, sponsor or benefactor) in general bears all the extra costs and receives all the extra returns: there are no obvious unborne costs or unappropriable returns that tend to make private incentives diverge systematically from those that are socially appropriate.<sup>4</sup>*

The points to note here are that Friedman saw vocational education solely in economic terms, and assumed like Smith that the social benefits of education were equivalent to the sum of the private benefits to individual investors operating on a free education market, i.e. that there was no case for government funding of vocational education because there were no social benefits independent of the benefits to private 'users' of education.

He suggested that the only form of government intervention should be the provision of loans to individuals, to be repaid from future earnings — possibly through the income tax system. "In this way, the individuals who received the training would in effect bear the whole cost . . . provided the calculated earnings reflected all relevant returns and costs. The free choice of individuals would tend to produce the optimum amount of investment."<sup>5</sup>

Friedman saw equality in education merely as a matter of providing everyone with free opportunities to invest<sup>6</sup> (that is providing they could raise the necessary money to do so).

Primary education was treated somewhat differently to vocational education in Friedman's schema. He acknowledged that there were some social benefits in the provision of schooling, albeit limited to the elementary school years.

Noting that education could provide "a minimum degree of literacy and knowledge" and "widespread acceptance of some common set of values", Friedman said that there were significant "neighbourhood effects" in the first few years of schooling — effects that yielded gains to all citizens.<sup>7</sup>

These neighbourhood effects were seen to diminish and disappear at later levels of education, especially at the higher education stage, on the curious ground that there was less agreement on the desired content of education once the three Rs had been left behind.

Friedman did not see the general education of all citizens to the end of secondary

school as necessary; society's general interest extended only to ensuring that "the exceptional few" received an education because "it is they who are the hope of the future."<sup>8</sup> He was an unequivocal elitist.

In a later work, Friedman suggested that compulsory school attendance laws were not necessary to guarantee the desired minimum degree of literacy and knowledge, and should be abandoned.<sup>9</sup>

### The voucher system

While Friedman expressed a preference for making parents pay all of the costs of schooling (even in the elementary school years) with subsidies to the needy only in "extreme cases",<sup>10</sup> he proposed the voucher system as a compromise:

*Governments could require a minimum level of schooling financed by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on 'approved' educational services. Parents would then be free to spend this sum and any additional sum they themselves provided on purchasing educational services from an 'approved' institution of their own choice. The educational services could be rendered by private enterprises operated for profit, or by non-profit institutions. The role of government would be limited to insuring that the schools met certain minimum standards.<sup>11</sup>*

Accordingly Friedman argued for the "denationalisation" of schools. Public schools in name would still exist, but via the voucher system parents would receive an equivalent sum whether their student children attended private or public schools.

This would permit direct competition to develop which in turn, he claimed, would improve the standard of all schools. Further, individuals' choices would be widened: the market would "permit each to satisfy his own taste". And "new sorts of private schools could arise to tap the vast new market."

Friedman said that under his proposals the public costs of schooling would be reduced but overall expenditure on education could well rise because of increased private expenditure<sup>12</sup> — a doctrine attractive to governments looking for ways of reducing the total education budget.

In higher education Friedman argued for fees corresponding to the full cost of services, to be partly paid through another voucher scheme.

### Friedman's Australian followers

The 'free market revolution' in economic thought after the 1974/1975 recession brought Friedman's ideas to the forefront of professional and political debate.

The Liberal Party first took up the

voucher plan in its 1975 pre-election policy, while still in opposition. The Fraser Government did not move to implement vouchers because of the likely resistance from State Departments and education interest groups, preferring instead to step up the per capita funding of private schools and foster the development of new private schools.<sup>13</sup>

Meanwhile, the new right was popularising the free market approach. The first clear official recognition of Friedman's educational ideas in Australia occurred in the year the Thatcher Government was elected in the UK — in the decision to publish, in the Fraser-appointed Williams Committee's report on education and training, an Appendix by Professor Richard Blandy of Flinders University.

Blandy concentrated on post-school education. He proposed that "the burden of financing post-secondary education be shifted progressively from taxpayers at large to taxpayers who have been students of the institutions (and who have, therefore, reaped direct benefits in greater earnings or consumer satisfaction or both)" and also that institutions charge fees intended to cover the whole of tuition in order to transfer costs to the "direct beneficiaries of the services".<sup>14</sup>

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The Blandy paper urged a graduate tax as proposed by Friedman and a mix of public and private institutions in place of the public higher education system. He suggested that all post-school students receive a "standard grant" — an education voucher — and be eligible for access to a government-administered loans scheme.

### George Fane's proposals

With the debate shifting further to the right, in 1984 George Fane of the Australian National University prepared a paper for the Federal Government's Economic Planning Advisory Council (EPAC) that was a fuller exposition of the free market human capital approach and one more faithful to Friedman.

Fane's view of education was entirely individualist. "In terms of its intrinsic economic characteristics education is a private good not a public good", he said. For society as a whole the net external economic benefits of education were

regarded as zero, with the possible exception of research, and the non-economic external benefits were limited to the elementary schooling years — although he admitted that the relevant data on external effects was lacking.<sup>15</sup>

Hence in his "first best" policy proposals Fane called for complete privatisation of education, and the abolition of all government subsidies to schools, TAFE and higher education apart from vouchers in the early years of schooling. The latter proposal arose because like Friedman, Fane considered that elementary schooling should be guaranteed by government; he argued for compulsory schooling up to the end of Year 6 (a four year reduction in the present school leaving age) and voucher funding up to and including Year 8.

Realizing that his first best policy was unlikely to be implemented, Fane's fall-back position was voucher funding of secondary schooling, experiments in privatisation of schooling, tertiary fees ideally set at the level of "the estimated marginal social cost" of the places,<sup>16</sup> the complete abolition of tertiary student assistance and open-market student loans rather than a subsidised loans scheme.

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Fane's most original suggestion was an uncompromising development of the human capital approach: the establishment of a market in tertiary places.

On the basis of Year 12 scores, students would be allocated a ticket; the higher the score, the higher the value of the ticket. Students who gained entry would then be able to sell their entry ticket — their partly developed human capital — to the highest bidding unsuccessful student.

He argued that this would encourage the most able students to seek entry into the courses with highest value and en-

courage all students to value education more than at present.<sup>18</sup>

The effect of the scheme would be to redistribute tertiary places and ultimately, labour market credentials, on the basis of an unambiguous capacity to pay, but Fane said equality was outside his paradigm: "a question for philosophers and not for economists".<sup>19</sup>

### **Moves towards privatisation in Australia**

Bizarre as some of these ideas appear to many people, the real world education system is moving closer to them.

In higher education contracting out of research is well established, and full-cost fee-based overseas marketing and general student fees at \$250 per annum have been introduced. Institutions will be permitted to retain 10 per cent of collected fees for their own use, inculcating an endogenous incentive to create the 'user pays' system against student resistance.

The Bond private University project has not been opposed by the Australian Vice-Chancellors' Committee and now has reasonable prospects; if it does become established, other private tertiary institutions can be expected to follow. Planning of the Yanchep private 'annexe' of the Western Australian Institute of Technology campus is now also well advanced.

The privatisation of schooling continues. Under the Hawke Government's present policy, Federal per capita grants to private schools will increase each year in real terms until at least 1992, and rising government grants are a direct cause of increased private school enrolments. The drift of enrolments to private schools threatens to very seriously undermine the standing of public schooling in the longer term.

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It would be unwise to assume that the highwater mark of the privatisation tide has been reached. The Committee for Economic Development of Australia (a major corporate think-tank) has urged that private schools receive the same level of funding as public schools.<sup>20</sup> In May 1986 the draft Liberal National Party policy on schools urged that a voucher system be introduced in the form of education credits and that extra credits

would be provided to private school students from needy families, thus providing parents with an incentive to switch from public to private sectors. The draft coalition policy also proposed the complete withdrawal of the Federal Government from special program funding of disadvantaged students with specific needs, such as students from depressed working class zones and migrant students.<sup>21</sup>

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The present Labor Government has been responsible for increased subsidies to private schools, tertiary tuition fees and overseas marketing of courses.<sup>22</sup> The last move has opened the door to the large scale privatisation of higher education.<sup>23</sup>

Whichever party or parties are in power in Canberra, the pressure for privatisation will continue. The implications of the free market policies therefore require the closest scrutiny and the widest public debate.

### **Implications of free market policies**

To the extent that the present education system is allowed to develop along the lines chosen by the free marketeers, the following practical consequences would result:

#### **1. Narrower education around vocational ends**

There would be a radical reduction of secondary education and post-school education to vocational education, with much greater emphasis on education's credentialling function at the expense of its broader educational function.

While people are not simply human capital, and would continue to seek non-vocational as well as vocational benefits from education, high cost fees would force students and their families to concentrate on vocational rewards. Producers of education would be obliged to narrow and shorten courses around more specifically vocational objectives. Teaching, learning and research in the humanities, social sciences and pure sciences would be severely weakened, undermining society's cultural production and its long term knowledge base.

There would be earlier specialisation and reduced general education at the secondary school stage.

#### **2. Lower level of participation in education**

There would be a lower level of participation in education, especially in higher education. High cost fees and the increased role of private schools would reduce effective demand for education. For poorer families first priorities would continue to be food, housing, clothing and basic health. Participation in education would drop sharply during periods of economic downturn, throwing many educational institutions into crisis and producing skilled labour shortages in the longer term.

But this reduced participation would be supported by at least some free market human capital economists. For example, amidst national efforts to raise educational participation Fane said in 1985 that:

*We have recommended that students at universities, CAEs and TAFEs should be charged fees equal to the estimated marginal social costs of their places. We have argued that the external benefits (i.e. the benefits not captured by the students themselves) from tertiary education are probably negligible so that the appropriate fees are roughly equal to the estimated direct budgetary marginal cost of the places; we have recommended that student assistance schemes be terminated and that subsidised loan schemes not be introduced. Critics may reply that if these policies were implemented most tertiary students would abandon their studies. We certainly expect that many would respond in just this way; however, we see this not as a defect of our recommendations but as their chief merit. In essence our argument is that government regulations and subsidies are causing students at tertiary institutions to obtain tuition and other services which are valued far below their costs of production, and that efficiency would, therefore, be increased if some of the resources currently devoted to tertiary education were re-allocated into more highly valued activities.<sup>24</sup>*

#### **3. Less education would be produced**

Less education would be produced in both the absolute sense (corresponding to reduced participation) and also in a relative sense. Institutions would have a strong incentive to increase efficiencies and in some cases, profits, by minimising the educational services provided for a given consumer dollar.

Many institutions would also have to devote a substantial part of their resources to marketing themselves rather than using those resources for teaching and learning.

#### **4. The quality of education would decline**

The quality of some education would

decline through the shortening of courses and reduced general education content, and more emphasis on gaining credentials at the expense of gaining knowledge and creativity; and also because of the effects of market competition on certain institutions, such as some of the remaining public schools.

For example, under a voucher scheme all of the present public schools would be competing directly with each other and with private schools for students and a more pronounced hierarchy of schools would rapidly emerge.

Weaker schools, such as those whose communities could ill-afford to supplement their vouchers with private funding (for example, those in working class zones) would deteriorate as the better-off parents took their children elsewhere.

To some extent, this 'residualisation' of public schools is already occurring under the present impact of privatisation. The difference is that in a deregulated system these weaker schools would no longer be backed by guaranteed Government resources and would face bankruptcy and educational collapse.

It is often claimed by advocates of privatisation that their policies would increase quality by quickening market responses and penalising weaker producers, but the market approach would turn some stronger producers into weak producers.

Further, educational innovation would be risky in market terms, discouraging improvements. As Blaug said, "To argue that competition will necessarily improve education as it has improved the quality of automobiles is mere dogma."<sup>25</sup>

#### **5. Privatisation is bad economics**

A privatised system would actually be economically dysfunctional in a number of ways.

An effective general education is necessary to vocational training, and earlier and greater specialisation in education and training would result in less flexibility and adaptability in the workplace. The elimination from education of many of the present students would certainly lower the general educational level of the workforce, which could contribute to a reduction in productivity.

The immediate financial interests of individual 'investors' in education do not always coincide with the long term interests of the economy. But the absence of comprehensive Government planning would make it impossible to effectively address new economic needs until they had started to directly and visibly affect demand for labour.

Lead times in education are long; it takes some years to establish new institutions and new courses in response to new needs, and unlike a properly planned system, a market system would be unable to anticipate the pattern of demand for labour in advance.

Given the boom/bust nature of the business cycle, supply of skilled labour and demand for skilled labour would therefore tend to be radically out of synchronisation.

#### **6. Access would depend on private capacity to pay**

It is obvious that effective participation in education would depend more on private capacity to pay than at present — not only because of the level of private costs, but because Governments would no longer be obliged to provide high quality public education available to all students, whatever their private capacity.

In such a system those social groups already disadvantaged economically and in access to the total education system (women, aboriginal students, students from non-English speaking backgrounds, poorer students) would clearly become more disadvantaged.

Given that access to credentials is one factor influencing labour market outcomes, increased inequality in access to education would increase inequality in access to the labour market, all else being equal.

#### **7. Democracy and freedom would be reduced**

Finally, a system in which education was treated as a private good (rather than a public good that is everyone's right) would weaken democracy and reduce social and individual freedom, as well as social equality. The provision of education as a public good has widened knowledge and social interaction and thereby increased freedom. As Wilenski has stated:

*Critics concentrate on the restriction placed on the individual by government laws and regulation but fail to see the new positive opportunities to exercise freedom that government intervention has also provided. It was the intervention of government that gave the bulk of people individual freedom to pursue their own life choices by liberating them from the fear and the reality of extreme poverty at a time of economic hardship, from the burden of industrial deaths and injuries, from urban blight, from exploitation of their labour, and from consumer fraud. The growth of government programs provided them with the means through public services such as educational training to have the capacity to make these individual choices meaningful.<sup>26</sup>*

1. Adam Smith, *The Wealth of Nations* (originally published 1776), ed. Andre Skinner, Penguin, Harmondsworth, 1970.
2. The fallacies in the human capital view of education are outside the scope of an article of this length, but are examined in Simon Marginson, 'Are students human capital? the free market theory of education.' *ATF Research papers 15*, Australian Teachers Federation, Melbourne, 27 October, 1986. See also Barbara Preston, 'Schooling and work — untangling the web', *The Victorian Teacher*, April-May 1986, pp. 6-8 and Carol O'Donnell, *The Basis of the Bargain*, George Allen and Unwin, Sydney, 1984. A useful discussion of human capital theory, albeit from a neo-classical economic perspective, is provided in Mark Blaug, *An introduction to the Economics of Education*, Penguin, Harmondsworth, 1970.
3. Marginson, *op cit*, pp. 4, 11 and 25-26.
4. Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, Chicago, 1962, pp. 100-101.
5. *Ibid*, pp. 102-106.
6. *Ibid*, p. 107.
7. *Ibid*, p. 86.
8. *Ibid*, p. 93.
9. Milton Friedman and Rose Friedman, *Free to Choose*, Macmillan, Melbourne, 1980, p. 162.
10. Friedman, *Capitalism and Freedom*, *op cit*, p. 87.
11. *Ibid*, p. 89.

## Footnotes

12. *Ibid*, pp. 91-95 and *Free to Choose*, p. 163.
13. For an account of the privatisation of schooling in the 1974 to 1983 period, fostered by Government policies, see Simon Marginson, 'The collapse of the 1973 Karmel consensus', *ATF Research papers 9*, Australian Teachers' Federation, Canberra December 1985 and Feodora Fomin and Richard Teese, 'Public finance to private schools: The argument of the Karmel Report and later policy', *Melbourne Working Papers 1981*, University of Melbourne Faculty of Education, pp. 184-200.
14. Richard Blandy, 'A liberal strategy for reform of education and training', Appendix E, Volume 2, *Report of the National Inquiry into Education and Training* (the Williams Report), Australian Government Publishing Service, Canberra March 1979, pp. 146 and 157-158.
15. George Fane, 'Education Policy in Australia', Office of the Economic Planning Advisory Council, *EPAC Discussion Paper 85/08*, Canberra, pp. 6 and 15-21.
16. *Ibid*, p. 66.
17. *Ibid*, p. 110.
18. *Ibid*, pp. 68-74.
19. *Ibid*, p. 21.
20. Committee for Economic Development of Australia (CEDA), *Education for*

*Development*, Report of the CEDA Strategic Issues Forum, July 1985.

21. Liberal Party and National Party, *Coalition Education Policy Draft for Schools*, leaked to media 27 May 1986, unpublished.
22. A useful outline of present privatisation developments in higher education is provided in Grahame McCulloch, *Background paper on the Privatisation of Higher Education*, unpublished draft, Federation of College Academics, Canberra, August 1986.
23. Ted Murphy, 'The business of education', *Socialist Labour*, August-September 1986, pp. 12-13.
24. Fane, *op cit*, pp. 99-100 (my emphasis — SM).
25. Blaug, *op cit*, p. 316.
26. Peter Wilenski (Chairman of the Commonwealth Public Service Board), *Occasional Address* to the Graduation Ceremony for students of the School of Social and Industrial Administration, Griffith University, Brisbane, 12 April 1985.

\*This paper was first presented at the Australian and New Zealand Comparative Education Society Conference held at St. Leo's College, University of Queensland, 1-5 December 1986. It is partly drawn from 'Are students human capital? The free market theory of education', *ATF Research Notes 15*, October 1986.

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ment introduced a Bill in 1983 (hereinafter NSW FOIB<sup>4</sup>).

Tertiary education institutions have reasons for concern regarding this legislation, because it is drafted with government Departments and government trading corporations primarily in mind, not teaching or research institutions. Universities and colleges have many functions common to other agencies subject to FoI: management of property; recruitment and supervision of administrative staff; health and safety concerns; financial matters etc. All of these functions may result in the creation of documents which are subject to FoI requests. The problems that such requests raise will be little different from those faced by any large instrumentality, and just as various.

However, there are certain functions of universities and colleges which, while certainly not unique, are unusual enough to deserve special consideration. These include the maintenance of student educational records, student assessment

methods, the promotion system for academic staff, the organs of academic government at all levels, and research activities (both applications and work in progress).

This article surveys the main FoI cases in which institutions of higher education have been parties, to illustrate the effect that FoI is having on some of these activities of academics and academic administrators. Such a case-oriented approach will not provide comprehensive coverage of all the FoI issues, or cases, which could be relevant to academic institutions, but should serve to give those unfamiliar with FoI an insight into the approach that tribunals and Courts have taken toward academic institutions in the implementation of FoI. The discussion concentrates on the Commonwealth FOIA, with references to Victorian developments where appropriate.

The following aspects of the activities of academic institutions are discussed: *Student records; Assessment methods; Academic promotions; Research applications; Research in progress; Academic government; Amendment of personal records; Documents of an agency; and The deliberative process exemption.*

The main FoI cases which have involved academic institutions are discussed under the aspect of academic activities to which they are most relevant. These cases include: *Re James and the Australian National University; Re Healy and the Australian National University; Hart v Monash University; Re Ascic and Australian Federal Police; Re Wertheim and the Department of Health; Re Baueris and Commonwealth Schools Commission, Department of Education; Re Burns and the Australian National University (No 2); Re Setterfield and Chisholm Institute of Technology; Re Horesh and Ministry of Education; and Re Burns and the Australian National University (No 1).*

### Basic principles of freedom of information

For those unfamiliar with FoI, a summary of basic principles and principal sections follows. Much of the subsequent discussion of cases assumes recognition of the different exemptions under the FOIA and Victorian FOIA.

The basic concept of freedom of information is that every person should have a right to obtain access to all documents of government agencies, without having to show a reason or interest which justifies their obtaining such access, unless there is good reason to deny them access. In other words, the onus is on the government to show why access should be denied. Such an approach to government documents was foreign to Anglo-Australian law and administration

until the Commonwealth FOIA of 1982, which was partly inspired by United States precedent<sup>5</sup>. The Act was soon amended by the incoming Labor government, implementing some of the recommendations of a 1979 *Report*<sup>6</sup> of the Senate Standing Committee on Constitutional and Legal Affairs, particularly in reducing the scope of some of the exemptions to access. At present, that Committee is re-reviewing the Act after its first three years of operation. It has concluded its hearings and is finalising its Report.

**Right to access** Every person has a legally enforceable right to obtain access to a document of an agency, other than an exempt document<sup>7</sup>. Such a *prima facie* right does not depend upon the person having an interest in obtaining access, or a reason for so desiring<sup>8</sup>. This contrasts with other legal rights the enforcement of which may incidentally provide a person with access to documents, but only because access to the document is necessary for the protection of some other right or interest<sup>9</sup>.

**'Agencies'** Universities and colleges of advanced education are included among the agencies covered by the Commonwealth and Victorian Acts, as well as the NSW Bill<sup>10</sup>. The FOIA only covers the Australian National University and the Canberra College of Advanced Education, as only they are established by Commonwealth legislation<sup>11</sup>.

**'Documents'** Access is limited to 'documents'<sup>12</sup>, but a request may relate to all documents of a specified class, kind, or subject-matter if its satisfaction would not substantially and unreasonably divert the resources of the agency from its other operations<sup>13</sup>.

**'Document of an agency'** Only a 'document of an agency' is accessible, which means a document in the possession of the agency 'whether created in the agency or received in the agency'<sup>14</sup>.

**Old documents** A document is exempt if it became a document of an agency more than five years before the FOIA commenced (i.e. before 1 December 1977), unless it contains information relating to the personal affairs of the applicant, in which case there is no time limit<sup>15</sup>.

**Exempt documents** Of the categories of exempt documents specified in the FOIA, ss33-47, the following exemptions are most likely to be applicable to universities and colleges:

• **Deliberative process** If documents contain opinion or advice for, or record the deliberations of, the deliberative processes involved in the functions of an agency (s36)<sup>16</sup>. Such documents are often referred to as 'internal working documents';

• **Property interests** If disclosure would have a substantial adverse effect on the financial or property interests of the agency (s39)<sup>17</sup>;

• **Examination methods** If disclosure would prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits, or the attainment of their objects (s40(1)(a) and (b))<sup>18</sup>;

• **Personnel management** If disclosure would have a substantial adverse effect on the management or assessment of personnel, or the conduct of industrial relations, by the agency (s40(1)(c) and (e))<sup>19</sup>;

• **Agency operations** If disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (s40(1)(d))<sup>20</sup>;

• **Privacy** If disclosure would involve the unreasonable disclosure of another person's personal affairs (s41)<sup>21</sup>;

• **Commercial information** If a document would disclose (a) trade secrets or (b) information with commercial value which would be diminished by disclosure or (c) information which would unreasonably adversely affect a person in his business and professional affairs, or an organisation's business, commercial or financial affairs<sup>22</sup>, or prejudice the future supply of information to the agency. The person or organisation referred to is most likely to be a third party other than the agency (s43)<sup>23</sup>;

• **Confidentiality** If disclosure would be a breach of confidence (s45)<sup>24</sup>.

For a document to be exempt under ss36, 39 and 40 its disclosure must also be contrary to the public interest<sup>25</sup>. There is no explicit<sup>26</sup> public interest requirement in ss41, 43 and 45. This difference is vital, because, while it is often relatively easy to establish that documents come within one of the exempt categories, it is often far more difficult to establish that disclosure would not be in the public interest. The university or college has the onus of establishing this<sup>27</sup>. There are roughly similar public interest requirements in the Vic. FOIA, including the confidentiality exemption. In addition, s50(4) allows the Tribunal to override any of the above exemptions (other than the privacy exemption) if the public interest so requires. The NSW FOIB has no relevant public interest requirements.

Other classes of exemptions could occasionally be relevant, for example in defence-related research, or in relation to a university's legal advice<sup>28</sup>.

While the exemptions obviously have significant overlaps, one exemption may not be construed as being limited by any other exemption: they stand independently<sup>29</sup>.

**Amendment of personal records** A person may request amendment of a document to which access has been granted under the

## Freedom of information and universities — in the courts<sup>1</sup>

**Implicit in the views expressed . . . is a fundamental assumption that, if any change in the University's Ph.D. examination system is to be made, it should not be imposed upon the University from outside but result from the University's free choice after it has fully considered the matter. That assumption is . . . inconsistent with the requirements of the FOI Act. (The Administrative Appeals Tribunal in Healy and ANU).**

**The days when universities could be seen as . . . independent fiefdoms of opinionated academics are drawing to a close. (The Hon. Justice M.D. Kirby CMG, Chancellor of Macquarie University)**

Universities and colleges in Australia are beginning to appreciate the implications of freedom of information legislation for their operations, prompted in part by a number of cases concerning universities under Commonwealth and Victorian freedom of information legislation. Similar legislation has been proposed in other States. The Commonwealth *Privacy Bill 1986* and associated legislation, if enacted, will introduce substantial new

rights and amend existing freedom of information legislation. Of the elements of the 'new administrative law', these are the newest.

The Commonwealth enacted Australia's first freedom of information (FoI) legislation, the *Freedom of Information Act 1982* (hereinafter FOIA)<sup>2</sup>. Victoria is the only State to have introduced FoI legislation (hereinafter Vic. FOIA)<sup>3</sup>, although the New South Wales Govern-