



## *Express law* fast track information for clients

7 September 2006

### **Freedom of information and review of conclusive certificates**

The High Court yesterday ruled on the role of the Administrative Appeals Tribunal when reviewing a conclusive certificate issued to exempt internal working documents from a Freedom of Information (FOI) request. In doing so the Court provided guidance on what factors the Tribunal should take into account when determining 'whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest.' The case will have significant consequences for agencies considering the use of conclusive certificates to respond to future FOI requests.

#### ***McKinnon v Secretary, Department of Treasury***

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High Court of Australia, 6 September 2006 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ)  
[\[2006\] HCA 45](#)

The *Freedom of Information Act 1982* (FOI Act) establishes a regime for people to access government documents. For some kinds of documents, including 'internal working documents', ministers and secretaries of agencies can issue certificates to conclusively exempt documents from access.

In this case the Treasurer had issued two such certificates in relation to FOI requests regarding tax bracket creep and the First Home Owners Scheme.

The Administrative Appeal Tribunal (Tribunal) can review the issuing of such certificates. Its function on such reviews is to determine 'whether there exist reasonable grounds for the claim [led in the conclusive certificate] that the disclosure of the document would be contrary to the public interest' (FOI Act subsection 58(5)). The High Court's judgment examines how the Tribunal is to establish the existence of 'reasonable grounds'.

#### ***Decision of the High Court***

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The High Court ruled in Treasury's favour, dismissing the appeal by a majority of 3–2. Callinan and Heydon JJ delivered a joint judgment for the majority, with Hayne J delivering the other majority judgment. Gleeson CJ and Kirby J delivered a joint judgment in dissent.

All five judges clearly held that it was not the role of the Tribunal under subsection 58(5) to decide whether the disclosure of a document was contrary to the public interest. Instead, the focus under the subsection is on the existence of reasonable grounds supporting the decision in the certificate.

The judgments differ in their assessment of the considerations which should be taken into account in determining the existence of reasonable grounds. The majority judgments

reinforce the existing view that the Tribunal does not weigh up competing facets of the public interest in determining whether there are reasonable grounds for reaching the conclusion that disclosure would be contrary to the public interest. Rather, in the majority's view, the focus is squarely on the claims advanced by the Government, and their reasonableness in light of the evidence, and in particular the documents in issue.

The dissenting judgment of Gleeson CJ and Kirby J also confirmed that the Tribunal's role under subsection 58(5) was not to decide whether disclosure was contrary to the public interest. However, they found that deciding whether there are reasonable grounds for the non-disclosure claim involves an evaluation of all the known facts, circumstances and considerations which may bear rationally upon the issue in question. In their Honour's dissenting view these relevant considerations will include different facets of the public interest.

### ***Implications for clients***

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The High Court's decision confirms the view that the Tribunal does not make its own assessment as to whether disclosure is contrary to the public interest when reviewing a conclusive certificate. Instead, the Tribunal must focus its attention on whether reasonable grounds exist for concluding that disclosure is contrary to the public interest. In doing so, the Tribunal must consider the relevant facts and arguments put before it. This means the Tribunal retains its important role in reviewing conclusive certificates. However, it seems that one reasonable ground in support of the claim may be enough if supported by strong evidence, including the content of the specific documents in issue.

Two justices also provided some guidance as to what grounds may – or may not – be considered reasonable in the future. Callinan and Heydon JJ indicated that the need for confidential communication about controversial matters of ongoing sensitivity, a lack of context for financial data, or the inclusion of technical jargon in a document, may not be reasonable grounds for concluding disclosure is contrary to the public interest.

*Text of the decision is available at:*

[McKinnon v Secretary, Department of Treasury \[2006\] HCA 45](#)

Justin Davidson, Lawyer, AGS acted as instructing solicitor for Treasury in this case. Madeline Campbell was junior counsel for Treasury and has recently retired from AGS.

*For further information please contact:*

Justin Davidson  
Lawyer  
T 02 6253 7240 F 02 6253 7380  
[justin.davidson@ags.gov.au](mailto:justin.davidson@ags.gov.au)

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