



## **Express law** *fast track information for clients*

13 October 2009

### ***Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 now law***

**On 7 October 2009, the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (the Act) commenced, the Bill having received royal assent the previous day. The Bill had passed through both Houses of Parliament without amendment.**

#### ***What are the significant changes introduced by the Act?***

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The Act has amended the *Freedom of Information Act 1982* (FOI Act) and the *Archives Act 1983* (Archives Act) by removing the provisions of the FOI and Archives Acts which empowered a Minister or his or her delegate to issue a certificate which established that a document was exempt from disclosure.

The Act has also introduced special protections for the handling of national security and other sensitive information in Administrative Appeals Tribunal (AAT) proceedings involving requests for access to documents under both the FOI and Archives Acts.

The Act has made important amendments to the procedure for notifying third parties of AAT proceedings when their personal or business information is contained in documents in issue in an FOI matter.

#### ***When do the new provisions take effect?***

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The amendments made by the Act apply to FOI or Archives Act requests received on or after 7 October 2009.

The only exception is that for all AAT decisions made on or after 7 October 2009, there will be an automatic stay on the operation of any decision to give access to a document once an agency institutes an appeal to the Federal Court (new s 67 FOI Act and new s 55A Archives Act).

#### ***More information?***

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AGS's experienced national team of expert information access lawyers are ready to assist you with assessing the implications of the amendments introduced by the Act and advising on the impact in relation to requests.

## ***Further information on the more significant amendments.***

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### **Abolition of conclusive certificates**

Prior to the commencement of the Act, certain of the exemption provisions in the FOI Act permitted a Minister or his or her delegate, or for Cabinet documents the Secretary of the Department of the Prime Minister and Cabinet, to issue a certificate which established conclusively that a document was exempt from disclosure. If a certificate was issued, the AAT did not have its normal power to fully reconsider the merits of the exemption claim. There was a similar provision for the issuing of conclusive certificates under the Archives Act.

The Act has removed from both the FOI Act and the Archives Act the provisions which permit the issuing of a certificate. All decisions made to deny access to documents under the FOI Act and the Archives Act are now subject to full merits review by the AAT. The Act has also revoked all existing certificates if and when a fresh application for documents covered by an existing certificate is received.

### **New measures to protect national security and other sensitive information during AAT proceedings**

New s 60A of the FOI Act now requires the AAT, before determining that a document is not exempt from disclosure under s 33 (damage to national security, defence or international relations or information communicated in confidence to the Commonwealth by a foreign government or international organisation), to request the Inspector General of Intelligence and Security to appear personally and give evidence on the damage that may be done or on whether information or a matter communicated in confidence would be divulged, were the document to be disclosed. Similar amendments have also been made to the Archives Act.

There are also now new protections for the handling by the AAT of documents claimed to be exempt under s 33 and s 34 (cabinet documents) of the FOI Act, or under s 33(1)(a) or (b) of the Archives Act (national security, defence, international relations or confidential communications from a foreign government). In any proceedings in which exemption claims are maintained under these provisions, the AAT must be constituted by a Presidential member or members. Such members are only permitted to inspect a document claimed to be exempt if they are not satisfied by evidence on affidavit or otherwise that the document is exempt.

The AAT is also now required, in proceedings involving an exemption claim under s 33 of the FOI Act or s 33(1)(a) or (b) of the Archives Act, to give particular weight to a submission made by an agency or Minister that it is desirable that confidentiality orders under s 35(2) of the *Administrative Appeals Tribunal Act 1975* be made (which may require a private hearing or impose restrictions on publication or disclosure to certain parties of evidence).

### **AAT now has discretion not to require third parties to be notified of FOI AAT proceedings**

The Act has made important amendments to ss 59 and 59A of the FOI Act. Prior to the amendments, ss 59(3) and 59A(3) obliged agencies and Ministers to inform third parties of proceedings when their business or personal information was contained in a document in issue in an AAT proceeding. In 2007, the AAT decided in *Re Andrews and Australian Research Council* (2007) 44 AAR 407 that it had no discretion to permit an agency to refrain from notifying a third party.

Under the amendments that have been made, although the obligation to inform third parties remains, the AAT will have the discretion to permit an agency or Minister to refrain from informing a third party or third parties, on application by the agency or Minister. In considering any such application, the AAT will be required to have regard to whether informing the third party would prejudice an investigation; enable a person to ascertain the identity or existence of a confidential source; endanger the life or physical safety of any person; or cause damage to the security, defence or international relations of the Commonwealth. The obligation to notify States and Territories of proceedings involving information concerning them remains unchanged.

#### **Automatic stay of AAT decision where an appeal is lodged with the Federal Court of Australia**

The Act has amended the FOI Act by including a new s 67 in the FOI Act providing for an automatic stay of the operation of any decision of the AAT that a document is not an exempt document under the FOI or Archives Act, if the agency or Minister institutes an appeal to the Federal Court. Similar amendments have been made to the Archives Act via a new s 55A.

#### **Documents originating from an intelligence or security agency no longer subject to the FOI Act when in the possession of a Minister**

Prior to the commencement of the Act, agencies were exempt from the operation of the FOI Act in relation to documents originating or received from certain intelligence and security agencies, but Ministers were not similarly exempt from the operation of the Act in relation to such documents. The Act amends the FOI Act by exempting Ministers from the operation of the FOI Act in relation to such documents.

#### **Amendment to the Archives Act limiting access to certain documents to staff with security clearances**

In addition to the abolition of certificates and special measures for the handling of national security and other sensitive information in AAT proceedings, the Act amends the Archives Act by providing that National Archives of Australia staff are permitted to access all records in the open access period (records that are at least 30 years old) provided they have appropriate security clearances to view material which remains sensitive.

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