



## *Express law* fast track information for clients

27 November 2008

### **Freedom of Information Amendment Bill introduced to parliament**

**Yesterday the Special Minister of State and Cabinet Secretary, Senator John Faulkner, introduced the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 into the Senate.**

The bill, if enacted, would amend the *Freedom of Information Act 1982* (FOI Act) and the *Archives Act 1983* to remove the provisions of the FOI Act which presently empower a Minister or his or her delegate to issue a certificate which establishes that a document is exempt from disclosure. At the same time, the bill would introduce 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 Act and the Archives Act.

The bill has been referred to the Senate Standing Committee on Finance and Public Administration, which is due to report by 10 March 2009.

A summary of the more significant amendments proposed in the bill follows.

#### ***Abolition of conclusive certificates***

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At present, certain of the exemption provisions in the FOI Act permit a Minister or his or her delegate, or in the case of cabinet documents the Secretary, Department of the Prime Minister and Cabinet (PMC), to issue a certificate which establishes conclusively that a document is exempt from disclosure. If a certificate is issued, the AAT does not have its normal power to fully reconsider the merits of the exemption claim and is limited to considering whether there exist reasonable grounds for the exemption claim. In the case of a certificate issued in support of a s 36 exemption (internal working documents), the AAT has power to determine whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest. That provision was considered by the High Court in *McKinnon v Secretary, Department of the Treasury* (2006) 228 CLR 423 following a challenge by Mr McKinnon to a certificate issued by the then Treasurer, the Hon. Peter Costello, over certain documents in the possession of Treasury. There is similar provision for the issuing of conclusive certificates under the Archives Act.

The bill would honour an election commitment of the government by removing 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 would thus be subject to full merits review by the AAT. The proposed bill would also revoke all existing

certificates if and when a fresh application for documents covered by an existing certificates is received.

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

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Significantly, the bill proposes a new s 60A of the FOI Act which would require 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 to the Archives Act are also proposed.

The bill also proposes other amendments which would introduce 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 would be required to be constituted by a Presidential member or members and would only be permitted to inspect a document claimed to be exempt if it were not satisfied by evidence on affidavit or otherwise that the document was exempt.

The AAT would also be 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 to be given discretion not to require third parties to be notified of FOI AAT proceedings***

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The bill proposes important amendments to ss 59 and 59A of the FOI Act. At present, ss 59(3) and 59A(3) oblige agencies and Ministers to inform third parties of proceedings when their business or personal information is 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 proposed amendments, although the obligation to inform third parties would remain, the AAT would be given 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 would 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.

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

The bill proposes amendments which would automatically stay 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.

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

At present, agencies are exempt from the operation of the FOI Act in relation to documents originating or received from certain intelligence and security agencies, but Ministers are not similarly exempt from the operation of the Act in relation to such documents. The proposed amendments would exempt 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 bill proposes that National Archives of Australia (NAA) staff would be permitted to access all records in the open access period (records that are 30 years old) provided they have appropriate security clearances to view material which remains sensitive.

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