



## HIGH COURT OF AUSTRALIA

Public Information Officer

6 September 2006

### MICHAEL McKINNON v SECRETARY, DEPARTMENT OF TREASURY

No error of law was made by the Administrative Appeals Tribunal in rejecting Mr McKinnon's claim that he is entitled to receive certain Treasury documents under the *Freedom of Information Act*, the High Court of Australia held today.

In 2002, Mr McKinnon, *The Australian* newspaper's FOI editor, requested material relating to "bracket creep" in the income tax system and to the First Home Owners Scheme, including possible fraudulent use of the scheme and the take-up of the \$7,000 first home owners' grant by wealthy individuals. Treasury provided lists of the documents falling within the scope of those requests. Of 40 related to bracket creep all but one were claimed to be exempt. Most of the 47 concerning the First Home Owners Scheme were claimed to be wholly or partly exempt.

Under section 36(1) of the *FOI Act*, internal working documents are exempt from FOI access if disclosure would be contrary to the public interest. Such documents may include opinion, advice or recommendation in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or minister or of the Commonwealth Government. Section 36(3) provides that a minister, if satisfied that disclosure of such a document would be contrary to the public interest, may sign a certificate specifying the ground of public interest.

An internal review upheld the decisions refusing access so Mr McKinnon applied to the AAT for review of those decisions. Section 58(5) of the *FOI Act* provides that the AAT shall determine whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest. Shortly before the case came before the AAT, Treasurer Peter Costello signed two certificates, one covering 36 of the 40 bracket creep documents and the other covering parts of or all of 13 of the 47 First Home Owners Scheme documents. Each certificate set out seven grounds which fell into two broad categories, one that disclosure would compromise confidentiality and candour and the other that disclosure would be likely to mislead due to the provisional nature of the documents and their use of jargon, acronyms and unexplained methodology. The AAT determined that two documents did not fall within section 36(1) but determined that reasonable grounds existed for the claim that disclosure of the other documents covered by the Treasurer's certificates would be contrary to the public interest. The Full Court of the Federal Court dismissed an appeal. Mr McKinnon then appealed to the High Court.

The Court, by a 3-2 majority, dismissed the appeal. Mr McKinnon had argued that section 58(5) of the *FOI Act* required the AAT to consider and balance competing facets of the public interest. However, the Court held that section 58(5) does not permit the AAT to substitute its opinion about whether the disclosure of particular documents would be contrary to the public interest or to assess for itself what the public interest required. There is no scope for a full merits review. Instead, section 58(5) requires the AAT to answer the question whether there are reasonable grounds for the claim that the disclosure would be contrary to the public interest. The Court held that the AAT had not committed error in this task and it had properly considered the documents in issue and all the grounds said to support the claim.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*