

PUBLISHED VERSION

Bannister, Judith Kaye. McKinnon v Secretary, Department of Treasury: the Sir Humphrey clause - review of conclusive certificates in freedom of information applications. *Melbourne University Law Review*, 2006; 30(3):961-971

Copyright (c) 2006 Melbourne University Law Review Association, Inc.

PERMISSIONS

<http://mulr.law.unimelb.edu.au/go/submissions>

Open Access Policy

The *Review* supports open access. Recent articles published in the *Review* appear free of charge on austlii.edu.au (in html format) and on the *Review's* website (in searchable pdf format). In accordance with the *Review's* Publication Policy, authors may also publish the searchable pdf format of their article on SSRN or an equivalent database, without obtaining the consent of the Editors, so long as no fee is charged to access that database. Authors may do so immediately upon receiving the final pdf file of their article from the Editors; they do not need to wait any particular length of time after the print edition has been released.

In accordance with the *Review's* Publication Policy, authors must obtain the Editors' consent if they wish to republish their article in a larger published collection or on an online forum that users access for a fee.

As noted above, to facilitate the double blind refereeing process, the *Review* requires contributors to remove submissions from publicly accessible sources for the duration of the referee process.

13 December 2012

<http://hdl.handle.net/2440/54854>

CASE NOTES

MCKINNON v SECRETARY, DEPARTMENT OF TREASURY*

THE SIR HUMPHREY CLAUSE — REVIEW OF CONCLUSIVE CERTIFICATES IN FREEDOM OF INFORMATION APPLICATIONS

JUDITH BANNISTER†

[In the recent McKinnon decision the High Court considered access to Treasury documents under the Freedom of Information Act 1982 (Cth) where the Minister had issued a 'conclusive' certificate that disclosure was contrary to the public interest. The case is fundamentally about who decides what is in the public interest, and whether there is any scope for independent external review of a Minister's decision.]

CONTENTS

I	Introduction.....	961
II	Limited Review by the Administrative Appeals Tribunal	962
III	Grounds Listed for the Conclusive Certificate	964
IV	How Should the Administrative Appeals Tribunal Decide What Constitutes 'Reasonable Grounds'?.....	966
	A The Administrative Appeals Tribunal	966
	B The Federal Court	966
	C The High Court	967
V	Judicial Review May Be a Possibility	969
VI	Conclusion	971

I INTRODUCTION

On 6 September 2006, the High Court dismissed an appeal brought by Michael McKinnon, the Freedom of Information Editor at *The Australian* newspaper.¹ In 2002 McKinnon sought access under the *Freedom of Information Act 1982* (Cth) ('*FOI Act*') to Treasury documents concerning bracket creep in income tax and possible misuse of the First Home Owners Scheme \$7000 grant. The Treasury refused access to most of the documents, relying predominantly upon the exemption for internal working documents, and also in some instances for documents which would reveal business affairs.² After an internal review the

* (2006) 229 ALR 187 ('*McKinnon*').

† BA (SAIT), LLB (Hons) (Adel); Solicitor of the Supreme Court of New South Wales; Lecturer, School of Law, Flinders University.

¹ *McKinnon* (2006) 229 ALR 187, 207 (Hayne J), 222 (Callinan and Heydon JJ). Gleeson CJ and Kirby J dissented: at 193.

² *FOI Act* ss 36(1), 43.

Treasurer, Peter Costello, signed a certificate which, under the Act, established conclusively that disclosure of the internal working documents would be contrary to the public interest.³

McKinnon took the matter to the Administrative Appeals Tribunal, the Federal Court and the High Court.⁴ His appeals were dismissed at all levels. This case is not about whether it is, or is not, in the public interest to know about how taxes are being collected and spent. Rather, the case is fundamentally about who decides what is ‘in the public interest’, and whether there is any scope for independent external review of that decision. Specifically, the appeal to the Full Federal Court and the High Court concerned how the Administrative Appeals Tribunal should approach the limited review of conclusive certificates allowed for under the legislation and whether the Tribunal had made an error of law when it found that there were reasonable grounds to support the claims made by the Treasurer in the certificates.

The High Court decision in *McKinnon* left the Administrative Appeals Tribunal with very little to do when faced with conclusive certificates. Kirby J expressed some cynicism about the provision in the Act allowing for conclusive certificates when the case was argued before the High Court. Alluding to Sir Humphrey Appleby, a fictional civil servant in the 1980s BBC television comedy series *Yes Minister* and its sequel *Yes, Prime Minister*, Kirby J said: ‘the first answer might be that this was a Sir Humphrey clause: “This was put in to give the appearance of having this high level tribunal with judges and others to review but really, Minister, it gives them nothing to do.”’⁵

II LIMITED REVIEW BY THE ADMINISTRATIVE APPEALS TRIBUNAL

The normal function of the Administrative Appeals Tribunal is to undertake merits review by considering a matter again from the beginning and substituting the Tribunal’s decision for that of the original decision-maker.⁶ However, the Tribunal’s review is constrained in relation to exempt documents under the *FOI Act*. Once it is established that a document falls within one of the exemptions, ‘the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted’.⁷ So, while government agencies and Ministers can decide to release documents even though they are protected by one of the exemptions, the Tribunal does not have the power to make that decision. There are a wide range of exemptions in Part IV of the Act, including where documents affect national security, international and inter-state relations, law enforcement, or personal privacy, where documents are of the Cabinet or the Executive Council, would reveal business affairs, or are internal working

³ *FOI Act* s 36(3).

⁴ *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138; *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70; *McKinnon* (2006) 229 ALR 187.

⁵ *McKinnon v Secretary, Department of Treasury* [2006] HCATrans 239, 29 (Kirby J, 18 May 2006).

⁶ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).

⁷ *FOI Act* s 58(2).

documents. Part of the Tribunal's review process is to determine whether a document falls within one of the exempt categories.

The category in question in *McKinnon* concerned internal working documents that are exempt if they:

- (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
- (b) would be contrary to the public interest.⁸

Obviously, not all internal working documents are exempt under this section and access will only be refused if disclosure would be contrary to the public interest.⁹ This requires a consideration of the public interest and raises the question: who should decide what this is? When a decision is challenged by an applicant in the Administrative Appeals Tribunal, the Tribunal has the power to decide whether a document falls within this particular exemption, including the public interest element. However, the scope of the Tribunal's review can be limited significantly if the Minister decides to issue a conclusive certificate.

Under s 36(3), if a Minister is satisfied that disclosure of an internal working document would be contrary to the public interest, he or she may sign a certificate that establishes this 'conclusively'. The Minister must give notice of the grounds of public interest upon which his or her decision is based.¹⁰

If an applicant appeals to the Administrative Appeals Tribunal when a certificate has been issued, the Tribunal must first be satisfied that the document in question is an internal working document. In *Re McKinnon and Secretary, Department of the Treasury*, Downes P held that two letters sent to the Treasury by third parties were not internal working documents.¹¹ The letters were from housing industry bodies that had made representations to the government about the First Home Owners Scheme. The Treasury also sought to rely upon the business affairs exemption for the letters.¹² All the other documents covered by the certificates were held to be internal working documents.¹³ Listed in full in a schedule to the Tribunal decision, they included internal minutes, emails, briefing papers, draft correspondence, spreadsheets, and briefs prepared for Ministers for parliamentary question time.¹⁴

Once the Administrative Appeals Tribunal is satisfied that a document subject to a conclusive certificate is an internal working document, the Tribunal cannot then make its own decision about whether disclosure would be contrary to the

⁸ *FOI Act* s 36(1). See also *McKinnon* (2006) 229 ALR 187, 189–90 (Gleeson CJ and Kirby J), 195 (Hayne J).

⁹ See, eg, *Re Bartl and Secretary, Department of Employment, Education, Training and Youth Affairs* (1998) 54 ALD 509.

¹⁰ *FOI Act* s 36(7).

¹¹ (2004) 86 ALD 138, 158.

¹² See *FOI Act* s 43.

¹³ *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, 161 (Downes P).

¹⁴ *Ibid* 163–80 (Downes P).

public interest. Under s 58(5) of the *FOI Act*, the Tribunal is limited to determining whether reasonable grounds exist for the claims made in the certificate:

Where application is or has been made to the Tribunal for the review of a decision refusing to grant access to a document in accordance with a request, being a document that is claimed to be an exempt document under section 36 and in respect of which a certificate is in force under that section, the Tribunal shall, in a case where it is satisfied that the document is a document to which paragraph 36(1)(a) applies, if the applicant so requests, determine the question whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest.

The difference between this limited form of review and the power the Tribunal has to review other claims for exemptions under the *FOI Act* can be demonstrated by the way the Tribunal dealt with the letters containing representations to the government from the housing industry bodies. Downes P decided that the letters were not internal working documents and that therefore the conclusive certificate did not protect them from disclosure.¹⁵ The Treasury also argued that the letters contained commercial information and so were protected by the business affairs exemption under s 43.¹⁶ The test for this exemption is whether disclosure could reasonably be expected to unreasonably affect business affairs or prejudice further supply of information. There is no provision for conclusive certificates for this exemption. Downes P substituted his own opinion on whether the documents were exempt, and held that they were not.¹⁷

For documents that are internal working documents and subject to a conclusive certificate, the Administrative Appeals Tribunal must determine whether reasonable grounds exist. This is not a question of whether the claim about public interest is itself reasonable, but whether there are reasonable grounds for the claim. Beyond deciding this question, the Tribunal has no power to review the Minister's decision to issue the certificate.¹⁸ How the Tribunal should approach review under s 58(5) was the central question in this case as it proceeded through the appeal courts.¹⁹

III GROUNDS LISTED FOR THE CONCLUSIVE CERTIFICATE

The Treasurer signed conclusive certificates for the bracket creep and First Home Owners Scheme documents sought by McKinnon. The grounds on which the certificates were based concerned confidentiality and the possibility that the information might mislead the public. More specifically, that officers of departments should be able to communicate freely and confidentially in writing with Ministers on sensitive and controversial matters, as they might otherwise do

¹⁵ Ibid 161.

¹⁶ Ibid 140, 158–9 (Downes P).

¹⁷ Ibid 161. See also *FOI Act* s 58(1).

¹⁸ *FOI Act* s 58(3).

¹⁹ See *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70, 73 (Tamberlin J), 78–9 (Conti J), 123 (Jacobson J); *McKinnon* (2006) 229 ALR 187, 188 (Gleeson CJ and Kirby J), 193–4 (Hayne J), 213 (Callinan and Heydon JJ). Cf *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, 140 (Downes P).

orally. The Treasurer stated that it is important to maintain proper records of these communications and that the possibility of disclosure might make officers reluctant to commit such matters to writing. The Treasurer also claimed that the release of documents outlining options that had not been settled upon might mislead the public, and that information intended for an audience with special knowledge of technical terms and jargon could be misinterpreted. Also, disclosure of sensitive material that had been prepared in response to parliamentary questions would, the Treasurer claimed, threaten the Westminster-based system of government.²⁰

The Treasurer's list drew upon grounds from earlier cases that have subsequently had a mixed reception.²¹ The grounds relied upon were general and did not address each document individually. Such use of 'pro forma' style grounds in conclusive certificates gives rise to very real concerns that class claims will develop and that presumptions will be made that disclosure of documents of a certain kind will always be contrary to the public interest without looking at individual documents in specific contexts.²²

In the Administrative Appeals Tribunal, Downes P held that the listed grounds were not irrational, but that their rationality did not decide the matter.²³ The grounds were less persuasive because they were general and so Downes P considered whether each individual claim could be supported.²⁴ To do this his Honour examined the documents and considered evidence led by both sides. How Downes P went about this process was analysed in some detail in the appeals. Some of the evidence was given in private hearings under procedures that also apply to certificates issued for documents reasonably expected to cause damage to national security, defence and international relations.²⁵ McKinnon's lawyers were able to cross-examine Treasury witnesses, but were excluded from parts of the hearings that disclosed the contents of the documents. They did not have access to the documents and so the evidence led by witnesses supporting disclosure was quite general. When the matter came before the High Court, several members of the Court expressed some frustration about this lack of access.²⁶ The Federal Court and High Court were not given access to the documents.²⁷

Much of the evidence given on behalf of McKinnon emphasised the importance of freedom of information in a democracy and made general comments about the way government departments work. The evidence against disclosure

²⁰ See *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, 144–5 (Downes P).

²¹ See *ibid* 146–50 (Downes P).

²² This was argued by the Australian Press Council in its amicus curiae submission: see Australian Press Council, *Australian Press Council Amicus Curiae Brief in the High Court Appeal, McKinnon v Secretary, Department of Treasury* (17 April 2006) <http://www.presscouncil.org.au/psite/fop/fop_subs/amicus_foi.html>.

²³ *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, 142, 146–7.

²⁴ *Ibid* 144–5.

²⁵ See *FOI Act* s 58C.

²⁶ *McKinnon* (2006) 229 ALR 187, 192–3 (Gleeson CJ and Kirby J), 199 (Hayne J).

²⁷ *McKinnon v Secretary, Department of Treasury* [2006] HCATrans 239, 39 (Gleeson CJ, 18 May 2006), 62 (Kirby J, 18 May 2006).

from the Treasury officers, on the other hand, directly addressed the claims in relation to the documents.²⁸ The following comment by Downes P about one of the applicant's witnesses is revealing and demonstrates the difficulties faced by applicants in such cases:

Much of Mr Stutchbury's evidence [the then Editor of *The Australian*] concentrated on the public interest in free and informed community debate and upon the robustness of modern government which can accommodate such debate. This is not to be doubted. However, there remains a legitimate potential public interest in letting government get on with its role without unnecessary intrusion and distraction. Provided the latter view is a reasonable view it will be difficult to upset a conclusive certificate based on it.²⁹

Downes P held that the evidence given in private by the Treasury officers supported the claims made in the certificates and that the cross-examination did not demonstrate that they were unreasonable.³⁰

IV HOW SHOULD THE ADMINISTRATIVE APPEALS TRIBUNAL DECIDE WHAT CONSTITUTES 'REASONABLE GROUNDS'?

A *The Administrative Appeals Tribunal*

The Tribunal held that reasonable grounds existed for the claims made in the Treasurer's certificates.³¹ Downes P did not balance the competing claims about the public interest. His Honour interpreted his task as follows:

It is not for me to decide which of the opinions of the applicant's and respondent's witnesses are preferable. That is not the s 58(5) task. Provided there is a reasonable basis for an opinion and there is evidence to support it the test in s 58(5) will be satisfied.³²

B *The Federal Court*

McKinnon appealed to the Full Federal Court arguing that this interpretation of s 58(5) involved an error of law.³³ A majority of the Court dismissed the appeal.³⁴ Jacobson J rejected the argument that the Tribunal is required to balance competing factors. His Honour concluded that approaching the task in that way would 'negate the reasonable grounds concept and permit the Tribunal, through the back door, to come to its own opinion of what is in the public

²⁸ *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138, 150 (Downes P).

²⁹ *Ibid* 151.

³⁰ *Ibid* 152.

³¹ *Ibid* 161 (Downes P).

³² *Ibid* 152.

³³ *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70, 91 (Conti J), 131 (Jacobson J); see also *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1). Other errors were also argued, which included the way the Tribunal dealt with the appellant's evidence, its construction of 'the public interest', and the procedures adopted for the taking of evidence in private: at 101, 107-8, 114 (Conti J).

³⁴ *Ibid* 77 (Tamberlin J), 144 (Jacobson J). Conti J dissented: at 123.

interest.³⁵ Tamberlin J agreed that it is not necessary for the Tribunal to weigh all the other possible facets of the public interest.³⁶ His Honour interpreted s 58(5) as posing a ‘threshold question of whether there is any non-absurd or rational ground for a claim’.³⁷ This reference to ‘any’ meant, literally, that one rational ground was sufficient.³⁸

Conti J dissented and would have remitted the matter to the Tribunal.³⁹ His Honour took a very different view to all other judges involved in the case. Conti J focused upon the words ‘determine the question’ in s 58(5) and held that this obliged the Tribunal to undertake a balancing exercise.⁴⁰

C The High Court

McKinnon’s counsel argued before the High Court that Downes P had not taken the public interest considerations that favoured disclosure into account in any meaningful way.⁴¹ He argued again that s 58(5) requires the Administrative Appeals Tribunal to undertake a balancing exercise and that the approach adopted by the Tribunal, and upheld by the Federal Court, rendered the review process essentially meaningless.⁴² The High Court rejected the appellant’s central argument that the Tribunal’s task involves balancing the various facets of the public interest.⁴³ The majority and minority judges then adopted different approaches when explaining what was required of the Tribunal.

Gleeson CJ and Kirby J dissented. Their Honours rejected the Federal Court majority’s view that applications for review under s 58(5) must fail if just one facet of the public interest supports non-disclosure and asked: ‘How, then, could an applicant ever succeed?’⁴⁴ Their Honours argued that the Tribunal was required to take all relevant considerations into account:

Until all relevant considerations, that is, all (known) considerations that could have a rational bearing upon the claim, or state of mind, or decision under review, are taken into account, it is impossible to form a just and fair judgment whether, objectively considered, there are reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest. It is not enough for the tribunal to ask whether there are facts, or opinions, or arguments that rationally bear upon that topic. All relevant matters must be taken into account; not for the purpose of deciding whether the tribunal agrees with the minister, but for the more limited purpose of deciding whether there are reasonable grounds for the claim which the minister accepted.⁴⁵

³⁵ Ibid 140.

³⁶ Ibid 74.

³⁷ Ibid.

³⁸ Ibid 76–7.

³⁹ Ibid 78.

⁴⁰ Ibid 91–2.

⁴¹ *McKinnon v Secretary, Department of Treasury* [2006] HCATrans 239, 81 (J E Griffiths, 18 May 2006).

⁴² Ibid 23 (J E Griffiths, 18 May 2006).

⁴³ *McKinnon* (2006) 229 ALR 187, 193 (Gleeson CJ and Kirby J), 221 (Callinan and Heydon JJ).

⁴⁴ Ibid 192.

⁴⁵ Ibid 191.

Their Honours found it difficult to ascertain exactly what the approach was that Downes P had adopted. Some passages in Downes P's decision suggested that his Honour may have taken account of all relevant considerations, and yet that was not the view adopted by the Federal Court when it upheld the decision.⁴⁶ Gleeson CJ and Kirby J would have allowed the appeal and remitted the matter to the Tribunal for consideration of all relevant matters before deciding whether there were reasonable grounds to support the claims.⁴⁷

Hayne J agreed that the Federal Court majority had been wrong when it held that one rational reason favouring non-disclosure was sufficient.⁴⁸

Rather, the tribunal's task is to decide whether the conclusion expressed in the certificate (that disclosure of particular documents would be contrary to the public interest) can be supported by logical arguments which, *taken together*, are reasonably open to be adopted and which, if adopted, would support the conclusion expressed in the certificate.⁴⁹

This involves taking into account any relevant evidence and arguments presented to the Tribunal.⁵⁰ Hayne J held that Downes P had done so and dismissed the appeal.⁵¹

Callinan and Heydon JJ also dismissed the appeal and took a more restrictive approach. Their Honours considered the grounds listed in the conclusive certificates in some detail and found that certain of these grounds were more persuasive than others.⁵² The importance of protecting candour in written communications, the problems associated with the release of tentative conclusions, and the need to maintain confidentiality before release to Parliament were cogent grounds. However, their Honours found the grounds that the information might be misleading to the public far less convincing. The information could be explained and given context by the Minister.⁵³ The public can, they held, be trusted to understand technical material and there are experts who can assist with interpretation.⁵⁴ Despite this ambivalence about some of the grounds, their Honours held that there were 'a number of grounds of claim which the tribunal was entitled to hold were reasonable and such as to justify conclusiveness.'⁵⁵

Callinan and Heydon JJ reasoned that the best approach for the Tribunal when determining this issue would be to simply examine the documents and the stated grounds. Their Honours thought it important that the Tribunal avoid balancing various interests and held that it ought not '[t]o have regard to extraneous matters such as other competing reasons, if the requisite statutory reason for

⁴⁶ Ibid 192–3.

⁴⁷ Ibid 193.

⁴⁸ Ibid 202, 204.

⁴⁹ Ibid 203 (emphasis in original).

⁵⁰ Ibid 204.

⁵¹ Ibid 206–7.

⁵² Ibid 220–1.

⁵³ Ibid 220.

⁵⁴ Ibid.

⁵⁵ Ibid 221.

non-disclosure has been demonstrated'.⁵⁶ Their Honours acknowledged that this meant

that if one reasonable ground for the claim of contrariety to the public interest exists, even though there may be reasonable grounds the other way, the conclusiveness will be beyond review. It is important to notice that the statutory language does not give an entitlement to access if there are, as often there may very well be, reasonable grounds for the revelation of the document in the public interest.⁵⁷

This may mean that the only means of challenging a conclusive certificate is to demonstrate that there are in fact no reasonable grounds, or that the grounds are so unreasonable that no reasonable person could accept them.⁵⁸ In *McKinnon*, Callinan and Heydon JJ held there were a number of grounds that the Tribunal could have found to be reasonable.⁵⁹

V JUDICIAL REVIEW MAY BE A POSSIBILITY

Gleeson CJ and Kirby J, in dissent, proposed an approach that would have required the Tribunal to consider all relevant material.⁶⁰ This is similar to the oversight of the administrative decision-making process exercised by courts when they undertake judicial review on the grounds that relevant considerations have not been taken into account. The majority did not support this approach for the Tribunal's review under s 58(5) of ministerial decisions.⁶¹ However, in obiter, Hayne J made some interesting comments on judicial review that may offer another possibility for future applicants faced with conclusive certificates. *McKinnon* had obtained reasons from the Treasurer under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) but made no application for judicial review in this case. Instead he sought review by the Tribunal under the *FOI Act* and then pursued appeals on an error of law claim through the courts. Hayne J suggested that *McKinnon* could have applied to the Federal Court for judicial review.⁶² His Honour referred to the possible grounds of an error of law or an improper exercise of power.⁶³ During the hearing before the High Court, Hayne J expressed particular interest in whether there was an argument that the Minister had failed to take account of relevant considerations.⁶⁴

Given the limited scope of review by the Tribunal under s 58(5) when Ministers sign conclusive certificates, judicial review proceedings that investigate whether a Minister has failed to consider relevant considerations, or has consid-

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 222.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* 221.

⁶⁰ *Ibid.* 192.

⁶¹ *Ibid.* 202 (Hayne J), 222 (Callinan and Heydon JJ).

⁶² *Ibid.* 197.

⁶³ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(f), (1)(e).

⁶⁴ *McKinnon v Secretary, Department of Treasury* [2006] HCATrans 239, 50 (Hayne J and J E Griffiths, 18 May 2006).

ered irrelevant ones, when signing the certificates may be of some use.⁶⁵ The remedies available include declarations that may offer some assistance to applicants.⁶⁶ While not as effective as the full merits review that the Administrative Appeals Tribunal normally undertakes, these remedies compare favourably to the procedures under the *FOI Act*. Even when the Tribunal does find that no reasonable grounds exist to support a conclusive certificate, the Tribunal simply makes a determination that is communicated to the Minister. The Minister may decide not to revoke the certificate despite this finding and instead read a notice of that decision to Parliament.⁶⁷

The High Court has considered the possibility of judicial review of freedom of information decisions before. In *Shergold v Tanner*,⁶⁸ the Court held that the phrase ‘establishes conclusively’ does not oust the jurisdiction of the Federal Court to judicially review a Minister’s decision to issue a certificate in a freedom of information case.⁶⁹ In that case Lindsay Tanner, then federal Shadow Minister for Transport, sought access under the *FOI Act* to documents on waterfront reform from the Department of Employment, Workplace Relations and Small Business. Before the matter was appealed to the Administrative Appeals Tribunal, the Secretary of the Department signed conclusive certificates as the Minister’s delegate. Rather than pursuing a Tribunal application, Tanner sought judicial review in the Federal Court of the Secretary’s decision to issue the certificates.⁷⁰ The High Court held that the conclusive certificates operated within the scope of the *FOI Act* and the statutory provisions did not impliedly repeal the Federal Court’s jurisdiction to exercise judicial review.

While judicial review may be an interesting option to pursue for future freedom of information applicants facing conclusive certificates, there is reason for caution. In *Shergold*, the High Court noted that the grounds for judicial review might have only limited operation for applications concerning conclusive certificates about the public interest when the Minister’s discretion is broad:

For example, the range of relevant considerations may be very wide and the range of irrelevant considerations very narrow. The content of a requirement to provide natural justice to the person aggrieved by the decision may be very limited.⁷¹

The High Court left these questions for further consideration by the Federal Court. The case did not proceed: Tanner decided not to pursue the matter further because of significant costs and delays.

⁶⁵ See *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(e), (2)(a), (2)(b).

⁶⁶ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(1)(c). Other remedies available include: orders quashing or setting aside the decision: s 16(1)(a); orders remitting the matter to the decision-maker subject to directions: s 16(1)(b); and orders directing any of the parties to do, or to refrain from doing, any act the court considers necessary to do justice between the parties: s 16(1)(d).

⁶⁷ *FOI Act* s 58A.

⁶⁸ (2002) 209 CLR 126 (*Shergold*).

⁶⁹ See *ibid* 139 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ). This is irrespective of whether the Federal Court has jurisdiction under *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 8(1) or *Judiciary Act 1903* (Cth) s 39B.

⁷⁰ *Shergold v Tanner* (2000) 102 FCR 215.

⁷¹ (2002) 209 CLR 126, 138 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

VI CONCLUSION

The High Court decision in *McKinnon* leaves freedom of information applicants facing conclusive certificates that, if accompanied by carefully drafted grounds, effectively preclude review by the Administrative Appeals Tribunal. The argument that the Tribunal must balance competing facets of the public interest before determining whether the grounds relied upon in a conclusive certificate are reasonable left open some scope for an independent assessment of the public interest during external review. That approach has been rejected.

Judicial review may offer an alternative form of review, however costs and delays involved in court proceedings may be a major disincentive for applicants such as journalists seeking information for current stories. In addition, while judicial review may offer remedies that are more flexible than the restricted procedures under ss 58 and 58A of the *FOI Act*, the court will not substitute its own view of the public interest for that of the Minister. After the High Court's decision in *McKinnon*, many called for reform.⁷² Although not necessarily expressed in these terms, full external merits review is what they seek. Legislative reform, specifically repeal of the conclusive certificate process for internal working documents, is the only way that access to documents of this kind will be effectively opened up.

⁷² See, eg, 'Calls for Urgent Reform of FOI', *The Canberra Times* (Canberra), 7 September 2006, 2; Nicola Roxon, 'Freedom of Information under Attack', *The Advertiser* (Adelaide), 8 September 2006, 22; 'The Failure of FOI', *The Canberra Times* (Canberra), 9 September 2006, 2.