

McKINNON v SECRETARY, DEPARTMENT OF TREASURY (S52/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of Judgment: 2 August 2005

Date of Grant of Special Leave to Appeal: 3 February 2006

The proceedings concern two applications made by the appellant, Michael McKinnon, the Freedom of Information ("FOI") Editor of the Australian newspaper, for release of documents under the *Freedom of Information Act* 1982 (Cth) ("the FOI Act") concerning subjects of public interest.

The appellant applied on 17 December 2002 to the FOI officer of the Australian Taxation Office for the disclosure of documents relating to "bracket creep". In particular, he sought reports, reviews or evaluations completed in the last two years detailing the extent of bracket creep and its impact on revenue collection, in particular the higher burdens faced by taxpayers resulting from increases due to bracket creep. This class of documents is referred to as "the Bracket Creep documents".

The appellant applied on 3 December 2002 to the FOI officer of the Federal Treasury for disclosure of a second category of documents. These were documents relating to reviews, reports or evaluations completed in the last two years on the First Home Buyers Scheme. He sought, in particular, documents summarising the level of fraud associated with that scheme including its use by high wealth individuals and its impact on the performance of the housing sector. This class of documents is referred to as "the First Home Buyers documents".

For both requests there were numerous documents which the respondent claimed were exempt under s 36 of the FOI Act. Section 36 Act provides that a document is exempt from disclosure if it is an internal working document (as defined in s 36(1)(a)) and disclosure would be contrary to the public interest. If the Treasurer is satisfied, in relation to an internal working document, that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect. Such a certificate is called a "conclusive certificate".

Shortly before the hearing dates listed for the applications, the Treasurer issued a conclusive certificate under s 36(3) of the FOI Act for the Bracket Creep documents on 1 December 2003. He issued a conclusive certificate for the First Home Buyers documents on 13 January 2004. The Treasurer said that disclosing the documents would be contrary to the public interest because they could confuse or mislead the public and would impede frank communication between a minister and staff.

The appellant was unsuccessful in the Administrative Appeals Tribunal ("the Tribunal"). The Tribunal decided, pursuant to s 58(5) of the FOI Act that there existed reasonable grounds for the claim made in certificates, signed by the

Treasurer under s 36(3), that the disclosure of certain documents would be contrary to the public interest. The appellant appealed to the Federal Court. The appeal was rejected by a majority of the Full Court of the Federal Court (Tamberlin and Jacobson JJ, Conti J dissenting). The Court found that there had been no error of law by the Tribunal in approaching the matter on the basis that it was not necessary "when considering s 58(5) to carry out the process of balancing or weighing all aspects of the public interest or indeed to decide whether or not that ground will ultimately prevail".

The Australian Press Council seeks to leave to intervene as amicus curiae in these proceedings.

The grounds of appeal include:-

The majority of the Full Court erred in finding that the Tribunal had not:

- misconstrued or misapplied sub-section 58(5) of the FOI Act;
- failed properly to exercise its jurisdiction;
- failed to take account of relevant considerations with respect to whether there existed reasonable grounds for claims made in certificates signed by the Treasurer under sub-section 36(3) of the FOI Act that the disclosure of certain documents would be contrary to the public interest, in particular by:
 - misconstruing the nature of the public interest as provided for in subsection 58(5);
 - applying a two stage approach to the question, namely, asking as a threshold matter whether the claims in the certificates were rational or logical, then examining the documents in question to see if they could be linked to one or more of the 7 claims; and
 - failing to take any or sufficient account of all of the evidence on public interest before the Tribunal.