Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008

Submission to the Senate Finance and Public Administration Committee

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Summary

1. Conclusive certificates cannot exist in a fair and rigorous Freedom of Information regime. Politicians cannot determine the public interest with a review mechanism that ignores the public interest in release of documents. This argument was lost when the FOI Act was passed by Federal Parliament.

2. Conclusive certificate can be issued over a range of exemptions and by both ministers and public servants with no requirement to revoke certificates even when an AAT appeal is lost by the government.

3. The review process for conclusive certificates is inherently unfair and against the doctrine of separation of powers. Conclusive certificates have been issued to protect the political interests of governments and reasons for issue are flawed without any evidentiary basis. The Howard factors used to justify certificate issue have little to no standing in case law and are based on the premise that public servants will act illegally.

4. Specific FOI cases where certificates were used related to issues of overwhelming public interest in document release. The RBA case illustrates despite claims made in certificates increased transparency had been entirely positive.

Conclusive Certificates and FOI Act

1.0 On November 26, on recommendation of the Selection of Bills Committee, the Senate referred to the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 to the Senate Finance and Public Administration Committee for inquiry and report by March 10, 2009. The Bill was referred to "allow all stakeholders an opportunity to review the final Bill, and ensure the efficacy and transparency of the mechanisms applicable to a decision to exempt material; review of appropriate regime for such decisions etc.''

1.1 The bill arises from the election commitment by the Rudd Government to abolish conclusive certificates. The ALP first promised to remove certificates from the FOI Act as part of its 2004 election platform following a FOI review announced by then shadow Attorney General Nicola Roxon.

1.2 The 1982 FOI Act provides for certificate issue under a number of sections of the FOI Act: s 33 (national security, defense and international relations), 33A (Commonwealth/State relations), 34 (Cabinet documents), 35 (Executive Council documents) and 36 (deliberative process documents). Where the Minister (or the Secretary to the Department of Prime Minister and Cabinet (s 34) or the Secretary to the Executive Council (s 35)) is satisfied that a significant document should not be disclosed, he or she may sign a certificate that establishes conclusively that a document is exempt from release under one of the relevant sections listed above.

1.3 The appropriate Minister to issue a certificate in relation to documents of an agency, under s 33, 33A and 36 is the Minister with responsibility for the subject matter or the responsible Minister for the agency in possession of the document. The latter also has the power to delegate the power to issue certificates (ss 33(5) & (6), 33A(6) & (7) and 36(8) & (9)).

1.4 The FOI Act allows the issue of certificates across a range of exemptions, including Section 36, allowing certificate issue on almost any document given the extensive scope of S36. The power to issue certificates, and therefore to determine the public interest can and has been delegated to unelected bureaucrats (see McKinnon v RBA, McKinnon v PM and C). Even if the Administrative Appeals Tribunal decided on appeal that reasonable grounds for a certificate do not exist there is no obligation for the minister to revoke the certificate. Instead, the minister must only provide reasons to Parliament for the decision.

1.5 Conclusive certificate can be issued over a range of exemptions and by both ministers and public servants with no requirement to revoke certificates even when an AAT appeal is lost by the government.

Certificates and review

2.0 In the cases of appeal on FOI applications to the Administrative Appeals Tribunal the onus rests with the respondent to prove reasons why documents should not be released. The AAT, like any court, considers both sides of the argument. For example, in the case of appeals under Section 36 (deliberative documents) and where the deliberative nature of the documents is not in dispute, the AAT will consider and balance public interest arguments favouring release and favouring non-disclosure before arriving at a decision on whether documents are exempt under the Act.

2.1 However, the Administrative Appeals Tribunal's review jurisdiction under Part VI of the FOI Act (Review of decisions) is that upon an application for review under Section 55, the Tribunal is empowered "to determine the question whether there exist reasonable grounds" for the relevant claim in the certificate. In the case of a conclusive certificate under Section 36, the relevant question for the Tribunal is whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest (see sub-section 58(5)). 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.

2.2 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 public interest or benefit the 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.

2.3 The issue of how tribunal and courts should interpret the FOI legislation relevant to certificates was addressed in the High Court appeal *McKinnon v Treasury*. The appeal was first heard by the AAT where AAT President Justice Downes took a narrow view of his review function under Section 58(5). Justice Downes proceeded on the basis that his task was not to decide which of the opinions of the various witnesses was preferable relevant to any claims made in support of the certificate. Rather, the test applied by Justice Downes was that as long as there was a reasonable basis for an opinion that disclosure would be contrary to the public interest and there was some evidence to support it, the Tribunal should find that reasonable grounds exist. Justice Downes upheld the conclusive certificates even though he did not agree that all the grounds relied upon in respect of individual documents were applicable because it was sufficient in his view, that at least one of those grounds had a reasonable basis. His Honour's approach was reflected in the following passage from his judgement:

"*Those are rational grounds. They have support in the authorities and in the evidence. Accordingly, without determining whether it is my opinion or not, applying the approach I have stated that I will adopt, I conclude that reasonable grounds exist*

for the claim that disclosure of each of the documents would be contrary to the public interest".

2.4 The grounds provided for the certificate issue in the McKinnon v Treasury case arise from the so-called Howard factors (see re Howard and the Treasurer of Australia *(1985) 7 ALD 645*) which will be addressed in further detail in this submission. The Howard factors remain open for use by any politician or agency in issuing a certificate.

2.5 Justice Downes's approach was upheld by the High Court. It is therefore impossible to imagine any realistic circumstances where on appeal against a conclusive certificate any court or tribunal would conclude anything other than reasonable grounds exist for claims that disclosure would be contrary to the public interest, including arguments concerning inhibition on frankness and candour and misleading or confusing the public – the Howard factors. As long as an agency is able to produce a credible witness to give evidence in support of the claims, those claims will be upheld despite any existence of unchallenged evidence disputing the government's claims and the demonstration of respectable competing facets of the public interest as was the case in McKinnon v Treasury.

2.6 The possibility of a successful appeal against a certificate was addressed in an October 2006 speech by the Commonwealth Ombudsman Prof. John McMillan in a speech to the Australian Institute of Administrative Law. Prof McMillan noted that in the McKinnon case, Callinan and Heydon JJ, in the majority, "went so far as to add that a conclusive certificate should be upheld if it contains one reasonable ground, with evidentiary support, for a claim that disclosure would be contrary to the public interest, even though there may be reasonable grounds to support disclosure''. Prof McMillan said: "The history of the McKinnon litigation illustrates that a conclusive certificate will be hard to overturn….In short, the test of whether a certificate claim constitutes a reasonable ground for denial of access is not an overly demanding test''.

2.7 The other option for challenging a conclusive certificate is an application for review under section 13 of the Administrative Decisions (Judicial Review) Act 1977. In McKinnon v Treasury, Hayne J suggested that I could have applied to the Federal Court for judicial review with reference to the possible grounds of an error of law or an improper exercise of power. It should be noted that the High Court has considered the possibility of judicial review of FOI decisions before the McKinnon case. In Shergold v Tanner, 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. 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.

2.8 The High Court noted in Shergold 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 advising that the range of relevant considerations may be very wide and the range of irrelevant considerations very narrow leaving very limited scope for the provision of natural justice.

2.9 The legislation and court's interpretation has meant any appeal against a conclusive certificate either through the FOI Act or the ADJR is doomed to failure even ignoring the onerous financial cost of such litigation to any individual or company. In a democracy, the doctrine of separation of powers requires the option of a full-merit

review by an independent judiciary of government decisions. This doctrine is particularly relevant when politicians opt for secrecy in the face of legislation providing a right of access to government documents. This fundamental check and balance of a fair legal challenge does not exist against the issue of conclusive certificates.

2.10 The review process for conclusive certificates is inherently unfair and against the doctrine of separation of powers.

Certificate reasons and the Howard factors

3.0 As noted in 2.1, a Minister must give notice of the grounds of public interest upon which his or her decision is based for issuing a conclusive certificate.

3.1 The reasons provided by the then Treasurer Peter Costello for the certificates issued in the McKinnon v Treasury are usefully reviewed as they are the same or very similar to the reasons used as justification for certificate issue on other FOI applications I have lodged. The exception is McKinnon v DFAT, a certificate case relating to documents on whether David Hicks was legally held by the United State Government. The exemption claim in that case relied on Section 33 of the FOI Act (documents affecting national security, defence or international affairs).

3.2 In McKinnon v Treasury, the then Treasurer stated disclosure of the relevant documents would be contrary to the public interest with seven grounds provided in support of that assertion. The grounds on which the certificates were based concerned confidentiality and the possibility the information might mislead the public. More specifically, officers of departments should be able to communicate freely and confidentially in writing with Ministers on sensitive and controversial matters or they might otherwise provide information 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. Effectively, three of the grounds argue that government officers should be able to communicate frankly and candidly with their Minister and other staff. The remaining four grounds were to the effect that release of the documents may cause the public to be confused or misled.

3.3 The Howard factors arose from an appeal by former Prime Minister John Howard in 1985. He had sought access to Treasury briefing papers with Treasury responding with class claims on public interest. The government's claims were upheld by a Federal Court judge, sitting as Administrative Appeals Tribunal President.

3.4 Those Howard factors, established in the 1985 case, are:

a) The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;

b) Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

c) Disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

d) Disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered tends not to be in the public interest;

e) Disclosure of documents which do not fairly disclose the reasons for a decisions subsequently taken made be unfair to a decision maker and may prejudice the integrity of the decision making process.

3.5 The then AAT president Justice Davies noted at the time of his Howard decision that "the Tribunal has not yet received evidence that disclosure under the FOI Act has in fact led to a diminishment in appropriate candour and frankness between officers. As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest. Weight must be given to the object of the FOI Act''.

3.6 Since the 1985 case, the Howard factors have been used as standard practice by Commonwealth and State Governments to reject access to documents under FOI Act. This is despite two fundamental flaws in the use of these factors to justify public interest in non-disclosure including in their use in certificate issue.

3.7 One flaw is the factors are used as "class claims'' so exemptions are claimed over an entire classes of documents on the basis release is always against the public interest as harm will always occur. This ignores the Act's requirement to judge each document on specific content and impact of release. These class claims of exemption have been criticised by the High Court in *Sankey v Whitlam* (1978) 142 CLR 1 at 43 (per Gibbs ACJ) and 62-3 (per Stephen J) and by the Full Court of the Federal Court in *Commonwealth of Australia v Northern Land Council* (1991) 30 FCR 1 at 28-30 (per Black CJ, Gummow and French JJ).

3.8 The second, and more important flaw with the Howard factors, is the lack of factual basis or evidence to support their existence. In *Saxon and AMSA* (unreported AAT decision 26 June 1995) the Tribunal said "the Howard factors had not aged as gracefully as they might''. Also, in *Chapman r and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 40 ALD 47 the Tribunal severely criticised the first three of the five factors. By 1996 only two of those factors remained and one of those remaining two has been criticised as being 'based on rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it and can judge what is a necessary or an unnecessary debate in a democratic society *(Eccleston and Department of Family Services* (1993) 1 QAR 60).

3.9 In *Sutherland Shire Council and Department of Industry, Science and Resources* (2001)

33 ALR 508 the Tribunal noted the changes in the application of the public interest test and the clear trend and preponderance of modem thought away from "'those *Howard* principles which act as a shield against disclosure based upon the status and supposed discomfiture of public servants''. The Tribunal noted claims an early draft of a document not submitted to Cabinet would might mislead and provoke captious public debate were difficult to justify.

3.10 In late April 2006, the New South Wales Court of Appeal handed down a decision in relation to the operation of the internal working document exemption in the *New South Wales Freedom of Information Act*. The Court of Appeal stated that the Howard Factors were not "determinative", but rather simply considerations which an agency must take into account. (see *General Manager, WorkCover Authority of New South Wales v the Law Society of New South Wales* [2006] NSWCA 84). Criticising previous reliance on the "*theoretical proposition*" that the disclosure of certain types of documents would be contrary to the public interest, the Court ruled that, in order to rely on this exemption, an agency must be able to demonstrate that public interest would actually be harmed by the disclosure of the document.

3.11 The essential flaws of re Howard were also exposed in a judgement from the AAT handed down in late November 2007 in McKinnon v Dept PM & Cabinet V2005/1033 in relation to industrial relations reform documents.

3.12 I will address this case in greater detail in this submission but am constrained on the amount of detailed information I can provide to the committee as I am legally bound to keep secret certain information about the case or be in contempt of the AAT. This secrecy of court proceedings about access to government documents is a disgraceful blemish on Australia's democracy and arises from Section 58 C which sets out the way in which the Tribunal must conduct proceedings when a conclusive certificate is in force. The AAT must hold in private the hearing of any part of the proceeding during which evidence or information is given, or a document is produced, by, among others, an agency, Minister, officer of an agency or member of ministerial staff. That is the effect of s 58C(2)(a)(i)-(iii). Section 58C (2)(v) goes on to provide that the Tribunal must also hold a private hearing when a submission is made by or on behalf of the agency or Minister when, in the case of certificate in force under s 36, a submission is made that the disclosure of the document would be contrary to the public interest.

3.13 However, I invite the committee to consider at length the public version of the judgement and the views expressed in relation to the use of the Howard factors. AAT deputy president Forgie noted if governments want to make claims based on Howard, then they will have to get senior bureaucrats and ministers to give sworn evidence, and be cross-examined on claims bureaucrats would refuse to abide by the rules governing public servants if they thought their records could be released under freedom of information. The deputy president rejected government claims that advisers would simply be cut out of the loop when policy is prepared. "If that is the course that would be likely to be taken, a minister should be asked to, and if asked be prepared to give evidence of that,'' she said." Ms Forgie also rejected claims that public servants have a reasonable expectation the documents they prepared would remain confidential noting: "If the work they did as Australian Public Service officers were revealed they would not in future do the work required of them as APS officers holding senior positions ... whichever way the claim is stated, it cannot be said to have a rational basis."

3.14 Indeed, even though the case involved the flawed process relating to certificates where the public interest in release is ignored, Deputy President Forgie rejected almost all Howard factor-based arguments. The public service simply does not and would not work the way the government claims on the basis of the Howard factors.

3.15 In my view, the government could not provide any evidence of their existence. The certificates were only upheld on the sole factor that document release was not in the public interest as it would lead to speculation the Coalition had planned a new wave of workplace changes. This narrow victory for secrecy was of questionable benefit to the then Howard Government given the judgement was provided in the last week of an election campaign dominated by workplace reform issues. In absence of a certificate, this sole barrier to release would have easily been overcome in a normal AAT appeal given the public interest in industrial relations reform issues.

3.16 The reasons provided by ministers and delegated agency heads for the issue of certificates are flawed given the reliance on the re Howard factors as justification and only survive in the AAT because of the unfair hearing process for certificates. While the reasons are flawed, there is evidence to suggest the real motivation for the use of certificates has been to protect the government's political interests and diminish accountability and transparency to the detriment of good government and the Australian people.

3.17 In an article published in The Canberra Times on January 24, 2006, one of Australia's most senior public servants, Treasury head Dr Ken Henry, provided a useful insight into the real reasons for the issue of conclusive certificates. Dr Henry has confirmed the accuracy of the interview.

3.18 Dr Henry noted the department had received FOI requests relating to the development of government policy. "I'm satisfied, having reviewed a number of them, that by and large they have been motivated by a desire to either embarrass the Government and Treasurer, or the department,'' he said. "Now it is not my role to help people embarrass the Government. So how am I going to respond? There are two likely responses. The first is that you will see conclusive certificates, stating conclusively that it is not in the public interest for the information to be released, issued on every one of them. That's very likely." Dr Henry also claimed the second response had already started occurring and documents were not being produced as communication on sensitive policy issues would be verbal.

3.19 Section 11.2 of the FOI act states: "…a person's right of access is not affected by….the agencies or Minister's belief as to what are his or her reasons for seeking access.''

3.20 In assessing the motives of applicants and taking action in response to those alleged motives, Dr Henry is clearly in breach of Section 11.2 of the FOI Act.

3.21 More significantly, the basis for Treasury's certificate issue is not the claim of some higher public interest determined by a conscientious politician in the national good. Instead it is the protection of political interests on issues that would be revealed under a more rigorous and fair FOI system. Treasury's motive for issuing certificates is to prevent apparent "embarrassment'' to the government. It is axiomatic that no government would be embarrassed by good policy or programs. Instead, it is policy and program failures, flawed administration or management, corruption or waste that are embarrassing to governments because of the impact on voter support and judgement about the government's performance. Effectively, Dr Henry argues failings should be kept secret, and indeed, can be kept secret, by the use of conclusive certificates. The attitude reflects a fundamental contempt for the electorate's right to be informed and is only possible because of the existence of conclusive certificates.

3.22 Further evidence of Treasury's myopia about an Act of Parliament that extends as far as possible the right of the Australian community to access to information in the possession

of the Government of the Commonwealth can be found in documents associated with a FOI request lodged by the Seven Network with the Commonwealth Treasury on November 21, 2007.

3.23 In that request I sought access to incoming government brief 2007 or the so-called Red Book. This FOI application is before the AAT at the moment but the documents already released show Treasury provided advice to the incoming Rudd Government on why it should break its election commitment to remove certificates from the FOI Act.

3.24 The brief advises: "We are concerned that the abolition of conclusive certificates, without a new and transparent safeguard, will adversely impact on the provision of advice to government….While conclusive certificates should only be used in exceptional circumstances, they play a valuable role in cases where the material in question is of extreme sensitivity for the workings of government. Reliance on conclusive certificates has in part occurred because the exemption for deliberative documents under the FOI Act does not expressly exempt documents on the grounds of frank and fearless advice to the government.''

3.25 The release of documents to the public on policy issues and options improves debate, informs voters and provides context for judgements about government decisions. This information is not only immensely beneficial to our political system but is a right. Deputy President Forgie questioned the government's claims in the judgement in McKinnon v Dept PM & Cabinet V2005/1033: "Why is it that the APS can only behave as a professional apolitical body if its work in giving high level advice is kept out of the public arena?''

3.26 Deputy President Forgie stated in the judgement that: "It is clear from that material that APS officers are part of an APS that must uphold APS Values and comply with the law. The APS must be openly accountable for its actions and must be responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice. It must be apolitical and impartial. Not only must the APS meet those obligations, it must be able to demonstrate that it has done so. That is to say, it must be able to demonstrate that its advice is objective, impartial and timely as well as responsive. It must have systems to monitor the effectiveness and quality of its advice. Those systems require APS officers to maintain proper records. It is clear from the APS Values and Directions as well as the Indicators relating to them that APS officers are expected to obtain and maintain written records of the instructions they are given by Ministers and their staff. They are advised to maintain a record of oral briefings provided to Ministers and their staff on significant issues and any resulting discussions and decisions. Written briefings are encouraged. The written records are not kept for their own sake but in order to demonstrate that the APS is apolitical and accountable. Accountability extends beyond the qualities of the advice to the efficient, effective and ethical use of the resources allocated to give that advice. The APS must ensure that is has reporting arrangements in place to give account of each agency's performance and its effective, efficient and ethical use of resources. That must be underpinned by existence and maintenance of good record keeping systems. These are not simply standards to aspire but **statutory requirements** framed in terms of the APS Values and Directions made under them….These requirement are not simply imposed upon the APS as a collective unit but each individual APS officer is required at all times to behave in a way that upholds the APS Values.'' (my emphasis added).

3.27 Viewed in the context of the statutory requirements on an APS officer, as outlined by Deputy President Forgie, at least some of the Howard factors are effectively claims that public servants will act illegally unless the object and practice of the FOI Act ignored. This administrative extortion ignores the public's right of access and is illogical and

contemptuous of openness and transparency.

3.28 As the politician responsible for introducing FOI in 1982, PM Malcolm Fraser noted in 1976: “If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?”

3.29 The words of the High Court in its judgement in the case of Commonwealth v. John Fairfax & Sons Ltd. as noted by Mason J. are also worth consideration on the importance of government transparency and accountability:

> “But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.”

3.22 Conclusive certificates have been issued to protect the political interests of governments and reasons for issue are flawed without any evidentiary basis. The Howard factors used to justify issue have little to no standing in case law and are based on the premise that public servants will act illegally.

Three certificate cases: Treasury, RBA and PM and C

4.0 I would to provide some information to the committee on three different FOI applications where conclusive certificates were issued removing any consideration of the public interest in disclosure by the AAT on appeal.

4.1 In late 2002, I sought access under FOI 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. After an internal review the then Treasurer, Peter Costello, signed certificates which established conclusively that disclosure of the internal working documents would be contrary to the public interest. The certificates were challenged in the AAT, the Federal Court and the High Court with appeals dismissed at all levels.

4.2 The actual documents sought were contained in two separate FOI requests that were ultimately joined as one appeal. One request sought documents relating to: “any reports, reviews or evaluations completed in the last two years detailing the extent and impact of bracket creep and its impact on revenue collection of income tax. Information in relation to higher tax burdens faced by Australians and/or projections of revenue collection increases from bracket creep would also fulfil the scope of the request.” The other request sought documents relating to: “any review, report or evaluation completed on the First Home Owners Scheme in the last two years and documents summarising the level

of fraud associated with the program, its use by high-wealth individuals and its impact on the housing sector's performance in the Australian economy''

4.3 These documents would have been released in the course of a normal FOI appeal as the public interest is overwhelmingly in disclosure. Release of information would have furthered public debate, allowed the public to judge the government's performance on economic policies impacting on almost every Australian family. To avoid release through certificate issue is a failure in accountability and transparency and increases contempt for the political process.

4.4 The Australian reported just days after the High Court decision, New Zealand public servants were asked to disclose a raft of Treasury analysis similar to the bracket creep information sought in the High Court appeal. Within 24 hours of a media request, the NZ Treasury was able to produce detailed figures showing just how many Kiwis have moved into the top tax bracket since the NZ Labour Government imposed a 39c rate on incomes over $NZ60,000 ($50,664) following its election in 1999. Australians were denied the same information so readily available to New Zealanders.

4.5 For the record, I also note that on May 13, 2005, I lodged a request with Treasury for documents relating plans and analysis about cutting the top income tax rate to 30 per cent and plans for automatic indexation of income tax scales. The request was denied and appealed ultimately to the AAT. On July 12, 2006, Dr Henry issued two conclusive certificates in relation to the request. Following the High Court's decision in McKinnon v Treasury, the appeal was discontinued given the judgement and its implications.

4.6 The second certificate case I draw to the committee's attention related to an application for access to the board minutes of the Reserve Bank of Australia rejected by the RBA on July 2, 2004 with an appeal lodged with the AAT. In November, 2004, the then RBA Governor Ian Macfarlane issued a conclusive certificate just three days before the start of a hearing in the AAT on access to the minutes of its meetings and voting records for 2003/04. Following, the High Court's decision in McKinnon v Treasury, this appeal was discontinued given the judgement and its implications.

4.7 It should be noted the RBA spent $304,530 on lawyers to block the Freedom of Information request according to its annual report.

4.8 On December 5, 2007, following the election of the Rudd Government and its promise to abolish certificates, the RBA announced its decision to release the minutes of its monthly board meetings and to provide a short statement after every meeting. The Seven Network had lodged FOI applications in relation to the board meetings following the election. The decision to publish the minutes has widely welcomed and contributed to market stability. Certainly, the grave concerns expressed in response to the FOI application and cited in the certificates have not occurred although the committee may seek the RBA's views.

4.9 The final case I raise with the committee is the McKinnon v PM and C appeal on industrial relations reform documents already cited in this submission. The issue of industrial relations reform was central to voters and debate at the last Federal Election. Disclosure of documents about any further reform proposals by the then Howard Government were clearly and overwhelmingly in the public interest and would have been released in a normal AAT appeal. The decision to issue certificates in this matter was motivated by the protection of political interests. This is another example of how conclusive certificates are

open to abuse as politicians confuse political interest with the national interest. The quality of political debate and public involvement can only be enhanced by more information in a democracy.