



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

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Law and Bills Digest Section

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

Date introduced: 26 November 2008

House: Senate

Portfolio: Cabinet Secretary

Commencement: The day after Royal Assent

Links: The *relevant links* to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To repeal the power to issue conclusive certificates in the *Freedom of Information Act 1982* and the *Archives Act 1983* for all exemption provisions where certificates may be issued. The effect would be that the Administrative Appeals Tribunal may undertake full merits review of all exemption claims.

Background

Freedom of information (FOI), or the statutory right of access to government documents, is justified on the grounds that it encourages transparency and political accountability and discourages corruption and other forms of wrongdoing. At the federal level, the *Freedom of Information Act 1982* (the FOI Act) formed part of a broader package of administrative law reforms in the 1970s and early 1980s, and was the first national legislation of its kind to be introduced into a country with a Westminster-style system of government. Similar legislation has been enacted in all Australian states, the Australian Capital Territory and the Northern Territory.

Each FOI Act has four major features:

- government is obliged to publish information about its activities in general, and about whether it holds certain kinds of documents
- every person has a legal right to obtain access to information in documentary form, which is in the possession of ministers or government agencies, subject to the operation of specific exemptions and exclusions. Exemptions can apply to specified

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- agencies (for example, ASIO), or to categories of documents (such as documents dealing with international relations and security)
- there is a personal privacy dimension, which enables a person who has gained access to a document held by government that relates to his or her personal affairs to:
 - request that the document be amended in some respect;
 - appeal against a refusal to amend the document; and,
 - even if the appeal is unsuccessful, request that an annotation be attached to accompany the record when it is shown to any person
 - there is a right of review in relation to most decisions made under the Acts, both internal review within the agency and further review by a body external to the decision maker.

While there have been only minor changes to the federal FOI Act since 1982, there have been a plethora of reviews. The major review was the *Open Government* report by the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) in 1996.¹ That report made 106 recommendations, some of the more important being:

- creation of a statutory FOI Commissioner to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies about how to use, interpret and administer the Act
- revision of the Act's objects clause to promote a pro-disclosure interpretation of the Act
- rationalisation of the exemption provisions, and publications of guidelines, so that information is only withheld where this is in the public interest, and
- FOI charges should be compatible with the objects of the Act—a scale of charges should be determined by the FOI Commissioner, and access to an applicant's personal information should be provided free of charge.

The Howard Government did not formally respond to the *Open Government* report. However, two private members' Bills introduced by Australian Democrats' Senator Andrew Murray in [2000](#)² and 2003 took up several of its key recommendations. These Bills subsequently lapsed.

On 24 September 2007, the then Attorney-General, Philip Ruddock, announced that the ALRC would again conduct a review of FOI laws and practice, although with more

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1. Australian Law Reform Commission, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1996.
 2. Freedom of Information Amendment (Open Government) Bill 2000.

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limited terms of reference than the 1996 *Open Government* report. The ALRC was asked to consider the possible harmonisation of state and federal FOI laws, and ways of removing the FOI administrative burden on agencies.³ That review has been suspended by the current Government. The rationale for suspension is that a more appropriate course of action is to review the FOI Act after the Government's reforms come into operation.⁴

Basis of policy commitment

The Australian Labor Party's 2007 election policy document, *Government information: restoring trust and integrity in government information*, foreshadowed significant changes to FOI legislation. It stated that a Labor Government would abolish conclusive certificates and implement the recommendations of the 1996 ALRC Report, *Open Government*. It would appoint a Freedom of Information Commissioner, designed to make review processes more efficient and cheaper. It would also create an independent statutory Information Commissioner to act as a whole-of-government clearinghouse for complaints, oversight, advice and reporting for freedom of information and privacy matters.⁵

The Bill would implement only that part of the election commitment related to the abolition of conclusive certificates. The Minister's second reading speech for the Bill states that the Government proposes to release a draft Bill for public comment as early as practicable in 2009 addressing its remaining FOI election commitments.⁶

Freedom of Information Act 1982 (Cth) and exemptions

The FOI Act creates a legally enforceable right of every person⁷ to obtain access to documents of agencies subject to the Act, provided that any applicable charge is paid, that the request does not involve unreasonable diversion of the agency's resources, and that the documents are not exempt.

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3. Hon Phillip Ruddock, Attorney-General, *Australian Law Reform Commission to examine FOI laws*, media release, 24 September 2007.
 4. Hon John Faulkner, *Freedom of information reform*, media release, 22 July 2008.
 5. K. Rudd and J Ludwig, *Government information: restoring trust and integrity in government information*, Election policy document, October 2007, pp. 5–7.
 6. Senator John Faulkner, Special Minister of State and Cabinet Secretary, 'Second reading speech: Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008', Senate, *Debates*, 26 November 2008, p. 7293.
 7. Person is defined in section 22, *Acts Interpretation Act 1901* to include a corporation and body politic. Every person means every person everywhere and includes (but is not limited to) a person resident in Australia, whether or not they are Australian citizens; a person resident abroad, whether or not they are Australian citizens provided they specify an address in Australia to which notices under the FOI Act can be sent. AGS, *Freedom of Information Guidelines: Exemption sections in the FOI Act*, December 2006, p. 6.

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Access to documents in the possession of a Government agency may be refused because it is claimed that a document is exempt by reason of Part IV of the FOI Act. Broadly speaking, exemptions in the FOI Act are of two basic kinds:

- exemptions which depend on demonstrating the expected harm of disclosure of the contents of the specific documents. These are found in sections 33 (national security, defence or international relations), 33A (Commonwealth-State relations), 36 (deliberative documents), 37 (law enforcement), 39 (financial or property interests of the Commonwealth), 40 (operations of agencies), 41 (personal information), 43(1)(b), (c)(i) & (ii) (business and professional affairs), 43A (research), 44 (national economy), 45 (material obtained in confidence); and
- exemptions which protect documents of a particular class or kind without a need to refer to the effects of disclosure: sections 34 (Cabinet documents), 35 (Executive Council), 38 (secrecy provisions), 42 (legal professional privilege), 47 (companies and securities legislation), 47A (electoral rolls).⁸

In addition to exempt documents, there are also some agencies that are exempt from the FOI Act entirely (e.g. ASIO and ASIS) and other agencies that are exempt in relation to some material (e.g. Telstra is exempt in respect of documents relating to commercial activities).⁹

Exemptions and conclusive certificates

Under the FOI Act a Minister may issue a certificate that establishes conclusively that a document is exempt. Ministerial certificates may only be issued in relation to certain categories of exempt documents. These are:

- National security, defence and international relations (section 33)
- Commonwealth/State relations (section 33A)
- Cabinet documents (section 34)
- Executive Council documents (section 35)
- Deliberative process documents (section 36)

For example, in relation to documents dealing with Commonwealth State relations subsection 33A(1) provides that a document is an exempt document if disclosure could reasonably be expected to cause damage to relations between the Commonwealth and a State, or if it would divulge information or matter communicated in confidence by or on behalf of a state government or one of its authorities.

8. AGS, *op. cit.*, p. 9.

9. See section 7 and Schedule 2 of the FOI Act. These types of exemptions are referred to under the Main Provisions section of the Digest, pp. 8–9.

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Subsection 33A(2) states that where the appropriate Minister (or delegate) is satisfied that a document:

- (a) is an exempt document for a reason referred to in subsection 33A(1); and
- (b) is not a document containing matter the disclosure of which under this Act would be, on balance, in the public interest;

the Minister may sign a certificate to that effect, specifying that reason.

Where a conclusive certificate has been issued, the power of the Administrative Appeals Tribunal (AAT) to review is limited. The AAT's role in reviewing such a certificate is limited to asking whether or not reasonable grounds exist at the time of the hearing for the claims made in the certificate. When a certificate has been issued this prevents the AAT from weighing public interest factors in favour of disclosure against public interest factors favouring non-disclosure. It can only consider the reasonableness of the non-disclosure reasons. Furthermore, even if the AAT decided on appeal that reasonable grounds for a certificate do not exist the relevant Minister is not obliged to remove the certificate (subsection 58A(2)). Instead the Minister must only provide reasons to Parliament for the decision (subsections 58A(3) and (4)).

The number of conclusive certificates issued since 1996 is relatively small¹⁰ although their symbolism and potential have been the subject of critical debate.¹¹ Conclusive certificates are seen as being at odds with the fundamental precepts that underpin the FOI Act, particularly transparency and government openness.

Most recently, the High Court considered certificates issued under subsection 36(3) of the FOI Act in *Re McKinnon v the Department of the Treasury*¹². In that case, section 36 exemption claims were made over advice given to the Treasurer and Assistant Treasurer

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- 10. Information on the number of conclusive certificates is not required to be recorded in the Annual FOI Reports. Consequently there is no simple quick way of ascertaining the frequency and use of such certificates. However a 2007 report commissioned by the [Australia's Right To Know](#) (RTK) campaign states that the Commonwealth had at that time issued 14 conclusive certificates since 1996.
 - 11. For example: 'Freedom: just another word for plenty to lose', *Australian*, 5 December 2003; 'Editorial: FOI rulings squeeze access', *Canberra Times*, 23 December 2004. See also the [Australia's Right To Know](#) (RTK) campaign launched in May 2007 by a coalition of 12 media organisations, including News Limited, the ABC, Fairfax, SBS, and AAP. The campaign's aim was to draw public attention to the tightening of restrictions on journalists and free speech in Australia. As part of its campaign, the RTK commissioned an audit report into the state of free speech, which concluded that FOI performance is patchy across all governments. The report was also critical of the federal Government's use of conclusive certificates.
 - 12. *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; 2006 229 ALR 187.

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by way of executive minutes and question time briefs and projections and forecasts used in preparation of advice to the Treasurer.

The Treasurer issued two conclusive certificates. The Court upheld the decision of the AAT President, Justice Downes, that he did not have to weigh up the public interest factors for and against releasing each document, as would have happened in the absence of conclusive certificates. The decision generated much critical media commentary, which highlighted the potential for mechanisms such as conclusive certificates to be abused by Ministers seeking to withhold information for political purposes.¹³

Committee consideration

The Bill has been referred to the Finance and Public Administration Committee for inquiry and report by 10 March 2009 (Senate inquiry). Details of the inquiry are at: http://www.aph.gov.au/senate/committee/fapa_ctte/foi/index.htm

The Digest draws on submissions to the Senate inquiry.

Position of significant interest groups/press commentary

In general, the media commentary and the submissions to the Senate inquiry recognise the significance of abolishing conclusive certificates and support the amendments in the Bill that would remove those provisions. However some of the Senate submissions were critical of other parts of the Bill that would introduce new exclusions in relation to security related information and arguably would further restrict rather than open up access to government information.¹⁴ Some submissions and commentary also expressed frustration and impatience at the limited terms of the Bill and with the Rudd Government's 'slow and opaque approach' toward implementing more fully its election promises in relation to FOI.¹⁵

13. For an account of the case, see John McMillan, the FOI landscape after McKinnon, *Public Administration Today*, April-June 2007; or Michael McKinnon, Submission No. 5, Senate Standing Committee on Finance and Public Administration, *Inquiry into the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*. The inquiry is subsequently referred to as the SCFPA inquiry.

14. For further detail see pp. 8–9 of the Digest.

15. For example, Ric Snell, Submission no. 7, SCFPA inquiry.

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Main provisions

Schedule 1—Freedom of Information Act 1982

Exemptions for documents produced by exempt agencies

Item 2 inserts **proposed subsection 7(2B)** and deals with exemptions for documents produced by exempt agencies. As noted above,¹⁶ subsection 7(1) and Part II of Schedule 2 provide that certain agencies (i.e. ASIS, ASIO, the Auditor-General, the Aboriginal Land Councils and Land Trusts etc) are exempt from the operation of the FOI Act. A further exclusion is provided in subsection 7(2A) which provides that agencies in possession of documents originating with or received from ASIS, ASIO, the Office of National Assessments, the Defence Intelligence Organisation, the Defence Signals Directorate or the Inspector-General of Intelligence and Security are exempt in respect of those documents. **Item 2** would broaden this exemption so that **proposed subsection 7(2B)** would provide that a document in the possession of a Minister would be automatically exempt from the operation of the Act where it has originated with or been received from those same defence and security agencies.

The Explanatory Memorandum notes that this amendment is to address an existing anomaly whereby a document in possession of an agency would be exempt but the same document, when held by a Minister is not so exempt.¹⁷ On the other hand it could be argued that the exemptions in section 7 have the effect of establishing conclusively that all documents originating from certain agencies are exempt documents and therefore this amendment further reinforces these restrictions.

Several submissions to the Senate inquiry expressed disappointment with this amendment. Moira Patterson, Associate Professor of Law, Monash University, points out that to the extent that documents require protection for reasons of national security, defence of international relations, they will arguably fall within the exemptions in subsection 33(1) of the FOI Act. In that case the new procedures in relation to AAT review would be available¹⁸ and arguably provide sufficient protection.¹⁹

The Australian Press Council notes that this amendment begs the question: should the mere fact that a document has originated with a security agency, by itself, justify its exemption from FOI. The Press Council's view is that while many documents that are held by security agencies ought to remain confidential, there will be some documents which it would be in the public interest to disclose. The fact that a document has been received

16. See p. 5 of the Digest.

17. Explanatory Memorandum, p. 3.

18. See pp. 10–12 of the Digest.

19. Moira Patterson, Submission No. 8, SCFPA inquiry, p. 2.

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from a security agency should not be enough by itself, to warrant exemption unless there is also a sound reason for maintaining the document's confidentiality. Such a reason might include a threat to national security or defence. Not all documents that originate with security agencies pose a threat to national security. Some such documents may be considered matters of legitimate public interest.²⁰

Moira Patterson also made a similar case noting that it is important at a time when national security bodies are provided with large budgets that there should be appropriate scrutiny of the financial processes and expenditure.²¹

The Public Interest Advocacy Centre (PIAC) considers that entirely excluding a new category of documents, not presently excluded from the operation of the FOI Act, is contrary to the principle of open and transparent government and winds back, in relation to defence and security documents, the advances of this principle made by the abolition of conclusive certificates. PIAC argues the proposed amendments fail to leave open any avenue to distinguish between documents the disclosure of which might pose a genuine threat to security or to the national interest, and those that merely have the potential to embarrass an agency, or the government of the day. The submission continues:

The Haneef case and subsequent visa revocation turning as they did on inconsistencies between reports and threat assessments issued by the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal Police respectively, and the extent of awareness at Ministerial level of those inconsistencies, demonstrate the importance of retaining a potential avenue for disclosure of such documents under the FOI Act.²²

Repeal of power to issue conclusive certificates

Items 5–10 are the key amendments. They would repeal those provisions that relate to the power to issue conclusive certificates.

For example subsection 33(1) provides that a document is exempt if its disclosure could reasonably be expected to damage the security, defence or international relations of the Commonwealth or would divulge information communicated in confidence to the Commonwealth by or on behalf of a foreign government or international organisation. Subsections 33(2)–(7) provides that a claim for exemption under section 33(1) may be supported by a conclusive certificate which relates to all or part of a document and may, if necessary, be couched in terms which neither confirm nor deny its existence. **Item 5** would repeal **subsections 33(2) to 33(7)** with the effect of repealing this power to issue conclusive certificates.

20. Australian Press Council, Submission No. 3, SCFPA inquiry, p. 4.

21. Moira Patterson, Submission No. 8, SCFPA inquiry, p. 2.

22. PIAC, Submission No. 2, SCFPA inquiry, p. 3.

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Items 6 and 7 would similarly repeal the power to issue conclusive certificates in respect of documents that would or could be expected to cause damage in Commonwealth State relations or in respect of documents that would divulge information about confidential Commonwealth State relations (subsections 33A(2) to (4A) and 33A(6) to (8)).

Item 8 would repeal the power to issue conclusive certificates in respect of Cabinet documents (section 34(2) to (5)).

Item 9 would repeal the power to issue conclusive certificates in respect of Executive Council documents (section 35(2) to (5)).

Item 10 would repeal the power to issue conclusive certificates in respect of internal working documents that would be contrary to the public interest (subsections 36(3), (4), (8), (9) and (10)).

Item 11 is a consequential amendment and would repeal **section 36A** that deals with time frames for conclusive certificates.

AAT review procedures

Items 12 to 33 propose amendments to **Part VI** of the FOI Act. **Part VI** deals with review procedures in relation to decisions regarding the release of documents under the FOI Act. Some amendments are purely consequential flowing from the removal of the power to issue conclusive certificates (for example **items 12–14 and 16**). Other amendments are unrelated to the conclusive certificate provisions and include new arrangements concerning AAT review procedures for national security-related information exemptions or Cabinet exemptions (i.e. section 33 and 34 exemptions).

Section 58B deals with the constitution of the AAT for proceedings dealing with conclusive certificates. **Item 15** would repeal **subsection 58B(1)** to abolish these arrangements. **Item 15** would also insert a **new subsection 58B(1)** to set up new special constitution requirements of the AAT for a review of decisions to refuse access to a document on grounds of a Cabinet exemption (section 34) or a national security/foreign government exemption (section 33). The effect of the amendment would be that presidential members²³ of the AAT must hear these review applications, the rationale being that in light of the special sensitivity of Cabinet and national security-related information it is appropriate that the most senior members of the AAT preside at these hearings.²⁴

Item 17 repeals and replaces section 58E. Existing section 58E allows the AAT to ask for the production of relevant documents in relation to hearings concerning conclusive

23. A presidential member means the President, Deputy President or member who is a Judge.

24. Explanatory Memorandum, p. 5.

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certificates. The **new section 58E** would grant the AAT power to require the production of a document the subject of a national security, defence or international relations exemption or a confidential foreign government communication exemption (subsection 33(1)) or the Cabinet exemption (section 34). The power would only be used where the AAT is not satisfied by evidence on affidavit or otherwise that the document is exempt (**proposed subsection 58E(2)**).

Items 18 to 21 are unrelated to the conclusive certificate provisions. They deal with the provisions setting out the rights of third parties where a request is made for access to a document containing personal information or business information about that third party.

Items 18 and 20 make amendments that would allow the AAT the discretion to order that an agency or Minister does not need to give notice to the third party of an AAT review application if it would not be appropriate to do so in the circumstances. **Item 19 and 21** set out the matters that the AAT must have regard when using this discretion. The matters that would affect the decision not to inform are where the notification could reasonably be expected to:

- prejudice the conduct of an investigation or breach of the law
- disclose confidential information in relation to enforcement or administration of the law
- endanger the life or safety of any person, or
- cause damage to the security, defence or international relations of the Commonwealth.

The Federal Privacy Commissioner in her submission to the Senate inquiry noted the potential privacy implications of this amendment but concluded that the proposed criteria and safeguards would continue to give third parties an adequate level of control over their personal information under the FOI Act.²⁵

Item 25 inserts **proposed section 60A**. It is a significant amendment relating to AAT proceedings involving review of a national security, defence or international relations exemption or a confidential foreign government communication exemption (subsection 33(1)). Before making a determination that a document is *not exempt* the AAT would be required to request the Inspector-General of Intelligence and Security (IGIS) to appear personally and give evidence on the possible damage that would or could reasonably be expected to be caused should such an exempt document be released. The IGIS must comply with such requests unless of the opinion that he/she is not appropriately qualified to give such evidence. The AAT is not bound by any opinion of the IGIS (**proposed subsection 60A(8)**).

25. Privacy Commissioner, Submission No. 4, SCFPA inquiry.

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Item 26 repeals and replaces **subsection 63(1)**. **Subsection 63(1)** currently directs the AAT to ensure non disclosure of certain matters by making confidentiality orders where necessary. The **new subsection 63(1)** includes the same direction but in addition **new paragraph 63(1)(b)** specifically refers to proceedings relating to a document that is claimed to be exempt under section 33 (i.e. national security, defence, international relations etc). In these matters the AAT must give particular weight to submissions from the relevant agencies and Ministers regarding the required confidentiality of such material.

Sections 64 and 65 of the FOI Act deal with AAT procedural matters relating to inspection of exempt documents and production of conclusive certificates. **Items 28–32** make consequential amendments to take account of the new role of the IGIS in defence/security/international relations exemption hearings and remove the subsections that refer to conclusive certificates.

Item 33 inserts **proposed section 67** and provides for the automatic stay of an AAT decision to give access to a document where an agency or Minister institutes an appeal in the Federal Court against that decision. The rationale for this amendment is that giving access to the document when an appeal has been instituted would render any appeal redundant.²⁶ The Australian Press Council, while noting that this rationale seems reasonable, also argues that this provision could be exploited by politicians wishing to delay the release of potentially embarrassing material.²⁷ Their submission suggests that this problem could be addressed by requiring that when exercising its power to stay the operation of an AAT decision, a court should be required to apply a test similar to that which is applied to applications for injunctive relief, i.e. there must be a reasonable prospect of the appeal succeeding in order for the stay to be imposed.²⁸

Application

Items 34 and **35** are application provisions. **Subitem 34(2)** is the most notable in that it deals with the treatment of conclusive certificates in force at the commencement of the Bill. Existing certificates will remain in force and will only be revoked if and when a new application for access to the document is made. A decision would then be made on whether or not an exemption should be claimed for any document formerly covered by a certificate.

26. Explanatory Memorandum, p. 7.

27. Australian Press Council, Submission No. 3, SCFPA inquiry, p. 5.

28. *ibid.*

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Schedule 2—Archives Act 1983

Repeal of power to issue conclusive certificates

The *Archives Act 1983* has been drafted to dovetail with the FOI Act. Like the FOI Act, it contains detailed exemption provisions, provision for the issuing of conclusive certificates, and rights to seek review by the AAT.²⁹

Under the Archives Act, the National Archives of Australia is responsible for providing that all Commonwealth records other than exempt records, are to be made available to the public when they are in the open access period. Records other than Cabinet notebooks are in the open access period when a period of 30 years has elapsed since they came into existence.³⁰ The types of records that can be exempt are numerous and are set out in section 33. They include for example records containing:

- information the disclosure of which would cause damage to security, defence, or international relations of the Commonwealth Government (paragraph 33(1)(a))
- information or matters communicated in confidence by a foreign government to the Commonwealth Government (paragraph 33(1)(b))
- information, the disclosure of which would cause a breach of confidence (paragraph 33(1)(d)).

Under section 34 of the Archives Act, a Minister or delegate may issue a certificate that establishes conclusively that a record is exempt. Where a conclusive certificate has been issued, the power of the AAT to review that decision is limited.³¹ Under section 34 conclusive certificates can only be issued in support of defence/national security/international relations related exemptions or in support of foreign government confidential communication exemptions.

Item 2 is the most significant amendment in Schedule 2. It repeals **section 34** thus removing the power to issue conclusive certificates with respect to these national security/foreign government communication exemption claims.

29. M. Patterson, *Freedom of information and privacy in Australia*, LexisNexis Butterworths, 2005, p. 234.

30. The open access period for Cabinet notebooks is 50 years after they came into existence.

31. The AAT review powers regarding conclusive certificates issued under the Archives Act are generally the same as the AAT review powers under the FOI Act. See explanation above at p. 6 of the Digest.

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Review of decisions

Most of the remaining amendments in Schedule 2 propose amendments to those provisions of the Archives Act dealing with the review of decisions concerning applications to access Commonwealth records. Many of the amendments are consequential and remove references to the AAT review process regarding conclusive certificates.

Other amendments include new arrangements concerning AAT review procedures for the national security or foreign government communications exemptions. They generally replicate similar amendments to the FOI Act proposed in Schedule 1 of the Bill and include the following:

Subsection 46(1) deals with the constitution of the AAT for proceedings dealing with conclusive certificates. **Item 6** would repeal **subsection 46(1)** to abolish these arrangements. **Item 6** would also insert a **new subsection 46(1)** to set up new special constitution requirements of the AAT for a review of decisions to refuse access to a record on grounds of the national security/defence/international relations or foreign government communication exemptions (paragraph 33(1)(a) and (b)). The effect of the amendment would be that presidential members³² of the AAT must hear these review applications. Once again the rationale being that in light of the special sensitivity of this type of information it is appropriate that the most senior members of the AAT preside at these hearings.³³

Item 10 inserts **proposed section 50A** and is the equivalent of item 25 in Schedule 1. It is a significant amendment relating to AAT proceedings involving review of a national security, defence or international relations exemption or a confidential foreign government communication exemption (paragraphs 33(1)(a) and (b)). Before making a determination that a record is *not exempt* the AAT would be required to request the IGIS to appear personally and give evidence on the possible damage that would or could reasonably be expected to be caused should such a record be released. The IGIS must comply with such requests unless of the opinion that he/she is not appropriately qualified to give such evidence. The AAT is not bound by any opinion of the IGIS (**proposed subsection 50A(8)**).

Item 11 repeals and replaces **subsection 52(1)**. **Subsection 52(1)** currently directs the AAT to ensure non disclosure of certain matters by making confidentiality orders where necessary. The **new subsection 52(1)** includes the same direction but in addition **new paragraph 52(1)(b)** specifically refers to proceedings relating to a record that is claimed to be exempt under paragraphs 33(1)(a) and (b) (i.e. national security etc.). In these matters the AAT must give particular weight to submissions from the relevant agencies and Ministers regarding the required confidentiality of such material.

32. A presidential member means the President, Deputy President or member who is a Judge.

33. Explanatory Memorandum, p. 9.

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Item 17 inserts **proposed section 55A** and provides for the automatic stay of an AAT decision to give access to a record where an agency or Minister institutes an appeal in the Federal Court against that decision. Again, the rationale for this amendment is that giving access to the record when an appeal has been instituted would render any appeal redundant.³⁴

Application

Items 19 to 22 are application provisions. Of note is **subitem 20(2)**. It provides that existing conclusive certificates will be revoked on and from the time the first request for access to a record covered by the certificate is made. Where a certificate covers more than one record, it will remain in force in relation to those records not subject to the access request.

Schedule 3—Administrative Appeals Tribunal Act 1975

The amendment to the Administrative Appeals Tribunal Act relates to the composition of the Security Appeals Division of the AAT when reviewing decisions by the National Archives in respect of access to a record of ASIO. The effect of the amendment in **item 2** would be that presidential members³⁵ of the AAT must hear these review applications.

Schedule 4—Inspector-General of Intelligence and Security Act 1986

Schedule 4 of the Bill proposes consequential amendments to the Inspector-General of Intelligence and Security Act (IGIS Act). These flow from the amendments to the FOI Act and the Archives Act in Schedules 1 and 2 that require the AAT to request the IGIS to give evidence in certain proceedings relating to exempt documents.

Section 34 of the IGIS Act places secrecy obligations on the IGIS and staff in relation to their work under the Act. **Item 2** would amend section 34 to extend these secrecy obligations to cover information that an IGIS or staff member would acquire in performing functions under the FOI Act or Archives Act.

Item 8 would amend section 34 so as to extend the existing restriction that applies to the production of documents to a court by the IGIS or staff member in respect of documents that are in their custody by virtue of performing the functions or duties under the FOI Act and the Archives Act.

34. Explanatory Memorandum, p. 11.

35. A presidential member means the President, Deputy President or member who is a Judge.

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Concluding comments

The submissions to the Senate inquiry are unanimous in recognising the significance of abolishing conclusive certificates and supporting the amendments in the Bill that would remove those provisions.

The removal of certificates is however a relatively minor and straightforward part of the bigger picture of FOI reform. A much greater challenge is to address the concerns that have been evident since the 1996 ALRC *Open Government* report which point to the legalistic interpretation of some of the exemption provisions, the time delays and the expense of FOI requests. One commentator suggests that the recently released FOI annual report for 2007–2008 confirms that these criticisms are still valid. Peter Mares says that the figures suggest the number of FOI requests granted in full has dropped down to 71 per cent of requests, down from 81 per cent the previous year and that the proportion of requests taking longer than three months has doubled.³⁶

The Government has promised that an exposure draft Bill will be released for public comment as early as practicable in 2009 to implement its remaining election commitments regarding FOI. FOI practitioners and experts await with some anticipation this more substantive Bill.

36. Peter Mares and Matthew Moore, 'Transparency: can Rudd walk the talk? National Interest on ABC Radio National 6 February 2009.

<http://www.abc.net.au/rn/nationalinterest/stories/2009/2484729.htm>

Accessed on 17 February 2009.

2007–2008 FOI Annual Report available at:

http://www.psnews.com.au/Page_psn1552.html

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