FoI after the *McKinnon case*

The Council's Executive Secretary, JACK R HERMAN, introduces a series of four articles examining aspects of freedom of information law and practice after the High Court's decision in *McKinnon*.

Four articles in this issue of the *News* are devoted to the question of the continued efficacy of Freedom of Information (FoI) laws in Australia. One key aspect of the original intent of the laws was to allow access to information on matters of public interest held by governments.

But, as a study commissioned by the Council in 2002 showed, delays, costs and exemptions, and the use of Conclusive Certificates by Ministers, had made FoI increasingly useless as a tool for Australian journalists. In August 2004, in a speech to the Public Right to Know Conference, the Council's Executive Secretary, Jack Herman, called for substantial change to FoI laws.

At the same time, the Council took notice of attempts by Michael McKinnon, the FoI Editor of *The Australian*, to access to information on the first home buyer's scheme and bracket creep. The federal Treasurer had issued Conclusive Certificates barring McKinnon's access to this material.

After appeals through the Administrative Appeals Tribunal and the Federal Court, *McKinnon's case* went to the High Court earlier this year. The Council participated in the case, having lodged an *amicus curiae* brief in support of better access to information of public interest under FoI.

On 6 September, by a 3-2 decision, the Court rejected McKinnon's appeal. The Court addressed the question of whether the Administrative Appeals Tribunal erred in determining that the Treasurer acted reasonably in issuing Conclusive Certificates that barred McKinnon's access to the material sought. The Press Council issued a press release that expressed its dismay at the decision. In the Press Council's view, the Court failed to give adequate weight to the aims of the *Freedom of Information Act*, to "extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth".

The Council went on the say:

> This aim should have been applied by the Court to correct the aberration whereby the courts will not interfere with a decision to issue a Conclusive Certificate unless that decision is completely absurd.
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> In the wake of the Court's decision the power of a tribunal to question the appropriateness or legitimacy of a certificate is effectively confined to deciding whether or not the decision to issue the certificate was irrational or absurd. In other words, it will in practice be impossible successfully to challenge a Minister's decision to refuse to disclose information, even where such information should rightfully be in the public domain.
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> The contention that the disclosure of information would mislead or confuse the public due to its complexity, one of the pillars of the government's case, suffers from legal paternalism and fails to appreciate the role of the press in informing the public on matters of public interest. It is the function of newspapers to interpret complex information and pass it on to the public in a comprehensible form.
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> Unfortunately, the practical effect of the High Court's determination will be to give governments fresh impetus to suppress information that is embarrassing or politically inconvenient. The true losers are Australia's voters and taxpayers.
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> The decision indicates that FoI law, as well as FoI practice, needs urgent reform.

The Council is not alone in drawing this conclusion. In a detailed case study of attempts by federal ALP member Kelvin Thomson to access information on whether the Australian government had knowledge of 'kickbacks' paid by AWB Limited to the former Iraqi regime, *Denying the Public's Right to Know: A critique of the operation of the* Freedom of Information Act *1982*, Michal Alhadeff suggests that there are three core problems with Australia's FoI framework:

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