HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

MICHAEL McKINNON APPELLANT

AND

SECRETARY, DEPARTMENT OF TREASURY RESPONDENT

McKinnon v Secretary, Department of Treasury [2006] HCA 45
6 September 2006
S52/2006

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

J E Griffiths SC with J K Kirk and T J Brennan for the appellant (instructed by Corrs Chambers Westgarth)

R R S Tracey QC with M F J Campbell for the respondent (instructed by Australian Government Solicitor)

Australian Press Council intervening as amicus curiae on the basis of written submissions only

CATCHWORDS

McKinnon v Secretary, Department of Treasury

Administrative law – Freedom of information – Statute conferring right of access to documents other than exempt documents – Documents exempt if relating to deliberative processes of government and if disclosure contrary to the public interest – Decision by Minister to issue certificate that disclosure of certain documents contrary to the public interest – Whether reasonable grounds exist for claim that disclosure contrary to the public interest.

Words and phrases – "exempt document", "internal working documents", "conclusive certificate", "public interest".

Freedom of Information Act 1982 (Cth), ss 3, 11, 36, 58(5), 58B, 58C, 58E, 64.
Administrative Appeals Tribunal Act 1975 (Cth), ss 43, 44.

1 GLEESON CJ AND KIRBY J. The characteristic function of the Administrative Appeals Tribunal, established by the *Administrative Appeals Tribunal Act* 1975 (Cth), is to undertake what is sometimes called "merits review" of administrative decisions, determining whether the decision under review was, on the material before the Tribunal, the correct or (in the case of discretionary decisions) the preferable one[1]. When the *Freedom of Information Act* 1982 (Cth) ("the FOI Act") was enacted, the Tribunal, by s 58(1), was given that function in relation to what might be described as ordinary or routine decisions concerning requests for access to a document of an agency or an official document of a Minister. It is not, however, the function with which this appeal is concerned. We are concerned with a different function, identified by s 58(5), relating to a limited class of document, and a particular kind of decision.

2 The central issue in the appeal turns upon an accurate understanding of the nature of the special function identified by s 58(5). The appellant contends that Downes J[2], the President of the Tribunal, who followed a line of authority in the Tribunal and the Federal Court, and whose decision was upheld by a majority of the Full Court of the Federal Court[3] (Tamberlin and Jacobson JJ, Conti J dissenting), erred in law in his understanding of the nature of the power given to the Tribunal by s 58(5).

3 The facts, and the relevant statutory provisions, are set out in the reasons of Hayne J. For our purposes, and at the risk of some over-simplification, it is sufficient to summarise the legislative context as follows.

4 The declared object of the FOI Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Commonwealth Government by creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests (s 3). We emphasise the repeated use of the word "right". Included in the exemptions and exceptions which qualify that right are those created by s 36 of the FOI Act, which deals with what are described as internal working documents. Such a document is exempt from disclosure if two conditions are satisfied. The first condition turns upon an objective description of the document itself. It must be a document the disclosure of which would disclose matter in the nature of, or relating to, opinion,

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1 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

2 *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138.

3 *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70.

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. If a document answers that description then a second condition (which is that of present relevance) applies. The second condition for exemption is that disclosure of the document would be contrary to the public interest.

5 A conclusion that disclosure of an internal working document would be contrary to the public interest may or may not turn upon contestable facts: either primary facts, or inferences to be drawn from those facts. It may or may not turn upon contestable matters of opinion. Inevitably, it will involve a judgment as to where the public interest lies. Such judgment, however, is not made in a normative vacuum. It is made in the context of, and for the purposes of, legislation which has the object described above, which begins from the premise of a public right of access to official documents, and which acknowledges a qualification of that right in the case of *necessity* for the protection of *essential* public interests (s 3(1)(b)).

6 The legislative scheme with respect to internal working documents (s 36(3)) is that, where a document is one as to which the first condition mentioned above is fulfilled (which turns upon the nature and contents of the document and, perhaps, other circumstances), then a Minister may sign a certificate which, so long as it remains in force, establishes conclusively that the second condition for exemption is fulfilled. The Minister's power so to certify is conditioned as follows:

> "(3) Where a Minister is satisfied, in relation to a document [which fulfils the first condition], that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect (specifying the ground of public interest in relation to which the certificate is given) ..."

7 Such a decision of a Minister is subject to review by the Tribunal. However, the power of review conferred upon the Tribunal by s 58(5) does not involve the exercise of the characteristic function of full merits review described at the commencement of these reasons. It is not the function of the Tribunal to decide whether the Minister was correct to be satisfied that the disclosure of a document would be contrary to the public interest. The Tribunal does not ask itself whether, on the evidence before it, the Tribunal is satisfied that the disclosure of the document would be contrary to the public interest. The question that, by s 58(5), is raised for the Tribunal's decision is a related, but different, question. It is "whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest."

8 Thus, in relation to internal working documents of the kind described in s 36(1)(a), it is for the Minister to decide the question of public interest raised by s 36(1)(b) and s 36(3), and it is the Minister's state of satisfaction on that issue that determines whether the document is exempt from disclosure. There is no provision for full merits review of that decision by the Tribunal. The Tribunal's review function, in such a case, is limited to determining whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest.

9 Although it is the FOI Act that must be applied, and analogies may be imperfect and risky, it is worth pointing out that such a limited form of review of primary decision-making is not unfamiliar. For example (although the analogy is far from exact), when, in an ordinary tort case, an appellate court reviews a finding of negligence by a court of first instance (a finding that may turn upon questions of fact and a normative judgment as to reasonableness), the kind of review that is undertaken will depend upon whether the decision at first instance was that of a judge alone, or of a jury. In the former case, depending on the statute creating the right of appeal, the appeal may be by way of rehearing, and the duty of the appellate court may be to decide whether it regards the decision at first instance as wrong. In the latter case, the appellate court does not decide whether it agrees with the jury's conclusion; it decides whether it was reasonably open to the jury to reach that conclusion[4]. That is a familiar form of review which falls short of full merits review. Again, as Downes J pointed out in his reasons, statutes which confer a power conditioned upon the existence of reasonable grounds for a state of mind such as suspicion, or belief, are common. Powers of search and seizure, or arrest, are often conditioned in that way. Downes J referred to the decision of this Court in *George v Rockett*[5] where it was said:

> "When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."

10 This is an objective test. *George v Rockett* was concerned with Queensland legislation empowering the issue of a search warrant if there were reasonable grounds for suspecting that there was incriminating evidence in a house. The statutory formula, however, is widely used. The point of the objectivity of such a test, when it is necessary to consider whether a primary

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4 *Swain v Waverley Municipal Council* (2005) 220 CLR 517.

5 (1990) 170 CLR 104 at 112.

decision-maker had reasonable grounds for a given state of mind, is that the question is not whether the primary decision-maker thinks he or she has reasonable grounds[6].

11 To decide whether it was reasonably open to a decision-maker, on the evidence, to make a judgment such as a decision whether a person was (or was not) negligent, or whether the known facts are sufficient to induce in a reasonable person a suspicion or belief that someone is guilty of a crime, or whether there are reasonable grounds for a claim that a course of action (such as disclosure of a document) would be contrary to the public interest, involves an evaluation of the known facts, circumstances and considerations which may bear rationally upon the issue in question. A judgment as to whether information or argument bears rationally upon a question is also a familiar exercise. It is usually discussed by courts under the rubric of relevance[7]. If a piece of information, or an opinion, or an argument, can have no rational bearing upon a question for decision, it is irrelevant, and must be left out of further consideration. Otherwise, being relevant, just decision-making requires that it be taken into account.

12 Where a claim, or an argument, or a conclusion or some other state of mind (such as suspicion, or belief, or satisfaction) involves an interplay of observation (of objective facts and circumstances), opinion, and judgment (which may involve an evaluation of matters such as reasonableness of conduct, or of the public interest), the question whether there are reasonable grounds for such a claim, or argument, or state of mind requires a consideration of all relevant matters and an assessment of the reasonableness of the claim, or argument, or state of mind having regard to all relevant considerations. Suppose the question is whether there are reasonable grounds for suspecting that A killed B. Suppose that A is a person of violent propensity, who had a motive to kill B, and had declared an intention to do so. Let it be assumed that those three facts are incontestable. In the absence of any other facts they may lead to a conclusion that there are reasonable grounds for suspecting that A killed B. Suppose, however, that A has an undisputed alibi. The first three facts then cease to constitute reasonable grounds for the suspicion. The question cannot be answered without considering all four facts. It is not a hypothetical question. It is a question to be answered in the light of all the known circumstances. This applies to all relevant considerations whether they be matters of objective fact (as

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6 *Bradley v The Commonwealth* (1973) 128 CLR 557 at 574-575; *Nakkuda Ali v M F de S Jayaratne* [1951] AC 66; *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952.

7 *Papakosmas v The Queen* (1999) 196 CLR 297 at 307 [23]; *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [2]; 190 ALR 370 at 371.

in the example given), or of opinion, or of argument. 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.

13 A problem may arise from an ambiguity in the word "grounds". A proposition (in the form of a statement of fact, or an opinion, or an argument) may be relevant to, and capable of supporting, a claim or a conclusion. There may be a number of such propositions. But that does not of itself mean that there are reasonable grounds for the claim or the conclusion. That is a question that can only be decided after considering all relevant propositions. The task of the Tribunal is not performed if, looking at a particular proposition, it says: "Other things being equal, that would be sufficient to induce in the mind of a reasonable Minister this state of mind." The Tribunal must look at, and take account of, any other relevant considerations as well. Section 36(3) requires the Minister, when giving a certificate, to specify "the ground of public interest" upon which he or she relies. There may be more than one such ground. But when s 58(5) refers to "reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest" it raises the question whether, having regard to all the relevant considerations available to the Tribunal, there are matters that are sufficient to induce in a reasonable person a state of satisfaction that disclosure of a document would be contrary to the public interest. The expression "reasonable grounds for the claim" means reasonable grounds for contending that the Minister should be so satisfied. That is the nature of the claim. The ground or grounds specified by the Minister as the basis of his or her satisfaction must, of course, be relevant to the conclusion reached by the Minister. If they are not, then that is the end of the matter. The application will succeed. However, more than that is required. They must be reasonable grounds for a conclusion (or a claim that a conclusion should be reached). That can only be determined in the light of all relevant considerations.

14 The point relied upon by the appellant emerges most clearly in the reasons of Tamberlin J, who was in the majority in the Full Court of the Federal Court. He said:

> "[O]ne example of a facet of the public interest that is relevant is the desirability of preserving confidentiality of intra-governmental communications prior to making a decision. Another, and obviously

> competing, facet of the public interest is the desirability of transparency in public administration. If there is a ground that is not irrational, absurd or ridiculous for a claim that the first-mentioned facet of the public interest would not be served by disclosure, then that alone is sufficient to satisfy the requirements of s 58(5). It is not necessary in order to decide that limited question that the decision-maker should consider and weigh all the other facets, and the grounds which may reasonably support each of those facets, in order for s 58(5) to be satisfied."

15 The other member of the majority in the Full Court, Jacobson J, did not put the point quite so directly, but he also considered and rejected an argument that "the question of whether something is contrary to the public interest involves a consideration of factors on the other side of the ledger."

16 Logically, the view of the majority in the Full Court appears to mean that, so long as there is anything relevant to be said in support of the view that disclosure would be contrary to the public interest, an applicant for review under s 58(5) must fail. We cannot accept that. To take the example mentioned by Tamberlin J, the preservation of confidentiality of intra-governmental communications prior to making a decision could always be advanced, in the case of internal working documents of the kind with which we are concerned, as a relevant consideration. How could that facet of the public interest ever be served by disclosure? How, then, could an applicant ever succeed? If it were enough for the Minister to point to one facet of the public interest that is served by non-disclosure, then it would be enough to say that non-disclosure preserves confidentiality. Of course it does. By definition, a facet is one side of something that has many sides. Looking only at a facet of an object is a necessarily incomplete way of looking at the object. Looking only at a facet of the public interest is a necessarily incomplete way of looking at the public interest.

17 It is undoubtedly correct that the Tribunal's function under s 58(5) is not to decide whether the Tribunal is satisfied that disclosure would be contrary to the public interest; just as an appellate court's function on an appeal from a jury in a negligence case is not to decide whether it finds that the defendant was negligent. It does not follow, however, that the Tribunal is not required to take account of all relevant considerations, or that the circumstance that there is something relevant to be put against disclosure is the end of the matter. It is not the end; it is the beginning.

18 Unaided by the reasons of the majority in the Full Court, and their explanation of the earlier decisions that were followed by Downes J, it would not have been obvious to us that Downes J in truth adopted the approach held by the Full Court to be necessary and correct. There are some passages in his reasons that are consistent with the approach that appears to us to be correct. The procedure by which a matter such as this comes before the Federal Court, or this

Court, means that we do not have available to us all the material that was available to Downes J (including the disputed documents) and, as Hayne J suggests, the argument on both sides was conducted at a disconcerting level of abstraction. Nevertheless, the appellant is entitled to have the matter considered according to law, and we are prepared to accept that the view of the law expressed by the Full Court in upholding the decision of Downes J reflects what he decided. It is certainly the basis on which the Full Court decided the case.

19 We have avoided reference to "balancing". This is a concept that assumes prominence in a different context, in which courts are required to deal with claims of public interest immunity advanced in opposition to the production of documents, for example under subpoena, in civil or criminal litigation. There, it is the public interest in the administration of justice, and considerations of fairness to litigants, that may need to be weighed against aspects of the public interest put at risk by disclosure of documents[8]. The image of the scales of justice is pervasive in legal thinking, and it is natural to talk of taking account of competing considerations in those terms. Under the FOI Act, however, the matter of disclosure or non-disclosure is not approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other. There is a "general right of access to information ... limited only by exceptions and exemptions necessary for the protection of essential public interests [and other matters not presently material]" (s 3(1)(b)). That is the context in which a Minister makes a decision under s 36(3), and in which such a decision is reviewed under s 58(5). References to "balancing" create a danger of losing sight of that context. That is the context in which the question of reasonableness raised by s 58(5) is to be addressed. To lose sight of that would be to lose sight of the principal object of the FOI Act.

20 We would allow the appeal with costs. The orders of the Full Court of the Federal Court should be set aside. In their place it should be ordered that the appeal to that Court be allowed with costs, that the decision of the Administrative Appeals Tribunal of 21 December 2004 be set aside, and that the proceedings be remitted to the Administrative Appeals Tribunal for reconsideration according to law.

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8 See, for example, *Conway v Rimmer* [1968] AC 910; *Sankey v Whitlam* (1978) 142 CLR 1; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394.

21 HAYNE J. This appeal concerns the operation of Pt VI of the *Freedom of Information Act* 1982 (Cth) ("the Act"). That Part of the Act (ss 53-66) provides for the review of decisions made under the Act, first by an internal review (under s 54), and then on application to the Administrative Appeals Tribunal ("the Tribunal"). The particular issue that arises in the appeal concerns the operation of s 58(5) of the Act in relation to two certificates signed by the Treasurer of the Commonwealth, certifying that the disclosure of certain internal working documents (documents of a kind described in s 36(1)(a)[9]) would be contrary to the public interest.

22 Section 58(5) provides that:

> "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*." (emphasis added)

23 How should the Tribunal determine that question?

24 The determination of that issue will require close attention to the text of s 58(5). It is as well, however, to place that particular provision in its statutory context.

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9 Section 36(1) provides:

> "Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:
>
> (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."

The Act

25 The object of the Act is stated[10] to be "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" by methods identified in the Act. One of those methods is described[11] as:

> "creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, *limited only by exceptions and exemptions necessary for the protection of essential public interests* and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities". (emphasis added)

The Act records[12] that "[i]t is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further" the Act's object.

26 Subject to the Act, "every person has a legally enforceable right to obtain access in accordance with this Act to ... a document of an agency, other than an exempt document"[13]. An "agency" includes[14] a "Department", which in turn includes "a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth".

27 One class of exempt documents is the class of "internal working documents" defined in s 36(1) of the Act. That sub-section has two elements. First, the documents with which it deals are those the disclosure of which "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"[15]. Secondly, a document of that kind is an exempt document only if its disclosure would be contrary to the public interest[16].

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10 *Freedom of Information Act* 1982 (Cth), s 3(1).

11 s 3(1)(b).

12 s 3(2).

13 s 11(1)(a).

14 s 4.

15 s 36(1)(a).

16 s 36(1)(b).

28 Section 36(3) provides that a Minister, if "satisfied, in relation to a document to which [s 36(1)(a)] applies," that its disclosure would be contrary to the public interest, may sign a certificate to that effect, "specifying the ground of public interest in relation to which the certificate is given". Subject to the operation of the provisions of Pt VI of the Act dealing with the review of decisions, "such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest".

The applications for documents

29 The appellant, Mr McKinnon, is the FOI Editor of *The Australian* newspaper. In October and in December 2002 he made two requests for material – the first, for material relating to "bracket creep" in the federal income taxation system, and the second, for material relating to the First Home Owners Scheme. The expression "bracket creep" has no single precise definition. In general it refers to inflation leading to an increase in the nominal incomes of taxpayers, moving them from one marginal tax bracket to another, and thus increasing the overall taxation receipts from personal taxpayers whose income has not increased in real terms. The First Home Owners Scheme provided a grant to those buying a home for the first time.

30 The first request, as ultimately formulated, sought:

> "Reports, reviews or evaluations completed in the 12 months from 3 December 2001 to 3 December 2002 detailing the extent and impact of bracket creep and its impact on revenue collection of income tax, including information in relation to higher tax burdens faced by Australians and/or projections of revenue collection increases from bracket creep, but excluding documents that have already been released publicly or duplicate copies of documents."

This request was originally directed to the Australian Taxation Office, but because it was seen to be more closely connected with the functions of the Department of the Treasury, it was transferred to that Department[17]. Nothing now turns on this aspect of the matter.

31 The second request, directed to the Department of the Treasury, sought:

> "Documents relating to any review/report or evaluation completed on the First Home [Owners] Scheme in the last two years, including documents

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17 s 16(1)(b).

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."

32 In answer to the requests, the Department provided Mr McKinnon with lists of the documents falling within the scope of the requests. Forty documents were listed as relevant to the first request (about "bracket creep"). All but one of those documents (a one page document described as being addressed to the Senate Economics Legislation Committee) were claimed to be exempt documents. In relation to the request for documents concerning the First Home Owners Scheme, 47 documents were identified as falling within the scope of the request. Most were claimed to be exempt documents in whole or in part.

33 Being dissatisfied with the results of the internal review of these decisions made under s 54 of the Act, Mr McKinnon, pursuant to s 55 of the Act, made applications to the Tribunal for review of the decisions refusing to grant access to all the documents to which the requests related. Shortly before the applications for review were listed for hearing, the Treasurer signed two certificates under s 36(3). By one, he certified that the disclosure of parts of, or all of, 36 of the 40 documents originally identified as falling within the scope of the request about "bracket creep", would be contrary to the public interest on one or more grounds identified in the certificate. By the other, he certified that the disclosure of parts of, or all of, 13 of the 47 documents that had been identified as falling within the scope of the request about the First Home Owners Scheme would be contrary to the public interest on one or more of the grounds identified in the certificate.

34 The schedule to each certificate set out a list of the documents concerned, identified what part or parts of the document were said to be exempt, and indicated, by reference to the statement of grounds set out in the body of the certificate, the particular ground or grounds on which the Treasurer relied in respect of each of the documents. Each certificate set out seven grounds:

"(a) Officers of the Government should be able to communicate directly, freely and confidentially with a responsible Minister and members of the Minister's office on issues which are considered to have ongoing sensitivity and are controversial and which affect the Minister's portfolio.

(b) Officers should be able freely to do in written form what they could otherwise do orally, in circumstances where any oral communication would remain confidential. Such written communications relating to decision-making and policy formulation processes ensure that a proper record is maintained of the considerations taken into account. If they were to be released for public scrutiny, officers may in the future feel reluctant to make

a written record, to the detriment of these processes and the public record.

(c) The release of a document that discusses options that were not settled at the time the document was drafted and that recommends or outlines courses of action that were not ultimately taken has the potential to lead to confusion and to mislead the public. The release of such potentially misleading or confusing material would not make a valuable contribution to the public debate and has the potential to undermine the public integrity of the Government's decision making process by not fairly disclosing reasons for the final position reached. Decision-making processes are multi-layered and the documents reflect partially considered matters and tentative conclusions.

(d) The release of the material would tend to be misleading or confusing in view of its provisional nature, as it may be taken wrongly to represent a final position (which it was not intended to do) and ultimately may not have been used or have been overtaken by subsequent events or further drafts.

(e) The release of documents that contain a different version of estimates, projections, costings and other numerical analysis that cannot be put into context because of the absence of any explanation of the variables used or assumptions relied upon has the potential to lead to confusion and to mislead the public. The release of such potentially misleading or confusing material would not make a valuable contribution to the public debate and has the potential to undermine the public integrity of the Government's decision-making process by not fairly disclosing reasons for the final position reached.

(f) The preparation of possible responses to questions in Parliament is a very sensitive aspect of the work of departmental officers and it is appropriate that briefing and other material produced on a confidential basis in the preparation of those responses, remain undisclosed. The release of such documents would threaten the protection of the Westminster-based system of Government.

(g) The release of documents that are intended for a specific audience familiar with the technical terms and jargon used, has the potential for public misunderstanding in that the contents of the documents could be misinterpreted. These documents were not intended for publication and publication would be misleading as the documents do not contain sufficient information for an uninformed audience to interpret them correctly and reasonably."

As the President of the Tribunal (Downes J) was later to observe[18], the grounds fell into two broad categories: first, that disclosure would compromise necessary confidentiality (grounds (a), (b) and (f)), and second, that disclosure would be likely to mislead (grounds (c), (d), (e) and (g)).

35 Pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), the appellant sought, and obtained, from the Treasurer, statements of reasons for issuing the certificates under s 36(3) of the Act. It was open to the appellant to apply to the Federal Court for judicial review, on any of the grounds specified in the ADJR Act, of the Treasurer's decision to issue a certificate, but no such application was made. In particular, no application was made for judicial review of the decision on the grounds that the Treasurer's decision involved an error of law[19], or was an improper exercise of the power[20], whether because the Treasurer took irrelevant considerations into account or failed to take relevant considerations into account[21] or for some other reason[22].

36 Rather, in the then pending applications to the Tribunal for review of the decisions to refuse the appellant access to the documents, the appellant required the Tribunal to determine the question whether there existed reasonable grounds for the claim that the disclosure of the documents would be contrary to the public interest. The Tribunal (Downes J) held[23] that it must determine whether those grounds existed at the time of the review decision, not at the time the certificate was given. Neither party challenged that conclusion. The Tribunal determined[24] that two documents were not within s 36(1)(a) but determined that there existed reasonable grounds for the claim that disclosure of any of the other documents covered by the Treasurer's certificates would be contrary to the public interest.

37 Pursuant to s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth), the appellant "appealed" to the Federal Court of Australia against the Tribunal's decisions that there existed reasonable grounds for the claim that disclosure of

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18 *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138 at 151 [58].

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

20 s 5(1)(e).

21 s 5(2)(a) and (b).

22 s 5(2).

23 (2004) 86 ALD 138 at 142 [15].

24 (2004) 86 ALD 138.

the documents falling within s 36(1)(a) would be contrary to the public interest. Because the Tribunal had been constituted by the President of the Tribunal, the appeal was to the Full Court of the Federal Court[25]. That Court, by majority (Tamberlin and Jacobson JJ, Conti J dissenting), dismissed[26] the appeal. By special leave, the appellant appealed to this Court.

38 Both the proceedings in the Full Court of the Federal Court, and the appeal to this Court, were argued at a high level of abstraction. The appellant said that the central question in the appeal to this Court was whether s 58(5) of the Act "require[d] the Tribunal to consider competing facets of the public interest". The respondent identified the central question in substantially identical terms: whether s 58(5) of the Act required the Tribunal "to take into account and balance public interest considerations favouring disclosure of a document when determining whether reasonable grounds exist for a claim that disclosure would be contrary to the public interest".

39 The appellant contended that it was necessary to identify the relevant question at a high level of abstraction, at least in part, because neither he nor his legal advisers had seen the documents in issue. Rather, pursuant to s 58C of the Act, Downes J had held parts of the hearing, during which evidence and information were given and submissions made about the content of the documents for which exemption was claimed, in the absence of the appellant and his advisers. And although Downes J had required the production of the disputed documents to him (in accordance with s 58E of the Act), he had, as the Act required, returned the documents to the persons by whom they were produced "without permitting any person who is not a member of the Tribunal as constituted for the purposes of the proceeding ... to have access to the document or disclosing the contents of the document to any such person"[27].

40 In this case, however, identifying the relevant question at the level of abstraction reflected in the parties' formulations of that question obscures two matters to which proper attention must be given. It obscures the need first, to identify the Tribunal's task in considering the question posed by s 58(5) of the Act, and second, to identify what the Tribunal did in the applications before it. The parties' formulations of the issue obscure those matters by leaving uncertain what is meant by saying that "competing facets of the public interest" should be "consider[ed]" or "take[n] into account and balance[d]".

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25 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44(3).

26 *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70.

27 s 58E(3).

41 Before identifying the Tribunal's task and relating that task, thus identified, to what the Tribunal did, it is desirable to say something more about the course of proceedings before, and the decision of, Downes J, and then to say something about the Full Court's reasons.

The Tribunal proceedings

42 In the Tribunal, the parties adduced a deal of evidence. The appellant called Mr Alan Rose, a former Secretary of the Attorney-General's Department of the Commonwealth who had also served as President of the Australian Law Reform Commission and as a member of the Administrative Review Council established under the *Administrative Appeals Tribunal Act*. The appellant also called evidence from the Editor of *The Australian* newspaper, Mr Michael Stutchbury, from Professor Peter Dixon, an applied economist particularly interested in questions relating to "bracket creep", and from Mr Anthony Harris, a senior financial writer and journalist who had been a senior Commonwealth public servant and State office holder. It is neither necessary nor profitable to record the details of the evidence adduced from these witnesses. Nor is it necessary or profitable to attempt to identify the precise forensic purposes which the appellant sought to achieve by the tendering of this evidence. Much of it appeared to be in the nature of argument and comment, rather than any proof of fact or relevant opinion.

43 At the risk of undue abbreviation, the evidence from Mr Rose was generally to the effect that none of the grounds stated in the Treasurer's certificates was sound. So, for example, he said that, in his experience, "release of even very sensitive and controversial documents does not impede public servants' direct and free communication with Ministers" and he controverted each of the other grounds stated in the certificates. Mr Harris gave evidence to the same general effect. Mr Stutchbury and Professor Dixon gave evidence that release of the documents sought would advance public debate about matters of interest and importance not only for members of the public generally but also for academic investigation and study by economists. But inevitably, none of the evidence adduced by the appellant could engage directly with particular disputed documents – none of the appellant's witnesses had seen them. All of the appellant's evidence and argument was necessarily pitched at an abstract level.

44 The respondent adduced evidence from a number of Treasury officers, including, in particular, Mr Philip Gallagher, Manager of the Retirement and Income Modelling Unit, and the officer of Treasury responsible for personal income tax costings since September 2001, Mr James Hagan, General Manager of the Domestic Economy Division, Macroeconomic Group, Ms Laurene Edsor, a senior adviser in the Integrated Tax Design Unit, Tax Design Division, and Mr Richard Murray, Executive Director, Fiscal and Corporate. Again, some of the material advanced in the affidavits of these witnesses appears to be more in

the nature of argument and opinion, than proof of relevant facts, but all of their affidavits gave some information about some or other of the disputed documents.

45 The respondent served all its affidavit evidence on the appellant and it followed that the appellant's legal advisers had access to this evidence, even though some of it was received in private hearings. The respondent's witnesses were made available for cross-examination on behalf of the appellant. In addition, however, Mr Murray and Mr Gallagher gave some further evidence in a private hearing from which the appellant and his advisers were excluded.

46 As noted earlier, Downes J inspected the disputed documents, and his reasons are to be read in light of that fact, and in light of what had been said in evidence by the Treasury officers about the nature of the material they said was revealed by those documents. In his reasons, Downes J recorded[28] the nature of the evidence that had been adduced by the parties. For present purposes it is important to observe that Downes J concluded[29] that the grounds asserted in the certificates did not challenge the existence of a substantial public interest in knowing the subject matter dealt with in the disputed documents. He described[30] the evidence given by the Treasury officers, particularly by Mr Murray, the most senior officer to give evidence, as supporting "the existence of an alternative reasonable opinion from the opinions expressed by the [appellant's] witnesses" but said[31] that it was not for him to decide which of the opinions of the parties' witnesses was preferable. "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]

47 Downes J then dealt in turn with each of the disputed documents. It is convenient to trace the outline of his Honour's reasons relating to one group of the "bracket creep" documents (described as documents B.001 to B.010) for those reasons are typical of the approach his Honour took to the matters.

48 Each of the documents B.001 to B.010 had been written by an officer of the Australian Tax Office and each was addressed to a Treasury officer. Downes J concluded[33] that each was "an advice or recommendation or both

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28 (2004) 86 ALD 138 at 150-152 [53]-[67].

29 (2004) 86 ALD 138 at 151 [59].

30 (2004) 86 ALD 138 at 152 [66].

31 (2004) 86 ALD 138 at 152 [66].

32 (2004) 86 ALD 138 at 152 [66].

33 (2004) 86 ALD 138 at 154 [75].

which was prepared for the purposes of the deliberative processes of government". The certificate asserted that grounds (c), (d), (e) and (g) (being the grounds asserting that disclosure would mislead) were engaged. Downes J said[34]:

> "Each of the documents certainly relates to options not settled, is provisional in nature and contains different versions of estimates, projections, costings and other numerical analysis which are not explained. The documents contain jargon and acronyms which would be meaningless to the average reader. The average reader would have difficulty in understanding the conclusions and even greater difficulty in understanding the reasoning and methodology."

All of the documents were said[35] to provide "a substantial factual basis for concluding" that they fell within the claimed grounds. Those grounds were described[36] as "rational grounds", having "support in the authorities and in the evidence". Accordingly, Downes J concluded[37] that reasonable grounds existed for the claim that disclosure of each of the documents would be contrary to the public interest.

49 This kind of analysis was undertaken in respect of each of the disputed documents. For the most part all the grounds relied on were upheld, but in some cases[38] greater weight or credence was given to some rather than all of the claimed grounds. The grounds that were upheld were described as being "rational" grounds, having support in the authorities (which is to say in past decisions of the Tribunal) and in the evidence.

The Full Court

50 In the Full Court, Jacobson J gave the principal reasons for the majority. Tamberlin J agreed in the reasons published by Jacobson J, but added some further observations. The parties' formulations of the relevant question to be considered in the appeal to this Court can be traced to what was said in the

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34 (2004) 86 ALD 138 at 155 [76].

35 (2004) 86 ALD 138 at 155 [77].

36 (2004) 86 ALD 138 at 155 [77].

37 (2004) 86 ALD 138 at 155 [77].

38 See, for example, (2004) 86 ALD 138 at 155 [79].

reasons of Tamberlin J. His Honour's discussion of relevant principles began[39] from the premise that:

> "The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where 'the public interest' resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that 'the public interest' can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable."

Having identified what he saw to be the relevant principles, his Honour continued[40]:

> "[O]ne example of a facet of the public interest that is relevant is the desirability of preserving confidentiality of intra-governmental communications prior to making a decision. Another, and obviously competing, facet of the public interest is the desirability of transparency in public administration. *If there is a ground that is not irrational, absurd or ridiculous for a claim that the first-mentioned facet of the public interest would not be served by disclosure, then that alone is sufficient to satisfy the requirements of s 58(5). It is not necessary in order to decide that limited question that the decision-maker should consider and weigh all the other facets, and the grounds which may reasonably support each of those facets, in order for s 58(5) to be satisfied.*" (emphasis added)

51 The appellant placed particular weight upon the emphasised part of the reasons of Tamberlin J and contended that it encapsulated the approach adopted by the Tribunal. It was submitted that it was "implicit in the Tribunal's construction of the s 58(5) task that if any one facet of the public interest can be established as supported by a non-absurd opinion of one witness, and/or by past Tribunal decisions, then that is sufficient to satisfy the test". Hence, so the appellant submitted, it was necessary for this Court to hold that the Tribunal must balance competing facets of public interest.

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39 (2005) 145 FCR 70 at 75-76 [12].

40 (2005) 145 FCR 70 at 76-77 [16].

52 As earlier observed, these submissions of the appellant require consideration of two elements: one concerning what the Act requires and the other concerning what the Tribunal did. It is convenient to deal first with what the Act requires.

The Tribunal's task

53 There can be no doubt that s 58(5), like all other provisions of the Act, must be construed in a way that promotes the object of the Act. In particular, it is to be construed in a way that promotes access to documents in the possession of a Minister or Department. Exceptions and exemptions, including the exception or exemption for which s 36(1) provides, are to be limited to those necessary for the protection of *essential* public interests[41]. But the appellant made no submission that any particular question of construction of s 58(5) arises in the present matter which engages such principles. Rather, the attention of the parties was properly directed to identifying what s 58(5) requires. It was for that purpose that the appellant referred to "facets" of the public interest and what was said to be the need to balance competing facets of the public interest.

54 It is necessary to begin the examination of the Tribunal's task by recognising that s 58(5) does not require, and does not permit, the Tribunal to substitute its opinion about whether the disclosure of particular documents of the kind identified in s 36(1)(a) would be contrary to the public interest, for the opinion expressed in a certificate given under s 36(3). Section 58(5) requires the Tribunal to answer a particular statutory question: are there *reasonable grounds* for the claim that disclosure would be contrary to the public interest? If the Tribunal answers that question in the negative, the Act requires[42] the Minister who has given the certificate to decide whether to revoke the certificate. If the Minister decides not to revoke the certificate, the Minister must give notice[43] of the decision to the applicant, must cause a copy of the notice[44], including a statement of findings on any material question of fact, the material on which those findings were based, and the reasons for the decision[45], to be laid before each House of the Parliament, and must read the notice[46] to the House in which

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41 s 3(1)(b).

42 s 58A(1).

43 s 58A(3)(a).

44 s 58A(3)(b).

45 s 58A(4).

46 s 58A(3)(c).

the Minister sits. Thus if the Tribunal considers that there are not reasonable grounds for the claim, the Act provides for a series of steps to be taken whose ultimate sanction is evidently intended to lie in the political arena of the Parliament.

55 It may readily be accepted that most questions about what is in "the public interest" will require consideration of a number of competing arguments about, or features or "facets" of, the public interest. As was pointed out in *O'Sullivan v Farrer*[47]:

> "[T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'[48]."

That is why a question about "the public interest" will seldom be properly seen as having only one dimension. But s 58(5) can be engaged only where a Minister has decided that the disclosure of a document would be contrary to "the public interest" and has specified the ground or grounds of public interest in relation to which the certificate is given. The Minister's decision that disclosure would be contrary to the public interest is a judgment about which reasonable minds may very well differ. But the Tribunal is not charged with the task of deciding what assessment of the public interest is to be preferred. Its task is to answer the statutory question: are there reasonable grounds for the claim that disclosure would be contrary to the public interest?

56 Again it may be accepted that there may be (and very often will be) competing considerations that are relevant to what I have called the statutory question posed by s 58(5). The Tribunal's task is not to be confined to examining those considerations separately. In particular, it is not to be confined to deciding whether one of the considerations advanced in support of a claim, that a document or documents should not be disclosed, can be seen to be based in reason. 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

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47 (1989) 168 CLR 210 at 216.

48 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

conclusion expressed in the certificate. The focus of the Tribunal must be upon the grounds for the conclusion. Are those grounds "reasonable grounds"?

57 Of course that is a matter for judgment, not calculation or observation. Against what standard is that judgment to be made? Tamberlin J said[49] that "[i]t is settled law that the words 'reasonable grounds', in [the present] context, denote grounds which are not irrational, absurd or ridiculous" and cited a number of previous Federal Court and Tribunal decisions as supporting that proposition[50]. It followed, so Tamberlin J held[51], that the question presented by s 58(5) "is confined, by the terms of the section, to the issue whether there is any non-absurd basis for a claim that disclosure is contrary to the public interest".

58 The appellant submitted that this approach is mistaken, and that it would be wrong to substitute a test of "not irrational, absurd or ridiculous" for the statutory language of "reasonable grounds" for the claim. Rather, so the appellant submitted, the statutory question asks whether there are sufficient grounds to induce the state of mind in a reasonable person that disclosure would be contrary to the public interest. This was a process that was said to require the resolution of disputed questions of fact (like whether release of the documents would inhibit free communication between public servants and Ministers) followed by an assessment of whether those factual grounds can, as a matter of reasoning, lead to the conclusion asserted.

59 The appellant sought support for the first step in these submissions from what was said by this Court in *George v Rockett*[52]. But that case concerned a very different legislative provision which governed a Justice's issuing of a warrant where there were "reasonable grounds for suspecting" certain matters. In that context, the references to inducing a particular state of mind are apposite. But the question presented by s 58(5) makes no reference to the state of mind of any person. It asks whether there exist reasonable grounds for a claim that has been made. And it may seriously be doubted that the understanding of the Tribunal's task is assisted by injecting notions of persuasion or satisfaction of the kind with which *George v Rockett* was concerned. Such notions are unhelpful in

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49 (2005) 145 FCR 70 at 74 [4].

50 *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190 per Bowen CJ and Beaumont J; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111; *Battalis v Secretary, Department of Health, Housing and Community Services* (1994) 34 ALD 483 at 496-497 per Carr J; *Centrelink v Dykstra* [2002] FCA 1442 at [24] per Mansfield J.

51 (2005) 145 FCR 70 at 75 [7].

52 (1990) 170 CLR 104.

this context because they all too readily may be understood as requiring the Tribunal to make its own assessment of where the public interest lies. That is not what s 58(5) permits or requires. It requires an assessment of the grounds for the conclusion that disclosure is not in the public interest. Do reasonable grounds exist for that conclusion?

60 The expression "not irrational, absurd or ridiculous" is not synonymous with "reasonable grounds". Of course, absurd, irrational or ridiculous grounds are not reasonable grounds. But the words "reasonable grounds" do not denote grounds which are "not irrational, absurd or ridiculous". The statutory words are to be given their ordinary meaning. It will seldom be helpful, and it will often be misleading, to adopt some paraphrase of them.

61 In *Attorney-General's Department v Cockcroft*[53] the Full Court of the Federal Court considered the operation of s 43(1)(c)(ii) of the Act – a provision which contained the words "could reasonably be expected to prejudice the future supply of information". In their joint reasons, Bowen CJ and Beaumont J rightly pointed out[54] that it was undesirable to attempt any paraphrase of these words. Thus when their Honours said, as they did[55], that the words required a "judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous," to expect certain consequences, they are not to be understood as having used the latter expression as a paraphrase of the former. Rather, they are to be understood, and have since been understood[56], as doing no more than drawing an emphatic comparison. To do more would have been, as their Honours correctly said, "to place an unwarranted gloss upon the relatively plain words of the Act"[57]. And the same approach should be taken to the expression "reasonable grounds" when it is used in s 58(5) of the Act.

62 It follows that the appellant was right to say that the characterization of any one reason favouring non-disclosure of documents as "non-absurd" does not of itself require an affirmative answer to the statutory question posed in s 58(5). That is, it would be an error to treat the statutory question as requiring an

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53 (1986) 10 FCR 180.

54 (1986) 10 FCR 180 at 190.

55 (1986) 10 FCR 180 at 190.

56 *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 122-123.

57 (1986) 10 FCR 180 at 190.

affirmative answer wherever there is any "non-absurd" reason favouring non-disclosure of the documents in question.

63 In deciding whether reasonable grounds exist for a claim, the Tribunal must take account of any relevant evidence that has been adduced and of any relevant arguments that have been advanced. It must consider the particular claim that has been made and that will require consideration (and commonly the examination) of the particular documents that are in question.

64 The bare fact that the disputed documents are internal working documents of a kind described in s 36(1)(a) of the Act will not demonstrate that there are reasonable grounds for the claim that their production will be contrary to the public interest. The Act assumes that such documents may be, but are not necessarily, of a kind whose production would be contrary to the public interest. But it is well-nigh inevitable that some classification will be made of the documents in issue in a particular case, and the allocation of some or all of the disputed documents to one or more particular classes of document does not necessarily bespeak error by the Tribunal. In particular it does not necessarily reveal that the Tribunal has treated a particular class of document as necessarily protected from disclosure regardless of whether and what grounds there are for that conclusion.

65 Of course the Tribunal must decide any relevant questions of fact that are tendered for decision in the matter before it. And, if opinion evidence is given, the Tribunal may find it necessary or desirable to decide what, if any, of that evidence it accepts. But it by no means follows that, by tendering evidence of opinion about what is or is not in the public interest, a party may require the Tribunal to decide what view of the public interest is to be preferred. That is not the question that the Act presents for the Tribunal.

What the Tribunal did

66 The appellant contended that the Full Court should have held that the Tribunal erred in a number of respects. In considering that argument it is necessary for this Court to decide for itself how the Tribunal set about its task. In this regard, the appellant placed chief weight upon the contention that, as Tamberlin J had suggested[58] was the proper approach, the Tribunal had seen it as sufficient to identify a single ground that was not irrational, absurd or ridiculous for the claim that preserving confidentiality of intra-governmental communications would not be served by disclosure of the disputed documents. But the appellant also submitted that the Tribunal had not decided all of the relevant questions of fact tendered by the competing evidence adduced at the

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58 (2005) 145 FCR 70 at 76-77 [16].

hearing, and had wrongly treated certain classes of documents as necessarily exempt from disclosure.

67 None of these submissions should be accepted. In particular, the premise for the appellant's argument (that the Tribunal had in fact followed the path which Tamberlin J suggested was the proper approach to the case) was not established.

68 First, Downes J did not treat "not irrational, absurd or ridiculous" as a paraphrase of "reasonable grounds". What his Honour said[59] was that "'reasonable grounds' means grounds based on reason, *as distinct from* something 'irrational, absurd or ridiculous' on the one hand, or 'fanciful, imaginary or contrived' on the other" (emphasis added). Downes J continued[60]:

> "To say that reasonable grounds must be grounds based on reason does not resolve one critical issue relating to the test. The concept of reasonable grounds conveys more than the idea of reason. Were that not so, the only task for the [T]ribunal would be to test the logic of the claim and not to examine its basis. What is required is reasonable grounds for the claim. Finding the existence of grounds is an essential aspect of the test. Determining the reasonableness of grounds requires more than reason or logic. *It requires the examination of the foundation for the claim.*" (emphasis added)

That examination was to be conducted, Downes J held[61], "by asking whether the facts established ... are sufficient to support the claim that disclosure would be contrary to the public interest in the mind of a person guided by reason".

69 Secondly, as is implicit in the description Downes J gave of the task required by s 58(5), his Honour did not confine attention to individual grounds that might tend in favour of the claim that had been made and ask whether any one of those grounds was not irrational. Rather, he considered the particular documents that were in issue, and all of the grounds that were said to support the claim that had been made.

70 The appellant did not contend that any of the grounds advanced in the Tribunal in support of the claim that disclosure of the disputed documents would be contrary to the public interest were irrelevant, or were not capable of constituting a ground for that claim. The appellant did not contend that it had not

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59 (2004) 86 ALD 138 at 142 [15].

60 (2004) 86 ALD 138 at 142 [16].

61 (2004) 86 ALD 138 at 144 [23].

been open to Downes J to conclude (as he had[62] in relation, for example, to the documents B.001 to B.010 referred to earlier in these reasons) that they contained "jargon and acronyms which would be meaningless to the average reader" and that "[t]he average reader would have difficulty in understanding the conclusions and even greater difficulty in understanding the reasoning and methodology" reflected in the documents. Thus, the appellant did not contend that it had not been open to Downes J to conclude, as he did[63] in relation to those documents, that they provided "a substantial factual basis for concluding" that they fell within the grounds asserted in the relevant certificate for the claim that their disclosure would be contrary to the public interest. In the case of those particular documents, the relevant grounds for the claim were grounds asserting that release of the material shown in the documents had "the potential to lead to confusion and to mislead the public". The appellant did not assert that this could not constitute a reasonable ground for the claim that had been made.

71 The appellant's complaint, in the Full Court, and repeated in this Court, was that Downes J had misdirected himself about the task required by s 58(5) by adopting a test of the kind described by Tamberlin J. That complaint was not made out.

72 The appellant's submission, that Downes J had not resolved all necessary factual questions arising from the evidence that had been tendered, was a contention that centred upon the evidence given by the appellant's witnesses to the effect that the grounds stated in the certificates were not soundly based. The contention should be rejected. To the extent to which the argument amounted to a submission that the Tribunal was bound to assess for itself what the public interest required, as distinct from whether reasonable grounds existed for the claim that had been made, the argument should be rejected for the reasons stated earlier. That was not the Tribunal's task. And close attention was given by Downes J to the opinions that the appellant's witnesses expressed in their evidence. Thus, Downes J referred (at some length) to the evidence given by the appellant's witnesses, but said[64] of it (by particular reference to the evidence of Mr Rose) that s 58(5) required him to consider "all the available reasonable opinions", and that "[t]o assess one expert opinion as definitive would not be to apply s 58(5)". There was no failure to resolve any relevant question of fact that was tendered by the parties.

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62 (2004) 86 ALD 138 at 155 [76].

63 (2004) 86 ALD 138 at 155 [77].

64 (2004) 86 ALD 138 at 150 [56].

73 The appellant submitted that Downes J had treated the classification of some documents as conclusive of the issue before him and that this represented a return to the "class claims" for confidentiality of documents that the Act had been designed to eliminate. This classification approach was said to be revealed by the use Downes J made of earlier decisions of the Tribunal considering whether reasonable grounds existed for claims made, in other circumstances, that disclosure of other documents would be contrary to the public interest. In the course of his reasons, Downes J made several references to previous decisions of the Tribunal in which claims that disclosure of certain kinds of documents would not be in the public interest had been considered and upheld. He said[65] of these earlier decisions that "[a] decision upholding a claim which has not been corrected on appeal must provide some basis for a positive finding that where a factual basis exists the grounds are reasonable". The reference to "where a factual basis exists" is important and shows that Downes J did not treat past decisions of the Tribunal as determinative of the issues that were to be decided in the matters before him. And that this was not the approach adopted is put beyond doubt in the very next sentence of the reasons where Downes J said[66] that "it is ultimately for me to be satisfied with respect to each document before me". Downes J did not, as the appellant contended, treat the class into which documents fell as determinative of whether reasonable grounds existed for the claims that had been made.

74 The appellant's contentions that the Tribunal erred in law were not made out. The appeal should be dismissed with costs.

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65 (2004) 86 ALD 138 at 150 [52].

66 (2004) 86 ALD 138 at 150 [52].

75 CALLINAN AND HEYDON JJ. The question that this appeal raises is as to the test to be applied to a review under the *Freedom of Information Act* 1982 (Cth) ("the Act") of a conclusive certificate of a Minister denying access to documents produced in or to the Minister's department.

The facts

76 The appellant works for *The Australian*, a broadsheet circulating throughout Australia. The appellant is its "Freedom of Information Editor".

77 The appellant requested the respondent to provide the following:

> "Reports, reviews or evaluations completed in the 12 months from 3 December 2001 to 3 December 2002 detailing the extent and impact of bracket creep and its impact on revenue collection of income tax, including information in relation to higher tax burdens faced by Australians and/or projections of revenue collection increases from bracket creep, but excluding documents that have already been released publicly or duplicate copies of documents."

78 A further request was made on 3 December 2002 for:

> "Documents relating to any review/report or evaluation completed on the First Home Buyers Scheme in the last two years, including 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."

79 Access to the documents sought was denied on the basis that they were exempt documents under the Act. Not all of the documents are in issue. This Court is concerned with some 47 of them only, 36 the subject of the first request, and 11 of the second.

The decision of the Administrative Appeals Tribunal

80 The appellant sought review by the Administrative Appeals Tribunal ("the Tribunal") of the exemption claimed by the respondent. Not long before the hearing was to begin, the Treasurer of the Commonwealth issued conclusive certificates under s 36(3) of the Act. The certificates identified seven grounds of conclusiveness. The grounds were the same in respect of each request. They were:

> "(a) Officers of the Government should be able to communicate directly, freely and confidentially with a responsible Minister and members of the Minister's office on issues which are considered to

have ongoing sensitivity and are controversial and which affect the Minister's portfolio.

(b) Officers should be able freely to do in written form what they could otherwise do orally, in circumstances where any oral communication would remain confidential. Such written communications relating to decision-making and policy formulation processes ensure that a proper record is maintained of the considerations taken into account. If they were to be released for public scrutiny, officers may in the future feel reluctant to make a written record, to the detriment of these processes and the public record.

(c) The release of a document that discusses options that were not settled at the time the document was drafted and that recommends or outlines courses of action that were not ultimately taken has the potential to lead to confusion and to mislead the public. The release of such potentially misleading or confusing material would not make a valuable contribution to the public debate and has the potential to undermine the public integrity of the Government's decision making process by not fairly disclosing reasons for the final position reached. Decision-making processes are multi-layered and the documents reflect partially considered matters and tentative conclusions.

(d) The release of the material would tend to be misleading or confusing in view of its provisional nature, as it may be taken wrongly to represent a final position (which it was not intended to do) and ultimately may not have been used or have been overtaken by subsequent events or further drafts.

(e) The release of documents that contain a different version of estimates, projections, costings and other numerical analysis that cannot be put into context because of the absence of any explanation of the variables used or assumptions relied upon has the potential to lead to confusion and to mislead the public. The release of such potentially misleading or confusing material would not make a valuable contribution to the public debate and has the potential to undermine the public integrity of the Government's decision-making process by not fairly disclosing reasons for the final position reached.

(f) The preparation of possible responses to questions in Parliament is a very sensitive aspect of the work of departmental officers and it is appropriate that briefing and other material produced on a confidential basis in the preparation of those responses, remain

undisclosed. The release of such documents would threaten the protection of the Westminster-based system of Government.

(g) The release of documents that are intended for a specific audience familiar with the technical terms and jargon used, has the potential for public misunderstanding in that the contents of the documents could be misinterpreted. These documents were not intended for publication and publication would be misleading as the documents do not contain sufficient information for an uninformed audience to interpret them correctly and reasonably."

81 The Tribunal, constituted by its President, Downes J, pursuant to s 58B(1) and (2) of the Act[67], proceeded to hear the matter which now raises the question of the conclusiveness of the certificates. Both the appellant and the respondent called evidence. Part of the hearing was held in private pursuant to s 58C of the Act. One of the witnesses called on behalf of the appellant was Mr Rose, a very experienced retired senior official, who had been the Secretary of the Department of the Attorney-General for a period. The Tribunal said this of his evidence[68]:

"This [Mr Rose's] evidence provides the [appellant] with a basis for challenging the certificates. It does not follow, however, that when such evidence is adduced the test in s 58(5) of the Act will be satisfied. There are a number of reasons for this. First, as the words of Mr Rose themselves show, he is giving evidence of his experience. Second, notwithstanding Mr Rose's distinction his evidence is stated largely in the form of conclusions which are drawn from primary evidence which is generally unstated. Third, the evidence does not exclude others from

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67 Section 58B(1) and (2) provide:

"(1) Where a request is made to the Tribunal in accordance with subsection 58(4), (5) or (5A), the Tribunal shall be constituted in accordance with subsection (2) for the purposes of any proceeding for the determination of the question to which the request relates.

(2) For the purposes of a proceeding referred to in subsection (1), the Tribunal shall be constituted by:

(a) 3 presidential members; or

(b) a presidential member alone."

68 *Re McKinnon and Secretary, Department of the Treasury* (2004) 86 ALD 138 at 150 [56].

> holding different opinions. In this regard I also have evidence from relevant treasury officers. Their evidence, if accepted, much more closely addresses the claims made for the documents under consideration. Their experience is direct and contemporary. Fourth, Mr Rose is addressing the validity of the reasoning as much as the factual basis for the grounds and that is not a matter wholly determined by expert evidence. The views of others, including the views of members of tribunals considering claims under the Act, are relevant. Fifth, the test itself, as I have found it to be, requires a consideration of all the available reasonable opinions. To assess one expert opinion as definitive would not be to apply s 58(5). Finally, the ultimate question of whether reasonable grounds exist is a matter for me."

82 The Tribunal derived little assistance from the evidence of the appellant's other witnesses, the editor of *The Australian*, Mr Stutchbury[69]; a former Auditor-General for New South Wales and now a writer and journalist, Mr Harris[70]; and an economist, Professor Dixon[71]. It was inhibited, the Tribunal said, in exposing publicly the most significant of the evidence given on behalf of the respondent by reason of s 58C(3) of the Act although that evidence had, in substance, been made available to the appellant[72].

83 The Tribunal was of the view that the evidence taken in private supported the claims made in the certificates, particularly that of Mr Murray[73], and that his evidence established the existence of an alternative "reasonable opinion" to any of those of the appellant[74]. The Tribunal said[75]:

> "Mr Murray was cross-examined. The cross-examination did not demonstrate the evidence to be unreasonable. It is not for me to decide which of the opinions of the [appellant's] and respondent's witnesses are

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69 (2004) 86 ALD 138 at 151 [58]-[60].

70 (2004) 86 ALD 138 at 151 [61].

71 (2004) 86 ALD 138 at 151 [62].

72 (2004) 86 ALD 138 at 152 [65].

73 An officer from the Department of the Treasury whose title was "Executive Director, Fiscal and Corporate".

74 (2004) 86 ALD 138 at 152 [66].

75 (2004) 86 ALD 138 at 152 [66].

> 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. The evidence of Mr Murray as to the reasonableness of the claims in the conclusive certificates affirms the findings of previous tribunals that there is a reasonable basis for claims of the kind represented by each of the claims made in the conclusive certificates here."

84 In deciding against the appellant, the Tribunal examined for itself each document in issue. It held that in order for the conclusiveness of the certificates to be sustained, the respondent must show, the onus being upon him, that there were reasonable grounds for the claim; and that therefore there had to be an "examination of the foundation for the claim."[76] It said this of the grounds relied on by the respondent[77]:

> "To the extent to which the generality of the grounds renders them less persuasive I will need to look at how each individual claim might be supported. Because the test is ultimately based in findings of fact and not simply on the process of reasoning attached to a ground relied upon, it will usually be necessary to know something about each document to enable a judgment to be made. Sometimes characterising the document will be enough, particularly where the ground relied upon addresses the document individually. However, where the claim is not obviously good it will usually be helpful to examine the document to see how the document relates to the claim."

85 The Tribunal was of the view that it sufficed for the Treasurer to show that the claim, meaning thereby, we think, the grounds for the claim, was not an irrational one[78].

86 As to the capacity of documents to mislead, the Tribunal said this[79]:

> "However, the s 36 ground may apply where the result of the disclosure will be to release misleading information about a topic of general interest when the purpose of the application is to gain access to general information or to government policy relating to such information."

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76 (2004) 86 ALD 138 at 142 [16].

77 (2004) 86 ALD 138 at 145 [29].

78 (2004) 86 ALD 138 at 146 [35].

79 (2004) 86 ALD 138 at 148 [43].

87 We will return to the Tribunal's reasons later but what we have referred to is enough, for present purposes, to provide the flavour and substance of the Tribunal's decision in favour of the respondent.

The appeal to the Full Court of the Federal Court

88 The appellant appealed to the Full Court of the Federal Court (Tamberlin and Jacobson JJ, Conti J dissenting)[80]. Such an appeal is on a question of law only (s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act")).

89 Jacobson J wrote the principal judgment for the majority. His Honour defined the substantial issues before the Full Court, which were somewhat broader and more numerous there than in this Court, in this way[81]:

> "(a) whether the Tribunal misdirected itself as to the test stated in s 58(5) of [the Act], namely, 'the question whether there exist reasonable grounds for the claim', and in its application of that test[;]
>
> (b) whether the Tribunal misdirected itself as to what is involved in the concept of 'public interest' under s 36 of [the Act;]
>
> (c) whether the Tribunal erred in failing properly to consider the appellant's evidence as to why it was in the public interest that the documents be disclosed[;]
>
> (d) whether the Tribunal erred in the procedure it adopted pursuant to s 58C of [the Act] by excluding the appellant from attending a part of the proceeding during which oral evidence was given by two Treasury witnesses in relation to the question of whether the disclosure of documents would be contrary to the public interest[;]
>
> (e) whether the Tribunal erred in its construction of the question of whether some of the documents were reports of 'scientific or technical experts'; see s 36(6) of [the Act]. That subsection provides that the section does not apply to such reports so that a purported certificate could not have the effect of establishing conclusively that the disclosure of the documents would be contrary to the public interest;

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80 *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70.

81 (2005) 145 FCR 70 at 125 [138].

(f) whether the Tribunal erred in finding that a communication with a member of the Minister's staff is effectively a communication with the Minister."

90 After summarizing the relevant provisions of the Act and the reasons for decision of the Tribunal his Honour said[82]:

> "It is plain that the question of whether reasonable grounds exist must be a question of fact for the Tribunal. It is equally plain that it would be an incorrect construction of s 58(5) for the Tribunal to approach the question of reasonable grounds solely upon the basis of analogical support for a particular type of claim by reference to past authorities. This would be to permit class claims to be accepted, contrary to the warnings of the High Court in *Sankey v Whitlam*[83] and the Full Court in *Northern Land Council*[84]. Moreover, it would be to divert the Tribunal from the requirement that it address, as a question of fact, the issue of whether reasonable grounds exist.
>
> ...
>
> It seems to me that the Tribunal was alert to the need to decide, as a question of fact, whether reasonable grounds existed and to examine the documents in order to make that finding. It said at [29] that the test was ultimately based on findings of fact and not simply on the process of reasoning attached to a ground relied upon in the certificate. It also referred at [52] to the need for a 'factual basis'. It repeated the reference to a factual basis in [56] of its reasons."

91 His Honour then turned his mind to the question whether the Tribunal is required to balance all aspects of the public interest, both for and against the claim[85]:

> "Although Dr Griffiths'[86] argument has some attraction, in my view it does not accord with the proper construction of s 58(5). The

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82 (2005) 145 FCR 70 at 137-138 [215], [219].

83 (1978) 142 CLR 1.

84 *Commonwealth of Australia v Northern Land Council* (1991) 30 FCR 1.

85 (2005) 145 FCR 70 at 140 [233].

86 Counsel for the appellant.

correct approach to construction was stated by Beazley J in *Australian Doctors'*[87] and in the authorities which her Honour followed in that case. Those authorities make it clear that the approach urged upon the court by Dr Griffiths 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 interest. That is not what s 58(5) requires. As Morling J said in *Re Peters*[88]:

> 'the question is not whether the Tribunal holds that opinion. Rather, the question is whether reasonable grounds exist for the claim that disclosure would be contrary to the public interest.'"

92 Jacobson J referred to another question which he answered adversely to the appellant[89]:

> "The third subquestion raised under this heading is whether the opinions of one witness whose views are not demonstrated to be unreasonable can be sufficient to support a finding of reasonable grounds. In my view this is a question of fact which cannot be the subject of an appeal under s 44(1) of the Act: *Vetter v Lake Macquarie City Council*[90].
>
> Even if this is not correct, there is nothing in the Tribunal's reasons to suggest that it did not take into account the views of the witnesses called for the appellant. It is true that the Tribunal made no express findings about the evidence of Mr Harris and Professor Dixon. But it is clear from what the Tribunal said at [56] about Mr Rose's evidence that it preferred the evidence of Mr Murray to that of the appellant's witnesses."

93 Some other of his Honour's observations should be quoted[91]:

> "First, it seems to me that the entire question is predicated upon an assumption that the concept of the public interest can be defined within

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87 *Australian Doctors' Fund Ltd v Commonwealth of Australia* (1994) 49 FCR 478.

88 *Re Peters and Department of Prime Minister and Cabinet (No 2)* (1983) 5 ALN N306 at N307.

89 (2005) 145 FCR 70 at 140-141 [238]-[239].

90 (2001) 202 CLR 439 at 450-451 [24]-[25] per Gleeson CJ, Gummow and Callinan JJ, 467 [78] per Kirby J, 477-478 [108] per Hayne J.

91 (2005) 145 FCR 70 at 141-142 [243], [246].

precise boundaries. That proposition was rejected by Lockhart J in *Right to Life Assn (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50 at 59. His Honour there observed that opinions have differed and will always differ as to what is or is not in the public interest.

...

It is plain that the categories of public interest are not closed and that different minds will differ as to what is, or what is not, in the public interest. Even if the question discloses a pure question of law in accordance with s 44(1) of the AAT Act, I do not consider that any error of law has been established. There is nothing in the subject matter or scope of [the Act] which confines the discretionary factors to be taken into account in the manner suggested by the appellant."

94 It is unnecessary to enter upon the detail of the reasoning of Conti J in dissent as his Honour's reasoning was substantially adopted in the submissions of the appellant to which we will immediately go.

The appeal to this Court

The appellant's arguments

95 The appellant first referred to the objects of the Act[92], pointing out that there was a tension between them and the apparently limited nature of the review which the Tribunal was empowered to undertake under the Act:

"(1) The object of this Act is 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 by:

...

(b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities".

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92 Section 3.

96 It was then submitted that the Tribunal did not address in any meaningful way the evidence adduced by the appellant: although the Tribunal said that it would "consider the opinions of Mr Rose in [its] assessment of the claims"[93], its reasoning showed that this was not done. The uncontradicted evidence of Mr Rose, it was said, was put to one side on the basis that the statutory test[94]:

> "requires a consideration of all the available reasonable opinions. To assess one expert opinion as definitive would not be to apply s 58(5)."

This should, it was submitted, be contrasted with the Tribunal's approach to the evidence of Mr Murray, as appears from this passage in its reasoning[95]:

> "The importance of this evidence is that it supports the existence of an alternative reasonable opinion from the opinions expressed by the [appellant's] witnesses. ... 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." (emphasis added)

Passing reference only was made, erroneously, the appellant argued, to the evidence of the appellant's other witnesses, Mr Harris and Professor Dixon.

97 In his written submissions the appellant then put this:

> "It is implicit in the Tribunal's construction of the s 58(5) task that if any one facet of the public interest can be established as supported by a non-absurd opinion of one witness, and/or by past Tribunal decisions, then that is sufficient to satisfy the test. There is no requirement to assess all the evidence on any particular facet of the public interest, let alone to assess competing facets of the public interest. The net result of the approach of the Tribunal is encapsulated in the statement of Tamberlin J that:[96]
>
> > 'If there is a ground that is not irrational, absurd or ridiculous for a claim that the first-mentioned facet of the public interest would not be served by disclosure, then that alone is sufficient to satisfy the requirements of s 58(5). It is not necessary in order to decide that

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93 (2004) 86 ALD 138 at 151 [57].

94 (2004) 86 ALD 138 at 150 [56].

95 (2004) 86 ALD 138 at 152 [66].

96 (2005) 145 FCR 70 at 76-77 [16].

> limited question that the decision-maker should consider and weigh all the other facets, and the grounds which may reasonably support each of those facets, in order for s 58(5) to be satisfied.'
>
> The effect of the Tribunal's decision, as upheld by the majority of the Full Court, is substantially to undermine the Tribunal's proper review function where a conclusive certificate has been issued. The practical result is that, contrary to the intention manifest in the Act, s 36(3) certificates are effectively unchallengeable in Tribunal proceedings (and the same may be said for other FOI certificates). The correlative increase in the temptation to grant such certificates in relation to matters of political or governmental sensitivity is obvious, undermining the Act's operation. The approach of the Tribunal represents an abdication of the Tribunal's statutory review function and a misconstruction of ss 36 and 58(5).
>
> ...
>
> Although broad, the scope of permissible considerations [of the public interest] is not unlimited. The ... Act itself manifests the Parliament's [view] of [the] public interest [in the] disclosure of official information, reflected in a general policy of disclosure and access 'limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons ...' (to quote s 3(1)(b)).[97]"

98 The appellant submitted that if there is conflicting evidence as to the degree of likelihood that the revelation of material will in some way compromise the flow of information or advice within a department, or to a Minister, or confuse or mislead the public, the Tribunal must resolve the conflict: it must assess the evidence, and find that either of these consequences is more likely than not, and do so by assessing the significance of all of the evidence in all of the circumstances.

99 The submission continued, that if the error of the Full Court is not corrected, in any future like dispute an official invariably will be capable of articulating a non-absurd rationalization for conclusiveness on the basis of contrariety to the public interest: to fail to resolve factual disputes in the light of a conclusion, stated by one witness, is to fail to undertake a true review, and is to defer to the view of one witness only.

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97 See also *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at [147]; *News Corporation Ltd v National Companies and Securities Commission (No 4)* (1984) 1 FCR 64 at 66.

100 The nub of the appellant's submissions was that the Tribunal and the majority of the Full Court effectively substituted a test of "not irrational, absurd or ridiculous" for the statutory language of "reasonable grounds". The expression "reasonable grounds" allows some room for difference based on an assessment of the evidence and the arguments.

Outline of relevant provisions

101 The objects of the Act should be set out in full because the appellant has submitted that the Tribunal and the Full Court failed to have due regard to them[98]:

> "**Object**
>
> (1) The object of this Act is 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 by:
>
> (a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and
>
> (b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities; and
>
> (c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect, out of date or misleading.
>
> (2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote,

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98 Section 3.

> promptly and at the lowest reasonable cost, the disclosure of information."

102 Section 4 of the Act is the definitions section. "Document" is broadly defined. Relevantly, an "exempt document" is a document which by virtue of Pt IV is an exempt document.

103 Section 11, subject to the Act, confers a right of access to documents, other than exempt documents, which are the subject of Pt IV of the Act, upon every person, regardless, among other matters, of a Minister's belief as to the motives of the person seeking access. Exceptions, not relevant to this case, are stated in s 12.

104 Part IV of the Act is concerned with categories of exempt documents. Section 33 is concerned with documents affecting national security, defence or international relations, s 33A with documents affecting relations with the States, s 35 with Executive Council documents, s 37 with documents affecting the enforcement of the law and public safety, s 39 with documents affecting financial or property interests of the Commonwealth, and s 41 with documents affecting personal privacy. Section 42 deals with privileged documents; s 43 with documents relating to business affairs; s 43A with documents relating to research; s 44 with documents affecting the national economy; s 45 with documents containing material obtained in confidence; and s 46 with documents which, if disclosed, would be in contempt of Parliament, or court. All of these sections make special provision for the treatment of each category.

105 Sections 15 to 20 are largely concerned with the means by which access may be sought and provided. Under s 21, a Minister may defer access. Section 23 states by whom the request may be granted. If compliance with a request would substantially and unreasonably divert the resources of the department, or an agency as defined, or substantially and unreasonably interfere with the performance of a Minister's functions, access may be refused (s 24). If access is refused, the applicant must be given findings of material facts and reasons (s 26). A charge for the provision of the documents may be imposed (s 29).

106 Section 36, which is in Pt IV of the Act and is one of the two sections most relevant to this appeal, is as follows:

> "**Internal working documents**
>
> (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:

(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.

...

(3) Where a Minister is satisfied, in relation to a document to which paragraph (1)(a) applies, that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect (specifying the ground of public interest in relation to which the certificate is given) and, subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest.

...

(7) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 26 shall state the ground of public interest on which the decision is based."

107 Part VI provides for the review of decisions under the Act: under s 54 by way, first, of internal review. Section 55 confers a right of review by the Tribunal. Section 58, which is the other of the most relevant sections, should be set out because it defines the jurisdiction of the Tribunal in undertaking the review:

"**Powers of Tribunal**

(1) Subject to this section, in proceedings under this Part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

(2) Where, in proceedings under this Act, it is established that a document is an exempt document, the Tribunal does not have

power to decide that access to the document, so far as it contains exempt matter, is to be granted.

(3) Where there is in force in respect of a document a certificate under section 33, 33A, 34, 35 or 36, the powers of the Tribunal do not extend to reviewing the decision to give the certificate, but the Tribunal, constituted in accordance with section 58B, may determine such question in relation to that certificate as is provided for in whichever of subsections (4), (5) and (5A) applies in relation to that certificate.

(4) 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 33, 33A, 34 or 35 and in respect of which a certificate (other than a certificate of a kind referred to in subsection (5A)) is in force under that section, the Tribunal shall, if the applicant so requests, determine the question whether there exist reasonable grounds for that claim.

(5) 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.

..."

108 The presence of s 58C(2), (3) and (4) in the Act explains why the hearing before the Tribunal proceeded in the way that it did, that is, partly in private:

"(2) At the hearing of a proceeding referred to in subsection 58B(1), the Tribunal:

(a) shall hold in private the hearing of any part of the proceeding during which evidence or information is given, or a document is produced, to the Tribunal by:

(i) an agency or an officer of an agency;

(ii) a Minister or a member of the staff of a Minister; or

(iii) a member, an officer, or a member of the staff, of a body referred to in subsection 7(1) or the person referred to in that subsection;

or during which a submission is made to the Tribunal by or on behalf of an agency or Minister, being a submission in relation to the claim:

(iv) in the case of a document in respect of which there is in force a certificate under subsection 33(2) or 33A(2) or section 34 or 35 – that the document is an exempt document;

(v) in the case of a document in respect of which there is in force a certificate under section 36 – that the disclosure of the document would be contrary to the public interest; or

(vi) in the case where a certificate is in force under subsection 33(4) or 33A(4) – that information as to the existence or non-existence of a document as described in a request would, if contained in a document of an agency:

(A) in a case where the certificate was given under subsection 33(4) – cause that document of an agency to be an exempt document for a reason referred to in subsection 33(1); or

(B) in a case where the certificate was given under subsection 33A(4) – cause subsection (2A) to apply to that document of an agency; and

(b) subject to subsection (4), shall hold the hearing of any other part of the proceeding in public.

...

(3) Where the hearing of any part of a proceeding is held in private in accordance with subsection (2), the Tribunal:

(a) may, by order, give directions as to the persons who may be present at that hearing; and

(b) shall give directions prohibiting the publication of:

(i) any evidence or information given to the Tribunal;

(ii) the contents of any documents lodged with, or received in evidence by, the Tribunal; and

(iii) any submission made to the Tribunal;

at that hearing.

(4) Where, in relation to a proceeding referred to in subsection 58B(1), the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence, information or matter or for any other reason, the Tribunal may, by order:

(a) direct that the hearing of a part of the proceeding that, but for this subsection, would be held in public shall take place in private and give directions as to the persons who may be present at that hearing;

(b) give directions prohibiting or restricting the publication of:

(i) the contents of any document lodged with the Tribunal in relation to the proceeding; or

(ii) any evidence or information given to the Tribunal, the contents of any document received in evidence by the Tribunal, or any submission made to the Tribunal, in relation to the proceeding otherwise than at a hearing held in private in accordance with subsection (2); or

(c) give directions prohibiting or restricting the disclosure to some or all of the parties to the proceeding of evidence given before the Tribunal, or the contents of a document lodged with, or received in evidence by, the Tribunal, in relation to the proceeding."

109 A Tribunal may, as it did here, personally examine exempt documents pursuant to s 64 of the Act.

110 Section 93 requires that a report be provided annually to Parliament on the operation of the Act which must be laid before each House of it. Material to enable its preparation must be made available by Ministers.

Disposition of the appeal

111 It may be accepted, as the appellant submitted, that there is a tension between the objects of the Act and the restricted function of the Tribunal in

undertaking a review. But that tension is resolved here by the explicit language of Pt IV of the Act which in language free of all ambiguity states what the function of the Tribunal is in reviewing the conclusiveness of a Minister's certificate. In short, the relevant sections clearly and designedly limit the broad and high-sounding objects. Furthermore the object set out in s 3(1)(b) is, itself, in terms, stated to be "limited ... by exceptions and exemptions necessary for the protection of essential public interests", a matter as to which a responsible Minister has the primary and, as will appear, almost the final judgment by reason of other relevant statutory language.

The appellant's evidence

112 The appellant's last submission is that the Tribunal failed to address, in any meaningful way, the evidence adduced by the appellant. So far as the evidence was substantially probative of any factual issue, the position simply was that the Tribunal preferred that of it which was given by the respondent's witness Mr Murray. Unfortunately, the Tribunal, the Full Court and this Court are precluded, by reason of the mandatory language of s 58C of the Act which we have set out, from revealing the nature and detail of Mr Murray's evidence which the Tribunal found so persuasive. But some of the evidence called on behalf of the appellant, which may be referred to and discussed, shows why it would have been easy for the Tribunal to regard other, more cogent evidence, as it saw Mr Murray's to be, as more helpful and ultimately more persuasive.

113 Mr Stutchbury, as experienced as he was, both in his affidavit which tended to rehearse the appellant's arguments rather than state relevant facts, and in cross-examination, failed to make the important distinction between a topic of public interest and documents on or in relation to the topic. It could hardly be denied that the topics with which the documents in issue are concerned were matters of public interest. That does not mean that every document generated by, or everywhere in the deep recesses of, the Executive, concerning these topics is valuable, useful, or necessarily one in respect of which there existed no reasonable grounds or bases for non-disclosure in the public interest: or, although this is not the statutory test, to put the matter another way, that the public interest necessarily, or even on balance, required that they be disclosed.

114 There was before the Court no evidence of the number of officials employed by the Commonwealth or within the Department of Treasury. But it is a matter of common knowledge that there are thousands of these, who, it may also safely be assumed, generate millions of documents annually, a large number of which would touch upon or concern the topics nominated by the appellant in his requests for documents. Not all of these documents could possibly be of equal importance. There are likely to be many documents written within a department of which a Minister could have no possible knowledge. Equally there are likely to be documents produced which reflect no opinion, proposal,

idea, or even hope of a Minister, and which will have no influence upon any decision of a Minister or a government of which he is a member. So too, documents of which the Minister, or even a senior official, do become aware, may be produced to test assumptions, or for the purposes of comparison with other documents only. Some documents may be erroneous, or be based upon invalid assumptions, or may be of ephemeral interest only, or be overtaken by other events or otherwise swiftly superseded. Departments of public service are today so large, so dispersed throughout the nation, and so numerous in staff, as to make harsh any unqualified application in modern times of the convention that a Minister is responsible for everything that happens or should have happened, or every document produced, in the department that he administers[99]. Mr Stutchbury's evidence did not take due account of the distinction between the topics, undoubtedly ones of public interest, and the direct relevance, currency, and varying significance and importance of the documents that might have been brought into existence about them.

115 The matter to which Mr Rose's evidence was largely directed was the candour with which officials advised, or should advise, their Ministers and threats to it. Again, however, much of his evidence was argumentative rather than factually probative. For example, he quoted in his affidavit at some length from a document produced by the Australian Law Reform Commission in relation to freedom of information. The material comprised matters for submission, rather than inclusion in an affidavit, even though Mr Rose had been President for a time of the Australian Law Reform Commission. He also asserted this:

> "In my experience release of even very sensitive and controversial documents does not impede public servants' direct and free communication with Ministers. An effective officer in the modern Public Service understands his or her role is to provide free and frank advice in a properly accountable manner."

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99 This is acknowledged in the Australian Department of Prime Minister and Cabinet publication, *A Guide on Key Elements of Ministerial Responsibility*, (1998) at 1. In any case, it seems debatable whether there has ever, in the United Kingdom or in Australia, been a strict convention that Ministers take individual responsibility for every departmental act, omission, or transgression: see Birch, *Representative and Responsible Government*, (1964) at 141; O Hood Phillips and Jackson, *Constitutional and Administrative Law*, 8th ed (2001) at 352-353 [17-017]-[17-019]; and Weller, "Parliamentary accountability for non-statutory executive power: Impossible dream or realistic aspiration?", (2005) 16 *Public Law Review* 314 at 318.

116 Deference should be accorded to Mr Rose's informed opinion. However, the opinion just quoted is a very far-reaching opinion relating to the states of mind of others. One must question his, indeed anyone's, ability to express an opinion of that kind. We would, for ourselves, have given it little weight, as we would his rejection of other grounds relied upon by the respondent based upon his own personal experience. Another paragraph of his affidavit failed to come to grips with the ground of conclusiveness relied upon by the respondent, that the documents were provisional in nature or superseded. Contrary to Mr Rose's opinion that the exposure of these would make "a very useful contribution to the public debate", in our opinion documents of that kind are more likely to mislead or confuse, or to make no contribution to any useful, or currently relevant debate.

117 Some of Professor Dixon's evidence made the point, incontestable we think, that the topics were of public interest, as to the way in which, for example, "bracket creep" adversely affected many taxpayers. But a distinction that he too did not make in his evidence was the distinction between provisional or superseded documents, and current ones. The former could do little to advance the analyses which Professor Dixon and other economists would wish to do, of "the Treasury's apparent concern with the number of people who move from one tax bracket to another in any given year".

118 The other witness called by the appellant was Mr Harris, an experienced financial journalist and a former senior official in the Commonwealth public service, working in Treasury, and Auditor-General for New South Wales. Much of what he said about "bracket creep" was self-evidently correct. So too, his knowledge of the processes followed in preparing budgets during his period of service could not be questioned. But his affidavit otherwise was also argumentative rather than factually probative. We would not have thought it helpful to describe as he did, the Treasurer's views of public administration as "old fashioned". Nor is it relevant to the controversy to point out that perhaps some of the documents could lawfully be revealed by the Auditor-General. Rather the contrary is the case. That they arguably could, merely demonstrates that the machinery of government is subject to another valuable check or balance[100]. Mr Harris also, unconvincingly, purported to speak as to the states of mind of other officials of other times.

119 It is understandable therefore that the Tribunal was unimpressed by the evidence called on behalf of the appellant. To the extent that that evidence was truly probative about relevant current matters, or otherwise warranted consideration, the Tribunal dealt with it adequately.

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100 See also s 93 of the Act, referred to earlier.

The grounds of claim

120 It is appropriate to make some observations at this point about the specific grounds taken of conclusiveness. The reference to "ongoing sensitivity" in the first is not entirely clear. We would be inclined ourselves to think that the fact that documents have continuing sensitivity, are controversial and affect a Minister's portfolio would not alone provide a reasonable ground for continuing confidentiality. The use of the word "ongoing" strongly suggests currency, and the use of the word "controversial" might well at least imply public interest.

121 The second ground, which speaks of jeopardy to candour, and the desirability of written communications, obviously cannot readily be dismissed, and it seems to us that this is a matter upon which a Minister's opinion and experience are likely to be as well informed and valuable as those of anyone else, including senior officials.

122 The third ground raises an issue of tentativeness, that is to say, that the documents were concerned with matters that were not settled and recommendations that were not adopted. This too, on its face, is a cogent ground. It is difficult to see how it would not be reasonable for a Minister to take the view that the release of material of that kind would not make a valuable contribution to public debate.

123 The fourth ground has so much in common with the third that nothing further need be said about it.

124 The fifth ground is far less persuasive. It claims that the difficulty of putting financial data into context provides reason for the non-disclosure of otherwise relevant documents. It is, we think, unrealistic for any Minister to believe that he or she can control, or dictate the context in which matters of public interest are debated. All that a Minister can do is seek to explain the data and to provide as accurate a context for it as possible.

125 The sixth ground takes the point that such documents as are prepared for possible responses to questions in Parliament should remain confidential because their exposure would threaten the Westminster system of government, that is to say, responsible government, to which we have earlier referred. This cannot be said to be an unreasonable view. The Minister is the one who is responsible for an answer given in Parliament, within the practical modern limits to which we have referred. It is his or her answer itself which is a, or the, matter of public interest, and not the various documents which may have canvassed that answer, or other possible answers. It will be in respect of the answer that the Minister actually gives that any political price will have to be paid, just as there may well be a political price to be paid for any claim of conclusiveness, whether it is well-based or not.

126 The seventh ground is at least arguably not reasonable, in effect, that the public may not be trusted to understand the technicalities of, and the jargon used in otherwise revealable documents. It is not as if the public is unaided by experts and others who can, including, for example, an informed journalist such as Mr Harris.

127 The grounds taken did not clearly articulate something that the oral evidence suggested, namely that the respondent was concerned that what might be disclosed could well be misrepresented, abbreviated or distorted, or at least not presented in a balanced way. Indeed, cross-examination of the appellant's witnesses certainly did go some way towards demonstrating lack of balance, indeed, lack of balance even in the reporting of the particular issue with which the Tribunal was concerned. That would not however be a ground that we would regard as reasonable, for the same reasons as we would reject a ground based upon an asserted lack of technical expertise, or inability to understand jargon on the part of each and every member of the public.

128 There were, however, as appears from what we have said, a number of grounds of claim which the Tribunal was entitled to hold were reasonable and such as to justify conclusiveness.

The application of the Act

129 We come now to the submission of the appellant which we have earlier set out in some length: that the Tribunal erred in holding that if any one facet of the public interest can be established as supported by a non-absurd opinion of one witness, or on the basis of earlier decisions of the Tribunal, the test in favour of the Minister is satisfied. That submission makes the assumption that the decision here was supported by no more than one non-absurd opinion of one witness or earlier decisions of the Tribunal. The assumption is not correct. Implicit in it also, is the contention that Mr Murray's opinion and evidence were determinative from the outset. We do not read the Tribunal's decision in that way. The test applied by it did not involve a choice between absurdity and non-absurdity. To say that an opinion or a proposition is not absurd, is not to say that it is necessarily reasonable. In this area, in any event, the opinions of witnesses on either side purporting to reveal and express the states of mind and attitudes of others on other occasions will rarely be very helpful and practically never determinative. The role of the Tribunal will usually be best performed simply by examining the documents with a view to assessing whether the stated grounds of conclusiveness satisfy the statutory test. That is because, as here, it will usually be possible readily to characterize the topics in question as topics of public interest without the need for any, or any extensive expert evidence to that effect. The real issue will almost invariably then be whether the document in question, having regard to its date, its author, the position of its author, and its contents, is

one in respect of which the Minister can hold the requisite opinion. The Act provides no mandate for any balancing exercise. To have regard to extraneous matters such as other competing reasons, if the requisite statutory reason for non-disclosure has been demonstrated, gives rise to a risk that a de facto balancing act will take place.

130 Nor are we by any means certain that it is apt to describe the public interest as multifaceted. Neither the fact that different people will see it through different prisms, nor the fact that an all-encompassing definition of it for all occasions is not possible, means that the public interest is multifaceted. For years, juries in defamation cases have had to perform the task of deciding whether the publication of defamatory matter is in the public interest, a task which they have performed in our view generally well, upon the basis of their understanding of what the public interest was at the relevant time. Judges have usually not found it necessary to direct juries at length as to the meaning of the expression, except to warn them that it is not enough that the matter might be of some personal or prurient interest, or merely something about which they may be curious.

131 We are unable to accept the language of the appellant's submission that the effect of the Tribunal's decision is substantially to undermine the Tribunal's proper function of review when a conclusive certificate has been issued. The function of the Tribunal is one which is mandatory and entirely statutory. And while a practical consequence may be that one or more of the stated objects of the Act are thereby defeated, the fact remains that this is a necessary consequence of the express, and as we have already said, unmistakably clear language of the sections with which the Tribunal and the courts are concerned here. The test upon which the Tribunal settled after summarizing a number of earlier cases decided by the Tribunal, and on appeal to the Full Court of the Federal Court, was whether the facts established before the Tribunal were sufficient to support the claim that disclosure would be contrary to the public interest in the mind of a person guided by reason. We would prefer to ask the question in terms of the language of the legislation itself, rather than any adaptation of it, because the former is perfectly clear in asking whether there exist reasonable grounds for the claim that the disclosure of the documents would be contrary to the public interest. The test actually posed by the Tribunal however was certainly, on no view, less advantageous to the appellant than the statutory language prescribes. It does follow, as the majority in the Full Court effectively held, 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. It further follows that the Tribunal is not obliged to undertake a balancing exercise of the kind the appellant submits it was bound to do. The role of the Tribunal in

the circumstances of, and on the basis of the statutory language governing this case, is not to undertake a full merits review of the kind contemplated by s 43(1) of the AAT Act. Whether therefore, the only practical and real means of attacking a conclusive certificate will be by demonstrating that there are no reasonable grounds in fact, or that the grounds relied on are so unreasonable that no reasonable person could hold the opinions upon which they are based, does not arise for decision in this appeal.

132 The Tribunal made no error of law in holding against the appellant in this case, and the Full Court of the Federal Court was accordingly correct in rejecting the appeal to it. The appeal to this Court must be dismissed with costs.