

**2008**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**FREEDOM OF INFORMATION AMENDMENT BILL 2008 (No 2)**

**EXPLANATORY STATEMENT**

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## Freedom of Information Amendment Bill 2008 (No 2)

### Outline

The Freedom of Information Amendment Bill 2008 (No 2) (the Bill) removes conclusive certificates in relation to executive documents and internal working documents from the *Freedom of Information Act 1989* (FOI Act). Amendments also provide exclusion of certain, specified documents from coverage under the FOI Act.

Conclusive certificates in relation to national security considerations under section 34 and section 37A are not affected by the amendments.

Conclusive certificates currently operate to remove documents and information from disclosure under the FOI Act. Further, conclusive certificates seriously limit access to the Administrative Appeals Tribunal to test decisions that documents subject to a conclusive certificate are exempt and protected from release under the Freedom of Information Act. The removal of conclusive certificates will enhance open and transparent government.

The Bill also removes certain classes of document from the application of the FOI Act. The removal of these documents from disclosure is in the public interest as such exclusions promote improved and comprehensive briefing of Ministers in a number of limited situations.

#### *Human right comment*

The Bill engages rights under the *Human Rights Act 2004* specifically section 16, Freedom of expression, which includes the freedom to seek, receive and impart information. There is some uncertainty in international human rights law as to whether a positive right to access to government-held information can be said to derive from the right to freedom of expression (Article 19, ICCPR). Never-the-less, the extent to which such a right can be implied, the right to freedom of expression is not an absolute right and it is accepted that the right may be legitimately subject to reasonable restrictions.

## Freedom of Information Amendment Bill 2008 (No 2)

### Detail

#### **Clause 1 — Name of Act**

This is a technical clause that names the short title of the Act. The name of the Act is the *Freedom of Information Amendment Act 2008*.

#### **Clause 2— Commencement**

This clause enables the Act to commence on the day after its notification except for section 19 of the Bill, which will commence immediately after the commencement of

the *ACT Civil and Administrative Tribunal Legislation Amendment Act 2008 (No 2)* amendment 1.195.

**Clause 3— Legislation amended**

This is a technical clause that notes that this Act amends the *Freedom of Information Act 1989*.

**Clause 4 – Pt 3 not to apply to certain documents New section 11 (1A)**

This clause inserts a new subsection under section 11. Section 11 provides that Part 3 of the FOI does not apply to certain documents. Part 3 is about access to documents. It is intended that this provision will exclude the listed documents from being assessed under an FOI request. It is not intended that the documents as listed will never be made available to the public merely that the discretion to place on the public record will remain with the Executive.

**Clause 5 – Executive documents section 35(1), new note**

The clause inserts a note to the effect that access to the cabinet notebook, as will be defined under the *Freedom of Information Act 1989* in new section 11(1A)(c) is excluded from access.

**Clause 6 - Executive documents Section 35 (3), (4), (5) and (6)**

This clause omits these sections from the Act thereby removing provisions that provide for conclusive certificates issued in relation to executive documents.

**Clause 7 – Internal working documents Section 36(3), (4) and (8)**

This clause omits provisions which provide for the issuing of a conclusive certificate in relation to internal working documents.

**Clause 8 – Certificates – acknowledgement about existence of documents not required Section 58(a)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 9 – Powers of tribunal Section 62(2)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36

**Clause 10 – Section 62(4)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 11 – Section 62(5)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 12 - Section 63(1) heading**

The clause is a name change to section 63 as a consequential result of removing conclusive certificates from section 35 and 36.

**Clause 13 – Section 63(1)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 14 – Section 63(2)(a)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 15 - Section 63(8)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 16 – Section 63(9)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 17 - Section 64 heading**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 18 - Section 64**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 19 – Section 64(1)**

This clause will correct changes made to the *Freedom of Information Act 1989* as a result of the commencement of the *ACT Civil and Administrative Tribunal legislation Amendment Act 2008 (No2)*, amendment 1.195. In effect it will reinstate the provision of clause 18 of this Bill.

**Clause 20 - Hearing of certain proceedings before the tribunal  
Section 65(2)(a)(iv)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 21 – Section 65(2)(a)(v)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 36.

**Clause 22 - Production to the tribunal of documents in relation to which a certificate has been issued section 67(1)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 23 – Section 67(2)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 24 – Parties Section 70(c)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35.

**Clause 25 - Production of exempt documents Section 74(5)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 26 – Section 74 (5)(a)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 27 - Section 74(6)**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.

**Clause 28 - Evidence of certificates Section 75**

This clause is a consequential amendment as a result of removing conclusive certificates from section 35 and 36.