
Freedom of Information

Payment of Costs

Five recent decisions of the AAT relate to requests for payment of costs by the Commonwealth. In three cases the applicants were granted access to all or most of the documents they had requested shortly before the date set down for hearing: Re Paterson and Department of Home Affairs and Environment (19 April 1985), Re Rae and Department of Home Affairs and Environment (13 May 1985) and Re Hounslow and Department of Immigration and Ethnic Affairs (20 June 1985). The Tribunal classified these three cases as being substantially successful within the meaning of sub-section 66(1) of the Act. However, in the first-mentioned case, the Tribunal applied the criteria set out in sub-section 66(2) but declined to exercise its discretion to make a recommendation that the Commonwealth pay the applicant's costs. The Tribunal held that it was not appropriate when applying the criterion of "the reasonableness of the decision" to have regard to any delaying conduct by the respondent, as such conduct was merely a step leading to the final result. In the second-mentioned case, the Tribunal held that sub-section 66(1) was the dominant provision and the criteria listed in sub-section 66(2) were mandatory considerations only in cases where the Tribunal had made a decision after conducting a review of the primary decision. In the last-mentioned case, the Tribunal endorsed the decision in Re Paterson and held that it was not limited to the criteria set out in sub-section 66(2) and recommended that the applicant's costs be paid by the Commonwealth.

The Tribunal will not recommend that the costs of a legally-aided applicant be paid for by the Commonwealth if there is no evidence that the Legal Aid Commission would seek to recover any of its expenditure from the applicant: Re Chan and Department of Immigration and Ethnic Affairs (21 June 1985).

Secrecy Provision Exemption

In Re Arnold Mann and Australian Taxation Office (14 June 1985) the Tribunal held, by taking a narrow rather than broad statutory interpretation of section 38 of the FOI Act, that sub-section

16(2) of the Income Tax Assessment Act 1936 was not an enactment of the type referred to in the FOI Act's secrecy provision exemption. It was held, however, not to be in the public interest to disclose the names of ATO officers lower than those holding delegations from the Commissioner of Taxation, and the Tribunal applied the exemptions under section 40 of the FOI Act relating to the operations of agencies, i.e. management and assessment of personnel, and proper and efficient conduct of agency operations. An appeal to the Federal Court has been lodged.

Extra-territorial Operation of Act

A foreign company, neither registered nor carrying on business in Australia, has a legally enforceable right to obtain access to documents under the FOI Act: Re Lordsvale Finance Ltd and Department of the Treasury (12 July 1985). In this case, the Tribunal stated that it doubted whether in fact the granting of a right of access to the applicant involved an extra-territorial application of the Act but, on the basis that it did, found that the presumptions against extra-territoriality had been displaced.

In Re Brennan and the Law Society of the Australian Capital Territory (5 July 1985) the Tribunal ruled that the Law Society was a 'prescribed authority' for the purposes of the FOI Act. The Society granted access to all but one document requested by the applicant and the Tribunal held that only one paragraph of this document was exempt. The Tribunal recommended that a conclusive certificate issued on the ground that it was a deliberative process document be revoked. It was held that the exemption claimed by the Society - that disclosure would have substantial adverse effect on the proper and efficient conduct of its operations - was not primarily concerned with protecting from disclosure particular information which should not be publicly accessible by reason of its confidentiality. Only one paragraph of the document in question was held by the Tribunal to be exempt because disclosure would constitute a breach of confidence.

Internal Working Documents Exemption

Two recent decisions of the Tribunal considered the internal working document exemption of the FOI Act. In Re Howard and the Treasurer (29 April 1985) the Tribunal held that there existed reasonable grounds for the claim that disclosure of the documents, to which access had been sought and over which a conclusive certificate had been issued, would be contrary to the public interest and affirmed the decision under review. The documents, which had been provided to the ACTU prior to the 1984/85 Budget, were held to fall within the internal working documents exemption. It was held, consistently with earlier AAT

decisions, that paragraph 36(1)(a) of the FOI Act had a wider coverage than mere deliberations on policy. Estimates and assumptions as to future occurrences were held not to be 'factual material' which would exclude them from the coverage of the exemption. The following considerations were relevant when evaluating a public interest issue: the possibility of future frank consultation by the Government with outside bodies being prejudiced; and the extent to which confusion and debate would be engendered about taxation proposals in fact not adopted by the Government. Comments were also made by the Tribunal on matters of procedure in conclusive certificate cases, as section 58C of the Act requires that part of the hearing be conducted in private.

In Re Waterford and The Treasurer of the Commonwealth of Australia (No. 1) (16 May 1985) the Tribunal also considered the internal working document exemption. The document in question, a minute to the Treasurer relating to forward estimates of budget receipts, was held to fall within this exemption as projections of predicted future revenue were not 'factual material', and the term 'technical experts' only applied to experts in the mechanical arts and applied sciences field and not to economics. Similar statements to those in Re Howard were made about public interest issues, and procedures in conclusive certificate cases. The Tribunal, however, found it necessary to prepare two reasons for decisions - one full and available to the parties only, and one edited version for general publication.

Exempt Agencies

In Re Geary and Australian Wool Corporation (26 April 1985) the Corporation refused access to requested documents in reliance on its exemption from the operation of the FOI Act 'in relation to documents in respect of its competitive activities'. The Tribunal found it unnecessary to express any view on the Corporation's submission that the question of exemption required judicial determination. The real question was whether the Tribunal could consider the issue, and it was held that the Tribunal had a duty to do so with a view to arriving at a decision within its jurisdiction.

Affidavit Evidence Ruling

After three days of hearing evidence from witnesses a ruling was made that all further evidence intended to be adduced should be in affidavit form: Re Dunn and Australian Federal Police (19 April 1985). The ruling was made having regard to the cost of hearings, the nature of the evidence to be adduced and the nature of the evidence already adduced. Hearing of the matter had commenced before the Practice Direction of the President had been issued on 12 April 1985, in which respondents are directed to lodge with the Tribunal and serve on the applicant, not later

than 7 days prior to the appointed hearing date, an affidavit or affidavits setting out the evidence relating to exempt documents.

A D M I N I S T R A T I V E L A W W A T C H

SSAT Uniform Procedures

The ARC's Report No. 21, The Structure and Form of Social Security Appeals, stressed the need for uniform procedures to be adopted by Social Security Appeals Tribunals ('SSATs') to minimise the possibility of different standards applying from one tribunal to another. Uniform procedures have since been drafted by a Committee of SSAT members and endorsed by the Minister for Social Security. The procedures were promulgated in April 1985 under the title Procedures of the Social Security Appeals Tribunal.

The stated objective of the procedures is to achieve a satisfactory balance between the establishment of an informal atmosphere at appeal hearings on the one hand, and formalising practices and procedures of the tribunals on the other hand.

This development is consistent with the ARC's conception of how the first level review body in a two tier review system should operate. The first tier of review in such cases should provide economical, expeditious and informal review, whereas the final level of review on the merits must determine individual cases upon an inquiry of greater depth, and also develop principles of general application for the guidance of primary decision makers and the first review body.

R E C E N T P U B L I C A T I O N S

The following recent works relating to administrative law may be of interest:

Abrams, Floyd

'Freedom of Information and the Law' in the Granada Guildhall Lectures 1984, The Right to Know, Granada Publishing Ltd, 1985