
Freedom of Information

AAT jurisdiction - secrecy exemption

The decision of the Full Court of the Federal Court in Commissioner of Taxation v Swiss Aluminium Limited (26 May 1986) settles for the time being the differences of opinion within the AAT on the proper application of section 38 of the FOI Act in relation to section 16 of the Income Tax Assessment Act.

The proceedings reached the court by a circuitous route. The Commissioner and another party first appealed to the court under section 44 of the AAT Act against a decision of the AAT that parts of a document were not exempt under section 38 of the FOI Act. The court held, however, in Alcoa of Australia Ltd & Ors v Swiss Aluminium Australia Ltd & Ors (1986) 64 ALR 317 that the court had no jurisdiction to hear the appeals since the AAT had not determined the questions raised by the Commissioner concerning the application of other exemptions. The AAT's decision consequently did not finally determine the matter. Soon afterwards the AAT referred the question of law involved to the Federal Court under the provisions of section 45 of the AAT Act. Those provisions, the court said, were wide enough to encompass a situation where the AAT, as in this case, had already made a decision on the matter in issue.

The Full Court decided by majority that the document concerned was an exempt document by virtue of section 38 of the FOI Act on the ground that section 16 of the Income Tax Assessment Act applied specifically to information of a kind contained in the document and prohibited persons referred to in the Act from disclosing information of that kind. Section 16 prohibits an officer from, amongst other things, communicating to any person any information respecting the affairs of another person acquired by the officer in the course of or by reason of his or her employment. Section 38 of the FOI Act provides that a document is exempt if there is legislation in force 'applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind'. The Chief Judge, Sir Nigel Bowen, characterised the information protected by section 16 as 'tax related information', while Mr Justice Jackson characterised it as information respecting the affairs of another person. Mr Justice Fox, who dissented, took the view that section 16 was of general rather than specific application, identifying the information in an entirely general way through the capacity of the person who received it.

Access to documents concerning Daintree rainforest

The decision of the AAT in Re Rae and Department of Prime Minister and Cabinet (4 March 1986) arose out of a request by the Daintree Campaign Director of the Wilderness Society for

access to documents held by the Department of Prime Minister and Cabinet relating to a report from the Australian Heritage Commission. The report concerned the international conservation significance of wet tropical rainforests in north-east Queensland, including the Greater Daintree. The Douglas Shire Council, supported by the Queensland government, had undertaken the construction of a road within the area. The applicant had been granted access to a number of documents. However, the department claimed that 24 documents were exempt under the provisions of the Act concerning Commonwealth-State relations (s.33A), Cabinet documents (s.34), and deliberative process documents (s.36), and the Secretary to the department had issued conclusive certificates under those sections.

The AAT concluded that a letter from the Premier of Queensland to the Prime Minister concerning the rainforest issue was exempt under section 33A on the ground that its disclosure would, or could reasonably be expected to, damage relations between the Commonwealth and the State of Queensland by inhibiting the exchange of advice on an unrestricted basis between the 2 governments. Under the provisions relating to review of decisions to refuse access where a conclusive certificate is in force under section 33A, the AAT considered that reasonable grounds existed for the claim that damage would be caused, although it might otherwise have required further evidence. There were no public interest grounds sufficient to displace the prima facie exemption attaching to a document satisfying the requirements of section 33A(1).

The AAT heard wide-ranging argument as to the public interest in relation to claims of exemption under section 36 for various 'deliberative process' documents, including the argument that disclosure would further the objects of the Act, and in particular its 'democratic objectives'. The AAT rejected the respondent's argument that there was a general public interest in the non-disclosure of documents which form part of the decision making process and which represent policy making at a high level: those factors were relevant to the question whether the documents fell within section 36(1)(a), but not to the public interest question to be determined under section 36(1)(b). Disclosure of documents is not necessarily contrary to the public interest because they are 'high-level' correspondence: it will depend on the individual characteristics of the documents in each case.

The section 36 claims were finally decided (except in relation to one document) on the basis that, given that conclusive certificates were in force, there were reasonable grounds for the claim that disclosure would be contrary to the public interest in that disclosure might inhibit the conduct of continuing negotiations between the Commonwealth government and the government of Queensland. Where there was a certificated claim that disclosure of documents would be contrary to the public interest the AAT stated it should be cautious of entering into an unfinished course of policy making and negotiation. Where a conclusive certificate was in force, so long as there was a relevant reasonable ground, which stood on its own, for the claim that disclosure would be contrary to the

public interest, that was enough to make out the claim even if the ground appeared insignificant when set against other very strong grounds tending in favour of disclosure.

Commonwealth-State relations

The question of the Commonwealth-State relations exemption under section 33A was also an issue in Re State of Queensland and Department of Aviation (30 May 1986). A Brisbane television journalist sought access to documents relating to the method of operation of the Queensland government's air wing, and in particular material relating to the reasons for the air wing operating as a 'private', rather than an 'aerial work' operation under the Air Navigation Regulations. The department initially claimed exemption for a number of documents under section 33A of the FOI Act, but on internal review decided to give access despite the views of the Queensland Premier's Department that Commonwealth-State relations would be damaged by disclosure. In proceedings brought by the State of Queensland the AAT held that the documents in question could be expected to cause damage to Commonwealth-State relations and the public interest did not require that they be disclosed.

Meaning of phrase 'could reasonably be expected to prejudice'

The Full Court of the Federal Court in Attorney-General's Department and Anor v Cockcroft (1986) 64 ALR 97 handed down an interesting decision on the meaning of the phrase 'could reasonably be expected to prejudice the future supply of information to the Commonwealth' which occurs in section 43(1)(c)(iii) of the FOI Act. The court allowed an appeal against a decision of the AAT which had been based on the view that the phrase in question required an assessment of what was more probable than not. The Chief Judge, Sir Nigel Bowen, and Mr Justice Beaumont took the view that it is undesirable to consider the operation of the provision in terms of probabilities or possibilities. Rather than construing the section as depending in its application on the occurrence of certain events in terms of any specific degree of likelihood or probability, it was preferable to confine the inquiry to whether the expectation claimed was reasonably based. Mr Justice Sheppard said that for the exemption to be made out the decision maker must act reasonably, and he or she will not be justified in claiming exemption unless there are real and substantial grounds for thinking that the production of the document could prejudice the future supply of information. The approach of the Full Court of the Federal Court in this case, which was the same as that adopted by the AAT in Re Actors' Equity Association of Australia & Ors and Australian Broadcasting Tribunal and Ors (1985) 7 ALD 584, was applied by the AAT to similar words in sections 37(2) and 40(1) of the FOI Act in Re Thies and Department of Aviation (29 May 1986).

Commonwealth Ombudsman

Section 17 report - Industrial Sugar Mills

The Acting Ombudsman's Special Report No. 2, made under section 17 of the Ombudsman Act, was presented to both Houses of the Parliament on 27 May 1986 (The Industrial Sugar Mills Case involving the Department of Defence, AGPS, 1986). In essence the facts were:

- . Industrial Sugar Mills Pty Ltd ('ISM') submitted the lowest price for a tender for the supply of sugar in pouches;
- . the department misread the ISM tender, taking its price for four pouches to be its price for one pouch;
- . the department therefore awarded the contract to a competitor at a price some 15% above ISM's;
- . there was no relevant non-price consideration in the award of the contract.

The department had also failed to connect with the tender a telex which made the basis of the company's tender pricing unmistakable.

The only question at issue was whether the firm should be compensated for loss of expected profit. In the view of the former Ombudsman, Professor Richardson, had the mistake not occurred the department would almost certainly have awarded the contract to ISM as the lowest tenderer. The Ombudsman agreed with the department that in determining the financial detriment suffered by ISM account would need to be taken of any loss-mitigating actions which could have reasonably been expected of ISM. As in his view the error that had arisen in this case was an isolated incident, concern about frequent utilisation of a precedent based on departmental error was unwarranted. In the Ombudsman's view it was a very clear case for the payment of compensation for defective administration. However, on receipt of the Ombudsman's report under section 16 of the Ombudsman Act, the Prime Minister had responded that in effect the Ombudsman was inviting the Commonwealth to assume in tendering cases additional standards of liability which do not fall upon the Australian commercial community generally.

In the Special Report the Acting Ombudsman, Air Vice Marshal Jordan (Ret'd), stated that there was no evidence that great resources would be involved, and that to fear the precedent value of compensating the complainant was 'to start at shadows'. He commented that the government was suggesting, in effect, that the field of tender activity should be immune from redress on the Ombudsman's recommendation even though there had been a manifest breakdown in administrative procedures leading to an undeniable loss. Refusals of an