
Freedom of Information

Reverse FOI

In Mitsubishi Motors Australia Ltd v Department of Transport (21 October 1986, Full Court) the Federal Court had before it a question of law which had been referred to it by the AAT under section 45 of the AAT Act.

The reference to the Federal Court arose from the application of the 'reverse FOI' procedures in the FOI Act. Following an application for access to documents made under the FOI Act to the Department of Transport, the Department gave Mitsubishi, pursuant to section 27 of the Act, an opportunity to make submissions in support of a contention that the documents were exempt documents under section 43 of the Act (documents relating to the business affairs of a person). Mitsubishi submitted that the documents were exempt under sections 43, 37(2)(a), 45 and 46(a). The Department, however, notified Mitsubishi, pursuant to section 27(2), that it had decided to grant access to the documents. This decision was taken on appeal by Mitsubishi to the AAT under section 59.

The question of law that was referred to the Federal Court was whether the AAT, on a review under section 59, was obliged or empowered to decide whether the documents in question were exempt under section 43 or any other provision of Part IV of the FOI Act. The court held that, on such a review, it was clear that the AAT was empowered to decide a claim for exemption based on section 43. So far as other provisions of Part IV were concerned, the court held that, on such a review, there was no power in the AAT to decide a claim for exemption based on those provisions. The court declined to interpret section 58(1) of the Act as expanding the Tribunal's jurisdiction under section 59:

In the face of the specific provision in s.59(1) conferring a right of review in the case of one kind of exemption, we do not think that the general language of s.58(1) should be seen as conferring an additional, ambulatory head of jurisdiction upon the Tribunal.

The High Court has refused special leave to appeal from the decision of the Full Court of the Federal Court.

In the opinion of Admin Review the decision in this case highlights a possible deficiency in the reverse FOI procedure of the Act. Section 27 provides for notice of an FOI request to be given to a person where the person might reasonably wish to contend that the document is an exempt document under section 43. This trigger for the reverse FOI procedure would appear to be adequate. However, if an appeal to the AAT under section 59 is made by the person, it is arguable that the AAT should not be limited to determining a claim for exemption based on section 43 but should be empowered to determine such

a claim based on other grounds also. There may, for example, be cases where the information concerned is not clearly of a business character of the kind contemplated by section 43 but is information that has been supplied on a confidential basis (section 45). The possible deficiency in the reverse FOI procedure is perhaps given sharper focus when one considers that if, following the giving of notice to a third party under section 27, the agency refuses access to the document concerned and the applicant for access appeals to the AAT, the AAT may consider a claim for exemption based on section 45 or any other provision (see, eg, Re Corrs Pavay Whiting and Byrne and Alphapharm Pty Ltd and Collector of Customs, 23 December 1986).

The view that the reverse FOI procedure is deficient was recently expressed by Dr John Griffiths in a paper presented at a seminar on FOI and business conducted by the Law Institute of Victoria on 25 September 1986. It is to be hoped that the adequacy or otherwise of the reverse FOI procedure is given careful attention by the Senate Standing Committee on Constitutional and Legal Affairs in its forthcoming report on the FOI Act.

Deliberative process documents which name names

In Re Reith and Attorney-General's Department (23 December 1986) the AAT upheld the decision of the respondent to refuse Mr Peter Reith MP access to a number of documents relating to the establishment of the Australian Constitutional Commission. Exemption from disclosure was claimed under section 36 of the FOI Act in relation to several documents which disclosed the names of possible or prospective appointees to the Commission or its advisory committees. The Tribunal held that there was a substantial public interest in ensuring the integrity of the processes of selection for appointment to positions of importance in the Australian community. Disclosure of the names of persons considered or approached for appointment, but not ultimately appointed, would be likely to provoke speculation as to the reasons for non-appointment with embarrassing effects upon the reputations of those concerned.

The Courts

Broadcasting decisions

Re Minister for Communications; ex parte NBN Ltd (2 December 1986) is an interesting case for 2 reasons. The case came before the Chief Judge of the Federal Court, Sir Nigel Bowen, on the return of an order nisi made by the Federal Court that the Minister for Communications show cause why a writ of mandamus should not be issued to him to deal with the application by NBN Ltd for a supplementary television licence in accordance with section 82A(4) of the Broadcasting and Television Act. That section requires the Minister to refer such an application to the Australian Broadcasting Tribunal