

to assist the Tribunal and to act fairly towards the other party. Once a review is initiated, the Act places on the respondent Government agency obligations to assist the Tribunal to perform its function of *de novo* review”.

The Tribunal went on to repeat the statement of the AAT President in *Re Taxation Appeals NT 94/281-NT 94/29* (1995) 21 AAR 275 (also reported as *Re Applicant and Deputy Commissioner of Taxation* (1996) 41 ALD 683) that *Australian Postal Commission v Hayes* (1989) 23 FCR 320 – in which the Federal Court allowed the Commission to refrain from disclosing the contents, as opposed to the existence, of a video to the other party on procedural fairness grounds – represented a high point in this type of case. The Tribunal also found that *Hayes* did not apply here because this was not a case where the Tribunal had been informed that the video existed before Price began to give evidence.

The South Australian judgment in the Courts section of this issue of *Admin Review* which disputes the correctness of the trend of AAT decision making in these sorts of cases draws the same distinction just noted between disclosing the existence as opposed to the content of evidence that might be used to ‘surprise’ a witness.

#### *Withdrawal of grant of citizenship*

*Re Leung and Minister for Immigration and Ethnic Affairs* (26 July 1996) raised the question whether the Minister had power to withdraw a grant of citizenship to Leung. The grant had been approved and a certificate of citizenship issued to Leung, but Leung was yet to take the pledge of allegiance. The Minister then became aware that the factual basis of Leung’s application for citizenship was incomplete and misleading, and decided to revoke the grant.

The Tribunal (Deputy President McDonald) decided that Leung had not adhered to the standards of openness and honesty required of those applying for Australian citizenship and that, since a grant of citizenship is discretionary,

one should not be made to Leung. The Tribunal rejected Leung’s argument that the Minister’s power was already spent and that the approval could not be undone. The Tribunal found that, since a two-step process was involved before a person obtains citizenship under the *Australian Citizenship Act 1948* – the grant to a person of a certificate of citizenship and the taking by the person of a pledge of allegiance in a specified public manner – the Minister had power to withdraw the grant of the certificate of citizenship prior to the pledge being taken, if the decision were shown to have proceeded on a wrong factual basis.

Although that finding effectively disposed of the case, the Tribunal also considered the question whether the Minister had power to revoke the certificate of citizenship on the basis that the *Acts Interpretation Act 1901* includes a provision whereby a statutory power to make an ‘instrument’ is read (absent a contrary indication) as including power to revoke such an instrument. The Tribunal considered itself bound by the Federal Court decision *Australian Capital Equity Pty Ltd v Beale* (1993) 114 ALR 50 to conclude that this provision applies only to instruments of a legislative character and not to an individual grant of citizenship.

## Freedom of Information

### Confidentiality and information provided by ‘informers’

Two recent AAT decisions concern the exemption from disclosure under the FOI Act of documents that might disclose the identity of a confidential source of information. Both involved information provided to the Department of Social Security in relation to the pension entitlements of the person seeking access to the documents. The results and, to some extent, the facts in the cases differ, but the cases show that the circumstances surrounding the provision and receipt of the documents are critical to claims for exemption based on a confidential source.

The relevant provision of the FOI Act is as follows:

“37(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to: ...

(b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; ...”

In *Re Hayes and Secretary, Department of Social Security* (6 September 1996), Hayes sought review of decisions exempting certain documents from release to him. Those documents comprised an unsigned letter from a member of the public containing information adverse to him and relating to his entitlement to a pension. It was accepted by all concerned in the review proceeding that the information was not true or correct (it did not result in any change to the benefits paid to him), but the Department nonetheless considered the documents exempt from the disclosure requirements on the ground set out above.

The Tribunal (Senior Member Kiosoglous) accepted the Department’s submission that the information was provided under an implied request for confidentiality said to stem from the fact that the writer of the letter did not provide his or her name, address or signature, thereby expressing a desire not to be identified or contacted by the Department. Furthermore, the letter was received in confidence by the Department, an officer of which stated that the Department often receives information about people allegedly incorrectly receiving pensions, and that where such information is unsolicited and received in writing, it is treated confidentially by the Department.

The Tribunal also found that the information related to the administration of the *Social Security Act 1991* and that its disclosure could reasonably be expected to enable Hayes to identify its author, such that the conditions of

exemption were met. The exemption decisions therefore were affirmed.

In *Re Caldwell and Secretary, Department of Social Security* (24 June 1996) an exemption from disclosure on the same ground was claimed in relation to certain documents following a request by Caldwell for all documents submitted by someone else relating to his pension and all records made by officers relating to information supplied verbally to the Department (his benefits had been terminated and later reinstated). The documents in question appear not to have been anonymous, as the Tribunal (Deputy President Forgie) said that nothing on the face of them indicated that their author or authors wished that they be kept confidential or not be revealed by the Department.

The Department argued that it was implicit that they were supplied on a confidential basis, suggesting that this is the case whenever adverse information is given to the Department by an informant. However, an officer of the Department stated that information is continually supplied to the Department and is assessed for investigation and action, and that such information “is frequently specified as having been given in confidence, or this can safely be inferred from the circumstances surrounding the giving of the information”. The Tribunal noted that this meant that information was not necessarily received in confidence, and the Tribunal was not satisfied here that the information in question was given on a confidential basis. That being so, there was no need for the Tribunal to go on to consider the further questions of the purpose of the information and whether it might identify a confidential source.

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## The Courts

### Judges performing administrative functions

The High Court has drawn a new line in the sand when it comes to the use of judges acting in their personal capacity to perform administrative functions for the Executive. By