

LEGISLATIVE COMMENT

FREEDOM OF INFORMATION AND THE COMMONWEALTH OMBUDSMAN — KAVVADIAS v. COMMONWEALTH OMBUDSMAN¹

On the 23rd March, 1984 the Full Court of the Federal Court handed down a decision which may have very serious consequences for the Commonwealth Ombudsman in terms of his ability to obtain information during the course of his investigations. The Full Court held unanimously that documents in the possession of the Ombudsman were not exempt from disclosure under the *Freedom of Information Act* 1982 (Cth.) ("the *F.O.I. Act*"), by virtue of any over-riding secrecy provision in the *Ombudsman Act* 1976 (Cth.). In view of this, the Ombudsman could only refuse to allow access to a document in his possession if he could show that it came within one of the other exemption provisions which protect some specific interest in non-disclosure.

BACKGROUND

This matter was first heard by the Administrative Appeals Tribunal which affirmed the Ombudsman's refusal to grant access to an interim report which he had prepared in relation to a complaint referred to him by the applicant.² It held that the report was exempt under section 38 of the *F.O.I. Act* because the provisions of the *Ombudsman Act* when read together constituted a code the effect of which was to prohibit from disclosure, except in defined circumstances, any documents in the possession of the Ombudsman. The applicant appealed on the basis that the provisions relied on did not come within the scope of the wording in section 38 of the *F.O.I. Act*.

THE RELEVANT LEGISLATION

Section 38 of the *F.O.I. Act* provides as follows:

"A document is an exempt document if there is in force an enactment 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, whether the prohibition is absolute or is subject to exceptions or qualifications."

¹ Unreported, 23rd March 1984. The members of the Full Court of the Federal Court were Bowen C.J., Fox and Sheppard JJ.

² *Re Lucire and Kavvadias and Commonwealth Ombudsman*, No. 83/418, 2nd November 1983.

It was therefore necessary for the Federal Court to consider whether the Ombudsman's report contained information of a kind to which there applied provisions of the *Ombudsman Act* which prohibited its disclosure. The key provision relied on by the Ombudsman was section 35 (2) which provides:—

“Subject to this section, an officer shall not, either directly or indirectly, and either while he is, or after he ceases to be, an officer, make a record of, or divulge or communicate to any person, any information acquired by him by reason of his being an officer, being information that was disclosed or obtained under the provisions of this Act, including information furnished by the Ombudsman of a State in the exercise of a power of the Ombudsman of a State delegated to him as provided by sub-section 34(7).

Penalty: \$500.”

In view of the initial qualifying words section 35(2) must be read in conjunction with the other sub-sections of section 35 and, in particular, sections 35(3) and 35(4) which allow information to be divulged in certain designated circumstances. Also of relevance is section 35A which gives the Ombudsman a broad discretion to disclose information where he is of the opinion that it is in the public interest to do so. Section 35A(4) specifically provides that section 35A is to have effect notwithstanding section 35 except where the Attorney-General has certified that disclosure would be contrary to the public interest.

THE DECISION

The Federal Court commenced its joint judgment by referring to its previous decision in *The News Corporation Limited v. National Companies and Securities Commission*,³ a similar case which raised the same considerations with regard to the construction and operation of section 38. It felt that the discussion in that case relieved it from the necessity of discussing the issues as fully as it might otherwise have done.⁴

In their joint judgment in *The News Corporation case* Bowen C. J. and Fisher J. had stated:

“We are firmly of the opinion that section 38 expressly and intentionally directs attention to the nature of the information contained in the document and not to the capacity of the person who has received the information.”⁵

The Full Court in *Kavvaidas's* case agreed that section 38 required that there be a more direct and explicit reference to the nature of the information itself and not merely to the fact that it was received by specified persons in the course of their duties. To hold otherwise would be to largely destroy the object of the Act as set out in section 3(1) “to extend as far

³ (1984) 8 A.C.L.R. 593

⁴ Id. 597

⁵ *Kavvaidas v. Commonwealth Ombudsman*, unreported, 23rd March 1984, p.8.

as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth''⁶

Section 11 of the *F.O.I. Act* confers a right of access subject to the provisions of that Act. This provision must be given effect to and if there is an apparent conflict with some other legislation it has to be resolved according to ordinary principles. There are a number of exemption provisions in the *F.O.I. Act* which go to maintain the policy against disclosure contained in other enactments. Section 38 is one of these and it does so by allowing those secrecy enactments which come within its definition to override the right of access in section 11. However, there are other provisions such as sections 41 and 45, dealing with the protection to personal privacy and confidentiality respectively, which preserve relevant aspects of the policy in such secrecy enactments. There is therefore no justification for giving the scope of other secrecy enactments a wide construction so as to bring them within section 38.⁷

So far as the provisions of the *Ombudsman Act* were concerned, the Court rejected the approach of examining separately the individual words of the various provisions. The relevant prohibition was to be found if at all, by considering the totality of sections 35 and 35A. The range of information dealt with in these provisions is qualified only by the fact that the Ombudsman has it in documentary form. This may encompass anything that is regarded as relevant to his investigations and cannot be sensibly comprehended as a genus. Moreover, in addition to the relaxations on the prohibition against the disclosure of information in section 35 there is also a wide discretionary power to disclose information under section 35A.⁸

The Court concluded:

''In the result we are of the view that section 38 does not avail the Ombudsman. For reasons which we think are sufficiently apparent from what we have said, it is also our view that the provisions of the *Ombudsman Act*, read as a whole, cannot be taken as constituting a code which brings section 38 into operation. Doubtless, if it is thought that the investigations of the Ombudsman should be free from the operation of the *Freedom of Information Act* appropriate legislative attention will be given to the matter.⁹''

It had been agreed by the parties that if section 38 was held to be inapplicable the matter should be remitted to the Administrative Appeals Tribunal for a further hearing in relation to the other exemption provisions relied on by the Ombudsman. The Court therefore made an order to this effect.

⁶ Id. p.9.

⁷ Id. p.10

⁸ Id. pp.10-11

⁹ Id. p.11

COMMENTARY

Although the Ombudsman is given wide powers to enable him to acquire information during the course of his investigations he is also dependent on the voluntary co-operation of persons who may be in a position to assist him. Up until now such persons have been able to supply information secure in the knowledge that it will not be disclosed to other persons unless the Ombudsman considers it appropriate to do so. However, as a result of this decision the Ombudsman is no longer in a position where he can totally control the outflow of information from his office and persons who have information which they do not want to be made available to the general public are less likely to be willing to divulge it to the Ombudsman.

It would seem very unfortunate that a piece of legislation introduced as the latest addition to a series of administrative reforms collectively referred to as "the new administrative law" should operate in such a way as to effectively undermine the operation of another major element in that series of reforms. The legislature would therefore do well to consider the course of action suggested by the Federal Court and to direct its attention to the possibility of enacting suitable amending provisions.

The adverse consequences of this particular decision highlight the problems inherent in the drafting of section 38. The Federal Court in its judgment commented that section 38 appeared to have been designed to avoid identifying in a list those secrecy enactments which were intended to prevail over the general right of access provided in section 11 of the *F.O.I. Act*.¹⁰ In fact an examination of its legislative history indicates that the 1978 Bill as presented to the Senate Standing Committee on Constitutional and Legal Affairs exempted from disclosure information subject to the secrecy provisions of other enactments only if they were prescribed by regulation. However, the government was unable to review all the relevant provisions prior to the enactment of the legislation and chose instead the existing catch-all provision.¹¹

As a result the approximately 33 secrecy provisions which have found their way into Commonwealth legislation remain in force and it is left to the persons who are required to make decisions as to the provision of access to documents and the bodies which review their decisions to work out the extent, if any, to which these provisions override the rights of access provided under the *F.O.I. Act*. This situation is exacerbated by the fact the provision contains no obvious mechanism for distinguishing between those more trivial provisions inserted during eras of excessive secrecy and those which operate in the public interest to protect legitimate interests in secrecy. Moreover, it is sufficiently general that if given a

¹⁰ *Id.* pp.7 and 9.

¹¹ Commonwealth of Australia, "Freedom of Information — Report of the Senate Standing Committee on Constitutional and Legal Affairs on The Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978" *Parliamentary Papers*, 272/1979, p.234.

wide interpretation it can undermine the effective operation of the *F.O.I. Act*. As a result the Federal Court has, commendably it is suggested, chosen to adopt a very narrow approach to its interpretation. However, as illustrated here, unless further legislative provision is made to resolve the problem, this will have the effect of undermining secrecy provisions which do in fact operate in the public interest.

The government has indicated that it proposes to undertake a comprehensive review of secrecy provisions to ascertain which should be retained and the form they should take.¹² It has not, however, given any indication as to when it proposes to complete that review. The need for such reform is becoming increasingly apparent and it is suggested that serious attention should be given to completing the review quickly so that the situation can be remedied before serious harm to the public interest results.

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¹² Commonwealth of Australia, "Freedom of Information Act 1982 — Annual Report for the Period 1st December 1982 to 30th June 1983," p.105

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