FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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WEETANGERA ACTION GROUP and (ACT) DEPARTMENT OF EDUCATION AND THE ARTS (No. C91/8)

D cid d: 31 January 1992 by R.K. Todd (President).

Abstract

FoI Act (ACT) — section 36(1) and (3) (identical to s.36 of the Commonwealth Act) — deliberative documents — conclusive certificate requires that reasonable grounds exist for exemption claim — whether disclosure 'contrary to the public interest' — 'class claims' inadmissible — grounds must be related to contents of documents — 'frankness and candour' a class claim — convention of not disclosing deliberative documents of former government to a subsequent government not a reasonable ground for public interest claim — disclosure of contents of documents could lead to confusion and unnecessary debate and would not fairly disclose reasons for decision — reasonable grounds for exemption claim.

Issues

Whether deliberative documents passing between senior public servants and a Minister or the Joint Party Room were exempt. Inadmissibility of 'class claims' for exemption on public interest grounds, in particular the claim that disclosure would adversely affect frankness and candour of communications. Relationship of public interest grounds to specific contents of documents. Whether convention that deliberative documents of former government are not disclosed to a subsequent government is relevant to a public interest claim. Likelihood that disclosure would cause confusion and unnecessary debate and would not fairly disclose reasons for decision.

Facts

The applicant (Weetangera) applied for access to documents relating to a review of the ACT Alliance Government's decision to close Weetangera Primary School, a decision which was subsequently reversed by the ACT Government. The decision was made as part of a process which resulted in decisions to close a number of schools and a subsequent review of those decisions. The Department claimed exemption under s.36(1) for documents which were communications between the Department's Director (Special Projects), or its Secretary, and either the Minister for Health, Education and the Arts, or the members of the Government Joint Parties. A conclusive certificate was issued under s.36(3).

Decision

The Tribunal held that reasonable grounds existed for the s.36(1) claims of exemption supported by the conclusive certificate, but did not accept all of the grounds advanced in support of those claims.

Section 36(1) — disclosure of deliberative documents contrary to the public interest — 'class claims'

The Tribunal stated that 'class claims' had been consistently rejected by the Commonwealth Tribunal (see e.g. *Re Sunderland and Department of Defence* (1986) 11 ALD 258 at 263-66). Only in *Re Howard and Treasurer of the Commonwealth* (1985) 7 ALD 626 was there, on one view, any support for remarks of Hartigan J in *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264 at 266. Those remarks included comments on the likelihood of disclosure of particular documents inhibiting the production of such documents or affecting the willingness of officials to fully communicate all relevant information such that disclosure would prejudice the decision-making processes of the government. The reasons in *Re Aldred* did not discuss the general issues concerning class claims raised in *Re Fewster and Department of Prime Minister and Cabinet* (1986) 11 ALN N266, *Re Fewster and Department of PM&C (No.2)* (1987) 13 ALD 139 and *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659 at 662, though there was reference to *Re Howard* (above) and *Re Reith and Attorney-General's Department)* (1986) 11 ALD 345. There would be more undesirable consequences in following the reasons of Hartigan J in *Re Aldred* than in not doing so: in Deputy President Todd's opinion they were inimical to the spirit and intendment of the *FoI Act*. The only evidence supporting them were 'the assertions of some well-meaning public servants who regret that the Act has introduced a change from the old ways and old days'. To establish that disclosure would be contrary to the public interest, something needs to be found in the information in the documents in question that affords support for the exemption claim (*Re Bartlett* (above)).

The Tribunal found that the relevant documents were 'deliberative documents' within the meaning of s.36(1)(a). The Department claimed that disclosure would be contrary to the public interest under s.36(1)(b) on a variety of grounds not all of which related to every document. The Tribunal considered that the following grounds constituted inadmissible 'class claims' (*Re Bartlett*, above), and therefore did not constitute reasonable grounds for a claim that disclosure of the relevant information would be contrary to the public interest:

(a) The document was a communication between senior officials concerning politically sensitive issues.

(b) The document was created in the course of the development of policy.

(c) Disclosure might inhibit frankness and candour in future pre-decisional communications.

(d) Disclosure

  (i) would impinge upon the confidentiality normally surrounding high level communications between a Minister and advisers, without countervailing public benefit, and

(ii) could reasonably be expected to result in the Minister and Cabinet making decisions or participating in collective decisions without full deliberative advice in the knowledge that such advice might be made public.

(e) That documents submitted to the Joint Party Room of the Alliance Government provided a reasonable ground for a public interest claim.

The Tribunal commented on the claim in (e) of the preceding paragraph, that there was no room for the creation by the back door, through the provisions of s.36, of an extra class of 'Cabinet' documents because they had been through 'some cabal, caucus, or other party room meeting not having the standing of Cabinet or, here, of the Executive'. Again, existence of a convention that deliberative documents of a former government are not made available to a subsequent government did not constitute reasonable grounds for a claim that disclosure of documents would be contrary to the public interest (*Re Bartlett* (above, at 664-66)).

The Tribunal found that the remaining grounds, which related specifically to the expected consequences of disclosure of the particular information in the documents, constituted reasonable grounds for the exemption claim.

These were that:

disclosure would not fairly disclose the reasons for the decision subsequently taken;

would lead to confusion and unnecessary debate resulting from a disclosure of possibilities considered; and

because of the role played by the Joint Party Room under the former Alliance Government, would not fairly disclose the reasons for that decision.

The Tribunal inspected the documents and had regard to a confidential submission made on behalf of the Department. In giving its reasons the Tribunal referred to non-confidential reasons for the claim given by the Department, and made no findings in relation to the confidential reasons. The Tribunal was particularly influenced by the claims that disclosure of the methodology for identifying schools for closure, and comparative projected enrolments and maintenance costs, could have a tendency to create expectations about future closures, and that future enrolments could be distorted by such expectations with an adverse effect on particular schools. Disclosure could spawn new problems that would distort and make worse the wider problem. It was not possible to say whether a time would come when there would no longer be reasonable grounds for a s.36 claim, but, if it did come, it was likely to be a long time ahead (compare *Re Bartlett* (above)).

Comments

This ACT decision is a valuable reassertion of the position that s.36 does not sanction the making of 'class claims' that disclosure of information is contrary to the public interest. It is necessary to relate the expected effect of disclosure to specific information in the particular documents sought. This approach is particularly relevant to claims that release would affect the 'frankness and candour' with which public servants would express their advice to Ministers and others, but it may also be noted that some of the other '*Howard* factors' — such as the level of communications and their part in the development of policy — were also identified as class claims when they stood on their own. *Re Aldred*, together with some remarks in *Re Howard*, are almost alone in supporting the 'frankness and candour' ground, and are inconsistent with comments by the High Court in *Sankey v Whitlam* (1978) 142 CLR 1 (see also Beaumont J in *Harris v ABC* (1983) 50 ALR 551 at 563, and recently *Re Kamminga and Australian National University* (1992) 15 AAR 297). Although Deputy President Todd said that if he had been sitting as a Deputy President of the Commonwealth Tribunal he would have felt bound to follow the reasons of the then President in *Re Aldred*, the comment was not necessary to the decision, and it is to be hoped that the reasons for decision, while not given in the Commonwealth Tribunal, will prove persuasive with that Tribunal.

[R.F./R.A.]

S and COMMISSIONER OF TAXATION (No. W91/63)

Decid d: 9 July 1992 by Deputy President P.W. Johnston.

Abstract

- *Application of cause of action estoppel (res judicata) and issue estoppel to decisions of the Tribunal — alternatively, application of similar policy approach.*
- *Consideration by Tribunal of documents created up to the date of the hearing.*
- *Section 37 — not applicable after completion of investigation.*
- *Section 40(1)(c) and (d) — applicable to names and initials of officers.*

Issues

The major issues dealt with in this ruling were (a) whether documents which had come into existence up to the date of the hearing should be considered by the Tribunal, and (b) whether information concerning the names and initials of Australian Taxation Office (ATO) officers, previously held by the Tribunal to be exempt, should be excluded from consideration on the basis of one or both of cause of action estoppel and issue estoppel, or alternatively on policy grounds. A further issue was the effect on previous claims under s.37(1)(a) and (2)(b) of the completion of the investigation founding those claims.

Facts

S made a request for all documents relating to an audit investigation carried out into his tax affairs. The scope of the request included documents held by the Tribunal in 1989 (*Re S and Commissioner of Taxation* (1989) 24 *FoI Review* 69) to be wholly or partially exempt on the basis of s.37(1)(a) (prejudice conduct of investigation of a breach of the law, or enforcement or proper administration of the law, in a particular instance), 37(2)(b) (disclose lawful methods or procedures which would prejudice their effectiveness), 40(1)(c) (substantial adverse effect on management or assessment of personnel) and 40(1)(d) (substantial adverse effect on conduct of operations of agency). The information covered by the s.40 claims consisted of the names or initials of ATO officers.

Decision

The Tribunal ruled:

that all relevant documents that had come into existence up to the date of the hearing should be considered by it;

to the extent that any of the documents had been determined in the previous Tribunal proceedings to be exempt under s.40(1)(c) they should be excluded from further consideration by the Tribunal.

The Tribunal incorporated in its reasons for decision on the substantive matters remaining in issue, delivered on 12 February 1993 ((1993) 46 *Fol Review* 47), the reasons for the preliminary ruling summarised separately here.

Section 37(1)(a) and (2)(b) — completed investigations

Because the investigation on which they had been based had been completed, ATO no longer maintained the exemptions previously claimed under s.37(1)(a) and (2)(b). The basis for withholding access while investigations were on foot was that an investigator should be able to gather information without the suspect looking over his shoulder to see how the inquiry was going; for an investigator to disclose his or her hand prematurely would also close off other sources of inquiry (*National Companies and Securities Commission v News Corporation* (1984) 52 ALR 417 at 437). Upon finalisation of the investigation there was a material change in the circumstances such that the ground on which the Tribunal's previous decision was based was no longer applicable and no issue estoppel arose (but see Comment below).

Issue estoppel and s.40(1)(c) and (d) claims — names of officers

In the previous proceedings the Tribunal had followed previous authority that the names and initials of officers which might lead to them being identified were exempt material under s.40(1)(c) and (d) (*Re Z and ATO* (1984) 6 ALD 673, *Re Mann and ATO* (1985) 7 ALD 698, and *Re Lander and ATO* (1985) 85 ATC 4674). Neither that finding nor the terms of s.40(1)(c) and (d) depended on there being a contemporaneous investigation. The earlier decision was intended to be conclusive and final and, if the doctrine of issue estoppel applied to it, the Tribunal would be precluded from reopening the issue and making fresh findings inconsistent with those entailed in the earlier decision. The Tribunal thought it could be argued that cause of action estoppel applied to the present matter, but on a narrower view of the previous decision the matter would be covered by issue estoppel as there was a clear identity of issue in respect of the same documents. If issue estoppel did not apply, considerations of policy based on the need for finality required that the Tribunal not review the decision in respect of the relevant documents.

Cause of action estoppel and issue estoppel and AAT decisions

The Tribunal undertook a detailed examination of recent decisions of the Tribunal on the application of cause of action estoppel and issue estoppel to decisions of administrative tribunals. In the first, the cause of action and the parties must be the same, while in issue estoppel the causes of action are not the same but a party 'is precluded from contending the contrary of any precise point which having once distinctly been put in issue had been solemnly and with certainty determined against him. Issue estoppel is confined to an estoppel as to ultimate facts and does not extend to mere evidentiary facts.' (Deputy President McGirr in *Re Petrou and Australian Postal Corporation* (1992) 25 ALD 407 at 413).

There was authority that cause of action estoppel applied to a tribunal whether or not it exercised judicial power under the Constitution or simply administrative power, so long as it was required to act judicially (*Administration of Papua New Guinea v Daera Guba* (1973) 130 CLR 353 at 453; *Bogaards v McMahon* (1988) 88 ALR 342). Some decisions of the Federal Court contained statements against the application of issue estoppel to the decisions of the Tribunal, for example the Full Court decision in *Commonwealth v Sciacca* (1988) 17 FCR 476. On the other hand, *obiter dicta* of Pincus J in *Bogaards* (above) seemed to favour the application of the doctrine of issue estoppel to tribunal decisions. The Tribunal concluded that, while it might still be an open question, the accepted view in the Tribunal itself seemed to be that issue estoppel did apply in circumstances where exactly the same issues found in one decision of the Tribunal were sought to be re-litigated in a subsequent application (*Re the Hospital Benefit Fund of Western Australia Inc and the Department of Health, Housing and Community Services* (1992) 16 AAR 158, relying on *Re Quinn and Australian Postal Corporation* (1992) 15 AAR 519). For an issue estoppel to arise in respect of an issue of fact, the issue decided must be identical with a factual issue to be decided in the later proceedings (*Re Cominos and Australian Telecommunications Corporation* (unreported, 9 April 1992).

Even if issue estoppel did not apply, the policy underlying s.34(2) of the AAT Act, concerning decisions following conferences of the parties, and s.43, concerning the Tribunal's decision-making powers, contemplated finality of a decision made after a comprehensive review. Powerful considerations of policy suggested that 'a determination involving specific findings of facts, once made, may not be reopened except in the case of demonstrable fraud, clear mistake or lack of consent' (but see Comments below). Considerations of legislative policy dictated that where identical issues are sought to be raised in a second application before it, the Tribunal is precluded from reopening the findings of material facts in the absence of a change to those facts.

The Tribunal noted there could be practical consequences to the differences between the two views. If the matter is one of jurisdiction (under the doctrine of issue estoppel), the Tribunal may as a preliminary issue determine that it cannot reopen an earlier decision. If it sees the matter as one of discretion, the Tribunal may decide, either as a preliminary matter in the interest of the parties, or as part of the substantive hearing of the application, that it is inappropriate to reconsider issues of fact already determined in earlier proceedings irrespective of whether new evidence is available.

Subsequent documents

The Tribunal could properly confine its review to documents which came into existence prior to the date of the application to it (*Re Edelsten and Australian Federal Police* (1985) 4 AAR 220; (1986) 2 *Fol Review* 24; compare *Re Murtagh and Commissioner of Taxation* (1984) 1 AAR 419). However, in view of S's request that all documents up to the hearing date be included in the application, and the ATO's lack of objection to such a course, the Tribunal ruled that

it had jurisdiction to review all relevant documents created up to the date of hearing so long as they had not been the subject of the earlier Tribunal decision. In that review, the reasons for the earlier decision would bear careful and weighty consideration in relation to the new documents.

Comments

In view of the involvement of the then President of the Tribunal, O'Connor J, in the *Hospital Benefit* and *Quinn* cases (above), Deputy President Johnston appears correct in saying that the accepted view in the Tribunal is that issue estoppel applies to its previous proceedings, mainly because it considers it illogical for cause of action estoppel to apply but not issue estoppel. Those decisions also took account of the decisions of the House of Lords in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273, and of the US Supreme Court in *Astoria Federal Savings and Loans Association v Solimino* (1991) 115 L Ed 96 that, subject to a contrary statutory intention, both cause of action estoppel and issue estoppel apply to final administrative decisions. However, it is not clear that the Full Court of the Federal Court would reach the same conclusion. Compare with *Bogaards* (above) the *dicta* of Hill J in *Midland Metals Overseas Ltd v Comptroller-General of Customs* (1991) 30 FCR 87 and of Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 and *Wiest v Director of Public Prosecutions* (1988) 86 ALR 464. Hill J's reasoning was that the Tribunal was an administrative body to which the rules of evidence did not apply and when it substituted its own decision for that of a decision-maker its decision was for all purposes to be deemed to be the decision of the decision-maker (s.43(6) of the AAT Act). In *Wiest* Gummow J referred among other things to the lack of definition or isolation of issues in pleadings, and to a limited obligation to give reasons.

An alternative approach, adopted by the majority in the *Quinn* case, is to rely on the relevance to administrative decisions of the policy bases for issue estoppel, namely the interest in finality of decisions. What was needed, they said, was a doctrine with sufficient flexibility to recognise that the balance of individual and public interests would produce different answers in the diverse areas of administrative practice. Such an approach might be preferable to the application of the strict doctrine of issue estoppel.

So far as FoI is concerned, the present decision is consistent with the carefully reasoned decision of Deputy President Thompson in *Re Hopper and Australian Meat and Livestock Research and Development Corporation* (1990) 11 AAR 329. He held that issue estoppel applies to decisions of the Tribunal on the granting of access and would avoid the need for agencies and the Tribunal to establish the existence of the same set of facts in a multiplicity of actions by an applicant. However, without casting doubts on the substantive decisions in *Hopper* and the present case, there are dangers of a simplistic application of issue estoppel in FoI matters. There is no presumption in the *FoI Act* that documents found exempt on one occasion will remain exempt. On the contrary, underlying circumstances may change (as in the present case in relation to the s.37 claims) so that, for example, it would no longer be contrary to the public interest to disclose deliberative information (s.36(1)). In this context it is of concern that the Tribunal in *S* made no reference to s.40(2) which requires that all aspects of the public interest be balanced in reaching a decision, and did not ask whether there was any change in this respect.

The case could have been decided on the basis of cause of action estoppel, which is agreed by all to be applicable to tribunals. Both cause of action estoppel and issue estoppel are subject to a contrary statutory intention and it could be argued that the *FoI Act* does indicate that a decision at one time that documents are exempt is not conclusive of the question whether they are exempt at a later time (see ss 11 and 18 and subsection (3) of each of ss.26A, 27 and 27A) (and see Tribunal decisions such as *Re Fewster and Department of Prime Minister and Cabinet (No.2)* (1987) 13 ALD 139 at 141 ((1987) 11 *FoI Review 59*) and *Re Weetangera Action Group and ACT Department of Education and the Arts* (reported in this issue of *FoI Review*)). Of course, if there has been no change in the circumstances relating to documents, there is a good policy reason (as in *Hopper* and the present case) to follow an earlier decision. Agencies should take care to investigate whether there have been changes which would affect the application of an exemption previously claimed.

The decision on subsequent documents depended on the consent of the ATO and did not purport to change the approach in *Edelsten* (above) that the cut-off date for documents the Tribunal will consider is the date of application to the Tribunal. Note also that the Tribunal seems to have been in error in believing that completion of the particular investigation alone made it inappropriate to continue to claim s.37(2)(b), which, unlike s.37(1)(a), does not depend on the continued existence of a particular investigation.

[R.F/R.A.]

WARREN and DEPARTMENT OF DEFENCE (No. 91/542)

Decided: 7 September 1992 by Deputy President B.J. McMahon.

Abstract

- *Section 4(1) — amended by Freedom of Information Amendment Act 1991 — 'personal information' defined.*
- *Section 26(1) — statements of reasons — facts must be clearly stated and not confused with views of the law — general statement as to documents not sufficient — reasons for a decision must look at each request and state why it is refused — appropriate reasons must be given in respect of each document.*
- *Section 48 — amendment of records containing 'information relating to personal affairs' (until October 1991) — information concerning assessment of capacity or work performance could include some personal affairs information — necessary to be precise as to the information concerned — 'information relating to personal affairs' replaced by 'personal information' from October 1991.*
- *Section 62(2) — declaration that notice under s.26(1) does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based, or adequate particulars of the reasons for the decision — direction to agency to furnish additional notice — direction to consider application anew under the provisions of Part V as amended in October 1991.*

Issues

The decision raised two principal questions, first, whether the respondent (Defence) had furnished a satisfactory statement of reasons under s.26(1) and, second, whether the Tribunal in making a declaration under s.62(2) could direct the agency to take account of the amended provisions of the Act relating to amendment of personal records when furnishing an additional notice.

Facts

This matter involved an application by Mr Warren for a declaration by the Tribunal under s.62(2) that a response by Defence to a request for amendment of documents did not contain adequate particulars of findings on material questions of fact, adequate reference to the evidence or other material on which those findings were based, or adequate particulars of the reasons for the decision.

Mr Warren had sought amendment under s.48, as it stood before October 1991, of 13 reports, letters and minutes which had been made available to him under the *FoI Act.* Defence had refused the amendment request on the ground that the information in the records did not relate to Mr Warren's 'personal affairs' within the meaning of the term as used in s.48. Mr Warren sought detailed facts and reasons for the decisions on each of the 13 items. Defence reiterated that each of the items did not constitute or contain information relating to Mr Warren's 'personal affairs', given the meaning of that term throughout the *FoI Act.* The letter summarised the 'thrust of a long line of decisions' by the Tribunal and the Federal Court concerning 'personal affairs'. It stated that 'personal affairs' did not include vocational competence or professional affairs except as these might be influenced by 'personal affairs'. Defence also undertook to keep a copy of the request for amendment with the records to which it related.

Mr Warren then sought a statement of reasons under s.28(1) of the *Administrative Appeals Tribunal Act,* but this was rejected by Defence on the ground that he had been provided with a statement under s.26(1) of the *FoI Act* (see also s.62(1) of the *FoI Act*, not referred to by Defence). Mr Warren then sought a declaration under s.62(2).

In the meantime, Part V of the *FoI Act*, dealing with amendment and annotation of personal records, was extensively amended from 25 October 1991 by the *FOI Amendment Act 1991*. Also inserted was a new definition of 'personal information' which replaced the term 'information relating to the personal affairs of a person' in a number of provisions including those in s.48 concerning amendment of records. The Tribunal commented that the general effect of the amendments in this context was to widen the scope of material that may properly be considered as 'personal'.

Decision

The Tribunal held that the letter to Mr Warren was not a sufficient response in accordance with the obligations under the Act.

In the Tribunal's view, there were no adequate findings of fact. A finding of fact required by the Act meant that the facts as found must be clearly stated. To say that the decision maker had formed the view that certain documents did not relate to personal affairs was to confuse his view as to the law with a finding of fact. Explicit statements of findings of fact were important in matters of this nature even before the 1991 amendments, since distinctions were drawn between the facts contained in some documents and those in others as to whether they related to 'personal affairs'. It could not be said that the phrase 'information relating to the personal affairs of a person' was incapable of application to information contained in an assessment of capacity or work performance (*Department of Social Security v Dyrenfurth* (1988) 80 ALR 533 at 538). Matters related to the pursuit of a vocation and 'personal affairs' are not necessarily mutually exclusive categories (*Bleicher v Australian Capital Territory Health Authority* (1990) 96 ALR 732 at 738). The facts contained in the documents — i.e. the facts as found — had an important bearing in any decision as to whether documents were within the terms of s.48 as it stood before the 1991 amendments.

The Tribunal also held that there had been no proper statement of reasons. Merely to make general assertions as to the effect of a line of decisions was not a compliance with the statutory obligations. An agency must look at each request and state why it refuses to accede to that request. Each document particularised was different, and each response must be appropriate.

The Tribunal made a declaration that the purported notice under s.26(1) did not contain adequate particulars of findings on material questions of fact, or adequate reference to the evidence or other material on which those findings were based, or adequate particulars of reasons for the decision. It remitted the matter to Defence in accordance with the terms of s.62(2) for furnishing an additional notice containing further and better particulars. The Tribunal said that in view of the absence of an adequate response, the application must now be considered by Defence anew under the current law as amended in October 1991.

Comments

The decision is a useful reminder of the need to be specific in a statement of reasons under s.26(1) as to the facts of the matter, in particular the contents of each of the documents to which access is being refused or which are not being amended, and as to the precise reasons why *those particular* documents are not being released or amended. At the same time, of course, it is not necessary to include matter in a statement which would itself cause the statement to be exempt (s.26(2)). All material findings of fact that have been relied on should be set out and clearly stated.

The Tribunal's direction that the application be considered anew under the current law seems to go further than the requirement in s.62(2) that the person responsible for furnishing a s.26(1) notice should furnish an additional notice containing further and better particulars in relation to matters specified in the declaration. As the Tribunal commented in *Re Gregory and Department of Social Security* 12 December 1986, a declaration under s.62(2) is a form of relief separate from review of a substantive access decision. Nonetheless, in a case like the present it does make sense for the agency to reconsider the request for amendment according to the current law, which in this case could be more favourable to the applicant, and to base its statement of reasons on that law, since that is the law the Tribunal would apply on a review of the substantive decision (see *Re Green and AOTC*, and Comments, (1994) 50 *FoI Review* 21).

[R.F./R.A.]

PROUDFOOT and THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (No. A92/4)

Decided: 22 October 1992 by President D.F. O'Connor J, D.B. Travers and N.J. Attwood (Members).

Abstract

Section 42(1) — legal professional privilege — confidential communication between a person and his or her lawyer brought into existence for the sole purpose of seeking or giving advice or for the sole purpose of use in current or anticipated litigation — privilege not precluded by fact that advice relates to exercise of statutory power or performance of statutory function or duty — application to 'in-house' government lawyers — question of fact whether government lawyer has the necessary degree of independence — whether current practising certificate necessary — whether advice given in the course of relationship of lawyer and client.

- *Section 36(1) — disclosure of deliberative process information in circumstances contrary to the public interest — exemption claimed on ground that disclosure would reveal contents of legal advice.*

Issues

The principal issue was whether a memorandum of advice given by an 'in-house' lawyer of a statutory authority was protected by legal professional privilege: was the communication created for the sole purpose of giving legal advice; did it arise in the course of the relationship of lawyer and client; and did the lawyer concerned have the necessary degree of independence to attract the privilege? Is having a current practising certificate essential to establish that independence?

Facts

Dr Proudfoot obtained access to a number of documents held by the respondent (HREOC), but was denied access to three documents for which exemption was claimed. Access to one was refused under s.42 on the ground that it would be subject to legal professional privilege in legal proceedings, while the others were claimed to be exempt under s.36(1) because their disclosure would reveal the legal advice contained in the first document. The advice concerned a complaint made by a Mr Tully alleging that the *Sex Discrimination Act 1984* (the *SDA)* was being contravened by a Queensland nightclub which charged a higher price for male patrons than it did for female patrons. The complaint was eventually dismissed as frivolous under the provisions of the *SDA*.

When it received the complaint, the Queensland office of HREOC wrote to the Sex Discrimination Commissioner, Ms Quentin Bryce, asking if it was appropriate to invoke the *SDA* provisions concerning frivolous complaints. The memorandum did not go directly to Ms Bryce, and a copy of it was forwarded to the Legal Section of HREOC with an annotation 'Legal Section' and an arrow. The annotated memorandum was interpreted by Ms Chalmers, an officer of HREOC's Legal Section, as a request for advice. Ms Chalmers was an admitted solicitor of the NSW Supreme Court and held a current practising certificate. She prepared a memorandum of advice and forwarded it through her superior to the Queensland office of HREOC. In the interim, however, Ms Bryce advised the Queensland office that the matter would not be accepted on the ground that it was frivolous, and Mr Tully was informed of this decision.

Decision

The Tribunal decided that the first document was not exempt under s.42(1) and that therefore the exemption in s.36(1) (disclosure of deliberative documents in circumstances contrary to the public interest) could not apply.

Section 42(1) — legal professional privilege — status of in-house lawyers — form of request for advice — relationship of lawyer and client

A document is privileged on the ground of legal professional privilege if, amongst other things, it is a confidential communication between a person and his or her solicitor or barrister brought into existence for the sole purpose of seeking or giving advice or for the sole purpose of use in existing or anticipated litigation (*Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 49 ALR 385). There are a number of exceptions to the doctrine, for example in relation to a document created for the purpose of committing a crime or fraud (*Attorney-General (NT) v Kearney* (1985) 158 CLR 500).

The Tribunal noted that, while the doctrine of legal professional privilege had largely evolved in the context of advice given or sought from a solicitor or barrister, there is an increasing tendency for corporations and government bodies to employ qualified legal practitioners as 'in-house' solicitors or counsel. Many governments also have a specialist area which provides legal advice to other government departments or agencies, for example areas of an Attorney-General's Department, the Crown Solicitor or the Australian Government Solicitor. The Tribunal set out some of the views expressed in the High Court decision in *Waterford v Commonwealth of Australia* (1987) 163 CLR; (1987) 10 *FoI Review* 47, and derived the following propositions from the judgments in that and other cases:

- legal advice given by a qualified lawyer employed by the government can be privileged, at least where the giver of the advice holds a current practising certificate (*but* see Comment below);
- for privilege to attach, the legal adviser must be acting in her or his capacity as a professional legal adviser — that is, the advice must be given pursuant to a relationship of lawyer and client; not only must the relationship exist, the advice must be given in the course of it;
- the circumstances in which the advice is given must be attended by the necessary degree of independence; if an advice is subject to direction as to its contents or conclusions by a person who is not a lawyer it would not be privileged;
- the document must be prepared for the sole purpose of giving legal advice;
- the advice must be confidential;
- the fact that the advice relates to the exercise of a statutory power or the performance of a statutory duty or function does not preclude privilege attaching to it.

The Tribunal held that Ms Chalmers' advice was clearly legal advice and that her memorandum was created for the sole purpose of giving that advice. The Tribunal held that all legal advice given to staff of HREOC by the Legal Section was treated as confidential. It also held that Ms Chalmers, a solicitor with a current practising certificate, had the necessary degree of independence in that

she was not subject to direction from elsewhere in HREOC with respect to the content of her professional legal advice. Although she forwarded her advice through a superior to whom she was answerable (about whom there was no evidence that she was a lawyer [in fact she was]), it was an inherent feature of in-house lawyers that somewhere along the chain of authority a person who is not a lawyer will, directly or indirectly, hold authority over them. The question of fact for the Tribunal is whether such supervision impacts upon the independence of the advice given.

The Tribunal held, however, that the advice was not provided pursuant to a relationship of solicitor and client (see below). Ms Chalmers had no recollection of any instructions being given to her. The mere fact that advice sought or provided is legal does not make it privileged: it must also be provided in the course of a relationship of solicitor and client, since it is the representation of clients by legal advisers that the privilege is designed to protect. A solicitor and client relationship often arises from an oral or written retainer, but it may also arise from a course of conduct. If the request for advice had been referred to the Legal Section on behalf of Ms Bryce, the Tribunal found it difficult to understand why she had made a decision on the matter without waiting for the advice. That was a strong indication that there was no relationship of solicitor and client in this case. There was no evidence why the notation was placed on the request other than the practice and convention prevailing in HREOC of consulting the Legal Section with respect to any uncertainty about HREOC's legislation. It was not conclusive that Ms Chalmers considered she was acting pursuant to a relationship of solicitor and client: such a relationship could not be brought into existence by a solicitor alone.

Comments

The decision is consistent with the High Court's reasoning in *Waterford* (above) in holding that legal officers in government employment are within the bounds of legal professional privilege, so long as their advice is of an independent character. The decision is one of the first examples in Australia where an 'in-house' lawyer employed by a statutory authority (or a Department of State other than the Attorney-General's Department) has been held to be within the privilege (in *Waterford* only Brennan J would have confined the privilege to Crown Solicitors, Attorneys-General and their officers). Whether their advice is of an independent character or not is, as the Tribunal said, a matter of fact. However, if the Tribunal was also suggesting that only a lawyer with a practising certificate may be within the privilege, it went beyond the majority reasoning on this point in *Waterford*, which required as a minimum only that a legal adviser be admitted to practice. For example, not all Attorney-General's Department lawyers, expressly covered by *Waterford*, are required to have practising certificates. In *Waterford*, only Deane J suggested that the legal adviser might need to hold a current practising certificate, while Dawson J considered that the legal adviser must be qualified to practise law and liable to professional discipline. In view of these remarks it is not possible to be certain what is required to satisfy the criterion of independence in relation to in-house lawyers in departments other than the Attorney-General's Department.

As noted, the Tribunal rejected the claim for legal privilege because it was not satisfied that the advice was provided pursuant to a relationship of solicitor and client. There clearly can be situations where legal advice is provided outside a solicitor/client relationship and thus does not attract legal privilege. In the present case, the evidence before the Tribunal indicating a solicitor/client relationship was incomplete. Conversely, the unexplained fact that Ms Bryce chose to act without waiting for the legal advice tended against the existence of that relationship. Thus, it can be seen that the Tribunal's decision on this issue was based on the particular evidence before it in this case and should not be regarded as establishing new principles. In particular, for example, it is clear that legal advice can be privileged even though it was given without a specific request. This could occur, for example, where a legal adviser volunteered advice on a particular issue during the course of advising or acting generally for the client: in some circumstances the legal adviser could be liable in negligence if the advice had not been volunteered.

Had the original document been subject to legal professional privilege, it may have been possible to claim exemption under s.42(1) for the other two documents without recourse to s.36(1). There is authority for the proposition that legal professional privilege applies to notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him or her to advise the client or conduct litigation on his behalf (see *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246; *Brambles Holdings Ltd v Trade Practices Commission* (1981) 58 FLR 452 at 458-9; *Eager v Australian Government Solicitor* (28 September 1992, Federal Court, Wilcox J, unreported; and *Re Geary and Australian Wool Corporation*). It may be that exemption under s.36(1) would not normally be upheld by the Tribunal in relation to documents of that kind in the same way that it has normally rejected the application of s.36 to confidential information, considering s.45(1) sufficient protection (see *Re Kamminga and the Australian National University* (1992) 15 AAR 297).

[R.F./R.A.]

ADVOCACY FOR THE AGED ASSOCIATION INCORPORATED and DEPARTMENT OF HEALTH, HOUSING AND COMMUNITY SERVICES (No.2) (No. Q91/158)

Decided: 23 October 1992 by Deputy President S.A. Forgie.

Abstract

- *Section 38 — secrecy provisions in legislation — pre-October 1991 form of s.38 applied to s.135A of National Health Act 1953 (NHA) — s.135A operates to prohibit disclosure of reports concerning the affairs of nursing home proprietors, staff and patients — information exempt — amended form of s.38 specified s.135A as a secrecy provision — information also exempt under amended s.38 — s.38(1A) not applicable.*

Issues

Whether certain reports on nursing homes contained information, disclosure of which was prohibited by s.135A of the *NHA* and whether s.38, either as it stood before the amendments of 25 October 1991 or as it had been amended, applied to s.135A.

Whether publication requirements concerning certain information modified the application of s.135A and whether s.38(1A), concerning release under the relevant secrecy provision itself, had any operation.

Facts

The applicant (the Association) sought copies of all current reports prepared by the Standards Monitoring Team of the respondent (DHH & CS) in respect of approved aged care nursing homes in Queensland. The Minister had power under s.45D of the *NHA* to determine standards to be observed in provision of care in approved nursing homes. Standards were determined by the Minister on 11 November 1987. Officers of DHH & CS visited each nursing home to obtain information relevant to monitoring the standards and wrote a report on each of them. The Minister also had power under s.45DA to prepare and publish a statement containing information concerning whether the standards had been met and certain other information. A statement was usually but not always published when a report had been prepared. Published statements are required by s.45DA to be made available for public inspection. Copies were provided to the Association of those statements which had been published, but there were reports for which there was no statement. The Association argued that the Minister was required to publish statements under s.45DA and that s.135A of the *NHA* (a 'secrecy' provision) could not frustrate the clear intention that information be published. DHH & CS argued that s.45DA did not modify the provisions of s.135A. A question relating to the Tribunal's jurisdiction to review DHH & CS's decision had been determined in an earlier interlocutory decision (*Re Advocacy for the Aged Association Incorporated and DCSH*; (1992) 39 *Fol Review* 38).

Decision

The Tribunal held that disclosure of the information in the reports was prohibited under s.135A of the NHA and was therefore exempt under s.38 of the *Fol Act*, whether as it stood before it was amended in October 1991 or after.

Differences between 'reports' and 'statements'

The Tribunal was satisfied that the reports of the officers, to which access was sought, were separate from the statements referred to in s.45DA of the *NHA*. The preparation of reports was reasonably incidental to the performance of the duties of the officers to enter nursing homes to monitor compliance with standards. There were differences between those reports and the statements required to be published. Both included information in relation to compliance with the standards, but 'statements' included additional information. However, it was not a relevant consideration in this case whether or not the Minister was under a duty to exercise his powers and prepare and publish such statements. The question was only whether disclosure of the reports was prohibited under s.38 of the *Fol Act.*

Section 38 — application of unamended and amended forms of s.38 to s.135A of the National Health Act 1953

Section 38 was amended on 25 October 1991, between the date of the request and the Tribunal's substantive decision in October 1992. The Tribunal did not have to decide which form of the provision was applicable to the request, since it held that s.38 would apply in either its amended or unamended forms (compare *Re Green and AOTC* in relation to an amendment favourable to the applicant; (1994) 50 *Fol Review* 21). Section 135A, which prohibits the disclosure of information acquired by an officer respecting the affairs of a third person, came within the wording of the unamended s.38 since it identifies information 'respecting the affairs of another person' (*Commissioner of Taxation v Swiss Aluminium Australia Ltd* (1986) 66 ALR 159; applied to s.130 of the *Health Insurance Act 1973*, which is virtually identical to s.135A of the *NHA*, in *Harrigan v Department of Health* (1986) 6 AAR 184; (1987) 7 *Fol Review* 11). As s.135A operates to prohibit disclosure of information in the documents concerning the affairs of the proprietor of the nursing home, its staff and its patients, the information was exempt under the unamended s.38.

Section 135A of the *NHA* was a provision specified in Schedule 3 of the Act as amended on 25 October 1991 and, under the amended s.38, information which s.135A prohibits from disclosure is exempt. Section 38(1A), also introduced on 25 October 1991, provides that s.38 does not prevent the disclosure of information where its disclosure is not prohibited by the relevant secrecy provision, in this case s.135A. The latter section does allow limited disclosure in certain instances, but they did not apply in this case. Section 45DA of the *NHA* was not relevant as it merely permitted the publication of information in statements and, until those statements were published, disclosure of the information was prohibited under s.135A.

[R.F./R.A.]

OVERSEAS DEVELOPMENTS

UK Open Government: Code of Practice

On 4 April 1994 a new Code of Practice came into effect to provide greater access to government information in the United Kingdom. The Code of Practice is based on the Citizens' Charter themes of increased openness and accountability. The Code includes five commitments:

- to give facts and analysis with major policy decisions;
- to open up internal guidelines about departments' dealings with the public;
- to give reasons with administrative decisions;
- to provide information under the Citizens' Charter about public services, what they cost, targets, performance, complaints and redress;
- to answer requests for information.

The Code covers central government departments and public bodies which are subject to investigation by the Parliamentary Ombudsman.

The Code contains a number of novel features that would delight many Australian Fol officers. The applicant writes in for information, as in Australia, but is not provided with access to information or documents but is