NSW FoI DECISION

District Court

BENNETT v UNIVERSITY OF NEW ENGLAND
(Unreported, NSW District Court, 7 August 1991, Dunford J)

Bennett v UNE was the third FoI case to come before the NSW District Court, and the first dealing with amendment of records.

Mr Bennett had enrolled for and completed a PhD thesis at the University of New England. During the course of the thesis, he had experienced some conflict with his supervisor, Associate Professor Rohde, and had complained to the Ombudsman about the delay in submitting the thesis to examiners. One of the three examiners (Examiner B) made a number of criticisms of the thesis, but said that if other examiners thought it contained sufficient worthwhile results for a PhD, it should be revised for re-examination.

Mr Bennett wrote to the university saying that parts of Examiner B's report contained criticisms of the type made by Associate Professor Rohde. He requested an assurance that Professor Rohde did not collaborate in the preparation of the report of Examiner B. This request was refused.

The university then wrote to Mr Bennett, stating that Associate Professor Rohde took extreme exception to the statement, and Mr Bennett was asked to either provide conclusive evidence supporting his statement, or withdraw it in writing. He withdrew the statement.

Meanwhile, Mr Bennett had complained to the Ombudsman that the PhD Committee had acted improperly in appointing Associate Professor Rohde to supervise the revision of his thesis.

Mr Bennett obtained access to relevant documents under the *Freedom of Information Act* 1989 (NSW). He discovered that there was a handwritten notation on a two-page letter from Associate Professor Rohde to the Deputy Academic Secretary. It said 'Dan, this is the most important letter, you should note that at one stage B. Bennett complained to the Ombudsman that I had conspired with an examiner to fail him'.

Section 39 of the *FoI Act* states:

> A person to whom access to an agency's documents has been given may apply for amendment of the agency's records:
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> (a) if the document contains information concerning the person's personal affairs; and
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> (b) if the information is available for use by the agency in connection with its administrative functions; and
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> (c) if the information is, in the person's opinion, incorrect, incomplete, out of date or misleading.

Mr Bennett applied to have the records amended in accordance with this section, i.e. to have the handwritten notation on the letter deleted, in whole or in part. The application was refused, and his application for internal review was unsuccessful. He applied to the District Court under s.53 of the *FoI Act*, and the case came before Dunford J.

Jurisdiction

Dunford J first addressed the question of jurisdiction: whether the Act applied to the university and whether it was therefore an 'agency' under the Act. Section 6 of the Act defines 'agency' to include a public authority. This is in turn defined in s.7 to include 'a body, whether incorporated or unincorporated, established for a public purpose by or under the provisions of a legislative instrument' other than certain exceptions.

The university was incorporated by the *University of New England Act* 1989, replacing the *University of New England Act* 1953. Dunford J ruled that the purposes outlined in the Act, including 'the provision of educational facilities . . . and the preservation, extension and dissemination of knowledge' were public purposes. He was therefore satisfied that the Act applied to the university.

Nature of the appeal

Dunford J considered the nature of an appeal under the Act, and examined the scheme of the legislation. The university had argued that this was an appeal 'in the strict sense' so that the issue was whether or not there was material before Professor Field (who conducted the internal review) to justify his determination. It argued that if there was, the appeal should be dismissed, even if the judge in the present case was minded on an independent assessment to come to a different conclusion.

Referring to *Turnbull v The NSW Medical Board* (1976) 2 NSWLR 281, 297, 298, quoted in *Clark and Walker Pty Ltd v The Department of Industrial Relations* (1985) 3 NSWLR 685, 691, Dunford J said that there are various forms of appeal. As a general rule, an appeal from an administrative body to a court will usually be an appeal by way of a hearing *de novo* (*Verghelyi v The Council of the Law Society of NSW* (1989) 17 NSWLR 669, 673).

Dunford J noted that s.55 of the *FoI Act* refers to an appeal 'by way of a new hearing' and that fresh evidence, and evidence in addition to, or in substitution for, the evidence on which the determination was based, may be given on appeal. He also noted that the appeal was from an administrative body to the court. These factors led him to conclude that this was an appeal by way of a complete re-hearing and he was in no way bound to consider the correctness of the original determinations under the Act. This view was reinforced by the provisions of s.55(2) which provide that the District Court should have all the functions and discretions which an agency has in respect of the matter the subject of the appeal. The provision was similar to s.43 of the Federal *Administrative Appeals Act* as considered in *Fletcher v The Federal Commissioner of Taxation* 88 ATC 4834.

The university sought to justify the notation complained of by reference to the cumulative effect of the correspondence between the parties. It said that the notation provided evidence that at one time, Mr Bennett believed that Associate Professor Rohde had conspired with an examiner. However, Dunford J remarked that the notation did not allege Mr Bennett *believed* a certain state of affairs but that he had *complained to the Ombudsman* about a certain state of affairs. He said there was a 'world of difference' between

believing something and keeping it to oneself and complaining to a public official of the same matter.

Was the statement that 'Mr Bennett complained to the Ombudsman that Professor Rohde had conspired with an examiner to fail him' incorrect or misleading?

Mr Bennett had used the term 'corroboration' in reference to dealings between Associate Professor Rohde and Examiner B. Dunford J held that this was quite different from 'conspiracy'. In addition, there was nothing in correspondence or elsewhere to suggest a conspiracy to fail Mr Bennett.

Referring to *Re Leverett v Australian Telecommunications Commission* 8 ALD N135 and *World Series Cricket v Parrish* (1977) 1 ATPR par 40-040, Dunford J stated that 'incorrect' involves anything that is not in accordance with fact or is erroneous or inaccurate, and that 'misleading' includes giving a wrong impression. He was satisfied that the notation or statement was both incorrect and misleading.

In case the matter went further, he stated that having regard to the correspondence between the parties, it was not possible for the decision maker to have been satisfied that the records were not incomplete or misleading. He noted that there was again a 'world of difference' between suggesting or alleging improper corroboration on a thesis, and working together or collaboration or conspiracy to fail someone in a thesis.

Order made

Dunford J considered that it was not appropriate to order an amendment. The original note had been Associate Professor Rohde's, and any amendment made by him (the judge) would obviously not be by the same author. Instead, he ordered the deletion of the last ten words 'that I had conspired with an examiner to fail him'. The note then read 'Dan, this is the most important letter, you should note that at one stage B. Bennett complained to the Ombudsman'.

The determination was disallowed and the university was ordered to pay Mr Bennett's costs.

[A.H.]

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

PERTON and DEPARTMENT OF PREMIER AND CABINET (No. 91/034691)

Decid d: 15 April 1992 by Judge Smith, President.

Request for access to documents relating to consultant services for study on public attitudes — claims for exemption under s.30(1).

The applicant, then an Opposition MP, had requested access to documents relating to consultant services provided by Australian Community Research to conduct a study on public attitudes to financial and asset management under the Cabinet's Public Attitudes Monitoring Program. The only document in dispute was the survey report which was claimed to be exempt under s.30. This report had been commissioned with a view to its use by the Cabinet as part of its budget process and had been discussed by Cabinet.

Section 30 provides that:

> 30. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under the Act —
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> (a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers, or an officer and a Minister, in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the Government; and
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> (b) would be contrary to the public interest.
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> . . .
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> (3) This section does not apply to a document by reason only of purely factual material contained in the document.

The Tribunal first considered whether the document fell within para (1)(a).

It concluded that the document did not appear to express any opinion, contain any advice (as distinct from information) or make any recommendation. It was simply there to assist the Cabinet in its decision-making processes and was predecisional in that it did not represent any concluded decision although it was not a draft or provisional document. The furnishing of the report by the ACT (being a 'consultant') to the respondent did, however, in its view, constitute a 'consultation', or at least a step along the way in the consultation between ACR and the respondent and was clearly submitted for the purpose of the deliberative processes of the Cabinet. The Tribunal therefore held that the release of the report would disclose matter being consultation that has taken place between officers (that is to say ACR) and the respondent and the Cabinet, for the purposes of the deliberative processes involved in the functions of the Government.

Insofar as the public interest issue was concerned, the Tribunal applied the criteria formulated in *Re Howard and Treasury of the Commonwealth* (1985) 3 AAR 169, 177-8, which were cited with approval in its earlier decision in *Re Tanner and Department of Industry, Technology and Resources* (1987) 2 VAR 65. These criteria are as follows:

1. The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed.
2. Disclosure of communications made in the course of the development and consequent promulgation of policy tends not to be in the public interest.
3. Disclosure which will inhibit frankness and candour in future predecisional communications is likely to be contrary to the public interest.
4. Disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest.
5. Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision maker and may prejudice the integrity of the decision-making process.

Applying these criteria the Tribunal noted that while it could readily be seen that the persons to whom the communication was made