

VICTORIAN FoI DECISION

Administrative Appeals Tribunal

BALE and LA TROBE UNIVERSITY (No. 1994/022792)

Decided: 13 June 1995 by Presiding Member Coghlan.

Sections 30 (internal working documents) — 35 (material obtained in confidence) — 50(4) (public interest override).

Ms Bale had been a student at La Trobe University from 1983 until 1992, and during her course has suffered a nervous breakdown. During that time she made telephone calls and sent letters to the homes of various university staff. In 1992 she had not responded to a requirement to show cause why she should be permitted to re-enrol, and a decision had been made not to permit re-enrolment. Ms Bale then sought access to all written records and reports about her held by the School of Humanities and the English Department. She was provided with all documents except two found to be exempt under s.35(1)(b). After receiving that response, Ms Bale further pursued contact with various university members making telephone calls to their homes. During 1993 Ms Bale had also contacted the Ombudsman after the University revoked any licence she had, or claimed to have, to be in or on the premises of the University.

Ms Bale was concerned that there were several reports in the possession of the University that had not been disclosed, and on investigation the Ombudsman did not find them. Ms Bale then applied to the AAT for review of further documents that had been held to be exempt that had evolved from and pursuant to her earlier application.

Fourteen documents were claimed to be exempt under ss.30 and 35. The documents contained handwritten notes, memoranda and letters between members of the University. All except one handwritten note were held to fall under the exemptions claimed. In relation to those identified as working documents, the Tribunal held that the public interest in protecting the free flow of advice and recommendation within an agency outweighed the public interest in disclosure. Ms Bale had relied on the right of individuals to know and answer allegations.

In relation to those documents claimed to be exempt under s.35, the Tribunal held that material communicated in confidence within the University would be contrary to the public interest to disclose if it would be reasonably likely to impair the ability the agency to obtain the information in the future. While the Tribu-

nal accepted Ms Bale's argument that staff in the future would continue to report harassment to the appropriate person notwithstanding its disclosure in this instance, it held that the University would find itself in a position where it could not carry out its responsibilities to staff, such as health and safety, if it became known that the University could not guarantee confidentiality.

In considering the public interest override in s.50(4) the Tribunal assessed whether there was a public interest that *require[d]* (Tribunal's emphasis) disclosure. Ms Bale relied on the objectives of the *FoI Act* and the line of cases since *Kioa v West* (1985) CLR 550 requiring that a person be given an opportunity to answer allegations against her. The Tribunal held that if Ms Bale had been charged with a criminal offence or a University disciplinary offence, then fairness may have dictated the provision of more detailed information to her. However, it held that in the context of this case and the issuing of a warning off notice which had been issued after she had been a student, this was not a matter to which the principles of natural justice applied.

[K.R.]

NEW SOUTH WALES FoI DECISION

Court of Appeal

BOTANY COUNCIL v THE OMBUDSMAN (CA40422/95)

Decided: 2 November 1995 by Kirby P, Sheller and Powell JJA (unreported).

Abstract

Sections 12, 13 and 26 Ombudsman Act 1974 — powers of Ombudsman — whether powers of review restricted to terms of FoI application — s.52 Freedom of Information Act 1989 — local government: FoI application — unreasonable conduct in

relation to application to amend records — ss.35A and 35B Ombudsman Act — construction of privative clause.

Held

The Court confirmed the wide powers of Ombudsman in relation to administrative conduct. The Ombudsman's decision of unreasonable conduct by the Botany Council was considered valid but construction of a privative clause in the Ombudsman Act was not decided as it was unnecessary to do so.

The Court of Appeal upheld a decision by Spender AJ in the Administrative Law Division of the NSW Supreme Court that dismissed a challenge by Botany Council against the actions of the Ombudsman in the way an FoI complaint was dealt with under both the *Ombudsman Act* and the *Freedom of Information Act*.

Spender AJ held a report by the Ombudsman was lawful and concluded the relief sought by Botany Council conflicted with the privative provisions of ss.35A and 35B of the *Ombudsman Act*.