for over-classification but not for under-classification. Citing the 'loss of public confidence' when information is withheld 'for any other reason than true military security', it recommended: procedures for independent review of complaints about over-classification; mandatory marking of each classified document with the future date or event after which it is to be reviewed or automatically downgraded or declassified; establishment of a date by which the Department of Defense would declassify classified material accumulating in agency files, with a 'minimum of exceptions', and disciplinary action against those who over-classify.

Seitz Task Force — 1970

The Department of Defense Science Board's Task Force on Secrecy was prompted by Department of Defense concerns over the effectiveness of its security measures. The Task Force, chaired by Dr Frederick Seitz, found that Department of Defense's classification system required 'major surgery' and noted negative aspects of classification such as its cost, 'uncertainty in the public mind on policy issues', and impediments to the free flow of information. Chief among its conclusions was that 'perhaps 90 per cent' of all classification of technical and scientific information could be eliminated. The 1 July 1970 report of the Task Force included the following recommendations: a maximum duration of five years for classification of scientific and technological information, with few exceptions; overhauling classification guides by considering the benefits to technological development that would result from greater public access to information; and review and declassification of classified Department of Defense materials within two years.

Stilwell Commission — 1985

Established by Secretary of Defense Caspar Weinberger to identify 'systemic vulnerabilities', the Commission to Review Department of Defense Security Policies and Practices found that 'little scrutiny' was given decisions to classify. The Commission, chaired by Gen. Richard Stilwell (Ret.), concluded that shortcomings in the classification management arena were 'primarily a matter of inadequate implementation of existing policy, rather than a matter of deficient policy'. Among the recommendations included in its report, issued on 19 November 1985, were the following: banning the retention of classified documents for more than five years unless the documents are 'permanently valuable;' further reduction in the number of original classifiers; a one time review and revalidation of all Department of Defense Special Access Programs; minimum security standards for all Department of Defense Special Access Programs; and placement of security responsibilities within a single staff element of Department of Defense.

Joint Security Commission — 1994

Tasked by Secretary of Defense William Perry and Director of Central Intelligence R. James Woolsey with developing a new approach to security, the Joint Security Commission engaged in a nine-month review. Finding that the system had reached 'unacceptable levels of inefficiency, inequity, and cost,' the Commission's February 1994 report, Redefining Security, included the following recommendations: a 'one level classification system with two degrees of [physical] protection;' establishing a Joint Security Executive Committee to oversee the development of policies in its new system; use of a 'risk management' philosophy when developing new security policies; and a single, consolidated policy and set of security standards for special access programs and sensitive compartmented information.

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VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

CITY PARKING PROPRIETARY LTD and CITY OF MELBOURNE (1996) 10 VAR 170

Decided: 23 April 1996 by Deputy President MacNamara.

Sections 30 (internal working documents) — 32 (legal professional privilege) — 34 (business affairs) — 36(2)(b) (Council deliberations) — 38A(1)(d) (closed Council meeting) — 50(4) (public interest override).

Background

This appeal concerned a building at 406 Bourke Street, Melbourne which was one of the city's first multi-storey carparks. The City of Melbourne leased the property to City Parking Pty Ltd (CP) in 1958 for a term of 60 years. In March 1993, issues arose in relation to the amount of land tax that was payable with respect to the building. These issues were litigated in the Supreme Court and there was a possibility of further litigation.

In May 1993, the City of Melbourne approached CP to discuss the possibility of CP either purchasing the property or surrendering its lease. The sale negotiations with CP proved to be unsuccessful, and the City of Melbourne eventually sold the property to a rival carpark operator.

Thus, whilst the sale negotiations were a thing of the past, the land tax issues were very much of present relevance.

Application

On 30 August 1994, CP applied for all documents relating to repairs at the premises since 1992, all reports prepared or received in relation to the structural condition of the premises, and all correspondence, memoranda, reports, and notes relating to the sale or proposed sale of the premises. In total, 158 documents were identified as falling within the terms of this request and, at the hearing, 100 documents or parts of documents remained in dispute.

Legal issu s

Before dealing with each document, the Tribunal discussed the relevant issues.

Commercial exemptions

The Tribunal discussed s.34 and how sub-section(1) creates two exemptions as the 'or' is to be read disjunctively (*Gill v Department of Industry, Technology & Resources* [1987] VR 681). The Tribunal also followed *Croom's* case which stated that, for a document to be exempt under s.34(1)(a), it was necessary to show that the information impinged in some way upon the conduct or operations of the undertaking itself. When considering whether information is a 'trade secret', the following matters should be considered: whether the information is of a technical character, the extent to which the information is known outside of the business, the extent to which the information is known by employees of the business, measures taken by the owner to guard secrecy, the value of the information, the effort and money spent in developing the information, the ease by which a competitor could duplicate the information. The Tribunal adopted the above considerations from Kyrou (para. 2357/1), *Bankers Trust v Department of Transport* (1989) 3 VAR 33, *Organon v Department of Community Services & Health* (1987) 13 ALD 588.

When considering sub-s.(4), the Tribunal held that an agency can be engaged in trade or commerce even if the activity was insignificant and incidental to its other functions (*Marple v Department of Agriculture* (1995) 9 VAR 29; *O'Bryan v Smolonogov* (1983) 53 ALR 107).

The Tribunal discussed O'Bryan J's approach to 'disadvantage' in *Croom*. In that case his Honour stated that disadvantage had to be of a financial rather than of a tactical kind. The Tribunal found this approach curious, as a tactical gain in that case would have had financial consequences either of an advantageous or disadvantageous kind. The Tribunal decided that the approach of O'Bryan J was closely linked to its context, as in that case, the documents could have been discovered using normal court procedure, so the decision under FoI was not about whether the documents would ultimately be disclosed, but at what stage in the proceedings they would be disclosed.

Agency procedures

The City of Melbourne sought to rely on s.36(2)(b) of the Act. The Tribunal was not referred to any authorities on this exemption and so was guided only by the text of the sub-section. In the Tribunal's view, this exemption only protects instructions which lay down general practices and procedures. An instruction to one officer from another in relation to a particular matter would not be protected unless its disclosure would reveal some generalised system of procedures which have been followed in the particular case.

Internal working documents

The Tribunal relied on *Brog's* case to find that a consultant to an agency can be regarded as an officer of that agency for the purposes of the Act. The City of Melbourne submitted that there was a line of authority in the decisions of the Tribunal to the effect that the release of draft or preliminary documents was generally contrary to the public interest. The Tribunal confirmed that these cases do not create a presumption against the release of draft documents which are not part of the deliberative process of an agency. Each draft must be considered in its own context.

The Tribunal stated that the recording of intentions or a state of mind was not a matter of opinion or advice: it was as much a matter of fact as the state of one's digestion (*Edgington v Fitzmaurice* (1885) 29 Ch D 459).

The Tribunal stated that when one officer submits a draft letter to another, it is an expression of opinion, recommendation or advice as to the appropriateness of the proposed draft. The Tribunal went on to state that it was contrary to the public interest to disclose documents which, on due consideration, the proposed signatory had regarded as wholly inappropriate for dispatch or inappropriate for dispatch save in an altered form.

Legal professional privilege

The Tribunal adopted the test set out by Dawson J in *Baker v Campbell* (1983) 153 CLR 52. It also quoted the comments of Kyrou at para. 2345 (release 45) about how sometimes a document can be broken into privileged and non-privileged parts. It also quoted *Waterford v The Commonwealth* which stated that privileged material should be deleted and access granted to the remainder.

Personal affairs

The Tribunal accepted that a *curriculum vitae* was a private or personal matter, however, details on a *curriculum vitae* which were a matter of the public record were not exempt (Kyrou, para. 2351, release 41; *Blum's* case (1988) 3 VAR 69). This exemption applies only if release would be unreasonable which requires the balancing process set out in *Page v MTA* (1988) 2 VAR 243.

The documents

Sections 34(1)(a), 34(4) and 36(2)(b)

Many documents were claimed to be exempt under all of these sub-sections. The Tribunal found that the evidence clearly established that the City of Melbourne was engaged in trade or commerce. It found that the basis for exemptions under s.34(1)(a) was simply lacking as the information did not impinge on the business undertakings involved. Section 36(2)(b) was routinely claimed, but the Tribunal found that the use of it was totally inappropriate, as this was a particular case, and not a generalised set of instructions.

The Tribunal, though, upheld the exemption under s.34(4) when the documents related to the land tax issues. It held that it was obvious that release would be financially disadvantageous for the City unless it was certain that the documents would in any event come into the possession of CP. This was because of the ongoing nature of the dispute being decided by the Land Tax Commissioner. The release of documents showing the Council's strategy with respect to the land tax issues would financially disadvantage it with respect to its trade and commerce in connection with its property portfolio.

The Tribunal did not uphold the claim under s.34(4) when the documents related to the sale and not the tax issues. It concluded that this claim was tenuous as the sale had already taken place. The Tribunal also concluded that the release of such documents would not disclose any special methodology or approach that was confidential to the City of Melbourne.

Section 30(1)

Some documents were claimed to be exempt under s.30(1). The Tribunal accepted that a consultant can be an officer, and had no trouble making out s.30(1)(a) but concluded that the disclosure of a number of the internal

working documents which related to the sale of the property (which was a concluded issue) would not be contrary to the public interest.

Other internal working documents relating to the land tax issues were claimed to be exempt under s.30. These documents were said by the Tribunal to form part of the City of Melbourne's deliberative processes, and were held to satisfy the public interest test of non-disclosure under s.30(1)(b). Though the Tribunal found that release would not inhibit frankness and candour in the decision-making process, on-going confidentiality was essential as the issues were part of a 'battle that is yet undecided'. Therefore it was in the public interest to uphold the exemption.

The Tribunal also found that a document that merely summarises events, or merely records the fact of a conversation, does not contain matter in the nature of opinion, advice or recommendation.

Section 32

Many documents were said to be the subject of legal professional privilege, as their subject matter contained advice from Mallesons. The Tribunal applied the sole purpose test. It went through each document for which the exemption was claimed, line by line, paragraph by paragraph, and upheld the exemption for some sentences or paragraphs but ordered the release of other parts of the documents as not containing advice to which the privilege attached.

The Tribunal held that legal advice was properly sought as to the correct form of draft letters in major transactions and that when a solicitor either furnishes a draft or comments on a draft, he or she is providing legal advice.

The Tribunal followed Kyrou with regard to whether a bill of costs can attract the exemption. The itemised account clearly indicated particular steps taken at the request of the respondent and matters on which the respondent received advice. Therefore it was exempt under s.32.

The Tribunal found that a document that recorded a conversation requesting that a conference with Mallesons be arranged to enable a client to receive legal advice on a particular subject matter was exempt under s.32. The Tribunal also found that the minutes of a meeting held with Mallesons was exempt under that section.

The Tribunal held that a summary of legal advice obtained may be privileged even if that summary is prepared by the client. Where, however, a document is more than a summary and contains expressions of the client's knowledge and belief, such expressions are not privileged.

The Tribunal also held that the following documents were not privileged:

- a handwritten note requesting Mallesons to take a particular (non-litigious) step within a limited time frame;
- a letter seeking a comment from Mallesons as to whether a draft set of minutes was an accurate record of a meeting that had taken place;
- a document that recorded the fact that a number of consultations with Mallesons had taken place (but did not record any advice that had been given);
- a letter that indicated legal advice was available (but did not indicate the substance of that advice);
- a letter that indicated a solicitor had been telephoned and been asked to return the call;
- a document that simply recorded a letter had been received from a law firm;
- a document that indicated notices were to be issued, where those notices were subsequently issued and this fact was publicly known; and
- a document that indicated notices had been issued, where this fact was publicly known.

Section 38A(1)(d)

The document in question was dated before the closed meeting, and so CP argued, relying on *Mildenhall No. 1*, it was inherently incapable of disclosing the meeting's deliberations and decision. The Tribunal found *Mildenhall* equivocal on the point. It found that the report to the closed meeting clearly indicated what the meeting was deliberating on, viz the sale of 406 Bourke Street, however that 'disclosed' nothing, as the fact that it was being deliberated on was already known to CP. The fact that the sale has been effected was now a matter of the public record. Accordingly, the Tribunal did not uphold the exemption in relation to that document.

In relation to another document, the Tribunal upheld the exemption under this section, even though the document existed before the meeting, as it discussed the very issues that the Council was deliberating on, and release would have disclosed not merely a subject matter of debate, but also the various options considered. Another document was held to be exempt under this section on the basis that its release would disclose the deliberations of a closed meting 'in a more extensive way than merely disclosing the text of an agenda item'.

Section 34(1)

Offers to purchase the property were claimed to be exempt under s.34(1)(a) and (b). In some cases, the offers came via an Estate Agent. The Tribunal found that there was no reason to suggest that s.34(1) exemptions have any less application when the information was acquired by the respondent through the agency of a third party, rather than directly from the business undertaking itself. The prices and terms on which a real estate investor would be prepared to purchase a CBD property were both matters of a business, commercial, or financial nature and were possessed of the necessary sensitivity to meet the requirements of s.34(1)(a).

The Tribunal found that an offer to purchase was not exempt under s.34(1)(a) where both the agent and the principal were unnamed.

The Tribunal also held that a report that dealt with the physical deterioration of a building was information of a 'technical or scientific' nature as opposed to information of a business, commercial or financial character. As such, the report was held not to be exempt under s.34(1)(a).

Finally, the Tribunal held that a valuation report was not exempt under s.34(1)(b), rejecting the argument that disclosure would be likely to cause disadvantage to the valuer because it might be sued by a third party who might rely on the valuation to its detriment.

Section 36(2)(b)

While s.36(2)(b) was held to be totally irrelevant to most of the documents for which it was claimed, the Tribunal did discuss its applicability in relation to one document in detail. This was a set of handwritten working papers left behind by a consultant

who was seconded to instil a more commercial way of doing business in the property division of the City of Melbourne. The City of Melbourne argued that these working papers were to be regarded as guides to his successors, hence they fall within the exemption, because they are intended to guide those who undertake transactions of that sort in the future.

The Tribunal discussed the difference between 'following' as a precedent something which was done as an individual transaction and following a precedent from a published set of precedents or from an established set of precedents in an organisation like a large law firm which were retrieved from a computer. The Tribunal held that something along the latter lines employed by a municipal council might qualify for the exemption but something like the former could not because the fact remained that those documents were brought into existence to effect a particular transaction.

Section 33

The Tribunal found that a document that related to a person's employment was exempt under s.33. But the Tribunal found that to disclose the particulars of the qualifications of the directors of a company would not be unreasonable because such information was 'widely disseminated for the purpose of attracting custom'.

Public interest — s.50(4)

CP put forward 12 grounds of public interest for the Tribunal to consider. In summary CP's view was that the City of Melbourne did not just play hard in relation to the transaction, but played unfairly. It contended that there was a public interest in transparency of business of public instrumentalities so the public can be satisfied that those involved behaved with propriety.

The Tribunal relied on the seminal analysis in *DPP v Smith*. The Tribunal concluded that CP's particular grievances were those of an individual not of the public as a whole. The Tribunal accepted that if it were shown that the City conducted dishonourably in a major property transaction, it would be in the public interest that the impropriety be exposed. However, the Tribunal examined the evidence, and to the best of its understanding, it did not disclose any impropriety. It would be disadvantageous for the ratepayers to have the City hamstrung in property transactions by transparency, when other players could keep their cards close to their chests. The City's duty was to obtain the best possible return for the benefit of its ratepayers. Therefore commercial confidentiality needed to be maintained. Accordingly, the Tribunal refused to invoke s.50(4) to override the remaining exemptions.

[C.M.]

THWAITES and DEPARTMENT OF HEALTH & COMMUNITY SERVICES (DH&CS) (No. 95/025696)

Decided: 4 April 1996 by Deputy President Macnamara.
Sections 28(1)(ba) (briefing for Cabinet) — 30 (internal working documents) — 34 (business affairs) — 50(4) (public interest override).

The application

On 26 June 1995, Mr Thwaites, MP, sought access to 'All documents relating to the enquiry into the Metropolitan Ambulance Service by Mr Pat Stone including any report prepared, a contract or arrangements made with Mr Stone, and records of any fees paid to Mr Stone'. The DH&CS initially claimed that all relevant documents were exempt, yet subsequently released some documents either as a whole or in part. At the hearing, six documents remained in dispute.

The decision

The Tribunal ordered the release of all the documents in dispute.

The reasons

The Tribunal made some observations about the scope of ss.30 and 34 before considering the status of the documents in dispute.

Section 30

The Tribunal accepted the *Howard* guidelines ((1985) 3 AAR 169) as having much force in deciding whether the release of an internal working document would be contrary to the public interest, though it expressed scepticism on the issue of whether candour and frankness within Departments would diminish if information was released under the Act. According to the Tribunal, the argument that the release of an internal working document may create unnecessary confusion and debate provides 'a much more convincing basis' for the conclusion that the 'disclosure of communications made in the course of the development and subsequent promulgation of policy' tends not to be in the public interest.

The Tribunal accepted the deliberative processes of an agency as being 'the creative debate which comprises part of the Government decision making process' (*Coleman's* Case (1985) 1 VAR 9) and that a working document ceases to be exempt once it has been adopted by an agency as the sole basis for action.

Section 34(1)(a)

The Tribunal considered *Thwaites v Department of Treasury,* unreported, 11 April 1994 and *Ventura Motors* (1988) 2 VAR 277 which both held that consultancy fees were not exempt under s.34(1)(a), but decided the correct approach to s.34(1)(a) was set out in *Thwaites v Department of Health & Community Services,* unreported, 22 August 1994. According to the Tribunal, the fees charged by a consultant may be characterised as information of a financial nature acquired by an agency from a business, commercial or financial undertaking in circumstances where no element of 'compromise' or 'settlement of claims' between the agency and the undertaking is present.

The Tribunal also endorsed the view that material claimed to be exempt under s.34(1) ought to be released if the undertaking does not object to the release (*Thwaites v Department of Health & Community Services,* unreported, 22 August 1994).

Documents containing fees

Parts of documents which dealt with the levels of fees were claimed to be exempt under ss.34(1) and 34(4). The Tribunal held that PacStone (Mr Stone's company) was a commercial undertaking and that the information was of a sensitive nature that related to the conduct of PacStone's business operations. Accordingly, the Tribunal held that these documents were exempt under s.34(1)(a).

Although the documents were held to be exempt under s.34(1)(a), the Tribunal would not have held them to be exempt under s.34(1)(b) as competitors would be well aware of the scope of tasks which successful consultants perform, and so could infer the charging practices of tenderers from the total amount paid. Therefore, the argument that disclo-

sure would be likely to expose Pacstone to disadvantage was rejected.

Similarly, the Tribunal would not have held the documents to be exempt under s.34(4) as, having regard to the extensive publication of tender fees in the Annual Report, it was difficult to accept that the release of information relating to fees for this single consultancy could seriously disadvantage the agency in its acquisition of consultancy services in the future.

The consultancy agreement

The standard form consultancy agreement was claimed to be exempt under ss.30 and 28(1)(ba). This document had a project brief annexed to it. The Tribunal found that the exemption under s.30 could not be sustained as the project brief contained directives *seeking to elicit* opinion and advice, rather than *containing* or *revealing* opinion or advice.

The Tribunal noted that documents held to be exempt under s.28(1)(ba) in previous cases have had a heading specifically stating their purpose as being a briefing of the relevant Minister in anticipation of discussion in Cabinet. The Tribunal did not claim that such a heading was essential, but pointed out that the exemption claimed was not in this instance a clear case. The only evidence that the document had gone before Cabinet was hearsay.

Even if the Tribunal had accepted this evidence, it would not have upheld the exemption. The Tribunal found that Ministers may seek briefings on all sorts of matters of importance. The mere fact that such a matter is ultimately considered by Cabinet did not *ex post facto* clothe such a briefing with an exemption under s.28(1)(ba). The mere knowledge that the issue might arise in Cabinet at some stage in the future was not enough: the document must have been prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.

The report

Mr Stone's report was claimed to be exempt under ss.30(1) and 28(1)(ba). The Tribunal found that the report was prepared to inform the Minister but was not prepared to find that the report was to inform the Minister with respect to a matter 'to be considered by the Cabinet'. There was no evidence that the report was prepared in immediate contemplation of a discussion in Cabinet. Accordingly, the document was held not to be exempt under s.28(1)(ba). The Tribunal also held that the report was not exempt under s.30, rejecting the argument that disclosure would be contrary to the public interest. According to the Tribunal, the management of the Metropolitan Ambulance Service is a 'legitimate and very important matter of public debate', and disclosure of the report would not 'raise public alarm'.

Section 50(4)

The Tribunal considered whether the otherwise exempt documents should be released pursuant to the public interest override found in s.50(4).

The Tribunal stated that it was guided by the approach in *Thwaites v Department of Health & Community Services,* unreported, 22 August 1994 which held that there was a public interest in accountable government, and in the amount of money spent out of public funds. The Tribunal found that, while there was abundant evidence of controversy relating to the ambulance service itself, there was no evidence of controversy relating to the cost of this particular review. The Tribunal noted, however, that the level of public controversy was not determinative of the public interest. In this case, due to time constraints, the contract for the consultancy was awarded without any process of tendering or seeking of expressions of interest. This meant that the contract was awarded in a manner inconsistent with the Government's own contracting out guidelines, which increased the public interest in the disclosure of the commercial terms of the consultancy.

For these reasons, the Tribunal decided that all the otherwise exempt documents should be released pursuant to the public interest override.

Attack on the AAT

The Tribunal did not feel it necessary to deal with the applicant's submission that recent decisions in the High Court which have discovered an implied freedom of speech in the Constitution exposed the fallacy of the Tribunal's approach to the interpretation of s.50(4) in a number of recent decisions.

[C.M.]

MILDENHALL and MELBOURNE CITY LINK AUTHORITY (No. 95/027122)

D cid d: 15 March 1996 by Presiding Member Coghlan.
Lack of jurisdiction.

Application

On 13 April 1995, Mr Mildenhall, MP, wrote to the Department of Transport requesting access to 'the project's brief to the two tendering consortia for the City Link Project'. After discussions between the Department and the Melbourne City Link Authority (MCLA), it was decided that the documents related more closely to the MCLA and the request was transferred to the MCLA under s.18 of the Act.

On 8 May the MCLA acknowledged receipt of the request and on 13 June refused access to all the documents it had identified as relevant to the request. This decision was upheld on internal review on 11 July.

Mildenhall applied to the Tribunal for review of the internal review decision, but on his application mistakenly stated that the decision was made by the Public Transport Corporation (PTC).

Background to this h aring

The Tribunal notified the PTC about a Preliminary Conference to be held on 20 October 1995 and they wrote back advising that they had not made the relevant decision. The PTC also advised the applicant of this. Mildenhall did not contact the Tribunal as he assumed that the Tribunal had been notified that the MCLA was the correct respondent, and if necessary the matter could be clarified at the Directions Hearing. The Tribunal sent out notices for hearing to Mildenhall and the PTC.

Mildenhall wrote to the MCLA on 23 October requesting consent to amend the application. The MCLA refused, stating that the time limit under s.52 had expired. At the Directions Hearing (of which the MCLA had not been notified) held on 24 November 1995, the Tribunal made an order that the respondent in the application was the MCLA and that the matter be listed for further consideration of the issue of whether the application had been made out of time.

Issues

The Tribunal stated that a number of difficult issues were raised by the

naming of the wrong respondent in the application for review. On its face, the original application simply could not be satisfied because the PTC had not made the relevant decision denying access to the documents in dispute. According to the Tribunal, the following issues needed to be considered:

Did s.32 of the *Administrative Appeals Tribunal Act 1984* operate to cure the problem?

Did the Tribunal's order of 24 November 1995 have the effect of curing it?

Can the application be amended so that the application for review is within time?

The operation of s.32(1) of the AAT Act

The Tribunal addressed the question of whether s.32(1) operated to cure a defect in the identity of the respondent. The competing assertions were said to be:

(i) from the outset, because the legislation creates the parties, a misdescription of the respondent is of no consequence; and

(ii) the legislation states who the appropriate parties should be, and a failure to correctly name them has consequences.

The Tribunal found that while the memorandum referred to s.32 as 'identifying the parties', that description in itself is not sufficient to create parties as of right. After looking at the structure of the Act as a whole, and the context of the section, the Tribunal decided that s.32(1) states who the parties should be and that subsection (1)(b) does not go further to create a party as of right. Otherwise, describing a respondent as 'Humpty Dumpty' would be a proper application; there is nothing in the legislation that requires the Tribunal to work out the identity of the correct respondent or to ensure that the respondent is correctly identified or named.

Does the Tribunal have power to amend orders it has already made?

The first order the Tribunal made at the Directions Hearing on 24 November 1995 was: 'The respondent in this application is the MCLA'.

The Tribunal decided that, for a Tribunal order to be final and not capable of amendment, the order needed to be expressed in a manner that makes it clear that nothing is left to be done. Here, the orders made, clearly indicated that they were not intended to be final with respect to curing the jurisdictional issue, and that it was an issue that needed to be fully argued by both parties affected and not decided ex parte. The Tribunal made provision for the consideration of objections. Accordingly, the Tribunal concluded that its previous order was not final and was capable of being amended.

Amendment of the application

The Tribunal considered the circumstances in which an amendment may be made to an application which has the effect of substituting a party so that the proceeding shall be taken to have commenced on the day the unamended proceeding commenced.

The Tribunal approached this question by referring to the related question of substituting a party under r.36.01(4) of the Supreme Court Rules. Under r.36.01(4), a mistake of name can be corrected even when the effect is to substitute another party. This order can be made notwithstanding the expiry of the limitations period.

In *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231, the High Court noted that an order may be made under r.36.01(4) only if:

(i) there has been a mistake;

(ii) the mistake was 'in the name of a party'; and

(iii) there is not incurable prejudice to the other party.

McHugh J stated that a mistake 'in the name of a party' had occurred when 'the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else'.

The Tribunal expressly adopted the Courts' approach to substitution. It found that the PTC was a completely separate entity from the MCLA, and the names are so different that they could not be confused. The Tribunal was therefore of the view that this was not the type of mistake in name where the Courts would substitute the correct party.

The Tribunal mentioned the prejudice element of the test for the sake of completeness and found that the MCLA could not have been prejudiced by an order substituting its name for the PTC, as a different applicant could apply to the MCLA for access to the same material afresh.

Tribunal procedure

The Tribunal is governed by s.35 of the *AAT Act.* The Tribunal decided that while the Tribunal's procedure is expressed to be within its discretion and proceedings are to be conducted with little formality, it is subject to specific provisions. Where there is a specific time limit and there is no discretion to extend that time period, the Tribunal cannot just adopt a convenient procedure to accommodate an unfortunate situation, which the Tribunal noted was brought about by the applicant and which could have been remedied by the applicant within time.

The decision

For the reasons set out above, the application was dismissed for lack of jurisdiction.

Commentary

The Tribunal in this case expressly adopted the High Court's reasoning in the *Grand Shipping* case. It seems, however, that the Tribunal may have misapplied the test in *Grand Shipping.* The High Court did not allow a change of name in that case as the plaintiff always had the intention of suing the 'owner' and not the 'carrier' of the vessel. The Court adopted an objective facts test — who did the plaintiff intend to sue? Here, applying the objective facts test, the applicant intended that the party to the proceedings would be the 'decision-maker'. The applicant made a mistake of name in the description of the decision-maker. This situation clearly fits into the test set out by McHugh J which the Tribunal adopted.

[C.M.]