

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2008

ADMINISTRATIVE LAW - EXAMINER'S NOTES

Question One: The Australian Wine and Brandy Corporation

Section 11 of the Commonwealth *Freedom of Information Act 1982* (FOI Act) states that every person has a legally enforceable right to obtain access to 'a document of an agency, other than an exempt document', or 'an official document of a Minister, other than an exempt document'.

It is therefore necessary to consider whether the Australian Wine and Brandy Corporation (AWBC) is an 'agency' under the FOI Act. Section 4 of the FOI Act defines 'agency' as a Department or a 'prescribed authority'. Section 4 defines 'prescribed authority' as 'a body corporate, or an incorporated body, established for a public purpose by, or in accordance with the provisions of an enactment or an Order-in-Council'.

The question does not state whether the AWBC is established under an enactment for a public purpose. However subsection 7(2AA) states that a body corporate established by or under an Act specified in Part III of Schedule 2 is exempt 'in respect of the commercial activities of the body corporate'. Part III of Schedule 2 refers to the *Australian Wine and Brandy Corporation Act 1980*. Two conclusions follow. Firstly that the AWBC is a prescribed authority within the meaning of section 4, secondly, that it is exempt with respect to its commercial activities.

Some discussion is necessary of what documents are relevant: FOI Act applies to any documents in possession or constructive possession of an agency. Document need not have been created by the agency. Therefore all documents in possession of AWBC are subject to FOI jurisdiction. Documents created by Watching and Listening may therefore be caught if these are held by AWBC.

Some discussion is necessary of 'official document of the Minister' as defined in section 4. This is a document in the possession of the Minister that relates to 'affairs of an agency'. All relevant documents relate to affairs of the AWBC (an agency), therefore all documents in possession of the Minister are subject to FOI jurisdiction.

Therefore both the Minister and the AWBC have an obligation to consider and respond to the FOI request. There is no requirement that applicants must be Australian residents; therefore the New Zealand wine industry representatives may apply if they are able to nominate an address in Australia: section 15(2).

Some discussion of whether the request is too broad: '*all documents relating to the overseas fact-finding mission by the Directors of the Corporation*' could arguably refer to travel forms, airline tickets, etc. Need to speak to applicant about whether the request can be narrowed to exclude such documents: paragraph 24(6)(c). If it cannot, then this part of the request could be refused on the grounds that it would be an unreasonable diversion of resources: section 24(1) of the FOI Act.

Section 21 provides that the Minister or agency may defer access if: (c): 'the premature release of the document would be contrary to the public interest. The Minister in this case may seek to argue that release is premature and contrary to the public interest, until a big order was received thus demonstrating that the export market was unaffected and that the effect on the national economy was minimal.

There are two main documents:

- (1) the detailed report prepared by the Corporation's Directors;
- (2) the market research report prepared by Watching and Listening Pty Ltd commissioned by the Directors.

Other documents which refer to or summarise the information in documents (1) or (2) may also exist – for example media releases prepared by the Corporation.

Assuming that the Part III, Schedule 2 exemption does *not* apply (that is, the neither document is relevant to commercial activities of the AWBC), other exemptions may be relevant.

Relevant exemptions may apply to either or both documents (1) and (2).

Exemptions applying to the report

The report is an internal working document under subsection 36(1) of the Commonwealth *Freedom of Information Act 1982* (FOI Act) as it contains recommendations and advice of the Directors to the Minister. The report relates to the 'deliberative processes involved in the functions of an agency' as it concerns export strategies of Australian fortified wines.

However: does s36(5) or s36(6) mean that the report is not exempt? Is it purely factual material (s36(5)), or a report of a scientific or technical expert which may include the expert's opinion(s36(6))? To satisfy this exemption it must be argued that the report includes deliberations, recommendations and advice involved in the functions of an agency and therefore is not a report referred to in subsection 36(6).

If s36(1) applies, the report is only exempt if its release would be contrary to the public interest: s36(2) of the FOI Act. Some relevant considerations:

- some information has been released by media release (including a statement that future marketing strategies will be modified)
- results of publicly funded fact finding mission should be made available for public benefit
- potential damage to export markets
- damage to Australian fortified wine industry.

The Minister's embarrassment and the reputation of the Corporation are not relevant considerations.

If satisfied that s36(1) applies and that release would be contrary to the public interest the Minister may issue a certificate under s36(3) specifying the ground of public interest. *McKinnon v Secretary, Department of Treasury [2006] 45* shows that the issuing of the certificate itself is difficult to review.

Subsection 39(1) – documents affecting financial or property interests of the Commonwealth or of an agency. May only claim this exemption if there could be a 'substantial adverse effect' on interests of the Commonwealth. Arguably here the interests are not those of the Commonwealth but of the regulated bodies in the wine industry and/or bodies in the Japanese and Russian alcohol markets.

Section 43(1)(c): business affairs – documents whose release may have an adverse effect on lawful business, commercial or financial affairs of an organisation. The relevant organisations may be the wine industry bodies whose export markets may be damaged by the report's release and/or the Japanese and Russian interests. Must prove 'unreasonably affect that person adversely': s43(1)(c)(i), or that if disclosed, future supply of information to the Commonwealth will be prejudiced: s43(1)(c)(ii).

Section 45: documents obtained in confidence. Subsection 45(2) states that this exemption only applies if disclosure of the information would constitute a breach of confidence owed to someone who is not the Commonwealth or Minister. If it contains market information about Japanese and Russian industries that was obtained in confidence, and release would cause damage to those persons, it may be breach of confidence.

Exemptions applying to the market research surveys

Section 43A only applies to research of agencies specified in Schedule 4 (the ANU and the CSIRO). Therefore not relevant.

As it was commissioned by the Commonwealth it may be an internal working document under s36. Is it excluded as a report by s36(6)? If s36(1) applies then similar public interest considerations arise.

It may also contain information on business affairs the release of which would prejudice future supply of information in surveys undertaken on behalf of the Commonwealth: s43(1)(c)(ii).

The information provided by persons who responded to the survey may have been provided in confidence: s45(2) may apply.

Exemptions applying to both documents

Section 33 exempts documents the release of which may affect international relations or would divulge matter obtained in confidence from foreign governments or agencies.

The survey reflects findings in a study by the French government. The report contains material obtained about Japanese and Russian industries which may have been obtained from governments. Release of either document may have the potential to affect international relations.

If the Minister is satisfied that s33(1) applies to the document he may issue a certificate under s33(2). If a certificate is issued it is difficult to go behind it: *McKinnon v Secretary, Department of Treasury*. *McKinnon's* case shows that the Minister need only demonstrate that there is one reasonable public interest ground against release. The decision to issue the certificate is judicially reviewable: *Tanner v Shergold*.

Section 44: documents affecting the national economy. If release of either report may damage the export market for wine or brandy this could result in 'an undue disturbance of the ordinary course of business in the community' (s44(1)(b)), or have 'a substantial adverse effect on the ability of the Government to manage the economy of Australia' (s44(1)(a)). The difficulty is that neither document comes within s44(2) examples.

Note: certificates may not be issued by the Minister unless the section relating to a particular exemption specifies that the minister has power to do so. There is no general power to issue a certificate. In this example, the exemptions of international relations and internal working documents ground the power for a certificate.

Re procedure: The agency should ensure it is a valid request under subsection 15(2). That is, it is in writing, identifies the document with precision, specifies an address in Australia, and accompanied by the fee.

Subsection 15(5) requires the agency to notify an applicant within 14 days of receipt that the application has been received. Paragraph 15(5)(b) requires the agency to notify the applicant of a decision on the request.

Under section 27, the agency must consult a person whose business affairs may be affected to seek their attitude on whether the documents should be released. If this consultation occurs, then the period in which to respond to the applicant's request is extended by a further period of 30 days: paragraph 15(6)(a).

If the Minister or agency refuses to provide access to the requested documents, reasons must be provided to the applicant: section 26. This must include appropriate information concerning rights of review of this decision including the right to make a complaint to the Ombudsman. An applicant has a right of internal review under section 54.

Question 2 – delegated legislation

Need to state the principle that delegated legislation is legislation made by the Governor in Council or other authorised body under authority of Parliament. In other words it is legislation made by the Executive. Must be consistent with and not go beyond the authorising legislation.

Refer to some relevant cases concerning scope of delegation: eg, *Shanahan v Scott* and/or ultra vires. Set out some of the grounds of ultra vires: simple or broad ultra vires including improper purpose, unreasonableness, etc.

It is useful because it allows detailed provisions to be set outside the formal parliamentary processes. Some requirements which may change over time may be more flexibly set. Amounts of fees, etc can be reviewed more regularly. May consult more broadly. Sunsetting clauses mean it is regularly reviewed.

Discuss tabling in Parliament and other requirements for disallowable instruments under the *Legislative Instruments Act 2003* (for Commonwealth instruments) or the *Subordinate Legislation Act 1989* (NSW instruments).

General discussion of use and benefits of delegated legislation.

Question 3 – state of administrative law

Should discuss recent developments in cases and statutes. Any or all of the following topics could be referred to: jurisdictional error, remedies, judicial review, review on the merits, freedom of information.

Question 4 – Ombudsman

Should refer to differences between courts and tribunals and the Ombudsman. For example, the Ombudsman is not bound by the rules of evidence, may make reports to Parliament, must only consider matters that are defined in its statutory jurisdiction (eg excludes actions of a Minister, worker's compensation, employment, and other matters). Ombudsman may consider 'system' as a whole, as well as individual cases. Ombudsman makes recommendations not binding judgments. However its recommendations and reports are made public, Departments often act on recommendations to avoid further reprimand including being reported to Parliament.

Ombudsman may decline to review (unlike a court which must review unless applicant is frivolous / vexatious).

Ombudsman conducts hearing in private – courts and tribunals are public hearings usually.

Ombudsman controls proceedings, parties may not cross examine, etc.

Ease of access to Ombudsman, cheap, no requirement of standing.

Question 5 – Commonwealth AAT

Should discuss the principle of review on the merits and the power of the Tribunal to exercise all the original functions of the decision maker and remake the decision. Should discuss types of evidence that may be considered: this is all material relevant to the decision at the time of the Tribunal's hearing, not just material before the original decision maker. Not bound by rules of evidence. However in practice proceedings are usually formal and may bear close resemblance to court proceedings particularly if both parties are represented. Cannot award damages unless specifically authorised under statute. Costs may not follow the event as Tribunal has discretion whether to award.