Review of decisions to prosecute

Smiles v Commissioner of Taxation (13 May 1992) concerned the role of judicial review in decisions to prosecute.

Mr Smiles, a member of the NSW Parliament, conducted a consultancy practice. He had three informations laid against him regarding certain taxation statements, one alleging a breach of the *Crimes Act 1914* (Cth) and two alleging breaches of the *Taxation Administration Act 1953* (Cth). The intent of the application was to seek orders by way of judicial review, under both the AD(JR) Act and the Judiciary Act, to bring the prosecutions to an end. The substance of Mr Smiles' case was that he had been prosecuted only because of his high profile, for the purposes of publicity.

The Federal Court, constituted by Justice Davies, stated that a decision taken by the Director of Public Prosecutions to prosecute, which has been held in *Newby v Moodie* (1988) 83 ALR 523 to be a decision to which the AD(JR) Act applies, is now likely to be beyond the ambit of that Act following the High Court decision in *ABT v Bond* (1990) 170 CLR 321, where it was decided that a decision, to be a decision to which the AD(JR) Act applies, must be final and operative. The application was within the terms of the Judiciary Act, however, which allows the Federal Court to hear matters where an injunction is sought against an officer of the Commonwealth.

After considering several cases dealing with judicial review of decisions to prosecute, the Court resolved the instant case as follows:

> 'The approach taken in the cases I have mentioned is that a decision to prosecute taken by or on behalf of the Director of Public Prosecutions is unexaminable, but this does not prevent a court, certainly a higher court, from controlling legal proceedings so as to prevent abuse of process. Section 5 of the AD(JR) Act and s 39B of the Judiciary Act are not, however, appropriate vehicles for the general control of abuse of process in the court of a State. This is a matter for the courts of a State. As neither provision would avail the applicant, the application must fail.'

The Court went on to discuss the role of publicity in both the prosecution of taxation cases and the criminal justice system generally. It took the view that the effect of publicity likely to arise and the deterrent effect of a prosecution may properly be taken into account in the decision whether to prosecute, though it would not be appropriate to institute a prosecution merely for publicity purposes.

The Ombudsman

Failure to pay pharmaceutical benefits

In February a complaint was received by the Ombudsman relating to the failure of the Health Insurance Commission (HIC) to pay a pharmacist's claims made under the *National Health Act 1953*. The continuing failure to pay the claims meant that the pharmacist was unable to pay suppliers and would have to cease business. The pharmacist was apparently under investigation in relation to claims involving an amount much larger than that of the unpaid claims. The HIC had not invoked provisions of the National Health Act which would have entitled it to offset past overpayments against current payments.

The Ombudsman pointed out to the HIC that it may have been acting illegally and that by suspending payments it may have been prejudicing possible recovery in the future of past overpayments. Following the Ombudsman's intervention, HIC resumed payments to the pharmacist. Further investigation revealed that the main reason for suspending payments was the need by HIC to be satisfied that the claims were correct, which required it to undertake a great deal of detailed vetting. Despite the large amount of overpayments to the pharmacist, the HIC has not sought to recover the overpayments against current claims.

Act of grace payments

Complaints were received recently by the Ombudsman regarding two matters in which appeals were still before the AAT. Both complaints sought action by the Ombudsman in relation to act of grace payments. In each case the parties clearly did not understand that the Ombudsman's role is to investigate complaints about administrative actions and to recommend a remedy where defective administration is found, not to make orders for remedies or to act on behalf of claimants. Further, it did not seem to be understood that act of grace payments, where appropriate, can only be paid where there is no legal entitlement to a benefit or other valid legal claim.

If misleading advice by a Department is established in a case, this may create a legal entitlement to compensation for detriment, in which event a pecuniary remedy would not be by way of an act of grace payment. If the Ombudsman finds defective administration warranting a pecuniary remedy, a recommendation to that effect could not be made until the question of legal entitlement has been determined by the AAT or it is clear that the appellant has no legal entitlement (and in this event even a concession by the appellant might not suffice).

Australian citizens returning – proof of identity

The Ombudsman investigated a number of complaints concerning the provision of resident return visas to Australian citizens for a fee. The Ombudsman recommended that the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) obtain legal advice on this point as it did not seem that the Migration Act gave power to issue visas and entry permits to Australian citizens. The advice obtained confirmed this view and in February of this year DILGEA instructed its posts to cease issuing resident return visas to Australian citizens except in very limited circumstances. It later put in place arrangements to refund fees paid by Australian citizens for such visas. At the moment DILGEA proposes to refund fees only for visas issued since it received the legal advice, rather than since the Ombudsman drew the matter to DILGEA's attention or some other time. Discussions with DILGEA on this point are continuing.

The administrative and practical advantages of DILGEA's policy of actively encouraging Australian citizens to present an Australian passport to prove nationality when re-entering Australia were recognised by the Ombudsman. He stressed, however, and it was accepted by DILGEA, that Australian citizens are not currently obliged by law to carry, obtain or use an Australian passport when travelling overseas, provided that they have a valid passport issued by another country.

The question of what documentation will be accepted by DILGEA as proof of Australian citizenship is currently receiving attention in that Department.

Administrative Law Watch

Report: Review of Codes of Conduct for Public Officials

The Council recently received a copy of the May 1992 report *The Review of Codes of Conduct for Public Officials* by the Electoral and Administrative Review Commission (EARC) of Queensland. The report had its genesis in a Fitzgerald Report recommendation that EARC 'implement and supervise the formulation of Codes of Conduct for public officials'.

The Codes developed in the report provide a general foundation for many of the traditional expectations and conventions of conduct referred to as the 'Westminster' principles of government. Emphasised in the report is the principle that all public officials – Ministers, other elected representatives, career public servants and contracted executives alike – are obliged to act as trustees of the public interest. To this end the proposed Public Service Ethics Act states in broad terms 5 core ethical obligations for public officials. They are:

- respect for the law and the system of government;
- respect for persons;
- integrity;
- diligence; and
- economy and efficiency.

As well as the statement of general principles in legislation, provision would be made both for more detailed general Codes of Conduct for various classes of public official and for agency-specific rules. No new particular ethical offences are to be created and breaches of the Codes of Conduct are to be dealt with on a discretionary basis under existing disciplinary procedures.

In order to promote increased awareness of public sector ethical standards among agencies and individuals, the creation of a small, independent statutory office called the Office of Public Service Ethics (OPSE) is proposed. Finally, to ensure that the standards are responsive to changes to community standards and expectations, it is proposed to create a community-based consultative body called the Advisory Panel on Public Service Ethics. This body would meet at least 3 times a year and would advise the OPSE and report to Parliament on public service ethics matters generally.