

affairs of a number of companies including that of the appellant. Access was sought by the appellant to investigate reports, file notes and other memoranda created by the investigation team.

The respondent relied on s.32 to refuse access to the documents and its refusal prompted an appeal to the County Court (which at the time had

jurisdiction over FoI appeals). Hewitt J had affirmed the decision under review and the Full Court of the Supreme Court had little hesitation in agreeing with this decision. The Court stated the documents were privileged if they were brought into existence for the purpose of submission to the Commission's solicitor for legal advice or use in legal proceedings, that being

the sole purchase *Grant v Downs* (1976) 135 CLR 674.

Having exercised the power to inspect the document in dispute with the consent of both parties, the Court concluded that they were properly the subject of the privilege claim and accordingly dismissed the appeal.

FEDERAL FOI DECISIONS

Administrative Appeals Tribunal

WANG and DEPARTMENT OF EMPLOYMENT EDUCATION AND TRAINING and DEPARTMENT OF IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

No. V87/720 and 721

Decided: 31 May 1988 by Deputy President I.R. Thompson.

Request for People's Republic of China Embassy correspondence and ministerial submission — whether release of documents would damage international relations with China — claims for exemption under ss.31(1)(a)(iii), 33(1)(b) and 45.

Background

The applicant had come to Australia in 1985 as part of an education exchange program between Australia and the People's Republic of China (PRC). His study was subsidised by the World Health Organisation (WHO) and the Australian Government and he had to enter into a contract with WHO, the terms of which required him to return to China after the completion of one year's study. During the applicant's stay in Australia he entered into a relationship with an Australian woman and applied for but was refused permanent residence status.

This application centered around three documents: two letters sent by the PRC Embassy to the then Minister for Immigration and Ethnic Affairs and a ministerial submission to the Minister for Immigration and Ethnic Affairs, which the applicant sought in order to assist his case in seeking permanent residence or refugee status.

The evidence

Evidence was given by an officer of the Department of Foreign Affairs that the communications by the PRC Embassy would have been made with an expectation of confidence and that this had been confirmed by the Embassy. In the officer's opinion, disclosure of the two letters would cause damage to Australia's relations

with China and would damage the established basis of trust and frankness essential to the relationship between the two countries. Moreover, disclosure of the letters in this case would or could reasonably be expected to reduce the Chinese Government's confidence in the Australian Government's ability to protect confidential communications and could be expected to lead to a reduction in the quality and quantity of confidential information passed by the Chinese Government to the Australian Government in international relations and dealings. The Tribunal was greatly persuaded by this evidence.

The decision

The respondents sought to rely on ss.33(1)(a)(iii), 33(1)(b) and 45 to justify their decision not to release the documents to the applicant.

The relevant parts of s.33 provide:

- (1) a document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for reason that the disclosure
 - (a) would, or could reasonably be expected to, cause damage to . . .
 - (iii) the international relations of the commonwealth; or
 - (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign Government, an authority of a foreign Government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

In construing this provision the Tribunal took the view that the sole public interest to be taken into account for the purposes of s.33 were those set out in paragraphs (a) and (b) of that sub-section. It was not prepared to take into account the applicant's personal interest in obtaining the documents other than as part of a general public interest in disclosure.

The Tribunal then considered the phrase 'could reasonably be expected to'. It agreed with the interpretation placed on this phrase by the Federal

Court in *Attorney General's Department v Cockcroft* (1985) 64 ALR 97 despite the Court in that case being concerned with the phrase as used in s.43. In *Cockcroft* the Court held that the words 'require a judgment to be made by the decision maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question was disclosed under the Act'. Having accepted the evidence of witnesses called by the respondents, the Tribunal was satisfied that disclosure of the Embassy letters could reasonably be expected to anger the Chinese Government and result in damage to the international relations between the two countries. The letters were therefore exempt under s.33(1)(a)(iii).

Turning its attention to s.33(1)(b) the Tribunal was also satisfied that this exemption could be sustained because the documents had been communicated in confidence by the Embassy despite the fact that the then Minister for Immigration and Ethnic Affairs had disclosed some of the information contained in the letter.

In view of its findings on s.33 the Tribunal did not consider it necessary to determine whether the documents were also exempt under s.45.

The remaining document in dispute was one paragraph of a ministerial submission. Ordering its release, the Tribunal observed that the content of the paragraph had already been disclosed by the Minister for Immigration and Ethnic Affairs and in any event the respondent had failed to discharge the onus placed on it by s.61 to prove the document was exempt.

The decision of the respondent was therefore affirmed in relation to the Embassy letters and varied to grant access to the whole of the ministerial submission.