AUSTRALIAN INSTITUTE OF MARINE AND POWER ENGINEERS v SECRETARY, DEPARTMENT OF TRANSPORT

FEDERAL COURT OF AUSTRALIA — GENERAL DIVISION

GUMMOW J

5, 17 December 1986 — Sydney

Administrative law — Industrial organisation — Decision of respondent to issue "manning notice" determining the number of crew members for a ship — Claim of entitlement by industrial organisation to request statement of reasons for decision — Whether organisation a "person aggrieved" — Whether class of decision exempted by Administrative Decisions (Judicial Review) Act Sch 1 — Respondent not bound by Income Tax Assessment Act to deny entitlement to statement of reasons — Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5, 13 — Income Tax Assessment Act 1936 (Cth) ss 16, 57AM.

Following receipt of a request by the owner of a ship to be commissioned, the respondent Secretary issued a "manning notice" under s 57AM of the Income Tax Assessment Act 1936 (Cth) (the Tax Act). The manning notice contained the respondent's determination of the number of crew members required "to enable the ship to be operated in a safe and efficient manner". The figure was reached after following an administrative procedure which included the participation of the applicant, a registered industrial organisation representing marine engineers.

The applicant contended that the manning figure reached in the notice represented a reduction from the number of marine engineers employed on similar ships, and would impair the safe and efficient operation of the vessel. It sought reasons for the respondent's decision to issue the manning notice, pursuant to s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). The respondent denied that the applicant was entitled to those reasons.

Held: The applicant was entitled to request reasons for the respondent's decision.

(i) The applicant had a sufficient interest to constitute it as "a person aggrieved" by the respondent's decision within the meaning of s 5 of the ADJR Act. The decision produced a danger and peril to the interests of the applicant that was clear and imminent rather than remote, indirect or fanciful. It accordingly had an interest in the decision of an intensity and degree well above that of an ordinary member of the public.

Tooheys Ltd v Minister for Business and Consumer Affairs (1981) 36 ALR 64; 54 FLR 421, approved.

(ii) The decision was clearly of an administrative character and did not fall within one of the classes of decisions exempted by the ADJR Act Sch 1.

Although the decision preceded the making of a calculation and assessment of tax under the Tax Act, it did not lead to the making of an assessment or calculation in the sense described in Sch 1.

DCT(Qld) v Clarke and Kann (1984) 52 ALR 603; *Mercantile Credits Ltd v FCT* (1985) 61 ALR 331, followed.

(iii) The receipt of a request falling within the terms of s 13 of the ADJR Act leads to the imposition upon the decision maker of a duty or requirement to prepare and furnish the statement of reasons for a decision. To the extent that in discharging or satisfying that duty or requirement the decision maker, being an "officer" within s 16 of the Tax Act, is divulging or communicating to any person any information

respecting the affairs of another person acquired by him by reason of or in the course of his appointment or employment as an officer, he does so "in the performance of a duty as an officer", and therefore within the exception contained in s 16(2).

Canadian Pacific Tobacco Co Ltd v Stapleton (1952) 86 CLR 1; *FCT v Nestle Australia Ltd* (1986) 69 ALR 445, applied.

FCT v Swiss Aluminium Australia Ltd (1986) 66 ALR 159, considered.

Application

This was an application challenging the refusal of the respondent to furnish a statement of reasons for decision requested by it pursuant to s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth).

J W Shaw QC and *S C Rothman* for the applicant.

C J Stevens for the respondent.

Cur. adv. vult.

Gummow J. In these proceedings the applicant by its amended application seeks to challenge the refusal by the respondent to furnish a statement requested of it purportedly pursuant to s 13(1) of the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act). The statement was sought in respect of a decision of the respondent to give a "manning notice" under s 57AM(22) of the Income Tax Assessment Act 1936 (the Tax Act). The respondent denies that the applicant was entitled to request a statement of his reasons for the decision in question.

The refusal was by letter from the respondent to the applicant's solicitors dated 9 May 1986. The amended application treats the letter as notice of the respondent's opinion within the meaning of s 13(3)(a) of the ADJR Act and, in my view, this is the correct way of characterising it.

The respondent filed a notice of objection to competency which in effect raises the substantive issues between the parties as to the adequacy of the reasons advanced by the respondent for denying the applicant's entitlement to request a statement of reasons. An agreed statement of facts was filed together with affidavits upon which there was limited cross-examination.

The facts

I turn first to the facts. The applicant is a registered organisation pursuant to the provisions of the Conciliation and Arbitration Act 1904 (Cth). Among the objects of the organisation are:

"(i) To foster the science and art of engineering.

"(ii) To advance the interests of the profession of engineering and those engaged therein, and to safeguard their status and character. To foster fraternal sympathy, discuss sound principles affecting the mutual good of its members, to use its influence to increase the confidence of the mercantile community in the employment of recognised engineers, and to procure that all maritime and other laws for the public safety be improved and carried out in their entirety.

"(iii) To endeavour to obtain and to maintain reasonable conditions of employment and fair rates of remuneration for its members, and to negotiate awards and agreements "

The controversy between the parties has its origin in the request by the owner of a vessel presently known as the *BP Endeavour Replacement* for the giving of a "manning notice" within the meaning of s 57AM of the Tax Act. The ship is expected to be commissioned early in 1987. The manning notice that was given under s 57AM(22) was not in evidence, but it appears to have been issued in November 1985 and to have stipulated a ship's complement of 29. It was in respect of the respondent's decision to give this notice that the applicant unsuccessfully sought a statement under s 13 of the ADJR Act.

The applicant is one of some five industrial organisations with members engaged in crews of ships comparable to the *BP Endeavour Replacement*. The members of the applicant that are involved are classified as "marine engineers and electrical engineers at sea". Section 57AM was inserted into the Tax Act by Act No 14 of 1984. In the second reading speech upon what became the Income Tax Amendment Act No 4 of 1984 (by s 7(1) of which s 57AM(22) assumed its present form), the Minister said (*Hansard*, House of Representatives, 13 September 1984, p 1285): "Honourable members will recall that these concessions were introduced earlier this year in order to provide greater incentives for the Australian shipping industry. These concessions are intended to promote greater efficiency in the manning of Australian ships. The amendments will modify the requirements that are imposed upon the Secretary to the Department of Transport in determining the maximum complement of officers and crew which in his opinion is appropriate for the safe and efficient manning of ships eligible for the tax concessions. Primarily, the amendments are to remove any suggestion that industrial relations considerations are a dominant or overriding factor to be taken into account when determining manning levels. They will make clear that industrial relations considerations, where relevant, are but one of the factors to be considered."

The provisions of s 57AM are lengthy, but for present purposes the principal elements of the regime which it establishes are as follows. Sub-section (7) provides:

"(7) The depreciation allowable to a taxpayer under this Act in respect of an eligible Australian ship in respect of the year of income in which the eligible date in relation to the ship occurred or in respect of a subsequent year of income is—

(a) in the case of a new ship . . . the eligible date in relation to which the commissioning date of the ship - - 20 per cent of the cost of the ship; or

(b) in any other case - - 20 per cent of the depreciated value of the ship at the beginning of the year of income in which the eligible date in relation to the ship occurred."

In sub-s (1) there is a number of definitions. "Eligible date" means, so far as is applicable here, in the case of a "new ship"—

"(i) if the ship becomes an eligible Australian ship before the expiration of 90 days after the commissioning date of the ship — the commissioning date of the ship; or

"(ii) in any other case — the day on which the ship becomes an eligible Australian ship."

The expression "manning notice" is defined as meaning a notice given by the Secretary under sub s (22) in relation to a ship, "new ship" is defined

as meaning a "trading ship" the commissioning date of which occurs after the commencement of the section, and "trading ship" (subject to qualifications not here relevant) is defined as meaning a ship that is used or is held in reserve for use for or in connection with any business or commercial activity and includes a ship that is used or is held in reserve for use wholly or principally for the carriage of passengers or cargo for hire or reward.

The expression "eligible Australian ship" takes its meaning from sub-s (4) which is in the following terms:

"(4) For the purposes of this section, a pre-July 1982 ship, a post-July 1982 ship or a new ship owned by a taxpayer shall be taken to be an eligible Australian ship if—

(a) the taxpayer is a resident;
(b) the ship was constructed by or acquired new by, the taxpayer and is for use by the taxpayer wholly and exclusively for the purpose of producing assessable income;
(c) depreciation is allowable to the taxpayer under section 54 in respect of the ship;
(d) the ship, when manned, is manned by persons each of whom is either a resident or a person in relation to whom a certificate issued under sub-section (26) is in force;
(e) in the case of a pre-July 1982 ship . . .
(f) in the case of a post-July 1982 ship or a new ship, the ship—
  (i) was, on the commissioning date of the ship, registered under the Shipping Registration Act 1981 and that registration has, at all times since that date, remained in force;
  (ii) has not, at any time since that date, been registered in a country other than Australia; and
  (iii) has, at all times since that date, been owned by the taxpayer;
(g) where the ship is on lease to another person—
  (i) the other person is a resident; and
  (ii) the ship is for use by the other person wholly and exclusively for the purpose of producing assessable income: and
(h) the ship is used, or is held in reserve for use, in operations of a kind specified in a manning notice in force in relation to the ship and is not, when manned, manned at a level that exceeds the level specified in the notice for operations of that kind."

The other provisions in s 57AM to which I should refer are sub-ss (20), (21) and (22). These read as follows:

"(20) A person who is, or is to be, the owner of a ship (including a ship in the course of construction or a ship the construction of which has not yet commenced), or a person authorized for the purpose by the first-mentioned person may, by notice in writing given to the Secretary, request the Secretary to give a manning notice in relation to the ship.

"(21) A request pursuant to sub-section (20) or (23) in relation to a ship shall include a statement setting out—

(a) the specifications of the ship (including a plan of the accommodation layout of the ship);
(b) details of the kinds of operations in which the ship is, or is to be, engaged, and

(c) the number of officers of specified designations and the number of members of the crew of specified designations with which the ship is being, or is proposed to be, manned while engaged in each of the kinds of operations referred to in paragraph (b).

"(22) The Secretary shall, after receiving a request made pursuant to sub-section (20) in relation to a ship, give a notice in writing by post to the person who made the request setting out, in relation to each kind of operations in which the ship is, or is to be, engaged, the number of officers and members of the crew with which the ship should, in the opinion of the Secretary, be manned to enable the ship to be operated in a safe and efficient manner while engaged in operations of that kind."

Some 17 manning notices have been issued in respect of ships comparable to the *BP Endeavour Replacement*. Three of the ships are not manned in accordance with the relevant notice but these are ships commissioned prior to the commencement of s 57AM in 1984.

Mr Thorpe, an officer of the Department of Transport, deposed that the manning notices issued in respect of these ships reduced the manning level from that sought in the applications by the ship owners. Mr Christiansen, an officer of the applicant, gave evidence that an existing manning level set an "industrial precedent" which the shipowner would find extremely difficult to reduce. In addition to the above manning notices, "preliminary" manning notices in relation to four other ships also commissioned before 1984 were withdrawn and never came into effect.

Upon the receipt of the notice in writing to the Secretary under s 57AM, an administrative procedure was followed in this as in other cases of this kind. The procedure has no statutory force. It is described in para 4 of the agreed statement of facts and in annexure B thereto. Paragraph 4 is as follows:

"(4) The process leading to a determination by the Secretary under the provisions of the ITAA [meaning the Tax Act] is as follows:

(a) On receipt by the Department of an application containing the information required by s 57AM(21) of the [Tax Act] the assessment process commences with . . . a series of meetings of a committee comprising representatives of the ship owner and maritime unions concerned under the chairmanship of the departmental officer. This committee is known as a Manning Committee. The principal purpose of the Manning Committee is to provide a consultative process to examine the manning considerations relevant to the operation of the ship concerned.

(b) Following the initial manning committee process, the Chairman evaluates the issues and prepares a report which particularly addresses the technical aspects relating to the safe and efficient manning of the ship.

(c) The Chairman's report is then viewed by policy areas of the Department at which stage non-technical considerations are addressed. These considerations may lead to a revision of the manning figure contained in the Chairman's report. The resulting figure is then released to all parties concerned as the preliminary assessment. The preliminary assessment is the Department's initial view, as distinct from the Secretary's final determination, as to the manning appropriate for the safe and efficient operation of the ship

in the kinds of operation the ship is, or will be engaged in, as specified in the application for manning.

(d) The preliminary assessment deals with all shipboard functions and with all categories of crew numbers but is issued in the form of a single number representing a total complement for the ship.

(e) If the preliminary assessment figure is disputed by one or more of the parties, an opportunity is provided for further material to be considered by the Chairman and, where appropriate, by one or more further meetings of the manning committee or a manning sub-committee.

(f) The ship owner's application, the preliminary assessment and material used in reaching it, the manning committee's reports, any sub-committee reports and any additional relevant material are then forwarded to the Secretary for his determination of the ship manning level."

The applicant was one of the maritime unions that participated in the administrative procedures I have described in respect of the present case. The figure in the manning notice issued in this case was an "all-in figure" which is the figure proposed by the ship owner. The applicant contends that the figure is two or three less in number than other "precedents" and the shortfall must be borne in some fashion between the five interested maritime unions.

Mr Christiansen deposed that a reduction of the total engineering component, this being the subject of the concern of his organisation, from six to five, would be "extremely significant" to it. The respondent urged that the issue of the manning notice does not prevent the applicant bringing the matter as an industrial dispute before the Conciliation and Arbitration Commission. The applicant in response pointed to what it said was an as yet undecided contested application before the Conciliation and Arbitration Commission over manning levels on another ship in which the Commonwealth Steamship Owners Association has put submissions that the Conciliation and Arbitration Commission should not deal with the matter because a manning notice was in force.

The applicant also contends and the respondent also denies that manning of the new ship as provided in the manning notice will impair safe and efficient operation of the vessel.

The issues

The legal issues between the parties which were debated before me were:

(1) Was the applicant a "person aggrieved" within the meaning of s 5 of the ADJR Act as referred to in s 13 thereof?

(2) Even if it were such a person, was the decision of the Secretary to issue the manning notice not "a decision to which [the ADJR] Act applies" because either or both—

(a) the decision fell within Sch 1 of the ADJR Act; and

(b) it was not of an administrative character within the definition of "decision to which this Act applies" in s 3(1) of the ADJR Act? and

(3) Does s 16(2) of the Tax Act so operate as to disentitle the applicant to make the request under s 13(1) of the ADJR Act?

I turn to these issues in the order I have mentioned

"Person Aggrieved"

Section 13 of the ADJR Act is a remedial provision in that the duty for which it provides stands in high contrast to the apparently very limited obligations at common law of a decision maker to furnish reasons: *Public Service Board of NSW v Osmond* (1986) 63 ALR 559; 60 ALJR 209 at 215 and 217. Brennan J recently observed (*Miller v TCN Channel Nine Pty Ltd* (1986) 67 ALR 321 at 361) that the ADJR Act removes what would otherwise have been procedural obstacles to discovery of the grounds on which discretions have been exercised. The policy which s 13 implements is (as Lockhart J explained in *Dalton v DCT(NSW)* (1985) 60 ALR 783; 7 FCR 382 at 391-2, to provide any citizen having sufficient interest in the matter with material to assist him in determining whether there is any error in the process of reasoning of the decision maker and, accordingly, to chart his future course of action, by, for example, seeking an order for review under the other provisions of the ADJR Act. Section 13 is not to be construed grudgingly or with a penchant for technicality.

Section 13 provides, as its criterion for standing, entitlement to make an application under s 5 in relation to the decision in question. In turn, s 5 may be set in motion only by "a person who is aggrieved" by the decision in question. Hence the debate in the present case as to whether the applicant organisation satisfied this description. The applicant is, as I have said, a registered organisation pursuant to the provisions of the Conciliation and Arbitration Act 1904 and there was no dispute of its being a "person" within the ADJR Act provisions. The issue was whether it was "aggrieved" in the necessary sense by the decision of the Secretary.

Section 3(4) of the ADJR Act so far as is presently material provides that a reference to a person aggrieved by a decision includes a reference to a person whose interests are adversely affected by the decision. Beyond that the Act appears to give no direct assistance as to the content of the expression a "person who is aggrieved by a decision to which this Act applies".

The term "person aggrieved" lacks novelty. It has appeared in statutes over a long period to identify the class of persons given standing to utilise a procedure established by statute. So, when the modern system of trade mark registration was introduced in Britain (by the Trade Marks Registration Act 1875, 38 & 39 Vict c 91) it was provided (by s 9) that persons aggrieved had standing to institute expungement applications and that expression was not interpreted by the courts in a narrow or technical sense, given the public interest in the purity of the register. The Australian Trade Marks legislation of 1905 and 1955 has followed the same pattern: *Continental Liqueurs Pty Ltd v G F Heublein & Bro Inc* (1960) 103 CLR 422 at 427-8 (reversed on other grounds (1962) 109 CLR 153); *Re Carl Zeiss Pty Ltd* (1969) 122 CLR 1 at 4. Section 303 of the Bankruptcy Act 1966 (Cth) also confers standing upon persons aggrieved: *Re Mottee; Ex parte Mottee* (1977) 16 ALR 129; 29 FLR 406 at 411-12. Other statutory examples are to be found in the judgment of Wilcox J in *Dalton v DCT (NSW)* (1985) 60 ALR 783; 7 FCR 382 at 396-7. In each instance the content of the expression is to be seen in the light of the scope and purpose of the statute in issue and, given the diversity of statutory provisions, no general proposition is to be established from these examples. Perhaps the closest analogy is found in the United States' Administrative Procedure Act s 10

(5 USC para 702). This confers standing, inter alia, upon those "adversely affected or aggrieved". Whilst mere "interest in a problem" will not suffice, injury to legal rights is not essential: *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 539-40, 548-50, 556; 28 ALR 257.

What of the general law? The rules as to *locus standi* were by no means uniform as between the various prerogative writs, but the concept of "grievance" as providing *locus standi* was embedded in the rules which controlled the issue of writs of certiorari. And, as Ellicott J explained in *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64; 54 FLR 421 at 437-8, the procedures established by the ADJR Act clearly were intended "in part" to be in substitution for the more complex prerogative writ procedures. At common law it became established that, whilst the court even in other cases had a discretion to issue certiorari, it would do so *ex debito justitiae* if the application was made by "an aggrieved party", who was not merely one of the public and who had "a peculiar grievance of [his] own": *R v Surrey Justices* (1870) LR 5 QB 466 at 472-4; *R v Corporation of Glenelg; Ex parte Pier House Pty Ltd* [1968] SASR 246 at 251-2; Yardley "Certiorari and the Problem of Locus Standi" (1955) 71 LQR 388; de Smith *Judicial Review of Administrative Action*, 4th ed, pp 412-15. What needs to be emphasised is that even at common law it was by no means apparent that "grievance" necessarily involved injury to property or present legal interests or "special damage" in any technical sense. Nor was it essential that the aggrieved person be a "party" to the administrative decision he sought to have quashed by certiorari, if he otherwise had sufficient standing: *R v Corporation of Glenelg; Cheatley v R* (1972) 127 CLR 291 at 299, 311; *R v Holmes; Ex parte Public Service Association (NSW)* (1977) 140 CLR 63 at 69, 78, 91; 18 ALR 159; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 555; 28 ALR 257. The fundamental consideration was that the common law remedies went in the interests of the community rather than simply to enforce private rights. Sir Owen Dixon put the matter as follows in delivering the reasons of the court in *Liston v Davies* (1937) 57 CLR 424 at 441-2::

"Looked at from the point of view of right, the matter may tend perhaps to get into some confusion. The position of relator or prosecutor in the case of prerogative writs and of informations is anomalous. The relator or prosecutor has a *locus standi* to obtain relief, but the relief or remedy runs in the name of the Crown. In form it is a proceeding by the Crown taken in the public interest. The relator or prosecutor cannot be said to have the ordinary private right to a remedy for the enforcement of the duties owing to him or for the vindication of his own personal rights. The remedy goes in the interests of the public and the relator is in the position of a person who informs the court of an occasion why the public remedy should go."

The other great field for judicial review of administrative decisions lay in equity, and, in particular, in the remedies of injunction and declaration. Hence, perhaps, the reference by Ellicott J in *Toohey's* case, *supra*, to the ADJR Act procedures being directed partially to the common law procedures. In equity attention was in the nineteenth century directed to use of equitable remedies to protect legal and equitable rights in the strict sense and, in particular, to protect such rights as were proprietary in nature Hence the treatment of equitable remedies in public law, in cases

where the claimant lacked the *fiat* of the Attorney-General, became enmeshed in the so-called rules in *Boyce's* case [1903] 1 Ch 109. These had their own complexities which, in Australia, have but recently been diminished by a series of High Court decisions. The complexities are discussed by Dr Finn in "A Road Not Taken: The Boyce Plaintiff and Lord Cairns Act" (1983) 57 ALJ 493 at 498-509, 571-5. The result is that standing here does not now require special damage in the traditional sense, and that whilst a mere belief or concern is not sufficient, a "special interest" over and above that enjoyed by the public will suffice: *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; 28 ALR 257; *Wentworth v Woollahra Municipal Council* (1984) 154 CLR 518 at 525; 56 ALR 233.

The result is that there is a measure of broad agreement as to *locus standi* both for legal and equitable remedies in public law and in that situation it would be a strange result if the ADJR Act posited, by use of the concept of grievance, some narrower criterion. It also has to be borne in mind that the ADJR Act is ambulatory in its operation and draws within its scope a diverse and extensive collection of decision making processes, truly an unclosed class. Too rigid a criterion of *locus standi* will threaten to stultify the utility of the procedures the ADJR Act offers.

Hence the force of the observations (frequently adopted in this court) by Ellicott J in *Toohey's* case (1981) 54 FLR 421 at 437-8; 36 ALR 64 to the effect that the meaning of "a person aggrieved" is not encased in any technical rules and that much depends upon the nature of the particular decision and the extent to which the interest of the applicant rises above that of an ordinary member of the public.

In the present case the direct legal effect of the issue of the manning notice is upon the ship owner because the giving of such a notice is an essential step in compliance with para (h) of the intricate definition of "eligible Australian ship" in s 57AM(4) of the Tax Act and only an eligible Australian ship may be the subject of the special depreciation provided for in s 57AM. Further, the "parties", in an immediate sense, to the decision of the Secretary to give the notice are the Secretary and the ship owner or other person who requested the Secretary under s 57AM(20) to give the notice. But that does not mean that the applicant is not a person aggrieved in the necessary sense for s 5 of the ADJR Act.

First, the applicant has among its interests or objects the obtaining and maintenance of reasonable conditions of employment of its members and the negotiation of awards and agreements with employers including the owner. Secondly, it was invited to participate in the Manning Committee in respect of the ship in question and made submissions in regard to the proposed manning notice. Having done so, it seeks the reasons (if any) as to why the ultimate decision of the Secretary as to the contents of the manning notice was at variance with its submissions to the Manning Committee. Thirdly, the respondent contends that the crew level fixed for the *BP Endeavour Replacement* is sufficient to ensure safe operation of the ship. This the applicant disputes, and it would be quite inappropriate to enter upon the merits of that debate. Nevertheless, the applicant's complaint is not said to be made frivolously and it plainly has a real interest in the matter. And one can think of no more fertile ground for an industrial dispute Fourthly, as a matter of practicality, the manning scale provided

for in the manning notice may be a determinant of the number of members of the applicant that will be engaged. If the owner wishes to obtain the special depreciation concession it must meet a number of criteria, including compliance with the manning notice. Should the owner wish to comply, and if that notice remains in its present form, an adjustment of what otherwise would be expected to be the manning levels will be necessary, with a shortfall to be divided in some fashion between the five industrial organisations involved, one of which is the applicant.

In my view, whilst no single one of the above matters might be adequate, looking to the picture they build up, the applicant does have a sufficient interest to constitute it a person aggrieved by the decision of the Secretary. It is true that the ship owner might not comply with the manning notice and that even if it did the applicant might manage to obtain what it says should be its full component of the crew. However, in my view (and in the circumstances of the case) there flows from the decision of the Secretary a danger and peril to the interests of the applicant that is clear and imminent rather than remote, indirect or fanciful, and the applicant has an interest in the matter of an intensity and degree well above that of an ordinary member of the public.

"Decision to which this Act applies"

The principal issue here is whether the decision of the Secretary was a decision included in any of the classes of decision set out in Sch 1 to the ADJR Act, viz, decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax under the Tax Act.

Each of these categories provides some extension of the former, but, as the Full Court of this court said in *DCT(Qld) v Clarke and Kann* (1984) 52 ALR 603 at 607, the overall effect is to emphasise the essential need for a connection between the decision and an assessment. The Full Court in the same passage, continued: "A decision does not lead to the making of an assessment merely because it precedes the making of an assessment or because its purpose is to enable or facilitate the making of any assessment which may be made. A decision is not a decision leading up to the making of an assessment unless the making of an assessment has followed or will follow from the decision."

The same is true, in my view, of the expression "calculations of tax" in the heading in the Schedule. The authorities were further considered by Morling J in *Mercantile Credits Ltd v FCT* (1985) 61 ALR 331. It was there decided that the decision to refuse a taxpayer a withholding tax exemption certificate in respect of a loan from an overseas creditor did not fall within the Schedule. This was because, although in the absence of an appropriate certificate withholding tax would be payable, a decision does not lead to the making of an assessment or calculation in the necessary sense for the Schedule merely because it precedes the making of an assessment or calculation, and the question of whether or not a certificate will issue has nothing to do with the actual calculation or assessment of withholding tax.

In the present case, the legislation obliges the taxpayer seeking the special depreciation to satisfy the network of requirements. These include (in the case of the ship involved here) the requirement that the ship be an eligible Australian ship in respect of the year of income in which the eligible

date in relation to the ship occurred: s 57AM(7) of the Tax Act. The ship will only be "an eligible Australian ship" if the conditions of s 57AM(4) are met. These include para (h) which I have set out above. The taxpayer is of course not obliged to comply with the manning notice that has been given, although, if the taxpayer does so, one of a number of essential steps will have been taken towards entitlement to the special depreciation. The giving of the manning notice is thus one of the matters which the taxpayer has to establish to claim the special depreciation, but that does not, on the authorities I have discussed, mean that the decision to give the certificate was within the class of decisions referred to in para (e) of Sch 1 of the ADJR Act. The decision precedes the making of a calculation and assessment but that does not mean that it leads to the making of an assessment or calculation in the necessary sense. Accordingly, the Schedule did not render the decision not one to which the ADJR Act applied.

As an independent matter, the respondent also submitted (but rather as a subsidiary argument) that the decision was not one to which the ADJR Act applied because it was not "a decision of an administrative character". In my view the decision plainly was of such a character. Section 57AM(22) of the Tax Act states that in the circumstances there described the Secretary "shall . . . give a notice in writing . . ." and the definition of "decision to which this Act applies" in s 3(1) of the ADJR Act in terms includes a decision required to be made under an enactment. The distinction between legislative and administrative decision making and the wide import of the term "administrative decision" are discussed in *Hamblin v Duffy* (1981) 34 ALR 333; 50 FLR 308 at 331-4; *Minister for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260; 60 FLR 325 at 331-4, and *ACT Health Authority v Berkeley Cleaning Group* (1985) 60 ALR 284 at 286. Here the Secretary was required to make, and did make, an administrative decision within the sense of that term as explained in those authorities.

Income Tax Assessment Act, Section 16(2)

Finally, it was submitted by the respondent that he has an obligation to comply with s.16(2) of the Tax Act and that because he would disobey this obligation by furnishing to the applicant (pursuant to s 13 of the ADJR Act) a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, the applicant was not entitled under s 13(1) of the ADJR Act to request such a statement.

The Secretary had received by notice in writing a request to give a manning notice in relation to the ship, which request had to include a statement setting out the information described in s 57AM(21) of the Tax Act. That information would, in my view, "respect the affairs of any other person" and would be "disclosed or obtained" under the provisions of the Tax Act, so as to attract to the Secretary the definition of "officer" in s 16(1) of the Tax Act. That brings one to s 16(2) which is as follows: "Subject to this section, an officer shall not either directly or indirectly, except in the performance of any duty as an officer, . . . make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer as mentioned in the definition of 'officer' in sub section (1) "

In *FCT v Swiss Aluminium Australia Ltd* (1986) 66 ALR 159 at 168, in the course of his judgment in the Full Court, Jackson J said:

"Read by themselves, the terms of s 16(2) prohibit an officer from:

(1) making a record of any information respecting the affairs of another person; or

(2) divulging to any person any information respecting the affairs of another person; or

(3) communicating to any person any information respecting the affairs of another person.

"The expression 'another person' in s 16(2) would thus apply to the affairs of all persons other than the officer in so far as it constituted a prohibition upon making records, and would apply to the affairs of all persons other than the officer and the person to whom the information was divulged or communicated in the case of the other prohibitions in s 16(2). It is true to say that sub-s (1) of s 16 in referring to information 'respecting the affairs of any other person' is clearly enough referring to any person other than the officer, but there is no reason why a similar approach should necessarily apply to all aspects of the prohibitions contained in sub-s (2). The wider approach applies without difficulty to the prohibition against making a record of information, but the addition of the words 'to any person' after the words 'divulge or communicate' suggests that a narrower meaning should be regarded as applying in those instances."

The debate in this case has concerned principally the meaning of the exception "in the performance of any duty as an officer". It may be observed that the exception to the obligation imposed by s 16(3) in respect of production and disclosure to courts is more specifically drawn, being limited to cases where "it is necessary to do so for the purpose of carrying into effect" the provisions of particular statutes or classes of statutes. The other provisions of s 16 include elaborate releases from the prohibition upon communicating information, but they are not expressed as limiting the general terms of the exception in s 16(2). As to that, Sir Owen Dixon (speaking it is true at a time before s 16 assumed its present length) said of the phrase "except in the performance of any duty as an officer" that he did not think that "duty" was used in the sense purely of legal obligation and would be better represented by the word "function". So understood, in Dixon CJ's view, the exception governed all that was incidental to the carrying out of the functions and proper actions which the employment authorised: *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6. This passage was applied in *FCT v Nestle Australia Ltd* (1986) 69 ALR 445, where it was said that the expression in question "ought to receive a very wide interpretation".

The functions and proper actions authorised, and indeed required, by the engagement of an officer in the defined sense, include observance and compliance with obligations arising at common law and in equity, save as excluded or supplanted by statute: see *Hogg Liability of the Crown* pp 147-160. These general law obligations would include those of care and skill (*Carpenter's Investment Trading Co Ltd v Commonwealth* (1952) 69 WN(NSW) 175 at 178), fidelity (*Reading v Attorney-General* [1951] AC 507) and confidentiality (*Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 50-1; 32 ALR 485). Also included, in my view, in the exception is what is appropriate to discharge or satisfy requirements or

duties imposed pursuant to procedures existing under statutes other than the Tax Act. The receipt of a request which falls within the terms of s 13(1) of the ADJR Act leads, by dint of s 13(2) of that Act, to the imposition upon the decision maker of a duty or requirement to prepare and furnish the statement described in sub-s (1). To the extent that in discharging or satisfying that duty or requirement the decision maker, being an "officer" for s 16 of the Tax Act, is divulging or communicating to any person any information respecting the affairs of another person acquired by him by reason of or in the course of his appointment or employment as an officer, he does so in the performance of a duty as an officer and within the exception provided in s 16(2).

It follows, in my view, that the existence of s 16(2) of the Tax Act did not remove the entitlement of the applicant to make the request it made under s 13(1) of the ADJR Act. In so concluding, I have taken into account the submission by the respondent that the result may be that if no other statutory provision supervenes the applicant may be furnished with information concerning the affairs of the ship owner. Section 13A of the ADJR Act indicates that the legislature has had in mind the problems that may arise in such situations. The presence of s 13A supports rather than weakens the interpretation of the other statutory provisions which I have accepted. I should make it clear that, quite properly, there was no debate before me as to the applicability of s 13A in these proceedings, the case being concerned with the earlier stage of entitlement to make a request under s 13(1).

Conclusion

In the result I propose to act as indicated by s 13(4A) of the ADJR Act and make an order declaring that the applicant was entitled to make the request it made under s 13(1) of the ADJR Act in respect of the decision of the respondent to issue a manning notice pursuant to s 57AM(22) of the Tax Act for the ship known as *BP Endeavour Replacement*. Accordingly, the orders of the court are:

Orders

The applicant was entitled to make the request it made under s 13(1) of the Administrative Decisions (Judicial Review) Act in respect of the decision of the respondent to issue a manning notice pursuant to s 57AM(22) of the Income Tax Assessment Act 1936 for the ship known as the *BP Endeavour Replacement*.

The respondent pay the applicant's costs of the application, including any reserved costs.

Solicitors for the applicant: *Turner Freeman*.

Solicitor for the respondent: *Australian Government Solicitor*.

CHRISTOPHER SPENCE
BARRISTER