

## From the Executive Director...

**F** **OI SOLUTIONS IS NOW** an Accredited Specialist firm in Administrative Law under the Law Institute of Victoria Accreditation Scheme. The accredited specialisation program for administrative law began this year, so we are one of the first to achieve this. This is a significant achievement, highlighting enhanced skill levels and substantial involvement in the specialist area of law. This accreditation recognises our expertise and commitment to servicing clients in all areas of administrative law over the past 15 years.

**MICK BATSKOS**



## Contents

Recent Cases	1-2
Recent Updates	2
Question Time	3
Firm News	3
Website	4
Training	4
Further Information	4

## Recent Cases

### **Point Pty Ltd v Commissioner of Taxation [2013] FCAFC 67**

In *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67 the Full Federal Court held that computer or other equipment is not 'ordinarily available' to an agency under s 17 of the Cth FOI Act if it is necessary to write a new computer program to produce the document sought. 'Computer or other hardware' did not mean only the computer hardware that is ordinarily available to an agency. Rather, it meant a fully functioning computer system that was capable of producing a written document without the need for additional components such as software. It was not ordinarily available where an agency was required to use its computer system in a way that departed from ordinary or standard usage.

However, an agency might be required to write a new computer program where such activity formed part of its normal operations, e.g. where it routinely engaged staff to produce the necessary programs for producing written documents under s 17. The Court also held that a document had to be capable of production under s 17 before an agency could consider if proc-

Cont. p2

## Recent Cases continued...

essing a request would cause a substantial and unreasonable diversion of its resources under s 17(2).

### **Re Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party) [2013] AATA 623**

Five applicant companies sought access from the Commissioner of Taxation to documents concerning them made in the context of Australian Taxation Office (“ATO”) audit assessments of those companies.

As part of the initial decision, the ATO contacted Her Majesty’s Revenue and Customs (“HMRC”) in the UK to determine whether s 33 of the *Freedom of Information Act 1982* (Cth) would apply. HMRC expressed the view that the information should not be disclosed as it “could undermine future relations between HMRC and the ATO in similar cases”.

The Commissioner refused the applicants’ access to a total of 463 documents of those identified as relevant. It decided most documents contained exempt matter under s 38, rather than being exempt documents, and were released in redacted form. The rest of the documents were claimed exempt under ss 33 or 37.

The applicants sought review by the Australian Information Commissioner. At the time of the hearing, the assessments issued to each applicant were the subject of proceedings in the Federal Court brought under the *Tax Administration Act 1953* (“TAA”).

The Information Commissioner informed the applicants that under s 54W(b) of the FOI Act, as the request related to proceedings in the Federal Court, it was desirable that the decisions be considered by the Tribunal instead of the Information Commissioner.

Some documents were subsequently released pursuant to “cross-authorisations” under which each applicant consented to the others receiving information otherwise protected under s 38.

#### s 33

A document was exempt under s 33(b) if releasing it

would disclose any information or matter communicated in confidence by or on behalf of a foreign government. Therefore, there was no need to consider whether release might damage the security, defence or international relations of the Commonwealth; that was the relevant test for s 33(a).

#### s 37

“Would, or could reasonably be expected” meant that there must be a “real significant or material possibility” of prejudice. A mere “suspicion” or “remote” chance would not satisfy the test. It required an inference based on reasonable grounds that the information could prejudice the conduct of an investigation of a breach of tax-related law. The Tribunal outlined a low-hurdle test, merely requiring a likelihood of that consequence or a possibility based on reasonable grounds.

#### s 38—Protected Information

Documents exempt under the TAA were exempt pursuant to s 38.

Section 355-25 of the TAA limited disclosure of information “disclosed or obtained” by a taxation officer. It held that internally generated discussions, proposals, information and communications between officers of the ATO could properly be described as “information obtained” by a taxation officer. There was no reason to limit the meaning of the provision.

Information was defined as “knowledge communicated or received concerning some fact or circumstances”. Specifically, information or proposals within the ATO as to future strategy was information obtained for the purpose of taxation law.

The applicants claimed that some information claimed to be exempt was in the public domain as it had been mentioned in a former court proceeding. The Tribunal held that the references to information in the decision were part of a narrative background, and were of a different subject matter and context to that in dispute.

Section 355-50 of the TAA contained an exception allowing disclosure of information to enable the entity to understand its tax obligations. This did not require the ATO to release information about its internal actions and deliberations.

## Recent Updates

The Victorian Freedom of Information Commissioner has recently published two new flowcharts. They summarise the procedures adopted by the FOI Commissioner in relation to handling complaints and conducting reviews.

For more information please go to the FOI Commissioner’s website: <http://www.foicommissioner.vic.gov.au/find/publications/>.

Please do not hesitate to contact FOI Solutions if you have any questions or require further clarification about these flowcharts or procedures.

## Question time

**Q: We have recently started to consider the new protected disclosure regime. We thought we could meet the changes by updating our Whistleblower Procedures. Another agency has just been telling me that they made significant changes to their procedures - is this right?**

**A:** The new protected disclosure regime is quite different to the old Whistleblower system. The Independent Broad-based Anti-corruption Commission ("IBAC") has produced guidelines that the legislation requires agencies to follow in their procedures, even if your agency cannot accept protected disclosures. These new requirements will not be met by making changes to your

agency's old whistleblower procedures. We can assist you with understanding whether your agency can accept protected disclosures or not, finalising your procedures and providing other more specific legal advice. The due date for procedures was 9 August 2013. However, if your agency has not kept up to date with these changes we can help.

**Q: I have just been asked to do a Privacy Impact Assessment and I don't know where to begin. Can FOI Solutions help?**

**A:** Yes, we can assist you with privacy reviews of current or proposed work in your agency. We can assist your agency to identify privacy risks within business cases for proposed projects, audit current processes or review document templates for a new program.

## Firm News

### **Amy & Derek welcome Aliyah Yizhen Ma**

On 24 August 2013, Amy Hu and her husband Derek Ma welcomed a daughter, Aliyah, weighing in at 3.015 kg (6.64lbs). Both mum and baby are doing well, and we extend our best wishes to Amy and her family over the next year. Amy remains on maternity leave.



### **Farewell to Paige Emery**

Paige left us at the end of November 2013. She brought a genuine sense of enthusiasm and energy to the FOI Solutions office in her role as administrative officer, and her marketing and administration skills have been highly valued by staff and clients. Paige moved to country Victoria with her partner Tom, where she looks forward to spending more time with family. Paige will be sorely missed, and we wish her all the best in this next chapter of her life.

### **New staff members**

Bronwyn James commenced at FOI Solutions in November 2013 and will take over Paige's position as administration officer. She has been settling into the position well, and looks forward to getting to know more of our clients over the coming weeks.

Thijs de Jong joined FOI Solutions as a full time research clerk in November 2013. He has recently completed a Masters Degree in International Law at Leiden University (the Netherlands). He looks forward to assisting the firm with his legal research tasks.

Bronwyn and Thijs are welcome additions to the team.

### **Merry Christmas and Happy New Year**

We wish all our clients best wishes for the festive season. We hope you have a fantastic break and are able to take some time out to spend with family and friends.

FOI Solutions remains open over the Christmas/New Year holiday period apart from 23 December 2013 to 27 December 2013. Please do not hesitate to contact us if you require assistance.

## Website

Be sure to check our website at [www.foisolutions.com.au](http://www.foisolutions.com.au) for information on recent news or developments, our training sessions and legal services offered. Register early for any training or seminar sessions as they tend to fill quickly.

On our website you will also find hotlinks to cases in which we have acted as well as other helpful information.

We would love to hear any comments or feedback, positive or negative, about it as we are about to engage in an update of the website. Any suggestions for improvement would also be welcome. It will be updated on a regular basis, so don't forget to come back often.



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## Further information

If you would like any further information about the matters raised in this Newsletter or any assistance with FOI, privacy, protected disclosures or other administrative law matters generally, please do not hesitate to contact

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Feedback about the newsletter is also welcome.

Don't forget our **FOI and Privacy VCAT decision summaries** are available on a monthly subscription or an annual basis to keep you up to date with developments in this area.

If you are interested in purchasing a copy of the 2012 summaries (back issues are also available), log on to our web site at [www.foisolutions.com.au](http://www.foisolutions.com.au) and click on the "Publications" button for more information. The 2013 summaries will also be available early in the new year.

## Training

FOI Solutions conducts training sessions and lunch time seminars throughout the year including:

- Basic FOI training for FOI decision makers
- Intermediate FOI training for FOI decision makers
- Third Party Consultation and Notification
- Protected Disclosures

### DRAFTING GOOD FOI DECISIONS

We recently held a session on Drafting Good FOI Decisions, which was very well received. The session covered all aspects of what makes a good decision letter, including what to include and exclude. Participants thought it was "an excellent refresher", "very thought provoking" and "informative". Many clients found particularly useful the workshop scenario problems, which were discussed in groups and then followed by a discussion as to what the "ideal" decision letter might be in such a situation.

Due to popular demand we intend to conduct a similar session early in 2014 so that more FOI decision-makers can take advantage of such a practical session.

### SOCIAL MEDIA AND FOI

We will also hold another social media session in 2014 on this interesting and emerging aspect of FOI. Please check our website regularly for updates.

## Upcoming Summer Series

### Social Media and FOI

Tuesday 21st January 2014

Tuesday 28th January 2014

Tuesday 4th February 2014

### Practical Tips from VCAT

Wednesday 22nd January 2014

Wednesday 29th January 2014

Wednesday 5th February 2014

New topics and sessions are added from time to time, so be sure to check our website regularly. If you would like to express interest in attending any future session, please email us at [marketing@foisolutions.com.au](mailto:marketing@foisolutions.com.au).

If you have a particular topic you would like covered in a future training session or lunchtime update, please contact us at [marketing@foisolutions.com.au](mailto:marketing@foisolutions.com.au).