

AAT settles the issue of legal privilege in Tribunal proceeding *Buttigieg and Comcare* [2017] AATA 1002

Key Points

- The key issue was whether section 38AA of the *Administrative Appeals Tribunal Act* 1975 (Cth) (**AAT Act**), and the ongoing obligation of a decision-maker to disclose all documents that come into its possession after it has complied with its obligations under section 37 of the AAT Act, applied in circumstances where legal professional privilege was claimed over such documents.
- The Tribunal determined that section 38AA of the AAT Act does not exclude the operation of legal professional privilege, therefore the ongoing duty to disclose is inoperative in circumstances where legal professional privilege is claimed over documents.

Background

Mr Buttigieg had applied for the review of a decision made by Comcare.

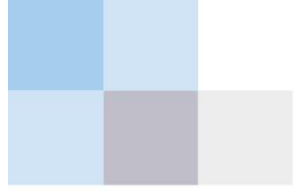
During these proceedings, Comcare obtained surveillance footage, investigation reports and a medical report relying on these materials. Comcare sought to lodge the materials with the Tribunal in accordance with its obligations of continuing to disclose documents under section 38AA of the AAT Act. At the same time, Comcare sought an order that the contents or existence of these materials not be disclosed to Mr Buttigieg unless and until it chose to reveal them in the course of cross-examination, pursuant to section 35 of the AAT Act.

The Law

Section 37(1)(b) of the AAT Act applies to the commencement of proceedings and states that every document in the decision-maker's possession or under its control which is relevant to the review of the decision before the Tribunal must be lodged with the Tribunal.

Section 37(1AE) of the AAT Act requires a decision-maker to provide a copy of any document filed with the Tribunal to the applicant, unless the Tribunal directs otherwise.

Section 38AA(1)(b) of the AAT Act contains an obligation of continuing disclosure, and states that if documents come into the possession of a party which are relevant to the review of the decision before the Tribunal these documents must, subject to any directions made by the President of the Tribunal under section 18B of the AAT Act, be lodged with the Tribunal as



soon as practicable after their receipt. Traditionally, there has been some confusion over the operation of section 38AA in relation to documents that would otherwise be subject to legal professional privilege, such as surveillance material.

Section 35 of the AAT Act sets out the circumstances where the public nature of Tribunal proceedings can be made private through various orders. Of relevance in this case, section 35(4) of the Act allows the Tribunal to make a direction, by order, that evidence relating to the proceedings which is lodged with, or otherwise given to the Tribunal, be prohibited or restricted from being published or disclosed, including to other parties in the proceedings.

In *Australian Postal Commission v Hayes* [1989] FCA 176, Wilcox J observed that there was no prejudice to an applicant in asking them to commit to their view of factual matters and then, if that view was contradicted by video surveillance, put that video to them. This was justified on the basis that it would expose falsehoods, if any, which was an approach consistent with the Tribunal's obligation in reviewing an administrative decision.

In *Australian Postal Corporation v Bessey* [2001] FCA 266, Gyles J observed that a party would be denied natural justice or procedural fairness if it were not able to show video surveillance to the other side in cross-examination and ask questions based on that video.

In *Re Stoiche and Telstra Corporation Limited* [1995] AATA 306, the Tribunal held that procedural fairness would not be denied to the respondent if the Tribunal ordered the disclosure of video surveillance, rather it would be denied on the basis that the respondent would be denied the opportunity to conduct effective cross-examination on the major issue of the applicant's credibility.

Conclusion

The Tribunal determined that if a decision-maker had surveillance footage in its possession at the time it made its decision or at a time when it was complying with its obligations to lodge documents under section 37(1)(b) of the AAT Act, that surveillance footage had to be lodged with the Tribunal. In order to not be bound to comply with that requirement, the decision-maker would need to make an application under sections 35(3) or 35(4) of the Act.

However, if the surveillance footage came into the possession of the decision-maker after the lodgement of documents under section 37 of the AAT Act (known as T-Documents), section 38AA of the Act creates an obligation for that footage to be lodged with both the Tribunal and the other party unless an order is made under sections 35(3) or 35(4), or legal professional privilege was claimed over the footage.

The Tribunal determined that Comcare was required to advise Mr Buttigieg of its application for an order under section 35 of the AAT Act and, if it chose not to lodge the surveillance footage under section 38AA of the Act, it would need to prove that legal professional privilege ought to exist over the footage.



Lessons Learnt

The Tribunal's decision is authority to support that where surveillance footage is obtained after the lodgement of T-Documents and is subject to legal professional privilege, it need not be lodged with the Tribunal or the other party.

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