FEDERAL COURT OF AUSTRALIA

Investrix Pty Ltd v Commissioner of Taxation [2015] FCA 1427

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| Citation: | Investrix Pty Ltd v Commissioner of Taxation [2015] FCA 1427 |
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| Parties: | **INVESTRIX PTY LTD v COMMISSIONER OF TAXATION and ADMINISTRATIVE APPEALS TRIBUNAL** |
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| File number: | NSD 1085 of 2015 |
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| Judge: | **ROBERTSON J** |
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| Date of judgment: | 17 December 2015 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of the Administrative Appeals Tribunal’s declining to make orders under s 35 of the *Administrative Appeals Tribunal Act* *1975* (Cth) restricting or prohibiting the disclosure of evidence given before the Tribunal, or the content of documents lodged with the Tribunal or received in evidence in the course of the proceedings – whether error of law – exercise of Court’s discretion to refuse relief where Tribunal’s decision lacking finality |
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| Legislation: | *A New Tax System (Goods and Services Tax) Act 1999* (Cth) Div 66  *Administrative Appeals Tribunal Act 1975* (Cth) s 35  *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 6, 16  *Judiciary Act 1903* (Cth) s 39B  *Taxation Administration Act 1953* (Cth) ss 14ZZE, 14ZZJ, 14ZZK |
|  |  |
| Cases cited: | *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321  *Brown v Commissioner of Taxation* [2001] FCA 276; 47 ATR 143  *Cook v ASP Ship Management* [2001] FCA 598  *Federal Commissioner of Taxation v Beddoe* (1996) 68 FCR 446  *Federal Commissioner of Taxation v Pham* [2013] FCA 579; 94 ATR 528  *Geographical Indications Committee v O’Connor* [2000] FCA 1877; 64 ALD 325  *Lee v New South Wales Crime Commission* [2013] HCA 39; 251 CLR 196  *Lee v The Queen* [2014] HCA 20; 253 CLR 455  *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* [2005] FCAFC 154; 145 FCR 523  *National Companies and Securities Commission v Bankers Trust Australia Ltd* (1989) 24 FCR 217  *Riverside Nursing Care Pty Ltd v Administrative Appeals Tribunal* [2001] FCA 1410  *Seller v Commissioner of Taxation* [2013] FCA 1373; 308 ALR 376  *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49; 230 CLR 486  *Trezona v Australian Securities & Investments Commission* [2004] FCA 1389  *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15; 319 ALR 181  *Von Stieglitz v Comcare* [2014] FCAFC 97; 64 AAR 356 *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92 |
|  |  |
| Date of hearing: | 26 November 2015 |
|  |  |
| Date of last submissions: | 10 December 2015 |
|  |  |
| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 97 |
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| Counsel for the Applicant: | Mr PJ Bambagiotti |
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| Solicitor for the Applicant: | Ganz Legal Pty Ltd |
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| Counsel for the First Respondent: | Ms K Stern SC with Mr AJ O’Brien |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent submitted save as to costs |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1085 of 2015 |

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| BETWEEN: | INVESTRIX PTY LTD  Applicant |
| AND: | COMMISSIONER OF TAXATION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 17 DECEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. Leave be granted to the applicant to amend its application in the form of the proposed amended application filed on 4 December 2015.
2. The applicant pay the first respondent’s costs thrown away by reason of that amendment.
3. The application as so amended be dismissed, with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| NEW SOUTH WALES DISTRICT REGISTRY |  |
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| BETWEEN: | INVESTRIX PTY LTD  Applicant |
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| JUDGE: | ROBERTSON J |
| DATE: | 17 DECEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

## Introduction

1. These applications are for judicial review in respect of the Administrative Appeals Tribunal (the **Tribunal**) declining to make orders under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**), on 12 August 2015.
2. As stated by the Tribunal, the relevant background was that the applicant applied to the Tribunal for review of the Commissioner of Taxation’s decision to disallow its objection against assessments of GST and penalty. The application was made under Pt IVC of the *Taxation Administration Act 1953* (Cth).
3. The Tribunal said that in 2012 and 2013 the applicant lodged Business Activity Statements in which it claimed GST input tax credits of over $40 million. The credits related to acquisitions of gold from suppliers who were not registered for GST purposes. The credits were claimed under Div 66 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). Division 66 allowed a purchaser of second-hand goods to claim credits even though the unregistered supplier of those goods did not pay GST to the Commissioner on that supply. To make good the credit claims, the applicant had to, among other things, succeed in its claim that the gold it acquired was second-hand goods.
4. The Tribunal said that the Commissioner disallowed the credit claims. The Commissioner did not accept that the applicant acquired the gold from the purported suppliers. Nor did he accept that the gold was second-hand goods. He claimed that the applicant was involved in the construction of an elaborate façade to disguise the true facts. He believed that what the applicant did was dishonest; and the imposition of an administrative penalty at the rate of 75 per cent (and 90 per cent for repeat behaviour) reflected that belief.
5. The Tribunal said that the hearing of a Pt IVC application was to be in private if the taxpayer asked for it to be in private: s 14ZZE of the *Taxation Administration Act*. The applicant asked for a private hearing in this case, and so it was entitled to one as of right. It was also entitled, as a consequence of the private hearing, not to have its identity disclosed when the Tribunal published its reasons for decision on the substantive application: s 43 of the AAT Act, as modified by s 14ZZJ of the *Taxation Administration Act*. But the taxpayer wanted a greater degree of privacy, and non-disclosure, than ss 14ZZE and 14ZZJ provided. It wanted the Tribunal to make orders under s 35 of the AAT Act restricting or prohibiting the disclosure of evidence given before the Tribunal, or the content of documents lodged with the Tribunal or received in evidence in the course of the proceedings.

## The application to the Tribunal

1. Before the Tribunal, the orders sought by the applicant were as follows:

[under s 35(2)]

1. Pursuant to s 14ZZE of the Taxation Administration Act 1953 (Cth) and paragraph 35(2)(a) of the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act) that the hearing of these proceedings take place in private.

2. Pursuant to paragraph 35(2)(a) of the AAT Act, that the only persons to be present are the parties, their legal advisors, and any witnesses for the period in which such witnesses are giving evidence.

[under s 35(4)]

3. Pursuant to paragraph 35(2)(b) of the AAT Act, that until further order, neither the Commissioner nor the Tribunal shall disclose or publish any evidence given before the Tribunal or filed with the Tribunal in the course of these proceedings, or the identity of any document or any matters contained [in] any of the documents filed with or read to or received by the Tribunal in the course of these proceedings.

[under s 35(3)]

4. Pursuant to paragraph 35(2)(aa) of the AAT Act, that until further order, the Applicant’s names and the names of any witnesses called are not to be published or disclosed by the Commissioner or the Tribunal, including any reason[s] given by the Tribunal.

5. Such further and/or other orders as this Tribunal may see fit, including to effect the intent of those sought herein.

1. In support of its application for orders under s 35, the applicant relied on two witness statements made by its solicitor, one dated 21 April 2014 and the other dated 16 June 2015.
2. The Tribunal found that a multi-agency taskforce, including officers of the Australian Federal Police (**AFP**), the Australian Taxation Office (**ATO**) and the Australian Crime Commission (**ACC**), had been investigating the applicant and two individuals in relation to alleged criminal activities and that an officer of the taskforce had formed the suspicion that, among other things:

* each of the two individuals had conspired with the other, and with the taxpayer, with the intention of dishonestly causing a loss to the Commissioner contrary to s 135.4(3) of the *Criminal Code*; and
* each of the two individuals had dealt with money or other property reasonably suspected of being the proceeds of crime, contrary to s 400.9(1) of the *Criminal Code*.

1. The Tribunal found that the alleged facts that led to the formation of that suspicion were, broadly, the same as the alleged facts that led the Commissioner to make the GST and penalty assessments in respect of the applicant.
2. The Tribunal found that the Commissioner was considering referring the activities of the two individuals and the applicant (which led to the claiming of the GST input tax credits) to the Commonwealth Director of Public Prosecutions (**CDPP**) for prosecution.
3. The applicant acknowledged through its solicitor that it bore the burden, under s 14ZZK of the *Taxation Administration Act*, of proving the GST and penalty assessments excessive. The applicant said that to discharge that burden it would be necessary to call, at least, both the two individuals to give evidence.
4. It was in that context that the orders under s 35 were sought.
5. Before the Tribunal, the applicant raised three bases for the making of the orders:

(a) the subject matter of the proceedings involved the management, storage and transport of substantial amounts of gold and cash. Publicising those activities may give rise to security risks, including the risk of armed robbery, kidnapping, hostage taking, blackmail and the like, particularly if, at the end of the proceedings, the applicant resumed its business activities;

(b) because serious criminal charges had been foreshadowed, there was an inherent unfairness in having evidence in these proceedings being made at large, and put in the hands of prosecutors – particularly because the applicant, “in a practical sense … has been forced to bring proceedings, which are, essentially, of a defensive nature”;

(c) if the orders were not made, the applicant would find it difficult to obtain and marshal evidence in support of its application. Witnesses, it was claimed, would be reluctant to give evidence where that evidence could then be made available to prosecution authorities and others. And if the witnesses were to decline to answer questions on the basis of an assertion of a self-incrimination privilege, that, of itself, would have the effect of restricting the nature, extent, and quality of evidence made available to the Tribunal in the proceedings.

1. The applicant’s solicitor had also expressed the opinion in one of his witness statements that if the orders were not made, then the reputations of the applicant and the two individuals may be damaged, but that ground was not pressed by the applicant’s counsel.

## The relevant legislation

1. Section 35 provided as follows, so far as relevant:

**35  Public hearings and orders for private hearings, non‑publication and non‑disclosure**

*Public hearing*

1. Subject to this section, the hearing of a proceeding before the Tribunal must be in public.

*Private hearing*

1. The Tribunal may, by order:
   * + 1. direct that a hearing or part of a hearing is to take place in private; and
       2. give directions in relation to the persons who may be present.

*Orders for non‑publication or non‑disclosure*

1. The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure of:

(a) information tending to reveal the identity of:

* + - * 1. a party to or witness in a proceeding before the Tribunal; or
        2. any person related to or otherwise associated with any party to or witness in a proceeding before the Tribunal; or

(b) information otherwise concerning a person referred to in paragraph (a).

1. The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure, including to some or all of the parties, of information that:
   * + 1. relates to a proceeding; and
       2. is any of the following:

(i) information that comprises evidence or information about evidence;

(ii) information lodged with or otherwise given to the Tribunal.

1. In considering whether to give directions under subsection (2), (3) or (4), the Tribunal is to take as the basis of its consideration the principle that it is desirable:
   * + 1. that hearings of proceedings before the Tribunal should be held in public; and
       2. that evidence given before the Tribunal and the contents of documents received in evidence by the Tribunal should be made available to the public and to all the parties; and
       3. that the contents of documents lodged with the Tribunal should be made available to all the parties.

However (and without being required to seek the views of the parties), the Tribunal is to pay due regard to any reasons in favour of giving such a direction, including, for the purposes of subsection (3) or (4), the confidential nature (if applicable) of the information.

…

1. Section 14ZZE and s 14ZZJ of the *Taxation Administration Act* provided as follows:

**14ZZE Hearings before Tribunal to be held in private if applicant so requests**

Despite section 35 of the AAT Act, the hearing of a proceeding before the Tribunal for:

* + - 1. a review of a reviewable objection decision; or
      2. …; or
      3. …;

is to be in private if the party who made the application requests that it be in private.

**14ZZJ Modification of section 43 of the AAT Act**

Section 43 of the AAT Act applies in relation to:

* + - 1. a review of a reviewable objection decision; and
      2. …; and
      3. …;

as if the following subsections were inserted after subsection (2B):

“(2C) If a hearing of a proceeding for the review of a decision … is not conducted in public, that fact does not prevent the Tribunal from publishing its reasons for the decision.

“(2D) If:

* + - 1. a hearing of a proceeding for the review of a decision … is not conducted in public; and
      2. a notice of appeal has not been lodged with the Federal Court;

the Tribunal must ensure, as far as practicable, that its reasons for the decision are framed so as not to be likely to enable the identification of the person who applied for the review.

“(2E) In subsections (2C) and (2D):

***reasons for decision*** includes findings on material questions of fact and references to the evidence or other material on which those findings were based.”.

## The reasons of the Tribunal

1. The Tribunal said that orders of the kind sought by the applicant were clearly capable of being made by the Tribunal. The Tribunal had extensive powers under s 35. Those powers, however, were to be exercised in accordance with s 35(5). The general principle in s 35(1) that hearings were to be in public had already been displaced in the present case by s 14ZZE of the *Taxation Administration Act*. But the Pt IVC modifications of the AAT Act took the privacy and confidentiality issues no further, with one exception – s 14ZZJ required the Tribunal to do its best not to allow its reasons for decision to enable identification of the taxpayer. Whether there were to be any further restrictions depended on a weighing of the principle that it is desirable that there should be openness and public access to the hearing and all information before the Tribunal (a principle that the Tribunal must take as the basis of its consideration) and the reasons, if any, in favour of the restrictions sought (to which the Tribunal was to pay due regard).
2. As to paragraph 1 of the orders sought by the applicant, which I have set out at [6] above, the Tribunal noted that the Commissioner had consented to the making of this order. However the Tribunal considered an order under the former s 35(2)(a), now s 35(2), in a case such as the present, to be inappropriate. There was no point asking the Tribunal to consider whether to make an order under s 35(2) because s 14ZZE of the *Taxation Administration Act* had already mandated a private hearing. The Tribunal declined to make the order sought in paragraph 1.
3. As to paragraph 2 of the orders sought by the applicant, the Tribunal declined to make that order, saying that a private hearing was a hearing that was not a public hearing. It was a hearing that excluded the public. The hearing of the applicant’s application for review would be conducted in the orthodox way, with a sign outside the hearing room notifying people that it was a “Private Hearing”. It would be for the parties to monitor whether there were any people in the hearing room from time to time who should not be there. It would be for the presiding member of the Tribunal to ensure the private nature of the hearing. An order in the nature of paragraph 2 would make things more complicated than they needed to be.
4. Before turning to paragraphs 3 and 4 of the orders sought by the applicant, the Tribunal considered *Federal Commissioner of Taxation v Pham* [2013] FCA 579; 94 ATR 528, and accepted that *Pham* was not an authority that necessarily lay against the making of orders of the kind sought in the present case. The Tribunal also noted that the applicant had made sure to put on evidence dealing with the second of Katzmann J’s reasons for quashing the order in that case. That, it hoped, would at least take that issue, or any like it, out of the equation in the present case.
5. The Tribunal then considered the applicant’s submission that the landscape had changed since *Pham*, with the decisions of the High Court in *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92; and the associated cases *Lee v New South Wales Crime Commission* [2013] HCA 39; 251 CLR 196and *Lee v The Queen* [2014] HCA 20; 253 CLR 455.
6. The Tribunal said that the problem with the applicant’s reliance on *X7* and *Lee* was that those cases concerned the exercise of what Hayne and Bell JJ referred to in *X7* at [147] as the “extraordinary processes of compulsory examination”. This case did not. Despite the applicant’s counsel’s valiant attempt to characterise things differently, neither of the individuals were under any compulsion to give evidence in these proceedings, to expose themselves to the rigours of cross-examination, or to answer questions if they reasonably apprehended that the answers may tend to incriminate them. If they were confronted with that circumstance, and their claim to the privilege against self-incrimination were upheld, they would not be required to answer. Neither X7 nor Lee had that opportunity.
7. That fundamental distinction between this case on the one hand, and *X7* and *Lee* on the other, the Tribunal said, removed all the oxygen from the applicant’s submission that the accusatorial nature of the criminal justice system would be undermined if the orders sought were not granted. Both the individuals were entitled to maintain their so-called “right to silence”. If they did, rather than, as in *X7* and *Lee*, placing the authorities in an unfairly advantageous position through the compulsory examination process, they would be arming the authorities with precisely nothing that could be used against them.
8. As to paragraph 3 of the orders sought by the applicant, the Tribunal noted that the Commissioner in the first instance took issue with the breadth of the proposed order, identifying a number of practical difficulties if an order were to be cast as widely as was sought. The difficulties included a prohibition against the use by the Commissioner, for any purpose, of any information obtained in the course of preparation for the hearing; an inability to show the evidence to potential lay or expert witnesses; restrictions in relation to documents that were already in the public domain; the Commissioner being prevented from investigating or assessing a third party shown by the evidence to warrant investigation; and that the restrictions were expressed to apply only to the Commissioner and to the Tribunal, not to the applicant or anyone else.
9. The Tribunal said there was undoubtedly some force in that general complaint but the problems could be eased or removed with judicious drafting. The Tribunal said it preferred to approach the issue as a matter of principle, and to address the substantive reasons for the applicant’s application and the Commissioner’s substantive objections to it.
10. The Tribunal then considered, first, the applicant’s claim that publication or disclosure of the applicant’s activities “could give rise to obvious security risks to all those involved, including the risk of armed robbery, kidnapping, hostage taking, blackmail, and the like, all of which can give rise to a danger of personal injury and/or death”. Despite the generality of the assertion, the Tribunal accepted that publication of the location, timing or frequency of any of those activities, or the names of any of the people involved, could jeopardise the safety of the individuals. There was no need for any of that information to be published beyond the applicant and its representatives, the Commissioner’s officers and representatives, the Tribunal and its staff assisting at the hearing, and the Tribunal’s transcript service provider. However, the Tribunal agreed with the Commissioner’s submission that this issue could be adequately managed by appropriate, but specific, orders or directions when the relevant material was taken into evidence at the hearing. An all-encompassing order of the kind sought was not justified.
11. The Tribunal next considered the applicant’s claim of unfairness in the context of possible criminal proceedings. The Tribunal said, at [35]:

The evidence does not establish that criminal charges are likely. Indeed, it seems that although the Commonwealth’s multi-agency taskforce has had, since middle to late 2013, sufficient information to make a successful application to the Supreme Court of New South Wales under the *Proceeds of Crime Act 2002* (Cth), leading to freezing orders in relation to several categories of assets of the taxpayer and others, no charges have yet been laid against anyone. They may never be. Having regard to that timeframe, I agree with the Commissioner’s submission that an assertion that charges will or are likely to be laid is speculative.

1. But even if charges had been laid, the Tribunal said, on what basis should it be thought proper for the Tribunal to make the orders sought? Orders prohibiting the use by the Commissioner or his officers of material or information provided to the Tribunal (such as by referring it, if thought appropriate, to the CDPP) would permit the applicant and its witnesses to tell their story, including those parts of the story that they thought might have involved criminal activity, but with complete immunity from any criminal action against them. The Commissioner submitted, and the Tribunal agreed, that an outcome like that was not in the public interest or in the interests of the administration of justice. After referring to *Pham*, at [37], the Tribunal said an order of the kind sought had the potential to interfere significantly with the exercise of the functions and responsibilities of the Commissioner and his staff. If information were provided in these proceedings that someone (whether the individuals or someone else) had been involved in criminal activities, or that the liability currently assessed to the applicant was actually the liability of someone else, or that someone (whether the individuals, or the purported suppliers, or anyone else) had incurred a previously undiscovered taxation liability, but the Commissioner were prevented from acting on that knowledge, then both the Commonwealth’s revenue base and the community generally would be significantly disadvantaged. That weighed heavily against making an order of the kind sought. The Tribunal then considered, and expressed agreement with, what had been said in *A Taxpayer and Commissioner of Taxation* (2004) 81 ALD 473; [2004] AATA 398 at [34].
2. The Tribunal then considered the applicant’s claim that unless the orders were made, the Tribunal would not be told the full story and would be forced to make its decision in ignorance of important factual material. The Tribunal said that such an outcome was in the hands of the applicant and its witnesses. It might be that the witnesses weighed up the potential advantage to the applicant’s taxation proceedings from their giving evidence, against the potential disadvantage to their own personal circumstances from doing so, and decided that the disadvantage outweighed the advantage. Or they might decide the opposite. That was a matter for them. The Tribunal would make the correct or preferable decision, based on the information available to it. What that information comprised would, as was commonly the case, be determined largely by the applicant. It was, after all, the applicant’s case.
3. The Tribunal declined to make the order sought in paragraph 3.
4. As to paragraph 4 of the orders sought by the applicant, the Tribunal said the protection sought by that paragraph could be adequately provided in the course of the proceeding, by the Tribunal as constituted to hear the matter. The Tribunal declined to make the order sought in paragraph 4.
5. As to paragraph 5 of the orders sought by the applicant, since the claim was for ancillary orders the Tribunal said that it followed that there was no reason to make this order, and the Tribunal declined to do so.
6. Although the Tribunal declined to make the orders sought, the Deputy President said that his decision was not intended to indicate that some narrower confidentiality orders might not be justified in relation to specific information or evidence. That question could be dealt with, if necessary, at a later time.

## The grounds in the application for judicial review

1. The grounds set out in the applicant’s application for judicial review (filed on 10 September 2015) were extensive and, correcting only the numbering, were as follows:

3. The Decision involved one or more errors of law, in the following respects

3.1 the Decision, set out at para [6] of the Reasons to decline to make Order 1, that was consented to by the First Respondent, was wrong in that, it misconstrued the effect of sec 14ZZE of the TAA as effecting, on its own, the mandate for privacy set out therein.

**Particulars**

(a) the Applicant has a right to an order in the nature sought, pursuant to sec 14ZZE of the TAA;

(b) the Tribunal misconstrued sec 14ZZE, in that it held that that section effected the sense of Order 1, whereas the section merely gives rise to an entitlement to a private hearing and a direction to have one, without providing the mechanism for that to take place.

(c) The Tribunal’s finding, at para [6], that the Order 1 was ‘inappropriate’ was in error in that order 1 sought to effect the ‘mandate’ referred to in sec 14ZZE and to make it an enforceable order of the Tribunal.

(d) The Tribunal misconstrued the relationship between sec 35(2) and sec 14ZZE, and so wrongfully failed to exercise its power to make the order.

3.2 The Tribunal’s decision, set out in para [7] of the Reasons to decline to make order 2, was wrong in that:

(a) on the materials before the Tribunal, generally and in respect of the subject matter of these proceedings, the First Respondent’s officers were interacting with the officials of other agencies, viz the Australian Crime Commission and the Australian Federal Police with a procedure of co-opting or seconding officers between those agencies.

(b) order 2 was directed to preventing those procedures from giving rise to a situation in which officers that were jointly authorised would be in a position to pass information and details gained in the course of the hearing of the private Tribunal Proceedings to other agencies and bodies, effectively circumventing the privacy principles inherent in sec 14ZZE of the TAA.

(c) the Tribunal’s decision in para [7] amounted to an improper exercise of power in failing to take the material before it into account, and failing to take the matters referred to in sub-para (a) above as a relevant consideration in the exercise of the power.

3.3 The Tribunal’s findings at [20] of the Reasons was wrong in that:

(a) it misconstrued the terms and function of sec 35 in the context of a taxation appeal that is subject to sec 14ZZE, which amounts to an error of law, and thereby failed to properly exercise the power and

**Particulars**

* + - * 1. Sec 35 of the AATA is a facilitative provision to serve the kind of proceeding to be conducted by the Tribunal. Sec 14ZZE modified sec 35 to characterise taxation appeal proceedings as private proceedings to which the balance of sec 35 is intended to facilitate.
        2. The Tribunal wrongly confined the operation of sec 14ZZE, and so misconstrued the nature and function of its sec 35 power as serving the objective of an open hearing when that function was reversed in the context of a taxation appeal.

3.4 The Tribunal, at paras is [26-29], [30-31], and [35-40], misconstrued the relationship between a taxation appeal under Part IVC of the TAA and the principle of the preservation of the adversarial system of criminal justice as set out in X7 v Australian Crime Commission *(2013) 248 CLR 92 (X7)* and *Lee v NSW Crime Commission* [2013] HCA 39, and *Lee v The Queen* [2014] HCA 20, and so improperly failed to exercise its powers under sec 35 in the circumstances of the case.

3.5 The Tribunal’s findings at para [38] and [39] were wrong in that:

(a) they were made without evidence as to what the functions and responsibilities of the First Respondent were said to be interfered with, and in any event, was an improper exercise in that the finding was inconsistent with the evidence before the Tribunal, that the reference had already been made to the Commonwealth Director of Public Prosecutions (**CDPP**) who was conducting its own inquiries;

(b) those findings failed to have regard to a relevant consideration, namely the qualification to the order, to the effect that the First Respondent had, within the order, the capacity to seek an ‘other order’ in appropriate circumstances.

(c) they failed to have regard to the fact that the matter had already been referred to the CDPP.

3.6 The Tribunal’s finding at para [42] was wrong in that it failed to have regard to the inquisitorial nature of the Tribunal’s function.

4. The Second Respondent misconstrued sec 35 of the AATA when read with sec 14ZZE of the TAA.

**Particulars**

(a) The Applicants repeats the terms of the Particulars to para 3.3 above.

5. The making of the decision was an improper exercise of the power conferred upon the Second Respondent by sec 35 of the AATA in pursuance of which it was purported to be made.

**Particulars**

(a) The Tribunal failed to have the correct regard to sec 35 has facilitating the private hearing regime in sec 14ZZE of the TAA and the effective reversal of the character of a taxation appeal to the ordinary position obtaining per sec 35(1) of the AATA.

(b) The Tribunal failed to have the correct regard to the exercise of the powers in sec 35 in the light of both sec 14ZZE of the TAA and the evidence that criminal proceedings were in the process of investigation by the CDPP and were, therefore, subject to the due execution of the elements of the accusatorial character of the criminal branch of the law.

6. The Second Respondent took the following irrelevant considerations into account in the exercise of its power in the decision:

6.1 in its findings at [20]:

(a) the mandate for open proceeding set out in sec 35(1) of the AATA, which were not relevant because the Tribunal Proceedings were characterised by the privacy mandate in sec 14ZZE and

(b) the utility for other organisations, such as the AFP and the ACC, to utilise the public nature of the proceedings for the purposes of gathering evidence in connection with planned criminal proceedings, contrary to the accusatorial character of the criminal process to which those enquiries were directed.

6.2 in its findings at [38] to [39] of the supposed views of the public in contrast to the preservation of the accusatorial criminal justice system mandated by the authorities

7. The Second Respondent failed to take the following relevant considerations into account in the exercise of its power in the decision:

7.1 in its findings at para [20]:

(a) it failed to construe and to apply its power in sec 35 to facilitate the private hearing in sec 14ZZE;

(b) it failed to take into account the salient obligation to recognise and to facilitate preservation of the accusatorial criminal justice system that was intermingled with the allegations subject of the Tribunal Proceedings, so that the Tribunal Proceedings could not be used to undermine the operation of that system.

7.2 The Tribunal’s finding at para [31] fails to take into account a relevant consideration, viz the position of the Applicant and its ability to call and to deploy appropriate evidence to conduct the Tribunal Proceedings and to satisfy the onus of proof it carries in that regard.

7.3 In relation to its findings at [36] was mistaken in its application of X7 and the two Lee cases to the circumstances of this case, whereby it failed to take relevant considerations into account, viz:

(a) that the Respondent had already referred the matter to the CDPP, who, with the AFP had already commenced and were undertaking investigation;

(b) the legitimate role of the ATO in respect of criminal enforcement expired with the referral of the matter to the CDPP, leaving its legitimate role only to dealing with administration of the tax law in the context of the Tribunal Proceedings;

(c) it failed to take into account the legitimate operation of the accusatorial character of the criminal justice system and the requirement of the civil procedural law not to subvert those principles.

8. The decision was, in the light of the reasons given and the arguments advanced, an exercise of the power that was so unreasonable that no reasonable person could have exercise the power in the following respects:

8.1 its decision refusing relief in respect of that sought in orders 2 to 5 for the reasons given above.

**Particulars**

(a) the subject matter of the Tribunal Proceedings were identical to the proceeds of crime proceedings that had already occurred and the charges proposed by the AFP and already referred to the CDPP.

(b) the reasons given effectively mean that the Part IVC proceedings, if they are to proceed will inevitably prejudice the ability of the taxpayer and critical witnesses to advance its case, and subverts the proper administration of the accusatorial character of the criminal justice system.

9. The Second Respondent breached the rules of natural justice and/or procedural fairness in connection with the making of the decision by failing to have regard to the evidence before it in the following respects:

9.1 The Tribunal’s finding at para [14] that the First Respondent is considering referring the matters subject of the Tribunal Proceedings to the CDPP, with the implicit finding that the Commissioner had not done so failed to take into account evidence to this effect set out in Exhibit A2, Annexure A, before it, and so amounted to a failure to have regard to the evidence and therefore a breach of the principles of natural justice and/or procedural fairness.

9.2 it its finding at [35] of the Reasons, to the effect that the evidence that criminal charges are unlikely, the Second Respondent did not have regard to the terms of Exhibit 2, Annexure A, which specifically dealt with the First Respondent’s referral to the CDPP, and so that finding amounts to a breach of the principles of natural justice and procedural fairness.

**Particulars**

(a) The evidence established that officers of the First Respondent were working with, and were seconded to the AFP and/or ACC and that a decision had been made about the existence of an offence and at Annexure A that the matter had already been referred to the CDPP.

**Orders sought**

1. A declaration that the decision was contrary to law, in that it failed to correctly reflect and to recognise, and was inconsistent with, the preservation of the accusatorial features of the elements of the criminal law to the extent to which they affected the conduct of the Tribunal Proceedings.
2. An order quashing and setting aside the decision.
3. An order remitting the application subject of the decision to the Second Respondent for further consideration in accordance with law.
4. The orders sought were later the subject of a proposed amendment, filed 4 December 2015, so as to add claims for remedies in fact referred to in s 39B of the *Judiciary Act 1903* (Cth). The amended orders sought were as follows:
5. A declaration that the decision was contrary to law, in that it failed to correctly reflect and to recognise, and was inconsistent with, the preservation of the accusatorial features of the elements of the criminal law to the extent to which they affected the conduct of the Tribunal Proceedings.
6. An order quashing and setting aside the decision or in the alternative:

(a) a writ of prohibition and/or

(b) an injunction

restraining the Respondents from giving effect to or taking any steps to give effect to the decision.

2A. In the alternative, a writ of certiorari quashing and otherwise setting aside the decision.

1. An order remitting the application subject of the decision to the Second Respondent for further consideration in accordance with law.
2. And in the alternative to order 3, a writ of mandamus compelling the Second Respondent to hear and determine the application subject of the decision according to law.
3. There is also a notice of objection to competency, filed 27 October 2015, on behalf of the first respondent Commissioner. It is in the following terms:

The First Respondent objects to the competency of the application on the following grounds:

**GROUNDS OF OBJECTION**

1. The decision complained of is not a decision under an enactment for the purposes of the *Administrative Decisions Judicial Review Act 1977* (“the ADJR Act”) as it lacks the requisite degree of finality.
2. The applicant is not a person within the meaning of the ADJR Act whose interests were adversely affected by the “decision”.
3. The relief sought is not relief available under s 39B of the *Judiciary Act 1903* (Cth).

Ground 3 falls away by reason of the amendment referred to in [35] above.

## The submissions of the parties

1. The applicant for judicial review submitted that the decision of the Tribunal denied the applicant access to evidence it required to discharge the onus of proof cast upon it unless those whose evidence was required forwent fundamental rights in relation to criminal proceedings which were clearly in contemplation and in respect of which the Commissioner of Taxation and the prosecuting authorities were acting in concert.
2. The applicant submitted that the orders were sought to prevent the Tribunal proceedings from being used by the AFP and the ATO as an information and evidence gathering exercise for the purposes of strengthening the prosecution case that was waiting to be brought.
3. The applicant submitted that s 35(2) of the AAT Act should be construed as calling for such orders as are desirable to maintain privacy. The Tribunal therefore misconstrued s 35(2) in the circumstances of this case. Section 35 gave the Tribunal a discretion to make orders that are “desirable” in the particular case, obviously with a view to advancing the exercise of its powers to inquire and to determine the issues before it. In the present case that power and function was to hear and determine a tax appeal.
4. The applicant relied on *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* [2005] FCAFC 154; 145 FCR 523 per Kiefel J at [25]. The applicant also relied on what Kiefel J said at [9] as follows:

The likelihood that a private hearing, in the sense as it has been understood in judicial proceedings, was intended by s 429 would appear to me to be high when regard is had to at least one of the likely reasons for its introduction. As Emmett J pointed out in *Selliah v Minister for Immigration & Multicultural Affairs* [1999] FCA 615 at [36]:

An applicant for a protection visa should be confident that nothing said in the course of hearing would find its way back to the authorities in the country in which he or she claims to be persecuted.

1. The applicant submitted that, given the limits of s 14ZZE, it was necessary to have orders under s 35(2) crafted in order to give practical effect to the privacy mandated by the *Taxation Administration Act*: *Brown v Commissioner of Taxation* [2001] FCA 276; 47 ATR 143 at [8]-[9]; *National Companies and Securities Commission v Bankers Trust Australia Ltd* (1989) 24 FCR 217 (***NCSC***) at 221-222 and 223; and *Pham*.
2. The applicant submitted that s 35 was to be construed, where possible, to facilitate the bringing and disposition of Tribunal proceedings, and to reduce or avoid unnecessary collateral harm to parties and to witnesses that might be suffered by the conduct of those proceedings. Collateral harm clearly included the potential to harm the ability of any future accused to have a fair trial and to enjoy the proper operation of the accusatorial model of criminal justice that underlay the general law.
3. The applicant submitted that *Pham* and the other authorities dealing with the issue now stood to be read in the light of the High Court’s decisions in *X7*, *Lee v New South Wales Crime Commission* and *Lee v The Queen*.
4. In relation to the Commissioner’s objection to competency, the applicant submitted that the Tribunal decision was a final decision for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) that fundamentally affected the applicant’s rights in a conclusive way in that it, in form or substance, could not be revisited otherwise than with a fundamental change of circumstances. It conclusively affected the applicant’s “access and availability to evidence, and the discharge of the onus of proof cast upon it”, and thereby the determination of its rights under the taxation law, its obligations under that law, and the characterisation and operation of the law.
5. As to paragraph 1 of the orders claimed, the applicant submitted that the Tribunal was in error because simply having a right to an order did not equate with the making of the order. The Tribunal misconstrued the terms of s 14ZZE and s 35(2) and so failed to exercise its powers according to law.
6. As to paragraph 2 of the orders claimed, the applicant submitted that the orders reflected the admitted interaction and secondment between the AFP and the ATO present in this case and the phenomenon addressed in decisions such as was addressed by Lockhart J in *NCSC* at 223 and the circumstances in *X7* and *Lee*. The Tribunal failed to take those factors into account as a relevant consideration, even in the light of the clear evidence of Agent Cutler of his dealings with the ATO personnel. There was a substantial risk of secondees or others having involvement with the Tribunal proceedings as well as any prosecution. The Tribunal misapprehended the issue and failed to properly consider the exercise of its discretion in respect of that order.
7. As to paragraph 3 of the orders claimed, the applicant submitted that without a restraint on publication, the privacy of proceedings was meaningless. Without the restraint, the accusatorial criminal process was turned on its head because the prosecutor simply had to wait for the obvious compulsion upon the taxpayer to bring an appeal under Pt IVC in order to extract material for the prosecution. The applicant submitted that the Tribunal misconstrued the relationship between s 14ZZE and s 35. The Tribunal erroneously construed s 35 to mandate openness in the face of s 14ZZE. The Tribunal did not make the operation of the AAT Act and s 14ZZE consistent with the general law as identified by the High Court in *X7* and *Lee*. The applicant submitted the Tribunal’s reasoning as to the individual’s right to silence was in error as it failed to take into account the position of, and disadvantage to, the applicant in the proceedings before it as opposed to witnesses, and to that extent failed to make orders to facilitate its own functions. The applicant submitted the interests of a third party prosecutor should not have been permitted to interfere with the proper discharge of the Tribunal’s function to determine the question of tax law. The applicant submitted the Tribunal failed to properly consider the evidence that the AFP had gone so far as to bring proceeds of crime proceedings on the basis of publicly made allegations and that the ATO was involved as part of a joint operation and had referred the papers to the CDPP. The applicant submitted the Tribunal did not consider the evidence in the light of the obvious attempt by the AFP to delay bringing charges hoping to better its case by the fruit of the Tribunal proceedings. The applicant submitted the Tribunal construed and applied authorities without taking into account the changes to the principles of law underlying those authorities as set out in *X7* and *Lee*. The applicant submitted that the Tribunal erred in failing to account for its inquisitorial function and disregarded that issue entirely in the context of s 35 read with *X7*. Further, the applicant submitted, the Tribunal misconstrued the issues before it. The Tribunal’s function should not have been misdirected because of the self-interest of witnesses. The applicant submitted the Tribunal should not have so construed its powers under s 35 or exercised its discretion under those powers in a way that was inconsistent with the general principle of preservation of the accusatorial assumption of the criminal law. Further, the Tribunal failed to account for the qualification to the order that facilitated any contingency that may have arisen and that justified the order. The applicant submitted that the Tribunal misconstrued the legislation and its function in the way it dealt with it in the notice of appeal.
8. As to paragraph 4 of the orders claimed by the applicant, the applicant submitted the same mistakes arose in the Tribunal’s refusal of this order. The suggestion that adequate protection “might” be provided in the course of the hearing failed to deal with the prejudice the applicant suffered in getting witnesses before the Tribunal in the first place.
9. The first respondent Commissioner submitted, in relation to the objection to competency, that this Court had identified the undesirability of interfering with procedural directions made by the Tribunal: *Geographical Indications Committee v O’Connor* [2000] FCA 1877; 64 ALD 325 at [26]-[31]. On this basis the Court may deny relief under s 39B of the *Judiciary Act*: *Von Stieglitz v Comcare* [2014] FCAFC 97; 64 AAR 356 at [55]; *Riverside Nursing Care Pty Ltd v Administrative Appeals Tribunal* [2001] FCA 1410 at [6]; and *Cook v ASP Ship Management* [2001] FCA 598 at [9] and [17] (per Spender and Weinberg JJ). The circumstances of the present case were not exceptional. Moreover the Tribunal had left open the possibility that more limited orders may be sought by the applicant as appropriate. On this basis, the Commissioner submitted, relief should in any event be denied.
10. So far as concerned the ADJR Act, the Commissioner submitted that the ‘decision’ of the Tribunal the subject of the application was not a decision for the purposes of the ADJR Act as it was not a final, operative decision: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 337-338. The Commissioner submitted that the refusal of the Tribunal to make the orders sought was manifestly a matter of procedure. Orders of the Tribunal dealing with procedural matters, including matters that may have consequences as to forensic advantages in Tribunal proceedings, did not constitute a decision under the ADJR Act: *Trezona v Australian Securities & Investments Commission* [2004] FCA 1389 at [23]; *Federal Commissioner of Taxation v Beddoe* (1996) 68 FCR 446 at 452-453; and *Geographical Indications Committee v O’Connor* at [28]. The orders in the present case did not finally resolve any issue in the proceedings. Further, while the Tribunal declined to grant orders of the breadth sought by the applicant, the Tribunal expressly left open the possibility of further orders in the course of the proceedings. This underscored the lack of finality inherent in the Tribunal’s orders.
11. In his written submissions, the Commissioner did not appear to address ground 2 or ground 3 of his notice of objection to competency, which I have set out at [36] above.
12. In response to the applicant’s submission that the ATO/AFP were using the Tribunal proceedings as a means of obtaining further information, that this was a deliberate tactic or that the AFP were delaying bringing charges with a view to obtaining more evidence from the Tribunal proceedings, the Commissioner submitted that the Tribunal had not made such a finding and that no evidence was adduced in support of the submission. The Commissioner submitted that these allegations were scandalous and made without any basis, and should be withdrawn.
13. As to ground 3.1 of the applicant’s application, the Commissioner submitted that the *Taxation Administration Act* modified the AAT Act and provided that despite s 35 of the AAT Act, a hearing is to be held in private if the party who made the application for review requested it be in private. There was thus no utility in the Tribunal ordering a private hearing under the AAT Act. There was no error in the Tribunal declining to make such an order.
14. As to ground 3.2, the Commissioner submitted there was no error of law in the Tribunal refusing to make an order in the form of paragraph 2, that is,that the only persons to be present were the parties, their legal advisors, and any witnesses for the period in which such witnesses were giving evidence. Such an order was otiose. The applicant’s contention that the Tribunal should have taken into account that officers of the ATO attending the hearing might pass on information to the AFP arising from the hearing did not arise on the form of the order sought by the applicant which only went to presence at the Tribunal during the hearing.
15. As to grounds 3.3, 4, 5 and 6, the Commissioner submitted that these grounds alleged a misconstruction by the Tribunal of the terms and function of s 35 of the AAT Act in the context of a taxation appeal. The Commissioner submitted there was nothing in s 14ZZE which went to the exercise of the Tribunal’s discretion to prohibit or restrict the publication or other disclosure of information under s 35(3) of the AAT Act. The Commissioner also referred to the requirement of s 35(5) of the AAT Act,which I have set out at [15] above. The Commissioner submitted that that was a mandatory consideration for the Tribunal in all matters, including taxation appeals. The Commissioner submitted that s 14ZZE modified s 35 only to the extent of provisions relating to a private hearing. Section 35 dealt separately with the privacy of the hearing and non-publication orders. Section 14ZZE should be construed only as modifying s 35 to the extent that s 35 went to the privacy of the hearing and as leaving untouched the Tribunal’s discretion to make orders in relation to non-publication. The Commissioner referred to *Brown v Commissioner of Taxation* [2001] FCA 276; 47 ATR 143 at [8]-[10] per Emmett J, as follows:

… Counsel for the Taxpayer contends that the expression, “the hearing of a proceeding before the Tribunal is to be in private”, in s 14ZZE, should be given a wide interpretation that would include a prohibition on the publication of evidence given before the Tribunal in a proceeding to which s 14ZZE applies. I consider that s 14ZZE must be construed in the light of s 35 of the AAT Act to which express reference is made in s 14ZZE. Section 35(2) draws a clear distinction between a hearing taking place in private, on the one hand, and the prohibition or restriction of the publication of evidence given before the Tribunal on the other. I do not see any reason for reading the expression in s 14ZZE as meaning anything more than the similar words contained in s 35(2)(a).

Thus s 35(2)(a) constitutes an exception to s 35(1) which requires, prima facie, that the hearing of a proceeding before the Tribunal be in public. Section 14ZZE also provides an exception to s 35(1) where a party who makes an application to the Tribunal requests that a hearing be in private. The matters that are dealt with in paragraphs 35(2)(aa), (b) and (c) are distinct and separate matters from the matter of the privacy of the hearing.

Parliament has conferred an express right on parties to certain taxation matters before the Tribunal to have the hearing in private. It does not confer any express right for a party to have the publication of evidence before the Tribunal prohibited or restricted. On the other hand, having regard to the terms of s 14ZZE, it would be a most unusual case where the Tribunal, if asked, did not give the directions that are contemplated by s 35(2) in a proceeding to which s 14ZZE applies. The Tribunal is empowered to give such directions for any reason, where it is satisfied that it is desirable to do so. Where a party exercised the right, under s 14ZZE, to have a hearing in private, that would be a very cogent reason for the Tribunal to make an order under s 35(2)(b).

1. As to grounds 3.4, 6 and 7, the Commissioner submitted that the Tribunal did not misconstrue the relationship between a taxation appeal and the principle of the preservation of the adversarial system of criminal justice having regard to the decisions in *X7*, *Lee v New South Wales Crime Commission* and *Lee v The Queen*. The Commissioner submitted that the Tribunal correctly distinguished those authorities as dealing with the situation where the accused was the subject of the extraordinary processes of compulsory examination. In the present case witnesses would not be under compulsion to answer questions and would be entitled to invoke the privilege against self-incrimination. Thus, the High Court authorities relied on by the applicant did not go to the proper construction of Pt IVC of the *Taxation Administration Act* nor to its relationship with the adversarial system of criminal justice. The same submission was made in relation to *NCSC* at 223. Moreover, the Tribunal expressly preserved the possibility that narrower confidentiality orders might be justified during the proceedings in relation to specific information and evidence. The Commissioner submitted there was no error in the Tribunal’s exercise of discretion in this case. The Tribunal weighed the relevant matters and concluded that the blanket orders as sought by the applicant should not be made. Further, the Commissioner submitted, the Tribunal did not consider that Tribunal proceeding should be utilised for the purposes of gathering evidence in connection with planned criminal proceedings. The Commissioner submitted that this was a gross misconstruction of the Tribunal’s findings at [20] of its reasons.
2. As to ground 3.5, the Commissioner submitted that [38]-[39] of the Tribunal’s reasons identified, as a matter of generality, that the orders as sought by the applicant would have the potential to prevent the Commissioner from acting upon information, which had the potential to disadvantage the community generally. That analysis did not require specific evidence but flowed from the character and breadth of the orders as sought. There was no error. Neither the fact that a further order could be made during the hearing, nor that there had been a referral to the CDPP, undermined the Tribunal’s analysis.
3. As to ground 3.6, the claim that the Tribunal failed to have regard to the inquisitorial nature of proceedings before the Tribunal, the Commissioner submitted that it was manifestly correct for the Tribunal to observe that the conduct of the case before the Tribunal was a matter for the litigant. This was not a case in which the Tribunal had sought to compel attendance by any witness.
4. As to ground 8, unreasonableness, the Commissioner submitted that the decision of the Tribunal was one which was clearly open on the material. The Tribunal found that an assertion that criminal charges would be laid was speculative but left open the possibility of a later application for confidentiality being made in relation to specific evidence or information. Witnesses could claim privilege against self-incrimination as regards any particular questions put to them. There was nothing unreasonable or irrational about the Tribunal’s decision.
5. As to ground 9, the Commissioner submitted that the applicant advanced no submissions in support of it, there was no error of fact by the Tribunal at [14], and that in any event would not give rise to the alleged denial of procedural fairness.
6. In its reply submissions the applicant submitted there was no blanket prohibition on reviewing decisions that amounted to interlocutory decisions of the Tribunal. The real issue was the weight and significance of those decisions to the conduct of any hearing and the discharge of the Tribunal’s jurisdiction and function. Where the decision substantially affected the rights of the applicant, that would be a matter that properly justified judicial review. The applicant submitted that the Tribunal’s decision was likely to significantly affect the evidence that the applicant would be able to employ in the appeal and thereby have a substantial effect on the applicant’s ability to vindicate its rights. The applicant submitted that the possibility of more limited orders did not meet the prejudice the applicant suffered. The applicant submitted that the Tribunal’s decision had a substantial and fundamental effect upon its rights in much the same way as a ruling about a privilege claim would have. The applicant submitted that the Tribunal’s decision had the effect of substantially undermining the applicant’s and the witnesses’ rights, inter-alia, in respect of the proper accusatorial function of the criminal law and turned the proceedings into a means by which that function and the consequent rights that arose were subverted. These were matters that were fundamentally and finally affected by the decision. The applicant submitted that the prospect of it seeking further orders was a chimera in the circumstances, not the least of which included the general principle that such a decision could not be revisited without a substantial change of circumstances.
7. In response to the Commissioner’s submission that there was no basis for the applicant’s submission that the ATO/AFP were using the Tribunal proceedings as a means of obtaining further information, the applicant submitted that the strategies of the ATO and the AFP were clear.
8. In response to the Commissioner’s submissions in relation to ground 3.1, the applicant submitted that the Commissioner now refuted the order that he had consented to and overlooked that the terms of the section did not effect the order.
9. In response to the Commissioner’s submissions in relation to ground 3.2, the applicant submitted that it could happen that an AFP agent was seconded to the ATO and attended even a private hearing as an ATO officer.
10. In response to the Commissioner’s submissions in relation to grounds 3.3, 4, 5 and 6, the applicant submitted that merely referring to the sections of the legislation was not the same as construing it and the Tribunal made no attempt to reconcile s 14ZZE with s 35. The applicant submitted that the test identified by the Commissioner was the wrong test because of the impact of s 14ZZE.
11. In answer to the Commissioner’s submissions in relation to grounds 3.4, 6 and 7, the applicant submitted that the parties differed as to the correct principle. The applicant submitted that the Tribunal misconstrued the principles emerging from *X7* and *Lee* and the discretion was misapplied.
12. In response to the Commissioner’s submissions in relation to ground 3.5, the applicant submitted that the Commissioner overlooked the difference between a general scope of enquiry by the ATO and a case in which it participated in a criminal enquiry and had already delivered a criminal brief to the CDPP, as in the present case.
13. In response to the Commissioner’s submissions in relation to ground 3.6, the applicant submitted that the Commissioner’s submission did not address the challenge made as to the Tribunal’s inquisitorial character, in circumstances where the Tribunal’s finding did not take that factor into account. The applicant referred to *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15; 319 ALR 181 at [62]-[63] (per French CJ, Kiefel, Bell and Keane JJ) as to importing into the inquisitorial review function of the Tribunal notions appropriate to adversarial proceedings conducted in accordance with formal rules of pleading.

### Amendment

1. In the course of the hearing, the applicant sought to amend its originating application for relief by adding the following ground, in the form of a proposed amendment filed by leave, on 4 December 2015, after the conclusion of the hearing:

10. Further, to the extent to which the Tribunal’s findings at [35] of the Reasons are findings of fact, then those findings are in error in that they are, in the context of the material before the Tribunal, irrational, illogical, unreasonable and/or not based on the evidence and hence were affected by an error of law, and in the alternative, not being based upon evidence, such a finding was in breach of the requirements of procedural fairness.

1. There then followed ten paragraphs of what were said to be particulars, one of those paragraphs having four sub paragraphs. They were as follows, as written:

**Particulars**

(a) the allegations underlying the proposed criminal charges include allegations advanced by the First Respondent of dishonesty and the creation of an ‘elaborate façade to disguise the true facts’ which amounts to allegations of fraud, sham and dishonesty, see para [10] of the Reasons.

(b) that the officer of the AFP, here agent Cutler, as part of a multi-agency task force involving the ATO, had formed suspicion (sic) of conspiracy involving intentional dishonesty and the commission of a crime, see para [12] of the Reasons.

(c) the First Respondent is considering referring the activities of the Applicant and others to the CDPP, see para [14] of the Reasons.

(d) the First Respondent had assisted the AFP in bringing the *Proceeds of Crime Proceedings* (**POC Proceedings**) in the Supreme Court of NSW involving the same facts as are subject of the Tribunal proceedings, see para [13] of the Reasons.

(e) all 5 of Agent Cutler’s affidavits in the POC Proceedings were before the Tribunal (and before this Court (see annexures B to F of Mr Ganz’s affidavit of 16 October 2015));

(f) Agent Cutler’s affidavits, as culminating in his affidavit of 4 June 2014, involve precise statements of allegation at paras 9, 10, 22, 30-38, 39, 40-41, 42-43, 44, 45, 46-47, 74-80, 81-82, 93, 95, 97 including statements of suspicion of serious criminal offences which are identified in the affidavit.

(g) Mr Ganz at para 16 of his affidavit deposes to his concern of a real risk that criminal charges as identified by Agent Cutler might be brought.

(h) The material produced by the First Respondent, included in Mr Ganz’s further affidavit before the Tribunal (annexure B to his affidavit in these proceedings) included:

(A) a reference to correspondence to the CDPP and the provisions of IT forensic services for the assistance of the CDPP, as well as a delivery of a brief to the CDPP (see annexure A, at page 112 of Mr Ganz’s affidavit in these proceedings);

(B) a reference (in annexure B at page 113 of Mr Ganz’ affidavit in these proceedings) to the AFP not requiring any further action by the ATO in respect to electronic data extracted in warrants;

(C) a reference to fraudulent activity and fraud typology in the material at annexure C (page 114 of Mr Ganz’s affidavit).

(D) A reference to the ATO wanting to head statements “in the matter of R v Cedric MILLNER and Jonathan KELU”, at annexure D (page 115 of Mr Ganz’s affidavit).

(i) There was no evidence to the contrary to the above material presented to the Tribunal, and no evidence that charges were not likely or that the allegations were to be abandoned. Nor was there any material at all going to the likelihood of charges other than that material advanced by the Applicant.

(j) the Tribunal did not deal with this material in the context of the statements and findings made at para [35] of the Reasons.

1. In this respect, the applicant submitted that even in the context of the fact that no charges had been brought to date, there was no basis for a finding that there was not a “real risk” of them. And if there was a “real risk”, there was no basis to say that such charges were “unlikely”, so to that extent, there was no rational basis to say that they were anything other than, at least, “likely”. The applicant submitted that the Tribunal either misconstrued the evidence or overlooked it, and thereby failed to take the applicant’s case into account. The applicant submitted the only rational conclusion that could be drawn from the evidence, if it were considered, was that the charges articulated in the evidence were “likely” at some time. There was no basis or foundation for a finding to the contrary. On the question of whether evidence was dealt with or ignored, if where reasons were given there was no reference to a particular matter, it may be inferred that the decision-maker disregarded that material, which could give rise to an error of law. The mere fact that the document might have been referred to elsewhere in the reasons or in some other context did not, of itself, satisfy a requirement that that material be considered in the context of the relevant question. The applicant submitted the Tribunal failed to deal with the only evidence before it in making its finding. The applicant submitted that there was a question whether there was any rational evidence to support the finding which was a question of law. The applicant also submitted that it was clear that a failure by the Tribunal to deal with a substantial and seriously advanced case involved a denial of procedural fairness. A failure to deal with the material in support of a finding in reasons may establish a breach of procedural fairness. The same arose in respect of evidence that was not considered.
2. In reply to the new ground 10, the Commissioner submitted that in the course of weighing the grounds relied upon in support of the applicant for the orders it sought, the Tribunal reached an evaluative conclusion that “an assertion that charges will or are likely to be laid is speculative”. The Commissioner submitted that the applicant’s purported further grounds for seeking review sought to trespass on the merits of the Tribunal’s evaluative judgment and disclosed no jurisdictional error nor error founding relief under the ADJR Act*.* The Commissioner submitted that to establish irrationality or illogicality as amounting to a jurisdictional error required a high threshold (even if such relief was available in relation to a finding of fact in relation to a matter taken into account in reaching an evaluative judgment, or in relation to an evaluative judgment which in turn was relied upon as part of the reasons informing the exercise of power under s 35 of the AATAct, rather than as regards the ultimate decision on the application itself). The matters relied on here fell well short of that threshold. There was clearly an evident and intelligible justification for the Tribunal’s conclusion. There was evidence available to the Tribunal to support its conclusion at [35]. A no evidence challenge to a factual finding will fail if there is some evidence which reasonably admits of different conclusions as to the existence of a fact or not. If there were some probative evidence of a fact and some logical ground to support the fact, the finding of fact would not involve error of law. The threshold as regards an evaluative conclusion such as that relied on by the applicant must, if anything, be higher. Here, the Commissioner submitted, the evidence reasonably admitted of different conclusions as to whether or not “the assertion that charges will or are likely to be laid is speculative”. The finding made by the Tribunal was open on the evidence and accordingly there was no error of law. Further, there was no basis for the submission that the Tribunal failed to take into account a substantive claim advanced by the applicant. The applicant’s application and the grounds relied upon were manifestly considered by the Tribunal. There was no possible denial of natural justice. In any event, the Commissioner submitted, the Tribunal took into account the matters particularised in ground 10 of the amended application, reference being made to the Tribunal’s reasons at [10], [12], [14], [13] and [35]. The Commissioner submitted there was no basis to infer that such matters were not considered by the Tribunal in reaching its conclusion in [35]. The Commissioner also submitted that it would be futile to remit the matter to the Tribunal for reconsideration because at [36] the Tribunal stated that “even if charges had been laid” it would still not have made the confidentiality orders sought.

## Consideration

1. In my opinion, despite the quantity of ink and the volume of words spent by the applicant on this application, it may and should be disposed of shortly.
2. I was told by counsel that nothing had been filed in the Tribunal beyond a statement of issues on each side. What are called the T documents were also before the Tribunal. I was also told by counsel that there had been no application in the Tribunal to stay the proceedings.
3. It is doubtful, in my view, that a decision of the Tribunal declining to make orders under s 35 of the AAT Act but at the same time stating, at [51], that the decision was not intended to indicate that some narrower confidentiality orders might not be justified in relation to specific information or evidence and that that question could be dealt with, if necessary, at a later time, is a “decision” within the meaning of the ADJR Act as considered in *Australian Broadcasting Tribunal v Bond*, particularly at 341 (per Mason CJ). This is because, although provision is made for that decision by or under a statute, it is not, in my view “substantive, final or operative”. It may be, however, that the word “conduct” in s 6 of the ADJR Act covers an interim order under s 35. This is because it could be said that such an order “looks to the way in which the proceedings have been conducted … rather than decisions made along the way with a view to the making of a final determination.”: See *Bond* at 341-342. It is not necessary for me to decide this question, first, because the applicant also invokes the jurisdiction of this Court under s 39B of the *Judiciary Act* but also, more importantly, because whether or not the order made was a “decision” or “conduct” within the meaning of the ADJR Act, I would refuse relief as a matter of discretion either under s 16 of the ADJR Act or under s 39B of the *Judiciary Act*. This is because, to adapt what Mason CJ said in *Bond* at 337:

To interpret “decision” in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.

1. It is unnecessary to go further.
2. To illustrate the point, in the course of argument I asked counsel for the applicant:

HIS HONOUR: [Assume] [y]ou have obtained from somebody a witness statement that even when charges were brought against your client could prove useful to the prosecuting authorities.

MR BAMBAGIOTTI: Yes.

HIS HONOUR: All right. You or your instructing solicitor goes to the tribunal and says I now have an application under section 35. There is this affidavit, a witness statement, in this brown envelope that I want an order about, that is, that it be restricted only to counsel for the Commissioner and the legal representatives of the Commissioner, and then you could have a hearing about it.

MR BAMBAGIOTTI: Yes.

HIS HONOUR: Or you could take six statements along those lines. Is there anything in what the tribunal has said that would prevent that happening?

Counsel’s response was that the Commissioner would say that there had been no change of circumstances and therefore the order made by the Tribunal could not or should not be varied. I discount that prospect in light of the express reasons given by the Tribunal to which I have already referred. No legal error on the part of the Tribunal has been established.

1. The submission was also put that, in effect, the Tribunal was in error in failing to make the blanket order for which the applicant applied and, instead of refusing to make an order until a specific issue arose, the Tribunal should have made the blanket orders and then lifted them as and when they proved to be unnecessary.
2. In my opinion, neither the terms of s 14ZZE of the *Taxation Administration Act* when read with s 35 of the AAT Act nor the facts before the Tribunal demonstrated error in the Tribunal taking the course which it did. Counsel for the applicant submitted that in order to persuade a person who might himself be the subject of charges even to prepare a statement or provide an affidavit, the applicant would have to seek that that person gamble with their own self-interest and rights. On behalf of the applicant, reference was made to paragraph 20 of Mr Ganz’ affidavit of 21 April 2014 (filed in the proceedings in the Tribunal). In my view however, no error could be established on the part of the Tribunal in not taking that evidence as establishing the proposition that witnesses the applicant wished to call would or might refuse to prepare a statement or provide an affidavit in the absence of the blanket orders which the applicant sought from the Tribunal. That paragraph is expressed in terms altogether too circumspect and conditional to establish that proposition.
3. In my opinion, there is no substance at all in the claims for relief advanced with respect to paragraphs 1 and 2 of the orders sought by the applicant before the Tribunal. I accept, consistently with *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49; (2006) 230 CLR 486 at [23], that the concept of privacy is imprecise and that the words “public” and “private” are words that are used in contrast, but they do not cover the entire range of possibilities. That does not, however, demonstrate any error of law on the part of the Tribunal in refusing to make an order, and doing no more than saying that the hearing of the proceeding before the Tribunal for a review of a reviewable objection decision is to be in private, being the words of s 14ZZE.
4. As to paragraph 2 of the orders sought, I could better understand an argument that it would be an error of law to make that order in the abstract than that it was an error to refuse to make the order in the absence of any information as to the nature of the evidence to be given, and by whom.
5. As to the balance of the orders sought, apart from the questions of statutory construction, the claims before the Tribunal had an abstract air about them, in respect of which, in my opinion, the Tribunal was entitled to say, as it did, that any specific concerns could be dealt with by specific orders as and when those concerns arose. The abstract nature of the claims is illustrated by the evidence placed before the Tribunal, which was both general and by a legal practitioner and not by an officer of the applicant taxpayer (or by either or both of the individuals).
6. The applicant’s submissions did not deal with the implied undertaking the subject of the Tribunal’s General Practice Direction issued by the President of the Tribunal on 30 June 2015, as follows:

**Part 5 – Implied undertaking not to use documents for another purpose**

**Application**

5.1 The procedures in this Part apply to applications in any Division other than the Migration and Refugee Division.

**Procedures**

*Implied undertaking*

5.2 If you or the decision-maker have obtained a document provided under compulsion in an application before the AAT, you, the decision-maker and any person to whom the document is given, by implication, undertake to the AAT that the document will not be used for any purpose other than the purpose for which it was given to us unless:

(a) the document was received in evidence by us in the application and the confidentiality of the document is not protected by an order under section 35 of the AAT Act or by another statutory provision; or

(b) we give you or the decision-maker permission to use the document for another purpose.

5.3 Documents to which the implied undertaking applies include:

(a) documents lodged under section 37 or 38AA of the AAT Act;

(b) documents lodged pursuant to a direction given by us (for example, expert reports or witness statements); and

(c) documents produced in response to a summons issued by us.

5.4 The implied undertaking continues even after an application has been finalised. Breach of the implied undertaking by using the documents for another purpose may constitute a criminal offence under section 63 of the AAT Act on the basis that it could, if the AAT were a court of record, constitute a contempt of court.

*Use of documents obtained in an application currently before the AAT in other current applications involving the same applicant*

5.5 Subject to any other direction we may make, either at the request of a party or of our own motion, documents that have been given to us in one application can be used in another application if:

(a) the applications have been lodged by the same applicant and are currently before the AAT; and

(b) we have decided that these applications should be dealt with together.

Except to the extent identified here, you and the decision-maker are not released from the implied undertaking in relation to the documents.

1. In the alternative, turning to the grounds and the submissions in more detail, my reasoning is as follows.
2. The decision in *Brown* stands against the applicant’s submissions as to the interrelationship between s 14ZZE and s 35, and which I have set out at [55] above. Emmett J set out the provisions of s 35 as then in force as follows:

...

Subject to this section, the hearing of a proceeding before the Tribunal shall be in public.

...

(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:

(a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and

(aa) give directions prohibiting or restricting the publication of the names and addresses of witnesses appearing before the Tribunal; and

(b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and

(c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal or of the contents of a documents (sic) lodged with the Tribunal or received in evidence by the Tribunal in relation to the proceeding.

(3) In considering:

(a) whether the hearing of a proceeding should be held in private; or

(b) whether publication, or disclosure to some or all of the parties, of evidence given before the Tribunal or of a matter contained in a document lodged with the Tribunal received in evidence by the Tribunal, should be prohibited or restricted,

the Tribunal shall take as the basis of its consideration, the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.

…

Emmett J then did say:

The matters that are dealt with in paragraphs 35(2)(aa), (b) and (c) are distinct and separate matters from the matter of the privacy of the hearing.

Parliament has conferred an express right on parties to certain taxation matters before the Tribunal to have the hearing in private. It does not confer any express right for a party to have the publication of evidence before the Tribunal prohibited or restricted. On the other hand, having regard to the terms of s 14ZZE, it would be a most unusual case where the Tribunal, if asked, did not give the directions that are contemplated by s 35(2) in a proceeding to which s 14ZZE applies. The Tribunal is empowered to give such directions for any reason, where it is satisfied that it is desirable to do so. Where a party exercised the right, under s 14ZZE, to have a hearing in private, that would be a very cogent reason for the Tribunal to make an order under s 35(2)(b).

1. I note, however, that his Honour was not dealing with the time at which such directions may be given or with the specificity of any such directions.
2. I reject the applicant’s submission that the Tribunal’s inquisitorial powers had the consequence that as a general proposition the Tribunal should require evidence, whether in a tax case or otherwise, which a party did not itself put on.
3. In relation to paragraph 3 of the orders claimed, in my opinion, no error is shown on the part of the Tribunal in refusing to make that order given the blanket nature of what was sought, that is, that no evidence given before the Tribunal or filed with the Tribunal or the identity of any document or any matters contained in any of the documents filed with or received by or read to the Tribunal be disclosed or published. I reject the submission that it was an error of law on the part of the Tribunal to refuse to make blanket orders, subject to later application, rather than, as the applicant submitted, to make the blanket orders and later lift them where they proved unnecessary.
4. In relation to paragraphs 4 of the orders claimed, as the Tribunal observed, the protection sought can be adequately provided in the course of the proceeding, by the Tribunal as constituted to hear the matter. I would add that, in terms, the scope of the paragraph is too broad. Considered at the level of abstraction at which the claim was put, there is shown no error on the part of the Tribunal by refusing to order that the names of all witnesses to be called were not to be published or disclosed by the Commissioner or the Tribunal. As to the nondisclosure of the applicant’s name, that is a matter dealt with by the *Taxation Administration Act* s 14ZZJ.
5. In addition, in relation to paragraph 5 of the orders claimed, I do not accept that it was for the Tribunal, by virtue of this claim, to attempt to reframe for the applicant, by narrowing or otherwise, the width of the preceding four paragraphs of the orders claimed.
6. In relation to the new ground 10, if it were necessary to decide, in my opinion, it would fail for four reasons. First, the Tribunal’s conclusion that the evidence did not establish that criminal charges were likely involved an evaluative judgment. Secondly, the evaluative judgment is one on which reasonable minds might differ, indicating that this is not a case of legal unreasonableness. Thirdly, I do not accept that the Tribunal failed to take into account what it had expressly referred to at [14] of its reasons, that the Commissioner was considering referring the activities of the two individuals there referred to and of the taxpayer to the CDPP for prosecution. Fourthly, I do not accept that the Tribunal’s findings at [35] were not based upon evidence. In my view, the particulars to the new ground 10 make it clear that this ground is in substance an attack on the merits of the Tribunal’s findings. In relation to this ground, I do not accept the Commissioner’s submission that the Tribunal also made an alternative finding at [36] beginning “But even if charges had been laid …” In my opinion, this is illustrative of the difficulties which beset the applicant’s case by reason of the breadth and prematurity of the orders sought in the Tribunal and of the consequent abstract quality of its case.
7. The applicant relied on what was said in *NCSC*. I would make three observations. First, that decision predated the decision of the High Court in *Bond*, and therefore throws no light on the question of whether the present orders of the Tribunal constituted either a “decision” or “conduct”. Secondly, the main issue in the case was the implied powers of the Commission to give directions ancillary to its authority to direct that the hearing take place in private. Thirdly, specific orders had been made by the Commission and it was those orders which were under challenge. Those orders bear no similarity to the present Tribunal’s declining to make the orders sought by the applicant.
8. As to the applicant’s reliance on *X7* and the *Lee* decisions, it may be that in those judgments the High Court more fully explained what it means to depart from the accusatorial nature of the criminal justice system and more clearly restated both the fundamental principle of the common law that the prosecution is to prove the guilt of an accused person and that the companion rule to the fundamental principle is that an accused person cannot be required to testify. In relation to s 13(9) of the *New South Wales Crime Commission Act 1985* (NSW) the High Court said that its protective purpose would usually require that the Commission quarantine evidence given by a person to be charged from persons involved in the prosecution of those charges. That, however, is not a matter to be decided in the abstract and may be dealt with by the Tribunal in the present case if and when it arises. For example, I applied *X7*, particularly at [124], in *Seller v Commissioner of Taxation* [2013] FCA 1373; 308 ALR 376 at [43] in making an order, in effect, that the applicants need not file their affidavit evidence in their tax appeals until after the conclusion of their criminal trial or further order.
9. As to *Pham*, it is to be recalled that in that case Mr and Mrs Pham had been committed to stand trial in the District Court of New South Wales before their applications under Pt IVC came on for hearing in the Tribunal. It was in that context, which stands in contrast to the present case, that the Tribunal made the order, which was successfully challenged by the Commissioner on judicial review, that until further order, the Commissioner and the Tribunal not “disclose or publish any of the evidence given before the Tribunal or … matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal”. It was held by Katzmann J, at [33], that the Tribunal fell into jurisdictional error because it did not advert to the submission advanced by the Commissioner to the Tribunal that the Phams were entitled to claim the privilege against self-incrimination. Further, at [59], Katzmann J held that there was no evidence to support the Tribunal’s finding that “aspects of their defence in the criminal proceedings would be compromised”. I accept, as the applicant submitted, that *Pham* was decided before *X7* and the *Lee* cases. However, I do not accept that *Pham* assists in the resolution of the present proceedings.
10. The applicant’s reliance on *Uelese* seems to me to be misplacedas the High Court was there dealing with a submission that the interests of the appellant’s two youngest children were not “relevant” to the Tribunal’s review because the appellant had not included their interests in the case he sought to present to the Tribunal.
11. In relation to the objection to competency, in light of what I have said at [75] above as to the exercise of my discretion, I need not and do not finally determine paragraphs 1 and 2 of that notice of objection.

## Conclusion and orders

1. I grant the applicant leave to amend its application by adding ground 10 and to amend the prayers for relief so as to claim a remedy specified in s 39B. The Commissioner should have his costs thrown away by reason of that amendment. The application as so amended is dismissed, with costs.

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| --- |
| I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 17 December 2015