FEDERAL COURT OF AUSTRALIA

Mullen v Aged Care Quality and Safety Commissioner [2019] FCA 1726

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| Appeal from: | *Mullen and Chief Executive Officer, Australian Aged Care Quality Agency (Freedom of Information)* [2017] AATA 1805; and  *Mullen and Aged Care Complaints Commissioner (Freedom of Information)* [2017] AATA 2556 |
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| File numbers: | WAD 602 of 2017  WAD 643 of 2017 |
|  |  |
| Judge: | **BANKS-SMITH J** |
|  |  |
| Date of judgment: | 24 October 2019 |
|  |  |
| Catchwords: | **ADMINISTRATIVE LAW -** freedom of information - where applications made for access to information under *Freedom of Information Act* *1982* (Cth) - secrecy provisions under Part 6.2 of *Aged Care Act 1997* (Cth) - exempt documents - whether information protected information - whether information protected on basis it related to affairs of an approved provider - whether potential for disclosure upon application under *Aged Care Act* and in discretion of Secretary of Department of Social Services relevant to protected status of information - statutory construction |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44  *Aged Care Act 1997* (Cth) ss 2, 3-1, 3-2, 3-3, 3-4, 86-1, 86‑2, 86-3, 86-9, Parts 6.2, 6.3, Schedule 1  *Freedom of Information Act* *1982* (Cth) ss 3, 40, 11, 11A, 16, 38, 47E, 47F, 54L, 55G, 55K, 57A, 60, 93A, Parts III, IV, VII, Schedule 3 |
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| Cases cited: | *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229  *CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70  *Haritos v Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315  *Illawarra Retirement Trust v Secretary, Department of Health and Ageing* [2005] FCA 170  *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90; (2012) 203 FCR 166  *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355  *SZNRZ v Minister for Immigration and Citizenship* [2010] FCA 107  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362  *Walker v Secretary, Department of Health and Ageing* [2016] FCA 233; (2016) 244 FCR 113 |
|  |  |
| Date of hearing: | 1 November 2018 |
|  |  |
| Registry: | Western Australia |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 133 |
|  |  |
| Counsel for the Applicant: | The Applicant appeared in person |
|  |  |
| Counsel for the First Respondent: | Mr J Davidson |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |
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ORDERS

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|  | | WAD 602 of 2017 |
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| BETWEEN: | JOHN MULLEN  Applicant | |
| AND: | AGED CARE QUALITY AND SAFETY COMMISSIONER  Respondent | |

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| JUDGE: | BANKS-SMITH J |
| DATE OF ORDER: | 24 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The name of the respondent be amended from the Australian Aged Care Quality Agency to the Aged Care Quality and Safety Commissioner.

2. Appeal dismissed.

3. The applicant pay the respondent's costs to be assessed, if not agreed, by a registrar of this Court on a lump sum basis.

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

ORDERS

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|  | | WAD 643 of 2017 |
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| BETWEEN: | JOHN MULLEN  Applicant | |
| AND: | AGED CARE QUALITY AND SAFETY COMMISSIONER  Respondent | |

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| JUDGE: | BANKS-SMITH J |
| DATE OF ORDER: | 24 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The name of the respondent be amended from the Aged Care Complaints Commissioner to the Aged Care Quality and Safety Commissioner.

2. Appeal dismissed.

3. The applicant pay the respondent's costs to be assessed, if not agreed, by a registrar of this Court on a lump sum basis.

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

REASONS FOR JUDGMENT

BANKS-SMITH J:

1 In August 2015 Mr Mullen made two separate applications under the *Freedom of Information Act* *1982* (Cth) (**FOI Act**) for information relating to the staffing levels in a residential aged care facility where his mother resided. It is clear that Mr Mullen was deeply and genuinely committed to the care of his late mother. He has been persistent in his quest for information over many years.

2 Generally speaking, the FOI Act facilitates access to a wide range of documents held by public authorities. However, following various review processes, access to certain requested documents was denied to Mr Mullen, and these appeals concern his pursuit of such access.

3 Despite Mr Mullen's request, the appeals were not consolidated as they involved separate decisions of the Administrative Appeals **Tribunal** and separate respondents before the Tribunal. However, the appeals were heard together and it is convenient that one set of reasons be provided. The notices of appeal and submissions were, save for minor modifications, the same in each matter and I invited Mr Mullen to file only one set of submissions.

4 I note that since the hearing of the appeals, the offices of the respective respondents have merged by operation of the *Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Act* *2018* (Cth) and accordingly the name of each original respondent to these appeals has now been substituted by reference to the 'Aged Care Quality and Safety Commissioner'. That change does not have any effect upon the determination of the appeals. It does not change the fact that before the Tribunal and before this Court at the time of the hearing the respondents to the two appeals were respectively the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner, and my references to a 'respondent' in these reasons should be construed as the context directs as a reference to the respondent in each appeal.

## Two requests and two decisions

5 Mr Mullen's first request under the FOI Act was made to the Commonwealth **Ombudsman** in order to ascertain information about matters raised by Mr Mullen in a complaint made to the Ombudsman in 2013 but which Mr Mullen contends was not investigated. Mr Mullen sought the following:

1) Evidence of Training, Qualifications and Experience of the Investigators specifically relevant to the field of Aged Care (Ms. [S] and Ms. [C])

2) A full log of all activities in this matter (including internal to the office of the Ombudsman); including records of all correspondence (other than to/from me), conversations (including by phone) and meetings, with all notes made accompanying these activities and minutes of any meetings.

3) Any background information gathered to help with this matter.

4) Any analysis carried out or 'working notes'.

5) Any Advice obtained by the Ombudsman and/or parties the Ombudsman interacted with.

6) Any 'recommendations' made by the Ombudsman related to this matter.

7) Any other information not specified above that has any relation to my concerns.

6 I will refer to this request as the **Ombudsman FOI request**.

7 The second request was made under the FOI Act to the **Department** of Social Services. Mr Mullen sought documents in four parts as follows:

Part 1:

This refers to a complaint made to the Aged Care Complaints Scheme on 14 August 2012, the complaint was originally given the 'Case ID' number 129782, but I now believe much of the discussion about this case may not have been recorded against this case number, but discussions on this same matter continued into November 2012 and may have been in part captured under another Case ID issued; 132562.

The information I am seeking in this part:

1a) A full log of all activities in this matter; including records of all correspondence, conversations (including by phone) and meetings, with all notes made accompanying these activities and minutes of any meetings.

The following are of particular interest;

- A copy of the referral email (as supplied to the Aged Care Commissioner for her investigation no. COM000157 allegedly sent but not delivered to the Aged Care Standards and Accreditation Agency (ACSAA, or Agency),

- Notes from the conference call (I sat in on) between Scheme members and Advocare in September 2012,

- Minutes/notes taken from the meeting held at Carinya of Bicton, 10:00am, 2/11/2012, including the preamble in which discussion about the Systematic Understaffing was arbitrarily removed from the agenda.

1b) Any background information gathered to help with this matter.

1c) Any analysis carried out or 'working notes'.'

- Of particular interest are any 'working notes' made by the Complaints Resolution Officer, Mrs. [T], following the meeting held at Carinya of Bicton 2/11/2012, after which she said she would go over 'all the information'.

1d) Any Advice obtained by the complaints Scheme and/or parties the Scheme interacted with (such as the Agency).

1e) Any other information not specified above that has any relation to investigation of my concerns about systematic understaffing at Carinya of Bicton in the period August 2012 to January 2013.

Part 2:

This refers to Aged Care Complaints Scheme's response(s) to the Commonwealth Ombudsman's 'Investigation' of this matter which was conducted from January 2014 to July 2015 under the Ombudsman's reference number; 2013-505570.

The information I am seeking in this part:

2a) A full log of all activities undertaken in responding or preparing to respond to the Ombudsman over this matter; Including records of all correspondence, conversations (including by phone) and meetings, with all notes made accompanying these activities and minutes of any meetings.

2b) Any background information gathered to help with this matter.

2c) Any analysis carried out or 'working notes'.

2d) Advice obtained by the Scheme and/or parties the Scheme Interacted with.

2e) Any other information not specified above that has any relation to the systematic understaffing issue under Investigation.

Part 3:

This refers to Aged Care Standards and Accreditation Agency (ACSAA) and now the Australian Aged Care Quality Agency, aka the 'Agency' Interaction with the 'Approved Provider' Bansley Pty, Ltd who operate the aged care facility Carinya of Bicton in Western Australia.

The information I am seeking In this part is a log of all contact the Agency has had with the facility Carinya of Bicton from January 2011 to the most recent available, including the numbers of staff attending (or working remotely for) the facility and the dates they 'worked' (provided services/generated Income in whatever capacity) for the facility.

Part 4:

This refers to Aged Care Standards and Accreditation Agency (ACSAA) and the Australian Aged Care Quality Agency, aka the 'Agency' response(s) to the Commonwealth Ombudsman's 'Investigation' of the systematic understaffing matter raised In 2012 which was conducted from January 2014 to July 2015 under the Ombudsman's reference number; 2013‑505570.

The information I am seeking in this part:

4a) A full log of all activities in this matter; including records of all correspondence, conversations (including by phone) and meetings, with all notes made accompanying these activities and minutes of any meetings.

4b) Any background information gathered to help with this matter.

4c) Any analysis carried out or 'working notes'.

4d) Advice obtained by the Agency and/or parties the Agency interacted with.

4e) Any other information not specified above that has any relation to the systematic understaffing issue under Investigation.

8 I will refer to this as the **Department FOI request**.

9 There is no doubt that the process by which the FOI requests were referred, considered and determined was convoluted and itself may have caused Mr Mullen some confusion. I will not repeat the history in full as it is set out in the respective reasons of the Tribunal.

10 However, the following events provide relevant background.

### The Ombudsman FOI request

11 The Ombudsman, having first considered the Ombudsman FOI request itself, transferred the request to the Australian Aged Care Quality **Agency** under s 16(1) of the FOI Act. That provision permits transfers between agencies where the transferee agency holds relevant documents or the subject matter of the documents is more closely connected to the transferee agency.

12 On 12 October 2015 the Agency determined the Ombudsman FOI request. The decision itself is confusing in that it refers to 'Part 4 of the request', but in context that must be a reference to Part 4 of the Department FOI request. There was no other 'Part 4'. The Agency later clarified by affidavit evidence (that has not been challenged) that its determination of the Ombudsman FOI request included a consideration of all documents that fell within the description of Part 4 of the Department FOI request. Consequently, according to the Agency, there was no separate determination as to Part 4 of the Department FOI request.

13 The Agency determined that there were 13 documents within the scope of the Ombudsman FOI request and, implicitly, also having regard to Part 4 of the Department FOI request.

14 The Agency determined that two of those documents were exempt from production to Mr Mullen in full pursuant to s 38 (secrecy provisions) and s 47F (personal privacy provisions) of the FOI Act. It granted Mr Mullen access in part to the other 11 documents. Of the 11 released, six were redacted in small ways under s 47F and five were almost entirely redacted taking into account s 86-2 of the *Aged Care Act* 1997 (Cth).

15 Mr Mullen sought review of the Agency's decision from the Australian **Information Commissioner** under s 54L of the FOI Act. The Information Commissioner is appointed under the *Australian Information Commissioner Act 2010* (Cth) and has powers of review under Part VII of the FOI Act.

16 Expressly exercising powers under s 55K of the FOI Act, the then Information Commissioner substituted his decision for that of the Agency, finding that only five documents were subject to a valid exemption under s 38 of the FOI Act (**First Decision**). The Information Commissioner found that the material was not exempt under either s 47E or s 47F.

17 The Information Commissioner said, relevantly:

18. I have examined the seven documents. It is clear from the character and content of the documents that the documents:

1. were acquired by the Agency under or for the purposes of the Aged Care Act, and

2. contain personal information or relate to the affairs of an approved provider.

19. This is 'protected information' under s 86-1 of the Aged Care Act. I accept that the Agency acquired this information under Part 4.1, 4.2 or 4.3 of the Aged Care Act in the course of performing functions delegated under s 96-2(1) of the Aged Care Act.

20. I am satisfied that disclosure of the material that the Agency found exempt under s 38 is captured by s 86-2(1) of the Aged Care Act. This material is exempt under s 38 of the FOI Act unless the document contains personal information about the applicant such that s 38(2) applies.

21. Some of the protected information in two documents, such as parts of file notes that record telephone conversations with the applicant, is the applicant's personal information. The applicant's personal information is not exempt under s 38 of the FOI Act.

(footnotes omitted)

18 Mr Mullen sought review of the First Decision from the Tribunal.

19 The Tribunal affirmed the First Decision: *Mullen and Chief Executive Officer, Australian Aged Care Quality Agency (Freedom of Information)* [2017] AATA 1805 (***Mullen and AACQA***).

### The Department FOI request

20 Meanwhile, the Department considered the Department FOI request. It determined Parts 1 and 2 in a decision of 21 September 2015. It transferred Parts 3 and 4 to the Agency under the FOI Act for the Agency's consideration.

21 As to Parts 1 and 2, Mr Mullen sought review by the Information Commissioner. On 1 January 2016 a statutory office of the Aged Care **Complaints Commissioner** was established to handle complaints about the Aged Care Complaints Scheme.

22 Before the Information Commissioner made any determination, the Complaints Commissioner made a series of revised decisions under s 55G of the FOI Act, ultimately giving Mr Mullen access to 54 documents in full, 43 documents in part and refusing access to 18 documents. In making those decisions, the Complaints Commissioner relied on the secrecy provisions exemption (s 38) and certain operations of agencies exemption (s 47E) of the FOI Act.

23 Despite those revisions, Mr Mullen sought review of the Complaints Commissioner's decision to exempt documents under s 38 of the FOI Act. He complained that the Complaints Commissioner had not taken reasonable steps to find an email that Mr Mullen contended existed but that the Complaints Commissioner had not identified. Mr Mullen also complained that the Complaints Commissioner should give him access to the original electronic copy of four specific documents.

24 The Information Commissioner conducted a review, expressly exercising powers under the FOI Act. On 6 April 2017 the Information Commissioner published his decision, deciding that:

(a) the information which the Complaints Commissioner determined to be exempt was exempt under s 38 of the FOI Act;

(b) the Complaints Commissioner was not required to give Mr Mullen access to the original electronic copies of the documents, as to do so would unreasonably interfere with the operations of the Commissioner; and

(c) the Complaints Commissioner took all reasonable steps to find the email Mr Mullen requested, and the email does not exist.

25 In the end the final determination of the Information Commissioner was that 29 documents were exempt from production (in whole or in part) under s 38 of the FOI Act.

26 As to Part 3 of the Department FOI request, a determination was made (also on 12 October 2015) by the Agency refusing access to the Part 3 documents. That decision is not impugned and not relevant in this appeal.

27 As to Part 4, as discussed above, it was not determined separately but absorbed by the Information Commissioner's determination with respect to the Ombudsman FOI request of 12 October 2015.

28 Mr Mullen sought review of the Information Commissioner's decision as to the Department FOI request of 12 October 2015 (**Second Decision**) by the Tribunal.

29 The Tribunal (differently constituted but with a common member) affirmed the Second Decision: *Mullen and Aged Care Complaints Commissioner (Freedom of Information)* [2017] AATA 2556.

30 It is not in question that an application may be made to the Tribunal for review of a decision of the Information Commissioner: s 57A of the FOI Act. From a procedural perspective, no point was taken about the identity of the respective respondents in the review application to the Tribunal. By s 60(3) the principal officer of an agency to whom a request or application is made is to be a party to proceedings.

## The appeals - jurisdiction

31 The appeals to this Court are appeals under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) from the reviews conducted by the Tribunal. Section 44 permits an appeal to this Court from a decision of the Tribunal on a question of law.

32 The grounds of appeal relate to the construction of various provisions of the applicable legislation. It is appropriate to record the provisions in these reasons for ease of reference, although they are relatively lengthy.

## The legislation

### Exempt documents

33 Part III of the FOI Act addresses access to documents. Section 11(1) of the FOI Act provides:

(1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document.

34 Under s 11A, the agency or Minister must disclose documents to a person who requests them, unless those documents are exempt.

35 Part IV of the FOI Act gives the status of exempt documents to documents of various categories. Those categories include, for example, documents to which certain secrecy provisions of other enactments apply (s 38) and documents concerning the operations of agencies (s 47E).

36 Relevantly, s 38 provides:

(1) Subject to subsection (1A), a document is an exempt document if:

(a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and

(b) either:

(i) that provision is specified in Schedule 3; or

(ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.

(1A) A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.

(2) Subject to subsection (3), if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.

(3) This section applies in relation to a document so far as it contains personal information about a person if:

(a) the person requests access to the document; and

(b) disclosure of the document, or information contained in the document, is prohibited under section 503A of the *Migration Act 1958* as affected by section 503D of that Act.

…

37 One of the relevant enactments that has secrecy provisions is the *Aged Care Act*. The secrecy provisions are found in Division 86, which is headed 'Protection of Information'. Four provisions of Division 86 of the *Aged Care Act* are specified in Schedule 3 to the FOI Act, including s 86‑2(1). Section 86‑2 provides that:

(1) A person commits an offence if:

(a) the person makes a record of, discloses or otherwise uses information; and

(b) the information is **protected information**; and

(c) the information was acquired by the person in the course of performing duties or exercising powers or functions under this Act or the *Aged Care (Transitional Provisions) Act 1997*.

(2) This section does not apply to:

(a) conduct that is carried out in the performance of a function or duty under this Act or the *Aged Care (Transitional Provisions) Act 1997* or the exercise of a power under, or in relation to, this Act or the *Aged Care (Transitional Provisions) Act 1997*; or

(b) the disclosure of information only to the person to whom it relates; or

(c) conduct carried out by an approved provider; or

(d) conduct that is authorised by the person to whom the information relates; or

(e) conduct that is otherwise authorised under this or any other Act.

38 'Protected information' is defined in s 86‑1 of the *Aged Care Act*. It provides that:

In this part, ***protected information*** is information that:

(a) was acquired under or for the purposes of this Act or the *Aged Care (Transitional Provisions) Act 1997*; and

(b) either:

(i) is personal information; or

(ii) relates to the affairs of an approved provider; or

(iii) relates to the affairs of an applicant for approval under Part 2.1; or

(iv) relates to the affairs of an applicant for a grant under Chapter 5.

39 'Personal Information' is defined in Schedule 1 - Dictionary to the *Aged Care Act* as having the meaning of that term in the *Privacy Act 1988* (Cth), which defines personal information as follows in s 6(1):

***'personal information'*** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

### Other provisions relied upon

40 Mr Mullen also relies upon s 55K of the FOI Act in support of one of his grounds. That section provides:

(1) After undertaking an IC review, the Information Commissioner must make a decision in writing:

(a) affirming the IC reviewable decision; or

(b) varying the IC reviewable decision; or

(c) setting aside the IC reviewable decision and making a decision in substitution for that decision.

(2) For the purposes of implementing a decision on an IC review, the Information Commissioner may perform the functions, and exercise the powers, of the person who made the IC reviewable decision

41 There are also various provisions in the *Aged Care Act* that grant power to the Secretary of the Department to make disclosure in certain circumstances. Mr Mullen relies upon those provisions. In particular, he relies upon s 86‑3 and s 86‑9.

42 Relevantly s 86‑3(1) of the *Aged Care Act* provides that:

(1) The Secretary may disclose protected information:

(a) if the Secretary certifies, in writing, that it is necessary in the public interest to do so in a particular case - to such people and for such purposes as the Secretary determines; and

…

43 Section 86‑9 of the *Aged Care Act* provides that:

(1) The Secretary may make publicly available the following information about an aged care service:

(a) the name, address and telephone number of the service;

(b) the number of \*places (if any) included in the service;

(ba) if the service is a home care service - the number of care recipients provided with care through the service;

(c) the location of the service and its proximity to community facilities, for example, public transport, shops, libraries and community centres;

(d) the services provided by the service;

(e) the fees and charges connected with the service, including \*accommodation payments, \*accommodation contributions, \*accommodation bonds and \*accommodation charges;

(f) the facilities and activities available to care recipients receiving care through the service;

(g) the name of the approved provider of the service and the names of directors, or members of the committee of management, of the approved provider;

(h) the amounts of funding received by the service under this Act or the *Aged Care (Transitional Provisions) Act 1997*;

(i) information about the variety and type of service provided by approved providers;

(j) any action taken, or intended to be taken, under this Act to protect the welfare of care recipients at a particular service, and the reasons for that action;

(k) information about the service's status under this Act (for example, the service's accreditation record);

(l) information about the approved provider's performance in relation to responsibilities and standards under this Act;

(m) any other information of a kind specified in the Information Principles for the purposes of this section.

[the \* is used in the legislation to denote a defined term]

### Guidelines

44 To assist with the application of the provisions of the FOI Act, the Information Commissioner has issued guidelines under the FOI Act. When applying the provisions of the FOI Act, decision‑makers, including the Tribunal, must have regard to the guidelines (s 93A(2) of the FOI Act) although they are not legislative instruments.

45 Relevant guidelines that relate to s 38 of the FOI Act include:

5.119 Section 38 is intended to preserve the operation of specific secrecy provisions in other legislation, including in cases where no other exemption or conditional exemption is available under the FOI Act. The primary purpose of secrecy provisions in legislation is to prohibit unauthorised disclosure of client information. Most secrecy provisions allow disclosure in certain circumstances, such as with the applicant's consent where the information relates to them, or where it is in the course of an officer's duty or performance of duties, or exercise of powers or functions, to disclose the information.

5.120 The effect of s 38(1A) is to limit the use of s 38 to the terms of the particular secrecy provision involved, and the exemption is only available to the extent that the secrecy provision prohibits disclosure. Contrary to normal FOI practice, a decision maker contemplating an exemption under s 38 must consider the identity of the FOI applicant in relation to the document. This is because s 38(1A) permits disclosure of a document in cases where the prescribed secrecy provision does not prohibit disclosure to that person.

5.121 Section 38 does not apply to documents in so far as they contain personal information about the applicant (s 38(2)). The exception applies only to personal information about the applicant and not to 'mixed personal information', that is, personal information about the applicant which, if disclosed, would also reveal personal information about another individual. If the FOI applicant's information can be separated from any third party personal information, the FOI applicant's information will not be exempt under s 38(1) and can be disclosed. The decision maker may consider providing access to an edited copy (s 22).

(Footnotes omitted)

## Before the Tribunal

### As to the Ombudsman FOI request and the First Decision

46 The respondent's position before the Tribunal was that:

(a) the information in the documents is protected information within the meaning of s 86‑1 of the *Aged Care Act* as it was acquired under or for the purposes of that Act, and is personal information or relates to the affairs of an approved provider;

(b) the information was acquired by the respondent in the course of performing duties or exercising powers or functions under the *Aged Care Act* and so its use is limited by s 86‑2; and

(c) therefore the five documents fall within the exemption provided for by s 38(1) of the FOI Act because the disclosure of the documents is prohibited under s 86‑2(1) of the *Aged Care Act*.

47 Mr Mullen was self‑represented before the Tribunal. It appears from the Tribunal's reasons that the questions raised by his submissions are generally those that fall to be addressed on this appeal, and they are discussed further below. Put generally, Mr Mullen submitted that only a narrow range of documents is intended to be protected as 'relating to the affairs of the approved provider'; that where documents might otherwise be disclosed under the *Aged Care Act* they are not to be considered as falling within the definition of 'protected information'; that s 55K of the FOI Act should be construed so as to permit disclosure in any event; and that the documents are not exempt and should be disclosed.

## The Tribunal's reasons on the First Decision

48 At the outset it is to be noted that the Tribunal reviewed the documents, an advantage that was not open to Mr Mullen.

49 The Tribunal determined that the documents were acquired or created for the purpose of the *Aged Care Act*. The nature and content of the documents relate to the investigation, monitoring and approval of aged care providers.

50 The Tribunal found that the documents contain personal information: insofar as the information related to Mr Mullen, the information was released by way of redacted versions of the documents. Insofar as the documents contain personal information of others, the information is protected because it falls within the terms of s 86‑1(b)(i).

51 The Tribunal also determined that the information 'relates to the affairs' of the relevant aged care provider. Although that expression is not defined, it is to be given a relatively broad interpretation given its context. The category is not at large: it is already limited in that it must have been acquired 'under or for the purposes of' the *Aged Care Act* (to meet the first limb of s 86‑1). The term must be read in the context of the purpose of the *Aged Care Act* as a whole. The *Aged Care Act* requires providers to provide information to the respondent so that the respondent can ensure that the quality of aged care meets regulatory and community standards. The broader purpose of the Act is facilitated by full and proper disclosure of information including that which might otherwise be considered commercially sensitive or confidential and so a broader interpretation of 'relates to the affairs' of a provider is supported. Under a restrictive interpretation providers would not be encouraged to disclose information.

52 The Tribunal held that support for a broader view is to be found in *Walker v Secretary, Department of Health and Ageing* [2016] FCA 233; (2016) 244 FCR 113, in which the Court found that the affairs of another person extended to the person's business or professional activities and, further, that the wide nature of sensitive information likely to be acquired by the respondent in administering its obligations under the *Aged Care Act* necessitates a comprehensive confidentiality regime and a broad interpretation of what is meant by 'relates to the affairs'.

53 The Tribunal found that:

(a) each of the documents was acquired under and for the purpose of the *Aged Care Act* and contains information that is personal or relates to the affairs of an approved provider, and so is 'protected information' for the purpose of s 86‑1 and s 86‑2(b) of the *Aged Care Act*;

(b) the documents were created in the course of performing duties or exercising powers under the *Aged Care Act* and so the requirements of s 86‑2(1)(c) are met, and so releasing the documents or the information contained in the documents would be an offence under s 86‑2(1) of the *Aged Care Act*;

(c) therefore, on their face the documents fall within the exemption provided by s 38(1) of the FOI Act, and there are no provisions that displace that exemption;

(d) insofar as there was personal information as referred to in s 38(2), that information has been provided to Mr Mullen;

(e) s 55K of the FOI Act does not assist Mr Mullen: it does not empower an Information Commissioner to exercise a power that a third party may have exercised which would have resulted in a different decision to the one being reviewed; and

(f) as a matter of construction, s 86‑2(2) cannot be construed so that a reference to 'conduct' is a reference to conduct generally, such that any information about 'conduct' may be released without an offence being committed. Rather, the reference to 'conduct' is limited to conduct referred to in s 86‑2(1): that is, to conduct in making a record, disclosing or otherwise using protected information acquired in the course of work.

54 For those reasons, the Tribunal affirmed the First Decision.

### As to the Department FOI request and the Second Decision

55 Mr Mullen sought review of the Second Decision insofar as it concerned findings of protected information and the application of s 38 of the FOI Act to the 29 identified documents.

56 At least from the Tribunal's perspective, Mr Mullen further limited the scope of the review application. He did not seek a review of the Second Decision insofar as it related to access to original electronic copies of the documents, or the 'missing' email. The review was limited to the decision to decline access to the 29 documents found to be exempt from production under s 38 of the FOI Act. Mr Mullen contended before me that the Tribunal misunderstood his submission as to the missing email but I will return to that aspect.

57 The arguments before the Tribunal as to the Second Decision were in effect the same as with the First Decision. The decision was published later in time and, not surprisingly, applied the reasons from *Mullen and AACQA*.

58 The respondent's position as to the 29 documents was that:

(a) all documents identified contain protected information on the basis that the information contained in the documents was obtained for the purposes of the *Aged Care Act* and is either personal information or information that relates to the affairs of an approved provider;

(b) the information was obtained in the course of carrying out functions delegated to it under the *Aged Care Act*;

(c) some of the information comprises personal information about staff members of the approved provider and is protected under s 86‑1;

(d) the phrase 'relates to the affairs of an approved provider' is not defined but is to be interpreted broadly to include information that has a relationship to the approved provider's obligations, business or activities, relying on (amongst other things) *Walker v Secretary, Department of Health and Ageing*; and

(e) the documents include information which relates to the affairs of an identified approved provider and is therefore protected information.

59 Mr Mullen raised in effect the same arguments that had been raised before the Tribunal with respect to the First Decision. Mr Mullen also submitted that the secrecy provisions in the *Aged Care Act* were primarily intended to protect the privacy, dignity and patient confidentiality of care recipients at a time when they are vulnerable and near the end of life, and that the legislators would never have intended there to be an 'all‑encompassing level of secrecy' which would follow from a broad construction of 'affairs of an approved provider'. He submitted that all information that is collected must be collected by a person in the course of carrying out duties under the *Aged Care Act*, and so, in effect, on the respondent's argument all information is protected from disclosure, a result that would not have been intended by legislators.

### The Tribunal's reasons on the Second Decision

60 The Tribunal inspected the documents. It was satisfied that the documents were acquired or created for the purposes of the *Aged Care Act*. It said that the nature and content of the documents relate to the investigation, monitoring and approval of aged care providers under the *Aged Care Act* and the very nature of the FOI request dictates that the documents sought are documents acquired or created by the respondent for the purposes of the *Aged Care Act*. The Tribunal was satisfied that the information relates to the affairs of the approved provider, and considered there was no reason to reconsider the view as to the construction of 'relates to the affairs' formed by the Tribunal in *Mullen and AACQA.*

61 The Tribunal was satisfied that each of the documents contain information that is personal or relates to the affairs of an approved provider and is therefore protected information for the purpose of s 86‑1 and s 86‑2(b) of the *Aged Care Act*.

62 The Tribunal rejected an argument that s 86‑9 (which permits disclosure by the Secretary to the public of information in certain circumstances) is to be construed so as to permit disclosure of the information regardless of s 86‑1 and s 86‑2(b).

63 The Tribunal rejected a 're-run' of the s 55K(2) argument pursued in *Mullen and AACQA*.

64 It followed that the Tribunal affirmed the Second Decision.

## The appeals to this Court

65 Mr Mullen's notices of appeal in each appeal are as follows (noting I have removed references to the *Australian Aged Care Quality Agency Act* *2013* (Cth), in accordance with Mr Mullen's request that I do so):

1. The main question of law is the misinterpretation of the definition of 'Protected information' given in the Aged Care Act 1997, s86-1. The respondents definition being far too broad, and beyond the intention of the legislation.

2. That the types of information listed in the Aged Care Act 1997, s86-9, point out the sort of information that is not 'protected information' and can be readily disclosed to the public, with or without an FOI request.

3. That if the Information Commissioner (IC), in the course of a merit review of an FOI request, becomes aware of cogent reasons to do so (such as the nefarious activity of the original decision maker), the IC may exercise the powers of the original decision maker as allowed by the Freedom of Information Act 1982 s55K(2) and release information 'in the public interest', as set down in the Aged Care Act 1997, s86-3(1)(a).

66 The notices of appeal also asked that the Court make various findings of fact. I will return to this request.

67 Mr Mullen filed submissions that listed (relevantly) nine points, eight of which he submitted should be taken as 'identifying' the points of law that the Court is to determine on this appeal. The ninth point was said to be limited to a submission. The submissions contained certain other points that I will touch upon below for completeness. When it was brought to Mr Mullen's attention that (in particular) the first ground of appeal did not clearly state a question of law to be determined he invited the Court to assist in isolating the questions of law. Having regard to *Haritos v Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315 at [91] and [103], there is authority for the proposition that the Court may assist in a limited manner to frame questions properly where material provided by a litigant in person indicates that questions of law might be discerned. In this case, the respondent had foreshadowed in its submissions that it consented to the first question being properly re‑framed.

68 I consider the appropriate way to address the matters raised by the notice of appeal is to address three questions, based on the three grounds of appeal, but in so doing I take into account the nine points identified by Mr Mullen. I have framed the questions as follows:

(1) Did the Tribunal misconstrue s 86‑1 and s 86‑2 of the *Aged Care Act* in finding that the information sought in the FOI request would be exempt in that on their proper construction, the words 'related to' admit of a relatively broad interpretation and are not limited to information relating to a care recipient or information about particular matters of care such as hygiene regimes?

Addressing this question involves considering issues such as: what is the proper construction of the definition of 'protected information' as used in s 86‑1 of the *Aged Care Act*? In particular, how is the requirement that the information must 'relate to the affairs' of an approved provider to be construed? Is it limited in the manner propounded by Mr Mullen?

(2) On its proper construction, is information listed in s 86‑9 excluded from the ambit of 'protected information' under in s 86‑1?

Addressing this question involves considering submissions such as: how are s 86‑1 and s 86‑9 to are to be read together? What is the effect of s 86‑3: does the power to release information under s 86‑3 influence whether it can be categorised as exempt?

(3) Does s 55K of the FOI Act empower the Information Commissioner to release information in the public interest under s 86‑3 of the *Aged Care Act*? Does s 3A of the FOI Act affect the result?

69 Whilst not clearly falling within the ambit of those grounds, I will also address another question raised by Mr Mullen in his submissions that might be perceived as a question of law that is relevant to the construction of s 86‑1: that is, the construction of 'conduct' in s 86‑2(2)(c) and whether a matter (said by Mr Mullen in this case to be systemic understaffing) might fall within the definition of 'conduct' such that it can be disclosed without any offence being committed under s 86‑2(2) of the *Aged Care Act*. This was not a new argument: it was also addressed by the Tribunal.

## Statutory construction - principles

70 There are recent authorities that summarise the principles relevant to statutory construction: see, for example, *CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70 at [44]‑[60].

71 I acknowledge such useful summaries and it is not necessary to repeat them. However, it is useful to recall the following from *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 (Kiefel CJ, Nettle, Gordon and Edelman JJ):

[14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

## About the *Aged Care Act*

72 The long title of the *Aged Care Act* is 'An Act relating to aged care, and for other purposes'.

73 The *Aged Care Act* outlines the obligations and responsibilities that aged care providers must follow to receive financial support from the Australian Government through payment of subsidies and grants (s 3‑1). Its objects include to provide for funding of aged care that takes into account the quality and type of care and accountability of the providers of care for funding and for the outcomes of recipients of care (s 2). However, before the Commonwealth can pay a subsidy to a provider, the provider of care must be approved. The recipient of care must also be approved as a recipient of the type of aged care that is provided (s 3‑2). Approved providers have certain responsibilities and accountability relating to the quality of care they provide, and failure to meet such responsibilities may affect access to subsidies (s 3‑3, s 3‑4). The obligations of approved care providers are set out in Chapter 4 of the *Aged Care Act*. By way of summary, they relate to the quality of care they provide; to user rights for the people to whom the care is provided; and to accountability for the care that is provided, and the basic suitability of their key personnel.

74 The *Aged Care Act* also contains a range of provisions that relate to the supply of information. For example, there are provisions that deal with: protection of information; the power of the Secretary to make certain protected information available publicly; compliance by approved providers with record‑keeping obligations so as to permit verification of claims for subsidy payments and so as to permit assessment of compliance with responsibilities as to the quality of aged care and user rights; and accountability of approved providers that requires, amongst other things, compliance with record keeping obligations and the obligation to notify and provide information about payments (see generally Part 6.3 'Record keeping' and the requirement to retain records that verify compliance with obligations under Chapter 4).

## Ground 1: Information related to the affairs of the provider

75 Mr Mullen contends that 'protected information' as defined by s 86‑1 of the *Aged Care Act* is to be construed as follows:

' ... the personal information protected is generally that of the care recipient, and the affairs or the approved provider can be construed to mean those affairs directly relating to a care recipient. The overall intent [of Division 86] seems to be that of protecting the privacy, dignity and human rights of the care recipient.'

I believe that the intention of the phrase 'affairs of the approved provider' as conceived at the commencement of the Aged Care Act in 1997 would have been to prevent the dissemination of information that might have once been seen as demeaning to care recipients, such as the open discussion of toileting arrangements, the use of incontinence pads, bathing arrangements, feeding requirements and intimate care issues.

76 I do not accept that on its proper construction the expression 'related to the affairs' is to be read down such that it has the narrow meaning propounded by Mr Mullen. Mr Mullen limits its meaning to in effect personal information directly relating to a care recipient or information that relates to matters that he considers 'personal' matters, such as hygiene, that relate to care recipients more generally.

77 There is no reason to construe the words 'affairs of an approved provider' narrowly.

78 The text of s 86‑1 itself does not suggest any such limitation. 'Personal information' is already covered by s 86‑1(b)(i). Information that 'relates to the affairs of an approved provider' is therefore intended to capture something different to simply 'personal information'. Otherwise its inclusion would be otiose.

79 'Affairs' is not defined. In *Walker v Secretary, Department of Health and Ageing*, Griffiths J considered the meaning of the phrase 'with respect to the affairs of another person' in the context of a secrecy provision in the *Health Insurance Act 1973* (Cth). His Honour rejected an argument that 'affairs of another person' was to be limited to personal affairs and held that it operates to include professional or business affairs, having regard to the activities carried out under the *Health Insurance Act*. Relevantly, dictionary definitions of 'affairs' did not suggest any relevant limitation. To the contrary, such definitions were broad, referring to ordinary pursuits of life, business dealings and public matters, and 'what one has to do'.

80 The nature of the 'affairs' that an approved provider may have is to be viewed in the context of the objects and scope of the *Aged Care Act*. As noted above, the Act is concerned not only with care provided to care recipients but also with an approved provider's ability to obtain funding from the Commonwealth, its reporting obligations in that regard and compliance more generally with its statutory obligations. There is to my mind no question that the 'affairs' to which the phrase refers contemplates matters such as investigation and monitoring of the approved provider in the context of its obligations and its approval status under the Act. Such matters are part of its business and relevant to its status and obligations under the Act.

81 Taking into account the reporting obligations as to both funding and compliance under the Act, it is likely that the type of information that government authorities might seek or receive about an approved provider would be broader than simply personal information or information about the narrow range of 'personal' matters to which Mr Mullen refers. It is therefore not surprising that the secrecy provisions would extend to information relating to the approved provider's business.

82 This interpretation is consistent with the Explanatory Memorandum to the *Aged Care Bill 1997* (Cth), which states (at 157):

Clause 86-1 Meaning of protected information

The provisions in this Division relate only to protected information. This clause sets out a definition of 'protected information' as information that has been acquired under or for the purposes of the Act, and either;

is personal information; or

relates to the affairs of an approved provider, or of an applicant under Part 2.1 or Chapter 5. The purpose of this part of the provision is to ensure that information such as commercial-in-confidence information is protected under this Part.

Personal information is defined in the Dictionary as 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

Any information that is **not** protected information can be used as necessary. It is not protected in any way under this Act.

83 Whilst I acknowledge the guidelines for s 38 of the FOI Act refer to the 'primary' purpose of secrecy provisions being the protection of client information, such guidelines do not operate to prohibit a decision maker having regard to the construction of the relevant secrecy provision and other purposes that are clearly relevant to the particular legislation and the terms of the section in question. Quite clearly, s 86‑1 does not have as its only purpose the protection of confidential care-recipient information. Its terms expressly include reference to information relating to an approved provider, or an applicant for approval or an applicant for a grant.

84 Mr Mullen argues against a broader interpretation because he perceives it as a means by which information about the quality of care that should be disclosed can be deliberately withheld. But it is important to note that despite information being protected (and so despite it being information that relates to the affairs of an approved provider), there are circumstances where the *Aged Care Act* provides for its release. Section 86‑2(2) of the *Aged Care Act* expressly quarantines from liability under s 86‑2 a person or entity who discloses protected information where disclosure is otherwise authorised under the *Aged Care Act* or other legislation. As Branson J explained in *Illawarra Retirement Trust v Secretary, Department of Health and Ageing* [2005] FCA 170:

[53] Subs 86‑2(2) recognises that some disclosures of the information identified in subs 86‑2(1) may be authorised and ss 86‑3, 86‑4, 86‑8 and 86‑9 themselves authorise particular individuals or bodies in certain circumstances to disclose information otherwise protected from disclosure by Division 86. The apparent purpose of specifying in Schedule 3 of the FOI Act subs 86‑2(1) and ss 86‑5, 86‑6 and 86‑7 of the Aged Care Act is to ensure that information protected under Division 86 of the Aged Care Act is not disclosed other than as authorised by that Division.

85 Section 86‑3 permits disclosure of protected information by the Secretary of the Department in his or her discretion in particular circumstances. For example, personal information might be disclosed to a person who in the opinion of the Secretary is expressly or impliedly authorised by the person to who the information relates to obtain it (s 86‑3(1)(b)). The Secretary may disclose information if he or she believes on reasonable grounds that disclosure is necessary to prevent or lessen a serious risk to the safety of a care recipient (s 86‑3(1)(e)).

86 Section 86‑9 permits disclosure by the Secretary in his or her discretion of information about an 'aged care service' (defined as an undertaking that provides aged care) and is not limited to disclosure relating to an approved provider. It permits public disclosure in the discretion of the Secretary of information that otherwise falls within the definition of protected information in s 86‑1(b)(ii), (iii) or (iv), and so including disclosure of information that is protected because it 'relates to the affairs of an approved provider'. This follows from the fact that by s 86‑9(2), the Secretary is not permitted under s 86‑9(1) to disclose 'personal information'. There is no similar express prohibition on disclosure by the Secretary of other categories of protected information. Section 86‑9(2) would be unnecessary if s 86‑9(1) were to be construed as a list of only non‑protected information.

87 There is no doubt that s 86‑9 lists many categories of information, some of which might include information that might be described as 'relating to the affairs of' an approved provider. To that extent, although such information remains protected information, it may be that the Secretary in the proper exercise of his or her discretion might decide to publicly disclose it and will not fall foul of s 86-2 because of such disclosure. However, it does not follow that it will automatically be disclosed. Nor does it follow that there will not exist particular information relating to the affairs of an approved provider that falls outside the scope of the particular items listed in s 86‑9 but is also protected information under s 86‑1. Nothing in the manner in which the provisions operate together suggests that 'affairs' must be construed narrowly.

88 It is useful to note that the Explanatory Memorandum to the *Aged Care Act* provides that:

**Clause 86-9 Information about an aged care service**

This clause allows the Secretary to release general information about a service or support service provided that personal information is not included. The intention of this clause is to ensure that residents and prospective residents have access to information about service to enable them to make informed decisions about their care. The type of information that can be released under this clause includes:

the name, address, and telephone number of a service,

the number of places included in the service,

the services provided by the service,

the facilities and activities available to care recipients receiving care through the service, and

information about the approved provider's performance in relation to responsibilities and standards under the Act.

Additionally, this clause allows the Secretary to give information about the outcome of a complaint relating to an aged care service to the complainant.

89 I note for completeness that the reference to an outcome of a complaint in the last paragraph of the extract from the Explanatory Memorandum is no longer reflected in the legislation, a provision that was formally included as s 86‑9(3) having since been repealed.

90 The reference to 'general information' in the Explanatory Memorandum is consistent with the manner in which I have determined the provisions may be sensibly read together: that is, a construction of s 86‑1, s 86‑2 and s 86‑9 that facilitates the protection of a broad range of information but with the power in the Secretary to exercise his or her discretion to make public certain information that is otherwise protected, other than personal information.

91 As noted, Mr Mullen contends that 'affairs' in s 86‑1(b)(ii) is to be construed narrowly. He contends that consistent with that submission, matters relating to the business of an approved provider are set out in s 86‑9 and, as they can be disclosed, they are not exempt.

92 I reject Mr Mullen's contention, taking into account a number of matters.

93 First, once one accepts that personal information as defined by s 86‑1(b)(i) is protected, on Mr Mullen's argument the content of 'affairs' is then limited by confined parameters, parameters that are undefined save that the information should have some subjectively-construed personal element. In light of the general usage of the word and its commonly understood meaning, there is no sound basis to accept Mr Mullen's submission that 'affairs' is limited to 'personal' matters that are generally relevant to the day to day care of the aged (and others) such as hygiene.

94 Nor is there anything in the connecting expression 'relates to' that compels a narrow meaning. Some guidance as to the meaning of such a connecting expression is to be found in DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 8th ed at [12.6]. It is accepted that the words indicate that a connection is required and it gathers its meaning from the context in which it appears. There is nothing in s 86‑1 that suggests that the relevant information must relate in any particular way to the affairs of an approved provider or must relate to any particular aspect of those affairs. The words should bear a general and broad meaning, having regard to the meaning of 'affairs', as already addressed.

95 Second, for the reasons already given, there is no inconsistency with information being protected under s 86‑1 but otherwise liable to disclosure in the Secretary's discretion under s 86‑9. The provisions can be read together. Section 86‑9 clearly contemplates that protected information falls within its scope.

96 Third, if 'affairs' in s 86‑1 were to be construed as narrowly as Mr Mullen contends, then many of the categories of information listed under s 86‑9 would not fall within the ambit of s 86‑1, would therefore not meet the description of protected information, and there would be no need for the disclosure regime provided for in s 86‑9, or at least no need for many of its subparagraphs. As was noted in the Explanatory Memorandum to the *Aged Care Bill*, non‑protected information is not protected under the *Aged Care Act*. A construction that gives meaning to every word of a provision is to be preferred: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ).

97 Fourth, the construction for which Mr Mullen contends may not accommodate the very example of the type of information anticipated by the Explanatory Memorandum to be protected by s 86‑1(b)(ii) (commercial in confidence documents).

98 Fifth, it is not the case that because the Secretary may exercise discretion to disclose the matters listed in s 86‑9 that such matters are not exempt. To the extent that those matters are protected information, their disclosure is only permitted when the Secretary elects to exercise his or her discretion to make them publicly available. The Secretary has not exercised such discretion in this case in any event.

99 There are other contextual matters that tell against Mr Mullen's position.

100 The secrecy regime does not operate without incursion. In addition to the potential for disclosure of non‑personal information taking into account (relevantly) s 86‑2(e), s 86‑3 and s 86‑9, it is also relevant to note that the scope of non-personal information that might be protected is confined by the fact that it must have been acquired under or for the purpose of the *Aged Care Act* (s 86‑1(a)). It is open to a person to seek access to information without seeking to enforce any right of access under the FOI Act.

101 Further, an overarching theme of Mr Mullen's submissions is that every person has a right to access information held by a government authority, and such freedom under the FOI Act directs a generous interpretation of legislative provisions such that terms that limit access should be construed narrowly. Any such presumption in the context of freedom of information legislation has been rejected by the courts: *Walker v Secretary, Department of Health and Ageing* at [59].

102 In any event, it is important to remember that the term 'relates to the affairs' appears in the context of the *Aged Care Act*, not the FOI Act. The *Aged Care Act* does not have any such indication evident within it, and Mr Mullen did not suggest that it did.

103 In conclusion, having regard to the text of Part 6.2 of the *Aged Care Act*, and in particular s 86‑1, s 86‑2 and s 86‑9, and having regard to the context and purpose of the Act, I dismiss Mr Mullen's first appeal ground in both appeals (as described at [68] above). I do not consider the Tribunal misconstrued s 86‑1 and s 86‑2 of the *Aged Care Act* or otherwise erred in finding that the information sought in the FOI requests would be exempt. I consider that on their proper construction, a broad interpretation of the words 'relates to the affairs of an approved provider' is open and 'affairs' is not limited as contended by Mr Mullen.

## Ground 2: On its proper construction, is information listed in s 86-9 excluded from the ambit of 'protected information' under s 86-1?

104 This ground has been addressed in the course of addressing the first appeal ground. The answer is 'no' for the reasons given. Section 86‑9 authorises public disclosure of protected information (other than of personal information) in the discretion of the Secretary. Accordingly, Mr Mullen has not established error on the part of the Tribunal in either decision. This ground in both appeals must be dismissed.

## Ground 3: Does s 55K of the FOI Act empower the Information Commissioner to release information in the public interest under s 86-3 of the *Aged Care Act*?

105 It is important to recall that Mr Mullen's applications were brought under the FOI Act. It is those requests that are the subject of the proceedings. The Tribunal noted that there was no evidence that Mr Mullen has made any request to the Secretary under s 86‑3 or s 86‑9 for disclosure under the *Aged Care Act*.

106 Mr Mullen contended before the Information Commissioner (as appears from the reasons for the Second Decision) and before the Tribunal that the Information Commissioner should have under s 55K(2) of the FOI Act exercised the power invested in the Secretary to disclose protected information under s 86‑3(1) or s 86‑9 of the *Aged Care Act*.

107 As was emphasised in *Illawarra Retirement Trust v Secretary, Department of Health and Ageing*, the powers of the Secretary provided for in s 86‑3 and s 86‑9 are powers exercised under the *Aged Care Act*. If the Secretary chooses to exercise his or her discretion to disclose protected information in accordance with those provisions, the Secretary is protected from liability for an offence by disclosure under s 86‑2(1).

108 As explained by Branson J:

[56] When the Secretary discloses protected information in circumstances authorised by s 86‑3 of the Aged Care Act, the disclosure is made under the Aged Care Act, not under the FOI Act. Section 86-3 has no relevance, in my view, to the operation of subs 38(1A) of the FOI Act as it does not affect a person's right to access to a document under the FOI Act. It is only the Secretary, acting under the Aged Care Act, who s 86‑3 exempts from the prohibition contained in s 86‑2. No other person may rely on the exception contained in s 86‑3.

109 Section 55K of the FOI Act was introduced after the decision in *Illawarra Retirement Trust v Secretary, Department of Health and Ageing*. However, that does not affect the outcome of the appeal. Nothing in s 55K authorises an Information Commissioner on a review to exercise the powers of the Secretary under the *Aged Care Act*. Nothing in s 55K authorises the Information Commissioner to disclose protected information under the *Aged Care Act*.

110 The operation of s 55K(2) is limited in operation. Section 55K(1) provides that the Information Commissioner must make a written decision on a review, either affirming, varying or setting aside the reviewable decision. Section 55K(2) then grants to the Information Commissioner the power to perform the functions of the person who made the reviewable decision but only for the purposes of implementing the decision. It does not grant to the Information Commissioner any greater functions or powers than those of the person who made the reviewable decision and in any event the powers can only be used 'for the purpose of implementing the decision'. That is to say, the Information Commissioner may only exercise powers under s 55K after reaching a decision, for purposes such as releasing documents he or she has determined not to be exempt.

111 The person who made the reviewable decision was exercising powers under the FOI Act and the section cannot be construed in a manner that assumes otherwise. That is, despite Mr Mullen's submissions to the contrary, it cannot be construed in a manner that permits the Information Commissioner in the exercise of powers under the FOI Act to proceed as if he or she were the Secretary exercising powers under the *Aged Care Act* or as if the person who made the reviewable decision were the Secretary exercising powers under the *Aged Care Act*.

112 The position is reinforced by s 55L of the FOI Act, which provides that where it is established on an Information Commission review that a document is an exempt document, the Information Commissioner does not have power to decide that access is to be given to that document.

113 I accept the respondent's submission that, similarly, any argument that the Information Commissioner or the Tribunal in determining Mr Mullen's FOI requests ought to have purported to exercise the discretion available only to the Secretary under s 86‑9 of the *Aged Care Act* must fail. The Information Commissioner was not reviewing a decision of the Secretary under the *Aged Care Act*.

114 Mr Mullen also referred to the objects provision in s 3A of the FOI Act. That provision states:

**Objects - information or documents otherwise accessible**

Scope

(1) This section applies if a Minister, or an officer of an agency, has the power to publish, or give access to, information or a document (including an exempt document) apart from under this Act.

Publication and access powers not limited

(2) The Parliament does not intend, by this Act, to limit that power, or to prevent or discourage the exercise of that power:

(a) in the case of the power to publish the information or document - despite any restriction on the publication of the information or document under this Act; and

(b) in the case of the power to give access to the information or document - whether or not access to the information or document has been requested under section 15.

115 I do not consider that object advances Mr Mullen's arguments. There is no question that the Secretary may exercise his or her discretion to disclose information under (for example) s 86‑9 of the *Aged Care Act*. It is not suggested by the respondent that the FOI Act operates to place any particular limitation on the exercise of the Secretary's discretion.

116 It follows that I dismiss Mr Mullen's third appeal ground in both appeals (as described at [68] above). I do not consider there was error in the findings of the Tribunal as to the s 55K FOI Act argument.

## The 'conduct' submission and s 86-2(2)

117 This issue can be addressed briefly.

118 Section 86‑2(2) cannot be construed without regard to s 86‑2(1) of the *Aged Care Act*. Section 86‑2(1) creates an offence where a person does certain things: where they make a record of, or disclose or otherwise use protected information acquired in the course of performing duties or exercising powers under the *Aged Care Act*. It is established that the effect of a provision that creates such on offence on disclosure is to be construed as prohibiting disclosure for the purpose of s 38 of the FOI Act: *Illawarra Retirement Trust v Secretary, Department of Health and Ageing* at [51].

119 Certain conduct that involves use or disclosure of protected information, however, will not attract liability. Such conduct is specified in s 86‑2(2).

120 The section does not provide, as Mr Mullen contends, that disclosure of information about the conduct of an approved provider is exempt from liability. Rather, it addresses the act of disclosure of information by certain persons (including an approved provider) and when such conduct will not constitute an offence. Mr Mullen's submission requires the insertion of words so that s 86‑2(2)(c) refers to 'information about conduct carried out by an approved provider'. That is not what the section says and there is no basis for it to be construed as if it did.

121 If Mr Mullen's construction were correct, there would be no need for provisions such as s 86‑9, which clearly contemplates that disclosure of information about an approved provider's conduct, such as, for example, that described in s 86‑9(1)(l), can only be disclosed in the discretion of the Secretary and not otherwise. That tells against his proffered construction and I reject it. The Tribunal in *Mullen and AACQA* was not in error in dismissing Mr Mullen's argument based on the reference to 'conduct' in s 86‑2(2).

## Miscellaneous issues raised

122 For completeness, I will refer to a number of other matters raised by Mr Mullen.

123 Mr Mullen expressed concern that the Tribunal in *Mullen and AACQA* stated that he did not pursue his complaint that the Information Commissioner wrongly found that the respondent had taken all reasonable steps to locate a 'missing' email and that the email did not exist. The Information Commissioner had before him at the time evidence as to the searches that had been undertaken. Based on his submissions before me, it is clear that Mr Mullen remains sceptical about whether or not the email exists. He considers the Tribunal misunderstood his submission. However, Mr Mullen properly accepted before me that it was not for this Court to investigate his concern about the email: it was not properly the subject of any ground of appeal and was provided by way of context and in explanation of the level of his grievances. He accepted that whilst the existence or non‑existence of the email was the source of 'persistent irritation' for him it was not for this Court to 'sort out understaffing' or 'naughty emails'. Mr Mullen's concession in this regard was properly made.

124 Mr Mullen also expresses residual concern about the manner in which the Part 4 Department FOI request documents were not accorded any separate treatment, but rather were considered as part of the determination of the Ombudsman FOI request. The Tribunal dealt properly with that complaint. Whilst the communications in that regard could have been better handled by the respondent, that is a matter of form. There is no substance to the complaint. The Tribunal was justified in relying on evidence that all information that may have fallen within the Part 4 category was in any event considered whilst considering the information within the ambit of the Ombudsman FOI request.

125 Mr Mullen submits that in effect the Information Commissioner is permitted to determine its own interpretation of 'affairs of the approved provider'. I do not agree with that contention. It is hardly uncommon for decision makers to apply terms used in legislation that are not defined. A decision maker such as the Information Commissioner is obliged to apply the statutory provisions. There is no suggestion that in considering the scope of information that was exempt under s 38 of the FOI Act because of the secrecy provisions in the *Aged Care Act* the Information Commissioner did otherwise, guided no doubt by the terms of s 86‑1 and (amongst other things) the fact that there are separate categories in s 86‑1 for personal information and information that relates to the affairs of an approved provider. The Information Commissioner also took into account appropriate authorities such as *Illawarra Retirement Trust v Secretary, Department of Health and Ageing*.

126 Mr Mullen submitted that as transparency is required in order for approved providers to source government funding, then requests such as his which (he asserts) relate to provider status should be dealt with transparently. I understand that Mr Mullen has not seen the relevant protected information. That will inevitably be the case in situations where information is exempt from disclosure. It is not the case, as he submitted, that 'everything in aged care is top secret'. The obligation of the Information Commissioner was to review the requests made under the FOI Act and apply the terms of s 38. That was the course undertaken. As already mentioned in these reasons, there are occasions where protected information may be disclosed under specific statutory provisions. The legislation provides for that. However the Tribunal was correct, in my view, in its findings that this is not a case where those statutory provisions are invoked.

127 I also note that in the notices of appeal, Mr Mullen listed several findings of fact that he considered this Court should make. These findings included findings about alleged misleading conduct on the part of the Commonwealth Ombudsman and the 'missing' email. He did not pursue those matters on the appeal, indicating he understood that the questions to be determined by me were limited to questions of law. As the respondent properly submitted, the Court's power to make findings of fact on an appeal under s 44 are strictly limited: s 44(7) of the AAT Act.

128 It was not necessary for me to make findings of fact in order to determine the question raised by the appeals. It was not appropriate for me to revisit the merits of a factual finding by the Information Commissioner as to (for example) the missing email. The facts referred to in the notices of appeal do not have any bearing on the questions of law the subject of the appeals.

129 Finally, Mr Mullen expressed concern that the respondent as a 'model litigant' was in a preferred position: that his or her submissions would be favoured. That is not the effect of model litigant requirements. The model litigant principle requires the Commonwealth and its agencies, as parties to litigation, to 'act with complete propriety, fairly and in accordance with the highest professional standards': *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90; (2012) 203 FCR 166 at [42]. The Commonwealth must act so as to facilitate a fair trial: *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 at [530]. However, it is not the case that a judge is permitted to merely accept the submissions of a model litigant without turning his or her mind to the legal and factual merits of the case: see *SZNRZ v Minister for Immigration and Citizenship* [2010] FCA 107 at [6]‑[8]. As should be apparent to Mr Mullen, these reasons go well beyond simply adopting the respondent's submissions.

130 I also note that whilst Mr Mullen is self‑represented, in each of the review applications the Tribunal provided quite detailed reasons for the benefit of Mr Mullen. Mr Mullen was also able to make quite eloquent submissions before me.

## Determination

131 Having carefully considered all of Mr Mullen's grounds and submissions, I have determined that his appeals from both decisions of the Tribunal must be dismissed.

## Costs

132 Both parties made submissions on costs at the hearing.

133 Counsel for the respondent in each appeal sought a lump sum payment of costs in the event the appeals were to be dismissed, and provided affidavit evidence as to the manner of calculation. A discount was factored into the calculation, noting the overlap of issues between the two appeals. Mr Mullen requested that if he is unsuccessful, any assessment be as low as possible. I consider that it is appropriate that costs be assessed on a lump sum basis for the appeals, but I refer such assessment to a registrar of this court.

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| I certify that the preceding one hundred and thirty-three (133) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Banks-Smith. |

Associate:

Dated: 24 October 2019