

Type	Jurisdiction	Database	Year	Citation
Cases	Commonwealth	Administrative Appeals Tribunal...	2023	[2023] AATA 3013

Brindabella Christian Education Limited and Minister for Education [2023] AATA 3013 (20 September 2023)

Last Updated: 22 September 2023

 **Brindabella Christian Education Limited**  **and Minister for Education [2023] AATA 3013 (20 September 2023)**
Division: **GENERAL DIVISION**File Number(s): **2021/3753**Re:  **Brindabella Christian Education Limited** 

APPLICANT

And **Minister for Education**

RESPONDENT

DECISIONTribunal: **Senior Member O'Donovan**Date: **20 September 2023**Place: **Canberra**

The applicant is released from the implied undertaking in relation to the documents listed in Annexure A for the limited purposes of:

- (a) Seeking advice in relation to the viability of a claim against BellchambersBarrett for breaches of the Australian Consumer Law;
- (a) Seeking advice in relation to any defamation risk in continuing to make public statements critical of BellchambersBarrett and the Audit Report.

.....[SGD].....

Senior Member O'Donovan**Catchwords**

PRACTICE AND PROCEDURE - application for release from the implied undertaking - where application for release made for three purposes - consumer law claim against expert who provided evidence in support of reviewable decision - advice regarding possible defamation of the expert - to engage in public debate about merits of reviewable decision - consideration of applicable principles - where material confidential to the Commonwealth - where application resolved without disturbing original finding - release given in relation purposes associated with potential legal claims

Legislation

[Administrative Appeals Tribunal Act 1975 ss 35, 42C](#)

[Australian Education Act 2013 ss 75, 81](#)

Cases

Anglo American Investments Pty Ltd (Trustee) v Commissioner of Taxation [\[2019\] FCA 1027](#)

Commonwealth v Fairfax [\[1980\] HCA 44](#); [\(1980\) 147 CLR 39](#)

Home Office v Harman [\[1983\] 1 AC 280](#)

Liberty Funding Pty Ltd v Phoenix Capital Ltd [\(2005\) 218 ALR 283](#); [\[2005\] FCAFC 3](#)

Re Palmer and Military Rehabilitation and Compensation Commission [\[2021\] AATA 1347](#)

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Secondary Materials

Administrative Appeals Tribunal General Practice Direction (28 February 2019) [Part 5](#)

REASONS FOR DECISION**Senior Member O'Donovan****20 September 2023**

1. The applicant has applied to be released from the implied undertaking in relation to two sets of documents which are listed at Annexure A and Annexure B to this decision.
2. In broad terms, the implied undertaking can be described as follows:
 - (a) it is an obligation which is imposed on parties to court and tribunal proceedings;
 - (b) it applies in relation to documents (and the information those documents contain)^[1] which come into a party's possession as a result of a compulsory process associated with court or tribunal proceedings – documents obtained through a summons process or discovery are categories of material where the implied undertaking applies;
 - (c) when it applies, a party can only use or disclose the documents and the information they contain for the purposes of conducting the proceedings in which the documents were acquired.
3. In relation to documents, the implied undertaking operates until the document is taken into evidence or the party is released from the implied undertaking by the relevant court or tribunal. In relation to the information contained in any document, the undertaking operates until the information is revealed in open court, or the party is released from the implied undertaking.
4. In the context of the Administrative Appeals Tribunal (Tribunal), if documents are taken into evidence, there is no restriction on use or disclosure from that point unless a confidentiality order is made pursuant to [section 35](#) of the [Administrative Appeals Tribunal Act 1975](#) (AAT Act).
5. If certain material subject to the implied undertaking has not been tendered and a party wishes to use that material for another purpose after the proceedings have been finalised, that party must apply for leave to be released from the implied undertaking. The Tribunal's General Practice Direction describes the process by which a release can be sought.^[2]
6. In deciding whether to grant a release the principles which should be applied can be summarised as follows:^[3]
 - (a) In order to be released from the implied undertaking the applicant must show special circumstances;
 - (b) The notion of special circumstances does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason has been shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes;
 - (c) The discretion is a broad one and all the circumstances of the case must be examined;
 - (d) matters which are relevant include:^[4]
 - (i) the nature of the document;
 - (ii) The circumstances under which the document came into existence;
 - (iii) The attitude of the author of the document and any prejudice the author may sustain;
 - (iv) Whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;

(v) The nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);

(vi) The circumstances in which the document came into the hands of the applicant; and

(vii) Most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.

7. This application arises in the context of proceedings brought by the applicant for review of a decision by a delegate of the respondent. The delegate found that the applicant was not fit and proper to be an Approved Authority for a school. The hearing of the review by the Tribunal began on 27 March 2023, but on the fourth day of the hearing a request for a decision under section 42C of the AAT Act was handed up by the parties and a decision in those terms was subsequently made.

8. There are two sets of documents which are the subject of this application. They can be described as follows:

(a) A subset of documents which were included in folders identified as the Applicant's List of Documents to Tender and the Applicant's Cross Examination Bundle (Annexure A);

(b) Documents provided to the applicant by the respondent's solicitors under cover of a letter dated 19 December 2022 (Annexure B).

Evidence

9. In dealing with this application, I had the following material available to me:

(a) Submissions of Bellchambers Barrett, filed on 8 May 2023;

(b) Affidavit of James Francis Barrett, sworn on 8 May 2023;

(c) Amended Affidavit of James Francis Barrett, sworn on 11 May 2023;

(d) Submissions of the Applicant, filed on 10 May 2023;

(e) Affidavit of Chloe Mae Ellis, sworn on 11 April 2023;

(f) Affidavit of Chloe Mae Ellis, sworn on 1 May 2023; and

(g) Affidavit of Chloe Mae Ellis, sworn on 10 May 2023.

10. I also had regard to the evidence which was taken in during the substantive hearing and the transcript of those proceedings.

Consideration

Annexure B documents

11. The documents in Annexure B can be dealt with very briefly. The documents were provided to the applicant by the respondent voluntarily. So much is clear from the letter from Sparke Helmore dated 19 December 2022, which provided the documents. It states:

...we do not consider such correspondence falls within the scope of section 37 [of the AAT Act] such that it is required to be filed as T-Documents. Our client has no concerns with producing such correspondence directly to your firm, noting you are entitled to file and serve any documents on which your client intends to rely.^[5]

12. In these circumstances the implied undertaking has no application, and no release is required.

13. I do however note that in response to this application, the respondent's solicitors advised the applicant that:

...the documents [listed in Annexure B] were provided to your firm in response to a request directly related to these proceedings and were provided without involving the Tribunal as a matter of professional courtesy and in good faith. At the time they were provided there was no suggestion they would be disclosed more widely, and their provision to your firm should not be taken as implicit acceptance they would be disclosed more broadly if not received into evidence and forming part of the public record.^[6]

14. This might suggest that the respondent's position is that the circumstances of disclosure result in a duty of confidence being owed by the applicant in relation to the documents. Whether that is the case is not a matter for the Tribunal to determine. It is sufficient that I am satisfied that the documents were not disclosed as a consequence of Tribunal compulsion and that the documents are therefore not subject to any implied undertaking. As stated above, no release is required in relation to the documents.

Annexure A Documents

15. In relation to the documents listed at annexure A, a release is required. As is clear from the principles cited above at [6], the discretion to release a party from the implied undertaking is a broad one and all of the circumstances of the case must be examined. Accordingly, it is necessary to briefly describe the history of the proceedings to which the documents relate including:

- (a) the matters which were dealt with during the public hearing of the application;
- (b) the resolution of the application by consent;
 - (c) the subsequent conduct of the applicant and its current Board Chair Mr Greg Zwajgenberg; and
 - (d) the subsequent conduct of the only witness questioned in the proceedings, Mr James Barrett, and his auditing firm BellchambersBarrett.

16. Brindabella Christian College is an independent school based in Canberra.

17. Its primary and secondary schools receive significant financial support from the Commonwealth. In order to receive that support it is necessary for the school to be operated by what is called an Approved Authority. An Approved Authority is the body to which funding under the [Australian Education Act 2013](#) (Cth) (**Education Act**) is ultimately paid. For a non-government school, the Approved Authority is the body corporate approved by the Minister.

18. In order to approve a body to be an Approved Authority for a school, the Minister must be satisfied that, amongst other things, the person is a body corporate or a body politic, and that the person is fit and proper to be an Approved Authority for one or more schools.

19. The applicant is an Approved Authority.

20. In 2019 the respondent through the Department of Education commenced an investigation into the conduct and structure of the applicant. The investigation was lengthy. BellchambersBarrett undertook an audit at the school and prepared a report in relation to its findings (the Audit Report). The report reached the conclusion in relation to the question of whether the applicant was fit and proper that 'there are significant concerns around governance and the [applicant's] ability to meet the fit and proper person requirement under subsection 75(5) of the Act.'^[7] Concerns were also raised in relation to a number of other issues. On 17 May 2021 a delegate of the respondent made a decision that the applicant was not fit and proper to be an approved authority (hereafter abbreviated to 'not fit and proper'), and, pursuant to section 81 of the Education Act varied the applicant's approval by making it subject to a number of conditions. Many of the concerns which prompted the investigation, and which ultimately led to the decision to impose conditions, related to conduct by the Chair of the applicant's board, Mr Greg Zwajgenberg.^[8]

21. On 8 June 2021 the applicant applied to the Tribunal to have that decision reviewed.

22. Between the application being made and the matter coming on for hearing a large volume of material was obtained and lodged with the Tribunal by both parties. That material included documents responsive to a summons served on BellchambersBarrett.

23. When the matter came on for hearing on 27 March 2023, the first witness called by the respondent was Mr Barrett. Mr Barrett is a partner in BellchambersBarrett and the principal author of the Audit Report.

24. Prior to Mr Barrett entering the witness box, an application was made by the applicant to have the Audit Report excluded from consideration by the Tribunal. The foundation of the application was that the report did not meet the standards required for admissibility under the Evidence Act. It was argued that, notwithstanding that the Tribunal is not bound by the rules of evidence, it should exclude the report on the basis that:

- (a) it was not rationally probative of any matters the subject of review,^[9] and/or
- (b) failure to exclude would involve a breach of procedural fairness.^[10]

25. For reasons given orally immediately following the application, I determined that the report should be taken into evidence. In rejecting the application, I noted that the report contained a wealth of material relevant to the financial performance of the applicant.^[11] In relation to the arguments concerning procedural fairness, I determined that the applicant had an ability to test the contents of the report in the course of the Tribunal hearing.^[12]

26. Following that decision, I heard the parties on whether there were specific paragraphs of the report which should not be taken into evidence. I determined that some short sections of the report should not be taken into evidence.

27. Following the resolution of that application, Mr Barrett was called as a witness for the respondent. He adopted the Audit Report and was cross examined in relation to it. The cross-examination was robust. The following issues with the Audit Report were raised with the witness:

- (a) that the report made findings which were not open when the relevant accounting standards which the witness had applied were properly understood;^[13]
- (b) that the report was prepared adopting a procedure which was unfair to the applicant;^[14] and
- (c) some recommendations lacked a proper factual foundation.^[15]

28. An allegation was also put to the witness that he had deliberately withheld documents which were caught by a Tribunal summons and that he was motivated by 'hostility' and 'animus' in doing so, and acted with a 'lack of integrity, a lack of accountability and with complete partiality.'^[16]

29. In the course of cross-examination, a number of documents were put to Mr Barrett which had been obtained under summons. The documents were shown to the witness but were not formally tendered at the time.

30. Mr Barrett's evidence concluded at 4.15pm on Wednesday 29 March 2023.

31. The following morning the parties requested that the Tribunal make a consent decision pursuant to section 42C of the AAT Act. Section 42C provides as follows:

(1) If, at any stage of a proceeding for a review of a decision:

(a) agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal in the proceeding or in relation to a part of the proceeding or a matter arising out of the proceeding that would be acceptable to the parties (other than an agreement reached in the course of an alternative dispute resolution process under Division 3); and

(b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and

(c) the Tribunal is satisfied that a decision in those terms or consistent with those terms would be within the powers of the Tribunal;

the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case.

(2) If the agreement reached is an agreement as to the terms of a decision of the Tribunal in the proceeding, the Tribunal may make a decision in accordance with those terms without holding a hearing of the proceeding or, if a hearing has commenced, without completing the hearing.

32. The terms agreed between the parties were as follows:

Pursuant to [subsection 42C\(2\)](#) of the [Administrative Appeals Tribunal Act 1975](#), the Tribunal varies the reviewable decision dated 17 May 2021 as follows:

1. The Conditions on Approval and Timeline of Conditions (Attachment A and Attachment B to the reviewable decision, respectively) are deleted and replaced with the conditions set out in the Annexure to this agreement.

33. The attached conditions required the applicant to, among other things:^[17]

- (a) expand its board;
- (b) improve its capacity to produce timely and quality management reporting;
- (c) agree to a repayment plan with the Australian Taxation Office;
- (d) introduce a program for market testing supply of all major cost items which have not been the subject of a tender process in the last 12 months;
- (e) clarify roles and responsibilities for requesting and selecting tenders;
- (f) identify whether the operations of its Charnwood campus were viable;
- (g) ensure all BAS reporting is up to date;
- (h) resolve outstanding Fringe Benefit Tax issues by 1 May 2023.

34. A decision was made by the Tribunal reflecting the agreement between the parties. It is worth noting that the unstated premise in the Tribunal's decision is that the applicant is not fit and proper. There was no change to the delegate's decision in this regard as a result of the varied decision.

35. On 6 April 2023, the applicant applied for release from the implied undertaking in relation documents produced by BellchambersBarrett in response to a summons issued on 12 December 2022. Those documents are listed at Annexure A. The documents included records of discussions between BellchambersBarrett and the respondent's department, the ACT Block Grant Authority (ACTBGA) and multiple draft copies of the Audit Report.

36. The applicant filed three affidavits in support of the application. All three were sworn by Chloe Ellis, a partner in the firm representing the applicant. The affidavits were dated:

- (a) 11 April 2023;
- (b) 1 May 2023; and
- (c) 10 May 2023.

37. Submissions, a supporting affidavit and an amended affidavit from James Barrett were filed on behalf of BellchambersBarrett on 12 May 2023. BellchambersBarrett opposed the application for release from the implied undertaking.

38. The application for review to that point had attracted significant media attention. Discussion of the proceedings continued in the media in the days and weeks which followed the Tribunal's decision. Included in the material annexed to the affidavit of James Barrett was a newspaper article dated 27 April 2023 which appeared in the Canberra Times and stated:

The school's board chair Greg Zwajenberg said in a statement to The Canberra Times the BellchambersBarrett report was "ill-conceived and flawed."

"In addition to our request for an internal review of the departmental officers involved...the board's related legal teams are preparing a comprehensive case file on the conduct of various departmental individuals and agencies involved in the matter, which will be referred to the National Anti-Corruption Commission for investigation once 'terms of reference' are established in the commission," Mr Zwajenberg said.

He said the board would be reviewing legal advice on recovering direct and indirect costs for the "untold reputational damage" from the appeal process, but would not say how this would be achieved.^[18]

39. This prompted an exchange of correspondence between the applicant's lawyers, and the lawyers representing BellchambersBarrett, with claims being made that the comments were defamatory. In the background the applicant was exploring the possibility of making a claim against BellchambersBarrett for misleading and deceptive conduct based on errors in the Audit Report. It is against this background that the application for release is made.

CONSIDERATION

40. The applicant's contentions in favour of release from the implied undertaking can be broken down as follows:

- (a) The documents should be released because had a different procedure been adopted at the hearing, they would have been tendered and would now be available without restriction;
- (b) The applicant will be assisted by a release in pursuing advice in relation to the viability of a claim for misleading and deceptive conduct under the Australian Consumer Law;
- (c) The applicant will be assisted by a release in pursuing advice in relation to the defamation risks of making certain statements in relation to the Audit Report; and
- (d) A release from the implied undertaking will allow a more informed public discussion of the merits of the action taken against the school.

41. BellchambersBarrett opposes the release for any purpose.

42. The applicant describes the documents in respect of which it is seeking release as:

- (a) Documents upon which Mr Barrett was cross-examined and re-examined in a public hearing;
- (b) Documents which would have been tendered, without objection, and without limitation as to use, had
 - (i) the applicant adopted the course of tendering each individual document as it was put to the witness, or
 - (ii) tendered the tender bundle prior to the parties reaching agreement.

[\[19\]](#)

43. The applicant contends that given that the documents would have been tendered if slightly different procedures had been adopted at hearing, that provides a sufficient reason for granting the applicant a release from the implied undertaking. It notes that neither the respondent nor BellchambersBarrett suggests that there existed or exists any basis upon which the tender of any of the documents in issue might have been resisted, or that any order under [s.35](#) might have been sought or made with respect to any such document. Mr Barrett gave no evidence that could support any such suggestion. In essence the applicant contends that release is appropriate because were it not for the fact that a particular course was adopted in relation to the tender of documents and the matter resolving, the documents would be public.

44. As a factual matter, I accept that there were a number of different ways in which the receipt of evidence could have been organised by the parties and the Tribunal. If the documents had been taken into evidence, it would mean that the applicant would not need to be released from the implied undertaking. There is no reason to think that had alternative methods of receiving the evidence been adopted, that a restriction would have been placed on the use of the documents. Had the documents been tendered in evidence on the afternoon of 29 March 2023, the applicant would have possession of the documents without restriction as to use. Importantly though, that is not what occurred. The documents were not taken into evidence. That fact has specific and enduring consequences for the handling of the documents.

45. The significance of non-tender needs to be understood in the context of the AAT Act. The Tribunal conducts itself according to the open justice principles which apply in courts. These principles are expressly incorporated into the AAT Act in section 35(5) in the context of considering confidentiality orders. Of particular relevance is the principle 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...

46. That principle is reflected in the Tribunal's registry procedures which allow non-party access to documents received in evidence by the Tribunal. At present, the material the subject of this application can only be accessed by the parties and not by the general public. The parties therefore enjoy a privileged position in relation to the material as a result of the litigation process. It is for that reason that each party's use of the documents is subject to Tribunal supervision. Tender into evidence is the critical event that relieves a party from the implied undertaking because, in the ordinary course, it renders the document accessible to parties and non-parties alike. In terms of supervision by the Tribunal, it is of no significance that had a different procedure been adopted at the hearing the documents might now be more freely available. The fact is they aren't, and in those circumstances the documents remain the subject of the implied undertaking and the requirements for release.

47. In the seminal case of *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, the solicitor who was the subject of contempt proceedings, disclosed the document which was subject to the implied undertaking to a journalist. A contempt was found notwithstanding that the document had been read in open court. It has been accepted that if the journalist had been shown a copy of the transcript no problem would have arisen.^[20] These facts emphasise how critical the fact of tender is in considering the operation of the implied undertaking. I appreciate that the applicant accepts it is subject to the implied undertaking, and the point it is making is not that it should not have to apply to be relieved from the undertaking, but a very low discretionary threshold should apply given how close the documents came to being in evidence. This is not an argument I accept. The fact the documents were close to being tendered does not add much when the Tribunal is considering release. The fact remains that the applicant enjoys a privileged position in relation to the documents and special circumstances are required for release.

48. Even though the contents of the documents the subject of this application were revealed in exchanges between counsel and Mr Barrett while he was being cross-examined, and a transcript of those exchanges is available, the documents did not make their way into evidence. Until the documents make their way into evidence they are not normally available to members of the public. The use of the documents remains subject to Tribunal supervision, and the Tribunal must be satisfied that release is appropriate. It cannot simply release the documents because the documents would have been more generally available if events had turned out differently. It does not provide a reason on its own for releasing the documents and in the broad mix of discretionary factors it does not add much weight in favour of release.

49. As a consequence, consideration of whether special circumstances are present is required.

RELEASE FOR SPECIFIC PURPOSES

50. The applicant identifies three uses to which the documents will be turned if a release is granted:

- (a) to facilitate the seeking of advice on the prospects of a Consumer Law claim,
- (b) to facilitate the seeking of advice on defamation risks and
- (c) to engage in public debate.

51. The context in which release for each purpose needs to be considered is as follows.
52. The applicant contends that it needs a release in order to seek advice from counsel on the prospects of the applicant obtaining damages from BellchambersBarrett. The basis of the claim is said to be a contravention of s. 18 of the Australian Consumer Law by BellchambersBarrett, as a consequence of the provision of the Audit Report to the respondent's department.^[21] The incipient claim would be for misleading and deceptive conduct, and would extend to a claim for damages for the costs incurred in this Tribunal. Ms Ellis, a partner at Hicksons lawyers, the solicitors who represent the applicant, has provided evidence that she has concluded that there is a prospect that the applicant could establish that the primary decision would not have been made had Bellchambers Barrett not provided its report in the terms in which it was provided to the respondent, and that there are prospects of establishing that had the primary decision not been made, the applicant would not have incurred the costs of the proceedings.^[22]
53. The applicant submits that seeking advice on its consumer law claim is a good reason to release it from the implied undertaking.^[23]
54. The applicant also contends that it requires a release from the implied undertaking in order to deal with a potential defamation claim, foreshadowed in a letter from BellchambersBarrett.^[24] The relevant facts are these.
55. On 24 April 2023, the applicant issued a media release containing the statement: 'in a substantive two-day cross-examination of the lead auditor the evidence showed that the BellchambersBarrett report was ill conceived and flawed'.^[25] I note that this assessment is the applicant's own assessment of the effect of the cross-examination. It does not reflect any assessment made by the Tribunal, nor is it based upon any remarks which the Tribunal made in the course of the hearing.
56. On 27 April 2023 lawyers for BellchambersBarrett wrote to the solicitors for the applicant referring to the press statement stating:
- The statement is defamatory and inherently false. Our client refutes that the audit report was ill conceived and flawed and is understandably concerned about the negative impact the statement may have on its business and good reputation in Canberra. Our client demands that you client immediately cease and desist any further actions that damage its business and reputation. We invite your client to formally retract the statement in writing and to advise the Canberra Times accordingly.*^[26]
57. The applicant contends that it has a real interest in being advised on legal risks which it would incur by repetition or amplification of the statement made in the press release.^[27] It contends that BellchambersBarrett seeks to deny the applicant the benefit of access to the full record of the cross-examination in order for those risks to be assessed: while having for itself any benefit to be obtained by the threats made by its lawyer. The applicant contends that the Tribunal should reject the unfairness of the applicant being placed in that position, and leave should be granted to enable the applicant to seek that advice.
58. The applicant also contends that it should be released from the implied undertaking to allow it to participate in public debate about the operations of Brindabella Christian College, in light of the proceedings and related events.
59. The applicant notes that the interest in the proceedings has been significant and that the applicant and the school for which it is an approved authority have been the subject of extensive negative publicity. The applicant cited media reports on the conduct of proceedings in the Tribunal, which included material from BellchambersBarrett's report. The applicant notes that the media reports, included comments from Mr Barrett (see, for example, page 56 of the affidavit of Chloe Ellis sworn 11 April 2023) but necessarily did not include any commentary or analysis by reference to the documents found in Annexure A.
60. The applicant contends that the desirability of allowing it to 'more fully inform its parent community and the public on the matters the subject of the current public debate is self-evident. It is a good reason for the leave to be given'.^[28]
61. BellchambersBarrett have filed evidence and submissions resisting the grant of any release. Having considered the submissions carefully I have decided to grant a release to the applicant for the purpose of seeking advice in relation to a Consumer Law claim and in relation to the defamation issues which have arisen between the applicant and BellchambersBarrett, but not for any other purpose.

62. In determining whether the applicant should be relieved of the burden of the implied undertaking I have adopted the framework outlined in paragraph [6] above. My assessments of the criteria are as follows.

The nature of the documents and the circumstances under which they came into existence

63. This criterion favours releasing the applicant from the implied undertaking. The documents, although not prepared for the purposes of litigation were prepared for a public purpose in circumstances where public release would or should have been in the contemplation of the authors of the documents.

64. I do not accept BellchambersBarrett's contention that the documents are of a kind that were prepared for strictly internal use. The documents were prepared in order to assist a public official exercise a public duty and are for the most part the product of interactions with employees of the Department or were prepared for the purpose of discussions with the Department. I am satisfied that the documents have a public character which sit in contrast to private documents which a person could assume are prepared for private purposes and which, in the absence of litigation, would never see the light of day. It was always possible that the documents could be scrutinised as part of any Tribunal review process or as a result of a Freedom of Information request. The nature of the documents is such that this factor favours release from the implied undertaking for all purposes.

Attitude of the author and any prejudice they are likely to sustain

65. The authors of the documents are hostile to the release being granted. BellchambersBarrett are concerned that they may suffer prejudice in the form of:

- (a) The commencement of proceedings on the ground that it engaged in misleading and deceptive conduct;
- (b) A reduced capacity to limit adverse public statements by the applicant;
- (c) A diminished reputation resulting from continued public criticism of the quality of the Audit Report by the applicant.

66. In relation to potential exposure to proceedings for misleading and deceptive conduct, the risk exists as a consequence of the content of the Audit Report. I am not in a position to determine the merits of any such claim. I am not satisfied that such a claim is completely far-fetched. The documents in Annexure A might assist any person advising the applicant on such a claim in undertaking an assessment. If, as BellchambersBarrett assert, the documents do not support a claim, then there can be no harm in giving the applicant's advisers access to those materials for the limited purpose of considering the viability of such a claim. In these circumstances, I do not consider that BellchambersBarrett's opposition to release from the implied undertaking provides a persuasive reason for not giving a release for the purpose of the applicant investigating the viability of a legal claim.

67. In relation to the release to enable the applicant to be properly advised in relation to the risk of defamation, BellchambersBarrett are opposed to release for that purpose. They contend that they have not foreshadowed such a claim nor commenced such a claim.^[29] Further they contend that the claim is purely hypothetical.

68. I do not accept those submissions.

69. In the course of correspondence with the applicant, BellchambersBarrett 'sought, by threat of legal liability, to dissuade the applicant from repeating or amplifying' certain statements concerning the Audit Report.^[30]

70. Consequently, the applicant has a real interest in being advised on legal risks which it would incur by repetition or amplification of the statements it has previously made in press releases. I am satisfied that access to the documents in Annexure A would assist the applicant in obtaining advice in relation to the issues which have arisen between the parties and it would be inappropriate to forestall proper investigation of that question by the applicant at the insistence of BellchambersBarrett.

71. It cannot be said that the legal issues which the applicant wishes to investigate are purely hypothetical. The issues between BellchambersBarrett and the applicant have crystallised to a point where it is not unreasonable for the applicant to seek to inform itself about the risks of making particular statements publicly in relation to the Audit Report and its prospects of bringing a claim against BellchambersBarrett.

72. BellchambersBarrett's opposition to the release from the implied undertaking to allow the applicant to investigate its legal position is understandable. However, the implied undertaking is not in place to protect parties from legal risks by preventing potential litigants from gaining access to relevant information. It is relevant that BellchambersBarrett does not want the documents to be released, but in circumstances where that opposition is based on a desire to prevent a party from investigating its legal

options, it does not provide a significant reason for not releasing the applicant from the implied undertaking.

73. In relation to release to allow the applicant to engage in public debate, BellchambersBarrett also opposed release for that purpose and contended that it would be prejudiced by it.^[31] They contend that the cross-examination of Mr Barrett does not present evidence of substantive grounds to question the reliability of the Audit Report and the documents will not rectify this. Mr Barrett in his affidavit expressed his concerns about the detrimental impact that further public debate will have on BellchambersBarrett, particularly as they near the end of a business acquisition process. Use of the documents for the purpose of public debate, combined with any cherry-picking of the transcript, poses greater risk of harm to BellchambersBarrett than any good it could achieve for the applicant. BellchambersBarrett contend that the applicant seeks to obtain 'justice' in the court of public opinion which is inherently unjust to BellchambersBarrett in circumstances where it was not responsible for the negative publicity the applicant experienced.

74. For the purpose of considering this criterion as it relates to the purpose of allowing the applicant to pursue public debate, I note that release is opposed by the authors of the documents. Those authors have identified some potential prejudice to them if the applicant is released from the implied undertaking and that that prejudice is different in character from the prejudice resulting from the investigation of a legal claim against them. I have some sympathy with the position taken by BellchambersBarrett. It prepared a report for a public purpose which was a report Mr Barrett was prepared to stand behind in the evidence he gave to the Tribunal. The applicant however, rather than allowing its complaints about the report to be adjudicated on by the Tribunal, opted instead to resolve proceedings in such a way that its claims about the Audit Report may never be finally determined. In those circumstances BellchambersBarrett's objection to the release from the implied undertaking is worthy of some consideration in deciding whether a release for this purpose should be granted.

Whether the document pre-existed litigation and the nature of the information

75. As discussed earlier, the document pre-existed the litigation, but was prepared for a public purpose where review was in the contemplation of its authors and those commissioning it. These factors favour release.

Circumstances in which the document came into the hands of the applicant

76. The document came into the hands of the applicant as a result of a summons. Beyond saying that such circumstances give rise to the implied undertaking, this factor does not favour release or otherwise.

The likely contribution of the document to achieving justice

77. My view is that release from the implied undertaking for the purposes of allowing the applicant to consider its legal position in relation to both the question of defamation and the question of whether the Audit Report involves misleading and deceptive conduct and a breach of the Consumer Law, will make a contribution to achieving just outcomes in relation to those issues. The facts suggest that these are genuine issues which the applicant wishes to explore and the documents in Annexure A have the potential to assist that process. Accordingly, I am satisfied that the documents should be released for those purposes.

78. However, in relation to releasing the documents for the purpose of informing public debate, I am not satisfied that such a release would contribute to achieving a just outcome in any public debate about the merits or otherwise of the applicant's conduct.

79. The evidence indicates that the applicant is seeking to promote a public narrative that it was the victim of a flawed investigation and a decision which should never have been made. The flawed investigation led to an unmeritorious decision by the delegate and significant costs associated with bringing the application to the Tribunal.^[32]

80. That narrative however runs counter to the terms on which the applicant invited the Tribunal to resolve the proceedings. The decision sought by the parties left undisturbed the original finding of the delegate that the applicant was not fit and proper.

81. It is important to emphasise that although a decision under section 42C is proposed as a result of agreement between the parties, the Tribunal cannot make such a decision unless it considers it 'appropriate'^[33] to do so. The decision which was requested by the parties did not seek to alter the original finding of the delegate that the applicant was not fit and proper. It would not have been appropriate for the Tribunal to issue a decision in the form requested by the parties if there was no proper basis for the conclusions reached by the delegate.

82. In circumstances where:

- (a) the applicant has sought a decision in terms which has left in place the delegate’s finding that it was not fit and proper; and
- (b) it is seeking a release from the implied undertaking in order to promote a public perception that that finding had no proper foundation;

it would not be appropriate to release to the applicant material covered by the implied undertaking for that purpose. To do so would not promote justice in all the circumstances of the case and would significantly undermine the decision made by the Tribunal that it was appropriate to leave in place the delegate’s finding that the applicant was not fit and proper. Accordingly, this factor weighs heavily against releasing the documents in Annexure A to inform public debate.

This last criterion is identified in the authorities as the most important. Given my finding on this question I am not prepared to release the applicant from the implied undertaking in relation to the documents to allow them to be used in further public debate.

Further press release

83. I note that Mr Zwajgenberg also announced in the press release of 24 April 2023 his intention to refer material to the National Anti-Corruption Commission. No application has been made for release from the implied undertaking for that purpose. In the absence of such an application the inclusion of any material subject to the implied undertaking in any such referral would involve a breach of the implied undertaking.

Decision

84. The applicant is released from the implied undertaking in relation to the documents listed in Annexure A for the limited purposes of:

- (a) Seeking advice in relation to the viability of a claim against BellchambersBarrett for breaches of the Australian Consumer Law;
- (b) Seeking advice in relation to any defamation risk in continuing to make public statements critical of Bellchambers Barrett and the Audit Report.

I certify that the preceding 84 (eighty four) paragraphs are a true copy of the reasons for the decision herein of Senior Member O’Donovan.

.....[SGD].....

Associate






















Dated: 20 September

Application heard on the papers

Date final submissions received: **12 May 2023**
 Counsel for the Applicant: **Mr Tom Brennan SC**
 Solicitors for the Applicant: **Ms Chloe Ellis, Hicksons Lawyers**
 Counsel for the Respondent: **Mr James Emmett SC**
 Solicitors for the Respondent: **Ms Laura Hinwood, Sparke Helmore**
 Solicitors for BellchambersBarrett: **Ms Shannon Priestly, Griffin Legal**

ANNEXURE A

- | NO. | DOCUMENT |
|-----|--|
| 1. | Meeting agenda dated 24 September 2020 |
| 2. | Questions James Barrett prepared for meeting on 24 September 2020 |
| 3. | Notes made by Mr James Barrett during the meeting of 24 September 2020 |
| 4. | Notes made by Kathleen Buckley during the meeting 24 September 2020 |
| 5. | Agenda for meeting between ACTBGA and Bellchambers Barrett dated 30 September 2020 |
| 6. | Minutes of meeting with ACTBGA dated 30 September 2020 |
| 7. | Emails from David Simpson to James Barrett dated 25 September 2020 |
| 8. | Agenda for teleconference between Jock Bennison and Geoff Kimber (undated) |
| 9. | Bellchambers Barrett file note by “JB” dated 8 October 2020 |
| 10. | Bellchambers Barrett file notes by unidentified person regarding ‘checking two MIT payment authorisations’, 4 June 2019 meeting with Board and 8 October 2020 discussion with DESE (undated) |

11. Bellchambers Barrett file note by "JB" at 10:30am dated 13 October 2020
12. Bellchambers Barrett file note dated 14 October 2020
13. Bellchambers Barrett file note by "JB" at 1:30pm dated 15 October 2020
14. Bellchambers Barrett file note: Questions (with handwritten notes) (undated)
15. Bellchambers Barrett file notes by "JB" dated 16 October 2020
16. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 3 November 2020
17. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Final Audit Report dated 23 November 2020
18. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 3 November 2020 (v1)
19. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 20 November 2020
20. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Final Audit Report dated 23 November 2020 stamped "Draft"
21. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Final Audit Report dated 23 November 2020
22. Bellchambers Barrett Meeting Agenda (with handwritten notes) (version 1) dated 3 November 2020
23. Bellchambers Barrett handwritten notes on a page of a draft audit report (undated)
24. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 3 November 2020 ("KB meeting notes 3/11/20")
25. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 3 November 2020 (v2)
26. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 20 November 2020
27. Bellchambers Barrett file notes (undated)
28. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 20 November 2020
29. Bellchambers Barrett: Audit of an approved authority  Brindabella Christian Education Limited  -
Draft Audit Report dated 3 November 2020 (v2)

ANNEXURE B**NO. DOCUMENT**

1. Email from James Barrett (Bellchambers Barrett) to Helen Arnold (Department) dated 18 September 2020, attaching Bellchambers Barrett audit quotation dated 18 September 2020
2. Bellchambers Barrett audit quotation dated 18 September 2020
3. Letter from James Barrett to Helen Arnold dated 18 September 2020
4. Email from James Barrett to Asha Chandrashekar and Helen Arnold dated 13 October 2020
5. Emails between Asha Chandrashekar and James Barrett dated 14 October 2020
6. Email from James Barrett (Bellchambers Barrett) to Mike Behnke (and email chain), attaching final audit report dated 23 November 2020 and Request for Quotation and Quotation Form
7. Email from James Barrett (Bellchambers Barrett) to Mike Behnke (and email chain), attaching final audit report dated 23 November 2020 and Request for Quotation and Quotation Form
8. Email from Mike Behnke (Department) to Chloe Tatti (Bellchambers Barrett) dated 13 January 2021 at 12:09pm regarding inaccuracies in audit report identified by ACTBGA, attaching email from Tara O'Keefe (ACTBGA) to Asha Chandrashekar dated 13 January 2023 at 11:24am and email from Mike Behnke to Tara O'Keefe dated 16 December 2020 at 11:12am (and its attachments)
9. Email from Chloe Tatti (Bellchambers Barrett) to Asha Chandrashekar and Mike Behnke (Department), attaching Final Audit Report dated 23 November 2020 (revised 21 January 2021)
10. Email from James Barrett (Bellchambers Barrett) to Asha Chandrashekar (Department) discussing the date of the final audit report (and email chain) dated 8 February 2021

^[1] *Treasury Wine Estates Ltd v Maurice Blackburn Pty Ltd* [2020] FCAFC 226.

^[2] Administrative Appeals Tribunal General Practice Direction (28 February 2019) Part 5.

^[3] See, for example, *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3; (2005) 218 ALR 283, *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217.

^[4] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3; (2005) 218 ALR 283, [31], citing *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217.

^[5] Affidavit of Chloe Mae Ellis sworn 11 April 2023, Annexure CME-3, pages 11-12.

^[6] *Ibid*, pages 25 -26.

^[7] T43, page 996.

^[8] T55, page 1237 – 1238.

^[9] Transcript, P90 – 91; Transcript of Oral decision, 28 March 2023, P2, line 12 – 17.

^[10] Transcript, P89, line 43 – 45; Transcript of Oral decision, 28 March 2023, P2, line 12 – 17.

^[11] Transcript of Oral decision, 28 March 2023, P2, line 29 – 35.

^[12] *Ibid*, line 37 – 41.

^[13] See, for example, Transcript, P204, line 13 – P205, line 41.

^[14] Transcript, P168, line 24 – 43.

^[15] See, for example, Transcript, P178, line 4 – 46.

^[16] Transcript, P196, line 35 – 40.

^[17] The terms of agreement, as handed up to the Tribunal, were extensive and covered some 6 pages.

^[18] Amended Affidavit of James Francis Barrett sworn 11 May 2023, Annexure A.

^[19] *Ibid*, paragraph 1(b)(ii).

^[20] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 305, 307.

^[21] Applicant's Submissions filed on 10 May 2023, paragraph 31.

^[22] *Ibid*, paragraph 31 – 39.

^[23] *Ibid*, paragraph 39.

^[24] *Ibid*, paragraph 41.

^[25] Affidavit of Chloe Mae Ellis sworn 1 May 2023, Annexure B.

^[26] Affidavit of Chloe Mae Ellis sworn 1 May 2023, Annexure C.

^[27] *Ibid*, paragraph 43.

^[28] Applicant's Submissions filed on 10 May 2023, paragraph 49.

^[29] Bellchambers Barrett Submissions filed on 8 May 2023, paragraph 28.

^[30] *Ibid*.

^[31] Bellchambers Barrett Submissions filed on 8 May 2023, paragraph 22.

^[32] Affidavit of Chloe Mae Ellis sworn 1 May 2023, paragraph 9; Annexure B.

^[33] *Administrative Appeals Tribunal Act 1975* (Cth), s 42C(1).

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