



Administrative Decisions Tribunal Amendment (Confidential Documents) Bill 2007

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Extract from NSW Legislative Council Hansard and Papers Thursday 21 June 2007.

Second Reading

The Hon. ROBERT BROWN [11.37 a.m.]: I move:

That this bill be now read a second time.

The Shooters Party is pleased to introduce the Administrative Decisions Tribunal Amendment (Confidential Documents) Bill 2007. The bill proposes an amendment to the Administrative Decisions Tribunal Act 1997 to enable the legal representative of any party to proceedings heard by the Administrative Decisions Tribunal to see and challenge otherwise confidential evidence. Generally, hearings before the Administrative Decisions Tribunal are held in public. However, under section 75 (2) (d) of the Administrative Decisions Tribunal Act 1997, the tribunal may make an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of the contents of a document lodged with the tribunal or received in evidence by the tribunal in relation to the proceedings. The tribunal may make such an order only if it is satisfied that it is desirable to do so by reason of the confidential nature of any matter, or for any other reason.

With this bill, the Administrative Decisions Tribunal Act 1997 is amended by omitting section 75 (2) (d) so as to allow any party to the proceedings and his or her legal representative to see and challenge all evidence lodged with the tribunal or received in evidence by the tribunal. With this proposed change the bill will limit the power of the tribunal to make an order prohibiting or restricting the disclosure of the contents of a document. The tribunal will continue to be able to make orders restricting the disclosure to anyone other than a party to the proceedings and his or her legal practitioner. If the bill is successful it will also necessitate an amendment to section 75 (5) (b) of the Firearms Act 1996 by omitting all words after the word "public". This amendment is required for consistency in the legislation, as the section refers specifically to a review by the Administrative Decisions Tribunal and will be moved in Committee.

The Shooters Party finds it untenable that discretionary powers will be granted to one or more members of a tribunal to keep information secret from a party to those same proceedings. While the tribunal may exercise this power rarely and infrequently, the Shooters Party firmly believes that the provision, as it stands, is against the essence of natural justice and denies a party to proceedings any ability to see and challenge otherwise confidential evidence.

Withholding the disclosure of confidential documents or information received in evidence from some or all of the parties to the proceedings would make it very difficult, if not impossible, for the evidence to be challenged. Given that there is no mechanism by which to challenge prohibited or restricted evidence, even in a higher

court of law, it would be very difficult indeed for a party to the proceedings to prove a negative. In fact, section 127 (1) (a) of the Administrative Decisions Tribunal Act 1997 states that a person who is, or has been, a member or officer of the tribunal is not competent and cannot be required to give evidence to a court relating to a matter if the giving of the evidence would be contrary to an order of the tribunal in force under section 75 (2) of the Act or under similar provisions of another Act. Effectively, section 75 (2) (d) of the Administrative Decisions Tribunal Act 1997 enables the tribunal to make an assertion that is not only vague but also a preventative law.

A fundamental belief in our judicial system is that certain rights and freedoms are accorded to each and every citizen of this country. Citizens have a right to legal representation, and that legal representation is entitled, on the client's instructions, to challenge evidence in a case. All citizens of this country are equal before and under the law. However, section 75 (2) (d) erodes a citizen's rights and freedoms and does not afford procedural fairness or uphold the principles of natural justice—I stress the latter point. Indeed, it is not even a fair fight. By prohibiting or restricting the disclosure to some or all of the parties to proceedings of the contents of evidence lodged with the tribunal, or received in evidence by the tribunal, in relation to the proceedings, the tribunal can make a decision in the absence of any ability by a party to challenge that evidence through its representative.

The Shooters Party has had an interest in this issue for several years after first recognising that the legislation appeared to be denying procedural fairness. It was first highlighted to us in the 2005 case *Aubrey v Commissioner of Police*, in which the applicant, David Aubrey, a licensed firearm owner, appealed to the Administrative Decisions Tribunal against the revocation of his licence by the Commissioner of Police. In this particular case it is clear that the tribunal placed significant weight on confidential evidence that could not be challenged. Clause 17 of the Firearms (General) Regulation 1997 provides that a licence may be revoked if the commissioner considers that it is not in the public interest for the person to whom a licence is issued to continue to hold it.

In affirming the commissioner's decision to revoke the applicant's firearm licence, it is interesting to note that the tribunal did not dispute the fact that the applicant had never been convicted of a criminal offence in New South Wales and had never used his firearm in a threatening manner towards any person or in an attempt to harm himself. In handing down its decision, however, the tribunal appears to rely on a confidential affidavit in which a member of the public provided evidence of dealings with the applicant. With the respondent in the case having sought and gained a confidential hearing in the matter under section 75 (2) (d) of the Administrative Decisions Tribunal Act 1997, the decision under review was affirmed.

Given the presumption against innocence in this case, the tribunal noted that the applicant had no opportunity to challenge the evidence. It is worth noting that the facts presented in the case—all of which the applicant vehemently denied—would be of little concern according to the tribunal's own findings. In all probability the tribunal may not have been able to affirm the commissioner's decision to revoke the applicant's firearm licence without this confidential evidence. Having said this, we would have no problem at all if the decision had been challenged and the tribunal had come to the same conclusion.

Another case that was brought to our attention is the 2007 case of *Khalil v Commissioner of Police*, in which the applicant, Walid Khalil, appealed to the Administrative Decisions Tribunal against a decision by the Commissioner of Police

to refuse him a security industry licence. The commissioner refused to grant a security licence to Mr Khalil for two reasons: he was not satisfied that Mr Khalil was a fit and proper person to hold the class of licence sought; and he considered that the granting of the licence would be contrary to the public interest. Once again, the tribunal in this case affirmed the decision of the commissioner based on evidence that was presented before the tribunal on a confidential basis, even though the tribunal acknowledged that Mr. Khalil has no criminal history whatsoever. Whether a person is fit and proper is a value judgment. It is interesting to note that the tribunal did not rule on this issue. Rather, the tribunal erred on the side of caution rather than on the side of natural justice based on evidence received on a confidential basis, and affirmed the decision of the commissioner that it would not be in the public interest for Mr Khalil to continue to hold a security licence.

The Shooters Party is happy for the relevant authorities to refuse or revoke licences or authorities to people who do not deserve them and/or who do the wrong thing. Our argument is about procedural fairness and natural justice. I repeat for clarity: Our argument is about procedural fairness and natural justice. In other words, the Administrative Decisions Tribunal should not act as a Star Chamber. The principle of open justice should be based upon meeting the needs of justice rather than the needs of particular individuals. While we accept that the needs of witnesses must be accommodated to a certain extent, this should go no further than that which is necessary for the administration of natural justice as a whole. I commend the bill to the House.