

OPINION

'The Ombudsman's Office is not subject to the Fol Act' — or is it?

In a matter recently before the VCAT, where the Office of the Victorian Ombudsman claimed that it was not subject to the Victorian *Fol Act* (the Act). This claim was presumably made in reliance upon the Freedom of Information Regulations 1998 (the Regulations). For the reasons set out below, it is my view that this claim is without substance.

The Act

The Act applies to 'agencies' and Ministers. The word 'agency' is defined in s.5 to mean a 'department, council or a prescribed authority'.

The word 'department' is also defined in s.5 to mean a department within the meaning of the *Public Sector Management and Employment Act 1998* or an office specified in s.16(1) of that Act. The offices specified in s.16(1) include:

- (a) the Office of the Legal Ombudsman,
- (b) the Office of the Ombudsman, and
- (c) the Office of the Regulator-General.

It follows that the Office of the Ombudsman and the other two offices are 'departments' within s.5 of the Act. This means that they are 'agencies' within s.5 of the Act, which means that they are subject to the Act.

The Regulations

At first blush, the Regulations appear to complicate the issue somewhat. This is because reg. 6 purports to exempt (ie exclude) a number of bodies from the operation of the Act. These bodies include: the Office of the

Legal Ombudsman, the Office of the Ombudsman, and the Office of the Regulator-General.

Regulation 6 is directly inconsistent with the Act insofar as it purports to exempt these offices. This is because the Act provides that they are 'departments' (and hence subject to the Act), whereas reg. 6 purports to exempt those offices from the operation of the Act.

It is a fundamental principle of statutory interpretation that regulations are invalid if they contradict or are repugnant to the Act under which they were made.¹ Accordingly, it is my view that reg. 6 is invalid to the extent that it purports to exempt the above offices from the operation of the Act. It follows from this submission that the Office of the Ombudsman and the other two offices are subject to the Act notwithstanding the Regulations.²

Conclusion

It is unusual to find a regulation that directly contradicts a provision of the Act under which it was made.³ Nevertheless, that is the position with the Regulations. It may only be hoped that the three offices in question are made aware that the apparent 'protection' offered to them by the Regulations is wholly ineffective, and that they must therefore put proper procedures in place for the handling of requests made under the Act.

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Victorian Bar

References

- 1 Pearce and Argument, *Delegated Legislation in Australia*, 2nd edition, Butterworths, p.200.
- 2 There is a doubt as to whether the Act authorises the making of the Regulations in the first place. See Kyrou and Pizer, *Victorian Administrative Law*, LBC Information Services, looseleaf service, at [2695/8].
- 3 Pearce and Argument, above, p.200.

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