necessarily constitute an adequate resolution to an investigation, the Ombudsman has approached the Prime Minister for his views on whether he believes it desirable for such reports to receive a guaranteed minimum of attention, with a view to taking some practical steps to improve the position.

Act of grace payments

Where the Ombudsman is of the opinion that payment of money is necessary to rectify or mitigate a decision or action, he is able to recommend that payment be made to persons affected by a particular decision or action under investigation. For example, a recent case in which such a recommendation was made concerned a block of land bought at auction in the ACT. Substantial hidden defects were later discovered and, being unable to afford the cost of the site preparation works necessary to enable a house to be built on the block, the parties approached the Department of Territories which took back the block and sold them a replacement at reserve price. They complained, however, that they were not reimbursed the cost of discovering the hidden defects and the Ombudsman subsequently recommended payment of these costs. This recommendation has not been implemented, and as the issue of financial recompense is a significant one for the future effectiveness of the Ombudsman's office the Ombudsman hopes to be able to discuss this matter, initially with the Department of the Prime Minister and Cabinet, in the near future.

The Courts

No reasons required

The NSW Public Service Board was not obliged to give reasons for dismissing an appeal under section 116 of the NSW Public Service Act, the High Court has unanimously ruled, in Public Service Board of New South Wales v Osmond (21 February 1986). In that case, the respondent, an officer of the NSW Public Service, unsuccessfully applied for promotion to the position of Chairman, Local Lands Boards. His appeal was dismissed by the Public Service Board and reasons were refused. By majority, the Court of Appeal declared that the Board was obliged to give its reasons and ordered it to do so - the Board then appealed by special leave to the High Court.

In the Court of Appeal, the President, Mr Justice Kirby, in the majority, had based his conclusion on the broad principle that the common law requires those entrusted by statute with the discretionary power to make decisions which will affect other persons to act fairly in the performance of their statutory functions. Normally this would involve an obligation to state the reasons for discretionary decisions affecting others. The Chief Justice of the High Court, however, ruled that this conclusion was opposed to overwhelming authority - there was no general rule of common law or principle of natural justice that required reasons to be given for administrative decisions. The other judges agreed with the Chief Justice, with Mr Justice Wilson adding that an examination of the relevant legislation revealed that the legislature had deliberately refrained from imposing an obligation on the Public Service Board to give its reasons in a case such as this, and had clearly taken the view that it was not in the public interest that senior officers should have their respective merits canvassed publicly.

Mr Justice Kirby had also adverted to policy considerations, but the Chief Justice held that even if it were agreed that such a rule of law would be beneficial, it was a change which the courts ought not to make because it involved a departure from a settled rule on the grounds of policy and should therefore be decided by the legislature and not the courts.

Notwithstanding that there was no general rule requiring reasons in this instance, the High Court also considered whether this was a special case in which the rules of natural justice required that reasons be given, and held that it was not as the issues before the appellant Board were simple and well-defined and the respondent knew what issues were canvassed on the appeal and could readily infer on which provision of the Public Service Act the Board's conclusion rested. The Chief Justice said that the rules of natural justice were designed to ensure fairness and it was difficult to see how the fairness of an administrative decision could be affected by what was done after the decision was made.

Reasons for seizure ordered

In Murphy and Ors v KRM Holdings Pty Limited (23 December 1985) the Full Court of the Federal Court upheld a decision of Mr Justice Wilcox requiring the appellants, customs officers, to provide a statement of reasons under section 13 of the AD(JR) Act. The appellants had seized Mercedes Benz motor vehicles imported by the respondent, believing the vehicles to be "forfeited goods" (see section 203 of the Customs Act 1901). When the respondent sought a statement of reasons for the decision to seize, the appellants had refused on the basis that that decision was within the classes of decisions

specified in Schedule 2 of the AD(JR) Act for which reasons are not required to be given under section 13. Paragraphs (e) and (f) of Schedule 2 were relied on.

This argument was rejected. The decision did not relate to "the administration of criminal justice" and was not "in connection with the investigation or prosecution of persons" nor was it either in connection with the institution or conduct of proceedings in a civil court or a decision which related to or may have resulted in the bringing of proceedings in a civil court for the recovery of penalties. "A seizure has its own consequences, but these are unrelated to proceedings for a penalty...the grounds giving rise to a forfeiture overlap with the customs offences (set out in section 234(1) [of the Customs Act]) which give rise to liability for a penalty and they are differently expressed", said Mr Justice Fox.

AD(JR) Act not directed to factual matters

The Full Federal Court, in Pearce v Button (7 March 1986), has held that there is no power, pursuant to section 16(1)(c) of the AD(JR) Act, to determine the question of forfeiture of imported goods. The appellants in that case had sought at first instance a review of the seizure and detention of six motor vehicles by Customs. They had also sought a declaration that the vehicles had been lawfully imported. The vehicles had been seized by Customs who alleged that false statements in regard to the prices paid for them had been made when the vehicles had been entered for home consumption. Mr Justice Pincus, at first instance, dismissed the application ((1985) 60 ALR 537). He found that the seized goods were forfeited goods and this finding rested on the view that under the AD(JR) Act the court could investigate the question of forfeiture and could make a declaration as to the legality or otherwise of the importation of the goods. He said that section 16(1)(c) of the AD(JR) Act enabled parties to avoid the necessity of litigating elsewhere matters closely related to the decisions attacked, by having the court make a declaration associated with the setting aside of a decision, or the refusal to set aside a decision. On appeal to the Full Court, however, it was held that the AD(JR) Act was not intended to provide for review of findings of fact, on the "merits" of a case. Section 16(1)(c) dealt with relief, and enabled orders in relation to collateral or related matters to give effect to a finding within jurisdiction. To determine the question of forfeiture would be to become involved in questions such as whether a breach of the Customs Act had occurred, and the title and right to possession of goods. These were factual matters to which the AD(JR) Act was not directed. Consequently the finding of forfeiture was set aside, but otherwise the appeal was dismissed.

Matter remitted to Tribunal

In Commonwealth v Twyman (23 December 1985) the Commonwealth had appealed against a decision of the Tribunal which had set aside a determination under the Compensation (Commonwealth Government Employees) Act 1971 that the Department of Defence Support, with which the respondent was working at the time of sustaining a back injury, was not liable to make weekly payments to the respondent in respect of personal injury arising out of or in the course of his employment.

The court held that in fact the Tribunal had not formally decided that the respondent was totally incapacitated for work and had been so for a specified period of time, distinguishing between the Tribunal's actual decision and its reasons for decision. The finding that the respondent was so incapacitated, as it appeared in the Tribunal's reasons, however, had not been open to it on the evidence.

The Tribunal was also held to have erred in law in attaching some weight to a finding by the Secretary to the Department of Social Security that the respondent was incapacitated for work. Although the Tribunal is not bound by the rules of evidence its duty was to form its own view on the merits of the case without any presumption as to the correctness of another's view. In addition, the Tribunal had erred in law in that, having set aside the delegate's determination, it had failed to comply with section 43(1)(c) of the AAT Act by either (i) making a decision in substitution, or (ii) remitting the matter for reconsideration. The matter was remitted to the Tribunal for re-hearing.

Discovery, and statements of reasons

The availability of discovery and its relationship to a statement of reasons pursuant to section 13 of the AD(JR) Act is discussed in Nestle Australia Limited v Commissioner of Taxation (14 February 1986). In that case, review of a refusal to extend time for payment of income tax was sought. To determine whether discovery was available, Mr Justice Wilcox followed the "anti-fishing" approach of the Full Court in W.A. Pines Pty. Ltd. v Bannerman (1980) 30 ALR 559, that is, "whether there is evidence to ground a suspicion that the applicant has a good case, proof of which is likely to be aided by discovery".

Following an investigation which had extended over many years, notices of assessment of tax for the years 1970 to 1981 had been issued, the total amount of tax assessed being in excess of $19 million. The applicant contended that the history of the investigation should have been taken into account in determining whether to grant an extension of time to pay. On the basis that this was arguably a material matter and that there was evidence to ground a suspicion that the applicant had a good case on this aspect, discovery of the documents relating to the progress of the investigation was ordered. Discovery of documents relating to the basis of assessment was refused, as was discovery of other documents relating to the actual decision under challenge. It was held that the applicant's complaint that the decision-maker had failed to take into account particular matters was not a sound basis for discovery because the section 13 statement of reasons itself was admissible to provide evidence of the matters which the decision-maker had taken into account.

Procedural fairness

A submission that the Minister for Immigration and Ethnic Affairs had failed to accord "procedural fairness" in the sense used by the High Court in Kioa & Ors v West & Anor ((1985) 62 ALR 321; see [1986] Admin Review 93) was not successful in Kaufusi & Anor v Minister for Immigration and Ethnic Affairs (21 February 1986). In applying Kioa, the court held that the requirements of procedural fairness in this case did not require the respondent to give to the applicants any opportunity to respond to any of the matters relied upon, beyond that afforded to them at the time of their interviews. Statements in the respondent's reasons which were relied upon by the applicants were held to be not prejudicial to the applicants and thus there had been no requirement that the applicants be given an opportunity to respond to them.

Invalid pension under reciprocal arrangements cancelled

An appeal against a decision of the Administrative Appeals Tribunal affirming the cancellation of an invalid pension has been dismissed by a Full Court of the Federal Court. In Wilson v Department of Social Security (13 February 1986) the applicant had been in receipt of the pension under reciprocal arrangements between Australia and New Zealand because of 10 years combined continuous residence in those two countries. This pension was cancelled, however, when the applicant received an invalid pension under New Zealand legislation. The applicant claimed that the Tribunal had failed to consider whether his entitlement to an invalid pension arose independently of the reciprocal arrangements but the court held this claim to a pension was barred because the applicant had not been physically present in Australia on the

date in which he lodged his claim, as required by section 24(1)(b) of the Social Security Act 1947. The court rejected the submission that this sub-section applied only to the first and not a subsequent grant of an invalid pension.

Compensation claim following squash game

A matter involving a compensation claim following a lunch time squash game has been remitted by the Federal Court to the Administrative Appeals Tribunal for decision. The matter arose out of a claim for compensation in respect of incapacity for work after an episode of cardiac arrhythmia suffered during a lunch time squash game at courts maintained by the employer. In Canberra College of Advanced Education v Culpin (10 February 1986) the court held that the Tribunal had erred in considering the case as one of "personal injury arising out of or in the course of the employment of an employee" under section 27 of the Compensation (Commonwealth Government Employees) Act 1971. The real question, it said, was whether the employee had suffered an aggravation of the condition of hypertension to which the employment had been a contributing factor within the meaning of section 29 of the Act.

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A D M I N I S T R A T I V E L A W W A T C H

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Appointment of new Ombudsman

Mr G.K. Kolts, OBE, QC, has been appointed Commonwealth Ombudsman from 1 July. Mr Kolts has been First Parliamentary Counsel for more than five years and has a long and sustained involvement in administrative law. He was a foundation member of the Administrative Review Council and served on the Council for six years. On taking up his appointment as Commonwealth Ombudsman, Mr Kolts will become an ex officio member of the Council. Until he takes up his appointment, Air Vice Marshal J.C. Jordan, AO will continue to act as Commonwealth Ombudsman.