Request for access to 'dob-in' document

In Re Gunther and Secretary to the Department of Social Security (16 March 1988) the AAT considered the provision of the FOI Act protecting confidential sources of information. The applicant, a recipient of unemployment benefit, had requested under the FOI Act a copy of a document which contained anonymous advice to the Department claiming that the applicant was heavily engaged in the construction of shops. The Department had given the applicant access to a document which was a record of a telephone conversation but had made deletions from the document on the basis that the deleted material could reasonably be expected to enable the applicant to identify a confidential source of information in relation to the administration of the law (s37(1)(b)). The applicant appealed against the decision to delete this material. The AAT held that the Department was clearly an agency concerned with the administration of the law, the Social Security Act, and the information was given to it in confidence. The AAT said that the Department in performing its function relies not only on information given by applicants for pensions or benefits but also on other sources of information. Although the AAT could not identify the source of the information from the deleted material this did not mean that the applicant could not reasonably be expected to do so. The deletion was therefore of matter exempt under section 37(1)(b) of the FOI Act.

The Courts

Ministerial decisions to reject AAT recommendations in deportation cases

A number of recent Federal Court cases dealt with the situation where the (then) Minister for Immigration and Ethnic Affairs chose not to accept the recommendation of the AAT in a deportation case. By virtue of section 66E(3) of the Migration Act the AAT, after reviewing a decision of the Minister under section 12 to deport a person, can either affirm the decision or remit the matter for reconsideration in accordance with any recommendation it makes; but cannot set aside the decision. The court has said that the ultimate decision remains that of the Minister and his obligation under the Migration Act is to reconsider the matter in accordance with any recommendations of the Tribunal.

In Haoucher v Minister for Immigration and Ethnic Affairs (9 February 1988) the applicant had been imprisoned for possession of cannabis resin with intent to sell or supply. This led, with the approach of his release, to a decision to deport him. The applicant sought review from the AAT which concluded, after examining the circumstances, that any possible benefit from his removal from the country was outweighed by the hardship to the applicant and his family. The AAT remitted the matter to the Minister with a recommendation that the deportation order be revoked.

The recommendation was not accepted by the Minister and the applicant then sought review under the AD(JR) Act of the Minister's decision, on the grounds, inter alia, of denial of natural justice. The Court considered the government's policy statement on criminal deportation, which included the provision that:

> 'recommendations of the Administrative Appeals Tribunal should be overturned by the Minister only in exceptional circumstances and only when strong evidence can be produced to justify his decision. Furthermore, it is the policy of the Government that, when the Minister decides to deport a person contrary to a recommendation of the Tribunal, the Minister will table in the Parliament at the first opportunity a statement of his/her reasons for doing so.'

It concluded, however, that the Minister was entrusted by the Migration Act with the discretion to act in accordance with his opinion and was not bound to apply the policy, nor to allow the applicant to make further submissions where the Minister did not accept an AAT recommendation. Justice Forster also said that the Migration Act gives the Minister a discretion whether or not to accept the Tribunal's recommendation and he may properly disagree with an opinion expressed by the Tribunal provided his disagreement is not so unreasonable as to demonstrate error. In this case His Honour did not regard the Minister's decision as so unreasonable.

With regard to one argument, that the Minister had failed to take into account relevant considerations relating to the applicant's convictions, his Honour said that this ground can only be made out if a decision maker fails to take into account a consideration which he is bound to take into account (Minister for Aboriginal Affairs v Peko Wallsend Ltd & Ors 1986 66 ALR 299).

A similar challenge to the decision of the Minister was the subject of Wiggan v Minister for Immigration and Ethnic Affairs (24 March 1988). In that case the argument was a challenge to the constitutional validity of section 12 of the Migration Act; ie an argument that the only constitutional power for legislation dealing with deportation was sections 51(xix) and (xxvii) of the Constitution which only referred to aliens and immigrants - nowhere in the Constitution was power given to deport 'non citizens' as referred to in section 12. Justice Forster stated that almost all recent arrivals to Australia fall into 3 broad categories: aliens; immigrants; or persons who were once immigrants but have ceased to be so by reason of becoming absorbed into the Australian community. He held that there is no constitutional power to deport the last class of persons unless the person is also an alien. However this did not make section 12 constitutionally invalid as a whole as section 15A of the Acts Interpretation Act 1901 operates to provide that a provision shall be construed as a valid enactment to the extent that it is within power. Thus section 12 should be regarded as a valid enactment insofar as the power to deport is used with respect to aliens or immigrants.

As in Haoucher, the applicant argued that a breach of the rules of natural justice had occurred, as he had not been afforded a further hearing following the decision by the AAT, and that the Minister had failed to take into account relevant considerations, namely the material that was before the AAT. Justice Forster said that, except perhaps in a case where the Minister takes into account new facts unknown to the applicant, there was no obligation to give the applicant another opportunity to be heard. There also was no obligation on the Minister to read all the material that had been before the AAT. The Minister was only required to seriously consider the Tribunal's recommendations.

There have been 7 cases recently where the Minister for Immigration, Local Government and Ethnic Affairs has not accepted an AAT recommendation that he revoke a deportation order. To date he has not provided Parliament with the statement of reasons anticipated above. Several of these cases raised difficult questions about the relative weight to be given to each relevant factor in criminal deportation decisions. Clearly, however, a problem is emerging as between the AAT and the Minister over the application of the criminal deportation policy. A resolution of the problem is unlikely until such time as the Minister states publicly his reasons for not following the AAT's recommendations.

Relevant considerations in temporary entry permit decision

In Minister for Immigration and Ethnic Affairs v Renee Maitan (24 February 1988) the full court of the Federal Court allowed an appeal against a finding that the delegate of the Minister had failed to take into account a relevant consideration in refusing an application for a temporary entry permit. The trial judge had found that, although a decision maker in the absence of statutory criteria is free to take into account such factors in the exercise of the discretion as he thinks fit, the Migration Act outlines the considerations to be taken into account in an application for an entry permit (ie for permanent residence). The decision maker was thus bound to consider the merits of the case put to him insofar as they related to occupational grounds, and the evidence suggested that he had not done so.

The full court did not accept this analysis. The statutory provisions for grant of a permanent entry permit require, in most cases, the applicant to be the holder of a valid temporary entry permit. Referring to Murphyores Incorporated Pty Ltd v Commonwealth (1976) 136 CLR 1 the court held that, since the relevant provisions of the Migration Act 1958 did not specify any criteria for the grant of a temporary entry permit, an examination of the subject matter and scope and purpose of the Act is necessary if a court is to hold that the reasons given for the exercise of a statutory discretion are extraneous to the legislature's intentions. In this case the discretion was sufficiently wide to allow it to be exercised in the light of what, in the judgment of the Minister, is in the best interests of Australia. Determining whether it is in the interests of Australia to grant, or refuse to grant, a temporary entry permit is essentially a matter for the judgment of the decision maker. The decision maker was

entitled to take into account 'occupational grounds' as mentioned in section 6A(1)(d) of the Migration Act, but all he was bound to take into account was the public or national interest. The court went on to say that whether the decision was the 'correct' one in terms of the merit or lack of merit of the application was not for it to consider.

Decision to withdraw all services: not made under an enactment.

In Taranto Pty Ltd v Kevin Leigh Madigan and the Commonwealth (15 March 1988), Justice Forster held that a decision of the Commonwealth Employment Service (CES) to withdraw all services to an employer was not a decision made under an enactment for the purposes of the AD(JR) Act. The CES operates a scheme known as Jobstart, which enables an employer to obtain a wages subsidy if it employs a person who has been unemployed for more than 6 months. The applicant company, which conducted a motel, applied under the Jobstart scheme for the employment of a chef. The CES, however, advised - in accordance with departmental guidelines - that as the applicant's manager was the subject of a complaint of sexual harassment, all services to the applicant, including the payment of a subsidy under Jobstart, would be stopped pending an investigation into the harassment charges. The applicant sought review claiming that the decision was an administrative decision made under an enactment: either under the Commonwealth Employment Service Act 1978 or under guidelines which fell within the definition of an enactment in section 3(1) of the AD(JR) Act. Justice Forster said that the source of power to produce the guidelines and make the decision to withdraw services lay in the common law duty and power of the Commonwealth to protect itself and its employees from claims made by 'clients' of the CES that they have been sexually harassed and, perhaps, in its duty and power to take steps to protect persons seeking employment. The decision could also be justified as an exercise of general administrative power by the Commonwealth to make arrangements for the proper carrying out of its functions. He concluded that, whatever the proper source of power, it was not to be found in the CES Act or the guidelines and thus the decision was not made 'under an enactment'.

Veterans' entitlements

The question of the standard of proof established by section 120 of Veterans' Entitlements Act 1986 was recently considered by the full court of the Federal Court on appeal from an order of a single judge setting aside a decision of the AAT in Webb v Repatriation Commission (30 March 1988). The interpretation of this provision has been a vexed question and has been the subject of a number of decisions of the AAT and Federal Court (see [1987] Admin Review 59-60 and 91-92). Justice Davies, with whom Justices Morling and Forster agreed, said that the section is substantially similar in terminology to provisions considered by the High Court in Repatriation Commission v O'Brien (1984) 155 CLR 422. The High Court had found in that case that the relevant provisions did not require material providing 'some positive inference of the requisite connection between death or incapacity' and war service; and that a claim could be disallowed if the

Commission was satisfied beyond reasonable doubt that any fact necessary to establish entitlement did not exist. Section 120(3) of the Act now requires a reasonable hypothesis as to the connection between death or incapacity and war service. This was interpreted by the Federal Court in East v Repatriation Commission (1987) 74 ALR 518 to mean that more was required than a possibility consistent with the known facts - it must be an hypothesis pointed to by the facts, even though not proved upon the balance of probabilities.

In Webb the court said that the effect of section 120(1), which is substantially the same as the provision considered in O'Brien, is that a theory or hypothesis which is otherwise reasonable may be dispelled if there is proof, beyond reasonable doubt, that one fact essential to the connection postulated does not exist. If, for example, the Commission were satisfied beyond reasonable doubt that an injury which the hypothesis reasonably connected with the claimant's incapacity or death had occurred other than in war service, it could dismiss the claim on the footing that a fact essential for the applicant's claim did not exist. Justice Davies agreed with the AAT's approach in looking at the matter as a 2 stage process, and in finding the applicant's disability and his war service were connected by a reasonable hypothesis, in which no fact essential to the hypothesis had been disproved beyond reasonable doubt. He allowed the appeal.

Availability of damages under judicial review proceedings

In Park Oh Ho and Ors v Minister for Immigration and Ethnic Affairs (29 March 1986) the Federal Court was required to consider whether damages were available in proceedings under the AD(JR) Act. The applicants' entry into Australia without an entry permit had been arranged by a dishonest migration agent with the collusion of corrupt Customs officials. A decision to deport was made but implementation delayed, as the Director of Public Prosecutions wanted the applicants to remain in Australia to help in the prosecution of the customs officers and the organiser of the scheme. The initial deportation orders were subsequently revoked and new deportation orders made. The applicants claimed they had been detained from 20 August to 2 December 1986 at the Villawood detention centre without authority and for an improper purpose.

One of the applicants' claims was for damages, including exemplary damages, in respect of the allegedly unlawful detention. Justice Davies held that this claim for relief was misconceived. He said that damages are not a remedy of judicial review and section 16 of the AD(JR) Act, which specifies the orders which the court may make, does not include an award of damages. Until section 64 of the Judiciary Act 1903 was passed, he said, it was not possible to obtain any award of damages against the Crown and even now a claim for damages must be based upon a civil wrong or a breach of contract. An applicant who merely establishes a ground of review under section 5 of the AD(JR) Act is not thereby entitled to an award of damages. Justice Davies said that section 16 of the AD(JR) Act makes it plain that the remedies of judicial review are those in the nature of certiorari, prohibition, mandamus, injunction and declaration. Section 22

of the Federal Court of Australia Act 1976, which authorises the court to give all remedies to which a party appears to be entitled, does not enlarge the provisions of substantive law to authorise the award of damages in circumstances for which the law does not provide. That provision does not entitle the court in proceedings under the AD(JR) Act to make an order by way of damages when there is not before the court any cause in respect of which damages may be awarded.

Justice Davies also held that the first deportation orders should be set aside ab initio as they were made under an error of law. The Migration Act does not authorise the Minister to sign a deportation order unless the decision maker has determined that the prohibited non citizen shall be deported as soon as appropriate arrangements can be made. A deportation order may not be made as a mere indication of a possible or likely future course of action. Once made the order may not be suspended. In this case the orders were made at a time when it was not correct to make them, as the part the applicants were to play in the criminal prosecutions had not been determined. As a result, the decision was flawed by error of such significance that the initial deportation orders should be treated as a nullity.

An appeal to the full court of the Federal Court has been lodged in respect of this decision.

The question of damages in administrative review proceedings was also considered recently by the NSW Court of Appeal in Macksville and District Hospital v Mayze (14 October 1987). The case involved a decision to terminate the appointment of an obstetrician, following allegations that he had performed unnecessary surgical procedures. The Court of Appeal held that natural justice was not excluded by the existence of a statutory appeal to another administrative body. Even though there was provision to appeal from a decision of the Hospital Board to the Minister, who was then required to appoint a committee of review to conduct a de novo hearing, a person was entitled to natural justice at the initial hearing by the Board of charges against him. The Court held that natural justice was not excluded on the basis of the principles established in Twist v Randwick Municipal Council (1976) 136 CLR 106, as the Board's decision was immediately effective and the statutory appeal was not the equivalent of a full appeal to a court or tribunal and did not disentitle the plaintiff to judicial review.

The trial judge had initially held that the respondent was entitled to damages for wrongful administrative action. Justice Kirby examined the cases relating to damages for administrative error and concluded that in this case, since the basis for an action for damages had not been identified and argued and no evidence had been led, the entitlement had not been established. The majority took the view that the question of damages did not arise on appeal to the court and they expressly left open the question for determination subsequently in the proceedings.

The High Court on 19 February refused an application by the hospital for special leave to appeal on the question whether damages are recoverable for denial of natural justice. Although it said that in other circumstances this question might attract a grant of special leave to appeal, in the case in point the question had been left open for subsequent determination in the proceedings, and therefore a grant of special leave was not appropriate.

Commonwealth Ombudsman

Delegates of The National Companies and Securities Commission

The Ombudsman advised the Council about concerns he has over the possible lack of any review mechanism, other than the courts, with respect to State Corporate Affairs Commissions when acting as the delegate of the NCSC. The NCSC falls within the Ombudsman's jurisdiction but the Ombudsman was specifically precluded from investigating the activities of its delegates by regulations made under the National Companies and Securities Commission Act 1976. At the time the regulations were drafted it was generally understood that the State Ombudsmen or their equivalents would have jurisdiction to investigate complaints about the actions of the delegates, but doubts recently were raised whether this is in fact the case.

The NCSC is empowered to appoint special investigators under section 291 of the Companies legislation. These investigators also appear to be outside the jurisdiction of the Commonwealth Ombudsman and there is doubt whether the State Ombudsmen or their equivalents have jurisdiction. NCSC delegates and special investigators thus may not be subject to any form of review by such bodies as the Ombudsman.

Proposed removal of pip tones from community calls

Telecom recently proposed that the pip tones be removed from community calls from areas on the fringe of metropolitan local call zones. Such calls are time charged, although at less than the STD rate, and carry the same initial warning pip tones as STD calls. The removal of the pip tones would mean that subscribers would no longer be alerted to the higher cost of such calls and would be likely to assume, wrongly, that the local call rate applied. The proposal was criticised by the Ombudsman. Subsequently Telecom decided not to proceed with the proposal.

Proposed charge for investigating disputes over metered calls

Telecom also recently proposed to introduce a charge for investigating disputes over metered calls, claiming that the investigations were costly, the disputes often only involved small sums and the process was being used by some people to delay payment of their bills. The Ombudsman pointed out that charges should not be levied for what was effectively an internal review process and that charges would discourage