introduced by the Attorney-General in the House of Representatives included amendments relating to review. The Bills as amended were passed by the House of Representatives on 28 and 29 September and are presently in the Senate.

Administrative Appeals Tribunal

NEW JURISDICTION

Since the last issue of Admin Review new jurisdiction has been conferred on the AAT under the following legislation:

> Taxation (Administration)(Amendment) Ordinance (No.3) 1988
> Stamp Duties and Taxes (Amendment) Ordinance 1988

KEY DECISIONS

Interpretations of the First Home Owners Act 1983

In Lempa & Lempa and Secretary, Department of Community Services and Health (13 July 1988) the Tribunal set aside a decision that the applicants were not eligible for assistance under the First Home Owners Act 1983 because they had previously 'owned a dwelling in Australia'. The previous dwelling had been put up for temporary occupation before the erection of a Council approved house. It was 9 square metres and made out of galvanised iron with a dirt floor. It had been erected without Council approval.

Deputy President Jennings QC decided that the phrase 'has not owned a dwelling in Australia' did not extend to a building of this nature. He observed that it was unreasonable to conclude that people living in such conditions should be denied assistance on the basis of an argument that they had occupied a previous building which 'substantially complies' with the regulations to the Act. He said that with the objects of the Act in mind it was clear that a building of the type occupied by the applicants was never intended to be a bar to qualifying for assistance.

In Austin & Austin and Department of Community Services and Health (1 August 1988) the Tribunal, constituted by Deputy President Breen, considered the proper computation of the period prescribed by section 13(1) of the First Home Owners Act. In a contract dated 14 October 1985 the applicants had engaged a contractor to build their home. This became their 'prescribed date'. They applied for assistance on 27 November 1985, indicating that construction had commenced and the expected date of completion was 11 December 1985.

On 21 August in the next year Mrs Austin gave birth to a second child and, on the same day, wrote to advise the Department of the birth.

To be eligible for additional assistance under the Act the couple needed to receive family allowance for the second child within 11 months of the prescribed date. The Department subsequently informed the couple that, as their prescribed date was 14 October 1985, they would have needed family allowance to be granted by 14 September 1986 to be eligible for the additional assistance. Since it was not granted until 15 September 1986, no extra benefit was payable. The Department affirmed the original decision on internal review.

The Tribunal concluded, however, that the Departmental decision-makers had erred in computing the 11 month period from and including the 14 October 1985. Referring to section 36(1) of the Acts Interpretation Act 1901, which has the effect that the reckoning of a period of time under an Act is to be exclusive of the day from which the period runs, the Tribunal concluded that the correct computation excluded 14 October 1985 and therefore included 15 September 1986.

In Pagram and Pagram and Secretary, Department of Community Services and Health (26 August 1988) the Department had affirmed a decision that Mr and Mrs Pagram were obliged to repay $3487 that they had received under the First Home Owners Act. Sections 5, 14, 15, 16 and 17 of the Act together give the Secretary a right to recover assistance paid under the Act where the Secretary is satisfied that a person has not resided in a dwelling as his or her principal place of residence and does not intend to reside there within a reasonable time.

The Pagrams lodged their application for assistance while their house was being constructed. Shortly thereafter their marriage broke down and eventually the house was sold without the couple ever having resided in it. The Tribunal decided that only after the house was put on the market could the couple be said no longer to have intended to reside in it, so only the amounts paid after that date were recoverable.

Rebate on diesel fuel

In Perkins Shipping Pty.Ltd. and Australian Customs Service (5 July 1988) the applicant had sought a rebate of the duty it had paid on diesel fuel used on its vessel. The rebate was sought under section 164 of the Customs Act or section 78 of the Excise Act, which are in identical terms. The Tribunal, constituted by the President, Justice Hartigan, held that the phrase 'being diesel fuel upon which duty had been paid' meant that a rebate could not be claimed until the duty had been paid. Eligibility for a rebate was not, however, limited to cases where duty was paid prior to or at the same time as the purchase of the diesel fuel. A rebate could be claimed at any time as long as duty was paid on the fuel prior to the claim for

rebate being made. After analysis of the relevant cases, the Tribunal also held that for the purposes of the Act an ocean going vessel of the type in dispute could amount to 'residential premises'. The Tribunal set aside the decision under review and remitted the matter for calculation of the rebate.

Definition of income for age pension

In Hoogewerf and Secretary, Department of Social Security (10 August 1988) the Tribunal set aside the decision under review with a direction that money paid into the joint account of the applicant and his wife in a bank in Bombay was not 'income' for the purposes of section 3(1) of the Social Security Act 1947. The applicant was entitled to a pension payable by the Indian Government, but the policy of the Indian Government was not to allow funds out of India. Mr and Mrs Hoogewerf migrated to Australia in 1974, and in 1987 Mr Hoogewerf applied for an Australian pension. This raised the issue of whether the Indian pension represented moneys 'earned, derived or received for the person's own use or benefit' such that the pension was 'income' to be taken into account in calculation of the applicant's entitlement to an Australian age pension.

It was clear that Mr and Mrs Hoogewerf would have to go to India to obtain any benefit from the Indian pension and, while they had been able to afford to fly to India in the past, they would find this virtually impossible after they had retired. The Tribunal concluded that it was impractical to expect the applicant and his wife at their ages and reduced resources to fly to India to take advantage of their Indian pensions in the hope of breaking even. In view of the policy of the Indian Government, the position was unlikely to change. The Indian pensions were therefore not 'income' for the purposes of the Act.

Claims for income tax deductions

In two taxation cases (Decision No.4596 of 2 September 1988 and Decision No. 4609 of 9 September 1988) the Tribunal affirmed the objection decision under review. In the first the taxpayer, a solicitor, had been investigated by the NSW Law Society, following which he was suspended from practice for a year and required to pay the costs of the Law Society's investigation. In subsequent years he paid a proportion of the costs and claimed them as a deduction, arguing that payment was essential to prevent further suspension from practice and thus further deprivation of income. The Tribunal concluded that the payments were in the nature of either defending or acquiring a structural asset and were therefore capital and not deductible.

In the second case the taxpayer was a Judge of the Family Court who claimed as deductions depreciation on a security system for a private residence, depreciation on a guard-dog and accessories, interest on the money borrowed to install the security system, the costs of maintaining and operating it, and

the costs of a police guard. The Tribunal concluded that the various deductions were either not in the nature of plant or articles, were private in nature or were not incurred in gaining or producing assessable income, and therefore were not allowable.

Deportation: risk of recidivism

In Epiha and Department of Immigration, Local Government and Ethnic Affairs (26 September 1988) concerned an application for review of an order that the applicant be deported. Deputy President Jennings QC remitted the matter to the Department for reconsideration in accordance with a recommendation that the order be revoked. The applicant had received his first conviction for possession of a large quantity of cannabis resin, and had been sentenced to over two years' imprisonment for his involvement, albeit relatively peripheral, in an international operation to import 1000 kilograms of cannabis resin, valued in excess of $6 million. He had only resided in Australia for about two years prior to committing the offence, and had a family in Australia and good employment prospects, but the crucial issue was the risk of recidivism. Tribunal found that in the circumstances there was not a realistic possibility of recidivism. Further, the material as to hardship to the applicant and his family if he were deported strongly supported the finding against any risk of further offences. In his judgment Deputy President Jennings observed that:

> The jurisdiction of this Tribunal to review decisions under the Migration Act does not necessarily require analysis of the reasons which motivated the decision-maker. The Tribunal is simply required to make what it considers to be the correct and preferable decision.

It is not known whether the Minister proposes to accept the recommendation of the Tribunal in this case (see Admin Review 16:33-5).

Freedom of Information

Clearance of appeals before the Administrative Appeals Tribunal

From May 1985, as part of a package designed to reduce the costs of administration of the Freedom of Information Act, all agencies receiving notice of appeals before the Administrative Appeals Tribunal in matters arising under that Act were required to clear them with the Attorney-General's Department. This requirement, designed to screen cases so that agencies did not waste resources defending FOI actions that had little merit, appears to have achieved its purpose, and also to have achieved a significant reduction in the number of defended matters going on appeal.