

The applicant was a young American who had come to Australia and married in 1984, at the age of 19. The marriage had not lasted and she subsequently entered into a de facto relationship. Her original application for resident status in 1984 was refused but she was granted further temporary entry permits on the basis of her de facto marriage. She later applied again and was told that the processing would take some months and that, due to the need to streamline its operations, the Department would not issue a further temporary entry permit; but she would be allowed to remain until her application for permanent residence was finalised. In the interim, however, her de facto relationship broke up during the late stages of her pregnancy, and two months after the birth the child died. She had few ties back in the United States, and her mother informed the Department that she did not wish to see her daughter again. The Department eventually rejected the young woman's application for resident status, denied her application for review, took her into custody and commenced arrangements for her deportation.

Ms Akers was eligible for an entry permit under section 6A(1)(b), as the spouse of an Australian citizen, and had also applied under section 6A(1)(e), on strong compassionate or humanitarian grounds. The Department had only considered the latter ground. Justice Lee accepted the applicant's eligibility under section 6A(1)(b), and rejected the respondent's submission that an application under section 6A(1)(e) may not be considered unless, at the date the application is made, the applicant is the holder of a temporary entry permit. Such a permit may be granted at any time and the question whether such a permit should be issued is to be considered at the same time as considering the application for permanent resident status. He held that the decision-maker had proceeded upon an erroneous premise on a fundamental matter and had, therefore, taken into account an irrelevant matter. The decision-maker had also proceeded to an incorrect conclusion after relying on misunderstood information provided to him by a Departmental officer. Justice Lee concluded that this amounted to an improper use of power. He set the decisions aside and remitted the matter to the Minister for reconsideration.

Ministerial discretion to reject AAT recommendations

Haoucher v Minister for State for Immigration and Ethnic Affairs (17 February 1989), an application for special leave to appeal to the High Court, is the latest development in the series of challenges to decisions by the Minister for Immigration, Local Government and Ethnic Affairs not to accept AAT recommendations in deportation cases (see Admin Review 19:9-10). The High Court granted leave to appeal.

Commonwealth Ombudsman

Act of grace payments

The Minister for Finance has signed a formal instrument delegating his act of grace powers under section 34A(6) of the Audit Act to heads of agencies for a two-year trial period. The

devolution is to apply only to those cases in which the Ombudsman has recommended compensation and is not to have retrospective application. Under the working arrangements, the Ombudsman's draft recommendations will be referred to the Department of Finance for comment before being sent to the agency concerned.

Australian Broadcasting Corporation

The extent of the Ombudsman's jurisdiction over the ABC was discussed with the Senate Standing Committee on Legal and Constitutional Affairs as part of the Committee's examination of the Ombudsman's 1987/88 Annual Report.

The Ombudsman currently investigates complaints that affect particular persons, such as alleged misrepresentation, but not general programming matters such as program standards. The ABC in the past has sometimes resisted an Ombudsman investigation. However the Ombudsman has been reluctant to spend public funds on legal proceedings to confirm the extent of his jurisdiction, on the ground that this is a policy matter which the Government should resolve.

1988-89 ABS Household Expenditure Survey

The Ombudsman has decided to investigate formally and report on complaints by two parliamentarians about the administration of the ABS survey on household expenditure (Admin Review 19:14-15). The main issues concern the alleged intrusiveness and burden of the survey; the insistence by the ABS and its interviewers that participation was obligatory; whether details of the survey should have been tabled in Parliament before it began; and whether there was an attempt to validate retrospectively the requirement to comply with the survey.

The ABS has dealt with several of the issues, including tabling the details of the survey, revising its instructions to interviewers and obtaining legal advice on various aspects. It also agreed to consider the possibility of clarifying relevant legislation and compensating persons for their time if they were compelled to participate in ABS surveys. The Attorney-General's Department advised that tabling requirements were met and that persons can be compelled to participate; but certain non-government lawyers expressed contrary views.

A related question, raised by another parliamentarian, was whether the survey breached Article 13 of International Labor Organisation Convention 160 because it sought data from a disproportionate number of persons in the ACT, the Northern Territory and Tasmania. The Ombudsman decided that it did not, on the grounds that the Convention only requires collection of minimum statistics and places no limit on other collections, and that there are good and lawful reasons for collecting additional information in certain regions.

Benefit Classification Certificates: amendment of the Superannuation Act

The Government has agreed to amendments to section 16(10) of the Superannuation Act, relating to the retrospective issue of a Benefit Classification Certificate (BCC) by the Australian

Government Retirement Benefits Office (AGRBO) if a contributor dies or is invalidated out of the service before a medical examination has been carried out or before AGRBO has considered the medical report. The amendment was suggested by the Ombudsman as a result of his investigation of a long-running case involving the retrospective issue of a BCC with regard to a contributor who died unexpectedly not long after joining the public service. As a result of the BCC, the surviving spouse was denied a superannuation pension. The Minister, Senator Walsh, has now approved an act of grace payment to the surviving spouse for the pension (less a lump sum already received) as from October 1982.

Compensation for negligent advice

The Department of Transport and Communications has made a \$20 000 compensation payment to a complainant for incorrect advice supplied by the Department to the effect that an aircraft the complainant wanted to buy was approved for a particular type of operation. The complainant had relied on the advice in deciding to proceed with the purchase and the departmental officer involved knew that he did so.

Sales Tax

The Ombudsman has drawn the Commissioner of Taxation's attention to several problems which became evident in the course of his handling of complaints about sales tax. The Ombudsman was concerned that, with an audit crackdown on sales tax imminent, these problems could mean that audit activity would have unfair results, especially with regard to penalties.

The most significant problems are:

- . uncertainty about key provisions of the sales tax legislation giving rise to confusion both within and outside the Taxation Office, and to disputation;
- . disadvantage to taxpayers because of the requirement to assess for themselves which goods are taxable and at what rate, leading to difficulty in the absence of an efficient inquiry system, in establishing correct liability for particular transactions;
- . absence of regular monitoring of sales tax returns by the Taxation Office so that taxpayers' errors are not detected in time to prevent significant arrears of sales tax, which continue to accrue until detection;
- . inconsistent advice and decisions from regional offices which may put some manufacturers at a significant competitive disadvantage; and
- . difficulties in obtaining refunds of overpaid sales tax.

The Ombudsman expressed the view that it is unfair to expect taxpayers to operate in a self-assessment system in an atmosphere of uncertainty and without an efficient advisory

service or a regular and timely monitoring system. It is equally unjust to penalise them for innocent errors resulting from these deficiencies.

Major changes to the administration of sales tax, announced by the Commissioner following a sales tax review last year, could alleviate some of the problems and the Ombudsman has asked the Commissioner for more details.

Compensation component of lump sum settlements

The Ombudsman investigated a complaint concerning the Department of Social Security's characterisation of lump sum payments. In a claim for damages under section 135 of the Accident Compensation Act 1985 (Vic) the Department had indicated that should the claim be settled out of court, it would treat 50% of the lump sum as 'the compensation part of a lump sum payment by way of compensation for the purposes of Part XVII of the Social Security Act'. In doing so, the Department relied on section 152(2)(a)(i) of the Social Security Act which provides, in part, that 'a reference to a payment by way of compensation is a reference to...a payment by way of damages;...'

Solicitors for the claimant objected to the Department's characterisation of such a payment on the ground that section 135 of the Victorian Act precludes payment for 'pecuniary loss' (which is defined as including loss of earning capacity). Accordingly, no part of any sum of damages could properly be treated as 'the compensation part of a lump sum payment'.

The Ombudsman advised the Department that in his view damages for non-pecuniary loss obtained under the Victorian Act did not fall within the definition of 'a payment by way of compensation' because all types of payment in the provision were qualified by the words 'being a payment that is in whole or in part, in respect of an incapacity for work'. The Department subsequently accepted advice from the Attorney-General's Department that where damages obtained under section 135 of the Victorian Act preclude recovery for pecuniary loss, Part XVII of the Social Security Act has no application.

Note: Not all payments made under section 135 of the Victorian Act preclude damages for pecuniary loss. Those payments to compensate for pecuniary loss which are made under other provisions of that Act, would fall within Part XVII of the Social Security Act.

Immigration fee illegal

Following inquiries by the Ombudsman the Federal Government has conceded that, on balance, a \$240 charge on thousands of immigration appeals may have been illegal. Since the fee was introduced in 1987 more than \$2 million has been collected from people seeking reassessment of decisions by the Department of Immigration, Local Government and Ethnic Affairs (DILGEA).

The Department's collection of a fee without statutory authority, and the proposed retrospectivity of the legislation prepared to authorise it, was addressed by the Council in a letter of advice provided to the Attorney-General on 19 November 1987. The Council suggested that the steps the Department had already taken to collect the fee could be illegal. It wrote again in February 1988, when it learned that the Department was still collecting the fee despite the omission in the Parliament of the provisions in the Bill relating to the fee.

On 7 April 1989 the Minister for Immigration, Local Government and Ethnic Affairs announced that as part of the resolution he had reached with the Ombudsman the Government would advertise an offer to refund, on application, fees collected from 12 December 1988 (the date of receipt of advice from the Attorney-General) to 7 March 1989 (when the review scheme was terminated). The offer is open until 30 June 1989. In addition, the Minister agreed that an amount of \$250 000 would be made available for a program to investigate access by members of the ethnic community to government services. The Government also agreed that it would no longer pursue costs it incurred before the withdrawal of a Federal Court application in early 1988 concerning the fee.

Child Support Scheme

The Ombudsman is investigating a number of matters concerning the Child Support Scheme:

- . delays in the payment cycle prescribed by section 76 of the Child Support Act are causing hardship. In some cases, the delay between payment in by non-custodial parents and payment out to the custodial parents is two months and there is no provision in the law for accelerated payment;
- . delays in effecting adjustments to child support required by indexation clauses in court orders;
- . confusion within the Child Support Agency over interpretation of court orders and the quantum of liability;
- . misleading advice to non-custodial parents regarding liability;
- . inappropriate recording of statutory penalties for late payment and the proper exercise of the power to remit the penalties; and
- . the operation of the secrecy provision in section 16 of the Child Support Act which the Child Support Agency is interpreting as preventing it from advising some non-custodial parents of the basis upon which the agency has jurisdiction over their child maintenance liabilities.

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

Administrative law seminar: publication of papers

The Council has been advised by RAIPA that the long-awaited collection of papers from the 1987 conference, 'Administrative law: retrospect and prospect', will be published in the next