## Commonwealth Ombudsman

### Unlawful customs fee

Since December 1988, the Australian Customs Service (ACS) has charged a Manual Entry Fee of about $30 for customs clearance information lodged on paper rather than electronically. The Ombudsman has been investigating a complaint that the Manual Entry Fee is unlawful.

At the Ombudsman's suggestion, the ACS sought advice from the Attorney-General's Department. It gave the opinion that charging the fee is unlawful and would require not only an amendment to regulations but also an amendment to the Customs Act 1901. The ACS agreed to stop collecting the manual fee; to refund fees to those applicants who could prove they had paid; to issue a Customs Notice to this effect; and to seek non-retrospective legislation for the fee, probably with effect from 1 January 1990.

### Calling tenders for land already under contract

In 1981, pursuant to the government policy at the time of offering tenants of Commonwealth land the opportunity of buying the freehold of the land when it became available, the Department of Administrative Services (DAS) offered land in Queensland to a rifle club. A price of $10 000 was agreed in 1984, and trustees were appointed to whom the Commonwealth could sell the land. After negotiations, the club accepted the terms of the Commonwealth's offer by letter on 21 September 1988.

In the interim, however, the ministerial policy had changed after the Government learned that some occupants of Crown land who had bought the land below market value in this way were reselling at a profit. Under the new policy, advertisements calling for tenders or offers for such land were to be placed in appropriate newspapers. On 29 September 1988, DAS told the club its offer was withdrawn. The club sought the Ombudsman's intervention to prevent DAS accepting a tender to buy the land and to request DAS to give the club time to raise $40 000, the estimated market value of the land.

The Ombudsman's investigations revealed, however, that in early 1989 DAS had received advice from the Australian Government Solicitor (sought prior to the lodgment of advertisements but supplied after tenders had closed) that a binding agreement between the Commonwealth and the club had come into effect as a result of the club's acceptance of the $10 000 offer on 21 September 1988. In the event, the Minister agreed to proceed with the contract to sell the land for $10 000 but requested DAS to negotiate a provision that would prevent the sale of the land by the club within the next ten years.

As a general rule, the Ombudsman takes the view that once a tender is let it probably is too late for his office to affect the tender processes. In this case, however, the Ombudsman was able to intervene before a decision was made to let the tender.

Change to tendering procedures

An unsuccessful tenderer complained to the Ombudsman when the tender for capital works projects at two schools was passed over even though it was the lowest offer. The matter was outside the Ombudsman's reach, however, because the tender decisions were made by the relevant school authorities, which did not come within his jurisdiction though the schools received Commonwealth funding.

As a result of this case the Department of Employment, Education and Training (DEET) amended the standard agreement between the Commonwealth and recipients for capital grants, to ensure that appropriate tendering practices and procedures are followed by recipients of grants in the future. As a result of the amendments, school authorities which pass over the lowest tenderer for a capital project will be in breach of the agreement with the Commonwealth unless they have given the lowest tenderer an opportunity to respond to the reasons why that tender was not acceptable, and have obtained DEET approval to accept another tender.

Accommodation allowance: delay

A member of the Defence Force approached the Ombudsman after the Department of Defence ceased payment of his temporary accommodation allowance when he refused, for the second time, to move into married quarters which he considered unsuitable.

The member had sought redress through the Defence Force Redress of Grievance system. In the examination of the grievance, a vital piece of information was not taken into account. As a result, the married quarter was deemed unsuitable in terms of the relevant Defence Instruction. The member's refusal of it was therefore considered justified, and the application for redress was upheld. The Department concluded that the initial grant of the allowance had been made for the wrong reasons, but that the payment of the allowance had been wrongly terminated.

The Department withheld payment of nearly $10 000 while it sought legal advice from the Attorney-General's Department on the legitimacy of the original payment of the allowance. The Attorney-General's Department advised that the first payments were valid because the married quarter did not conform with the prescribed standards. The member was entitled to another $6 000 which would have accrued had his allowance not been discontinued at the time that he refused the second married quarter.

The Department challenged the Attorney-General's Department's opinion on the ground that, if accepted, 'the overall administration of the ADF housing could be put in serious

jeopardy'. It considered that the married quarter in question was only deficient in 'minor respects' and that the standards had been taken too literally by the Attorney-General's Department. The latter Department, however, re-affirmed its original opinion, albeit on slightly different grounds. On that basis, a decision was made to pay the member the full $16 000; but he did not receive the money until more than two years after his application for redress of grievance had been upheld.

The Ombudsman found several administrative aspects of the case unsatisfactory, including the decision to seek a second legal opinion and the unnecessary delay in effecting payment.

Lack of review rights

The Ombudsman received a complaint about the suspension of compensation payments to a Telecom employee because he did not participate in a rehabilitation program as required under the Commonwealth Employees Rehabilitation and Compensation Act 1988. The man's medical practitioner provided a certificate testifying that it was physically impossible for him to attend the program, but Telecom's Comcare delegate refused to accept it.

Since the action related to the man's continuing employment, however, it was excluded from the Ombudsman's jurisdiction by virtue of the Ombudsman Act. Persons in this situation originally were assumed to be covered by public service review mechanisms, but Telecom is one of a number of authorities that have not yet agreed to come within the jurisdiction of the Merit Protection and Review Agency. In cases of this nature the person concerned therefore has no right of review by either agency.

Admissibility of statements of reasons

In the course of proceedings in Taveli v Minister for Immigration, Local Government and Ethnic Affairs (28 April 1989, unreported) the Department sought to tender its section 13 statement as prima facie evidence of the reasons for the decision. Mr Taveli objected, and Justice Wilcox rejected the tender on the basis that a section 13 statement is not admissible in the decision maker's favour as a self-serving document. The matter is under appeal.

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Higher Education Funding Act 1988: guidelines for remissions

Under section 63 of the Higher Education Funding Act 1988 the Secretary of the Department of Employment, Education and Training (DEET) is empowered to remit a student's semester debt in special circumstances. A semester debt is a student's