responses are being analysed and further research, in particular a comparison of rule making in other jurisdictions, is now being undertaken. The final report is due by 30 June 1991.

Multicultural Australia

This project was described in some detail in the August edition of Admin Review at pp 58-59. In essence it involves surveying and liaising with two communities: the Turkish community in the Sydney suburb of Auburn and the Vietnamese community in the Melbourne suburb of Footscray, in order to encourage contact and foster increased understanding by and use of certain Commonwealth agencies by these communities. As part of the project regular articles have been published in the local ethnic press, explaining how common grievances, which might relate for example to Telecom, social security benefits and immigration matters, may be remedied.

A 'phone-in' held for the Melbourne Vietnamese community in Footscray on immigration matters attracted many enquiries. A public meeting on social security matters held during November in Auburn attracted 80 people, including community, local media and welfare representatives. The question of access to and use of the AAT and the Commonwealth Ombudsman is a priority for the project and meetings to that end have been held with both bodies.

Review of the Administrative Decisions (Judicial Review) Act

This review relates to the ambit of section 13 of the AD(JR) Act, which obliges certain decision makers to furnish statements of reasons for their decisions. Mr Denis O'Brien, a solicitor with Minter Ellison and a former Director of Research for the Council, is preparing a report in the light of responses to the discussion paper published by the Council on this topic on 19 January 1990.

Specialist Tribunals

This project was discussed in the August edition of Admin Review at pp54-57.

Outcomes in AD(JR) Matters

The Council is examining the eventual outcome in migration and customs cases remitted by the Federal Court to decision makers for reconsideration.

Administrative Appeals Tribunal

NEW JURISDICTION

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

- Therapeutic Goods Act 1989 and Theraputic Goods Regulations Statutory Rules No. 394 of 1990
- Federal Airports Corporation Amendment Act 1990
- Training Guarantee (Administration) Act 1990
- Occupational Superannuation (Reasonable Benefits Limits) Act 1990
- Designs Act 1906 as amended by the Industry, Technology and Commerce Legislation Amendment Act (No 2) 1989
- Patents Act 1990
- Ships (Capital Grants) Act 1987 as amended by the Transport and Communications Legislation Amendment Act (No 2) 1989.

AAT DECISIONS

Marine Council: suitability of seaman - invalid regulation

In Re Jonsson and the Marine Council (20 August 1990) the AAT reviewed a decision by the Marine Council that Mr Jonsson was unsuitable for engagement as a seaman after finding that he had assaulted the chief steward on board ship and also threatened further violence. The AAT found that while the assault was a serious matter, it occurred when Mr Jonsson was very intoxicated and was so completely out of character that it could be described as a 'one off'. The AAT also found that the incident occurred in the officers' mess and that the officers present must carry some of the responsibility for allowing Mr Jonsson to enter and remain in the mess in an intoxicated state. In reaching its decision, the AAT considered the validity of regulations under the Navigation Act and the Tribunal's power to rule on the validity of those regulations.

Section 47(3) of the Navigation Act required the Marine Council to exercise its discretion in deciding whether a person was unsuitable for engagement as a seaman in accordance with 'prescribed principles'. These were set out in the regulations and appeared to direct the decision-maker in the exercise of his discretion as they were expressed in mandatory form. The Tribunal found that the relevant regulation was invalid to the extent that it purported to limit the discretion of the Marine Council in deciding the suitability of seamen.

It is well established that the declaration of the validity of a law is a judicial function and the AAT in this case examined a number of decisions to ascertain its power in this regard. For example, in Re Costello and Secretary to the Department of Transport (1979) 2 ALD 934, it was said 'Before this Tribunal, as an administrative body, could determine to mould its conduct by treating delegated legislation as invalid, there would, in our view, need to be the most compelling grounds to justify it in so doing'. The AAT also relied on a decision of the Town Planning Appeal Tribunal (WA) in Bonton Pty Ltd v City of South Perth 4 APAD 8. That Tribunal concluded that 'the tribunal has jurisdiction to 'decide' the question of invalidity in the sense that it may express an opinion upon it (which does not have the effect of a 'binding' decision) for the purposes of determining these appeals'.

The AAT considered whether it should refer the matter to the Federal Court but found 'that the interpretation of ... [the regulation] is not of such importance as to justify referral to

the Federal Court'. It decided that this was the sort of case where the grounds were 'most compelling' in view of the Marine Council's attempt to withdraw its first decision and then remake it. It therefore determined that the regulation was invalid for the purposes of this case only and recommended compensation for Mr Jonsson's extended unemployment because of the way the Marine Council had proceeded with its decision-making process.

The Transport and Communications Legislation Amendment Bill 1990 proposes to amend the Navigation Act to overcome the effect of the decision. In the second reading speech, the Minister said 'The amendment will remove doubt about the validity of regulations under which the Marine Council exercises its functions, to ensure that unsuitable persons do not serve in the industry'.

Superannuation: benefit classification certificate - 'real risk' is an imprecise term

In Re Kirby and the Commissioner for Superannuation (4 September 1990), the AAT reviewed the decision of a delegate of the Commissioner not to revoke a benefit classification certificate. The delegate had varied the certificate on review by removing one condition, but two others remained - 'history of polyarthritis' and 'minimal change glomerulonephritis'. A certificate is issued by the Commissioner when there is a real risk that an employee will not continue to maximum retiring age. The Tribunal had to consider whether there was a real risk of premature retirement for a reason connected with the conditions listed in the certificate.

The AAT reviewed the recent decisions on the meaning of 'real risk' and approved the test as set out in Re Gelsthorpe (1989) 18 ALD 793. The Tribunal found the word 'real' imprecise as it was not clear whether the meaning to be attributed to it was the meaning in common parlance or some other meaning. The AAT noted that the certificate would be of no effect after 20 years of contributory service. If the employee did not retire within that period, there was no harm in its existence. However, if he did retire within that period, then the issuing of the certificate would prove to have been justified. The AAT varied the wording of the conditions stated on the certificate but refused to revoke it.

Compensation: findings of fact require evidence

In Re Pippas and the Commonwealth of Australia and COMCARE (11 October 1990), Mr Pippas asked for review of a determination ending the liability of the employing Department to continue his compensation payments. Mr Pippas had suffered a leg injury in the course of his employment which resulted in a subperiostal haematoma. Attempts at rehabilitation were unsuccessful.

The AAT had some difficulty in obtaining an accurate picture of Mr Pippas as he proved to be an unsatisfactory witness. There were also a number of inconsistencies and gaps in establishing his state of health and capacity to work. The employing

Department had retained the services of a private inquiry agent to obtain a video of him assisting at a market stall. Not all the medical witnesses had had the advantage of seeing the video and it left the state of the medical evidence in a somewhat unsatisfactory state. In addition to this, the AAT was critical of counsel for both parties for not calling other witnesses to establish a more complete picture of Mr Pippas' health problems and his capacity to work.

The AAT was not satisfied that if Mr Pippas had genuine psychiatric or psychological problems, they would result in incapacity for work. On the state of the evidence before the AAT, the decision under review was varied by substituting a later date for the cessation of liability to pay compensation but the decision was otherwise allowed to stand. It also ordered COMCARE to pay Mr Pippas' costs as the determination under review was varied in a manner more favourable to him.

Migration: Decision to deport

In Re Thain and the Minister for Immigration, Local Government and Ethnic Affairs (8 October 1990), the AAT reviewed a decision of the delegate of the Minister to deport Mr Thain after a conviction for armed robbery. Mr Thain who was aged 27 was born in Scotland and came to Australia at the age of 10 with his mother, stepfather and siblings. The AAT found his early life in Australia was not a happy one, as he had been subjected to physical abuse by his stepfather. At the age of 22, he was convicted of an armed robbery offence and this offence became the basis for the deportation order. Prior to this, he had also been convicted of burglary, armed robbery, rape and other offences involving violence. There were two issues the AAT had to consider - the length of time Mr Thain had been a resident in Australia and the decision to deport.

On the first issue, the Migration Act 1958 provides for deportation where at the time of the commission of the offence, the person was not an Australian citizen or had been present in Australia as a permanent resident for a period of less than 10 years. Mr Thain was not an Australian citizen but if he could show he had the required period of residence he could avoid the deportation order. Periods of imprisonment are disregarded for the purposes of calculating the required period of lawful permanent residence. The Minister's delegate found a period of residence totalling 8 years 4 months and 20 days taking into account the various periods of imprisonment. The AAT found this to be incorrect as it did not include a period when Mr Thain had escaped from juvenile detention and subsequently turned 18. As periods of juvenile detention are not counted as imprisonments, and the juvenile sentence expired at age 18, any period after this could be counted as residence even though Mr Thain had absconded from legal custody. Although this period amounted to more than one year, the AAT added one year to the period of residence resulting in a total of 9 years 4 months and 20 days.

On the substantive issue of deportation, the Tribunal found that while Mr Thain had been convicted of a serious offence, it was satisfied that the risk of recidivism was low. In addition, Mr Thain had strong family ties with Australia and

was now living in a stable environment in the home of his married sister. He also had a five year old son and the AAT was satisfied that he had a genuine desire to maintain contact with his son.

As the AAT does not have the power in deportation cases to make new decisions, the AAT recommended to the Minister that the deportation order be revoked.

Wildlife Protection: Importation of Elephant Tusks

Re Tween and the Australian National Parks and Wildlife Service (29 October 1990) considered an unusual application for review of a decision to refuse permission to import a pair of elephant tusks. Mr Tween had shot the elephant while on safari in Africa and wanted to import the tusks as personal trophies.

The Australian Government is a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and had enacted the Wildlife Protection (Exports and Imports) Act 1982. Fauna listed in Schedule 2 to the Act could be imported if the animal was taken in accordance with an approved management program. Fauna listed in Schedule 1, however could only be imported on a more restricted basis, even if taken in accordance with an approved management program. Mr Tween had claimed the elephant was shot in accordance with an approved management program. The issue for the Tribunal was whether the elephant was listed in Schedule 1 or Schedule 2.

The African elephant was on the Schedule 2 list until August 1989 when the Minister published a gazette notice purporting to move the item from Schedule 2 to Schedule 1. However, due to a publishing error, the literal effect of the gazette notice was that the African elephant was included on both Schedules. The Tribunal was urged by Mr Tween to accept this interpretation but, after reviewing the authorities, rejected the literal interpretation in favour of a purposive approach. This enabled the AAT to read the gazette notice as if the error was omitted and allowed the interpretation that the African elephant was transferred from Schedule 2 to Schedule 1 to prevail. Thus, it was governed by the more restrictive provisions and could not be imported even if taken in accordance with an approved management program. The decision under review was affirmed.

Medicare Scheme: disqualification of medical practitioner

In Re Summers and the Medicare Participation Review Committee and the Minister for Community Services and Health (19 October 1990) the AAT reviewed a decision to exclude Dr Summers from participation in the medicare scheme for a period of four and a half months. He had been found guilty by a Magistrate of five offences under the Health Insurance Act 1973 concerning billing practices, fined and ordered to make reparation. The conviction was reported to the Medicare Participation Review Committee which decided to exclude him from participation in the scheme for a fixed period.

Dr Summers had claimed that his actions in the payment of accounts were endorsed by a medicare officer by telephone. Although later visited by another medicare officer Dr Summers

did not change his billing practice because the visiting officer did not confirm his advice in writing.

The Tribunal found the offences to be of a serious nature and, despite Dr Summers previously good record, the offences could not be ignored. The AAT took into account the fact that the loss of his services to the community was not as critical as if he had been in a small country town. Dr Summers had also complained that the period of exclusion was uncertain. The AAT therefore set a period of exclusion of eighteen weeks.

Freedom of Information

'Personal Affairs' includes personality and reputation

Re: Toomer and Department of Primary Industries and Energy (1990) 20 ALD 275. Under section 48 of the Freedom of Information Act if a person claims that a document of an agency contains information relating to his personal affairs that is incomplete, incorrect, out of date or misleading, and that has been used for an administrative purpose, he may request the agency to amend the record of that information.

The AAT noted that the Full Federal Court in Dyrenfurth (1988) 80 ALR 533, made it clear that information concerning a person's state of health, the nature or condition of his marital or other relationships, domestic responsibilities or financial obligations, might be included within the phrase 'personal affairs' used in the exemption provision of the FOI Act (section 41). In the Tribunal's view the comments in Dyrenfurth were to apply, as far as possible, to construing the phrase 'personal affairs' in section 48. The Tribunal noted however that section 48 differs from section 41 in that documents within the ambit of section 48 may include public information which is not kept private or confidential but which nevertheless may be used by an agency for an administrative purpose.

In the Tribunal's view Dyrenfurth did not limit the class of what may be information relating to 'personal affairs'. The Tribunal referred to the dictionary definitions of 'personal' and 'private' and took the view that information about a person's personality or reputation is within the meaning of 'personal affairs'.

Mr Toomer was employed as a Senior Quarantine Inspector. Two documents in the possession of the Department criticised Mr Toomer's personality and competence 'in such a way as to destroy his professional reputation and render it impossible for him to perform his duties'. In the Tribunal's view the attack on his professional reputation contained in the document was based on information concerning his work performance and accordingly it related to his personal affairs. Further the information was incomplete, incorrect, out of date and misleading and was to be used for an administrative purpose. The Tribunal ordered a notation on each document to that effect.