

part of the Cox Peninsula, near Darwin - the Kembi (Cox Peninsula) Land Claim.

During 1978 action had been taken in connection with a rural plan for the Darwin environs. In December 1978 new Town Planning regulations were made extending the town boundaries. The Aboriginal Land Commissioner found that the regulations were made solely to ensure that no aboriginal land claim could be made to the area specified. He decided that the regulations were invalid and that the Cox Peninsula was not land within a town, within the meaning of the Aboriginal Land Rights (Northern Territory) Act 1976. As a result, it was not excluded from the definition of 'unalienated Crown land' and therefore was amenable to a land rights claim.

The Full Court observed that 'it is a fundamental principle of administrative law that, in the absence of a specific statutory provision to the contrary, the proper limits of the exercise of a statutory discretion are defined by, and only by, the scope and purpose of the legislation itself'. To the extent that the making of the regulations was motivated by a desire to facilitate regional planning, as distinct from invoking the planning controls within a 'town' envisaged by the Town Planning Act, they were outside the regulation making power of that Act. The Court concluded that the Commissioner did not err in law, and dismissed the application.

Taxation: appeal from the AAT

Commissioner of Taxation v Raptis (21 September 1989) involved an appeal by the Commissioner against an AAT decision that Mr Raptis should not have been issued with an amended assessment whereby his taxable income was increased by \$380 000 and he was charged additional tax of \$336 790.

Justice Gummow pointed out that there is no error of law simply in making a wrong finding of fact. An error of law would occur, however, if there was no evidence to support a conclusion of fact, if the only true conclusion which the AAT could reach was contrary to that it did reach, or if its decision otherwise was perverse.

Crucial to the AAT's decision was its finding as to the credit of the taxpayer. This was not challenged before the Court. Justice Gummow found that the Commissioner was endeavouring to have the Court embark on a challenge as to findings of fact and not a question of law. He dismissed the appeal.

Commonwealth Ombudsman

Health Insurance Commission: nonpayment of Medicare benefits

Under the Health Insurance Act, Medicare benefits may not be payable in certain circumstances for a professional service rendered to a claimant in the course of the treatment of an injury, where the claimant has received or has established the right to receive compensation. The right to receive compensation must be established, however, and a Ministerial determination made before the benefit becomes non-payable.

One circumstance in which this would apply is where the Minister has made a determination that all or part of the compensation payment relates to the medical expenses incurred. The Act also provides for a provisional payment to be made to a claimant where, at the time the claim for medical benefits is made, the claim seems likely to give rise to a determination concerning a compensation payment.

The Ombudsman had previously received several complaints about these matters. As a result of his investigations, the Health Insurance Commission agreed that its officers should not pre-empt the Minister's determination by telling claimants that their claims for Medicare benefits would be rejected because there was a possibility that they might receive compensation for the injury.

Pharmaceutical benefits: failure to establish entitlement

A man who had to undergo surgery while on holiday in Queensland could not remember afterwards whether he had advised the hospital when admitted that he held a pharmaceutical benefits card. The hospital had no record of having asked him, but assumed that it had done so. It therefore billed him for \$290 for pharmaceuticals. He sent a copy of his entitlement card to the hospital but it was too late for him to receive the benefit. He approached his Member of Parliament who complained to the Ombudsman on his behalf.

The Department of Community Services and Health had intended to amend the National Health Act to allow payment of pharmaceutical benefits where the failure to establish entitlement had arisen through no fault of the cardholder. The legislation, however, was not intended to be retrospective. For this reason, and because this was a pioneer case that highlighted a deficiency in the current legislation, the Ombudsman suggested to the Department that an act of grace payment might be appropriate.

The Department of Finance recommended against such a payment on the basis that Parliament was not exercising its option to make the legislation retrospective. However, the Secretary of the Department exercised his delegation to make an act of grace payment to the complainant.

Taxation Relief Board: proceedings

On several occasions recently the Ombudsman has had reason to criticise the quality of decision-making by the Taxation Relief Board. In particular, the Board's record-keeping has not been sufficient to enable it to state its reasons for decision. The Ombudsman also noted that the Registrar of the AAT has not always had sufficient background information to enable all relevant issues to be canvassed at the examination of the taxpayer. The Commissioner has acknowledged these deficiencies and has issued guidelines on the conduct of the Board's activities.

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

Courts and tribunals: new administrative arrangements

The Courts and Tribunals Administration Amendment Act 1989 came into operation on 1 January 1990. Its major functions include:

- . separation of day-to-day control of the Federal and Family Courts, and the AAT, from the Attorney-General's Department;
- . making the head of jurisdiction responsible for 'managing the administrative affairs' of the Court or Tribunal;
- . giving a senior officer the staffing responsibilities of a Departmental Secretary. He is to be appointed by the Governor-General and not employed under the Public Service Act;
- . requiring Annual Reports of the management of the administrative affairs of the court or tribunal, and financial statements audited by the Auditor-General, to be tabled in Parliament.

Immigration: unlawful detention

On 21 November 1989, in Park Oh Ho v. Minister for Immigration and Ethnic Affairs, the High Court heard an appeal against an order of the full court of the Federal Court (Admin Review 18:86) upholding a previous decision by Justice Davies (Admin Review 16:37).

The appellants were South Koreans whose entry into Australia allegedly had been part of a migration racket. They were taken into custody in July 1986. On 20 August 1986 an officer of the Department of Immigration and Ethnic Affairs made out deportation orders. The Koreans claimed that the orders were prepared not to enable their early deportation but to facilitate their further detention as potential prosecution witnesses in proceedings against participants in the migration racket. They challenged the legality of their detention from that date. Justice Davies found that the deportation orders were made for an improper purpose, and ordered that they be set aside. He refused, however, to make an order that the detention after 20 August 1986 had been unlawful. The full court of the Federal Court was divided on whether the deportation orders had been made for an improper purpose, and also on whether Justice Davies should have made a declaration that the detention was unlawful. Nonetheless, it upheld the original decisions by a majority.

The only decision reviewed by the High Court was whether a declaration should have been made that the detention of the Koreans from the date of the deportation orders until their release on 2 December 1986 was unlawful. It decided that the Koreans had been legally detained under section 18 of the Migration Act 1958, but this came to an end when the deportation orders were made, so that their continued detention