REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Since the last edition of *Admin Review* the Council has provided:

- a report to the Attorney-General: Report No 34 *Access to Administrative Review by Members of Ethnic Communities;*
- a discussion paper on tribunal procedures for the Commonwealth Tribunals Conference;
- a letter of advice to the Attorney-General on the proposed abolition of the Taxation Relief Board;
- a letter of advice to the Attorney-General on the Fisheries Management Bill 1991; and
- a report to the Fifteenth Australasian Law Reform Agencies Conference.

Current work program - developments

Community services & health

The Council is examining a range of decisions made under programs administered by the Commonwealth Department of Health, Housing and Community Services, with a view to recommending the administrative review principles which ought to apply to grants programs made within that portfolio. The release of an issues paper has been deferred.

Intellectual property

Dr Margaret Allars of the University of Sydney is preparing a consultant's paper on review of patents decisions.

Rule making

The Council's Rule Making Report is in the final stages and should be sent to the Attorney-General late in 1991.

Multicultural Australia

The Report has been provided to the Attorney-General and was tabled in the Parliament on 12 September 1991. Note that the focus article in this issue refers to aspects of the Report dealing with a new role for the Ombudsman. In addition, a more comprehensive summary of the Report appears in Administrative Law Watch at page [49].

Specialist tribunals

This project was discussed at [1990] *Admin Review* 54. The current phase of this project is concerned with tribunal procedures. A conference of tribunal members and officers was held in Melbourne on 18 and 19 October 1991. Discussion focused on a paper on procedures prepared by the Council. Work has now commenced on preparation of a draft report.

Government business enterprises

The Council's newest project examines the extent to which the Commonwealth administrative law package should apply to government business enterprises of different kinds. The principal issue is the extent to which such organisations should remain accountable while still being able to operate effectively in a commercial environment.

The Council plans to circulate an issues paper in the new year and will then undertake a program of consultation before making its final report.

Administrative Appeals Tribunal

New jurisdiction

Since the last edition of *Admin Review* jurisdiction has been conferred on the AAT by the following legislation:

- *Australian Wool Corporation Act 1991*
- *Bounty (Citric Acid) Act 1991*
- *Bounty Legislation Amendment Act 1991*
- *Community Services and Health Legislation Amendment Act 1991*
- *Freedom of Information Amendment Act 1991*
- *Great Barrier Reef Marine Park Amendment Act 1991*
- *Health Legislation (Pharmaceutical Benefits) Amendment Act 1991*
- *Industrial Relations Legislation Amendment Act 1991*
- *Industry Technology and Commerce Legislation Amendment Act 1991*
- *National Food Authority Act 1991*
- *National Health Amendment Act 1991*
- *Petroleum (Submerged Lands) Amendment Act 1991*

- *Primary Industries Levies and Charges Collection Act 1991*
- *Primary Industries Levies and Charges Collection (Consequential Provisions) Act 1991*
- *Telecommunications Amendment Act 1991*
- *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1991*
- *Training Guarantee (Administration) Amendment Act 1991*
- *Veterans' Affairs Legislation Amendment Act 1991*
- *Veterans' Entitlements Amendment Act 1991*
- *Veterans' Entitlements (Rewrite) Transition Act 1991*
- *Wildlife Protection (Regulation of Exports and Imports) Act 1991*

AAT decisions

Jurisdiction

Re Surf Air and Civil Aviation Authority (1991) 22 ALD 118 arose out of a decision by the CAA to cancel its approval of Surf Air's Chief Pilot. Surf Air sought review of that decision. The CAA raised a jurisdictional objection, claiming that: as the approval had been without power, it and the cancellation were nullities; and that the purported decision, made under Air Navigation Orders, did not fall within the words, 'this Act or the regulations', that empowered AAT review. The Tribunal, constituted by its President, Justice O'Connor, agreed that both the approval and cancellation lacked any legislative basis but reiterated the decision of the Full Federal Court, in *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1, that the Tribunal 'has jurisdiction to review a decision which is a nullity or which is without legal basis'. On the second issue, the Tribunal determined that as the purported cancellation was made under an Order rather than the Act or regulations, it was not reviewable. Finally, the Tribunal noted that even if it had had jurisdiction, because the approval and cancellation were nullities it would not be in a position to offer any remedy, adding that there was no power under the AAT Act to order a stay indefinitely.

It should be noted that the distinction drawn by the Tribunal between, on the one hand, decisions made under the Act or regulations, and, on the other hand, decisions made under Orders which are made under the Act or regulations, may lead to certain decisions under subordinate legislative instruments being outside the Tribunal's jurisdiction.

Remittal to AAT

An interesting issue arose but was not resolved in *Re James and Secretary, Department of Social Security* (1991) 22 ALD 794. The matter had been considered by the Tribunal then appealed to the Federal Court, which remitted it to the Tribunal with certain instructions. The question arose whether there could be a section 34(2) agreement in these circumstances. Section 34(2) provides, as far as is presently relevant, that once agreement has been reached between the parties at or after a preliminary conference, 'the Tribunal shall, *without holding a hearing*, make a decision in accordance with [the agreement]' (emphasis added). In this case the Tribunal had already held a hearing. With the consent of both parties and to avoid the problem, the Tribunal held another brief hearing and made its orders after receiving a little more information. The general issue remains to be resolved as to whether this kind of matter could be resolved by a section 34(2) agreement.

Onus of proof at AAT

In *Re Lucke and Commission for the Safety Rehabilitation and Compensation of Commonwealth Employees* (9 April 1991), the Tribunal, constituted by Deputy President Todd, was faced with a case in which the applicant was unable to give evidence and in which there was a conflict of expert medical evidence. The Tribunal noted that there was no strict onus of proof to be met in its proceedings but acknowledged that an applicant effectively bears the burden to substantiate his or her claim. Here, the Tribunal had sought medical evidence when the applicant had been unable to arrange it but, in the end, when the question of causation was still very controversial in medical circles, it decided in favour of the respondent. In the course of its judgment, the Tribunal referred to the difficulties it has in its dual role, first to seek-out the best case that can be made for the applicant and secondly to adjudicate the dispute.

'Special circumstances' and common practices

Section 23 of the *Disability Services Act 1986* requires a person, who has undertaken a rehabilitation program paid for by the Commonwealth,

to repay the Commonwealth for the program upon receiving compensation. In addition, the provision gives the Secretary power, in special circumstances, to waive recovery or, if recovery has occurred, to return such funds to the person. In *Re Sharman and Secretary, Department of Community Services and Health* (21 June 1991), the Tribunal, constituted by Deputy President Johnston, had to determine whether the Department's practice of not informing patients that they would have to pay for the programs and its encouragement for them to stay amounted to 'special circumstances'. The Department contended that as this was a common practice there was nothing that could amount to 'special' circumstances. The Tribunal's response was:

> 'But to accept that the applicant was not unique or alone in not being informed of the likely costs misses the point... It assumes that if some default of a department or instrumentality is repeated among a sufficiently large group of persons it changes the character of the circumstances to being normal'.

The Tribunal preferred to view the issue by looking at what the individual might expect in the normal course of events:

> 'To view 'special' in this way is to shift the focus from seeing 'special' in *personal* terms of comparing the individual with other people, to centring on the conduct of the [Department] and how it affected the individual. This involves a comparison of what in fact occurred with what one would *normally expect to be the case*'. (Emphasis in original.)

The Tribunal determined that the Department's practices did amount to special circumstances in this case and ordered an appropriate refund. The view taken by the Tribunal as to the meaning of 'special circumstances' should, in addition to resolving the present case, lead to better administration under the Act.

Illusory appeal rights

Re Shortis and Secretary, Department of Community Services and Health (21 June 1991) concerned an applicant who sought approval from the Pharmacy Restructuring Authority ('PRA') to supply pharmaceutical benefits. The procedure was that the PRA made a recommendation to the Secretary to the Department for approval or disapproval. If, as was the case here, the PRA's recommendation was unfavourable to an applicant, the Secretary was required to adopt the recommendation. He had no power to approve the application. A difficulty arose because under the *Community Services and Health Legislation Amendment Act 1990* the Secretary's decision was reviewable on the merits by the Tribunal but the effective decision by the PRA was not. Despite this the notification to the applicant of the Secretary's decision was required to (and did) include a statement that an application might be made to the Tribunal for a review of that decision.

In Shortis the Tribunal found that, while it technically had jurisdiction to hear the case, it had no power to overturn the decision appealed from. The power of review was described by the Tribunal as 'in practical terms worthless' and the Tribunal decided that no further purpose would be served by proceeding to a hearing on the merits of the case.

Agreements and concessions concerning AAT jurisdiction

In *Re Rose and Repatriation Commission* (25 June 1991), the Tribunal, constituted by Deputy President Forgie, considered the scope for agreements and concessions extending to jurisdictional matters:

> 'It seems to me that, as a matter of practicality, if the parties do wish to make a preliminary agreement upon a point extending to jurisdictional matters, they should draw it to the attention of the Tribunal constituted to hear the application or to the presiding member of that Tribunal prior to the hearing so that there may be an opportunity to consider whether or not the concession will be accepted'.

The Tribunal noted that parties do not have the power to bind the Tribunal to any agreements they make as to jurisdictional matters. However, in this case, given the Tribunal's views on the merits it did not need to decide specifically on the jurisdictional issue raised.

'Decision under review'

In *Re Salecich and Repatriation Commission* (19 July 1991), the Tribunal, constituted by Mrs Dwyer, a Senior Member, considered the meaning of the expression 'decision under review' in section 43 of the AAT Act. Mr Salecich had applied for an increase in his pension on two grounds: (i) additional disabilities; and (ii) the worsening effects of an existing accepted dis-

ability. The Repatriation Commission rejected both claims though it concentrated on the first as having the greater likelihood of success. Mr Salecich subsequently appealed unsuccessfully to the Veterans' Review Board ('VRB') on the first ground, and then appealed, only on this ground, to the Tribunal. The Tribunal affirmed the decision of the Repatriation Commission in respect of the ground under review but sought submissions about its power to look at the other ground for an increase in pension.

The Repatriation Commission contended that the Tribunal had no jurisdiction to review a decision which has not been reviewed by the VRB and that the two grounds were severable such that Mr Salecich's right of review in the second ground had expired under the statutory time limit.

In considering these submissions, the Tribunal acknowledged that the VRB must have first reviewed the decision before the Tribunal had jurisdiction but it determined that the relevant legislation:

> 'makes it clear that the decision which this Tribunal reviews, where the Veterans' Review Board has affirmed the decision of the Repatriation Commission is, 'the decision of the Commission that was so affirmed'. In this matter a perusal of the reasons of the Repatriation Commission shows that it dealt, not only with the claim for new conditions to be accepted as war-caused, but also with the application for increased pension in respect of [the existing disability].'

It followed then that the 'decision under review' involved both of the grounds for an increase in pension even though the second ground had not been argued before either the VRB or the Tribunal. After reviewing the decision of the Federal Court in *Fitzmaurice v Repatriation Commission* (1989) 10 AAR 172, the Tribunal concluded that:

> 'the subject matter of the review *is the decision of the Commission* that was affirmed.
>
> 'It is the 'totality' of the decision or 'everything decided in the decision' which is to be considered by this Tribunal'. (Emphasis in original.)

The Tribunal went on to increase Mr Salecich's pension on the basis of the second ground.

This approach of the Tribunal in undertaking the broadest review of a decision can be contrasted effectively with the approach of courts. It would be most unusual for an appellate court to allow a point to be raised that was not dealt with in the court below. And even more unusual for it to raise this kind of point when neither party did so before it. The case provides an excellent example of how the Tribunal is efficiently undertaking its functions in the more inquisitorial, pro-active role given to it.

Review of trial evidence

Re Lee and Department of Immigration, Local Government and Ethnic Affairs (23 August 1991) involved review of the decision to deport Mr Lee. The deportation order was made pursuant to section 55 of the *Migration Act 1958*, following Mr Lee's conviction. Mr Lee had continued to protest his innocence but was unable to get legal aid or other legal assistance necessary to lodge an appeal. Before the Tribunal, Mr Lee argued that, in light of his having been denied any real chance to pursue an appeal and having presented detailed argument that there was a strong arguable basis for succeeding in an appeal, the Tribunal should have less confidence in the conviction and take this into account in making its ultimate decision.

The Tribunal, constituted by Deputy President Johnston, responded that it was:

> 'not prepared to canvass whether the various grounds on which the appeal would have been based might have succeeded. To do so even to the extent of forming a provisional view about the 'arguability' of the grounds would entail reviewing the evidence at trial in a way that could cast substantial doubt on those convictions. As the Federal Court has emphasised in a number of decisions ... that review function is properly the province of the courts, not this Tribunal.'

Exhaustion of jurisdiction

Re Nicholson and Secretary, Department of Social Security (9 September 1991) involved the question whether the dismissal, pursuant to section 42A(1) of the AAT Act, of an application exhausts the Tribunal's jurisdiction in respect only of that application or in respect also of the decision under review. In this case, Mr Nicholson had previously withdrawn an application and had it dismissed under section 42A(1). In his next application, the Tribunal had determined that because of the

previous application it lacked jurisdiction. In his following application, the Tribunal, then constituted by Deputy President Forgie, disagreed with the previous decision of the Tribunal but felt that the question of jurisdiction had already been determined. Again, Mr Nicholson sought review in the present proceedings. In each case the subject matter was identical though the description of the decision that was under review varied.

The Tribunal, constituted by Mr Muller, a Senior Member, found that the present application related to a recent decision but noted that it would have followed the recent judgment of the President of the Tribunal in *Re Mulheron and Australian Telecommunications Corporation* (20 August 1991), which approved Deputy President Forgie's approach:

> 'the Tribunal may have exercised all of its power in relation to a particular application when it dismisses it but it does not follow that it has exercised all of its powers in relation to review of a decision. It follows that the applicant may bring a fresh application to review that decision.'

Lodgment of applications

In *Re Purnell and Repatriation Commission* (10 September 1991), the Tribunal had to consider the meaning of the expression 'an application ... shall be *lodged* with the Tribunal' (emphasis added), in section 29(1) of the AAT Act. Mrs Purnell had written a letter addressed to the Deputy Registrar of the AAT supplying her name, regimental number, the name of the body that made the decision, the nature of the decision and in broad terms - 'I cannot accept some of the evidence on which the VRB based its decision' - her reasons for making the application. The Deputy Registrar filed it on a correspondence file and sent to Mrs Purnell a copy of the form prescribed for making applications. Mrs Purnell returned that form about two months after sending her initial letter.

The effect of section 177 of the *Veterans' Entitlement Act 1986* was that if the Tribunal were to uphold an application for review the higher rate of pension would, if that application were lodged within three months of the decision, be payable from the earliest time that the increase could have been made by the relevant department. But, if the application for review were made after that three month period, the increase in pension would be payable only from the date of that application. Mrs Purnell's letter to the Deputy Registrar fell within the three month period but her application form was returned after the period had ended. The parties had agreed on the merits but there was still controversy regarding the correct date for the increase in pension. The Tribunal was, thus, left to determine whether Mrs Purnell's letter amounted to an application to the Tribunal under section 29(1) of the AAT Act.

Being in writing, the letter fulfilled the requirement of section 29(1)(a). Not being in accordance with the prescribed form, it was in breach of section 29(1)(b) but the Tribunal determined that this requirement was not mandatory.

Mrs Purnell's broad statement of her reasons for application was sufficient to fulfil the requirement in section 29(1)(c): 'shall set out a statement of the reasons for the application'. It was not important that the reasons stated by Mrs Purnell were not those which eventually carried the day.

Finally, section 29(1)(d) required that the application 'be lodged with the Tribunal within the prescribed time'. The respondent was prepared to accept an extension of time in respect of Mrs Purnell's proforma application but it claimed that her letter, though within time, was not 'lodged'. The Tribunal referred to the decision of the Full Federal Court in *Angus Fire Armour Australia Pty Ltd v Collector of Customs* (1988) 83 ALR 449, which noted that for a document to be lodged there 'must be a physical acceptance of the document by an officer of the registry.' In *Angus Fire Armour*, an application was accepted but returned because the regulations required that a fee be paid; in these circumstances, the Court determined that the application had been lodged. In the present case, the Tribunal determined that Mrs Purnell was in an even stronger position than the applicant in *Angus Fire Armour;* her letter had been retained in the Registry at all relevant times and there had been no non-compliance with the regulations. Hence, the Tribunal accepted that Mrs Purnell's letter amounted to a proper application.

'Decision'

Re Gallivan Investments Ltd and Australian Securities Commission (27 September 1991) dealt with two important matters: the meaning of 'decision' under the AAT Act and the meaning

of section 1317C of the *Corporations Law*. It arose following the decision of the ASC to refer certain conduct to the Corporations and Securities Panel under section 733 of the *Corporations Law*. The scheme of the legislation is that if the ASC considers that 'unacceptable circumstances' have occurred in connection with an acquisition of shares, or with other conduct, the ASC may apply to the Panel for a declaration to that effect. In the event of the Panel concluding that there were 'unacceptable circumstances', it has various powers to make orders affecting the parties.

In this case, Gallivan sought review by the Tribunal of the ASC's decision to apply to the Panel. Section 1317B confers a general power to make applications to the Tribunal for 'review of a decision made under this Law' by, inter alia, the ASC. It was contended by the ASC that the decision to apply to the Panel is not a decision within the meaning of that word in section 1317B. After considering the judgment of Justice Deane in *Director-General of Social Services v Chaney* (1980) 31 ALR 571, the Tribunal stated:

> '... it seems to me that unless the Commission's decision can be regarded as the ultimate or operative decision determining the substantial issues between the parties, it can not be regarded as a reviewable decision as discussed by His Honour. The fact that the decision was that unacceptable circumstances *may* have occurred prima facie precludes it from being regarded as one that settles the issues.'

The Tribunal noted that, in *ABT v Bond* (1990) 94 ALR 11, members of the High Court had 'accepted that the activities defined as constituting a decision in the AAT Act are virtually indentical with those in s3(2) of the [AD(JR) Act]'. The Tribunal drew a parallel between this case and *Edelsten v Health Insurance Commission* (1990) 21 ALD 710. Both cases involved a situation where a body could investigate a matter before referring it to another body for action. As in *Edelsten*, the Tribunal determined that the decision was a non-operative decision and therefore was not reviewable.

Although it had resolved the matter, the Tribunal commented on the second argument put forward by the ASC. The ASC had argued that the decision to apply to the Panel fell within the terms of section 1317C, which excludes from review by the Tribunal decisions 'in respect of which any provision in the nature of an appeal or review is expressly provided by this law'. The Tribunal, in rejecting this argument, said:

> '... the proceedings of the Panel can not be said to be directed to the correction or improvement of the decision of the [ASC]. Whatever the result of the Panel's deliberations, the decision of the [ASC] to refer the matter to the Panel is left unassailed. The Panel does not revise or alter the result of the [ASC's] decision. The decision to apply to the Panel, with all its practical consequences for [Gallivan], continues to stand... The proceedings of the Panel are no more a review than the decision of a jury to find an accused not guilty would be a review of the decision of the Director of Public Prosecutions to institute a prosecution.'

Freedom of Information

The Freedom of Information Amendment Act 1991

On 25 October 1991, the *Freedom of Information Amendment Act 1991* ('the Act') came into operation. Not having a retrospective effect, it applies only to FOI requests lodged after that date.

A valid request is now required to: be in writing, provide sufficient information to enable the agency to identify the requested documents, give the applicant's address, be sent to the agency's address in the phone book, and be accompanied by the $30 application fee. The request need no longer specify that it is made under the FOI Act.

The Act changes section 24(1) of the FOI Act, which allows an agency to refuse a request which would substantially and unreasonably divert its resources from its other operations. At present section 24(1) is limited because, in determining what is a substantial or unreasonable diversion of resources, an agency can only take into account the work involved in identifying, locating and collating relevant documents. The Act will change section 24(1) to allow the agency to also take into account the work involved in officers of the agency:

- examining documents to identify any exempt matter;
- consulting any person or body outside the agency about the request;
- making copies of the documents with exempt material deleted; and