An application by the Commissioner for special leave to appeal to the High Court was refused as the tax dispute between the parties had been settled. However, the Chief Justice, Sir Anthony Mason, said that the case raised a point which, in an appropriate case, would warrant the grant of special leave.

National justice - adverse conclusions

Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 102 ALR 339 involved a claim that the decision-maker had denied Mr Somaghi natural justice when the decision-maker took a letter, written by Mr Somaghi, into account and, drawing from it an adverse conclusion, did not give Mr Somaghi an opportunity to respond to that conclusion. The majorty of the Court upheld the appeal. Mr Justice Gummow stated:

> '[I]n a particular case, fairness may require the applicant to have the opportunity to deal with matters adverse to the applicant's interests which the decision-maker proposes to take into account, even if the source of concern by the decision-maker is not information or materials provided by the third party, but what is seen to be the conduct of the applicant in question.'

Mr Justice Jenkinson, also in the majority, looked at the reasonableness of the conclusion drawn. Here the purpose inferred by the decision-maker 'was not so obviously the purpose which a reasonable observer would attribute to transmission of the letter that the applicant should be treated as having knowledge of what the delegate's judgment of that conduct would be'. It follows that a decision-maker who draws an adverse conclusion from some material supplied by an applicant may deny natural justice if his or her conclusion is not the obvious one. Decision-makers must consider whether their conclusion is sufficiently obvious to not require the giving of an opportunity to be heard.

Mr Justice Keely, in dissent, took the more traditional view:

> 'In my opinion procedural fairness does not require a decision-maker to give an applicant an opportunity to comment upon the view which the decision-maker has provisionally taken of part of the material submitted to him in support of the application ...'

Commonwealth Ombudsman

Review of the Office of the Commonwealth Ombudsman

The Senate Standing Committee on Finance and Public Administration Inquiry into the Office of Ombudsman began on 1 and 2 May 1991 at Parliament House in Canberra.

During this session the Committee heard from the Ombudsman and members of his Office; the Australian Statistician; representatives of the departments of Defence, Finance and Social Security; the Australian Taxation Office; the Merit Protection Review Agency; and the Administrative Review Council.

The Committee then held a plenary session and heard from Messrs Hugh Selby, Peter Bailey and Julian Disney. The evidence has now been published in Hansard.

The Administrative Review Council made a written submission to the inquiry. In summary its views were as follows:

- The Ombudsman is an essential and effective component of the Commonwealth's integrated administrative review system.
- The Ombudsman should give increased attention to the investigation of systemic problems.
- There should be greater liaison with other review bodies to eliminate gaps and overlaps in operations.
- Consideration could also be given to reviewbodies sharing offices and personnel.
- There are outstanding jurisdictional issues relating to the ABC, certain Archives decisions and court and AAT registries that require resolution.
- The Ombudsman is ideally placed to assist in overcoming ignorance of and impediments to access to the administrative review system:
  - by providing a central reference point for use by those who are dissatisfied with a government decision and do not know how to deal with it; and
  - by disseminating knowledge and information about administrative review, in particular the concept of review and that 'you can complain'.
- The Ombudsman could also be the spearhead for promotional activities on the administrative review system directed at particular segments of the community in accordance with

needs identified by review agencies and co-ordinated by the Council.
- Additional funding will be required to enable the Ombudsman to undertake the proposed promotional and central reference activities.
- The continued underfunding of the Ombudsman is a matter of serious concern.

Section 16 reports

The Ombudsman lodged a report under section 16 of the *Ombudsman Act 1983* late in 1990 in respect of the actions of Telecom in connection with the retirement on invalidity grounds of one of its staff. In the Ombudsman's opinion, Telecom failed to exercise a duty of care in advising its employee of his retirement entitlements, as a result of which he suffered detriment in that he received a lesser superannuation pension than would have been the case had he been properly advised.

Telecom has resisted implementing the Ombudsman's recommendation that it redress the complaint. It argued that it had no legal obligation to do so, and was not persuaded by the argument that it was morally obliged. However, after the Minister for Transport and Communications, Mr Beazley, wrote to Telecom urging it to reconsider its position, Telecom has had a change of heart and is now negotiating with the complainant.

In 1989, the former Defence Force Ombudsman (DFO) withdrew a section 16 report he had made to the Prime Minister concerning the actions of the former Defence Service Homes Corporation (DSHC) (since subsumed within the Department of Veterans' Affairs).

The complaint had concerned the DSHC policy of absolute protection against creditors of holders of current DSHC loans. The complainant had obtained a Judgement Order and a Warrant of Execution against a DSHC borrower, but the Corporation had refused to allow the borrower's home to be sold to satisfy the debt. Although the former DFO reported to the Prime Minister that he considered that policy to be flawed, he withdrew his report when the *Defence Service Homes Act 1918* was amended to give legal force to what had until then been simply applied as a policy.

Recently, the AAT considered a case with very similar features to that of the complainant. The AAT determined that there was a point beyond which protection should not be provided, and (in the case before it) distinguished debts arising out of commercial ventures as examples of the type of debt where the legislative protection ought not to be extended. The AAT reversed the Department's decision. The DFO is seeking to reopen the original complaint.

Jurisdiction

The Ombudsman's jurisdiction over ABC programming decisions has been a source of controversy for some time. Former Ombudsman, Professor J E Richardson said that the Ombudsman's policy was to investigate a complaint when the Commonwealth authority (either the ABC or SBS) published false or misleading information about an individual or sought to prejudice the legitimate interests of a person in the community. SBS now accepts that the Ombudsman has jurisdiction in these circumstances; the ABC does not. In 1985 Professor Richardson forwarded a Special Report to the Parliament under section 17 of the Ombudsman Act about an investigation (known as 'the Cotton case') involving the ABC.

There have recently been the following developments:
- The ABC recently announced the establishment of an Independent Complaints Review Panel (ICRP). The ICRP is to review written complaints relating to allegations of serious bias, lack of balance or unfair treatment arising from ABC programs broadcast after 12 May 1991. While the ICRP is appointed by the ABC Board, its reports go to the Managing Director who decides whether any redress will be made. (The establishment of the ICRP cannot, of course, affect the legal existence of the Ombudsman's jurisdiction.)
- A Private Member's Bill has been introduced into the House of Representatives that would expressly make ABC programming decisions subject to the Ombudsman's jurisdiction.
- The Draft Broadcasting Services Bill released by the Minister for Transport and Communications on 7 November 1991 provides for an Australian Broadcasting Authority which will have as one of its functions the investigation of complaints of breaches of codes of practice by all broadcasters including the ABC and SBS. This would obviate the need for the Ombudsman to investigate this in the first instance.

Aboriginal and Torres Strait Islander Commission

The Ombudsman received a complaint from an Aboriginal community alleging that ATSIC had failed to ensure that adequate funding was available to the community in time to avoid an overdraft with the community's bankers and had refused to pay some $40,000 due to the community as an on-cost payment in respect of community development employment project funds for 1 July to 31 December 1990. The community also sought the Ombudsman's assistance in respect of the recovery of the extra bank charges incurred by the community because of the lack of timely funding.

ATSIC admitted that errors had occurred, largely caused by computer malfunctions and inadequacies in the handling of documentation. ATSIC took appropriate remedial action, including repayment of the bank charges incurred by the community and the implementation of changes to administrative arrangements for future payments to the community.

ADMINISTRATIVE LAW WATCH

ARC report - Multicultural Australia Project

Council Report Number 34 *Access to Administrative Review by Members of Australia's Ethnic Communities* was tabled in Parliament on 12 September 1991. It represents the Council's most recent report on the topic of access. The previous reports on access were:

- No 27, *Access to Administrative Review: Stage One - Notification of Decisions and Rights of Review;* and
- No 30, *Access to Administrative Review, Provision of Legal and Financial Assistance in Administrative Law Matters.*

Report No 34 concluded that members of ethnic communities do not have effective access to administrative review. This was mainly because review agencies have failed adequately to publicise themselves and their services. More specifically, the Report, which was the result of the Council's Multicultural Australia Project, made the following observations:

- The Project's strategy based on the application of basic marketing principles to publicising administrative review has been demonstrably successful.
- There is at present little knowledge or understanding, either theoretical or practical, of administrative review within Australia's ethnic communities.
- Impediments to effective access include:
  - ignorance of the concept of administrative review - that is, that people have a right to complain or appeal;
  - language difficulties and cultural alienation;
  - the fact that the people to whom members of ethnic communities look for help and advice are themselves often poorly informed and apprehensive about how to deal effectively with government agencies;
  - confusion caused by the diversity of institutions and remedies for review;
  - agencies' failure to consider the specific needs of people from non-English-speaking backgrounds; and
  - the absence of proper arrangements for the provision of translators and interpreters.
- To date, efforts to publicise administrative review have mostly been uncoordinated and have concentrated on individual agencies rather than on the basic availability of a right of review. This message is not, in itself, a particularly complex one; nor need it be difficult to convey.
- While the Project has concentrated on ethnic communities, there is little doubt that most of these conclusions apply to the community as a whole, especially to disadvantaged groups which depend more on government and welfare services and which might therefore be expected to have most need of review agencies' services. Most of the following recommendations seem to be applicable to the wider community.
- Access to the administrative review agencies cannot properly be considered in isolation from the primary service-providers. People who do not know that they have a right to