

## Specialist Tribunals Project

This project was discussed in *Admin Review* No. 25. The current phase of the project is concerned with tribunal procedures. A conference of tribunal members and officers will be held in Melbourne on 18 and 19 October, 1991.

## Government Business Enterprises

The Council has begun a new Project, examining 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 July, outlining the possible criteria for the application of administrative review. After consultation, the Council's report will be finalised by the end of 1991. The Project Officer is Ms Gina Foster who can be contacted on (06)257 6115.

## Administrative Appeals Tribunal

### New jurisdiction

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

- *Export Market Development Grants Amendment Act 1990*
- *Transport and Communications Legislation Amendment Act 1990*
- *Veterans' Affairs Legislation Amendment Act 1990*

### AAT decisions

#### Urgent interim orders - duty of disclosure by parties

In *Re Island Voice and Great Barrier Reef Marine Park Authority* (19 October 1989) (1989-90) 20 ALD 684 Island Voice made an urgent application through Counsel to the AAT at 4.30 p.m. on a Friday afternoon for an order preventing the Marine Park Authority from building a breakwater. Mr Justice Hartigan granted an interim order. However, during a later hearing it

emerged that Island Voice had not disclosed to the Tribunal the fact that some time before, a different Tribunal member had refused to make identical orders to those sought from Mr Justice Hartigan. The Tribunal found that it had been misled. Mr Justice Hartigan said that there was an obligation upon the parties seeking an interim stay order "to supply all of the material which would otherwise be supplied by the absent party, and which is within the knowledge of the party applying ... the parties must be made aware that full and frank disclosure of all facts, and ... all matters, is essential to the orderly administration of justice". Since the Tribunal had been materially misled, the stay order was discharged. [P.G.]

#### Recovery of rehabilitation costs - 'special circumstances'

'In *Re Whale and Department of Community Services and Health* (23 November 1990) the Tribunal heard that Mr Whale had been seriously injured in a car accident in 1987. During the course of his recovery the Department incurred rehabilitation costs of \$16,036.95 which it sought to recover when Mr Whale's damages case was settled.

Mr Whale argued that 'special circumstances' existed so that the Department should have decided to waive recovery of the rehabilitation costs.

Mr Justice Purvis referred to cases previously heard on the recovery of sickness benefits by the Department of Social Security and confirmed the decision by the Department to recover. He considered that relevant considerations in coming to the decision included:

- the result of the settlement of the court case
- the amount of money that becomes available, and
- the extent to which that money is appropriate to meet the needs of an applicant. [P.G.]

#### Tribunal uses inquisitorial powers

In *Re Mourtitzikoglou and the Secretary to the Department of Social Security* (22 February 1991) Mrs Dwyer, Senior Member, used the AAT's broad inquisitorial powers to help determine the case. Section 33 of the AAT Act describes the procedure of the Tribunal and specifically states that:

'the Tribunal is not bound by the rules of

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evidence but may inform itself on any matter in such manner as it thinks appropriate.'

The question for the Tribunal was whether Mrs Mourtitzikoglou's invalid pension should be suspended for a period as her husband had received a payment of compensation. The Tribunal had to determine whether 'special circumstances' existed which could justify not suspending the invalid pension.

At the hearing Mrs Dwyer received a Departmental social worker's report on Mrs Mourtitzikoglou's family circumstances. After considering the matter Mrs Dwyer decided she needed a more detailed report. Mrs Dwyer asked the Deputy Registrar to write to both parties seeking more evidence especially from the social worker. The Department arranged for the social worker to answer the points Mrs Dwyer raised. On the basis of those answers the Department conceded the case and paid arrears to Mrs Mourtitzikoglou.

Mrs Mourtitzikoglou had appeared personally at the Tribunal with the assistance of a Greek interpreter. It could be assumed she would not herself have been able to produce the evidence the Tribunal needed to determine the matter. [P.G.]

### AAT may set aside a consent order wrongly made

In *Re Pontin and Repatriation Commission* (15 February 1991), Mrs Dwyer, Senior Member, considered the Tribunal's powers to vary consent orders made under Section 42A of the AAT Act. Following a preliminary conference staff at the AAT had incorrectly sent Mr Pontin a form stating that he consented to the dismissal of his application. In fact, the Repatriation Commission had decided to grant Mr Pontin's claim. The claim was then dismissed by consent, but on the wrong basis.

Mrs Dwyer had to determine whether she had the power to set aside the dismissal which had been recorded. She decided that the Tribunal had an incidental power to correct irregularities by consent or without objection of the parties if the correction created no injustice either between the parties or to any other person.

She set aside the first order and made a consent order on the basis which the parties had agreed to. [P.G.]

### Student assistance meaning of 'relevant period'

Two appeals concerning the same question recently came before Mrs Balmford, Senior Member, in *Re Bruggemann and Department of Employment, Education and Training* (8 February 1991) and *Re Carvalho and Department of Employment, Education and Training* (8 February 1991). Both concerned decisions by the Department to terminate the payment of Austudy and to recover an alleged overpayment of benefits.

The statutory provisions governing the payment of Austudy are quite complex. In these cases the Department argued, in effect, that the 'relevant period' within which the applicants were entitled to receive benefits, runs to 31 December each year. This meant that income the applicants received late in the year had the effect of retrospectively reducing their entitlement to a benefit based on what they had expected their income to be earlier in the year. This caused the overpayments which the department sought to recover.

Mrs Balmford determined that the relevant period had stopped running when the applicants' circumstances changed and they became ineligible for benefits (one commenced employment, the other received a compensation payment). The effect of that decision was to reduce the amount of the overpayment as the payments did not fall within the 'relevant period'.

She referred to *Re Secretary, Department of Employment, Education and Training and Micallif* (9 June 1989) which determined a similar matter favourably to the student. She considered she should follow that decision as it was given by a Deputy President (see *Re Gančov and Comcare* (1990) 11 AAR 408, [1990] Admin Review 35). She also noted that the Department had not sought to appeal *Micallif* to the Federal Court, although it had argued that the matter had been incorrectly decided. [P.G.]

Comment: The Regulations have since been substantially redrafted: see page 29.

### FOI and national security

*Re Aldred and Department of Foreign Affairs and Trade* (AAT - 21 December 1990) was an FOI application by Mr Aldred, a Member of the House of Representatives, to the Department of Foreign Affairs and Trade ('the Department') for all documents held by it concerning a Mr Zemskov, which related to intelligence activities carried out by him in Australia. (Claims had been made that Mr Zemskov, a USSR diplomat formerly stationed in Australia, was an officer of the KGB.)

'Exempt documents' under the *Freedom of Information Act 1982* ('the FOI Act') include those whose disclosure would cause damage to the security or international relations of the Commonwealth or would divulge information communicated in confidence by or on behalf of a foreign government to the Commonwealth or its authorities.

The Minister's delegate issued three certificates claiming exemption. Two listed the documents claimed by Mr Aldred, to which the exemptions were said to apply. The third certificate simply claimed exemption for the remainder of the document claimed by Mr Aldred, without confirming or denying the existence of specific documents. Mr Aldred sought review of the decision to claim these exemptions.

The AAT said that it was clear that a statement by the executive government as to the sensitivity of any information on national security grounds, including any national security classification, could not of itself conclusively determine the question whether disclosure would cause damage to the Commonwealth's security, but noted that the role of the AAT in this case was limited to determining simply whether reasonable grounds existed for the exemptions claimed. If those grounds existed the FOI Act did not permit the AAT to authorise disclosure in the public interest. The AAT found that reasonable grounds did exist.

The AAT contrasted the exemption for information communicated 'in confidence' with the exemption contained in section 45 of the FOI Act which applies where disclosure would constitute 'a breach of confidence'. It concluded that the phrase 'in confidence' is wider than 'breach of confidence'. Mr Aldred also argued

that communications made for an ulterior and improper purpose could not be regarded as made 'in confidence' under this provision in the FOI Act. The AAT rejected this argument, as it assumed both that Mr Zemskov was an officer of the KGB and that he had acted in that capacity during trade negotiations with Australian officials. Neither assumption had been proved. The AAT declined to alter the decisions of the delegate.

### FOI access to Public Service promotion applications

In *Re Dyki and Commissioner of Taxation* (AAT - 27 December 1990) Mr Dyki had unsuccessfully applied for one of four higher level positions in the Australian Tax Office. He was entitled to appeal, on limited grounds, to the Merit Protection Review Agency (which required cases to be substantiated with verifiable facts). Mr Dyki sought access under the FOI Act to the statements made by two successful applicants and one unsuccessful applicant which had accompanied their applications ('the job applications'). The Commissioner resisted disclosure under the FOI Act on a number of grounds.

#### Substantial adverse effect on management

Under the FOI Act a document is an exempt document if its disclosure would have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or its agencies. The AAT held that while the release of the job applications might have had an adverse effect on personnel management it was not satisfied that the effect would be substantial. The Commissioner had a heavy onus to establish a 'substantial adverse effect' and had not done so. Further, this exemption did not apply if disclosure would be in the public interest. As the AAT found that the effect was not substantial it did not need to decide whether it would be in the public interest to disclose the documents. However, it indicated that the need to ensure the promotions were made (and were seen to be made) fairly and the natural justice requirement that Mr Dyki could properly prepare his submissions to the MPRA, tended to show that the public interest would be served by disclosure.