

REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Since the last issue of *Admin Review*, the Council has made submissions to:

- the Australian Law Reform Commission's review of the law of standing;
- the Australian Taxation Office on the discussion draft of the Taxpayers' Charter;
- the Review of decision-making by the Aboriginal and Torres Strait Islander Commission (ATSIC) and its reconsideration of decisions by a Review Team of the Attorney-General's Legal Practice; and
- the Australian Law Reform Commission's inquiries into complaints against the Australian Federal Police (AFP) and the National Crime Authority (NCA).

Current work program – developments

Freedom of Information

Since the last edition of *Admin Review* the Council and the Australian Law Reform Commission (ALRC) completed their joint review of the *Freedom of Information Act 1982* (Cth) with the publication of the report *Open Government: a review of the federal Freedom of Information Act 1982* (ARC Report No 40, ALRC Report No 77) in January 1996. A summary of that report is one of the focus articles of this issue of *Admin Review*. Copies of the report are available from AGPS bookshops or from the ALRC (See focus article for details). Further information on this report can be obtained from the Council's project officer, Gabrielle Mackey on ☎ (06) 247 5100.

Appeals from the AAT to the Federal Court

In May 1995 the Council published a discussion paper to consider whether the provision that governs appeals to the Federal Court from the AAT (section 44 of the *Administrative Ap-*

peals Tribunal Act 1975) should be changed. The concerns that led to the preparation of the discussion paper arose initially in the tax and subsequently, the patents areas of the AAT, although any change to the provision governing appeals from the AAT to the Federal Court could cut across all review jurisdictions of the AAT. While the paper was directed to all persons interested in the AAT's activities, there may be reasons why tax, patents or other types of decisions should be treated separately from the remainder. In a nutshell, the discussion paper asked:

- whether the ground of appeal from the AAT to the Federal Court should be broadened;
- whether the Federal Court should be given a discretion to determine questions of fact where it finds on appeal that the AAT has made an error of law;
- whether the President of the AAT should be given a discretion to refer whole cases to the Federal Court for determination; and
- whether any change to AAT appeals or referrals should be general or be limited to particular AAT review jurisdictions.

The Council received some 30 submissions in response to the Discussion Paper. The Council is awaiting the High Court's decision in the case of *Collector of Customs v Agfa-Gavaerz Limited*. That case, in which judgment has been reserved, involves, in part, the scope of the phrase "question of law" in section 44.

Administrative Review of Patents Decisions

In January 1994 the Council published an issues paper titled *Administrative Review and Patents Decisions*. The central issue raised in the issues paper was the appropriateness of the current arrangements for the review of decisions by the Commissioner of Patents. Some decisions are currently reviewable by the AAT, others by the Federal Court and there are decisions that are currently not subject to

review at all. Many issues raised in this project overlap with issues raised in the Council's project on the review of appeals from the AAT to the Federal Court. The project will be finalised with the section 44 project once the High Court has handed down its judgment in *Collector of Customs v Agfa-Gavaerz Limited*.

AAT Review of Decisions under the Corporations Law

In May, the Council responded to that part of the Corporations Law Simplification Task Force consultation paper "Takeovers—Proposal for Simplification" that deals with review by the Administrative Appeals Tribunal of decisions of the Australian Securities Commission (the ASC) in the takeovers area.

The takeovers papers suggests that "[t]he substantive dispute [in an application for review] is usually not between the applicant for review and the ASC, but between parties to the takeover [and that it] is undesirable to allow merits review by the Administrative Appeals Tribunal to be used to frustrate hostile takeovers."

Currently, nearly all decisions of the ASC under the Corporations Law are reviewable. The takeovers paper recommends that the following ASC decisions not be reviewable by the AAT:

- whether to exercise its exemptions and modification powers under section 728 and 730 in relation to takeovers or proposed takeovers;
- whether to register a bidder's statement under section 644; and
- whether to refer a matter to the Corporations and Securities Panel under section 733.

The Council's response is that modification and exemption decisions should continue to be reviewable by the AAT. The main reason is that there is no evidence to suggest that merits review is a problem or is frequently being used to frustrate hostile takeovers.

In any case, even if the motive behind a particular application for merits review might be to frustrate the takeover, the Council considers that merits review should continue to be available so that the correctness of the primary decision can be reviewed. Supporting this, the Council's response sets out what the Council considers to be the primary objective of merits review provided by the AAT: that all administrative decisions of government are correct and preferable in individual cases. There is also the flow-on effect of review of improving primary decision making. Further, the Council considers that the Task Force's proposal goes too far in that it excludes from merits review *all* persons affected by a modification or exemption decision, even when the decision is not in respect of a hostile takeover.

The Council notes that the Tribunal already has existing powers to expedite proceedings and to dismiss frivolous or vexatious applications.

The Council concludes that the ASC's decision to register a bidder's statement was not appropriate for merits review as it is difficult to see the benefits merits review would provide in these circumstances. However, the Council considers that a bidder should continue to be able to seek review of a decision to refuse to register the statement.

The Council concludes that a decision of the ASC to refer a matter to the Corporations and Securities Panel was not suitable for merits review as it was a decision of a preliminary or procedural nature.

Further information on this subject can be obtained from the Council's project officer Gabrielle Lewis on ☎ (06) 247 5100.

Administrative Appeals Tribunal

New jurisdiction

Since the last issue of *Admin Review*, jurisdiction has been conferred on the AAT, or existing AAT jurisdiction has been amended, by the following legislation: