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:

Air Navigation (Aircraft Emissions) Regulations

Customs Tariff Act (147 of 1995)

Higher Education Funding Amendment Act (135 of 1995)

Human Services and Health Legislation Amendment Act (No. 3) (149 of 1995)

Industrial Relations and Other Legislation Amendment Act (168 of 1996)

International Shipping (Australian-Resident Seafarers) Grants Act (151 of 1995)

Law and Justice Legislation Amendment Act (No. 1) (175 of 1995)

National Food Authority Amendment Act (152 of 1995)

Ozone Pro' 'ction Amendment Act (124 of 1995)

Primary Industries Levies and Charges Collection (Vegetable) Regulations (SR 18 of 1996)

Social Security (Non-Budget Measures) Legislation Amendment Act (105 of 1995)

Social Security and Veterans' Affairs Legislation Amendment Act (1 of 1996)

Student and Youth Assistance Amendment (Youth Training Allowance) Act (No. 2) (155 of 1995)

Superannuation Industry (Supervision) Legislation Amendment Act (144 of 1995)

Sydney Airport Curfew Act (134 of 1995)

Trade Marks Act (119 of 1995)

Transport Legislation Amendment Act (No. 2) (89 of 1995)

Veterans Affairs (1995-96 Budget Measures) Legislation Amendment Act (128 of 1995)

Veterans Affairs (1995-96 Budget Measures) Legislation Amendment Act (No. 2) (146 of 1995)

Wildlife Protection (Regulation of Exports and Imports) Amendment Act (121 of 1995)

AAT decisions

Constitution of AAT on rehearing a matter remitted by the Federal Court

In *Strang and Siddha Yoga Foundation and the Department of Immigration and Ethnic Affairs* (19 December 1995) the AAT (Senior Member Dwyer) considered the issues of whether the same single member Tribunal could consider a matter remitted by the Federal Court for re-hearing on one issue only. In this case the Tribunal was constituted for the rehearing by the same member who had heard the original application.

One of the applicants argued that it would be 'reinventing the wheel' if a differently constituted Tribunal were to deal with the part of the matter that had been remitted for further hearing.

The other applicant argued that the Tribunal for the rehearing should be differently constituted for 3 reasons. Firstly, the Tribunal which previously dealt with the matter was functus officio. Secondly, as the Federal Court had not directed under section 44(5) of the AAT Act that the matter be remitted to the same Tribunal, it should be re-heard by a differently constituted Tribunal. Thirdly, the rehearing was a fresh matter and should therefore be heard by a different Tribunal.

The Tribunal concluded that there was no reason why the matter could not be re-heard by the same Tribunal.

In response to the applicant's arguments, Senior Member Dwyer noted firstly, that section 44(6) of the AAT Act raises the clear implication that a matter can be, but need not be, reheard by the same Tribunal. Secondly, it could be argued that, as the Court had not remitted the matter to a different Tribunal, it should be re-heard by the same Tribunal. In response to the applicant's third submission, the Tribunal distinguished the authorities on which the applicant relied in support of the submission.

The first authority distinguished, *Re Trimboli and Secretary, Department of Social Security* (1990) 21 ALD 554 dealt with the reconstitution of the Tribunal where the member who originally heard the matter was no longer a member of the Tribunal and said nothing as to whether or not the original member, if still a member of the Tribunal, should or may constitute the Tribunal for the rehearing.

The second authority, *Northern New South Wales FM Pty Limited v Australian Broadcasting Tribunal (1990) 26 FCR 39,* was distinguished on the basis that in that case the Tribunal's original decision had been set aside 'in toto' and the matter had been remitted for a full rehearing. The Federal Court had said there that the reason why a matter, on rehearing should be constituted by a differently constituted Tribunal in that situation was because the member originally hearing the matter would have formed a view upon the facts which would need to be determined in the rehearing. Senior Member Dwyer noted that in the present case, the issue to be determined on rehearing was an issue that had not been fully argued at the original hearing and was not an issue on which the Tribunal had already expressed a concluded view.

The Tribunal agreed that reconstituting the Tribunal when only one issue has been remitted would be 'reinventing the wheel' and saw no reason to disqualify herself or to ask the President to reconstitute the Tribunal in a different way. [GM]

Source of ASC power to waive late lodgement fees - AAT jurisdiction

The AAT has held that it does not have jurisdiction to review a decision of an officer of the Australian Securities Commission (ASC) to refuse to waive a late lodgment fee for an company's annual return.

In *Re Bajaur Holdings Pty Ltd and the Australian Securities Commission* (15 February 1996) the Tribunal was asked by the applicant to review a decision of an ASC officer to refuse to waive a late lodgment fee. The Tribunal (Deputy President McMahon) concluded that the power to waive the fee was given by section 70C of the *Audit Act 1901* and the Tribunal did not have jurisdiction to review decisions made under that section.

The Corporations Law imposes an obligation on companies to lodge annual returns. It also imposes a general obligation to pay a fee to the Commonwealth that is prescribed by the Corporations Regulations when an annual return is lodged.

Although section 1359 of the Corporations Law preserves any other power of the Commonwealth to waive or reduce fees that would otherwise be payable under the Corporations Law, section 1359 makes it clear that the source of the power to waive or reduce fees is to be found elsewhere.

In coming to this conclusion the Tribunal found that the only relevant power to waive the fees for late lodgment of an annual return is the power of the Minister for Finance under section 70C of the Audit Act. Under that section the Minister for Finance has the general power to waive on behalf of the Commonwealth its right to the payment of any amount payable to it. Under section 70A of that Act the Minister for Finance may delegate his or her power under the Act.

When the ASC officer refused to waive the late lodgment fee she was exercising the delegated power of the Minister for Finance under section 70C of the Audit Act. As there was no provision in any legislation for the AAT to review decisions under the Audit Act, the AAT could not review the decision of the ASC officer.

The Tribunal also noted that the ASC officer was not appointed under the Corporations Law to the position to which the delegation was given under the Audit Act. She was appointed either under the Public Service Act 1922 or under Part 6 of the ASC Law. The decision to refuse to waive the fees was not made by the ASC or by a staff member in the exercise of a delegation of the ASC. The fact that the officer was a member of the ASC's staff

did not make her decision a decision of the Commission. The decision of the ASC officer acting under the delegation was deemed to be the decision of the Minister for Finance because of section 34AB of the *Acts Interpretation Act 1901* and section 70A(2) of the Audit Act.

The Tribunal pointed out that section 1317B of the Corporations Law allowed the Tribunal to review decisions under the Corporations Law made by the Minister, the ASC and the Companies and Auditors Liquidators Disciplinary Board. The Minister is defined to be the Minister for the time being administering the Corporations Law — at that time the Attorney-General.

Section 1317B did not empower the Tribunal to review the decision of any minister other than the Attorney-General. Nor did it empower the Tribunal to review decisions made by a staff member of the ASC under a delegation by another minister. It was not sufficient for the purposes of section 1317B that the decision was made under another enactment but in respect of the Corporations Law.

The Tribunal rejected the argument that an estoppel arose because the respondent informed the applicant by letter of the decision not to waive the late lodgment fee and stated that the decision could be reviewed by the Tribunal. The Tribunal considered that an erroneous statement by the respondent as to the Tribunal's power to review decisions did not act as an estoppel so as to increase the Tribunal's jurisdiction. "Estoppel will not operate so as to contradict a statute or to extend the authority of a decision-maker beyond the powers given by statute" (Davies and Branson JJ in *Minister for Immigration and Ethnic Affairs v Polat* (1995) 37 ALD 394). [GL]

Freedom of Information

Application for declarations under section 62(2) of FOI Act - discretion of Tribunal - adequacy of section 26 statement of reasons for decision

Under Section 26(1) of the *Freedom of Information Act 1982* (Cth) (the Act) a decision-maker who refuses to grant access to a document in accordance with a request under the Act is required to give the applicant a written statement of reasons for the decision. The statement of reasons must state the findings on any material questions of fact and refer to material on which the findings are based as well as stating the reasons for the decision. If the applicant considers that the content of the notice given under section 26(1) does not comply with the requirements set out in that section they may apply to the AAT for a declaration under section 62(2) of the Act that the notice does not satisfy the requirements of section 26(1) and requiring the person responsible for giving the notice to fully comply with the statutory obligation in section 26(1).

The AAT matter, *Luton and Commissioner of Taxation* (Unreported, 19 February 1996) concerned an application for a declaration under section 62(2) of the Act in respect of a notice furnished to the applicant by an officer of the Australian Taxation Office (ATO) pursuant to section 26(1) of the Act.

The applicant had sought access to a particular document and all documents utilised or collected in the process of compilation of the particular document. He had also sought access to documents and information in relation to the implications of a recent High Court decision for the administration of child support legislation. The statement of reasons given to the applicant under section 26(1) of the Act identified a number of documents falling within the first part of the request and claimed that the documents were exempt from release under the Act. In relation to the second category of documents requested the section 26(1) statement prepared by the ATO read:

> You are advised no such document exists as the [High Court] case has not been considered by the office from the perspective of the Child Support legislation. Accordingly, I am obliged to deny access to the documents relevant to this part of your request.