

Amending the functions of the ARC

The Committee considers that it is undesirable to place extensive reliance on the incidental power conferred by s. 51(2) of the Administrative Appeals Tribunal Act 1975.

Recommendation No. 7

Accordingly, the Committee **recommends** that s. 51(1) of the *Administrative Appeals Tribunal Act 1975*, which sets out the Administrative Review Council's functions, should be amended to reflect more clearly all the major activities that it currently performs, in particular to underpin its current focus on improving primary decision-making.

Recommendation No. 8

The Committee **recommends** that, if the proposed merger of the five main merits review tribunals goes ahead, the amendments to the Administrative Review Council's functions take into account the impact of the merger on them.

The Minister's power to refer matters and issue directions to the ARC

Recommendation No. 9

The Committee recommends that the *Administrative Appeals Tribunal Act 1975* be amended to explicitly empower the Minister to issue directions to the Administrative Review Council and to refer matters to it for inquiry and report.

Recommendation No. 10

The Committee further recommends that the *Administrative Appeals Tribunal Act 1975* be amended to provide that Administrative Review Council project reports are to be delivered to the Minister and tabled by the Minister in the Parliament.

Government responses to ARC reports

Recommendation No. 11

The Committee recommends that the Government give an undertaking to respond to all Administrative Review Council project reports within twelve months of their delivery."

The Council will await the Government response to all the Committee's recommendations with considerable interest. Council welcomes the endorsement for its work expressed throughout the report and in the evidence of almost all the submissions and evidence given to the Committee.

Council Advice on Review of Decisions under the Corporations Law

As reported in *Admin Review* 47, the Council completed its work on this project at the end of 1996 and provided advice to the Attorney-General on the appropriateness of review by the Administrative Appeals Tribunal of decisions made under the Corporations Law. In its 1996-97 Annual Report, the Council published its advice to the Attorney-General. The following is an outline of that advice.

All decisions taken under the Corporations Law by the Minister, the Australian Securities Commission and the Companies Auditors and Liquidators Disciplinary Board are subject to review by the Administrative Appeals Tribunal unless specifically exempted. The Tribunal and the Federal Court have had to determine what matters are decisions for the purposes of this conferral of review jurisdiction. Experience has shown that it can be difficult to determine when merits review is available and that sometimes review rights may be provided where this is inappropriate.

The Council examined the decisions which may be taken under the Corporations Law against its own Guidelines (as spelt out in the Council's Seventeenth Annual Report). The Council's *prima facie* position, as stated in the Guidelines, is that a person whose interests are

affected by a decision should be able to seek merits review of the decision.

Decisions Not Within The Prima Facie Test

Applying this test, the Council noted three types of decisions made under the Corporations Law which did not appear to come within the Council's *prima facie* test as being suitable for merits review.

a. Mandatory Decisions

There are some "decisions" within the Corporations Law which might be described as "mandatory". These are decisions where there is a statutory obligation to act in a certain way, for example, under section 145 (2), the Australian Securities Commission (the ASC) must register an applicant as a company by registering the application and allocating a registration number to it. In these situations, the ASC probably makes no decision. However, given the ASC's statutory obligation to notify people of their appeal rights when a reviewable decision is taken, the Council expressed the view that the Corporations Law should make it clear that these decisions are not reviewable by the AAT.

b. Decisions to Institute Proceedings

The Council's view was that decisions to institute proceedings against a person or company should not be reviewable by the AAT. This is a question of basic principle, namely, that the right to proceed to a court for resolution of issues in dispute must always be available. It is possible that legislation might require another step to be discharged before that right is exercised, for example, a requirement to try alternative dispute resolution first. However, if the statute is silent then no restriction on the right to proceed to a court should be read into it. A power to seek review of a decision to go to court would be such a restriction or inhibition on the right to proceed.

Further, the Council expressed the view that a decision to apply to another forum for the resolution of an issue should not be reviewable, for example, an application by the Australian Securities Commission to the Companies

Auditors and Liquidators Disciplinary Board for the cancellation of an auditor's registration should not be reviewable.

Steps which are an integral part of the process of the institution of proceedings should also be excluded from review. A particular example of this is section 1313(1) which provides that, where the ASC has reason to believe that a person has committed certain minor offences, the ASC may give the person a notice requiring the person to pay the prescribed penalty. If the penalty is not paid then proceedings may be instituted.

The issue of how a penalty might be imposed or collected is not appropriate for review in this instance as the imposition of a civil penalty/fine can be seen as a step in the process leading to the institution of proceedings (if the penalty/fine remains unpaid).

c. Decisions to Delegate a Power or Appoint a Person to Undertake a Specified Function

Council noted that decisions to appoint a person to undertake a specified function should not be subject to merits review because the decision is a decision relating to personnel and internal management. Where the appointment is of a specified person who has been chosen because of their particular expertise for the position, the decision to appoint should not be reviewable, except perhaps by the body seeking the appointment of the person. Decisions involving an appointment of a person to a specified function should be distinguished from decisions to grant a person the qualifications which allow them to perform a specified function, for example, decisions granting a person a licence, approving a person to act as an auditor, liquidator, receiver, etc. The latter decisions should be reviewable. Decisions involving a delegation of a function and power to a person should not be subject to merits review because the decision does not, of itself, affect that person's interests.

Exceptions to the Prima Facie Rule

The Council's Guidelines also identify exceptions to the Council's prima facie rule which are decisions that may not be appropriate for merits review. These decisions can be summarised as:

- (a) preliminary or procedural decisions
- (b) decisions of a law enforcement nature
- (c) quasi-legislative decisions
- (d) decisions where there is no appropriate remedy on review
- (e) decisions involving extensive inquiry processes
- (f) polycentric decisions
- (g) decisions that involve the exercise of a discretionary power to determine a penal sanction
- (h) policy decisions having high political content.

Applying these categories, the Council identified a number of decisions which are currently reviewable by the AAT but which the Council felt were not appropriate for merits review. Council also identified a number of decisions which did not fall within the Guidelines but which it nevertheless felt should not be reviewable by the AAT. These decisions were ones with a significant public interest element and:

- there is a need to take rapid action to restore or maintain investor confidence in the market; or
- the decision is essentially a Government financial policy decision rather than a decision about the merits of a particular application.

Decisions that fell within this category will typically :

- involve an evaluation of complex and competing facts and policies (going beyond fact finding);
- have a significant impact on markets;

- involve consultation with expert bodies or market participants;
- affect national and international investment confidence;
- involve a high level of political accountability.

The Council's view was that very few decisions under the Corporations Law will fall within this description and it is unlikely that decisions under other legislation would come within this description.

Decisions which can be characterised in this way would include a decision of the Minister to approve a body corporate as a stock exchange. Such a decision is clearly a matter of significant public interest. The decision would be based upon in-depth advice from the Minister's department, from the Australian Stock Exchange and from other interested parties. The decision would impact significantly upon the financial markets and would impact upon national and international investor confidence. For these reasons, Council was of the view that such a decision should not be subject to merits review.

Current work program – developments

The Contracting Out of Government Services

In early March the Administrative Review Council released its Issues Paper on the administrative law implications of contracting out of Commonwealth Government services. A summary of the Issues Paper is one of the focus articles in *Admin Review* 48.

The Council sought comments and submissions on the Paper and has been conducting consultations around Australia.

The Council will shortly be releasing a Discussion Paper on Access to Information in the context of the contracting out of Government services. A copy will be sent automatically to people and organisations who received a copy of the earlier Issues Paper. The Council's fi-