pay for interpreters where applicants could not easily do so themselves. In practice, the Tribunal invariably paid for interpreters for unrepresented applicants and sometimes did so for represented applicants.

As a result of the review the Tribunal has decided that, from 1 July 1997, it will book and pay for interpreters for all clients who need one, irrespective of whether or not they are represented.

Community Education Kit

The Tribunal has produced an "Information kit & Training package" for advocates and community workers. This package was compiled by Ms Loula Rodopoulos, a Tribunal Member based in Melbourne, and Mr Peter Kent, Manager Corporate Support.

The package covers the Administrative Appeal Tribunal's processes, as well as those of the Social Security Appeals Tribunal, the Veterans' Review Board, the Immigration Review Tribunal, the Refugee Review Tribunal and the Ombudsman.

The package was prepared in loose leaf format so that it can accommodate future changes in the structure of the Commonwealth administrative review system. The package was sent to approximately 150 peak bodies including community legal centres, welfare rights centres, disability, ethnic, Aboriginal and Torres Strait Islander organisations, women's and veterans' organisations and other advocates.

Other Recent Access Initiatives

Additional information sheet for overseas applicants

A number of people lodge their applications for review of a government decision while they are overseas, or they need to go overseas while their case is processed. The procedures followed in these cases are different because conferences and hearings cannot be held. The current general information leaflets do not provide sufficient information to these applicants. Consequently the Tribunal has produced an "Additional information sheet for overseas applicants" which is available in English, Greek, Turkish, Serbian, Croatian and Italian.

Audio tapes

The Tribunal's series of five information pamphlets have been recorded on tapes for people with a visual impairment. The tapes have been distributed to disability organisations around Australia.

Large print leaflets

The Tribunal's new plain English information pamphlets are also available in large print (18 point) and in an easy-to-read font for people with a visual disability.

Video tapes

The Tribunal's video "Getting Decisions Right" was recently subtitled in an additional four languages: Greek, Turkish, Serbian and Italian. The video is also subtitled in English for people with hearing difficulties.

AAT decisions

Continued payments of AUSTUDY allowance through administrative error after applicant had advised Department that he was ceasing full-time study – applicant unsuccessful in attempting to have payments stopped – whether applicant received payments in good faith – *Prince and Secretary, Department of Employment, Education, Training and Youth Affairs* (No N95/1588 – decision (11753) 7 April 1997)

During 1993, the applicant had been studying full-time and receiving AUSTUDY payments. At the end of 1993 he was advised that he would not be permitted to continue his course. He attended the Student Assistance Centre within a few days of receiving this advice, informed them of the advice he had received, completed a form and was advised that the

AUSTUDY payments would cease after the first week in January 1994. In February 1994 he realised the payments were continuing and after attempting unsuccessfully to contact the Department he contacted his local Member of Parliament's office where a member of staff offered to assist. In early March that staff member provided him with a telephone number to ring where he was advised not to worry about the overpayment and the Department would contact him if there was a problem. Shortly thereafter, he went back to his MP's office and was subsequently given another telephone number but was unable to get through. He then spent the AUSTUDY money on expenses associated with his search for work. Payments were ceased during March and the Department subsequently sought recovery of the overpayment of $1457.17.

At the time of the hearing $258.32 of the debt had been recovered. The applicant conceded that he was not eligible for AUSTUDY payments in 1994 and the respondent conceded that the debt resulted solely from administrative error. The issues were whether the applicant had received the AUSTUDY payments in good faith and what was the applicable legislation.

Section 289 of the *Student and Youth Assistance Act 1973*, which provided that the Secretary of the Department of Employment, Education, Training and Youth Affairs must waive a debt if it arose solely because of administrative error and the person received the payments in good faith, was amended prior to the hearing. New section 289(1) provided that the Secretary must waive the proportion of a debt that is attributable solely to administrative error if the debtor received the payments in good faith. The amending Act provided that new section 289 applied to the amount of debts arising before 1 January 1996 that were outstanding at the start of that day. The applicant submitted that he had an accrued right to have the matter determined under the pre-amendment section 289 and the respondent submitted that section 289 as amended should apply.

Following an earlier decision on identical amendments, the Tribunal (Senior Member M T Lewis) decided that section 289 as amended applied to the debt outstanding at 1 January 1996 and section 289 prior to amendment applied to the amount of the debt already recovered.

On the matter of good faith, the Tribunal was satisfied that the applicant received all payments in good faith and determined that the debt, including the amount already recovered, should be waived. In respect of the payments made during January and early February, the Tribunal found that the applicant had received them in good faith because he had complied with his obligation to inform the Department that he was no longer eligible for AUSTUDY and he was unaware that the payments were continuing. In respect of the payments made from mid-February to mid-March, the Tribunal found that the applicant demonstrated honesty of purpose and reasonable diligence in attempting to clarify his suspicion that payments were continuing and to have the payments stopped. While he spent the money in his account without regard to whether he was entitled to the money he was withdrawing, he stated that at all times he was prepared to repay the money.

The decision is the subject of an appeal to the Federal Court.

Civil Aviation - application to operate airship in Sydney area – whether airship will have a significant noise impact on the public – *Lightship America Inc & Virgin Lightships Inc and Department of Transport and Regional Development* (No N 96/1556 – decision (11773) 15 April 1997)

This was an application to review a decision made under regulation 9AB of the Air Navigation (Aircraft Noise) Regulations. That regulation provides that the Minister may grant permission for aircraft (not covered by other regulations) to engage in air navigation. Regulation 9AB had been specifically inserted so that the applicant's request for permission to

operate an airship in the Sydney area could be dealt with.

The applicant was given permission in September 1996 to operate an airship "the Lightship" for 6 months in Melbourne and to operate at particular areas for limited periods (such as over the Bathurst 1000 car race during October 1996) but was refused permission to operate in the Sydney area for a 12 month period from mid February 1997. The reasons for the refusal included that the Lightship would be noise intrusive and because the Bond Skyship, which operated from Sydney Airport in 1987, was the subject of a large number of complaints.

The Tribunal (Deputy President McMahon) found that the operation of the Lightship in Melbourne had provoked few complaints. The applicant's expert witness, an acoustical consulting engineer, maintained that noise from the Lightship would be significantly less than noise from ordinary urban sounds in residential areas removed from traffic. The Tribunal also accepted evidence, based on the Melbourne experience, about the activities in which the Lightship would be engaged and that it would not fly the same route all of the time. Thus the Tribunal concluded that it would be unlikely that Sydney operations would be unduly noise intrusive.

The Tribunal also concluded that the comparison with the Bond Skyship was not a reliable indicator of likely outcome if permission was granted for operation of the Lightship in the Sydney area. It was observed that the evidence of complaints of noise from Sydney Airport was irrelevant as the applicants proposed to base the Lightship's operations at Bankstown Airport. The biggest difference between the two aircraft was that the Skyship had a noticeable tonal component in the sound it emitted during an over flight. This tonality affects one's perception of noise and, in effect, makes it more annoying. The Lightship had no such component. Thus the Tribunal found that the Lightship could be expected to cause a smaller perception of noise of an annoying variety even when (and the Tribunal heard that this would not often be the case) it generates the same number of decibels as the Skyship.

The Tribunal largely accepted the conditions proposed by the applicant and those operating conditions, including engine speed and operating hours, formed part of the reasons for decision. The Tribunal also noted that the relevant regulation continued to operate so the Department could revoke permission should the airship have a significant noise impact.

This decision is the subject of an appeal to the Federal Court.

Whether appeal to the Administrative Appeals Tribunal lodged by a person who is, or subsequently becomes, bankrupt is 'property' under the provisions of the *Bankruptcy Act 1966* – *(Unnamed Applicants) and Commissioner of Taxation* (No VT94/228-237 – decision (11885) 21 May 1997)

This case was a challenge to the jurisdiction of the Tribunal to hear and determine several applications, each seeking review of a decision of the Commissioner of Taxation disallowing notices of objection filed by the applicants against assessments made by the Commissioner.

The notices of objection were lodged in August 1992. The applicants executed a deed of arrangement under the Bankruptcy Act in January 1994 and a trustee was appointed to administer their affairs. In April 1994, the Commissioner disallowed the objections filed in 1992 and the applicants subsequently each lodged an appeal to the Tribunal to review the Commissioner's decision. The Commissioner challenged the right of the applicants to lodge and pursue the right of review on the basis that the statutory right of appeal is "property" and as such could only be dealt with by the trustee under the terms of the deed of trust. The applicants elected not to make any submissions to the Tribunal.

The trust deed defined "property" by reference to section 5(1) of the Bankruptcy Act, namely

> "Real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent arising out of or incident to any such real or personal property."

The Schedule to the trust deed referred to "all the divisible property of the debtors". The term "divisible property" is defined by reference to section 187(1) to be property that would be divisible amongst creditors and the definition of what is property divisible amongst creditors is found in section 116(1) of the Bankruptcy Act, namely

> "Subject to this Act:
>
> (a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him, or has devolved or devolves on him, after the commencement of the bankruptcy and before his discharge;
>
> (b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his discharge;
>
> (c) property that is vested in the trustee of the bankrupt's estate by or under an order under section 139D; and
>
> (d) money that is paid to the trustee of the bankrupt's estate under an order under section 139E;
>
> is property divisible amongst the creditors of the bankrupt."

The Tribunal (Deputy President McDonald) noted conflicting views in previous AAT and Federal Court decisions on whether a right of review was property for bankruptcy purposes. Deputy President McDonald took the view that there were cases where an applicant may find him or herself disadvantaged by appealing to the Tribunal. This would arise if the Tribunal takes the view that, on the material before it, it is satisfied that the correct or preferred decision is different from the original decision and that that difference results in a finding less favourable to an applicant. If that was to occur, then it may result in the estate of a bankrupt being placed in a worse position than if the review had not been carried out. As a general matter of policy, the Trustee in Bankruptcy would clearly have an interest in any such appeal just as he would if an applicant was to succeed and receive a benefit.

The Tribunal concluded that in those circumstances a right of appeal to the Tribunal does amount to a proprietary right which vests in the trustee. Accordingly, in the case such as the one before it where the trustee declined to participate in the continuation of the appeal, the Tribunal should regard the appeal as being discontinued under the provisions of section 42A(1B) of the *Administrative Appeals Tribunal Act 1975*.

Whether Tribunal has power to reconsider its decision as to costs – *Salvador Sanchez and Comcare* (No A95/329 – decision (11493A) 30 May 1997)

In December 1996, the Tribunal varied a decision of an Independent Review Officer of Comcare to cease compensation and ordered that the applicant's costs be paid by the respondent. In March 1997, the respondent sought re-listing before the Tribunal for argument in relation to costs. The Tribunal (Senior Member Bayne) invited written submissions concerning the power of the Tribunal to re-list the matter.

The Tribunal did not accept the applicant's submission that the costs order "was made with neither party having been offered the opportunity to make any submission with respect to the costs order" but examined the question

whether the Tribunal had power to re-consider the costs order.

Drawing on principles established in previous cases, Senior Member Bayne noted that the Tribunal has no power to revisit a decision it has made, subject to the slip rule (section 43AA), the power to reinstate a matter it has dismissed (section 42A(10)) and any statutory provisions to the contrary. However, unless the Tribunal deals with the costs question in delivering its written reasons, it should be assumed that the issue is reserved and may be raised by either party.

In response to the applicant's argument that section 33(3) of the *Acts Interpretation Act 1901* (the power to make, grant or issue an instrument includes the power to repeal, rescind, revoke, amend or vary it) enabled the Tribunal to revoke the order, he noted that some Tribunal decisions had taken the view that this section did enable the Tribunal to revoke an aspect of a decision it had made. However, whether these decisions are correct depends upon whether a decision of the Tribunal is an "instrument". Cases on section 33(3) made clear that the section referred to the power not the manner of its exercise. Section 43(2) of the *Administrative Appeals Tribunal Act 1975* provides that the Tribunal may give reasons for any decision either orally or in writing. Thus, the Tribunal could make a decision without creating an instrument, ie a document. Senior Member Bayne concluded that section 33(3) does not confer a power on the Tribunal to revoke or vary a decision it has made.

While not argued by the parties, the Tribunal then considered whether section 43(1) of the Administrative Appeals Tribunal Act should be read as implying that the Tribunal may vary or revoke any decision it makes on the basis that a power to take administrative action may carry by implication the power to vary or revoke that action. However, having regard to the existence of specific powers in the Act to vary decisions (section 42A(10) and section 43AA), the Tribunal concluded that it would not be proper to imply such a power into section 43.

The Tribunal did not endorse the applicant's suggestion that because the Tribunal's decisions are published in the absence of the parties it should, as a matter of practice, not deal with costs but simply advise the parties that they are at liberty to approach the Tribunal with respect to costs.

Freedom of Information – whether numismatic business of Reserve Bank of Australia is "banking operations" for the purposes of general FOI exemption – application for documents concerning tender bids – *Peake and the Reserve Bank of Australia* (No V96/363 – decision (11977) 24 June 1997)

The applicant, who was a bank note collector for many years, had sought access to documents concerning the numismatic business of a division of the Reserve Bank, Note Printing Australia (NPA). The Bank released some of the information requested and claimed exemption for other documents under section 43 of the *Freedom of Information Act 1982* (the FOI Act) arguing that the commercial value of the information sought would be destroyed or greatly diminished if disclosed. It also argued that the disclosure of the documents would have an unreasonable adverse effect on the business activities of NPA.

The Tribunal (Deputy President McDonald, Mr D L Elsum AM and Mr C G Woodard, Members) noted that the applicant argued that private collectors were missing out on being able to buy desirable items direct from NPA because NPA allocated a large proportion of its product direct to dealers; collectors then had to buy from dealers at substantial mark-ups. The Tribunal observed that the applicant appeared to wish to challenge the way in which NPA conducted its numismatic business but that, while the applicant was free to make such a challenge, the Tribunal's function under the FOI Act was more limited and would not permit it to address his broad concerns.

The Tribunal heard that the numismatic business was extremely competitive and profitable. The Bank led evidence from various dealers

who stated that they provided detailed and sensitive information in the course of a tender bid, and did so in the expectation that the information would remain confidential. The Tribunal accepted that the documents contained financial details of the tender bids which, if released, would disclose many of the details of the commercial practices of the dealers, such as profit margins and volume of sales.

The Tribunal concluded that the commercial value of the information would be adversely and unreasonably affected if disclosed and, therefore, the documents were exempt under section 43(1)(b) of the FOI Act and that many of the documents were exempt under section 43(1)(c)(i) on the basis that disclosure could be reasonably expected to adversely affect the commercial operations of the Bank.

The Bank also sought to rely upon section 7(2) and Part II of Schedule 2 of the FOI Act which provides an exemption in respect of the Bank carrying out its "banking operations". The *Reserve Bank Act 1959* does not define "banking operations". The Tribunal noted that the Bank was required by statute to carry out a number of functions and some, such as the prudential supervision and monitoring of non-government banks, were not "banking operations". The statutory power to issue currency notes was clearly distinguishable from its "banking operations". Accordingly, the exemption did not extend to documents concerning the Bank's numismatic business.

High Court and Federal Court Decisions of Particular Interest

The following case summaries of recent decisions of administrative law interest from the High Court and Federal Court have been contributed by Alan Robertson, Senior Counsel and former Member of the Administrative Review Council.

Administrative law – Judicial review – Practice and procedure – Joinder of party – Bias – Security for costs – Application to cross-examine – Proper place of proceedings – *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors* (Federal Court of Australia, Branson J, 1 November 1996); *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors* (Federal Court of Australia, Sackville J) (1997) 142 ALR 632

As is well known, in October 1996 the Friends of Hinchinbrook Society applied to the Federal Court for judicial review of the decision of the Minister for the Environment giving approval to Cardwell Properties Pty Limited pursuant to sections 9 and 10 of the *World Heritage Properties Conservation Act 1983* to carry out certain works at Oyster Point.

Before the proceedings were ready to be heard, Branson J dealt with a number of interlocutory applications.

First, she refused to disqualify herself from further hearing the matter by reason of her acquaintance with the Minister for the Environment, a Senator from South Australia the State from which her Honour had recently moved. Her Honour had disclosed the matter to the parties.

Secondly, her Honour dealt with an application by the State of Queensland to be joined under section 12 of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act) and pursuant to the Rules of the Federal Court.

The application under the AD(JR) Act was granted subject to the condition that Queensland would not at any time be entitled to make a claim for costs against any party to the proceeding. The basis of the joinder was that Queensland had had extensive involvement in, and expended significant resources on, investigation and facilitation of the proposed development. However, section 12 was held to allow only joinder for a limited purpose, that is the purpose of the AD(JR) Act, rather than for the other jurisdictional bases of the claim. The application by Queensland to be joined as a party under the Rules was refused on the basis that it was neither a necessary nor a proper party. Queensland was however given leave to be