

right of review ultimately lies to the AAT.

- . Ombudsman/AAT. This project examines the relationship between the Ombudsman and the AAT. A draft report has been prepared and it is hoped that a final report will be transmitted in the near future.

UPDATE ON COUNCIL RECOMMENDATIONS

Citizenship

As reported in the last issue of Admin Review, most of the Council's recommendations made in its 7th Report, Citizenship Review and Appeals System, were adopted in the Australian Citizenship Amendment Bill 1984. The Bill has since been enacted into law.

Australian Broadcasting Tribunal

The Minister for Communications, Mr Duffy, announced on 10 September 1984 that the Government would implement virtually all of the recommendations made by the Council in its 12th Report, Australian Broadcasting Tribunal Procedures. The ABT's procedures are to be streamlined, including the establishment of a two-tiered inquiry procedure, elimination of specific licence inquiries in certain cases, and reduction in the number of members required to sit on an inquiry.

Repatriation

As reported in the last issue of Admin Review, the Repatriation Legislation Amendment Bill 1984 substantially adopted recommendations made by the Council in its 20th Report, Review of Pension Decisions under Repatriation legislation. The Bill was assented to on 9 October 1984.

Administrative Appeals Tribunal

NEW JURISDICTION

The following recent legislation confers jurisdiction on the AAT:

- . Air Navigation (Aircraft Noise) Regulations
- . Air Navigation (Charges) Amendment Act
- . Australian Citizenship Amendment Act 1984

- . Biological Control Act 1984
- . Bounty (Two-stroke Engines) Act 1984
- . Co-operative Societies Amendment (No 2) Ordinance 1984 (ACT)
- . Fishing Legislation Amendment Act 1984
- . Insurance (Agents and Brokers) Act 1984
- . Meat Export Charge Collection Act 1984
- . Passports Amendment Act 1984
- . Repatriation Legislation Amendment Act 1984
- . Social Security and Repatriation (Amendment) No.2 Act 1984
- . Social Security and Repatriation (Assets Test and Budget Measures) Act 1984
- . Taxation Laws Amendment Act 1984
- . Veterinary Surgeons Legislation (Amendment) Ordinance 1984 (ACT)

KEY DECISIONS

Administrative Appeals Tribunal Powers

Not a Primary Decision Maker. The AAT is a statutory tribunal with power to review decisions. Accordingly, when, in the course of a review of a particular decision it appears that a the decision under review was not the 'correct or preferable' decision the Tribunal can vary the decision or set it aside and make a decision in substitution for the decision set aside. But that substituted decision must be related to the decision under review. Thus in Re Tradigrain Australia Pty Limited and Export Development Grants Board (No.1) (15 August 1984) the Tribunal ruled that it could not, in the course of a review of the Board's decision not to increase the amount of a grant to the applicant, decide that the amounts paid should be recovered. The Tribunal stated that the legislation under which proceedings for the recovery of an overpayment might be sought placed the responsibility for initiating such proceedings on the Board.

Confidentiality Orders. In Re Sheepskin and Opal Exporters and Export Development Grants Board (20 September 1984) the Tribunal considered a request by the Corporate Affairs Commission (SA) to reconsider a confidentiality order the Tribunal had made with respect to evidence presented to the

Tribunal in 1982 by the applicant partnership. The Tribunal concluded that disclosure to the CAC would not result in indiscriminate publication of the financial and business affairs of the partnership.

Administrative Appeals Tribunal Procedure

Overseas Evidence. The flexibility of the Tribunal's procedures for the receipt of evidence was illustrated in two recent cases. In Re Petropoulos and Director-General of Social Security (9 August 1984), where the applicant was at the time of the hearing living in Greece, the Tribunal received evidence on her behalf solely in the form of correspondence and statutory declarations. In Re Baldt and Director-General of Social Security (23 July 1984) the Tribunal ruled that it was not appropriate to reject an application for review in the absence of evidence when that absence resulted from overseas residence and ignorance as to the evidence required to support a claim. After suggesting that the Department might find it easier to resolve these matters if it prepared standard information for assisting overseas claimants to prepare their claims, the Tribunal directed that a letter drafted by the Tribunal be sent to the applicant. The Tribunal's action is a good example of how it may inform itself 'in such manner as it thinks appropriate' (AAT Act, para.33(1)(c)).

Withdrawal of Application. The Tribunal ruled in Re Eastman and Department of Treasury (17 August 1984) that there was no prohibition, express or implied in the AAT Act, upon an applicant withdrawing or discontinuing his application to the Tribunal.

Commonwealth Employees' Compensation : Incapacity for Work

The tests of incapacity for work applied by the Tribunal in social security, superannuation and defence force pension cases, and by the courts in repatriation cases, must be applied in relation to Commonwealth employees' compensation cases, the Tribunal ruled in Re Stevanovic and Australian Telecommunications Commission (6 July 1984). Thus, partial incapacity should not be found to exist simply because a person has a theoretical capacity, medically assessed, to perform some employment, and when the employer asserting the capacity of the person to perform light duties was not prepared to find or provide such employment.

Isolated Patients' Travel and Assistance Scheme : Meaning of 'Nearest Suitable Specialist'

The Tribunal ruled in Re Brooks and Director-General of Health (11 July 1984) that determining who was the 'nearest suitable specialist' for the purposes of IPTAAS, should take into account the suitability of the transport available,

bearing in mind the patient's condition. Thus, a child from Coffs Harbour suffering renal failure who had attended a specialist in Sydney to which there was a direct and daily return flight from Coffs Harbour (compared with Newcastle which, although a shorter journey, would have involved two stopovers on the way) had attended the 'nearest suitable specialist'.

Social Security

Overpayments. In reviewing a determination to recover an overpayment pursuant to sub-section 140(1) of the Social Security Act, the Tribunal emphasised that it could not make a decision finally determining the liability of the person from whom the overpayment was sought while at the same time asserting that it was proper that there should be a right of review with respect to administrative decisions involved in the recovery (Re Taylor and Director-General of Social Security, 5 July 1984).

Residence. In a case where the applicant had lived in both Italy and Australia over a number of years, the Tribunal discounted any notion that it was somehow morally improper for a person to take steps to bring himself within the provisions of the Social Security Act so as to attract the payment of a benefit under that Act (Re Petropoulos and Director-General of Social Security, 9 August 1984).

Handicapped Child's Allowance. In two recent cases the Tribunal has clarified the eligibility of persons for a handicapped child's allowance in respect of children absent for seven to nine hours at school. The Tribunal ruled that the requirement 'constant care and attention' looked to constant care and attention that was either continuous or continually recurring and not merely intermittent or spasmodic (Re Mrs W and Director-General of Social Security, 17 August 1984; Re Seager and Director-General of Social Security, 3 September 1984).

Statistical Trends

The figures in the table below for the July/September quarter confirm the expectations expressed in last issue of Admin Review that IPTAAS applications would begin to decline with reconsideration now being a pre-requisite to AAT review.

<u>Jurisdiction</u>	<u>No. of Applications to AAT</u>			
	Oct/Dec 1983	Jan/Mar 1984	Apr/June 1984	June/Sep 1984
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Social Security	204 (41.05%)	180 (35.57%)	175 (40.98%)	180 (37.19%)
IPTAAS	111 (22.23%)	144 (28.46%)	102 (23.88%)	84 (17.36%)
FOI	63 (12.68%)	43 (8.50%)	27 (6.32%)	77 (15.91%)
Compensation	67 (13.48%)	74 (14.62%)	55 (12.88%)	59 (12.19%)
Other	52 (10.46%)	65 (12.85%)	68 (15.93%)	84 (17.36%)
TOTAL	<u>497</u>	<u>506</u>	<u>427</u>	<u>484</u>

Commonwealth Ombudsman

Greek Conspiracy Case

After several years of investigation including a delay of about 12 months by reason of the Kavvadias cases (see [1984] Admin Review 9 and below) the Ombudsman has completed a report on the so-called 'Greek conspiracy case'. The report is receiving attention within the Department of Social Security

Privacy of Investigations : Disclosure of Draft Report under FOI (Round Two)

The Federal Court has resolved, largely in favour of the Ombudsman, the question whether a complainant has a right of access under the FOI Act to a draft report of the Ombudsman. Justice Sheppard held that the draft report was an internal working document and that, except for purely factual material, disclosure would be contrary to the public interest for the reason that the document contained criticisms of