

- . Damages. Work in suspension.
- . Immunities, Privileges and Time Limits Affecting Statutory Authorities. Work in suspension.
- . Impact. Considerable work has been done on this project which aims to assess the institutional and community impact of recent reforms in administrative review. Case studies of four selected departments and authorities have been conducted and an integrated report will be prepared as soon as staff time can be made available.
- . Migration. This project deals with review of decisions under the Migration Act 1958 and related legislation. A draft report has been prepared and it is hoped that a final report will be transmitted in the near future.
- . Notification of Review Rights. The Council has begun work on a project examining notification of review rights. In the first instance it is examining notification of review rights where a right of review ultimately lies to the AAT.
- . Ombudsman/AAT. This project examines the jurisdictional relationship between the Ombudsman and the AAT. A discussion paper has been prepared and distributed, and a draft report is currently being written.

#### ADMINISTRATIVE APPEALS TRIBUNAL

##### New Jurisdiction

Meat and Livestock Corporation. The Australian Meat and Livestock Corporation Amendment Act 1984 provides that applications may be made to the AAT for review of decisions made by the Corporation to refuse to enter the particulars of a person upon a register and to remove the particulars of any person from the register.

Sex Discrimination. The Sex Discrimination Act 1984 empowers the Tribunal to review decisions of the Human Rights Commission relating to exemption from provisions relating to discrimination in employment and other areas.

Shipping. The Shipping Registration Amendment Act 1984 extends the existing jurisdiction of the AAT under the Shipping Registration Act 1984. The new decisions subject to review relate to entries in the register, entitlement to registration, and provisional registration.

Student Assistance. The Statute Law (Miscellaneous Provisions) Act (No. 1) 1984 amends the Student Assistance Act 1973 to provide for review by the AAT of decisions of Student Assistance Review Tribunals.

#### Proposed Jurisdiction

Citizenship. The Citizenship Amendment Bill 1984 proposes that the Tribunal should be empowered to review certain decisions under the Australian Citizenship Act 1948.

Patents. The Patents Amendment Bill 1984 proposes that the AAT should be empowered to review decisions of the Commissioner of Patents under section 131 of the Act (prohibition on the publication of certain information in respect of inventions).

#### Procedure

Generally - Onus of Proof. Rules on onus of proof have developed in the courts over centuries. They determine, among other uses, how an issue or a case should be decided where the court is in a state of uncertainty. Do these technical rules apply in the AAT (an administrative body, not a court)? How should the AAT resolve matters where it is uncertain? In a series of cases the AAT sought to avoid the application of rules as to onus of proof. Now, in McDonald v Director-General of Social Security (27 March 1984) these questions have been authoritatively dealt with for the first time by the Full Federal Court of Australia. All three judges (Justices Woodward, Northrop and Jenkinson) rejected the notion that judicial rules relating to onus of proof should apply in the AAT, although Justice Woodward stated in effect that they may be of assistance as a last resort. Two of the judges (Woodward and Jenkinson) indicated, in similar vein, how the AAT should resolve uncertainty. The answer should be sought by carefully analysing the decision being reviewed. For example, if upon analysis of the relevant legislation it was found that a pension was required to be cancelled where certain facts were found to exist, then the Tribunal's lack of persuasion that the facts existed would preclude cancellation. The converse would apply where it was found that the legislation required a pension to be cancelled unless certain facts were found to exist, and the Tribunal was not persuaded that the facts existed.

Finally, it is interesting to observe that only Justice Jenkinson expressly referred to any duty upon administrative

decision makers (such as the AAT) to conduct their own enquiries where the material presented to the Tribunal leaves it in a state of uncertainty.

I.P.T.A.A.S. The AAT has in recent months been flooded with applications for review of decisions under the Isolated Patients Travel and Accommodation Assistance Scheme (see 'Statistical Trends' below). An amendment to the National Health Act 1953 by the Statute Law (Miscellaneous Provisions) Act (No. 1) 1984 now requires that internal reconsideration of decisions under IPTAAS be sought before recourse may be had to the AAT for review.

### Statistical Trends

The table below indicates the trend in applications to the AAT in its major jurisdictions over the period July 1983 - June 1984. It is apparent that applications in the social security jurisdiction are falling, due perhaps to the normative effect of AAT decisions. IPTAAS appeals are expected to decline following the amendment to the National Health Act referred to above.

<u>Jurisdiction</u>	<u>No. of Applications to AAT</u>			
	July/Sept 1983	Oct/Dec 1983	Jan/Mar 1984	Apr/June 1984
Social Security	343 (55.50%)	204 (41.05%)	180 (35.57%)	175 (40.98%)
IPTAAS	22 (3.56%)	111 (22.23%)	144 (28.46%)	102 (23.88%)
Compensation	91 (14.72%)	67 (13.48%)	74 (14.62%)	55 (12.88%)
FOI	59 (9.55%)	63 (12.68%)	43 (8.50%)	27 (6.32%)
Other	103 (16.67%)	52 (10.46%)	65 (12.85%)	68 (15.93%)
<b>TOTAL</b>	<b>618</b>	<b>497</b>	<b>506</b>	<b>427</b>

## COMMONWEALTH OMBUDSMAN

### Jurisdictional Developments

Public Service Grievances. With the passing of the Merit Protection (Australian Government Employees) Act 1984 former government employees will now have, it seems, a choice between taking at least some of their grievances to the new Merit Protection and Review Agency (see s.55 of the Act) or to the Ombudsman, though the Ombudsman has a discretion not to investigate complaints which may be taken elsewhere.

National Crime Authority. The National Crime Authority Bill 1984 originally provided that the National Crime Authority should be subject to investigation by the Ombudsman. The Act as passed provides instead for monitoring of the Authority by a Parliamentary Joint Committee.

### Procedure

Manner of Investigations. The privacy of the Ombudsman's investigations, which was formerly thought to be unimpeachable, has been thrown into doubt by the decision of the Federal Court in Kavvadias v Commonwealth Ombudsman (23 March 1984). Prior to the decision, it was the Ombudsman's general practice, pursuant to his power to conduct an investigation 'in such manner as [he] thinks fit' (Ombudsman Act, sub-s.8(2)) to release a draft report to the Department concerned before he made particulars available to the complainant. The significance of the decision is that it interprets for the first time the effect of the FOI Act upon the Ombudsman's powers and duties. The Federal Court held that the Ombudsman was not entitled to claim that the draft report was an exempt document (i.e. one to which the applicant had no right of access) by virtue of there being secrecy provisions in the Ombudsman Act. The effect of the decision is clouded, however, by the fact that only one ground of exemption was at issue before the Court. The fate of other possible grounds of exemption remains undecided. Nevertheless, the decision has nullified what many believe to be one of the strongest grounds which the Ombudsman might have argued.

Role in FOI. The Kavvadias case (discussed above) contrasts with the new, active role of the Ombudsman as an advocate in FOI matters before the AAT. The Ombudsman has been vested with the role since the passing of the Freedom of Information Amendment Act 1983 but has been hampered by a lack of provision of personnel for the purpose. The first appearance of the Ombudsman before the AAT occurred in May in the matter of Re Peters and Department of Prime Minister and Cabinet. At the