5 August 1988 which was also held in Melbourne.

Decisions under research and development legislation. The submissions received are being evaluated in the light of proposed changes in this area announced by the government and in the light of recent legislative changes to one of the relevant schemes.

Community Services and Health. The Council's committee met with the Secretary of the Department of Community Services and Health in June to discuss the most appropriate approach for the Council's project.

Migration. At the invitation of the Secretary, Department of Immigration, Local Government and Ethnic Affairs, the Council is currently considering the recommendations of the Committee to advise on Australia's immigration policies (CAAIP) with regard to review, and the design of an appropriate review system.

Broadcasting. In July 1988 the Council provided a submission on this subject to the Parliamentary Inquiry into the Australian Broadcasting Tribunal.

Administrative Appeals Tribunal

NEW JURISDICTION

Since the last issue of Admin Review new jurisdiction has been conferred on the AAT under the following legislation:

Child Support Act 1988
Commonwealth Employees Compensation Act 1988
Heard and McDonald Island Environmental Protection Ordinance 1988
Public Rental Housing Program (ACT)
Sea Installations (Miscellaneous Amendments) Act 1987
Taxation Laws Amendment Act (No. 2) 1988
Transport Legislation Amendment Act 1988

KEY DECISIONS

Anxiety state for compensation purposes

In Commonwealth of Australia and Dingwall (22 April 1988) the Tribunal set aside the decision of a delegate of the Commissioner for Employees' Compensation and remitted the matter to the Commissioner with directions that the respondent's anxiety state did not entitle him to compensation. Mr Dingwall had worked in the Army from 1955 to 1968, during which time he had been a mess supervisor and had spent 5 months at Maralinga. He was discharged as medically unfit due to chronic obstructive airways disease, hypertension, obesity, hearing loss, right knee injury and epigastric pain. He had claimed compensation for anxiety state, which had been determined, and many other conditions, which had not. He was reported as suffering from

depression the year after he left the Army, subsequently obtained work as a chef but was advised to retire because of angina. He was totally incapacitated for work for several years. After having been contacted in 1983 by the Department of Health for information about the health of people from Maralinga, he applied for compensation, claiming that he had developed mental illness as a result of his Maralinga experience but that it had remained latent until triggered by the Department of Health inquiry.

The Tribunal said that the Commonwealth must succeed on this review, for several reasons. First, with regard to section 10 of the Commonwealth Employees' Compensation Act 1930 read in the light of Busby and the Commonwealth of Australia 12 ALD 559, nothing in the evidence suggested that the general nature of Mr Dingwall's employment as a mess supervisor entailed a risk of causing, aggravating or accelerating his mental disease. Second, answering the Department of Health questionnaire could not be regarded as part of his employment, as discussed in Federal Broom Co. Ltd v Semlitch (1964) 110 CLR 626, or as an aggravation of an injury or disease within section 29 of the Compensation (Commonwealth Government Employees) Act 1971.

Finally, the evidence showed that the respondent was totally incapacitated for work some 3 years before the inquiries into Maralinga, so these could not have caused the incapacity.

The Tribunal criticised the handling of the case by the office of the Commissioner for Employees' Compensation, and suggested that this had raised Mr Dingwall's expectations in an unfortunate way. It also reminded the Commissioner that section 20(2)(b) of the Act, which requires him to give any person directly affected by the determination a fair opportunity to present his or her case, should not be interpreted to relate to the employee to the exclusion of the employing authority.

In Novak and ATC (22 April 1988) the Tribunal, constituted by Mr Ballard, varied a compensation determination by deleting and substituting the date from which the determination was to apply. Ms Novak, the applicant, had been receiving compensation for an injury received on 1 October 1977. Payment was stopped, without a determination, on 13 November 1986. After threats of court proceedings, the Commissioner wrote to the applicant's solicitors on 13 July 1987, giving them until 24 July to show cause why a determination retrospectively terminating her entitlement as of 13 November 1986 should not issue.

Mr Ballard sought submissions on whether the determination was made in contravention of section 20(2)(b) of the Compensation (Commonwealth Government Employees) Act, and whether it was effective in retrospectively terminating the applicant's accrued rights to payment of compensation for total incapacity, before the matter proceeded to a hearing of the substantive issues. He said that, on the facts, a fair opportunity had been given to show cause, although the very brief time afforded was subject to criticism and might be relevant to costs if that became an issue in due course. Neither the applicant nor her solicitors, however, were given an opportunity to present a case against the

retrospective application of the determination.

Mr Ballard said that in his view, a determination cannot be made to terminate retrospectively an accrued right of an applicant, as a matter of natural justice. Further, the principles with regard to retrospective legislation and specifically those in sections 8 and 48 of the Acts Interpretation Act 1901 apply. Even if this were not the case the retrospective application of the determination (although not the determination itself) was effected without giving the applicant an opportunity of presenting a case against it, and to that extent the determination was invalid pursuant to section 20(2)(b) of the Act.

Smoking, cardiovascular disease and war service

Ernst and Repatriation Commission (19 April 1988) concerned an application for review of a decision of the Repatriation Commission, confirmed by the Veteran's Review Board, rejecting the applicant's claim that his condition of artherosclerotic vascular disease was war-caused. The Tribunal accepted that the disease could not be said to have arisen directly from war service, but that the claim only arose through the connecting factor of the acceleration of light smoking into a heavy habit during service in Papua New Guinea. It distinguished Ernst's case from those of Repatriation Commission and Baird (Admin Review 16:28), and Dunning and Repatriation Commission 12 ALD 235, where the applicants did not establish a plausible connection, and accepted the medical evidence that smoking contributes to the development of arterial disease.

The Tribunal, citing Holthouse v Repatriation Commission (1982) 1 R.P.D. 288 on the interpretation of the term 'causal connection', concluded it was a reasonable hypothesis that smoking, due to eligible war service, was a contributory cause of the applicant's artherosclerotic disease. It also considered the case of Piggott v Commonwealth of Australia & Rothmans of Pall Mall (Aust) Ltd (Supreme Court of NSW No. 15545 of 1987) since the applicant had continued to smoke after his doctor advised him against it. It decided that Piggott was not relevant.

In passing, the Tribunal, constituted by Senior Member Ballard, remarked that in his view reliance on the personal experience of Tribunal members could be contrary to the rules of natural justice; but that this would not apply to experience obtained in other Tribunal proceedings, which could be relevant - particularly if drawn to the attention of parties at a hearing.

In Ernst's case the Tribunal noted two other relatively recent AAT cases, Marshall and Repatriation Commission (30 November 1987) and Bargarey and Repatriation Commission (21 August 1987), both of which considered the connection between smoking and heart disease and concluded that the applicant's heavy smoking was attributable to war service. In each case the Tribunal was reasonably satisfied that a causal and material connection existed between the veteran's smoking and the disease which was the cause of death; so that the requirement of section 120(4) of the Veterans' Entitlements Act was satisfied.

Availability of Special Benefit for fostering

In Christie and Secretary, Department of Social Security (1 July 1988) the Tribunal affirmed the Department's decision that the applicant, a Roman Catholic nun of the Order of the Sisters of Mercy, was not entitled to Special Benefit for the care of children she was fostering. Sister Carmel previously had applied for Supporting Parent's Benefit, encouraged by erroneous advice from departmental officers; but the applications had been rejected initially because she did not have legal custody of the children and later because she was able to earn a sufficient livelihood. For Special Benefit it was necessary to show that because of domestic circumstances the person concerned was unable to earn a sufficient livelihood for herself, and that circumstances warranted the exercise of the Department's discretion in her favour.

Though the Tribunal concluded that the purpose of the discretion was not to provide support from the public purse for people who make a voluntary decision to commit themselves to full-time social work, it acknowledged the exceptionally good work of the applicant in the fostering field and expressed the hope that the respondent would recompense the applicant in some way for the period in which she had acted on the wrong advice of departmental officers.

Concession for importation of motor vehicle

In Lloyd-Roberts & Anor and Customs (6 May 1988) the Tribunal affirmed the decision under review that the motor vehicle owned by the female applicant did not satisfy the requirements for concession of goods imported as personal effects. The applicants arrived in Perth as migrants from South Africa on 10 January 1987. The vehicle had been purchased some 4 years earlier by a company of which the male applicant's father was the principal shareholder and director, and had been gifted to the applicants as a wedding present.

Prior to the wedding, however, on 24 November 1982, the couple had entered into a contract whereby the male applicant gave the female applicant all wedding presents as her sole and absolute property. In January 1983 the father, unaware of the arrangements in the contract, had the vehicle registered in his son's name; but title to the car as a result of the contract was vested in the female applicant. Mr Lloyd-Roberts did not transfer the car to his wife's name until 12 November 1986, preparatory to the couple leaving Africa on 21 January 1987. This, however, meant that the car did not meet the Customs requirement of being in the possession of the person importing the vehicle for the whole 6 months prior to importation. The only matter in which the female applicant did not satisfy the criteria was in the section of the by-law which provided that ownership would be calculated from the date of registration or delivery overseas. Though Deputy President Nicholson found that the by-law had not been satisfied, he suggested that a re-drafting of paragraph 6(10) of Customs by-law No. 8640003 might be necessary if Customs policy in the future were to rely on ownership and usage as the paramount test.

First Home Owners Act: eligibility for assistance

In Eid & Anor and the Secretary, Department of Community Services and Health (20 May 1988), the Tribunal affirmed that the applicants were not entitled to assistance under the First Home Owners Act. The case turned in large part on the date that Mr Eid became domiciled in Australia, which affected the 'relevant year of income' for purposes of assistance. The couple were married in Beirut in January 1984. Mr Eid, however, did not arrive in Australia until 29 July 1984. They obtained a loan to purchase a house but the contract was not entered into until 25 June 1987. On 27 October 1987 a delegate of the Secretary to the Department of Community Services and Health determined that the relevant year of income for Mrs Eid was 1983/84 but that for Mr Eid was 1985/86, since he had not been in Australia for most of July 1984. As a result, the total prescribed earnings for each was greater than the amount allowed in the regulations.

The applicants claimed that the relevant year of income for Mr Eid should have been the 1984/85 financial year. Sub-section (5), however, requires an eligible person to have been domiciled in Australia throughout the relevant year of income. As Mr Eid did not arrive in Australia until 29 July 1984, the Tribunal concluded that he was not domiciled throughout the year. It affirmed the decision under review.

Eligibility for rehabilitation assistance

The applicant in Porter and Secretary, Department of Community Services and Health (1 June 1988) was a young man who had had a serious hearing problem since he was in primary school. His hearing was deteriorating and he had difficulty as a result in procuring and maintaining employment. In 1983 he obtained a public service position as a base grade clerk with the Department of Social Security. He went to night school to improve his educational standing and in 1984 sought assistance to enable him to enrol at Deakin University in 1985 in an Arts-Psychology course. He obtained leave without pay to enrol full-time, and was seeking the provision of a note-taker and equipment to replace his existing hearing aid, to enable him to obtain maximum benefit from the course. After considerable delays he was notified of the rejection of his application, and appealed to the Social Security Appeals Tribunal. It made a recommendation in his favour in February 1987, but the Department rejected the recommendation. He then applied to the AAT.

The Department claimed that because Mr Porter was a 'permanent' public servant and there were many alternative ways in which his disability could be accommodated, his employment was not at risk and he therefore did not meet the criteria for assistance. The Tribunal found that his employment, in which he had experienced considerable difficulty, did not preclude a finding that his disability was a 'substantial handicap to undertaking employment'. The Tribunal rejected the argument that the phrase 'undertaking employment' was confined to persons entering upon employment, and said that there is no prohibition upon eligibility if the disability is likely to be a substantial

handicap to existing employment or any future employment.

The Tribunal also expressed the view that the streamlining of the public service, introduced by the Public Service Legislation (Streamlining) Act 1986, had the effect of limiting the prospects of an officer with a serious disability being transferred from one department to another. It emphasised the urgency in this case of implementing a satisfactory rehabilitation program for the applicant, and granted liberty to apply generally to give the applicant an opportunity to seek further more specific recommendations or directions to the respondent if necessary.

Freedom of Information

Inquiry by the Legal and Constitutional Committee of the Victorian Parliament

The Legal and Constitutional Committee, an all party Committee of the Parliament of Victoria, is currently reviewing the operation of the Victorian Freedom of Information Act. The terms of reference for this inquiry direct the Committee to examine four major issues:

(i) whether provision should be made to exempt agencies from the ambit of the Freedom of Information Act;

(ii) the means of overcoming the problems posed by voluminous and expensive Freedom of Information applications;

(iii) the means of safeguarding the confidentiality of Cabinet documents; and

(iv) the relationship between the Freedom of Information Act and the Public Records Act.

The Governor in Council directed the Committee to report by 31 December 1988. The Committee invites submissions from interested persons on all matters relevant to the terms of reference. The closing date for submissions has been moved back to the end of August 1988, but persons wishing to make submissions after this date should check with the Committee's Secretary, Mr Marcus Bromley, on (03) 650 3506 or (03) 650 3407.

A discussion paper has been prepared and copies may be obtained by contacting the Secretary as above.

Information relating to personal affairs

Department of Social Security v Dyrenfurth (5 May 1988) was an appeal against a decision of the Administrative Appeals Tribunal concerning access to documents showing the assessment of applicants for public service appointment. The full Court of the Federal Court allowed the appeal, and remitted the matter to