Taxation: authority for entry

In Commissioner of Taxation v Citibank Ltd (19 April 1989) the Full Court did not agree with Justice Lockhart's earlier conclusion that a written authority was required for entry and access under section 263 of the Income Tax Assessment Act 1936, and that the written authorisation show on its face the premises to be searched and the documents which were to be the subject of the search as well as a reference to the statute under which the search was made. The Court agreed with the trial judge, however, that section 263 is subject to the principle of legal professional privilege.

Immigration: natural justice

In Minister for Immigration and Ethnic Affairs v Pashmforoosh (28 June 1989) the Full Federal Court rejected the trial judge's conclusion (Admin Review 20:47) that procedural fairness had been denied, but upheld the conclusion that the Minister had failed to take into account relevant considerations and had failed to consider the substance of the Pashmforooshs' case. The section 13 statement of reasons provided by the Department did not fairly state the case or fairly address a point which had been made by a majority of the Immigration Review Panel. The appeal was therefore dismissed.

Commonwealth Ombudsman

Change to Social Security's benefit manual

As a result of the Ombudsman's pursuit of an oral complaint from a person whose spouse had a workers' compensation case pending against three previous employers, the Department of Social Security agreed to a minor change in its benefits manual.

The manual provided that a compensation 'clearance' should be obtained from the relevant State headquarters when there was any suggestion of present or future compensation being paid, before benefit entitlement was determined for unemployment and sickness benefits. The clearance is designed to ensure that State headquarter's compensation section is aware of the case and can serve a notice on the insurer or employer to recover benefits from the compensation payment if necessary. The manual provided that, alternatively, if delay were likely a signed acknowledgment that benefit may later have to be recovered from future compensation payments should be obtained from the applicant. In the complaint to the Ombudsman the person concerned had declared the matter on the application for benefit but refused to sign the acknowledgment, which resulted in a delay in payment of benefit.

The manual now provides a mechanism to ensure payment of benefit is not delayed pending compensation clearance, and for a written record to be retained of advice regarding possible future recovery if the applicant declines to sign the acknowledgment. The wording of the acknowledgment that applicants are being asked to sign is now the subject of another complaint.

Supporting parents benefit while overseas

A mother on supporting parents benefit advised the Department of Social Security, as required, that she would be out of Australia for some months on a visit to her family in Europe. Despite this, the Department suspended her benefits when she failed to return a benefit review form. The suspension of her benefits led to the collapse of arrangements she had made for paying rent while overseas. Learning of a threat that she would be evicted, she telephoned the Department from Europe, and was assured that payment of her benefits would be restored. When she subsequently heard that, nonetheless, she had been turned out of her Perth home for non-payment of rent, she cut short her visit.

The Department conceded that it had erred in suspending her benefits, but refused to reimburse her for the additional expenses she had incurred as a result. After the Ombudsman's intervention, however, the Department agreed to the reimbursement.

Medibank: hospital expenses for a premature baby and other matters

A single mother on supporting parents benefit complained that Medibank staff at Alice Springs gave her misleading advice that her forthcoming confinement and any possible complications would be covered by her current single rate membership of Medibank Private. Medibank denied knowledge of this advice.

The baby would normally have been covered for up to 10 days 'bedside' treatment but because of pre-birth complications the mother was moved to the Queen Victoria Hospital in Adelaide, where the baby was born nine weeks prematurely and required intensive care. According to the mother, at no stage was the baby's patient classification raised with her; and she did not have the correct Medibank card which would have alerted hospital staff to the fact that she was a single rate member. Medibank declined to pay the $4 880 expenses of the baby's treatment immediately after birth.

On referral by the Northern Territory Ombudsman, the matter was investigated by the South Australian Ombudsman. As a result, the hospital agreed to write off the amount outstanding for the baby's treatment.

Two other recent complaints to the Ombudsman concerned Medibank Private. One related to the non-payment of benefits by Medibank Private for endodontic services covered by membership of the Supercover Table; the other concerned the application of the pre-existing ailment rule to a claim for dental treatment. Both, after investigation, were found to involve mistakes in the application of Medibank Private's policy.

Mobility allowance

An invalid pensioner working 20 hours a week on a voluntary basis for Meals on Wheels applied to the Department of Social Security for a mobility allowance. The allowance, to cover transport costs, is designed to help disabled people enter the workforce.

The Department rejected the pensioner's application because the Social Security Act stipulates that the person must be in 'gainful employment' to be eligible. He appealed to the Social Security Appeals Tribunal (SSAT) which upheld his appeal on the grounds that his attendance at Meals on Wheels was regular enough to be considered 'employment' and that the occasional meals he was allowed to take home were 'gainful'. The Department did not accept the SSAT decision and the pensioner appealed to the AAT, which affirmed the Department's decision.

In the course of the investigation the Ombudsman examined the broader question whether the Act should be amended to take account of cases of this nature. But given the terms of the Act and the absence of any record of an intention by Parliament that such cases should be eligible for the allowance, he concluded that the Department could not be criticised for declining to propose a change to the legislation.

Change of resident status for a de facto spouse

A British citizen arrived in Australia under an executive exchange scheme on a two-year temporary permit due to expire in December 1988. During 1988 he met an Australian woman and in September they began living together. He applied for permanent residence in October 1988 but was rejected on the ground that there was insufficient evidence that the de facto relationship was genuine. His subsequent appeal to the Immigration Review Panel was unsuccessful.

The Ombudsman's investigation revealed, however, that the departmental statement to the Panel was inaccurate, and had ignored some significant factors in the British citizen's submission. The Ombudsman asked the Department to reconsider its decision. The State Director who then reviewed the case agreed that his officers had made at least one crucial error of fact regarding the date the relationship began and that there was sufficient evidence to indicate that the relationship was genuine. The person concerned has now been granted permanent residence subject to the usual health and character checks.

Sales tax: ATO refund and other issues

The Australian Tax Office is to refund $308 000 overpaid sales tax to a company following an Ombudsman investigation. After obtaining a declaratory order from the Federal Court to the effect that sales tax had been overpaid during a 6-year period, the company had made two refund applications, each for 3 years. The ATO at first refused to refund any of the sales tax, but later accepted that it was required to do so for the second 3-year period and refunded approximately $700 000 out of a total overpayment of about $1 million. It maintained its refusal to refund approximately $300 000 for the first 3-year period because the legislation was couched in discretionary rather than mandatory terms.

The Ombudsman disputed the ATO's interpretation of 'may' and 'shall'. The ATO subsequently accepted that the Commissioner was required to refund the sales tax in this particular case, but argued that the claim for the first period was out of time

under the time limit for refunds prescribed in the Sales Tax Regulations. Eventually, however, it accepted that the refund was payable and it is currently reviewing its interpretation of the refund provisions.

Staff of the Ombudsman also met with senior officers from the Australian Taxation Office to discuss other sales tax problems (Admin Review 20:50-1) which the Ombudsman had raised with the Commissioner. The ATO is now taking measures to improve its administration of the sales tax legislation.

Veteran's service pension: cancellation

A veteran and his wife, who returned to Australia in August 1986 after an absence of four years, were granted a service pension. They subsequently left Australia the following December, and in April 1987 their pension was cancelled with effect from August 1986 because they had left Australia within 12 months of the pension being granted, in contravention of the Veterans Entitlements Act. They appealed unsuccessfully to a principal determining officer and to the AAT, on the ground that their departure had been the consequence of misleading oral advice from the Department of Veterans' Affairs.

After the Ombudsman concluded that they acted on this advice to their disadvantage, the Department agreed to make special arrangements to ensure that the veteran and his wife, who were suffering considerable hardship, would receive money equivalent to the pension plus a lump sum to cover the period since the pension was discontinued.

Compensation for loss of use of money legally owed

After several months of negotiation the Department of Employment, Education and Training has agreed to pay a small sum by way of compensation to a person who had been in a contractual relationship with the now abolished Curriculum Development Centre. Under a 'fee for service agreement', CDC was to have paid the contractor four instalments each of $250. On each occasion there was a lengthy delay before the due payment was made.

The Ombudsman argued, on the basis of the High Court decision in Hungford v Walker (1988) 84 ALR 119, that the contractor was entitled to compensation for the lost use of the money due to her under the agreement. He suggested that payment could be made pursuant to Finance Direction 21/3, in settlement of her potential legal claim for such compensation. Given the amount of the claim (around $30), however, and the economic inequalities between the parties, the Ombudsman also suggested that it would be unreasonable to refuse payment pending formal initiation of legal action by the complainant.

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Child support scheme

The first stage of this scheme was the Child Support Act 1988