Reasonableness of decision

Luu v Renevier (1989) 91 ALR 39 arose out of a decision to deport a person with a record of offences involving sexual assaults. There was evidence that the sexual assaults were at least partially caused by a medical condition that was surgically redressed while Mr Renevier was in hospital. The decision-maker refused Mr Renevier's application for permanent residency on the basis that the real risk of recidivism outweighed the counterveiling compassionate grounds. The Full Court upheld the decision of the trial judge that because the finding on a question of critical importance that there was a real risk of recidivism was not based on any cogent evidence from a suitably qualified medical practitioner, it was unreasonable within the meaning of paragraph 5(2)(g) of the AD(JR) Act. The unreasonableness was constituted primarily by the decision-maker's failure to obtain relevant medical reports. During the course of its judgment the Court stated that:

> 'One may say that the making of a particular decision was unreasonable - and, therefore, an improper exercise of the power - because it lacked a legally defensible foundation in the factual material or in logic. But, equally, one may be able to say that a decision is unreasonably made where, to the knowledge of the decision-maker, there is readily available to him or her other factual material, likely to be of critical importance in relation to a central issue for determination, and which has not been obtained.'

Commonwealth Ombudsman

Defence Service Homes Second Assistance Policy

In February 1990 the Ombudsman, in reporting to the Secretary to the Department of Veterans' Affairs, expressed the opinion that the law and practice in relation to second assistance under the Defence Service Homes Scheme was unreasonable and improperly discriminatory and in all the circumstances wrong. He recommended that the Defence Service Homes Act 1918 and the relevant policies be amended to enable portability to be extended to loans granted before December 1987 comparable to the portability for loans approved after that date (Admin Review 24:45). During the 1990 Federal Election campaign, the Prime Minister announced that the Government would move to provide uniformity of loans portability.

Since that time the Ombudsman has kept in touch with the Department to ascertain what steps would be taken to implement the Prime Minister's promise. In the meantime, the Department completed its review of its policies on second assistance and proposed significant liberalisation of its previously restrictive policies as an interim measure until the new law comes into operation. The Ombudsman welcomed this development, although he still had some reservations about the scope of both the interim amendments and the proposed

legislative changes. He told the Department that his report could not be regarded as having been satisfied before the passage of the proposed portability legislation.

Telecom: missing telephone handsets

A matter that has been of concern to the Ombudsman for some time and which he referred to in his 1987-88 Annual Report was the Telecom policy of charging subscribers who move into premises where the handset is missing a fee of $50 for a replacement handset. The Ombudsman regarded it as unreasonable to penalise the new subscriber for the actions of the previous householder. In addition, it was not clear that Telecom had the authority to apply such a charge.

The Ombudsman's investigations showed that, although Telecom had been charging the fee since March 1987, it did not formally determine the charge, as required under the Telecommunication Act 1975, until June 1987. Moreover the determination was not published in the Commonwealth Gazette, as is also required under that Act, until 15 July 1987. The Ombudsman therefore concluded that the application of the additional fee before July 1987 was without legal authority.

Telecom accepted the Ombudsman's conclusion and will try to identify those subscribers affected by the charge to arrange a refund.

The Ombudsman discussed with Telecom a number of policy options for making a more equitable arrangement to cover the cost of replacing missing handsets. Telecom now proposes to require from each subscriber a bond of about $50 that would be refundable with interest after 12 months or before that time if the subscriber leaves the premises, provided that the handset is left behind.

The Ombudsman will continue to monitor the situation to ensure that the bond system does not unreasonably affect any particular segment of the community.

Australian Customs Service (ACS) and penalty notices

Penalth notices can be issued when a person makes a statement that is false or misleading in a material particular having the result that less duty is apparently payable than should actually be the case. The ACS has commented as follows on the note in the May 1990 edition of Admin Review concerning complaints to the Ombudsman on ACS practices in issuing penalty notices (24:44):

- it is not ACS policy to impose a penalty in all cases of error - discretions include level of duty shortpaid, dispute over the error, and ability to avoid the error;

- the operating guidelines provide specifically for deferment in the case of dispute and require delegates to accede to any request for an interview, as well as to defer a decision until after consideration of the interview result;

- the penalty regime is intended to improve the standard of entry documentation: fraud or attempted fraud are dealt with under other provisions of the Customs Act and action under one set of provisions excludes action under the other;

- in the 6 months to 30 June 1990, whole or partial remission was granted in 91% of those cases for which remission was sought.

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A D M I N I S T R A T I V E L A W W A T C H

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Role of Secretaries and external review bodies

In the Public Service Commission's Occasional Paper entitled 'The Role of Secretaries of Departments in the APS', released in March 1990, the Secretary to the Department of Prime Minister and Cabinet, Mr Mike Codd, included an exhortation to heads of departments to co-operate with external review bodies. Mr Codd said that:

> 'Interaction with bodies such as the courts, the Administrative Appeals Tribunal (AAT) and the Ombudsman will depend to a considerable extent on the nature of the department's activities and will relate primarily to program administration, though policy issues can arise in some AAT or Ombudsman cases.
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> 'So far as the courts are concerned, although secretaries would rarely be involved in the actual processes of litigation, they do need to be aware of the potentially far reaching effect that individual cases can have on the administration of the department's programs and sometimes those of other departments. In such cases, secretaries must take personal responsibility and involve the Minister as appropriate. Similar considerations can apply in the AAT.
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> 'The more frequent contact is likely to be with the Ombudsman whose concern is with defects in administration. Where the Ombudsman is proposing to report in a way which reflects adversely on a department, there is an obligation that the secretary concerned be provided with an opportunity to comment on the draft report. At this stage, the secretary should take a personal interest and, if necessary, discuss the issues with the Ombudsman.
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> 'Just as in the case of the Auditor-General, there is potentially much to be gained from a fully cooperative and positive approach to the activities of the Ombudsman, and the secretary has a responsibility to set such a tone.'

Legitimate expectation and government policy

On 7 June 1990 the High Court handed down a judgment in the case of Haoucher v Minister for Immigration and Ethnic Affairs