REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Since the last regular issue of *Admin Review*, the Council has provided:

- a report to the Attorney-General: Report No 35 *Rule Making by Commonwealth Agencies;*
- letters of advice to the Attorney-General on
  - the Review of the Administrative Appeals Tribunal;
  - the Review of the Office of the Commonwealth Ombudsman;
  - the draft Broadcasting Services Bill; and
  - proposed conscientious objection decision appeal provisions; and
- letters of advice to the Australian Law Reform Commission on
  - customs and excise matters; and
  - administrative penalties.

Current work program – developments

Community Services and Health

The Council has recently redirected this project towards investigating the scope of merits review of decisions made under Commonwealth funding programs.

Intellectual property

A draft discussion paper on review of patents decisions is being prepared by a consultant, Dr Margaret Allars of Sydney University.

Specialist tribunals

It is expected that the Council will circulate a draft report on tribunal procedures late in 1992. Preparations are under way for the second Conference of Commonwealth Review Tribunals, to be held in Sydney in October.

Government business enterprises

The Council is working on a draft report on the extent to which GBEs should be subject to administrative review. This is expected to be available towards the end of this year. Anyone interested in obtaining a copy of the draft report should contact Robyn Johansson, the responsible Project Officer at the Council, phone number (06) 257 6115.

Environmental decisions

The Council is currently arranging the engagement of a consultant to examine the issue of merits review of environmental decisions.

Administrative Appeals Tribunal

New jurisdiction

Since the last issue of *Admin Review* jurisdiction has been conferred on the AAT, or existing AAT jurisdiction has been amended, by the following legislation:

- Australian Horticultural Corporation (Export Control) Regulations
- Australian Wool Corporation Regulations
- Customs and Excise Legislation Amendment Act 1992
- Defence Legislation Amendment Act 1992
- Development Allowance Authority Act 1992
- Federal Court of Australia Regulations
- Health, Housing and Community Services Legislation Amendment Act 1992
- High Court of Australia (Fees) Regulations
- Industrial Chemicals (Notification and Assessment) Regulations
- Insurance Laws Amendment Act 1991
- Law and Justice Legislation Amendment Act (No 2) 1992
- Life Insurance Policy Holders' Protection Levies Collection Act 1991
- Ozone Protection Amendment Act 1992
- Pooled Development Funds Act 1992
- Taxation Laws Amendment (Self-Assessment) Act 1992

AAT decisions

Order of giving evidence

Re Department of Social Security and Spoolder (5 September 1991) involved an application to the AAT, constituted by Deputy President Forgie, for a direction that Mrs Spoolder, the respondent, give evidence prior to the applicant Department presenting its case. The principal matter was an application for review of a decision by the Social Security Appeals Tribunal to the effect that Mrs Spoolder was not a de facto spouse and thus was qualified to receive an invalid pension as a single person.

The essence of the Department's submission was that Mrs Spoolder's credibility was a vital

issue, such that its right to cross-examine her to test issues of credit would be substantially diminished and it would be denied procedural fairness if required to lead its evidence first. Much reliance was placed on the Federal Court decision of Justice Wilcox in *Australian Postal Commission v Hayes* (1988) 18 ALD 135.

In *Hayes'* case, a compensation matter, the Federal Court reversed an AAT ruling that the respondent Commission lead its video evidence of the applicant before the applicant presented her case. Among the comments of Justice Wilcox were the following:

> 'It is the everyday experience of those who attend courts that cross-examination is at its most effective when the evidence of a witness is able to be confronted by documents. But, as with any other cross-examination, it is normally necessary for the cross-examiner first to have the witness commit himself or herself to a precise version of relevant matters...'

and later in the judgment;

> 'in an exceptional case in which a party can demonstrate that the temporary suppression of a document is necessary for the proper presentation of a case, the ideal of openness [in Tribunal proceedings] must give way to the Tribunal's statutory obligation to give all parties a reasonable opportunity to present their cases.'

The Tribunal noted that what it described in the present case as the 'usual procedure', said to be often adopted by the AAT, was the same as applied in most civil proceedings, with the applicant presenting its case first and having its witnesses cross-examined, followed by the respondent in a like fashion. *Hayes'* case was dealt with as follows:

> 'The clear result of *Hayes'* case is not that the procedure needs to be such that the applicant's right to cross-examine effectively should not be limited but that the procedure adopted will be such that both parties will have a reasonable opportunity to present their cases i.e. what will be procedurally fair. The procedure which I have described as the "usual procedure" is such that in the majority of cases it does give each party that opportunity.'

Noting that the effect of the decision in *Hayes'* case was to follow this usual procedure, the Tribunal went on to state that to accede to the Department's request here would be to require Mrs Spoolder to give evidence without knowing the case against her, a more disadvantageous situation than a respondent in AAT or civil proceedings could be expected to be placed. The Department, on the other hand, would have advantages additional to those a respondent normally enjoys, with the opportunity to build a case without having to reveal its hand. The application was refused.

Tribunal jurisdictions

Secretary, Department of Social Security and Sinclair (31 January 1992) concerned the jurisdiction of both the Social Security Appeals Tribunal (SSAT) and the Administrative Appeals Tribunal, and the interpretation of 'decision' in the *Social Security Act 1947.*

In June 1989, a delegate of the Secretary 'decided' to 'approve' a recommendation that in respect of Mrs Sinclair, who had improperly received a pension for ten years:

- an overpayment of $60,930 be raised;
- the pensioner be advised and requested to refund;
- the recoveries section be notified;
- taxation adjustments be effected as necessary; and
- prosecution action be considered.

Mrs Sinclair was subsequently convicted and made the subject of a pecuniary penalty order under the *Proceeds of Crime Act 1987* (the POC Act).

Mrs Sinclair appealed to the SSAT in respect of a 'decision to recover over $59,000 Sole Parent's Pension'. The SSAT decided that the amount owing should be waived. The Secretary, who was supported by the Director of Public Prosecutions whose interest derived from the order under the POC Act, applied to the AAT for review of the SSAT's decision on three grounds:

- the character of the delegate's action approving recovery, and particularly whether it constituted a decision to recover monies owing to the Commonwealth;
- whether the applicant's delegate had made a relevant decision in respect of waiver, not having given consideration to the matter of how recovery was to be effected; and
- whether the Tribunal can make any decision about waiver in light of the order under the POC Act.

Under the Social Security Act, the SSAT has jurisdiction if the person applying for review was 'affected by a decision', the decision was made by 'an officer' exercising delegated authority from the Secretary, and the decision was made 'under this Act'. The Administrative Appeals Tribunal, constituted by Deputy President Johnston, Senior Member Barnett and Member Fayle, adopted the meaning of 'decision' pronounced by Chief Justice Mason in *ABT v Bond* (1990) 170 CLR 321, which required that decisions be: made under a statute; final or operative and determinative, at least in a practical sense; and substantive, rather than procedural.

The Secretary contended that there was no decision that could be the subject of review before the SSAT. That is, the action of the delegate to approve the recommendation, having not led to any recovery action at all, was not a decision. Recovery action by the DPP was a prosecutorial discretion and was not directed by the Secretary or his delegate. The Tribunal accepted that no consequences flowed from the delegate's recommendation as far as the Department was concerned. At best the recommendation was a step towards recovery but that was insufficient to amount to a 'decision' under the Act, and as such the SSAT had no jurisdiction to review the matter.

The Tribunal noted, however, that even though the SSAT's decision was a nullity, that did not affect the AAT's jurisdiction to review SSAT decisions. On this point, it relied upon *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1. [SL]

Telephone evidence

In *Re Opitz and Repatriation Commission* (24 February 1992) the Tribunal, constituted by Senior Member Allen, received the evidence of Mr Opitz by telephone from the Philippines. The Tribunal stated that it had reservations about the appropriateness of taking telephone evidence where credit is in issue, that proper and effective cross-examination is not possible in such circumstances, and that the imposition of sanctions for giving false evidence cannot be envisaged against a witness resident overseas. The evidence of Mr Opitz was taken as simply a possible version of the facts.

Estoppel in tribunal proceedings

In *Re Petrou and Australian Postal Commission* (24 January 1992) the AAT, constituted by Senior Member McGirr, considered whether issue estoppel could arise from prior AAT proceedings, as compared with court proceedings.

The application was for an extension of time for the making of an application for review of a decision. There was some discussion of the merits of the applicant's case, during which the Commission submitted that the Tribunal was estopped by an earlier AAT decision from reconsidering whether the injury Mr Petrou suffered in 1978 had any effect on his current condition. The AAT had there stated in its Reasons for Decision that 'any effect of the fall in 1978 upon the applicant's back condition had dissipated by March 1979'.

The Tribunal discussed the authorities on estoppel, the only form of which might be relevant here being estoppel of record or quasi of record, as to which *Halsbury's Laws of England* 4th ed Vol 16 states:

> 'Where the earlier decision is that of a court of record the resulting estoppel is said to be "of record"; where it is that of any other tribunal,...the estoppel is said to be "quasi of record." '

Estoppel of record or quasi of record was said to be itself divided into two categories: 'res judicata' or cause of action estoppel, and issue estoppel. The Tribunal stated that:

> 'Issue estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once distinctly been put in issue had been solemnly and with certainty determined against him.'

Further consideration of the authorities led the Tribunal to conclude that whereas res judicata applies to tribunals as well as to courts, issue estoppel does not apply to administrative bodies such as the AAT. The Tribunal went on to state that:

> '...in matters before the Administrative Appeals Tribunal, any question of res judicata would involve consideration of the Decision, whereas any question of issue estoppel would involve consideration of the Reasons for Decision. The estoppel raised by counsel for the respondent in this matter is issue estoppel rather than res judicata and therefore is not applicable to the Administrative Appeals Tribunal.'

Although the application for an extension of time was refused in this matter, the Tribunal stated, without needing to make a finding on the point, that the chances of success on the merits appeared to be poor because:

> '...a duly constituted Tribunal has already heard all of the evidence on that issue [that the effects of the injury of 1978 are continuing] and has determined that, as of 1982, that was not so.'

In similar circumstances in *Plumb's* case (reported below) the AAT found that a cause of action estoppel arose.

Re Plumb and Comcare (14 February 1992) concerned the question whether a cause of action estoppel precluded the AAT, constituted by Presidential Member The Hon Justice Moss, from reviewing a compensation decision.

In 1988 a compensation decision relating to Mr Plumb's psychiatric condition had been reviewed by the AAT, which had set out the scope of its inquiry as being:

> '...to find whether at 18 February 1985 the Applicant was incapacitated by a deemed injury, whether that incapacity continued and if so, for how long and to what degree.'

That Tribunal found as follows:

> 'We have no hesitation in finding that from 20 July 1987...he had ceased to be incapacitated to any degree whatsoever. ...The maximum period of his compensable incapacity therefore is from 18 February 1985 to 20 July 1987, a closed period.'

There had been no appeal against that decision, and the Tribunal took the view that the instant proceedings amounted to an argument that the earlier AAT decision was wrong. The Tribunal followed the principles set out by Justice Pincus in *Bogaards v McMahon* (1988) 80 ALR 342, a case described by that Judge as being one depending on 'cause of action estoppel', and found that the earlier decision had determined the rights and obligations of the parties in respect of the relevant injury, such that it was functus officio (a duty, having been discharged, cannot be discharged again) and had no jurisdiction to decide the matter afresh.

The question of the availability of issue estoppel in tribunal proceedings also arose in *Re Colosimo and Comcare* (10 June 1992). In this AAT matter the Tribunal, constituted by Senior Member Handley, took the view that issue estoppel is available in tribunal proceedings, a contrary conclusion to that reached by the Tribunal in the *Petrou* case (reported in this issue above).

Mr Colosimo had sought to show that there was a link between psychiatric injury suffered by him and a previous employment of his. It was argued on behalf of Comcare that this question had already been determined by the AAT in previous proceedings and that the present Tribunal was functus officio. Although there was no reference to psychiatric injury in the previous decision itself, the Tribunal here was satisfied on the basis of the reasons for that decision that the claim for a connection between such injury and the employment had been considered and found not to exist.

In response to Mr Colosimo's submission that issue estoppel does not apply to AAT proceedings, the Tribunal here stated that it disagreed. Reference was made to *Bogaards v McMahon* (1988) 80 ALR 342, including the statement by Justice Pincus that:

> 'The doctrine of estoppel extends to the decision of any Tribunal which has jurisdiction to decide finally a question arising between parties even if it is not called a Court and its jurisdiction is derived from statute or from the submission of parties and it only has temporary authority to decide a matter ad hoc...'

These cases show that there is some uncertainty as to both the applicability of estoppel in tribunal proceedings and whether an estoppel should be classified as a cause of action estoppel or an issue estoppel.

Freedom of Information

Exempt documents

Searle Australia Pty Ltd v Public Interest Advocacy Centre (27 May 1992, Full Federal Court) arose after the Public Interest Advocacy Centre lodged a request for information held by the then Department of Health concerning intra-uterine devices manufactured by Searle. Much of the information held by the Department had been supplied by Searle, but some had also been supplied by persons who evaluated the product on behalf of the Department.

The Department provided some documents but relied on various exemptions under the FOI Act in respect of other documents. PIAC sought