rently investigating the scope of this project and is considering the engagement of a consultant.

Administrative Appeals Tribunal

New jurisdiction

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

- *Administrative Appeals Regulations Amendment*
- *Australian Citizenship Amendment Act 1991*
- *Bankruptcy Amendment Act 1991*
- *Civil Aviation Regulations Amendment*
- *Fisheries Legislation (Consequential Amendments) Act 1991*
- *Fisheries Management Act 1991*
- *Health and Community Services Legislation Amendment Act 1991*
- *Health Insurance Amendment Act 1991*
- *Health Insurance Amendment (No 2) Act 1991*
- *Health Insurance (Pathology) Amendment (No 2) Act 1991*
- *Hearing Services Act 1991*
- *Insurance Acquisition and Takeovers Act 1991*
- *Prime Minister and Cabinet Legislation Amendment Act 1991*
- *Social Security Act 1991*
- *Social Security Legislation Amendment (No 3) Act 1991*
- *Social Security (Rewrite) Transition Act 1991*
- *Taxation Law Amendment Act (No 3) 1991*

Natural justice in a specialist tribunal

In *Re Davey and Repatriation Commission* (20 September 1991), the Tribunal, constituted by Senior Member Allen and Members Hooper and Campbell, commented on the application of natural justice to Veterans' Review Board hearings.

Mr Davey gave the VRB some letters which supported his case. The VRB did not accept those letters and made adverse comments about them in its decision.

In the course of its decision on the main issues in the review application, the Tribunal reminded the VRB that natural justice applied in its hearings. Mr Davey should have been given an opportunity to answer the doubts that the VRB had had about the letters. This aspect of the decision of the Tribunal provides a useful example of the application of the principle expressed in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339. [PG]

Jurisdiction: 'decision under an enactment'

Re Advocacy for the Aged Association Incorporated and Department of Social Security (24 October 1991) concerned the scope of the Tribunal's jurisdiction when what was challenged was a group of decisions amounting to a departmental practice.

The Association applied to the Tribunal to review the arrangements by which the Department of Social Security paid pension monies directly to several Queensland nursing homes on account of pensioners who were living in those homes. The *Social Security Act 1991* enables pension payments to be made to a person other than the pensioner. This is often the situation when aged people live in nursing homes. The Association was concerned that the pension monies were not being completely devoted to supporting the people who lived in those nursing homes.

The Tribunal found that it did not have jurisdiction to consider the Association's application for two reasons:

- The Association's application did not relate to a particular decision, rather it related to a group of decisions amounting to a departmental practice.
- The Social Security Act, which determines the scope of the Tribunal's jurisdiction, provides that an application for review can be brought to the Tribunal only after it has been considered by the Social Security Appeals Tribunal. There had been no such consideration in this case. [PG]

Unbalanced referrals to medical specialists

Re Klinkert and Australian Postal Corporation (29 October 1991) raised a question about the handling of medical evidence.

Ms Klinkert received compensation payments from 1985. In 1990, after determining that she was no longer incapacitated for work, Australia Post cancelled those payments on the basis of certain medical reports.

However, the Tribunal, constituted by Deputy President Forrest, considered that Australia Post's

referral letter to the doctors who had recommended cancelling payments had presented an unbalanced picture of Ms Klinkert. The referral letter had raised the suggestion that she was unwilling to work. The Tribunal commented that such a suggestion did not give Ms Klinkert an opportunity of refuting it because she was unaware of what had been said about her.

As Australia Post's referral letter only presented one side of the story to the doctors, there was a chance that an inaccurate and therefore less credible report would be received. In turn, those reports became part of the evidence leading to the cancellation of Ms Klinkert's payments.

After the Tribunal saw Ms Klinkert and examined the complete range of medical reports it ordered that her benefits be restored. [PG]

New dismissal power for VRB

Re Linnehan and Veterans' Review Board and Repatriation Commission (8 November 1991) involved the operation of section 148(3D) of the Veterans' Entitlement Act. Subsections 148(3A) to (3E) were inserted in the Act by the *Veterans' Affairs Legislation Amendment Act 1990*. The scheme enables the Principal Member of the VRB to dismiss applications for review if no hearing date has been fixed within two years of the application being made and the Principal Member considers that the applicant should be ready to proceed to a hearing. An application will not be dismissed if the veteran can offer a 'reasonable explanation'.

Justice O'Connor, and Members Lynch and Keane, constituting the Tribunal, considered that the expression, 'a reasonable explanation', should be liberally interpreted to take into account the beneficial nature of the Veterans' Entitlements Act. The Tribunal took into account the following two points:

- Mr Linnehan was actively pursuing other claims through the Repatriation Commission and the VRB at the time; and
- some of the delay was not caused by Mr Linnehan.

The Tribunal set aside the decision to dismiss Mr Linnehan's claim. [PG]

Absence of best witnesses

Re Rodger and Secretary to the Department of Social Security (13 November 1991) provides an example of how the Tribunal deals with the absence of the witnesses that would appear to be best able to provide useful information.

Ms Rodger received sole parent's benefit for a number of years. The Tribunal, constituted by Senior Member Balmford and Members Elsum and McLean, had to consider whether Ms Rodger was entitled to those payments. The issue was whether she was, during the period in question, living with a man on a bona fide domestic basis. If she were she would lose her benefit.

The Department's solicitor contended that the Tribunal should draw an adverse conclusion because neither Ms Rodger's parents (with whom she said she was living at the relevant time) nor the man with whom she was alleged to be living gave evidence to the Tribunal. The Tribunal was not prepared to accept the proposition that if these people did not give evidence it must be because the evidence would not support Ms Rodger's case. The Tribunal commented that it would not apply this principle, which is a rule of evidence derived from the case of *Jones v Dunkel* (1959) 101 CLR 298, to disadvantage Ms Rodger because she did not have any legal assistance.

However, the Tribunal noted that it would be prepared to apply the principle to the Department, which had the advantage of greater resources and legal representation. The Department had, therefore, not established that Ms Rodger had actually lived in the same house with the man. Accordingly, the Tribunal decided the case in favour of Ms Rodger.

Having the power to inform itself, the AAT could have easily resolved the matter by calling these witnesses but instead it chose to decide the case on the information before it. [PG]

Section 28 statements

In *Re Ellenbogen and Department of Social Security* (13 November 1991), the Tribunal, constituted by Justice Purvis, considered the meaning of 'decision' under section 28(1) of the AAT Act.

Section 28(1) enables people who have received a decision, from which they can apply to the Tribunal for review, to seek a statement of reasons for the decision from the decision-maker. In this case, Mr Ellenbogen sought a section 28 statement from the Social Security Appeals Tribunal. The relevant facts of the case were that the Commonwealth Employment Service had issued an adverse report to the Department of

Social Security, which had acted on the report by suspending Mr Ellenbogen's unemployment benefits.

The SSAT reviewed the Department's decision and found in favour of Mr Ellenbogen. However, the SSAT considered that it lacked jurisdiction to review the decision to issue the adverse report which was made by a CES officer. Mr Ellenbogen, apparently unhappy that the SSAT had not specifically reversed the findings in the CES report, requested a statement of reasons relating to the decision not to review the CES officer's action. After being unsatisfied with the SSAT's response to his request, Mr Ellenbogen sought a statement of reasons in accordance with section 28 of the AAT Act.

The Tribunal decided that Mr Ellenbogen had no right to reasons under the AAT Act because:

> '... unless the applicant seeks, which he does not, that the restoration of the benefit be set aside or varied, there is no "decision" in respect of which an application can be made by the applicant for review.'

The net result of this decision is that section 28 appears not to give a right to reasons where the prospective applicant has been successful in the tribunal below. [PG]

Discovery of documents, nature of public interest immunity

Re Queensland Nickel Management Pty Ltd and Great Barrier Reef Marine Park Authority (unreported 21 November 1991) concerned an application for review of a decision of the Great Barrier Reef Marine Park Authority refusing a permit to Queensland Nickel Management Pty Ltd for the construction of mooring facilities and the carrying on of certain shipping activities in waters under the jurisdiction of the Authority. During the conduct of the hearing, Queensland Nickel applied to obtain information in the possession of the Queensland Government, which had been made a party to the proceedings.

A number of issues arose in relation to the documents:

- the State of Queensland contended that the documents sought were irrelevant to the issues in the application, arguing that some material was of historic interest only. The Tribunal, constituted by Mr Justice Gray, found that even though the chain may be a tenuous one, a party is entitled to discovery of documents which might lead it on a useful train of inquiry, relevant to the proceedings before the Tribunal.
- Queensland argued that it would be oppressive to require it to search for all the documents it might have, answering the descriptions sought. The Tribunal largely rejected this argument on the basis that many of the documents were already ascertained.
- reliance was placed by the State of Queensland on section 36B of the Administrative Appeals Tribunal Act 1975 to avoid disclosure. Section 36B provides that, if the Attorney-General of a State certifies that the disclosure of information would be contrary to the public interest by reason that it would involve the disclosure of decisions of Cabinet or for any other specified reason, the Tribunal will ensure that the information is not disclosed to any other person and may make the Attorney-General a party to the proceedings. The principle to be applied by the Tribunal is the desirability, in the interest of securing the effective performance of the Tribunal's functions, of the parties to a proceeding being made aware of all relevant matters, while paying due regard to the Attorney-General's reasons for non-disclosure.

The most significant of the Attorney-General's claims for immunity was that, as the information from port users was received in confidence by the Department of Transport, the continued public confidence and effective participation in government inquiries would be imperilled if the information were disclosed. The Tribunal found this to be a significant public interest, which went beyond mere confidentiality and which threatens the future ability of the government of the State of Queensland to obtain information in such circumstances.

In the Tribunal's view, the public interest arising from confidentiality and the need to obtain confidential information in the future should override the interest of the parties in being aware of all relevant matters. However, the Tribunal stated that the same considerations do not apply if there are any documents containing summaries or analyses of the information obtained from port users, which would not reveal the identity of the supplier of any particular information, whether directly or indirectly. These documents he would be prepared to disclose to the applicant.

An issue of general interest, which was not

argued before the Tribunal, involves the existence of the Tribunal's power to order discovery from a party that is not the decision-maker.

In Sutton v Commissioner of Taxation (1959) 100 CLR 518, the High Court said:

> 'Of course the Board [of Review] deals with the cases before it in a judicial spirit, and decides them by ascertaining the facts and applying the law as it sees it. That is a duty belonging to quasi-judicial as well as judicial bodies. Moreover it is armed with the powers given in Part V of the Regulations and is governed so far as they go by the directions contained in that Part. But it is not exercising judicial power. The importance of this is that the basis does not exist for implying a power over the Commissioner as a litigant party to impose on him a legal obligation to formulate his case by pleadings or particulars or to give discovery by answering interrogatories or otherwise or to fulfil some other procedural requirement borrowed from the courts of justice. To enable the Board to impose such obligations upon the Commissioner express authority would be necessary.'

It is understood that Mr Justice Gray's decision was appealed by the Attorney-General for Queensland to the Federal Court on 2 December 1991 seeking that the decision be set aside and that the application for discovery by Queensland Nickel be dismissed. The Court on 31 January delivered an ex tempore decision allowing the appeal but apparently not on the ground that the AAT lacks power to make orders for discovery. [GF]

Requirement to hear submissions by affected parties

In *Re Hawker de Havilland Ltd and Australian Securities Commission* (unreported 27 November 1991), the Tribunal, constituted by the President, Justice O'Connor, Deputy President McMahon and Member McLean, reviewed a decision made by the Australian Securities Commission. The decision was to grant to BTR Nylex (the second respondent) a conditional exemption, under section 728(1) of the *Corporations Law*, from the requirement that it make a formal takeover offer after its deemed acquisition of 20% of the voting shares of the applicant companies.

A matter of general interest that arose in the proceedings involved the Tribunal's rejection of the ASC's proposition that the ASC was not obliged to hear submissions from people who may be affected by the exercise of its discretion because such people have a statutory right of review. The Tribunal referred to the decisions in *Kioa v West* (1984-85) 159 CLR 550 and *Attorney-General v Quin* (1990) 170 CLR 1 and stated:bn

> '... it is therefore a clear principle of administrative law that all parties whose interests may be affected have a right to be heard by the decision-maker. The fact that those parties have a right to have that decision reviewed elsewhere does not subvert their right to be heard in the initial decision making process. There may be constraints which limit the extent of the consultation available, as there were in this case. This is quite different however from an assertion, as a general principle, that parties have no right to be heard and that the ASC has no obligation to hear them because they have a statutory right of review. This proposition is quite untenable.' [GF]

The weight of evidence

In *Re Aronovitch and Secretary, Department of Social Security* (6 December 1991), the Tribunal, constituted by Senior Member Dwyer and Members Burns and Rodopoulos, discussed the process of determining the weight of evidence received in hearings.

The Tribunal had to determine the ownership of a house which was registered as belonging to Mrs Aronovitch. Mrs Aronovitch claimed that she was holding the title to the house on trust for her mother, who lived in Israel.

A number of people gave evidence to the Tribunal, in person or by statutory declaration. The Tribunal noted that the people who gave statutory declarations could have attended the hearing to speak or been available to speak on the telephone to the Tribunal. However, the Department did not insist that those people attend in person. If they had done so the Department would have been able to question them on their evidence.

In the light of the Full Federal Court decision of *Repatriation Commission v Maley* (15 October 1991), the Tribunal discussed the weight which should be given to the pieces of evidence to be considered. That decision determined that

if a tribunal accepts evidence without any objection being made to its admission then there can no reason why it should not be treated as probative and credible evidence. The Tribunal concluded that, as there was no reason advanced by the Department for rejecting the evidence in support of the claim, the case be decided in Mrs Aronovitch's favour. [PG]

Australian Capital Territory AAT: Whether it is desirable to follow Commonwealth AAT decisions

Re Weetangera Action Group and Department of Education and the Arts (31 January 1992) arose after the issue of a conclusive certificate under section 36 of the *Freedom of Information Act 1989* (ACT). The ACT Administrative Appeals Tribunal, constituted by its President, Mr R K Todd, considered an application to gain access to documents relating to the closure of schools in the ACT, in particular the Weetangera Primary School.

President Todd discussed several Commonwealth AAT decisions including *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264. President Todd considered that that decision was not consistent with the spirit and intention of the ACT FOI Act, nor with the earlier decisions to which he had referred. He determined that he was not obliged to follow the *Aldred* decision as he was sitting as the President of the ACT AAT. However, he noted that he would have been required to follow *Aldred* if he were considering an application as a Deputy President of the Commonwealth AAT because *Aldred* had been decided by the then President of that tribunal.

He concluded that there were reasonable grounds for deciding that releasing the documents would be contrary to the public interest and upheld the original decision. [PG]

Freedom of Information

Amending medical reports

In *Re Gordon and Department of Social Security* (23 September 1991), the Tribunal, constituted by Senior Member Balmford and Members Rodopoulos and Gillham, considered an application, under section 48 of the FOI Act, to amend documents. Section 48 allows people to ask to have their personal records amended if the information which is recorded is 'incomplete, incorrect, out of date or misleading'.

Mr Gordon wanted a number of documents amended, including several medical reports and some file notes. Before the hearing, the Department had agreed to add a notation to each of the documents pointing out that Mr Gordon's views should be read in conjunction with the documents. Mr Gordon was dissatisfied with that proposal, so the issue before the Tribunal was the method of amendment.

In particular, Mr Gordon argued that several medical reports should be removed from his file. These were reports which did not support his claim for an invalid pension, which had been subsequently granted. The Tribunal made three points about amending medical reports on the basis that they were 'incomplete, incorrect, out of date or misleading':

- simply because the reports did not support the decision which was ultimately made did not necessarily mean they were incomplete etc;
- there needed to be medical evidence presented to the Tribunal before it could decide if the reports were incomplete etc (neither Mr Gordon nor the Department had arranged for any medical evidence to be presented); and
- in any event, the Tribunal considered that the medical reports should stand as representing the view of that doctor at the date of the examination.

Finally, the Tribunal determined that the power to amend documents would not extend to completely removing them from the file. [PG]

The Courts

Bias: previous dealings with a party

Re Polites; Ex parte Hoyts Corporation Pty Ltd (1991) 65 ALJR 445, concerned circumstances in which Deputy President Polites had been hearing a matter in the Industrial Relations Commission ('IRC') that had run, so far, for 27 days. At that juncture, a party discovered that the Deputy President had provided advice to the other party before he joined the IRC and objected to his continuing to sit. Deputy President Polites decided to discontinue sitting. The party that had not raised the matter initiated proceedings to obtain a writ of mandamus to compel Deputy