Environmental decisions

The Council has engaged a consultant, Professor Julian Disney of the Centre for International and Public Law of the Australian National University, 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:

- *Bankruptcy Amendment Act 1991*
- *Coal Tariff Legislation Amendment Act 1992*
- *Customs Legislation (Tariff Concession and Anti-Dumping) Act 1992*
- *High Court of Australia (Fees) Regulations (Amendment)*
- *Industrial Chemicals (Notification and Assessment) Amendment Act 1992*
- *Migration Amendment Act (No 2) 1992*
- *Migration Amendment Act (No 3) 1992*

AAT decisions

Veterans' Affairs – making of AAT review applications

Re Roberts and Repatriation Commission (4 March 1992) concerned the question of when an application for AAT review of a decision of the Veterans' Review Board is both "made" for the purposes of section 177(2) of the *Veterans' Entitlements Act 1986* and "lodged" within the meaning of section 29 of the AAT Act. Section 177(2) sets out the manner in which a pension may be paid, depending on whether the application is made to the Tribunal within three months of service of the VRB decision on the applicant under section 177(2)(a), or more than three months from that time under section 177(2)(b). Section 29 requires that an application be "lodged" with the Tribunal within the prescribed time.

The application by Mr Roberts had been made on the wrong form and sent to the Department of Veterans' Affairs (DVA). A delay in forwarding the application to the AAT meant that it was received by the Tribunal more than three months after the VRB decision had been served on Mr Roberts. It was argued for Mr Roberts that the forwarding of his application to the DVA was sufficient to comply with section 177(2)(a). The answer to the question raised was important for Mr Roberts because his pension, which the Repatriation Commission had indicated it was liable to pay, would have been payable from a significantly earlier date if the application were held to have been made within three months of the VRB decision being served on him.

The Tribunal, constituted by Justice O'Connor, decided that it was not sufficient for the purposes of either the AAT Act or the Veterans' Entitlement Act for the application to have been received by the DVA. A valid application must be lodged with the Tribunal within the prescribed time limit, with lodgement meaning a physical acceptance of the document by an officer of the Registry, whether the document was sent or deposited in person. It was further decided that the time limits set by the Veterans' Entitlement Act must be complied with strictly and that substantial compliance would not suffice.

The Tribunal referred this case and similar cases existing in AAT registries to the Ombudsman for investigation.

Summons for production of documents

Lego Australia Pty Ltd v Collector of Customs (10 April 1992) dealt with several aspects of the power to issue a summons under section 40(1A) of the AAT Act. Lego had sought review of a Customs decision to demand an amount of duty said to be owing in relation to goods imported from Denmark. On 14 November 1991, while the matter was pending, a search of Lego's premises by members of the Australian Federal Police, under a warrant issued on 30 October 1991, took place. A large amount of Lego's documentation was taken during the search.

On 17 December 1991, the AAT matter was listed in a callover and was stood over for a Directions Hearing in March 1992. At that hearing, Justice Moss, constituting the Tribunal, was informed by Lego that a summons dated 4 February 1992 had issued from the Tribunal Registry seeking, in

effect, the information document upon which the search warrant had been issued. That document was delivered into the Tribunal's possession but access to it by Lego was resisted by Customs on the grounds that it was not relevant to the decision under review and that the issue of the summons constituted an abuse of process because of its alleged ulterior purpose. A Certificate of the Attorney-General was also filed within section 36(1)(c) of the AAT Act objecting to disclosure of the information document on the basis of public interest immunity. Under section 36(3A) the Attorney-General thereby became a party to the proceedings.

The Tribunal decided that the information was of no relevance to the review of the decision on the amount of duty said to be owing, and that it was therefore unnecessary to consider the abuse of process argument. It also decided that there was a strong case for refusing to disclose the information to Lego on the ground of public interest immunity. The Tribunal's further comments on the operation of section 40(1A) of the AAT Act, although not the basis for its decision here, merit further attention.

The Tribunal stated that the power of the Registrar or a Deputy Registrar, if directed by a relevant person, to summon a person to appear at a hearing and to produce documents "for the purposes of the hearing of a proceeding before the Tribunal" within the meaning of section 40 (1A) of the AAT Act was restricted to proceedings specifically authorised by the Act. This meant that apart from a "proceeding for the purpose of reviewing a decision" within section 40(1), only proceedings referred to in section 21(1A) could be the subject of such a power. Directions Hearings, as in the present case, and Preliminary Conferences were not such proceedings. It was therefore not possible to issue a summons in relation to and returnable at a Directions Hearing.

The Tribunal went on to state that the lack of any provision elsewhere in the Act for the exercise of powers by the Tribunal in relation to section 40(1A):

> "may lead to the consequence that, apart from a discretion in the relevant member of the Tribunal to give or withhold such a direction as is contemplated by s 40(1A), once the summons has issued the powers of the Tribunal in relation to it cease, so that, for example, there is no power in the Tribunal to take such action as setting the summons aside on any ground."

Referral to Ombudsman

In *Re Trustees of the C & M Baldwin Pension Fund and Insurance and Superannuation Commissioner* (20 May 1992), the Fund had submitted an annual return on a superseded form and had thereby not supplied information required by the Commissioner for the issue of a notice in writing under the *Occupational Superannuation Standards Act 1987*. This notice would have certified that the Fund satisfied superannuation fund conditions for the income year.

The Fund submitted that the revised form became available too late in the accounting year for it to be reasonable for the Fund to use it and that the Commissioner should have accepted the superseded form and issued the notice.

Deputy President Thompson, constituting the Tribunal, found that, under the Act, the preconditions for the issue of a notice by the Commissioner had not been met and that there was no requirement for the Commissioner to decide whether or not to issue the notice. In the absence of a decision, therefore, there was no reviewable decision before the Tribunal and the Tribunal had no power to hear and determine the application.

However, the Tribunal was critical of the process involved in the release and distribution of the revised forms and directed that a copy of the application, a transcript of the Tribunal hearing and a copy of the documents tendered in evidence be forwarded to the Ombudsman. This matter and *Re Roberts,* reported earlier in this section, provide examples of the AAT referring problems of a systemic or procedural nature that come to its attention to the Ombudsman for further investigation. [PJ]

Estoppel in administrative tribunals

In the June 1992 issue of *Admin Review*, three cases dealing in different ways with the question of the application of cause of action and issue estoppel to the decisions of administrative tribunals were noted (see

[1992] *Admin Review* 61). In *Re Quinn and Australian Postal Corporation* (18 June 1992), the Tribunal attempted to resolve the question. Unfortunately, the decision of the Tribunal was not unanimous.

The facts may be briefly stated. Ms Quinn suffered a neck injury at work in July 1984 and was off work for several months but returned in November 1984. After having suffered what was diagnosed as a relapse, she left work again in February 1985 and had not returned. Her compensation payments were reinstated when she left work. However, in August 1987 compensation was terminated when the Australian Postal Corporation (APC) denied liability. In a decision in October 1988, the AAT determined that Ms Quinn was totally incapacitated for work as a result of the injury suffered in July 1984. Compensation was reinstated. In June 1991, APC again stopped compensation on the basis of a range of medical reports that stated that any incapacitating effects of the injury would have ceased shortly after the accident in 1984.

As an interlocutory question, Ms Quinn contended that the decision of the AAT of October 1988 governed the question of liability and capacity in respect of the injury up until that time, and that the only factual question for review in the current proceedings was whether there had been a change in circumstances since October 1988 that would justify the termination or varying the award of compensation on any date thereafter.

The Tribunal noted that the matter before it related to a different decision to that under review in 1988 and to a different period of incapacity. As such, this was not a situation where cause of action estoppel could apply. There remained the question of whether issue estoppel applied. In this regard, the majority, constituted by the President, Justice O'Connor and Senior Member Barbour (Member Katz writing a separate decision), noted that:

> "It is certainly illogical to argue that decisions of the Tribunal could create cause of action estoppels, but not issue estoppels."

The majority of the Tribunal was not prepared to accept Ms Quinn's contentions because to do so "would fetter the Tribunal's appropriate and necessary discretion in the exercise of its procedures".

However, in its concluding remarks it discussed the question of estoppel and how the AAT might best address the policy issues related thereto:

> "The Tribunal does not need to decide in this case whether as a matter of law the doctrine of estoppel applies to administrative decisions. The Tribunal's process is administrative and in understanding the task of review is obliged to consider the administrative consequences and fairness of the investigation it makes in reaching the correct or preferable decision. The policy basis upon which the doctrine of estoppel rests, ie 'it is for the common good that there should be an end to litigation' and 'no one should be harassed twice for the same cause', are relevant to administrative law...
>
> "There is no single appropriate answer to the question of what extent estoppel as a matter of policy rather than law should apply in administrative decision making as the balance of individual and public interests can and will produce different answers in the diverse areas of administrative practice. A doctrine with sufficient flexibility to recognise this diversity is needed...
>
> "It would seem inappropriate and unreasonable to us for there to be relitigation without reason of the same issues before the Tribunal. It would be unjust to applicants to have to face a situation where a decision may be made today and relitigated tomorrow on the very same facts. The Tribunal should not generally allow relitigation of issues already decided and previous Tribunal decisions should be regarded as establishing the matters actually decided and of the grounds for the determination. In compensation cases like the present, the issues of causation and level of incapacity for the period the subject of the earlier decision would thus not be areas contested in a subsequent hearing.
>
> "Where there are attempts to adduce or present evidence the subject of previous decisions, the Tribunal should consider the evidence and make appropriate directions as to its admissibility during the course of the Hearing..." [SL]

AAT jurisdiction – Corporations Law

As noted in the Courts section of this issue of *Admin Review*, the Federal Court in the *Hongkong Bank* case restrictively interpreted the scope of the AAT's jurisdiction to review decisions under the Corporations Law. An example of the application of that interpretation is provided by *Re Creswick and the Australian Securities Commission* (29 June 1992), in which the AAT, constituted by Deputy President McMahon, considered whether it had jurisdiction to review a decision of the ASC not to make an application, under section 1292(2) of the *Corporations Law*, to the Companies Auditors and Liquidators Disciplinary Board in relation to the conduct of a particular person alleged not to be fit to remain registered as a liquidator. Section 1292(2) provides, as far as is relevant, that "The Board may, if it is satisfied on an application by the Commission..."

The Tribunal stated:

> "The opening words of the sub-section, to use the Court's phrase, are 'not expressed as a dispositive provision creating rights or liabilities or reposing powers or functions' [in the Commission]... They simply describe the exercise of a function of the ASC. The remainder of the sub-section sets out the preconditions as to which the Board must be satisfied before it can deal with the registration of the liquidator in the manner set out above. The opening words of the sub-section simply describe the standing of the body authorised to apply to the Board in order to set its enquiry in train... The source of the power to make this application is to be found in sub-section 11(4) of the *Australian Securities Commission Act 1989*... An exercise of power under that section is not reviewable by this Tribunal... It follows that s 1317B, the only source of power to review ASC decisions under the Law, does not apply in relation to a decision by the ASC not to apply to the Board..." [SL]

Archived ASIO records

In *Re McKnight and Australian Archives* (23 July 1992), the Tribunal, constituted by Deputy President Johnston, considered the issue of access to material held by Australian Archives on behalf of ASIO. Both a claim for exemption from disclosure of certain material, and the question whether ASIO had exceeded its charter in collecting the information, were addressed by the Tribunal.

Mr McKnight sought access to records relating to Dr JF Cairns which fell into the "open access period" under the *Archives Act 1983* (the Act), i.e. records which have been held for a period of at least 30 years and which are to be available for public access unless exempt. Archives claimed an exemption in respect of a number of those records under section 33 of the Act, which lists various grounds for exemption.

Evidence was given by a senior officer of ASIO in support of the exemption claim. He argued that disclosure of the documents in issue would lead to a reduction in the quality and quantity of information received by ASIO from overseas security services, as the information had been provided in confidence. It was also feared that ASIO methods of operation and the identity of ASIO informants might be revealed as a result of such disclosure. In part, this fear was based on the "mosaic theory", a theory of "cumulative prejudice", i.e. that, although a document may not itself reveal a source of information or method of operation, a number of documents when pieced together have the potential to do so.

Under section 33(1)(a) of the Act, which appears to have been the section most heavily relied on in support of the claim for exemption, there had to be a "reasonable expectation" that damage to the security, defence or international relations of the Commonwealth would ensue from the release of a document. The Tribunal found that the mosaic theory was not discredited simply because ASIO could not identify the particular information in this instance that might be pieced together with other information to reveal a confidential source or method of collecting information. The need for a degree of speculation in assessing the risk of such a revelation was not of itself sufficient to defeat a claim of cumulative prejudice.

The Tribunal found that there was a reasonable expectation that damage would ensue in respect of a number of the documents being sought by Mr McKnight. The potential damage concerned Australia's international relations, defence and security, through the loss of confidence in

Australian authorities by foreign governments that would follow such disclosure, or as a result of the identification of sources or methods of collecting information.

The Tribunal also discussed whether ASIO had acted outside its charter in collecting the material and whether a claim for exemption should therefore be unsuccessful. A Directive of Prime Minister Chifley in 1949 had established ASIO, and the documents being sought related to a period when the charter of ASIO was governed by that and another such Directive issued by Prime Minister Menzies. The relationship between ASIO's compliance with its charter and a current right of access to ASIO material in the Archives was described by the Tribunal in the following terms:

> "Even if, to put the case at its highest, the information had been illegally or improperly obtained, its disclosure could still seriously prejudice the ongoing operations of ASIO. To say that is not to sanction any possible breach of the law: it is to say that release to someone such as [Mr McKnight] is not an appropriate remedy. ...the Directives were administrative commands addressed to the organisation: they were not directed to providing a mandate for access. ...the claim for exemption does not fail, in my opinion, even if it should be established (which it has not been) that there had been an exceeding on the part of ASIO of its charter under the Prime Ministerial Directives, because of some public interest consideration. There is in fact no public interest test requiring a balance between the statutory right to access and the interests of security imposed in relation to s.33 of the Act. ...Unlike s.33A(2)(b) of the Freedom of Information Act 1982, s.33 of the Archives Act contains no balancing test." [MD]

Right to Withdraw

Re Queensland Nickel Management Pty Ltd and Great Barrier Reef Marine Park Authority (7 August 1992) concerned the right to withdraw an application from the Tribunal. A number of parties which had been given leave to join in the application challenged Queensland Nickel's right to withdraw its application when they had invested substantial time and money in the proceedings before the Tribunal which had occupied 92 sitting days.

The Tribunal, constituted by Justice Gray, Deputy President Breen and Member Christie, considered a number of Australian and English authorities, as well as previous decisions of the AAT itself. It found that in the absence of either a specific exclusion of the right to withdraw in the legislation itself or a public interest dictating that the legislation should be construed as prohibiting a right to withdraw, an applicant has the right to withdraw an application at any time without the need for the Tribunal to grant leave. Even if the Tribunal were required to grant leave, it would not have the power to attach conditions to a grant of leave to withdraw an application, e.g. preventing future applications on the same matter from being made.

The Great Barrier Reef Marine Park Authority (GBRMPA) and other parties which had been given leave to join in the case were unsuccessful in their bid to be compensated for the time and expense of their participation in the proceedings. The Tribunal found that it did not have the power to compensate parties for costs.

It also took the view that it could not give a decision when an application had been withdrawn, as the withdrawal brought the matter to an end. It appreciated the desire of the parties to know the views of the Tribunal on the issues which arose in the case and accepted "that a decision of the tribunal would be a valuable guide, particularly to GBRMPA in its operation of the planning scheme in the marine park." As the withdrawal of the application brought the matter to an end, however, an opinion of the Tribunal would be advisory only and it did not have the power to provide such an opinion in this case. The Tribunal went on to state that:

> "Even if the Tribunal had a choice as to whether to proceed to deliver a decision and reasons for decision in respect of the application for review, we should decline to do so. There is no point in the further expenditure of public money, and the relegation of the commitments of members of this tribunal, for the purposes of determining a controversy which is no longer alive." [MD]

Referees' reports in universities

Re Kamminga and Australian National University (13 March 1992, AAT) involved review of a decision refusing Dr Kamminga access, requested under the *Freedom of information Act 1982* (the FOI Act), to six referees' reports that had been provided in support of two job applications he had made at the Australian National University. An example of the type of letter requesting the reports was given to the Tribunal. It requested the referee's comments "on an 'in confidence' basis".

The University relied on four provisions of the FOI Act in support of its claim for exemption. They were: that it could reasonably be expected that their disclosure would have a substantial adverse affect on either the assessment of personnel by the University [section 40(1)(c)] or the proper and efficient conduct of the operations of the University [section 40(1)(d)]; that the documents were obtained in confidence [section 45]; and that the documents were internal working documents the disclosure of which would be contrary to the public interest [section 36(1)].

Regarding the claim for exemption under section 36(1), the Tribunal, constituted by the President, Justice O'Connor, and Members Attwood and Julian, considered the public interest in both confidentiality and in relation to the quality of referees' reports and the selection of staff. On the first point, the Tribunal took the view that in the absence of special circumstances, a document is only exempt on the ground of confidentiality if it is exempt under section 45, at least where the confidentiality arises out of an understanding between an agency and an outside person that a document is "confidential". That is, the public interest in confidentiality is not a factor to be taken into account under section 36(1). As for the second point, the University argued that referees' reports, if available to applicants, would be less candid and helpful and would lead to the selection of poorer quality staff. The Tribunal considered, however, that there may be cases where adverse comment is made that is unfounded or out of context, and that in such cases the selection of the best staff might be facilitated by giving access to the reports. It was not satisfied that the public interest in the maintenance of high standards of scholarship in the University would be undermined by disclosure of the reports, so the argument under section 36(1) failed.

Following its reasoning in relation to the section 36(1) claim, arguments relating to the candour and quality of referees' reports were also rejected by the Tribunal in respect of the claims made for exemption under sections 40(1)(c) and (d).

In considering the claim for exemption under section 45, the Tribunal noted a 1991 amendment of the FOI Act, the effect of which is to limit exemptions on the basis of confidentiality to situations where disclosure would constitute an action for breach of confidence at general law. It noted that it is unclear whether the term "breach of confidence" covers contractual rights to confidence. In the present case, there was found to be no contractual or proprietary basis for a claim of confidentiality. The question for the Tribunal therefore was whether the referees who wrote the reports would, if the reports were disclosed, have an action in equity against the University for breach of confidence. In this regard the test set out by Justice Gummow in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 14 FCR 434, was applied with the result that the reports were exempt from disclosure under section 45.

Transcript of court judgment

Re Altman and Family Court of Australia (16 April 1992, AAT) concerned an application before the President of the AAT, Justice O'Connor, for access to a transcript of an *ex tempore* Family Court judgment under the *Freedom of Information Act 1982* (the FOI Act). Mrs Altman's request had been directed to the Commonwealth Reporting Service (CRS – now known as Auscript), but was later transferred to the Principal Registrar of the Family Court. Access to the document was refused by the Court.

It was argued on behalf of the Court that, pursuant to section 5 of the FOI Act, the transcript was not a document to which the Act applied. It also argued, on three grounds under the FOI Act, that the transcript was an exempt document and that therefore, under section 18(2) of that Act, it was not required to give access to it.