

opinion to deny the applicant procedural fairness in the circumstances of this case.

The Federal Court also said that, given that at the time Mr B's statement was tendered, counsel for the Commissioner had not requested that Mr B be made available for cross-examination, the applicant and his counsel were entitled to expect that Mr B's statement would not be denied evidentiary significance for the reason stated by the Tribunal. The Court said that, in the circumstances, procedural fairness to the applicant required that the hearing be reconvened and the applicant's counsel informed of the Tribunal's conclusion so that the applicant could have considered whether to have applied for leave to reopen his case in order to adduce other evidence supporting the existence of the facts stated in Mr B's statement, whether by oral testimony of Mr B or of other witnesses.

The Federal Court found that the Tribunal's failure to reconvene the hearing for this purpose was an error of law. The Court also found that this failure contravened section 39 of the *Administrative Appeals Tribunal Act 1975* in that it failed the "ensure that every party ... is given a reasonable opportunity to present his case". The AAT's decision was set aside and matter remitted to the Tribunal for rehearing. Given that the Tribunal had expressed the opinion that the applicant's testimony was "virtually worthless" the Court expressed the view that justice would be better seen to be done if the Tribunal is reconstituted for the purpose of rehearing. [GM]

The Ombudsman

Report on complaint by New Burnt Bridge Aboriginal Corporation

On 28 March 1996 the Ombudsman made public her final report (the March 1996 report) on a complaint by New Burnt Bridge Aboriginal Corporation (NBBAC) concerning the actions of the Aboriginal and Torres Strait Islander Commission (ATSIC). The March 1996 report

consists of a report under section 35A of the *Ombudsman Act 1976* which provides an overview of the actions taken since her final report to ATSIC in January 1995 (the January 1995 report) which became the subject of Federal Court proceedings between ATSIC and the Ombudsman. [See *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman*, 134 ALR 238] The January 1995 report, revised slightly to meet the terms of the judgment (21 September 1995) and orders (22 December 1995) of Justice Einfeld of the Federal Court, is appended to the March 1996 report.

The Ombudsman's investigation began with a complaint received in November 1992 from the NBBAC, representing the residents of part of the former Burnt Bridge Aboriginal reserve in Kempsey, New South Wales. Briefly, the complaint related to the appointment of consultants to produce a development application and to design and manage the construction of a housing project for the Aboriginal community. The NBBAC wanted to select their own consultant and were concerned that ATSIC would not allow it to control the selection process for the consultants. The NBBAC was also concerned about administration of project funds by the ATSIC regional officers.

In her report the Ombudsman notes that the matter was essentially a local one but it raised broader issues concerning:

- possible favouritism towards a consultant;
- conflicts of interest;
- procedures for the provision of grants;
- accountability of public monies; and
- ATSIC's adherence to its own self determination principles.

During the Ombudsman's investigation the Ombudsman became concerned at what she saw as ATSIC's unwillingness to review its own actions and take remedial action in relation to its administration emerged as a further issue of concern to the Ombudsman.

Between the time the complaint was received and release of her final report, the Ombudsman made a preliminary report to ATSIIC and issued a draft report setting out preliminary views on the issues and including some 20 recommendations. The Ombudsman reports that ATSIIC responded positively to most of the recommendations but there remained some outstanding issues.

The Ombudsman's conclusions were contained in the January 1995 report. The report contained conclusions in relation to the ATSIIC regional officers involved and in relation to ATSIIC management. The conclusions in respect of the latter were:

- ATSIIC had not followed its own rules on the appointment of consultants;
- on a number of occasions ATSIIC had not adequately reviewed the actions of its regional officers; and
- ATSIIC's response to the Ombudsman's investigation raised concerns about its ability to objectively recognise and remedy serious defective administration.

Four recommendations of the Ombudsman that had not been satisfactorily responded to by ATSIIC were contained in the January 1995 report. Three of these concerned recommended action that ATSIIC should take in response to the particular complaint. The remaining one was a recommendation that ATSIIC review the principles, procedures and resources involved in providing clients with effective internal reconsideration of its administrative actions.

As indicated above, the January 1995 report became the focus of legal action by ATSIIC in the Federal Court to prevent the Ombudsman from issuing her report. ATSIIC argued that release of the report would be unlawful because the Ombudsman was not legislatively empowered to make recommendations in disciplinary matters or findings of guilt in criminal or disciplinary offences. ATSIIC also claimed that some criticisms in the report had not been previously put to ATSIIC. ATSIIC was also concerned that release of the report would

adversely impact on ATSIIC's reputation and that of some of its officers.

The Federal Court found merit in some of ATSIIC's arguments but concluded that in all but some minor instances the Ombudsman had acted within her jurisdiction and that due process had been followed. As a result of the Federal Court proceedings some changes were made to the January 1995 report and the amended report was given to ATSIIC in January 1996.

ATSIIC responded to the amended Ombudsman's report by letter in February 1996. The Ombudsman notes in the Report that the matters could have been addressed by ATSIIC in response to the amended report. If they had been addressed earlier, the wording of the report would have been altered. However, none of the points were significant enough to lead the Ombudsman to change any of her findings or alter her final recommendations.

The Ombudsman acknowledges that ATSIIC has made 'significant procedural changes' in response her investigation. For example, ATSIIC has initiated an inquiry to evaluate procedures for reviewing administrative decisions. It has concluded a major review of guidelines and procedures relating to conflict of interest and has issued all staff with revised grant procedures and introduced a CD ROM based multi-media package for all field staff providing access to guidance on procedural and legislative requirements. ATSIIC has also revised its *Funding Procedures Manual* clearly setting out the responsibilities of ATSIIC officers and grant recipients, including the role of each in the selection and appointment of project managers. The Ombudsman notes that these procedural changes should lead to 'significantly improved administrative accountability.'

New Outreach materials

The Ombudsman's Office has recently produced new outreach resources designed to inform the public about the role of the Ombudsman in handling complaints about federal government Departments' and authorities' actions and decisions. The resources include:

- multi-lingual fact sheets in 24 languages for ethnic community organisations;
- a new illustrated brochure about the Commonwealth Ombudsman, particularly targeted to students, youths and people of Non-English speaking backgrounds; and
- a new Defence Force Ombudsman brochure.

ADMINISTRATIVE LAW WATCH

An AAT for Western Australia? - Commission on Government - Discussion paper on Administrative Appeals Tribunal

The WA Commission on Government (the Commission) is inquiring into the possible functions and terms of reference for an administrative appeals tribunal in Western Australia. The Commission was set up by the Western Australian Government to inquire into 24 Specified Matters which are set out in the First Schedule of the *Commission on Government Act 1994* (WA). The Commission's primary focus is on matters relevant to the prevention of corrupt, illegal or improper conduct of public officials, including Ministers and Members of Parliament. It may also inquire into other related matters.

Specified Matter 5 requires the Commission to inquire into:

The functions and terms of reference of an administrative appeals tribunal and its relationship to the respective roles of the judiciary and the executive.

In March 1996 the Commission published a Discussion Paper as part of its inquiry into whether an administrative appeals body should be established in Western Australia. The Discussion Paper notes that in 1992 the *WA Royal Commission into the Commercial Activities of Government* (WA Royal Commission) acknowledged that Western Australians had 'inconsistent and restricted rights of appeal against administrative decisions.'

Much has been said over the last 20 years or so about the fundamental requirements for

an accountable administrative system. The Discussion Paper notes comments on this issue that have been made by such bodies as the Commonwealth Administrative Review Committee (the Kerr Committee, 1971), the Administrative Review Council and the Access to Justice Advisory Committee (which was established in 1994 by the federal Attorney-General to review Australia's justice system and recommend reforms to enhance access to justice). The ability to obtain reasons for decisions and independent merits review are included in these fundamental requirements.

The Discussion Paper briefly outlines systems for handling administrative appeals that have been developed in the United Kingdom, the United States of America, some Canadian provinces and New Zealand as well as at federal and State level in Australia. It notes that the administrative appeals system in Western Australia 'is characterised by a proliferation of tribunals which have been criticised for having no scheme or pattern, no common objectives or principles and no uniformity of procedures' and that the number of tribunals is increasing.

Among the many issues raised for consideration in the Discussion Paper are the criteria that should be applied to determine what decisions should be the subject of administrative appeal, when decision-makers should be required to provide reasons for decisions, whether internal review should be available and a prerequisite to external review, whether there should be a right of appeal against administrative decisions to an independent external appeals body and whether a general administrative appeals body should replace the