

REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Since the last issue of *Admin Review* the Council has made submissions to:

- the Senate Legal and Constitutional References Committee in relation to its Inquiry into Legal Aid in Australia;
- the Attorney-General's Department in response to the review of Guidelines for the granting of Financial Assistance by the Attorney-General in Native Title Cases;
- the Australian Law Reform Commission in response to the introductory paper on the Commission's review of the adversarial system of litigation;
- the Senate Standing Committee for the Scrutiny of Bills in response to an entry in Alert Digest No. 13 of 1996 concerning proposed amendments included in the Financial Laws Amendment Bill 1996;
- the Federal Bureau of Consumer Affairs concerning Benchmarks for Industry-based Consumer Dispute Resolution Schemes;
- the Review of Business Programs being conducted by Mr David Mortimer;
- the Public Service and Merit Protection Commission in response to the discussion paper, *Towards a Best Practice Public Service*;
- Dame Margaret Guilfoyle concerning her review of the Social Security Review and Appeals System;
- the Australian Law Reform Commission in response to Issues Paper 19, *Review of the Archives Act 1983*; and
- the Joint Standing Committee on Migration in relation to its Inquiry into Criminal Deportation.

Current work program – developments

The Contracting Out of Government Services

In early March the Administrative Review Council released its Issues Paper on the administrative law implications of contracting out of Commonwealth Government services. A summary of the issues paper is one of the focus articles in this issue of *Admin Review*.

The Council sought comments and submissions on the Paper by 18 April 1997 and is now conducting consultations around Australia. Copies of the issues paper are available from the Council's secretariat on (06) 247 5100.

Further information on this project can be obtained from the Council's Director of Research, Philippa Lynch Tel (06) 247 5100.

Internal Review

There are a number of reasons why agencies might choose to have internal review systems. The Council's purpose in undertaking this project is to identify the purposes that agencies seek to achieve by adopting systems of internal review and to examine the extent to which those goals are met. The Council will use this examination to develop guidelines that would assist agencies to develop or adapt internal review systems to achieve particular purposes.

The Council's *Better Decisions* report defined internal review as follows:

“ ‘Internal review’ is merits review of an agency's primary decision that is undertaken by another officer within the same agency (usually a more senior officer).” (at para 6.42)

The Council's Internal Review project will adopt this definition. Thus it is concerned with how agencies review their own decisions rather than how they handle complaints generally. Agency complaint-handling practices is a matter which has been under consideration by

the Commonwealth Ombudsman and this is discussed under the heading THE OMBUDSMAN (below) and in the Ombudsman's paper in the Focus Articles.

The contact officer for this project is the Council's Deputy Director of Research, Sue Bromley, Tel (06) 2475100.

Appeals from the AAT to the Federal Court

In May 1995 the Council published a discussion paper on whether the provision that governs appeals to the Federal Court from the Administrative Appeals Tribunal (section 44 of the *Administrative Appeals Tribunal Act 1975*) should be changed. The concerns that led to the preparation of the discussion paper arose initially in the tax, and subsequently the patents, areas of the AAT, although any change to the provision governing appeals from the AAT to the Federal Court could cut across all review jurisdictions of the AAT. While the paper was directed to all persons interested in the AAT's activities, there may be reasons why tax, patents or other types of decisions should be treated separately from the remainder. In a nutshell, the discussion paper asked:

- whether the scope of the appeal from the AAT to the Federal Court should be broadened;
- whether the Federal Court should be given a discretion to determine questions of fact where it finds on appeal that the AAT has made an error of law;
- whether the President of the AAT should be given a discretion to refer whole cases to the Federal Court for determination; and
- whether any change to AAT appeals or referrals should be general or be limited to particular AAT review jurisdictions.

The Council received some 30 submissions in response to the discussion paper.

As advised in the last edition of *Admin Review*, the Council had put this project on hold pending a High Court decision in a case which involved, in part, what constitutes a 'question of law' for the purposes of section 44.

The High Court handed down its decision in *Collector of Customs v Agfa-Gavaert* (1996) 141 ALR 59 on 10 December 1996. The High Court shed no further light on the distinction between questions of law and questions of fact, taking the view that the AAT had adopted the correct approach to the interpretation of the legislation in question.

The Council has now engaged the services of a consultant, Mark Leeming, who is a Sydney barrister, to complete a draft of a final report on the section 44 project. The Council expects to complete the project and issue its final report later this year.

Further information on this project can be obtained from the Council's Director of Research, Philippa Lynch, Tel (06) 247 5100.

Administrative Review of Patents Decisions

In January 1994 the Council published an issues paper, *Administrative Review and Patents Decisions*. The central issue raised in the paper was the appropriateness of the current arrangements for the review of decisions made by the Commissioner of Patents. Some of these decisions are currently reviewable by the AAT, others by the Federal Court and there are decisions that are currently not subject to review at all.

Some issues raised in this project overlap with issues raised in the Council's project on the review of appeals from the AAT to the Federal Court. The project will be finalised after completion of the section 44 project.

Further information on this project can be obtained from the Director of Research, Philippa Lynch, Tel (06) 247 5100.

Professional Development Activities

In mid April, the Council held the first of a series of workshops entitled "Everyday Dilemmas for Tribunal Members". The workshop took the form of discussion of hypothetical problems faced by Tribunal members and was held in Sydney. A Sydney barrister, Brian Knox, facilitated the workshop.

Workshop participants and Heads of Tribunals strongly endorsed the workshop. Further workshops have now been held in Sydney and Melbourne.

Further information about the Workshops can be obtained from the Director of Research, Philippa Lynch, Tel (06) 247 5100.

Administrative Appeals Tribunal

New jurisdictions

The following legislation, which has been passed since the last edition of *Admin Review*, conferred jurisdiction on the AAT, or altered existing AAT jurisdiction:

Air Navigation (Aircraft Noise) Regulations (Amendment) (SR 209 of 1996)

Airports Act 1996 (No. 42 of 1996)

Airports (Building Control) Regulations (SR 292 of 1996)

Airports (Environment Protection) Regulations (SR 13 of 1997)

Airports (Ownership – Interests in Shares) Regulations (SR 341 of 1996)

Airports (Protection of Airspace) Regulations (SR 293 of 1996)

Australian Law Reform Commission (Repeal, Transition and Miscellaneous) Act 1996 (No. 38 of 1996)

Bankruptcy Amendment Act 1997 (No 11 of 1997)

Bankruptcy Regulations (SR 263 of 1996)

Customs Amendment Act(No1) 1997 (Act No.3 of 1997)

Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill (No. 1) 1996 (No 41 of 1996)

Export Control (Hardwood Wood Chips) Regulations (SR 206 of 1996)

Export Control (Unprocessed Wood) Regulations (SR 338 of 1996)

Family Law Regulations (SR 188 of 1996)

Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations (SR 283 of 1996)

Hazardous Waste (Regulation of Exports and Imports) Regulations (SR 284 of 1996)

Health and Other Services (Compensation) Amendment Bill 1996 (No. 33 of 1996)

Marine Personnel Legislation Amendment Act 1997(No. 10 of 1997)

Primary Industries and Energy Legislation Amendment Bill (No 2) 1996 (No 59 of 1996)

Veterans' Affairs Legislation Amendment Bill (No. 1) 1996 (No. 55 of 1996)

Wheat Industry Fund Regulations (Amendment) (SR 256 of 1996)

This report on legislation is based on material provided by the Principal Registry of the Administrative Appeals Tribunal. The Tribunal also advises that the number of enactments that confer jurisdiction on the Tribunal is 286.

The following legislation, which provided for merits review by the Tribunal, has been repealed:

Customs (Cinematograph Films) Regulations

Dairy Industry Stabilization Act 1977

International Shipping (Australian-Resident Seafarers) Grants Act 1995

Ships (Capital Grants) Act 1987

Road Transport Reform (Dangerous Goods) Act 1995 – jurisdiction has been transferred to the ACT Administrative Appeals Tribunal.

AAT decisions

Access to Documents Refused on the Ground of Prejudice to Criminal Investigations – Whether Prejudices Preparation of Applicant's Case or Amounts to Punishment –