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The following legislation, which provided for merits review by the Tribunal, has been repealed: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

*Natalie Kaufman and the Department of Immigration and Ethnic Affairs* (No N96/116 – decision (11712) 18 March 1997)

This matter involved an application by an Australian citizen whose husband, who was not an Australian citizen or a permanent resident, had been refused an entry visa. The Department had provided documents pursuant to section 37 of the *Administrative Appeals Tribunal Act 1975* and had sought direction that certain of those documents should be prohibited from publication or disclosure to all persons other than members and staff of the Tribunal in the course of performance of their duties. The applicant claimed she was entitled to access to the documents as she did not know precisely what case was being made against her husband and needed details in order to prepare for the hearing.

The Tribunal (Deputy President McMahon) considered that there was an overwhelming public interest in retaining the confidential nature of the material in the documents in order to avoid prejudice to on-going criminal investigations in the Philippines "and in seeing that they are not compromised for collateral reasons". He rejected the applicant's contention that she was being punished by being denied access to the documents and by being prejudiced in the preparation of her case. Deputy President McMahon said that Mr Kaufman had "no rights other than those conferred in the administration of the *Migration Act*. Refusal of an application for a visa is not a conviction upon facts proved beyond reasonable doubt carrying criminal sanctions". He also took the view there was ample material in the open documents to enable the applicant to prepare her case.

**Duty of Parties to Court Proceedings not to Disclose the Contents of Documents in Other Forums without the Consent of the Party who filed the Document or the Leave of the Court – Whether Such an Implied Undertaking Applies in Relation to Later Disclosure of Documents Produced Before the Tribunal** – *Beaconsfield Gold NL and the Australian Securities Commission and Otter Gold NL (First Party Joined) and Burdekin Resources NL and Tennscourt Oil Pty Ltd (Second Party Joined)* (No V97/61 – decision (11676A) 27 March 1997)

In these proceedings, the Tribunal (Deputy President McDonald) dealt with an application by a party to earlier proceedings before the Tribunal (Otter Gold NL) that certain documents, statements and evidence produced or relied on during the course of those proceedings should be available to Otter Gold for use in connection with proceedings it was commencing in the Federal Court. The Australian Securities Commission did not participate in the hearing of the application.

By the time the proceedings were heard by the Tribunal, they had been overtaken by events as an appeal had been lodged in the Federal Court against the Tribunal's earlier decision and, in accordance with section 46(1)(a) of the *Administrative Appeals Tribunal Act 1975*, all documents in connection with the proceeding to which the appeal related were required to be forwarded to the Federal Court. However, while it was not considered appropriate for the Tribunal to make a ruling on documents which were before the Federal Court, the Tribunal addressed the issues raised by the case.

The Tribunal decided that it had jurisdiction to consider the application and was not *functus officio* even though it had already given its decision in relation to the substantive application before it. In order to be able to consider the matter, the application needed to fall within the definition of "proceeding" in section 3 of the Act. Deputy President McDonald decided that the application fell within paragraph (h) of the definition, namely "an incidental application . . . in connection with an application".

In its application Otter Gold referred to courts of record having an inherent jurisdiction which recognises an implied undertaking attaching to a party to a proceeding not to disclose the contents of any document disclosed for the purposes of that proceeding in any other forum without the consent of the party who filed the document or without the leave of the Court.

Deputy President McDonald examined UK and Australian case law on the principle, noting the distinction drawn between the consequences of access to documents which are discovered or subpoenaed and documents which are admitted into evidence. The case law proposed that a court should prevent utilisation for collateral purposes of the former kind of documents and permit utilisation for legitimate collateral purposes of access for the second kind. This is subject to the Court's discretion to withhold consent to release of the document.

In considering whether an implied undertaking applied in Tribunal proceedings, Deputy President McDonald noted that, while the Tribunal was not a court, it had a number of similar powers. He said that parties should be able to approach the Tribunal without fear that the material they present may be used in other proceedings.

> "If that was the case, then it may be the processes of the Tribunal would be misused by parties as an information gathering exercise to achieve a purpose which could not have otherwise been achieved. Accordingly, there being both legislative authority and sound policy reasons for doing so, the principle applied by the courts should be taken to apply to proceedings before the Tribunal."

The case followed previous proceedings before the Tribunal – *Re Environmental Images Pty Ltd and Australian Trade Commission* [1996] 23 AAR 439 – where Deputy President McMahon had found that the undertaking applied to proceedings before the Tribunal but, having regard to the facts of that case, directed that the respondent should be released from the undertaking in circumstances where the documents were required for a criminal prosecution.

**Section 56B of the *Veterans' Entitlements Act 1986* – Whether section is self-operating or requires the making of an administrative decision – reconsideration of *John's* decision** – *Bruce Edward Cunningham and the Repatriation Commission* (No S95/151 – decision (11657) 28 February 1997 – interim decision in respect of jurisdiction only).

The substantive proceedings were for a review of a decision by the Commission that an overpayment of pension had been made to the applicant. Mr Cunningham claimed that he had notified the Department of Veterans' Affairs orally and in writing of a change in his circumstances in 1992. The Department claimed that it did not receive such notification until 1994 and that, as a result of the change in circumstances, his rental assistance should be cancelled from 1992 with the consequences that Mr Cunningham had received an overpayment. Mr Cunningham applied to the Tribunal for a review of that decision.

The Tribunal (Deputy President Burns) looked at the question whether a decision was actually made and, if so, the nature of it. The Commission took the view that Mr Cunningham's entitlements had been reduced in accordance with section 56B of the *Veterans' Entitlements Act 1986* which, it submitted, was a "self-operating" or "automatic" section which does not require a decision of a delegate in order to come into or take effect. Briefly, section 56B provides that where a person is required to notify the Department of an event or change in circumstance and the event or change in circumstance occurs but the person does not inform the Department then the pension or income support becomes payable at a reduced rate.

The applicant submitted that section 56B was not automatic by virtue of the determinations that must be made under that section and referred the Tribunal to its previous decision in *Re John and Repatriation Commission* (1994) 20 AAR 548 which held that because there was an implied power in section 56B it has the power to consider the matter on its merits and make whatever decision is appropriate. On the other hand, the power to make these determinations was noted by the respondent as involving no exercise of discretion but merely a scrutiny by an officer to ascertain whether certain objective facts were made out or not.

The Tribunal considered the decision of the Federal Court in *Buck v Comcare* (1996) 137 ALR 335 where Finn J had concluded that section 57(2) of the *Safety Rehabilitation and Compensation Act 1988* was self-operating. He concluded that

> "s 57(2) does not, relevantly, authorise or require a decision of an administrative character to be taken by Comcare. To use the language of Lockhart J in *Minister for Immigration and Ethnic Affairs v Naumovska* . . "[t]he sub-paragraph means what it says"."

In light of the Federal Court's decision, Deputy President Burns decided to depart from the view expressed in the *John's* case and found that section 56B was self-executing. The Tribunal had jurisdiction to consider the application and to determine whether all the pre-conditions in section 56B had been met.

**Factors Relevant to Tribunal's Decision to Refer Questions of Law to the Federal Court – *Re Davina and Defence Force Retirement and Death Benefits Authority*** (1997) 43 ALD 761

In these proceedings, the Tribunal considered whether it must refer questions of law to the Federal Court if requested to do so by a party and the factors relevant to the exercise of the Tribunal's decision on referral.

That case arose out of a 1972 decision of the Defence Forces Retirement Benefits Board which had determined that the applicant, who was to be retired on the ground of invalidity from the Australian Air Force, was 10% Class C. The effect of this determination was that the applicant was entitled to a refund of his contributions and a lump sum gratuity (rather than a pension). In 1995, the Defence Force Retirement and Death Benefits Authority reconsidered the Board's decision and decided it was correct. Had the Authority disagreed with the decision, it would have then considered if it was appropriate to recommend that an act of grace payment be made to the applicant to represent the amount of pension that would have been payable if the correct decision had been made. The applicant sought review of the Authority's decision and, at the outset of the Tribunal hearing, requested that the matter be referred to the Federal Court on the basis that the parties were so diametrically opposed that the matter could only be decided substantively by the Court.

The Tribunal (Deputy President Forgie) refused the request and noted that there was no obligation on the Tribunal to refer a question of law even if requested to do so by one or both of the parties. Deputy President Forgie noted that the matters which the Tribunal should take into account in exercising its discretion whether to refer a case were as summarised by Gallop J in *Mitchell v Noble* (1981) 7 NTR 19 at 22 (in relation to the right of a court of summary jurisdiction to reserve a question of law, by way of a special case stated, for the opinion of the Supreme Court), namely

> "(1) the question is of general importance and involves a substantial argument fit for consideration by the Supreme Court . . .;
>
> (2) the answer to the question will determine or ought to determine the issue between the parties . . .; and
>
> (3) the course of stating the case is preferable on the grounds of expense or otherwise to deciding the question of law and disposing of the case in the ordinary way."

The Tribunal decided that, had the Authority purported to reclassify the applicant, the Tribunal would have jurisdiction to review the decision. However, it decided that the Authority's decision could not be characterised as a review of the merits of the 1972 decision as it did not review the merits with a view to altering or affirming it but only in the context of deciding whether a recommendation should be made to the Minister for Finance in respect of an act of grace payment. Further, it decided that the Authority did not have jurisdiction to re-classify a person in the applicant's situation.

## The Courts

### Workplace Relations and Other Legislation Amendment Act 1996 (No 60 of 1996)

Changes made by this Act include the transfer of the jurisdiction of the Industrial Relations Court of Australia to the Federal Court of Australia. Schedule 16 of the Act, which commenced on 25 May 1997, also makes a number of formal changes in the Federal Court, including the abolition of the Divisions of the Court and the renaming of the Chief Judge as the Chief Justice.

### High Court and Federal Court Decisions of Particular Interest

The following case summaries of recent decisions of administrative law interest from the High Court and Federal Court have been contributed by Alan Robertson, Senior Counsel and Member of the Administrative Review Council.

**Register of National Estate – Power of Australia Heritage Commission to enter place in the Register – Whether dependent on Commission's own view of identity of place or objective ascertainment of jurisdictional fact** – *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 142 ALR 622

Section 23 of the *Australian Heritage Commission Act 1975* provides that the Commission shall enter in the Register a place *"where the Commission considers"* that the place *"should be recorded as part of the National Estate"*. The Commission resolved to enter in the Register an area of some 300,000 hectares which included the Sir Edward Pellew Group of islands. Mount Isa Mines Limited sought judicial review of the decision.

Section 4 of the Act declared that the national estate consisted of 'places' having certain aesthetic, historic, scientific or social significance or other special value. A majority of the Full Court of the Federal Court had said that the status of a place, as provided in section 4, was an objective fact, ascertainable by reference to its qualities and that, in ascertaining whether a particular place had those qualities, the Commission was bound to make an evaluation of the particular place which would involve matters of judgment and degree.

The High Court allowed the Commission's appeal.

After noting that judicial review may be available, in a case such as the present, at general law or under s 75(v) of the Constitution or under the *Administrative Decisions (Judicial Review) Act 1977*, the High Court approved the dissenting judgment of Black CJ. He had said that the final determination of the question of whether or not a place was part of the national estate was one that was committed by the Act to the Commission: it was not a jurisdictional fact.

The High Court said that the Commission's determination of the question whether a place should be recorded as part of the national estate was not subject to review provided the Commission otherwise conducted itself in accordance with law.

**Judicial Review of decisions of Casino Control Authority – Challenge to grant of licence to operate casino – Whether jurisdictional error – Privative clause excluding judicial review** – *Darling Casino Limited v New South Wales Casino Control Authority and Others* (1997) 143 ALR 55

The NSW Court of Appeal had ordered that the proceedings brought to challenge the Casino Control Authority's decision to grant a licence to operate the Darling Harbour casino be dismissed on the footing that they were barred by the privative clause* in section 155 of the *Casino Control Act* 1992 (NSW). In the High Court the appellant relied upon alleged jurisdictional error and submitted that section 155 did not exclude judicial review on that ground.

The relevant part of section 155 provided –