

COMMONWEALTH OMBUDSMAN

Jurisdictional Developments

Public Service Grievances. With the passing of the Merit Protection (Australian Government Employees) Act 1984 former government employees will now have, it seems, a choice between taking at least some of their grievances to the new Merit Protection and Review Agency (see s.55 of the Act) or to the Ombudsman, though the Ombudsman has a discretion not to investigate complaints which may be taken elsewhere.

National Crime Authority. The National Crime Authority Bill 1984 originally provided that the National Crime Authority should be subject to investigation by the Ombudsman. The Act as passed provides instead for monitoring of the Authority by a Parliamentary Joint Committee.

Procedure

Manner of Investigations. The privacy of the Ombudsman's investigations, which was formerly thought to be unimpeachable, has been thrown into doubt by the decision of the Federal Court in Kavvadias v Commonwealth Ombudsman (23 March 1984). Prior to the decision, it was the Ombudsman's general practice, pursuant to his power to conduct an investigation 'in such manner as [he] thinks fit' (Ombudsman Act, sub-s.8(2)) to release a draft report to the Department concerned before he made particulars available to the complainant. The significance of the decision is that it interprets for the first time the effect of the FOI Act upon the Ombudsman's powers and duties. The Federal Court held that the Ombudsman was not entitled to claim that the draft report was an exempt document (i.e. one to which the applicant had no right of access) by virtue of there being secrecy provisions in the Ombudsman Act. The effect of the decision is clouded, however, by the fact that only one ground of exemption was at issue before the Court. The fate of other possible grounds of exemption remains undecided. Nevertheless, the decision has nullified what many believe to be one of the strongest grounds which the Ombudsman might have argued.

Role in FOI. The Kavvadias case (discussed above) contrasts with the new, active role of the Ombudsman as an advocate in FOI matters before the AAT. The Ombudsman has been vested with the role since the passing of the Freedom of Information Amendment Act 1983 but has been hampered by a lack of provision of personnel for the purpose. The first appearance of the Ombudsman before the AAT occurred in May in the matter of Re Peters and Department of Prime Minister and Cabinet. At the

time this bulletin went to press the matter stood adjourned.

THE COURTS

New Avenue of Federal Court Review

Another avenue of judicial review of federal administrative action before the Federal Court has been created. A new sub-section 44(2A) of the Judiciary Act 1903 (inserted by the Statute Law (Miscellaneous Provisions) Act (No. 1) 1984) enables the High Court to remit to the Federal Court matters pending in the High Court in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. Other ways in which the Federal Court may undertake judicial review are the procedures under the AD(JR) Act and under section 39B of the Judiciary Act.

Scope of Review under AD(JR) Act

The range of government decisions which may be reviewed by the Federal Court under the AD(JR) Act has been considerably widened by the decision of the Federal Court in Chittick v Ackland (27 February 1984).

The Court held that one of the technical (but essential) preconditions for review of a decision, that the decision be made 'under an enactment' was not limited to decisions made directly under instruments of a legislative character such as an Act or regulations. A decision could still be reviewed -

- . where the instrument under which the decision was made (such as a contract of employment) was itself made under an Act or Ordinance; and
- . where the terms of the instrument were unilaterally determined.

The Chittick decision has implications for employees of statutory authorities. See 'Administrative Law Watch', below.

Review of National Crime Authority

The National Crime Authority is to be subject to judicial review and in respect of AD(JR) Act review special rules of court may be made. A person claiming to be entitled to refuse to give certain evidence to the Authority may also make application to the Federal Court under a special procedure established under the National Crime Authority Act 1984.

Procedure - Availability of Judicial Review

The Kavvadias case highlights also the fact that the courts may