being pursued through the Multicultural Australia project and a submission on the costs of justice for the Senate Standing Committee on Legal and Constitutional Affairs.

Community Services and Health. Work is continuing on the discussion paper on review issues in the area of joint Federal/State funding programs and a draft report on review of decisions involving assessment of therapeutic products.

Broadcasting. A draft of the discussion paper on inquiry procedures of the Australian Broadcasting Tribunal and review of its procedural decisions is currently being prepared for the Council by the Communications Law Centre. The Council is also examining the Australian Broadcasting Tribunal (Inquiries) Regulations to determine the extent to which the Council's recommendations in its Report No. 12, Australian Broadcasting Tribunal Procedures, have been implemented.

Subordinate and Intermediate Tribunals. At its meeting on 13 October 1989 the Council agreed to host a conference in early 1990 to enable these tribunals to exchange views on matters of joint interest.

Informal rule-making. See 'Administrative Law Watch', p.xx.

Review of the AD(JR) Act. The discussion paper on the furnishing of statements of reasons under section 13 of the AD(JR) Act is near completion.

Multicultural Australia. Selection for the position of project leader for the Multicultural Australia project is near finalisation. The project will be based in Melbourne.

Administrative Appeals Tribunal

NEW JURISDICTION

Since the last issue of Admin Review new jurisdiction has been conferred on the AAT under the following legislation:

- Aged or Disabled Persons Homes Act 1954 as amended by the Aged or Disabled Persons Homes Amendment Act 1989
- Australian Securities Commission Act 1989
- Bounty (Ships) Act 1989
- Close Corporations Act 1989
- Corporations Act 1989
- Lands Acquisition Act 1989
- Motor Vehicle Standards Act 1989

KEY DECISIONS

Social security: pension while receiving lump sum compensation

In Secretary, Department of Social Security and Bolton (7 July 1989), the AAT was asked to decide whether special circumstances entitled Mr Bolton to invalid pension during the period in which he would otherwise have been excluded from a pension due to his receipt of a lump sum compensation payment.

In 1984 Mr Bolton suffered a work-related injury for which he eventually received a lump sum payment. He was not aware that the lump sum payment could prevent him claiming a pension for some years, and spent most of it on a property. Subsequently, however, he was diagnosed as having heart trouble and tuberculosis, as a result of which he applied for invalid pension. It was refused because acceptance of the lump sum made him ineligible for pension until January 1992.

The Social Security Appeals Tribunal (SSAT), however, decided that the dramatic change to Mr Bolton's health was not reasonably foreseeable and constituted a 'special circumstance' as provided for by the Social Security Act. It therefore brought forward his eligibility for the pension to November 1988. The Department appealed to the AAT.

The AAT discussed the significance in Mr Bolton's case of financial hardship, legislative changes, incorrect legal advice, and ill health. With the exception of Mr Bolton's health, it found that none of these factors was crucial. The change in his health, however, did not justify the exercise of the 'special circumstances' discretion given by the Act. It therefore set aside the SSAT decision and concluded that pension was not payable until January 1992.

Student assistance: eligibility

Department of Employment, Education and Training and Ruddell (7 July 1989) involved a teacher who applied for financial assistance under the 'Austudy' scheme, to undertake a preliminary course prior to entering a post-graduate M.Sc. course. As he previously had completed a degree, the Department had rejected his application on the grounds that under the Student Assistance Regulations the earlier degree was at the same level as the M.Sc. qualifying course, and exceeded the workload specified for eligibility.

Mr Ruddell appealed to the Student Assistance Review Tribunal, which allowed his appeal on the basis that the Regulations permitted assistance in a similar situation, where a Master's qualifying course followed a 3-year pass degree and a Diploma of Education, and in Mr Ruddell's case produced an anomalous and unjust result. The Department sought review by the AAT.

The AAT expressed the view that unless the Regulations under review were ambiguous and open to differing interpretations it

did not have the discretion to adopt a construction beneficial to the person concerned. In this case the provisions were clear. The difficulty stemmed from the refusal of the University to recognise Mr Ruddell's earlier degree as adequate for entry to the M.Sc. course. The AAT concluded that Mr Ruddell was not eligible for Austudy in 1988.

Veterans' Affairs: definition of 'resides in Australia'

In Ptohopoullos and Repatriation Commission (14 August 1989) the applicant was the second wife of a Greek Cypriot who was entitled to a service pension as an 'allied Veteran'. They had met in Cyprus but were married in Australia on 8 March 1988. Mrs Ptohopoullos lodged her claim for a wife's service pension two days later. Shortly after it was granted the couple made arrangements to return to Cyprus. In May 1988 the Commission cancelled the pension on the grounds that Mrs Ptohopoullos was not an Australian resident.

Under the Veterans' Entitlements Act 1986 the wife of a veteran is not eligible to lodge a claim for a wife's service pension unless she is an Australian resident, residing in Australia. Its definition of 'Australian resident' allows the person concerned to be physically outside Australia, as long as the person has an valid entry permit, return endorsement or resident return visa. Mrs Ptohopoullos satisfied these criteria. The case turned, however, on whether it could be said that she was 'a person who resides in Australia'.

The AAT expressed the view that the term 'a person who resides in Australia' should entail some indication that the person concerned intends Australia to be his or her settled or usual abode. Mr and Mrs Ptohopoullos had decided to come to Australia and to remain as long as necessary to enable Mrs Ptohopoullos to receive a service pension. They did not intend to make Australia their settled or usual abode. It therefore affirmed the decision to cancel the pension.

Compensation: eligibility for continuation of payments

In Reserve Bank of Australia and Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees (Comcare) and Coronado (11 August 1989) a question arose concerning the exercise of judicial power by the AAT, and whether the AAT had jurisdiction to revoke existing determinations. The case in point was an application by the Bank to revoke determinations under which Mr Coronado had been paid over $33 000. The Compensation (Commonwealth Government Employees) Act 1971 provides a procedure for recovery of overpayments in courts of competent jurisdiction, but the Commissioner for Employees' Compensation sought to have the determinations set aside by the AAT on review. As neither party wished the question of the AAT's jurisdiction to be referred to the Federal Court, the AAT proceeded to hear the case despite some doubt about its competence to revoke a determination.

Mr Coronado, who was resident in Chile at the time of the hearing, had lodged 56 claims for compensation arising from the onset of pain in the neck, back, shoulder and arm during his employment in 1985 as a messenger with the Reserve Bank. The first 55 claims were determined in his favour, but in June 1988 the Commissioner in dealing with the 56th claim determined that the effects of the injury had ceased to exist. The applications to have the earlier determinations set aside followed a surveillance report which showed no obvious infirmity, and were supported by revised opinions from medical practitioners who had previously examined Mr Coronado. It was suggested that he had been malingering and had been fit for work for at least 18 months.

Though the AAT expressed reservations about the available evidence, since there was no acceptable evidence to point to a different decision, it set aside the previous determinations and terminated Mr Coronado's compensation from 16 September 1986.

Administrative Appeals Tribunal: pre-trial access to evidence

Lindsay and Australian Postal Commission (3 May 1989) is consistent with the Federal Court ruling in Australian Postal Commission v Hayes (18 May 1989) (see p. xx). Ms Lindsay was a postal worker who had challenged the termination of her compensation payments. In the process she sought access, prior to the commencement of evidence in the AAT, to a video tape on which the Postal Commission had obtained a medical opinion.

The 3-member AAT considered that the tape attracted legal professional privilege. A pre-trial reference to the material in question did not constitute a waiver of that privilege. Further, the AAT Act did not empower the AAT to give a direction requiring the Commission to produce the video tape for inspection by Ms Lindsay and her advisers prior to the actual commencement of the hearing.

The AAT also expressed the view that, while consideration of material of this nature involved many competing considerations, the credibility of the claimant in such cases is of crucial importance and must be rigorously tested. 'Ambush by film or video tape' in these circumstances 'is ambush by the truth, and is a valuable aid in testing the credit of an applicant'.

Social security appeals: stay of decision

Webber and Department of Social Security (12 May 1989) involved an application for stay of a decision made by the Social Security Appeals Tribunal (SSAT), using its relatively new determinative powers. The SSAT had upheld a decision by the Department of Social Security to pay Mr Webber's invalid pension at the married rate on the basis of his de facto relationship. He applied for AAT review. Shortly thereafter the Department commenced the reduced payments and Mr Webber applied for a stay of implementation of the decision not to pay him at the higher single rate.

The Department argued that, since the SSAT decision had been implemented, it could no longer be stayed. The AAT concluded, however, that as the entitlement to pension was an on-going one and a different amount could if necessary be paid on each pension day, something was left which could be stayed.

Social security: failure to supply information

Todd and Department of Social Security (17 July 1989) dealt with the situation when an applicant failed to return to the Department a questionnaire seeking income information in relation to the means test for family allowance. The applicant, Mrs Todd, and her husband had arranged an extended camping trip around Australia. As Mr Todd was then receiving unemployment benefit, they notified the Department before they departed, and made arrangements for the redirection of mail during their absence. When they returned they found that their family allowance had been discontinued.

Mrs Todd claimed that she had not received the questionnaire or any letter from the Department, and had not seen the publicity relating to the imposition of a means test. The Department claimed that it had given Mrs Todd the requisite notice by a letter to her old address sent out in a bulk batch. It also claimed that the onus was on the recipient of a benefit to ensure that the Department was informed of any change of address.

The AAT examined the requirements of the Social Security Act and the Acts Interpretation Act 1901 with regard to the serving of a notice by post. It concluded that any letter from the Department which had been sent to Mrs Todd's old address had not been 'properly addressed'. Further, while there was no statutory requirement for the person concerned to notify the Department of a change of address, Mrs Todd had in fact done so. The Department's letter, if sent, therefore did not constitute 'notice', as required by the Social Security Act; and Mrs Todd's family allowance should not have been cancelled.

Reasonable hypothesis: smoking and heart disease

Repatriation Commission and Woodman (23 August 1989) was an appeal against a decision by the Veterans' Review Board (VRB) that the Commonwealth was liable to pay pension to the widow of a veteran who died from atherosclerotic heart disease.

Mr Woodman had taken up smoking when he joined the Navy in 1942, and had smoked fairly heavily until 1950. In 1966 he was found to be hypertensive, and in 1976 to have a high cholesterol level. He first exhibited symptoms of coronary artery disease in July 1985 and died in June 1987. Mr Woodman's widow claimed that his adoption of a smoking habit was causally connected with his war service (with which the AAT agreed), and that his

smoking habit was causally connected to his coronary heart disease.

Mr Woodman's cardiologist expressed the view that there was a possible connection, although not a certain association, between Mr Woodman's coronary artery disease and his smoking history. After examining the literature and hearing further evidence on the relationship between smoking and coronary heart disease, however, the AAT did not accept this. The relationship between Mr Woodman's coronary condition and the fact that he smoked at a relatively young age for a relatively short period of time was not enough to raise a reasonable hypothesis connecting his war service and his condition when he had ceased to smoke 35 years before symptoms were evident. The AAT set aside the VRB's decision, leaving the original decision of the Repatriation Commission to stand.

Compensation: inappropriate tactics before the AAT

In Ermolaeff and Commonwealth of Australia (22 August 1989) the AAT heard an appeal against a decision to cease payment of compensation. Mr Ermolaeff received compensation for several absences between 1983 and 1986 due to a back injury, before ceasing work entirely. The Department requested him to return to work in 1986, but he provided medical evidence of his condition and compensation continued until January 1988. The Department arranged to have Mr Ermolaeff medically examined and the reports generally supported his claims.

When the matter came up for hearing before the AAT, however, the Department indicated that it would not tender these reports in evidence. It also opposed an attempt by Mr Ermolaeff's counsel to tender them, on the grounds that the requirements for disclosure at least 28 days before the hearing had not been met, and that the authors of the reports were not available for cross-examination.

The AAT said that such adversarial tactics were inappropriate and unacceptable in an administrative inquiry. Further, it pointed out that the requirement in the Act that an administering authority be guided 'by equity, good conscience and the substantial merits of the case without regard to technicalities', appeared to have been overlooked.

The AAT concluded that all the current medical evidence, with one notable exception which it found unsatisfactory, supported a finding of continued liability. It also noted that Mr Ermolaeff had not been offered light work at any stage, and that there was a strong inference of total incapacity. It remitted the matter to Comcare with the direction that Mr Ermolaeff was totally incapacitated as a result of deemed injuries in the course of his employment.

Freedom of Information

Amendment of records

In Nguyen and Department of Immigration, Local Government and Ethnic Affairs (29 June 1989) the AAT examined an application for review of a decision by the Department to refuse amendment of a Departmental record relating to entry to Australia.

Mr Nguyen and his family had left Vietnam by boat in June 1981 and for some time resided in a refugee camp in the Philippines. During that time his wife's brother lodged a sponsorship for the family to migrate to Australia. In it the brother gave the date of birth of one of Mr Nguyen's daughters as 30 October 1979. The same birth date was given in the papers provided by Mr and Mrs Nguyen and again, after the family's arrival in Australia, in their application for registration under the Aliens Act 1947. Mr Nguyen later obtained access to the records under the Freedom of Information (FOI) Act, and requested that his daughter's date of birth be altered to read '30 October 1976'.

The situation had arisen in part because the family had understood that it would expedite the family's resettlement in Australia, and be better for the child's education, to lower her age. The AAT noted that refugees have used migration documentation as a surrogate for birth, death or marriage certificates or for other evidentiary purposes.

In the absence of public documents, the AAT had to rely on evidence from the child's mother and father, and from other persons said to have been present at her birth, as well as evidence from inspection. Despite the difficulties it found in trying to establish the facts in a cross-cultural situation, it concluded that the child's date of birth was in fact 30 October 1976. It decided that in the circumstances alteration of the record was a more satisfactory procedure than merely making a notation; but that the alteration should be effected in such a way that the previous information remained legible.

Access to social security documents

Liddell and Department of Social Security (28 June 1989) involved the problem of assessing confidentiality in the provision of information used in the enforcement or administration of the law. Mr Liddell had sought access to documents on his unemployment and sickness benefit file, relating to the reported non-disclosure of income from rentals. The Department had claimed exemptions for some of the documents.

The Department has a policy that all information supplied by the public concerning alleged breaches of the Social Security Act will be kept confidential. It claimed exemption in this case on the grounds that release of the material sought would disclose,