the Court considered the purpose of a section 13 request for a statement of reasons and whether an applicant, having applied to the Federal Court, no longer satisfied the description of a person entitled to make the application. Mr Justice Hill said 'it cannot be assumed that the need for a section 13 statement evaporates once a decision has been taken to institute proceedings for judicial review... Once a person with standing requests a decision-maker to furnish a statement, then, in my opinion there arises a duty upon the decision-maker to furnish that statement'. The Court held however, that once the consent order was made there was no practical purpose to be served by ordering that a section 13 statement be furnished. The application was dismissed.

Commonwealth Ombudsman

Australian Customs Service - tariff concessions

A manufacturer had imported certain mixing apparatus capable of both batch and continuous operation. Limited local enquiries had indicated that no suitable Australian equivalent was available and the manufacturer sought by-law tariff concession. Customs referred him to other possible suppliers, all but one of whom stated that they were unable to meet his needs. It had originally been thought that the firm that constituted the exception was unable to meet the manufacturer's demand but it subsequently changed its position on this point a number of times. The manufacturer eventually complained to the Ombudsman in 1988 by which stage some considerable time had passed since the by-law tariff concession had been sought and many relevant records had been destroyed. In addition, the recollections of those involved were understandably fading.

Customs at first suggested that its officers must have known at the time what could and could not be made in Australia but its files provided no indication of further manufacturers nor had the complainant been asked to approach any. In all the circumstances, the Ombudsman could draw no clear conclusion on the question whether a suitable local equivalent could be said to be available. He did, however, indicate that Customs should not accept claims regarding capacity to supply a product at face value if such claims were contested. (There was always a risk that a local firm might object simply for tactical reasons).

Customs suggested that the complainant should have sought review by the Industries Commission. The Ombudsman drew no adverse inference from the failure to do so as the Commission's procedure was somewhat cumbersome, was more suited to cases of principle, and may not in this instance have led to a binding decision.

A question arose whether any discretion on the part of Customs should be exercised in favour of, or against, concession orders. It seemed to the Ombudsman that the policy underlying the tariff concession order system was fairly simple. Customs duties served two main functions: raising revenue and protecting local industry. As duties imposed cost burdens on

local industry there was provision for concessions where there was no suitable local equivalent. The Ombudsman saw no need for a preference either in favour of or against granting concessions: the decision should be made on the balance of probabilities in the light of available information.

The Industries Commission had expressed the criterion for grant of a tariff concession as being whether '... a suitable equivalent of which that is the produce or manufacture of Australia, is not reasonably available'. The complainant had made substantial efforts in line with Customs suggestions and the Ombudsman thought these were sufficient.

The complainant had contributed significantly to the delay which had occurred by directing attention for over 12 months to the pursuit of a concession under an existing concession order covering apparatus which had the continuing mixing capabilities of the imported mixer. Customs rejected this claim. It pointed out that the imported mixer had both continuous and batch mixing capabilities and that this was the relevant consideration in determining eligibility for a concession. In this context it noted that, while the imported mixer might be used for continuous mixing, there could be no control over the end use of imported machinery and consequently that use was not a relevant consideration in determining whether a concession should apply. The Ombudsman thought it proper for Customs to take dual capabilities of imported machinery into account when assessing whether a concession was applicable.

Because of the uncertainty relating to the availability of a suitable local equivalent and the conduct of the applicant which had not always been as forthcoming as it might have been, the Ombudsman concluded that it was not possible to say that Customs had acted unreasonably.

Australian Taxation Office - Obligations under section 200B

The Ombudsman received a complaint from a solicitor on behalf of clients who had been involved in tax litigation lasting over six years, culminating in a decision of the Full Federal Court which was favourable to them. There were two aspects to the complaint. The first was that the Australian Taxation Office (ATO) had failed to give effect to the Federal Court's decision within the period required by section 200B of the Income Tax Assesment Act 1936. This section of the Act requires the Commissioner to take action on a decision of the Tribunal or of a Court not later than 60 days after that decision becomes final. Secondly the ATO had unreasonably delayed paying the taxpayers their entitlement to interest under the Taxation (Interest on Overpayments) Act 1983. Over the eight months after the expiration of the appeal period prescribed by section 200B, the taxpayers still had not received their full entitlements to interest notwithstanding strenuous efforts by their solicitor.

This complaint raises fundamental questions about the standards of service the ATO offers taxpayers and the Ombudsman is investigating the ATO's procedures in relation to its obligations under section 200B and the payment of interest.

Retirement Benefits Office (RBO) - Delays in issuing Estate Group Certificates

A firm of solicitors complained about a delay in obtaining a group certificate from the RBO for the estate of a deceased client. The RBO commented that it is responsible for the administration of the Commonwealth Superannuation (CSS), Public Sector Superannuation (PSS) and Defence Force Retirement and Death Benefits (DFRDB) Schemes and as such is responsible for collecting contributions on behalf of 370,000 public service and defence force personnel and for maintaining their contributor records. Additionally it assesses and pays over 132,000 ongoing fortnightly pension benefits to retired members as well as making over 58,000 new benefit grants each year.

To administer these shemes the RBO employs between 400 and 500 people with a turnaround of approximately 100 staff each year. Separate areas of specialisation have been established within the office to cope with these responsibilities and large scale automated processing systems have been employed which cope with the regular annual issue of group certificates. The issue of group certificates for the estates of deceased pensioners is handled manually due to the inherent unpredictability of these certificates.

The RBO stated that it is satisfied that its procedures for issuing of estate group certificates was basically satisfactory but that problems in this particular case had occurred through a misunderstanding by staff of current procedures. Staff did not follow up the case as quickly as they should have. These procedural breakdowns were drawn to the attention of the officers concerned. However, it was stated by the RBO that it was a large task to train staff in all clerical procedures and particularly so in the more specialised facets of their operations. The RBO acknowledged that this case had highlighted the need for the RBO to devote more resources to the basic training of clerical staff and in that regard it reallocated significant additional resources to training activities and to the introduction of a range of computer based training packages.

RBO had been concerned for some time with the possible time delays caused by the manual production of estate group certificates but hoped to be able to issue these certificates through an automated system within 12 months. This undertaking was believed to be a satisfactory resolution of this problem and should ensure that similar problems will not arise in the future. Apologies were conveyed to the solicitors who made the initial complaint.

Defence Force pay system - accuracy and efficiency

The Ombudsman received a number of complaints about the accuracy and efficiency of the Defence Force Pay System together with the manner in which it acts to recover overpayments. This, together with anecdotal information, suggested that there may be a significant problem. It has been suggested that, for example, despite the introduction in March last year of a new pay system designed to be quicker and more accurate, most pay accounts of members of the Navy are not balanced within acceptable limits (+ or - $5).

The extent of the possible problems this creates was shown in one complaint the Ombudsman received recently where a Lieutenant in the Navy had apparently at no time since he commenced full time service three years ago, been paid his correct entitlement. This was despite many representations on his behalf with his Navy pay office to resolve the continuing and growing discrepancies in his pay. The situation came to a head when he was handed a demand for the immediate repayment of over $14,000. At the same time his Commanding Officer was instructed to interview him to find out why he had accepted so much money without query! The Ombudsman is waiting with interest to receive a full explanation from the Defence Department along with data to confirm the extent of the problem.

Misleading advice from academic staff

A complaint was received from a university student in relation to advice he had received from academic staff regarding a HECS (Higher Education Contribution Scheme) Scholarship. This information contradicted other written advice that he had received from the university in question and subsequently meant that the student became liable for a HECS debt of $500.

This complaint raised the issue of clarifying the roles and responsiblities of academic staff and those of the administrative staff. The university's solution was to undertake to amend the general information section of the University Handbook in order to inform readers to seek advice on academic matters from academic staff and to seek advice on administrative matters (such as scholarships) from Student Administration.

Whilst this was acknowledged as useful in overcoming the difficulties highlighted by the student's complaint, the question then arose whether or not academic staff would in fact read the Handbook to become aware of their responsibilities as the Handbook is seen to be primarily aimed at students and not academics. It was further suggested to the University that consideration be given to reminding staff annually of the revised terms of the Handbook.

Procedural Issue - investigation of matters settled in the course of legal proceedings

Two complaints raised a significant procedural issue: whether the Ombudsman should investigate a matter that had been settled in the course of legal proceedings. The Ombudsman is always reluctant to intervene where parties on an equal footing have negotiated a settlement, especially where each has had legal advice.

The complainant privately imported a car, which was subsequently seized by Customs on suspicion that he had understated the purchase price to reduce duty and sales tax. His initial explanations were not accepted and he was forced to institute legal proceedings for the return of his car. Equivocal legal advice received on four separate occasions did not prevent Customs defending the seizure. It also prosecuted the complainant. Two and a half years after the car was seized, the matter was settled only days before the hearing, with the car being returned to him and each side bearing its own, substantial, costs. The complainant received no explanation or apology.

Although the settlement precluded any legal action by the complainant, he complained to the Ombudsman who decided to investigate because the outcome of litigation is never certain and because the complainant faced the risk of having to pay the Commonwealth's legal costs. Accordingly the settlement may have resulted more from duress than from truly voluntary negotiations. If so, it was 'unreasonable, unjust or oppressive' in the terms of the Ombudsman Act 1976 notwithstanding that the process was lawful.

The Ombudsman ultimately recommended act of grace compensation for the complainant. The Comptroller-General has now compensated him for loss of use of his vehicle and the Legal Aid Office has reimbursed his legal expenses - in all the payments totalled about $14,000.

In the second case, the complainant alleged that, in the course of negotiations which led to settlement of certain legal proceedings, Customs stated that it was not agreeable to the complainant making further representations to the Ombudsman. The terms of settlement themselves contained no such restriction. However there was the usual prohibition on further claims and the complainant's solicitors confirmed a requirement or understanding that no further complaint be made to the Ombudsman's Office.

The Ombudsman's views on attempts to oust the right of citizens to raise a matter with the Ombudsman are in summary that:

- a private agreement cannot prevent the Ombudsman from exercising his statutory powers;
- however, only in exceptional circumstances would the Ombudsman intervene in a freely negotiated settlement;
- a mere desire to settle all outstanding issues which might otherwise be resolved finally by litigation is not objectionable.

The Australian Government Solicitor, which had acted for Customs, explained that the only desire was to achieve a full and final settlement. The Ombudsman was satisfied that the settlement was freely negotiated and declined to intervene.

Section 16 Report - Telecom's failure to inform employee of superannuation entitlements

The Office received a complaint from a former Telecom employee that Telecom had advised him that he would receive a superannuation pension of 27.5% of his final salary if he accepted invalidity retirement, but did not tell him that the date it proposed for his retirement would entitle him to only a 25% pension. On 31 July 1990 the Ombudsman recommended that Telecom make good the complainant's loss, attributable to its unreasonable failure to inform him of his superannuation entitlements.

Telecom's response was to deny legal liability, based on its Corporate Solicitor's advice. The Ombudsman informed Telecom that he had not recommended that it accept legal liability but that it pay the complainant in consequence of its defective

administration. As Telecom gave no indication within the stipulated time that it proposed to implement the Ombudsman's recommendation, he reported to the Prime Minister on 18 October 1990, under section 16 of the Ombudsman Act, that Telecom had not taken adequate and appropriate action within a reasonable time in respect of the matters and recommendations included in the Ombudsman's report.

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A D M I N I S T R A T I V E L A W W A T C H

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The High Court decision in Australian Broadcasting Tribunal v Bond (1990) 94 ALR 11

This important decision of the High Court explains the distinction between 'decision' and 'conduct' in the Administrative Decisions (Judicial Review) Act 1977, ('AD(JR) Act') and the meaning of 'error of law' in that Act. It should result in fewer premature applications for judicial review and a corresponding decrease in disruption to administrative proceedings.

The facts

The facts of the case are complex and are set out in full in the law reports. In essence, the Broadcasting Act 1942 allowed the Australian Broadcasting Tribunal ('ABT') to suspend or revoke a commercial television licence if the licencee was 'no longer a fit and proper person to hold the licence': sections 85 and 88(2). The licences were owned by companies associated with Mr Bond. Prior to making any decision to suspend or revoke the licences, the ABT held an inquiry into various matters, ruled that Mr Bond was guilty of improper conduct under the Act and accordingly determined that he, and the licensee companies (which the ABT held he controlled) would not be found to be fit and proper persons to hold broadcasting licences. Neither ruling was itself the ultimate decision under the Broadcasting Act that the licensees were not fit and proper persons. Bond and the licensees sought a review of these actions and findings.

The Decision

The AD(JR) Act allows judicial review for

- 'a decision to which this Act applies' - section 5
- 'conduct [engaged in] for the purpose of making a decision to which this Act applies'- section 6.

The Act defines neither 'conduct' nor 'decision' although other provisions of the Act include certain actions as 'decisions' or conduct.

In Bond a majority of the High Court (Chief Justice Mason, with Justices Brennan and Deane concurring on this point) held that generally speaking: