notwithstanding the many developments that have occurred in administration and administrative law since the 1970s, the system still retains its integrity and cohesiveness.

Conclusion

The Council acknowledges that the values of administrative law have been widely accepted by Federal Government agencies in the last 20 years. The Council is of the view that the quality of public administration has been immeasurably improved by the administrative law system. The Council is pleased to be part of that system and to help it to remain dynamic and responsive to community and government demands for greater efficiencies and greater value for money from government administration and decision making.

Administrative Appeals Tribunal

New Jurisdiction

Since the last issue of *Admin Review*, jurisdiction has been conferred on the AAT, or existing AAT jurisdiction has been amended, by the following Commonwealth legislation:

Australian Postal Corporation Regulations

Customs Amendment Act 1996

Education and Training Legislation Amendment Act 1996

Export Market Development Grants Amendment Act (No 1) 1996

Hazardous Waste (Regulation of Exports and Imports) Amendment Act 1996

Health Insurance Commission Regulations (Amendment)

Therapeutic Goods Amendment Act (No 2) 1996

Therapeutic Goods Amendment Act 1996

AAT decisions

Employment Services Act decisions

Since the last issue of *Admin Review*, there have been several interesting decisions by the AAT concerning the *Employment Services Act 1994* (the Act), particularly regarding agreements between people seeking employment and 'case managers' charged with assisting these people to find employment.

The Act creates a new decision-making scheme in relation to people seeking jobs. It empowers the Minister to determine that certain people (such as long-term unemployed people) are to become participants in the case management system (CMS) established by the Act. This ministerial determination is done by way of a disallowable instrument and is therefore subject to parliamentary scrutiny. It is not subject to merits review, whereas most decisions of officers of the Department of Employment, Education, Training and Youth Affairs and of the Commonwealth Employment Service (CES) are subject to merits review.

The CES is required to notify and interview people who qualify to become participants in the CMS to assess their needs prior to referring them to case managers (both public and private) for assistance tailored to individual needs and capacities. Participants and case managers must negotiate agreements called case management activity agreements (CMAAs) to this end, the idea being that there are reciprocal obligations on people seeking jobs and on case managers alike. Wherever available, people seeking jobs are entitled to exercise choice as to which case manager they would like to be referred to, and this choice must be taken into account by the CES when referring the person to a case manager. Breaches of CMAAs by people seeking jobs may, subject to certain statutory conditions, result in deferral or cancellation of allowances payable to those people. Decisions about such breaches are subject to merits review.

The Act also provides for other administrative law and regulatory mechanisms that are not relevant for present purposes.

Re Secretary, Department of Employment, Education, Training and Youth Affairs and Ruiz (1996) 41 ALD 627 involved review of a decision to cancel Ruiz's 'newstart' allowance for breach of his CMAA. Having been interviewed by the CES and referred to a case manager, Ruiz entered into a CMAA with the case manager. The CMAA contained pre-printed clauses whereby the person seeking a job agreed to "contact, attend or provide information to [case manager/CES] when I have information concerning this agreement or when asked". Ruiz was subsequently required to attend 'Jobclub' over a specified two-week period and, on a day that fell within that period, to also attend an information seminar about 'Job Compact'. Ruiz and his case manager discussed this clash before the period commenced. In the event, he failed to attend the information seminar but did attend Jobclub. His newstart allowance was cancelled because of his breach of his CMAA in failing to attend the information seminar.

Although the facts were disputed, the Tribunal (Senior Member Lewis) found that the case manager had failed properly to explain to Ruiz that two distinct activities were involved and that he was required to leave one for a time to attend the other. In other words, his failure to comply was the result of this failure and beyond his control, and such a failure does not amount to a failure to take reasonable steps to comply with a CMAA for the purposes of the Act. The Tribunal's decision did not turn on this finding. It also found that the pre-printed clauses were not part of his CMAA because they were not specific (tailored to the person's needs, in line with the scheme of the Act) and should be the subject of discussion and negotiation between the case manager and the person seeking a job. The use of such pre-printed terms appeared to preclude the negotiation and renegotiation of CMAAs provided for by the Act. The Tribunal also endorsed a line of reasoning to the effect that the provisions of statutes are to be construed strictly where consequences in the nature of financial penalties apply.

In *Re Murray and Secretary, Department of Employment, Education, Training and Youth Affairs* (1996) 42 ALD 409 the Tribunal (Deputy President Chappell) endorsed the approach of giving a strict construction to provisions (and an agreement made under them) where deferment of allowance might result. Nonetheless, on the facts the Tribunal found that Murray had been in breach of his CMAA for failing to attend a work program as required under the CMAA.

Murray, who lived in a small country town some distance from the town in which the program was conducted, had failed to continue to attend the program as required because his car was unregistered (he had been unable to get financial assistance for this purpose in time) and he was unwilling to travel on the community/school bus or to seek a lift with other people. The Tribunal found that this failure was within his control and foreseeable by him, and that he should have contacted his case manager or the manager of the work program to seek assistance in resolving his transportation problems. After noting that the consequence was a non-discretionary deferral of payment of Murray's newstart allowance for a period of six weeks, the Tribunal said that:

> "... this conclusion has been reached with some reluctance by the Tribunal. A six week deferral of payment of allowance to the applicant seems to be a very severe penalty in the circumstances. The applicant is a long term unemployed person, living in an isolated community. The provision of realistic and rewarding job opportunities to persons in the applicant's situation must represent some of the most difficult and challenging tasks confronting those responsible for our social welfare programs. When measured against some objective behavioural tests the applicant may appear to be an unreasonable and obstinate person, lacking in good sense and decision-making capacities. How-

ever, these are the very characteristics which have probably resulted in him failing to obtain employment opportunities in the past. To punish him for these same deficiencies makes little sense but that is the inevitable outcome of the findings flowing from his actions and responsibilities under the CMAA."

Re Tremayne and Department of Employment, Education, Training and Youth Affairs (18 October 1996) concerned the earlier decision that the person be placed in the CMS. Tremayne was a 'conscientious objector' to case management and sceptical about what a case manager could do for him; and argued that administrative review rights were weakened if the decision involved was a ministerial one and therefore not reviewable. The Department suggested that any complaints about the Tremayne's placement in the CMS should be taken up with the Ombudsman or by way of judicial review. The Tribunal (Senior Member Handley) found that the Act provided that the decision was not reviewable.

Video evidence and the 'right to surprise'

The extent to which someone (usually a government body) should be able to surprise another person during administrative review proceedings arose again in *Re Prica and Comcare* (28 June 1996). The Tribunal (Senior Member Bayne and Members Anforth and Re) was reviewing decisions of Comcare revoking earlier Comcare decisions involving liability to pay workers' compensation to Prica. At a point during cross-examination of Prica, Comcare announced that it intended to show a video relevant to the capacity of Prica to engage in work. No prior notice that this would be done had been given to the Tribunal or to Prica.

The Tribunal refused to rule the video inadmissible, since it was said to be relevant to issues of fact to be decided, but said that the action was "an aggressive assertion of the right to surprise a witness for the other party". Such a course was said to raise problems of fairness to the other party and to have ramifications for the efficiency with which the Tribunal conducts its business (if an adjournment were allowed, there are costs to the parties and the Tribunal involved, and in the compensation jurisdiction, the AAT has power to award costs only to the party who succeeds on the review).

The AAT Act requires decision makers to provide certain material 'relevant to the review of the decision' to the Tribunal within 28 days of an application for review. The Tribunal considered that the reference in the relevant provision to material 'considered by the person to be relevant' did not mean that a decision maker can control information so that only that information which supports the decision is provided; rather, the provision means that all material of which the decision maker is aware and which is relevant to the decision should be provided. However, once the relevant material is provided, the question arises as to what is required in relation to material subsequently gathered.

To address this issue, the Tribunal next discussed a General Practice Direction issued by the AAT President under the AAT Act, which, subject to other statutory provisions, requires the exchange by parties at least 14 days prior to a hearing of any material a party intends to rely on at the hearing, including material that comes into existence after a final conference has been held. Despite this requirement, the Tribunal has faced arguments that even where this requirement has not been complied with, the Tribunal remains obliged to receive and consider relevant information in order to reach the 'correct and preferable' decision and for procedural fairness reasons to do with enabling a party to put their case in the way they want to. The Tribunal did not decide the point here, but noted past comments to the effect that government bodies should approach their task before the Tribunal as though they were Crown counsel. It said that:

"No party to a Tribunal hearing should without good reason seek to adduce evidence the existence of which has not been disclosed to the other parties, but the decision-maker whose decision is under review has a particular obligation

to assist the Tribunal and to act fairly towards the other party. Once a review is initiated, the Act places on the respondent Government agency obligations to assist the Tribunal to perform its function of de novo review".

The Tribunal went on to repeat the statement of the AAT President in *Re Taxation Appeals NT 94/281-NT 94/29* (1995) 21 AAR 275 (also reported as *Re Applicant and Deputy Commissioner of Taxation* (1996) 41 ALD 683) that *Australian Postal Commission v Hayes* (1989) 23 FCR 320 – in which the Federal Court allowed the Commission to refrain from disclosing the contents, as opposed to the existence, of a video to the other party on procedural fairness grounds – represented a high point in this type of case. The Tribunal also found that Hayes did not apply here because this was not a case where the Tribunal had been informed that the video existed before Prica began to give evidence.

The South Australian judgment in the Courts section of this issue of *Admin Review* which disputes the correctness of the trend of AAT decision making in these sorts of cases draws the same distinction just noted between disclosing the existence as opposed to the content of evidence that might be used to 'surprise' a witness.

Withdrawal of grant of citizenship

Re Leung and Minister for Immigration and Ethnic Affairs (26 July 1996) raised the question whether the Minister had power to withdraw a grant of citizenship to Leung. The grant had been approved and a certificate of citizenship issued to Leung, but Leung was yet to take the pledge of allegiance. The Minister then became aware that the factual basis of Leung's application for citizenship was incomplete and misleading, and decided to revoke the grant.

The Tribunal (Deputy President McDonald) decided that Leung had not adhered to the standards of openness and honesty required of those applying for Australian citizenship and that, since a grant of citizenship is discretionary, one should not be made to Leung. The Tribunal rejected Leung's argument that the Minister's power was already spent and that the approval could not be undone. The Tribunal found that, since a two-step process was involved before a person obtains citizenship under the *Australian Citizenship Act 1948* – the grant to a person of a certificate of citizenship and the taking by the person of a pledge of allegiance in a specified public manner – the Minister had power to withdraw the grant of the certificate of citizenship prior to the pledge being taken, if the decision were shown to have proceeded on a wrong factual basis.

Although that finding effectively disposed of the case, the Tribunal also considered the question whether the Minister had power to revoke the certificate of citizenship on the basis that the *Acts Interpretation Act 1901* includes a provision whereby a statutory power to make an 'instrument' is read (absent a contrary indication) as including power to revoke such an instrument. The Tribunal considered itself bound by the Federal Court decision *Australian Capital Equity Pty Ltd v Beale* (1993) 114 ALR 50 to conclude that this provision applies only to instruments of a legislative character and not to an individual grant of citizenship.

Freedom of Information

Confidentiality and information provided by 'informers'

Two recent AAT decisions concern the exemption from disclosure under the FOI Act of documents that might disclose the identity of a confidential source of information. Both involved information provided to the Department of Social Security in relation to the pension entitlements of the person seeking access to the documents. The results and, to some extent, the facts in the cases differ, but the cases show that the circumstances surrounding the provision and receipt of the documents are critical to claims for exemption based on a confidential source.