- review of decisions under the Pharmaceutical Benefits Incentive Payment Rules 1988;
- draft ordinance for the proposed A.C.T. Vocational Training Authority;
- the Industrial Chemicals (Notification and Assessment) Bill 1989.
- draft ordinances in the administrative law package for A.C.T. self-government; and
- recommendations of the Veterans' Entitlements Act Monitoring Committee.

CURRENT WORK PROGRAM - DEVELOPMENTS

Access to administrative review. Following the series of meetings with senior departmental staff in late 1988, the Council decided to focus on the role of information and advisory services for the next stage of its access project. Preliminary work is under way.

Review of the AD(JR) Act. Preliminary work has commenced on the next stage of this project, prior to preparation of a discussion paper on statements of reasons under the AD(JR) Act.

Community Services and Health. The Council is pursuing two stages of its examination of decision-making in the Department of Community Services and Health. Stage 1 examines programs involving joint Commonwealth/State funding arrangements using current renegotiations on the Supported Accommodation Assistance Program (SAAP) as a starting point. Stage 2 of the project focusses on Departmental programs involving assessment of products, initially concentrating on therapeutic goods.

Migration. The Council's Migration Committee is currently examining the Migration Legislation Amendment Bill 1989 with regard to the implications of its proposals for a new system of immigration review which is to be 'fair, just, economical, informal and quick'.

Other tribunals. As a first step in determining ways in which the Council might be able to assist the operation of the various intermediate level tribunals, the Council is planning a meeting of the tribunals later in the year and is developing a statistical data base on their activities.

Administrative Appeals Tribunal

NEW JURISDICTION

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

Higher Education Funding Act 1988
Ozone Protection Act 1989
Navigation Act 1912 as amended by the Transport Legislation Amendment Act 1989

KEY DECISIONS

Immigration: criminal deportation decisions under the new policy

On 26 January 1989 Deputy President Thompson, in Uyanik and Minister for Immigration, Local Government and Ethnic Affairs and Ameri and Minister for Immigration, Local Government and Ethnic Affairs, handed down two contrasting decisions based on the statement concerning criminal deportation which the Minister made to the Parliament on 8 December 1988 (Admin Review 19:18). In Uyanik the Tribunal examined the new policy and found, first, that 'the policy as developed in the statement is not inconsistent with the Act; nor does it purport to fetter the exercise of discretion in such a way as to destroy it. I am satisfied, therefore, that the Tribunal ought to take it into account'. Deputy President Thompson concluded that 'were it not for the policy that considerable additional weight should be given to drug trafficking offences and to any risk of the commission of further such offences, I should recommend revocation of the deportation order. However, I accept that the weight to be given to those factors is in this case such as to weight the balance firmly in favour of deportation'.

In Ameri the Tribunal examined a further aspect of the new policy, concerning the relevance of the fact that a person was a minor when he arrived in Australia as an immigrant. In the policy statement the Minister had said that:

> 'Clearly, the time a person has been in Australia and the degree of connection persons have with their country of origin are relevant factors in coming to a decision on whether or not a non-citizen resident ought to be deported when the person has offended against the laws of Australian society. The view has occasionally been expressed that persons who have migrated to Australia when they were minors ought never to be deported. This is not consistent with the legislation or Parliament's intentions...Where there is a pattern of criminal behaviour indicating a likelihood that the person will commit further serious crime, I believe a decision to deport must be seriously considered.'

Deputy President Thompson expressed the view, however, that 'the Minister did not intend to state a policy which would have the effect of Australia dumping on to other countries criminals who had come to Australia from those countries as children of tender years and who had become criminals in Australia because they had been corrupted during their formative years by malign influences emanating from within the section of Australian society in which the circumstances of their parents as immigrants had caused them to live'. He suggested that 'if that were the policy and its existence became known generally throughout the world, it would attract such obloquy as would do more harm to the Australian community than the continued presence in it of those offenders'. He recommended that the deportation order be revoked.

Negligent advice: the Shaddock precedent

In Katsos and the Secretary, Department of Social Security (20 January 1989) the issue was whether the applicant was entitled to payment of unemployment benefit prior to 2 May 1988. He completed his matriculation examinations in November 1987 and immediately sought employment. On 1 February 1988 he registered with the Commonwealth Employment Service (CES) and applied for unemployment benefit.

The applicant said that on or about 11 November 1987 he had rung the Department to inquire about the new procedures, which he had heard on the news media had been introduced since his previous receipt of unemployment benefits. He had been told to register first with the CES, then apply for the benefit; and that there would be a 13-week waiting period before the benefit was paid. On the understanding that the waiting period commenced from the time he left school (as previously had been the case) he did not register immediately with the CES, in the hope that he would find employment. He claimed that, had he been given more information, he could have received unemployment payments from February instead of May.

The Tribunal, taking into account the High Court decision in Shaddock and Associates and Anor v The Council of the City of Parramatta (1981) 150 CLR 225, concluded that the young man had acted on the basis of a mistaken belief but that, as it did not consider that this was the result of a negligent mis-statement by the DSS, it was not appropriate for the Tribunal to recommend payment of benefits for the period sought.

Superannuation: Benefit Classification Certificate

In Kozman and Commissioner for Superannuation (3 February 1989) a 3-member Tribunal examined the question of the issuing and relevance of a Benefit Classification Certificate (BCC) under section 16(10) of the Superannuation Act 1976, some 8 years after the applicant had joined the superannuation scheme. The Tribunal, taking into account several recent landmark decisions - Neal and Commissioner for Superannuation (1986) 5 AAR 202, (1987) 13 ALD 460; Commissioner for Superannuation v Miller (1985) 63 ALR 237 and (1985) 8 FCR 153; and Commissioner for Superannuation v Benham (unreported, 14 April 1988) - concluded that the BCC was of no effect and that it should be set aside as invalid.

The applicant, a social worker, was medically examined for purposes of the superannuation scheme on 7 February 1977. He retired on invalidity grounds in November 1985. The Commissioner for Superannuation subsequently issued a BCC specifying the condition 'history of back injury' and decided that the incapacity leading to Mr Kozman's retirement was connected with that pre-existing condition, thus reducing the benefits to which he was entitled.

Section 16(10) of the Superannuation Act allows the Commissioner to issue a BCC where, inter alia, an eligible employee retires on the grounds of invalidity; where the results of his medical

examination have not been considered by the Commissioner; and where the Commissioner is 'NOT satisfied that...the incapacity ...was NOT caused, and was NOT substantially contributed to, by a physical or mental condition...that existed at the time the person became an eligible employee, or by a physical or mental condition or conditions connected with such a condition' (editorial emphasis).

The Tribunal expressed the view that 'a condition must be identified, and the Commissioner must be of the opinion that it existed at the time a person became an eligible employee, before he can consider issuing a BCC on the ground that he is not satisfied that the incapacity causing retirement was not caused or substantially contributed to by that condition or by a condition connected with that condition'. The Tribunal remarked that the word 'existed' required more than a past history of a condition, and concluded that a term like 'history of neck or back injury' could not be a description of a physical or mental condition that existed at a particular date. As it was not satisfied on the evidence that any physical or mental condition existed when Mr Kozman became an eligible employee, it decided that section 16(10)(b) had no application.

Veterans affairs: failure to attend

In Robert George Kretchmer and the Repatriation Commission (7 November 1988) the applicant sought a review of a decision of a Veterans' Review Board rejecting a claim for a pension based on certain disabilities related to his war service. The applicant failed to attend or to be represented at two preliminary conferences. He also failed to notify the Tribunal of his intention to proceed with his application, in spite of a written request to do so. A member of the Tribunal therefore made an order dismissing the application under section 42A(2) of the Administrative Appeals Tribunal Act 1975. The applicant's failure to attend the proceedings was due to a combination of events including an oversight by his solicitors and his absence on vacation. He later sought to have his application for review set down once more for conference.

The Tribunal formed the view that the order dismissing the application was not made by a Tribunal constituted in accordance with the provisions of section 21(1A) of the Act. At the time the order for dismissal was made no direction had been given under section 20 as to the member(s) who were to constitute the Tribunal for the purposes of the relevant proceedings. As the hearing had not commenced the Tribunal, for the exercise of powers under section 42A, should have been constituted by a Presidential Member or by a Senior Member endorsed by the President. The member who purported to make the order of dismissal was not a member who could constitute the Tribunal in this case so as to exercise power under section 42A.

The Tribunal concluded that the decision of the member was made in error as to jurisdiction and was therefore void. In such circumstances, as a matter of prudence, a person aggrieved would be advised to seek judicial review of the decision and have it declared a nullity. It decided to relist the matter for a

conference on the grounds that it recognised that its original decision was void and was prepared to treat it as a nullity; both parties were agreeable to this course of action (although the Tribunal noted that this in itself could not give rise to jurisdiction); and unnecessary expense and inconvenience would be incurred by parties if in the circumstances of the case the matter were to be the subject of court proceedings.

Taxation: fee for personal guarantee for a loan

In a recent case (20 February 1989) the applicant, an active licensed bookmaker with extensive real estate interests, sought a review of a decision by the Commissioner for Taxation to tax a fee of $210 000 received by the applicant. The money was paid to the applicant for personally guaranteeing a loan facility of $8.4 million for 24 months.

The Commissioner of Taxation had characterised the payment as income of the applicant as:

- the sum had the general character of income under section 25(1) of the Income Tax Assessment Act;
- the sum was a benefit to the applicant in relation to services rendered by him under section 26(e) of the Act; and
- the sum was taxable within section 26(h) of the Act as 'the amount of any fee or commission received for procuring a loan of money'.

In relation to the first proposition the applicant argued that the guarantee was a transaction on capital account and therefore the money the applicant received must be capital. The Tribunal noted there did not appear to be any direct authority in Australia on the question whether a fee received as consideration for giving of a guarantee constituted taxable income. It considered the receipt of the guarantee fee could not be looked at in isolation. The money was paid as part of a chain of events and as one of a series of amounts passing between the parties to a business venture. The Tribunal, applying the principles set out in the decision of the full bench of the High Court in Federal Commissioner of Taxation v Meyer Emporium Limited 163 CLR 199, concluded that the receipt of the fee was in the nature of income because it was an aspect of the applicant's reward in the course of a concerted business project.

Furthermore, although the applicant may not have been in the business of giving guarantees for consideration he was personally involved in an overall commercial transaction. The guarantee was an integral part of the transaction the purpose of which was to create a profit. Although this was sufficient to dispose of the application the Tribunal also offered its views on the other two bases of assessment.

In relation to section 26(e), which requires the taxable benefits to be received in relation to services rendered by the taxpayer, the applicant argued that he did not render services to the debtor company which paid the money. The party that

benefited from the guarantee was the lender. The Tribunal decided that, under the terms of the section, as long as the service is rendered to any party and moneys are paid in relation to the rendering of that service by any party, the amount so paid is assessable.

The applicant also argued that section 26(e) could not extend to payments not normally regarded as income. This argument was rejected by the Tribunal which that considered amounts that might normally be regarded as capital for accounting purposes could be regarded as income for taxation purposes. The Tribunal noted that this view was affirmed in varying degrees in Smith v Federal Commissioner of Taxation 87 ATC 4883.

On the third basis of assessment the Tribunal noted that it was not consistent with the dictionary meaning of the words to conclude that money paid to the applicant for his service (ie the giving of a guarantee) was also paid to him for 'procuring the loan'.

Freedom of Information

Personal affairs: vocational matters

In Jones and Attorney-General's Department (13 March 1989) the applicant, following an unsuccessful application for employment, obtained access to certain documents pursuant to a request under the Freedom of Information Act 1982. He then applied to have two documents amended under section 48 of the Act, on the basis that they contained information that was 'incomplete, incorrect, out of date or misleading' . The documents were amended. The applicant was dissatisfied with the method of amendment adopted (namely by way of a schedule) and subsequently applied to have the documents themselves amended.

The Tribunal first queried whether the documents fell within the terms of section 48 and in particular whether the documents related to the applicant's 'personal affairs'. It found that those documents which discussed the applicant's work performance, capacity or suitability for appointment could be characterised as dealing with his 'vocational competence', but there was nothing in the documents of a private or familial nature. In particular, there was nothing concerning the applicant's state of health, the nature or condition of any marital or other relationship, his domestic responsibilities, or his financial obligations; nor was any reference made to matters which might be regarded as an extension of these things.

The Tribunal concluded that it had no jurisdiction to proceed with the hearing on the grounds that the documents did not relate to the applicant's 'personal affairs' and therefore did not fall within the terms of section 48.