Submission on AD(JR) Amendment Bill 1986. In response to a request for submissions on the Administrative Decisions (Judicial Review) Amendment Bill 1986 by the Senate Committee on Constitutional and Legal Affairs, the Council wrote to the Committee on 9 July. The Council's views on the issues with which the amending Bill deals are expressed in the report of the Council, Review of the Administrative Decisions (Judicial Review) Act 1977: Stage One (Report No. 26). However, it was thought that some explanation of the issues involved would be of assistance to the Committee in its inquiry into the amending Bill.

Administrative Appeals Tribunal

NEW JURISDICTION

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

Building Ordinance 1972 (A.C.T.)
Childrens Services Ordinance 1986 (A.C.T.)
Co-operative Societies Ordinance 1939 (A.C.T.)
Disability Services Act 1986
Health Authority Ordinance 1985 (A.C.T.)
Long Service Leave (Building and Construction Industry) Ordinance 1981 (A.C.T.)
Income Tax Assessment Act 1936
Nuclear Non-Proliferation (Safeguards) Act 1987
Patents Regulations
Plant Variety Rights Act 1987
Public Lending Rights Act 1985
Ships (Capital Grants) Act 1987
Sugar Cane Levy Collection Act 1987
Wool Marketing Act 1987

KEY DECISIONS

Veterans' entitlements

In Re Repatriation Commission and John Leslie Bramston (1 May 1987) the AAT was called upon to review a decision of the Veterans' Review Board that a tumour arose from, or was attributable to, eligible war service for the purposes of a claim for a repatriation pension under the Veterans' Entitlements Act 1986. The respondent, a Vietnam veteran, claimed that his disease, the tumour, was attributable to Agent Orange type defoliants used in Vietnam during the period of his service. Due to the concentration by the respondent on this point the Tribunal was not required to consider whether the neurosis or anxiety state suffered by the respondent was attributable to his war service generally. However, the Tribunal said that if he was able to establish this, it would not matter that a condition not attributable to war service also contributed to the development of the neurosis or anxiety. It is not necessary that war service be the sole cause of a physical or mental disability but merely that it contribute in a material way.

On the issue whether the tumour was attributable to the war service, the Tribunal found that the appropriate test to be applied was that stated in section 42(3)(b) of the Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Act 1986, namely, that a claim for a pension shall be granted unless the Commission is satisfied beyond reasonable doubt that there is no sufficient ground for granting the claim. When the effect of earlier provisions in the Repatriation Act had been examined by the High Court, it had rejected the argument that there must be some factor positively shown to connect the disability with war service and that it was not sufficient that the disability be of unknown etiology or that there was no evidence one way or the other on whether it was connected with war service (see Repatriation Commission v O'Brien (1985) 155 CLR 422). However, the later provisions had been intended to reverse the ruling in O'Brien's case.

On the medical evidence presented, the Tribunal determined that, as the tumour was slow developing, the time interval between the exposure to defoliants and the development of the symptoms was too short for it to be believable that there was a connection between the tumour and the defoliants. The Tribunal held that it was satisfied beyond reasonable doubt that there was no connection between the tumour and defoliants and that no environmental factor encountered by the respondent in Vietnam contributed to the tumour.

In Re Thomson and Defence Force Retirement and Death Benefits Authority (5 May 1987) the AAT affirmed a decision of the DFRDBA to reclassify the applicant for invalidity benefit purposes thereby reducing the amount of invalidity pay he received. The applicant had received a wrist injury during service with the RAAF and the matter to be determined by the Tribunal was the percentage of the applicant's incapacity in relation to civil employment. The fact that the injury may have prevented the applicant continuing his engagement in the RAAF or affected his home, sporting and social life was not relevant. The Tribunal stated that the concept of partial incapacity for work is that of reduced physical capacity, by reason of disability, for actually doing work in the labour market in which the employee was working or might reasonably be expected to work rather than whether or not the injured employee suffered actual economic loss (see Arnotts Snack Products Pty Limited v Jacob (1985) 57 ALR 229). The determination of a percentage of incapacity is not to be determined as if it were a mathematical calculation. Rather it is a value judgment, expressed in percentage terms, of the extent to which a person has suffered incapacity to engage in civil employment. In this case the applicant had considerable employment experience and could engage in almost any work that did not involve particular technical skills. Although the range of work that he could undertake was reduced by 50%, as he was precluded from manual work, this did not mean he should not continue in full employment in work as satisfying and well remunerated as the work he would have been likely to do but for his impairment. In the circumstances, the Tribunal considered that 25% incapacity was the appropriate figure.

In Re Easton and Repatriation Commission (29 June 1987) the Tribunal was required to consider whether the applicant should be granted an Intermediate or Special Rate of pension under the Veterans' Entitlements Act 1986. The applicant had a number of disabilities, including an anxiety state, which were accepted by the Repatriation Commission as disabilities attributable to war service. The Tribunal referred to the power conferred on it by section 43 of the AAT Act and commented that there was no reason why relevant facts which occurred up to the date of the decision should not be taken into account in the formulation of the Tribunal's decision in the review. The Tribunal held that, had it not been for his accepted disabilities, particularly his anxiety state, the applicant would have been likely to have been in employment either as a tradesman in the carpentry field or as a taxi driver. Although the applicant's condition had no doubt deteriorated, he was in February 1981, the date the Repatriation Commission considered he was entitled to 100% of the General Rate, and he was at the date of the Tribunal's decision, totally unemployable due to his disabilities. He was therefore entitled to the Special Rate of Pension under section 24(1) of the Act as from February 1981.

Application for extension of time

In 3 recent decisions the AAT has had to consider whether, pursuant to section 29(7) of the AAT Act, it should allow an extension of time for the making of an application for review of a decision. In Re Tully Partners Pty Ltd and Australian Apple and Pear Corporation (12 June 1987) the applicant sought review of a decision made by the respondent on 6 October 1986 refusing to grant an export licence for the export of apples and pears. The application for review should have been made within 28 days of the decision, namely, by 3 November 1986, but an application for extension of time was filed on 16 December 1986. The AAT said that the tests to be applied in considering such an application are those set out in Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment (1984) 58 ALR 305. The prima facie rule is that proceedings commenced out of time will not be entertained and therefore that AAT must be positively satisfied it is proper to grant the application. In this case the relevant factors were held to be the relatively short period for which extension was claimed, the fact that the respondent was made aware that the applicant was considering seeking a review, the absence overseas of the director of the applicant company and a lack of detail contained in the respondent's letter advising of the time limit for review. In addition the delay was not prejudical to the respondent and there was no obvious weakness in the application for review. In these circumstances the AAT considered this was an appropriate case in which to extend the time allowed for the making of a review.

In Re Babiker and Minister for Immigration and Ethnic Affairs (26 June 1987) an order had been made under the Migration Act in August 1985 for the deportation of the applicant. In September 1985 an application was made for review of that decision but the application was dismissed under section 42A of the AAT Act on 18 February 1986 when the applicant failed to

appear. The applicant then applied to the AAT under section 29(7) for an extension of time to make a further application for review of that decision.

The AAT said that the applicant must establish an acceptable explanation of the delay. Any prejudice the respondent may suffer must be taken into account and the granting of an extension must not favour the applicant unfairly in comparison with others. The merits of the review are to be taken into account and in a case where the decision to be reviewed is to deport the applicant, the seriousness of the consequences of the refusal of an extension should also be taken into account. Although in this case the applicant could be regarded as essentially a petty criminal, none of his offences was so heinous that for that reason alone the Australian community could not be expected to tolerate having him as a member of it and he therefore had an arguable case on the merits. Evidence was presented that although the applicant had acted irresponsibly in respect of the initial application, his illiteracy and general lack of worldliness meant he did not appreciate the likely consequences of his action. There was no real prejudice to the respondent in granting an extension nor would it favour the applicant unfairly as against others. Therefore in the unusual circumstances of the case, the AAT concluded the explanation for the delay was reasonable. The AAT distinguished Re Nolan and Minister for Immigration and Ethnic Affairs (29 April 1987) where an application for extension in similar circumstances was turned down but where there was no acceptable explanation of the delay and where the applicant was literate and had known of the date of the hearing but had simply absconded.

In Re Oldfield and Secretary to the Department of Primary Industry (13 May 1987) the applicant on 10 March 1987 sought an extension of time to lodge an application for review of a decision made in March 1985. There was no evidence that the applicant had, by non-curial means, continued to make the decision maker aware that he contested the finality of the decision (as there was in Tully Partners). In the circumstances of the case, the granting of an extension could have an effect on the allocation of the tuna fishing quota causing harm to the respondent and those in the industry. The applicant had not applied for review of the decision initially as he mistakenly thought that the AAT would not be able to vary the relevant guidelines applicable to Southern Bluefin Tuna. [The Tribunal in Re Mansted and Secretary, Department of Primary Industry (17 February 1987) had held that the guidelines should be adjusted in certain circumstances – see 1987 Admin Review 33.] Although the AAT found that the applicant could possibly succeed on the merits, it held that, due to the length of time that had passed since the date of the decision and the possible effect of an extension on others, the extension should not be granted.

Application of assets test in relation to farm property

In Re Wurst and Secretary, Department of Social Security (26 June 1987) the AAT was required to consider, pursuant to section 6AD(3) of the Social Security Act 1947, what amount the applicant could reasonably be expected to derive from the use of farm property. The applicant was the owner of property which was being used, through a family partnership, by the applicant's children and their dependants who were farmers of long standing. The partnership gave the applicant an amount for 'rent' of the property. This arrangement was not intended to circumvent the assets test as it was in operation before the assets test provisions were introduced. Rather it was a common means of passing a family farm from one generation to the next which had been accepted by the government as appropriate for rural properties. The respondent gave evidence that if the applicant's property had been leased at a commercial rate the amount which could be obtained for rental would be sufficient to disentitle the applicant to a pension. The departmental guidelines, which had been accepted by the AAT in Re Butler and Secretary, Department of Social Security (3 October 1986), stated that in considering what could reasonably be derived from the use of property in section 6AD(3), a reasonable basis was 2.5% of the current market value of the property as an annual rate of income unless there were reasons, having particular regard to the circumstances of the applicant, which indicated that a lower figure was appropriate. The issue before the AAT was whether, having regard to all the circumstances, it was reasonable to expect that amount of income to be derived from the property.

The AAT examined ministerial statements issued in relation to the assets test and held that it was clear that the legislation intended that each hardship case under section 6AD be considered individually. The word 'reasonably' used in section 6AD was not to be interpreted objectively. Rather, regard was to be had to the particular circumstances of use of the property in question. The income derived from farming by the members of the family partnership was an amount only a little above the pension rate for a family, although the value of the assets which they used to derive that income had a capital value of $673,000. The applicant's accountant did not consider that the partnership could afford to pay the applicant more than it already did pay her for 'rent' for the use of the property.

The AAT held that in the circumstances of the case taking into account the family relationship between the applicant and the user of the property it was not reasonable that the respective Wurst families reduce their present low income even further in order to pay the applicant an amount which meant she would no longer require a government pension.

Income for purposes of rate of age pension

In Re Zolotenki and Secretary, Department of Social Security (29 April 1987) the AAT reviewed a decision that restitution payments made by the German Government to the applicant were

income for the purpose of assessing his rate of age pension. The applicant was in receipt of an age pension the rate of which took into account moneys received from Germany. Following the decision in Re Kolodziej and Secretary, Department of Social Security (6 June 1985) in which the AAT held that certain German restitution payments did not constitute 'income' within the meaning of section 6 of the Social Security Act, the applicant requested that the Department reassess his pension. The respondent however maintained that the payments constituted income notwithstanding that the Social Security Appeals Tribunal on appeal had recommended that the decision of the Secretary should be the same as in Kolodziej.

The AAT examined several decisions including Kolodziej where the question whether German restitution payments comprised income within the meaning of section 6 of the Act was examined. Those decisions tended to rely on distinctions being made between receipts of a capital nature and receipts of an income nature. However, the question of the relevance of this distinction to payments of this type had recently been settled by the Federal Court in Secretary to the Department of Social Security v Read (10 March 1987), which said that there is no reason to give the definition of income in section 6 a meaning different from that appearing from the language used which gives the term a broad meaning. In this case, whether either a broad or narrow meaning was adopted, the receipt by the applicant of a periodical payment of moneys, being compensation related to loss of earning capacity due to ill health following persecution, would undoubtedly fit within the ordinary meaning of income. In addition the pension was income on the ground that it was a periodical payment by way of allowance. The AAT said that it could appreciate the resentment felt by the applicant as a result of these payments being considered as income but the issue must be determined according to the terms of the relevant legislation and, unless an exemption similar to that in the Income Tax Assessment Act was made in the Social Security Act, such payments would continue to be regarded as income.

Freedom of Information

Legal professional privilege - legal advice obtained from within government

In Waterford v The Commonwealth of Australia (1987) 71 ALR 673 the High Court considered whether it is open to the Commonwealth to claim legal professional privilege as a ground for denying access under the FOI Act to documents the subject matter of which is legal advice obtained from officers of the Attorney-General's Department and concerned with proceedings pending in the AAT. The appellant, a Canberra journalist, had applied to the AAT for review of a decision by the Department of Treasury to refuse him access to documents concerning the 1982-83 budget papers. After this appeal had been heard by the AAT, but before a decision had been handed down, Mr Waterford