AMBIT OF AAT REVIEW REVISITED - SAWMILLERS EXPORTS DECISION

*Pat Brazil**

Deputy President B J McMahon's ultimate decision in *Sawmillers Exports Pty Ltd and Minister for* Resources (17 May 1996) was to affirm the decision of the Minister under review because the relevant Regulations, the Export Control Hardwood Woodchips Regulations, imposed a national ceiling on woodchips exports which prevented him from increasing the volume of woodchips to be exported by the applicant. At the same time, however, he reviewed the merits and made a "conclusion" that "the preferable decision" would have been to grant the increase sought (at p 16).[1]

It has been held that the Administrative Appeals Tribunal (AAT) may discontinue a hearing when the application to review is merely "a sterile exercise": *Re Gowing and Civil Aviation* Authority (1990) 11 AAR 411. In the *Sawmillers Exports case*, a preliminary submission was made that this was such a case, but the Deputy President rejected it and entered upon an examination of the merits, and of the associated submissions made by the applicant that the provisions in the Regulations as to the national ceiling on woodchips exports were invalid.

The course followed by the Deputy President is not expressly authorised by the provisions of the *Administrative Appeals Tribunal Act 1975* (AAT Act). Under subsection 43(1) of the Act, the only types of decision referred to are:

- affirming the decision under review;
- varying the decision under review; and
- setting aside the decision under review and either making a decision in substitution or remitting the matter for reconsideration in accordance with the "directions or recommendations" of the AAT.

At the same time, subsection 43(1) does not rule out what the Deputy President did. The reason why he was unable to give effect to his finding was that under the Regulations in question, the Minister had already granted licences for export volumes for 1996 that in the aggregate used up the whole of the ceiling. This type of problem is, if not a familiar one, nevertheless one that has been identified and dealt with in writings on administrative review. It has been dignified with the description of "polycentric" decision-making. Thus the *17th Annual Report of the Administrative Review Council 1992-1993*, at 76, refers to decisions that relate to the allocation of a finite fund or resource, against which all potential claims for a share of that fund or resource could not be met. The report goes on to suggest that such decisions are "generally considered inappropriate for merits review". The reason given is that this is because a decision to make an allocation affects the amount granted to other claimants and that if that decision is altered then so is the basis of all other decisions. Whether consciously or not, this wisdom was obviously not taken into

* *Pat Brazil is a consultant to Allen Allen & Hemsley. He was Secretary to the Commonwealth Attorney-General's Department 1983 - 1989.*

account in drawing up the Regulations considered by the Deputy President, which specifically gave a right of review on the merits in relation to the grant of licences, without any express exclusion of the volume of exports from the scope of the review. The comment may also be made that the finite nature of the ceiling on exports only made it more important that the individual allocations of resource be fair and just, and, if at all possible, subject to review.

Also, under subsection 43(2) of the AAT Act, the AAT is required to give reasons for its decisions. The AAT should be able, in giving its reasons, to say that it has only affirmed the decision under review not because it considers it to be the right one but only because no effective decision can be made to redress what is perceived to be an erroneous outcome. It is pertinent to note in this regard that in the *Sawmillers Exports case* the findings raised substantial matters of administrative fairness and justice. The Deputy President found that the decision under review depended upon advice that was wrong, it failed to take into account representations made by the exporter to the Minister, and finally that the nature of the process leading to the fixing of the quantum of the national ceiling was completely unexplained, either in the Regulations themselves or in the submissions that were put to the AAT (at p 16).

The submissions put on behalf of the exporter that the Regulations in relation to the ceiling were invalid were, first of all, that they gave preference to one state or part of a state over another state, contrary to section 99 of the Constitution, by making a distinction between exports sourced from the relevant region in New South Wales specified in the Schedule to the Regulations and other parts of Australia. It was also submitted that the Minister's decision was intended to transfer, or had the effect of transferring, export allocation from an exporter in one state region to other states and other parts of Australia on the basis of false assumptions of a factual character and that this produced constitutional invalidity.

The Deputy President ruled that it was not appropriate for the AAT to rule on the constitutional validity of Regulations, saying that this was a matter that should be determined by a court of competent jurisdiction and this was a policy that had always been followed by the AAT. He cited *Re McKie and Minister for Immigration (1988)* 8 AAR 90, at 96. The comments to the same effect by the present Chief Justice of the High Court (Brennan CJ) when President of the AAT in *Re Adams and Tax Agents Board* (1976) 12 ALR 239, at 241, could also have been cited. Some findings of fact were made by the Deputy President in relation to the constitutional issues, but only in so far as they might turn out to be relevant (at p 18).

A different approach was taken however to the other submission that the Regulations establishing the national ceiling were in any case beyond the regulation-making power contained in section 7 of the *Export Control Act 1982*. The Deputy President made it clear during argument that questions of validity of this kind could be dealt with by the AAT, and he proceeded to consider them. He concluded that the Regulations relating to the ceiling were a valid exercise of the regulation-making power, but his willingness to rule on the question was, with respect, soundly based.

Thus, in *Re Jonsson and the Marine Council* (1990) 12 AAR 323, the AAT ruled that the regulation on which the decision under review was based was ultra vires the regulation-making power, and it set aside the decision on that basis. The ruling on invalidity was made, not as an authoritative legal ruling such as only a court can make, but rather on the basis that the AAT has the competence to form an opinion of the invalidity of regulations (on non-constitutional grounds) merely as a means which the AAT as an

administrative review body may adopt so that "it may appropriately mould its conduct" in reviewing the decision to accord with the law. This language derives ultimately from a passage in the decision of Brennan CJ in *Re Adams and Tax Agents Board* (1976) 12 ALR 239, at 242.

The AAT, in *Re Jonsson and the Marine Council* (at pp 341-2), said that it took the course it did because in the circumstances of that case the grounds for doing so were "compelling". In the *Sawmillers Exports case* no such reservation was entered, and a general competence to deal with such issues of invalidity was assumed by Deputy President McMahon. Despite the reserved approach which was ably expounded in *Re Jonsson and the Marine Council*, Deputy President McMahon's approach is probably the better one. To use language used by Bowen CJ in *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, at p 316, it is difficult to distinguish degrees of nullity or invalidity. Suffice it that the AAT can, on its own motion or at the request of a party, refer the question of invalidity to the Federal Court if it wishes to do so (AAT Act, section 45).

Lawlor's case is an appropriate point on which to end this case note. The approach taken and the reasons given by Deputy President McMahon in the *Sawmillers Exports case* are in line with the object and purpose of the AAT Act, as described by Bowen CJ in *Lawlor's case* (at p 313), namely to provide a simpler and more broadly based system of appeals from administrative decisions. The approach is in accord with the majority's view in *Lawlor's case* that the AAT could decide a matter on the ground that the decision under review was "in excess of authority". Bowen CJ observed that a more restrictive view of the ambit of AAT review would mean that, whenever it appeared there was an error of law by reason of which the decision was legally ineffective and that the applicant certainly needed relief, the AAT would be obliged to refuse on the ground it had no jurisdiction. The word "decision" in section 25 of the AAT Act is to be taken as referring to a decision in fact made, in purported exercise of powers conferred by an enactment, regardless of whether it is legally effective. Finally, there are no degrees of nullity.

Endnotes

1 Page references in this case note are to the "Decision and Reasons" as published by the AAT.