

Zimbabwe Parliament, and Mr David Zaamchiya, Permanent Secretary of the Zimbabwe Ministry of Justice, held talks with Mr E.J.L. Tucker, Chairman of the Council, Deputy Presidents AN Hall and R.K. Todd of the AAT, the Director of Research and Mr Ron Fraser, the Council's Principal Project Officer. The Zimbabwe Government is in the process of drafting a new constitution and discussion centred on the operation of the Commonwealth administrative review structure. The Secretary to the Attorney-General's Department, Mr P. Brazil, visited the Council's secretariat at the invitation of the Director of Research.

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### Administrative Appeals Tribunal

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#### NEW JURISDICTION

The following legislation confers new jurisdiction on the AAT:

- . Bounty (Commercial Motor Vehicles) Amendment Act (No. 2) 1985
- . Customs and Tariff (Stand-by Duties) Act 1985
- . Health Legislation Amendment Act (No. 2) 1985
- . Prescribed Goods (General) Orders (No. 2 of 1986)
- . Sales Tax Assessment Act (No. 11) 1985
- . Taxation Boards of Review (Transfer of Jurisdiction) Act 1986
- . Telecommunications (General) By-laws (notified 27 March 1986)
- . Veterans' Entitlements Act 1986

#### KEY DECISIONS

##### Overpayments and functions of the AAT

The decision of the AAT in Re Church and Secretary, Department of Education (No. 2) (21 May 1986) follows an earlier decision of the AAT that it had jurisdiction to consider an application for review of decisions to raise an overpayment in relation to TEAS benefits paid to the applicant and to make a demand for recovery of the overpayment (Re Church and Secretary, Department of Education (1985) 8 ALD 441) (see also 7 Admin Review 85). In the earlier decision the AAT had concluded that, as a matter of interpretation of the Student Assistance Act 1973, it had jurisdiction to review those decisions even though they had not been made in the exercise of powers conferred by an enactment. The AAT had also determined that, as a decision to seek recovery was not determinative of legal rights, review by it would not involve an exercise of the judicial power of the Commonwealth.

The applicant had received TEAS benefits for a full-time course based on the expectation of her receiving certain income during a full year. She later commenced full-time work and discontinued her studies for that year with the intention of resuming them on a full-time basis in the following year. The department recalculated her entitlement to assistance accordingly. It was claimed by the applicant that there was no right to recalculate the entitlement or to raise and recover an 'overpayment' so calculated.

In the later decision the AAT held, after further argument, that the only question which required decision was whether the alleged overpayment was recoverable at law or not. As distinct from some previous decisions of the AAT, no questions arose as to administrative error or the applicant's circumstances. In the light of that, the AAT could not decide the question with any finality as a final determination could only be made by a court of law, exercising judicial power. It was thus not appropriate for it to reach any conclusion as to the recoverability at law of the alleged overpayment. The applicant has appealed to the Federal Court against the AAT's decision.

Eligibility for invalidity pension where services terminated for other reasons

The decision in Re Hastings and Commissioner for Superannuation (7 April 1986) has aroused some public discussion. In that decision the AAT was called upon to interpret section 7(2) of the Superannuation Act 1976 which applies to a Commonwealth employee who retires or has his services terminated otherwise than on the ground of physical or mental incapacity to perform his duties. If the Commissioner is satisfied that at that time the person was, by reason of physical or mental incapacity, 'unfit to perform his duties', the Commissioner may direct that the ground for retirement shall be deemed to be the incapacity. The provision thus enables the Commissioner in an appropriate case to render a person eligible to receive an invalidity pension although that person was not formally retired on grounds of incapacity.

The applicant had been retired on invalidity grounds in 1971, but had later become a permanent employee of the Northern Territory government, which had the consequence under the Act that he was no longer eligible for an invalidity pension. However, after a few months his employment was terminated by the NT government on grounds related to 'conduct, diligence and efficiency'. He then sought a resumption of his invalidity pension on the ground that, on that termination, he ceased to be an eligible employee. However, the Commissioner refused to direct, pursuant to section 7(2) of the Act, that he be deemed to have been retired on the ground of physical or mental incapacity.

On the available medical evidence the AAT agreed with the Commissioner's delegate that, at the time of the termination of his services, the applicant was, on the basis of incapacity, unfit to perform the duties of his position as a Senior Health Inspector. But was unfitness to perform the duties being performed at the time of that termination all that was required, or did the legislation require unfitness to perform a range of duties broader than those being performed by the employee at that time? The AAT endorsed the first interpretation in view of the statutory scheme found in the Act.

The AAT also found that the legislation did not give the Commissioner a discretion whether or not to deem the person to have been retired on invalidity grounds where the Commissioner was satisfied that the person was unfit to perform the person's duties at the appropriate time and the other prerequisites in the section had been met. Once again the AAT took account of the statutory scheme, and in particular the aim of the legislation 'to grant invalidity pensions to persons who are unable to perform their duties on the grounds of physical or mental incapacity'. The Commissioner has appealed to the Federal Court.

#### Pension rate provisions clarified

Three recent decisions of the AAT have shed considerable light on the application of the provisions of Schedules 1 and 2 to the Repatriation Act 1920 as amended by the Repatriation Legislation Amendment Act 1985. The decisions are Re Delkou and Repatriation Commission and Re Banovich and Repatriation Commission (10 April 1986), and Re Lucas and Repatriation Commission (6 May 1986). Appeals to the Federal Court have been lodged by all 3 applicants. In the last of these decisions the AAT discussed in detail the similarities in, and differences between, the provisions in the Schedules concerning entitlement to receive incapacity pensions at the 'Intermediate' Rate or the Special Rate. The AAT concluded that the major differences between the qualifying conditions for the Special Rate as opposed to the Intermediate Rate of pension lay 'in the extent to which the member's incapacity from accepted war disabilities is, of itself alone, of such a nature as to render the member incapable of undertaking remunerative work' (AAT's emphasis).

In all 3 decisions the AAT concluded that the applicants had satisfied one requirement for eligibility for either the Special or the Intermediate Rate of pension, in that the accepted disability alone rendered the member incapable of undertaking remunerative work for more than the relevant number of hours a week. However, the further requirement that the incapacity from accepted disabilities alone should have

prevented the member from continuing to undertake remunerative work that the member was undertaking was not satisfied in any of the applications - in Delkou because a non-accepted disability had contributed to that result, in Banovich and Lucas because age had contributed, and in Lucas also because of a present lack of relevant contacts which would have enabled the member to obtain architectural consultancy work. For similar reasons, in both Banovich and Lucas the applicants failed to satisfy a further requirement as to loss of salary or wages.

#### Unemployment benefits and student intentions

In Re Mathews and Secretary, Department of Social Security (25 March 1986) the AAT held on the evidence that a full-time student had not been uncertain during two university vacations whether or not (in the first case) to continue to a fourth honours year of his BA course and (in the second case) to commence a Ph. D course; he had every intention of proceeding with the courses. He was accordingly not entitled to receipt of unemployment benefits in respect of those periods. While it did not have to decide the question, the AAT expressed the view that substantial practical difficulties would arise if the Social Security Act were to be administered on the basis that a person whose intentions were uncertain over the vacation between successive years of a course or between successive courses was 'unemployed' for the purposes of the legislation. The AAT also rejected the applicant's contention that a full-time Ph. D student should be regarded as 'unemployed' for the purposes of the Act!

#### Entitlement to export market development grant

In Re Tatham Ltd v Australian Trade Commission (12 March 1986) the AAT concluded that expenditure by the applicant was eligible for the purpose of attracting a grant under the Export Market Development Grants Act 1974 because it had been incurred 'primarily and principally' for the purpose of creating or seeking opportunities, or creating an increasing demand, for export sales of Australian goods. The applicant company had secured an agreement with a co-operative society in Vanuatu to provide commercial management in return for the option to supply goods purchased by the society outside Vanuatu. An employee of the applicant company was sent to Vanuatu to act as commercial manager of the society. As a result of his activities, there was a very large increase in the volume of the society's retail business and, consequently, a similar increase in the applicant's sales of Australian goods to the Vanuatu society.

The AAT distinguished the facts in this case from those involved in the decision of the Full Court of the Federal Court in Export Development Grants Board v Geoffrey Thompson & Growers' Co-Operative Company Pty Ltd (1985) 8 ALN N27. In the latter case an exporter of pears employed a person both to

supervise their packing and storage in Australia and to be present in the country of destination to supervise their delivery and unpacking. The Court held that payment in respect of the services of that person was not eligible expenditure under the Act. In the present case, unlike the Geoffrey Thompson case, the relevant contract was not one for the sale of specific goods, and the chief purpose of the expenditure was not the discharge of the contracted obligation but a purpose independent of or collateral with the performance of the contract.

When must a benefit classification certificate be issued?

In 2 recent cases the AAT, constituted differently in each case, reached different conclusion as to the meaning of the provision in section 16(4) concerning the issue by the Commissioner for Superannuation of a benefit classification certificate (BCC), which may result in the payment of reduced benefits in the event of premature death or retirement on grounds of invalidity. The Commissioner is required to issue a BCC where the Commissioner is of the opinion that the person concerned is 'not likely...to continue to be an eligible employee until the person attains his maximum retiring age'. In Re Weeks and Commissioner for Superannuation (22 May 1986) the tribunal followed the decision in Re Bewley and Commissioner for Superannuation (1985) 8 ALD 293 that the provision meant that, before the Commissioner could decide to issue a BCC, 'there must be a positive satisfaction that the person in question is not likely to continue in employment until retirement, that is to say it must be more probable than not that the person in question will not continue to his or her maximum retiring age by reason of or for a reason connected with a physical or mental condition'. The AAT found that, although there was a substantial chance that the applicant's hearing would deteriorate to the stage of moderate to severe loss, there was only a small risk, in view of the continuing improvements in hearing aids and the flexibility in work modes involved in university lecturing, that she would not by reason of her condition complete a normal working life.

The AAT in Re Dakin and Commissioner for Superannuation (10 June 1986) was unable to agree with the views expressed in Re Bewley as to the meaning of the legislation, and concluded that the language of section 16(4) was apt to include a case where the opinion was held that, by reason of or for a reason connected with the disclosed condition, death or retirement before attaining the maximum retiring age was 'an event which may well happen'. The AAT's reasons for decision referred to the purpose of the provision to protect the superannuation fund, and to the procedures for appointment to the Commonwealth Public Service. In the circumstance of that

case, however, the AAT was not satisfied that at the time the applicant became an eligible employee he had the condition specified in the BCC. The AAT added that even if it had taken the contrary view, it could not have been said of the applicant on the evidence given that his early retirement was an event likely to occur.

As a result of the decision in Re Bewley the test in section 16(4) of the Act was altered by the Superannuation Legislation Amendment Act 1986 so that the Commissioner is now required to issue a BCC if 'there is a real risk' that the person in question will not continue to be an eligible employee until retiring age. The amendment came into force on 1 July 1986.

#### STATISTICAL TRENDS

Table 1 below shows a large increase (746) in the number of applications in 1985-86, of which a substantial number (663) is due to the relatively new jurisdiction in veterans' appeals. (In comparing percentages between 1984-85 and 1985-86 account should be taken of the distorting effect of the addition of this large number of cases.) The declining trend in social security applications has been reversed with a large increase (187) in applications over the previous year. This is due in part to the introduction of the assets test and to an unexpected increase in the number of invalid pension cases coming before the AAT. Stringent economic circumstances may also be a contributing factor in this and some other areas where increases have occurred. Compensation applications have increased, while export grants applications have more than doubled. Freedom of information applications were somewhat fewer than last year, and IPTAAS applications dropped very considerably.

Table 1  
No. of applications to the AAT for review

	1982-83	1983-84	1984-85	1985-86
Social security	1104 (64.1%)	931 (43.9%)	566 (31.3%)	753 (29.5%)
IPTAAS	21 (1.2%)	386 (18.2%)	168 (9.3%)	66 (2.6%)
FOI	59 (3.4%)	210 (9.9%)	318 (17.6%)	286 (11.2%)
Compensation	298 (17.3%)	305 (14.4%)	189 (10.4%)	240 (9.4%)
Customs	68 (4.0%)	57 (2.7%)	171 (9.5%)	136 (5.3%)
Tax agents	13 (0.8%)	37 (1.7%)	6 (0.3%)	11 (0.4%)
ACT rates	1 (0.1%)	18 (0.8%)	84 (4.6%)	7 (0.3%)
Superannuation	25 (1.4%)	22 (1.0%)	27 (1.6%)	43 (1.7%)
Export grants	26 (1.5%)	33 (1.6%)	35 (1.9%)	90 (3.5%)
Veterans' apeals	—	—	71 (3.9%)	663 (26.0%)
Migration	31 (1.8%)	23 (1.1%)	22 (1.2%)	46 (1.8%)
Other	75 (4.4%)	98 (4.6%)	152 (8.4%)	214 (8.3%)
TOTAL	<u>1721</u>	<u>2120</u>	<u>1809</u>	<u>2555</u>

Source: AAT

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Freedom of Information

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AAT jurisdiction - secrecy exemption

The decision of the Full Court of the Federal Court in Commissioner of Taxation v Swiss Aluminium Limited (26 May 1986) settles for the time being the differences of opinion within the AAT on the proper application of section 38 of the FOI Act in relation to section 16 of the Income Tax Assessment Act.

The proceedings reached the court by a circuitous route. The Commissioner and another party first appealed to the court under section 44 of the AAT Act against a decision of the AAT that parts of a document were not exempt under section 38 of the FOI Act. The court held, however, in Alcoa of Australia Ltd & Ors v Swiss Aluminium Australia Ltd & Ors (1986) 64 ALR 317 that the court had no jurisdiction to hear the appeals since the AAT had not determined the questions raised by the Commissioner concerning the application of other exemptions. The AAT's decision consequently did not finally determine the matter. Soon afterwards the AAT referred the question of law involved to the Federal Court under the provisions of section 45 of the AAT Act. Those provisions, the court said, were wide enough to encompass a situation where the AAT, as in this case, had already made a decision on the matter in issue.

The Full Court decided by majority that the document concerned was an exempt document by virtue of section 38 of the FOI Act on the ground that section 16 of the Income Tax Assessment Act applied specifically to information of a kind contained in the document and prohibited persons referred to in the Act from disclosing information of that kind. Section 16 prohibits an officer from, amongst other things, communicating to any person any information respecting the affairs of another person acquired by the officer in the course of or by reason of his or her employment. Section 38 of the FOI Act provides that a document is exempt if there is legislation in force 'applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind'. The Chief Judge, Sir Nigel Bowen, characterised the information protected by section 16 as 'tax related information', while Mr Justice Jackson characterised it as information respecting the affairs of another person. Mr Justice Fox, who dissented, took the view that section 16 was of general rather than specific application, identifying the information in an entirely general way through the capacity of the person who received it.

Access to documents concerning Daintree rainforest

The decision of the AAT in Re Rae and Department of Prime Minister and Cabinet (4 March 1986) arose out of a request by the Daintree Campaign Director of the Wilderness Society for