F O C U S

Review of AAT procedures

The Task Force on Review of Administrative Appeals Tribunal Procedure was set up by the Attorney-General in late December 1986 to conduct a review of the operations of the AAT and of the provisions of the AAT Act. Its terms of reference cover such aspects as pre-hearing procedures, legal representation, simplification of procedures, the obligation to file section 37 statements, and whether the AAT should be empowered to determine matters on the papers. The members of the Task Force are Mr LJ Curtis (Attorney-General's Department), Mr JL Carroll (Department of Finance), Justice Davies (President, AAT) and Dr CA Saunders (Chairman of the Council).

The Task Force has had some consultation with AAT members and some client groups and representatives of government agencies. It has distributed the terms of reference to government agencies and a selection of client groups for comment. The Council has been invited to comment on the findings of the review before decisions are taken by the government.

One of the specific terms of reference requires the Task Force to advise 'whether in relation to the review of a decision given in the exercise of a discretionary power, the discretion of the Tribunal to substitute its own decision should be qualified in any way'. It thus raises again the issue of the attitude that the AAT should adopt towards government policy.

The Kerr Committee envisaged an administrative review tribunal empowered to substitute its decision for that of the administrator where the justice of the case so required, but not when it was shown that the administrative decision was properly based on government policy (Commonwealth Administrative Review Committee, Report, August 1971; P.P. No. 144/ 1971; para. 297). The Bland Committee said: '[The tribunal] should not be entitled to question the policy grounds on which a decision is based or a decision to the extent that it gives effect to policy. It should do no more than identify the government policy on which the decision is based' (Committee on Administrative Discretions, Final Report, October 1973; P.P. No. 316/1973; para. 172). Section 43 of the AAT Act, however, provides that for the purposes of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision. The power to review policy has been taken to have been impliedly conferred by this section.

It is said that the Tribunal stands in the shoes of the decision maker and it will consider whether the decision 'was objectively, the right one to be made. Merely to examine whether the administrator acted reasonably in relation to the facts .. may not reveal this' (per Justice Smithers Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60 at 77). In a joint judgment in Drake's case, Chief Judge Bowen and Justice Deane made it clear that it was the Tribunal's role to determine whether the decision made was, on the material before the Tribunal, the correct or preferable one, rather than merely determining whether the decision conformed with any relevant government policy, and that it was not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the Tribunal's determinations (at p. 70). In re-hearing Drake's case, Justice Brennan said that the Tribunal would ordinarily apply policy which had been adopted by a Minister, unless it was unlawful or tended to produce an unjust decision. An argument against the policy or its application would be considered, but cogent reasons would have to be shown against its application (Re Drake and Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2 ALD 634 at 645).

It should also be noted that in Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158 Justice Brennan (at p. 163) had drawn a distinction between policies made or settled at the political level and policies made or settled at the departmental level. These were distinguished by the difference between the factors to be taken into account in the two kinds of policy and the difference in parliamentary opportunity to review them, and different considerations could apply to the review of different kinds of policy. For example, more substantial reasons may require to be shown why 'basic' policies, which may have been forged at the political level, should be reviewed.

In Re Gillespie and Minister for Immigration and Ethnic Affairs (1984) 5 ALN No. 348, Deputy President Thompson re-stated the principles. He said that the law (in this matter, a deportation case) was set out in the Migration Act and that the Minister's policy was not law. Nevertheless it would be given weight because its formulation was an exercise of political power and was appropriately taken in a political context. Re Aston and Secretary, Department of Primary Industry (1985) 8 ALD 366 also adopted this approach in an area apart from criminal deportation. In that case, a policy adopted by the Minister after consultation with state ministers and industry representatives was given great weight, and in the absence of special circumstances affecting the applicants, the decision was affirmed. Justice Davies pointed out in that case that the Tribunal was not accountable politically and could not proceed by obtaining industry consensus, and it had not been shown that the policy either was entirely misconceived or proceeded on a wholly erroneous basis (at p. 380).

In relation to departmental policy, the Tribunal has emphasised that it should be properly informed, but it has assessed the policy on its merits. For example, in Re Te Velde and

Director-General of Social Services (1981) 3 ALN No. 75 the Tribunal acknowledged that a departmental manual served 'a valuable purpose in guiding the consistent exercise [of a discretion] by departmental officers', but it had no legislative force and was not binding on the Tribunal, whereas in Re Hewitt and Secretary, Department of Transport (No. 2) (1983) 5 ALN No. 28 the Tribunal affirmed the Secretary's decision and applied his policy of refusing a licence to an applicant who failed a certain colour perception test.

Re Hobart Clinic Association and Minister for Health (1986) 9 ALD 52 is a recent case which perhaps can be seen as demonstrating the benefits of the AAT reviewing policy. In that case, the Tribunal found that the Minister had exercised a particular discretion inconsistently with the criteria which he had chosen to specify as being relevant to the exercise of the discretion. Having specified criteria, 'confidence in the administrative process would be lost if the Minister were to make decisions on any other basis' the Tribunal held (p. 57).

Pursuant to section 25(3) of the Victorian Administrative Appeals Tribunal Act 1984, the Victorian AAT, in reviewing a decision, is required to apply a relevant statement of policy if the following conditions are met: the Minister certifies that there was a statement of policy in existence at the time the decision was made; the Tribunal is satisfied that at the time the decision was made the applicant was aware of the statement of policy, persons who might apply for review could reasonably be expected to be aware of the statement of policy, or the statement of policy had been gazetted; and the decision maker stated, when giving reasons pursuant to the AAT Act, that he or she relied on that statement of policy in making the decision. There have been no policy statements gazetted to date, and nor has this provision been tested before the Tribunal, although it has not gone entirely without comment. While section 25(3) offers a different resolution of the policy-review question, it is a provision of some complexity.

These issues, among others, are now before the Task Force in its consideration of this particular term of reference. It may be argued that the Tribunal's policy-review role forces decision makers to articulate their policies and keep them under review. It also allows justice to be done in individual cases. On the other hand, departures by the Tribunal from policy, to the extent that they occur, could give rise to inconsistency in decision making and tend to derogate from the normative effect of AAT decisions. Regardless of these arguments, it is clear that the AAT is reluctant to interfere at large with promulgated policies or their application, particularly where they have been adopted or developed in the political arena and subjected to parliamentary scrutiny.

REGULAR REPORTS

Administrative Review Council

LETTERS OF ADVICE

Since the last issue of Admin Review (January 1987), the Council's letters of advice to the Attorney-General have included the following matters: the awarding of costs by the AAT, AAT review of certain decisions under meat and livestock industry legislation, the functions of Taxation Relief Boards and review of migration decisions.

CURRENT WORK PROGRAM

Customs (anti-dumping). A report was approved by the Council at its meeting on 6 February and was transmitted to the Attorney-General on that date. Arrangements have been made for the printing of the report.

Constitution of the AAT. At the Council's meeting on 3 April, it was decided that further consultation on this matter was necessary. Consequently an issues paper is to be prepared and circulated for comment. It is hoped to arrange a seminar on the matter in early July.

Access to administrative review. Interviews have taken place for the selection of researchers to conduct the social security review officer survey. Questionnaires are being prepared and it is anticipated that the clients of review officers will be surveyed in May-June.

Industry research and development and related legislation. A draft report was considered by a committee on 1 April. It is now being prepared for circulation to interested persons for comment before the final report is prepared.

AAT Task Force. As noted elsewhere in this issue, the Attorney-General has set up a Task Force to review certain aspects of the AAT's procedures. The Council's Secretariat has been engaged in preparing papers for Dr Saunders in connection with the Task Force.

Visitors to the Council. The Attorney-General, the Hon Lionel Bowen, and his Principal Private Secretary, Mr John Broome, attended the February Council meeting, and some useful discussion took place. The Attorney-General referred in particular to the effect budget considerations could have on the implementation of Council recommendations. The Secretary of the Department of Social Security, Mr Derek Volker, attended the April Council meeting. He spoke about the changes anticipated