in the department as a result of the introduction and increasing use of on-line information systems. Statistics on social security appeals supplied by Mr Volker are set out in Administrative Law Watch ([1987] Admin Review 47 et seq).

Administrative Appeals Tribunal

NEW JURISDICTION

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

Antarctic Seals Conservation Regulations
Apple and Pear (Conditions of Export) Regulations
Australian Citizenship Amendment Act 1986
Bounty (Books) Act 1986
Bounty (Bed Sheeting) Act 1977
Bounty (High Alloy Steel Products) Act 1983
Bounty (Paper) Act 1979
Bounty (Printed Fabrics) Act 1981
Bounty (Steel Mill Products) Act 1983
Bounty (Textile Yarns) Act 1981
Electricity Ordinance 1971
Fertilisers Subsidy Act 1986
Health Insurance Act 1973
Income Tax Assessment Act 1936
Interstate Road Transport Regulations
National Health Act 1953
National Health (Pharmaceutical Benefits) Regulations
Navigation Act 1912
Patent Attorneys Regulations
Poisons and Narcotic Drugs Ordinance 1978 (A.C.T.)
Subsidy (Cultivation Machines and Equipment) Act 1986
Therapeutic Goods Act 1966
Wildlife Protection (Regulation of Exports and Imports) Act 1982

In accordance with the recommendation of the Council, jurisdiction has been removed from the Tribunal under the following legislation:

Health Insurance Act 1973
National Health Act 1953

KEY DECISIONS

Deportation order

At [1986] Admin Review 87, note was made of a case concerning a deportation order which had been made against a prisoner who was serving a mandatory life sentence. The order was to take effect on the prisoner's release from gaol, although that was an indeterminate date. The prisoner had served 8 years of his sentence at the time the order was made, and although pursuant to the Crimes (Amendment) Act 1986 (Vic) he was eligible to apply to

the Supreme Court of Victoria for a determinative sentence to be fixed, he had not done so. He had sought review of the decision of the Minister for Immigration and Ethnic Affairs to make the deportation order alleging that it had been made prematurely because of the dynamic nature of the criteria which were considered in making such an order - for example, the possibility of recidivism, the person's contribution to the community, family and social ties, etc. In November 1985, the AAT ruled that because of the seriousness of the issues raised, the matter should be set down for a full hearing on the merits. The decision on the full hearing was handed down on 22 January 1987 (see Re Bardek and Minister for Immigration and Ethnic Affairs). The Minister had argued that he had exercised his power validly because the facts relevant to the decision whether or not to deport were most unlikely to change in the future and therefore the decision was not inappropriate. Deputy President Thompson remitted the matter to the Minister for reconsideration in accordance with a recommendation that the deportation be revoked and that the question of the prisoner's deportation be considered afresh at a time proximate to his release from prison. (The AAT has recommendatory power only in such matters.)

The Tribunal said that where the date of release was unknown or a long time in the future, it may be contrary to natural justice that a deportation order be made; such an order could be invalid or liable to be declared void by the Federal Court, but that would depend in each case upon the facts. In some cases the interests of justice could be better served by an early order - a relevant consideration is also the fact that an offender in respect of whom a deportation order is made has a right to seek AAT review, and it appeared that one of the matters the Adult Parole Board of Victoria took into consideration in deciding whether a prisoner should be released on parole, and, if so, when, was whether he or she was going to be deported. Thus an offender might sometimes suffer serious disadvantage if a decision on his or her deportation were delayed until the date of release were known.

The Tribunal examined the circumstances of the prisoner and found that the risk of his re-offending was sufficiently great for it to weigh very heavily in favour of his deportation, and that he would not be likely to make any significant contribution to the Australian community if he remained in Australia. On the other hand, a return to his country of birth would involve hardship and he would be without any supporting relatives or community. If the prisoner were due to be released in the immediate future, the factors favouring his deportation would heavily outweigh the one factor favouring his remaining in Australia, but on the medical evidence it could not be said that there was no reasonable possibility of a significant change in the relevant facts and circumstances. Thus, the Tribunal concluded, it would be unfair to affirm the decision to deport, and accordingly the matter was remitted to the Minister for reconsideration in accordance with a recommendation that the deportation order be revoked and that the question of the applicant's deportation be reconsidered at a time proximate to his release from prison.

Assets test - no disposal of property

In Re Barnes and Secretary, Department of Social Security (9 February 1987) the AAT set aside a decision of the delegate of the Secretary to the Department of Social Security, finding that the applicant had not disposed of property and/or income within the meaning of section 6AC of the Social Security Act 1947.

The applicant was aged 93. In 1927, subsequent to her marriage, she and her husband had separately purchased areas of land which they had farmed in partnership as a single farm. In 1963, the applicant's husband had transferred his parcel of land to the oldest son. At that time, the applicant had retained her land in order to support herself, although the son worked the whole of the property. The applicant and the son later entered a share farming agreement whereby the applicant received an income of 25% of the net proceeds from the grain crops. This agreement terminated in 1982, although the arrangement continued after that time on the same terms. Concerned at the possible introduction of probate duty and the rising costs of stamp duty, the applicant later transferred her land by way of gift to her son. The transfer was registered in 1984, prior to the commencement of the assets test legislation, but the respondent considered that it was caught by the retrospective provisions and advised the applicant of the cancellation of the age pension which she had been receiving for 11 years prior to the transfer.

In income tax returns the applicant had stated her occupation or business as 'farming', and until the transfer of the property, she had paid her proportion of the farming debt accounts, including the cost of superphosphate, the provision of fencing material and the payment of rates and taxes, although she had not been physically involved in the farm work. The Tribunal found that the applicant had been in the 'business' of farming. Thus her conduct in transferring her land to her son came within the exclusionary provisions of sections 6AC(10) and (11), because she had engaged in a course of conduct under which she had ceased to be engaged in the business of farming, and the transfer had therefore not constituted a disposition of property within the meaning of section 6AC(2). As the transferred land was not the property of the applicant within the meaning of the Act, it should not be taken into account in determining her pension entitlement, the Tribunal found.

Pension claim disallowed

In Re Dunning and Repatriation Commission (12 February 1987), the AAT affirmed a decision of the Veterans' Review Board disallowing a claim for a pension for a medical condition described as essential hypertension which the applicant claimed was war-caused. Pursuant to section 120(3) of the Veterans' Entitlements Act 1986, the Tribunal found that there was no sufficient ground for determining that the hypertension was a war-caused injury. The applicant had become a heavy smoker during war service in Papua New Guinea, and had smoked intermittently after his discharge from the army. He related his smoking to stress, both during the war and in his work afterwards. The Tribunal found that the applicant's elevated

blood pressure had first been disclosed in 1964, and some 14 years had elapsed before the applicant showed any serious concern about it. In 1978, a positive diagnosis of essential hypertension had been made. This had been 32 years after discharge from the army and 17 years after the applicant had discontinued smoking. The Tribunal was unable to find any reasonable hypothesis connecting the hypertension with heavy smoking resulting from war-caused stress - it noted that there were no studies relating smoking and hypertension or supporting a reasonable hypothesis of a link - although it did accept the relevance of the stress of the applicant's war service to his commencing heavy smoking and was satisfied beyond reasonable doubt that the stressful circumstances of the applicant's civilian work extended over 20 years, during which time his elevated blood pressure was established, and that stress had been accepted as a factor leading to his retirement.

The Tribunal also commented on the procedures which should be adopted in the repatriation or compensation jurisdiction when expert medical evidence is to be heard. It emphasised that it was undesirable that such evidence be heard until lay evidence had been given of the facts forming the basis of the expert evidence. Otherwise the Tribunal could be deprived of the opportunity of asking questions of the expert witnesses with an adequate knowledge of the facts of the claim.

The Tribunal considers the application of policy

From 1 October 1984, the implementation of the Southern Bluefin Tuna Management Plan has imposed on fishermen individual quotas calculated in accordance with a set formula which, among other things, recognises the previous best catch of the relevant fishing vessel. The criteria by which the quota is fixed have been so expressed as to endeavour to take account of circumstances in which fishermen might be modifying their level of participation in the industry by replacing their fishing vessels with smaller or larger vessels, or where bona fide tuna fishermen such as a skipper or deckhand might acquire a fishing vessel for the purpose of continuing in the industry.

In Re Mansted and the Secretary, Department of Primary Industry (17 February 1987), the applicant sought review of an allocation of quota on the basis that it did not give due weight to the size of the fishing vessel he had acquired and commenced to operate. He had been involved in the fishing industry for 13 years although he had previously fished from smaller boats. His quota had been calculated therefore by reference to a smaller boat as his new, larger boat had no catch record.

There was no evidence to suggest that the Management Plan was not called for or that the quota system or overall quota was undesirable. It had reduced the number of fishermen in the industry, presumably had stabilised the overall catch, and had provided a measure of compensation to those forced to leave the industry, but this applicant contended that application of the policy to determine his quota wrought an injustice in the circumstances - that is, when applied to the purchaser of a boat with no catch history. He asked the Tribunal to take into

account in reviewing the quota decision and applying the policy the size and potential catch record of the new boat purchased with no catch record - that was not a factor recognised as such by the policy.

The Tribunal adverted to the decision of Justice Brennan in Re Drake and Minister for Immigration and Ethnic Affairs (No. 2) 1979 2 ALD 634 in which the role of the Tribunal in relation to government policy was summarised at (p. 645). In particular it referred to the Tribunal ordinarily applying policy in reviewing a decision unless the application tended to produce an unjust result in the circumstances of the particular case. Inconsistency was a further factor to be taken into account. The Tribunal in this case was satisfied that the applicant was in a position of unusual or special disadvantage deriving from the absence of consideration in the policy as written of his particular circumstances. To adjust the policy in such a situation would not produce inconsistency because this applicant was not in the same situation as a number of other applicants who had applied to the Tribunal where their catch record had been affected by various events or by their own choices and decisions that had limited their commitment. Here the purchase of the larger vessel by the applicant was regarded as a demonstration of personal and financial commitment to the industry which was not adequately recognised by the policy. The Tribunal remitted the matter to the respondent for reconsideration in accordance with a recommendation that the applicant's quota be increased by an amount calculated in accordance with the method set out in the Tribunal's reasons for decision.

In Re Rendevski & Sons & Ors and Australian Apple and Pear Corporation (17 March 1987), decisions under the Australian Apple and Pear Corporation Act 1973 and the Apple and Pear (Conditions of Export) Regulations refusing to grant licences to export apples and pears from Victoria were examined. The refusals to grant licences to two applicants were affirmed; the refusal was set aside in the third case.

The stated policy of the Corporation was that there should be no more than 6 licences to export apples and pears for each of the main exporting states, of which Victoria was one, and no more than 25 throughout the whole of Australia. This policy was supported by the view that an increase in the number of licences had led to a deterioration in quantity and quality of exports. The Tribunal found, however, that important factors such as quality and condition of fruit, fruit varieties, costs of production and shipping, and rates of exchange bore little relationship to the number of exporters. Indeed, the stability of exports had held up, 1987 was expected to be a good year, the general level and quality of export of pears seemed to be improving, and new markets were being created. The Tribunal found that the economic conditions which may have favoured a severe reduction in numbers did not exist and the proposed reduction in the number of licences would not have given rise to a monopoly position that would significantly have increased Australia's export performance, but a restriction in numbers would have been likely to lead to loss of competition and drive.

The stated policy was found to look primarily to the return of growers, although the Tribunal found that the function of the Corporation was to promote the export of apples and pears.

While the Tribunal did not accept the appropriateness of this policy, it agreed entirely with the general approach of the Corporation. Whatever its stated policy, it had in fact acted to give licences to organisations with potential to increase the export of apples and pears, and had granted 12 licences. The Tribunal pointed out that the Corporation had consulted with the industry and government and that, even if the Tribunal had not agreed with the course taken, it would have been guided by the substance of the steps taken by it. The Tribunal ought to be guided by the practice or policy of the body whose decision is under review, the Tribunal said, referring to Re Drake (supra) and Re Aston (supra) as setting out the philosophical basis for this course of action.

The Tribunal agreed with the view of the Corporation that the number of licences ought to be limited, and considered the present applications for review on this footing. It took the view that a licence ought to be granted if it could be shown that to do so would be likely to promote exports (Re John Holman & Co Pty Limited and Minister for Primary Industry and Australian Apple and Pear Growers' Association (party joined) (1983) 5 ALN No.154). The claims of the applicants were to be weighed generally against the claims of those who had been granted licences, and if, having regard to what had been done by the Corporation, it was judged fair that another licence should be granted, then that should be done. As the third applicant was shown to have special competence in the export of fruit and vegetables, an extensive knowledge of the Victorian apple and pear industry and an adequate and ready source of fruit for export, the Tribunal directed that a licence be granted to that applicant.

Statement of reasons required for a deemed decision

In Re Gregory and Department of Defence (5 March 1987) (and also see [1987] Admin Review 37) the Tribunal ruled that there was no power allowing it to direct that a section 37 statement and other relevant documents were not required to be lodged. This was because although section 33(2) of the AAT Act empowers the Tribunal to give directions regarding the procedure of the Tribunal, section 33(1)(a) specifically provides that the procedure is 'subject to this Act and the regulations and to any other enactment'. Thus the Tribunal cannot give directions which would have the effect of nullifying a statutory provision such as section 37 which provides that a decision maker whose decision is the subject of an application for review shall lodge a statement of findings on material questions of fact, referring to the evidence on which the findings were based and giving the reasons for the decision, and every other relevant document in his possession. This is so even when the decision in question is a deemed refusal of access under the FOI Act, and access has been granted in full approximately 3 weeks after the application for review was lodged.

This decision raises an aspect of Tribunal procedure which is receiving the close attention of the Task Force (see [1987] Admin Review 26). Any amendments to the section would need to balance cost and time saving considerations against the benefits which a section 37 statement brings by way of providing necessary information to applicants and of ensuring that agency decisions are soundly based. It is obviously absurd, however, in a case such as Re Gregory, for a section 37 statement to be required. (It should also be noted in this context that the Tribunal may only dismiss an application where all parties to a review consent to this course (s. 42A(1), AAT Act).)

STATISTICS: COMPOSITION OF TRIBUNAL

The AAT exercises its power in divisions, in accordance with section 19 of the AAT Act. The present divisions are the General Administrative, the Medical Appeals, the Valuation and Compensation, the Veterans' Appeals and the Taxation Appeals Divisions, although no members have been assigned to the Medical Appeals and the Valuation and Compensation Divisions. Section 21 of the AAT Act specifies the manner of constitution of the AAT for the exercise of its powers, in relation to particular proceedings, subject to any other provision made in the AAT Act or in any other enactment. Section 21 provides that the Tribunal shall be constituted by -

- a presidential member who is a judge and 2 other members who are not judges;
- a deputy president and 2 non-presidential members;
- a presidential member alone;
- 3 non-presidential members of whom at least one is a senior member; or
- a non-presidential member alone.

Various enactments which confer jurisdiction on the AAT to hear matters arising pursuant to those enactments also prescribe that the AAT shall be constituted in a certain way in order to hear matters pursuant to those enactments. For example, section 141 of the Commonwealth Electoral Act 1918 provides that in order to review certain decisions made under that Act the Tribunal shall be constituted by 3 presidential members who are judges of the Federal Court of Australia, while the Wildlife Protection (Regulation of Exports and Imports) Act 1982, the Life Insurance Act 1945 and the Insurance Act 1973 require that the Tribunal include among its members in order to hear matters arising pursuant to those Acts members who have special knowledge or skill in relation to the kind of matter being heard.

The Council is presently engaged in an investigation of the effect of these kinds of provisions (see [1987] Admin Review 29) - on the one hand, resources of the AAT must be considered, on the other there is the need for the Tribunal to be constituted appropriately and for client groups and government to be confident that matters will be dealt with competently.

The following table shows the constitution of the Tribunal for the hearing of particular matters in the first quarter of this year.

1 January 1987–31 March 1987	Ade	Bri	Can	Dar	Mel	Per	Syd	Tas	Total
Judge alone		1		2	6	2			11
Judge & 2 other members					12		4		16
Deputy President alone	6	28	5		16	9	13	3	80
Deputy President & 2 other members	19	14	6		22	21	41	12	135
Senior member alone	5	11	4		10	1	29		60
Senior member & 2 other members	16	13	5		57	16	89		196
Member alone							8	1	9
Tribunal type not specified								9	9
TOTAL	46	67	20	2	123	49	184	25	516

Freedom of Information

Deemed refusal to grant access

In Re Gregory and Department of Defence (5 March 1987, and also see [1987] Admin Review 35) the applicant sought access to Royal Australian Air Force personnel and medical files. An application for review was lodged when the 45-day period expired and access had not been granted (see s.19(3)(b), FOI Act), although access was granted approximately 3 weeks after that period had expired.

A number of issues stemming from the deemed refusal to grant access, under section 56(1) of the FOI Act, were considered by the Tribunal. First, it decided that it had jurisdiction to review the deemed refusal notwithstanding that the applicant had not requested internal review. This was because section 54(3)(b) indicates that internal review is not required where refusal is deemed pursuant to section 56(1). Secondly, the