

affirmed by the AAT. In 1981 the applicant obtained a Papua New Guinea private pilot licence and in 1981 he was regranted an Australian student pilot licence. The respondent opposed the granting of a licence on the grounds of the applicant's poor pilot record before and after the cancellation of his licence in 1980, his training history, and flight test and air safety incidents dating back to January 1977. The issue before the Tribunal was whether the applicant was a 'fit and proper person' to hold a private pilot licence within the meaning of regulation 255(1)(c)(ii) of the Air Navigation Regulations. The Tribunal, after considerable hesitation, took the view that the applicant should be given the opportunity to undergo all necessary tests to qualify again for the grant of a private pilot licence. Though it accepted that the decision under review was the correct one at the time (ie in 1983), in the light of evidence concerning the applicant's subsequent flying history and attitude it set aside the decision and remitted the matter to the respondent for reconsideration.

Non-appearance of party

In Brady and Secretary to the Department of Social Security (24 August 1987) the Tribunal discussed the options available to it when a party fails to appear at a hearing. In this case, given that the decision sought to be reviewed was a decision to recover a substantial sum of money and given the need, in the interests of good administration, for the matter to be finalised, the AAT decided that the matter should proceed to be heard in the absence of the applicant in accordance with section 40(1)(b) of the AAT Act.

Departmental guidelines

In Bryer and Secretary, Department of Social Security (23 September 1987) the AAT considered whether the disability of phenylketonuria (PKU) suffered by the applicant's child Aaron required constant care and attention so as to qualify the applicant for a handicapped child's allowance pursuant to section 102 (previously 105J) of the Social Security Act 1947. The Tribunal held that the applicant's case for the allowance was established and the present guideline used by the Department of Social Security relating to PKU children produced an unjust decision in its application to Aaron.

Freedom of Information

Use of conclusive certificates

In Association of Mouth and Foot Painting Artists Pty. Ltd. and Commissioner of Taxation (29 July 1987), the AAT

considered the proper use of conclusive certificates issued under section 33(1)(b) of the Freedom of Information Act. The applicant had sought documents, held in the course of an investigation by the Commissioner, including some with information which had been supplied by overseas sources. Claims for exemption had been made with regard to various documents. In addition, at the commencement of proceedings counsel for the respondent produced a document purporting to be a conclusive certificate under section 33 of the Act. Neither the applicant nor the Tribunal was aware prior to the hearing that such action was contemplated, and the Tribunal roundly condemned the 'ambush' tactic of last-minute production of the certificate.

Under section 58B of the Act, the Tribunal's power to consider whether there exist reasonable grounds for the claim that disclosure of a document in respect of which a conclusive certificate has been issued would be contrary to the public interest is subject to the Tribunal being specially constituted; that is, by 3 presidential members or a presidential member alone. The Tribunal on this occasion was not so constituted and, though there was nothing in the existing Practice Directions requiring advance notice, it indicated its disapproval of the respondent's action.

The Tribunal decided that it could, as constituted, examine the question whether the certificate was valid. The certificate had been issued by the Commissioner of Taxation and the issue was whether the Minister's instrument of delegation successfully delegated all necessary powers to the Commissioner.

A majority of the Tribunal reasoned that section 33(2) had 2 components: first, that the Minister should satisfy himself that disclosure would be contrary to the public interest and, second, that he sign to that effect. The majority considered that the instrument of delegation in favour of the Commissioner was effective as to the latter component but not as to the former. Consequently, the Commissioner's certificate was invalid as he had not been delegated the power to satisfy himself that disclosure would be contrary to the public interest. Mr Nicholls expressed a dissenting view on this point. He said that the power under section 33(2) should properly be regarded as a single power rather than 2 separate powers. Accordingly, in his view, the certificate issued by the Commissioner was a valid exercise of the delegation made by the Treasurer.

Notwithstanding the Tribunal's decision, by majority, that the conclusive certificate was invalid, all members of the Tribunal upheld the claims for exemption on various grounds provided for in the Act.

Internal working documents

In Fewster and Department of the Prime Minister and Cabinet, No.2 (31 July 1987) conclusive certificates were again in issue, this time relating to documents claimed to be exempt under section 36 of the Act. The conclusive certificates had been issued in relation to documents concerning the crisis that had occurred in the management of the Australian Bicentennial Authority. Deputy President Todd found that reasonable grounds existed for the issue of the certificates. The major basis for this finding was that disclosure of documents that would simply reactivate issues that are now in the past would be contrary to the public interest in that disclosure would, without countervailing public benefit, divert the resources of the ABA and of high levels of government, not least the Department of the Prime Minister and Cabinet and no doubt the Prime Minister's own office, into dealing once again with such issues at a time when the commencement of the Bicentennial programs and celebrations is only months away.

Convention that documents of former governments not disclosed to subsequent governments

An interesting question which arose in Bartlett and Department of the Prime Minister and Cabinet (31 July 1987) was whether the convention as to non-disclosure of the documents of former governments to subsequent governments provided a sufficient basis for non-disclosure of documents under section 36 of the FOI Act on the grounds that disclosure would be contrary to the public interest. Deputy President Todd said that it was difficult to see how the convention could be given any weight under the FOI Act. While the convention may have some force as between the Ministers of different administrations, the existence of the FOI Act in the Commonwealth meant that it was now under considerable strain. Certainly it could not operate of itself to deny to citizens rights they otherwise had under the Act.

The Courts

Veterans' entitlements

The last few months have seen several cases which tested section 120 of the Veterans' Entitlements Act 1986. In East v Repatriation Commission (22 July 1987) the full court of the Federal Court dismissed an appeal against a decision of the AAT to affirm the Repatriation Commission's interpretation of the relatively new provisions governing the connection between war service and death or incapacity.