

Industry, technology and commerce (research and development legislation). A draft report on review of decisions under research and development legislation in the Industry, Technology and Commerce portfolio is nearing completion. It is expected that the draft report will be circulated publicly for comment early in 1988.

Community services and health. Preliminary work on review issues in the Community Services and Health portfolio is under way.

Administrative Appeals Tribunal

NEW JURISDICTION

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

National Health Amendment Act (No.2) 1987
Petroleum Excise (Prices) Act 1987
Sea Installations Act 1987
Student Assistance Amendment Act 1987
Occupational Superannuation Standards Act 1987
Air Pollution (Amendment) Ordinance 1987 (A.C.T.)
Children's Services (Amendment) Ordinance (No. 2) 1987 (A.C.T.)

KEY DECISIONS

Assets test - application of financial hardship provision under Veterans' Entitlements Act

Fuller and Repatriation Commission (3 November 1987) concerned an application for review of a determination of a delegate of the Commission that the applicant did not qualify for the application of the hardship provisions as contained in section 53 of the Veterans' Entitlements Act 1986. Section 53(1) provides that the value of a person's property is to be disregarded for the purpose of calculating the rate of pension payable to the person if the property cannot be sold or realised or used as security for borrowing (or if it would be unreasonable to expect the property to be sold or realised or used as security for borrowing), and if the Commission is satisfied that the person would suffer severe financial hardship if the property were taken into account for the purposes of the assets test.

The property concerned was a farming property in a 7 to 8 inch rainfall area north of Yunta in South Australia. There was no dispute between the parties as to the application of section 53(1) to the applicant.

The issue in dispute was whether the applicant could reasonably be expected to derive income from the property and what amount, if any, was to be taken into account in calculating the applicant's rate of pension pursuant to section 53(3) of the Act.

The departmental guideline for calculation of the amount it is reasonable to expect to be derived from rural property is 2.5% per annum of its capital value. An amount of this order was not suggested by the Commission to be appropriate. However, the Commission thought it appropriate for the applicant's son who, in partnership with his wife, leased the property from the applicant to pay the applicant an amount in the order of \$2,000 to \$5,000 per annum for the use of the property.

Evidence was given by the son and his accountant that the partnership could not support such a payment.

The AAT noted that the decision of the full court of the Federal Court in Secretary, Department of Social Security v Copping (1987) 73 ALR 343 had established that the word 'reasonably' in section 53(3) is not to be interpreted objectively; rather, regard is to be had to the particular circumstances of use of the property sought to be disregarded. The AAT also noted that the government and the AAT had acknowledged a genuine rural reality of the passing of farms from one generation to the next for little or no consideration. There was evidence before the Tribunal that in areas of marginal rainfall in South Australia it is not common for leases to be given because the Pastoral Board of S.A. considered that there were too many risks involved.

In all the circumstances of the particular case, the Tribunal considered that the amount the applicant could reasonably have expected to receive for his son's use of the property was nil. The Tribunal accordingly set aside the decision under review.

No power in AAT to reinstate an application that has been withdrawn

In Stevenson and Commonwealth of Australia (5 October 1987) the AAT considered the effect of withdrawal of an application for review. The applicant, who was represented by solicitors, applied for compensation under the Compensation (Commonwealth Government Employees) Act 1971; he then withdrew his application. Some years later he wished to pursue the matter. He sought either to continue his original application or to be granted an extension of time to lodge a new application. The AAT held that the inclusion of section 42A in the Administrative Appeals Tribunal Act in 1977 did not result in the extinction of the common law right of withdrawal and that after the withdrawal there was no longer a 'subsisting application' or an 'effective application'. Consequently, the Tribunal had no power to reinstate in the hearing list an application that had been withdrawn. The Tribunal, having considered the reasons for delay, refused to grant an extension of time.

Decision on endorsement of shark fishing licence made in accordance with policy

In Gale and Secretary to the Department of Primary Industry (23 December 1987) the AAT, by majority, set aside a decision refusing to endorse a Commonwealth fishing boat licence of the applicant so as to enable him to take shark with nets in the

Southern Shark Gillnet Fishery. The Minister has power under the Fisheries Act to control the shark gillnet fishery. Criteria had been developed to guide the Minister in the exercise of his powers under the Act. One question in issue was whether the applicant should be granted an endorsement because he complied with the criteria. The AAT found that he had not strictly complied with the criteria one of which required a continuing dependence on the shark gillnet fishery. The AAT nonetheless considered whether there were special circumstances for exercising discretion in favour of the applicant notwithstanding his non-compliance with the letter of the criteria. In this consideration the Tribunal was guided by the dictum of Justice Brennan in Drake (No.2) and by subsequent Tribunal cases in which it was said that cogent reasons needed to be shown to warrant departure from a policy emanating from a Minister. In all the special circumstances of the applicant's case a majority of the Tribunal was of the view that discretion ought to be exercised in favour of the applicant. The special circumstances included the circumstances in which the applicant's reduced dependence on shark gillnet fishing had come about, the circumstances in which the relevant criteria were developed, including a last-minute change in the wording of one of the criteria of particular significance to the applicant's case, and the circumstance of some inconsistency between the terms of a media release and the subsequently published criteria.

Classification of press die bodies for customs purposes

At issue in Toyota Manufacturing Australia Ltd and Collector of Customs (22 December 1987) was the appropriate customs classification of press die bodies required by Toyota for use in the plant where it manufactures motor cars. The question was whether the press die bodies were machine tools for working metal or whether the press die bodies and the trim and pierce inserts which fitted into them were to be identified as subordinate to the unit created by their combination and, as such a unit, were an interchangeable tool for a machine tool, namely the press for pressing car panels.

Engineering evidence was led before the AAT. By reason of its constitution for the case, the AAT had some knowledge of engineering and was ultimately able to conclude that the press die body was an accessory used solely or principally with a tool holder within the meaning of item 84.48 of the customs tariff.

The Tribunal set the decision under review aside and remitted the matter to the respondent.

Effect of filing fees in taxation jurisdiction

In 2 decisions in the income tax jurisdiction of the AAT handed down on 9 October 1987 (Decision No. 3824 and Decision No. 3825) Mr Roach, Senior Member, drew attention to the anomalous effect the application of filing fees in the AAT's taxation jurisdiction was having. He pointed out that delays in tax litigation necessitated the raising of objections and the making of requests for reference of objection decisions to the AAT year by year over periods of several years. The requirement that

each request for reference be accompanied by a fee of \$200 (now \$240) meant that a person wishing to dispute several assessments might be obliged to pay fees amounting to several hundreds of dollars. In Decision No. 3824 Mr Roach said:

I mention these matters because I am concerned that already the fixing of such fees as prerequisites to securing an independent review of the Commissioner's decisions is working to deny such an independent review to many and, thereby, justice to some.

In Decision No. 3825 Mr Roach said:

The present standards as to payment of fees go way beyond what is appropriate to ensure that individuals do not put the community to undue expense by making frivolous or vexatious claims I hope that the Parliament will act to ensure that a more appropriate and just system is introduced.

Expenditure incurred in macadamia nut venture

Decision No. 3845 (19 October 1987) concerned the review of a decision which disallowed the taxpayer's claim to deduct under section 51(1) of the Income Tax Assessment Act several items of expenditure incurred in relation to a macadamia-growing venture. The central issue was whether the taxpayer was, in the year in question, carrying on a business of primary production. The expenditure concerned related to the acquisition by the taxpayer of macadamia trees and their propagation and grafting. The trees were not, however, planted. The AAT held that, although the taxpayer may have made some wrong decisions concerning the venture, the expenditure had been incurred for no other purpose than of carrying on a business of primary production for the purpose of gaining or producing assessable income. Accordingly, the taxpayer was entitled to a deduction for the expenditure incurred.

Freedom of Information

Senate committee report on the operation of the FOI Act

In December 1987 the Senate Standing Committee on Legal and Constitutional Affairs tabled its long awaited report on the operation of the FOI Act. The 126 recommendations are too extensive to summarise here. Some of the recommendations concerning administrative review matters are:

- that, where a business which has been consulted under reverse-FOI concerning a request to an agency for access to a document seeks review by the AAT of the agency's decision to grant access, the business should not be restricted to reliance upon the section 43 grounds of exemption (see [1987] Admin Review 10-11);