timate fact that no such documents existed and that it did not satisfy the elements of section 26(1) of the Act. The Tribunal said that in the interests of public administration and in the interest of the applicant, the ATO should furnish the applicant with a further statement of reasons that adequately satisfies the requirements of section 26(1) of the Act. [GM]

## The Courts

### Federal Court - s 43 AAT Act - statutory obligation on AAT to give reasons for decision

In *Australian Postal Corporation v Wallace* (Unreported, 26 February 1996) the Federal Court (Justice Tamberlin) considered whether the AAT had sufficiently complied with its obligations under section 43(2) and section 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). It was alleged by the appellant that the Tribunal had failed to give reasons or sufficient reasons for its decision, or failed to include findings on material questions of fact on which those findings were made because, among other things, the AAT had simply given a bald statement of preference for certain medical evidence over other medical evidence.

The AAT had been required to consider issues concerning the applicant's incapacity for work as the result of injuries suffered by her whilst in the employ of the Australian Postal Corporation. The Tribunal had to consider whether the applicant (the respondent in the Federal Court proceedings) continued to suffer the effects of the injury, whether she was incapacitated for work as a result of that injury and whether the nature and conditions of the applicant's employment resulted in injury or aggravation of a pre-existing condition.

The AAT's reasons for decision listed the exhibits tendered at the hearing and referred to the fact that oral evidence was given by a number of witnesses. There was conflict between the medical evidence put to the AAT by the applicant's treating specialist and other treating doctors (in her favour) and that given by specialists called by the respondent employer, which did not support the applicant's claim. The AAT summarised and provided some quotations from the medical evidence but did not evaluate or discuss that evidence. The Tribunal stated that it preferred the evidence of the applicant's treating doctors and set aside the decision under review.

The appellant in the Federal Court claimed that the AAT had made an error of law in that it failed to give reasons for its preference of certain medical evidence over other medical evidence and also failed to consider other aspects of the applicant's medical and work history as well as medical opinion regarding the applicant's work capacity.

The Federal Court noted that in *Savas Vasili v Australian Telecommunications Corporation* (Unreported), 12 December 1991, the observations by von Doussa J supported the conclusion that, 'where the opposing medical views are clear-cut and differ on precise issues, merely stating a preference can be sufficient to disclose the reasoning process leading to the findings of fact based on the opinion.' However, this was not seen to be the case in the matter under appeal as there were aspects of the applicant's medical history raised in evidence that had not been referred to by the treating doctors whose evidence had been preferred. In the Federal Court's opinion, these matters called for 'considered expert opinion and some analysis by the decision-maker.' The Federal Court did not think that this was a case in which the reasons for the Tribunal's preference of the evidence by some expert witnesses over that of others could be inferred from the content of the decision read as a whole.

The Federal Court cited the broad principles which underlie the proper approach to a determination of sufficiency of reasons, the adequacy of findings, or the sufficiency of references to evidence or material before the decision-maker laid down by Sheppard J in *Commonwealth v Pharmacy Guild of Australia* [(1989)91 ALR 65 at 88]. Among other things,

Sheppard J said that the public statement of the Tribunal's reasoning process engendered confidence in the community that the Tribunal had 'gone about its task appropriately and fairly'.

The Federal Court noted that section 43 of the AAT Act should be construed in 'a practical common sense way' and that the Tribunal's task in giving reasons for its decision called for an exercise of judgment which, to a large extent, cannot be specifically tied down to precise and detailed reasoning. In this matter the Federal Court stated that the reasons and findings of the Tribunal were not exposed, nor was the relevant evidence adverted to, analysed or discussed. The Court concluded that the Tribunal had not complied with the requirements of section 43 of the AAT Act and that this failure was an error of law. The Tribunal's decision was set aside and the matter remitted to the Tribunal for rehearing. [GM]

**Federal Court - breach of rules of natural justice - opportunity to present case - denial of natural justice**

In the matter of *Kunz and The Commissioner of Taxation of the Commonwealth of Australia* (Unreported, 27 February 1996) the Federal Court (Justice Jenkinson) heard an appeal against a decision of the AAT affirming a decision of the respondent Commissioner regarding the applicant's assessable income. The applicant in the AAT was the appellant in the Federal Court proceedings.

In the AAT, the applicant argued that the increase in the amount of his assets resulted principally from large receipts of money from gambling and from the sale of chattels left to him by his mother who had died in 1983. He claimed that a friend, 'Mr B', could corroborate his testimony. Mr B, however, was unable to attend to give evidence before the AAT because at the same time he was appearing as a defendant in a County Court Criminal Trial.

The AAT proceedings were adjourned for 5 months but Mr B was still defending his own trial when the matter was again listed for hearing. An application for further adjournment was refused and the AAT hearing proceeded as scheduled. The applicant's counsel indicated to the AAT that he would not be seeking a further adjournment for the purpose of providing the corroborative evidence of Mr B. However, during the proceedings the applicant's counsel tendered a statement of Mr B. Although its tender was objected to, the AAT accepted the tender after confirming that the applicant did not wish to adjourn the proceedings to await the availability of Mr B to give evidence.

In the written reasons for the AAT's decision the AAT stated that, having looked at the statement, 'on more mature reflection' the tender of Mr B's statement should have been rejected by the Tribunal. The AAT said that the statement contained critical allegations that had not been raised by the applicant in evidence and that the Tribunal was satisfied that no weight could be given to its contents as the matters contained in it should have been subjected to cross-examination.

On appeal it was claimed that the AAT had erred in law by failing to take into account a relevant consideration, or made a decision that was manifestly unreasonable in giving 'no weight' to Mr B's statement for the reasons stated when at the time of tender of the statement it was tendered and accepted by the Tribunal on the basis that Mr B would not be available for cross-examination. Alternatively, it was claimed that the applicant did not receive a fair hearing in that the Tribunal, having accepted the tender of Mr B's statement, subsequently decided, without giving the applicant an opportunity to reopen his case, that it should have rejected the tender and would give no weight to its contents.

Having considered the Tribunal's reasons in whole the Federal Court said:

... to deny [Mr B's statement] evidentiary significance because statements contained in it should have been, in the Tribunal's opinion, the subject of cross-examination, and not to reconvene the hearing and inform the applicant's counsel of that conclusion, was in my

opinion to deny the applicant procedural fairness in the circumstances of this case.

The Federal Court also said that, given that at the time Mr B's statement was tendered, counsel for the Commissioner had not requested that Mr B be made available for cross-examination, the applicant and his counsel were entitled to expect that Mr B's statement would not be denied evidentiary significance for the reason stated by the Tribunal. The Court said that, in the circumstances, procedural fairness to the applicant required that the hearing be reconvened and the applicant's counsel informed of the Tribunal's conclusion so that the applicant could have considered whether to have applied for leave to reopen his case in order to adduce other evidence supporting the existence of the facts stated in Mr B's statement, whether by oral testimony of Mr B or of other witnesses.

The Federal Court found that the Tribunal's failure to reconvene the hearing for this purpose was an error of law. The Court also found that this failure contravened section 39 of the *Administrative Appeals Tribunal Act 1975* in that it failed the "ensure that every party ... is given a reasonable opportunity to present his case". The AAT's decision was set aside and matter remitted to the Tribunal for rehearing. Given that the Tribunal had expressed the opinion that the applicant's testimony was "virtually worthless" the Court expressed the view that justice would be better seen to be done if the Tribunal is reconstituted for the purpose of rehearing. [GM]

## The Ombudsman

### Report on complaint by New Burnt Bridge Aboriginal Corporation

On 28 March 1996 the Ombudsman made public her final report (the March 1996 report) on a complaint by New Burnt Bridge Aboriginal Corporation (NBBAC) concerning the actions of the Aboriginal and Torres Strait Islander Commission (ATSIC). The March 1996 report consists of a report under section 35A of the *Ombudsman Act 1976* which provides an overview of the actions taken since her final report to ATSIC in January 1995 (the January 1995 report) which became the subject of Federal Court proceedings between ATSIC and the Ombudsman.[See *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman*, 134 ALR 238] The January 1995 report, revised slightly to meet the terms of the judgment (21 September 1995) and orders (22 December 1995) of Justice Einfeld of the Federal Court, is appended to the March 1996 report.

The Ombudsman's investigation began with a complaint received in November 1992 from the NBBAC, representing the residents of part of the former Burnt Bridge Aboriginal reserve in Kempsey, New South Wales. Briefly, the complaint related to the appointment of consultants to produce a development application and to design and manage the construction of a housing project for the Aboriginal community. The NBBAC wanted to select their own consultant and were concerned that ATSIC would not allow it to control the selection process for the consultants. The NBBAC was also concerned about administration of project funds by the ATSIC regional officers.

In her report the Ombudsman notes that the matter was essentially a local one but it raised broader issues concerning:

- possible favouritism towards a consultant;
- conflicts of interest;
- procedures for the provision of grants;
- accountability of public monies; and
- ATSIC's adherence to its own self determination principles.

During the Ombudsman's investigation the Ombudsman became concerned at what she saw as ATSIC's unwillingness to review its own actions and take remedial action in relation to its administration emerged as a further issue of concern to the Ombudsman.