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SOCIAL SECURITY

Including Student Assistance Decisions

Opinion

20 years of the AAT

On 1 and 2 July 1996 a conference marking the 20th anniversary of the Commonwealth Administrative Appeals Tribunal was held in Canberra. Many former members of the AAT addressed the conference, including the first president of the AAT, the Chief Justice of the High Court, Sir Gerard Brennan. Justice Brennan recalled the first day of the AAT on 1 July 1976, although it was several months before the AAT received its first appeal. Justice Brennan noted that after 20 years it was a useful time to reflect on whether the AAT had evolved in a way which practically answers the needs of the community and of government administration.

In particular, he referred to the appointment procedures of members to the AAT. Members had to possess high qualifications and be independent of the influence of the parties to decisions under review. The *AAT Act* did not prescribe independence as a requirement, but the practice was established that the Attorney-General appointed members and not the Ministers of the Departments whose decisions were reviewed. According to the Chief Justice the model for the operation of the Tribunal was defined in the *AAT Act*, which was:

> '... to interpret and apply the relevant law. It was to ascertain the facts from witnesses in a court-like procedure, and its obligation to state reasons for decision was similar to the obligations of the court to state their reasons for judgement.'

Parties to the AAT had to be given their precise legal entitlements and these were to be based on their precise legal obligations. The AAT was given the authority to review every aspect of administrative decision making, which included fact, law and discretion, including policy. It should not be surprising that the decisions reached by the AAT were frequently different from the primary decision makers. The evidence given to the AAT was different from the information available to the primary decision makers, and thus their decisions would be different.

One of the responsibilities of the AAT was to open to scrutiny departmental culture and practice. Handbooks were to be scrutinised to ensure that they conformed with the governing Act. Discretions were to be exercised rather than ignored. That is, the AAT was not only to give 'administrative justice' in the individual case but to improve primary decision making. To achieve this the AAT's reasoning had to be of the highest quality. Errors had to be clearly demonstrated, and the method of reaching the correct or preferable decision clearly explained.

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not in receipt of the allowance. For example, a person who discontinued their allowance because they had employment of less than 13 weeks duration, but did not advise the CES in writing that they no longer wished to be a participant, would suffer a penalty for any non-compliance that occurred during the period of employment.

It is the experience of the Welfare Rights Centre in Sydney that job seekers do not expect they might continue to be subject to case management requirements during periods of non-receipt of an allowance. Consequently, it does not occur to job seekers to inquire how they might discontinue case management. The result is that the Determination provides a further avenue for the imposition of penalties in contexts in which any failure may have no relevance to the person's actual employment prospects. While a person's access to case management services ought not be compromised by short periods of non-receipt of the allowance, a job seeker ought not be exposed to the risk of a penalty during this period. The determination ought to be revised to remove this possibility.

Conclusion

While there is a good argument for legislative reform of the *Employment Services Act* and the Determinations thereunder, the recent cases demonstrate that scope already exists to apply the law in a more beneficial manner than has so far been the case. Decision makers should review their approach to these cases to ensure that penalties are only applied in those cases in which the legislation specifically demands it, and thus avoid the imposition of severe penalties for the type of technical or administrative failures seen in some cases to date.

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The Chief Justice went on to refer to matters which were of present concern with respect to the external administrative review process, and in particular the membership of the AAT. Members should have specialist skills, not just management skills. Also, there is a need for a high level of competence in decision making in a judicial manner. This involves not only skill and knowledge, but independence and impartiality. The Chief Justice disagreed with the recommendation of the ARC in its report on better decision making, that legal qualifications should not be a pre-requisite for appointment to a new tribunal. He was not suggesting that all members would require legal qualifications, but that presiding officers should have legal training. The Chief Justice was extremely supportive of specialist non-legal members on a tribunal.

Finally, the Chief Justice concluded that the success of the AAT:

> '... depends on the maintenance of nice distinctions between the departmental lines of ministerial responsibility and the interventionist function of external merits review.'

DEET TO DEETYA

On 11 March 1996 the name of the Department of Education Employment and Training was changed to the Department of Education Employment Training and Youth Affairs, that is, from DEET to DEETYA.

[C.H.]