Review of decisions under research and development legislation. A discussion paper on this subject has now been widely circulated. The paper may be obtained by contacting the Council Secretariat on 434671. Submissions on the issues raised by the paper are requested by 10 June 1988.

Community services and health. The Council has agreed to undertake a project to review decisions in this area. The Community Services and Health Committee expects to meet with officers of the Department at the end of June to discuss the approach to be adopted in the project.

Administrative Appeals Tribunal

NEW JURISDICTION

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

A.C.T. Institute of Technical and Further Education Ordinance 1987 (A.C.T.)
Agents (Amendment) Ordinance 1988 (A.C.T.)
Broadcasting Amendment Act (No. 4) 1987
Dairy Produce Amendment Act 1987
Horticultural Export Charge Collection Act 1987
Horticultural Levy Collection Act 1987
Long Service Leave (Building and Construction Industry) (Amendment) Ordinance 1987 (A.C.T.)
Management and Investment Companies Legislation Amendment Act 1987
Patents Regulations (Amendment)
Petroleum Resource Rent Tax Assessment Act 1987
Social Security and Veterans' Entitlements Amendment Act (No. 2) 1987

KEY DECISIONS

Danger from hostile forces of the enemy

Several recent AAT decisions have examined the term 'incurred danger from hostile forces of the enemy' with regard to qualifying service for the purpose of entitlement to a service pension under the Veterans' Entitlements Act 1986. The question when such danger has been incurred has been the subject of some seemingly inconsistent decisions and on 2 recent occasions tribunals containing a presidential member or presidential members have attempted to bring the law in this area together and to clarify the appropriate test to be applied.

In Re Crawford and Repatriation Commission (1 December 1987) the AAT found that an applicant who had been unloading naval ships in the Woolloomooloo Bay area at the time of the Japanese midget submarine attack on ships in Sydney Harbour had incurred danger from hostile forces of the enemy. The Tribunal said that the principle emerging from the decisions

in this area was that the test of 'danger' must be an objective one and not subjective or fanciful. It is not sufficient for an applicant to believe that he or she was in danger if in reality there was no danger. The test of danger must entail an analysis of the actual military situation, independent of an applicant's perception of it, and must establish that there was an actual risk of physical or mental harm.

In Re Noble and Repatriation Commission (4 February 1988) the applicant was a member of the Women's Auxiliary Australian Air Force and was stationed in Townsville in 1942 when that city was the subject of Japanese air raids. During one attack the applicant had been required to remain on duty in a lighted building about 2 kilometres away from the harbour facility area that was the target for the raid. At least one bomb exploded midway between the wharf facilities and where the applicant was on duty. The AAT indicated that it agreed with the approach taken in Re Crawford and, after applying the above test, found that in all the circumstances the applicant was in actual danger by reason of her proximity to the hostile activities of the Japanese aircraft. The AAT stressed that the decision related to the particular case and did not apply generally to people in Townsville on that night.

However, the situation still is not entirely clear. In Re Dean and Repatriation Commission (4 February 1988) the AAT referred to a decision of Justice Einfeld of the Federal Court in Thompson v Repatriation Commission (22 January 1988). Justice Einfeld had found that the AAT had erred in holding that 'incurred danger' meant an actual risk of physical or mental harm and that the proper test was whether 'looked at objectively the veteran was in a situation of real danger or liability to danger'.

The applicant in Re Dean had served in Darwin and one of his duties was to carry ammunition and fuel to 2 airfields servicing American bombers. During the applicant's service at the airfields 7 Japanese air raids occurred. The target of 5 of these raids was one of the airfields. Following the test proposed by Justice Einfeld, the AAT held that the applicant had rendered qualifying service because his service had put him from time to time at a place that was the target of strikes by enemy aircraft and, if not in a situation of real danger, certainly in a situation of liability to danger.

The test formulated by Justice Einfeld, however, leaves some uncertainty as to what constitutes 'liability to danger', especially as the word 'danger' itself means 'liability or exposure to harm or injury; risk, peril' (Shorter Oxford Dictionary). It also contradicts to some extent the test for 'incurred' formulated by the Tribunal in Re Crawford and Re Noble. The decision of Justice Einfeld in Thompson is under appeal to the full Federal Court.

Reasonable hypothesis - hypertension attributed to large intakes of salt

In Re Repatriation Commission and William Baird (24 March 1988) the Repatriation Commission appealed against a decision of the Veterans' Review Board that the hypertension suffered by a veteran resulted from an above normal intake of salt during and after war service and thus was a war-caused disease. The veteran had argued that his appetite for salt had arisen because of the salty food served during the war, and that this had led to his hypertension. He also contended that his hypertension was attributable to stress he suffered during the war and to the increase in his smoking during the war. The AAT said that it was required under section 120 of the Veterans' Entitlements Act 1986 to determine that a disease is attributable to war service unless it is satisfied beyond reasonable doubt that there is no sufficient ground for making that determination. It is required to be satisfied beyond reasonable doubt if, after consideration of the material before it, it forms the opinion that the material does not raise a reasonable hypothesis connecting the disease with the circumstances of the veteran's service.

The AAT held that on the evidence before it, and on the basis of previous decisions, there was no reasonable hypothesis that the respondent's hypertension was caused by his smoking during his service. Some material pointed to a reasonable hypothesis that stress can cause hypertension in previously normotensive persons but where it does so, the hypertension would have to come into existence while the chronic stress continued; and there was no evidence to suggest that the respondent's blood pressure was above the normal level before 1964. In respect of the salt, some evidence suggested that ingestion may lead to hypertension but, as in the case of stress, where it does so the hypertension develops quite quickly. The evidence therefore did not suggest that in this case the hypertension was attributable to ingestion of salt during the respondent's war service. Moreover the respondent had come from an environment where large quantities of salt were used, and there was no satisfactory evidence that his intake of salt was significantly greater than would have been the case if he had not served during the war and been supplied with salty food.

Veterans' affairs - no medical evidence to support hypothesis

In Re Repatriation Commission and Scanlon (18 April 1988) the AAT followed the recent decision of the full court of the Federal Court in Webb v Repatriation Commission (discussed at pages 36-37 below) in determining that the widow of a deceased veteran had not established a causal link between her husband's war service and his death for the purposes of section 120 of the Veterans' Entitlements Act 1986. The widow's case depended entirely upon the hypothesis that her husband died in a car crash because he had fallen asleep as a result of pulmonary tuberculosis, for which he had been in receipt of a disability pension. No medical evidence was tendered to support this hypothesis. The AAT considered it very questionable whether the hypothesis could be regarded as reasonable but in any event it depended upon the deceased's

tuberculosis having been reactivated at the time of the accident. The evidence from the autopsy and other evidence showed that this was not the case. Referring to the decision in Webb, the AAT held that the crucial fact for the applicant's case was that active tuberculosis existed at the relevant time; and the Commission had established beyond reasonable doubt the non-existence of that fact.

Effect of chronic stress on hypertension

In Re Soltys and Commonwealth of Australia (11 February 1988) the AAT endorsed a view that it repeatedly had taken in earlier cases, namely that chronic stress may contribute to the development of arteriosclerosis through its effect on blood pressure. The AAT, after considering the evidence of several doctors, found no strong reason to believe that the view it had taken in earlier cases was wrong. It concluded that before it could be persuaded to decide otherwise it would need much more than the evidence of physicians, however eminent, based only on their clinical experience and their reading of reports of research carried out by others. Only if convincing evidence of findings made by researchers of acknowledged competence and objectivity were presented, and satisfied the AAT, would it depart from the previous decisions. Otherwise it was a waste of money to reargue the question.

In this case the applicant had been an employee of the Department of Defence and had suffered a stroke at home. The AAT held that the applicant's work was not stressful although the applicant may not have enjoyed some aspects of it. It also found no adequate foundation to conclude that continual hard physical work contributes to the development of persisting elevated blood pressure.

Welfare legislation not to be interpreted narrowly

In Re Williamson and Secretary to the Department of Social Security (2 March 1988) the AAT was required to consider whether the absence from home of a boy attending a special school for 5 days a week was temporary for the purposes of section 105KA of the Social Security Act. The applicant was the divorced mother of a boy, Adam, who suffered from dysphasia and dyspraxia. The applicant had originally made a successful application for handicapped child's allowance (HCA) but this had been cancelled after the applicant had advised the Department in an income and costs review that Adam boarded 5 days each week in Melbourne to attend a special school. The respondent's delegate had decided that, as Adam was not receiving constant or almost constant care and attention at home, HCA was not payable. After considering the evidence the AAT felt that Adam's home remained in Ballarat with his mother.

The AAT stated that section 105KA was an ameliorating provision providing that entitlement to HCA not be affected by the fact that a child is temporarily absent from his 'private home'. It added that welfare legislation should not be interpreted narrowly to exclude from its operation those applicants who at great personal cost provide for a

handicapped child so that the child may reach his or her full potential. The applicant had not placed Adam in an institution and continued to carry the burden of appropriate care for him. The arrangements which had been made must be temporary because of the very nature of the problem. The AAT held that the absence was temporary for the purposes of the Act, and referred the matter for reconsideration by the Department.

Application for statement of reasons in respect of decision to refuse to grant a gun licence

In Re Grant and the Commissioner of Police (8 April 1988) the AAT considered an application for review of a decision to refuse to furnish a statement of reasons pursuant to section 28 of the AAT Act. The applicant had applied for a gun licence pursuant to the provisions of the Gun Licence Ordinance 1937 (A.C.T.), which provides that the registrar may grant a gun and pistol licence; but the Commissioner of Police or his delegate has power to certify that he objects to the grant of a licence. If the Commissioner or his delegate so certifies, that certification is the relevant decision in respect of the gun licence and it is that decision which should be the subject of review. On 27 August 1987 a delegate of the Commissioner had certified in writing that the applicant was not a fit and proper person to be the holder of a licence, but that document was not furnished to the applicant until a directions hearing held by the AAT on 26 February 1988. On 28 August 1987 the registrar wrote to the applicant simply saying that an objection had been raised which prevented a licence being granted. On 2 November 1987 the applicant's solicitor sought reasons from the Commissioner pursuant to section 28 of the AAT Act. On 1 December 1987 the registrar declined to give reasons for the decision on the basis that the request was not made within 28 days after the applicant was formally notified of the decision.

The AAT found that the applicant had not been furnished with a copy of the decision until the directions hearing on 26 February. The letter of 28 August did not record the terms of the decision and it was not sent to the applicant by the decision maker. The AAT held therefore that the request under section 28 for a statement of reasons was made within a reasonable time and the applicant was entitled to expect from an arm of government that the right person will notify a decision and that the decision will specify with reasonable particularity what that decision was. The AAT also criticised the complexity of the Ordinance.

Freedom of Information

Conclusive certificate in respect of Australia card Cabinet documents

Recent FOI and Archives Act cases have dealt with the issue of conclusive certificates. In Re Porter and Department of Community Services and Health (14 March 1988) the Shadow