Administrative Appeals Tribunal

NEW JURISDICTION

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

- Air Navigation (Charges) Act 1952 as amended by the Transport and Communication Legislation Amendment Act 1989;
- Copyright Act 1968 as amended by the Copyright Amendment Act 1989;
- Customs Act 1901 as amended by the Customs and Excise Legislation (No.2) Amendment Act 1989;
- Horticulture Export Charge Collection Act 1989 as amended by the Horticultural Legislation Amendment Act 1989;
- Horticultural Levy Collection Act 1987 as amended by the Horticultural Legislation Amendment Act 1989;
- Insurance Supervisory Levies Collection Act 1989;
- Trade Practices Act 1974 as amended by the Trade Practices (International Liner Cargo Shipping) Amendment Act 1989;
- Wheat Industry Fund Levy Act 1989.

KEY DECISIONS

Taxation: split income from consultancy services

On 23 June 1989 the President of the AAT found that an applicant taxpayer had entered into and carried out a scheme for the purpose of obtaining a tax benefit and that the whole of that benefit should be cancelled.

The taxpayer, then employed in Sydney, had sought employment in Hobart without success, and eventually agreed to a consultancy arrangement. This required him to set up a corporate entity, and the taxpayer's accountants advised him that the company should also act as the corporate trustee for a discretionary family trust. The taxpayer agreed that in effect the company acted as an extension of himself.

At issue was the question whether the Commissioner of Taxation can, pursuant to section 177F of the Income Tax Assessment Act 1936, cancel the tax benefit gained by the taxpayer through the non-inclusion in his assessable income of the full consultancy fee. The consultancy fee was distributed as salary to the taxpayer as an employee and the balance as trust income to the taxpayer and his family. The case required a decision on whether the anti-avoidance provisions of Part IVA of the Act applied in these circumstances. Counsel for the taxpayer submitted that the provisions of Part IVA should not apply to ordinary commercial arrangements and family arrangements. Counsel for the Commissioner submitted that the taxpayer had entered into a scheme which operated in such a way that he ostensibly received as salary an income considerably less than that his exertions had generated, and thereby gained taxation benefits.

Justice Hartigan concluded that the scheme fell within the ambit of Part IVA. It had been entered into for the purpose of enabling the taxpayer to obtain a tax benefit and had in fact produced a tax benefit.

Compensation entitlement

In Willis and Australian Telecommunications Commission (30 June 1989) the tribunal, constituted by 3 members, was required to decide whether Mr Willis was barred by reason of section 16 of the Commonwealth Employees' Compensation Act 1930 from applying for compensation under the Commonwealth Employees' Rehabilitation and Compensation Act 1988.

Mr Willis, a Telecom employee, in 1987 claimed compensation for injuries which allegedly occurred in about 1956 and 1957 while he was an employee of the Postmaster General's Department, which later became the Australian Telecommunications Commission ('Telecom'). The Commissioner for Employees' Compensation had disallowed the claim, noting that neither incident had been reported, neither had caused any incapacity for work and Telecom had no details of either incident. By the time the application for review came before the AAT, the 1988 Act was in force.

Mr Willis told the AAT that, while in linesman training in 1956, he suffered a neck injury at football. The next year, while recovering galvanised wire, a twist in the wire caught the crowbar he was using and knocked him unconscious. His evidence was supported by several affidavits.

Since Mr Willis did not lodge his claim within 6 months of the two accidents, however, there was some doubt whether action could be taken 30 years later to obtain compensation. This depended in the first instance on the interpretation of the transitional provisions in the 1988 Act. Under these provisions, Mr Willis could be entitled under the 1988 Act if compensation would have been payable to him under the 1930 Act. This in turn depended on whether he was barred from making an application at all by section 16 of the 1930 Act because of the delay in lodging his claim, or whether his case fell within the 'reasonable cause' proviso.

The AAT concluded that mistake had occasioned Mr Willis' failure to make a claim within the requisite time, and that there was reasonable cause for this. He was therefore not disentitled from making a claim for compensation.

Valuation of assets in age pension

In James and Secretary, Department of Social Security (21 April 1989) the AAT set aside the decision under review on the ground that Mrs James did not hold the beneficial ownership of the property involved. Consequently its value should not have been included in the total value of her assets for purposes of the age pension.

Mrs James' principal residence was adjacent to a unit which she purchased in 1983 for the use of her daughter and 13 year old granddaughter, who previously had lived with her. Her daughter

suffered from brain damage and epilepsy, and needed constant medication. The unit was purchased with money from her husband's estate, augmented by her own savings, and the daughter paid her $40 per fortnight to cover rates, taxes and insurance costs on the unit. In 1987 Mrs James applied for a pension, but it was granted at a reduced rate because the unit was considered part of her total assets. She appealed to the SSAT, which upheld her appeal, but the Department rejected the SSAT's recommendation.

The main question was whether the applicant held both the legal and beneficial interest in the unit or whether she held the unit in trust for her daughter and granddaughter. The AAT took the view that, in the context of what Mrs James was trying to achieve for her daughter and granddaughter, she intended a trust to be established. It found that the Mrs James purchased the unit for the benefit of her daughter and granddaughter but only retained the title in her own name to protect the investment. The Department should not have included the unit for assets test purposes.

Aviation: colour blindness standards

Denison and Civil Aviation Authority (7 April 1989) was a test case in which Mr Denison was funded, at the request of the Civil Aviation Authority, by the Attorney-General's Department. It concerned the extent to which colour defective vision should disqualify from flying, or place limits on, a pilot. The issue had been addressed in 1987 by the AAT in Pape and Secretary, Department of Aviation (9 October 1987), but only with regard to a private pilot's licence.

A 3-member AAT not only examined Mr Denison's personal situation in considerable detail but also looked at the broader issues relating to defective colour vision, including the different types of defect, the role of colour in piloting an aircraft, and the level of risk resulting from any type or degree of defective colour vision.

The AAT concluded that a pilot who is a deutan (ie who lacks sensitivity to the colour green) does not, simply because of his defective colour vision, pose a significant and unacceptable risk to the public by flying an aircraft at all or at night or by flying an aircraft equipped with EFIS and EICAS instrumentation. It recommended that suitable practical tests be devised for pilots with defective colour vision and that pilots who are protans (defective with regard to the colour red) should be tested individually, if they wish, at their own expense to ascertain the extent of the loss of ability to perceive the intensity of red lights. While recognising that the AAT has no power to review decisions of the Civil Aviation Authority to set medical standards, it also suggested that those with some insensitivity to red should not be totally prevented, as they are at present, from meeting the colour vision standard.

The AAT accepted, nonetheless, that different countries have different standards of colour vision for a pilot's licence. A licence granted where the medical standard had not been met should be subject to the condition that the pilot not fly in any country other than Australia except with the express approval of the civil aviation authority of that country.

Changes are currently being made to the colour blindness standards to take account of the AAT's decisions.

Taxation: self-education expenses while unemployed

'X' and Commissioner of Taxation (12 May 1989) involved a woman with a family who, as a mature age scholar, took up an academic career. In 1983 she earned a small income from her academic work, but in 1984 she was unemployed while travelling overseas with her husband and family. On her return to Australia she worked towards the degree of Doctor of Philosophy which she obtained in 1987. In 1987 and for the next two years she was again earning income, as a part-time lecturer or tutor.

The question at issue was whether the expenses she incurred in attending two conferences while overseas constituted allowable deductions for the purposes of the Income Tax Assessment Act. The argument basically was that as a scholar pursuing an income-producing career as an academic and teacher she was entitled to claim the expenses incurred in pursuit of that career.

The AAT found that it is not essential for a taxpayer to be employed, at the time an expense is incurred, for that expense to be deductible. However, at the time these expenses were incurred the taxpayer was neither deriving assessable income nor had any prospect for many months to come of deriving any assessable income. The AAT could not conclude that any expenses in maintaining or increasing learning, knowledge, experience or ability in a profession or calling constituted an allowable deduction, whether the person concerned gained income by the exercise of that calling or not and whether the expense was incurred in the course of income producing activities or not. It affirmed the decision under review.

Freedom of Information

'Candour and frankness' at HREOC

In VXF and Human Rights and Equal Opportunity Commission (28 April 1989), involving the first Freedom of Information request that the relatively new Commission had received, the AAT addressed the 'candour and frankness' argument. It noted that a document which had the potential to embarrass the Commission or subject a public servant to criticism was not for that reason exempt. To the contrary, it was in the public interest that the document be released and that potential applicants should be in a position of deciding whether or not to lodge a complaint with the Commission, knowing how it operates. Further, the AAT remarked that 'it could not be seen as a substantial adverse effect, if the disclosure of this document inhibited unqualified people making medical assessments'. The document in question contained an opinion by a member of HREOC staff about the applicant's health and about the steps, if any, which should be taken to assist her.