meaning of section 33A(1)(b) (confidential communications from state premiers) although that claim had been abandoned by the respondents.

The applicant also unsuccessfully challenged the reasonableness of the fee of $360 for search and retrieval time. The applicant had initially sought internal review of the decision not to remit the charges, but this had been denied on the ground that decisions as to remission of charges are not reviewable (Re Waterford and Attorney-General's Department (No. 1) (1985) 8 ALD 545). On internal review of the decision to impose the charge, the decision was affirmed. The Tribunal found that the imposition of the fee was not unreasonable because an exchange of correspondence prior to meeting the request for access had made the applicant aware of his potential liability and he had paid a deposit. (See Re Fewster and Department of Prime Minister and Cabinet, 17 December 1986.)

The Courts

What is a relevant decision for the purposes of the AD(JR) Act?

In several recent cases under the AD(JR) Act the Federal Court has considered the types of decisions susceptible of review under that Act. If a decision is susceptible of review under the AD(JR) Act, a statement of reasons may be sought of the decision maker (s.13). In Ansett Transport Industries Limited v Taylor (23 December 1986) Justice Lockhart declared that the applicant was entitled to seek a section 13 statement in relation to a decision made by the Secretary of the Department of Aviation pursuant to 'the Two Airlines Agreement' because the decision was of an administrative character made under an instrument made under an Act, and therefore was within the meaning of section 3(1) of the AD(JR) Act.

The current Two Airlines Agreement was executed in 1981 and later approved by the Airlines Agreement Act 1981 which set the agreement out in a schedule. The Airlines Agreement Act is one of a number of enactments which constitute the arrangements by which the federal government currently regulates domestic airlines. The Secretary had made a decision pursuant to a certain clause in the agreement. The significance of the decision was that the Minister may have taken it into account in estimating total traffic on relevant routes and determining maximum aircraft capacity required by airlines, and it may consequentially have affected the right of the airlines to import aircraft into Australia. The Secretary had declined to furnish a statement of reasons, however, claiming that the decision had not been made 'under an enactment' and therefore was not one to which the AD(JR) Act applied.

Following Chittick v Ackland (1984) 53 ALR 143 at 264 Justice Lockhart ruled that to qualify as an instrument for the purposes of the AD(JR) Act a document must be of such a kind as to have the capacity to affect legal rights and obligations. There was no doubt that the Two Airlines Agreement answered this description. Although the agreement had been made prior to the Airlines Agreement Act, clause 1(1) of the agreement itself provided that it was of no force or effect unless approved by the Commonwealth and the preamble to the Airlines Agreement Act stated that one of the purposes of that Act was to approve the execution of the agreement. Accordingly the Secretary's decision had been made under an instrument made under an Act, and the applicant was entitled to seek reasons pursuant to section 13.

In Mahoney & Ors v Chhinda Singh-Dillon (19 February 1987) the Full Court of the Federal Court allowed an appeal from the decision of Justice Sheppard (noted at [1987] Admin Review 18) on the ground that a particular decision alleged to have been made was not capable of review. Justice Sheppard had upheld the validity of a deportation order made against the applicant (the respondent in this appeal) but had ordered that the execution of the deportation order be stayed. The Full Court agreed with the submission of the appellants that there had only been one relevant decision, the decision to make the deportation order. Section 20(1) of the Migration Act requires that a deportation order be complied with unless revoked - thus there was no scope for a subsequent decision to suspend the order and consequently such a 'decision' was not capable of review. Solicitors for the respondent had, in correspondence with the Minister, requested that he stay the order but these requests could not be considered applications for revocation. It followed that there was no relevant decision under the AD(JR) Act. Justices Beaumont and Gummow, in a joint judgment, noted that in connection with the arrangements for deportation, it was conceivable that a decision susceptible of AD(JR) Act review could arise - Zhaty v Minister of State for Immigration (1972) 126 CLR 1 per Walsh J at p.8, and Daguio v Minister for Immigration and Ethnic Affairs, unreported, 31 October 1986, per Ryan J at p.18 were cited - but that question was not pursued in this case.

An objection to the competency of an AD(JR) Act application on the ground that a decision refusing to stay criminal proceedings brought in the A.C.T. Magistrates Court was not of an administrative character and was not made under an enactment was dismissed in Emanuele v Cahill & Anor (25 February 1987). The applicant had been charged with bribing a Commmonwealth officer contrary to section 73(3) of the Crimes Act 1914 (Cth). The offence was punishable either on indictment or on summary conviction, at the discretion of the Magistrates Court.

In support of the objection to competency, it had first been submitted that one of the indicia of a judicial, as opposed to an administrative, decision was the conclusive nature of the former, and that a decision granting an indefinite stay of the criminal proceedings would have the quality of conclusiveness.

The submission continued that the trappings and procedures of a court, proceedings in adversary form, and a duty in the court to apply established legal principles in a judicial way to a particular factual situation also indicated that any decision made upon an application for an indefinite stay of the criminal proceedings was judicial in character and not administrative. Justice Neaves, referring to the discretion in the Magistrates Court to treat the matter summarily or commit the applicant for trial, ruled that the proceedings pending against the applicant were by way of preliminary inquiry, and were properly described as committal proceedings, and that it was well established that some decisions made in the course of such proceedings were reviewable under the AD(JR) Act (Lamb v Moss (1983) 49 ALR 533). The decision in this case was so reviewable and the objection to competency, in so far as it rested on the proposition that the decision was not of an administrative character, failed.

Secondly the objection to competency was made on the basis that the decision was not a decision 'under an enactment' but was part of the court's inherent jurisdiction, that is, part of the power which the court had simply because it was a court (The Queen v Forbes; ex parte Bevan (1972) 127 CLR 1 per Justice Menzies at p.7). Justice Neaves held that if it were true that the power to make the decision in question was inherent in the Magistrates Court's function as a court, that power inhered in it because of its creation as a court by the Magistrates Court Ordinance 1930 (A.C.T.). It did not follow that because a particular legislative provision, conferring the relevant power either expressly or by necessary implication, could not be identified, the decision was beyond the ambit of the AD(JR) Act. The question was whether, as a matter of substance, the decision had a sufficiently close connection with the legislative provision to make it appropriate to speak of it as having been made 'under' that provision. In this case, the sufficiently close connection arose because the power to make the decision had its source in the Magistrates Court Ordinance. Thus the objection to competency failed. The substantive application also failed, no reviewable error on the part of the magistrate having been established.

The meaning of 'wholly or substantially dependent'

The Full Court of the Federal Court has allowed an appeal from a decision of the AAT that the widow of an eligible employee was entitled to a spouse's pension under section 81 of the Superannuation Act 1976 - see Commissioner for Superannuation v Scott (11 March 1987).

Mrs Scott was a widow, but for the last few months of her husband's life she and her husband had lived separately. They had entered into a maintenance agreement, registered under the Family Law Act, pursuant to which the husband had transferred his interest in the matrimonial home to Mrs Scott upon her payment to him of a certain amount. From that date no

maintenance had been paid by the husband for either Mrs Scott or the children of the marriage. Mrs Scott had received certain benefits under the Social Security Act and varying amounts of money from her parents. The AAT had considered whether Mrs Scott was 'wholly or substantially dependent' upon her husband, and had found that she had been, notwithstanding the maintenance agreement. It had adopted the meaning of substantial dependence as defined in an earlier decision, Re Schlatter and Defence Force Retirement and Death Benefits Authority (1985) 8 ALD 133, where it had held that the dependency shown 'should not be trivial, minimal or nominal... and should be greater than partly ... and should not be total but something in between'. The court allowed the appeal. It held that the word 'substantially' in the definition of 'spouse' in section 3 of the Superannuation Act meant 'in the main or essentially' and remitted the matter to the AAT for reconsideration accordingly. It also expressed the opinion that the matter could be determined as a matter of fact without being virtually confined to the Family Law Act and decisions of the Family Court.

Definition of 'served in a theatre of war' considered

The correct construction of the expression 'served in a theatre of war' for the purposes of Part III of the Repatriation Act 1920 has been raised in an application, brought pursuant to an order extending time, to review under the AD(JR) Act a decision of a delegate of the Repatriation Commission to refuse a service pension - see Marsh v Repatriation Commission (13 March 1987).

The facts are set out at [1986] Admin Review 107, but, in brief, the applicant had served with the Royal Australian Air Force within Australia during 1944 and 1945. On 3 September 1945 he had left Sydney for Balikpapan where he performed guard duties, and later he had been transferred to Labuan, a small island off the coast of North Borneo, where he had performed guard duties in respect of medical stores and Japanese prisoners of war carrying out labouring duties. The day before his departure from Sydney, however, the Japanese forces had surrendered.

The applicant argued that the Japanese surrender should not be equated with the termination of the war and that the guarding of allied installations and prisoners of war was an operation against the enemy, and he made reference to concepts of international law by which a state of war still existed after 2 September 1945. The court held that the definition in section 23 did not refer to any concept of international law but looked to military realities. It relied on practical concepts - 'operations against the enemy' and 'danger from hostile forces of the enemy'. Furthermore, reference was made to the second reading speech of the then Prime Minister, Mr Lyons, when the definition was inserted into the Act. It referred to the 'stress and strain of their experiences' as justifying the grant of a service pension to those who had served in a 'theatre of

war', and made mention of 'the deprivations inevitably resulting from participation in modern warfare', concluding that 'it is .... undeniable that the strenuous conditions of modern war are capable of hastening the process of decay which impairs organic functions' (Hansard, H of R, 1935, at 1809, 1814). This also suggested that parliament contemplated that the special stresses of combat during the continuance of military operations as a part of the conduct of war in the ordinary sense, and not the mere existence of a state of war according to international law, might require the grant of a pension. Thus there had been no error of law on the part of the decision maker who had concluded that there were no 'hostile forces of the enemy' from which the applicant could have incurred danger in the relevant area. The application was dismissed.

Priests have standing to challenge film censorship decision

In August 1986 Justice Sheppard held that an Anglican priest and a Roman Catholic priest had no standing to seek review under the AD(JR) Act of certain decisions of the Censorship Board relating to the registration of a film entitled 'Je Vous Salue Maria' ('Hail Mary') - see [1986] Admin Review 167. The priests alleged the film was blasphemous and that the decisions which culminated in the importation of the film should be set aside. The Full Court of the Federal Court (Justices Fisher, Lockhart and Wilcox) has now overturned the decision of Justice Sheppard at first instance and held that the priests have the relevant standing - see Ogle & Anor v Strickland & Ors (13 February 1987).

Justices Fisher and Lockhart held that as ministers of religion the appellants were in a special position compared with ordinary members of the public, in that it was their duty and vocation to maintain the sanctity of the scriptures, to spread the gospel, to teach and foster Christian beliefs and to repel or oppose blasphemy which was the denial of the basic tenets of their faith. Adopting the language of Justice Stephen in Onus v Alcoa of Australia Limited (1982) 149 CLR 27, in which the High Court unanimously held that descendants and members of the Gournditch-jmara aboriginal people had standing to bring proceedings for the purpose of preventing Alcoa from carrying out works which it was claimed would interfere with aboriginal relics, Justice Lockhart held that the doctrines and teachings of the Christian faith were of 'great cultural and spiritual significance' to the appellants. Further, the appellants were not meddlers or busy bodies; nor were they people who had mere intellectual or emotional concern about the film. Thus their position was different from the Australian Conservation Foundation which was held not to have standing to challenge decisions which it alleged would be detrimental to the environment in Australian Conservation Foundation Incorporated v The Commonwealth of Australia (1980) 146 CLR 493.

Justice Wilcox found that the damage the appellants claimed as committed Christians was sufficient to entitle them to standing. They were susceptible, as committed Christians, to an offence and to an outrage which would not be shared by non-believers. As the appellants were priests, who had dedicated their lives and talents to the propagation of beliefs some of which they claimed were denied by the film, his Honour

said that they would probably be entitled to rely upon the frustration of their professional activities which they alleged the film would occasion, but he preferred not to base his decision upon this additional factor.

The judgments in this case review the authorities dealing with the phrase 'person aggrieved', and discuss standing criteria generally. Justice Wilcox points out that the liberalisation of standing rules evident in Onus is consistent with attitudes expressed in other common law countries, and that there need be no concern that the recognition of non-financial interest will lead to an unmanageable proliferation of cases. He adverts to the concern that a liberalised interpretation of standing criteria will lead to an inadequate presentation of the issues to the court - the courts are entitled to insist upon a plaintiff who will adequately represent the case sought to be made, in the public interest, a plaintiff who has 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court, so largely depends for illumination of difficult ... questions' (per Justice Brennan in Baker v Carr (1962) 369 US 186 at 204). However, his Honour also refers to aboriginal land cases and other recent Australian cases where ideologues have gained access to the courts and voluntary groups have participated in planning appeals, all cases which have been hard fought and professionally conducted. Thus, Justice Wilcox maintains, 'to assume that competitive instincts are aroused only by concern for material wealth would be to ignore history'.

Commonwealth Ombudsman

Jurisdictional vacuum for employees of statutory authorities

The Ombudsman has drawn to the Council's attention a jurisdictional vacuum in regard to a large area of Commonwealth employment. He recently referred to the Merit Protection and Review Agency a complaint from a former temporary employee in the Public Service about the circumstances in which she was dismissed. This employee's complaint was within the jurisdiction of the MPRA, because she worked for a department. However, the Ombudsman observed that, had she been employed in a statutory authority that employed under its own legislation rather than under the Public Service Act, she may not have had any avenue of review available to her. The Ombudsman said that it was his understanding that many statutory authorities have yet to seek changes to their legislation to confer jurisdiction on the MPRA, while his own jurisdiction only covered limited matters concerning employment by the Commonwealth.