income for the purpose of assessing his rate of age pension. The applicant was in receipt of an age pension the rate of which took into account moneys received from Germany. Following the decision in Re Kolodziej and Secretary, Department of Social Security (6 June 1985) in which the AAT held that certain German restitution payments did not constitute 'income' within the meaning of section 6 of the Social Security Act, the applicant requested that the Department reassess his pension. The respondent however maintained that the payments constituted income notwithstanding that the Social Security Appeals Tribunal on appeal had recommended that the decision of the Secretary should be the same as in Kolodziej.

The AAT examined several decisions including Kolodziej where the question whether German restitution payments comprised income within the meaning of section 6 of the Act was examined. Those decisions tended to rely on distinctions being made between receipts of a capital nature and receipts of an income nature. However, the question of the relevance of this distinction to payments of this type had recently been settled by the Federal Court in Secretary to the Department of Social Security v Read (10 March 1987), which said that there is no reason to give the definition of income in section 6 a meaning different from that appearing from the language used which gives the term a broad meaning. In this case, whether either a broad or narrow meaning was adopted, the receipt by the applicant of a periodical payment of moneys, being compensation related to loss of earning capacity due to ill health following persecution, would undoubtedly fit within the ordinary meaning of income. In addition the pension was income on the ground that it was a periodical payment by way of allowance. The AAT said that it could appreciate the resentment felt by the applicant as a result of these payments being considered as income but the issue must be determined according to the terms of the relevant legislation and, unless an exemption similar to that in the Income Tax Assessment Act was made in the Social Security Act, such payments would continue to be regarded as income.

Freedom of Information

Legal professional privilege - legal advice obtained from within government

In Waterford v The Commonwealth of Australia (1987) 71 ALR 673 the High Court considered whether it is open to the Commonwealth to claim legal professional privilege as a ground for denying access under the FOI Act to documents the subject matter of which is legal advice obtained from officers of the Attorney-General's Department and concerned with proceedings pending in the AAT. The appellant, a Canberra journalist, had applied to the AAT for review of a decision by the Department of Treasury to refuse him access to documents concerning the 1982-83 budget papers. After this appeal had been heard by the AAT, but before a decision had been handed down, Mr Waterford

made a further request for documents relating to the processing of the initial request including the AAT hearing (a process he referred to as 'FOI squared'). The legal professional privilege exemption (s.42) was eventually claimed in respect of all of the documents to which this later request related and it was this claim which was the subject of the appeal to the High Court.

All of the members of the court agreed that advice received from legal officers in government employment (at least in the Attorney-General's Department) can be the subject of legal professional privilege and the privilege will clearly apply where the advice relates to the government in its capacity as a litigant or potential litigant. In such a situation the government will be engaging in the legal process in the same way as an ordinary citizen and it is that process which legal professional privilege is designed to aid and protect. However, the Court disagreed on whether the Tribunal had made an error of law in respect of the claim for privilege for these particular documents.

The majority of the court (Justices Mason, Wilson and Brennan) found that notwithstanding that the subject matter of the communication was the manner in which a statutory administrative power should be exercised or a statutory duty should be performed by a public officer (in this case the giving of access to documents or resisting an application for access made to the Administrative Appeals Tribunal), if the sole purpose for which the document was brought into existence was to give legal advice in respect of this duty or power, there was no reason why the document could not be the subject of legal professional privilege. Provided that the sole purpose test enunciated in Grant v Downs (1976) 135 CLR 674 was satisfied, there was no reason to arbitrarily exclude functions of an administrative nature from those functions of government to which privilege will apply. The plain reading of section 42 of the FOI Act suggests that Parliament intended that legal advice given in relation to administrative decision making will attract the privilege. The fact that the document itself may have attracted public interest immunity is immaterial as this is an entirely separate issue from that of legal professional privilege.

Justices Mason and Wilson, in a joint judgment, said that the intermingling of policy matters with legal advice in a document will not deny it the protection of the privilege if the sole purpose for it was created was to give legal advice. This was a question of fact to be determined by the Tribunal in each case. In this case, the majority of the documents were in the category of professional communications between a client and his legal adviser in connexion with legal proceedings. In such a case it was not relevant that a document may contain advice relating to policy as well as law. The connection with the legal proceedings was what gave the document its character and attracted the privilege.

Justice Brennan said that advice relating to the policy of the FOI Act, not the policy of the government, is as much a question of law upon which legal advice might be given as the meaning of particular words in the Act. However, a

communication that was brought into existence for a purpose of giving advice as to government policy in the administration of an Act, as distinct from the policy of the Act itself, would not be privileged. This executive policy relates to the manner in which a statutory discretion should be exercised and is a matter of fact whereas the policy of the Act determines, in reference to a discretion created by the Act, whether there are limits confining the scope of the discretion and is a question of law. Notwithstanding that evidence before the Court, which was not before the Tribunal, indicated that one document contained advice as to executive policy, the finding by the AAT that it did not contain such advice was an error of fact. The AAT had not made an error of law upon which the appellant could succeed in his appeal.

Justices Deane and Dawson, in dissent, stated that a communication the purpose of which was to convey advice about the application of government policy would not attract legal professional privilege. As the Department of the Treasury had made no attempt to sever such policy advice from legal advice it had not discharged its onus under the FOI Act to show that the privilege attached to the whole document. It had not shown that the sole purpose for its creation was to provide legal advice and the AAT in failing to consider this had made an error of law.

Commonwealth-state relations

The Commonwealth-state relations exemption (s.33A) was examined by the Federal Court for the first time in Arnold v The State of Queensland and Anor (13 May 1987). The background to the case was that an unincorporated association, Australians for Animals, had made an FOI request for documents relating to consultations between the Queensland and Commonwealth national parks and wildlife services in respect of the formulation of guidelines for the export of koalas. A decision had been made to grant access to the documents but, following an application from Queensland, the AAT found that disclosure could reasonably be expected to cause damage to relations between the Commonwealth and Queensland. An appeal was made to the Federal Court by the Association under section 44 of the AAT Act on the ground that the AAT had made an error of law in that there was no evidence to sustain the finding that disclosure could cause damage to Commonwealth-state relations.

A preliminary matter was the regularity of an appeal made by an unincorporated association with no legal identity of its own. The court considered that the Tribunal's order allowing the Association to be joined as a party to proceedings before the Tribunal, should be read as joining as parties the individual members of the Association as at that date. As parties, the individual members had a right of appeal to the Federal Court on a question of law but when exercising this right they should have done so by filing a Notice of Appeal disclosing a named representative of them all. The failure to do this was simply rectified by an amendment of the record.

The full court of the Federal Court held that, on the evidence, the decision of the Tribunal was open to it. However, Justice Burchett commented that such a conclusion would not necessarily be arrived at in every case involving the development of a policy between agencies of the Commonwealth and a state. Nor, in every such case, would that conclusion, if reached, survive the application of section 33A(5) which, although assuming as a general principle that there is a public interest in the non-disclosure of matter that could cause damage to relations between the Commonwealth and a state, contemplates that it may, on balance, be in the public interest for matter in that document to be disclosed.

Substantial adverse effect on industrial relations

In *Re McCarthy and Australian Telecommunications Commission* (19 June 1987) the AAT considered whether the release of regional manpower bids to a union representative would, or could reasonably be expected to, have a substantial adverse effect on the conduct by Telecom of industrial relations (s.40(1)(e) of the FOI Act). The documents in question were estimates of staffing requirements prepared by district managers which were used by Telecom as an aid in setting manpower levels but were not a major input. The Tribunal held that, although the documents related to an area in which disputes between employers and employees may well arise and thus could have an adverse effect on the conduct of industrial relations by Telecom, there was no evidence to establish that the effect would be serious or significant enough to be a substantial adverse effect for the purposes of section 40(1)(e) of the FOI Act (see *Re Heaney and Public Service Board* (1984) 6ALD 310). Industrial disputes in Telecom would continue whether or not the information in the bids was released. The supplying of the information may have the effect of increasing the level of disputes or decreasing the ability of Telecom to reach what it considers is a satisfactory result but it would not do this to the extent of causing a substantial adverse effect on the conduct of industrial relations.

The Courts

Decisions under the Two Airlines Agreement

Ansett, Australian Airlines and East-West Airlines have been engaged in a crucial battle for control of air routes in Australia. At the centre of the controversy is the Two Airlines Agreement, to which the Commonwealth is one of the parties. The decision under challenge is a decision of the Secretary to the Department of Aviation under clause 6(1)(c) of the Agreement concerning trunk route air services. With the stakes high, the litigation has been expensive. It has also raised some interesting points of legal principle, which are mentioned below. It is unclear at the time of writing whether the recent sale of East-West Airlines to a company related to Ansett will affect continuance of the litigation.