Secretary to the Department of Prime Minister and Cabinet and the Acting Secretary to the Department of Foreign Affairs and Trade that the documents were sensitive and their release would be contrary to the public interest. The question arose whether reasonable grounds existed for the claims that disclosure would be contrary to the public interest.

The President of the AAT, citing his earlier decision in Macphee, first examined the certificates which claimed exemption, to determine whether the claims were reasonable. With relatively few exceptions he found in favour of the Department. Some documents were official records of Cabinet or had been submitted to Cabinet. Others involved the security or international relations of the Commonwealth, or could lead to unproductive public debate. He concluded that release of such documents would be contrary to the public interest.

Interview reports in accident investigations

In Associated Minerals Consolidated and Secretary, Department of Transport and Communications (26 February 1990) the decision under review was the refusal of access to two records of interview concerning the preliminary investigation under the Navigation Act 1912 into the loss of the vessel MV Singa Sea.

The AAT accepted that the purpose of conducting a preliminary investigation is to assess safety procedures to ensure that the highest possible standards are maintained in the protection of life at sea, as well as protection of the environment. It also accepted that the release of a statement obtained in the course of a preliminary hearing in the face of objection to its release would lead to a withdrawal of full hearted cooperation and consequent diminution in the effectiveness of the preliminary hearing process. It concluded that this would have a 'substantial adverse effect on the proper and efficient conduct of the operations of the agency'.

The AAT pointed out that in making any assessment under the relevant section of the Freedom of Information Act it must have regard to the circumstances and context in which exemption is claimed. That section of the Act does not restrict consideration only to the person who generated the information in the document in question but also looks at the general effect which the release of such documentation may have on the operations of the agency concerned. In this case the agency dealt with all the industry groups. If it were to lose the confidence of one of those groups, the consequences would be reflected throughout the entire industry. The AAT affirmed the decision under review.

The Courts

AAT hearings in certificate cases

Department of Industrial Relations v Forrest (1990 91 ALR 417) was an application to the Federal Court for review of a decision by Mr Forrest in his capacity as Deputy President of the AAT, involving the nature of the AAT's powers concerning in camera hearings in certificate cases.

The original application before the AAT was a request by Mr Burchill, a journalist, for review of a decision by the Department not to disclose the Government's submission to the Anomalies Conference on Parliamentary Salaries. This document had been made available to the participants in the conference. The Department claimed several grounds for exemption, including that the document was an internal working document and that its disclosure would reveal the deliberations and a decision of Cabinet. The Secretary of the Department of Prime Minister and Cabinet provided a certificate that the document was an exempt Cabinet document.

The decision by the AAT prohibited Mr Burchill, his witnesses and his advisers, other than his counsel and instructing solicitor, being present at the hearing of evidence relevant to the question whether there were reasonable grounds for issuing the exemption certificate. The Court considered two main issues, the first on the validity of the certificate and the second whether Mr Burchill's lawyers could be present.

Justices Lockhart and Hill expressed the opinion that unless the certificate were valid the AAT had no jurisdiction to proceed with its inquiry. They held that the certificate was so uncertain in its description as to render it invalid. They granted the Department's application on the grounds that the Freedom of Information Act contemplates that, where there is an examination of documents to determine if reasonable grounds exist for the exemption, the examination will be conducted in private with only the AAT, its staff, and the relevant agency or Minister or their legal representatives present.

Justice Northrop allowed the application on two grounds. First, an order of the AAT with regard to a hearing in private should give directions as to the persons who can be present and the order under review did not. Second, the AAT had made an error of law by proceeding to exercise the powers relating to hearings in private when it was not appropriate to do so in the circumstances of this case.

The judgments contain a general review of the procedures to be followed in matters before the AAT under the Freedom of Information Act.

Equal opportunity

An application for special leave to appeal to the High Court from the decision by the Full Bench of the Federal Court to quash the decision of the trial judge in Styles v Secretary, Department of Foreign Affairs (18 October 1988) (Admin Review 19:8-9) was rejected on 16 February 1990. The Full Bench, after examining the four elements of sex discrimination posited by the Sex Discrimination Act 1984, had concluded that the requirement for a discriminatory action to be 'not reasonable' had not been satisfied. Giving reasons for the refusal of leave, Mason CJ said:

> 'We are not persuaded that the proposed appeal would raise any question of general principle or would result in the elaboration of such a principle. The applicant seeks to challenge a finding that the condition or requirement was unreasonable. That was a finding of fact turning on the particular circumstances of the case. The applicant also seeks to challenge a finding that the relevant officer had regard to the Department's equal opportunity programme.

That, again, was a finding of fact. The case is therefore not appropriate for the grant of special leave.'

Immigration: humanitarian and compassionate grounds

Dahlan v Minister for Immigration, Local Government and Ethnic Affairs (12 December 1989) was an application for review of decisions that Mr Dahlan be refused a further temporary entry permit; that he be refused resident status; that he did not have refugee status within the meaning of the Convention relating to the Status of Refugees or the Protocol relating to the Status of Refugees; and that he be deported.

Justice Hill held that the Court had jurisdiction to review the decision on the application for refugee status because, while it was not a decision under the Migration Act 1958, it was a step preliminary to reconsidering the application for a temporary entry permit. It was thus 'conduct engaged in for the purposes of making a decision'.

Justice Hill also discussed the application of the 'strong humanitarian and compassionate grounds' criterion in relation to to the grant of an entry permit. He concluded that Mr Dahlan had made out several of the grounds required under the Administrative Decisions (Judicial Review) Act. The Department had taken into account irrelevant matters, had not taken account of relevant matters, and in reaching its decision had exercised its power in a manner so unreasonable that no reasonable person would have so exercised the power. He set aside the decisions and ordered that the matters be remitted for reconsideration.

Customs: impermissible delegation with prohibited imports

In Owen v Turner (21 December 1989) an officer of the Australian Customs Service (ACS) had seized certain rifles imported by Mr Owen on the grounds that they were prohibited imports under the Customs Act 1901. The weapons previously had been inspected and cleared for release.

The Customs (Prohibited Imports) Regulations provide that unless the consent of the Minister is obtained, the importation of certain goods is prohibited. These include:

- goods which, in the opinion of the Minister, are of a dangerous character and a menace to the community; and
- rifles of a military type, the calibre of which is greater than .22 calibre, and parts for those rifles.

On these grounds the Minister had declared that the importation of weapons of a machine gun construction, and parts for these weapons, was prohibited unless for official purposes.

The Court concluded that, notwithstanding the claims in the Notice of Seizure and in the Statement of Reasons supplied under section 13 of the AD(JR) Act, the reason for the seizure was simply that the weapons were of machine gun construction. It decided that the rifles were not weapons of machine gun construction and that the seizure therefore was unlawful.

The Court expressed the view that 'where there has been full disclosure of all relevant facts and documents and when the relevant police officers and Customs officers have, acting honestly and reasonably, concluded that the goods may be

released for entry into home consumption, it is not competent for an officer of Customs at any later time to seize the goods relying on a reasonable suspicion that the goods were of a different character to that honestly adjudged by the examining officers'.

The Court was also of the view that the Act did not empower any person other than the Governor-General to prohibit the importation of goods. The relevant item in the schedule to the regulations included an unauthorised and impermissible delegation of a legislative function to the Minister and was therefore invalid.

Taxation audit

Southern Farmers Group v Deputy Commissioner of Taxation (23 December 1989) involved an objection to the competency of an application for the review of decisions under the Income Tax Assessment Act 1936. The decisions concerned the power of the Commissioner to gain access to the buildings, books, documents and papers of Southern Farmers as part of a proposed audit of its affairs. The objection to competency was based on a claim that what was done did not amount to the making of decisions but was properly characterised as engaging in conduct which might or might not result in the making of a decision to issue a further assessment to tax. If this were correct, the application for review was misconceived and the entitlement to a statement of reasons under section 13 of the AD(JR) Act did not apply.

Justice O'Loughlin noted that, though several decisions may be made in relation to the subject-matter such that the latest in time subsumes all previous decisions in some cases, the situation in this case was different. He concluded that 'the deliberations on the part of the respondents that led to the proposal that they, or one of them, would utilize the powers contained in sub-s.263(1) represent a decision that is reviewable'. He decided that Southern Farmers were entitled to seek and obtain reasons for the decision, and dismissed the objection to competency.

Health: referral to Medical Services Committee of Inquiry

Edelsten v Health Insurance Commission and Edelsten v Blewett (5 February 1990) involved an application for review of two decisions in relation to Medicare benefits paid under the Health Insurance Act 1973. The first was a decision by a delegate of the Health Insurance Commission to refer to the delegate of the Minister the question whether Dr Edelsten may have rendered excessive medical services. The second decision, made by a delegate of the Minister, was to refer to a Medical Services Committee of Inquiry the question whether certain services to specified patients of Dr Edelsten, for which Medicare benefits had been paid, were excessive services.

Justice Jenkinson held that while the first decision was a decision to which the AD(JR) Act applied, there was no requirement that the applicant be given the opportunity to oppose the referral before the decision could be made. The decision was no more than a step, and not an essential step, in the administrative process of reaching a Ministerial decision whether to refer the matter to a Medical Services Committee of Inquiry.

His Honour held that the second decision, however, was vitiated by the failure to observe the principles of natural justice. Those principles required that the applicant be informed of the allegations against him and be given the opportunity to answer them before the matter was referred to a committee for inquiry.

Health: acute care certificates

Murray v Griffin, Campbell v Griffin, and Pillenger v Secretary to the Department of Community Services and Health (6 February 1990) were applications for review of decisions to revoke 'acute care' certificates issued under the Health Insurance Act 1973. The certificates had been revoked on the grounds that the applicants' medical treatment was designed only to maintain their present medical condition, not to improve it, in reliance on comments by Justice Northrop in a previous case. Justice Davies, however, said that while those comments were valuable, they were not intended to be, and should not be treated as, a definition of the term 'acute care'. Each case was to be considered on its own facts, having regard to the circumstance that, as a matter of law, a patient may be in need of 'acute care' notwithstanding that no improvement in the patient's condition is expected. Reliance on Justice Northrop's earlier comments as being decisive of the issue represented an error of law.

Commonwealth Ombudsman

Child care fee relief: failure to follow court decision

In December 1988 the Department of Social Security (DSS) took over the responsibility from the Department of Community Services and Health (DCSH) for assessing eligibility of children for grants for child care fee relief. It was the DSS intention that the definition of income which applied to pensions and benefits under the Social Security Act should henceforth apply to assessment of eligibility under the Child Care Fee Relief scheme.

In May 1989 the Federal Court in Garvey's case decided that a previous interpretation by the AAT and the Department of Social Security of the term 'income' was incorrect. The issue was whether losses from one source of income could be offset against profit from another source to arrive at the true income of the person in question. Previously losses from one source could not be so offset where the two sources were unrelated. The Federal Court took the view that the term 'income' as defined in the Social Security Act meant net income, and that rental losses could properly be taken into account. Neither DSS nor DCSH was prepared to adopt the court's reasoning in Garvey and DSS appealed to the Full Court of the Federal Court. The Full Court upheld the appeal on 7 December 1989 and reversed the decision of the trial judge.

The Ombudsman's complainant was a businessman who derived income from two business ventures, and had losses from a third. In assessing the eligibility of his child for fee relief, DSS declined to offset the loss from one of his business ventures against the profits from the other and held