The AAT accepted that the records were complete and correct records of the opinions held by the person who made them. Nonetheless, it said that they could be incomplete or out of date and, as a result, may now have to be seen as so flawed as to be misleading for the purpose of present resort to them.

The Courts

Broadcasting: meaning of 'advertisement'

Gold Coast Christian & Community Broadcasting Association v Australian Broadcasting Tribunal (28 September 1989) involved decisions by the Australian Broadcasting Tribunal (ABT) that sponsorship announcements by Gold Coast Christian were advertisements and therefore in breach of the Broadcasting Act 1942.

The Act provides that a public licence shall be granted for 'general community purposes' or 'a special interest purpose',and specifically proscribes promotional sponsorship announcements. The ABT had decided that a considerable number of sponsorship announcements by Gold Coast Christian had exceeded the conditions of the licence and were in fact promotional.

Justice Gummow concluded that no error of law was involved. The prohibition on broadcasting advertisements was consistent with the non-commercial nature of public broadcasting services, and qualified by provision for the broadcasting of certain community information, certain promotional material and sponsorship announcements. These qualifications, however, were limited.

Committal hearing: refusal to disqualify

Cheatle & Sturdy v Davey & Prescott (27 July 1989) involved the refusal of a magistrate, Mr Prescott, to disqualify himself for apparent bias from presiding over a preliminary hearing in the Adelaide Magistrates Court.

The applicants were charged with an offence against the Crimes Act 1914. They applied for, and were granted, an order suppressing from publication any information which would tend to identify them, on the ground that publication of their names would cause them undue hardship. Before the preliminary hearing resumed, however, a major amendment had been made to the Evidence Act 1929 (S.A.) in relation to suppression of names. In particular, the amendment removed the power to make an order where publication might cause undue hardship to a party. The new provisions expressly recognise 'the public interest in publication of information relating to court proceedings, and the consequential right of the news media to publish such information'.

At the hearing, Mr Prescott asked whether, in the light of the amendment, either party wished to make an application to vary the previous suppression order. Neither wished to do so. At the luncheon adjournment Mr Prescott requested a member of the

court staff to notify representatives of the media that the order would be reconsidered after lunch, though at that time no application had in fact been made. After lunch two media representatives made submissions in favour of lifting the order, and it was eventually revoked. Attempts to obtain a new order were unsuccessful. The applicants then asked that Mr Prescott disqualify himself on the grounds of apparent bias. He refused.

Justice Von Doussa found that the magistrate's failure to inform the parties of his intention to have the media notified amounted to a breach of natural justice, but that the breach was of a technical nature and would not create a reasonable apprehension of prejudice in the mind of a reasonable bystander. He exercised his discretion under the AD(JR) Act and dismissed the application, notwithstanding his opinion that the magistrate had made a mistake of law in his interpretation of the rights of the news media and the duties of the Court under the amended provision.

The issue of possible bias in a magistrate's hearing also emerged in Goldspink v Moodie (28 August 1989). That case involved possible taxation fraud and an application by Mr Goldspink for a stay. Justice Foster, not satisfied that a decision had been made which could be the subject of review, dismissed the appeal.

Taxation: validity of notices

Fieldhouse v Deputy Commissioner of Taxation; Perron Investments v Deputy Commissioner of Taxation; Century Finance v Deputy Commission of Taxation; and Prestige Motors v Deputy Commissioner of Taxation (27 September 1989) were appeals concerning the validity of notices issued by the Deputy Commissioner. The full court of the Federal Court identified 3 main questions:

- whether the notices could require each recipient to create copies of documents or otherwise obtain copies of them, whether or not such copies were in the recipient's custody or under the recipient's control when it received the notice.

- whether the notices were bad, either by requiring the production of documents which are prima facie privileged or by failing to make clear on the face of the notices themselves that the recipients are not required to produce privileged material; and

- whether the notices were invalid for ambiguity or want of clarity in the description of the documents or classes of documents.

The Full Court held, with regard to the first question, that the notices did ask the recipient to make copies of documents in his possession and that this requirement was beyond the power given by the legislation. A majority of the Court held that in consequence the notices were wholly invalid. In the case of the second and third questions, it held that the notices were not invalid.

Meaning of 'aboriginal'

In Queensland v Wyvill (24 November 1989) the State of Queensland sought review of a decision that a man who died in custody, Mr Darren Wouters, was an aboriginal within the meaning of letters patent issued by the Governor of Queensland, and thus came within the terms of reference of the inquiry into aboriginal deaths. The hearing followed a decision by Justice Pincus on 28 September 1989 limiting the persons who had sufficient interest to be joined as parties to a blood relative of Mr Wouters and the National Aboriginal and Islander Legal Services Secretariat.

The question was whether every part-aboriginal person was within the terms of reference of the inquiry. Mr Wouters' mother was partly of aboriginal descent but his father was Dutch. Mr Wouters himself was of European appearance and, although he eventually became aware that he was part-aboriginal, did not identify or mix socially with aboriginals. The State claimed that the decision-maker was wrong in law in deciding that a proportion of aboriginal genes was sufficient to justify classifying their possessor as 'aboriginal'.

Justice Pincus took the view that the ordinary usage of the term was the relevant one. Ordinary usage would not apply the term to a person believed to have no aboriginal ancestry, however closely that person associated with aboriginals. Nor would proof of any degree of such ancestry, however slight, be enough in itself to justify the term. The decision-maker erred if he treated as irrelevant social factors such as self-recognition as aboriginal and recognition by the aboriginal community. Mr Wouter's case thus did not fall within the scope of the inquiry.

Immigration: procedural fairness

Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh (28 June 1989) was an appeal to the Full Court of the Federal Court against a decision (Admin Review 20:47) that the Minister's rejection of Mr and Mrs Pashmforoosh' application for resident status was not in accordance with law.

The Full Court found no element of procedural unfairness in the way the Minister and his Department handled the applications, but agreed with the trial judge that the Minister had failed to take into account relevant considerations and failed to consider the substance of the Pashmforoosh case. Further, it pointed out that a decision-maker who is required by section 13 of the AD(JR) Act to give reasons for his decision may be found to be in error if the statement simply rejects the substance of an applicant's case without giving reasons which can rationally support that rejection. The Court dismissed the appeal.

Aboriginal land rights

Attorney-General for the Northern Territory v Olney and the Northern Land Council (28 June 1989) was an application to the Full Court of the Federal Court concerning the validity of certain regulations based on the Town Planning Act 1964 (NT). The case derived from a claim by the Northern Land Council to

part of the Cox Peninsula, near Darwin - the Kembi (Cox Peninsula) Land Claim.

During 1978 action had been taken in connection with a rural plan for the Darwin environs. In December 1978 new Town Planning regulations were made extending the town boundaries. The Aboriginal Land Commissioner found that the regulations were made solely to ensure that no aboriginal land claim could be made to the area specified. He decided that the regulations were invalid and that the Cox Peninsula was not land within a town, within the meaning of the Aboriginal Land Rights (Northern Territory) Act 1976. As a result, it was not excluded from the definition of 'unalienated Crown land' and therefore was amenable to a land rights claim.

The Full Court observed that 'it is a fundamental principle of administrative law that, in the absence of a specific statutory provision to the contrary, the proper limits of the exercise of a statutory discretion are defined by, and only by, the scope and purpose of the legislation itself'. To the extent that the making of the regulations was motivated by a desire to facilitate regional planning, as distinct from invoking the planning controls within a 'town' envisaged by the Town Planning Act, they were outside the regulation making power of that Act. The Court concluded that the Commissioner did not err in law, and dismissed the application.

Taxation: appeal from the AAT

Commissioner of Taxation v Raptis (21 September 1989) involved an appeal by the Commissioner against an AAT decision that Mr Raptis should not have been issued with an amended assessment whereby his taxable income was increased by $380 000 and he was charged additional tax of $336 790.

Justice Gummow pointed out that there is no error of law simply in making a wrong finding of fact. An error of law would occur, however, if there was no evidence to support a conclusion of fact, if the only true conclusion which the AAT could reach was contrary to that it did reach, or if its decision otherwise was perverse.

Crucial to the AAT's decision was its finding as to the credit of the taxpayer. This was not challenged before the Court. Justice Gummow found that the Commissioner was endeavouring to have the Court embark on a challenge as to findings of fact and not a question of law. He dismissed the appeal.

Commonwealth Ombudsman

Health Insurance Commission: nonpayment of Medicare benefits

Under the Health Insurance Act, Medicare benefits may not be payable in certain circumstances for a professional service rendered to a claimant in the course of the treatment of an injury, where the claimant has received or has established the right to receive compensation. The right to receive compensation must be established, however, and a Ministerial determination made before the benefit becomes non-payable.