'Unreasonable affect'

A question arose in relation to section 43(1)(c) and, in particular, whether disclosure would, or could reasonably be expected to, unreasonably affect a person adversely. In considering the meaning of the expression 'unreasonable affect', the Court stated:

> 'If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be *unreasonably* affected by the disclosure; the effect, though great, may be reasonable under the circumstances. To give two examples: if the relevant information showed that a business practice or product posed a threat to public safety or involved criminality, a judgment might be made that it was not unreasonable to inflict that result though the effect on the person concerned would be serious.'

Breach of confidence

Finally, the Court was required to consider the scope of section 45 of the FOI Act. The Court noted the impact that the FOI Act itself had on the capacity of the Commonwealth to agree to keep documents confidential. That is, with access to documents becoming enforceable under the FOI Act, subject to its provisions, there could henceforth be no understanding that absolute confidentiality would be maintained. However, the Court noted that:

> 'there may remain a distinction, not discussed by the Tribunal, between those documents emanating from Searle which it provided because it sought a decision under the *Therapeutic Goods Act* and documents which, on the other hand, Searle voluntarily supplied to the Department on the understanding that the documents would be kept confidential.'

It may be that documents voluntarily provided are capable, or perhaps more capable, of being documents subject to a requirement of confidentiality. Conversely, documents required under statute are less likely to be subject to such a requirement.

Result

In the end, as the application of these principles all involved questions of fact, the case was remitted to the AAT to be heard and decided according to law. [SL]

The Courts

Meaning of 'work'

In *Braun v Minister for Immigration, Local Government and Ethnic Affairs* (10 December 1991) the Federal Court, constituted by Justice French, was required to consider a determination of non-compliance with a condition of a tourist entry permit. The condition was that no work be undertaken without the permission in writing of the Secretary of the Department. The effect of such a determination is that upon notification to the permit-holder the permit ceases to be in force.

Miss Braun was a German woman who had entered Australia on a 6-month visitor permit. After visiting friends on a station property in Western Australia, she decided to experience the station lifestyle on a neighbouring property where she had met a man and where the cook had just resigned. Having ample time and wanting to make herself useful, Miss Braun managed the cooking from time to time without being paid. A delegate of the Minister visited the station some time later and decided that she was engaged in work there, and issued a determination that she was in breach of a condition of her entry permit.

The delegate applied the definition of work in Regulation 2 of the Migration Regulations, being that:

> 'Work in relation to a visitor visa or a visitor entry permit means an activity that in Australia normally attracts remuneration.'

This definition was introduced to the Regulations apparently as a consequence of the decision of the Full Court of the Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Montero* [1992] *Admin Review* 11 in which work was accorded its ordinary meaning, drawn from the dictionary, in terms of exertion.

The Federal Court decided that the delegate's conclusion that Miss Braun had been working had been correct, whether the dictionary definition of work which applied when the permit was granted or the new, narrower definition had been relied on. Once the delegate had reached that conclusion there was no discretion as to whether or not to issue a determination of breach of condition because of factors personal to the applicant or of a compassionate character. The Court did state, however, that:

'It may be that circumstances can arise in which persons engage in activity of a domestic or social character which for the reasons expressed in the *Montero* case should not be seen as falling within the notion of work as used in the Regulations.'

When does an application cease?

In *Hamsher v Swift* (28 January 1992) the question when an application ceases to be on foot was considered. The major issue in the case was whether the 12 US citizens involved (the 12) were, by reason of their 1986 applications for permanent residence, within the transitional provisions of section 6(4) of the *Migration Legislation Amendment Act 1989* and thereby entitled to be considered for permanent residence under the law as it stood before 19 December 1989, when new migration provisions came into force. If not, there would be no basis for their applications to be considered under the amended law. All 12 applied in April 1986 to remain permanently in Australia.

No further official communications relating to these applications appears to have occurred until 1989. The Federal Court constituted by Justice French found that in September 1989, on the basis of several pieces of advice and correspondence given around that time, the Minister had refused to grant permanent entry permits to the 12, but that he had decided instead to grant temporary entry permits for 2 years and had undertaken that at the expiry of that period, applications for permanent resident status would be considered having regard to the 12 demonstrating a 'satisfactory record of residence' for that period.

In September 1991 the 12 were told by officers of the Department that changes to the migration laws meant there was no longer any basis upon which they could apply for permanent residence and that the applications they had recently put forward in August 1991 could not be considered, as no such category of entry permit as that applied for by the 12 existed any longer.

The Court held that the Minister, in refusing in 1989 to grant at that time permanent entry permits, foreshadowed that the exercise of this power could be reconsidered in 2 years. The 12 had thus been effectively offered a 2-year probation period with the prospect, though not guarantee, of a favourable consideration of a grant of permanent residence at the end of that period. That offer and the undertaking it implied was an outcome of the 1986 applications. The 12 were entitled to now rely on those applications and to have them considered under the law as it stood prior to the amendments.

Minister for Immigration, Ethnic Affairs and Local Government v Hamsher (1 May 1992) was the Minister's appeal to the Full Court of the Federal Court against the decision of Justice French. The majority view, of Justices Beaumont and Lee, was that the conclusion reached by Justice French, that in September 1989 the Minister had not finally determined the applications for permanent residence, was one that was open to him to make. They therefore let the decision stand. Justice Davies took the view that the advice and correspondence relating to the September 1989 decision disclosed not ongoing applications but a refusal of the existing applications with the possibility of further applications being made and considered at a later stage. He therefore held that the 12 were not entitled to have the law as it stood prior to 19 December 1989 applied to them, and that the applications made in 1991 had been correctly refused.

Nature of a visa

In *Li Fang v Minister for Immigration, Local Government and Ethnic Affairs* (29 January 1992) the Federal Court, constituted by Justice Hill, reviewed a decision to cancel Ms Li Fang's entry visa. Arguments about estoppel and natural justice were considered by the Court in relation to that decision.

Ms Li Fang had been approved to come to Australia on the sponsorship of her husband, who was residing in Australia at all relevant times on a temporary entry permit. Before the visa was issued by the Australian Embassy in Beijing, the sponsorship was withdrawn, with the husband asserting that the marriage was over. Ms Li Fang was not informed of the withdrawal prior to travelling and was refused entry at the Sydney airport. An instrument of cancellation of her visa was issued in Beijing on the morning on which she arrived in Australia.

It was argued that in these circumstances the Minister was estopped from cancelling the visa because Ms Li Fang had relied to her detriment, by leaving China to come to Australia, upon the fact that she had been issued a visa. The visa was

said to amount to a representation that, provided no new facts arose between its issuance and presentation, it would not be cancelled and that the holder of it would be granted an entry permit and permitted to enter Australia. The Court disposed of this argument by referring to the High Court case of *Attorney-General (NSW) v Quin* (1989-90) 170 CLR 1 where Chief Justice Mason stated:

> 'The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power...Accordingly, it has been said that "a public authority ...cannot be estopped from doing its public duty..." '

The Federal Court went on to state that the only representation constituted by the issuance of a visa is that the holder is entitled to the advantages which the law confers upon such a person, but subject to the provisions of the Act, including those relating to cancellation of visas and the requirement that a person obtain an entry permit before entering Australia.

It was also argued that Ms Li Fang had a legitimate expectation that she would continue to be in a category of persons entitled to enter Australia. The Court dealt with this as an element to be taken into account in determining whether an obligation exists to afford natural justice in a particular case, rather than as a head of substantive administrative review. This approach was said to follow the majority view in *Quin*, cited earlier.

Denial of natural justice was argued separately on the basis that at the time the visa was cancelled Ms Li Fang was not given an opportunity to be heard as to the matter found adverse to her, being either that her husband had withdrawn his sponsorship of her or that their marriage was finished. Having found that the husband no longer had the intention to cohabit on a permanent basis with his wife, the Court found that the two matters of fact in question here were external to Ms Li Fang and that in the present circumstances the principles of natural justice did not require that she be given an opportunity to be heard by the decision-maker.

Unreasonableness

Skidmore v Minister for Immigration, Local Government and Ethnic Affairs (6 February 1992) involved a review of an assessment as to Mr Skidmore's skill level and whether that assessment was unreasonable in a *Wednesbury* sense, amounting to an error of law.

After adopting the reasoning put forward by the Immigration Review Tribunal in *Tan* (26 July 1990) as to when a person has an 'appropriate record of employment in that occupation', Justice Einfeld, constituting the Court, had to consider whether the department's decision in this case was so unreasonable that no reasonable person could have made it.

His Honour noted that the test was a stringent one and 'not some type of casual and regularly available litigious finding'. He accepted that there were major constitutional, policy and public interest considerations that underlie the narrowness of the test. However, His Honour did not reject the role of courts entirely, as requested by the Minister:

> 'The [Minister] submits that this case is one that highlights the fact that the Department is a branch of government charged with balancing the interests of the community against the interests of the individual in a matter more appropriately dealt with by the administration rather than the courts. I am not sure that the matter can be put quite so grandly and with such appealing faith in government officials, but there can be no doubt that legitimate policy considerations will limit the availability of the ground relied on by the applicant here to relatively few cases.'

On the facts of the case, the decision was found not to be unreasonable. [SL]

No evidence

In *Curragh Queensland Mining Limited v Daniel* (14 February 1992) the Full Court of the Federal Court, constituted by Chief Justice Black and Justices Spender and Gummow, considered the 'no evidence' ground of review in the AD(JR) Act. The Court stated that the ground contained in section 5(1)(h) may be made out if and only if the case falls within either section 5(3)(a) or (b).

A concessional import tariff was sought by Curragh in respect of gearcases it had imported in order to supply coal under a contract. The basis for the concession was that there was no

reasonably available Australian equivalent to the imported product. The decision-maker rejected the application by Curragh after finding that Curragh could have negotiated a later delivery date for the coal than was provided for in its contract, and that there was therefore a possibility that an Australian manufacturer could have supplied the gearcases within a reasonable time. The Court found that there was a complete lack of evidence to support this finding.

In concluding that the finding in question was within the terms of section 5(3)(b) the Court made the following comments:

> 'If the existence of a particular fact is seen to be critical to the making of a decision then the decision will be based upon the existence of that particular fact. ... A decision may be based upon the existence of many particular facts; it will be based on the existence of each particular fact that is critical to the making of the decision. A small factual link in a chain of reasoning, if it is truly a link in a chain and there are no parallel links, may be just as critical to the decision, and just as much a fact upon which the decision is based, as a fact that is of more obvious immediate importance.'

As for the final words of section 5(3)(b), 'and that fact did not exist', the Court stated that this imposed the additional requirement that it must be established to the Court's satisfaction, by way of admissible evidence in Court but not limited to material that was before the decision-maker, that the particular fact did not exist. The Court went on to say that:

> 'The additional requirement will therefore preclude the making of an order of review in a case where, although there was no evidence or other material of a particular fact upon which the decision was based, it is clear enough that the particular fact did exist... the onus of proving the non-existence of a fact rests upon the applicant.'

Time limit for reasons in AAT

BTR PLC v Westinghouse Brake & Signal Company (Australia) Ltd (1992) 106 ALR 35 arose out of the AAT's review of a decision by the Australian Securities Commission to give an exemption in respect of BTR's takeover of Hawker Siddeley Group PLC. The case raised, albeit as a relatively peripheral issue, the question whether it is an error of law for the AAT to defer the giving of its reasons until some time after the making of its decision.

On this matter, Justices Lockhart and Hill concurred in the decision of Justice Beaumont:

> 'It is clear that the s. 43 [of the AAT Act] distinguishes between the *Tribunal's* decision on the one hand and its reasons on the other. It is also clear from the provisions of s. 43(2) that the *Tribunal* is bound to give reasons either orally or in writing. Because s. 43(2) does not expressly specify a time within which reasons, whether oral or in writing, must be given, the usual implication, that the *Tribunal* is bound to provide reasons within a reasonable time of the making of its decision should, in our view, be made...
>
> 'In my opinion, no breach of the duty, express or implied, embodied in s.43(2) has been made out in the present case. It may be accepted that the matter was urgent. But it was also complex. Reasons in writing were given approximately a fortnight after the making of the decision. The applicants have, in my view, failed to demonstrate that this amounted to a delay which went beyond what, in all the circumstances, was a reasonable time for the *Tribunal*, constituted as it was by three persons, to explain its process of reasoning in a matter which, on any view, was complicated and also of considerable importance.
>
> 'I would add that there is no substance in the suggestion that, in every case, the *Tribunal* is bound to give oral reasons when making its decision.' [SL]

Public interest litigation

The appropriate orders to be made, including cost orders, following the discontinuance of 'public interest litigation' was the subject of *Council of the Municipality of Botany v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories* (9 March 1992).

The Council had applied for review under the AD(JR) Act of decisions relating to the construction of a third runway at Sydney Kingsford-Smith Airport, but had subsequently discontinued the proceedings. Without expressing a final view on the matter, the Federal Court, constituted by Justice Gummow, stated that there was certainly a question whether, if properly advised, the Council would or should have instituted the proceedings.

The Court ordered that in these circumstances, the interests of justice in the case called for an order that the discontinuance operate as a bar to proceedings under the AD(JR) Act or the Judiciary Act for the same or substantially the same cause of action, reversing the ordinary operation of Federal Court Order 22 Rule 7.

It was also ordered that the Council pay the costs of the other parties, on the usual basis that the costs follow the event in the absence of special circumstances. In reaching this conclusion, the Court rejected the argument put forward by the Council that no order for costs should be made against it because this was 'public interest litigation' and that the Council represented the public interest. The Court stated that the discretion in section 43 of the Federal Court Act as to the award of costs is not controlled by any special categories, and agreed with the comments of Justice Burchett in *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166. There it was suggested that special circumstances might exist where individuals become involved in litigation in the public interest, and not for personal economic gain, due to the impact of such orders on individuals. The following statement by Justice Burchett was said to apply with additional force to the Council as a statutory body set up under local government laws with a wide range of functions:

> 'If a body is set up to pursue causes, which its founders consider to be in the public interest, and which may generally be in the public interest, by means including court proceedings against others, it does not follow that those proceeded against should be deprived of the ordinary protection of a right to an order in respect of their costs in the event the claims made against them prove unfounded.'

Administrative and legislative decisions

Sanyo Australia Pty Ltd v Comptroller-General of Customs (12 March 1992) raised two interesting issues: the distinction between administrative and legislative decisions for the purposes of the AD(JR) Act, and when a judicial review application will be out of time.

In June 1987, a commercial tariff concession order (CTCO) was made that exempted from duty scanning receivers. As part of a reform of the tariff system effective from 1 January 1988, the tariff item that included all receivers was split into two items, one for radio receivers and the other for television receivers. Under section 8(5) of the *Customs Tariff (Miscellaneous Amendments) Act 1987*, the Comptroller was required to prepare an instrument that would correspond items under the old tariff with items under the new tariff. This instrument would have effect such that other instruments, for example CTCOs, that referred to old items would be taken to refer to the noted items under the new tariff.

In preparing the instrument under section 8(5), the Comptroller corresponded the old receivers item to the new radio receivers item only. The effect was that the CTCO dealing with scanning receivers no longer exempted from duty television receivers.

Some three years after the section 8(5) instrument was made, Sanyo discovered the CTCO and contended that the section 8(5) instrument should have corresponded the old receivers item to both new items for receivers, namely radio and television receivers. If this had occurred Sanyo would have had the advantage of a CTCO.

The question arose whether the section 8(5) instrument was administrative, and thus subject to judicial review, or legislative, and thus immune. After noting several cases, Justice Davies, constituting the Court, stated:

> 'These cases emphasise the distinction between legislation which in general involves the laying down of general rules which have legal and binding effect and the taking of administrative action which, insofar as it has legal and binding effect, is taken in execution or application of the law and, insofar as it lays down general rules, tends not to have a legally binding effect but to lay down rules in the nature of policy or of guidelines.'

His Honour accepted the view that the individual conversion of all extant CTCOs, which are themselves administrative, would not be a legislative process. However, the process of doing this through an instrument which the legislation provided would have a general effect on all CTCOs was sufficient to make the instrument legislative, and therefore not subject to judicial review.

In addition, His Honour noted that, given the broad impact of CTCOs, the lapse of 3 years before making the application for review was sufficient to make the application outside the 'reasonable time' limit implied for judicial review applications under both the AD(JR) Act and section 39B of the *Judiciary Act 1903*. [SL]

Review of decisions to prosecute

Smiles v Commissioner of Taxation (13 May 1992) concerned the role of judicial review in decisions to prosecute.

Mr Smiles, a member of the NSW Parliament, conducted a consultancy practice. He had three informations laid against him regarding certain taxation statements, one alleging a breach of the *Crimes Act 1914* (Cth) and two alleging breaches of the *Taxation Administration Act 1953* (Cth). The intent of the application was to seek orders by way of judicial review, under both the AD(JR) Act and the Judiciary Act, to bring the prosecutions to an end. The substance of Mr Smiles' case was that he had been prosecuted only because of his high profile, for the purposes of publicity.

The Federal Court, constituted by Justice Davies, stated that a decision taken by the Director of Public Prosecutions to prosecute, which has been held in *Newby v Moodie* (1988) 83 ALR 523 to be a decision to which the AD(JR) Act applies, is now likely to be beyond the ambit of that Act following the High Court decision in *ABT v Bond* (1990) 170 CLR 321, where it was decided that a decision, to be a decision to which the AD(JR) Act applies, must be final and operative. The application was within the terms of the Judiciary Act, however, which allows the Federal Court to hear matters where an injunction is sought against an officer of the Commonwealth.

After considering several cases dealing with judicial review of decisions to prosecute, the Court resolved the instant case as follows:

> 'The approach taken in the cases I have mentioned is that a decision to prosecute taken by or on behalf of the Director of Public Prosecutions is unexaminable, but this does not prevent a court, certainly a higher court, from controlling legal proceedings so as to prevent abuse of process. Section 5 of the AD(JR) Act and s 39B of the Judiciary Act are not, however, appropriate vehicles for the general control of abuse of process in the court of a State. This is a matter for the courts of a State. As neither provision would avail the applicant, the application must fail.'

The Court went on to discuss the role of publicity in both the prosecution of taxation cases and the criminal justice system generally. It took the view that the effect of publicity likely to arise and the deterrent effect of a prosecution may properly be taken into account in the decision whether to prosecute, though it would not be appropriate to institute a prosecution merely for publicity purposes.

The Ombudsman

Failure to pay pharmaceutical benefits

In February a complaint was received by the Ombudsman relating to the failure of the Health Insurance Commission (HIC) to pay a pharmacist's claims made under the *National Health Act 1953*. The continuing failure to pay the claims meant that the pharmacist was unable to pay suppliers and would have to cease business. The pharmacist was apparently under investigation in relation to claims involving an amount much larger than that of the unpaid claims. The HIC had not invoked provisions of the National Health Act which would have entitled it to offset past overpayments against current payments.

The Ombudsman pointed out to the HIC that it may have been acting illegally and that by suspending payments it may have been prejudicing possible recovery in the future of past overpayments. Following the Ombudsman's intervention, HIC resumed payments to the pharmacist. Further investigation revealed that the main reason for suspending payments was the need by HIC to be satisfied that the claims were correct, which required it to undertake a great deal of detailed vetting. Despite the large amount of overpayments to the pharmacist, the HIC has not sought to recover the overpayments against current claims.

Act of grace payments

Complaints were received recently by the Ombudsman regarding two matters in which appeals were still before the AAT. Both complaints sought action by the Ombudsman in relation to act of grace payments. In each case the parties clearly did not understand that the Ombudsman's role is to investigate complaints about administrative actions and to recommend a remedy where defective administration is found, not to make orders for remedies or to act on behalf of claimants. Further, it did not seem to be understood that act of grace payments, where appropriate, can only be paid where there is no legal entitlement to a benefit or other valid legal claim.