reconsideration with directions that, unless the Department decided that the document was an exempt document under section 41, access was to be given in relation to VXV's personal affairs. It had not been argued that the documents might be exempt under any other sections.

The matter reached the Tribunal after access was again refused by the Department. When an officer of the Department informed the Tribunal that the Department intended to present a case that the documents were exempt under either or both sections 40 and 45 of the FOI Act, the Tribunal drew his attention to its previous decision and ruled that, in respect of the question whether VXV was to be given access to the documents if they were not exempt under section 41, the Tribunal was functus officio (a duty, having been discharged, cannot be discharged again).

The question to be determined therefore was whether or not the documents were exempt under section 41 as it stood at the time of making of the decision under review on the basis that disclosure of them would involve unreasonable disclosure of information relating to the personal affairs of any person. In the result access to the documents was denied on that basis by the AAT.

The Courts

Natural justice and remedies

In *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11, Mr Ainsworth claimed that he had been denied natural justice by the Criminal Justice Commission in relation to its inquiry into the introduction of poker machines into Queensland. The Full Court of the Queensland Supreme Court had determined that there had been no denial of natural justice because the Act establishing the CJC required the provision of procedural fairness only in "proceedings" and the CJC's report had not involved the carrying out of any "proceedings", by which the Full Court meant the carrying out of something akin to a hearing.

In a joint judgment, four Justices of the High Court, Chief Justice Mason and Justices Dawson, Toohey and Gaudron (Justice Brennan writing a separate judgment reaching the same result), determined that "proceedings" should not be confined to formal hearings. However, the judgment went further, not relying upon the particular provisions of the Act relating to procedure:

> "... a body established for purposes and with powers and functions of the kind conferred on the Commission and its organizational units is one whose powers would ordinarily be construed as subject to an implied general requirement of procedural fairness, save as to the extent of clear contrary provision."

The judgment made it clear that even if "proceedings" were to be narrowly defined, a duty of fairness would be implied in all areas involving the CJC's functions and responsibilities, complementing any express fairness provisions.

The judgment also determined that procedural fairness will operate to protect a person's reputation. In this case, without consulting Mr Ainsworth at all, the CJC had released a report that was highly critical of him and certain companies with which he was associated, making a recommendation that they not be permitted to participate in the gaming machine industry in Queensland. The report did not have any legal effect on Mr Ainsworth or the companies. The Court was required to consider what would be an appropriate remedy in this instance. It noted that mandamus could not lie because the CJC, which had in any event reported already, was under no duty to undertake to investigate the Ainsworth group of companies. Moreover, as the report had no legal effect, a writ of certiorari, which has the function of quashing the legal effect or consequence of decisions, was also inappropriate. The Court concluded that the appropriate remedy was to make a declaration. According to the joint judgment:

> "The present case involves no mere hypothetical question. At all stages there has been a controversy as to the Commission's duty of fairness. A report has been made and delivered... That report has already had practical consequences for the appellants' reputations. For all that is known, those consequences may extend well into the future. It is appropriate that a declaration be made in terms indicating that the appellants

were denied natural justice. That may redress some of the harm done." [SL]

Right to AAT review

The question whether there is a right to AAT review which may survive the repeal of an Act was considered by the High Court in *Esber v Commonwealth* (1992) 106 ALR 577. That case concerned the repeal of the scheme under the *Compensation (Commonwealth Government Employees) Act 1971* for the redemption of employees' compensation and the substitution of another scheme under the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*.

Before the new Act came into operation, Mr Esber had applied, in accordance with Part V of the 1971 Act, for AAT review of the decision not to allow him to redeem the Commonwealth's liability to pay compensation to him. It had been necessary for Mr Esber to apply for an extension of time in which to make his application, but that extension having later been granted (after the new Act came into operation), it was taken to have the effect that the review proceedings had been instituted at the earlier time.

Under the 1988 Act, Mr Esber would not have been entitled to obtain redemption. The majority of the High Court (Chief Justice Mason and Justices Deane, Toohey and Gaudron, Justice Brennan dissenting), held that the transitional provisions in the 1988 Act sufficed to ensure the continuance of the application to the AAT and the resolution of the entitlement to redeem in accordance with the 1971 Act.

The majority went on, however, to consider the application of section 8 of the *Acts Interpretation Act 1901*. The view was taken that Mr Esber had, at the time of repeal of the 1971 Act, a substantive right to have his application to the Tribunal determined pursuant to Part V of the 1971 Act. In the absence of a contrary intention, that right was protected by section 8 of the Acts Interpretation Act and survived the repeal of the 1971 Act.

Legally erroneous inference

In *Deputy Commissioner of Taxation v Blackman* (3 February 1992), the Federal Court, constituted by Justice Jenkinson, heard an appeal from a decision of the AAT in which the Tribunal had erred in its interpretation of the evidence.

In the hearing, the parties had agreed that a particular division of income occurring in 1986, by which all exertion income went to the person providing the services and non-exertion income was divided among other beneficiaries of the trust, was different to that in previous years. However, in its reasons the Tribunal found that the same basis of division had been used in previous years, resulting in a simple factual error.

The Court allowed the appeal on the basis that, in its reasoning process, the Tribunal had made a legally erroneous inference. The matter was remitted to the AAT to be decided according to law. [SL]

Binding promises as to procedure

In *Cox v O'Donnell* (5 February 1992), the Federal Court, constituted by Justice Neaves, had to consider whether a decision-maker's assurance as to the procedure he would follow was binding.

Mr Cox requested Lieutenant-General O'Donnell to make a determination, under section 37 of the *Defence Force Retirement and Death Benefits Act 1973*, that, at the time of Mr Cox's retirement, circumstances existed upon which he could have been retired on the ground of invalidity or of physical or mental incapacity to perform his duties. If such a determination were made, it would make Mr Cox eligible to receive an invalidity benefit.

Over a period of several years, during which extensive litigation occurred, Mr Cox sought but failed to obtain a lawful determination. However, the Court accepted that he was led to believe that, in making a determination, L-G O'Donnell would have a comprehensive and impartial medical review of Mr Cox's condition at the time of his retirement carried out by a medical practitioner who had appropriate qualifications and experience and who was independent in the sense that he was not a member of the Defence Forces, and that L G O'Donnell would take into account the report arising from the comprehensive medical review. This had not occurred in making of the determination that was the subject of these proceedings.

In setting aside the determination, the

Court noted:

> "...the doctrine of procedural fairness entitles [Mr Cox] to hold [L-G O'Donnell] to his agreement or undertaking that the procedure agreed to would be followed... It would be unfair to [Mr Cox] and inconsistent with good administration to allow [L-G O'Donnell] to do other than follow the agreed procedure. To require [L-G O'Donnell] to follow that procedure involves no conflict with the statutory duty imposed upon him by s.37." [SL]

Procedural fairness – bias

Richmond River Broadcasters v Australian Broadcasting Tribunal (6 March 1992) dealt with the question of apparent bias in tribunal proceedings. This issue arose in connection with an inquiry by the ABT into whether the operations of incumbent radio licensees in the Lismore district would remain commercially viable if a new licence were to be granted.

The substantial question raised by Richmond River, which was an incumbent radio license-holder, was whether the issuing by Mr O'Keefe, constituting the ABT for the purposes of the inquiry, of a "preliminary view" that the incumbent licensees would remain commercially viable meant that he should be disqualified from concluding the inquiry because of apparent bias.

The "preliminary view" was expressed in documentary form. The words "preliminary view" appeared in the heading to the document, which over some 21 pages set out findings which were often referred to as "conclusions" without qualification. On the basis of these findings Richmond River argued that an objective bystander would reasonably apprehend that the critical issue of commercial viability had been pre-determined. It therefore applied under both the ADJR Act and section 39B of the Judiciary Act for review of the decision of the Chairman of the ABT that Mr O'Keefe would continue to conduct the inquiry.

The Federal Court, constituted by Justice Wilcox, rejected the Richmond River argument. The Court noted that the procedure adopted, involving the expression of a preliminary view to be followed by further submissions from the parties prior to hearing of the matter, had been made known in advance to the parties, and that the "preliminary view" document had invited responses from the parties. In the course of finding that apparent bias had not been established, the Court stated that:

> "The essence of the doctrine of apparent bias is that an objective bystander would reasonably apprehend that the decision-maker had a closed mind – not an uninformed mind – on the relevant question."

The Court went on to discuss as follows the practice whereby judges sometimes indicate to counsel their impressions of a case during a hearing, and extended the reasoning behind the practice to tribunals.

> "Where a judge takes this course nobody would suggest that the judge ought then to be disqualified from concluding the case. The reason is that the judge is merely expressing a tentative view and inviting a response which he or she may take into account in determining whether to adhere to, or abandon, that view in the final decision. The readiness to listen and be persuaded is the critical matter.
>
> "There is no reason in principle why an administrative body such as the Australian Broadcasting Tribunal should not take a similar course. In a matter as complex as commercial viability it is helpful for any preliminary view to be carefully considered and fully stated. It is advantageous for it to be stated in writing, so that it may be more easily digested, and responded to, by the parties. As with the case of a judge, what is critical is that, until the issue is finally decided, any view which is expressed be merely a preliminary view, with a clear invitation to the parties to respond critically to it, and that the decision-maker be genuinely willing to consider on their merits any responses which might be made. I do not believe that a person who takes this course would be regarded by an objective observer as unable to bring an impartial and unprejudiced mind to the issues to be resolved. On the contrary, such a decision-maker would be seen as conscientiously grappling with those issues, in a way designed to extract maximum assistance from the parties."

AAT Jurisdiction over Corporations Law

In *Hongkong Bank of Australia Ltd v Australian Securities Commission* (10 June 1992), the Full Federal Court, constituted by Justices Lockhart, Gummow and O'Connor, considered the interpretation of section 1317B of the *Corporations Law*, which defines the scope of the AAT's jurisdiction to review decisions made under that law.

Section 1317B(1) of the *Corporations Law* provides:

> "Subject to this Part, applications may be made to the Tribunal for review of a decision made under this Law by:...
>
> (b) the Commission..."

The ASC authorised two persons to apply to the Court, under section 597(2) of the *Corporations Law*, for orders in relation to the examination of persons concerned with a corporation. The question arose whether the ASC's decision to authorise those persons was a reviewable decision.

The only specific reference to the power of the Commission to authorise persons to make section 597(2) applications appears in section 597(1):

> "In this section, a reference, in relation to a corporation, to a prescribed person, is a reference to an official manager, liquidator or provisional liquidator of the corporation or to *any other person authorised by the Commission* to make applications under this section..." (emphasis added).

The Court thus had to determine whether a decision to authorise a person to make applications was a "decision made under this Law", within the meaning of section 1317B.

In doing so, the Court also considered whether section 11 of the *Australian Securities Commission Act 1989*, which deals with the functions and powers of the ASC, was the source of power to make the authorisations:

> "(1) The Commission has such powers and functions as are conferred on it by or under the following:
>
> (a) the *Corporations Act 1989;*
>
> (b) the Corporations Law of the Capital Territory;
>
> (c) this Act
>
> ...
>
> (4) The Commission has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions."

The Court considered the character of decision-making powers that are expressly conferred upon the ASC by the *Corporations Law*, concluding that decisions made in the exercise of such powers are subject to AAT review in accordance with section 1317B. However, the Court drew a distinction between provisions in which the powers of the ASC are directly and expressly conferred and other provisions that, like section 597 (1), are "not expressed as a dispositive provision creating rights or liabilities or reposing powers or functions."

The Court went on to explain the distinction:

> "Sub-section 597(1) specifies the membership of a class in which, together with the ASC, is reposed the power or function of making certain Court applications. Membership of the class includes those "authorised" to a certain effect by the ASC. It is consistent with this explanatory or definitional character of sub-s.597(1) to treat the phrase "authorised by the Commission" as a descriptive of persons who have attained that state or condition by the exercise of a function or power of the ASC which has a legislative source outside the sub-section."

That is, as the power to make authorisations having effect under section 597 was found to arise outside the *Corporations Law*, probably in section 11(4) of the ASC Act (although the Court did not decide the point), decisions to authorise do not fall within the ambit of section 1317B, quoted above.

The key criterion is whether the provision expressly confers the power upon the ASC as opposed to a provision that suggests that the power is sourced elsewhere. If the power is sourced elsewhere, section 1317B may not apply, leaving the decision-making power not subject to review by the AAT.

The effect of this decision appears to be that the scope of AAT review of ASC decisions under the *Corporations Law* is

substantially narrower than previously thought. A matter in which this narrow interpretation is applied is *Re Creswick,* which is reported in the Administrative Appeals Tribunal section of this issue of *Admin Review.* [SL]

Review of committal decisions

The NSW Court of Appeal considered the ambit of the AD(JR) Act in relation to committal decisions in *Buckett v Commonwealth Director of Public Prosecutions* (unreported, 3 July 1992).

Mr Buckett had been committed for trial by the Local Court in Sydney on three counts under the *Proceeds of Crime Act 1987* (Cth). He commenced proceedings by way of summons seeking to have the committal order quashed. Justice Allen of the Supreme Court ruled that the Court had no jurisdiction to review the order for committal, and it was that decision that was appealed to the Court of Appeal.

It was conceded on behalf of Mr Buckett that the magistrate's committal order was a decision of an administrative character within section 3(1) of the AD(JR) Act. The Court of Appeal, constituted by Justices Sheller, Cripps and Samuels, held that, following *Lamb v Moss* (1983) 49 ALR 533, this concession was correctly made. It had also been conceded that "review" of the decision within the meaning of section 9(2) of the AD(JR) Act had been sought. The Court of Appeal held that it followed inevitably that under section 9(1) of the AD(JR) Act, which excludes the jurisdiction of State courts in relation to decisions to which that section applies, the NSW Supreme Court had no jurisdiction to review the magistrate's decision.

Later inconsistent reasons

In *Ma v Commissioner of Taxation* (30 July 1992), the Federal Court, constituted by Justice Burchett, had to consider, among other matters, whether the AAT may add entirely fresh reasons in writing more than a month after it had given oral reasons.

During the hearing in the AAT, the Tribunal, which was constituted by Deputy President Gerber, intervened in and stopped both Mr Ma's examination-in-chief and his cross-examination by the Commissioner. The Tribunal, in giving its oral reasons, stated that Mr Ma's case suffered from a major flaw in failing to provide certain evidence as to the source of income and affirmed the decision under review. Upon hearing that Mr Ma intended to appeal, without having had an application from either party and without providing any opportunity for submissions as to whether it should do so, the Tribunal forwarded to the Commissioner's solicitor an amended version of the original oral reasons together with a very large "addendum". The reasons provided therein were substantially different from those originally given.

In considering the effect of section 43 of the *Administrative Appeals Tribunal Act 1975,* the Court stated:

> "Sub-section 1 elaborates the nature of the decision the Tribunal may make, requiring it to be 'a decision in writing'. Sub-section 2 then provides: 'the Tribunal shall give reasons either orally or in writing for its decision.' That lays down a clear alternative – although the decision is in writing, the reasons may be given either orally or in writing. Once one of those alternatives has been adopted, the decision in writing has been clothed with reasons and is complete... There is no suggestion in this that the Tribunal can later strip the decision of its original reasons to replace them with new ones."

In reviewing the Tribunal's original oral reasons, the Court determined that the Tribunal had failed to consider at all the way in which Mr Ma's case was put, preferring to deal with "what can only be regarded as a misleading caricature of his case". This failure, which amounted to an error of law, required the case to be remitted to the AAT. In light of the circumstances, namely that Dr Gerber was prepared to apply to Mr Ma "by way of a Shakespearian cliché, the term 'idiot', and elsewhere in the addendum to say that 'the oral evidence of Mr [Ma] isn't worth the paper it is written on', and to describe him as 'an unmitigated liar whose evidence I cannot accept' ", the Court ordered that upon remittal the Tribunal be differently constituted. [SL]

The Ombudsman

Public awareness survey

The Council earlier in the year contributed a small amount of funding towards a survey of public awareness of administrative review bodies conducted on behalf of the Ombudsman in June 1992. The survey showed that the following percentages of people aged 16 and over were able to recognise the names of the respective institutions:

- Commonwealth Ombudsman – 54%
- State and Territory ombudsmen (average) – 60%
- Administrative Appeals Tribunal – 39%
- Social Security Appeals Tribunal – 57%
- Immigration Review Tribunal – 48%
- Veterans' Review Board – 45%
- Federal Court – 70%

The survey's chief interest lies in the detailed results showing correlations of knowledge with other characteristics. For example, although only 45% of people had heard of the Veterans' Review Board, 87% of recipients of service pensions recognised its name. Significantly more men than women appear to be aware of the Ombudsman. Lack of knowledge of the Ombudsman is directly correlated to indicators of disadvantage such as: recent arrival in Australia; English not the person's first language; receipt of income support from the government; limited education; youth; and low income level generally. The Ombudsman intends to use the information from the survey to target specific groups for promotional activities during the coming years and to measure the effectiveness of those activities. The planning of such activities on a significant scale will await the Government's response to the Council's Report No 34 on access to administrative review.

Regional information register

The Ombudsman's Office is in the process of establishing a register of Ombudsman-related information to be made available to Ombudsmen in the Australasian and Pacific region, and possibly for purchase by other bodies interested in the subject. The information will be available as hard copy and on computer disc.

Consultants have begun developing the data base and indexing the information. Once the project is established, funds from subscriptions and sale of the register will enable it to be maintained and updated. The establishment of the project is being funded by the Australian International Development Assistance Bureau and by the New Zealand Government in recognition of the assistance it will provide to Pacific Ombudsmen.

Detainees and duty of care

The Ombudsman considered the question of duty of care in the context of a complaint against Australian Federal Police (AFP) watch-house officers that a lack of immediate medical attention had caused additional and unnecessary scarring to the complainant.

In their community policing role, AFP officers often detain people affected by alcohol for their own protection. Many have sustained injuries either from fighting or from falling over while intoxicated. Often they refuse medical attention when it is offered. Watch-house sergeants do not generally call the medical officer on duty if the detainee has refused medical attention.

In the present case, medical evidence showed that there would not have been a difference in the amount of scarring because of the delay. However, the case highlighted the problems that can arise when watch-house officers are not trained to recognise serious injuries, particularly when they are not obvious. It also showed an anomaly between the AFP's standing orders and the local guidelines, which give greater discretion to watch-house officers on when to call the duty medical officer.

Members of the Ombudsman's Office and the AFP had discussions on how best to protect both detainees and officers. The Ombudsman has been informed that the AFP is updating its procedures and standing orders, which will include a detailed medical sheet on pre-existing medical conditions to be filled out by watch-house officers.

Recovery of overpayments

The Ombudsman's Office receives a steady flow of complaints relating to recovery of past overpayments of benefits.