did not make her decision a decision of the Commission. The decision of the ASC officer acting under the delegation was deemed to be the decision of the Minister for Finance because of section 34AB of the *Acts Interpretation Act 1901* and section 70A(2) of the Audit Act.

The Tribunal pointed out that section 1317B of the Corporations Law allowed the Tribunal to review decisions under the Corporations Law made by the Minister, the ASC and the Companies and Auditors Liquidators Disciplinary Board. The Minister is defined to be the Minister for the time being administering the Corporations Law — at that time the Attorney-General.

Section 1317B did not empower the Tribunal to review the decision of any minister other than the Attorney-General. Nor did it empower the Tribunal to review decisions made by a staff member of the ASC under a delegation by another minister. It was not sufficient for the purposes of section 1317B that the decision was made under another enactment but in respect of the Corporations Law.

The Tribunal rejected the argument that an estoppel arose because the respondent informed the applicant by letter of the decision not to waive the late lodgment fee and stated that the decision could be reviewed by the Tribunal. The Tribunal considered that an erroneous statement by the respondent as to the Tribunal's power to review decisions did not act as an estoppel so as to increase the Tribunal's jurisdiction. "Estoppel will not operate so as to contradict a statute or to extend the authority of a decision-maker beyond the powers given by statute" (Davies and Branson JJ in *Minister for Immigration and Ethnic Affairs v Polat* (1995) 37 ALD 394). [GL]

Freedom of Information

Application for declarations under section 62(2) of FOI Act - discretion of Tribunal - adequacy of section 26 statement of reasons for decision

Under Section 26(1) of the *Freedom of Information Act 1982* (Cth) (the Act) a decision-maker who refuses to grant access to a document in accordance with a request under the Act is required to give the applicant a written statement of reasons for the decision. The statement of reasons must state the findings on any material questions of fact and refer to material on which the findings are based as well as stating the reasons for the decision. If the applicant considers that the content of the notice given under section 26(1) does not comply with the requirements set out in that section they may apply to the AAT for a declaration under section 62(2) of the Act that the notice does not satisfy the requirements of section 26(1) and requiring the person responsible for giving the notice to fully comply with the statutory obligation in section 26(1).

The AAT matter, *Luton and Commissioner of Taxation* (Unreported, 19 February 1996) concerned an application for a declaration under section 62(2) of the Act in respect of a notice furnished to the applicant by an officer of the Australian Taxation Office (ATO) pursuant to section 26(1) of the Act.

The applicant had sought access to a particular document and all documents utilised or collected in the process of compilation of the particular document. He had also sought access to documents and information in relation to the implications of a recent High Court decision for the administration of child support legislation. The statement of reasons given to the applicant under section 26(1) of the Act identified a number of documents falling within the first part of the request and claimed that the documents were exempt from release under the Act. In relation to the second category of documents requested the section 26(1) statement prepared by the ATO read:

> You are advised no such document exists as the [High Court] case has not been considered by the office from the perspective of the Child Support legislation. Accordingly, I am obliged to deny access to the documents relevant to this part of your request.

After the provision of the statement of reasons under section 26(1) and lodgment of the application to the AAT, the ATO provided the applicant with all documents in its possession that it considered to be within the terms of the request.

Before examining the statement in issue, the Tribunal (Senior Member Bayne) considered the wording of section 62(2) of the Act and whether it gave the Tribunal a discretion to make a declaration or whether the Tribunal would be required to do so if the specified grounds were made out. The Tribunal decided that the provision confers on the Tribunal a discretion to make a declaration and that there may be situations in which no real purpose would be furthered by the Tribunal making a declaration. The Tribunal considered that the present case, in which the statement dealt with subsequently released documents, appeared to be such a situation and declined to make a declaration in relation to the adequacy of the reasons statement concerning the released documents.

Despite the ATO's view that all documents falling within the terms of the request had been released, the applicant was not satisfied and maintained that there must be further documents. The Tribunal considered that for the purposes of section 26(1) of the Act the ATO's response was a decision refusing to grant access to a document in accordance with the request. Therefore, the Tribunal went on to consider the adequacy of that part of the statement of reasons given by the ATO which set out the ATO's view that there were no other documents in its possession falling within the scope of the request.

The Tribunal first considered the nature of the test of adequacy for the purposes of section 62(2). It was noted that the provision may enable the Tribunal to assess the justifiability of the decision(s) which are the subject of the statement of reasons or, alternatively, it may enable the Tribunal to examine whether the reasons given are an adequate explanation of the reasons of the decision-maker on the ground that an applicant could understand the basis for the decision(s) which are the subject of the reasons. The Tribunal considered the latter interpretation to be the correct test for determining the adequacy of the reasons.

The Tribunal then, in some detail, examined each of the three individual elements set out in section s26(1) of the Act, that the notice in writing of the decision shall:

- state the findings on any material questions of fact;
- refer to the material on which those findings were based; and
- state the reasons for the decision.

The Tribunal concluded that what the first element set out in section 26(1) refers to are 'those *findings of primary facts which are of some importance in the process of reasoning* to the conclusion that an ultimate fact exists ... [t]he importance of a primary fact ... to be assessed primarily from the perspective of the person who will be provided with the reasons statement.' The second element requires only a reference to the evidence or other material on which the findings on material questions of fact are based and that how that reference should be made is a matter for judgment in the particular matter. The Tribunal said that the third element requires a linking up of the findings on material facts to the decision-maker's understanding of the law relevant to the decision and an exposé of reasoning that demonstrates why it is that the law justifies the decision reached.

The Tribunal noted that in the present case, the ultimate fact is whether there exists a document fitting the description in the FOI request in the possession of the agency concerned. Preparatory to finding this ultimate fact the agency could make certain kinds of findings of fact such as that concerning the extent of searches made in order to demonstrate that there are no such documents in its possession. The agency had not done so in this case.

The Tribunal found that the statement of reasons given to the applicant after the decision was made was a bare statement of the ul-

timate fact that no such documents existed and that it did not satisfy the elements of section 26(1) of the Act. The Tribunal said that in the interests of public administration and in the interest of the applicant, the ATO should furnish the applicant with a further statement of reasons that adequately satisfies the requirements of section 26(1) of the Act. [GM]

The Courts

Federal Court - s 43 AAT Act - statutory obligation on AAT to give reasons for decision

In *Australian Postal Corporation v Wallace* (Unreported, 26 February 1996) the Federal Court (Justice Tamberlin) considered whether the AAT had sufficiently complied with its obligations under section 43(2) and section 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). It was alleged by the appellant that the Tribunal had failed to give reasons or sufficient reasons for its decision, or failed to include findings on material questions of fact on which those findings were made because, among other things, the AAT had simply given a bald statement of preference for certain medical evidence over other medical evidence.

The AAT had been required to consider issues concerning the applicant's incapacity for work as the result of injuries suffered by her whilst in the employ of the Australian Postal Corporation. The Tribunal had to consider whether the applicant (the respondent in the Federal Court proceedings) continued to suffer the effects of the injury, whether she was incapacitated for work as a result of that injury and whether the nature and conditions of the applicant's employment resulted in injury or aggravation of a pre-existing condition.

The AAT's reasons for decision listed the exhibits tendered at the hearing and referred to the fact that oral evidence was given by a number of witnesses. There was conflict between the medical evidence put to the AAT by the applicant's treating specialist and other treating doctors (in her favour) and that given by specialists called by the respondent employer, which did not support the applicant's claim. The AAT summarised and provided some quotations from the medical evidence but did not evaluate or discuss that evidence. The Tribunal stated that it preferred the evidence of the applicant's treating doctors and set aside the decision under review.

The appellant in the Federal Court claimed that the AAT had made an error of law in that it failed to give reasons for its preference of certain medical evidence over other medical evidence and also failed to consider other aspects of the applicant's medical and work history as well as medical opinion regarding the applicant's work capacity.

The Federal Court noted that in *Savas Vasili v Australian Telecommunications Corporation* (Unreported), 12 December 1991, the observations by von Doussa J supported the conclusion that, 'where the opposing medical views are clear-cut and differ on precise issues, merely stating a preference can be sufficient to disclose the reasoning process leading to the findings of fact based on the opinion.' However, this was not seen to be the case in the matter under appeal as there were aspects of the applicant's medical history raised in evidence that had not been referred to by the treating doctors whose evidence had been preferred. In the Federal Court's opinion, these matters called for 'considered expert opinion and some analysis by the decision-maker.' The Federal Court did not think that this was a case in which the reasons for the Tribunal's preference of the evidence by some expert witnesses over that of others could be inferred from the content of the decision read as a whole.

The Federal Court cited the broad principles which underlie the proper approach to a determination of sufficiency of reasons, the adequacy of findings, or the sufficiency of references to evidence or material before the decision-maker laid down by Sheppard J in *Commonwealth v Pharmacy Guild of Australia* [(1989)91 ALR 65 at 88]. Among other things,