The Courts

Common Law Obligation to Give Reasons

The N.S.W. Public Service Board is obliged to provide reasons for certain decisions in a promotion appeal, despite the absence of an express statutory requirement (such as section 13 of the Commonwealth AD(JR) Act) to do so, according to a majority of the New South Wales Court of Appeal in Osmond-v-Public Service Board of N.S.W. (21 December 1984). The President of the Court, Justice Kirby, emphasised in his judgment that the requirement to give reasoned decisions was not a novel principle - it was an aspect of the established doctrine that powers which affected individual rights and interests must be exercised fairly.

In a dissenting judgment, Justice Glass suggested that the presence of Commonwealth and Victorian legislative initiatives in the area of administrative law, which include statutory requirements that reasons be given upon request, merely underlined the deliberate nature of the failure of the New South Wales Government to adopt similar proposals for reform (NSW Law Reform Commission Report No. 16, Appeals in Administration and P. Wilenski, Review of New South Wales Government Administration, Interim Report 1977 and Unfinished Agenda 1982). In these circumstances, his Honour concluded that the Court should not fill a gap created by legislative inaction.

Statement of Reasons Under the AD(JR)Act

A request for a statement of reasons before a decision is given is not a request within the meaning of sub-section 13(1) of the AD(JR)Act according to the Federal Court in Lally-v-West (5 November 1984).

Discretion to Refuse Relief and Jurisdiction of State Courts

The Federal Court's discretion to refuse relief for the reason that adequate provision is made elsewhere for review was invoked in Woss-v-Jacobsen and Anor. (30 October 1984). The Court held that a full appeal was available to the Supreme Court of Western Australia under section 19 of the Service and Execution of Process

Act 1901, and that that Court's jurisdiction was not ousted by section 9 of the AD(JR)Act.

Time Limit for Applications for Review

An application is in time if a request for a statement of reasons under section 13 of the AD(JR)Act is made within 28 days of the relevant decision, and the application is made within 28 days of the furnishing of a document which complies with the section 13 request: Herlihy-v-Minister for Foreign Affairs (16 November 1984). This case highlights some potential practical difficulties in not being able to ascertain with any certainty whether an adequate statement of reasons has been furnished and, consequently, when the 28 day period begins to run within which an application must be made.

Deportation Orders and Natural Justice

In Kioa and Ors-v-West (1984) ADMN 96-032 (CCH Federal Administrative Law Reporter) the Full Federal Court held that, in making deportation orders against two overstaying immigrants, the decision maker was not obliged to abide by the rules of natural justice, even though the decision would affect a third party, the Australian-born child of the prohibited immigrants. The High Court has granted special leave to appeal in this case and it is likely that the Court will take the opportunity to consider such matters as the authority of its earlier decision in Salemi-v-MacKellar (No. 2) (1977) 137 CLR 396, and whether all decisions within the ambit of the AD(JR) Act are subject to the requirements of natural justice irrespective of the position at common law.

Scope of Review under AD(JR)Act

Two judgments were recently handed down by the Federal Court which further defined the requirement under the AD(JR)Act that the decision to be reviewed must have been made 'under an enactment'.

In the first case, Mabey-v-Australian Film Commission (27 November 1984), it was held that a decision to terminate the applicant's employment was an exercise of a statutory power whether or not in accordance with the terms of his contract of employment. The Court stated, however, that if the decision had been made pursuant to the contract alone, the application would fail, as the decision in Chittick-v-Ackland (1984) 53 ALR 143 was confined to cases where the decision had been made pursuant to a provision created in the exercise of a

statutory authority, as distinct from an agreement by the parties.

A decision refusing refugee status was held to be a decision 'under an enactment' by the Federal Court in Mayer-v-Minister of Immigration and Ethnic Affairs (10 October 1984). The Court held that a decision relating to recognition as a refugee, as defined in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol thereto (neither of which has the force of law in Australia), was a decision which had to be made prior to determining whether a permanent entry permit would be granted under the Migration Act 1958. This view was followed in Sidhu-v-Minister for Immigration and Ethnic Affairs (5 November 1984), however, an appeal has been lodged in the Mayer case.

Statistical Trends

As the table below indicates, there has been a continuing decrease in the number of AD(JR) applications made with respect to the Public Service Act 1922, and a marked to steady increase in other jurisdictions such as customs, taxation, broadcasting and immigration.

Jurisdiction	No of Applications under the AD(JR) Act			
	Oct 1980- Dec 1981	1982	1983	1984
Income Tax Assessment Act 1936	-	5	25	42
Customs legislation *	3	9	6	35
Migration Act 1958	14	26	33	36
Public Service Act 1922	7	31	15	12
Broadcasting and Television Act 1942	1	5	4	7
Other	55	42	81	92
TOTAL	80	118	164	224

* Includes legislation relating to dumping and countervailing duties

Freedom of Information

Restriction on Publication of Reasons for Decision

The AAT found that there were not reasonable grounds for the claim that all documents covered by a conclusive certificate were exempt from access in the case Re Bracken and Minister of State for Education and Youth Affairs (7 November 1984). However, Deputy President A.N. Hall interpreted paragraphs 58C(3)(b) and 63(2)(a) of the FOI Act as preventing him from publishing the Tribunal's full reasons for decision in the case. But when the Minister subsequently accepted the Tribunal's recommendation and revoked the conclusive certificate, the restriction on the publication of the Tribunal's reasons for decision was lifted.

In the case Re Anderson and Department of Special Minister of State (26 October 1984) the AAT found, except in relation to one document, that reasonable grounds existed for the claim that the documents covered by the conclusive certificates were exempt from access. The Tribunal also prohibited publication of the full reasons to the applicant (but allowed publication to his legal advisers). However, the AAT directed that various minor amendments be made to the reasons for decision in order that they could be published generally.

Access to University Records

A decision was handed down in James & Others and Australian National University (23 November 1984) in favour of five former history honours students who had sought access to their assessment documents. The Tribunal held that there was a public interest in the right of the individual to have access to documents relating not only to the affairs of government but also to the affairs of the individual making the request.

Victorian Ombudsman's Investigation Documents

The Victorian County Court in Deasey-v-Geschke (1 November 1984) held that documents relating to the investigation of a complaint were exempt from access under the confidentiality exemption of the Victorian FOI Act. Judge Hassett distinguished the Commonwealth and