FEDERAL COURT APPEALS

	77/78	78/79	79/80	80/81	81/82	82/83	83/84	84/85	85/
Discontinued	1	1	4	1	4	8	6	12	2
Struck out	–	–	–	1	3	–	2	–	–
Dismissed	–	9	4	6	8	16	17	30	9
Allowed	–	–	–	–	1	1	2	3	9
Allowed and Remitted to AAT	1	1	1	2	5	2	9	7	7
Total	2	11	9	10	21	27	36	52	27
Case stated	–	–	–	–	2	–	–	–	–

Freedom of Information

Costs under the FOI Act

In Hounslow v Dept of Immigration and Ethnic Affairs (20 December 1985), a freedom of information matter, the Federal Court set aside so much of a decision of the Administrative Appeals Tribunal as related to the question of costs and remitted the matter to the Tribunal to be re-heard. The applicant had sought access to various documents relating to immigration matters. Access had been partially granted but, shortly before the date on which the matter was to come before the Tribunal, the Department had released further material and the applicant had been satisfied with this further disclosure.

The Tribunal had been asked to make a recommendation that the applicant's costs be paid by the Commonwealth pursuant to section 66 of the FOI Act and was satisfied that the applicant had met the statutory conditions necessary to enable it in its

discretion to make such a recommendation. Nevertheless it declined to make the recommendation. The applicant claimed the respondent had delayed unreasonably, but the Tribunal had held that the decision of the respondent had not been unreasonable and it had not been demonstrated that payment of the costs would have caused the applicant financial hardship. To make a recommendation in this case, where acceptable access had eventually been granted, would be to discourage parties from reaching an agreement that avoided the necessity of a full hearing, the Tribunal had ruled.

Mr Justice Sweeney in the Federal Court held that the Tribunal had erred in law by taking into account the wrong decision - when it had considered "the reasonableness of the decision reviewed by the Tribunal" (section 66(2)(d)) it had had regard not to the decision to deny access but to the eventual decision to grant it. It had also failed to take into account a relevant consideration, namely that a recommendation that the costs of an applicant be paid would be likely to shorten rather than lengthen proceedings by encouraging respondents to make prompt decisions.

Public interest under section 33

A claim of exemption under section 33(1)(a) of the FOI Act has been upheld by the Tribunal on the ground that disclosure could reasonably be expected to cause damage to the international relations of the Commonwealth. In Re O'Donovan and Attorney-General's Department (29 November 1985) the applicant had sought access to part of a document containing information communicated in confidence by the Ontario Police to the Commonwealth Chief Censor. The information concerned the production and distribution of pornography and derived from confidential sources of the Ontario Police. The Censor had subsequently given evidence of the substance of the information to a Senate Committee and that evidence had formed part of the public transcript. The Canadian Government strongly objected to disclosure.

The Tribunal ruled that disclosure could reasonably be expected to cause damage in at least two important respects: it could have repercussions for the Ontario Police in relation to confidential sources of information, and it could result in a greater reluctance on the part of the Canadian Government to channel sensitive information to the Australian Government or its agencies in the future.

Contrary to some earlier decisions of the Tribunal, it was held in this case that there was no scope under section 33 for the balancing of facets of the public interest. The words of the section focus attention specifically on the aspects of the public interest set out in the section, to the exclusion of

other relevant interests, the Tribunal ruled. Where any of those grounds was made out, then it was not open to the Tribunal to find otherwise than that disclosure would be contrary to the public interest within the meaning of section 33.

Charges - no jurisdiction to review remission

The Tribunal decided that it did not have jurisdiction to review a decision refusing the remission of charges in a case where a request for access and a request for the remission of any charges that might be imposed had been made concurrently. In Re Waterford and Attorney-General's Department (29 November 1985) the applicant had sought access to "documents relating to recent Government decisions about reducing the cost of administering FOI legislation" and had applied for the remission of any charges. At the hearing the Tribunal pointed out that technically the application for remission was premature. At the time of the application, the applicant had neither paid any charges nor been notified of any liability, and the Tribunal found that the scheme of the FOI Act contemplated a request for remission only after notification of the liability to pay. A decision in accordance with the Charges Regulations is quite separate from the discretion to remit that charge.

The Tribunal rejected the argument of both parties that as an incident of reviewing a decision in regard to liability to pay charges (section 29), it was open to the Tribunal to exercise the power of remission available to the agency (section 30). The Tribunal referred to this as a type of indirect review and was not convinced that it had power to review in this way a decision that it was not able to review directly. It said that within the scheme of the FOI Act, the power of remission was not available to the agency at the time when a decision whether or not to impose charges was being made, and as it was not available to the primary decision-maker at that time, it was not normally available to the Tribunal.

The Tribunal allowed the application for review to be amended so that review was sought of a decision to impose charges, thus bringing the application within the Tribunal's jurisdiction. The Tribunal also adverted to the confusion and waste of resources that could result from a possible overlap between the discretionary elements involved in a decision to impose charges and a decision to remit those charges, the former being reviewable but the latter not.

Different departments, different approaches

Re Dillon and Department of Treasury and Re Dillon and Department of Trade (7 February 1986) concerned identical requests for documents relating to the Argyle diamond mines but reflect a divergence of approach to such matters by the respondent departments. The Treasury issued a conclusive certificate (section 36(3), FOI Act), made various claims of exemption and did not volunteer the documents in issue to the Tribunal, while the Department of Trade did not issue a certificate and volunteered the documents. In the Trade matter, the exemptions were largely upheld because the information which would have been disclosed had been provided in confidence by companies and state and foreign governments. In reaching this decision, the Tribunal placed considerable evidential weight on the documents themselves. In the Treasury matter, the Tribunal was generally unable to reach a state of satisfaction that disclosure would be contrary to the public interest on the evidence adduced and required production of the documents.

Considerable attention was paid to the effect of a certificate upon the order of proceedings and it was decided that the non-certificated claims of exemption need not be considered before requiring production.

In Re Lordsvale Finance Limited (No. 2) and Department of Treasury (7 February 1986), where access to documents relating to a foreign takeover proposal was refused by the Foreign Investment Review Board, the Treasury had also issued a certificate. However, the Tribunal required production of the documents, not being satisfied that there existed reasonable grounds for the claim that disclosure would be contrary to the public interest. It also considered various facets of the public interest.

Commonwealth Ombudsman

Reports to Parliament

The Acting Ombudsman has expressed his concern that reporting to Parliament pursuant to section 17 of the Ombudsman Act may not be sufficient sanction or end result of an Ombudsman investigation where the Ombudsman is critical of an agency that fails to implement the Ombudsman's recommendations. Having ascertained from other Ombudsmen that they too consider that reports to Parliament, in the absence of any guarantee that Parliament would actively consider them, do not