Registrar or a Deputy Registrar of the AAT. The Council is currently preparing a letter of advice to the Attorney-General which examines the adequacy of those arrangements and the operations of the Relief Boards.

AD(JR) Act. Little work has been done in the past 3 months on stage 2 of the AD(JR) Act project.

Intellectual property. The Council has adopted a project which examines decisions under the intellectual property legislation and considers whether or not there should be review on the merits of those decisions. The decisions concerned are decisions of the Registrar of Trade Marks under the trade marks legislation, decisions of the Commissioner of Patents under the patents legislation and decisions of the Registrar of Designs under the designs legislation. Some of the decisions are presently subject to appeal to the AAT, some are subject to appeal to State and Territory Supreme Courts (although a Bill presently before the Parliament proposes some changes here) and some are not subject to appeal. The question of appeals in this area is a complex one. The Council has engaged a consultant, Ms Pamela Morey-Nase of the Melbourne law firm Phillips Fox, to assist it in the project. The first stage of the project is the preparation of a draft report on review of decisions under the trade marks legislation.

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## Administrative Appeals Tribunal

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### NEW JURISDICTION

Since the last issue of Admin Review new jurisdiction has been conferred on the AAT under the Health Insurance Act 1973, National Health Act 1953 and Therapeutic Goods Act 1966.

### KEY DECISIONS

#### Recoupment of unpaid company tax

Decision No. 3076 (5 December 1986) concerned objections to assessments of unpaid company tax under the Taxation (Unpaid Company Tax) Assessment Act 1982. The assessments in question had been raised against 2 proprietary companies (ACO and BCO) as vendor shareholders in a target company (ZCO) which had been stripped of its assets. The questions in issue were whether the applicants were shareholders in ZCO at the relevant time and whether there had been a genuine sale of the shares in ZCO. The AAT held that the applicants were shareholders at the relevant time and that they did sell the share capital in ZCO. The Tribunal said that it did not matter that the applicants were not registered as the shareholders of the issued capital in ZCO. The facts showed that there had in fact been a sale by them of shares in ZCO and this was sufficient for the purposes of section 5(1) of the Act.

Property acquired for the purpose of profit-making by sale

In Decision No. 3114 (19 December 1986) the question was whether an International logging-truck acquired by the taxpayer in partnership with his wife and subsequently sold by him had been acquired by him for the purpose of profit-making by sale. If it had been acquired for that purpose, the profit on the sale was assessable income of the partnership under section 25A of the Income Tax Assessment Act. The truck had been leased to the partnership and, at the expiration of the lease, it was purchased by the partnership for the residual value specified in the lease of $5,800. Thereafter the truck continued to be used by the partnership for carting logs to sawmills. The taxpayer gave evidence that, at the time the partnership acquired the truck, he intended to rebuild it at an estimated cost of some $45,000 and that he had no thought of acquiring a new truck. Shortly thereafter, however, he sold the truck to a dealer for $39,203 and took on lease a Scania truck. Having regard to all the facts, the Tribunal was not persuaded that at the date of acquisition of the International truck by the partnership the dominant purpose was not to profit-make by sale. Accordingly, the Tribunal affirmed the determination of the Commissioner of Taxation on the taxpayer's objection.

Payment of family allowance in respect of children in Vietnam

In Re Ho and Secretary to the Department of Social Security (28 November 1986) the Tribunal set aside a decision of the respondent that the applicant was not eligible to receive family allowance in respect of his children in Vietnam. The Tribunal found that the applicant continued to provide material support for the family by, amongst other things, regularly freighting items of value to the family. It also found that it was the intention of the applicant and his wife for the family to join him in Sydney as soon as that could be achieved. The Tribunal said that the applicant had the custody, care and control of the children as required by section 95(1) of the Social Security Act 1947 because he had retained 'parental sovereignty and autonomy' over them notwithstanding his indefinite separation from them. The facts were different from those before the Tribunal in Re Le and Secretary to the Department of Social Security (28 July 1986). As to the residency requirements for family allowance set out in section 96 of the Act, the Tribunal held that the transitional provisions in the Social Security and Repatriation Legislation Amendment Act 1985 had the effect of maintaining eligibility for family allowance for children outside Australia for a maximum period of 4 years from the date on which family allowance first became payable.

The decision in this case is interesting in that the Tribunal adopted a different attitude on the question of 'custody, care and control' than had been adopted in some other similar cases. In Re Huynh and Secretary, Department of Social Security (11 November 1986), for example, the Tribunal said:

> Whilst ever the Government of [Vietnam] has not issued exit visas, the applicant is unable to factually resume the 'custody, care and control' he so earnestly wants. Factual 'custody, care and control' is in reality exercised by his wife and whilst she was imprisoned appears to have been exercised by her parents.

(See also Re Phan and Secretary to the Department of Social Security, 18 November 1986.)

Cohabitation and effect on pension

The question at issue in Re Belbin and Boske and the Secretary to the Department of Social Security (18 December 1986) was again the question whether each of 2 pensioners was to be regarded as a person living with the other as a spouse on a bona fide domestic basis. If not, each would be entitled to pension at the single rate, which is higher than that for 'married persons'. The Tribunal affirmed the decision of the respondent that the applicants ought to be paid pensions at the married rate. It was accepted by the Tribunal that, although the applicants had lived together for many years, there had been no sexual relationship between them. However, said the Tribunal, a sexual relationship was but one of the characteristics of a marriage relationship for the purposes of the Social Security Act and the absence of sexual relations did not preclude Miss Boske from being described as living with Mr Belbin as his spouse on a bona fide domestic basis.

The facts of the particular case are obviously of prime importance in cases of this kind. For a case in which the Tribunal concluded that a woman whose widow's pension had been cancelled was not living with a man as his spouse on a bona fide domestic basis, see Re Mackenzie and Secretary to the Department of Social Security (18 December 1986).

Superannuation BCC issued 3 years after CMO's report

Decisions concerning the issue by the Commissioner for Superannuation of benefit classification certificates (BCCs) under section 16 of the Superannuation Act 1976 continue to come before the Tribunal. In Re Miller and Commissioner for Superannuation (24 November 1986) the question in issue was whether the Commissioner was empowered under section 16(10) of the Act to issue a BCC following the retirement of an eligible employee and more than 3 years after the receipt by the Commissioner of the Commonwealth medical officer's report of the result of the medical examination of the employee. The Tribunal held that section 16(4), which imposes a duty on the Commissioner to consider medical reports, had an element requiring action by the Commissioner within a reasonable time after the furnishing of a report:

> Sub-sections 16(2), (3) and (4) propose the setting in motion of a sequence of events within a temporal framework and it is not consonant with that framework in the Tribunal's opinion for the Commissioner to be furnished with a medical report, to set it to one side without

further consideration, upon the ground that the Senior Medical Officer had not recommended that the eligible employee failed to meet the General Medical Standard, and then to purport to more fully consider the report three years later after the employee had retired.

The Tribunal held that the BCC issued in respect of the employee was of no effect and ordered that it be set aside as invalid.

The state of the law in this area is unclear. The decision in Miller is inconsistent with the Tribunal's decision in Re Neal and Commissioner for Superannuation (7 July 1986), in which Mr Justice Davies was the presiding member, and appears not to take into account the Tribunal's decisions in Re Homsey and Commissioner for Superannuation (1981) 3 ALN N.18 and Re Amess and Commissioner for Superannuation (1984) 7 ALD 290.

The Commissioner for Superannuation has lodged an appeal in Miller. This appeal may, however, depend on the outcome of the appeal lodged by the applicant in Neal, which is expected to be heard by the Federal Court in March.

### Air navigation regulations - suspension of licence for low flying

Re Gruzman and Secretary to the Department of Aviation (28 November 1986) concerned the aftermath of the running aground of the naval patrol boat HMAS Wollongong off Gabo Island on 1 June 1985. Following that incident, the applicant had flown over the site of the accident and, as a result, his commercial and private pilot licences were suspended for low flying. The applicant was also convicted by a magistrate in Victoria on charges arising out of the incidents in question. The decision which the applicant sought to be reviewed by the Tribunal was the decision to suspend his pilot licences. The AAT decided that the decision ought to be varied by restoring the applicant's private licence and suspending his commercial licence for 4 months. Restoration of the private licence was seen to be appropriate because, having regard to the applicant's age of 63 years, the absence of opportunity to fly would lead to irreparable loss of the manipulative skills necessary for competent airmanship. Of the applicant the Tribunal said:

> He is a very competent airman. His only problem appears to be his absolute, but quite untenable conviction that he has acquired the right to ignore regulations which he believes are obscure or are seen by him to be frequently overlooked by the Department.

### Cancellation of fishing licences

In Re La Macchia and Minister for Primary Industry (24 November 1986) review was sought of a decision of the Minister to cancel the applicant's fishing boat licence and master fisherman's licence with effect from 15 November 1986, with a proviso that applications for renewal of the licences

were not to be considered until 9 December 1986. Under section 9A of the Fisheries Act 1952 the Minister has powers of suspension and of cancellation of licences. The cancellation power may be exercised where the holder of the licence has been convicted of certain fishing offences. The applicant, a rock lobster fisherman, had been convicted over the years of a number of offences in relation to his rock lobster fishing activities. The issue in the case was whether the Minister could properly exercise the power of cancellation in the way he had. It was argued that cancellation was an act of a permanent nature and that the Minister could not properly exercise the power to achieve, by the back door, suspension not possible under any other provisions of the Act. The Tribunal noted that sections 9A(1) and (2) compelled the conclusion that the suspension power was available only where proceedings had been instituted and pending their completion. However, there was, said the Tribunal, a power in the Minister to cancel a licence and to indicate that the grant of a new licence would not be considered for a certain period after the cancellation. Having regard to delays that had occurred in the resolution of the matter, the Tribunal considered that the correct period for the cancellation to remain in force was a period of 2 weeks.

The applicants appealed to the Federal Court from the decision of the Tribunal (La Macchia v Minister for Primary Industry, 22 December 1986). The applicants argued that there had been an impermissible use of the power to cancel to achieve a suspension for which the Act did not provide. The Federal Court upheld the Tribunal's decision. The court considered that the AAT's reasons when read in their entirety indicated that the Tribunal was not intending to bring about a result short of permanent deprivation of the licences. It was clear, said the court, that the Tribunal was affirming the decision of the Minister to cancel the licences with the consequence that applications for new licences were required, the granting of such licences being a matter for the Minister.

Applications for review of decisions which affect numerous interests

A principle of general application was stated by the Tribunal in Re Ferguson and Minister for Arts, Heritage and Environment (23 December 1986) in which the Tribunal declined to entertain an application to review a decision of the Minister approving a management scheme for kangaroos. The Tribunal considered that the application for review had not been lodged within a reasonable time. It was, said the Tribunal, a firm principle of administrative practice that decisions affecting numerous interests, if they are to be challenged, should be challenged quickly. Administrative certainty was important and indeed expected by people who need to plan their affairs.

## Freedom of Information

### Reverse FOI

In Mitsubishi Motors Australia Ltd v Department of Transport (21 October 1986, Full Court) the Federal Court had before it a question of law which had been referred to it by the AAT under section 45 of the AAT Act.

The reference to the Federal Court arose from the application of the 'reverse FOI' procedures in the FOI Act. Following an application for access to documents made under the FOI Act to the Department of Transport, the Department gave Mitsubishi, pursuant to section 27 of the Act, an opportunity to make submissions in support of a contention that the documents were exempt documents under section 43 of the Act (documents relating to the business affairs of a person). Mitsubishi submitted that the documents were exempt under sections 43, 37(2)(a), 45 and 46(a). The Department, however, notified Mitsubishi, pursuant to section 27(2), that it had decided to grant access to the documents. This decision was taken on appeal by Mitsubishi to the AAT under section 59.

The question of law that was referred to the Federal Court was whether the AAT, on a review under section 59, was obliged or empowered to decide whether the documents in question were exempt under section 43 or any other provision of Part IV of the FOI Act. The court held that, on such a review, it was clear that the AAT was empowered to decide a claim for exemption based on section 43. So far as other provisions of Part IV were concerned, the court held that, on such a review, there was no power in the AAT to decide a claim for exemption based on those provisions. The court declined to interpret section 58(1) of the Act as expanding the Tribunal's jurisdiction under section 59:

> In the face of the specific provision in s.59(1) conferring a right of review in the case of one kind of exemption, we do not think that the general language of s.58(1) should be seen as conferring an additional, ambulatory head of jurisdiction upon the Tribunal.

The High Court has refused special leave to appeal from the decision of the Full Court of the Federal Court.

In the opinion of Admin Review the decision in this case highlights a possible deficiency in the reverse FOI procedure of the Act. Section 27 provides for notice of an FOI request to be given to a person where the person might reasonably wish to contend that the document is an exempt document under section 43. This trigger for the reverse FOI procedure would appear to be adequate. However, if an appeal to the AAT under section 59 is made by the person, it is arguable that the AAT should not be limited to determining a claim for exemption based on section 43 but should be empowered to determine such