a claim based on other grounds also. There may, for example, be cases where the information concerned is not clearly of a business character of the kind contemplated by section 43 but is information that has been supplied on a confidential basis (section 45). The possible deficiency in the reverse FOI procedure is perhaps given sharper focus when one considers that if, following the giving of notice to a third party under section 27, the agency refuses access to the document concerned and the applicant for access appeals to the AAT, the AAT may consider a claim for exemption based on section 45 or any other provision (see, eg, Re Corrs Pavey Whiting and Byrne and Alphapharm Pty Ltd and Collector of Customs, 23 December 1986).

The view that the reverse FOI procedure is deficient was recently expressed by Dr John Griffiths in a paper presented at a seminar on FOI and business conducted by the Law Institute of Victoria on 25 September 1986. It is to be hoped that the adequacy or otherwise of the reverse FOI procedure is given careful attention by the Senate Standing Committee on Constitutional and Legal Affairs in its forthcoming report on the FOI Act.

Deliberative process documents which name names

In Re Reith and Attorney-General's Department (23 December 1986) the AAT upheld the decision of the respondent to refuse Mr Peter Reith MP access to a number of documents relating to the establishment of the Australian Constitutional Commission. Exemption from disclosure was claimed under section 36 of the FOI Act in relation to several documents which disclosed the names of possible or prospective appointees to the Commission or its advisory committees. The Tribunal held that there was a substantial public interest in ensuring the integrity of the processes of selection for appointment to positions of importance in the Australian community. Disclosure of the names of persons considered or approached for appointment, but not ultimately appointed, would be likely to provoke speculation as to the reasons for non-appointment with embarrassing effects upon the reputations of those concerned.

The Courts

Broadcasting decisions

Re Minister for Communications; ex parte NBN Ltd (2 December 1986) is an interesting case for 2 reasons. The case came before the Chief Judge of the Federal Court, Sir Nigel Bowen, on the return of an order nisi made by the Federal Court that the Minister for Communications show cause why a writ of mandamus should not be issued to him to deal with the application by NBN Ltd for a supplementary television licence in accordance with section 82A(4) of the Broadcasting and Television Act. That section requires the Minister to refer such an application to the Australian Broadcasting Tribunal

('ABT') or to dismiss it on technical grounds. The first interesting aspect of the case is that NBN Ltd, after writing to the Minister and informing him that, in the light of his failure to make a decision on its application, it proposed to apply to the Federal Court for an order of review under the AD(JR) Act in respect of that failure, did not then pursue the AD(JR) Act remedy but instead applied for a mandamus in reliance on the jurisdiction conferred on the Federal Court by section 39B of the Judiciary Act. It is not apparent from a reading of the case why the Judiciary Act procedure was preferred to the procedure under the AD(JR) Act. Section 7 of the AD(JR) provides for an application for an order of review where a person under a duty to make a decision to which the Act applies has failed to make the decision. Section 16(1)(d) of the Act empowers the court to make an order directing the making of a decision. Furthermore, 'duty' is defined in the Act in such a way as to overcome the limitations on mandamus in respect of duties imposed on Crown servants. Thus, it would seem that an AD(JR) Act application would have been an appropriate means of seeking review of the Minister's failure to make a decision.

This aspect of the case again raises the question whether the existence of the jurisdiction in the Federal Court under section 39B of the Judiciary Act may tend over time to diminish the primacy of the AD(JR) Act as a means of review of Commonwealth administrative action. (Overlap between the AD(JR) Act and section 39B of the Judiciary Act does not, of course, arise in cases where, by reason of the exclusions in Schedule 1 to the AD(JR) Act or by reason of the other limitations on the ambit of the Act, section 39B provides the only available means of proceeding in the Federal Court. See, for example, Re Deputy Commissioner of Taxation for the State of Western Australia; ex parte Briggs (5 November 1986) and Re Aboriginal Land Commissioner; ex parte Banibi (27 November 1986).)

The second aspect of the case that is of interest is the discussion of the court's discretion to refuse relief. Counsel for the Minister argued that the application should be dismissed on the ground of unwarrantable delay in applying for the remedy of mandamus. The Chief Judge concluded that relief should not be denied on this ground. Next it was argued that relief should be refused because of the likelihood of legislative change which would render academic and futile the question of the Minister's referral to the ABT of the application of NBN Ltd. The Minister introduced into evidence the Broadcasting Amendment Bill 1986 which provided for the abolition of the supplementary television licence scheme. That Bill had been passed by the House of Representatives and debate on the second reading in the Senate was expected to take place during the week following the hearing before the Chief Judge.

Sir Nigel Bowen said that in general terms he agreed with the proposition that the court applies the law as it is in force when a matter is before the court and does not speculate as to the future course of legislation. On the other hand, he said,

the court was not obliged to shut its eyes to the realities and to ignore what was taking place. His Honour concluded that NBN Ltd had made out a case of breach of duty on the part of the Minister and that it was not excluded by discretionary grounds from having the order nisi made absolute. So that the order would not result in a futility, however, he ordered that the operation of the order making the order nisi absolute be suspended for a period of 14 days.

(As it happened, the Broadcasting Amendment Bill 1986 was not passed by the Parliament. On 4 December 1986 it was referred by the Senate to a Select Committee for report early in the 1987 parliamentary sittings.)

A further decision in the broadcasting area is Western Television Ltd v Australian Broadcasting Tribunal (4 November 1986). That case concerned an application under the AD(JR) Act in respect of a decision of the ABT to grant a commercial television licence to West Coast Telecaster Ltd for a period of 5 years to serve the Perth metropolitan area. It will be recalled that the ABT inquiry concerning a third commercial television licence in Perth was a protracted affair and interlocutory decisions of the ABT in the inquiry were the subject of several applications under the AD(JR) Act (see the Council's Report No 26, Review of the Administrative Decisions (Judicial Review) Act 1977–Stage One, pp.7–8). Western Television Ltd was one of the unsuccessful applicants for the licence.

In the present case, the application for review was based on several grounds, none of which was accepted by Mr Justice Pincus. In part, his Honour relied on the discretion of the court to refuse relief. Having found that the ABT had fallen into legal error in failing to give weight to certain convictions of a director of the successful applicant for the licence, Mr Justice Pincus exercised the discretion of the court not to grant relief because the point on which the applicant relied in its application under the AD(JR) Act had been expressly abandoned by it in the proceedings before the ABT:

> I do not act on the view that every abandonment of a point before an administrative tribunal makes it proper for this Court to decline to grant relief, with respect to that point, under the Judicial Review Act. Here, however, the Tribunal had before it an inquiry of unparalleled length and cost. The potential importance of the convictions of Mr Treasure must have been evident to the present applicant, as must have been the waste of time and money which could ensue if the Tribunal were led into legal error. The present applicant preferred to take its chance of success before the Tribunal on the basis that Treasure's convictions were not to be used in its favour; having failed before the Tribunal, it should not, I think, be allowed to take advantage of the error for which it was partly responsible.

Proposed inclusion of stage 2 of Kakadu National Park on World Heritage List

The proposal of the Commonwealth to submit stage 2 of the Kakadu National Park for inclusion on the World Heritage List has provoked much litigation involving Peko-Wallsend Ltd. The principal proceedings brought by it were proceedings in the Federal Court for declaratory and injunctive relief in relation to the proposed action of the Commonwealth. The application was based on the company's claim that it was entitled to certain mining rights in stage 2 of the park.

Before the application was determined Peko-Wallsend applied to the Federal Court for interlocutory relief (Peko-Wallsend Ltd & Ors v Cohen, 26 November 1986). In the application for interlocutory relief the company sought orders restraining the Commonwealth from taking certain steps in connection with the listing of stage 2. Mr Justice Beaumont granted the interim injunction. He noted that in the principal proceedings the applicants had put their case on the grounds of denial of natural justice and he took the view that, having regard to the decision of the High Court in Kioa (1985) 62 ALR 321 and to the obligation to protect the area that would be imposed on the Commonwealth if stage 2 were listed, the application in the principal proceedings raised a serious question to be tried. His Honour made an order directing the Minister and the Commonwealth to inform the World Heritage Committee that the Federal Court had directed them to inform the committee of the claims made by the company and the court proceedings brought by it and directing them to request the committee to defer its consideration of the relevant part of the submission for listing.

Following the orders made by Mr Justice Beaumont, and on the same day as those orders were made, the Minister for Arts, Heritage and Environment applied to the Full Court of the Federal Court for leave to appeal against the interlocutory judgment of Mr Justice Beaumont. The application was heard that same day and was dismissed by the Full Court. On the next day the Minister applied to the High Court for special leave to appeal against the decision of the Full Court.

The High Court refused the application for special leave, stating that it was rare indeed for the High Court to grant special leave to appeal from an order dismissing an application for special leave to appeal from an interlocutory order.

Following these proceedings the government informed the World Heritage Committee that it wished its submission to be deferred until the committee's next session in November 1987.

In his final judgment (22 December 1986) Mr Justice Beaumont held that the decision to submit Kakadu Stage 2 for inclusion on the World Heritage List would prejudice the applicants' property rights, and that the Executive had failed to satisfy the requirement of procedural fairness which applied because of that prejudice to the applicants' interests. The

applicants would be prejudiced in relation to their property rights, his Honour said, because in 'technical terms, the inclusion of the site on the List amounts to the satisfaction of a condition precedent to the availability of the powers to "freeze" the applicants' rights or interests given to the Executive under the Heritage Act', and it seemed probable that the government would invoke those powers to prohibit the applicants' mining activities. In his Honour's opinion fairness required that the applicants be given reasonable notice of the proposal that the Cabinet nominate Kakadu Stage 2 for World Heritage listing and an opportunity to present a submission to the Cabinet as a body. It was not sufficient that the applicants had been free to attempt to persuade 1 or 2 Ministers before the decision was taken by the Cabinet: 'It was to Cabinet, meeting as a body on 15 or 16 September, that the applicants had to direct their attentions'.

An interesting submission on behalf of the Commonwealth was that the matter in issue involved the exercise of the royal prerogative to make and implement treaties and was therefore not susceptible of judicial review. In his Honour's opinion, however, there were multiple sources of the power to nominate a site for inclusion on the World Heritage List: the common law prerogative, the executive powers conferred by section 61 of the Constitution, and the provisions of the Heritage Act. But in any case, even if the decision to nominate Kakadu Stage 2 had had its sole source in the prerogative, it was not the source of the power but its subject matter which determined whether the exercise of the power was subject to judicial review. In this respect his Honour followed the decision of the House of Lords in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374. However, he noted that the position might differ where the challenge was not based on procedural impropriety, which was capable of being measured and tested by established and defined legal criteria, but, for example, was based on the ground of unreasonableness or some other 'generalised or "political" grounds'.

Dumping

In GTE (Australia) Pty Ltd v Brown (31 October 1986) the applicant sought review of a decision of the Minister under the Customs Tariff (Anti-Dumping) Act 1975 to publish in the Gazette a notice which had the effect of causing anti-dumping duty to be imposed on clear and pearl light bulbs from Belgium imported into Australia by the applicant. The dumping complaint which led to the dumping investigation by the Australian Customs Service and ultimately to the action taken by the Minister had been made by Electric Lamp Manufacturers (Australia) Pty Ltd, the sole Australian manufacturer of goods of this kind.

The applicant was successful in the application for judicial review. The first ground on which review of the Minister's decision was sought was that the applicant had not been accorded natural justice. Mr Justice Burchett found that the Minister was under a duty to comply with the principles of

natural justice. That duty involved the provision to the applicant of a meaningful opportunity to make submissions about adjustments in prices that were necessary in order to make a proper comparison between the normal value of goods and their export price (s.5(5) of the Act). It was found by the court that, in the investigations undertaken by Customs, such an opportunity was not given to the applicant.

His Honour also held that, in the assessment of normal value, the Minister had not taken into account a relevant consideration which, by virtue of section 5(4) of the Act, he was bound to take into account, namely, the making of an allowance for certain warehousing and other costs incurred by the exporting company in Belgium. The final ground on which the court granted an order of review was that the Minister's exercise of power was so unreasonable that no reasonable person could have so exercised the power. In order to ascertain the normal value of goods, section 5 of the Act requires a comparison with the price paid for like goods in the country of export and, where the comparison is made with goods that are not identical, certain adjustments are required to be made. The court found that, in the investigation of normal value, use had been made of domestic price lists for certain non-identical goods of the exporting company in Belgium without due adjustment and that this constituted an unreasonable exercise of the Minister's power.

Another application for judicial review in the anti-dumping area was determined by the Federal Court in Re Hayes; ex parte J. Wattie Canneries Ltd (18 November 1986). In that case the application was brought pursuant to section 39B of the Judiciary Act in respect of the imposition of cash securities on exports to Australia by the applicant of frozen peas. The proceedings were brought under section 39B because, by virtue of an amendment of Schedule 1 to the AD(JR) Act made in 1983, decisions to require and take security in respect of anti-dumping or countervailing duty that may be payable are excluded from the ambit of the Act.

The Federal Court (Mr Justice Beaumont) dismissed the application as the power to require securities had been properly exercised.

An appeal in the anti-dumping area was determined by the Full Court of the Federal Court in Wattmaster Alco Pty Ltd v Button (18 December 1986). The appeal related to a decision of Mr Justice Pincus made on an application under the AD(JR) Act in which his Honour determined that his order setting aside a decision of the Minister to make a declaration pursuant to section 8(2) of the Anti-Dumping Act should take effect as from 24 January 1986. That was the date on which his Honour gave judgment in the proceedings under the AD(JR) Act. On appeal, the appellants argued that Mr Justice Pincus erred in failing to order that the Minister's decision be set aside as from the date on which it was made. The Full Court held that Mr Justice Pincus was in error in casting the onus on the applicant to show that the Minister's declaration should be set aside from the date on which it was made:

> Section 16(1) of the Administrative Decisions (Judicial Review) Act gives to the Court a wide discretion as to the orders appropriate to be made. The words 'with effect from the date of the order or from such earlier or later date as the Court specifies', in para. [16(1)(a)], are, in our opinion, intended to do no more than to indicate that the Court has a choice from all the available possibilities: the date of the order, an earlier date or a later date.

The appellants had made a number of payments of anti-dumping duty between the date of the declaration under section 8(2) of the Anti-Dumping Act and the date on which the declaration was held by Mr Justice Pincus to be bad in law. Recovery of the amount of the payments would not be possible if the declaration were to be set aside only as at the date of the judgment. In all the circumstances, the Full Court decided that the Minister's decision ought to be set aside as from the date on which it was made.

The applications for judicial review in GTE, Wattmaster Alco and Wattie are 3 of several such applications that have been made concerning decisions in the anti-dumping and countervailing duty area. Review on the merits of decisions in the area is not presently available and the question whether such review should be provided for is the subject of consideration by the Council in a report which is expected to be sent to the Attorney-General early in 1987. The extent to which review on the merits of decisions in the area can be availed of can be expected to decrease the level of judicial review applications.

Export market development grant

In Sea King Pty Ltd v Australian Trade Commission (5 November 1986) the Federal Court upheld an appeal from the AAT against a refusal of a claim by the applicant for a grant under the Export Market Development Grants Act 1974. The applicant had paid a Japanese company a retainer in respect of sales by the applicant of rock lobster in Japan. The question in issue was whether the retainer was eligible expenditure for the purposes of the Act. The court held that the AAT, in looking at how the Japanese company used the money rather than at the purpose for which the money was paid by the applicant, had failed to apply correctly the provisions of section 4 of the Act.

Rate of repatriation pensions

In the July 1986 issue of Admin Review ([1986] Admin Review 131-2) decisions of the AAT in 3 cases concerning the rate of repatriation pensions were discussed. In that discussion it was noted that all 3 applicants had lodged appeals to the Federal Court. The appeals have now been determined by the court in decisions handed down on 17 November 1986: Banovich v Repatriation Commission, Lucas v Repatriation Commission and Delkou v Repatriation Commission. In each case the Federal Court found that there was no error of law in the conclusions reached by the AAT, and dismissed the appeal.

Deportation orders

In Chhinda Singh-Dhillon v Mahoney (9 October 1986) the applicant sought review under the AD(JR) Act of the making of an order for his deportation and of a decision to execute the order. The ground on which review was sought was that the making of the decisions by the Minister's delegate was an improper exercise of power in that they were made without taking relevant considerations into account (s.5(2)(b)) and were such as to disclose an unreasonable exercise of the power to deport the applicant (s.5(2)(g)).

The applicant was a prohibited non-citizen by virtue of the operation of section 6(1) of the Migration Act 1958. He was apprehended following a police raid at premises in Griffith, NSW, in the course of which he was shot in the leg.

The matters relied on by the applicant in support of his application were, first, that at the time the deportation order was made he was not fit to travel and this should have been known to the Minister's delegate, secondly, that the Minister's delegate should have known that to return the applicant to India was to expose him to grave danger, because he was a Sikh from the Punjab, and thirdly, that the Minister's delegate ought to have realised that the applicant might wish to institute proceedings to recover damages against those who were responsible for his injuries.

Mr Justice Sheppard, after considering the words of Mr Justice Mason in Minister for Aboriginal Affairs v Peko-Wallsend (1986) 66 ALR 299 concerning what must be established before the ground of failure to take into account a relevant consideration was made out, held that none of the matters referred to above was a matter which the Migration Act obliged the Minister to take into account in making the deportation order. His Honour pointed out that no criteria are provided for in section 18 of the Act in relation to the Minister's deportation power; his discretion is at large.

His Honour also held that the decision to deport the applicant could not be shown to be unreasonable on the basis of any of the matters referred to above.

As to the decision to execute the deportation order, his Honour held that it would be unreasonable to execute the order without giving the applicant an opportunity of seeing the outcome of the examination of an Assistant Commissioner of the NSW police force which had been ordered by the Supreme Court of NSW in proceedings for discovery brought by the applicant in connection with his possible damages claim. Accordingly, Mr Justice Sheppard ordered that the execution of the deportation order be stayed until 14 days after the examination of the Assistant Commissioner in the Supreme Court of NSW.

Ho v Minister for Immigration and Ethnic Affairs (26 November 1986) concerned an application for a stay of deportation orders made by the Minister in respect of a group of Koreans.

Mr Justice Burchett granted the interim relief on the basis that there was a serious question to be tried in the applications by the Koreans for judicial review of the decision to deport them. It appeared that the Koreans were the innocent victims of an illegal migration scheme and the evidence indicated that, despite deportation orders having been made, proposals were put to them by officers of the Department suggesting that they could stay in Australia if they were prepared to give prosecution evidence in the hearing of criminal charges against principals of the scheme. The Koreans had agreed to this and it was indicated to them that they would be released from detention and would be issued with entry permits. Nothing had, however, happened for 3 months and ultimately the Koreans complained to the Ombudsman. Following that complaint, the Department had moved to execute the deportation orders.

In Waniewska v Minister for Immigration and Ethnic Affairs (27 November 1986) review was sought under the AD(JR) Act of a decision to deport the applicant. Mr Justice Keely granted the application on several grounds. He held, first, that the delegate of the Minister had failed to accord the applicant natural justice by not giving her an opportunity to respond to a suggestion in the submission on which the delegate founded his decision that the applicant attempted to extend her stay in Australia by arranging a marriage that was a pretext. His Honour also held that the delegate had failed to take into account relevant considerations in failing to have regard to the applicant's claim as to events in Poland and the likelihood of her arrest on her return.

The decision of Mr Justice Keely as to the latter ground for relief does not appear to be consistent with the view concerning relevant considerations in deportation matters taken by Mr Justice Sheppard in Chhinda. The decision in Chhinda is not referred to in Mr Justice Keely's judgment.

COMMONWEALTH OMBUDSMAN

Report by Senate Standing Committee on Constitutional and Legal Affairs on Ombudsman's special reports

As noted in [1986] Admin Review 165, on 22 August 1986 the Senate referred to its Standing Committee on Constitutional and Legal Affairs the following Commonwealth Ombudsman's Special Reports to the Parliament made under section 17 of the Ombudsman Act:

- Special Report No. 1, The Cotton Case involving the Australian Broadcasting Commission (AGPS, 1985)

- Special Report No. 2, The Industrial Sugar Mills Case involving the Department of Defence (AGPS, 1986).