him on the Passenger Automatic Selection System (PASS), which enables identification of persons entering or leaving Australia. The respondent agency, under section 25 of the Freedom of Information Act, refused either to confirm or deny the existence of the material sought, on the grounds that such information could prejudice the enforcement or proper administration of the law or could disclose a confidential source of information.

The Tribunal, citing Jephcott and Department of Community Services (29 August 1986), concluded that a document would not be exempt under section 37(1)(a) or (b) merely because it included information about the existence or non-existence of a document answering the terms of the applicant's request. It established, through information it held confidential, that on the relevant date the PASS document sought did not exist; and ordered the respondent to advise the applicant of this. It also directed the respondent to advise the applicant whether or not any document concerning him at any other date existed.

Amended tax assessment

Saunders and Commissioner for Taxation (26 July 1988) was an application for review of the Commissioner's refusal of the applicant's request for 'all records and documents relating to the...amended assessment and all decisions taken about that amended assessment including departmental memoranda, reports, submissions, recommendations and general information relating thereto to the extent to which such information is not exempted under the Act'. The Commissioner had formed the view, under section 170(2)(a) of the Tax Act, that the applicant was involved in large-scale tax avoidance and evasion; and he therefore had issued an amended assessment for a period more than 6 years earlier. The applicant sought documents revealing the basis of this opinion.

The respondent claimed release of the material would be contrary to the public interest with regard to two broad classes of material. The first related to whether the applicant was entitled to know whether the amended assessment was based on fraud or evasion or both. The second was whether the applicant was entitled to know the basis, including any particular provision of the Tax Act, from which the respondent arrived at the necessary opinion to proceed after expiry of the 6 year period; and whether he was also entitled to know the legal authority upon which the respondent relied in arriving at that opinion. On all these questions the Tribunal concluded that the answers were in the affirmative, and that release was not contrary to the public interest.

The Courts

Danger from hostile forces of the enemy

In Repatriation Commission v Thompson (24 June 1988) the full Federal Court considered an appeal against the judgment of Justice Einfeld (Admin Review 16:26-7) with regard to

interpretation of the term 'incurred danger' in section 36(a)(i) of the Veterans' Entitlements Act. This issue was also considered by the Administrative Appeals Tribunal in Crawford and Repatriation Commission (1 December 1987) and Noble and Repatriation Commission (4 February 1988), both of which required an objective test establishing actual risk of physical or mental harm. In Thompson the full Federal Court concluded that

> 'The words "incurred danger" therefore provide an objective, not a subjective, test. A serviceman incurs danger when he encounters danger, is in danger or is endangered. He incurs danger from hostile forces when he is at risk or in peril of harm from hostile forces. A serviceman does not incur danger merely by merely perceiving or fearing that he may be in danger. The words "incurred danger" do not encompass a situation where there is mere liability to danger, that is to say, that there is a mere risk of danger. Danger is not incurred unless the serviceman is exposed, at risk of or in peril of harm or injury'.

Unreasonableness in immigration decisions

In Ebrahimi v Minister for Immigration and Ethnic Affairs (23 May 1988) the applicant, an Australian citizen from Afghanistan, had sought review of the decision by the Department of Immigration and Ethnic Affairs to reject the application of his sister and her family to migrate. The question whether the applicant was an 'aggrieved person' within the meaning of the Act was resolved in the applicant's favour. Justice Einfeld also found in the applicant's favour with regard to the Department's decision, on the grounds of failure to take into account relevant considerations, the taking into account of irrelevant considerations, no evidence on which to have based aspects of the decision, error of law, the adoption of a policy or rule without regard to the particular merits of the case, and unreasonableness.

The applicant sought in 1985 to sponsor the migration to Australia of his sister, Nafisa Saedi, and her family. The family had fled Afghanistan and were then living in Pakistan. In March 1986 the family was interviewed to establish whether they were eligible either as refugees, on special humanitarian grounds or under the family migration program. The departmental officer who interviewed the family concluded that they did not satisfy the criteria in any of the three categories because, inter alia: Mr Saedi did not satisfy the good character requirements because he had 'secretly carried weapons' in assisting the Mujahideen resistance to the Soviet-backed Afghan regime; and his wife's 'illiteracy, complete lack of education and traditional background' meant that she did not have 'personal qualities likely to facilitate successful resettlement in Australia'.

The case was reviewed as a result of parliamentary representations to the Minister, who confirmed the original decision in July 1986 and, following further inquiries, reiterated his decision in September 1986. His Honour, in a detailed analysis of the case, rejected the Department's

submissions and referred the matter back to the Minister for further consideration.

Abuse of power

The question at issue in Sunshine Coast Broadcasters Ltd v Minister for Land Transport and Infrastructure Support (8 July 1988) was whether the Shire of Caboolture should be included in the service area of the applicant's radio licence. The case is one of the very few reported cases to use or rely on section 5(2)(j) of the AD(JR) Act, which includes as grounds for review 'any other exercise of a power in a way that constitutes abuse of the power'.

Caboolture is the centre of a largely rural shire north of Brisbane. Many residents commute to work in Brisbane, but very few business people in Caboolture use Brisbane radio stations for advertising. Business and community leaders were interested in a radio service which would be concerned with local interests. The applicant's radio station was at Nambour, further north. The Minister had rejected the station's application on the ground that normally a station's service area would not be extended significantly beyond the existing service area unless the community in the proposed new area was not within the service area of another station and not receiving a service.

The Minister, however, a month earlier had extended the service areas of several Brisbane metropolitan stations to include the Shire of Caboolture, without applying the same guidelines. The applicant argued that, since several of the Brisbane stations did not previously serve the Shire of Caboolture, the guidelines should equally have applied to them. Justice Pincus, citing several English precedents which established that inconsistency can be an abuse of power in administrative law, found in the applicant's favour on grounds of abuse of power and also failure to take into account a relevant consideration. He concluded that the Minister had failed to take into account the interests of the public affected by the decision, including any disadvantage to them from not being served by a station professing to emphasise local interests as opposed to metropolitan interests; and that the Minister's decision was vitiated by inconsistency of the guideline thought to be relevant, in applying it only to this applicant and not to others where it was equally applicable. He set aside the decision and referred the matter back to the Minister for reconsideration.

Use of the Court's discretion to review

In Newby v Moodie and the Director of Public Prosecutions (3 June 1988) the full Federal Court dismissed an appeal against the decision of the primary judge rejecting the applicant's claim that prosecution was oppressive and an abuse of process, and that the decision to prosecute was an improper exercise of power.

The appellant, a solicitor, had formerly acted for clients engaged in what were known as Slutzkin assets stripping tax

minimisation schemes. The Court held that a decision of the DPP to institute proceedings against him was clearly a decision of an administrative character made under the Director of Public Prosecutions Act 1983. Decisions in connection with prosecution are specifically excluded by Schedule 2 of the AD(JR) Act from the classes of decisions to which section 13 of the Act applies, but are not excluded by Schedule 1 from the operation of the Act. The Court expressed the view that this was a clear indication of a legislative intention that decisions in connection with prosecution could be the subject of an application under the AD(JR) Act, and that the Court was not justified in taking a narrow view of the wide language used by Parliament in the Act.

It also considered the power to make an order of review in respect of committal proceedings and, citing Lamb v Moss (1983) 49 ALR 564, confirmed the principle that this power should only be exercised in the most exceptional circumstances. Their Honours listed several factors which should have led the primary judge to exercise his discretion not to entertain the application. These were:

- the delay in bringing the application was considerable;
- the applicant had made a considered choice to pursue his claim in the local court and would not have suffered any prejudice had the Federal Court refused to entertain the application, because the local court stood ready to hear it; and
- the court in which the applicant is to be tried is so obviously the place to seek a stay of prosecution that it was not appropriate to invoke the Federal Court's jurisdiction.

They concluded that circumstances were such as to make it inappropriate for the court's jurisdiction under the AD(JR) Act to be exercised.

In Holmes & Ors v Deputy Commissioner of Taxation (13 May 1988) each applicant sought an order of review in respect of the respondent's decision to issue and serve a notice under section 264 of the Income Tax Assessment Act 1936, and then to prosecute for failure to comply with the notice. The applicants argued that the power to fix the date upon which each applicant was to attend to give evidence was exercised so unreasonably that no reasonable person could have so exercised the power. Justice Davies said that this ground could not be upheld, as the decision was within the choice or discretion conferred upon the decision-maker. Other grounds with regard to the effectiveness of the notice were also rejected.

His Honour held, however, that in reaching the decision to institute proceedings the decision-maker had failed to give consideration to matters that were material to his decision and which, though not brought to his attention, ought to have been taken into account since they were within the knowledge of the Taxation Office. Nonetheless, His Honour declined to set aside the decision on the grounds that it was not necessary for the

Court to intervene to prevent an abuse of process or to ensure a fair trial.

Natural justice with regard to Ministerial directions

In Attorney-General for the Northern Territory of Australia v Minister for Aboriginal Affairs and Anor (28 March 1988), the applicant sought review of the respondent's decision under section 11 of the Aboriginal Land Rights (Northern Territory) Act 1976 to recommend to the Governor-General that two areas of land in the Finnis River area of the Northern Territory be granted to an aboriginal land trust established under the Act. It was argued that the Minister had breached the rules of natural justice in failing to inform the applicant of certain representations made to him by the Northern Land Council and the traditional owners of the areas in question and in failing to give the applicant an opportunity to respond to those matters before the decision was made.

Although Justice Foster upheld the applicant's submission on the facts, he declined to exercise his discretion to quash the Minister's decision. His Honour regarded it as significant that the applicant had not put before the Court any indication of the response it would have made had the material been referred to it; that the Minister's refusal to give a firm undertaking that the applicant would have a further opportunity for submissions before his final decision had put the applicant on notice that it should take its own steps to provide information updating or elucidating the matters before the Aboriginal Land Commissioner; and that a lengthy delay had occurred between the making of the Aboriginal Land Commissioner's report and the making of the decision under review.

Balance of convenience with regard to other proceedings

In United States Tobacco Co. v Minister for Consumer Affairs and Anor (28 March 1988) the applicant sought review of the Minister's action in publishing notice of a proposed declaration that certain goods are unsafe, at which point suppliers of the goods in question may request the Trade Practices Commission to hold a conference on the matter.

Under section 65J of the Trade Practices Act 1974 the Minister may declare goods to be unsafe goods if he is satisfied that they will or may cause injury to any person. Before making a declaration he is required to give notice by publication in the Gazette of a draft declaration and a summary of the reasons for the declaration. The Minister published such a notice in respect of certain smokeless tobacco products and snuffs on the ground that they cause oral cancers, throat tumours and other medical or pathological consequences for their users. The applicant requested the appropriate conference without prejudice to its right to seek review of the decision to publish the notice; and commenced legal proceedings questioning whether the pathological conditions concerned were within the statutory concept of 'injury' and whether the relevant parts of the Act were ultra vires section 51(xx) of the Constitution. The applicant then sought injunctive relief to stay the holding of

the conference pending the determination of the proceedings.

Justice Einfeld refused injunctive relief on the ground that there was no serious question to be tried and that the balance of convenience required that the conference proceed. He queried whether the Minister's action in publishing the notice was a 'decision' or 'conduct' to which the AD(JR) Act applied, and said that he was not yet persuaded that the applicant was 'aggrieved' in the terms of the Act. He decided that if the appropriate test was whether the applicant established a concept such as 'a serious question to be tried' or 'a point of substance to be argued', it had failed. If other formulations were followed, the balance of convenience was the issue. He concluded that the overwhelming public interest was to have the substantive matter of safety determined so that the Minister, unless prevented by court order on legal grounds, could finally decide on what action he should take.

Racial discrimination and refusal of hotel service

In Maynard v Neilson (27 May 1988) Mr Maynard, one of four aboriginal men who had been refused service at a Hobart hotel, had complained to the Human Rights Commission. When the Human Rights Commission Act 1981 was repealed and the new Human Rights and Equal Opportunity Commission Act 1986 came into force, the Racial Discrimination Act 1975 was amended to vest in the new Commission the functions previously conferred on the former. Mr Maynard's case was the first inquiry of its kind determined by the new Commission, which found in Mr Maynard's favour.

Under section 25Z(2) of the Racial Discrimination Act, however, determinations of the Commission after inquiry are not binding. The Act empowers the Federal Court to make orders if necessary to give effect to a determination by the Commission. Justice Wilcox, hearing the application to the Federal Court in Maynard's case, expressed the view that this situation was far from satisfactory. Though it avoided conferring a part of the judicial power of the Commonwealth upon a non-judicial body, if a respondent elects not to implement an adverse determination the applicant has no recourse other than to the courts. This occurred in Maynard's case, when the Court heard evidence upon matters not previously investigated.

Justice Wilcox said that while he was satisfied the people concerned believed the refusal to serve them was on racial grounds, after considering evidence which was not before the Commission he was not satisfied that the refusal to serve the men was occasioned by their race or colour. Nonetheless, His Honour was critical of the insensitive way in which the respondent applied the hotel's dress policy, and of his subsequent failure to place all the evidence before the Commission. His Honour deferred consideration of costs, expressing the view that the respondent should not be placed in a more favourable position than he would have been in before the Commission because, by his own course of conduct, the applicant was forced to apply to the court.

Definition of income for pension purposes

In Read v Commonwealth (1988) 78 ALR 655 the High Court by a 3-2 majority allowed an appeal from a decision of the full Court of the Federal Court concerning the definition of income for purposes of calculating entitlement to a social security pension. Mrs Read, who had been receiving age pension, was the registered owner of units in a capital growth trust which in 1984, following a revaluation, issued her with 8755 additional units. The full Federal Court, reversing an AAT decision (Justice Davies), had found that the bonus units constituted income within the meaning of the Social Security Act.

The High Court held that it was not possible to regard the appellant as having 'earned, derived or received' any 'valuable consideration' in this case, since the units were not capable of being treated separately from the beneficial interest she acquired on issue to her of the original units; and that the additional units did not constitute a 'profit', since they did not result in any consequential financial gain to the appellant. The definition of income in the Social Security Act has since been amended to refer to receipts whether of a capital nature or not, but it seems that this would not have resulted in a different decision.

Commonwealth Ombudsman

Act of grace payments

The Ombudsman's recommendations for act of grace payments have been a difficult issue for some years, with the agencies involved and the Department of Finance in particular sometimes reluctant to make such payments, especially where large sums of money are involved. Following discussions in June this year, however, the Prime Minister and the Minister for Finance agreed to new arrangements for processing act of grace payments. When these are implemented, the intention is to devolve responsibility for approving act of grace payments to departments and agencies for a 12 month trial period. The Department of Finance will play an advisory role. When the Ombudsman proposes to recommend an act of grace payment he will seek the Finance Department's views on whether the proposed payment would set an undesirable precedent or would run counter to established policy. If he then persists with the recommendation, the Ombudsman will pass the Department of Finance's views on to the relevant agency.

Delay in redress of Defence Force grievances

Under the Defence Force 'redress of grievance' system, complaints by members of the Defence Force are dealt with internally through a series of appeals to progressively higher authorities. In general complainants may only approach the Defence Force Ombudsman on completion of that process or where the member considers the delay in processing excessive. The