In September 1988 the Prime Minister agreed that the requirement for agencies formally to clear Freedom of Information appeals with the Attorney-General's Department should be discontinued forthwith.

The Department will continue to be available to provide advice in individual cases and, having regard to the Attorney-General's responsibility as the Minister administering the Act and his right to intervene, will continue to have a role where matters of special difficulty or controversy arise. The Department will also continue to provide input into general service-wide training.

Amendment of personal records

In Jacobs and Department of Defence (5 August 1988) an experienced RAAF pilot had been selected to become the Commanding Officer of an F111 squadron and, since his previous duties had not involved flying the F111 aircraft, he undertook a 16 week conversion course. During the course, however, he made so many errors, despite remedial work, that he was formally suspended. He sought amendment of the record on which the suspension was based.

The Tribunal, after considering the decisions concerning 'information relating to his personal affairs' given in Young v Wicks (1986) 11 ALN 176, Williams and the Registrar of the Federal Court of Australia (1985) 8 ALD 219, Wiseman and Department of Transport (1985) 4 AAR 83 and Department of Social Security v Dyrenfurth (Admin Review 17:55-6), found that the full Federal Court decision in Dyrenfurth left it open to the Tribunal to find that a report of the nature of the one under consideration contained information 'referring to matters of private concern to the individual'. The Tribunal then considered whether the information in dispute was, in terms of section 48 of the Freedom of Information Act 1982, incomplete, incorrect, out of date or misleading. It accepted that it was incomplete but not that it was incorrect, out of date or misleading. The Tribunal ordered that the record be amended.

The Courts

Grounds to be joined as a party to an application for review

United States Tobacco Company v Minister for Consumer Affairs and Trade Practices Commission (14 July 1988) concerned an application by the Australian Federation of Consumer Organisations (AFCO) to be joined as a party to an application for review of the Minister's decision to gazette a notice pursuant to section 65J(1) of the Trade Practices Act 1974 (Admin Review 17:61-2). The application also addressed the respondents' conduct in relation to a conference called by the Commission under section 65J(4) of the Act.

Justice Einfeld refused the application on the ground that AFCO did not have the requisite involvement in the substance and outcome of the litigation nor was it 'a person interested' within the meaning of that expression in section 12 of the Administrative Decisions (Judicial Review) Act. He gave leave, however, to AFCO to appear as an amicus curiae at and prior to the hearing of the substantive application.

United States Tobacco Company subsequently sought leave from the full court to appeal against the leave granted to AFCO to appear as an amicus curiae, and AFCO sought leave to cross-appeal from the decision that it did not have a sufficient interest.

For convenience, the full court heard the parties both on the application for leave to appeal and also on the substantive appeal (15 September 1988). It allowed both the appeal and the cross-appeal, ordered that the decision of the primary judge that AFCO be given leave to appear as an amicus curiae be set aside and in lieu ordered that AFCO be joined as a respondent to the proceedings. The Court decided that, having regard to all the circumstances, AFCO had a sufficient interest to be joined as a party in the proceedings though its interest was different in kind from the interest of members of the public.

Though the Court's decision made it unnecessary to examine further the orders with regard to amicus curiae status, it also commented on the interpretation of this expression and distinguished the position of amicus curiae from that of an intervener, citing Corporate Affairs Commission v Bradley (1974) 1 NSWLR 391 at 396-8 and North American authorities.

Material required to establish grounds of review

Attorney-General for the Northern Territory v Minister for Aboriginal Affairs and Ors (3 August 1988) involved an application for review of a decision of the Minister under section 11(1)(b) of the Aboriginal Land Rights (Northern Territory) Act 1976 to establish one or more land trusts to hold land intended to be granted in consequence of a land claim under that Act. The applicant submitted that the Minister's decision was invalid as it involved a decision in favour of granting land not capable of being granted under the Act in that it included land being a road over which the public had right of way. The two grounds relied upon were error of law and an improper exercise of power.

Justice Wilcox discussed the question whether an application for an order of review must be determined solely upon the material that was before the decision-maker or whether other evidence is admissible. His Honour thought it not possible to postulate a general rule that the Court is limited to the material which was, or ought to have been, before the decision-maker. The ambit of the relevant evidence depends on the ground upon which the decision or conduct is challenged. To challenge a decision

on the ground that the decision-maker has failed to take into account a material consideration it must be shown that the consideration was, or ought to have been, before the decision-maker. Where it is suggested that the decision-maker took into account an extraneous consideration, the focus of the evidence will be the material before him.

In the case of unreasonableness, attention will focus primarily on the material before the decision-maker, but not necessarily to the exclusion of other material. Whether there is an error of law in a particular case depends upon the reasoning of the decision-maker read against the material before him at the time of his decision. Other material, therefore, is irrelevant. To attack a decision by reference to other evidentiary material is not to say that he erred in law but rather to claim that different evidence would have impelled a different conclusion of law. It is also difficult to see that material other than that before the decision-maker is relevant where the ground of attack is an improper exercise of power.

The appropriate ground upon which the application in this case ought to have been made was section 5(1)(d) of the Administrative Decisions (Judicial Review) Act, 'that the decision was not authorised by the enactment in pursuance of which it was purported to be made'. If that ground had been taken, evidence would have been admissible to show that the relevant decision was one which the Minister could not lawfully have made. There being no prejudice and the point of substance having been fully argued, his Honour proceeded to consider whether the land in question was a road over which the public has a right of way. Concluding that it was not, he dismissed the application.

Failure to take into account published criteria - effect on legality of decision

McArthur v Punch (28 July 1988) concerned an application for an order of review of the Minister's decision under the Motor Traffic Ordinance of the ACT not to remit a portion of the fee otherwise payable upon the issue of a taxi licence under the Ordinance. The Minister had approved and published criteria regarding the eligibility for the grant of taxi licences at a concessional rate. The Federal Court held that a failure by the Minister to take the criteria into account in the exercise of his discretion to grant a taxi licence at a concessional rate did not constitute a basis for setting the decision aside. The approval and publication of criteria for eligibility did not operate to limit the width of the discretionary power. It was, therefore, not appropriate to discuss the question whether the Minister took into account irrelevant considerations or failed to take into account relevant considerations by reference to the criteria which the Minister had approved. The matters which the Minister took into account were clearly relevant to the question whether the fee should be remitted.

The decision in this case is consistent with the decision of the full court of the Federal Court in Broadbridge v Stammers (1987) 76 ALR 339 in which the full court held that failure to observe strict compliance with guidelines in a manual was not a matter going to absence of power in the decision maker.

Alleged bias of decision maker

In Laws v Australian Broadcasting Tribunal (5 August 1988) the applicant sought review of decisions of the Australian Broadcasting Tribunal relating to his radio programs. One of the decisions in question was constituted by an expression of opinion by three members of the Tribunal that the applicant had breached Radio Program Standard RPS3, as laid down under section 16(1)(d) of the Broadcasting Act 1942, in that the subject programs 'were likely to incite and perpetuate hatred against a group on the basis of race'. This expression of opinion preceded a recommendation for an inquiry under section 17C(1) of that Act; and the decision to hold such an inquiry was also challenged.

Justice Morling rejected a submission that, before forming the opinion referred to, the members of the Tribunal were bound to afford the applicant an opportunity to put submissions to them. The expression of opinion did not affect any right or interest of the applicant and, therefore, the respondent was not obliged to observe the rules of natural justice.

His Honour also rejected the applicant's submission that the three members of the Tribunal had, in deciding to hold an inquiry under section 17C(1) of the Act, exhibited bias against the applicant such as to preclude the Tribunal from further investigating the matter. Nonetheless, he directed that those three members should take no part in the inquiry as there was a likelihood of reasonable suspicion in the minds of fair-minded people that they would prejudge the issue. Otherwise he dismissed the application. The applicant has appealed the decision to the full Federal Court.

Order of court directing decision maker to take certain action

In Raveendran v Minister for Immigration, Local Government and Ethnic Affairs (8 July 1988) the applicant sought an order of review with respect to decisions to refuse to grant him a temporary entry permit under the Migration Act, to order under section 36A(3) of the Act that he be taken into custody and not to grant him refugee status or permanent resident status. Following his arrival at Sydney airport on a visitors visa, the applicant, a Tamil, was taken into custody. The Department believed that the applicant had arrived in Australia on the basis of a visa obtained by false representations. He remained in custody for 12 months during which time he made an application for refugee status. The application was refused.

The court held that there was not evidence capable of supporting a finding that the visa was obtained by false representation. Accordingly, the taking of the applicant into custody was unlawful. The court made an order directing that he be released from custody.

This case is interesting in two respects. First, the court took the unusual step, which had also been taken in the Platters Case (1986) 68 ALR 441, of directing particular action by the decision maker (s.16(1)(d) of AD(JR) Act). Secondly, the court did not apply the dictum laid down in the Television Capricornia Case (1096) 70 ALR 147 which said that to establish the no evidence ground of review (s.5(1)(h)) the applicant carries the burden of establishing that a fact relied on by the decision maker does not exist.

Nexus between statement of reasons and judicial review

Srokowski v Minister for Immigration, Local Government and Ethnic Affairs (27 June 1988) demonstrates the importance of the availability of a statement of reasons in relation to a decision to seek judicial review of administrative action. The applicant had been held in custody for 20 months pending deportation. He sought release from custody, which was refused. He then sought a statement of reasons for the refusal decision and subsequently judicial review of the decision. The court considered that material in the statement of reasons was more relevant to a decision to deport than a decision on a request for release from custody. Justice Lee said that the reasons displayed no assessment of some of the most important and relevant considerations, such as the inordinate period of imprisonment, the lack of imminence of deportation and whether suitable conditions for release could be imposed. In the circumstances, the court set the decision aside on the ground that the decision maker had failed to take into account important and relevant considerations.

A separate issue raised in the case was whether an authorised officer under the Migration Act acted as the delegate of the Minister in making a decision. Justice Lee said that he did not. He said that an authorised officer in the exercise of a discretion conferred on him was not subject to direction by the Minister (Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54, Mason J. at pp 82-3).

Damages not available in judicial review proceedings

In Ho v Minister for Immigration and Ethnic Affairs (4 August 1988) the full court of the Federal Court upheld the decision of Justice Davies (Admin Review 16:37) that the remedies referred to in section 16 of the Administrative Decisions (Judicial Review) Act do not include the making of an award of damages.

Potential difficulties in lack of transcript of AAT proceedings

Oldfield v Secretary to the Department of Primary Industry (14 April 1988) concerned an appeal to the Federal Court from the AAT against the Tribunal's refusal to grant an extension of time for lodging an application to the Tribunal for the review of a decision. One of the grounds of appeal was that the AAT had taken into account evidence and submissions which were not

before it at the hearing. In dismissing the appeal the full court of the Federal Court mentioned that one of the difficulties about the case was that there was no transcript available of the proceedings before the Tribunal. Although the court held that there was no legal obligation on the Tribunal to keep a record of what takes place before it, it said that it was desirable that such a record be kept.

At a time when the AAT is coming under pressure to do without transcription services as a cost cutting measure, the decision of the full court illustrates the difficulties which a party contemplating an appeal may face if no transcript of the proceedings of the AAT is available.

Commonwealth Ombudsman

Telecommunications (Interception) Amendment Act 1987

Under section 82 of the Telecommunications (Interception) Amendment Act, proclaimed on 1 September 1988, the Ombudsman is required to perform inspections at least twice a year of documents that the Act requires the Australian Federal Police and the National Crime Authority to maintain. The first of these inspections is planned to take place before the end of the year.

Taxation: late lodgment amnesty

The Ombudsman recently raised with the Commissioner for Taxation apparent inequities raised by complaints he had received in the wake of the taxation amnesty. The amnesty was designed to encourage people who have not lodged income tax returns for many years or who have never lodged to come forward and lodge their returns. These non-lodgers are benefitting from the amnesty while mere late lodgers are not. The Commissioner's power to remit late lodgment penalties is not being exercised for late lodgers. They are required to pay late lodgment penalties throughout the course of the amnesty, on the basis that they lodged their returns 'in the ordinary course of business'. The Ombudsman has taken issue with this approach, principally on the basis that the late lodger class should not be treated more severely than taxpayers who have persistently avoided their income tax responsibilities.

Tax effect on lump sum payments

Over the years the Ombudsman has received many complaints from taxpayers who had been required to pay more tax than they should have on lump sum payments for arrears of entitlements such as worker's compensation and certain pensions. For the purposes of the tax legislation this income has been treated as derived in