departmental file were exempt documents pursuant to section 33(1)(a) or 36(1)(a) of the FOI Act. As to the claim concerning section 33(1)(a), Justice Neaves concluded that it might reasonably be apprehended that disclosure of the documents concerned would reveal, or assist in revealing, the source from which certain information concerning the applicant was communicated, on an understanding of strict confidentiality, to ASIO. In consequence he was satisfied that there existed reasonable grounds for the claim that each of the documents in question was an exempt document by reason of the circumstance that its disclosure under the Act would be contrary to the public interest for the reason that the disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

The Courts

Discounting lump sum compensation payments

The issue before the High Court in Commonwealth of Australia v Blackwell (1987) 73 ALR 571 was whether, in the computation of a lump sum payable under section 49 of the Compensation (Commonwealth Government Employees) Act 1971, by way of a redemption of a liability to make periodical compensation payments, a discount rate should be applied and, if so, what the rate should be. This issue arose on an appeal from a decision of the full court of the Federal Court which had allowed an appeal from a decision of the AAT. (The decision of the full court of the Federal Court is mentioned at [1986] Admin Review 167.)

The High Court upheld the appeal from the decision of the Federal Court (Justice Deane dissenting). It considered that the general approach of the AAT was correct in applying a fixed rate of discount in the quantification of a redemption sum where a long period was involved. This general approach properly accorded with the view taken by the High Court in Todorovic v Waller (1981) 150 CLR 402 in relation to personal injury cases. However, in the present case, the High Court held that the AAT had misdirected itself in arriving at a discount rate of 4.5% per annum. It considered that there would be no objection to a discount rate of 3% per annum being applied. Accordingly, the High Court remitted the matter to the AAT to enable it to reconsider that part of its decision relating to the discount rate.

Departure by decision maker from policy rules

In Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce (11 December 1987) the applicant sought review of a decision of the Registrar of Quota Tender extending time for the lodgment of securities under the 1988 Global Tender Quota Scheme. The scheme was formulated by the Minister under section 266 of the Customs Act. The applicant was one of several tenderers who lodged securities by the required date. Several other tenderers lodged securities during an extension period

granted by the Registrar. A failure to lodge securities within the time provided for in the scheme meant loss of quota entitlement.

The Registrar had no express power under the scheme to extend time for the delivery of securities. The applicant contended that it was wrong for the Registrar to have given the extension.

Justice Davies considered the authorities which had dealt with the question in what circumstances a departure from rules or principles by reference to which decisions are taken but which are not statutory might invalidate a decision. He concluded that the scheme had to be looked on as a statement of guidelines, not as a prescription of legal entitlements. It was a statement of policy. It did not have legislative force.

Nonetheless, he said that, even if non-statutory rules did not of themselves have binding effect, the failure of a decision maker to have regard to them or to interpret them correctly might amount to an error of law justifying an order of judicial review. The evidence did not, however, show that the Registrar had failed to have regard to a material fact or had misinterpreted his authority. He had authority under section 42 of the Customs Act to extend time for the giving of securities and, in so far as a particular clause of the scheme might be read as taking away the authority, it was invalid.

Justice Davies also found that the Registrar's decision was not invalid on the grounds of improper purpose or breach of the rules of natural justice.

Extradition from Australia - need for law reform

In Hempel and Etheredge v Attorney-General (20 October 1987) Justice French concluded that the case before him disclosed deficiencies in the system of decision making and review in the extradition area that could affect public confidence in the law and in the administration of justice.

Mr Hempel and Mr Etheredge were on 1 August 1986 committed to prison by a magistrate under section 17 of the Extradition (Foreign States) Act to await the warrant of the Attorney-General. They sought review of that decision under section 18 of that Act and also under the AD(JR) Act. Their application was dismissed by Justice Burchett on 10 December 1986. They appealed against that decision to the full court of the Federal Court. That appeal was not able to be heard until May 1987. In interlocutory proceedings, they successfully resisted an attempt by the Director of Public Prosecutions to bring the hearing date forward but were unsuccessful in an application to be released on bail ((1987) 70 ALR 714). Their appeal was dismissed by the full court of the Federal Court on 22 May 1987. In June 1987 the Attorney-General signed warrants for their surrender to Israel. They then brought new proceedings in the Federal Court under the AD(JR) Act for review of the Attorney-General's decision.

The application was heard by Justice French. In his judgment dismissing the application, he expressed the conclusion referred to above. He said that the problem arose 'in large part out of divided review of divided primary decision making'.

On 27 November 1987 the full court of the Federal Court dismissed an appeal brought from the decision of Justice French.

It should be noted that decisions made under the Extradition Bill 1987 are proposed to be excluded from review under the AD(JR) Act. The Bill proposes to replace the present extradition legislation. It has been passed by the House of Representatives and is presently before the Senate. As was mentioned above in the report on the Council's activities, the Council wrote to the Attorney-General concerning the proposal to exclude review under the AD(JR) Act.

Law reform issues were also highlighted in Linhart v Elms (26 November 1987). That case concerned an application under section 15 of the AD(JR) Act for the applicants to be admitted to bail pending a final hearing of their judicial review application for review of a decision of a magistrate under the Extradition (Foreign States) Act that they be committed to prison to await the warrant of the Attorney-General for their surrender to West Germany. Justice Morling noted the unsatisfactory nature of the Extradition Act which, once a committal order has been made, gives a magistrate no power to grant bail except in the limited circumstances referred to in section 17(6)(d). The result was, as other cases had noted, that a fugitive was better off if he had broken the law in Australia than if he had not done so.

Justice Morling considered that the AD(JR) Act could supply the deficiencies of the Extradition Act. He held that the Federal Court had power under section 15 of the AD(JR) Act to make an order the effect of which was to grant bail to a person who had been dealt with under section 17(6) of the Extradition Act.

It should be noted that the proposed new extradition legislation presently before the Parliament appears to overcome the deficiency concerning bail in the present Extradition Act.

A further matter mentioned by Justice Morling in the case was that, if the AD(JR) Amendment Bill presently before the Senate (see 'Administrative Law Watch' section in this issue) is passed into law, applications for review of decisions made under the Extradition Act might well be unlikely to proceed because of the alternative methods of review provided for in section 18 of the Extradition Act. His honour considered that this matter ought to be taken up by the Parliament.

Snapper Island - decision to give notice to quit leased property

Interesting facts were before the Federal Court in 'Sydney' Training Depot Snapper Island Ltd v Brown (26 October 1987). The case concerned a judicial review application in relation to a decision of the Commonwealth to issue a notice to quit to tenants who occupied Snapper Island in Sydney Harbour. The

tenancy dated from 1931 and the island was used from that time by sea cadets. In 1963 the tenants had developed a maritime museum on the island. The notice to quit was issued because of a perceived danger to life and property posed by usage of the waters around the island as a staging point for the transportation by the Navy of ammunition to and from ships at Garden Island.

One issue before the court was whether the decision concerned was made 'under an enactment' so as to be reviewable under the AD(JR) Act. The applicants sought to avoid this question by also placing reliance on section 39B of the Judiciary Act.

The Commonwealth argued that the decision related merely to the exercise of a property right vested in it. Counsel for the applicant on the other hand argued that the decision also involved an exercise of the power of the control and management of the island given to the Minister by section 6 of the Cockatoo and Schnapper Islands Act 1949.

Justice Wilcox said that the concept of natural justice had no application to a case where a person was considering the exercise of a mere right of private property. It was not clear that the decision was an exercise of power under section 6. Assuming that it was, however, Justice Wilcox concluded that the facts showed that there had been no denial of natural justice.

He also held that none of the other grounds relied upon by the applicants, including unreasonableness and lack of authority had been established.

Improper exercise of power in decision under Migration Act refusing grant of permanent resident status

In Khan v Minister for Immigration and Ethnic Affairs (11 December 1987) the applicants sought review under the AD(JR) Act of decisions refusing to grant them permanent resident status. It was argued that, in making the decisions, the department had improperly exercised the power conferred on it within the meaning of section 5(1)(e) of the AD(JR) Act, in the sense that a discretionary power had been exercised in accordance with a rule or policy without regard to the merits of the case (s. 5(2)(f)). The Federal Court considered the department's statement concerning the case of the applicants for a grant of permanent resident status and concluded that several factors indicated that, in determining whether 'strong compassionate or humanitarian grounds' existed for the grant of permanent resident status in accordance with section 6A of the Migration Act, the department had exercised its power in accordance with a rule or policy without regard to the merits of the applicants' case. The Federal Court set the decisions aside and ordered that they be referred back to the Minister for further consideration.

Necessity to identify error of law in decision of AAT to found appeal to Federal Court

Commissioner of Taxation v Brixius (6 November 1987) illustrates the difference between provisions governing appeals from the AAT to the Federal Court and the former provisions providing for appeals from a Taxation Board of Review to a State Supreme Court. The case involved an appeal from the AAT to the Federal Court. The AAT had allowed the taxpayer a deduction under section 51 of the Income Tax Assessment Act for rent paid by her in respect of a home study.

In the appeal to the Federal Court, counsel for the Commissioner of Taxation was asked to identify, for the purpose of establishing the jurisdiction of the court under section 44(1) of the AAT Act, the error of law which he contended the AAT had made. He answered that the error of law involved in the appeal was the proper construction of section 51(1) of the Income Tax Assessment Act. He contended that the AAT had wrongly applied the relevant law to the facts before it. He argued that in substance the Federal Court had the same jurisdiction under section 44(1) as a Supreme Court had under the former section 196 of the Income Tax Assessment Act to hear an appeal from a Taxation Board of Review.

The Federal Court said that this was not the case. Appeals under the former section 196 were available from a decision of the Board that involved a question of law. Appeals under section 44 on a question of law were more limited. The Federal Court cited the words of Justice Brennan in Waterford v Commonwealth of Australia (1987) 71 ALR 673, 689 who had said that the error of law which an appellant must rely on under section 44 to succeed 'must arise on the facts as the AAT has found them to be, or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make'. Justice Brennan had then said 'There is no error of law simply in making a wrong finding of fact'.

The Federal Court expressed the view that this result was somewhat incongruous. If a taxpayer chose to appeal to the Federal Court from a decision of the Commissioner instead of to the AAT, there was no limit on the power of the full court to review a decision of a single judge of the Federal Court made on the appeal. There was, however, the limitation mentioned when the appeal came from the AAT.

The Federal Court found that, in the case before it, the AAT had made no error of law. It dismissed the Commissioner's appeal.

When one considers certain of the appeals that have gone to the Federal Court from the AAT in areas apart from taxation, it might be suggested that the Federal Court in this case took a somewhat strict view of its jurisdiction. But, even if one accepts the view taken by the Federal Court, it might be argued whether the result in the case is incongruous as the Federal Court said given that the choice of forum that a taxpayer has in disputing a tax assessment is up to the taxpayer.

Application for review not properly lodged with AAT unless accompanied by fee

In Angus Fire Armour Australia Pty Ltd v Collector of Customs (NSW) (23 December 1987) the question in issue was whether an application to the AAT which was sent by post without the required filing fee and was returned by the District Registrar was nonetheless validly made within the relevant lodgment period. The Federal Court decided that it was not, and dismissed the applicant's appeal from a decision of the AAT. An application is made to the AAT upon its lodgment with the AAT. The court said that there was an element of acceptance required before it could be said that a document had been 'lodged' with the Tribunal. If an application made to the Tribunal were returned to the applicant without unreasonable delay, it could not be said to have been lodged with the Tribunal.

Costs of proceedings for judicial review of decisions of Australian Broadcasting Tribunal

The limited role of the Australian Broadcasting Tribunal in proceedings for the judicial review of one of its decisions was noted by the Federal Court in Our Town FM Pty Ltd v Australian Broadcasting Tribunal (3 November 1987). The application before the Federal Court was an application for costs incurred in connection with judicial review proceedings in the court. Justice Wilcox mentioned that, as a result of statements by the High Court in R v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13, 35-6, the ABT had, in judicial review proceedings which challenged its decisions, desisted from putting active argument in support of the decisions. These circumstances were, said Justice Wilcox, a matter to be taken into account in the exercise of the Federal Court's discretion as to costs. He said that it would seem somewhat hard for the courts at the one time to tell the ABT that it should not actively intervene to defend its decisions and, at the same time, to order it to pay costs if, without its having had an opportunity of defending a decision, the decision was held to be bad in law.

The judicial review proceedings in the Federal Court had involved applications for review of a decision of the ABT to award an FM commercial radio licence to Newcastle FM Pty Ltd. One of the grounds of attack was ultimately upheld, resulting in the ABT's decision being set aside. In the present proceedings, Justice Wilcox ordered that Newcastle FM Pty Ltd pay one half of the applicant's costs.

His honour suggested that consideration needed to be given to the situation which occurred when there were a number of parties who sought to attack a decision of the ABT. He suggested that the unsuccessful parties should, in certain cases, give consideration to the selection of the one firm of solicitors and the one counsel to represent all of them. It would, he said, be a serious state of affairs 'if the belief were to spread abroad that any disappointed applicant could come along and be separately represented and, if its application succeeded, obtain an order for costs in its own name, which might be duplicated

many times over as against the party who was unsuccessful' in the Federal Court proceedings.

Payment of family allowance in respect of children in Vietnam

The somewhat surprising decision of the AAT in Ho and Secretary to the Department of Social Security, which was commented on at [1987] Admin Review 6-7, was the subject of an appeal to the Federal Court in Secretary to the Department of Social Security v Ho (27 October 1987). Justice Davies allowed the appeal and remitted the matter to the AAT for rehearing according to law. Similar facts concerning whether a father in Australia had the custody, care and control of children in Vietnam so as to qualify for the family allowance arose in Huynh v Secretary, Department of Social Security. In a judgment delivered on the same day as the judgment in Ho, Justice Davies dismissed the appeal from a decision of the AAT which had affirmed the decision of the department cancelling Mr Huynh's entitlement to family allowance.

Commonwealth Ombudsman

Rural telephone services

For some time the Ombudsman has been investigating Telecom's pricing policy for installation of rural telephone services. In particular, he was concerned at what appeared to be discriminatory pricing for installation of services on properties which differed from the traditional family farm (eg cluster development or 'communes'). Telecom has now revised its pricing policy and the first reduction of around $1,000 has been achieved for a subscriber who complained to the Ombudsman. The Ombudsman is still concerned, however, that the operation of waiting lists in rural areas may be having similar discriminatory effects against non-farm properties. He is continuing to investigate the operation of these waiting lists.

Compensation for Telecom errors

Section 111 of the Telecommunications Act 1975 provides immunity from suit for errors by Telecom in many situations. The Ombudsman has taken the view, however, that immunity from legal suit should not preclude Telecom from paying compensation to subscribers in particular cases where there is an obvious error by Telecom and the consequences are quantifiable. Telecom has recently agreed to pay $2,400 in compensation to a business proprietor whose home telephone number was incorrectly listed as his business number in the yellow pages directory. The $2,400 covered his cost of installing a call-diversion machine on his telephone. There are other outstanding cases of a similar type which the Ombudsman is pursuing. The Ombudsman is yet to take up with Telecom the validity of a by-law which purports to deny liability specifically in the case of directory error.