

The AAT also discussed the question whether a recommendation should be made that VXF's costs be paid by the Commission. It decided that, since it was not probable that the applicant would have to pay any costs to Legal Aid, the hardship provisions did not apply. The case had a public interest component, but no commercial benefit for the applicant. Further, while the AAT was critical of the Commission's handling of the case it did not find the decision reviewed unreasonable. It therefore made no recommendation for payment of costs.

#### New South Wales Freedom of Information Act

The New South Wales Freedom of Information Act, which commenced operation on 1 July 1989, is the first of a NSW administrative review package which is expected to include merits review by an Administrative Appeals Tribunal and judicial review under the equivalent of the Commonwealth AD(JR) Act.

The NSW Freedom of Information Act, based on the Commonwealth and Victorian models, covers all documents relating to personal affairs, and such other documents as were brought into existence after 30 June 1984. Applications must be in the prescribed form, and accompanied by a fee to be determined in accordance with Ministerial guidelines. Time limits apply for dealing with applications. The Act contains provisions for internal review except where the request is for documents held by a Minister, and for amendment of records relating to personal affairs. It also contains provision for external review by the District Court or the Ombudsman.

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#### The Courts

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#### Broadcasting: 'in accordance with' the guidelines

Australian Capital Television v Minister for Transport and Communications (27 February 1989). This case referred to the Minister's decision to approve implementation of plans submitted under the Broadcasting Act. Any plan was required to be 'in accordance with' any guidelines issued. Justice Gummow found that, in the context of the legislation as a whole, the words 'in accordance with' were more akin to 'pursuant to' than to 'in strict compliance with'. The submissions satisfied this standard and the application was dismissed.

#### Deportation: basis of second order

In Kurtovic v Minister for Immigration, Local Government and Ethnic Affairs (28 February 1989) Justice Einfield found that the making and revocation of a deportation order did not exhaust the power under section 12 of the Migration Act to make a second order. Nevertheless, the Minister was prevented or estopped from exercising the power to deport in a way that would break a promise made to Mr Kurtovic. Mr Kurtovic had also been denied natural justice and the Minister's decision had involved an improper exercise of power.

Some years ago Mr Kurtovic shot and killed his parents-in-law and was subsequently convicted of manslaughter. The then Minister signed a deportation order but following a recommendation by the AAT the deportation order was revoked. In July 1986 the NSW Court of Appeal, in considering an application for review of a decision by the Parole Board, stated that there was a compelling case for deporting Mr Kurtovic and that the recommendation of the AAT should be reconsidered.

In January 1988 a later Minister signed a fresh deportation order which relied on the same offence. An application was lodged with the AAT for the review of that decision and the question of the Minister's powers was referred to the Federal Court. The Court concluded that while the second deportation order may be reviewable under the AD(JR) Act, the legislation did not prevent the making of a second order.

The Court, however, also held that estoppel was available in principle against a Minister exercising statutory power, although an estoppel would not operate if the actions which would otherwise be prevented could be shown to be for the public good. Further, a Minister may be estopped or prevented from exercising a statutory discretion in a way which would break or not fulfil a voluntary promise. In the circumstances the Court found that a letter to Mr Kurtovic constituted a voluntary promise by the then Minister and created or encouraged an assumption in him that the promise would be kept. The Minister was therefore estopped from signing and executing the 1988 deportation order.

The Court also found that failure to afford Mr Kurtovic an opportunity to make submissions on the reconsideration of the deportation order amounted to a denial of natural justice. Furthermore, it noted that 'there was no evidence, or no new evidence, which supported a conclusion that recidivism by the applicant was likely, or that there were...health reasons for deportation'. These were relevant considerations which did not appear to have been considered, rendering the decision an improper exercise of power.

#### Delegation of ministerial power

In Dhillon v Minister of State for Immigration, Local Government and Ethnic Affairs (15 March 1989) Justice Lee expressed the view that the power to cancel a temporary entry permit could not be delegated to a person other than the Minister, because the relevant statutory provision required that it be exercised 'by writing under his hand'.

#### Taxation: relief on hardship grounds

Powell v Evreniades (13 April 1989) challenged a decision of the Taxation Relief Board to refuse relief sought on the grounds of serious hardship from tax owing on a deceased estate. The Court found that the Board had taken into account irrelevant considerations, including a finding by the Board that the taxpayer's husband had participated in tax avoidance schemes. Even had this been relevant, failure to provide the taxpayer with an opportunity to rebut the allegation amounted to a breach of the rules of natural justice.

Taxation: authority for entry

In Commissioner of Taxation v Citibank Ltd (19 April 1989) the Full Court did not agree with Justice Lockhart's earlier conclusion that a written authority was required for entry and access under section 263 of the Income Tax Assessment Act 1936, and that the written authorisation show on its face the premises to be searched and the documents which were to be the subject of the search as well as a reference to the statute under which the search was made. The Court agreed with the trial judge, however, that section 263 is subject to the principle of legal professional privilege.

Immigration: natural justice

In Minister for Immigration and Ethnic Affairs v Pashmforoosh (28 June 1989) the Full Federal Court rejected the trial judge's conclusion (Admin Review 20:47) that procedural fairness had been denied, but upheld the conclusion that the Minister had failed to take into account relevant considerations and had failed to consider the substance of the Pashmforoosh's case. The section 13 statement of reasons provided by the Department did not fairly state the case or fairly address a point which had been made by a majority of the Immigration Review Panel. The appeal was therefore dismissed.

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Commonwealth Ombudsman

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Change to Social Security's benefit manual

As a result of the Ombudsman's pursuit of an oral complaint from a person whose spouse had a workers' compensation case pending against three previous employers, the Department of Social Security agreed to a minor change in its benefits manual.

The manual provided that a compensation 'clearance' should be obtained from the relevant State headquarters when there was any suggestion of present or future compensation being paid, before benefit entitlement was determined for unemployment and sickness benefits. The clearance is designed to ensure that State headquarter's compensation section is aware of the case and can serve a notice on the insurer or employer to recover benefits from the compensation payment if necessary. The manual provided that, alternatively, if delay were likely a signed acknowledgment that benefit may later have to be recovered from future compensation payments should be obtained from the applicant. In the complaint to the Ombudsman the person concerned had declared the matter on the application for benefit but refused to sign the acknowledgment, which resulted in a delay in payment of benefit.

The manual now provides a mechanism to ensure payment of benefit is not delayed pending compensation clearance, and for a written record to be retained of advice regarding possible future recovery if the applicant declines to sign the acknowledgment. The wording of the acknowledgment that applicants are being asked to sign is now the subject of another complaint.