or enable a person to ascertain, the existence or identity of a confidential source of information; that statutory secrecy provisions applied; and that it would involve unreasonable disclosure of someone's personal affairs.

The AAT concluded that the Department's policy on confidential sources was only one aspect of the case and could not determine the issue by itself. It noted that the file gave no indication of the informer's name nor whether he sought to have his identity kept confidential. It was also not satisfied that release of the document in question would disclose the identity of a confidential source.

However the AAT concluded that applications for residential tenancy in the properties concerned related to the personal affairs of the persons who had completed the forms. The documents had been obtained without the knowledge of the persons submitting the applications and without their authority for disclosure, but had current relevance. They were therefore exempt documents.

The Courts

Taxation: superannuation deductions

In Commissioner of Taxation v Arklay (28 February 1989), the Full Bench of the Federal Court examined the considerations to be taken into account by the Commissioner of Taxation in determining whether a deduction claimed for a contribution to a superannuation scheme was allowable.

In 1982 Mr Arklay, a temporary porter with the Queensland Railways, paid $120 to the Wales Retirement Fund. He then claimed that amount as a deduction in his income tax return. The Commissioner, however, decided that it was reasonable to expect that Mr Arklay on his retirement would receive superannuation benefits other than from his own contributions and he was therefore not entitled to the deduction. As a temporary employee Mr Arklay was not eligible to contribute to the State superannuation scheme, though long-term temporary staff were entitled to a 'retiring allowance'.

The AAT, in reviewing the decision not to allow the deduction, had decided that the question whether a person is an eligible person is 'one of fact and degree', depending on whether there were grounds in existence on which one could predict with reasonable confidence that superannuation benefits would be payable in retirement. In Mr Arklay's circumstances at the time the prospect of him continuing in the service, attaining permanent status and joining the State superannuation scheme was uncertain. The Court concluded that the Tribunal correctly construed and applied the legislation, and dismissed the Commissioner's appeal.

Calculation of damages

Jenkins and Associates, and Jenkins v Coleman (7 July 1989) was an appeal against orders of a single judge of the Federal Court that Jenkins and Associates, a firm of architects, had contravened the Trade Practices Act 1974, that they and Mr Jenkins had given negligent advice, and that they were liable to pay damages to Mr Coleman. The judge had ordered that the damages be ascertained by the Registrar pursuant to the Federal Court Rules.

The Full Court of the Federal Court found that the use by the trial judge of the 'Practice Notes' used by the Royal Australian Institute of Architects, which were not in evidence before his Honour and on which the appellants had not been given the opportunity to comment, constituted a breach of the rules of natural justice. In addition, given the complexities of the case the Full Court was unable to conclude that negligence was, or was not, established. It therefore ordered a new trial.

On the question of damages, both parties contended that it was not within the trial judge's power to refer the matter to the Registrar. The Court found that a necessary precedent to the use of the power was that the amount of the damages was 'substantially a matter of calculation'. The function sought to be entrusted to the Registrar, however, involved fact-finding and judgment as well as matters of calculation. The Full Court concluded that the reference went beyond what was authorised by the rules, and set it aside.

Immigration: provision of false information

Rubrico v Minister for Immigration and Ethnic Affairs (31 March 1989) provides a detailed examination of the difficulties involved in assessing whether the omission of information or provision of false information at entry is sufficient to render The person concerned indefinitely subject to deportation.

Ms Rubrico entered Australia in May 1981 as the fiancee of an Australian resident whom she married the following September. Shortly thereafter, in applying for citizenship, she revealed that she had a child in the Philippines. At later interviews it also emerged that she had been married.

Between 1982 and 1986 Ms Rubrico visited the Philippines, and on each occasion she was granted an unconditional entry permit on her return.

Justice Lee first examined the question whether the misleading information Ms Rubrico had given in 1980, ie that she was single and had no children, rendered her a prohibited non-citizen in the absence of an endorsement to her entry permit. He concluded that the requirement for an endorsement under certain circumstances related to the entry permit current at that time and not to all or any subsequent entry permits. He also suggested that, since the Department was aware not long after

entry of the misinformation in Ms Rubrico's case, it had an obligation to consider whether subsequent entry permits required an endorsement. There was scope for the view that either the Department had decided that no endorsement was necessary, or the duty to endorse Ms Rubrico's entry permit appropriately remained to be performed. In either case, Ms Rubrico would not have been a prohibited non-citizen and the deportation order was fundamentally flawed.

His Honour also considered the decisions to refuse Ms Rubrico's application for an entry permit and to refuse to allow her to depart voluntarily from Australia. He concluded that the decision-maker had erred in failing to take account of relevant considerations and in taking into account irrelevant considerations. He therefore set aside the decisions in question and remitted the matter to the Minister for further consideration.

Veterans' affairs: meaning of 'allied veteran'

In Truchlik v Repatriation Commission (16 June 1989) the Full Bench of the Federal Court examined the meaning of 'allied veteran' in the Veterans' Entitlements Act 1986.

Mr Truchlik served in the Czechoslovak Army after the rebellion against Germany in August 1944, when Czechoslovakia was an allied country. Prior to August 1944, however, elements of the Slovak Army in which Mr Truchlik served had supported or assisted the forces of Germany. The Repatriation Commission rejected Mr Truchlik's application for a pension on that basis and he applied to the AAT. The AAT accepted evidence that Mr Truchlik had been a member of the resistance and, while a member of the Slovak Army, had served the Resistance Movement. Nonetheless, it upheld the primary decision, concluding that because Mr Truchlik had been enrolled in the Slovak Army he necessarily served in that Army.

The Full Court concluded that the AAT had erred in substituting the test of 'enrolled' for the test of 'served'. Mr Truchlik's case was unusual. He had entered the Slovak Army as the best means of serving the Resistance. His actions in serving the Resistance were a breach of the duties of a member of the Slovak Army. He thus was enrolled in that Army but he did not serve in that Army.

The Court remitted the case to the Repatriation Commission with the direction that Mr Truchlik was eligible to receive the pension.

Natural justice in government contracting

Century Metals and two other companies had expressed interest in reviving the mining operation on Christmas Island. The liquidator, Mr Yeomans, who had been asked to evaluate the proposals, recommended that another company, Elders, be granted the franchise. The Minister accepted the recommendation.

Century Metals challenged these decisions on the grounds of breach of the rules of natural justice and improper exercise of power. The Full Court of the Federal Court allowed an appeal from a decision of Justice French dismissing an application for review, upholding the natural justice ground (Century Metals and Mining NL v Yeomans and the Minister for Arts and Territories (25 July 1989)).

The Court rejected a submission that the decisions were not justiciable on the ground that the ultimate decision was one to be made in the public interest and was one of a political nature. It applied the test of Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service (1985) 1 A.C. 374: 'There is no general principle that decisions which are made in the public interest and/or which are politically controversial are immune from judicial review'. The Court acknowledged that, having regard to the width of the matters which might legitimately be considered in an assessment of mining proposals, including social and political factors, it might be difficult for any person to challenge the decision accepting one proposal rather than another. But this provided no reason for immunizing the decision from review. It similarly rejected a suggestion that the rules of natural justice did not apply in relation to the decisions in question.

The Court accepted the view that where the facts give rise to a legitimate expectation that a particular benefit will be conferred, or even that a particular procedure will be followed in relation to the applicant's case, the decision-maker cannot avoid the obligation to accord procedural fairness. Here the Minister freely chose to take 'the exceptional step' of promising an independent inquiry before any decision was made in connection with mining on Christmas Island. Since the Minister failed in that, a breach of the rules of procedural fairness occurred.

On questions of independence and impartiality, the Court held that the test of bias applicable to judicial proceedings was, in the particular circumstances of this case, the appropriate principle to be applied. The Court held that since the liquidator might reasonably have been perceived to be biased, having previously expressed strong views on the matter, the requisite independence and impartiality were lacking, and hence a further breach of natural justice occurred.

The Court remitted that matter to the Minister for further consideration according to law.

Administrative Appeals Tribunal: availability of evidence

Australian Postal Commission v Hayes (18 May 1989) was an appeal from a decision of the AAT that the Postal Commission show Ms Ursula Barnbrooke, an applicant for compensation, a film depicting her activities.

Ms Barnbrooke had been granted compensation in March 1986 for 'pain in the right hand' attributed to her work sorting mail. Two years later the Commissioner for Employees' Compensation terminated the compensation payments, and Ms Barnbrooke applied to the AAT for review.

At the commencement of the hearing, Ms Barnbrooke's solicitor sought access to a video film of Ms Barnbrooke's activities that the Commission proposed to use in evidence. On the grounds that 'in fairness, where something is alleged against a person before the Tribunal, then the applicant should not be taken by surprise, but should have the opportunity of...giving her explanation for what is said', the AAT ruled that Ms Barnbrooke be shown the film at the commencement of her evidence. The Commission appealed the ruling.

Justice Wilcox accepted that the right to cross-examine effectively must include the right to test the credibility of the claimant. Where the claimant's account of the symptoms of a disability is likely to be critical, it is normally necessary for the cross-examiner first to have the witness commit himself or herself in relation to the extent of the disability before confronting the claimant with a film depicting his or her actions. It is important, in that process, that a mendacious witness not be aware of material available to the cross-examiner to contradict false evidence and therefore be able to tailor his or her evidence to accommodate it. The AAT Act, which requires all relevant material to be disclosed by the decision maker before the commencement of the hearing, does not require disclosure of material of this nature or authorise the production of material to bodies other than the AAT. Justice Wilcox concluded that the direction given by the AAT denied the Postal Commission procedural fairness, and remitted the matter to the AAT.

Promotion appeal: meaning of 'seniority'

Kerr and Others v Verran and Others (7 July 1989) concerned promotions within the A.C.T. Fire Brigade. Mr Verran had appealed against several provisional promotions on the ground of equal efficiency and seniority. A Promotions Appeal Committee had dismissed the appeal, concluding that Mr Verran was not senior to any of the provisional promotees. Mr Verran then took the matter to the Federal Court, where the trial judge held that 'seniority' within the meaning of the relevant Ordinance derived from the date upon which the person was appointed to the Brigade. He therefore set aside the decisions concerned.

The Full Court reversed the trial judge's decision on the ground that seniority was to be determined by reference to the rank held by the member at the time. In addition, Justice Beaumont expressed the view that a tribunal or decision-maker who has considered a case initially ought not normally be permitted to present a substantive argument as a party to an application to the Court for judicial review. Rather the tribunal or decision-maker ought to submit to such order as the Court might

make. Subject to its consent, the Commonwealth could be joined as a party and be given an opportunity to make submissions. Justices Gallop and Jenkinson, however, considered that in the circumstances no action should be taken to invite the Commonwealth to be joined.

Equal employment opportunity: indirect discrimination

In Department of Foreign Affairs and Trade v Styles (28 August 1989) the Full Bench of the Federal Court allowed an appeal against a decision by a single judge that an implicit requirement in the Department's selection process indirectly discriminated against Ms Styles by comparison with male applicants (Admin Review 19:8-9). After examining the four components under the Sex Discrimination Act 1984 which must be present before it can be concluded that sex discrimination has occurred, the Full Court decided that in the circumstances of this case the precept of fairness, when weighed against the discriminatory impact, was sufficient to render the requirement reasonable.

Immigration: decisions set aside

In four cases heard in July/August 1989 the Court set aside decisions on migration matters. Eskaya v Minister for Immigration, Local Government and Ethnic Affairs (21 July 1989) and Renevier v Tuong Quang Luu (28 July 1989) involved applications for permanent resident status on compassionate and humanitarian grounds. In Eskaya Justice Lee concluded that the decision-maker's discretion had been exercised in accordance with policy guidelines which were in disharmony with the provisions of the Act, and that the application had not received proper, genuine and realistic consideration. Justice Spender in Renevier concluded that a decision by the Department that there was a real risk of recidivism, which had been contradicted by the medical evidence, was so unreasonable that no reasonable person could have made it.

In Mayur Kumar v Minister for Immigration, Local Government and Ethnic Affairs (4 August 1989) Justice Beaumont allowed the application on the grounds of denial of natural justice. He pointed out that while it was not necessary to put all adverse material to an applicant, it is important that the applicant be given the opportunity to answer adverse material where that material is sourced from someone other than the applicant and the applicant has no means of knowing or anticipating that such material will be used against him. In the remaining case, Barrett v Minister for Immigration, Local Government and Ethnic Affairs (21 July 1989), the Full Court allowed an appeal on the grounds that the material upon which a deportation order was based was misleading, and that an extension of time should have been granted to allow the applicant to file an application for review.

Commonwealth Ombudsman

Unlawful customs fee

Since December 1988, the Australian Customs Service (ACS) has charged a Manual Entry Fee of about $30 for customs clearance information lodged on paper rather than electronically. The Ombudsman has been investigating a complaint that the Manual Entry Fee is unlawful.

At the Ombudsman's suggestion, the ACS sought advice from the Attorney-General's Department. It gave the opinion that charging the fee is unlawful and would require not only an amendment to regulations but also an amendment to the Customs Act 1901. The ACS agreed to stop collecting the manual fee; to refund fees to those applicants who could prove they had paid; to issue a Customs Notice to this effect; and to seek non-retrospective legislation for the fee, probably with effect from 1 January 1990.

Calling tenders for land already under contract

In 1981, pursuant to the government policy at the time of offering tenants of Commonwealth land the opportunity of buying the freehold of the land when it became available, the Department of Administrative Services (DAS) offered land in Queensland to a rifle club. A price of $10 000 was agreed in 1984, and trustees were appointed to whom the Commonwealth could sell the land. After negotiations, the club accepted the terms of the Commonwealth's offer by letter on 21 September 1988.

In the interim, however, the ministerial policy had changed after the Government learned that some occupants of Crown land who had bought the land below market value in this way were reselling at a profit. Under the new policy, advertisements calling for tenders or offers for such land were to be placed in appropriate newspapers. On 29 September 1988, DAS told the club its offer was withdrawn. The club sought the Ombudsman's intervention to prevent DAS accepting a tender to buy the land and to request DAS to give the club time to raise $40 000, the estimated market value of the land.

The Ombudsman's investigations revealed, however, that in early 1989 DAS had received advice from the Australian Government Solicitor (sought prior to the lodgment of advertisements but supplied after tenders had closed) that a binding agreement between the Commonwealth and the club had come into effect as a result of the club's acceptance of the $10 000 offer on 21 September 1988. In the event, the Minister agreed to proceed with the contract to sell the land for $10 000 but requested DAS to negotiate a provision that would prevent the sale of the land by the club within the next ten years.