would be an 'unreasonable' effect. That is, the decision maker must be satisfied that the effect is of substance rather than incidental or trivial.'

PIAC attempted to put an argument that Schering had in its business activities breached section 52 of the *Trade Practices Act 1974* such that certain documents did not relate to a 'lawful' business. The Tribunal rejected the argument noting that it did not see how, in the context of the FOI Act, it could make a determination under the Trade Practices Act. It concluded that it had no jurisdiction to make a finding about this kind of lawfulness. Note that the Tribunal's rejection of the balancing of interests approach is inconsistent with the approach taken in *Rogers Matheson Clark* discussed above.

Finally, the Tribunal referred to the departmental officer's statement that, in making his decision under the FOI Act, he skim read the material and addressed the matter as a whole, determining that the documents formed part of an application to the Department and that they were confidential and therefore exempt. The Tribunal rejected this method of making a decision under the FOI Act:

'It is not sufficient to simply say that, because material is submitted as part of an application to the department, it is confidential and therefore exempt. The material itself must be examined.'

Applying these principles, the Tribunal made a determination about which documents and parts of documents should be disclosed.

The Courts

Adequacy of reasons

Soldatow v Australia Council (1991) 22 ALD 750 concerned an application by Mr Soldatow for a statement of reasons why the Australia Council had rejected his application for a Writers Fellowship. Mr Soldatow had been provided with two statements of reasons but both lacked any real specificity. Mr Justice Davies of the Federal Court, in considering the obligation under section 13 of the AD(JR) Act, said:

'Section 13(1) requires proper and adequate reasons which are intelligible, which deal with the substantial issues raised for determination and which expose the reasoning process adopted. The reasons need not be lengthy unless the subject matter requires but they should be sufficient to enable it to be determined whether the decision was made for a proper purpose, whether the decision involved an error of law, whether the decision-maker acted only on relevant considerations and whether the decision-makers left any such consideration out of account ...'

'The making of an order under section 13(7) is discretionary. Therefore, before making such an order, the Court should be satisfied that, notwithstanding that the reasons given may not satisfy all aspects of section 13(1), nevertheless, the ordering of a fuller and better statement would be a useful step furthering the interests of justice.'

Payment of interest under AD(JR) Act

In *Kawasaki Motors Pty Ltd v Comptroller-General of Customs* (1991) 102 ALR 258, Kawasaki had applied to the Federal Court to set aside the revocation of a tariff concession order and to be repaid overpaid duty with interest. The Court set aside the revocation but reserved the question of remedies. The Comptroller-General repaid the overpaid duty but disputed his liability to pay interest. Mr Justice Davies of the Federal Court said:

'I am therefore satisfied that an order made under section 16(1)(d) of the AD(JR) Act directing a party to do any act or thing 'which the Court considers necessary to do justice between the parties' may include an order for the payment of interest in accordance with the general policy established by section 51A [of the *Federal Court of Australia Act 1976*].'

Negligence and judicial review

Buksh v Minister for Immigration, Local Government and Ethnic Affairs (1991) 102 ALR 647 arose after Mr Buksh had been provided with incorrect forms upon which to apply for an entry visa to stay in Australia. As a result of being given forms that would certainly lead to his application being unsuccessful, Mr Buksh had lost his opportunity to apply under a category in respect of which he may have been successful. Mr Buksh claimed that he was denied procedural fairness because he was not advised that his application may have been successful if put differently.

Mr Justice Einfeld first considered the matter as a claim under estoppel:

'In this case, the department failed to advise the applicant correctly as to his rights; it guided him wrongly and misrepresented the correct position to him by providing him with wrong forms; it required him to complete and submit them; and the Act and regulations required that he pay one or more fees upon lodgment. According to the respondent's submission the applicant was thereby prevented from making or having considered an alternative application which might succeed. Hence, in completing and submitting the abortive forms, and in paying the relevant moneys, this applicant has, even on the respondent's case, acted to his own severe irreversible detriment on the basis of the false advice and negligent action of the department ...

'If I am free to do so and without specifying the category of estoppel from those discussed with great learning by Gummow J in *Kurtovic*, I would find that the respondents are estopped from refusing this applicant a consideration of any entitlement under regulation 35AA and section 47.'

However, the Court did not have to rely upon estoppel. It went on to determine that the department's actions

'... manifested a breach of the department's duty to take reasonable care to give correct information. This breach, and the suffering by the applicant of serious loss or damage in consequence, provide the applicant with legal entitlements and establish legal consequences. Among those relevant for present purposes are that the respondents' decisions under review become infected with the taint of illegality referred to in various provisions of section 5 of the [AD(JR) Act], as for example subsection (1)(a), (e), (f) and (j), and (2)(b), (f), (g) and (j).'

The decisions were set aside. This judgment appears to expand significantly the role of negligence in judicial review. An appeal has been lodged.

Ouster clauses: section 39B Judiciary Act and section 75(v) Constitution

Statutory provisions which purport to restrict judicial review, for example, by making a decision 'final and not to be questioned by any court', are known as 'ouster clauses'. It is now established that the jurisdiction of the High Court under section 75(v) of the *Constitution* to make certain orders against an officer of the Commonwealth cannot be ousted.

The judgment of the Full Federal Court in *David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 has raised but not finally determined an important related administrative law question. Is the Federal Court, exercising jurisdiction under section 39B of the *Judiciary Act 1903*, to construe clauses which purport to oust its jurisdiction in the same way that the High Court would when exercising its jurisdiction under section 75(v) of the *Constitution?* With presently immaterial exceptions, section 39B gives the Federal Court original jurisdiction in identical terms to section 75(v).

The ouster clause in issue was section 177 of the *Income Tax Assessment Act 1936*. It provides that, in court proceedings involving a challenge to a tax assessment, production of the notice of assessment is conclusive evidence of the due making of the assessment. It is also conclusive evidence, other than in a review under part V of the Act, that the amount of the assessment and all the particulars of the assessment were correct.

In this case the Commissioner duly produced notices of assessment. David Jones challenged the assessment under section 39B. On appeal, a majority of the Full Federal Court held that section 177 could not displace the jurisdiction conferred on the Court under section 39B. In their view:

'it is apparent from the language of s 39B, its identity with that of s 75(v) and the second reading speech that the intention of the legislature was to confer on the Federal Court the full amplitude of the original jurisdiction of the High Court under s 75(v). Consistently with that intention, and the case law, the jurisdiction so conferred will not be displaced, qualified or limited by privative provisions in statutes predating the amendment. And for statutes which post-date it, there will be a powerful presumption, in the absence of clear words to the contrary, that no such displacement, qualification or limitation is intended. Statutory erosion of the jurisdiction will effectively return it, contrary to the legislative intention, to the exclusive province of the High Court'.

An application by the Commissioner for special leave to appeal to the High Court was refused as the tax dispute between the parties had been settled. However, the Chief Justice, Sir Anthony Mason, said that the case raised a point which, in an appropriate case, would warrant the grant of special leave.

National justice - adverse conclusions

Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 102 ALR 339 involved a claim that the decision-maker had denied Mr Somaghi natural justice when the decision-maker took a letter, written by Mr Somaghi, into account and, drawing from it an adverse conclusion, did not give Mr Somaghi an opportunity to respond to that conclusion. The majorty of the Court upheld the appeal. Mr Justice Gummow stated:

> '[I]n a particular case, fairness may require the applicant to have the opportunity to deal with matters adverse to the applicant's interests which the decision-maker proposes to take into account, even if the source of concern by the decision-maker is not information or materials provided by the third party, but what is seen to be the conduct of the applicant in question.'

Mr Justice Jenkinson, also in the majority, looked at the reasonableness of the conclusion drawn. Here the purpose inferred by the decision-maker 'was not so obviously the purpose which a reasonable observer would attribute to transmission of the letter that the applicant should be treated as having knowledge of what the delegate's judgment of that conduct would be'. It follows that a decision-maker who draws an adverse conclusion from some material supplied by an applicant may deny natural justice if his or her conclusion is not the obvious one. Decision-makers must consider whether their conclusion is sufficiently obvious to not require the giving of an opportunity to be heard.

Mr Justice Keely, in dissent, took the more traditional view:

> 'In my opinion procedural fairness does not require a decision-maker to give an applicant an opportunity to comment upon the view which the decision-maker has provisionally taken of part of the material submitted to him in support of the application ...'

Commonwealth Ombudsman

Review of the Office of the Commonwealth Ombudsman

The Senate Standing Committee on Finance and Public Administration Inquiry into the Office of Ombudsman began on 1 and 2 May 1991 at Parliament House in Canberra.

During this session the Committee heard from the Ombudsman and members of his Office; the Australian Statistician; representatives of the departments of Defence, Finance and Social Security; the Australian Taxation Office; the Merit Protection Review Agency; and the Administrative Review Council.

The Committee then held a plenary session and heard from Messrs Hugh Selby, Peter Bailey and Julian Disney. The evidence has now been published in Hansard.

The Administrative Review Council made a written submission to the inquiry. In summary its views were as follows:

- The Ombudsman is an essential and effective component of the Commonwealth's integrated administrative review system.
- The Ombudsman should give increased attention to the investigation of systemic problems.
- There should be greater liaison with other review bodies to eliminate gaps and overlaps in operations.
- Consideration could also be given to reviewbodies sharing offices and personnel.
- There are outstanding jurisdictional issues relating to the ABC, certain Archives decisions and court and AAT registries that require resolution.
- The Ombudsman is ideally placed to assist in overcoming ignorance of and impediments to access to the administrative review system:
  - by providing a central reference point for use by those who are dissatisfied with a government decision and do not know how to deal with it; and
  - by disseminating knowledge and information about administrative review, in particular the concept of review and that 'you can complain'.
- The Ombudsman could also be the spearhead for promotional activities on the administrative review system directed at particular segments of the community in accordance with