Although the application for an extension of time was refused in this matter, the Tribunal stated, without needing to make a finding on the point, that the chances of success on the merits appeared to be poor because:

> '...a duly constituted Tribunal has already heard all of the evidence on that issue [that the effects of the injury of 1978 are continuing] and has determined that, as of 1982, that was not so.'

In similar circumstances in *Plumb's* case (reported below) the AAT found that a cause of action estoppel arose.

Re Plumb and Comcare (14 February 1992) concerned the question whether a cause of action estoppel precluded the AAT, constituted by Presidential Member The Hon Justice Moss, from reviewing a compensation decision.

In 1988 a compensation decision relating to Mr Plumb's psychiatric condition had been reviewed by the AAT, which had set out the scope of its inquiry as being:

> '...to find whether at 18 February 1985 the Applicant was incapacitated by a deemed injury, whether that incapacity continued and if so, for how long and to what degree.'

That Tribunal found as follows:

> 'We have no hesitation in finding that from 20 July 1987...he had ceased to be incapacitated to any degree whatsoever. ...The maximum period of his compensable incapacity therefore is from 18 February 1985 to 20 July 1987, a closed period.'

There had been no appeal against that decision, and the Tribunal took the view that the instant proceedings amounted to an argument that the earlier AAT decision was wrong. The Tribunal followed the principles set out by Justice Pincus in *Bogaards v McMahon* (1988) 80 ALR 342, a case described by that Judge as being one depending on 'cause of action estoppel', and found that the earlier decision had determined the rights and obligations of the parties in respect of the relevant injury, such that it was functus officio (a duty, having been discharged, cannot be discharged again) and had no jurisdiction to decide the matter afresh.

The question of the availability of issue estoppel in tribunal proceedings also arose in *Re Colosimo and Comcare* (10 June 1992). In this AAT matter the Tribunal, constituted by Senior Member Handley, took the view that issue estoppel is available in tribunal proceedings, a contrary conclusion to that reached by the Tribunal in the *Petrou* case (reported in this issue above).

Mr Colosimo had sought to show that there was a link between psychiatric injury suffered by him and a previous employment of his. It was argued on behalf of Comcare that this question had already been determined by the AAT in previous proceedings and that the present Tribunal was functus officio. Although there was no reference to psychiatric injury in the previous decision itself, the Tribunal here was satisfied on the basis of the reasons for that decision that the claim for a connection between such injury and the employment had been considered and found not to exist.

In response to Mr Colosimo's submission that issue estoppel does not apply to AAT proceedings, the Tribunal here stated that it disagreed. Reference was made to *Bogaards v McMahon* (1988) 80 ALR 342, including the statement by Justice Pincus that:

> 'The doctrine of estoppel extends to the decision of any Tribunal which has jurisdiction to decide finally a question arising between parties even if it is not called a Court and its jurisdiction is derived from statute or from the submission of parties and it only has temporary authority to decide a matter ad hoc...'

These cases show that there is some uncertainty as to both the applicability of estoppel in tribunal proceedings and whether an estoppel should be classified as a cause of action estoppel or an issue estoppel.

Freedom of Information

Exempt documents

Searle Australia Pty Ltd v Public Interest Advocacy Centre (27 May 1992, Full Federal Court) arose after the Public Interest Advocacy Centre lodged a request for information held by the then Department of Health concerning intra-uterine devices manufactured by Searle. Much of the information held by the Department had been supplied by Searle, but some had also been supplied by persons who evaluated the product on behalf of the Department.

The Department provided some documents but relied on various exemptions under the FOI Act in respect of other documents. PIAC sought

review before the AAT of the Department's decision to deny access to the documents claimed to be exempt. Searle joined the proceedings as an interested party in accordance with the AAT Act. After considering the matter, the AAT granted access to further documents but also continued to deny access to others. Searle appealed and PIAC cross-appealed from the decision of the AAT. The case raised a large number of issues, the most important of which are individually considered below.

Function of the Tribunal

PIAC contended that the Tribunal was limited to considering the grounds of exemption initially relied upon by the primary decision-maker. The Court, constituted by Justices Davies, Wilcox and Einfeld, made it clear that 'the function of the Tribunal is to hear matters *de novo* and to reach a view for itself, untrammelled by the view of the primary decision-maker.'

PIAC also contended that Searle should be limited to presenting argument on section 43, which creates an exemption for documents relating to certain kinds of business affairs, and which would be the only ground open to it if it had initiated reverse FOI proceedings. The Court noted that Searle was a party under the AAT Act and was not limited by virtue of section 59 of the FOI Act, a reverse FOI provision, in relation to the kind of submissions it could make.

The leaning approach

PIAC argued that in light of the objects provision of the FOI Act, the Court should adopt a 'leaning approach' to the interpretation and application of the exemption provisions. That is, the Court should 'lean' in favour of disclosure of documents. This approach was rejected in *News Corp v NCSC* (1984) 1 FCR 64, but PIAC argued that that case should no longer be regarded as good law in light of the High Court's subsequent decision in *Victorian Public Service Board v Wright* (1986) 160 CLR 145.

The Court did not see any inconsistency between the cases and stressed that while the objects provision may assist the interpretation of any ambiguities in the legislation, it cannot prevail over words plainly expressed. In this way, the Court again clearly rejected the leaning approach.

Operations of an agency

Section 40(1)(d) exempts documents if their disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency. This exemption had been used to exclude from disclosure reports, which were about Searle-manufactured intra-uterine devices and which were prepared by the Department's external evaluators, on the ground that it would be difficult for the Department to continue to acquire the services of such evaluators if their views were to become publicly available.

PIAC argued that this exemption should be read as limited to matters relating to the internal administration of the agency, such as a report by a consultant on the operations of the agency. The Court agreed with the Tribunal that the exemption extends to documents the disclosure of which would have a substantial adverse effect on the way in which an agency discharges or performs any of its functions.

A public interest onus?

Several exemptions in the FOI Act do not apply to documents when their disclosure would, on balance, be in the public interest. The Tribunal referred to there being an onus on the applicant 'to make out a positive case with respect to public interest'. The Court made it clear that it would have been an error of law if the Tribunal had resolved the question by holding that the applicant had failed to discharge an onus, but because it had balanced the competing interests there was no error of law.

Trade secrets

Section 43(1)(a) of the FOI Act exempts a document if its disclosure would reveal a trade secret. The Tribunal, in determining the meaning of 'trade secret', referred to the case of *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588 and in particular the criteria there noted as to what constitutes a trade secret. The Court stated that this approach amounted to an error of law:

> 'If a term is used in legislation, Parliament is to be taken as requiring that individual cases will be judged against that term, not against other terms or criteria not used in the statute.'

In particular, the Court noted that the introduction of the limitation that the information needs be of a technical character does not appear in the statute and is not inherent in the term 'trade secret'.

'Unreasonable affect'

A question arose in relation to section 43(1)(c) and, in particular, whether disclosure would, or could reasonably be expected to, unreasonably affect a person adversely. In considering the meaning of the expression 'unreasonable affect', the Court stated:

> 'If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be *unreasonably* affected by the disclosure; the effect, though great, may be reasonable under the circumstances. To give two examples: if the relevant information showed that a business practice or product posed a threat to public safety or involved criminality, a judgment might be made that it was not unreasonable to inflict that result though the effect on the person concerned would be serious.'

Breach of confidence

Finally, the Court was required to consider the scope of section 45 of the FOI Act. The Court noted the impact that the FOI Act itself had on the capacity of the Commonwealth to agree to keep documents confidential. That is, with access to documents becoming enforceable under the FOI Act, subject to its provisions, there could henceforth be no understanding that absolute confidentiality would be maintained. However, the Court noted that:

> 'there may remain a distinction, not discussed by the Tribunal, between those documents emanating from Searle which it provided because it sought a decision under the *Therapeutic Goods Act* and documents which, on the other hand, Searle voluntarily supplied to the Department on the understanding that the documents would be kept confidential.'

It may be that documents voluntarily provided are capable, or perhaps more capable, of being documents subject to a requirement of confidentiality. Conversely, documents required under statute are less likely to be subject to such a requirement.

Result

In the end, as the application of these principles all involved questions of fact, the case was remitted to the AAT to be heard and decided according to law. [SL]

The Courts

Meaning of 'work'

In *Braun v Minister for Immigration, Local Government and Ethnic Affairs* (10 December 1991) the Federal Court, constituted by Justice French, was required to consider a determination of non-compliance with a condition of a tourist entry permit. The condition was that no work be undertaken without the permission in writing of the Secretary of the Department. The effect of such a determination is that upon notification to the permit-holder the permit ceases to be in force.

Miss Braun was a German woman who had entered Australia on a 6-month visitor permit. After visiting friends on a station property in Western Australia, she decided to experience the station lifestyle on a neighbouring property where she had met a man and where the cook had just resigned. Having ample time and wanting to make herself useful, Miss Braun managed the cooking from time to time without being paid. A delegate of the Minister visited the station some time later and decided that she was engaged in work there, and issued a determination that she was in breach of a condition of her entry permit.

The delegate applied the definition of work in Regulation 2 of the Migration Regulations, being that:

> 'Work in relation to a visitor visa or a visitor entry permit means an activity that in Australia normally attracts remuneration.'

This definition was introduced to the Regulations apparently as a consequence of the decision of the Full Court of the Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Montero* [1992] *Admin Review* 11 in which work was accorded its ordinary meaning, drawn from the dictionary, in terms of exertion.

The Federal Court decided that the delegate's conclusion that Miss Braun had been working had been correct, whether the dictionary definition of work which applied when the permit was granted or the new, narrower definition had been relied on. Once the delegate had reached that conclusion there was no discretion as to whether or not to issue a determination of breach of condition because of factors personal to the applicant or of a compassionate character. The Court did state, however, that: