The relevant provision of the FOI Act is as follows:

> "37(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to: ...
>
> (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; ..."

In *Re Hayes and Secretary, Department of Social Security* (6 September 1996), Hayes sought review of decisions exempting certain documents from release to him. Those documents comprised an unsigned letter from a member of the public containing information adverse to him and relating to his entitlement to a pension. It was accepted by all concerned in the review proceeding that the information was not true or correct (it did not result in any change to the benefits paid to him), but the Department nonetheless considered the documents exempt from the disclosure requirements on the ground set out above.

The Tribunal (Senior Member Kiosoglous) accepted the Department's submission that the information was provided under an implied request for confidentiality said to stem from the fact that the writer of the letter did not provide his or her name, address or signature, thereby expressing a desire not to be identified or contacted by the Department. Furthermore, the letter was received in confidence by the Department, an officer of which stated that the Department often receives information about people allegedly incorrectly receiving pensions, and that where such information is unsolicited and received in writing, it is treated confidentially by the Department.

The Tribunal also found that the information related to the administration of the *Social Security Act 1991* and that its disclosure could reasonably be expected to enable Hayes to identify its author, such that the conditions of exemption were met. The exemption decisions therefore were affirmed.

In *Re Caldow and Secretary, Department of Social Security* (24 June 1996) an exemption from disclosure on the same ground was claimed in relation to certain documents following a request by Caldow for all documents submitted by someone else relating to his pension and all records made by officers relating to information supplied verbally to the Department (his benefits had been terminated and later reinstated). The documents in question appear not to have been anonymous, as the Tribunal (Deputy President Forgie) said that nothing on the face of them indicated that their author or authors wished that they be kept confidential or not be revealed by the Department.

The Department argued that it was implicit that they were supplied on a confidential basis, suggesting that this is the case whenever adverse information is given to the Department by an informant. However, an officer of the Department stated that information is continually supplied to the Department and is assessed for investigation and action, and that such information "is frequently specified as having been given in confidence, or this can safely be inferred from the circumstances surrounding the giving of the information". The Tribunal noted that this meant that information was not necessarily received in confidence, and the Tribunal was not satisfied here that the information in question was given on a confidential basis. That being so, there was no need for the Tribunal to go on to consider the further questions of the purpose of the information and whether it might identify a confidential source.

The Courts

Judges performing administrative functions

The High Court has drawn a new line in the sand when it comes to the use of judges acting in their personal capacity to perform administrative functions for the Executive. By

a majority of six judges to one, the Court found in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220 that the nomination of Justice Mathews of the Federal Court to prepare a report for the Minister under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the ATSIHP Act) breached the constitutional separation of powers.

The ATSIHP Act empowers the Minister to make a declaration that may prevent or condition development of an area so as to protect certain Aboriginal heritage interests in the area. Before the Minister may make a declaration other than an emergency (temporary) declaration, he or she must (among other things), have received and considered a report under section 10 from a reporter nominated by the Minister. Expressed broadly, the report must deal with the Aboriginal heritage interests involved, the effects the making of a declaration might have on the proprietary or pecuniary interests of others and what protection is offered by State/Territory laws. The ATSIHP Act also requires the reporter to invite, consider and attach to the report representations from interested persons. Otherwise, it is silent on the role of and the procedures to be followed by the reporter.

The majority of the Court reasoned from the constitutional restriction on the availability of judges appointed under Chapter III of the Constitution to perform non-judicial functions, in particular the condition that no function can be conferred on such a judge that is incompatible with the performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.

The principal judgment was the joint judgment of Chief Justice Brennan and Justices Dawson, Toohey, McHugh and Gummow (Justice Gaudron delivered a separate judgment agreeing that the nomination was unconstitutional). The approach set out in the principal judgment to determining whether the nomination or appointment of a judge to perform non-judicial functions breaches the constitutional restriction involves the following questions:

- is the function an integral part of, or closely connected with, the functions of the Legislature or the Executive Government? (if not, then no question of incompatibility arises);
- is the function required to be performed independently of any non-judicial instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law? (if not, then the separation of powers is breached); and
- is any discretion purportedly possessed by the Chapter III judge to be exercised on political grounds – that is, grounds that are not confined by factors expressly or impliedly prescribed by law? (in this regard, it will often be relevant to ask whether there is a requirement to act judicially, and the requirements of procedural fairness are not necessarily indicative of this).

The principal judgment equated the reporter's function under the ATSIHP Act with that of a ministerial adviser; someone liable to removal before the report is made and without the usual judicial protections in the performance of functions provided by other statutes. Unlike the AAT Act, in which the legislature clearly intended that the AAT should be constituted upon the judicial model, separate from and independent of the Executive, there was no requirement under the ATSIHP Act that the reporter act independently of the Minister. The political nature of the task of the reporter was also noted.

Justice Kirby dissented. In disputing in this case where the separation of powers line should be drawn, he said that:

> "A reflection on the extended list of federal inquiries in Australia conducted by judges, federal and state, demonstrate that the use of judges, as Royal Commissioners, statutory office-holders or otherwise, to investigate sensitive and complex issues (some of them very controversial and partisan in their potential) has been a settled feature of Australian

public life during the whole history of the Commonwealth."

In relation to Royal Commissions, the principal judgment noted that the terms of reference of a particular royal commission and the enabling legislation would be significant.

Patient's right of access to medical records

On 6 September 1996 the High Court delivered judgment in the case *Breen v Williams* (1996) 138 ALR 259. Breen claimed that she had a right of access to her medical records and to inspect and/or copy them, and appealed from the NSW Court of Appeal's rejection (by majority) of those arguments (see [1995] *Admin Review* 21). The High Court unanimously dismissed the appeal, upholding the right of a doctor to refuse to provide a patient access to her medical records.

Breen relied on three common law sources in asserting the existence of a right of access. First, it was asserted that a patient had a proprietary right or interest in the information contained in the records. The High Court rejected this argument indicating that the information contained in the records could not be separated from the records themselves. As owner of the records the doctor had the sole right to copy or permit the copying of them.

Secondly, it was claimed that a right to access was an implied term of the contract between doctor and patient. This was also rejected by the High Court. The contractual obligation owed by a doctor to a patient was said to require the doctor to provide advice and treatment to the patient with reasonable skill and care. In some cases this may extend to providing the patient or the patient's nominee with information obtained by the doctor in the course of discharging the contractual obligation. However, any implied obligation to act in the patient's 'best interests' did not create an obligation to give a patient access to the doctor's records.

Lastly, it was alleged that access rights stemmed from a fiduciary relationship between doctor and patient. The High Court said that while duties of a fiduciary nature may be imposed upon a doctor they do not cover the entire doctor-patient relationship nor give rise to a duty to provide access to or permit the copying of her doctor's records.

Breen also asserted that the validity of the claim to access was supported by a movement in the law governing doctor-patient relationships towards a recognition of the patient's 'right to know' all necessary information concerning their medical treatment which included a right of access to their medical records. In relation to this argument, Justices Gaudron and McHugh held that while recent decisions of Australian courts had rejected the attempt to treat the doctor-patient relationship as basically paternalistic, it would require a 'quantum leap' to justify providing access to medical records on this basis. They also stated that in this case "it is not possible, without distorting the basis of accepted legal principles, for this court to create either an unrestricted right of access to medical records or a right of access, subject to exemptions."

The High Court decision in *Breen* makes it clear that a patient has no common law right of access to his or her medical records and if such a right is to be created it will require legislation. The Commonwealth Attorney-General's Department has recently released a discussion paper concerning the extension of an information privacy regime to the private sector (see Admin Law Watch).

Role of judicial review

In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481, the High Court made significant comments about the proper role of courts when undertaking judicial review. In particular, the Court said that:

> "... the reality [is] that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which they are expressed."

The case concerned applications for determinations by the Minister of refugee status under section 22AA of the *Migration Act 1958*. This provided:

> "If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee."

The Court was concerned that the Full Court of the Federal Court, from which the case (involving three decisions) came on appeal, had been overly demanding in scrutinising the reasons given by the three decision makers (delegates of the Minister). The Court noted that the above provision, requiring 'satisfaction' as to a given state of affairs, differed from the previous statutory approach, which provided that the relevant permit was not to be made unless the Minister had determined that a person had the status of a refugee. The decision to be made was not a determination of refugee status but a decision as to satisfaction regarding the status of a person as a refugee. The Court found that the subjective nature of the new approach was relevant to the question whether there had been a legal error.

The correct test for determining refugee status, enunciated in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, is based upon a person showing genuine fear founded upon a 'real chance' of persecution for a Convention reason (should they be returned to their country of nationality). The Court found that the Federal Court had developed a line of authority to the effect that attribution by a decision maker of particular weight to particular factual material amounted to renunciation of the correct 'real chance' test to be applied in favour of a 'balance of possibilities' test.

In response to submissions as to what decision-making process ought to have been followed by the decision makers involved, the Court noted that administrative decision making was of a different nature to decisions of the courts under common law procedures:

> "Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law."

The Court commented further on the use of standard paragraphs in statements of reasons for decisions under section 13 of the AD(JR) Act.. It said that:

> "A statement of reasons for a decision reviewable under the AD(JR) Act is not invalid [presumably meaning the decision is not invalid] merely because it employs a verbal formula that is routinely used by persons making similar decisions. If the formula is used to guide the steps in making the decision and reveals no legal error, the use of the formula will not invalidate the decision. On the other hand, if a decision-maker uses the formula to cloak the decision with the appearance of conformity with the law when the decision is infected by one of the grounds of invalidity prescribed by the Act, the incantation of the formula will not save the decision from invalidity."

Review of broad discretion exercised in the 'public interest'

Another issue about the scope of judicial review arose in *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 136 ALR 453. At issue was a decision of the Australian Securities Commission (ASC) to commence civil proceedings in the name of a company, which it was empowered to do under the ASC Act where "it appears to the [ASC] to be in the public interest". The action in-

volved was against former directors of the company, the aim being to ensure that creditors and shareholders would not be left without a remedy, and it appeared unlikely that the company would commence such proceedings. Deloitte Touche Tohmatsu (DTT) was the company's auditor at the relevant time, and it sought judicial review under the AD(JR) Act of the ASC's decision.

The Full Court of the Federal Court (Justices Beaumont, Drummond and Sundberg) upheld the ASC's exercise of discretion. From an administrative law perspective, the judgment is of interest for comments made about the nature of the statutory discretion vested in the ASC. The Court held that the remedial character of the relevant provision and the circumstances indicated that the provision was intended to confer an extremely wide discretion, and further that the exercise of discretion by reference to the public interest imported a discretionary value judgment of fact and degree. In other words, while such a discretion remains subject to judicial review, there is greater leeway provided to decision makers in these circumstances. The High Court recently refused special leave to appeal against this decision.

Review of ministerial directions

At issue in *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 139 ALR 577 were written directions given by the Minister to the Aboriginal and Torres Strait Islander Commission (ATSIC).

The ATSIC Act provides that ATSIC "shall perform its functions and exercise its powers in accordance with such general directions as are given to it by the Minister in writing". Such directions must be tabled in Parliament, but are not subject to disallowance. The directions given concerned the grant of funds by ATSIC, a function ATSIC is empowered by the Act to undertake. The directions were to the effect that ATSIC was not to make any grants unless a 'Special Auditor' appointed by the Minister found the applicants for the grants to be fit and proper persons to receive those grants.

The Full Court of the Federal Court (Chief Justice Black and Justices Tamberlin and Sackville) held that the power to give general directions did not extend to authorise the directions given here, since they purported to give the Special Auditor an effective veto power, exercisable by reference to a subjective judgment in particular cases, over the power conferred by Parliament on ATSIC.

Standing to seek judicial review

There have again been some interesting recent cases dealing with the issue of who is able to commence judicial review proceedings. The decision in the first of the following cases and comments in the second concerned standing under the AD(JR) Act of:

- an elected official to challenge a decision of the body to which he was elected; and
- local councils in areas that would be affected by increased aircraft traffic challenging a decision exempting a proposed Commonwealth action that was 'environmentally significant' from the administrative procedures generally required to be followed in respect of such an action.

In *Robinson v South East Queensland Indigenous Regional Council of the Aboriginal and Torres Strait Islander Commission* (unreported, 17 September 1996), Robinson, a Commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC) sought review of a decision of the relevant ATSIC Regional Council to provide funding to a particular Aboriginal legal service.

The Regional Council was exercising power to make funding grants under delegation from ATSIC, which is the peak national body consisting of Aboriginal people and Torres Strait Islanders elected by those peoples. ATSIC performs political, administrative and advisory functions and is charged with advancing the welfare of Aboriginal people and Torres Strait Islanders, who elect Regional Council members. There are 36 Regional

Councils. Regional Council members elect 'zone representatives' for 17 zones. ATSIC 'consists of' these 17 zone representatives.

Robinson sought standing essentially on the basis that he was an ATSIC Commissioner, and also because he was the Chair of an advisory committee (advising ATSIC) with responsibility among other things for 'law and justice' issues including provision of legal services. The Federal Court (Justice Drummond) decided that this was not sufficient to give him standing to challenge the decision in question, and in doing so rejected the suggestion that individuals elected to the controlling organ of a body performing political and public functions have standing to sue with respect to the body's functions. Rather, the Court was of the view that such a person must be able to show a special interest that was affected by the decision or activity of the elected body.

In *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 137 ALR 281, several NSW Local Government Councils sought unsuccessfully to challenge a decision in relation to the procedures to be followed before changes to the use of Sydney's major airport could be made. Having found that the substantive issues raised by the councils lacked merit, the Court (Justice Lehane) went on to discuss the question of their standing. He found that they had standing to seek judicial review:

> "They are local councils responsible for areas whose environment may well suffer, at least as an indirect consequence of the decision. Each has a statutory charter, which it is obliged to pursue, which includes, as one of the principles intended to guide it in carrying out its functions, the enhancement and conservation of the environment of its area. It has thus, I think, an interest considerably greater than that of an ordinary member of the public and one at least as substantial as that of the successful applicant in *North Coast Environmental Council Inc v Minister for Resources (No 2)* (1994) 55 FCR 492, 127 ALR 617."

Another standing decision of interest, in a different statutory context, is that of *Boots Company (Australia) Pty Ltd v SmithKline Beecham Healthcare Pty Ltd* (1996) 137 ALR 383. Here the latter company challenged the standing of the former to bring an action against it claiming that it had advertised and promoted a therapeutic product by false, misleading or deceptive representations in breach of the *Therapeutic Goods Act 1989*. SKB argued that the action was a public interest one that it should be the province of the Attorney-General to commence.

The Federal Court (Justice Lehane) was not satisfied that SKB had shown that Boots could not establish standing, finding that a commercial or financial interest, if sufficiently substantial, could constitute a 'special interest' for this purpose. After referring to cases in which standing to challenge administrative decisions had been refused on the basis that the applicant had only commercial interests at stake, the Court said that this case:

> "... illustrates what is, I think, a clear distinction between a case, on the one hand, where a party claims standing to seek review of an administrative decision and, on the other hand, one where a private person seeks to restrain the commission of an offence. In the former case, as *Alphapharm* and *Big Country* demonstrate, a lack of coincidence between the interest of the party seeking review and the statutory purpose which the decision maker is required to observe may be crucial to the question of standing. In the latter case it may well be considerably less so."

Scope of the AD(JR) Act

There have been several recent decisions dealing with the scope of the AD(JR) Act. In issue were decisions:

- of the Commissioner of Taxation to vote against a motion put to a meeting of creditors under the Bankruptcy Act;
- of the stock exchange to remove a company from the official list;
- of the Promotions Committee of the Board of the Faculties of the Australian National University not to recommend a promotion to Reader; and
- of the Commissioner of Taxation not to commence prosecution action against audit staff.

The first three decisions were all found to be beyond the scope of the AD(JR) Act, while the last was found to be covered by the Act. Each is dealt with below.

Hutchins v Federal Commissioner of Taxation (1996) 136 ALR 153 concerned a decision of the Commissioner to vote against a motion put to a meeting of Hutchins' creditors convened in accordance with the *Bankruptcy Act 1966*. The motion was for a special resolution that the creditors accept a composition of Hutchins' debts (one of which was a debt owed to the Commonwealth for income tax and associated liability).

The Full Court of the Federal Court (Chief Justice Black and Justice Spender, Justice Lockhart dissenting) held that the motion was not a decision under an enactment. It had been argued that the motion was a decision under sections 8, 208 and 209 of the *Income Taxation Assessment Act 1936*. The provisions authorising the Commissioner to recover tax that is a debt to the Commonwealth were very general and the decision too remote and non-specific for it to be said that it was made under that Act.

Two judges (Chief Justice Black and Justice Lockhart) also said that the decision was not reviewable under the AD(JR) Act because it was not of a substantive nature. The decision to vote did not of itself determine anything.

Chapmans Limited v Australian Stock Exchange Limited (1996) 137 ALR 433 involved a decision of the Australian Stock Exchange to remove Chapmans Limited (Chapmans) from the official list. Chapmans argued that this was a 'decision under an enactment' for the purposes of the AD(JR) Act. The reason Chapmans argued this was that it was seeking to obtain a statement of reasons for the decision under section 13 of the AD(JR) Act.

The Full Court of the Federal Court – Justices Lockhart and Hill (with whom Justice Sheppard agreed) – found that the relevant criterion was that there needed to be sufficient proximity between the decision and the enactment for the decision to be characterised as one made under an enactment. In this case there was no Act which required or authorised delisting. Nor could it be said that the rules were contained in an instrument made under an Act. The listing requirements were identified in the Securities Industries Act which provided for the incorporation of the Exchange. Although it was true that a court might enforce compliance with the listing rules and the Exchange's enforcement of that compliance, the fact that the listing requirements were referred to in an Act did not mean they were made under it. More than identification in an Act was required before an instrument could be said to be one made under an enactment.

Australian National University v Lewins (1996) 138 ALR 1 involved the unsuccessful application by an academic for promotion from senior lecturer to Reader. Lewins sought from the University reasons for the decision of the Promotions Committee of the Board of the Faculties not to recommend his promotion. The case turned on the status of a document entitled "Statement of Policy Procedures for Promotion to Academic Level D (Reader)". It was argued by Lewins either that the decision was made under the *Australian National University Act 1991* (the ANU Act) itself (within the power on the part of the University 'to employ staff'), or that the document was an 'instrument' for the purposes of the definition of 'enactment' in section 3(1) of the AD(JR)

Act and the decision was made under the document.

The Full Court of the Federal Court (Justices Davies, Kiefel and Lehane) rejected these arguments. In discussing the question whether the document was an 'instrument', Justice Lehane (with whom Justice Kietel agreed) referred to comments made by a majority of the Full Court of the Federal Court in *Chittick v Ackland* (1984) 1 FCR 254 to the effect that to qualify as an 'instrument', a document must have the capacity to affect legal rights and obligations. He then found that it was not possible to construe a statutory power to employ staff as enabling the University unilaterally to vary its contracts with its employees or to impose on them, without their consent, conditions which legally bound them (except to the extent permitted by contracts of employment themselves). Thus the document was not one that the ANU Act gave the capacity to affect legal rights or obligations, any more than a similar document issued by a private employer would have that capacity.

Review was sought under the AD(JR) Act of a decision of the Commissioner of Taxation not to prosecute audit staff of the Australian Taxation Office for alleged breaches of the secrecy provisions of the *Income Tax Assessment Act 1936* in *Schokker v Commissioner of Taxation* (unreported, 30 August 1996). The ATO had decided not to put a case for prosecution to the Commonwealth Director of Public Prosecutions (DPP) after receiving advice from the DPP that there was a defence to the alleged breach. This view depended on the interpretation of a provision of the Income Tax Assessment Act and was contested by Schokker.

The Federal Court (Justice Nicholson) found that the offence alleged was one that, under the relevant legislation, was required to be instituted by or on behalf of the Commissioner. Therefore the Commissioner was required to make a decision whether to institute a prosecution, and as the decision was expressly authorised by the Income Tax Assessment Act, it was reviewable under the AD(JR) Act.

Statement of reasons for ministerial decision

In *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (unreported, 26 June 1996) the statement of reasons for a decision of the Minister became relevant to one of the main issues in the case, and some important comments were made about the requirement under section 13 of the AD(JR) Act on a decision maker to provide a statement of reasons for a decision.

This case involved a declaration under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the ATSIHP Act). There is a brief summary of the process leading to the making of (or refusal to make) such a declaration in the earlier discussion of the *Wilson* case. One of the ways in which the declaration here was challenged was on the basis that the Minister had failed, as required by the ATSIHP Act, to consider the representations from interested persons attached to the relevant report.

The judge whose decision was appealed from had found that the statement of reasons for the Minister's decision amounted to an incantation of his compliance with the requirements imposed on him by the ATSIHP Act and a reference to a bundle of information, and that this stated the Minister's conclusions but not his reasoning. The statement asserted that the representations had been considered, but the meaning of 'considered' and whether the representations had been considered were issues in the case. The report and other material the Minister was required to consider had been provided to him shortly before the decision was made, and following further explanation of the circumstances existing at the time and after the report was provided the judge determined that the Minister had not considered the representations.

The Full Court approved the reasoning of the judge on this issue. The fact that the Minister did not give evidence (some evidence was given by his senior adviser) did not provide positive evidence that he did not consider the

representations but, unexplained, it left the Court in a position where other inferences could be drawn more confidently. The Court said that what the judge had done was to apply, without explicitly saying so, a rule of evidence (known as the rule in *Jones v Dunkel*).

AAT refusal to dismiss – whether reviewable

In *Australian Postal Corporation v Matusko* (unreported, 29 April 1996), the AAT was asked by Australian Postal Corporation (Australia Post) to dismiss the application by Matusko for review of a decision concerning Commonwealth workers' compensation. The suggested basis of the request was that the AAT had previously determined the relevant issues. The AAT refused to exercise its power under section 42B of the AAT Act to dismiss the application.

Australia Post appealed against the AAT's refusal decision. Section 44(1) of the AAT Act provides for appeals from any decision of the Tribunal on a question of law. Matusko objected to the appeal, essentially on the basis that it was premature. The Federal Court (Justice Olney) agreed with Matusko.

The AAT would have been required, as a result of its refusal decision, to go on to consider the merits of the application for review of the compensation decision, including any questions of law involved in it, and to dispose of the application. Judicial review by way of appeal could be sought of the AAT's decision disposing of the application to the AAT, and the AAT's decision presumably would cover the arguments advanced by Australia Post about whether the AAT had previously determined the relevant issues. The Court recognised that it would have been different had the ruling been that the AAT had no jurisdiction to deal with the matter, because there the decision would have effectively disposed of the case.

The decision is also of interest because of the Court's comments about the relevance of judicial comments about the meaning of 'decision' for the purposes of the AD(JR) Act to the same issue as it arises under the AAT Act (and in particular, the implications of permitting challenges to decisions reached as steps in an overall decision-making process). The authorities referred to were *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 for the AD(JR) Act and *Director of Social Security v Chaney* (1980) 47 FLR 80 for the AAT Act. In each of these cases there is discussion of the need to balance a person's right to challenge government decision-making processes with the need to avoid impairing the efficient administration of government. Starting with the *Bond* case, the Court said that:

> "A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.
>
> The statutory context in which the decision in Bond was reached was not the same as that in Chaney. In Bond the court had to consider whether a ruling made by the Australian Broadcasting Tribunal was a decision under an enactment whereas in Chaney the question was whether the ruling of the President of the AAT was a decision of the Tribunal. Despite these differences the similarities both of the language used in, and the overall objectives of, the two statutes suggests that what was said in Bond has relevance in relation to the question presently under consideration."

Preservation of review rights – what law applies?

The *Acts Interpretation Act 1901* by section 8 provides a measure of protection of rights accrued under Acts repealed in whole or in part (they can, of course, be excluded or limited by the repealing Act). In *Lee v Secretary, Department of Social Security* (1996) 139 ALR 57,

the Full Court of the Federal Court (Justices Davies, Cooper and Moore) examined the way this protection worked in relation to an exercise of the right to have a decision reviewed on its merits under the *Social Security Act 1991*.

The decision involved was that Lee owed a debt to the Commonwealth and that the debt should be recovered. Lee sought review (by the Social Security Appeals Tribunal, and subsequently by the Administrative Appeals Tribunal) of that decision. The initial application for review was made the day before certain legislative amendments commenced. These changed the circumstances in which a debt could be waived, and none of the new circumstances applied to Lee. Both tribunals affirmed the decision, and it was the AAT's doing so on the basis that the new law applied that was challenged here. Justices Cooper and Moore decided (Justice Davies dissenting) that Lee had the right, by virtue of section 8 of the Acts Interpretation Act, to have the decision reviewed according to the law applying at the time the primary decision was made, a right that arose at the time the initial application for review was made.

Procedural fairness and the opportunity to test credit

A recent South Australian Supreme Court decision deals with the question whether an employer should, in the interests of fairness, have the opportunity to withhold from production until the hearing of a workers' compensation claim a video of an employee performing activities.

In *BHP Pty Co Limited v Mason and Jennings* (unreported, 7 November 1996), the Court (Justice Debelle) held that, as a general rule, a court or tribunal should be slow to order production of such a film before cross-examination. The decision sought to be judicially reviewed was made by a 'review officer' under the South Australian *Workers' Rehabilitation and Compensation Act 1986*. The review officer decided that the employer's withholding from production of a video of the worker would amount to a breach of the rules of procedural fairness.

The review officer had relied heavily on comments made in a line of (federal) AAT decisions (another recent example of which, *Re Prica and Comcare*, is reported in this issue of *Admin Review*). The Court noted that there was contrary judicial authority in South Australia, and rejected the suggestion in the AAT decisions that the Federal Court's decision in *Australian Postal Commission v Hayes* (1989) 23 FCR 320 represented a high water mark and that non-production of a film represents 'trial by ambush'. The Court drew a distinction between the need to disclose to an opposing person the existence of evidence such as a film and a requirement to disclose the contents of the film before its subject gives evidence at a hearing. The Court said that:

> "If with the knowledge of the existence of a film the person filmed gives evidence exaggerating the disability occasioned by his injuries, he is not ambushed. He has simply been detected in his untruthfulness, that is to say, caught in a trap of his own making instead of in a trap set by his opponent.
>
> When deciding not to order inspection of such a film before cross-examination, a court makes no assumption about the veracity or otherwise of the person filmed. Truthful evidence has as much capacity to be enhanced by the film as dishonest evidence might be exposed by it."

The Ombudsman

Inquiries into complaints against the AFP and NCA

In mid July 1996 the Australian Law Reform Commission (ALRC) released a Draft Recommendations Paper entitled Complaints against the AFP and NCA (DRP 2). The Draft Recommendations Paper is the result of two references made to the Commission during 1995 –