who stated that they provided detailed and sensitive information in the course of a tender bid, and did so in the expectation that the information would remain confidential. The Tribunal accepted that the documents contained financial details of the tender bids which, if released, would disclose many of the details of the commercial practices of the dealers, such as profit margins and volume of sales.

The Tribunal concluded that the commercial value of the information would be adversely and unreasonably affected if disclosed and, therefore, the documents were exempt under section 43(1)(b) of the FOI Act and that many of the documents were exempt under section 43(1)(c)(i) on the basis that disclosure could be reasonably expected to adversely affect the commercial operations of the Bank.

The Bank also sought to rely upon section 7(2) and Part II of Schedule 2 of the FOI Act which provides an exemption in respect of the Bank carrying out its "banking operations". The *Reserve Bank Act 1959* does not define "banking operations". The Tribunal noted that the Bank was required by statute to carry out a number of functions and some, such as the prudential supervision and monitoring of non-government banks, were not "banking operations". The statutory power to issue currency notes was clearly distinguishable from its "banking operations". Accordingly, the exemption did not extend to documents concerning the Bank's numismatic business.

High Court and Federal Court Decisions of Particular Interest

The following case summaries of recent decisions of administrative law interest from the High Court and Federal Court have been contributed by Alan Robertson, Senior Counsel and former Member of the Administrative Review Council.

Administrative law – Judicial review – Practice and procedure – Joinder of party – Bias – Security for costs – Application to cross-examine – Proper place of proceedings – *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors* (Federal Court of Australia, Branson J, 1 November 1996); *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors* (Federal Court of Australia, Sackville J) (1997) 142 ALR 632

As is well known, in October 1996 the Friends of Hinchinbrook Society applied to the Federal Court for judicial review of the decision of the Minister for the Environment giving approval to Cardwell Properties Pty Limited pursuant to sections 9 and 10 of the *World Heritage Properties Conservation Act 1983* to carry out certain works at Oyster Point.

Before the proceedings were ready to be heard, Branson J dealt with a number of interlocutory applications.

First, she refused to disqualify herself from further hearing the matter by reason of her acquaintance with the Minister for the Environment, a Senator from South Australia the State from which her Honour had recently moved. Her Honour had disclosed the matter to the parties.

Secondly, her Honour dealt with an application by the State of Queensland to be joined under section 12 of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act) and pursuant to the Rules of the Federal Court.

The application under the AD(JR) Act was granted subject to the condition that Queensland would not at any time be entitled to make a claim for costs against any party to the proceeding. The basis of the joinder was that Queensland had had extensive involvement in, and expended significant resources on, investigation and facilitation of the proposed development. However, section 12 was held to allow only joinder for a limited purpose, that is the purpose of the AD(JR) Act, rather than for the other jurisdictional bases of the claim. The application by Queensland to be joined as a party under the Rules was refused on the basis that it was neither a necessary nor a proper party. Queensland was however given leave to be

heard as an *amicus curiae* in respect of all matters before the Court on that day on which it did not otherwise have a right to be heard by reason of being made a party to the AD(JR) application alone.

Thirdly, Branson J declined to order the applicant give security for costs since such an order for security for costs in an amount in any way reflecting the likely costs of the second respondent would almost certainly bring the litigation to an end. Therefore the interests of justice required that an order for security for costs not be made.

Branson J also refused the application to cross-examine a Ms Thorsborne, an officer of the applicant. Her Honour formed the view that the application to cross-examine was not made bona fide for the purpose of testing the evidence put forward. Her Honour also formed the view that the cross-examination proposed would have been of limited, if any, assistance to the Court in determining the application for security for costs.

Fourthly, Branson J refused an order that the proceedings be transferred to the Court's Queensland District Registry. The primary consideration was the efficient case management of the proceeding, especially the question whether a Queensland based judge would be available to hear the matter as early as would a judge based in New South Wales. The possibility was left open that the hearing, or part of it, might be conducted in Queensland.

The subsequent history of the matter is that in February 1997 Sackville J dismissed the application for judicial review, his Honour being of the view that none of the grounds advanced for challenging the Minister's decision to give consents under the *World Heritage Properties Conservation Act 1983* had been made out.

An appeal to the Full Court of the Federal Court against the judgment of Sackville J was dismissed on 6 August 1997.

Practice and procedure – Power of Federal Court to transfer to Supreme Court a matter remitted to the Federal Court by the High Court – *Dinnison v Commonwealth of Australia* (Federal Court of Australia, Foster J) (1997) 143 ALR 635

The applicant sought an order that the proceedings he had brought against the Commonwealth in the High Court, and which had been remitted by the High Court to the Federal Court, be transferred to the Supreme Court of New South Wales for hearing pursuant to the *Jurisdiction of Courts (Cross-vesting) Act 1987* of the Commonwealth.

Foster J was asked by the parties to consider at that stage only whether the Federal Court had the power to make the order sought. His Honour held there was such power on the basis that, once a matter had been remitted to the Federal Court for hearing, it became a proceeding in the Federal Court to be determined in all respects in accordance with the Federal Court's procedures and in accordance with any relevant statute law impinging on those procedures.

The Court held that the fact that the High Court had "selected" the Federal Court as the appropriate forum went not to the power of the Federal Court to transfer the matter but to the discretion whether or not to exercise that power.

Constitutional law – Alleged inconsistency between State law authorising seizure of tobacco pending proceedings under State tax law and provisions of *Customs Act 1901* that Customs have control of goods from importation until delivery into home consumption – *Goben Pty Limited v Chief Executive Officer of Customs and Ors* (Federal Court of Australia, 9 April 1997, Beaumont, Hill and Lehane JJ) (1997) 143 ALR 611

The Full Court of the Federal Court has held that, on the facts of the case before it, there was no inconsistency within the meaning of section 109 of the Constitution between section 58 of the *Business Franchise Licences (Tobacco) Act* (1987) (NSW) and any of sections 30, 33 and 153 of the *Customs Act 1901*.

The facts were that 38 cartons of tobacco products were delivered by air and road transport to the appellant's bond store, a warehouse licensed under Part V of the Customs Act. A week later, the New South Wales Chief Commissioner for Business Franchise Licences said that he was taking the tobacco products into his custody under section 58 of the New South Wales Act on the basis that he reasonably believed the tobacco was evidence of an offence.

Thereafter the Chief Commissioner applied to Customs for permission to move the tobacco to his own licensed warehouse. Customs granted that permission.

The next step was that the importer applied to Customs to move the goods but this application was refused on the basis that the Commissioner had said the goods were to remain in his custody.

Subsequently most of the goods were stolen or otherwise disappeared whilst they were in the custody of the Chief Commissioner.

It was argued for the importer that the Customs' permission to the Chief Commissioner was invalid in part because section 58 of the New South Wales Act was invalid as inconsistent with the Customs Act.

The Court held however that it was inherent in the statutory control by Customs of the goods to grant assent to the action taken by the Chief Commissioner in his exercise of the temporary powers granted by section 58 of the State Act. There was therefore no constitutional inconsistency. The control of Customs continued to subsist and the custody of the Chief Commissioner could be exercised without interfering with the Customs' control.

Government tender – Misleading and deceptive conduct – Whether *Trade Practices Act 1974* applies to Commonwealth Government – *J S. McMillan Pty Ltd v Commonwealth of Australia* (Federal Court of Australia, Emmett J, 15 July 1997) (1997) 147 ALR 419

The Australian Government Publishing Service (AGPS), the primary publisher of Commonwealth Government information, was a business unit within the Department of Administrative Services. By Request for Tender dated 7 April 1997, the Commonwealth invited tenders for the purchase of five separate packages comprising aspects of the activities of AGPS.

The Court held that, to an extent, the conduct of the Commonwealth had been misleading. However the *Trade Practices* Act *1974* applies to the Crown in right of the Commonwealth only "in so far as [it] carries on a business, either directly or by an authority of the Commonwealth": section 2A. The Court concluded that section 2A did not have the effect of making the Trade Practices Act applicable to the conduct of which complaint was made by the applicant in the proceedings.

The conduct of the Commonwealth in issuing the Request for Tender and in dealing with prospective tenderers was held not to be activity engaged in in carrying on the business hitherto carried on by the Commonwealth under the name AGPS. A one off decision to cease engaging in the activities of AGPS, to dispose of plant and equipment relevant to those activities and to invite private enterprise to take on those activities was also held not to be conduct in the carrying on of a business.

The application was therefore dismissed.

Immigration – *Migration Reform Act 1992* – Whether unreasonableness of decision of Refugee Review Tribunal unreviewable by Federal Court – *Moges Eshetu v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia) (1997) 145 ALR 621

The last edition of *Admin Review* reported that Hill J had held that a decision of the Refugee Review Tribunal (the RRT) was so unreasonable that no reasonable tribunal could have arrived at it and that natural justice had been denied but that relief could not be granted by the court because of the limited grounds of re-

view for which s 476 of the *Migration Act 1958* provides.

This decision has been reversed by a Full Court of the Federal Court (Davies and Burchett JJ; Whitlam J dissenting).

Davies J held that s 420, in requiring the RRT to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick and to act according to substantial justice and the merits of the case described procedures with which the RRT was bound to comply and that a breach of them was a ground of review under s 476(1). Davies J held that the procedural elements prescribed by section 420 may be challenged under section 476(1)(a) (procedures required to be observed were not observed) and the substantive elements may be challenged under s 476(1)(e) (incorrect application of the applicable law). If there were a misinterpretation of the substantive elements of s 420(2)(b) or an incorrect application of the law, including that provision, to the facts as found, the Court may correct the error.

Burchett J reached a similar conclusion. He also said the legislation should be understood as substituting for a broad conception of natural justice a series of specific provisions by one or other, or even several, of which each rule of natural justice is given effect, so that a separate ground expressed in the traditional way would be otiose.

An application for special leave to appeal has been made to the High Court.

Government tender process – Civil Aviation Authority – Award of the Australian Advanced Air Traffic System Acquisition (TAAATS) Contract – *Hughes Aircraft Systems International v Airservices Australia* (Federal Court of Australia, 30 June 1997) (1997) 146 ALR 1

The Civil Aviation Authority (CAA) conducted a tender process in relation to a contract. It was a two party bid for the award of the TAAATS contract. The CAA accepted the Thomson tender and rejected the Hughes tender.

In a 119 page judgment, Finn J of the Federal Court has held, in summary:

1. The processes leading to the award by the CAA of the TAAATS contract were governed by **a process contract**, the principal terms of which were contained in the Request for Tender (RFT). It was also held to be an implied term of that contract that the CAA would conduct its tender evaluation fairly. Importantly, Finn J held as well that a term should be implied as a matter of law into a tender process contract with a public body that that body will deal fairly with a tenderer in the performance of its contract.

   In this contractual setting, the CAA acted in breach of its contract with Hughes (the unsuccessful tenderer) in that

   (i) it failed to evaluate the tenders in accordance with the priorities and methodology prescribed in the RFT;

   (ii) it failed to ensure that measures designed to achieve strict confidentiality of information contained in tenderers' proposals were maintained; and

   (iii) it accepted an out of time change to Thomson's proposed deed of Australian industry involvement commitment.

2. The CAA made, and falsified, certain representations as to the processes and methodology to be followed in the selection of the TAAATS contractor. These occurred in circumstances where Hughes was reasonably entitled to expect the CAA to disclose to it that the CAA did not intend to, and did not, adhere to what it had previously represented it would do.

3. In these circumstances the CAA was also held to have engaged in conduct in contravention of section 52 of the *Trade Practices Act 1974*.

The Administrative Review Council's *GBE's Report* was referred to in the judgment of Finn

J on page 59 on the distinction between 'commercial' and 'regulatory' activities.

Judicial review – Collateral challenge – Whether an action for the recovery of monies paid under an administrative act maintainable in the absence of a challenge to the validity of that act – *Federal Airports Corporation v Aerolineas Argentinas and Ors* (Federal Court of Australia, Full Court, Beaumont, Whitlam and Lehane JJ, 1 August 1997) (1997) 147 ALR 649

Airlines sued to recover money paid by them to the Federal Airports Corporation (the FAC) under a determination of charges. The basis of the claim was that the determination had invalidly determined the charges. The question was whether the airlines could proceed unless the determination to fix the charges was first (or perhaps simultaneously) challenged in appropriate administrative law proceedings. The commercial importance of the question was whether the time limits of the AD(JR) Act applied or not, since the airlines had brought their proceedings many months after the determination of the charges was made by the FAC. The determination was made in 1991, payments were made by the airlines of some $25 million and those payments were not made under protest, and the proceedings to recover the amounts were commenced in August 1993.

The Full Court of the Federal Court held that the proceedings for the recovery of the money were maintainable for the short reason that before the AD(JR) Act took effect it would have been possible for the airlines to maintain the proceedings and the AD(JR) Act had not altered that position.

The Full Court held that *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 was Australian authority directly relevant to the present question. Also, the principle of collateral **attack**, whatever its precise limits might be, is well established in English law eg *Cooper v Wandsworth District Board of Works* (1863) 143 ER 414. Australian cases of **defensive** collateral challenge include *Coco v R* (1994) 179 CLR 427 and *Foley v Padley* (1984) 154 CLR 349.

The Court said the ability to challenge the administrative decision was not limited to cases where lack of power appears on the face of the decision.

Administrative law– Reasons for decision – Whether common law duty on the part of a decision-maker to give reasons – *Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (Federal Court of Australia, Hill J, 8 August 1997) (1997) 147 ALR 509

One of the many questions decided by Hill J in the proceedings brought against the Treasurer by Canwest was whether the Treasurer was under a duty to give reasons for his decision to issue divesting notices under the *Foreign Acquisitions and Takeovers Act 1975*. This question arose because that Act is excluded by Schedule 1(h) from the operation of the AD(JR) Act.

The argument was that a compulsory divesting notice has such severe consequences to a person affected by the decision that there is an obligation on the part of the decision maker to give reasons: if he or she does not, then it must be inferred that the process of reasoning was false and subject to error, otherwise the decision maker would have exposed it.

Hill J noted the recent decision of Sperling J of the Supreme Court of New South Wales in *Kennedy Miller Television Pty Limited v S J Lancken* (7 August 1997) to the effect that a costs assessor who had reduced on taxation a claim for costs in relation to a hearing and appeal was obliged to give reasons. A basis for that decision was that the statutory right to appeal would practically be frustrated unless reasons were provided. Note that the relief sought was the provision of reasons, not the setting aside of the decision for absence of reasons.

Hill J also referred to the decision of the House of Lords in *R v Secretary of State for the Home Department; ex parte Doody* [1994] 1 AC 531

but said that no court in Australia has, as yet, taken the course of setting aside a decision for failure to give reasons. The law of Australia has not progressed so far.

Canwest succeeded in the proceedings against the Treasurer on the basis of (other) error of law.

Constitutional law – Capacity of States to enact laws applying to the Commonwealth – Cigamatic doctrine – *Re Residential Tenancies Tribunal of New South Wales v Henderson and Anor; Ex parte Defence Housing Authority* (High Court of Australia, 12 August 1997) (1997) 146 ALR 495

The Defence Housing Authority (DHA) leased premises at Epping in New South Wales from Mr Henderson, the owner, under a lease for a term of ten years. The function of the DHA is to provide residential dwelling units to the Commonwealth of Australia for occupation by defence personnel.

The owners sought orders against the DHA under the *Residential Tenancies Act* 1987 (NSW) authorising the landlord to enter the premises and requiring a copy of a key to be given to the landlord.

The High Court held, by majority, that the New South Wales Act applied to the DHA. First, there was no relevant inconsistency between the Residential Tenancies Act and the *Defence Housing Authority Act 1987*. Second, the Department of Defence was not a department which the Commonwealth had exclusive legislative power over under section 52(ii) of the Constitution.

Most importantly, the Court held there was no general principle of immunity from State legislation which protected the DHA. It was assumed that the DHA was or represented the Crown in right of the Commonwealth. Brennan CJ in agreeing with Dawson, Toohey and Gaudron JJ said there was no reason why the Crown in right of the Commonwealth should not be bound by a State law of general application which governs transactions into which the Crown in right of the Commonwealth may choose to enter. The executive power of the Commonwealth, exercised by its choice to enter the transaction, is not affected merely because the incidents of the transaction are prescribed by State law.

Brennan CJ, and Dawson, Toohey and Gaudron JJ, distinguished between the capacities of the Crown on the one hand, its rights, powers, privileges and immunities, and the exercise of those capacities on the other.

The purpose of this distinction was to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities.

Judiciary Act – section 39B(1A)

Alan Robertson has also kindly provided the following note on the impact of the recent amendment made to the *Judiciary Act 1903* by the *Law and Justice Legislation Amendment Act 1997*.

The jurisdiction of the Federal Court has now been enlarged to include any matter arising under any laws made by the Parliament (see section 76(ii) of the Constitution and Schedule 11 to the *Law and Justice Legislation Amendment Act 1997* (Act No 34 of 1997) assented to on 17 April 1997).

Earlier judicial decisions on the meaning of *"matters arising under any laws made by the Parliament"* as that expression appears in section 76(ii) of the Constitution have established the following:

1. It will not be sufficient to enliven this head of the Court's jurisdiction that the mere interpretation of a federal statute is involved or that the federal statute is involved as an incidental consideration or where it is merely "lurking in the background".

2. However, where the right or duty in question in the matter owes its existence to the