Advice to the Attorney-General. The Council has recently provided advice to the Attorney-General on a number of legislative matters. Advice is also being prepared on the proposed privacy legislation which is expected to be introduced in Parliament in the near future.

Canadian visitor. Mr Mario Bouchard, who is about to complete his service as Co-ordinator, Administrative Law, Canadian Law Reform Commission, visited the Secretariat on 27 February 1986. While in Canberra, meetings were arranged for him with the President of the AAT, the Acting Ombudsman and officials in the Department of Immigration and Ethnic Affairs. The Secretariat assisted Mr Bouchard in collecting documents on matters of interest to his work.

Administrative Appeals Tribunal

NEW JURISDICTION

The following legislation confers new jurisdiction on the AAT:

- Customs and Excise Legislation Amendment Act (No. 2) 1985
- Grain Legumes Levy Collection Act 1985
- Health Authority Ordinance 1985 (ACT)
- Health Legislation Amendment Act (No. 2) 1985
- Insurance (Agents and Brokers) Act 1984
- Interstate Road Transport Act 1985
- National Occupational Health and Safety Commission Act 1985
- Public Lending Right Act 1985
- Registration of Deaths Abroad Act 1984
- Subsidy (Grain Harvesters and Equipment) Act 1985

ACCOMMODATION

Members and staff of the Tribunal based in Sydney are soon expected to move into the Tribunal's new premises in Kindersley House.

KEY DECISIONS

Export grant assessment not to be re-opened

In Re Labsvirs and Export Development Grants Board (6 December 1985) the applicant sought review of a decision of the Export Development Grants Board not to "re-open" assessments of claims he had made for the grant years 1975-76 to 1980-81

inclusive. At the time these claims had been determined they had not been challenged, but the applicant, an opal exporter, said that when he made the claims he had been unaware that he could claim for petrol and parking expenses in relation to the use of hire cars during visits to Europe to promote his business. Having obtained the necessary documentation, he believed he was entitled to have these further claims determined by the Board.

The Tribunal affirmed that the Board had no power to re-open the assessments in this case. The Tribunal had no jurisdiction to review decisions made by the Board in relation to grant years commencing prior to 1 July 1978 and it held that as this application was in the nature of a further claim, it was out of time. Although there was a limited power to extend time, and the Board had a policy of extending time in some situations, the time sought here was a matter of years and the longer the time, the more the elements of finality surrounding the original decision tended to be reinforced. The legislation probably only contemplated one claim, the Tribunal found, and the Tribunal was not prepared to adopt or act upon the Board's policy in relation to extensions of time as it was not supported by the legislation.

The Tribunal noted that the discretion to extend time for the lodgment of claims under section 13(2A) of the Export Market Development Grants Act 1974 has substantially been abolished so that the issues arising in this case are unlikely to come before the Tribunal again.

Special benefit for high school students

In Re MT and Ors and Secretary, Department of Social Security (30 January 1986) the Tribunal decided that four high school students, each of whom had been forced to leave home because of intolerable domestic circumstances, should be paid special benefit at the maximum rate, taking into account as income various other amounts that each received. The principal issues before the Tribunal were whether a child in Year 11 or Year 12 who is in receipt of a SAS (Commonwealth Secondary Allowance Scheme) allowance should be regarded as a proper subject for the exercise of the section 124 (Social Security Act 1947) discretion to pay special benefit, and whether a child in any school year in respect of whom a payment was received under section 27A of the Child Welfare Act 1939 (NSW) should be regarded as a proper subject for the exercise of that discretion.

The respondent argued against a favourable exercise of the discretion because the applicants were variously receiving benefits, albeit indirectly, under SAS or from YACS (the Department of Youth and Community Services in New South

Wales). The Tribunal found, however, that the SAS allowance was only intended to be a top-up measure and was not intended to provide for the complete financial needs of an individual. Thus its receipt did not bar receipt of special benefit. The Tribunal found similarly in relation to the YACS payments, and in determining the amount of special benefit payable, money received under these schemes in addition to small amounts received from other sources was taken into account.

Backdating of handicapped child's allowance

The Social Security Act (section 102) confers a discretion in 'special circumstances' to extend the time for lodgment of a claim beyond the 6 months statutory limit, and the Tribunal has recently considered what circumstances are sufficient for the exercise of the discretion. In both Re Corbett and Secretary to the Department of Social Security (No. 2) (18 March 1986) and Re Johns and Secretary to the Department of Social Security (No. 2) (18 March 1986) the applicants claimed to have their handicapped child's allowances backdated. In Re Corbett, the facts were not sufficiently weighty to allow a finding of special circumstances. The applicant's ignorance of her entitlement was not determinative. She had sought assistance in making her application once she became aware of the possible entitlement, but little weight could be given to the failure of other persons to advise her of her possible entitlement as her child's need for care and attention was not obviously constant. In Re Johns, the totality of the circumstances was sufficiently weighty. The applicant was illiterate and isolated, without access to welfare agencies. She suffered ill health and her child was severely handicapped and obviously required constant care and attention.

Definition of "service in a theatre of war" considered

The Tribunal has affirmed a decision that an applicant was not entitled to a service pension on the ground that he had not served in a theatre of war as defined in section 23 of the Repatriation Act 1920. Re Marsh and Repatriation Commission (30 January 1986) is the first occasion on which the definition "served in a theatre of war" has been considered by a court or tribunal.

The applicant had served with the Air Force in peaceful areas before embarking at Sydney on 3 September 1945, one day after the general surrender of Japanese forces, to serve in areas formerly known as Dutch Borneo and North Borneo (now Kalimantan and Labuan). He was discharged in Japan on 30 April 1946. He had been assigned to general duties and in particular to guarding an airstrip and guarding prisoners of war, and had not been under fire. He was unarmed except when on guard duty and at other times considered there had been no threat to his safety.

At the time of the applicant's service there had been no official enemy, as defined, but the Tribunal found the definitions not to be exhaustive and that it was possible to serve in a theatre of war after "the war", as defined, had ended. There was no evidence, however, to indicate that persons in the areas in which the applicant has served had generally been in danger from the remnants of an armed, organised, uniformed force, although there had been some evidence of danger from disorganised stragglers. In particular, there was no evidence that the applicant had been in any danger either from the enemy, an organised force or disorganised predators.

Tribunal decides date for commencement of pension

The Tribunal has backdated the commencement of a pension to the date of a veteran's discharge, in 1944, two days after the only formal claim for pension was lodged. In Re Thomas and Repatriation Commission (3 January 1986) the matter had been remitted to the Tribunal by the Federal Court following review of a decision of the Repatriation Review Tribunal (the RRT). The RRT had set aside a decision of the Repatriation Commission and granted a pension commencing on 27 March 1983. The commencement date had been appealed to the Federal Court which had found an error of law and had remitted the matter to the Administrative Appeals Tribunal, pursuant to transitional provisions of a 1984 amending Act, the RRT no longer being in existence.

An important preliminary point concerned the jurisdiction and powers of the Tribunal in a case such as this. The Tribunal rejected the proposition that it had review powers pursuant to section 43 of the AAT Act - if so, it would have exercised the powers of the decision-maker whose decision was under review, that is, the Repatriation Commission. Instead it held that it had the role and powers that the now defunct RRT would have exercised had this matter come before it. Thus it had a discretion to set a date for the commencement of the pension, but it could not backdate it beyond 3 months prior to the "relevant claim for pension". It followed the Federal Court in Repatriation Commission v Morecombe (Beaumont J, unreported, delivered 19 September 1983) in holding that the relevant claim for pension was a matter of characterisation for each case. In this case, it found, after examining the veteran's history, that the relevant claim had been lodged in 1944. The Tribunal held that a pension may be backdated prior to the introduction of the onus of proof provision (section 47, Repatriation Act 1920) in 1977, and commented that a "claim" only referred to a claim in the form prescribed by section 24AA and lodged pursuant to section 24AB, or the predecessors of these sections.

Tribunal proceedings adjourned

In Re Gruzman and Secretary, Department of Aviation (28 February 1986) the respondent sought an adjournment of review of suspension of the applicant's pilot licence pending the outcome of criminal proceedings in the Victorian magistrates' court. The criminal proceedings involved the same incident as formed the basis of the decision to suspend the applicant's licence. The applicant sought immediate continuation of the proceedings before the Tribunal but the Tribunal considered that such a continuation would be inappropriate if not vexatious, and ordered that the matter be set down for hearing after the completion of the criminal proceedings.

A measuring or checking machine?

The Tribunal in Re Queensland Glass Manufacturers Company and Collector of Customs (Qld) (7 February 1986) had close regard to the method of operation of a machine which removed faulty glass bottles from a conveyor immediately upon their coming out of a furnace and recorded the total number of faults. It decided that although the machine 'measured' the diameter of a bottle and compared it with a pre-programmed diameter, it was not a measuring or checking machine as this process was a means to an end (determining whether bottles were faulty) rather than an end in itself. The applicant had argued that a device which performed a quality control function was a control to secure accuracy and that an item which covered measuring or checking instruments, appliances and machines would be the appropriate item. Preferring the respondent's argument that although the machine did measure or check, its vital function was to detect and remove faulty bottles from the conveyor belt, the Tribunal affirmed the decision under review that the machine was within item 84.59 of the Customs Tariff (a machine "having individual functions, not falling within any other item in this chapter").

STATISTICAL TRENDS

The table which follows shows the results of Federal Court appeals from decisions of the Administrative Appeals Tribunal. Where a matter has been further appealed to a Full Court, only the result of the Full Court decision has been taken into account for the purposes of these statistics.

FEDERAL COURT APPEALS

	77/78	78/79	79/80	80/81	81/82	82/83	83/84	84/85	85/
Discontinued	1	1	4	1	4	8	6	12	2
Struck out	–	–	–	1	3	–	2	–	–
Dismissed	–	9	4	6	8	16	17	30	9
Allowed	–	–	–	–	1	1	2	3	9
Allowed and Remitted to AAT	1	1	1	2	5	2	9	7	7
Total	2	11	9	10	21	27	36	52	27
Case stated	–	–	–	–	2	–	–	–	–

Freedom of Information

Costs under the FOI Act

In Hounslow v Dept of Immigration and Ethnic Affairs (20 December 1985), a freedom of information matter, the Federal Court set aside so much of a decision of the Administrative Appeals Tribunal as related to the question of costs and remitted the matter to the Tribunal to be re-heard. The applicant had sought access to various documents relating to immigration matters. Access had been partially granted but, shortly before the date on which the matter was to come before the Tribunal, the Department had released further material and the applicant had been satisfied with this further disclosure.

The Tribunal had been asked to make a recommendation that the applicant's costs be paid by the Commonwealth pursuant to section 66 of the FOI Act and was satisfied that the applicant had met the statutory conditions necessary to enable it in its