1 January 1987–31 March 1987	Ade	Bri	Can	Dar	Mel	Per	Syd	Tas	Total
Judge alone		1		2	6	2			11
Judge & 2 other members					12		4		16
Deputy President alone	6	28	5		16	9	13	3	80
Deputy President & 2 other members	19	14	6		22	21	41	12	135
Senior member alone	5	11	4		10	1	29		60
Senior member & 2 other members	16	13	5		57	16	89		196
Member alone							8	1	9
Tribunal type not specified								9	9
TOTAL	46	67	20	2	123	49	184	25	516

Freedom of Information

Deemed refusal to grant access

In Re Gregory and Department of Defence (5 March 1987, and also see [1987] Admin Review 35) the applicant sought access to Royal Australian Air Force personnel and medical files. An application for review was lodged when the 45-day period expired and access had not been granted (see s.19(3)(b), FOI Act), although access was granted approximately 3 weeks after that period had expired.

A number of issues stemming from the deemed refusal to grant access, under section 56(1) of the FOI Act, were considered by the Tribunal. First, it decided that it had jurisdiction to review the deemed refusal notwithstanding that the applicant had not requested internal review. This was because section 54(3)(b) indicates that internal review is not required where refusal is deemed pursuant to section 56(1). Secondly, the

Tribunal said that the provision of photocopies was appropriate (pursuant to section 20(1)(b)) in the absence of the applicant having specified the form of access he required. In any event, the respondent indicated that it would make arrangements for the applicant to inspect the documents. Thirdly, the Tribunal found that the subsequent decision to grant access was a separate and 'fresh' decision, the first being the deemed refusal, but nevertheless the two matters could be heard together, as a matter of procedure, if both were to proceed to a review hearing. If the applicant were dissatisfied with the access granted, then he would have to request internal review before seeking review by the AAT. This was because of section 56(5). That section allows the Tribunal, in proceedings before it in which review of a deemed decision to refuse access is sought, to extend those proceedings to encompass a subsequent decision made by the agency after the application for review was made to the Tribunal. However, the section specifically excludes such an extension to encompass a decision to grant access without deferment.

Conclusive certificates - international relations and deliberative process documents

In Re Fewster and Department of Prime Minister and Cabinet (17, 23 December 1986), the AAT upheld a conclusive certificate under section 33 of the FOI Act. The applicant, a journalist, had sought certain documents which related to the Australian Bicentennial Authority, and the section 33 certificate had been issued to protect part of a letter from the Minister for Arts, Heritage and Environment to the Prime Minister, containing a report on certain bicentennial matters following discussions with the premiers of a number of states. One sentence of the letter was said to contain an observation the release of which would embarrass Australia and a number of other nations.

A certificated claim for exemption from disclosure under section 36 (internal working documents), however, was upheld only in respect of some of the documents claimed to be exempt because they were deliberative process documents. In considering whether the documents came within section 36(1)(a), the Tribunal considered whether deliberative processes in that section should be read as the equivalent of 'policy-forming processes', and concluded that deliberative processes were not limited in that way, although there was a conflict in opinion among the Federal Court judges who had considered the issue. The deliberative processes of an agency were taken to be the thinking processes of the agency, and this undoubtedly included deliberations on policy matters (Re Waterford and Department of Treasury (No. 2) (1984) 5 ALD 588 at 606).

The Tribunal further found that the grounds of candour and frankness and ministerial confidentiality relied on for the section 36 certificate were 'thinly-veiled "class" claims' and could not satisfy the public interest test for a section 36 certificate (s.36(1)(b)). Other reasonable grounds were held to exist, however, notwithstanding that they had not been stated in the certificate. The Tribunal found that there was no doubt that disclosure of some of the documents would disclose information communicated in confidence within the

meaning of section 33A(1)(b) (confidential communications from state premiers) although that claim had been abandoned by the respondents.

The applicant also unsuccessfully challenged the reasonableness of the fee of $360 for search and retrieval time. The applicant had initially sought internal review of the decision not to remit the charges, but this had been denied on the ground that decisions as to remission of charges are not reviewable (Re Waterford and Attorney-General's Department (No. 1) (1985) 8 ALD 545). On internal review of the decision to impose the charge, the decision was affirmed. The Tribunal found that the imposition of the fee was not unreasonable because an exchange of correspondence prior to meeting the request for access had made the applicant aware of his potential liability and he had paid a deposit. (See Re Fewster and Department of Prime Minister and Cabinet, 17 December 1986.)

The Courts

What is a relevant decision for the purposes of the AD(JR) Act?

In several recent cases under the AD(JR) Act the Federal Court has considered the types of decisions susceptible of review under that Act. If a decision is susceptible of review under the AD(JR) Act, a statement of reasons may be sought of the decision maker (s.13). In Ansett Transport Industries Limited v Taylor (23 December 1986) Justice Lockhart declared that the applicant was entitled to seek a section 13 statement in relation to a decision made by the Secretary of the Department of Aviation pursuant to 'the Two Airlines Agreement' because the decision was of an administrative character made under an instrument made under an Act, and therefore was within the meaning of section 3(1) of the AD(JR) Act.

The current Two Airlines Agreement was executed in 1981 and later approved by the Airlines Agreement Act 1981 which set the agreement out in a schedule. The Airlines Agreement Act is one of a number of enactments which constitute the arrangements by which the federal government currently regulates domestic airlines. The Secretary had made a decision pursuant to a certain clause in the agreement. The significance of the decision was that the Minister may have taken it into account in estimating total traffic on relevant routes and determining maximum aircraft capacity required by airlines, and it may consequentially have affected the right of the airlines to import aircraft into Australia. The Secretary had declined to furnish a statement of reasons, however, claiming that the decision had not been made 'under an enactment' and therefore was not one to which the AD(JR) Act applied.