The full court of the Federal Court held that, on the evidence, the decision of the Tribunal was open to it. However, Justice Burchett commented that such a conclusion would not necessarily be arrived at in every case involving the development of a policy between agencies of the Commonwealth and a state. Nor, in every such case, would that conclusion, if reached, survive the application of section 33A(5) which, although assuming as a general principle that there is a public interest in the non-disclosure of matter that could cause damage to relations between the Commonwealth and a state, contemplates that it may, on balance, be in the public interest for matter in that document to be disclosed.

Substantial adverse effect on industrial relations

In Re McCarthy and Australian Telecommunications Commission (19 June 1987) the AAT considered whether the release of regional manpower bids to a union representative would, or could reasonably be expected to, have a substantial adverse effect on the conduct by Telecom of industrial relations (s.40(1)(e) of the FOI Act). The documents in question were estimates of staffing requirements prepared by district managers which were used by Telecom as an aid in setting manpower levels but were not a major input. The Tribunal held that, although the documents related to an area in which disputes between employers and employees may well arise and thus could have an adverse effect on the conduct of industrial relations by Telecom, there was no evidence to establish that the effect would be serious or significant enough to be a substantial adverse effect for the purposes of section 40(1)(e) of the FOI Act (see Re Heaney and Public Service Board (1984) 6ALD 310). Industrial disputes in Telecom would continue whether or not the information in the bids was released. The supplying of the information may have the effect of increasing the level of disputes or decreasing the ability of Telecom to reach what it considers is a satisfactory result but it would not do this to the extent of causing a substantial adverse effect on the conduct of industrial relations.

The Courts

Decisions under the Two Airlines Agreement

Ansett, Australian Airlines and East-West Airlines have been engaged in a crucial battle for control of air routes in Australia. At the centre of the controversy is the Two Airlines Agreement, to which the Commonwealth is one of the parties. The decision under challenge is a decision of the Secretary to the Department of Aviation under clause 6(1)(c) of the Agreement concerning trunk route air services. With the stakes high, the litigation has been expensive. It has also raised some interesting points of legal principle, which are mentioned below. It is unclear at the time of writing whether the recent sale of East-West Airlines to a company related to Ansett will affect continuance of the litigation.

In the first of the cases, Ansett Transport Industries Limited v Taylor (1987) 70 ALR 743, Justice Lockhart held that a decision made by the Secretary pursuant to clause 6(1)(c) of the Agreement, which is set out as a Schedule to the Airlines Agreement Act 1981, was a decision of an administrative character made under an instrument made under an Act and was therefore a decision to which the AD(JR) Act applied under section 3(1) (see 1987 Admin Review 39). Therefore the Secretary was obliged to provide a statement of reasons under the AD(JR) Act in respect of that decision.

Ansett then filed an application with the court seeking further and better particulars of a section 13 statement provided by the Secretary in relation to the decision. In Ansett Transport Industries (Operations) Limited v Taylor (10 April 1987) Justice Lockhart said that whether the reasons given in a section 13 statement are sufficient must depend on the circumstances of the case. Section 13 is remedial in character and a statement under that section should not be interpreted narrowly or technically by the courts. The aim of the section is to strike a balance between the requirement that a person affected by an administrative decision know the basis upon which it was made and the necessity for effective administration without undue intervention by the courts in the administrative process. The basic requirement is that a citizen must have, when he receives the statement, sufficient information to decide whether to accept the decision or pursue the matter further. A section 13 statement should draw the attention of the person sufficiently to the relevant law to enable him to understand the legislative framework in which the decision was made. That does not mean that in every case a decision maker must in substance specify all relevant law or give a legal opinion as if he were a barrister advising his client. In this case the statement sufficiently enabled Ansett to chart its course and determine whether a challenge was justified.

The next round of the battle saw an objection by the Secretary to the competency of the application for review brought by Ansett and Australian Airlines. The objection to competency was brought on the grounds that the decision was not made under an enactment. This objection was dismissed by the full court of the Federal Court in Taylor v Ansett Transport Industries Limited & Anor (13 April 1987). The court held that the decision in question was made under the Airlines Agreement Act itself. As the Secretary was not a party to the Two Airlines Agreement, any duty on him to make decisions of the kind contemplated by clause 6(1)(c) of the Agreement must arise either from an implied term of the Agreement or be imposed by implication from the terms of the Airlines Agreement Act and the legislative scheme of which it forms part. The context in which the making of a decision contemplated by clause 6(1)(c) of the Agreement was entrusted to the Secretary immediately suggested that the Airlines Agreement Act itself was the source of the power to make the decision. These circumstances were distinguishable from others such as those in Australian National University v Burns (1982) 64 FLR 166, where the connection between the decision and the enactment under which

it was said to be made was much less apparent. As the relevant decision was made under the Airlines Agreement Act, it was not necessary for the court to determine whether the agreement was an 'instrument' made under that Act. However, the court said that the question whether an agreement annexed to an Act for the purpose of signifying parliamentary approval of its terms is an instrument made under that Act is to be determined on an examination of the agreement and the Act in all the relevant circumstances. As this agreement expressly stated that it had no effect unless approved by the Commonwealth it was an instrument made under the Act.

Ansett, in support of its objection to competency, contended that Justice Lockhart's judgment of 23 December 1986 gave rise to an issue estoppel as between Ansett and the Secretary as the judgment was a final judgment determining the 2 issues presently before the court, namely that the decision was 'of an administrative character' and 'under an enactment'. The majority of the court (Justice Northrop dissenting) agreed with this contention although all judges still considered the substantive issue. Justice Fisher, with whom Justice Ryan agreed, said that the issue to be determined as a preliminary to the exercise of the power to review, was exactly the same as that determined by Justice Lockhart earlier when he considered the obligation to provide a statement of reasons. The fact that that decision was subject to appeal at the time of the later decision was not to the point. In appropriate circumstances the doctrine of issue estoppel can have application in the area of judicial review. In a strong dissent, Justice Northrop said that on the facts of the appeal the court should not countenance a highly technical defence which would prevent the full court from considering the substantive question between the parties.

In the final round, to date, of this curial battle the application for review of the Secretary's decision was heard by Justice Lockhart (Ansett & Anor v Taylor & Anor (14 May 1987)). His Honour held that the decision of the Secretary under clause 6(1)(c) of the Agreement may affect rights, interests and liabilities and give rise to legitimate expectations in the sense in which Mr Justice Mason spoke in Kioa v Minister for Immigration and Ethnic Affairs (1985) 62 ALR 321 at 345-7. The issue involved in the case was whether services provided by East-West Airlines over the successive routes Sydney/Yulara, Yulara/Perth were predominantly for the purpose of carriage over those routes or were really for the carriage of passengers between trunk route centres. Under the Two Airlines Agreement, Ansett and Australian Airlines have a monopoly over trunk routes within Australia. The decision of the Secretary was that he was not satisfied that the services provided by East-West were not predominantly for the purpose of carriage over the successive routes. Although the Secretary was not required to conduct his inquiry as if it were a formal hearing, his decision would affect the ability to acquire aircraft by the 3 major domestic airlines and also the competition between them over prescribed routes and therefore fairness required that all interested parties should have been given an opportunity to submit material and comments. The

court accordingly ordered that his decision be quashed. It said that the fact that confidential material is involved in the decision making process does not negate the application of the rules of natural justice; rather it narrows the field of their operation.

Nature and extent of jurisdiction of the AAT in student assistance cases

The decision of the full court of the Federal Court in Church v Secretary to the Department of Education (13 May 1987) raises important questions as to the nature and extent of the AAT's review jurisdiction under the Student Assistance Act 1973. The applicant had been granted student assistance in semester 1 in respect of a full-time course based on the expectation of her receiving a certain income. In the second semester she took up employment. Following an increase in her income the Department recalculated her entitlement for semester 1 and sought repayment of the overpayment.

The AAT initially had to determine whether it had jurisdiction to review this primary decision. It did this by breaking the decision into 3 component parts, namely a decision that, in the light of the circumstances, the benefits paid exceeded the applicant's entitlement, a decision that an overpayment should be raised and a decision to make a demand for recovery of the overpayment. The Tribunal concluded that each of these decisions embodied in the primary decision was reviewable before it (see Re Church and Secretary, Department of Education (1985) 8ALD 441). On the substantive hearing of the review, the only issue raised was whether, on the proper construction of regulations made under the Act, moneys paid to the applicant were recoverable at law. The AAT declined to give a ruling on this question on the ground that to do so would exceed its proper administrative review jurisdiction and accordingly affirmed the decision under review (see Re Church and Secretary, Department of Education (No.2) (1986) 10 ALN N51 and also 1986 Admin Review 129). The applicant appealed to the Federal Court on the ground (inter alia) that the Tribunal had erred in law in refusing to rule on the recoverability issue. The respondent cross-appealed on the ground that the Tribunal had exceeded its proper jurisdiction by purporting to review the 'decision' to raise and recover an overpayment of benefit.

Justices Neaves and Everett (Justice Sheppard dissenting) held that the reviewable decision before the Tribunal was the decision that, in light of her changed circumstances, the benefits paid to the applicant exceeded her proper entitlement and that the Tribunal had erred in finding that its jurisdiction extended to the consequential decisions (if such they were) to raise and seek recovery of the alleged overpayment. Under the Act, a reviewable decision, so far as relevant, is a primary decision that has been affirmed by the Student Assistance Review Tribunal and a primary decision is a decision made by an authorised person that has been affirmed by a senior authorised person. Justice Neaves held that, on the proper construction of the Act and Regulations, it was the function of an authorised person to determine all questions

relating to the type and amount of allowance payable and, although a decision to recalculate benefits may result in a person being overpaid, the questions whether to demand repayment and sue for recovery are not questions which under the Act or Regulations are required to be determined by an authorised person. Justice Everett held that neither the decision to raise an overpayment nor the decision to demand repayment was a reviewable decision as on the facts they were not 'primary decisions' that had been affirmed by the Student Assistance Review Tribunal.

On the majority view as to the Tribunal's review jurisdiction, the question of recoverability of the alleged overpayment did not arise. However, Justice Sheppard held (Justices Neaves and Everett agreeing) that the student assistance paid to the applicant was paid by way of advance, subject to recalculation having regard to any change in circumstances. The moneys overpaid to the applicant were, in the circumstances of this case, recoverable by the Commonwealth in an action for moneys had and received.

Superannuation BCC issued 2 years after CMO's report

In Neal v Commissioner for Superannuation (4 June 1987) the full court of the Federal Court clarified the law in relation to the issue by the Commissioner for Superannuation of benefit classification certificates (BCCs) in circumstances where a lengthy period had passed following the receipt by the Commissioner of the Commonwealth medical officer's report of the result of the examination of the employee. This was an area in which there had been some conflicting decisions of the AAT (see 1987 Admin Review 7). In this case the husband of the applicant had been medically examined for the purposes of section 16 of the Superannuation Act 1976 in December 1981 when a migraine condition was noted but, due to a backlog at the Commissioner's office, by the time of his death from heart failure in December 1983, no BCC had been issued. Following the death of Mr Neal, a delegate of the Commissioner, pursuant to section 16(10) of the Superannuation Act, issued a BCC specifying the conditions 'migraine' and 'history of anterior myocardial infarction', being conditions which in the opinion of the delegate existed at the time Mr Neal joined the public service. This certificate was deemed by section 16(10) to have been in force immediately before Mr Neal's death and affected the benefits which would have been payable to the applicant as Mr Neal's surviving spouse.

The applicant applied to the AAT for a review of the decision to issue the BCC claiming that the scheme of the Act requires a BCC to be issued within a reasonable time after the Commissioner has received a medical report which he is required under the Act to consider. This argument was rejected by the AAT which considered that a condition as to reasonable time should not be implied into section 16 of the Act. On appeal, the full court of the Federal Court (Justice Beaumont dissenting) also rejected the applicant's argument. In a joint judgment, Justices Fox and Neaves stated that section 16 does not simply confer powers on the Commissioner but also imposes a

statutory duty upon him to issue a BCC whenever the prescribed circumstances exist. In a case where the Commissioner had failed to make a decision in relation to a BCC, the Commissioner would not be relieved by reason of his conduct from any further obligation to fulfill his duty and could be required to carry out the function by the issue of an order in the nature of a mandamus. As a matter of good administration it may be that the duty should be carried out as soon as it conveniently can be after a person becomes an eligible employee but that does not mean that a time limit should be implied into the section when Parliament has not done so by express language. The court considered that this conclusion was supported by a consideration of the legislative purpose of section 16 which is to provide some protection for the superannuation scheme established by the Act.

Meaning of 'ship's stores'

The High Court in BP Australia Limited and Another v Collector of Customs (1987) 71 ALR 449 was called upon to consider whether fuel supplied by the appellants to 3 Japanese long-line tuna fishing boats was ship's stores for the purposes of the Excise Act 1901. The Excise Act exempts ship's stores from excise duty. The fuel would not be 'ship's stores' if the fishing boats were not engaged in making international voyages. The applicants maintained that each boat was engaged in a continuous international voyage commencing and ending in Japan but in the course of which it fished for bluefin tuna in waters off South Africa and southern Australia calling into ports for repairs and supplies, including fuel, when needed. The AAT had found that the boats were not liable to excise duty as they were currently engaged in making international voyages. However, the Federal Court had allowed an appeal from that decision of the Tribunal finding that at the relevant time the boats were about to make a voyage other than an international voyage.

The full court of the High Court held that the notion implicit in the relevant provisions of the Excise Act was that, where a ship travelled to a destination in the fishing grounds to pursue its fishing activities, rather than pressing on to its ultimate port of destination overseas, the voyage to the fishing grounds was distinct from the international voyages in which it was otherwise engaged and was therefore other than international. The policy of the provision is to deny an exemption from excise to fuel supplied to a fishing vessel which, though currently engaged in making an international voyage, is nevertheless exploiting fishing grounds outside Australia and is resorting to an Australian port for supplies so as to enable it to continue its fishing activities. The evidence was that each of the 3 fishing boats would return to Australia after going to the fishing grounds before returning eventually to Japan. The immediate voyage for which the fuel in question was supplied was distinct from the international voyage from Fremantle to Japan.

Reasonable apprehension of bias

On 2 recent occasions the Federal Court has been asked to consider whether a fair minded member of the public might entertain a reasonable apprehension that a judge sitting on a case might not bring an impartial and unprejudiced mind to the resolution of the questions involved in the case. In such a situation the High Court has said that the judge should not continue to hear the case (see Livesey v The NSW Bar Association (1983) 151 CLR 287).

In Re The Hon. M.P.H. Maurice, Aboriginal Land Commissioner; ex parte The Attorney-General for the Northern Territory & Anor (13 April 1987) combined proceedings under the AD(JR) Act and section 39B of the Judiciary Act were taken by the Attorney-General for the Northern Territory to obtain an order prohibiting Justice Maurice from proceeding to hear 2 land claims in his capacity as Aboriginal Land Commissioner. The Attorney-General claimed that views expressed by Justice Maurice were so critical of the Northern Territory Government, a participant in the hearing of land claims, that there was a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues involved. Evidence was adduced and submissions made only in respect of the prohibition proceedings under the Judiciary Act as there was a question whether there was any decision or conduct of the Commissioner reviewable under the AD(JR) Act. The full court noted that, in respect of 1 of the land claims that were to be considered, the High Court in The Queen v Toohey; ex parte Northern Land Council (1981) 151 CLR 170 had held that the Commissioner would be required to determine the bona fides of members of the Northern Territory Government in the making of a Cabinet decision which led to the making of regulations which purported to bring the area concerned within the town area of Darwin. The essential question would be whether the regulations were made bona fide or for the ulterior purpose of defeating or impeding the land claim. The Commissioner had earlier made a statement in which he expressed concern about some form of patronage in the Territory and the court thought that these remarks related closely to the question of the good faith of the government which was to be determined by the Commissioner. In all the circumstances, the court held that it might reasonably be apprehended by a fair-minded person that the Commissioner might not resolve the questions before him with a fair and unprejudiced mind. The Federal Court therefore ordered that the writ of prohibition prohibiting Justice Maurice from hearing the claim be made absolute.

In Gunaleela & Ors v Minister for Immigration and Ethnic Affairs (16 June 1987) Justice Einfeld was required to consider whether he should disqualify himself from further hearing of the case upon the basis of a letter he had written on 6 May 1987 in his capacity as President of the Human Rights and Equal Opportunity Commission. The case before Justice Einfeld related to review of decisions to refuse refugee status and temporary entry permits to 4 Tamils from Sri Lanka. The letter he had written was on behalf of 4 different Sri Lankans of

Tamil origin who had been refused temporary entry permits at Perth airport. The letter sought the extension, to these 4 people, of the special policy of the Department of Immigration and Ethnic Affairs in relation to Australian residency by Sri Lankan Tamils and requested that their case be given compassionate and humanitarian consideration.

His Honour said that the only parallel between the cases was that the applicants were Sri Lankan Tamils seeking permission to reside in Australia and that the matters raised in the letter were not objected to by the Minister and were quite different from the matters to be considered in this case. For these reasons His Honour held that he need not disqualify himself from hearing the matter as no fair minded person could reasonably perceive that a decision would not be delivered in the usual completely dispassionate way.

It does seem to Admin Review that the decision of Justice Einfeld is not completely in line with the decision of the full court in Re Maurice. In neither case was the question of actual bias or prejudice before the court. Rather, the question was whether there could be an apprehension by a fair minded person that the issues would not be resolved with a fair and unprejudiced mind. Although the statement of Justice Maurice referred directly to a matter which was to be considered by him, the letter written by Justice Einfeld could be taken to indicate a viewpoint which favoured a particular result.

The substantive issue in Gunaleela was eventually determined by Justice Morling, thus removing the question of a reasonable apprehension of bias as an issue.

The right to a hearing

Two recent cases in the Court of Appeal of New South Wales illustrate how the requirements of procedural fairness may have broad application.

In Johns v Release on Licence Board (7 May 1987) the Court of Appeal quashed a decision of the Release on Licence Board revoking a licence to the plaintiff to be at large. The plaintiff, who had been convicted of serious offences, had been released on licence after serving more than 7 years in prison. The release on licence was made subject to the condition that he not move from his place of residence or his employment without the consent of the parole officer. The Board subsequently considered that the condition had been breached. It purported to revoke the licence.

In quashing the decision, the Court of Appeal pointed out that the plaintiff was not permitted to attend the meeting of the Board before the decision was made, that he was not permitted to give evidence to the Board and that he was not given an opportunity to see the documents before it. The court held that procedural fairness required in this case, where the deprivation of freedom previously granted was at stake, that the plaintiff be granted a hearing, notwithstanding that a hearing was not provided for in the legislation constituting

the Board and notwithstanding the practical difficulties for the Board's operations and the potential increased costs of conducting hearings.

Macrae v Attorney-General for New South Wales (24 June 1987) concerned a decision of the New South Wales Government not to reappoint 6 magistrates following a restructuring of the magistracy in that state. The Court of Appeal held the decision void. The central issue was whether the prerogative of the Crown to appoint judicial officers to a new court was non-justiciable or whether the appellants had such a legitimate expectation to procedural fairness as to require the Attorney-General to afford them the opportunity to be heard in response to material adverse to them. The court answered the latter question in the affirmative. As to the former question, the court affirmed the view taken in such cases as R v Toohey; ex parte Northern Land Council (1981) 151 CLR 170 and FAI Insurances v Winneke (1982) 152 CLR 342 that the courts may review decisions, even if made in exercise of prerogative powers, where it is demonstrated that a denial of natural justice has occurred.

There is an interesting discussion in the judgment of the President, Justice Kirby, of the 'convention' in common law jurisdictions of preserving and respecting the continuance in office of judicial office holders and others who hold quasi-judicial offices following the abolition of one court or tribunal and the creation of another.

Commonwealth Ombudsman

Section 16 report - A.C.T. teachers' leave entitlements

The recommendations in a report that had been made to the Prime Minister under section 16 of the Ombudsman Act in 1986 have been accepted by the Prime Minister. The report concerned several A.C.T. teachers who had been recruited from Victoria on the promise that they would be entitled to carry over sick and long service leave entitlements from their previous employment. When it became known that this was not the case, complaints were made to the Ombudsman who found that the teachers' decision to move to the A.C.T. had been influenced by this wrong advice. The Ombudsman recommended that, although there was no legal obligation to recognise the leave entitlements, the A.C.T. Schools Authority should do so as a matter of equity. The Authority initially agreed to implement this recommendation but later reneged on this agreement which led to the section 16 report being made to the Prime Minister. The Prime Minister decided that the promise originally given to the teachers should be met.

Withdrawal of income tax ruling

In his 1984/85 Annual Report, the Ombudsman referred to difficulties he had with the Commissioner of Taxation's exercise of his discretion under section 221D of the Income Tax