Internal working documents

In Fewster and Department of the Prime Minister and Cabinet, No.2 (31 July 1987) conclusive certificates were again in issue, this time relating to documents claimed to be exempt under section 36 of the Act. The conclusive certificates had been issued in relation to documents concerning the crisis that had occurred in the management of the Australian Bicentennial Authority. Deputy President Todd found that reasonable grounds existed for the issue of the certificates. The major basis for this finding was that disclosure of documents that would simply reactivate issues that are now in the past would be contrary to the public interest in that disclosure would, without countervailing public benefit, divert the resources of the ABA and of high levels of government, not least the Department of the Prime Minister and Cabinet and no doubt the Prime Minister's own office, into dealing once again with such issues at a time when the commencement of the Bicentennial programs and celebrations is only months away.

Convention that documents of former governments not disclosed to subsequent governments

An interesting question which arose in Bartlett and Department of the Prime Minister and Cabinet (31 July 1987) was whether the convention as to non-disclosure of the documents of former governments to subsequent governments provided a sufficient basis for non-disclosure of documents under section 36 of the FOI Act on the grounds that disclosure would be contrary to the public interest. Deputy President Todd said that it was difficult to see how the convention could be given any weight under the FOI Act. While the convention may have some force as between the Ministers of different administrations, the existence of the FOI Act in the Commonwealth meant that it was now under considerable strain. Certainly it could not operate of itself to deny to citizens rights they otherwise had under the Act.

The Courts

Veterans' entitlements

The last few months have seen several cases which tested section 120 of the Veterans' Entitlements Act 1986. In East v Repatriation Commission (22 July 1987) the full court of the Federal Court dismissed an appeal against a decision of the AAT to affirm the Repatriation Commission's interpretation of the relatively new provisions governing the connection between war service and death or incapacity.

The provisions in the Veterans' Entitlements Act and in the legislation which preceded it relating to the causal relationship between the incapacity or death of a veteran and his war service have had a long history and have been the subject of much litigation. The East judgment provides a useful summary of the development of the current provisions.

In the East case, the AAT previously had rejected the submission that the absence of evidence in disproof of a connection between war service and death was in itself sufficient to raise a reasonable hypothesis connecting injury or death with war service. The court also rejected this submission, adopting, as the AAT had done, the words of the Veterans' Review Board in Stacey. The court concluded that 'a reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts. It is an hypothesis pointed to by the facts, even though not proved upon the balance of probabilities'.

The question of the onus of proof arose again in Repatriation Commission v Webb on 16 September 1987. This also was an appeal from a previous AAT decision. The AAT had allowed Webb's appeal, saying that the Repatriation Commission had not dispelled beyond reasonable doubt the hypothesis that his disability was war-caused. Justice Beaumont, referring to the East decision, pointed out that that there was no onus on the Commission to disprove Webb's hypothesis beyond reasonable doubt. He declined to express an opinion on the reasonableness of the hypothesis as to do so would trespass beyond the court's supervisory jurisdiction. Accordingly, he referred that matter back to the AAT.

Eligibility for pension at special rate

Three cases, McGuire v Repatriation Commission, Repatriation Commission v Smith and Repatriation Commission v Wright (10 August 1987), addressed the interpretation of section 24 of the Veterans' Entitlements Act with regard to whether a veteran's inability to obtain remunerative employment was due to war-caused injury or disease alone. The decisions of the full court of the Federal Court in each case suggested that the court did not see the special rate as applicable where other factors, such as advanced age, were influential in the veteran's inability to obtain remunerative work.

Immigration decisions

In Tuncak v Minister for Immigration and Ethnic Affairs (29 July 1987) Justice French allowed an application for extension of a stay of the Minister's decision to refuse the applicant entry and to return him on the next flight to Bangkok. The court considered the decision sufficiently harsh to give rise to the possibility of an error of law arising from the apparent failure to give any weight to the position of the applicant's wife and children, who were Australian citizens resident in Australia. On 1 September 1987, however, Justice

French dismissed the application for review of the Department's refusal of an entry permit.

The main basis for the application was the claim that the decision maker had failed to take relevant considerations into account. Justice French, referring to the principles governing this ground for review in the judgment of Justice Mason in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 66 ALR 299 at 308, noted that 'it is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion and a decision made within those boundaries cannot be impugned'. He concluded that, while the decision maker had not given great weight to factors favourable to the applicant, he had had the material before him and his decision therefore could not be invalidated for failure to take account of matters he was bound to consider.

The court also addressed the extent of the Department's inquiries. It decided, however, following Justice Wilcox in Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 at 169, that there were strict limits to the circumstances under which a decision on entry which the Act required be taken as a matter of urgency would be invalid for failure to inquire. Furthermore, there were no circumstances in this case to make the failure to inquire further an unreasonable omission. In dismissing the application, Justice French pointed out the limited role proper to the court in reviewing decisions of this nature.

A recent decision by Justice Keely in Palko v Minister for Immigration and Ethnic Affairs (4 September 1987) could have significant implications for departmental handling of cases where a deportation order is current; for example, where the Department needs to consider an application for a temporary entry permit and an application for permanent residence in addition to the question of deportation. Ms Palko was the subject of a deportation order, which had been signed after her application for a further temporary entry permit and for permanent resident status (on the basis of a marriage which at that time had in fact dissolved) had been rejected. Ms Palko had sought judicial review of these rejections, but the application was dismissed. Shortly after the signing of the order she remarried and lodged a new application, which was rejected by the Department on the grounds that section 20 of the Migration Act prevented the grant of an entry permit to a person who was the subject of a deportation order. While counsel for the respondent conceded that section 6A(1)(b) of the Migration Act gave the spouse of an Australian citizen the right to apply for an entry permit, he argued that this right was lost upon the signing of a deportation order and contended that 'the end of the review process, the administrative one, finished at the date the deportation order was made and the judicial review finished at the date [of Justice Keely's decision of 6 March 1987 dismissing Ms Palko's previous

application for review]'. Counsel also drew the court's attention to the Department's concern that 'there has to be an end somewhere along the line to the review process', and suggested that if the matter were referred back to the Minister the same decision would be likely. The court pointed out that the proper construction of the Migration Act could not be determined by reference to difficulties which might be encountered in practice, which were matters for the legislature. Justice Keely expressed the view that the decision would not necessarily be the same, given the change in Ms Palko's circumstances, but that even if it were, that would not be a reason for the court to refuse to make the orders sought. He referred the application back to the Minister.

In Haoucher v Minister for Immigration and Ethnic Affairs (23 July 1987) the Federal Court granted an application for a stay of a deportation order under section 12 of the Migration Act (deportation of a convicted non-citizen), pending the hearing of a substantive application for judicial review. The case was somewhat unusual in that the applicant had initially appealed to the AAT, which had remitted the decision to the respondent for reconsideration with the recommendation that the deportation order be revoked; but the respondent had rejected the AAT recommendation. This was only the third occasion on which such a recommendation has been rejected. In accordance with the Minister's criminal deportation policy, the Minister can be expected to table in the Parliament a statement of his reasons for rejecting the AAT's recommendation, although it is understood that any statement may await the outcome of the substantive proceedings under the AD(JR) Act in this case and in a separate case of Wiggan.

In the Federal Court the applicant claimed that he had been denied natural justice because he had not been given the opportunity to be heard on the question of the disposition of the AAT's recommendation. The court found that there was an arguable case that the applicant had a right to be heard regarding the respondent's proposed departure from the AAT's recommendation and, further, that the balance of convenience favoured the applicant. It ordered a stay of the deportation order.

Commonwealth Ombudsman

New income tax ruling concerning Tax Relief Board

A new Income Tax Ruling, No.2440, announced on 13 August 1987, will affect taxpayers who cannot pay their tax because of hardship and who apply to the Taxation Relief Board. The Board is able to reduce or waive tax debts, but in the past