contained identical parts to a Cabinet submission, it was not exempt under section 34. The Tribunal made reference to the conclusions in Porter and Reith that draft documents are not intended for submission to Cabinet per se, and therefore exemption could not be claimed for those documents under section 34 of the FOI Act.

His Honour then considered the argument that the document was an internal working document exempt under section 36. He concluded that release of the document would be contrary to the public interest by breaching the principle of Cabinet confidentiality, and would also mislead the public, being 'a single document in a series of documents which were part of the process of developing the Government's policy on Aboriginal Affairs.' The Tribunal affirmed the decision under review.

The Courts

Equal Employment Opportunity programs in Federal Departments

A case with important ramifications for public service personnel practices was Styles v The Secretary to the Department of Foreign Affairs and Anor (18 October 1988). The applicant sought an order for review under the Administrative Decisions (Judicial Review) Act 1977 regarding the Department's decision to transfer the second respondent, a member of its staff, to a position in the Australian High Commission in London. The applicant, a female, also on the Department's staff, had applied for promotion to the position. She sought review on the grounds of failure to take into account a relevant consideration, namely the comparative efficiency of the applicants for the position; that procedures required by the Department of its staff were not observed; and that the Department had, in making the decision, breached the Sex Discrimination Act 1984 by limiting the range of applicants it considered for the position.

Justice Wilcox rejected the applicant's first submission. Since the second respondent was transferred rather than promoted to the position, there was no obligation on the Department under section 50A of the Public Service Act 1922 to consider the comparative efficiency of the applicants. His Honour pointed out that 'this conclusion makes a mockery of the insistence of the Administrative Circular of 2 September 1987 on selecting "the most suitable and efficient officer available to do a particular job"; but I have reached the conclusion that it correctly reflects the law'.

He also rejected the applicant's second submission. Section 22B(5) of the Public Service Act 1922 obliged the Secretary and persons exercising powers in relation to employment matters to give effect to an adopted equal opportunity program; but not to an objective or to a draft program. The Department had produced both of these, but considerable work was yet to be done on its equal opportunity program. There was therefore no legally binding obligation upon the Department to adopt the procedures outlined.

His Honour found, however, that the Department had indirectly discriminated against the applicant within the meaning of section 5(2)(b) of the Sex Discrimination Act 1984 in that it had included her in a group which was not considered for the position, where the implicit requirement for the higher grade meant that she was disadvantaged by comparison with male applicants. The decision was set aside and remitted to the Department for its consideration according to law.

The decision has been appealed to the Full Court.

Ministerial discretion to reject AAT recommendations in deportation cases.

In Haoucher v The Minister for Immigration and Ethnic Affairs (29 September 1988) the full Federal Court considered the decision by Justice Forster to dismiss an application for review of a Ministerial decision to deport the applicant (Admin Review 16:33-4). The AAT had previously recommended that the appellant not be deported, and the request for review under the ADJR Act was based on whether statements of Ministerial policy gave rise to a legitimate expectation on the part of the applicant that he would be given an opportunity to be heard before the Minister's decision not to accept the Tribunal's recommendation.

By majority decision (Justices Northrop and Lee, with Justice Sheppard dissenting) the Court dismissed the appeal. Justice Lee stated that, in making a decision contrary to the recommendation of the Tribunal and in not identifying the exceptional circumstances in this case, the Minister had apparently abandoned the stated policy setting out the guidelines the Minister would follow in exercising the discretions under the Migration Act 1958. He concluded that

> 'the Minister apparently...reverted to the use of a discretion provided by statute and determined that it was his opinion that the appellant should be deported having considered all the matters on which the appellant had already been heard...The ministerial statement of policy may have amounted to an acknowledgement that the Minister would only exercise the discretion contrary to the recommendation of the Tribunal in exceptional circumstances but the use of that discretionary power contrary to such a recommendation does not involve denial of an opportunity to be heard if it merely amounts to the formation of another view.' (at p.10-11)

In dissenting, Justice Sheppard noted that Barbaro v Minister for Immigration and Ethnic Affairs ([1982] 46 A.L.R. 123) established that

> 'if the Minister intended to depart from the facts found by the Tribunal, to draw inferences of fact different from those drawn by it, or to rely on further matters not adverted to by the Tribunal, he was bound to inform the person concerned of what he proposed to do and give him an opportunity of making further submissions'.

In addition, Justice Sheppard expressed the view that the statement of ministerial policy gave rise to a legitimate

expectation that the Minister would act in accordance with it when he came to consider a recommendation made by the Tribunal or to notify the person affected that he did not propose to do so and inform him of the matters he relied on in taking that course.

Consideration of compassionate grounds for immigration entry

In Hindi v Minister for Immigration and Ethnic Affairs (30 September 1988) application was made for an order of review under the ADJR Act of the Minister's decision to refuse to grant the applicant and his family an entry permit pursuant to section 6A(1)(e) of the Migration Act 1958 on strong compassionate or humanitarian grounds. Justice Sheppard set aside the decision on the ground that there had not been proper, genuine and realistic consideration of the applicant's case; the letter in which the decision was communicated to the applicant showed an inadequate consideration of the material before the delegate. This amounted to the failure to take into account a relevant consideration and to the exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case. The matter was remitted to the respondent.

Request for certain evidence at broadcasting licence renewal

In Ballarat Broadcasters Pty Ltd and Ors v Australian Broadcasting Tribunal and Ors (16 September 1988) the applicant sought an order of review under the ADJR Act in respect of a decision of the ABT to inform the licensees of radio broadcasting stations that it proposed, at licence renewal, to request evidence that the station had used a significant amount of new recordings, new independent material and station originated music performed by Australians. Justice Davies noted that the ABT had not identified the statutory power under which it purported to act and said he found it impossible to infer what power it had exercised. Further, the Court was unable to determine what effect the 'decision' was intended to have. The Court declared that what the ABT had done did not constitute a valid determination of a standard, the valid imposition of a condition, the valid making of an order or the valid giving of a direction. An objection to the competency of the application was dismissed.

Immigration entry for adopted children

In Lowe and Ors v Minister for Immigration, Local Government and Ethnic Affairs and Anor (14 October 1988) the first and second applicants, husband and wife, had taken steps to adopt the third applicant, a baby girl, in accordance with the laws of China. They encountered difficulties when they sought to bring the baby to Australia. The New South Wales authorities had not approved the parents as suitable to adopt and the Minister for Immigration, Local Government and Ethnic Affairs, under a relatively recent arrangement with State adoption authorities, would not grant an entry permit until the adoption was recognised by the State authorities. The applicants sought a review of the Minister's decision under the ADJR Act.

They also sought, under section 47 of the Adoption of Children Act 1965 (N.S.W.), a declaration that the adoption of the child

was one to which section 46 of that Act applied. In reliance on the jurisdiction conferred on the Federal Court pursuant to the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) and the Jurisdiction of Courts (Cross-Vesting) Act 1987 (N.S.W.), Justice Wilcox found that the infant had been legally adopted, in that she was a person to whom section 46 of the Adoption of Children Act applied. This removed the basis upon which the Minister's decision was made and His Honour remitted the matter to the Minister for further consideration.

Lodgment of review application with AAT when not accompanied by fee

In Angus Fire Armour Australia Pty Ltd v Collector of Customs (NSW) (29 September, 1988) the full Federal Court heard an appeal from the decision of Justice Woodward (Admin Review 15:15), who had decided that an application to the AAT which was sent by post without the required filing fee could not be said to have been lodged at that time. In this case the original application had been received by the AAT Registry within the time, but returned by the Registrar as the fee was not attached. It was subsequently re-lodged, with the fee, after the expiry of the time limit. In a majority decision, Justices Sweeney and Northrop held that the ordinary meaning of the word 'lodge' in section 29 of the Administrative Appeals Tribunal Act 1975, included 'to deposit in court or with an official a formal statement of an information, complaint, objection etc', which meant that the application deposited with the Registrar must be considered to have been properly lodged despite the absence of the filing fee.

The Court ordered that the AAT decision not to hear the application be set aside and the original application for review be remitted to the AAT to be heard. Mr. Justice Northrop contrasted the term 'lodged' in the Act, with the word 'filed'. Under Federal Court of Australia Regulation 2(3), a document shall not be filed unless 'the fee (if any) payable upon or in respect of the filing has been paid.' His Honour also referred to Purden Pty Ltd v Registrar in Bankruptcy (1982) 64 F.L.R.306, where a similar definition of the word 'lodged' was applied as in this case.

Competence of AAT to consider review of Veterans' Review Board decisions

In Ward v Nicholls and Ors (10 October 1988) the Federal Court considered an application under the ADJR Act to review decisions by two Veterans' Review Boards and the Repatriation Commission. Justice Wilcox found that the VRB had misinterpreted three Full Court decisions, namely Banovich v Repatriation Commission (1986) 69 ALR 395, Delkou v Repatriation Commission (1986) 69 ALR 406 and Lucas v Repatriation Commission (1986) 69 ALR 415, in taking the view that a Board was entitled only to consider the facts as they had occurred up to the date of the application, or the Commission's decision. His Honour concluded that the circumstances of those cases were other than those of the present case. The applicants in those cases had sought to claim a special rate pension on the grounds of an ability to satisfy the necessary criteria at some time previously, but no longer at the time of assessment.

In contrast, the Court in the present case adopted the principle used in Jebb v Repatriation Commission (1988) 8 AAR 285, that the VRB is required to have regard to the evidence as to disability as it may be at the date of consideration. This principle has been taken into account in recent legislative amendments to veterans' legislation (see Administrative Law Watch).

The Administrative Appeals Tribunal had considered a further VRB decision denying that it had jurisdiction to review a particular Commission decision because of the expiry of the time limit as specified. Deputy President Bannon had taken the view that a decision denying jurisdiction was not a 'decision by the Board' to affirm a decision of the Commission as provided by section 175(1) of the Veterans' Entitlements Act 1986, and that therefore the Tribunal had no jurisdiction. Justice Wilcox found that, if the effect of what the VRB did was to affirm the Commission's decision, then it was clear that the AAT itself did have jurisdiction in the matter. His Honour concluded:

> 'It would be a very odd situation if the position were as perceived by Mr Bannon; that is, if the (VRB) found that it had no jurisdiction, and the AAT - which is set up by statute to review on their merits decisions of the Board - was then precluded from considering for itself whether that Board in fact had jurisdiction and, if so, what decision it should have made...I think that the true position is that the VRB is always in the position of having to decide whether to affirm, to vary or to set aside the decision of the Commission; and that, whatever decision it makes, that decision is subject to review by the AAT.'

The Court set aside the decisions of the Boards and remitted the application to the Veterans' Review Board.

Commonwealth Ombudsman

Annual Report

The 1987-88 Annual Report of the Commonwealth Ombudsman and Defence Force Ombudsman was tabled in the Parliament on 20 October, 1988.

On 18 November the Ombudsman and senior officers appeared before the Senate Standing Committee on Legal and Constitutional Affairs as part of the Committee's examination of the Ombudsman's annual report.

One of the most pressing matters of concern raised by the Ombudsman was the continuation of cuts in resources resulting in reductions in both investigating and support staff. The Ombudsman warned that these reductions would probably lead to an increase in the time taken to deal with complaints generally and to extensive delays for particularly difficult cases. In addition, the conduct of hearings in relation to complaints may have to be abandoned, with implications for the resolution of