of section 1317C of the *Corporations Law*. It arose following the decision of the ASC to refer certain conduct to the Corporations and Securities Panel under section 733 of the *Corporations Law*. The scheme of the legislation is that if the ASC considers that 'unacceptable circumstances' have occurred in connection with an acquisition of shares, or with other conduct, the ASC may apply to the Panel for a declaration to that effect. In the event of the Panel concluding that there were 'unacceptable circumstances', it has various powers to make orders affecting the parties.

In this case, Gallivan sought review by the Tribunal of the ASC's decision to apply to the Panel. Section 1317B confers a general power to make applications to the Tribunal for 'review of a decision made under this Law' by, inter alia, the ASC. It was contended by the ASC that the decision to apply to the Panel is not a decision within the meaning of that word in section 1317B. After considering the judgment of Justice Deane in *Director-General of Social Services v Chaney* (1980) 31 ALR 571, the Tribunal stated:

> '... it seems to me that unless the Commission's decision can be regarded as the ultimate or operative decision determining the substantial issues between the parties, it can not be regarded as a reviewable decision as discussed by His Honour. The fact that the decision was that unacceptable circumstances *may* have occurred prima facie precludes it from being regarded as one that settles the issues.'

The Tribunal noted that, in *ABT v Bond* (1990) 94 ALR 11, members of the High Court had 'accepted that the activities defined as constituting a decision in the AAT Act are virtually indentical with those in s3(2) of the [AD(JR) Act]'. The Tribunal drew a parallel between this case and *Edelsten v Health Insurance Commission* (1990) 21 ALD 710. Both cases involved a situation where a body could investigate a matter before referring it to another body for action. As in *Edelsten*, the Tribunal determined that the decision was a non-operative decision and therefore was not reviewable.

Although it had resolved the matter, the Tribunal commented on the second argument put forward by the ASC. The ASC had argued that the decision to apply to the Panel fell within the terms of section 1317C, which excludes from review by the Tribunal decisions 'in respect of which any provision in the nature of an appeal or review is expressly provided by this law'. The Tribunal, in rejecting this argument, said:

> '... the proceedings of the Panel can not be said to be directed to the correction or improvement of the decision of the [ASC]. Whatever the result of the Panel's deliberations, the decision of the [ASC] to refer the matter to the Panel is left unassailed. The Panel does not revise or alter the result of the [ASC's] decision. The decision to apply to the Panel, with all its practical consequences for [Gallivan], continues to stand... The proceedings of the Panel are no more a review than the decision of a jury to find an accused not guilty would be a review of the decision of the Director of Public Prosecutions to institute a prosecution.'

Freedom of Information

The Freedom of Information Amendment Act 1991

On 25 October 1991, the *Freedom of Information Amendment Act 1991* ('the Act') came into operation. Not having a retrospective effect, it applies only to FOI requests lodged after that date.

A valid request is now required to: be in writing, provide sufficient information to enable the agency to identify the requested documents, give the applicant's address, be sent to the agency's address in the phone book, and be accompanied by the $30 application fee. The request need no longer specify that it is made under the FOI Act.

The Act changes section 24(1) of the FOI Act, which allows an agency to refuse a request which would substantially and unreasonably divert its resources from its other operations. At present section 24(1) is limited because, in determining what is a substantial or unreasonable diversion of resources, an agency can only take into account the work involved in identifying, locating and collating relevant documents. The Act will change section 24(1) to allow the agency to also take into account the work involved in officers of the agency:

- examining documents to identify any exempt matter;
- consulting any person or body outside the agency about the request;
- making copies of the documents with exempt material deleted; and

- notifying the applicant of the agency's decision on the request.

The Act also reforms a number of other areas. It

- broadens the rights of individuals and businesses to be consulted before a decision is made on the release of documents affecting their interests;
- inserts a provision to require an agency to notify a 'qualified person' where a document, containing medical or psychiatric information provided by that person, is to be released to the person who is the subject of that information;
- broadens the rights of applicants to have access to documents with exempt material deleted;
- empowers the agency to delete material from documents that can reasonably be regarded as irrelevant to the request;
- inserts a definition of 'personal information', which is taken from the *Privacy Act 1988*, and which replaces the more limited and uncertain phrase 'information relating to personal affairs';
- broadens access to documents created prior to 1 December 1977 if they relate to 'personal information', or information about a person's or company's business, commercial or financial affairs;
- outlines a general principle that an applicant's reasons, or what the agency believes to be the applicant's reasons, for access should not affect the success of an application;
- permits an agency to refuse a request for access to a document if the documents requested do not exist or cannot be found;
- includes a schedule which lists all of the secrecy provisions to which section 38 applies, removing previous doubts on this matter;
- amends section 45 to make it clear that a document is exempt as confidential only if its disclosure would be actionable at general law;
- removes provision for the Ombudsman to represent applicants in FOI-related AAT procedures; and
- extends the jurisdiction of the AAT by allowing review of agency decisions on remission of application fees and decisions whether or not to impose a charge; and
- makes a number of technical amendments relating to onus of proof in reverse FOI proceedings, notification of AAT appeals to third parties and the AAT's power to require an agency to produce documents.

Unreasonable effects

Re Rogers Matheson Clark and Australian National Parks and Wildlife Service (1991) 22 ALD 706 arose following a request by Greenpeace for information concerning export permits. ANPWS provided the information with the names of exporters and consignees deleted. Greenpeace sought internal review of the decision to delete the names.

ANPWS was advised by the Attorney-General's Department that, as section 52(1) of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* ('Wildlife Protection Act') required the Minister to publish in the *Gazette*, the 'particulars of - ... (b) permits granted or authorities given; ...', any information that should have been published should also be provided under an FOI request. ANPWS notified each of the organisations mentioned in the permits of its decision to release their names and advised them that they may wish to seek review of that decision under section 43 of the FOI Act.

These proceedings arose from applications for review lodged by several exporters named in the permits. The applicants contended that there is no statutory obligation to publish their names under section 52 of the Wildlife Protection Act. In addition, it was argued that the information should not be released under the FOI Act because it would 'unreasonably affect them adversely in respect of their lawful businesses' (to paraphrase the legislation).

Looking first at the question of an obligation to publish, the Tribunal, constituted by Deputy President Gerber, noted that paragraph (a) of section 52(1), which had required publication of the particulars of 'applications for permits or authorities', had been deleted. From this amendment, the Tribunal stated that 'as a matter of construction, it was satisfied that section 52, as amended, does not require gazetting of the names of exporters and/or consignees.' The Tribunal did not specify what it considered to be the particulars of the permits that were required to be published in the *Gazette*.

The Tribunal then considered whether the documents were exempt under section 43. The Tribunal considered that the names and addresses

of the applicants' overseas customers fell classically under the protection of section 43(1)(b): 'any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed'.

Although that had disposed of the matter, the Tribunal also considered the application for exemption under section 43(1)(c)(i): 'information ... the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business ...'. About this exemption from disclosure the Tribunal said:

> 'In considering the unreasonableness or otherwise of the disclosure sought in the instant case, consideration must be given both to the private interest in the protection from disclosure and the public interest in having access to the information held by Government. Thus, the commercial interests of the applicants in protecting their lawful business must be weighed against the public interest in knowing who exports kangaroo products and to whom ... An overwhelming picture emerges on the one hand of exporters who fear for their survival should any information be supplied to an organisation bent on their industry's destruction ... On the other hand is Greenpeace's avowed aim to save the kangaroo by killing the industry which depends on its slaughter.
>
> 'On balancing these competing interests, it seems to me that whether an industry operating lawfully within the Wildlife Act should be closed down should be more appropriately decided by government through legislation than by me by directing that commercially sensitive information should be released via the FOI Act. Weighing up these competing claims, I am satisfied that there is nothing in either Act, taken individually or collectively, which compels a victim, facing execution, to supply his own rope. In short, the balance tilts heavily in favour of the applicants.'

'Personal affairs'

In *Re Forrest and Department of Social Security*, (AAT - 21 June 1991) Mr Forrest had made an FOI request in respect of some documents lodged with the Department by his former de facto wife. The documents contained various statements about their relationship and its break up. The Department refused the request on the basis of section 38(1) of the FOI Act, claiming that section 19 of the *Social Security Act 1947* prohibited disclosure of any information. The Tribunal, constituted by Deputy President Thompson, accepted that section 19 had this effect, leaving itself to determine whether the documents fell within the exception to the section 38 exemption: that is, whether the document contained 'information relating to the person's personal affairs' (section 38(2) of the FOI Act).

The Tribunal first determined that the expression 'personal affairs' bears the same meaning throughout the Act. It decided that the following matters did fall into the description of 'personal affairs':

- the relationship of two persons with one another as de facto husband and de facto wife;
- the facts relating to the breakup of that de facto marital relationship;
- the existence of a child born of that relationship;
- property of the person either alone or jointly with his or her de facto spouse; and
- details of the person's or the couple's financial circumstances.

The Department contended that the exception in section 38(2) arose only in relation to a person's own dealings with the Department. As the information here was provided by Mr Forrest's former de facto wife in respect of her pension entitlements, it was argued that Mr Forrest could not take advantage of the 'personal affairs' exception. The Tribunal responded:

> 'I do not accept that argument as sound. First, it seeks to give to section 38(2) a meaning other than its natural meaning; *the* person in the phrase 'the person's personal affairs' is the person who has requested access to the document ... Any person may request such access, not only a person already dealing with the Minister, department or authority in possession of the information ...'(Emphasis in original.)

The Tribunal rejected the Department's objections but returned the matter to it to determine whether the personal affairs exemption applied.

Section 43 exemptions

In *Re Public Interest Advocacy Centre and Department of Community Services and Health*

(AAT - 16 August 1991), the Tribunal, constituted by Justice O'Connor, Mrs McClintock and Dr Thorpe, had to consider a broad array of issues arising from PIAC's FOI request. The request was made for information about an intrauterine device known as Nova-T, and in particular concerned information supplied to the Government by the distributor, Schering Pty Ltd, in support of its marketing application. Without attempting to exhaustively state all of the issues raised in the case, the following outlines some of the more significant points.

PIAC made submissions that Schering, as a joined party, should have its submissions confined to the grounds of the exemption set out in section 43. The Tribunal rejected this submission noting that Schering had been joined as a party, without objection, pursuant to section 30(1A) of the AAT Act and that its rights are governed by those joinder provisions.

PIAC objected to the classification of a collection of certain material as a document, arguing that a document cannot be a collection of a large number of documents having different authors, different dates and with some documents being publicly available and others not. The Tribunal's response to this submission was:

> 'The Tribunal must take a commonsense approach to what is and what is not a document for the purposes of the FOI Act. There are some circumstances where a collection of material may be viewed as one document while in others that collection may rightly be broken down into a number of documents.'

In this case the Tribunal allowed each collection to be classified as a single document.

The Tribunal next considered a claim for exemption by the Department under section 40(1)(d), which exempts a document if its disclosure would 'have a substantial adverse effect on the proper and efficient conduct of the operations of an agency'. In section 40(2) this exemption is made subject to a public interest test. The Department claimed that certain documents could be used to identify external evaluators and that such identification would discourage any evaluators from working for the Department. The Tribunal accepted that this would have a substantial adverse effect on the proper and efficient conduct of the Department's operations.

In respect of whether there existed a counterveiling public interest, the Tribunal noted that the 'onus is placed upon the applicant to make out a positive case with respect to public interest'. PIAC profferred evidence of various groups that would be interested in the information. The Tribunal drew the distinctions between 'the public having an interest' and 'something being in the public interest' and between 'a public interest in an activity' and 'public interest in disclosure'. In the end, the Tribunal was not satisfied that it was in the public interest to release the identity of the evaluators.

There was extensive argument under each ground specified in section 43 of the FOI Act. First, addressing the definition of 'trade secrets', the Tribunal adopted the test outlined in *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588. The Tribunal rejected PIAC's submission that a restrictive interpretation should be given to the expression, concluding 'that the words 'trade secrets' should be given their ordinary meaning under Australian law'. However, the Tribunal accepted PIAC's submission that as health and safety data and results from clinical tests are not of 'a technical character' they do not fall within the definition of 'trade secrets' and, thus, are not exempt under section 43(1)(a).

The Tribunal then considered the scope of section 43(1)(b) of the FOI Act relating to information having a commercial value. The Tribunal rejected Schering's submission that the act of compiling documents into a collection gives it commercial value, stating that in its view 'to interpret section 43(1)(b) as applying to the compilation of material otherwise publicly available would not be in accord with the object of the Act nor the intention of Parliament'.

The Tribunal also dealt with a claim for exemption under section 43(1)(c)(i) in respect of the submission that disclosure would 'unreasonably affect that person adversely in respect of his lawful business'. First, the Tribunal said:

> 'The word 'reasonably' should be given its usual meaning and there is no need to balance competing interests. We agree ... that in other sections of the FOI Act ... the concept of public interest is provided for specifically and if that had been the intention in section 43 it would have been easy to so provide. It is not sufficient for a party to establish that disclosure of information may have an adverse effect upon its business. A decision maker must make a factual judgment that there

would be an 'unreasonable' effect. That is, the decision maker must be satisfied that the effect is of substance rather than incidental or trivial.'

PIAC attempted to put an argument that Schering had in its business activities breached section 52 of the *Trade Practices Act 1974* such that certain documents did not relate to a 'lawful' business. The Tribunal rejected the argument noting that it did not see how, in the context of the FOI Act, it could make a determination under the Trade Practices Act. It concluded that it had no jurisdiction to make a finding about this kind of lawfulness. Note that the Tribunal's rejection of the balancing of interests approach is inconsistent with the approach taken in *Rogers Matheson Clark* discussed above.

Finally, the Tribunal referred to the departmental officer's statement that, in making his decision under the FOI Act, he skim read the material and addressed the matter as a whole, determining that the documents formed part of an application to the Department and that they were confidential and therefore exempt. The Tribunal rejected this method of making a decision under the FOI Act:

'It is not sufficient to simply say that, because material is submitted as part of an application to the department, it is confidential and therefore exempt. The material itself must be examined.'

Applying these principles, the Tribunal made a determination about which documents and parts of documents should be disclosed.

The Courts

Adequacy of reasons

Soldatow v Australia Council (1991) 22 ALD 750 concerned an application by Mr Soldatow for a statement of reasons why the Australia Council had rejected his application for a Writers Fellowship. Mr Soldatow had been provided with two statements of reasons but both lacked any real specificity. Mr Justice Davies of the Federal Court, in considering the obligation under section 13 of the AD(JR) Act, said:

'Section 13(1) requires proper and adequate reasons which are intelligible, which deal with the substantial issues raised for determination and which expose the reasoning process adopted. The reasons need not be lengthy unless the subject matter requires but they should be sufficient to enable it to be determined whether the decision was made for a proper purpose, whether the decision involved an error of law, whether the decision-maker acted only on relevant considerations and whether the decision-makers left any such consideration out of account ...'

'The making of an order under section 13(7) is discretionary. Therefore, before making such an order, the Court should be satisfied that, notwithstanding that the reasons given may not satisfy all aspects of section 13(1), nevertheless, the ordering of a fuller and better statement would be a useful step furthering the interests of justice.'

Payment of interest under AD(JR) Act

In *Kawasaki Motors Pty Ltd v Comptroller-General of Customs* (1991) 102 ALR 258, Kawasaki had applied to the Federal Court to set aside the revocation of a tariff concession order and to be repaid overpaid duty with interest. The Court set aside the revocation but reserved the question of remedies. The Comptroller-General repaid the overpaid duty but disputed his liability to pay interest. Mr Justice Davies of the Federal Court said:

'I am therefore satisfied that an order made under section 16(1)(d) of the AD(JR) Act directing a party to do any act or thing 'which the Court considers necessary to do justice between the parties' may include an order for the payment of interest in accordance with the general policy established by section 51A [of the *Federal Court of Australia Act 1976*].'

Negligence and judicial review

Buksh v Minister for Immigration, Local Government and Ethnic Affairs (1991) 102 ALR 647 arose after Mr Buksh had been provided with incorrect forms upon which to apply for an entry visa to stay in Australia. As a result of being given forms that would certainly lead to his application being unsuccessful, Mr Buksh had lost his opportunity to apply under a category in respect of which he may have been successful. Mr Buksh claimed that he was denied procedural fairness because he was not advised that his application may have been successful if put differently.

Mr Justice Einfeld first considered the matter as a claim under estoppel: