not does not deprive it of the character of information relating to the person's "personal affairs". Such a document would therefore prima facie answer the description of one which relates to the "personal affairs" of a person ...

If something is notorious about a person and recorded in a document, this may provide ... cogent evidence to justify the finding that its disclosure would not represent an "unreasonable disclosure" of the information; but that is a different question from the first question of what constitutes information relating to "personal affairs" of a person.'

Mr Justice Lockhart said it would be inappropriate to attempt to set out the meaning of 'personal affairs' in a definitive way but in his opinion 'a person's affairs may be personal to him not withstanding that they are not secret to him'. In his view documents which would reveal the name of a telephone subscriber, patterns of telephone calls, and in some cases the name of the caller, related to a person's "personal affairs."

Mr Colakovski had argued that the disclosure would not be unreasonable under the FOI Act as the 'nuisance' telephone caller had arguably committed a criminal offence. Mr Justice Lockhart said that while the fact that information would be useful or material in establishing the commission of an offence would be relevant in determining whether disclosure would be unreasonable, at the time the FOI request was made no prosecution could have been brought for the 'nuisance' calls as twelve months had elapsed and prosecution would be precluded under the *Crimes Act 1914* (Cth). Mr Justice Lockhart concluded that the disclosure would be unreasonable and that the notion of unreasonableness 'must have as its core public interest considerations'. He then concluded

'it offends a right thinking person's sense of fairness and justice that citizens may not have access to important documents which are available to their opponents or available to the government and which may be before the tribunal and that their rights are to an extent determined in camera. Although this is an unsatisfactory nature of the proceedings it is inevitable. The right of the public to gain access to information in the possession of the government of the Commonwealth must necessarily be subject to limitations and they are recognised throughout the [FOI] Act ... It is the price that the community must pay for the considerable benefit of having a statutory right of access to official documents of the government of the Commonwealth and of its agencies. But the exclusion of applicants from access to documents, although necessary in cases such as the present, must be treated with great care by tribunals before whom questions arise under the FOI ACT'.

The Full Federal Court unanimously dismissed the appeal.

The Courts

Meaning of 'Decision' - ABT v Bond Applied

Edelsten v Health Insurance Commission, (Full Federal Court 16 November 1990) (1990) 96 ALR 673 clarified and applied the recent decision of the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. This case involved a statutory scheme for the investigation of the practices of medical practitioners who had apparently 'over-serviced' patients and so become improperly entitled to claim Medicare benefits. Dr Edelsten, a Melbourne medical practitioner, had some of his Medicare benefit claims investigated by the Health Insurance Commission. The Commission delegate referred the Medicare claims to the Ministerial delegate who then referred the question of possible over-servicing by Dr Edelsten to the Victorian Medical Services Committee of Inquiry. (Following a hearing this Committee had power to recommend repayment of benefits and a reprimand or counselling for the medical practitioner.)

In this case, Dr Edelsten argued before the Federal Court that the decisions of both delegates were reviewable 'decisions' under section 3 of the AD(JR) Act and that the rules of natural justice applied to those decisions but had not been followed by either delegate.

Mr Justice Jenkinson held that both actions by the delegates were 'decisions' but the rules of natural justice only applied to those taken by Dr Dash. (The Judge's decision was made before the High Court gave judgment in *Australian Broadcasting Tribunal v Bond.*)

On appeal, Justices Northrop and Lockhart considered that the *Bond* decision

'is authority for the proposition that generally, for a decision to be reviewable under the Judicial Review Act, it must have a quality of finality, not being merely a step taken on the way to the possible making of an ultimate decision; and it must have the essential quality of being a substantive as distinct from a procedural determination'.

The judges went on to say that
'the rationale underlying *Bond* is that Parliament could not have intended the Judicial Review Act to be a vehicle for judicial review of every decision of a decision-maker under a Commonwealth enactment. Some decisions will have a real impact upon a person's rights, privileges or obligations; some will have no such impact, whilst others are mere stepping stones which may ultimately lead to the making of a decision which does affect the person's position'.

The Court held that neither delegates' action amounted to a reviewable 'decision'. Neither was final, no rights of Dr Edelsten were affected by them, nor did any legitimate expectation arise. The actions were simply steps in the administrative process which might ultimately lead to a determination by the Committee.

Mr Justice Davies while finding that Dr Edelesten had established no basis for relief, said that the delegate's reference to the committee was reviewable conduct.

Confirmation of belief

Whim Creek Consolidated N.L. v Colgan (Federal Court - 2 November 1990) concerned a goldminer who contracted with Westmont Equipment Pty. Ltd. ('Westmont') to buy certain equipment for $1.796m, 'inclusive of all Customs Duty'.

When the equipment arrived in Australia, Customs officers seized it and advised Whim Creek that Westmont had understated the value of the equipment. Whim Creek applied to the Federal Court to review the decision of Mr Colgan, a Customs officer, to seize the imported equipment. This raised the question of the nature of 'decisions' under an enactment to which the AD(JR) Act applies - in this case the decision to seize forfeited goods under the *Customs Act 1901* (Cth).

In the course of its decision the Court stated that the fact that an officer may seek from superior officers both confirmation of his belief that goods were liable to seizure and support for his intention to seize those goods, would not elevate either to 'decisions' made under the AD(JR) Act. However, the Court said that procedural determinations or conclusions of these types, made during a process of reasoning leading to an ultimate decision, might be reviewable as 'conduct' engaged in for the purpose of making a decision. [G.F.]

Dismissal of a Telecom Employee is not a reviewable decision

In *Hudson v Australian Telecommunications Corporation* (Federal Court - 22 November 1990) a Telecom Disciplinary Appeal Board dismissed Mr Hudson from the Australian Telecommunications Corporation. Mr Hudson sought review under the AD(JR) Act. That Act does not permit review of decisions made under the *Industrial Relations Act 1988*. Under the *Telecommunications Act 1975* Mr Hudson would have had a right of review.

However, as a result of some statutory amendments, Mr Justice Spender found that the AD(JR) Act did not apply. This was because the Disciplinary Appeal Board's power to dismiss Mr Hudson was clause 10 of the *Telecom General Conditions of Employment Award*. This award was to be regarded as an instrument made under the Industrial Relations Act as it had the capacity to affect legal rights and obligations. Accordingly, the decision was excluded from AD(JR) review.

Court substituting its own decision for that of the decision maker

In *Calleja and Secretary to the Department of Community Services and Health* (Federal Court - 15 November 1990) Mrs Calleja was seriously ill, her last chance of treatment was the administration of the drug 'Laetrile' and her doctor believed that the most likely benefit from the use of that drug would be increased peace of mind for Mrs Calleja and those closest to her. Importation of Laetrile required the permission of the Secretary to the Department under the *Customs (Prohibited Imports) Regulations*. That permission was initially refused. Mrs Calleja had sought

review of the decision by the Minister under those regulations. She then asked the court for orders that the Secretary's decision be set aside and also 'such other orders as will enable the applicant to have the drug urgently administered to her'.

Mr Justice Lee decided that the Secretary's decision was not properly made. The real question in the case then was what the Court should do. The matter was extremely urgent, and while the Minister was proceeding to review the decision as quickly as possible, he could give no undertaking as to precisely when that review would be completed. A further difficulty was that if the Court ordered a review by the Secretary of his decision the separate process of review by the Minister would be terminated. The normal remedy in this type of case would have been to remit the matter for reconsideration to the Secretary.

Section 16 of the AD(JR) Act allows the court on application for an order of review to make 'an order directing any of the parties to do ... any act or thing the doing ... which the court considers necessary to do justice between the parties.' Mr Justice Lee said that the circumstances were of the utmost urgency, unique, and of no general import or precedent and ordered that Mrs Calleja be permitted forthwith to import the drug. Thus the Court substituted its decision for that of the decision maker.

Comment: While the matter was clearly urgent, and the Court was in a difficult position as the Minister had not given an undertaking to consider the matter within a given time, the Court's decision on the merits was most questionable. As Justice Mason said in *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 40-41

> 'the limited role of a Court reviewing the exercise of an administrative discretion must be constantly borne in mind. 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.'

Where an original decision maker is bound to make a particular decision if certain preconditions are satisfied, and a Court conducting judicial review believes that all preconditions have been satisfied, it may occasionally be both economical and appropriate for a Court to itself make the decision which the decision maker would be bound to make if the matter were remitted back. Where however, as in this case, a residual discretion remains with the decision maker it is doubtful whether a Court should do more than require reconsideration of the decision forthwith. See for example *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 68 ALR 441 at 453.

Refugee status, 'refugee sur place'

Jafar Heshmati v Minister of Immigration, Local Government and Ethnic Affairs (Federal Court - 22 November 1990) involved an application for review of the Minister's decision to refuse to grant Mr Heshmati an entry permit (as he had not 'entered Australia' in the technical sense) and to refuse to grant Mr Heshmati refugee status. Mr Heshmati, an Iranian national, had arrived in Australia on a fraudulently obtained Greek passport and had subsequently lodged an application with the Department for grant of refugee status. His application was based on a period of imprisonment in Iran and continuing fears for his safety. The Minister's delegate formed the view that Mr Heshmati did not have a well-founded fear of persecution should he be returned to Iran, and determined that he was not a refugee.

Mr Heshmati then embarked upon a publicity campaign, including a hunger strike, in protest, and sent a letter to the Iranian Embassy in Canberra expressing his opposition to the Khomeini regime and the current Iranian Government. The Department's investigations revealed a number of Mr Heshmati's claims to be inconsistent with previous statements. The Minister affirmed the decision of the delegate.

Mr Justice Lockhart confirmed that Mr Heshmati had not technically 'entered Australia' under the Migration Act as he had been in custody. He held that no incorrect decisions or improper conduct had been established.

Mr Heshmati had argued that he was a refugee, relying on the doctrine of 'refugee sur place', which states that a person becomes a 'refugee sur place' when, due to circumstances arising in his country of origin during his absence, he acquires refugee status after leaving

that country. Mr Justice Lockhart did not accept that an applicant for refugee status who deliberately created circumstances in the country of residence for the sole purpose of subsequently justifying a claim of refugee status is entitled to be treated as a 'refugee sur place'. The application was dismissed. [P.G.]

Bias - private communication by counsel for one party with an AAT member

In *The City of St Kilda v Evindon Pty Ltd* (Supreme Court of Victoria) ([1990] VR 770), - Justices Kaye, McGarvie and Ormiston confirmed that the rules of procedural fairness applied to statutory tribunals such as the Victorian Administrative Appeals Tribunal.

This case concerned a planning appeal which was to be heard by three members of the AAT. One member, a Mr Buckley, was well known to the solicitors for Evindon. Its Counsel telephoned the presiding AAT member, to inform him of this fact. The AAT was then reconstituted without Mr Buckley but the telephone conversation was not revealed to any other party until the planning appeal was decided. The Court felt that while there was no suggestion that the telephone call was made for any wrong motive, the decision of the AAT would be set aside. The Court also ordered the matter to be reheard by different members of the AAT.

The Court said that the AAT had made an error of law by failing to reveal the fact of the telephone call, as this denied the City of St Kilda natural justice.

The Court found that while the rules of natural justice are variable and flexible, there was

> 'nothing about the nature of the tribunal, its enquiry, the power it exercises or the statutory provisions applying to it which would make it appropriate that the practices it should follow to accord natural justice be significantly different from those a Court would be expected to follow'.

The practice that there should be

> 'no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and comment of the other party [is designed] to ensure that not only do parties receive a fair hearing and determination of their cases but that situations are avoided which are likely to produce reasonable doubt that a party will receive or has received a fair hearing and determination'.

Accordingly, once the parties, objectors and members of the public knew of the telephone call they

> 'might reasonably have feared that Mr Webb might have been given information favourable to Evindon's case and might not have brought an impartial and unprejudiced mind to the decision of the appeal'.

Rules of natural justice

In *Annetts v McCann* (High Court-20 December 1990) (1991) 97 ALR 177 the question, on appeal was whether a West Australian Coroner, Mr McCann SM, had misconceived or exceeded his jurisdiction in conducting a coronial enquiry by refusing to hear submissions from counsel representing the parents of the deceased.

Late in 1986 or early in 1987 James Annetts, aged 16, and Simon Amos, aged 17, perished in desert country south-east of Halls Creek in the north of Western Australia. Over a period of many months the Coroner conducted an inquiry into their deaths. Counsel engaged by Mr Annett's parents was permitted to cross-examine all witnesses who gave evidence at the inquiry. At the conclusion of the evidence, that counsel told the Coroner that he wished to make submissions before the Coroner made any finding. The Coroner, believing that he had a discretion to do so, refused to hear addresses.

The High Court held (by majority) that nothing in the *Coroners Act 1920* (WA) showed a legislative intention to exclude either the rules of natural justice or the common law rights of the parents of a child (whose death is the subject of an inquest) to be heard in opposition to any potential finding prejudicial to their interests, especially where those parents have been granted representation at the inquest.

Further, the High Court held that the Coroner had no unfettered discretion to refuse to entertain submissions from the parents. The Coronor was required either to invite counsel representing the parents to make submissions on those matters identified by the coroner that could result in adverse findings concerning either the parents or the deceased child, or to inform counsel that he

did not propose to make any such adverse findings. [G.F.]

Migration: Change to points system - no denial of procedural fairness

In *Hossain v. O'Connor* (Federal Court - 22 February 1991) Mr Hossain had applied to migrate to Australia with his wife and son in 1986. His wife's family were then resident in Australia. Two months later Mr Hossain's wife applied for a visa to visit Australia. (The discretion to grant such visas is broad and unfettered however the practice is to assess the application by reference to a non-statutory points system. The departmental practice in Dhaka was to carry out an initial preliminary points assessment for migration at the same time as an application for a visitor visa was received.) Mr Hossain failed to reach the minimum pass mark and the visitor application was refused. This decision was revised in 1987 and Mr Hossains' point score then reached the minimum pass mark so that his application could proceed towards a final assessment, however the Department then suspended processing of migration applications for a number of months and increased the minimum pass mark.

Another departmental officer, unaware of the initial decision, then considered the application of Mr Hossain, found that he failed to meet the new pass mark and refused his application. The Immigration Review Panel affirmed this decision and Mr Hossain appealed to the Federal Court, arguing, among other grounds, that the points test at the time of the initial application should have been applied and that Mr Hossain should have been advised of the change in the minimum pass mark and given an opportunity to supplement his original application.

Mr Justice Neaves found that the decision maker had an unfettered discretion, could give relevant matters the weight he considered appropriate and was entitled to consider Mr Hossain's application by reference to the more recent minimum pass mark. Secondly, there was no denial of procedural fairness by the Department not notifying Mr Hossain of the change in the minimum standard. Mr Justice Neaves cited *Kioa v. West* (1985) 159 CLR 550 which stated that 'in the ordinary course of granting or refusing entry permits there is no occasion for the principles of natural justice to be called into play' (at 587) and indicated the same reasoning was applicable in granting or refusing to grant a visa preliminary to an entry permit. The application was dismissed.

Natural Justice and Adjournment of Hearings

Max Opitz v. Repatriation Commission (Federal Court - 17 April 1991). Mr Opitz was a Australian citizen receiving a war disability pension. In 1986 he returned to Australia from the Philippines where he had lived for some years with his wife and son, and applied for a service pension. The application stated that he had arrived back in Australia from the Philippines, his wife and child would be joining him and that he had no plans to travel outside of Australia but would notify the Department should that circumstance change. Soon after his arrival he was arrested and eventually convicted of conspiring to defraud the Commonwealth. He was imprisoned and when released on licence returned to the Philippines. The *Veterans' Entitlements Act 1986* (Cth) required claimants for a service pension to reside and to be physically present in Australia. The Repatriation Commission determined that Mr Opitz was not likely to remain permanently in Australia at the time that he applied for the pension, cancelled that pension and demanded repayment of the pension payments already made. The Administrative Appeals Tribunal heard that Mr Opitz had given evidence under oath in his criminal trial to the effect that he had only returned to Australia temporarily for medical treatment and a family reunion.

Although Mr Opitz was not present at the AAT hearing, he had made a short statement and intended to give evidence by telephone from the Australian Embassy in Manila. The AAT expressed doubts as to the evidentiary weight of either type of evidence. When the AAT attempted to place a telephone call to the Australian Embassy in Manila an earthquake in the Philippines prevented the call from being made. The AAT then adjourned the case.

Upon resumption Mr Opitz's advocate, while contending that Mr Opitz should be given the opportunity of making a further statement expressed doubts as to whether there was a great deal that he could say. The AAT declined a further adjournment and proceeded to make a decision against Mr Opitz who then appealed to

the Federal Court contending that the AAT had denied him natural justice, amongst other grounds.

Mr Justice Hill found the facts 'unusual' and the question of denial of natural justice 'extremely difficult'. He said

> 'although it might be thought unlikely on the facts of the present case that the statement, sworn or unsworn, of Mr Opitz over the telephone could have explained satisfactorily the statement he had made under oath [to the District Court] ..., and not withstanding the opinion of the lay advocate as to the possible content of Mr Opitz's proposed evidence, these matters are not to the point. Mr Opitz apparently regarded the statement theretofore made by him as inadequate and wanted the ability to put the matter to the Tribunal by telephone'.

The court found the failure to give Mr Opitz this opportunity was a breach of procedural fairness and an error of law which required the matter to be remitted to the AAT for reconsideration.

Local Government Planning - Minister's decision set aside

Balmain Association Inc. v. The Planning Administrator for the Leichhardt Municipal Council (New South Wales Court of Appeal - 19 February 1991)

Five large industrial sites in Balmain became available for redevelopment and Leichhardt Council received applications to re-zone those sites. Draft local environmental plans were issued under the *Environmental Planning and Assessment Act 1979 (NSW)* ('the Act'), public submissions were received, and a request was made under the Act for a public hearing. The regulations made under the Act required at least twenty-one days notice before the public hearing could be held. The Minister then gave a direction under the Act requiring the Council to submit the local environmental plans within five weeks. Following the completion of a substantial report the Council resolved to hold a public enquiry. The Minister then appointed a planning administrator to carry out the Council's planning function in the area.

There was evidence before the Court that the Council's failure to comply with the Minister's directions was a matter the Minister took into account in making the decision to appoint the planning administrator. The New South Wales Court of Appeal found that the five week period was an 'unreasonable, indeed impossibly, short time' for the performance of what the Council was entitled or bound to do under the Act. The Minister had therefore taken an irrelevant consideration into account in making the decision to appoint a planning administrator.

The Court applied *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Thompson v. The Municipality of Randwick* (1950) 81 CLR 87 and decided that basing the decision on 'some wholly extraneous consideration' vitiated that decision. The Court said

> 'it is sufficient for the claimant for relief to show that the decision could have been affected by a vitiating factor. In the absence of evidence from the decision maker, it is generally not possible to go outside the objective material in deciding what was taken into account by the decision maker'.

The Court said that procedural fairness required that the Council be given opportunities to be heard 'on all the matters which concern the Minister before he exercised the power', thus, denying the Council procedural fairness also made the Minister's decision invalid.

Commonwealth Ombudsman

Change of Ombudsman

Professor Dennis Pearce retired on 31 January 1991 at the end of his three year appointment as Commonwealth Ombudsman and has returned to his position as Professor of Law and Dean of the Faculty of Law at the Australian National University.

Mr Alan Cameron, (pictured above) whose appointment as Commonwealth Ombudsman was announced by the Prime Minister on 20 December 1990, took up his new position on 1 April 1991. Mr Cameron was formerly National Executive Partner of the legal firm, Blake Dawson Waldron. He was a judicial member of the NSW Equal Opportunity Tribunal and a former chairman of the Business Law Section of the Law Council of Australia.

Relationship with the Australian Customs Service

Following criticism of the Australian Customs Service in the Ombudsman's 1989-1990 Annual Report, arrangements have been made between the Ombudsman's office and the Australian Customs Service with a view to establishing a cooperative relationship between the two. The arrangements include regular, formal meetings; establishment of a joint committee to discuss general issues and specific cases where necessary; and participation by Ombudsman staff in appropriate ACS training courses.

Comcare

As part of an ongoing review of compensation payments, Comcare informed a number of compensation recipients that their payments would cease on 28 February 1991. In some cases recipients had only two days in which to protest against the decision. Several, concerned by the lack of reasonable notice, approached the Ombudsman's Office.

The form letters appeared to contravene an agreement between the Ombudsman's Office and Comcare, whereby individuals whose payments were to be terminated would be told the reasons for the decision and given a reasonable period in which to respond.

Investigation revealed that several of the letters, as the last step in protracted correspondence, were appropriate in the circumstances. Others were found to be inadequate, and Comcare agreed to provide those recipients with more details. The remaining nine were found to be wholly inappropriate, and in these cases Comcare, within 72 hours, reinstated payment and prepared letters of apology.

Evaluation of Defence Force Ombudsman program

During January 1991 the retiring Defence Force Ombudsman completed a limited evaluation of the DFO program in the Ombudsman Corporate Plan. The terms of reference, restricted because of resource constraints, were to:

- assess whether the Office of the Defence Force Ombudsman was efficiently and effectively investigating complaints and reporting the outcomes to affected agencies and complainants;
- assess whether the role of the Defence Force Ombudsman was understood by agencies and persons eligible to lodge complaints.

The main conclusion of the evaluation was that the Defence Force Ombudsman is unable, because of inadequate resources, to meet all the objectives set out in the Corporate Plan. He has