if a tribunal accepts evidence without any objection being made to its admission then there can no reason why it should not be treated as probative and credible evidence. The Tribunal concluded that, as there was no reason advanced by the Department for rejecting the evidence in support of the claim, the case be decided in Mrs Aronovitch's favour. [PG]

Australian Capital Territory AAT: Whether it is desirable to follow Commonwealth AAT decisions

Re Weetangera Action Group and Department of Education and the Arts (31 January 1992) arose after the issue of a conclusive certificate under section 36 of the *Freedom of Information Act 1989* (ACT). The ACT Administrative Appeals Tribunal, constituted by its President, Mr R K Todd, considered an application to gain access to documents relating to the closure of schools in the ACT, in particular the Weetangera Primary School.

President Todd discussed several Commonwealth AAT decisions including *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264. President Todd considered that that decision was not consistent with the spirit and intention of the ACT FOI Act, nor with the earlier decisions to which he had referred. He determined that he was not obliged to follow the *Aldred* decision as he was sitting as the President of the ACT AAT. However, he noted that he would have been required to follow *Aldred* if he were considering an application as a Deputy President of the Commonwealth AAT because *Aldred* had been decided by the then President of that tribunal.

He concluded that there were reasonable grounds for deciding that releasing the documents would be contrary to the public interest and upheld the original decision. [PG]

Freedom of Information

Amending medical reports

In *Re Gordon and Department of Social Security* (23 September 1991), the Tribunal, constituted by Senior Member Balmford and Members Rodopoulos and Gillham, considered an application, under section 48 of the FOI Act, to amend documents. Section 48 allows people to ask to have their personal records amended if the information which is recorded is 'incomplete, incorrect, out of date or misleading'.

Mr Gordon wanted a number of documents amended, including several medical reports and some file notes. Before the hearing, the Department had agreed to add a notation to each of the documents pointing out that Mr Gordon's views should be read in conjunction with the documents. Mr Gordon was dissatisfied with that proposal, so the issue before the Tribunal was the method of amendment.

In particular, Mr Gordon argued that several medical reports should be removed from his file. These were reports which did not support his claim for an invalid pension, which had been subsequently granted. The Tribunal made three points about amending medical reports on the basis that they were 'incomplete, incorrect, out of date or misleading':

- simply because the reports did not support the decision which was ultimately made did not necessarily mean they were incomplete etc;
- there needed to be medical evidence presented to the Tribunal before it could decide if the reports were incomplete etc (neither Mr Gordon nor the Department had arranged for any medical evidence to be presented); and
- in any event, the Tribunal considered that the medical reports should stand as representing the view of that doctor at the date of the examination.

Finally, the Tribunal determined that the power to amend documents would not extend to completely removing them from the file. [PG]

The Courts

Bias: previous dealings with a party

Re Polites; Ex parte Hoyts Corporation Pty Ltd (1991) 65 ALJR 445, concerned circumstances in which Deputy President Polites had been hearing a matter in the Industrial Relations Commission ('IRC') that had run, so far, for 27 days. At that juncture, a party discovered that the Deputy President had provided advice to the other party before he joined the IRC and objected to his continuing to sit. Deputy President Polites decided to discontinue sitting. The party that had not raised the matter initiated proceedings to obtain a writ of mandamus to compel Deputy

President Polites to hear and determine the matter.

In the course of its judgment, a Full Court of the High Court, consisting of Justices Brennan, Gaudron and McHugh, observed:

> 'A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit.'

In the instant case, Deputy President Polites' advice was not a live issue for determination and as such it was appropriate for him to continue to hear the matter. This principle will, no doubt, apply equally to the AAT and the Commonwealth specialist review tribunals.

Error of law: the correct meaning of 'work'

In *Minister for Immigration, Local Government and Ethnic Affairs v Montero* (14 August 1991), the Full Federal Court, constituted by Justices Spender, French and Von Doussa, was required to consider the validity of a decision to cancel a visa. Upon his arrival in Australia, it was discovered that Mr Montero, a cook by occupation, had brought with him references, menus and recipes. He stated that he was intending to stay with his sister and that he would help her by either cooking, or teaching her to cook, dishes for her weekly stall at a local market. He acknowledged that he might receive pocket money.

Mr Montero's visa, in accordance with the migration legislation, prohibited him from working without permission. The Minister's delegate took the view that Mr Montero intended to work in breach of his visa condition and therefore cancelled the visa. The delegate relied upon the definition of 'work' in the departmental procedures advice manual, it being that 'work' meant 'the undertaking of activity in Australia in a paid or unpaid capacity'.

At first instance the trial judge had set aside the decision of the delegate. In dismissing the appeal from that decision, the Court said:

> 'In the end, the decision [whether or not an activity is work] is one of fact and degree which must be decided in all the circumstances of the case. The term "work", in the abstract, and in the context of the Act, is probably incapable of precise definition.'

The Court then assessed the evidence:

> 'The conclusion reached that [Mr Montero's] proposed activities - which [he] said, after being warned that helping his sister was not permitted, would be confined to teaching her recipes - would constitute work indicates that [the delegate] applied a test which included those activities, even if unpaid. When regard is had to [Mr Montero's] stated purpose for his visit, the fact that he was to stay with his mother and sister from whom he had been separated for a long time, the offer of accommodation and support from [his sister who was] in regular employment when [Mr Montero's] visit was arranged, and the limited nature of [his sister's] food stall, we do not consider that the information available to [the delegate] could reasonably be regarded as indicating that [Mr Montero's] intended activities in Australia would be work contrary to the visa condition. We consider the conclusion reached by Olney J that [the delegate] misunderstood the concept of work was correct on the material before the Court and should be upheld.'

This long quotation, in which the Court provided no test for 'work' other than to say that the facts of this case did not amount to it, reinforces the view that the distinction between merits review and judicial review is often a fine one.

'Decision'

In *Pegasus Leasing Ltd v Federal Commissioner of Taxation* (1992) 104 ALR 442, the Federal Court, constituted by Mr Justice O'Loughlin, considered the scope of the meaning of 'decision' in the AD(JR) Act. Pegasus was concerned in the management of Thoroughbred Investment Parcels, which involved certain expenditures and receipts in Ireland. Pegasus had sought the Commissioner's view on whether certain income would be treated as foreign-source income. A taxation officer had provided oral advice that the income would be treated in a particular way to the detrimental effect of Pegasus. Pegasus made a request for reasons for that decision under section 13 of the AD(JR) Act. The Commissioner refused to supply reasons on the ground that the advice was not a

decision to which the AD(JR) Act applied.

The Court agreed with the Commissioner that there had not been a reviewable decision and therefore there was no obligation to provide reasons:

> 'I have come to the conclusion that the communication... amounted only to or, perhaps, an expression of opinion by the [Commissioner] to a statement of policy. I do not believe that it should be classified as a "decision" for the following reasons. First, the *Income Tax Assessment Act* did not require the [Commissioner] to make any such communication; no such communication is contemplated by the legislation and, in that sense, it was not authorised by the Act. Despite the importance of [the conclusions expressed in the communication], I can only see it as advice given by the [Commissioner] to [Pegasus] of an opinion that he had formed which would be applied in due course of time to the individual affairs of each taxpaying participant. Secondly, the manner in which I have classified the communication... means that it did not have "the character and quality of finality". That would only come at a later stage during the assessment or amended assessment process of the individual affairs of each taxpayer.'

This case aptly reveals a situation where the narrow definition of 'decision', arrived at by the High Court in *ABT v Bond*, has denied a statement of reasons to people who are seriously affected by a decision. This arises because the direct impact of the decision will not be felt until sometime in the future, when taxation assessments are made. The indirect impact of the decision is that Pegasus will find it hard to attract investors when it is unable to clarify the taxation position of its investment vehicle.

The Kawasaki cases

On 4 November 1991 two decisions of the same name, *Comptroller-General of Customs v Kawasaki Motors Pty Ltd* (1991) 103 ALR 637 and 661, were handed down by the Full Federal Court, in each case comprised of Justices Beaumont, Hill and Heerey. One case, the *Revocation case*, dealt with natural justice and the revocation of Commercial Tariff Concession Orders ('CTCOs'). The other case, the *Interest case*, concerned the power to make orders requiring the payment of money with interest under section 16 of the AD(JR) Act.

The Revocation case

In this case the Court unanimously determined that there was no obligation to accord natural justice in the process of revoking CTCOs. This was because they are of 'general application' and involve 'social, political and economic considerations affecting the whole Australian community'. The Court did not go so far as to say that they were legislative instruments, in which case not being administrative decisions they would be excluded from the ambit of the AD(JR) Act.

Concerning the question of the validity of a revocation order, Justices Hill and Heerey decided that the revocation order was void from the date it was purportedly made. They reached this position after noting the long-recognised public interest in the avoidance of litigation when the parties have agreed. That is, after Kawasaki had challenged the validity of the revocation order, once Customs agreed that it was invalidly made that was sufficient for the order to be invalid from its inception. This decision by the Court is rather surprising. Customs has no power to revoke its orders retrospectively yet, apparently, it may agree to their being void from the time they were made. This approach makes the rules for importation unclear. How can a prospective importer or manufacturer determine if a CTCO is valid or if Customs has agreed to its invalidity? How are interested third parties to protect their interests against instruments being made void?

The Interest case

In this matter, Kawasaki sought repayment of duty paid, and interest thereupon, during the period commencing with Customs' making of an invalid revocation of a CTCO and ending with the making of a valid revocation. Without being required to, Customs had repaid the duty but refused to pay interest thereupon. Kawasaki took this action to obtain interest upon the duty unlawfully exacted.

The majority of the Court, Justices Hill and Heerey, were of the view that the *Customs Act 1901* provided an exclusive mechanism for the recovery of customs duty and that no order for repayment could be made under section 16 of the AD(JR) Act. However, they acknowledged that in an appropriate case, albeit that it would be an exceptional case, a section 16 order could 'extend to directing the decision-maker to make a payment that had been refused contrary to law'. But the majority did not consider that interest would

be payable on any such amount because, as section 16 orders are discretionary, the right to the principal sum would arise only upon the making of the order, so that until the making of the order no interest would be payable. Mr Justice Beaumont dissented; he would have made an order for interest in this case.

'Decision under an enactment'

In *Mair v Bartholomew* (1992) 104 ALR 537 , the Federal Court, constituted by Mr Justice Davies, had to consider whether a decision by the Promotions Board of Review of the Reserve Bank was reviewable under the AD(JR) Act. The judgment considered both the meaning of 'instrument' and 'decision'.

The decision was made in accordance with the procedure set out in the Reserve Bank of Australia Staff Handbook and some subsequent circulars. The Court noted that these documents have a 'legally binding effect in the sense that they are incorporated into or evidence the terms and conditions of employment of the officers of the Bank'. The Court determined that the documents were 'instruments' within the meaning of the AD(JR) Act:

> 'The documents came into being pursuant to the Bank's authority under s.66(2) to determine the terms and conditions of employment.'

The Court rejected an argument that the decision of the Promotions Board of Review was a mere recommendation and not an 'ultimate or operative decision', an expression used by the High Court in *ABT v Bond* (1990) 170 CLR 321. The Court noted:

> 'The decision of the Promotions Board of Review is, of course, determinative in a case such as the present where the appeal is disallowed for, in that case, [the Handbook] provides that 'the provisional promotion will be confirmed'. However, even in the case of a recommendation, as occurs where the Promotions Board of Review upholds an appeal, the decision is one required to be taken before the appeal can be considered. It is a final decision similar to the magistrate's ruling in committal proceedings as to the prima facie case which was held to be a reviewable decision in *Lamb v Moss* (1983) 49 ALR 533, which finding was approved in this respect by Mason CJ in *ABT v Bond*...'

In addition, the Court noted that under section 3(3) of the AD(JR) Act, the recommendation by the Promotions Board of Review would be a 'decision' within the meaning of that Act.

Standing

Mark v Australian Broadcasting Tribunal (22 November 1991) involved the scope of the standing rule under the AD(JR) Act. Mr Mark was the President of the Anti-Discrimination Board of New South Wales and he sought an extension of time to lodge an application for judicial review of a decision by the Australian Broadcasting Tribunal ('ABT'). Mr Mark had made a submission to the ABT after having received a complaint about a broadcast by Mr Ron Casey. The ABT's decision concerned that broadcast and the interpretation of the ABT's radio program standard, RPS 3, which standard concerned issues of racism and racial vilification.

The Federal Court, constituted by Mr Justice Davies, enunciated the standing rule as follows:

> 'To bring an application under the *AD(JR) Act*, a person must have an interest in the subject matter of the proceedings extending beyond that of a member of the general public and other than that of a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed.'

Applying this test, the Court noted that Mr Mark, as a member of the general public, did not have any requisite interest to bring the proceedings, 'notwithstanding that he had an intellectual interest and expertise with respect to matters of discrimination, including racial discrimination'.

Mr Mark sought to rely upon his position as President of the Anti-Discrimination Board to give him standing. On this matter the Court said:

> 'It is not contended that... Mr Mark did not act with a view to promoting the general objects sought to be achieved by the *Anti-Discrimination Act*, or that he did not act in the interests of the complainants who had lodged complaints with him. However, by lodging a submission with the Australian Broadcasting Tribunal, Mr Mark not only did not perform any function conferred upon him or the Anti-Discrimination Board by the *Anti-Discrimination Act*, but acted in breach of the statutory duty imposed upon him by s.94 of the *Anti-Discrimination Act*.
>
> 'In the circumstances, it seems to me that Mr Mark's office as President of the Anti-Discrimination Board conferred upon him no

relevant interest entitling him to challenge in this Court the subsequent decision of the Australian Broadcasting Tribunal.'

Bona fides of ASC investigation

Little River Goldfields N L v Moulds (22 November 1991) concerned applications for judicial review in respect of notices issued under the *Australian Securities Commission Act 1989* (Cth). The notices were issued in relation to an investigation being conducted by the Australian Securities Commission and they required the provision of evidence on oath and the production of documents. The notices referred to an investigation of suspected offences which may have been committed in respect of dealings in securities of Little River Goldfields.

Little River Goldfields' appeal was based on a number of grounds, the first one being that there was no valid investigation being undertaken by the ASC in the absence of any written decision to undertake the investigation. The Court, constituted by Mr Justice Davies, rejected this argument, noting that the only requirements under the ASC Act are a reason to suspect that a contravention has been committed and a belief that it is expedient and appropriate to undertake the investigation. The ASC Act does not require any matters to be put in writing and it is not to be implied that strict limited terms should be imposed.

Little River Goldfields also argued that no officer of the ASC could have had reason to suspect that there had been a relevant contravention. It further submitted that the ASC was not entitled to investigate whether a contravention had occurred unless it had cogent information that such was the case.

The Court rejected these arguments on the basis that no attempt had been made to prove what was the material before the investigating officer at the time the investigation had been recommended or before the ASC at any time in the course of the investigation, therefore it could not be held that the actions taken in the course of the investigation were entirely without foundation or were unreasonable or not bona fide or that material factors were ignored. It was at this point that Mr Justice Davies stated that he would not regard the original report, the approval to investigate or the subsequent carrying on of the investigation as constituting reviewable decisions. The notices, however, were reviewable as formal acts which impose obligations upon the recipients.

The Court stated further that if any challenge is made to the investigation, the onus lies on the challenger to establish lack of bona fides etc., especially in a case in which the ASC appears to have grounds for inquiry into a possible contravention.

Little River Goldfields also submitted that the Court should make an order declaring the ambit of the investigation so as to ensure that the investigation did not trespass into other areas. Mr Justice Davies found that the approval for the investigation contained no clearly identifiable limits but that it was not necessary for it to do so. [GF]

The Ombudsman

Proposed legislative amendments

The *Prime Minister and Cabinet Legislation Amendment Act 1991*, which effects some amendments to the *Ombudsman Act 1976* ('the Act'), came into force on 18 December 1991. The purpose of the amendments to the Act is:

- to enable the Ombudsman to refer a matter to the Administrative Appeals Tribunal for an advisory opinion; the present section 11 of the Act provides only that he may recommend that the relevant principal officer (usually the Secretary to the agency concerned) seek such an opinion;
- to ensure that the Ombudsman's powers to obtain information under section 9 of the Act are not circumscribed by the provisions of any other enactment and that a claim of legal professional privilege is not available to deny him access to information which has passed between an officer of a body over which he has jurisdiction and another person; and
- to provide that the Ombudsman's role is not necessarily exhausted when he reports to the Parliament under section 17 of the Act, but that he may discuss any matter to which the report relates with the relevant principal officer for the purpose of resolving the matter.

Review of the Office of the Commonwealth Ombudsman

The report by the Senate Standing Committee on Finance and Public Administration, released in December 1991, concluded a review of the Of-