CHAPTER 5

THE ADMINISTRATIVE ENVIRONMENT WHICH ACQUIRED THE NEW ADMINISTRATIVE LAW

Some aspects of the administrative environment which came into possession of the new administrative law were touched on in the preceding chapters. In line with the two realms of discourse hinted at in those chapters, they can be aggregated into two predominant features, "legal" and "administrative". The "legal" dimension encompasses a written Constitution incorporating judicial review and separation of powers, and an inheritance which stresses judicial independence and restraint, open courts, an adversarial mode of operation, natural justice and the redress of individual grievances. The "administrative" dimension encompasses a parliamentary, that is, a Cabinet, adversarial, party system of Government and Opposition, and an inheritance which stresses collective and individual ministerial responsibility, together with a neutral and anonymous public service. These features, and certain realities which flow from them, will now be examined more closely as groups of interrelated factors - societal, constitutional, legal, administrative and political - which have formed the administrative environment of Commonwealth government.

Australians, it has been said, 'have displayed an ambivalence towards social and political reform'. The 'institutions and structures' created at Federation, for example, 'were designed to be compatible with the traditions and attitudes developed during the era of British colonial administration'.[1] One of the most active supporters of FOI spoke of 'a lack of vigorous public opinion and a constant

campaigning' to sustain the concept, even from public interest groups.[2] Hazell considered that 'probably ... most Australians do not want to participate' in the political process.[3] Bayne cited findings of the Ombudsman in noting that, '[n]ot surprisingly, given the social facts about knowledge of and access to government in our society, complaints from large businesses are rare', for they pursue issues informally with agencies and ministers.[4] The Constitutional Commission noted the 'confusion and resentment felt by electors' when confronted with frequent elections.[5]

These observations do not point to a vigorous, participatory political community in the formal sense. At the same time, it has been pointed out that, '[u]nlike the Constitution of the United States', constitutional change at the Commonwealth level 'is not the function of the States. Nor of political parties, nor of the Constitutional Commission or Commissioners - but only of the Australian people'.[6] This implies that elements of populism are comprehended by the Australian Constitution, that is, the possibility of 'a direct relationship between people and government'.[7]

The Constitutional Commission discussed the 'legislative, executive and judicial arms of government' [emphasis added], and the appropriateness of judges 'to decide the meaning of Constitutional guarantees'.[8] It was also concerned with the separation of powers and the possibility of investing 'the judicial power in bodies which are not strictly courts', and investing 'courts with administrative powers which are not incidents in the exercise of judicial powers'.[9]

Kirby referred to aspects of judicial restraint and creativity, in

noting that in Australia, and in New Zealand, England and other countries, 'the judiciary, since the nineteenth century and the reforms of Parliament, has, with notable exceptions, preferred to emphasize the noncreative features of the common law'.[10] Yet, he went on to say, the common law has always contained a 'creative element'.[11]

Goldring wrote that, whereas modern-day governments in Australia, in the development of policy initiatives, have been concerned with the 'interests of "collective consumption"',[12] legal culture has been preoccupied with 'individual, private, rights'. He saw this as 'almost inevitable, given that the main business of the courts and of the legal profession has traditionally been the business of pursuing and enforcing private rights of property and contract'.[13]

The Constitutional Commission reflected Kirby and Goldring. It recognised the role of the individual case in building up common law safeguards for individual rights, and the tendency of the courts to 'recede in importance as "makers of law"', in the face of more active Australian and British parliaments.[14]

The strength of legal tradition was brought out by Kirby in referring to the High Court's reversal of a decision 'relevant to information rights' of the New South Wales Court of Appeal. The latter had 'declared that, in modern circumstances, the common law of natural justice required the giving of reasons by public officials enjoying legislative discretions',[15] those areas 'where departmental rules and established precedents no longer have direct application and where public servants must exercise judgement'.[16] The High Court, however,

> unanimously ruled that a right to reasons was not required by the rules of natural justice. Development of the law here, it was said, was for the Parliament, not the courts.[17]

On the other hand, the strength of traditional natural justice in the hands of an adventurous judge, 'to stave off and curb the arbitrary use of power by government ministers or officials',[18] was illustrated by the "Kakadu Case", first heard in late 1986. In this case, a judge of the Federal Court found that Peko-Wallsend Ltd. was denied procedural fairness by Cabinet in reaching a decision to include Stage II of the Kakadu National Park in the World Heritage List. That is, the company had not been given 'reasonable notice of the proposal ... and an opportunity to present a submission to the Cabinet as a body'.[19] One media comment was that this ruling pointed to an obligation on the part of a government, in the absence of 'clearly expressed legislative intention', to consult parties whose interests would be affected adversely by a Cabinet decision.[20] Justice Beaumont made clear that it was not the source of governmental power, 'but its subject matter which determined whether the exercise of the power was subject to judicial review' [emphasis added]. He drew out the varying thrusts of the legal/individual and political/collective dimensions of government in remarking that the

> position might differ where the challenge was not based on procedural impropriety, which was capable of being measured and tested by established and defined legal criteria, but, for example, was based on the ground of unreasonableness or some other 'generalised or "political" grounds'.[21]

The Full Bench of the Federal Court, however, on hearing the Government's appeal against this ruling, considered unanimously that

the Cabinet decision was 'not one which could be reviewed by the court'.[22] One judge said, in keeping with the traditional slant of the law towards the individual, that the 'nature and effect' of the Cabinet decision did not 'attract the obligation to accord natural justice', since the case 'did not relate essentially to the personal circumstances of an individual'.[23] Another judge, in a clear reference to the informal workings of government administration, found that the company 'had had adequate opportunity to put its case to the relevant ministers and government officials, and had done so'. The Chief Judge said that it would be 'inappropriate' for the court 'to intervene to set aside the Cabinet decision, which involved complex policy considerations', and that 'the matter appears to lie in the political arena'.[24] Hence the Full Federal Court exercised traditional judicial restraint in the face of executive, that is Cabinet, policy-making. This may be less adventurous, but it should be noted that the strongest statement in support of this stance was made by a former Coalition MP and Attorney-General in the person of the Chief Judge, Sir Nigel Bowen, who must have a sound grasp of the niceties of governmental decision-making, both formal and informal.

While AAT decisions to date in determining the public interest in disclosure and non-disclosure of governmental records have bowed to legal tradition in not recognising 'any general democratic justification',[25] change is coming about generally by using extrinsic aids to the interpretation of statutes. This was facilitated by amendments in 1984 to the Acts Interpretation Act 1901 which permitted the courts to exercise 'considerable latitude to resort to extrinsic materials'[26] in seeking out the purpose and meaning of legislation.[27] Nevertheless,

difficulties are still being experienced with this departure from established practice,[28] no doubt because some arbitrators are discomforted by the thought of grappling with the interests of collective consumption.

But, to recapitulate, the new administrative law was introduced precisely to break down the 'immunity of ministerial decisions from query, enquiry, investigation', together with the 'ultimate power of the minister' which is 'devolved' to public servants 'who administer his or her decisions'.[29] This devolution came about, as Wilenski said, because

> [t]he nature and pace of contemporary government mean that ministers cannot concentrate solely on a single matter for any length of time. The wording of a government decision cannot foresee every possible circumstance and problem, and ministers cannot personally pursue even major decisions through each stage of the implementation process to see that each clause of every regulation, guideline and circular complies with the original intent of the decision. Every dispute among officials cannot be referred back to ministers, as this would be an intolerable imposition on their time and patience; and, indeed, they expect these disagreements to be resolved at an official level. Thus continual interpretation and re-interpretation by officials must take place.[30]

At the same time, the first Hawke Labor Government determined to 're-affirm and strengthen ministerial responsiblity and control'.[31] Ministers were no longer to be concerned primarily with matters of 'lofty policy', leaving the 'management and mere administration of the policies ... as consequential acts for public servants'.[32] By early 1987 Dawkins was proclaiming that '[m]inisters, not mandarins, govern modern Australia',[33] while the Prime Minister's explanation to parliament of the new administrative arrangements following the 1987

elections referred to their strengthening ministerial control over the public service, a principle supported strongly by the Opposition.[34]

Such declarations foreshadowed a reinforcement of elements of administrative tradition or culture. Even an activist member of the judiciary like Kirby has praised the 'many fine features' of the British administrative tradition: 'competitive entry on merit; advancement on merit; the ideal of loyal service to whoever is elected to government; general incorruptibility and high professional dedication ...'.[35] Kirby noted that 'openness and effective accountability are not strong features' of this tradition.[36] Wilenski wrote that, '[l]ike other countries in the British tradition, Australia has had little history of review of administrative decisions by judicial and quasi-judicial agencies', but that the introduction of the administrative law reforms 'fundamentally affected the Westminster system of ministerial responsibility and brought judicial power into administration in order to redress the balance of bureaucratic power'.[37] Wilenski also drew attention to another feature of the administrative tradition - the fact that 'the political nature of administration is hidden', despite the 'redistribution of the rights, benefits and resources' provided by government[38] which is inherent in public administration.

Thus far, this survey of the new administrative law has shown that the political nature of administration is indeed implicit, for there has been almost no overt mention by legal commentators of certain fundamental features of the Commonwealth system of government, summed up in Hughes' description of it as a 'disciplined-party, programmatic, majoritarian democracy government', one 'concerned with patching up

policy-making and administration'.[39]

The salience of party politics is discernible in, for example, Government and Opposition conflict about the use of the FOI Act by parliamentarians. The Constitutional Commission itself is a party-political issue, as exemplified by an Opposition attack on its rationale and membership towards the end of 1986.[40] Kirby acknowledged that a Bill of Rights would in essence define 'the consensus which is above party politics'.[41] So did the former Chief Justice; he issued reminders that, in Australia, such a Bill would in fact be introduced by a political party, and that social change would thus be sought 'by judicial rather than legislative decision'.[42]

Waterford was sure that, as far as public administration is concerned, 'there is only a close [media] interest' in public service activities when they actually reach the 'political level - that is, when the politicians ... are interesting themselves in it'; more particularly, when there is 'a Government-Opposition clash about policy or action'.[43]

With regard to policy, many students of public administration are used to thinking about governmental decision-making along the lines expressed by Hawker in Chapter 2, that is, in terms of the policy process or cycle, which is difficult to either prescribe for or describe. It is accepted that, for analytical purposes, models of the process can be useful, but that often, in reality, a combination of them may have to be brought into play to explain how policy is made. It is also accepted that the cycle can be broken down into stages of, say, policy formulation, implementation and evaluation, but that these

divisions are indistinct; that unintended consequences can come to light during each or all three stages, necessitating change which, in effect, perpetuates the cycle.

As part of these problems of conceptualisation, levels of policy-making are discussed. These, after all, fit into the largely hierarchical structure of government agencies. Thus, policy-making is said to take place for the most part 'from the bottom up', as policy proposals are refined and fed upward to and through the more senior levels of the hierarchy, until they reach ministerial and Cabinet levels. Once the policy decision emerges from Cabinet, it is applied 'from the top down'. There is something of an ideal type about this description, but it probably approximates the way most practitioners who become involved in such matters think policy-making occurs. It follows that this view of the policy process does not recognise a gap between policy and administration, but perceives instead levels of policy. It would acknowledge, however, that there are differences between higher levels of policy-making and the application, on a day to day basis in certain policy areas, of rules flowing from the former. It follows also that it is virtually impossible, other than in the latter areas, to ascertain just who made a decision, or to find a whole process of policy-making recorded in a single, or even a few, documents, as Waterford discovered.

Students of public administration are conversant with policy areas, for example, social welfare, immigration, education, natural resources, etc. More than one agency may have a legitimate policy interest in some areas, because of the allocation of ministerial portfolio responsibilities, and each will no doubt insist on playing a

part in policy-making bearing upon those areas. Again, this view probably coincides with that of most public servants who find themselves engaged in such activities.

Above all, students of public administration realise, in keeping with Hughes' description, that the policy process operates within a political framework, the parameters of which are set by the party which holds power in parliament, and are subject to pressures exerted by the wider community through the Opposition, interest groups, individuals, the media, etc.

For all this apparent conceptual imprecision, public administration operates according to long-established and internally well-understood networks of understandings which essentially govern institutional relationships. Hence the Administrative Arrangements Orders which are promulgated each time a new Cabinet is formed - most notably following an election - set the scene for Commonwealth administration. They detail the responsibilities of each minister - Acts administered by, agencies within, and policy interests of, each portfolio. These ministerial responsibilities become second nature to those public servants who need to be aware of them with regard to some functions of the respective agencies in which they are employed. For example, when dealing with "ministerial matters" such as parliamentary questions, representations to the minister or the preparation of, say, an annual report, relevant practitioners are cognizant of the fact that the end result of the particular exercise is not a public document until it has been tabled by or has seen the light of day courtesy of the minister. Practitioners also know that the minister's parliamentary brief is updated from time to time, usually for each new

session of parliament. The minister, therefore, is supported in endeavouring to hold his or her own in various arenas. The relationships involved in these few basic examples of the interaction of agency and minister - between, say, statutory authority, department and minister's office - are largely informal but familiar to those involved. In other words, and again from these few examples, it can be seen that the convention of individual ministerial responsibility is alive, even if sometimes blurred across agency/functional boundaries.*

Similarly, to those public servants whose functions involve knowledge of such things, the convention of collective ministerial responsibility is also healthy. After all, Cabinet is at the apogee of the policy process; submissions to Cabinet are fundamental to that process and its decisions are regarded as ex cathedra pronouncements. It is realised also that there is a Cabinet 'pecking order' determined by factors such as portfolio held, party position and support at, say, the State level.

At the same time, some public servants or students of public administration whose backgrounds do not include legal training would be aware of a number of "legal niceties" of the policy process. For example, Australia is a common law country with a federal, written Constitution. Cabinet is not mentioned in the Constitution, nor is the Prime Minister, yet both are all-important to the practice of public administration. Also, the High Court was established under the Constitution and has the power to rule on the constitutionality of Acts of parliament. This means that the Commonwealth maintains a separation of powers, bearing in mind, however, that the executive is drawn from the legislature, specifically from the party holding power

*especially since the changes in administrative arrangements in July 1987.

in the lower house, and that the executive appoints the judges. The legal framework of government would include, particularly to the staff of statutory bodies, the enabling legislation which brought them into being and lays down their powers and functions. It would also include Attorney-General's as the source of legal advice within government.

This outline of the administrative environment which inherited the new administrative law indicates that it is shaped by, inter alia, a powerful executive, which includes the public service, and by two hoary conventions of fundamental importance to the workings of government; in short, by certain political realities attached to traditional concerns. The new system of statutory external review of government administration was inserted into this environment. Legal theory and principles in the form of a new set of understandings and vocabulary, centred on concepts rather alien to most public servants and students of public administration - judicial review, process and restraint; redress of grievances, procedural and substantive reforms, natural justice, the judicial or legal view of decision-making - were buffeted by political-administrative realities.

Some legal concepts would not be so strange. Once it is appreciated that Crown privilege, executive privilege and public interest immunity are actually synonymous with confidentiality or the need-to-know principle, they would be immediately recognisable to public servants. Likewise, to both practitioners and students, the exemptions in the FOI Act not only protect, but also inform observers of, the more important institutions and policy areas in Commonwealth government: Cabinet and Executive Council; national security; defence and international relations; Commonwealth-State relations; law

enforcement and protection of public safety; the national economy, and, of course, internal working documents[44] as they relate to all these. In the same vein, the "particularly sensitive documents" which attract the added protection of conclusive certificates under the FOI Act would be looked upon by public servants or students as containing information with obvious political implications.

It is possible to discern what has been termed the 'court proceedings paradigm' in relation to natural justice[45] in the openness said to result from the FOI Act and statements of reasons under relevant provisions of the new laws. After all, as Kirby noted in Chapter 1, judges have operated for many years in open courts; the reasoning leading to their decisions is laid out painstakingly for all to see. "Exposure" of public servants is not quite so simple, due, as shown, to the nature of the policy process. Nor would it necessarily be desirable in the higher echelons of policy advice, if, say, it meant that a senior public servant would receive the kudos the minister would wish to attract in line with his or her political role.

To a public servant or student of public administration, it it not surprising that, considering these realities of the administrative environment, the new administrative law exhibits features designed to give due weight to characteristics of Cabinet, parliamentary, party government. The official behaviour of public servants is dictated, in line with these characteristics, by the PSB in its 'Guidelines on Official Conduct of Commonwealth Public Servants', which apply across the spectrum of public sector agencies. The 1982 edition constituted a paean to traditional concerns.[46] The new edition of mid-1987 couched those concerns in more "modern" terms, by basing them on the three main

current principles of the Commonwealth public service. That is, in the interests of ensuring that public confidence is maintained in the public sector, duties should be performed with 'professionalism and integrity', 'efficiently' serving the government of the day; with 'fairness and equity' in dealings with the public and other public servants, and avoiding conflicts of interest.(47)

The Guidelines reveal what foundations the relationships between public servants, government and parliament rest upon, and how they are protected. Under section 64 of the Constitution the Governor-General appoints Ministers of State "to administer the departments of State of the Commonwealth". Acts administered and major departmental functions are set out, as mentioned earlier, in the Administrative Arrangements Orders. The Public Service Reform Act 1984 clarified the role of the departmental secretary to make clear that, except where specific powers are statutorily conferred on a secretary, his or her responsibility for general departmental operations is subject to the minister's Constitutional powers.(48) Hence ministerial responsibility was statutorily strengthened, as alluded to by Dawkins and Wilenski.

This legislative support is complemented by the four principal present-day conventions: of ministerial responsibility, parliamentary privilege, and 'a professional and scrupulous public service'. Ministerial responsibility to parliament for departmental actions was acknowledged to be frequently contentious, and the Board fell back on mention made, in the Report of the Royal Commission of Australian Government Administration 1976, of departmental as opposed to personal culpability of ministers.(49) On the unresolved matter of parliamentary versus executive privilege, it was noted that public servants have

declined to answer questions from parliamentary bodies where public interest immunity is claimed by the executive.[50] The policy role of public servants is recognised in directives to provide frank and full policy advice to ministers and to apply decisions 'with full regard for government policy', in all this exercising judgement and being aware of values, but mindful always of 'legislative requirements, government policy, ministerial direction and considerations of equity and efficiency'.[51] Although mention is made of policy formulation and 'program implementation', the Guidelines stipulate that the 'fundamental government policy framework' must remain uppermost in public service considerations of government administration.[52]

Whereas public servants may, under the convention controlling behaviour in an election period, consult with the Opposition, they must not discuss government policies or offer opinions on party political matters.[53] Likewise, they should not comment on the relative merits of particular policies in the context of public and parliamentary criticism and 'normal' scrutiny of public administration.[54] Political neutrality is thus preserved. While the lessening of anonymity is recognised, in that it is now expected that senior public officials will participate in public discussion of matters in which they possess expertise - in order to facilitate governmental policy-making - they must ensure that their comment is appropriate to the relationship between the public service and the elected government.[55] Political neutrality in these circumstances is statutorily preserved by section 70 of the Crimes Act which renders unauthorised disclosure of official information a criminal offence.[56] It also applies to former public servants.[57]

"Leaks" are forbidden, again with statutory sanctions, because of possible damage to the public interest,[58] official disclosure of governmental information now being controlled for the most part by the FOI Act.[59] In a somewhat low-key presentation, this Act is said to have extended the right of the Australian public to gain access to government-held information. The virtues of using less formal means of access are alluded to,[60] and more space is devoted to circumstances where disclosure is inappropriate.[61] The privacy of those about whom the government holds information is to be guarded.[62] Staff in more sensitive areas have 'special responsibilities to protect the national interest', although they will be subjected to a security clearance only when there is a reasonable expectation that they will handle classified material.[63]

Flowing from the principle of fairness, and again under the Public Service Act, officers are to treat the public and fellow officials with 'courtesy and sensitivity to their rights, duties and aspirations', and to provide 'reasonable assistance' to members of the public in their dealings with the public service, helping them to 'understand any requirements with which they are obliged to comply'.[64]

The new administrative law is most prominent in the directives on fairness and equity, reference being made to the enactments covering the Ombudsman, AAT, AD(JR), sex discrimination, and alterations to public employment legislation. While the greater degree of 'public examination and review' is noted, the emphasis is stated to be on the '<u>procedures</u> by which officials carry out actions, make decisions, and administer programs and policies' [emphasis added],[65] rather than on the substance of those activities. The point is made, in relation to

equity in policy application, that often 'it will only be the public servant at the workface', by implication not review bodies, 'who will be fully aware of the wide range of minor factors' which feed into the exercise of an official's judgement of a particular case.(66)

Forming part of the public service "bible" are the Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters.(67) These were last issued in August 1984. Whereas they took account of the FOI Act, they adhered to the principles set out above, and were supported by the Opposition.(68)

The thrust of both Guidelines is towards public service political neutrality and anonymity, in terms of explanation of government policy, not comment by way of opinion in formal public arenas. They show that the new administrative law has been incorporated into public service understandings of government administration but with an emphasis on its procedural aspects, on fairness and equity in the treatment of individuals, both inside and outside the public service. In essence, though, the Guidelines reveal the significance of conventions in the practice of Commonwealth administration. Just how firmly these are embedded in public service understandings is shown by three of the FOI Memoranda issued by A-G's dealing with functional overlap between portfolios or policy areas, Cabinet documents, and levels of decision-making with regard to FOI requests.

As noted in Chapter 1, the FOI Memoranda series made up the Guidelines to Freedom of Information Act, published in 1982. Some have since been revised. Revised FOI Memorandum No.31 covers requests for 'documents of common interest'. It stressed the importance of consultation where a requested document was received from another agency,

contains information received from another agency or a record of consultation with another agency, or was prepared jointly by two or more agencies.[69] Consultation is to occur regarding the release of ministerial documents, that is, those which either involve or have involved a minister personally in the handling of sensitive matters, including a former minister of a current or past government. Where there is doubt, PMC's FOI Coordinator should be contacted.[70]

Contact must also be made where requests involve Cabinet and Executive Council documents, State Premiers, legal matters concerning advice from A-G's, classified records or intelligence agencies. PMC should be consulted regarding the first two categories and A-G's about the third. Documents classified in accordance with the Protective Security Handbook[71] should not be disclosed 'without following the approved procedures' to declassify them. Also, 'where internal communications network cables received via the Department of Foreign Affairs [and Trade] are declassified and disclosed, the communications centre of that Department should be notified'.[72]

Where different agencies receive similar requests from the same applicant, s.16 of the FOI Act and the consultation procedure aim to ensure that 'as far as possible' the responsibility for deciding on release 'is entrusted to the agency which is best able to make an informed assessment about the sensitivity of the document's contents'. There is no formalised procedure, for it is said that

> [in] a Cabinet system of government, where there is a mechanism for co-ordination through the Cabinet, it is not appropriate to lay upon agencies a legal obligation to consult in areas of common interest, or to set up legal mechanisms for resolving differences in a public forum. The [FOI] Act assumes that

> established methods of consultation and dispute resolution within the Government structure can be relied on to deal with any problems which may arise.[73]

Discretionary transfers are allowed where an agency receiving a request does not have the document sought but knows it is with another agency, or where the subject matter of the document sought 'is more closely connected with the functions' of another agency.[74] Compulsory transfers apply to documents of exempt agencies, since a record of such an agency is still subject to access under the FOI Act 'if it is in the possession of another agency which is subject to the Act'. Requests are to be transferred under s.16(2) to the 'relevant' department responsible for the exempt agency so that it can decide whether to grant access.[75] Hence, for example, PMC is listed as the relevant department for the Auditor-General.[76] The functions of the exempt agency are uppermost in these considerations.[77]

Similar procedures and provisions apply to the compulsory transfer of requests for certain records of partially exempt agencies.[78] In these cases, the documents must relate to the particular exempt activities of such agencies.[79]

Relevant departments also decide on the release of records from the various intelligence agencies - Foreign Affairs and Trade for ASIS, A-G's for ASIO, PMC for ONA, Defence for JIO and DSD,[80] mindful of the strictness of the original need to know application.[81] Contrary to the general requirement that an agency transferring a request in whole or in part is to notify the applicant of the transfer, this should not be done in respect of intelligence records without prior consultation with relevant departments, to ensure the protection

of the security, defence and international relations of the Commonwealth, and information 'communicated in confidence by or on behalf of a foreign Government or international organization'. It is 'only in the most extraordinary circumstances' that agencies may, under the FOI Act, 'negate an applicant's right, to have reasons for refusal of access, by withholding the fact of the existence of a document from the applicant'. A decision not to inform an applicant of a transfer 'should only be made with the agreement of the relevant Department and only where a ground of exemption in section 33, 33A or 37 clearly applies'.(82)

On the meaning of 'more closely connected with ...', the focus should be on the 'contents of the document and the functions of the agencies concerned' [emphasis added]. Where an agency provides or coordinates 'a particular kind' of information or advice,

> there will normally be a strong presumption that a document generated by that agency for that purpose will be more closely connected with the generating agency than with the receiving agency.

This rule does not usually apply, however, to legal advice 'furnished on request' by A-G's, since that would be regarded as being more closely connected with the functions of the client agency. At times a document may be more closely connected with the functions of a third agency, 'in which case a request for access to that document might be properly transferred to that third agency'.(83)

Where documents were generated by the joint activity of a number of agencies, for example a report of an IDC, the 'rule of thumb' is that they should be regarded as more closely connected with the 'functions of the agency which chaired the committee or which otherwise initiated' their production.(84)

For requests received by a minister for official records, while formal transfers between minister and department may be made, these 'may not be appropriate in some cases'. This is because, by and large, the functions of minister and department are the same. The department, therefore, may make the access decision without a formal transfer. It was explained that the FOI Act does not oblige a minister to 'personally decide' whether to release in response to a request for access to his or her official documents:

> As with many other kinds of decisions made pursuant to statutory powers which Ministers are not required to exercise personally, a decision on a request for access to an official document of a Minister may be made on the Minister's behalf by a responsible officer of his [or her] Department. Where it is appropriate for a Department to deal with such a request, the applicant should be notified of the decision on the request in the normal way, except that -
>
> . the decision-maker should state that [the] decision is made for and on behalf of the Minister;
>
> . in giving the applicant information about ... rights of review, no reference should be made to internal review of the decision (since the decision is legally a decision by the Minister, internal review is not available).(85)

This FOI Memorandum is revealing on a number of counts. The fact that it went into so much detail on the transfer of requests between agencies points to the virtual impossibility in modern government administration of neatly dividing policy areas into clear-cut structures and functions, particularly the latter, or distinguishing easily between areas of justiciable controversies. Only a system exhibiting a high degree of policy and functional overlap, and hence guardianship of policy domain or territory, would necessitate such

detailed guidance on the transfer of requests for documents of common interest. Hence the need for policy-coordinating mechanisms such as inter-agency committees.

In referring to the Protective Security Handbook, the intelligence agencies and Foreign Affairs' communications centre, the memorandum also shows that the need-to-know principle and traditional security considerations and classifications are well and truly extant in deciding on sensitive issues and documents within the public service. In effect, procedures for transferring FOI requests allow for the orchestration of agency responses to some requests.

As well, No.31 reveals some of the subtleties in the relationships between minister, former minister and agency, whether department or other administrative entity. In pointing out that the consultative arrangements which attach to these relationships are not codified, the memorandum underlines the salience of conventions in Commonwealth government. In spelling out how a public servant may decide the response to a request for official documents of a minister, it serves as a reminder that, in acting in this way, the public servant is acting on behalf of his or her minister. Legally, the decision is that of the minister; the functions of minister and department are the same. Moreover, such behaviour is not novel, and does not separate agency from minister, but is in keeping with long-exercised statutory powers which permit ministers to delegate authority to public servants.

In short, this memorandum emphasises individual ministerial responsibility. It referred to Cabinet as a coordinating mechanism. Revised FOI Memorandum No.34 went to great lengths to define Cabinet

documents and to provide guidance on their treatment under the FOI Act. It stated that the 'confidentiality necessary for Cabinet government requires that the deliberations of Cabinet and of the Executive Council should be protected from mandatory disclosure under the FOI Act'. The basic premise in ss.34 and 35, therefore, 'is that it is in the public interest that Cabinet and Executive Council deliberations should be protected from mandatory disclosure under the Act'. While there is no requirement, as there is with most other exemptions in Part IV of the FOI Act (ss.33-47), 'to identify the consequences of disclosure of a document claimed to be exempt' under s.34 or s.35 'in order to establish the exemption', account must be taken of content 'to decide whether any purely factual material in the document must be released'.(86)

"Cabinet" embraces Cabinet and Cabinet Committees, and includes 'co-ordinating, functional and special purpose' Cabinet committees established by the Prime Minister or Cabinet. It does not include 'informal meetings' of ministers established outside the Cabinet system; it was pointed out, however, that s.36 may be applicable to records of those meetings. The memorandum referred to the view of PMC 'that 'Cabinet' includes meetings of the full Ministry'.(87)

This memorandum noted that four types of Cabinet document are exempt under s.34. The first concerns documents created for submission to Cabinet (s.34(1)(a)), the 'most readily identifiable' of which are those 'lodged with the Cabinet Office' and thence submitted to Cabinet. These 'would constitute the primary material put to Cabinet for its consideration' and include submissions and memoranda, their addenda, corrigenda and attachments 'which are lodged with the

Cabinet Office by, or on behalf of, a Minister or Department respectively'; Legislation Committee memoranda, together with draft Bills and explanatory memoranda lodged with the Legislation Secretariat, and correspondence between a minister and the Prime Minister which is submitted to Cabinet by either as the basis for 'consideration of matters, including proposed appointments, raised "under-the-line", i.e. without formal submission, in Cabinet, by virtue of being lodged with the Cabinet Office'.

A document signed by a minister for submission to Cabinet may also be exempt. Without a ministerial signature, 'it must be established that the document represents a final, or near-final, text as approved by the Minister'. Claiming an exemption for a document not lodged with the Cabinet Office 'entails a judgement as to the stage of finality a Submission has reached'. A Cabinet memorandum prepared by a department but not submitted to the minister 'would not be exempt until it is lodged with the Cabinet Office'.

A document prepared at the request of Cabinet, such as the report of an IDC, is caught by s.34(1)(a) when the relevant minister has decided to submit it to Cabinet or, 'where it is lodged directly as a Memorandum, as soon as it is in the agreed final form for presentation to Cabinet'. A document prepared for another purpose, however, such as the report of a Royal Commission, does not fall within s.34(1)(a) 'merely by reason that it becomes part of, or is attached to, a Cabinet Submission, or that Cabinet has asked that it be presented to Cabinet'.(88)

The second type of document exempt under s.34 is 'an official

record of the Cabinet' (s.34(1)(b)). This paragraph includes 'all records which are produced or maintained by or under the authority of the Secretary to the Cabinet and includes Submissions, Decisions, Memoranda, etc. circulated by the Cabinet Office'.

'A copy or extract of a Cabinet document' falls within, and constitutes the third type of exemption under s.34(1)(c). The fourth type is 'a document disclosing a deliberation or decision of Cabinet' (s.34(1)(d)). A 'factual test' is applied here to exempt documents which would disclose Cabinet deliberations or decisions 'where the fact of those deliberations or decisions has not been officially published'. Documents caught by this exemption

> would summarise or repeat the language of material put to or discussed in Cabinet, summarise or repeat decisions taken by Cabinet, or make references such that they could be identified with the Cabinet process.(89)

A number of types of document do not fall within s.34, for example, a document which 'simply states that Cabinet decided to adopt a particular course of action, and the decision is public knowledge at the time a request for access to [it] is received'. Also excluded are 'press releases, copies of speeches and the like, by means of which Cabinet decisions are officially made public' [emphasis supplied]. A "leaked" document which 'makes public a Cabinet decision nevertheless remains an exempt document'. Indeed, 'any document the disclosure of which would have the effect of confirming the "leak" remains an exempt document'.

Other documents which are not caught by s.34 include attachments to Cabinet submissions, if they have been created for a purpose other

than submission to Cabinet; documents by which a Cabinet decision was 'officially published (e.g. a press release or other official announcement)'; the Cabinet Handbook* and 'drafts of Cabinet Submissions, Cabinet Memoranda and like documents prepared prior to obtaining ministerial approval'. The latter drafts may, of course, be exempt under s.36 which protects internal working documents.(90)

On the disclosure of 'purely factual material', Memorandum No.34 reminded recipients that s.34 'is directed at the protection of the Cabinet decision making process, but not necessarily the raw material on which that process operates'. It was admitted that 'a somewhat complex test' exists in s.34(1A) to determine 'whether purely factual material in documents prepared for Cabinet's "information", or as background for a discussion, is exempt material'. Hence, factual material in a s.34(1)(a) document is exempt only if

- the document has been or was proposed by a Minister to be, submitted to Cabinet for its consideration;
- the document was brought into existence for the purpose of submission for consideration by Cabinet;
- disclosure of the factual material in the document would disclose a deliberation or decision of the Cabinet; and
- the fact of that deliberation or decision has not been officially published [emphasis supplied].

These four criteria apply to documents which may fall within the other paragraphs of s.34. While s.34(1A) obviously concerns 'statistical data, studies, surveys and other factual reports prepared as attachments in support of submissions or memoranda for consideration

*See Cabinet Handbook, Canberra, AGPS, 1983 (Reprinted 1984).

by Cabinet', each Cabinet document 'must be examined to determine whether it contains purely factual material'. Such material may still be exempt under s.34 if release

> would prematurely reveal the deliberative processes of Cabinet. Revealing the selection of facts referred to in a Cabinet decision may disclose the trend of Cabinet's deliberations or its decision - the factual material would be exempt unless that deliberation or decision would be officially published.(91)

As with the general operation of the FOI Act, deletion of exempt material under s.22 needs to be considered before exemption is claimed, so that access may be granted to purely factual material in a Cabinet document or to 'so much of a document, which is exempt under s.34(1)(d), that does not disclose any deliberation or decision of Cabinet'.(92)

Memorandum No.34 also reminded recipients that Canberra follows the convention that Cabinet and Executive Council documents 'are confidential to the Government creating them'. Accordingly,

> no Cabinet document or part of a Cabinet document of a previous Government should be released except with the agreement of the Secretary to Cabinet who by convention seeks the views of the current Leader of the Party which formed the relevant Government.

The FOI Coordinator in PMC should be consulted when a request for such a document is received.

This memorandum also pointed out that the FOI Act does not override the procedures laid down in the Cabinet Handbook. Ministers and agencies must still comply with its requirements 'to ensure appropriate handling and security arrangements'. Agencies were exhorted to 'note the direction that Cabinet documents must not be copied except

with the agreement of the Cabinet Office'. It was noted that some documents covered by the Handbook 'do not necessarily coincide with the categories of documents exempt from mandatory disclosure' under s.34. 'Such documents may, of course, be exempt' under s.36 as internal working documents. Agencies were told that classification of a document as a Cabinet document under the Cabinet Handbook procedures does not relieve them 'of the obligation to assess whether or not the document is exempt from mandatory disclosure' under s.34.(93)

The 'considerable overlap' between Cabinet documents under s.34 and internal working documents under s.36 of the FOI Act was mentioned: 'Documents relating to Cabinet matters which do not fall within section 34 will need to be considered under section 36'. Examples include draft Cabinet submissions and memoranda, ministerial briefings on matters to go before Cabinet, 'and correspondence between Ministers and officials on matters proposed or likely to be raised in Cabinet where such correspondence does not fall within paragraph 34(1)(a)'. In considering the application of s.36 to documents concerning Cabinet matters, agencies were urged to recognise that 'a primary purpose' of that provision 'is to provide necessary protection for the deliberations and exchanges of views of Ministers. Protection of the integrity of the Cabinet process is fundamental to this purpose'.(94)

Executive Council documents, except for purely factual material, are protected under s.35 of the FOI Act in similar fashion to Cabinet documents under s.34.(94) As already mentioned, the Secretaries to PMC and the Executive Council may issue conclusive certificates to exclude Cabinet or Executive Council documents, or parts of them,

from access.

The memorandum pointed out that it is not necessary for a conclusive certificate to be issued to claim exemption under ss.34 and 35. Where an agency wishes to deny access under either provision, 'it will usually be convenient to make that refusal without obtaining a certificate'. Where an applicant seeks review by the AAT of the decision to deny access, a certificate should be obtained before the review by the Tribunal proceeds.

Any application for review of a refusal under ss.34 or 35 should be notified to the Secretaries of PMC and the Executive Council by the agency or minister handling the request consulting PMC's FOI Coordinator. A-G's FOI Branch should also be informed of 'any application' to the AAT under the FOI Act.(96)

Agencies should apply for a conclusive certificate under ss.34 or 35 to PMC's FOI Coordinator in writing and 'in sufficient time to allow a proper consideration to be given to the issue of a certificate'. Applications should include supporting paperwork.

Again, as already noted, a conclusive certificate under s.34 or s.35 'does not of itself ordinarily mean that the Secretary issuing the certificate assumes responsibility for the request'. The respondent in proceedings before the AAT 'will be the agency which, or Minister who, sought the certificate and the question of revocation following a decision by the Tribunal 'is a matter for the Prime Minister' (s.58A(9)(b)).(97)

Appendix C is a copy of the attachment to FOI Memorandum No.34. It links types of Cabinet document to applicable sections of the FOI Act.

Revised Memorandum 34 reveals some home truths about Cabinet government. This is said, by the executive via A-G's, to necessitate the confidentiality of Cabinet's deliberative processes - its integrity - in the public interest, to the extent that trends in Cabinet thinking, even where they are patently based on factual material, are not to be revealed. In s.36, furthermore, there is a safety net for documents related to Cabinet deliberations which may not be caught by the provisions of the FOI Act specifically dealing with the exemption of Cabinet documents.

The Cabinet Handbook, which applies the need-to-know principle to Cabinet documents, continues to provide the first safety net. The conventions applying to documents of former governments also continue to operate to protect Cabinet documents. PMC acts as departmental watchdog and is joined by A-G's where an application for review is made to the AAT. Ministerial responsibility is upheld by ensuring that the Secretary who issues a conclusive certificate does not assume responsibility for the request under consideration.

No.34, of course, must have been necessitated by the FOI Act's codification of Cabinet, which hitherto did not, strictly speaking, exist in law, yet is fundamental politically and administratively to the system of government in Australia. Section 34 and FOI Memorandum No.34, then, attempt to grapple with collective ministerial responsibility. The latter also touches upon individual ministerial responsibility in its implicit description of the way in which submissions, etc. from individual ministers are fed into collective deliberations.

These two memoranda (Nos.31 and 34), when coupled with the design of the FOI Act itself and the thrust of review decisions to date, that is, towards the protection of high-level deliberative processes, reveal that there is an FOI scheme in operation which acknowledges the political realities of the administrative environment outlined earlier in this chapter. The scheme's vocabulary is in the realm of political-administrative discourse. The "proper working of government", for example, means that Cabinet decisions must be officially disclosed; "premature" disclosure is frowned upon. The FOI scheme is designed to uphold ministerial responsibility, and is slanted towards public judgement of the government's record as officially defined. The scheme accords, therefore, with an inside view of "government" emanating from the top down, and with a public administration perspective of a party executive mindful of being seen to be in control of policy-making.

Control of policy is the major theme of Revised FOI Memorandum No.45, which pointed out that the FOI Act does not override established lines of agency decision-making. Only those who are 'properly authorized' under s.23 of the Act may make decisions under it. Nor should it affect established arrangements for disseminating material apart from under the Act.

Section 23(1), which applies to all subject agencies, provides that decisions on requests for access may be made on behalf of an agency by its minister, principal officer or any officer so authorised in accordance with arrangements approved by its minister or principal officer. While the FOI Act does not require any agency to consult a

minister about its s.23 arrangements, A-G's advised that agencies with 'substantial policy responsibilities should ensure that their Ministers are aware of their proposed decision-making arrangements' [emphasis added].(98)

It was recalled that the Senate Standing Committee on Constitutional and Legal Affairs recommended that authority to grant FOI requests 'be delegated downwards as far as realistically possible', and authority to deny requests should be confined to a small number of at least Senior Executive Service officers. A-G's stated that 'hard and fast rules' in this regard are not practicable.(99) It was suggested that agencies utilise senior officers in, inter alia, refusals where these may involve the issue of a conclusive certificate or 'administrative grounds of substantial and unreasonable diversion of resources'. Relatively junior officers, on the other hand, might make access decisions regarding, say, 'routine documents e.g. documents of a predominantly factual character or documents having no significant policy or administrative sensitivity' [emphasis added].(100)

Certain types of internal working documents 'should ordinarily be reserved for decision-making at senior levels', including correspondence between ministers, advice from officials to ministers and 'documents relating to the making of significant policy or administrative decisions of other than a routine kind' [emphasis added].(101) Senior officials should also make access decisions on records relating to the exemptions provisions in Part IV of the FOI Act. In establishing procedures, agencies were urged to apply the principle enunciated above, that is, the level of decision-making on access should approximate the level of policy or administrative sensitivity in the

requested document.(102)

Revised Memorandum No.45, then, unequivocally links decision-making levels with levels of policy sensitivity, such that matters of high policy, having party-political implications, in effect are watched over and therefore protected by senior officials who would be more mindful of political sensitivities - so-called "matters of current controversy". At the same time, in talking about "significant policy or administrative sensitivity", it does not draw a clear distinction between higher-level and lower-level decisions.

All three memoranda serve to illustrate how traditional concerns were incorporated within the FOI scheme and inform the whole administrative law package. A fortiori, with their emphasis on established lines of decision-making, they show that ministerial responsibility is still the overarching principle of Commonwealth government administration. Under these circumstances, it is not surprising that the conclusive certificate remains extant, even if not often used. It is at once both a symbol and an expression of ministerial responsibility. It is not surprising that the public service had largely accepted FOI, even before the changes to the scheme in 1986. After all, traditional relationships have been preserved. It is also not surprising that the whole package has not exactly flourished; the administrative environment which acquired it was, if not hostile, then not exactly receptive. Codified reforms collided with conventions. This has led to a certain lack of uniformity in governmental arrangements, such as: the Constitution does not mention Cabinet or Prime Minister, yet both are included in the FOI Act; both individual and collective ministerial responsibility are acknowledged by the FOI Act

and review decisions, yet neither is comprehensively codified elsewhere; individual ministerial responsibility is now touched on in the Public Service Act and applies to all levels of the policy process; the outsider's right to know said to be embodied in the FOI Act is still overriden by the insider's need to know.

The environment's political realities, clad as conventions wielded by a powerful executive, exerted enormous pressures on the new administrative law. It is clear that the real cost of the package of most concern to the elected executive is the political cost, hence the moves made to facilitate control in the name of "financial" cost-effectiveness. It is a reality tinged with irony, perhaps, that ministerial responsibility in a sense embraces the administrative law mechanisms themselves. This is because the PM administers the Ombudsman Act and is thus "responsible for" the Ombudsman; likewise for the Attorney-General and the ARC, AAT and Federal Court. This means, at least to the Constitutional Commission, that they 'must bear political responsibility' for defects in those mechanisms.(103)

But just how far does responsibility extend? The executive government appoints members of the review institutions; they are not politically accountable in the way that the elected members of government are. The government subjects those institutions to the budgetary process, along with the other non-elected agencies, hence controlling their resources and capability. The government can introduce legislation to expand or contract the scope of activities undertaken by the review institutions. The current Minister for Finance was adamant in mid-1987 that the 'ultimate power over spending public money must reside with those who have the ultimate responsibility for procuring

it, ie, in the hands of the elected government'.[104] All these findings point towards the "political-administrative" realm of discourse possessing the upper hand in the working of the new package. To ascertain why this should be so, other realities, which affect policy and judicial or legal decision-making, will now be investigated.

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CHAPTER 6

ENVIRONMENTAL REALITIES, POLICY AND LEGAL DECISION-MAKING

While constitutionally the AAT is unable to exercise judicial power, but exercises administrative power, previous chapters showed that it attracted criticism for being too "court-like", for wanting to be regarded as a court. Some time ago, it was said that the distinction between the Tribunal and a court cannot be articulated to the non-lawyer 'in a meaningful way',(1) and one of its current Deputy Presidents admitted that it functions according to a 'judicial model'.(2) The IDC on FOI costs found that '[a] common complaint of agencies is that AAT proceedings are too judicial in character';(3) its 'documentation, hearing and onus of proof requirements tend to be more akin to those of a Court than to those of an independent administrative decision-maker'.(4) These findings reveal that insiders and outsiders are likely to see the Tribunal as fitting into a general perception of "legal" bodies. This view must be encouraged by the fact that its decisions have, as the ARC pointed out, legal force. For, recalling the difference between judicial review and review on the merits, the AAT in fact has 'much wider powers' than a court undertaking judicial review. Under the latter circumstances, the court is not empowered to substitute its own decision for that of the primary decision-maker. It can 'set aside the impugned decision and remit the matter to the primary decision maker for reconsideration perhaps in accordance with specific directions given by the court'. However, a primary decision-maker 'may on reconsideration confirm the original decision albeit on different, legally-acceptable grounds'. The AAT, on the other hand, is empowered, not only to remit a matter for reconsideration, but

also 'to substitute its own decision for that of the primary decision maker'. Its decision 'then becomes legally binding' [emphasis added].[5] The status of the AAT's decisions would lead also, no doubt, to a wider community perception of it as a "legal" institution. Because of this, it will be included in an examination of policy and legal decision-making.

In this study thus far, it is possible to discern an impression that judicial or legal decision-making is somehow superior to, or more rational than the vagaries of political decision-making or policy-making in the interests of collective consumption. Indeed, it almost seems that the legal or judicial model of decision-making is being offered as a successor or rival to the economic model in yet another attempt to explain and direct the policy process.

Wilenski has criticised the economic model, believing that the most glaring inadequacy in 'the public/private efficiency debate derives from the fact that at a conceptual level it has been conducted almost exclusively in the language of economics'. By contrast, products delivered only by the public sector have qualitative rather than quantitative characteristics. Wilenski referred here to that sector's 'capacity to deliver values such as equity, consistency and public accountability',[6] 'values sought by society at large and articulated by the political system'.[7]

Kirby earlier expressed doubts about the application of the legal method via the AAT to administrative decisions, because of the latter's 'evaluative' content.[8] In this regard, certain ministerial decisions related to ten enactments had been rendered reviewable by the AAT at

its inception. These included the Broadcasting and Television Act 1942, the Customs Act 1901, the Migration Act 1958 and the National Health Act 1953.[9]

Kirby felt also that 'the problem for syllogistic decision-making is compounded by the generalities of the language used in ... ministerial policy statement[s]'.[10] While he was concerned that the AAT's power to review the policy underlying decisions of ministers, subordinate tribunals and administrators extends beyond the traditional, 'orthodox functions of judges in the past',[11] he submitted that policy would be improved by external review with its ability to elucidate and clarify considerations and to temper 'rigid rules by the civilising principles of justice and fairness ...'.[12] Nevertheless, Kirby worried about the harmonisation of review on the merits with government policy, in particular the role of an 'unelected tribunal' in assessing 'lawful government policy';[13] the gap between the respective duties of the AAT and public servants when the latter are bound by ministerial responsibility and the former is not;[14] the 'adjudicative' nature of the AAT which meant that it was ill-equipped to deal with other than "either/or" questions,[15] and the possible effect on 'judicial prestige' and the separation of powers.[16]

In line with Kirby's doubts, the environmental realities of policy-making for collective consumption mean that:

> In the vast majority of submissions to ministers the overriding concern is to get the advice up on time in the form that the minister will find most useful, and officials think will be most persuasive, and all else tends to be subordinate to that objective.[17]

At the same time, the AAT has said that it is

> a firm principle of administrative practice that decisions affecting numerous interests, if they are to be challenged, should be challenged quickly. Administrative certainty was important and indeed expected by people who need to plan their affairs.[18]

Nonetheless, in administrative justice, where so much emphasis is placed on the facts of the individual case, blanket rules pose difficulties.[19]

The element of speed in Hazell's description probably accords with the view of policy-making held by many public servants - that it often occurs "on the run". It does not lend itself to a time-consuming model of 'discretionary justice' which would consider factors such as 'legality, morality, facts of the case, just procedures, possible decisions' plus 'the implications or effects of decisions, and the strategies that might be used to implement a decision',[20] presumably in a comprehensive, sequential or more leisurely fashion. This is not to say, however, that those factors are not important in policy-making "on the run", but that blanket, collective considerations are uppermost.

In regard to FOI, the IDC on costs noted that policy requests are often 'framed in very broad terms and that considerable time is required to process them'.[21] Although the IDC took policy to mean 'relating to the development of Government policy (e.g. Ministerial discussions, draft Cabinet Submissions, etc.)',[22] it insisted that policy documents 'cannot be defined with any certainty ...',[23] other than in relation to their sensitivity vis-à-vis the formulation of government policy; hence the exemptions in the FOI Act covering internal working documents, Cabinet and Executive Council documents, etc.[24]

The IDC was prepared to consider the meaning of commercially sensitive documents, as containing 'complex elements' which 'involve loosely defined matters of predictive opinion to which high levels of subjectivity, uncertainty and volatility may attach'.[25] Many public servants and students of public administration would think this an apt definition of politically sensitive and, therefore, policy documents concerning aspects of community consumption. The new administrative law had, in effect, to grapple with these factors, and with a line of decision-makers extending from the counter to the Cabinet and Crown. The ARC, in reviewing decisions in two policy areas - customs and migration - faced such complexities and, by implication, the issues raised by Kirby.

The ARC's review of the customs area will cover five stages. The report on the second stage dealt with 'all the decisions which may be made in the exercise of powers conferred by the Customs Act or the regulations made under the Act', other than import control, by-law and censorship decisions, and 'decisions relating to the imposition of dumping or countervailing duty'.[26] The ARC pointed to an example of internal conflict over the new administrative law in noting the general opposition of the Department of Industry, Technology and Commerce (DITAC), responsible for the administration of most of the pertinent legislation, to its 'proposals for reform which would have the effect, if implemented, of extending the existing jurisdiction of the AAT to review customs decisions on their merits'.[27]

The Council acknowledged that 'there are some decisions which are not in principle appropriate' for review on the merits, for example, when it is 'necessary or desirable for the Government to

ensure that it is in a position to make the final decision on a particular matter'. Inter-governmental relations and matters of 'a sensitive political nature' were mentioned here. While the ARC could not provide 'an exhaustive definition of such decisions', it suggested that those of a sensitive political nature are likely to be taken 'at a high level of Government (or at least subject to influences from such a level)'.(28) Their features, as described by the ARC, are similar to those of the IDC's commercially sensitive documents, while they also recognise the vagaries of general consumption, and point towards the Full Federal Court's ruling in the "Kakadu Case". That is:

> . while they may be based to some extent on established facts and available evidence, they are likely to involve significant elements of political intuition and judgment;
>
> . such decisions are likely to have significant consequences for the community as a whole as opposed, for example, to individual licensing decisions which generally do not have widespread community consequences; and
>
> . such decisions are frequently made in a situation where it is not feasible, or considered not desirable, to establish a precise policy with objective criteria which is capable of being administered by an independent body. Rather, the policy is in effect redefined as each decision is made.

The Council believed that the 'political process' is most suited to the review of high-level, politically sensitive government decisions, rather than 'a tribunal with no political accountability'.(29) The vital consideration to the ARC, however, 'in determining whether a decision is appropriate for review', remained 'the nature of the decision rather than the status of the decision maker' [emphasis

added].[30] This statement is at odds with general public service understandings of the overarching principle of ministerial responsibility as elicited in the previous chapter. There, status is all.

One dimension of the customs area singled out by the ARC as most likely to attract high-level attention due to its 'significant political element' is the import and export of prohibited goods, including the export of uranium and other materials of nuclear significance. Faced with the 'highly sensitive or partisan political issues' involved here, and due to the impossibility of classifying prohibited goods 'into categories of those which will invariably involve decisions of a political nature and those which will not', the Council reported that the weight to be attached to relevant considerations 'will often depend on an exercise of political judgment requiring a balancing of the individual interests of the applicant with the wider public interest'.[31]

In reviewing migration decisions, the ARC acknowledged the historical importance to Australia of migration, the high volume of decisions in this area, and their potential to stir 'deep personal interests and generate much passion and controversy'.[32] It also recognised the 'complex and changing field' of this policy area and the wide 'scope of the issues to be canvassed'. Again, this review was carried out in stages, Report No.25 being concerned with decisions taken under the Migration Act and Regulations.[33] In contrast to the attitude of DITAC in the customs area, the then Department of Immigration and Ethnic Affairs had 'no objection in principle to external determinative review by a single body such as the AAT'.[34]

Broadly speaking, the ARC in its recommendations in both policy areas pursued the philosophy of the development of administrative law, that is, 'in the direction of reducing the open-ended and non-reviewable nature of many administrative discretions'.[35] Accordingly, it suggested an increased role for the AAT, refinement of legislation, regulations and discretions to render them more specific, tiered appeals systems, rationalisation of existing appeal rights and mechanisms, allowance for ministerial certificates to enable the government to retain ultimate responsibility for certain decisions, and, in the case of migration decisions, statements of reasons.[36,37]

In its report on migration decisions, the ARC showed that it had, in effect, worked its way through Kirby's concerns. It stated that 'a body such as the AAT may, by subjecting a policy to impartial analysis, assist the development of a clearer, more coherent and better structured policy'. It was accepted, however, that 'not all areas of government activity are equally suited to the stipulation of detailed rules designed to guide the exercise of discretionary powers in primary decision making'.[38] The Council's philosophy, elaborating on these statements, was set out in its annual report for 1983-84, following eight years of external review. Twelve headings dealt with:

- Criteria for Reviewability of Administrative Decisions on the Merits
- Reviewability of Ministerial Decisions
- Two-Tiered Structure of Appeals
- Tribunal Panels in First Tier of Review
- Independence of Members of Tribunals
- Public/Private Review Tribunal Hearings

- No Prohibition on Representation of Parties
- Obligation on Administering Department to Notify Subject of Decision of Appeal Rights
- Reasons for Decisions
- The Appropriate Tribunal - the AAT, an Existing or a New Specialist Tribunal?
- Recommendatory/Determinative Powers
- Restrictions on the Constitution of the AAT.(39)

The stress in the concomitant guidelines was on the procedural fairness of substantive decisions, that is, those with a high degree of finality and lasting effect, specifically and significantly affecting individual rights or interests, and able to attract appropriate remedies, as opposed to "polycentric" decisions bearing upon high-level, politically sensitive issues. The ARC noted that restricting the AAT to a recommendatory power in an area such as migration distorted its character as a determinative body, since its function was not to act as 'Ministerial adviser'. The government, however, would not lift this restriction, so the ARC recommended that where the minister decided inconsistently with a recommendation of the AAT, the reasons should be explained to parliament. In the broadcasting area, by contrast, the Council agreed to a recommendatory power because of the 'interdependence between decisions and the need to consider issues beyond the immediate merits of an individual exercise of power ...'.(40)

Reserving the ultimate decision-making power to ministers/government in the areas of migration and broadcasting would be expected by many students of public administration, since both the so-called "ethnic vote" and control of broadcasting are politically sensitive matters. Nevertheless, the guidelines show that the ARC

recognised the difficulties in the application, by a non-elected adjudicative body, of the syllogistic, legal model of decision-making to evaluative policy issues which attract ministerial and parliamentary attention.*

The Federal Court and AAT have also developed the Tribunal's approach to policy. For example, in being able to substitute its own decision for that of an administrator, it is not enough for the AAT simply to examine whether the decision-maker 'acted reasonably in relation to the facts',(41) or merely to determine 'whether the decision conformed with any relevant government policy'; also, 'it was not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the Tribunal's determinations'.(42) The AAT

> would ordinarily apply policy which had been adopted by a Minister, unless it was unlawful or tended to produce an unjust decision. An argument against the policy or its application would be considered, but cogent reasons would have to be shown against its application.(43)

A distinction was drawn between policies determined at the political and departmental levels, by differentiating between 'the factors to be taken into account in the two kinds of policy', 'parliamentary opportunity to review them', and 'considerations [that] could apply to the review of different kinds of policy'. For example, 'more substantial reasons may require to be shown why "basic" policies, which may have been forged at the political level, should be reviewed'.(44) These principles carried through to a deportation case where it was said that, although the law was laid down in the Migration Act and 'the Minister's policy was not law', it would 'be given

*The Family Court, of course, is involved in evaluative policy issues, which no doubt helps to explain some of its problems.

weight because its formulation was an exercise of political power and was appropriately taken in a political context'.[45] This stance was also adopted in another area, where

> a policy adopted by the Minister after consultation with state ministers and industry representatives was given weight, and in the absence of special circumstances affecting the applicants, the decision was affirmed.

The judge in this case pointed out that the AAT 'was not accountable politically'; it 'could not proceed by obtaining industry consensus, and it had not been shown that the policy either was entirely misconceived or proceeded on a wholly erroneous basis'.[46]

With regard to 'departmental policy', the AAT has stressed that it should be 'properly informed, but it has assessed the policy on its merits'. In one case, it 'acknowledged that a departmental manual served "a valuable purpose" in guiding' the uniform application of a discretion by officials, 'but it had no legislative force and was not binding on the Tribunal'.[47] In another case, the AAT 'affirmed the Secretary's decision and applied his policy of refusing a licence to an applicant who failed a certain colour perception test'.[48]

In one case said to illustrate the benefits of review of policy by the AAT, it was found that the minister had applied a certain discretion 'inconsistently with the criteria' he had specified 'as being relevant to the exercise of the discretion'. Under these circumstances, the Tribunal held that '"confidence in the administrative process would be lost if the Minister were to make decisions on any other basis"'.[49]

Based on these rulings, the ARC felt that the AAT's policy review role 'forces decision makers to articulate' and monitor their policies, as well as facilitating individual justice. It warned, however, that any departures from policy 'could give rise to inconsistency in decision making and tend to derogate from the normative effect of AAT decisions'. Nonetheless, it is obvious that the Tribunal is 'reluctant to interfere at large with promulgated policies or their application, particularly where they have been adopted or developed in the political arena and subjected to parliamentary scrutiny'.(50)

These pronouncements of ARC, Federal Court and AAT reveal that the new package of administrative law dealt cautiously with issues such as those raised by Kirby, and adapted itself to the environmental realities of party-based, programmatic, majoritarian government examined in the preceding chapter. Despite protestations to the contrary, the decision-making status inherent in the niceties of ministerial responsibility is upheld by reserving high-level, evaluative policy decisions for ministers, if necessary through the device of the conclusive certificate. In this way, an unelected, politically unaccountable review tribunal is left free to ensure the application of objective, detailed criteria to individuals. The language of legal precision fits comfortably into this "either/or" dimension of public administration, and the separation of powers as practised in Canberra is undisturbed.

With regard to FOI, this approach means that the higher the level of advice and/or decision about which information is being sought, the lower the likelihood of disclosure. It also means that, in order

to adapt to environmental realities, the new system was virtually forced to conceptualise a distinction between policy and administration. The ministerial certificate, after all, formalises that gap. Yet, as Goldring remarked, the distinction is 'artificial',[51] since it flies in the face of numerous studies which have 'demonstrated the political dimensions of policy implementation ...'.[52]

It can be argued, then, that the new administrative law changed itself in the sense of adjusting to the realities of the administrative environment into which it was placed, as well as being changed by the executive as outlined in Chapter 4. Why did it do this? Chapter 5 looked at some political-constitutional features of that environment which stem from Australia's development of its administrative inheritance. In adapting itself to its environment, however, the package reacted to a number of pressures, including those flowing from the development of its legal inheritance, and their interaction with the features brought out in Chapter 5.

Kirby has spoken about Australia's inheritance from Britain of the 'ideas of freedom', the 'many debts, intellectual and emotional' owed to Britain and its laws, the sharing of institutions, his 'admiration' for them and his 'respect for its ancient laws'.[53] He placed Australian judges into the 'lineage of the English judiciary' as 'inheritors of the eight-century-old traditions of the King's Judges in England'.[54] Doogan recalled the monarchical roots of Australian government and law:

> The common law developed on the basis of the historical theory that the reigning monarch was the source of all government power irrespective of whether the power was legislative, executive or judicial. ... In modern

> times, reference to action by the Crown is usually a reference to action by the executive government, and, by extension, means action by government Departments and agencies.(55)

Aspects of Australia's monarchic tradition of government figured in the "Kakadu Case" mentioned in the previous chapter, when the Commonwealth submitted, in the initial court case, that 'the matter in issue involved the exercise of the royal prerogative to make and implement treaties and was therefore not susceptible of judicial review'.(56)

Street drew attention to the fact that English law defines limits on freedoms rather than listing them as rights: 'The legal concept of liberty is that there are residual areas of great importance where man is free to act as he likes without being regulated by law'. In other words, 'what is not forbidden is permitted'.(57)

These fundamental features of the administrative and legal inheritance were embedded in the underpinnings of Australia's governmental framework. Thompson showed that, despite differences between the political systems in Australia and Britain, particularly in regard to institutional arrangements,(58) the 'system of commonly held beliefs and values', the 'accepted and unquestioned attitudes towards the society's political system',(59) were transferred from Westminster and remain 'intact'.(60) Reid agreed in writing that '... Australians have wished to believe that they were upholding the Westminster ideals in the Antipodes'. Following on from Doogan, he considered that, in Australia, 'the executive ministers of state have been the chief beneficiaries of the preservation of the links with London'.(61) Reid contended that, ultimately, notwithstanding the 'symbolism and

mythology' attached to ministerial responsibility in both Australia and Britain,

> [i]t is the result of the factor common to Westminster and Australian government - that ministers of state are members of parliament - that it can be alleged that the "doctrine" ... is as relevant in Australia as it is in Westminster.(62)

The enlargement of executive power - repeatedly said to provide the rationale for the new administrative law - is itself a reflection of the inheritance, its '"historical acceptance of the unity of the Crown and the desirable harmonization of all public action"' [emphasis added].(63) This means that the assumptions of the political system are 'consensual', as illustrated by the institutionalisation of opposition into "Her Majesty's Loyal Opposition".(64) The system therefore stresses 'unitary and conflict-avoidance' values(65) throughout the whole of government administration, from public service(66) to parliament, in the case of the latter by attempting to channel conflict into 'two unitary conceptions of policy'.(67) As Street put it, 'Government is in the saddle, and the senior Opposition politicians soon hope to be'.(68) In Australia, according to Galligan, these attempts result in an 'extreme partisanship'.(69)

Galligan claimed that, '[a]s a colonial offshoot of Britain, Australia had strong populist tendencies that favoured majoritarianism, parliamentary supremacy and a restricted role for the courts'.(70) In relation to the position of the courts in the Australian scheme of government, Mallory referred to the seventeenth century constitutional conflict in England. One result of those struggles was the triumph of parliamentary sovereignty which meant that, in England, the

'primary role of adapting the law to changes in social values was securely located in parliament, and the role of the courts became the subordinate one of interpreting the law'.[71] However, '"the older tradition of seventeenth century England, stemming from Coke, tended to place the courts and the constitution above parliament"'. While this '"alternative tradition has become one of the foundations of the American constitutional system"', it is present to a certain extent '"in all federal constitutions because of the role which the courts have assumed in defining the boundaries of legislative power between the two levels of government"'.[72]

Kirby has remarked on the inevitable importance of judges in a federal country.[73] Reid drew upon Dicey in pointing out that a federal constitution 'establishes for a polity "a spirit of legality", "the predominance of the judiciary ...", and the "the preference for legalism"'.[74] Whereas the Constitution can be said to comprehend judicial activism, Mallory found another reason for Australian courts to become more aggressive, in that they could call upon colonial experience which has translated into a 'deep-seated pattern of political culture'. For, due to the subordinate position of colonial legislatures before self-government, courts were able 'to assert a dominance over the legislature which had no part in the British system itself'. In Mallory's opinion, it may be that this role of the courts 'has a longer history in Australia than anywhere else in the parts of the British Empire which achieved self-government in the nineteenth century'.[75] Federation added to this pattern, since it then became 'possible to impugn the law by challenging the jurisdiction of the legislature which enacted it'. Mallory noted that in Australia and

Canada such cases comprise 'a large part of the body of constitutional law', and that the capacity to take jurisdictional disputes to the courts 'adds an extra dimension to the political system in federal states'.(76)

It should be borne in mind, however, that the written constitutions of Australia and Canada 'deliberately avoided the "unmentionable" parts which in Britain were governed by convention and not by law'.(77) Mallory claimed that lawyers have problems dealing with these 'rather protean "understandings", which are modified from time to time and from place to place'. This is because their training tends to press them 'to assert precise meanings where no such precision exists'.(78) Hence, from a strict 'legal' viewpoint, the executive government 'is still essentially governed by the conventions of the constitution'. The major part of the executive, the cabinet, does not appear in the Constitution and has no powers as an executive body. It must translate its policy decisions into executive action

> by inviting the exercise of the powers of its members, either individually or collectively. The collective powers of ministers are exercised through the governor-general, normally through the instrumentality of the governor in council.(79)

Despite the potential provided by the federal constitution and the colonial experience, the English tradition of judicial restraint has coloured the idiom of legal discourse in Australia. The judiciary is 'part of the machinery of government',(80) functioning in open courts, but judges have gone to 'extraordinary lengths to preserve anonymity ...', and 'very few' come into public focus.(81) Judicial creativity has been cloaked by the '"myth" of a purely mechanical judicial

function',[82] based on 'the assumption of a canonical moment at which a statute is born and has all and only the meaning it will ever have'.[83] The High Court until recently, according to Galligan, promulgated the techniques of legalism - 'conceptual definition, quasi-logical format, quotation of select precedents and formal dismissal of extra-legal considerations'[84] - as its 'official doctrine on constitutional adjudication', to mask its political function.[85] Yet the High Court is the 'third branch of government and as such is an integral part of the institutional machinery of government';[86] in exercising judicial review it fulfills a 'political role'.[87]

Thus, in defining its place and role within its environment, the new administrative law bowed to the weight of a legal inheritance coupled and interwoven with an administrative inheritance, both of which nourish Australia's political tradition and culture; that is, 'the attitudes of a society towards its governmental institutions and its behaviour patterns in relation to them'. Whereas tradition shapes, for example, formal governmental arrangements, 'it is societal values that will determine how individuals actually set about' interacting with those arrangements.[88] Australia's joint inheritance permeates its

> written constitution, the division of powers between federal and state governments, the political role of the high court, the powers of the governor-general and the split between upper and lower houses of political responsibility. While Australia's institutional arrangements attempt to combine "separation of powers" with the Westminster model, the prevailing [culture] is almost purely that of Westminster.[89]

There may well be 'a formal separation of law from politics narrowly defined as government', which is mirrored in academic circles and detracts from a 'proper understanding' of both in society,[90] and a 'compartmentalization' and separation of 'constitutional law from other parts of public law'.[91] On the other hand, it has proved virtually impossible in this chapter to separate law from politics, whether in the guise of policy or institutions, other than by drawing an artificial distinction between policy and administration as the new administrative law has done. Separation is not feasible, even when tracing "legal" aspects of Australia's administrative tradition.

It is possible to separate courts and political executives on a functional basis, in bearing in mind that a court 'cannot normally govern in the sense of legislating about a general class of things, nor can it govern with the flexibility of the executive in directing specific actions'.[92] But, as Street observed, 'administrative law ... impinges on politics',[93] while it stands to reason that all '[l]aws must ultimately reflect and be responsive to the societies they serve'.[94]

In keeping with Hazell's conclusion in Chapter 5, that most Australians probably do not want to participate in the political process, it can be seen that Australia's political tradition has not encouraged active, extensive participation in policy-making by the wider community or legal institutions in the formal sense. Thompson went so far as to say that Australian political culture 'denies the possibility of inherent conflict' even 'between the individual citizen and the administrative state'.[95] Australian society, like that of

Britain, Kirby maintained, is 'less vibrant, less assertive, less open-minded than the United States: less open to new ideas'.[96] He did not think, for example, that 'pursuit of the chimera of the First Amendment' in respect of media freedom was appropriate in societies which are 'too tender to the competing claims to reputation, privacy, fair trial, legitimate confidences, intellectual property rights, privilege, national security and other human rights'.[97]

It is obvious that the advent of the new administrative law has unearthed what can be termed the Commonwealth's constitutional matrix, consisting of a multiplicity of inter-related legal and political facets such as powers, values, institutions, traditions, conventions and laws; perceptions, ideals and realities; expectations, assumptions, attitudes and beliefs. Three countries figured largely in the discussion of influences on the new package: Britain, Canada and the United States. Perspectives of and developments in administrative law in those countries will now be surveyed, in an effort to further illuminate the Commonwealth matrix and the relationship between law and politics.

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