CHAPTER 3

USE MADE OF THE TOTAL PACKAGE: PROMISE AND PRACTICE

Impact is related to use of the new administrative law. Having examined the impact on the public service, the use made of the package by the wider community will now be investigated and interwoven with findings in Chapter 2, together with observations of, and governmental response to that use. Since the FOI Act virtually encompasses all the features of, and issues connected with the total review process, it forms the springboard of the examination. That Act came into force in late 1982, as noted in Chapter 1. The first full year of operation of all four major reforms, therefore, was 1983-84. Since this study is concerned with principles, statistics are here kept to a minimum. Figures are available in relevant annual reports, that is, those of the Attorney-General on the operation of the FOI Act, the Commonwealth Ombudsman, PSB, A-G's and the ARC. What follows is an analysis of emerging patterns of use, observations and response up to the end of '85-6, bearing in mind claims made for the reforms and the relationship between public law and public administration so far brought to light.

The extent of the growth of the new administrative law, and an accompanying preoccupation with costs in terms of use of the FOI Act, were highlighted in early 1985 when the Attorney-General, Lionel Bowen, answered a Question Without Notice about the cost of providing material under that Act. He announced that approximately 3,000 FOI requests were by then being received each month. Some 36,000 requests were expected during 1984-85 compared with 19,000 in 1983-84. The

cost of handling requests in 1983-84 was $17M, or about $900 per request. Yet only $13,000 was collected in charges. The Government was worried about the gap between costs and collections. Most requests were being directed to the Taxation Office, DVA, DSS, Defence and Immigration and Ethnic Affairs. The Attorney-General seemed to hope that a simpler way could be found of providing the information requested.(1)

Actual total FOI applications were: for 1983-84, 19,227; for 1984-85, 32,956.(2) Bowen mentioned government concerns about FOI costs in the third FOI annual report. New directives designed to streamline FOI procedures and increase charges had been issued to subject agencies by 30 June 1985. The amended Charges Regulations allowed for continuing minimal charges to members of the public seeking documents regarding their income support benefits. All other requests were to be considered on their merits and against the remission provisions of the FOI Act. In the event, the Senate disallowed the amended Charges Regulations. Bowen remained convinced, however, of the need to balance the future gains and costs of FOI.(3) The Attorney-General's pessimistic view of FOI costs contrasted with his more sanguine comments in the second FOI annual report covering 1983-84. There he said that, although there had been some difficulties in implementation, the Act was 'working well and achieving its stated purpose of extending as far as possible the right of the Australian community to access to information in the possession of the Australian Government' [emphasis added]. Administration was now more open to scrutiny and more accountable, and government processes had not suffered.(4)

Most requests in 1984-85 (more than a thousand each) were

directed to DVA, the Commissioner of Taxation, DSS, Defence, and Immigration and Ethnic Affairs, in that order.[5] By far the greatest number of applications were for 'personal documents of agency clients or individuals and firms with whom agencies have dealings'.[6] There was, however, 'a steady growth' in "non-personal" applications.[7] Journalists were largely responsible for this, together with public interest groups, while unions were becoming active in obtaining material relating to Commonwealth employment terms and conditions. According to the 1984-85 annual report, such use of the FOI Act, to obtain agency records and 'policy documents', enabled people to ascertain the basis of decisions, 'to evaluate the performance' of government and public service, and to gain information which may be commercially useful.[8] At the same time, the bulk of material, access to which is consistently refused, is private sector commercial information.[9]

The usefulness of non-personal information obtained under the FOI Act recalls the distinction between control or regulation and accountability of public administration. That is, the release of this type of material enables evaluation of governmental decision-making. It constitutes, therefore, ex post facto review, contributing to accountability in accordance with Birkinshaw's claims at the end of Chapter 1, rather than the public scrutiny of policy-making alluded to by FOI enthusiasts. The Act does appear to go some way towards matching claims made for it in respect of the redress of individual grievances, judging by the large numbers of requests for access to personal documents. However, the fact that by 30 June 1985 less than 1% of all FOI applicants had pursued the right to have personal records amended,[10] indicates that it would be unwise to read too

much into this at present. (It could be, as the third annual report remarked, that this low figure testifies to the accuracy of agency records.[11])

The third annual report, while noting that the main type of information now released that 'may not have been released but for the FOI Act is policy material',[12] did not define 'policy document'. It did mention, in relation to FOI decision-making arrangements in agencies, that those which handle 'significant policy issues and have little direct public contact' have retained the authority to grant and deny access at senior levels. This contrasts with the client-based agencies which have received most FOI requests; they have delegated decision-making authority 'to a significant extent in anticipation of the use of the Act by their clients'.[13] This linkage between policy and senior levels of public administration harks back to the re-emergent split between policy and administration brought out in Chapter 2 in discussing conceptualisation of the policy process. Indeed, use of the term "policy documents" marks off such documents and their related areas of administrative activity from other records/areas. Use of the term "personal documents" reinforces the separation.

With regard to impact on resources, increased utilisation of the FOI Act resulted in a heavy coordinating workload on A-G's FOI Branch by the end of June 1985. While agencies had by then developed their FOI procedures, many were receiving more complex requests necessitating advice from the Branch. The growing number of AAT appeals was placing strains on Branch resources.[14] Staffing problems due to FOI pressures were evident in some agencies.[15]

While there was a 'continuing increase in agency acceptance of FOI principles',[16] most agencies were 'silent' on the question of benefits conferred by the FOI Act,[17] as they were in regard to detriments.[18] The Government had decided to suspend further publicity about the Act 'for the meantime',[19] because of its preoccupation with costs. This was made clear in Bowen's announcement of 14 June 1985 about a new cost-conscious approach to FOI.[20]

After two years and seven months of operation of the FOI Act, therefore, a total of 57,852 requests had been received[21] by 212 of the 400-odd agencies subject to the Act,[22] the vast majority of applications going to client-oriented agencies with large holdings of personal files. This means that, on average, fewer than 2,000 requests were received each month across a relatively wide spectrum of government agencies, but most requests came within one end of the spectrum, that is, to agencies involved with "benefits".

The FOI appeals system continued to operate during 1984-85 in such a way that a body of 'FOI jurisprudence' was being developed.[23] As pointed out in Chapter 1, apart from internal review of an agency's access decision, appeals may be pursued through the AAT, Federal Court and Ombudsman. By the end of June 1985, the last had received only 142 FOI complaints, but found himself involved in more complicated and time-consuming complaints which often raised difficult matters regarding application of the Act.[24] His staffing situation had become 'desperate' and efforts to obtain relief had been unsuccessful.[25]

By 30 June 1985, the AAT had decided a total of 84 FOI cases and the Federal Court 10.[26] During 1984-85 the AAT received 334 applic-

ations for review of FOI decisions and determined 259 of them. Most appeals stemmed from decisions by the Taxation Commissioner, Transport, Social Security, Communications, Immigration and Ethnic Affairs, and A-G's.[27] The Tribunal handed down 56 interim or final decisions in this period.[28] The Federal Court ruled on five FOI cases.[29] There was still some confusion about the scope of s.38 of the Act, which protects 'specific secrecy provisions' in other Commonwealth legislation,* despite a number of decisions of the AAT and Federal Court. Some of these appeared 'to conflict' and further clarification was awaited from the Federal Court.[30]

AAT and Federal Court decisions affect the application of the FOI Act. The "judicial view of governmental decision-making" in relation to FOI legislation focuses on s.36 of the FOI Act, which applies to the so-called "internal working documents", and acknowledges the 'need for confidentiality in the decision-making process'. S.36 aims

> to protect from mandatory disclosure communications involving Ministers and their advisers and other documents reflecting advice, opinion, recommendation or deliberation, where disclosure of such communications and documents would be contrary to the public interest.[31]

It can be seen that s.36 in effect recognises ministerial responsibility and the key role played by, in particular, senior policy advisers in the Australian context. Yet the accountability of senior

*The Senate Standing Committee on Constitutional and Legal Affairs identified 'upward of 290 provisions in other Acts, ordinances, regulations and statutory instruments that authorise, empower, or require designated officers and bodies to restrict disclosure of particular categories of information'. See its Report on Freedom of Information, Canberra, 1979, p.233 and Appendix 6.

public servants was meant to eventuate from the new administrative law. It can be seen, too, that internal working documents and policy documents could be synonymous, if the latter term is used to describe deliberative policy processes, again implying a gap between policy and administration.

In terms reminiscent of struggles over the meaning of "decision" and "administrative processes" under the AD(JR) Act, the AAT and Federal Court have laboured over s.36 of the FOI Act.* As written, it distinguishes between deliberative process documents and purely factual material,(32) and the definitional struggle has revolved around this distinction. Broadly speaking, Tribunal and Court decisions have established a wide test for a document designated as an internal working document, but have critically examined 'the question whether disclosure of the document would be contrary to the public interest'.(33) During 1984-85, for example, it emerged from the Tribunal and Federal Court that the term "deliberative processes" in s.36 is broad enough to encompass

> any of the processes of deliberation or consideration involved in the functions of an agency (its "thinking processes") as distinct from purely procedural or administrative matters. It is not limited to the policy-forming processes [emphasis added].(34)

While this definition would fit comfortably into a conception of levels of policy, the gap between policy and administration is again

*Details of AAT and Federal Court deliberations were first given in Appendix II of the Third FOI Annual Report, p.353 ff. This Appendix contains copies of the "D" Memoranda issued by A-G's to subject agencies (see p.16 of Report). See especially D10/1, 2 and 3, D14, D18/1, D26, D26/2, D27, D37, D41, D43, D52 and D60.

evident in the AAT's reluctance to accept the 'candour argument' - sometimes advanced to preserve the confidentiality of policy advice proferred by senior public servants - as a ground of public interest 'for other than high level decision-making and policy-making documents, all of which must be examined to ascertain whether disclosure is contrary to the public interest'.[35] This approach was reiterated in March 1986, when the Tribunal made clear that the public interest in non-disclosure of "high-level" material 'will depend on the individual characteristics of the documents in each case'.[36] On the other hand, the AAT did not accept the argument that access can only be gained under the FOI Act 'to final decisions and not earlier discussions and deliberations'.[37] Thus, from another perspective, the whole policy cycle could come within the purview of the AAT and Federal Court.

Some of the FOI cases which engaged the Tribunal and Federal Court involved conclusive certificates. As mentioned in Chapter 1, these may be issued by ministers or their (senior) delegates, or the Secretaries of the Department of Prime Minister and Cabinet (PMC) and the Executive Council to protect 'certain particularly sensitive documents'. Rather than the AAT, ministers exercise the final decision on disclosure in respect of documents concerning defence, security, international relations, Commonwealth-State relations and the 'deliberative and policy forming processes of government' (s.36). The final decision with regard to the release of Cabinet or Executive Council documents rests with the Prime Minister.[38] Twelve out of the 20 certificates issued in 1984-85 concerned internal working documents.[39]

The AAT, however, in the form of a presidential member, 'may

determine questions relating to the claim of exemption in respect of which a conclusive certificate is issued'. Where documents related to national security, defence and international relations, Cabinet or Executive Council are involved, the Tribunal has the power to decide 'whether in its opinion there exist reasonable grounds for the claim' that the document is exempt. In s.36 cases the Tribunal can decide whether in its opinion release of the documents would be against the public interest.(40) In considering the question whether documents covered by a certificate relate to an agency's deliberative processes, the AAT is not empowered to demand that they be produced. Its investigation is restricted 'to the evidence given at the hearing describing the general nature of the contents of each document'.(41)

The Tribunal cannot order release of a document subject to a conclusive certificate, but, if it finds that 'reasonable grounds' for the claim in a certificate do not exist, the relevant minister is obliged by the FOI Act to decide within 28 days whether or not to revoke the certificate. If revocation does not occur, the minister must provide a statement of reasons to the applicant and to parliament.(42)

During 1984-85 the AAT examined six cases involving conclusive certificates. In two cases, the Tribunal found that reasonable grounds did not exist for the claims in the certificates and they were revoked. One case concerned the international relations exemption, the other Commonwealth-State relations. The latter also came before the Federal Court. No other certificates were revoked during 1984-85 and no statement of reasons was required to be provided to parliament.(43)

It should be noted that in all cases where conclusive certificates are issued by the delegate of a minister, the delegated power 'shall ... be deemed to have been exercised by the responsible Minister'.* Thus, a conclusive certificate issued by either the Secretary of PMC or the Secretary of the Executive Council to protect Cabinet or Executive Council documents, 'does not of itself ordinarily mean that the Secretary issuing the certificate assumes responsibility for the request' for the document in question; 'the respondent to proceedings, if any, before the [AAT] will be the agency which, or Minister who, sought the certificate'. As already noted, the 'question whether a certificate should be revoked following a decision by the [AAT] is a matter for the Prime Minister'.(44) In the case of the FOI Act, then, it appears that, in law, public officials are <u>not</u> themselves responsible for the conclusive certificates they issue. This state of affairs does not appear to be consistent with the situation outlined by Curtis in Chapter 2, that is, in law an official <u>is</u> responsible for a decision taken in exercising a delegation under a statutory power.

The place of FOI in the general pattern of applications made to the AAT is shown in Table 1.

*See Appendix A, ss.33(6); 33A(7); 36(9).

Table 1 (45)

No. of Applications to the AAT for Review - 1982-83 - 1985-86*

	1982-83	1983-84	1984-85	1985-86
Social security	1104 (64.1%)	931 (43.9%)	566 (31.3%)	753 (29.5%)
IPTAAS**	21 (1.2%)	386 (18.2%)	168 (9.3%)	66 (2.6%)
FOI	59 (3.4%)	210 (9.9%)	318 (17.6%)	286 (11.2%)
Compensation	298 (17.3%)	305 (14.4%)	189 (10.4%)	240 (9.4%)
Customs	68 (4.0%)	57 (2.7%)	171 (9.5%)	136 (5.3%)
Tax agents	13 (0.8%)	37 (1.7%)	6 (0.3%)	11 (0.4%)
ACT rates	1 (0.1%)	18 (0.8%)	84 (4.6%)	7 (0.3%)
Superannuation	25 (1.4%)	22 (1.0%)	27 (1.6%)	43 (1.7%)
Export grants	26 (1.5%)	33 (1.6%)	35 (1.9%)	90 (3.5%)
Veterans' appeals	-	-	71 (3.9%)	663 (26.0%)
Migration	31 (1.8%)	23 (1.1%)	22 (1.2%)	46 (1.8%)
Other	75 (4.4%)	98 (4.6%)	152 (8.4%)	214 (8.3%)
TOTAL	1721	2120	1809	2555

*Reproduced from Admin Review, No.9, July 1986, p.135; source cited as AAT.

**Isolated Patients Travel & Accommodation Assistance Scheme.

In its annual report for 1983-84 the ARC discerned three emerging trends in AAT review: the 'importance of accessibility', the Tribunal's 'supervisory role', and 'procedures'. The first was linked with the citizen's ability to challenge, for the first time, the merits of an administrative decision, and the 'normative effect' of the AAT's independent review role. The second trend was linked with the AAT's apparent determination to function as an independent body developing a set of precedents to guide both aggrieved citizens and decision-makers, not 'as a mere extension of the administration' [emphasis added]. With regard to the third trend, the Tribunal, wherever possible, seeks to operate informally, although its 'supervisory approach' necessitates a degree of formality.(46)

In its annual report for 1982-83 the ARC said that the AAT had acquired 'more of the character of a general administrative tribunal'.(47) A description such as this, when coupled with the AAT's own view of its role as a supervisor, makes it difficult to separate the Tribunal completely and utterly from "the administration". Aspects of the control or regulation of administration are reflected in both perspectives.

Table 2 shows the number of applications made to the Federal Court under the AD(JR) Act to mid-June 1986.

Table 2[48]

No. of Applications under the AD(JR) Act - 1980-86*

Jurisdiction	Oct 1980-Dec 1981	1982	1983	1984	1985	1 Jan 1986 - 11 June 1986
Income Tax Assessment Act 1936	-	5	25	42	31	34
Customs Legislation**	3	9	6	35	38	5
Migration Act 1958	14	26	33	36	73	47
Public Service Act 1922	7	31	15	12	10	1
Broadcasting and Television Act 1942	1	5	4	7	12	1
Repatriation Act 1920	6	2	5	9	7	-
Telecommunications Act 1975	3	2	9	3	7	-
Compensation (Commonwealth Government Employees) Act 1971	5	4	5	3	2	1
Other	41	34	62	77	58	30
TOTAL	80	118	164	224	238	119

*Reproduced from Admin Review, No.9, July 1986, p.145; source not stipulated.

**Includes legislation relating to dumping and countervailing duties.

With regard to the AAT and Federal Court, it will be noted that there is a degree of correlation between areas of administration concerned with customs and migration. Also, in recalling the five administrative areas most affected by the FOI Act (taxation, veterans' affairs, social security, defence, migration), there is considerable overlap between them, the AAT and Federal Court in respect of migration matters - since the then Department of Immigration and Ethnic Affairs was a major recipient of FOI requests - and with the AAT in respect of veterans' affairs, taxation, social security matters and, of course, FOI itself. This pattern carries through to the Ombudsman's activities, since the main areas of the 16,084 complaints received by his office in 1984-85 included social security, taxation and migration matters, as well as the operations of Telecom. FOI also overlaps with the Ombudsman.(49) Altogether, in its first eight years of existence, the Ombudsman's office was approached by over 100,000 members of the public, 95,000 of whom wished to make a complaint; 70,000 complaints were pursued.(50)

The most striking feature of this pattern of use is the overwhelming preponderance of "social welfare" matters of concern to individual members of the community, as they pursue benefits, mainly of a financial nature, conferred by the State. It seems appropriate, therefore, to consider the new administrative law as being directed towards procedural aspects of personal benefits now clad in the language of legal rights, in accordance with the traditional thrust of the law towards the individual and his or her case.

The financial implications of the package did not escape notice.

As already mentioned, the Government attempted, without success due to action by the Senate, to increase FOI charges in mid-1985. The third FOI annual report ended on a decidedly cost-effective note, in stating that the whole of the new administrative law will need to be subjected to 'fine tuning ... and unnecessary complexity must be removed'. For the package to meet its promise of providing 'accountability and openness and to continue to improve both the quality and the efficiency of administrative decision-making', an 'increased emphasis on effective management will be required'.(51) It was revealed elsewhere 'that more and more complainants are seeking monetary compensation',(52) yet a representative of a public interest group called for 'a more effective damages/compensation mechanism'.(53)

Towards the end of 1985 a number of commentators obviously felt that the new package was under threat due to, and in the guise of, the Government's preoccupation with costs. The late Senator Missen pointed out that the Ombudsman had not been allocated additional resources in line with his increased functions under the FOI Act.(54) The Deputy Ombudsmen gained the impression that the total package of reforms, and not merely its institutions such as their own office, was 'bearing the brunt of severe and perhaps disproportionate funding cuts'.(55) Ellicott, who saw the ARC as the 'grinding mill of reform', urged that 'any attempt by Government or the public service to remove it or to weaken it must be resisted'.(56) Bayne believed the FOI Act to be the 'most vulnerable' of the reforms. It could be amended if privacy legislation were introduced, when pressure may be exerted to trim its scope.(57)

Like senior officials of DVA and DSS previously, the then Commissioner for Superannuation balanced costs against gains in agency management. Some 600,000 out of about 20 million 'reviewable decisions' taken by his office each year 'could realistically be seen as involving the possibility of an adverse decision'. While 14 per cent of his office costs could 'now be attributed directly or indirectly to internal and external review',[58] it was found that monitoring enquiries from the Ombudsman enabled an agency head 'to gauge the effectiveness' of the organisation, 'the quality of the service it provides and its general efficiency'.[59] The Commissioner praised the Ombudsman for his 'informality and flexibility' which were in marked contrast with the other review processes, and cited these as reasons for the much lower costs associated with the Ombudsman's operations.[60] Goldring maintained that the costs of administrative review 'are relatively easy to quantify, and benefits notoriously far more difficult'.[61] Kirby argued that, 'in public expenditure, it is essential to take into account the public necessity of providing the service'.[62]

The ARC fought back on the issue of costs in answer to accusations made in mid-1986 that 'strange decisions' of review bodies are adding huge sums to the national welfare budget.[63] The Council made four points. One, it is not possible to extrapolate from a Tribunal decision 'made on the facts in a particular case to indicate likely additional amounts of government expenditure'. Two, the AAT must conclude what, 'in a particular case', is the 'correct or preferable decision'. This is achieved 'on the basis of the facts as found by the AAT, the relevant legislation and taking into account any relevant government policies'. The Tribunal's role is not one of aiming to

lessen the costs to government 'involved in determining equitably citizens' entitlements under legislation'. Three, the AAT is required to interpret legislation as part of review on the merits. The 'meaning and/or application of the legislation is [often] difficult to determine', which 'may commonly indicate that the legislation requires amendment'. Four, it is open to the government to appeal to the Federal Court on a point of law, or to sponsor amending legislation.(64)

Apart from the then largely unspecified threat from government, aspects of administrative law faced criticism from some of its "consumers". For example, the Director of the Public Interest Advocacy Centre, in recounting the saga of the 'Greek social security case', was critical of the five years it took the Ombudsman to report on his investigation into matters connected with it.(65) Cashman urged the Ombudsman to change his practice of not providing both affected parties to a complaint with an opportunity to comment on his findings before they are finalised. Cashman expressed misgivings about the 'proliferation of separate enquiries and proceedings' dealing with different features of this case, 'before a multitude of independent and unrelated individuals, organisations, tribunals, courts, ministers and departments, not to mention the Ombudsman'.(66) Another interest group representative advocated 'systematic assessment of the effectiveness of the Ombudsman', claiming, inter alia, that he was not improving the quality of administration and that he displayed 'an undue regard for the sensitivities' of agencies under investigation.(67) Brennan was worried about loss of public confidence in the Ombudsman.(68)

Goldring and Kirby defended fragmentation and overlap, the former in terms of the 'growing popular scepticism of bigness in all organisations, but especially in machinery of the state'.[69] This led him to say, in one of the few overt references by legal commentators on the new package to its political overtones, that

> a multiplicity of review mechanisms which may overlap, but which also combine so that some review mechanism is available to any person aggrieved by action of a department or agency seems politically necessary to maintain political legitimacy of the state apparatus and a degree of accountability of all aspects of government administration.[70]

In more "managerial" terms Kirby claimed that overlap 'sometimes promotes competition and tends to keep the competing organs striving for efficiency'.[71]

Goldring seems to pin political legitimacy on a somewhat mechanistic assertion of individual rights which would, at the same time, provide a guarantee of total accountability. This type of rhetoric does not appear to be matched by use of the system to date, that is, as a means by which individuals pursue financial benefits in a rather narrow band of administrative activities, unless the community as a whole is now prepared to perceive those benefits as political rights. In times of economic restraint, it is doubtful whether any Commonwealth government would encourage the adoption of such a view. Even if it were accepted, repeated references to 'middle class welfare'[72] show that the multifarious instruments of external review are not reaching down into the less-privileged sections of society. They are being manipulated, however, by vexatious complainants, 'those people who feel passionately about their own cause and are uncompromising in

their reaction to a negative conclusion ...'.[73] The Ombudsman is an 'easy target' for such individuals, due to the 'facility' with which complaints may be made to him, combined with the facility for FOI requests and appeal to the AAT by 'dissatisfied requesters'. One suggestion to deal with this problem was to amend the FOI Act, but only as a 'special case', to exempt the Ombudsman from it. If a 'vexatious litigants procedure' were introduced into the whole system, it should be open to judicial review.[74] Kirby also suggested that vexatious complainants might be named in the way that courts name vexatious litigants. He wanted extreme caution exercised here, however, since separating the 'courageous from the vexatious is possible and the protection of the rights of the many from the depredations of the few is a legitimate concern that requires attention'.[75] On the other hand, one of the reasons why the Superannuation Commissioner found the Ombudsman useful was because he acted as 'a buffer between the administrator and the paranoid personalities who can prove so difficult for an administration to handle'.[76] This seems to be a rather negative view of the Ombudsman's role, and is one which detracts from the supposedly new accessibility of members of the public to administrative institutions.

Both Bayne and Kirby expressed misgivings about the Ombudsman's enlarged FOI role following the 1983 amendments to the FOI Act. Bayne noted that having to adopt an adversarial approach in representing complainants before the AAT could affect the Ombudsman's stance as an 'impartial umpire'. It also enabled the Ombudsman to sight documents in dispute which neither complainants nor their legal advisers can sight.[77] Kirby noted that it could 'introduce [a formal] adversary

quality into the relationship between the Ombudsman and the administration'.[78]

On the inside of public administration, one view of the effects of the new laws held that, to circumvent a build-up in contested decisions, 'either administrators spend much more effort to make their decisions "fire proof", which is costly or wasteful in itself', or - shades of thoughts along the same lines referred to earlier - 'they are induced to favour claimants beyond their due, as a means of reducing the risk and volume of complaints'.[79] The Superannuation Commissioner, despite finding the Ombudsman's activities helpful in a management sense, could not say that they had 'brought about substantial changes' in the way that his office conducted its business.[80] These comments, taken together with those of representatives of two major "consumer" groups mentioned earlier, do not appear to point towards an improved quality of decision-making. Davey added that external review bodies such as the Ombudsman and AAT 'have no responsibility for the ongoing administration' of relevant enactments 'and for maintaining a consistent approach in decision-making'.[81] This statement is a reminder that the modernised doctrine of ministerial responsibility resulting from the new administrative law encompasses day-to-day administration. The new external review system, since its institutions comprise non-elected officials, cannot. Davey's observation also echoes doubts about the relationship between the judicial or legal process and mass decision-making.

The spectre of responsibility hovers around comments about limits on the capacity of the Prime Minister 'to intervene' on the Ombudsman's behalf where the latter has struck difficulties with

independent statutory bodies like the ABC. The only avenue available to the Ombudsman in such cases is to make a special report to parliament, and Richardson seemed to doubt the efficacy of such a 'sanction'.(82)

On another tack, Goldring drew attention to the inability of the new package, other than the Ombudsman Act, to provide 'any general means of redress' in cases of:

> 1. delay (other than cases in which this constitutes failure to exercise a public duty);
>
> 2. the exercise of a discretion or power in a way which, though unjust, unreasonable, oppressive, improperly discriminatory or otherwise wrong, complies strictly with the formal requirements of the law; unless an "enactment" has conferred review jurisdiction on the [AAT]; or
>
> 3. the exercise of a discretion or power in accordance with a rule of law, where either the rule of law itself or the application of the rule in the circumstances results in injustice or unreasonableness.(83)

Amidst this catalogue of internal and external doubts about the new administrative law after the first three years or thereabouts of its operation as a whole, the cognoscenti had their ameliorative proposals at the ready. Ellicott urged the House of Representatives, in particular, to take steps to enable it 'to play a more creative role in the preparation of legislation and as watchdogs over the public sector'.(84) Richardson wanted parliament to play a greater part in the choice and oversight of the Ombudsman, perhaps through a parliamentary committee such as in Britain.(85) This idea was not greeted with enthusiasm by the late Senator Missen, who believed that extra staff for existing parliamentary committees and the Ombudsman would be

more useful.[86] Kirby favoured a parliamentary committee.[87] The Deputy Ombudsmen, in the face of resource problems, believed that it may become necessary for the Ombudsman to be concerned only 'with a small and select group of complaints which are seen as raising important issues of principles'.[88] They did not elaborate on just who would take such decisions or on how they would be accommodated, for example, within the Ombudsman Act.

The main impression emerging from this investigation of the impact of the new administrative law is that practice does not match promise in respect of the advent of a new era in the relationship of individuals and institutions; the volume of actions taken by individuals within a relatively small band of areas, when measured against the total volume and span of governmental activities, is too small to permit any other finding at this stage. The reforms have made their presence felt in those parts of the spectrum most affected by it, but not, apparently, in terms of rendering the concept of quality of administration any less nebulous.

Of course, the total package has been in force for only a short period. Despite this, or perhaps because of it, it is clear that other traditional institutional relationships - between executive, judiciary, parliament and public service, and, therefore, between public law and public administration - are in a state of uncertainty and need to be considered in the light of the new package's arrival on the governmental stage. After all, by the end of 1985, elements of the reforms are being questioned by consumers, practitioners and commentators on a number of fronts: for being too formal, not "user-

friendly"; for not reaching sections of society while being open to abuse by others; for costing too much; for not embracing realistic sanctions. There are warnings about the need for extra resources to maintain the viability of the package. There is uncertainty about the role of parliament, and about the advisability of employing adversarial models in the workings of the reforms.

It seems that this confusion revolves around the "proper" place and role of statutory external review in the Commonwealth system of government, for there is an atmosphere of defensiveness and 'creative confusion'[89] about discussion of these fundamental aspects of the new administrative law, typified by remarks made by the Ombudsman in his 1984-85 annual report. For example, harking back to Cowen's doubts about constitutional dimensions of the reforms, Richardson admitted that the AAT includes judges, but went on to say that only 'in a few instances' does its jurisdiction lead to 'consideration and possible modification or rejection of Ministerial policy', notably in regard to the Migration Act, and here its powers are only recommendatory. He continued that the Federal Court had stated in one of its decisions* that it was not open to it, 'in an application under the AD(JR) Act, to review the merits of a decision'. To Richardson, then, '[f]or the most part the reforms have little to do with judges reviewing decisions and in the case of the Ombudsman, nothing at all'. It was his firm opinion that the measures operate in the area of the 'day to day administrative functions of a department' and result in 'accountability which would otherwise be lacking'.[90]

*Not cited.

Above all, it can be seen that confusion stems from the inharmonious intermingling of the two realms of discourse - one "legal", the other "policy-" or "political-administrative" - forced together by the administrative law reforms. This is evident from the government's response to utilisation of the new package, which will now be examined.

REFERENCES - CHAPTER 3

(1) House of Representatives, Daily Hansard, 28 February 1985, pp.384-5.

(2) Third FOI Annual Report, op.cit., p.15.

(3) ibid., pp.4-5.

(4) Second FOI Annual Report, op.cit., p.(iv).

(5) Third FOI Annual Report, op.cit., p.29.

(6) ibid., p.30.

(7) ibid., p.17.

(8) ibid., p.31.

(9) ibid., p.144.

(10) ibid., p.46.

(11) loc.cit.

(12) ibid., p.144.

(13) ibid., p.116.

(14) ibid., p.96.

(15) ibid., pp.98-9.

(16) ibid., p.17.

(17) ibid., p.135.

(18) ibid., p.137.

(19) ibid., p.16.

(20) ibid., p.163.

(21) ibid., p.23.

(22) ibid., p.27.

(23) ibid., p.15.

(24) ibid., p.93.

(25) ibid., p.333.

(26) ibid., p.16.

(27) ibid., pp.86-7.

(28) ibid., p.88.

(29) ibid., p.91.

(30) ibid., p.71.

(31) ibid., p.69.

(32) See Appendix A, Section 36(1)(a), (5) and (6).

(33) Third FOI Annual Report, op.cit., p.69.

(34) ibid., p.88.

(35) ibid., p.89.

(36) Admin Review, op.cit. (July 1986), p.137.

(37) Third FOI Annual Report, op.cit., p.456.

(38) ibid., p.80.

(39) ibid., p.81.

(40) ibid., p.90.

(41) ibid., p.388.

(42) ibid., p.90.

(43) ibid., pp.90-91.

(44) A-G's, Revised FOI Memorandum No.34, Cabinet and Executive Council Documents (Sections 34 and 35), December 1984, p.14.

(45) Admin Review, op.cit. (July 1986), p.135.

(46) ARC, Eighth Annual Report 1983-84, Canberra, 1984, pp.50-51.

(47) ARC, op.cit. (Annual Report 1982-83), p.ix.

(48) Admin Review, op.cit. (July 1986), p.145.

(49) See Commonwealth Ombudsman and Defence Force Ombudsman, op.cit., p.190 ff.

(50) Richardson, op.cit. (CBPA), p.223.

(51) Third FOI Annual Report, op.cit., pp.152-3.

(52) I. Castles, 'Recommending Pecuniary Remedies - Ex Gratia and Compensation Based on Fairness: Some Comments', CBPA, op.cit., p.265.

(53) P. Cashman, 'The Ombudsman - Another View', ibid., p.237.

(54) A. Missen, 'The Ombudsman's Resources - A Comment', ibid., p.249.

(55) W.J. Blick and C.T. Hunt, 'An Unequal Struggle: Meeting Objectives with Reduced Resources', ibid., p.242.

(56) R.J. Ellicott, 'Law Reform', ibid., p.216.

(57) Bayne, ibid., p.284.

(58) R. Davey, 'The Ombudsman - A Bureaucrat's Impression', ibid., p.275.

(59) ibid., p.277.

(60) ibid., p.276.

(61) Goldring, ibid., p.295.

(62) The Hon. Mr. Justice M. Kirby, 'Ombudsman - The Future?', ibid., p.299.

(63) See R. Farmer, 'Stupidity in the Billion Dollar Social Security Scandal', The Bulletin, 10 June 1986, p.10.

(64) Admin Review, op.cit. (July 1986), p.146.

(65) Cashman, op.cit., p.233.

(66) ibid., p.235.

(67) T. Brennan, 'The Ombudsman - A Consumer's Impressions', ibid., pp.278-9.

(68) ibid., p.281.

(69) Goldring, ibid., p.294.

(70) loc.cit.

(71) Kirby, ibid., p.300 (citing Wade, publication not stipulated).

(72) See, e.g., Richardson, ibid., p.224; Blick and Hunt, ibid., p.248; Brennan, ibid., p.281; Goldring, ibid., pp.292-3; Kirby, ibid., pp.301-2.

(73) Kirby, ibid., p.300.

(74) Bayne, ibid., p.284.

(75) Kirby, ibid., p.300.

(76) Davey, ibid., p.277.

(77) Bayne, ibid., p.285.

(78) Kirby, ibid., p.301.

(79) Castles, ibid., p.266.

(80) Davey, ibid., p.277.

(81) loc.cit.

(82) Richardson, ibid., p.223.

(83) Goldring, ibid., pp.293-4.

(84) Ellicott, ibid., p.218.

(85) Richardson, ibid., pp.224-5.

(86) Missen, ibid., p.249.

(87) Kirby, ibid., p.301.

(88) Blick and Hunt, ibid., p.248.

(89) Lord Scarman, Editorial, PA, op.cit., p.133.

(90) Commonwealth Ombudsman and Defence Force Ombudsman, op.cit., p.230.

CHAPTER 4

USE, USEFULNESS AND THE THREAT FROM GOVERNMENT

The Government was not confused. Kirby had warned of the possibility of a 'counter reformation' being mounted against FOI, on the ground of 'cumbersome and costly machinery',(1) through 'frank legislative amendment and repeal' or charges.(2) By the winter of 1986 the Government had introduced into parliament legislation to amend the FOI Act. The amendments were designed 'to reduce administrative costs and increase revenues', and arose, according to the Attorney-General, from continuing concerns about FOI costs and the 'very low contribution made by users towards meeting those costs'.(3) The main thrust of the amendments was towards increased access charges, while exempting 'persons seeking personal income maintenance documents from all charges and fees'.(4) Bowen said that, for 1985-86, requests appeared to be levelling off and revenue was growing.(5) Nevertheless, cost problems identified in mid-1985, which the Government had attempted to deal with in changes to the Charges Regulations disallowed by the Senate in November 1985, remained.(6)

The amendments were criticised by interested journalists who claimed that they would drastically curtail the effectiveness of the FOI Act.(7) The Opposition claimed that, while it was not happy with all the amendments, it found itself, since the legislation was introduced as a Budget matter, unable to stand in the way of governmental Budgetary measures.(8) In the Senate the Opposition successfully moved to water down in favour of FOI applicants the amendments in respect of three 'non-Budgetary' areas of the legislation: the time limit for handling requests, multi-document requests, and the waiver of fees in certain cases involving the public interest.(9) The Government reluctantly accepted these changes, maintaining that, despite

appearances to the contrary, it remained 'committed' to FOI, while continuing with its attempts to render the Act 'more efficient'.[10] The Opposition felt that, under the new charges, 'most Australians' would be unable to use the FOI Act.[11]

The costs of enabling access to government-held information loomed large in a number of respects during the second half of 1986. In introducing privacy legislation into parliament in October, the Attorney-General remarked that the proposals, drawn up to 'mesh' with FOI provisions, were 'expected to have a direct cost to the Government of $800,000 in a full year of operation'.[12] The fourth FOI annual report, for 1985-86, was not tabled in parliament until December 1986, and then only a few copies were available. This occasioned unfavourable comment in the Senate, as did the Attorney-General's reference in the report to its uncertain future, due to total production costs of $700,000.[13] Scepticism was expressed about methods employed by public servants to calculate administrative costs of FOI.[14]

The fourth annual report carried on the cost-effective slant discernible in the previous report. Gone were the somewhat high-flown statements about the value of FOI contained in earlier annual reports. It included reference to an IDC established to 'review costs and workload associated with the administration of the FOI Act' and to 'recommend improvements in administration'.[15] The IDC consisted of officials from A-G's (Chair), Defence, Finance, Industry, Technology and Commerce (including Customs), PMC, Social Security, Special Minister of State (including the Australian Federal Police) and Taxation. 'Other agencies were consulted as options relating to

their responsibilities were developed'. Working Groups were appointed by the IDC to examine: non-access costs; business requests; security and law enforcement; personal and personnel requests; policy requests, and revenue options.(16)

The IDC's work complemented that of the Senate Standing Committee on Constitutional and Legal Affairs which, in line with a recommendation made in its 1979 report on FOI legislation, had begun a review of the FOI Act three years after its commencement, that is, at the end of 1985.(17) The IDC's report was eventually made available to the Senate Standing Committee,(18) while A-G's provided it with written and oral testimony in mid-1986.(19) A-G's also vetted all submissions from Commonwealth agencies to the Senate Committee 'for factual accuracy and consistency with general Government policy'.(20)

A-G's written submission focused on: Achievement of Objectives; Operation in Key Areas (such as Personal Affairs Information, Internal Working Documents, Business Information, Law Enforcement and National Security Documents, Conclusive Certificates, etc.); Past Concerns; Administrative Options for Cost Reduction; Legislative Options for Cost Reductions, and Technical Matters.(21) Its general conclusion was that, while the FOI Act was 'working satisfactorily', there were some 'problem areas - particularly in relation to costs'.(22) More specifically, A-G's found that the growth in the rate of requests was 'comparable to that in other jurisdictions which have recently introduced FOI legislation'. Public awareness was said, therefore, to have reached a high level, and the public service to have generally accepted FOI. The Act had proved 'a highly successful vehicle for access by individuals to Government records about themselves',

although 'some difficulties' had emerged with regard to the alteration of personal records. Use of the FOI Act for non-personal documents had been 'slower to develop'. The operation of exemption provisions was satisfactory, allowing for 'some practical problems' concerning reverse-FOI costs and procedures (by which challenges can be made to the release of private sector commercial information). Whereas the conclusive certificate system was still controversial, it was 'rarely used'; nevertheless, it maintained 'a balance between general access policies and Ministerial control in sensitive situations'. The AAT had performed a worthy and independent role in the interpretation and operation of the FOI Act. It was felt that the Ombudsman might play a larger role in the FOI scheme. Detailed recommendations on administrative costs were left to the IDC.(23)

The IDC identified approximately forty options for changing the FOI scheme. These were aggregated into two groups - those which could result in savings 'without requiring any modification to rights of access', and those which could lead to savings 'while involving some modification to rights of access'.(24) Four options were in effect encompassed by some of the Government's proposed amendments which had been introduced into parliament before the IDC's report was finalised.(25) One, seeking to permit agencies to refuse multi-document requests due to the workload involved, was among those altered by the Senate.(26)

'Options affecting access' included: exempting public service personnel requests from the FOI Act (recommended); exempting draft documents from disclosure (recommended); exempting an agency in respect of documents concerning 'competitive commercial activities of

a business insofar as the documents contain information which originated with, or was received from, that business' (recommended); amending s.45 of the FOI Act [Documents containing material obtained in confidence] such that the onus for justifying a refusal would shift from agencies and ministers to applicants (not recommended but held to contain merit - previous option preferred); removing decisions by ministers or agency heads on access to policy documents from review by the AAT (not recommended); removing decisions by agency heads on access to personal records from review by the AAT (not recommended); abolishing all public interest tests (not recommended); providing blanket exemption for certain categories of documents (not recommended); exempting specified categories of documents (e.g. of confidential Royal Commissions) by regulation for a period of years (recommended); strengthening the existing right of agencies to refuse access on workload grounds (already included in Government amendments, but altered by the Senate - see above); strengthening the existing provisions which allow an agency to refuse to make deletions where it is not 'reasonably practicable' to do so (recommended); specifying indicative grounds for public interest exemption of internal working documents (recommended); exempting the whole of a document in which any exempt business information appears (not recommended); amending s.37 of the Act to provide for the issue of a conclusive certificate 'where disclosure could reasonably be expected to endanger the life or prejudice the physical safety of a person' (recommended); amending s.7 of the Act 'to extend the exemption of documents received from security agencies to documents received from crime intelligence agencies specified in Regulations made under the Act' (recommended);

amending the Act 'to exempt (e.g. for 5 years) any document containing crime intelligence information' (recommended).[27]

Whereas these later governmental reports are short on qualitative declarations about the policy or political value of FOI, and long on quantitative statements, they are instructive with regard to attempts to define some of the more troublesome features of the FOI Act. For example, arbitral decisions about internal working documents have, as noted earlier in discussing the third FOI annual report, established a 'broad test for what is an internal working document', while examining critically 'whether disclosure would be contrary to the public interest'. Again as the third annual report made clear, "deliberative processes", while given a broad interpretation in terms of policy formulation, 'is not restricted to deliberations at senior or ministerial levels'.[28]

The "public interest", however, demands that a distinction be drawn between that "in which the public is interested" and that "which is in the public interest", the 'balance of the effects of disclosure' being the key factor. There is a need to protect the 'integrity and viability of the decision-making process' and to balance these 'against any countervailing public benefit from disclosure'.[29] At the same time, there is a 'strong public interest in examination of agency operations which directly affect the public'; here the FOI Act is 'a mechanism for public accountability ...'. Also,

> [w]here a document is seen as "politically sensitive", that fact alone does not make disclosure contrary to the public interest; however, factors giving rise to that sensitivity will obviously be material to the question.[30]

While "candour and frankness" are still subject to argument in relation to internal working documents, the AAT has carefully protected 'predecisional deliberative processes, particularly drafts differing from settled documents', opinions of officials which 'may give the misleading impression that they represent settled views of the agency (when they do not)', or which 'may otherwise mislead the public or generate unnecessary or wasteful controversy'.(31)

Presumably the next episode in the FOI saga will occur when the Government responds to the recommendations of the IDC and the Senate Standing Committee. From these two submissions, however, it can be seen that A-G's continues to play the central role for the public service in implementation of the FOI scheme. The submissions also show that arbitrators of FOI disputes have been careful not to tread on executive toes with regard to governmental decision- or policy-making. The above public interest test, for example, accords with the view of the Attorney-General, that 'it is irresponsible not to properly consider the consequences of disclosure of material'; agencies need protection against 'either deliberate or unintentional disruption of their work'.(32) As Bayne noted, such an approach 'subverts the public disclosure thrust of the FOI Act'.(33)

Kirby's warnings about an FOI counter-reformation were prescient. The executive, through its virtual control of the parliamentary process, was able to attack the legislation. It is always open to the government, of course, to attack the operation of the new administrative law through its control of public sector resources. The Ombudsman's resource problems, for example, were referred to during A-G's

oral evidence to the Senate Standing Committee on Constitutional and Legal Affairs,[34] yet his level of staffing had been defended by the Government in the Senate.[35]

It must not be forgotten that all the institutions of the new laws are financed and staffed from public funds allocated by the government of the day. Thus, however independent arbitral bodies may aspire to be in their interpretation of legislation, financially they are utterly dependent on the executive. This fact of life in relation to the High Court was made quite clear by the Senate Standing Committee on Constitutional and Legal Affairs when discussing the former's annual report for 1985-86. The Committee observed that there is a definite distinction between the constitutionally-guaranteed independence of the judiciary

> and its consequent immunity from the requirement that it account to Parliament for its exercise of judicial power, and the accountability of institutions which are funded by public moneys, whether they be administrative, legislative or judicial.[36]

Any government would find it tempting and convenient to use its control of public sector resources to shackle administrative law schemes, especially if they are painted as providing redress in the form of monetary benefits which themselves add to the overall costs of the new package.

The Government seems to have applied this rationale to costs connected to the AAT and the AD(JR) Act, which were also mentioned in the IDC report. It was estimated that 'a typical AAT hearing matter costs the Commonwealth of the order of $11,000', and 'typical costs to the Commonwealth of an ADJR matter heard in the Federal Court have

recently been estimated at $12,000'.[37] The ARC, in its annual report for 1984-85, pointed out that the areas of administration 'which have most been exposed' to the operation of the AD(JR) Act 'tend to be areas where a right of review on the merits by the AAT is not generally available'.[38] The former Chief Justice of the High Court spoke about the AAT's 'province' as 'one to which the citizen can gain entry cheaply and easily'.[39] Estimated AAT costs to DSS from 1982-83 to 1985-86, by contrast, amounted to $9.6M.[40]

By the end of 1986 the Government was moving to modify the AD(JR) and AAT schemes. Among changes to public service terms and conditions announced in September, selection decisions were excluded from the requirement to formally state reasons under s.13 of the AD(JR) Act.[41] In October, the Attorney-General introduced the AD(JR) Amendment Bill 1986 into parliament, intended to fine tune the AD(JR) Act by rationalising overlapping avenues of review and remedies. Bowen said that review by means other than through the AD(JR) Act 'is often a more cost and time effective means of obtaining proper review of an administrative decision'.[42]

The Bill went further, in some respects, than recommendations made by the ARC after reviewing the AD(JR) Act.[43] The ARC had found that many of the allegations about abuses of the Act were 'exaggerated'. The Council felt that it could only regard as abuses those actions undertaken deliberately to 'delay or frustrate Commonwealth administration (in a broad sense) merely in order to gain a tactical advantage rather than to establish a genuine legal right or interest'. It recognised, however, that 'it may not always be easy or possible to identify such cases'. It was pointed out that in some of the main

areas of AD(JR) Act proceedings, such as taxation and migration, the volume of decisions which are not open to review on the merits by the AAT or a specialist tribunal helps to explain the large number of applications under the AD(JR) Act.(44)

One proposed amendment gives statutory recognition to the Federal Court's 'present wide discretion to refuse relief'. Two others, going beyond ARC preferences, concern the availability of alternative review mechanisms and use of the AD(JR) Act 'during the course of administrative proceedings before a tribunal in circumstances where the particular decision could be challenged at the conclusion of those administrative proceedings'. These amendments require the Court to refuse to grant an application for review 'unless the applicant satisfies it that the interests of justice require that it should not refuse to grant the application'. It was hoped that in the former case - availability of alternative avenues of review - the Court would take 'a liberal view' of 'the interests of justice',(45) presumably because of the potential to narrow review rights inherent in strengthening the Court's discretion to refuse an application. In the event, this Bill was referred in May 1987 by the Senate to its Standing Committee on Constitutional and Legal Affairs, where it attracted attention from those concerned about its effects on the ability of less well-off members of society to challenge government.(46)

The AAT did not escape attention. Again as part of its 1986-87 Budget measures, the Government announced that a filing fee of $200 would be introduced for applications to the AAT. The fee would not apply to 'personal income maintenance matters eg pensions and benefits', and would be reimbursed where an application is successful. It

was also proposed that a fee of $300 be payable on appeals from the AAT to the Federal Court. The ARC had long since advised a former Attorney-General that 'in the absence of cogent arguments it would feel concerned by the inclusion of this power in the Act'. (47)

In late December 1986 the Attorney-General established the Task Force on Review of the AAT Procedure. Members represent A-G's, Finance, the AAT and ARC. Its terms of reference include pre-hearing procedures, legal representation, simplification of procedures, the obligation to file s.37 statements, and whether the Tribunal should be empowered to determine 'matters on the papers'. (48)

By the end of 1986, then, the FOI counter-reformation had spread to the AAT and AD(JR) schemes, throwing into relief the power of the executive in the Commonwealth system of government to dictate, in the name of cost-effectiveness, the balance between government preferences and rights of review embodied in administrative law.

With regard to the Ombudsman, A-G's stated in its evidence to the Senate Standing Committee on Constitutional and Legal Affairs that the AAT was able to give definitive assistance to administration compared with the Ombudsman processes. (49) In August 1986 the Senate decided that all Ombudsman's special reports under s.17 of the Ombudsman Act would be referred to that Committee. (50) Subsequently the Committee agreed that 'the Ombudsman's role should not be exhausted by the presentation of a section 17 report'. If necessary, the Act should be amended to enable the Ombudsman 'to resolve any dispute arising out of any matter of administration, even after the presentation of a special report upon the matter'. (51)

In time, the Government will no doubt respond to IDC report, Senate Committee reports on FOI and Ombudsman, and AAT Task Force report. Judging by developments in administrative law up to the end of 1986, there will be further "finetuning" of the package in the so-called interests of cost-effectiveness; regulation, control, accountability - the boundaries of each or all will be subject to executive preferences. The latter will also influence the place or fit of the structures of external review in the institutional firmament. In this, they will be aided and abetted by a number of factors, one being internal institutional conflicts - over, for example, ARC examination of legislative proposals with implications for administrative law, (52) aiming, say, to limit the availability of judicial review. (53)

The general uncertainty in perceptions of the reforms will also aid the executive. It will be recalled that outsiders or "consumers" saw the Ombudsman as part of the public service infrastructure. As well, while firm views were held about the independence of the AAT, it was criticised for its legal, court-like formality. For all the talk about the AAT's independence and desirable non-judicial character, it adheres to the legal model of decision-making. Both the Ombudsman and AAT were seen to be too adversarial in their modus operandi.

One factor that must aid the executive is the paucity of hard evidence about the effect or usefulness of the reforms, as opposed to the obvious financial benefits which have flowed to successful appellants pursuing "welfare" grievances. A-G's may have found AAT decisions useful due to their definitive nature, but Bayne claimed that '[w]here technical legal expressions are introduced, the AAT may be considered to have rendered initial decision-making more, rather than

less, difficult'.[54]

The usefulness of FOI figured in Senate debates on the 1986 amendments. It was noted that use of the FOI Act had led to information being gained on the: MX missile, Daintree rainforest, fate of Australian aid to the Philippines, fake testing in the US of chemicals used in Australia, social security fraud, surveillance of doctors in the Medicare investigations, Budget planning, tax avoidance and defence planning, 'at an inconvenient time to the Minister concerned'.[55] This last remark implies that ministers may have suffered a degree of political embarrassment as a result of the release of some information.

One journalist with a strong interest in administrative law, Jack Waterford of 'The Canberra Times', spoke about the value of FOI. He highlighted its usefulness ex post facto. For, in using the FOI Act to check 'how something came to happen', he obtained 'the impression of intelligent people of considerable integrity making what seems, on the facts available to them, the best decisions' [emphasis added]. While feeling that he had grounds for criticism if he was aware of additional facts, Waterford admitted that often he had 'the luxury of hindsight'.[56]

There were benefits in the form of lessons on the machinery of government. Waterford found the statements about agency activities called for under ss.8 and 9 of the FOI Act useful, together with annual reports, review papers, etc. He admitted also that frequently, on receiving papers via the FOI Act, he had 'found little in the documents themselves to justify a story'. He had, however, learned 'a

lot about the way a department works either from what the document contains, or from the process of trying to extract it'.(57)

Waterford believed that, when it comes to policy formulation, the more information circulating around agency or minister, the better. He acknowledged that openness can complicate the policy process, since it can 'underline deficiencies in existing policies before the solution is necessarily apparent'. Although demands grow as more interest groups are drawn into an increasingly public debate, the 'net effect of this is usually that there is a better policy or practice at the end of the road', and public acceptance is more likely. Waterford confessed that journalists tend 'to focus on failure rather than achievement, conflict rather than consensus, problems rather than solutions'.(58)

Waterford found more pluses than minuses in FOI. Another observer discovered little usefulness in FOI legislation, despite it being 'here to stay'. Hazell claimed that the Government has not suffered 'any major political embarrassments' from FOI, and 'no major changes of policy' are attributable to it. In fact, his only concrete example of a policy change due to FOI was the 'thwarting of the Army's proposals for the purchase of a major training area in New South Wales'. FOI played a part in ending the Greek conspiracy case and was used in some of the associated compensation claims, but it did not, in Hazell's opinion, alter the outcome of proceedings. He considered that it 'may have tilted the balance of litigation' in a few cases involving private sector companies.(59)

This rather negative view of FOI was underlined in pointing out

that it had not resulted in greater public participation in the political process. Elaborating Waterford's assessment, Hazell stated that, '[i]n the policy area, FOI is never going to do more than show, after the event, the reasons why government came to a decision'. In any case, he maintained that the s.36 exemption covering internal working documents, and the other exemptions, protect confidentiality and inhibit public participation. In all, apart from the Army land case, interest groups have not been given 'any more leverage in affecting the outcome of decisions than they had before'.(60)

Like Waterford, Hazell saw value in the administrative effects of FOI, in providing access to personal files, causing the publication of manuals, etc. regarding agency practices, and improving the standard of record writing.(61) Other than in the case of referees' reports, he was sceptical of the - admittedly few - claims made about lack of candour and frankness in official advice, since the nature of that advice remains unaffected by FOI [emphasis supplied].(62) Moreover, as Hazell noted above, the exemptions in the FOI Act effectively preserve its confidentiality.

One aspect of FOI that Hazell found puzzling was the low use of the Act by the Opposition.(63) Yet there is evidence of Government discomfiture at Opposition use, however low. In the Senate in early 1985 the Minister for Finance berated present and former Opposition politicians as the major 'abusers' of the FOI Act, accusing them of 'fishing expeditions' requiring large amounts of public service time and effort for no 'legitimate purpose'.(64) Kirby saw this outburst as a warning sign(65) of what was to become the FOI counter-reformation.

Government and Opposition sparring over FOI was still evident in late 1986. Delays and costs suffered by Opposition MPs when using the Act figured in debate on the amendments in the House of Representatives.(66) One Opposition Senator tabled a Notice of Motion calling for the free release of documents about the Community Employment Program for which the charge was $400.(67) Later in the Senate the Opposition criticised the way in which a request for documents concerning the export of uranium to France had been dealt with by the then Department of Trade. On being informed that the two documents finally released were 'doctored ... so as to remove virtually anything that could not have been learned from a ministerial Press release', Senator Evans suggested that the Opposition pursue legal remedies.(68)

It can be seen that both these examples relate to sensitive policy areas which are highly political, internally and externally, for a Labor government. For an Opposition to be able to use FOI so as to embarrass government, it needs funds for rapid and full access to relevant documents. The formal FOI scheme does not operate in such a fashion, the more so when government wishes to protect confidentiality, as it would certainly wish to do in sensitive policy areas. It is probably more productive to make representations to ministers direct or by letter, or to ask Questions on Notice. No payment is required for the amount of time and effort spent on responses to these traditional means of eliciting information from government, even when they involve numbers of documents. Delay will occur, of course, if ministers do not insist on quick responses, and there is no guarantee that sensitive information will be forthcoming, but at least explanations must be attempted. Perhaps this is why the then Commissioner

for Superannuation was able to report that, in his office, 'parliamentary enquiries continue to outnumber Ombudsman enquiries by at least two to one'.(69)

No doubt much more material on the usefulness of the FOI Act will be brought out in submissions to the Senate Standing Committee on Constitutional and Legal Affairs. Over 200 submissions were made to its review and its report will be voluminous.(70)

Hazell took a positive view of the main benefits of FOI on its fourth birthday, in that it has increased the openness and accountability of agencies to 'individual clients and to the general public', albeit in an informal rather than formal sense. That is, FOI has resulted in a 'quiet revolution' in 'administrative practice and bureaucratic attitudes' towards informal access and openness with outsiders.(71) Wilenski would have agreed about the ability of new laws to change public service behaviour 'in a lasting way, particularly where avenues are open for judicial review of administrative actions'.(72) He too considered that the administrative law package has 'already begun to establish a new framework and a new style in the relationships between the administration and the public';(73) that 'administrative fairness and justice' is now the norm in Commonwealth public administration. This has come about through, inter alia, new mechanisms of 'increased ministerial control over decision-making', FOI and 'external review of administrative decisions'.(74)

Following on from Hazell's and Wilenski's sanguine views of the new relationship between government administration and the public, by 1984 Bayne said that the AD(JR) Act applied to 'the vast bulk of

decisions which affect individuals and are taken under Commonwealth law'.[75] By the end of 1986 a minister - in this case the Attorney-General - was able to list, in response to a Question on Notice, an impressive array of mechanisms through which a member of the public could lodge a complaint against the 33 statutory bodies within his portfolio responsibilities. These mechanisms ranged from a complaint to the Attorney-General, an MP or the body itself, through an appeal under the AD(JR) Act, to the AAT or specific tribunals, and a complaint to the Ombudsman to 'a prerogative writ in the High Court or Federal Court'.[76]

Yet doubts about accountability continued to be voiced. The Senate Standing Committee on Finance and Government Operations, for example, in its Report on Non-Statutory Bodies (NSBs), concluded that the latter had proliferated in an 'uncontrolled' and 'unaccountable' manner. Less than ten per cent of the 598 NSBs identified by the Committee reported annually to parliament. Moreover, it was found that some of those bodies which 'support the more underprivileged' and 'deal most closely with people in need' had the fewest committees 'for consulting public opinion'. Departments named in this respect were Aboriginal Affairs, Communications, Social Security, Veterans' Affairs, Treasury and Immigration and Ethnic Affairs.[77]

It will be recalled that the last five of these departments, and/or entities under their departmental umbrellas, are amongst those which most attract public attention via the new administrative law mechanisms. The above comments reveal that, despite the elaborate machinery now in existence, and claims made for its value, there are still uncertainties about its effect and usefulness, particularly in

the context of public service reform. Wilenski's optimism notwithstanding, another commentator wrote that, in Canberra, '[w]orking with ministers on policy issues is the glamour field. People in tax, social security, etc. - the workhorse departments - are looked down on'. Also, more departmental heads 'come from the policy areas than from any other field'.(78)

The Deputy Ombudsmen had earlier pointed to difficulties here. They said that "high flyers" could be expected to 'spend the greater part of their careers, often from an early age, in Canberra focussing on policy work, having only limited contact with the public at large'. They recommended that "high flyers" should obtain first-hand experience of problems in the delivery of government services.(79) Wilenski's reply would have been that, in the second half of 1986, the neglect of 'managerial abilities' as opposed to policy skills was by then 'being rectified'.(80)

Thus, the overwhelming impression of the impact, use, usefulness, place and perceptions of the new administrative law by the end of 1986 is one of uncertainty. Promise with regard to greater public participation in, and external review of policy formulation has not been realised. Fulfilment of the promise of individual procedural justice is threatened by an executive preference for cost-effective legal rights. At the same time, the public service is said to have been reformed so that the improved quality of public administration seems to rest on procedural fairness in dealing with members of the wider community.

It is difficult not to conclude that this uncertainty indeed

results, following on from findings in Chapter 3, from the discordant jostling of the two realms of discourse and their concomitant sets of understandings - "legal" and "political-administrative" - forced together by the advent of the new administrative law package. The emergent tone, however, is political-administrative, in that governmental forces are now setting the scene. The package, of course, does not operate in a vacuum, but within an administrative environment, which, in being shaped by and shaping those realms of discourse, exerted pressures on the reforms. That administrative environment will now be examined in an effort to explain the behaviour of the new administrative law.

REFERENCES - CHAPTER 4

(1) Michael D. Kirby, 'Access to Information and Privacy: The Ten Information Commandments', Government Information Quarterly, (GIQ), Vol.3, No.4, 1986, p.336.

(2) ibid., p.339.

(3) House of Representatives, Daily Hansard, 19 August 1986, p.271.

(4) loc.cit. and p.272 ff; see also Freedom of Information Laws Amendment Bill 1986 and Explanatory Memorandum.

(5) Actual figures: 36,512 FOI requests; total cost $15.7M; total charges received $75,464. See Freedom of Information Act 1982, Annual Report 1985-86 (Fourth FOI Annual Report), p.1.

(6) House of Representatives, op.cit. (19 August 1986), p.272.

(7) See 'FOI in travail', CBPA, Vol.XIII, No.2, Winter 1986, p.157.

(8) House of Representatives, Daily Hansard, 18 September 1986, p.902.

(9) Senate, Daily Hansard, 15 October 1986, p.1357 ff.

(10) House of Representatives, Daily Hansard, 23 October 1986, pp.2591-2.

(11) The Sydney Morning Herald, 24 October 1986, p.7.

(12) House of Representatives, op.cit. (23 October 1986), pp.2656-8.

(13) Senate, Daily Hansard, 3 December 1986, pp.3276-7, and see Fourth FOI Annual Report, op.cit., p.vi.

(14) Senate, op.cit. (3 December 1986), p.3276.

(15) Fourth FOI Annual Report, op.cit., p.87.

(16) ibid., pp.87-8.

(17) ibid., pp.88-9.

(18) ibid., p.(iv).

(19) ibid., pp.(iii) and 89.

(20) ibid., p.89.

(21) Senate, Standing Committee on Constitutional and Legal Affairs, (Reference: The operation and administration of the Freedom of Information Legislation), Official Hansard Report, (Senate Committee Hansard), 19 June 1986, pp.6-8.

(22) ibid., p.101.

(23) ibid., pp.101-2.

(24) Report of the Inter-Departmental Committee on Costs of the Freedom of Information Legislation, (IDC Report), Canberra, 29 September 1986, p.9.

(25) ibid., p.6.

(26) See above, p.104.

(27) IDC Report, op.cit., p.36 ff.

(28) Senate Committee Hansard, op.cit., p.26.

(29) ibid., p.27.

(30) ibid., p.28.

(31) ibid., p.29.

(32) House of Representatives, op.cit. (23 October 1986), p.2592.

(33) P. Bayne, Administrative Law in 1984, in J.R. Nethercote, A. Kouzmin and R. Wettenhall (eds.), Australian Commonwealth Administration 1984: Essays in Review, (Australian Commonwealth Administration 1984), Canberra, 1986, p.165.

(34) Senate Committee Hansard, op.cit., p.26.

(35) Senate, Daily Hansard, 12 February 1986, p.175.

(36) Senate, Daily Hansard, 4 December 1986, p.3393.

(37) IDC Report, op.cit., p.A22.

(38) ARC, Ninth Annual Report 1984-85, Canberra, 1985, p.62.

(39) Quoted in ibid., p.43.

(40) House of Representatives, Daily Hansard, 20 November 1986, p.3614.

(41) Admin Review, No.10, October 1986, p.173.

(42) House of Representatives, Daily Hansard, 22 October 1986, p.2560.

(43) Admin Review, No.11, January 1987, pp.2&3.

(44) ARC, Report to the Attorney-General, Review of the Administrative Decisions (Judicial Review) Act 1977 - Stage One, Report No.26, Canberra, 1986, p.6.

(45) Admin Review, op.cit. (January 1987), pp.2-3.

(46) Senate, Daily Hansard, 17 September 1987, p.278 ff.

(47) Admin Review, op.cit. (October 1986), p.154.

(48) Admin Review, No.12, April 1987, p.26.

(49) Senate Committee Hansard, op.cit., p.161.

(50) Admin Review, op.cit. (October 1986), p.165.

(51) Admin Review, op.cit. (January 1987), p.20.

(52) See A-G's Annual Report, op.cit. (1984-85), p.44.

(53) ARC, Ninth Annual Report, op.cit., (1984-85), p.57.

(54) Bayne, op.cit. (Australian Commonwealth Administration 1984), p.153.

(55) Senator Macklin in Senate, op.cit. (15 October 1986), p.1310.

(56) J. Waterford, 'Reporting the Public Service' CBPA, op.cit. (Winter 1986), p.105.

(57) loc.cit.

(58) ibid., p.104.

(59) R. Hazell, 'FOI - Four Years On', CBPA, Vol.XIII, No.4, Summer 1986, p.378.

(60) loc.cit.

(61) ibid., p.379.

(62) ibid., p.380.

(63) ibid., p.379.

(64) Senate, Daily Hansard, 17 April 1985, p.1139.

(65) Kirby, op.cit. (CBPA), p.298.

(66) House of Representatives, op.cit. (18 September 1986), p.904 ff.

(67) Senator Durack in Senate, Daily Hansard, 26 November 1986, p.2737.

(68) Senate, op.cit. (4 December 1986), p.3368.

(69) Davey, op.cit. (CBPA), p.276.

(70) Verbal communication, Senator C.J.G. Puplick, 17 December 1986.

(71) Hazell, op.cit., p.381.

(72) P. Wilenski, 'Administrative Reform - General Principles and the Australian Experience', PA, Vol.64, No.3, Autumn 1986, p.264.

(73) ibid., p.268.

(74) P. Wilenski, 'Australia's Public Service Is Proving More and More Efficient', The Australian Administration Magazine, (AAM), Vol.1, No.3, Spring 1986, p.10.

(75) Bayne, op.cit. (Australian Commonwealth Administration 1984), p.149.

(76) Senate, Daily Hansard, 28 November 1986, p.3035.

(77) Senate, op.cit. (8 October 1986), pp.1015-18.

(78) P. Bowden, 'Backbiting, waste, timidity on Canberra's sticky pole', The National Times on Sunday, 26 October 1986, p.13.

(79) Blick and Hunt, op.cit., p.247.

(80) Wilenski, op.cit. (AAM), p.10.