CHAPTER 1

THE "NEW" ADMINISTRATIVE LAW: DESCRIPTION AND PROMISE

A package of Commonwealth administrative law, consisting of four enactments, began its existence in the 1970s: the Administrative Appeals Tribunal (AAT) Act 1975, the Ombudsman Act 1976, the Administrative Decisions (Judicial Review) (AD(JR)) Act 1977 and the Freedom of Information (FOI) Act 1982.[1] What is administrative law?

One definition is: 'the law governing decision-making by public authorities and tribunals',[2] a tribunal being a body established by legislation which is not part of the court system but which exercises a function similar to a court adjudicating specific types of disputes'.[3] The term 'quasi-judicial' describes 'functions akin to those exercised by courts which are exercised by a tribunal or other non-judicial body'.[4]

An American source offers a more expansive definition, particularly with regard to the role of the courts and legislative bodies, as:

> [r]ules and regulations made and applied by governmental regulatory agencies. [It] also includes the legal provisions used to establish administrative agencies, empower them, determine their methods of procedure, and provide for judicial review of agency activities. ...

Furthermore, administrative law has become 'the most common type of law affecting people in modern life'. At the local, state and national levels in the USA,

> the elected representatives of the people have delegated their powers to appointed administrators because they lack the time and the expertise to deal with the vast array of complex problems growing

> out of government's regulatory role. The main checks on those who make and enforce administrative law are found in the courts, through the process of judicial review, and in the legislative bodies that have the the power to oversee all administrative operations and to change or nullify decision-making authority delegated to administrative agencies [emphasis added].(5)

The Law Reform Commission of Canada (LRCC) has stated that 'the two basic values, equity and effectiveness, ... are the very reason for the existence of administrative law'. The LRCC's activities in regard to administrative law

> are essentially devoted to a single objective: the implementation of procedures and structures that are simplified, systematic, consistent and suitable for the purposes intended for them by Parliament. They must embody the [above] two basic values ... To this end, the Commission plans to modernize three key sectors of administrative law in order to improve relations between the individual and government. These three sectors are independent administrative agencies, the federal Crown and [observance of the law].(6)

Although in the USA public servants have 'always had to answer to the courts',(7) disagreement exists there about the 'proper blend' of administrative law and public administration.(8) The former is said to be 'uncomfortable to both public administration and law'. Dolan urged public administration to address issues raised by legal propensities to judicialise administrative processes, such as the effect on agency operations and redress of grievances of increasingly complex agency procedures, the suitability of the adversarial environment to protect individuals, and the extent of judicial review of administrative decisions. He also questioned the utility of the judicial or legal model of decision-making in 'administrative government'. Dolan remarked on the gap between inside and outside views of US FOI legislation. That is, from the lawyer's standpoint, the Act is regarded

as 'a question whether the information requestor is given sufficient procedural tools to force a determination whether his request is legally valid'. From the point of view of the public servant, there is a quite different question. This 'tension between competing interests', labelled the "information paradox", should be the 'focus of the public administrator', according to Dolan.(9)

In the same vein, the LRCC advocated that

> [l]awyers should refocus their attention on the role of law in the design and implementation of administration, just as they should recognize the limits of law in this area and allow other disciplines to play their part.(10)

Similar problems regarding the intersection between "government" and "law" have been identified in Britain, where it was said that '[p]olitical science has, to its own detriment, thrown out the legal baby, ugly though it may be, with the murky bath water of institutional formalism'. Drewry noted the lack of a written constitution in Britain, and the lack of a settled consensus about the actual boundaries of administrative law 'in a country which has done nothing to codify its jurisprudence in this area and which has no proper administrative court'.(11)

At the same time, 'the law of public administration, or administrative law' was designated as the fastest growing area of public law in Britain,(12) and defined as essentially 'that part of constitutional law which reveals what tangible and enforceable limits can be placed on administrative action'.(13) While there must have always existed in England a body of law 'to regulate relations between the citizen and the state',(14) Yardley considered that it was more

important to bear in mind the fundamental 'umpiring function of the law' in the 'control of power within its lawful compass' than to search for an acceptable definition of administrative law.(15)

These few examples of definitional concerns with administrative law reveal two major, common themes: the relationship between individuals or outsiders and modern, complex government or insiders, and the relationship between administrative law embodying judicial or legal precepts and institutions - which supposedly bridges the gap between insider and outsider - and government administration, both as practice and discipline. The background theme, however, is the constitutional relationship between law and politics.

Faced with a variety of perceptions overseas, how is administrative law viewed in detail in Australia? It appears that most comment has emanated from the legal side of the fence, so to speak, both inside and outside government. Comment, and the institutions involved in the package of Commonwealth administrative law, are reviewed below.

One new institution is the Administrative Review Council (ARC), established by section 48 of the AAT Act. Part V of that Act sets out the ARC's composition, functions and powers. Under s.51 the ARC monitors Commonwealth administrative law and makes recommendations to the Attorney-General on its scope and operation.(16) The Council started functioning in November 1976. Its members are the President of the AAT, the Commonwealth Ombudsman, the Chairman of the Australian Law Reform Commission and 'not less than three nor more than ten other members who are appointed by the Attorney-General'.

Now and again the ARC appoints committees to oversee projects it has underway. Its regular staff include a small number of research and administrative personnel.[17]

The ARC has described administrative law as a system of 'external review' of government administration.[18] This external administrative review aims not only to guarantee individual justice, but also 'to create an awareness at the primary decision making level of the legal and procedural considerations which must be taken into account in making decisions'.[19] In legal terminology, 'primary' is defined as 'first; principal; chief; leading. First in order of time, or development, or in intention'.[20]

The Review of Commonwealth Administration[21] reported on what it saw as the recent dramatic expansion in administrative review which had occurred 'largely in response to widespread calls for greater accountability in public administration'. In the Review Report, mention was made of the use of 'Parliamentary Committees, Royal Commissions, Committees of Inquiry, Government Reviews, Efficiency Audits, etc.' and the 'plethora of internal reviews which are typically initiated because of the need better to match scarce resources with expanding government programs'.[22] Administrative law, on the other hand, is a 'much more formalised system ... to scrutinise actions and decisions of administrators'. The Report maintained that, through its changes in administrative law, the Commonwealth had moved ahead of countries with a similar form of government. Moreover, the changes had stemmed from the relatively recent Commonwealth Administrative Committee (headed by the then Mr. Justice Kerr) which reported in 1971.[23] As for objectives, the Review Report stated that

the main purpose of the new package was to ensure 'greater administrative accountability to those directly affected by various actions and decisions, the accent being on perceived grievances of the citizen against the bureaucracy' [emphasis added].(24)

One observer traced the formalisation of administrative law at the Commonwealth level to the enlargement of the role of the State, particularly in the payment of pensions and other welfare benefits, which had increased the importance of administrative discretions. Problems with the common law remedies in seeking redress of grievances meant that 'unfairness in particular circumstances' in the exercise of discretions was not satisfactorily dealt with. Ginnane remarked that, due to the separation of powers under the Commonwealth Constitution, public officials or administrative bodies could not be granted judicial powers.(25)

Another observer wrote that the 'philosophical underpinning' of administrative law reforms 'is an assumption that members of the public should receive the protection of various statutory rights and guarantees against the government administration' [emphasis added].(26) The 'ultimate aim' of the new package was said to be the 'improvement of the quality of administration at the counter'.(27) The Director of FOI in the Department of Social Security (DSS) concurred. In his opinion, if administrative law is to work effectively and allow 'equal access to its review provisions to all citizens it must operate at the point of administration - at the counter, the switchboard and other points of public contact'.(28)

The Chief Ombudsman of New Zealand believed that an Ombudsman's

true value is measured finally by 'his effectiveness in holding the balance between the citizen and the state and in that way contributing to the greater efficiency and humanity of the administrative process'. Furthermore, for Ombudsmen to remain independent of governmental machinery and to retain the confidence of the public and the administration, requires not only 'a certain agility of approach but also an awareness of the changing nature of society and the changing base of government within society'.(29)

The Commonwealth Ombudsman felt that the new package was developed to render the 'executive machinery of government directly accountable to individual members of the community'.(30) According to another commentator, the developing field of administrative law is characterised by 'novelty, increasing importance and opportunity'. In Australia, Cavanough claimed, 'a fully comprehensive scheme for the review of administrative action in the Commonwealth jurisdiction' has eventuated. It is being operated by 'judges, tribunals and institutions mindful of the need to balance administrative efficiency with the demands of justice in the individual case'.(31)

Earlier concerns with the relationship between citizen and government are in effect elaborated upon in the above comments. There is an emphasis on individual justice, embodied in statutory or judicial rights, <u>against</u> the bureaucracy or administration, thereby injecting a note of conflict into understandings of public administration. It is clear that, due to the separation of powers in the Australian Constitution, the full judicial powers of a court could not be given to the administration, hence the need for 'external' review mechanisms. Legal and procedural considerations in

administrative decision-making about State benefits are spoken of in a way that envisages greater scrutiny of their administration via direct accountability 'at the counter', where government and citizen literally meet. Likewise, the relationship between administrative law and public administration seems to centre on the area of public contact between insider and outsider 'at the counter', where tension is likely to surface between inside and outside views of, for example, access to benefits or, say, governmental information.

The package of new administrative law, therefore, was to provide for the external legal review of government administration in the interests of, not only the redress of grievances, but also improved scrutiny and accountability. It is said to both protect citizens from, and allow them, as individuals with perceived grievances, to challenge administrative decisions and actions. As a corollary, it obliges administrators 'at the primary decision-making level' and in contact with the public, to assimilate legal and procedural considerations into their conceptions of duties and responsibilities as public servants. After all, to some with a background in public administration, as practitioner and/or student, the appreciation of administrative law arrived at thus far embraces a number of novel features. These are encapsulated in the phrase 'direct administrative accountability to individuals' and the notion of primary decision-making. The former implies the drawing of conceptual distinctions between 'administration' and 'government', the lateral accountability of public servants to individuals, and hence the separation of agencies and public servants from ministers. The latter raises questions about understandings of policy-making. So,

what are the legal and procedural considerations which stem from the new administrative law?

In examining the concept of judicial review, the ARC pointed out, in line with Yardley's thoughts, that it is 'an aspect of the concept of the rule of law which requires that executive action is not unfettered or absolute but is subject to legal constraints'. Judicial review 'refers to the process by which the courts may review the legality of administrative acts and decisions ... on both procedural and substantive grounds of review' [emphasis added]. It is not concerned, therefore, 'with the merits of administrative action but with the question whether such action is lawful or unlawful' [emphasis added]. Thus,

> [t]he scope of judicial review is in principle confined to the issue whether a decision was taken in accordance with legal principles and it does not extend to the broader issue whether the decision was the correct or preferable one in all the circumstances.(32)

The then Public Service Board (PSB) pointed to a blurring of these two concepts. That is, 'a decision made by a biased decision-maker (legally improper) will usually also be wrong on the merits of the case (an unbiased decision-maker would have made a different decision)'.(33) Observers have also discerned an overlap between review on the merits and review of the legality of a decision. Cavanough, for example, perceived that some Federal Court judges 'have been careful to preserve the traditional judicial reluctance to enter the merits of the decision under review; other judges have been somewhat bolder'.(34) Burnett claimed that the Federal Court had begun to probe the merits in the name of 'exploring "an improper exercise

of power" exposed by the statement of reasons' required of a decision-maker under the AD(JR) and AAT Acts. This move was hastened by the amount of information which the decision-maker is obliged to disclose.[35] Bayne noted that the distinction easily collapses where, for example, a minister did not take into account all relevant considerations because of departmental neglect in failing to provide him or her with an accurate statement of the facts.[36]

Bearing this relationship between legality and merit in mind, the AD(JR) Act gives statutory expression to the concept of judicial review. It

> established a relatively simple form of proceeding in the Federal Court ... for obtaining judicial review. It codified the [common law] grounds for review and introduced a statutory duty to provide, upon request, reasons for a reviewable decision. The Act applies to any decision of an administrative character made under an enactment but decisions of the Governor-General are expressly exempt from review. Schedules to the Act identify particular classes of decisions which are exempt either from the operation of the Act generally or from the specific duty to provide a statement of reasons.[37]

McMillan said that the AD(JR) Act applies in fact to most decisions of Commonwealth agencies, ministers and public servants. Apart from decisions of the Governor-General, other major exceptions are decisions concerning taxation, arbitration and security intelligence.[38] Recommendations to the Governor-General, as opposed to his decisions, are not excluded from review,[39] although a case in May 1986 established that <u>ministerial</u> advice to the Governor-General 'is a necessary part of the decision itself' and, therefore, not open to review under the AD(JR) Act [emphasis added].[40] According to Cavanough, the commencement of the AD(JR) Act was delayed for three

years due to 'lobbying' by various Commonwealth departments to have decisions excluded from review or from the obligation to provide reasons under the Act.(41)

Judicial review itself is certainly not new. As the PSB explained, under common law,

> [t]he courts have always had power to review administrative decisions on the grounds of justice (fairness), acting beyond power (ultra vires), jurisdictional error, error of law, and fraud. Traditionally, five judicial processes have provided the major bases for such review. These fall into two broad categories - prerogative writs and equitable remedies:
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> Prerogative Writs -
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> . mandamus, an order by a Court compelling the performance of a duty,
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> . certiorari, an order by a Court quashing a decision, and
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> . prohibition, an order by a Court to prevent the continuance of proceedings leading to a decision.
>
> Equitable Remedies -
>
> . injunction, an order of a Court which requires a party in a proceeding before the Court to do something (or, more usually, to refrain from doing it), and
>
> . declaration, an order of a Court which sets out or declares, in relation to a particular matter, the respective rights and duties of the parties, without actually requiring either of the parties to carry out such duties or to give effect to such rights.
>
> The above processes are technically very complex, relatively uncertain and costly. The [AD(JR)] Act was passed to extend, simplify and codify the grounds for review by Courts of Commonwealth administrative actions. In matters to which it applies, the effect of the Act is to make available, in place of the measures mentioned above, a system providing simplified procedures, specified and extended powers of the Federal Court to make orders, specified grounds of

> review, and the provision of a single flexible remedy - the order for review - embracing and extending all the orders which could have been made under the traditional remedies.(42)

According to the ARC, the 'general weakness of common law judicial review is the tendency to concentrate on technical and jurisdictional questions rather than on the substance of applicants' grievances'.(43) It must be remembered that Australia has 'a constitutionally-entrenched system of judicial review which is based on common law principles', whereby the High Court is empowered to review Commonwealth administrative action. This 'original jurisdiction' continues, and other procedures for judicial review of Commonwealth administrative action are also available from State courts, the Federal Court, and Territory Supreme Courts.(44)

Under the AD(JR) Act the Federal Court

> may make orders to
>
> - quash a decision, or suspend all or part of its operation
> - refer the matter back to the decision-maker for further consideration
> - declare the rights of the parties
> - direct the parties to do, or not to do, something, or
> - direct the making of a decision.(45)

The Federal Court's jurisdiction under this Act is restricted to applications by individuals whose interests are adversely affected by the disputed decision and who can meet the requirements of standing in ss.5-7 of the Act. The 'power to make an order of review is discretionary, and the procedures governing such actions, like those

governing any other action in court, are essentially adversary in character'.(46)

Strictly speaking then, 'judicial review' means court review of the lawfulness of administrative decisions. It is an ancient right attached to the rule of law enabling affected individuals to challenge the legality of executive decisions. 'Executive' and 'administrative' decisions appear to be interchangeable, thus embracing various levels of decision-making. It seems also that aspects of the judicial tradition or legal culture were bound up with the creation of the AD(JR) Act. Decisions of the Governor-General, presumably as an embodiment of the Crown, are unchallengeable, while some judges are reluctant to enter into the merits of executive or administrative decisions, continuing the leitmotif of the relationship between law and politics.

Other reforms in the new administrative law were:

> the establishment of an Administrative Appeals Tribunal to review certain administrative decisions on their merits; the appointment of an Ombudsman to carry out investigations and to make recommendations in relation to defective administration; and the enactment of freedom of information legislation which provides a statutory right of access to information held by Government Departments and statutory authorities, subject to specified exemptions [emphasis added].(47)

As mentioned above, the AAT is another new institution, given life by the AAT Act 1975 and established in 1976. It may affirm, vary or set aside decisions. In the latter case, it can substitute a new decision or refer a decision 'back to the primary decision-maker for reconsideration in accordance with any directions or recommendations ...'. Decisions fall within the AAT's purview only where this is spelt out in legislation; it has no general jurisdiction. Its

powers are further limited to those of the primary decision-maker; it is unable to make a decision which he or she could not have made.[48] Here, 'primary decision-maker' seems to mean that person in the decision-making chain who takes the decision which can actually be reviewed.

As at 1 July 1986, the AAT's jurisdiction extended to 233 enactments.[49] These embraced a varied range of

> decisions made under legislation such as the Migration, Customs, Superannuation, Broadcasting and Television, Social Security and Repatriation Acts; decisions relating to the granting of various classes of licences, for example tax agents, marriage celebrants, patent attorneys; and certain decisions under ACT Ordinances, especially in relation to the fixing of land rates. The Tribunal may also give advisory opinions where requested to do so by the Ombudsman.[50]

The AAT's procedures allow, inter alia, an individual whose interests are affected by a decision reviewable by the Tribunal to obtain a statement of the reasons for the decision.[51] Proceedings may be conducted 'as informally and expeditiously as possible'. The AAT

> is not bound by the rules of evidence, and may hold preliminary conferences of the parties or their representatives. ... Appeal, on a question of law, is available to the Federal Court from any AAT decision.[52]

Despite the possibility of informal proceedings, Goldring has pointed out that the AAT operates far more formally than the Ombudsman, 'though not as formally as the courts'. The Tribunal's procedure, according to Goldring, is basically adversarial, its members having stressed their belief in the rules of evidence and the adversary procedure as the most appropriate method of settling disputed

questions of fact.[53]

In contrast with judicial restraint under the AD(JR) Act, the AAT, far from having to worry about straying into the merits of administrative decisions, was established to do just that, indeed firmly to traverse the merits domain. At the same time, the Tribunal's adherence to adversarial proceedings reflects aspects of legal tradition.

The Ombudsman Act 1976 led to the appointment of the first Commonwealth Ombudsman in 1977. The Act was amended in 1983. This officer's function is

> to investigate complaints about 'matters of administration' by Commonwealth officials or agencies. His concern is principally with the manner or procedures by which officials have gone about the matter which is the subject of complaint. [He] may investigate a a matter of his own motion.
>
> Specific grounds for investigation and report include:
>
> - action which appears to be contrary to law
> - action (including rules of law, provisions or practices) which is unreasonable, unjust, oppressive or improperly discriminatory
> - action based wholly or in part on a mistake of law or fact
> - action which is otherwise, in all the circumstances, wrong (by this is meant action which involves some unfairness or impropriety, not action which the applicant simply thinks is incorrect on the merits) [emphasis supplied]
> - exercise, and refusal to exercise, a discretionary power for an improper reason or on irrelevant grounds, or
> - failure to give reasons, where these should have been given, for deciding to exercise a power in a particular way or to refuse to exercise a power.[54]

> The policy objective is that the Ombudsman should have, as far as practicable, power to investigate complaints concerning 'matters of administration' involving any official under Commonwealth authority, or any person employed for Commonwealth purposes.
>
> Certain action is expressly excluded from the Ombudsman's jurisdiction, including action by a Minister (although some matters relating to Ministerial activity are within jurisdiction), action by a Judge or magistrate, and certain actions relating to employment matters. [However, the] action of a delegate of a Minister, whether or not deemed by legislation to be action of the Minister, may be investigated.(55)

The Ombudsman may, in fact, investigate departmental action 'preparatory' to action by a minister.(56)

The former Commonwealth Ombudsman said that the exclusion from his jurisdiction of ministerial actions stems 'presumably' from Westminster theory that ministers already account to parliament for the actions of their departments, and 'for the time being at least they should not be exposed further beyond the processes of a court'. As noted above, his office, can, however, examine advice given to a minister and, 'if it is found to be defective, an opportunity for remedial action may present itself'. A department may be requested to make a fresh submission to the minister based on findings of fact, etc, and this may change the ministerial mind. If the minister remains unmoved, the Ombudsman can do nothing. Richardson's experience was that, generally, ministers 'are as sensitive to the work of the Ombudsman as their departments'.(57)

With regard to the relationship between the Ombudsman and the AAT,

> [a]part from the difference in their jurisdictions, the major difference between the two bodies is in

> the remedies each can offer a complainant. The AAT may affirm, vary, set aside, or refer back to the original decision-maker for reconsideration a reviewable decision. In effect, the AAT makes a new decision in a matter, having the same force and effect as the original decision which is the subject of the AAT appeal. The Ombudsman is limited to making reports and recommendations to the department or authority concerned, to the Prime Minister and ultimately to Parliament. Overlap between jurisdictions is minimised by a provision that the Ombudsman is not to investigate a matter where another right of appeal has been exercised or is available, unless the Ombudsman considers that there are special reasons why he should investigate the matter.(58)

That is, as Bayne wrote, the Ombudsman is concerned with 'defective administration' while the AAT 'is able to substitute its judgement for that of the agency (or, in addition, for that of a minister in the case of AAT)'. The Ombudsman may find, however, that action was 'unreasonable'. In this way, 'the scope of investigation by the Ombudsman can approach a review on the merits'.(59)

Richardson felt that an Ombudsman should exert a 'humanising influence' on government in ensuring 'fair treatment' for complainants,(60) and adopted the 'common law position of the reasonable man' in investigating official actions which attracted complaints.(61) With this type of approach, the Ombudsman thus constitutes an embodiment of the rules of natural justice. These demand that 'judges must be unbiased, parties must be given an opportunity to present their cases', and procedures must be fair and reasonable.(62) Richardson also stressed flexibility and informality,(63) as opposed to a court with its formal procedures and rules of evidence.(64) To Goldring, the informal and private operations of the Ombudsman set that office apart from the other more 'legal' review mechanisms,(65) enabling him to function as an 'inquisitor or auditor'.(66)

Procedures allow the Ombudsman wide powers of access to administrative processes.[67] He must notify the agency concerned, and the responsible minister, of his intention to investigate a matter. He is 'empowered, subject to certain restrictions, to enter premises, inspect files, examine witnesses on oath, obtain relevant information from any person'.[68] Under both the Ombudsman and AD(JR) Acts, the Attorney-General can issue a certificate to prevent disclosure of information on public interest grounds.[69] This power extends to the AAT Act.[70] Up to the end of 1986 it had not been exercised.[71]

The Ombudsman's role in the operation of the FOI Act was enlarged by the amendments to that Act in 1983.[72] It has been claimed that, even before the introduction of FOI legislation, the establishment of an Ombudsman penetrated 'the veil of official secrecy', since he is 'an independent official who is allowed behind the screen of secrecy, so that what is there said and done is subject to independent scrutiny'.[73] Richardson himself, on the other hand, cast doubts on the degree of that independence in saying that, in Australia, Ombudsmen 'have been linked more closely with the executive arm of government than the Parliament ...'.[74] Goldring described the Ombudsman as 'clearly part of the executive branch', and, as a statutory creation, subject to parliamentary control and obliged to report at least annually to parliament on his activities. In common with other members of the executive, he is 'dependent in form upon Parliament and in practice upon the government of the day' for his resources, which enable him to execute his functions.[75]

Again, even before the amendments to the FOI Act, the Ombudsman provided an alternative avenue of review to members of the public,

but this, according to Richardson, 'largely ... escaped the attention of several departments in seminars and other discussions about implementing the [Act] and in advice from agencies to unsuccessful applicants'.(76)

The Ombudsman's services are free. Originally, in AAT cases, each side bore his or her own costs other than in cases concerning FOI and Commonwealth employees' compensation. Costs are usually awarded against the unsuccessful party in cases heard by the Federal Court under the AD(JR) Act. The standing requirement, that is, who can complain, is 'very relaxed' in relation to the Ombudsman. For the AAT, it is 'reasonably strict, but interested organisations can often join in proceedings'. The standing requirements of the Federal Court are 'very strict'.(77)

This outline of the first three pieces of administrative law shows that all afford what might be called by a non-lawyer 'judicial review' in the generic sense. More correctly and specifically, since 'judicial review' refers to court review of the legality of decisions, 'administrative review' refers to tribunal or quasi-judicial review of decisions on the merits, the Ombudsman being involved in general administrative review. All forms of review can be encompassed by the term 'external review'. The three tiers of review have corresponding levels of operational formality, from Ombudsman to AAT to Federal Court.

A number of important points have emerged. Firstly, administrative law in terms of judicial review is not really "new"; indeed, judicial review by the High Court is entrenched in Australia's

(written) Constitution. Secondly, the emphasis on procedures and remedies should be noted. The AD(JR) Act, for example, essentially rationalised these traditional concerns of the law; the Ombudsman deals, above all, with administrative procedures, with a view to remedying defective administration. Thirdly, the AAT and AD(JR) Acts moved beyond the uncodified remedies of the common law and established the statutory potential for relevant review bodies to scrutinise, with a view to perhaps overturning, nominated decisions of ministers, agencies and officials. The Ombudsman, on the other hand, was not empowered to review the decisions of ministers, as opposed to agency decisions and recommendations 'preparatory' to those decisions or made by a delegate of a minister. Fourthly, and following on from the third point, this potential external review power obviously has implications for institutional relationships beyond those expressed in earlier, simple terms of the gap between individual and government which would be narrowed by direct accountability of administration to individual. Surely administrative law has entered now the realm of relationships between the executive, public service, judiciary, parliament and wider community. In this regard, the comment about traditional judicial reluctance to enter the merits of decisions under review should be noted, as should the stress on the independence of the review bodies. The lexicon of public administration had to absorb these and other legal concepts such as primary decision and decision-maker, procedures, remedies, natural justice and standing. Fifthly, the three enactments so far considered are concerned with administrative decisions, with the process of governmental decision-making to those with a background in public administration. This raises

questions about the relationship between administrative or public law and public administration, in theory and practice, and, therefore, between legal culture and administrative culture, between law and politics.

Where, however, does the FOI Act fit as the fourth and final member of this new quartet? The FOI Act 1982 became effective on 1 December 1982. Bayne noted that a number of proposals for this type of legislation wound their way through two inter-departmental committees (IDCs), a protracted inquiry by the Senate Standing Committee on Constitutional and Legal Affairs* and a number of parliamentary debates.(78) The Act was drawn up with regard to some of the recommendations of the Senate Committee's Report. The FOI Amendment Act was passed on 20 October 1983, received Assent on 3 November 1983 and came into operation on 1 January 1984.(79) A copy of the Consolidated Act is at Appendix A. The PSB mentioned that the Attorney-General's Department (A-G's) issues memoranda 'to explain and interpret aspects of the FOI Act'. A consolidated set of these memoranda, Guidelines to Freedom of Information Act, was issued in late 1982** FOI Memorandum No. 64 explaining the FOI Amendment Act 1983 was issued in February 1984. The Board summarised the Consolidated Act, with reference to applicable sections.

The basic principles of the Act were stated as follows:

*See Freedom of Information, Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, Canberra, AGPS, 1979.

**Published by AGPS, Canberra. An index was first included in the third FOI annual report (84/85) as Appendix C - Part 1, pp.168-74.

'to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth, by -

(a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealing with departments and public authorities are readily available to persons affected by those rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities.' s.3(1)

Sub-section (b) is the more important provision, and much of the Act is devoted to providing machinery to give effect to this provision, consistent with the remainder of the section:

'(2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in sub-section (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.' s.3(2)

The Act specifies that every person, irrespective of any personal interest in a document, has a legally enforceable right to obtain access, in accordance with the Act, to documents in the possession of a Minister, department or prescribed authority. Even where, for some reason, there is no entitlement under the Act to a document (eg. the document is an 'exempt document', or the authority holding it is not a 'prescribed authority', or the document contains 'exempt material'), the Act is not intended to prevent access being granted where this can 'properly' be done.(80)

Procedural aspects of the FOI Act are summarised in Appendix B.

Bayne claimed that the right of access in the FOI Act is

curtailed;[81] it extends only to information in existing records, and there is 'no obligation on the government to create a new document'.[82] Since, for the most part, an applicant does not need to declare a personal interest in obtaining the information requested, the FOI Act is 'premised on a person's right to know, rather than on a need to know'.[83] The agency receiving a request is under an obligation to consult the applicant to expedite identification of a document sought, and 'before it refuses a request on the ground that the document cannot be identified (ss.15,24)'.[84]

According to Bayne, the limits on the right of access set by the Act reflect concerns raised during debate on the legislation. These centred on facets of the Commonwealth system of public administration, including the provision of comprehensive and candid advice to government, and cabinet confidentiality; resource implications for subject agencies; possible politicisation of the public service by ministers anxious to ensure that they received advice 'that could not embarrass them if it were subsequently disclosed under the Act'; business confidentiality, and the 'privacy of those persons about whom the government held information'.[85] In other words, considerations of institutional relationships stemming from Australia's system of government were brought to bear on codification of the right to know.

Bayne grouped the sixteen exemption provisions in ss.33-47 into four categories. Firstly, the 'workings of government', which included ss.34,35,33,33A and 36.[86] Secondly, 'conclusive certificates', by which claims of exemption under those sections may be supported by a minister, a principal officer on delegation from a minister, or, in relation to ss.34 and 35, by certain senior officials.[87] Bayne's

third category of exemptions was the 'privacy of others' - ss.41,43, 27,59 and 45. Under 'other exemptions', his fourth category, he listed ss.42,44,46,38 and 47.[88] He was concerned that s.38, which provides for the operation of existing secrecy provisions in other enactments, could allow those laws to 'constitute a legal bar to the discretionary release of documents' under s.14, 'although the legal situation depends on the wording of the statutory prohibition'.[89]

With regard to conclusive certificates, Bayne explained that, in the case of s.36, the AAT 'can review only the question whether the document is a "deliberative process document", and it cannot determine in addition whether disclosure would be contrary to the public interest'. The Tribunal may, however, 'refer this question to an AAT panel constituted by a presidential member or members in accordance with s.58B'. Where, on the other hand, a conclusive certificate relates to ss.33,33A,34 or 35, the Tribunal 'has no function other than to refer, on request, to the presidential member(s) the question whether there exist reasonable grounds for the claim to be made (s.58)'. While such members may determine the questions referred by the AAT, 'the decision operates only as a recommendation to the appropriate minister (s.58A), who thus retains the power to decide whether to revoke the certificate.[90]

Bayne mentioned the 'extensive obligations' placed on agencies under ss.8 and 9 to 'publish certain information' about their activities, including categories of documents held and "internal law". He remarked on the need, as a result of the FOI Act, for agencies to introduce 'more efficient records management systems', and to develop 'a system of communication' with outsiders who provide them with

information.[91] In the early stages, he was probably correct.

The FOI Act, then, is a complex, multi-faceted piece of legislation which interacts with the other three components of the new package. In contrast to the others, it emphasises a general public as well as an individual right of access. It establishes a restricted right to know, limitations taking the form of exemptions settled on during debate. It can be seen that those exemptions both reflect and embody the political protection of institutional relationships, in that ministerial responsibility is well to the fore in the procedures relating to exemptions. At the same time, the Act gives a person a right to have the AAT examine the merits of access decisions by agencies or ministers.[92] The Ombudsman, on the other hand, is unable to substitute a fresh decision for a decision of an agency. In line with his emphasis on procedures, he is able to question officials and examine documents.[93]

For the Attorney-General's Department, the coming into force of the FOI Act brought to fruition 'a major project' which had been engaging its attention for almost a decade. According to A-G's, the FOI Act 'is potentially of profound significance for relationships between Commonwealth Ministers, departments and statutory authorities on the one hand and members of the public on the other'.[94] According to the ARC, the FOI Act 'bears a close relationship to the process of administrative review'.[95] Its commencement was the 'significant event of the year'. While the drawn-out debate which preceded its commencement may have led to familiarity with the concept of FOI, the ARC contended that the Act 'retains something of a revolutionary quality'. It has a key role in rendering government more 'open' and, as such, 'is

generally perceived as a desirable measure; however, its impact will clearly require continual monitoring and assessment ...'. The FOI Act is an important addition to the 'existing institutions of external review'. Information obtained under the Act could aid an individual in deciding on a course of action regarding a perceived grievance - whether or not to pursue a grievance, challenge a decision, or seek reasons under the AAT or AD(JR) Acts. 'More generally', the ARC argued, disclosure of information under the FOI Act 'is likely to bring the broader policy and procedural aspects of primary decision making to public notice'.(96)

Both A-G's and the ARC, then, emphasised the significance of the FOI Act for improving relations between government and public, the ARC believing that it could, in effect, open up the policy process. Bayne proclaimed elsewhere that the FOI Act is 'in terms of legal theory, one of the most radical changes' that has occurred in the reforms of the last ten years, since, at common law, 'there is no right to obtain information in documentary form held by the government'.(97)

The ARC agreed with the Ombudsman that his office could become an appeal route alternative to the AAT in respect of most complaints under the FOI Act. This is due to the effect of s.57 of the latter, under which the availability of a right of appeal to the AAT does not hinder the exercise of powers by the Ombudsman under the Ombudsman Act.(98)

The Legal Counsel to the New Zealand Ombudsman coined the term "the new administrative law". He thought at the time that FOI

legislation 'would be an important mechanism for making available material relevant to past errors and to prevent existing situations leading to future error in the administration'.[99] He came to believe that FOI legislation is the 'keystone' of administrative law, since:

> [t]he discipline of having to expose one's views to outsiders
>
> (1) encourages accuracy and care,
>
> (2) encourages reason and not prejudice
>
> (3) promotes acceptance by others of what is done, and
>
> (4) makes for better decisions.

Taylor maintained that review bodies pronounce upon only a small number of administrative actions, whereas access to information acts upon a much greater proportion. Administrative practices were bound to be affected with the advent of FOI, once public servants realised that their actions may be exposed.[100]

In contrast to Taylor's leaning towards a preventative role for FOI legislation, the ARC said of the four enactments at the basis of the new administrative law that each 'has its own special features'. The total reform package, however, 'is designed to regulate the relationship between government and individuals and to reconcile the sometimes conflicting interests of efficient and effective individual justice' [emphasis added]. The Council continued that the 'fundamental policy objectives' of administrative law reform are to render officials 'accountable to independent and non-partisan agencies for their actions and decisions' [emphasis added]; to do away with 'unnecessary secrecy in administration'; and to improve the 'quality

of primary decision making',[101] thereby enhancing the public interest and the interests of individual justice, open government and the effectiveness of public administration. Both regulation and accountability, therefore, are included in the ARC's perspective.

With regard to openness and legal tradition, Kirby pointed out that, '[l]ong before freedom of information came in vogue, the Judges worked in open courts, giving reasoned opinions, subject to public scrutiny'.[102] It was to be expected, then, that reformers with a legal background would envisage a relatively easy translation of this legal process to the practice of public administration.

Ginnane echoed the sentiments of the ARC in claiming that reform 'has led to a new relationship between the State and the citizen', based on the codification of traditional procedures, the establishment of the Ombudsman's office, and the ability to obtain reasons for, and information about, administrative decisions. Not all decisions, of course, can be reviewed on the merits. Ginnane remarked that the major problem is in reaching the balance between legitimate individual rights to fair treatment and '"the necessity for the administrators to be able to make decisions without a judge breathing down their necks all the time"'.[103]

By 1984 the PSB included a total of eleven enactments, guidelines and mechanisms under the umbrella of machinery for administrative review. Apart from the four main enactments and the ARC, they covered the Human Rights Commission, Privacy and Access to Personal Records, Grievance and Appeals Bureau, Merit Protection Agency, Security Appeals Tribunal, and Review Avenues under Public Service

Regulations.[104] The Archives Act 1983 could be added to the list. With the FOI Act, it forms 'a comprehensive system of public access to official information'.[105] Section 93B amending the Judiciary Act 1903 might also be added. This provision became effective in December 1983 and

> empowers the Federal Court (directly or by remittal) jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. ... This new jurisdiction is additional to jurisdiction under the AD(JR) Act. It is likely to be invoked fairly frequently in cases where Commonwealth administrative action is under challenge.[106]

The four enactments which are being considered in this study, therefore, form the basis or core of the "new" Commonwealth administrative law. These reforms, with their 'marked legal character',[107] are due partly, in Richardson's opinion, to the fact that the courts 'are becoming increasingly irrelevant to the average citizen because of the cost and delays'.[108] Goldring contended that the new package

> can be seen, not only as an exercise in "lawyers' law reform", but also as a response to the growth of interventionist activities of the state in Australia, and, within that state, to the growth of the bureaucracy as an independent source of power and public policy which has been growing, and which threatens the power of other established interest groups in Australia.

Goldring went on to claim that the new administrative law 'can also be regarded as a measure by which the deficiencies of the Westminster model of government in securing accountability of government administration might be remedied'.[109] Richardson seemed to sum up such sentiments when writing that, under the above circumstances, 'the public service cannot remain a body responsible only within itself or

to its Ministers'.[110]

The growing importance of administrative law in Commonwealth legal administration is attested to by the creation in late 1982 of the Administrative Law Division in A-G's. By mid-1983 the Division consisted of three Branches - Freedom of Information, Administrative Law and Industrial Law and General. It was given 'legal and policy responsibilities' in relation to, inter alia, FOI, 'administrative law matters generally including judicial and non-judicial review of administrative decisions; and administration of a range of legislation dealing with 'machinery of Government' matters'.[111]

The FOI Act is unique in that, unlike most Commonwealth Acts, which generally vest all decision-making powers in a single minister or agency, it vests such powers in all Commonwealth ministers and more than 400 agencies.[112] A-G's plays a key role in coordinating its implementation. Broadly speaking, the Department strives for uniformity in the application of the Act to the spectrum of affected agencies. The FOI Branch provides 'oral and written advice to agencies on questions of law arising under the Act'. It also monitors appeals before the AAT. Ministers were asked to ensure that agencies inform A-G's of proceedings under the Act in the AAT or the Federal Court. The Attorney-General also reminded ministers of his responsibility for the administration of the FOI Act and for 'legal argument put to courts and tribunals on behalf of the Commonwealth'. This became increasingly important by mid-1983 'as a growing number of FOI cases came on for hearing' before the AAT.[113]

The FOI Act, then, is vital to the new administrative law.

Information which can be elicited from government administration can be important to other avenues of external review, and in its own right as part of open government. The exposure of administrators' views is said to result in an enhanced quality of primary decision-making, the exact meaning of which is still unclear. The obligation to provide reasons under this Act is said to add to the improvement of public service accountability.

The FOI Act is intended to forge new relationships between the executive - now spoken of as three discrete entities of ministers, departments and statutory authorities - and the public, by giving the latter an insight into policy and procedural aspects of governmental decision-making. It is said to resemble closely the administrative review process. At the same time, that total process is now said to ensure the accountability of public service and public servants - spoken of as "administration" and "administrators" - for their actions and decisions to independent and non-partisan bodies, the latter having been nurtured in an "open" environment in contrast to the former. All this is to be achieved in such a way that a balance is struck between the redress of individual grievances and individual efficiency. Legal concepts, and a resultant more "legal" view of public administration, are seemingly furthering their way into its lexicon.

Commonwealth government administration appears to have entered a new era in the constitutional relationship between public and State. Laws designed to establish various individual rights - of review <u>of</u> and reasons <u>for</u> government decisions, and <u>to</u> government information -

are burgeoning. So, too, are entities to administer them - the AAT and Ombudsman, ARC and sections of A-G's (not forgetting that the Federal Court itself was established only in 1976).

On the surface, it seems that government at the Commonwealth level in Australia is moving towards the more expansive US definition of administrative law cited at the beginning of this chapter, that is, a body of law intended to regulate relationships between government and individuals. Yet, for all this, the "spirit of Westminster" stalks the new administrative law in the form of ministerial responsibility. On the one hand, the new package has come into being in recognition of an inadequacy in the notion of ministerial responsibility to embrace public service independence within modern public administration, and individual grievances against areas of that administration. On the other hand, the summary of the FOI Act in the third annual report on its operation stated unequivocally that its exemptions 'are based on what is essential to maintain the system of government based on the Westminster system ...'.(114)

The spirit of the latter is manifested in the evident willingness of the new mechanisms to review decisions up to the level below ministerial decisions, beyond which a feeling of unease is apparent. The allowance made in the FOI Act for the issue of conclusive certificates by those occupying the heights of decision-making, in order to protect certain aspects of governmental activities, is one example of this. Others are the protection of ministerial advice to, and decisions of, the Governor-General, and the Attorney-General's power to prevent disclosure of information under the AD(JR), AAT and Ombudsman Acts.

Also, the AAT is limited to a recommendatory role in reviewing certain deportation decisions under the Migration Act 1958.(115)

It must be borne in mind, then, that the "new" rights and concomitant institutions are restricted by, broadly speaking, the scope of exemptions in the various enactments and limits in jurisdictions. In the same vein, regulation smacks of control. Birkinshaw distinguished between controlling administration and rendering it accountable: 'control is usually exercised ex ante, before a decision is made or made effective', whereas 'it is more usual to talk of accountability as an ex post facto feature after a decision is taken'.(116) A former Deputy Commonwealth Ombudsman made the same point in relation to review of the merits: 'it is normally regarded as a relevant concept only when applied to decisions'.(117)

It is now necessary to examine the operation of the new package of administrative law to ascertain whether or not it does regulate and/or render government administration accountable, and if so, how, by throwing light on just who might control/regulate or guarantee accountability. As for the definition of administrative law with which this chapter commenced, it can be seen that this is bound up, above all, with the relationship between law and public administration and inter-related issues of judicial restraint and independence, and the process of governmental decision-making. Dolan, it will be recalled, queried the applicability of the judicial or legal model of decision-making to public administration. Drewry, in assessing the status of administrative or public law in Britain, noted that it 'is surrounded by a fog of definitional uncertainty'.(118) He found that

public law could include discussion of constitutional and administrative law - themselves not distinctly separate - redress of grievances, judicial review, 'para-legal agencies, like tribunals and inquiries', and 'essentially political remedies, such as ombudsmen and the 'grievance chasing' role of elected representatives'. Faced with such variety in Australia, it is difficult not to agree with Drewry's contention that '[p]recise definitional boundaries are impossible to draw, and it is necessary to proceed pragmatically'.(119)

In the case of the Commonwealth, however, "administrative law" has become part of the administrative vocabulary, since the Commonwealth now has, unlike Britain, a body of statutory judicial and administrative review, or, in Drewry's words, 'a distinctive corpus of public law'.(120) It is obvious also that consideration of administrative law within and between various polities entails the consideration of constitutional arrangements and their effect on the relationship between law and politics. For Australia, examination of the new laws in practice should provide guidance, beginning with their impact on public administration.

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CHAPTER 2

THE IMPACT OF THE NEW ADMINISTRATIVE LAW ON PUBLIC ADMINISTRATION

How was the new package received? Within public administration its advent gave rise to criticism and problems, both administrative and technical. The Review Report found a growing realisation 'in a number of quarters' [not stipulated] that the complex structure of recently-developed administrative law 'may have gone too far'. The Report called for an independent cost-benefit analysis, together with a 'simplified' framework to facilitate use by members of the public. It urged that use of this machinery in public sector personnel matters should be modified.(1) The Report recommended also that, pending completion of this assessment, 'existing arrangements not be extended'.(2) It was noted that assessment would also facilitate an initial overview of the operations of the FOI Act, about which much apprehension was expressed by officials to the Review Committee.(3)

The Committee found that administrative law reforms were of increasing concern to public service managers.(4) In taking an 'overall' look at the package, it acknowledged the difficulty of estimating in advance the full effect on administrative efficiency of such reforms. The Committee met with 'strong pleas' to examine the impact of the new laws on the operation of the public service which, except for the FOI Act, 'had little or no resource supplementation to meet the additional workload'. While there was substantial support for the basic concept of machinery for redress of citizens' grievances, the Committee was informed repeatedly of concerns that the review processes had caused severe administrative problems and delays.

There were five major worries: one, 'the costs of sustaining the new system'; two, 'the diversion of effort away from the area of primary decision-making'; three, 'the equity of a system that gives such comparative weight of process to the occasional appealed decision compared with the mass of uncontested decisions'; four, 'the power in some cases for unelected appointees to override policy decisions of Ministers'; five, 'the tendency towards production of very complex legislation'. Another concern was the amount of overlap between the various mechanisms. This enabled grievances to be heard by more than one body in different jurisdictions, some cases being handled in a quasi-judicial forum which could conceivably be dealt with by more informal means, such as those of the Ombudsman.(5)

Internally, then, there was general sympathy for the redress of individual grievances, but misgivings about FOI. Doubts about the new package centred on financial and managerial costs, the intermittent nature of the appeals system and its effect on ministerial responsibility.

The Review Report revealed that it was not just public servants who had doubts. Sir Zelman Cowen had expressed misgivings about 'the role of judges in setting aside government policy' in 'a democratic framework of society'.(6) Kirby as Chairman of the Australian Law Reform Commission 'had already raised a similar question on the same topic'.(7) Richardson's later retort to Cowen was that constitutional law 'is full of decisions with substantial policy components, for example, the Tasmanian Dams Case'.(8) This type of decision is of a different order, however, from those discussed by other defenders of the new package. They maintained, particularly with regard to the

AAT, that the initial high degree of appeals activity and consequent upheaval in certain areas of administration decreased, due, it was said by some, 'to improved quality of the decision-making process'. Hence it was claimed that 'the number of complaints having peaked initially, it has then fallen away to a reduced plateau'. Alternatively, it

> could be that once an administrative process has been subjected to scrutiny, with the attendant consumption of time and skill in preparing for and attending hearings, the resolve to administer the rules tightly is eroded ...(9)

It appears that Cowen and Kirby were concerned about a particular aspect of external review which bears upon the separation of powers in Australia; that is, the role of independent, non-elected (and, therefore, politically unaccountable) judicial officers in overturning policy decisions of ministers. Presumably, those decisions could be contrasted with more routine mass decisions or administrative processes in areas of public administration prone to appeal. Nevertheless, the comments of Cowen and Kirby serve as reminders that constitutional matters bearing upon the relationship of law and politics are involved in considerations of the new administrative law.

Apart from its unease at 'overly legalistic trends' in public sector management, when the Public Service Act and related laws provide adequate protection, the Review Committee wondered whether, during development of the package, sufficient account was taken of practical difficulties and the various review bodies already in existence to safeguard the citizen against 'inertia, incompetence or caprice'. Hence the Committee's calls for restraint and rethink in

charting this 'new and untraversed territory'.(10)

Judging by the findings of the Review Report, public administration has taken on a more legalistic tone than hitherto. Criticism of the financial and resource costs of the new administrative law came also from the then head of the Australian Government Retirement Benefits Office (AGRBO). Davey aired problems involved in adjusting to the package in an agency engaged in mass decision-making. He claimed that neither the 'cost implications of the new initiatives' nor their possible impact on areas of administration which engage in large-scale decision-making were examined during debate on the new arrangements. Furthermore, not many people have 'a real appreciation of the extent of decision-taking within the public service or of the nature of the process'. In AGRBO, for example, some 1,500 to 2,000 decisions are taken under legislation each week. This means that 'relatively minor extensions of the decision-taking process can have significant cost effects' such that an extra five minutes a decision on 2,000 decisions a week requires an additional four to five staff.(11)

Section 13 of the AD(JR) Act, which, in Davey's opinion, demands 'much more than a simple statement of reasons', caused problems, in that it 'necessitated changes in the decision-taking process so that any requests that might be made under that section can be met'; the documentation of decision-taking must constitute 'a record of all factors taken into account when arriving at a decision'. Although few s.13 requests might actually be received, it is impossible to determine in advance which decisions will generate requests, and costly and time-consuming procedures must be followed in every case. Moreover, in his view, the final results were 'not apparently any

different from what they were or would have been under the previously less detailed, more economical and more productive procedures'.[12]

Davey felt that the AAT added to departmental costs by operating 'in a court-like atmosphere with adversarial type proceedings in which the rules of evidence apply'. This criticism was in line with comments made elsewhere that the Tribunal should be using 'largely inquisitorial procedures' despite the fact that most administrative tribunals in Australia have endeavoured 'to turn themselves into courts'.[13] According to Davey, the representation of applicants, and adversarial proceedings, puts the responding party - the decision-maker - at a disadvantage, since that officer is expected to assist the AAT in arriving at the 'right or preferable decision', unlike the applicant's representative. Again unlike the latter, the decision-maker has 'an obligation for full disclosure whether that disclosure supports the decision or not'. Davey claimed that, in effect, the decision-maker now had to prove a case 'beyond a balance of probabilities', and that the cost of the 'decision in the first instance' had risen markedly. The Ombudsman, on the other hand, appeared to Davey to be 'more attuned to the realities of administration than are the other institutions of administrative review'.[14]

The ARC undertook a case study of AGRBO in an attempt to measure the impact of the reforms on the superannuation activities of the office. The study revealed 'that the cost impact has been high with little to show by way of benefit to the Office'. The ARC was trying to establish 'what might have been achieved by way of community or consumer benefit'.[15]

Although Davey did not extrapolate specifically from the experience of his agency to others, the suggestion that this may be possible is implicit in his article. Nonetheless, he provided a glimpse of the "other side of the coin", of an agency on the receiving end of increased legalism and the high initial peak of appeals against its decisions. AGRBO's early experience appears to give the lie to arguments that external review would result in improved decision-making, in that most of its decisions were upheld at appeal.

External review accounted for approximately 4.5 per cent of AGRBO's total salary bill in 1981-82 of $4.4 million for personnel directly or indirectly associated with superannuation administration. This was expected to increase with the recruitment of additional staff needed because of external review. As for the effect on benefits, the Ombudsman's investigations had ' only rarely resulted in a benefit or additional benefit being paid; so far the AD(JR) Act score is nil'.(16)

Davey referred also to the upsurge in public service positions and 'useful pickings for the private legal practitioner' resulting from the 'new growth industry' of administrative law. He made the point that the institutions of administrative law, and the departmental structures that have eventuated to meet their demands, have contributed significantly to "big" government. Because of the high costs to agencies with heavy decision-making responsibilities, Davey suggested that primary decisions be exempted from s.13 of the AD(JR) Act - the provision of a statement of reasons - when an alternative review mechanism is available. He also advocated a less formal

approach by the AAT. He warned that developments in administrative law were

> increasing [the] attraction to the hard-pressed decision-taker of the "soft option"; of saying "Yes" when the answer should be "No"; of saying "Yes" instead of taking the much harder road of pursuing the evidence that will establish that there is no entitlement.

Davey concluded that this must be resisted.(17)

Davey's remarks mirror those of the Review Committee, particularly in respect of resource and cost implications and the erosion of the resolve, under pressure from external review procedures, to administer rules tightly. Such an approach would contribute to a levelling-off in appeals, but would this constitute an improvement in the quality of decision-making? And what section of the decision-making chain is to be reviewed and improved?

In similar vein to the Review Report and AGRBO, the PSB drew attention to aspects of court rulings. On one hand, some led to 'improvements in decision-making processes, thereby reducing the risks of defective decision-making'. On the other hand, 'decisions have been set aside for very technical reasons having little relationship to the intrinsic merit of the case'.(18) The Board felt that this posed 'a dilemma to the busy administrator' now required to concentrate on processes to ensure conformity with legal decisions. Indeed, it said that pursuing the right procedures may come to assume more importance than pursuing the right decision. The Board agreed that the promotions appeal processes had become more time consuming and complex, and remarked that judges themselves differ on the application of the rules of natural justice. It perceived in some recent

court decisions an awareness of the ramifications of applying processes familiar to the courts to the administrative decision-making processes.[19] It also perceived 'an appreciation on the part of the courts of the need to balance the interests of the individual and various public interests such as efficiency and economy in the Service'. It mentioned the problem of the 'vexatious litigant' who can 'abuse successive avenues of review, at potentially inordinate administrative cost', and who is not generally in the most needy sections of the community.[20]

With regard to the effect of the FOI Act on the public service, the PSB noted that requests to date had been much less than forecast, but in many cases were complicated, involving many documents and the activities of a number of portfolios.[21] The number of requests, however, 'is a very crude indicator of workload'.[22]

These comments on the administrative implications of the new administrative law highlight a number of problems. The complexity of the package appears to affect both members of the public and the public service - the former in terms of ability to use it, the latter in terms of cost, time and resources. With regard to the FOI Act, for example, the number of requests is no real indication of the workload involved in handling particular applications.

The little understood nature of the decision-making process caused problems for implementation within the public service of the new formalised legal rules, to the extent that the so-called quality of the process - the improvement of which is a central aim of the new laws - may be threatened, according to the inside view. Levels and

types of decisions are distinguished in discussing 'primary' decision-makers or first-instance decisions - although neither is clearly defined - and large-scale decision-making areas. Echoing Dolan at the beginning of Chapter 1, the PSB sees difficulties in the relationship between the judicial or legal process and the governmental decision-making process.

It is possible to discern two other concerns. Firstly, the laws may not be reaching those in the community who, perhaps, most need them. Secondly, there is some unease at the prospect of unelected appointees overturning ministerial decisions. It seems, therefore, that institutional relationships between public servants, ministers and elements of the judiciary are under new pressures, in line with the promise of the package as surveyed in Chapter 1. Relationships could be said to be in a state of flux as they come to grips with novel or newly-enunciated responsibilities and functions, and adjust to new features in the administrative environment.

Administrative and technical problems concerning the decision-making process are inter-related. The meaning of "decision", for example, has been pondered at length. As Bayne said, '[t]he notion of a decision is fundamental to the operation of schemes for review of administration action' under both the AAT and AD(JR) Acts.[23] In respect of the latter, the PSB advised that the legal definition of a 'decision under an enactment' is evolving and it could take some time for court decisions to consolidate into 'a settled body of opinion'.[24]

Bayne noted that a substantial body of case law 'has been generated by the vagueness and complexity of the definition and

elaboration' in the AD(JR) Act of the key concept of decision.[25] The cases showed that a prime difficulty for the courts has been 'to determine whether the action in question has the requisite degree of finality to be considered a "decision"'. The Full Federal Court in 1983 opined that

> there is no limitation, implied or otherwise, which restricts the class of decision which may be reviewed to decisions which finally determine rights or obligations or which may be said to have an ultimate and operative effect.

Bayne thought that this view was likely to be influential.[26] He also believed that the focus on 'conduct leading to a decision' in s.6 of the AD(JR) Act may be 'a means of overcoming the limitations inherent in the concept of a decision'.[27]

The ARC remarked that, while the AD(JR) Act

> does not contain a definition of what constitutes a "decision" for the purposes of review ... it does contain provisions which expansively define the meaning of "the making of a decision". Sub-sections 93(2) and (3) provide respectively that:
>
> (2) in this Act, a reference to the making of a decision includes a reference to -
>
> (a) making, suspending, revoking or refusing to make an order, award or determination;
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
>
> (d) imposing a condition or restriction;
>
> (e) making a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing

and a reference to a failure to make a decision shall be construed accordingly.

(3) Where a provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purpose of this Act, to be the making of a decision.

The ARC mentioned that a number of Federal Court cases had wrestled with the question 'whether a mere "opinion" or "intermediate determination" constitutes a "decision", or whether "decision" refers only to "ultimate and operative" determinations'.(28) While the Court at one stage seemed to favour the latter interpretation, thereby restricting the compass of the Act, it later favoured a 'wide meaning' for "decision", not limited to decisions which 'finally determine rights or obligations'.(29)

To a public administration practitioner or student devoid of a legal background, this agonising over the definition of "decision" - and its inherent features including conduct resulting in, the actual making and finality of a decision - is redolent of attempts to break down the policy-making process into stages such as formulation, implementation, evaluation, etc. The activities in the ARC's explanation of sub-sections 3(2) and (3) of the AD(JR) Act approximate those involved in large-scale decision-making areas of public administration as opposed to policy-making in a more general sense.

Problems also arose about the question whether the AD(JR) Act applies to "ministerial" or "mechanical" decisions 'which lack any element of discretion'. In this regard, the ARC wondered if

legislative action was necessary to ensure that the AD(JR) Act 'does apply to decisions other than those taken in the exercise of a discretion', or if it is 'sufficient to rely on the judicial process to effect reform'.(30)

A problem concerning reports and recommendations fed into decision-making came to the fore. Section 3 of the AD(JR) Act was intended 'presumably to reverse the common law principle that, in general, reports and recommendations preliminary to a decision are unreviewable because they do not determine rights or obligations'. According to the ARC, notwithstanding the 'causal connection' which should exist between such material and a decision for it to come within sub-section 3(3), 'there is the question whether a report or recommendation made otherwise than pursuant to an enactment should be reviewable as a "decision" under the Act'.(31)

Difficulties in relating "administrative character" to "decision" have led to

> a considerable amount of litigation. The Federal Court has consistently taken the view that the definition of the Act's ambit in these terms requires it to classify functions as being administrative, judicial or legislative. Decisions of a legislative character are not reviewable under the Act ... The Act does not attempt to define "administrative character" and it is left to the Court to give that concept meaning. ... [I]n one case [the view was expressed] that it was not possible to state an exhaustive definition of what is meant by "administrative character" and a "continuing solution" would be provided by the Court in defining the concept progressively ... Consequently, there is some uncertainty about the precise ambit of the Act and, perhaps not unexpectedly, there have been differences of opinion as to whether certain decisions have the requisite "administrative character" ... Such uncertainty about the ambit of the Act is clearly undesirable but the difficulty rests in formulating an alternative way of defining

> the ambit of the Act which would avoid similar problems.[32]

The ARC felt that stipulating criteria to identify either 'the primary features of an "administrative" decision' or "judicial" and "legislative" decisions comes up against 'the sheer difficulty of identifying with any precision what are those criteria'. However, instead of classifying functions,

> [c]onsideration might be given to defining the ambit of the Act in terms of the status of the decision maker rather than in terms of the character of the decision. Thus the Act could apply to any decision given, order made, or conduct engaged in, by a Commonwealth officer acting under an enactment. ... It might be noted in this context that the concept of a "Commonwealth officer" is currently employed in defining the ambit of both the High Court's jurisdiction under paragraph 75(v) of the Constitution and the Federal Court's jurisdiction under section 39B of the Judiciary Act.[33]

Cavanough believed, that, in general, the Federal Court had 'adopted a generous interpretation of the elements of the expression "decision of an administrative character made under an enactment"'. The jurisdiction of the court had 'expanded accordingly'.[34] In Bayne's opinion, however, 'some basic issues' concerning the meaning of "decision", which have troubled both the AAT and the Federal Court, remained 'unsettled'.

> There is language in the decisions of these bodies which suggests that action only amounts to a "decision" if it is ultimate, or operative, or affects rights or liabilities. But other opinions do not accept that the notion of a decision is so limited, and accept that it may embrace action which is intermediate, or a condition precedent to the taking of action by some other person or body. There has been a tendency to adopt a uniform approach to the definition irrespective of the particular statutory context, but it may be questioned whether this is correct.[35]

One judge in 1983 pointed out that he had described "decision" two years earlier 'as a word of aoristic meaning', and claimed that '[i]t must take its colour and content from the enactment which is the source of the decision itself'. That is, the Act which confers jurisdiction on the AAT and the administrative framework surrounding its operation must be examined 'to determine whether there is a "decision" susceptible of review' under the AAT Act.(36) The judge adverted to de Smith's aphorism:

> "Judicial review of administrative action is inevitably sporadic and peripheral. The administrative process is not, and cannot be, a succession of justiciable controversies. ... The prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action".(37)

Bayne maintained, therefore, that not only will the definition of decision be tied to the 'language of the Act which confers jurisdiction', but also that it 'will be influenced by the attitude of AAT or the courts to the desirability of permitting an appeal or view in relation to the kind of administrative action in issue'.(38)

This survey of certain technical aspects of the AD(JR) and AAT Acts affords a glimpse of the difficulties involved in what amount to, in the eyes of some with a background in public administration, attempts to codify the governmental decision-making process. For it seems that a codified administrative law, as presented thus far, has no choice but to grapple with, in the precise terms of the judicial or legal process, the former's complexities. Hence the preoccupation with "decision" - its meaning, stages, levels, types and classes - and "administrative character". Furthermore, "decisions"

seem to blur into "discretions" in the form of the application of rules in mass decision-making areas.

Discretions were at the centre of developments in administrative law. 'Tens of thousands of discretionary powers' were identified in the early seventies by one of the committees whose recommendations led to the package of reforms.(39) The ARC inquired into primary decision-making procedures to ensure that discretions are 'exercised justly and equitably'. It has engaged in projects to examine 'classes of administrative discretion with a view to determining whether such discretions should be subject to review and, if so, by which review agencies'.(40) These discretions cover large areas of decision-making, but those requiring 'particular attention' include primary industry, transport, natural resources and taxation.(41)

Notwithstanding de Smith's aphorism to the contrary, that the administrative process is not a succession of justiciable controversies, it will be recalled that the stress throughout the discussion to date has been on the "primary" decision or decision-maker, as if each does form an area of justiciable controversies. Also, as shown in Chapter 1, while the Ombudsman is not permitted to investigate decisions of ministers, he may investigate "preparatory" decisions, and the AAT and AD(JR) Acts envisage the overturning of certain decisions made by ministers, agencies and officials. Under common law, "preparatory" reports and recommendations were unreviewable, on the grounds that they do not determine rights or obligations. They were not, therefore, regarded as areas of justiciable controversies. Clearly, the meaning or understanding of "decision" is of crucial importance to the new institutions. If, however, as the ARC suggested, meaning should

concentrate on the status of the decision-maker, the emphasis would then be, surely, on levels of decision-making in an hierarchical sense, familiar to practitioners and students of public administration.

With regard to conceptual difficulties concerning decision-making, Hawker wrote before the advent of the FOI Act that there was a major problem in identifying the activities of public servants which affect group interests and about which information is wanted. As he pointed out, in tracing the formulation of a policy 'or the progress of a case' through the bureaucratic strata in order to judge a decision, it is not enough to search for the simple facts and document them. The facts are 'not simple'. In the complex structures of the public service 'decisions can rarely if ever be located clearly in time and place. The responsibilities and knowledge of officials overlap in a most blurred and shifting way'.(42) This view of decision-making does not encourage the identification of individual public servants in the way that the new laws demand for direct accountability, except when exercising a delegated, statutory power.

Hawker coupled the problem of adequately conceptualising these governmental processes 'before defining the information needed for ... prescriptions' with the reluctance of public servants to permit the critical examination of their activities.(43) He acknowledged that some processes will remain forever unknown, 'and, much more important, other processes are inherently unknowable'. General description must often suffice, in order to take account of 'unknowables'. Hawker, added, however, that the dimension of 'what is knowable though not yet known remains large'.(44)

Problems highlighted by Hawker in conceptualising the decision-making, or, as he reminded his readers, policy process, are apparent in relation to the new administrative law. In attempting to translate a little-understood process to the realm of legal precision, it seems to have become necessary to divide that process into discrete entities or justiciable controversies, mainly in the guise of the primary decision or decision-maker, and, in the case of the FOI Act, attaching decisions to documents. Yet the review bodies still have to vest concepts with meanings. In classifying and thus splitting up the decision- or policy-making process, there appears to be danger, again to those schooled in public administration, of a return to the assertion of a gap between policy and administration. Such a gap was denied by the Review Committee which agreed with the 'long-established view' that there is no clear division between policy and administration.(45) The Parliamentary Joint Committee of Public Accounts would have concurred. In considering in 1982 the selection and development of senior managers in the public service, it also clearly recognised, like Hawker, that 'the public service partners ministers in the exercise of executive power'. It also saw a 'consequent need to increase the public accountability especially of the more senior of public service officials'.(46) This leads to the question of just what senior public servants are to be accountable for, and how, therefore, they can be regarded as "separate" partners, considering Hawker's general overlap, in line with de Smith, between the responsibilities and knowledge of officials in the many-tiered public service. Moreover, an emphasis on the accountability of <u>senior</u> public servants would seen to encourage the perception of a gap between policy and administration.

Nevertheless it appears that, by concentrating on so-called primary decision-making and discretions, administrative law as manifested in institutions such as the ARC and judicial and quasi-judicial bodies, now demands that a line be drawn between, say, a (primary) decision-maker functioning at a lower operational level in certain narrow administrative spheres within a given policy framework (in the application of discretions or decisions), and higher-level decision- or policy-makers (in the area of policy determination). After all, this division would fit comfortably with pronouncements in Chapter 1, that the new package is designed to ensure public service accountability, and with Richardson's definition of policy in the executive sphere of government as 'no more than an administrative decision to decide a case in a particular way, or to observe a particular procedure set forth in legislation'. In his opinion, '[e]ven when a Minister had determined policy within a department the implementing actions of a department remain administrative actions' over which the Ombudsman has jurisdiction.(47) This is quite a different conception of the policy process to that of Hawker.

In respect of other technical and inter-related aspects of the new administrative law, the ARC also reviewed s.13 of the AD(JR) Act obliging primary decision-makers 'to provide upon request a statement of reasons concerning a reviewable decision'. The Council examined, inter alia, the possible 'need to clarify the requirements' of s.13 and the burden it places on public servants.(48) It should be remembered that the AD(JR) Act not only renovated the major elements of administrative law and simplified the law of remedies, but also introduced 'a major substantive change' in enabling application to be made

to a decision-maker for a statement of reasons.[49]

In this regard, one commentator claimed that the increasing obligation on public servants to supply reasons for the decisions they make has been a factor 'in drawing aside the curtain of official secrecy'. This was said to be reinforced by the obligation,

> where a decision-maker is acting under a power of delegation from the person in whom the statutory power of decision is vested, [to] reveal his identity. For in such a case, the decision is his in law, and he must be prepared to take responsibility for that decision.[50]

Another observer, Burnett, saw the 'value of a duty to give reasons ... as encouraging consistency in decision-making, as a means of controlling abuse of power and as encouraging better quality in decision-making'. In her opinion, the underlying essential justification for reasons is to allow parties to 'know at the end of the day why a particular decision has been taken'.[51] Burnett thought that guidelines for decision-makers on how the statutory obligation is to be discharged needed improving to assist the decision-maker, who will often be a comparatively junior public servant and not a lawyer.[52] In relation to the FOI Act, she remarked that it 'recognises the need to provide reasons' when an application for access is denied. She noted also that the provision in section 26 of that Act 'does not place any onus on the complainant to request reasons and it provides the basis for a challenge before the AAT or the courts on a denial of access'.[53] Burnett discerned a fundamental difference between reasons called for by the AD(JR) Act, the AAT Act and the FOI Act. This is because the reasons under the latter are concerned with justifying non-release of records 'as opposed to justifying a decision to refuse a

pension or to deport an overstayer'.[54]

The then Secretary to the Department of Veterans' Affairs (DVA), D. Volker, admitted that the necessity to prepare written reasons for decisions is time-consuming but 'is just one aspect of what should be an efficient primary decision-making process. The discipline of writing reasons no doubt has led to better decision-making'.[55] He remarked that users of the new package 'tend to be those who have already had experience of the system'. Consequently he wondered if it might not be advisable 'to consider now whether there should be a re-emphasis on access to administrative systems and on the speedy and comprehensive operation of decision-making systems ...'.[56] Volker was not surprised that most requests to DVA under the FOI Act to date were for access to personal files. That Department for some time had operated a system allowing access to such files.[57]

A member of the ARC felt that much of the statement of reasons 'could be reduced to a standard form, with facts relied upon, documents referred to, other material, reasons for decision one through five, and then another paragraph for other reasons'.[58]

The newly-imposed obligation to give reasons for decisions embodied, therefore, a right to know why particular decisions have been taken. This obligation is intended to lessen secrecy and to enhance decision-making and administrative accountability, thereby augmenting the potential power of the new administrative law to redress individual grievances against government administration. Based on Burnett's reading of the situation, the relatively junior official, presumably at or near "the counter", whose interaction with

individuals is no longer covered by the "old" version of ministerial responsibility, is the one most in need of guidance on the provision of a statement of reasons. Furthermore, it seems that the naming of an official as a decision-maker, for example, in exercising a statutory delegation, means that the decision is his or hers, and that, in law, he or she must account for it. This state of affairs implies that, in law, an official, regardless of rank, may be separated from his or her minister. Again reference has been made to the use of the new laws by those perhaps best placed to use it, leading to a call for renewed stress on access to administrative institutions.

Thus far then, the advent of the new system has led to two major and related sets of difficulties, administrative and technical. The former centre on resource problems vis-à-vis new obligations, the latter on problems inherent in attempting to apply legal precision to a decision- or policy-making process characterised by conceptual imprecision. These difficulties must have implications for the new era of institutional relationships which appeared to be heralded by the new administrative law.

The ARC acknowledged the Review Report's comments on the costs of external review and 'the need to balance the requirements of individual justice and sound administration'.[59] It also referred to concerns expressed by the PSB about the effects of the new package and recurrent claims 'that the development of the system has been too rapid or that it has gone too far'[60]:

> The reforms ... have been achieved in a relatively short time and it is recognised that the need to respond to them may have caused short-term problems for the bureaucracy, particularly as they were introduced

> during a period of financial restraint and stringent staff ceilings. In addition, the reforms exhibit certain novel features, most notably in respect of the scope for review which they provide and the general obligation they impose on administrators to give reasons for their decisions. It should be remembered, however, that the concept of external review of administrative decisions is not itself novel. The legality of such decisions has long been reviewable by the courts, and specialist bodies have existed for some time to review certain classes of action on the merits. Thus, administrators operating in a number of areas of Commonwealth activity would have been familiar with external review principles and procedures before the present system became effective. Furthermore, the novelty of that system would have been diminished by the fact that the reforms have been introduced progressively, giving the bureaucracy time to adjust to the requirements they have imposed.

As for criticism, the Council considered that the 'validity of claims that the system is too costly and affects detrimentally the efficient operation of the bureaucracy can properly be established only by a thorough and comprehensive assessment'.(61)

With regard to misgivings about the formality of AAT operations, the ARC felt that, as the Tribunal lays down 'principles governing primary decision making, it is not appropriate that its procedures be unstructured or completely informal'. In the Council's view, the AAT's operations 'necessarily involve elements of both adversarial and inquisitorial procedures', according to the needs of the case in hand.(62)

Again in commenting on criticisms of the new package, the ARC stated that arguments about its impact did not always distinguish between the various components of the reforms, 'but it is apparent that many of the questions which have been raised about the costs and effects of those reforms have been directed at the AD(JR) Act.'(63) In

defending the new package, the Council referred to the impressions of the then Chairman of the PSB. In early 1984 Wilenski said that the reforms had resulted in 'better primary decisions being made'. In terms reminiscent of Goldring and Richardson in Chapter 1, he welcomed the reforms as '"modernising the doctrine of ministerial responsibility" by facilitating public scrutiny and enhancing the accountability of Commonwealth administration'.(64)

With regard to personnel decision-making in the public service, Wilenski felt that the problems of legalism in this area arose not from the new package, but from the legal framework required for public sector employment, the 'Australian emphasis on employee rights embodied in our personnel system and the changed attitudes of employees to those rights'. The ARC reiterated that exposure of public servants '(including personnel management decision makers)' to judicial review is not novel; judicial review can still be sought using procedures based on traditional common law principles.(65)

The Review Report was criticised elsewhere for emphasising the costs of administrative law, 'thus reflecting a particular managerial perspective that pays scant regard to the benefits which accrue especially to members of the community'. It was admitted that such benefits 'clearly are less amenable than are the costs to expression and evaluation in tangible terms'. Nevertheless, Carr and Thynne acknowledged that perceptions of benefits are important and 'any analysis of the impact of administrative review developments obviously needs to examine benefits in some detail'.(66)

Like DVA's Secretary mentioned above, DSS adopted a more positive

stance towards administrative law developments. Rather than attempting to quantify their effect, the Director of FOI in that Department discussed departmental responses 'in organisational and management terms'. He pointed out that DSS has a clientele of approximately four million people, and had 'felt the early force of the new laws'.(67) According to Nicholson, most agencies established a specialised unit to handle administrative law matters, staffed by lawyers or personnel with legal backgrounds. He perceived a danger in such units being located away from policy and management structures, since 'organisational isolation' would militate against feedback, making improved accountability difficult to achieve.(68)

In implementing the FOI Act, DSS built on to experience already gained with the earlier components of the new administrative law, and decentralised FOI responsibilities to its approximately 200 regional offices. Instead of forming a specialist group, DSS decided that departmental managers would be FOI decision-makers with regard to the documents in their charge. This 'created a direct feedback between a manager and his or her clients', allowing for direct accountability to the community. DSS thereby assimilated FOI into its general administration as a tool which would monitor and improve it.(69)

Turning to broader issues connected with the new laws, Nicholson echoed concerns expressed elsewhere about its usefulness to some sections of the community. He maintained that 'administrative law reform is, in many ways, the legal equivalent of middle class welfare'. This is because, except perhaps for the Ombudsman, the package demands of individuals challenging administrative decisions a useful knowledge of the law. As Nicholson saw it, the palliatives in the package are

'designed for well-educated, articulate people with the means and confidence to pursue their case. It is most use to those who need it least'. He added that officials working in administrative areas can find this frustrating. DSS was trying to overcome the problem by producing 'simplified materials' on access, etc. and by supplying more information to interest groups and legal centres. Nicholson felt that agencies must 'properly and fully' inform their clients 'of their rights'.(70) He remarked that the average citizen is very much at the mercy of public servants when it comes to administrative law and tends to obtain his or her rights more or less by default. In his opinion, the 'basically defensive postures' adopted by some agencies added to public ignorance of FOI matters.(71)

Nicholson was hostile towards any assessment of the impact of the new administrative law which found that agencies were subject to 'unreasonable' resource consequences. While there are costs and faults, he concluded that if agencies 'find the reforms a rod for their backs, it will be a rod of their own making'.(72)

DSS, then, one of the client-based departments most likely to be affected by the package, adopted an entrepreneurial approach towards its arrival on the administrative scene. The Department linked costs with client dissatisfaction. It was also in no doubt that it is now directly accountable to its clients. Both these perspectives are in line with Wilenski's thoughts on the same subjects, in particular his assertion that the new administrative law has "modernised" ministerial responsibility by ensuring public scrutiny and accountability of Commonwealth administration. The entrepreneurial approach adopted by a large client-based agency like DSS, in identifying costs with client

dissatisfaction and reaching out to its public, is in marked contrast to AGRBO's stance. DSS's approach would do much to narrow the gap between agency and public, between insiders and outsiders which was seen as a problem, reported in Chapter 1, in the USA under its FOI Act. The extent of contact between a major client-based agency and its public was later revealed by DVA's Secretary.

In 1983-84 DVA spent $2.7 billion, an increase of $0.9 billion over 1981-82, due largely to the growth in expenditure on pensions 'and because of the increase in the treatment population'. At the end of 1983-84 departmental staff numbered 12,015. These were supplemented by over 10,000 local medical officers, almost 5,000 local dental officers, 5,400 community pharmacists and thousands of allied health professionals. As for clients, in the same year claims for disability pensions reached 25,000, applications for increase in pension reached 15,000, and the service pension population totalled 374,124. Furthermore, the community and government were warned that 'peak workloads in both pensions and treatment have still to come'.(73)

Volker noted that DVA has to function within an administrative framework governed by 'an increasing number of laws and regulations'. One of the tasks confronting the Department is the development of an understanding of the "new administration", particularly the new structure of external review.(74) Additional legal resources became necessary to deal with 'the review of legislation and the growing need for legal advice and appearances before various courts and tribunals'.(75) Volker made clear that, despite fostering skills at the primary decision-making stage, DVA and similar departments can 'never' match the amount of effort spent on single claims by the

Ombudsman and the Federal Court under the AD(JR) Act.[76]

One of the reasons for the projected increase in DVA's workload is the 'more generous interpretation placed upon the Repatriation Act by the Courts than was the case up to around 1981'.[77] The problem remains, however,

> of defining exactly what the law in on the basis of judgments handed down against a particular set of facts and of translating the law into policy instructions which have to be applied to many sets of facts which do not fit those of the precedent case.

This means that the task of striking a balance between ensuring that appropriate entitlements are received and 'maintaining a satisfactory audit of decisions so that they are within the law' is made difficult.[78] As well, in a department such as DVA, where 'widespread delegations and autonomy' are given to branch offices, there is the problem of ensuring that there is 'adequate control over decision-making and operation', to ensure in turn that there is 'consistency in applying the law and policy'.[79] In operational departments, according to Volker, 'the basic requirement for success in many areas is knowledge of the legislation and policy and the ability to apply it correctly'.[80] Yet, he said, staff in direct contact with clients receive too little training.[81]

In 1983-84 DVA received its largest volume of ministerial correspondence for at least a decade. Up to July 1984, 8,000 FOI requests had been received by DVA and, with 'only a few exceptions', its clients were 'well satisfied' with what they saw on their files.[82]

Volker's experience points up the difficulties already alluded to in applying the legal model of decision-making, based on the

individual case, to mass decision-making. Bearing his comments in mind, trying to measure the costs to agencies against benefits to individuals seems rather one-sided, particularly in view of the stress placed on the latter by administrative law. Nevertheless, the question needs to be asked whether the regulation or accountability to be provided by the new laws was meant to focus on the rather narrow dimension of individual financial benefits.

This is where perceptions need to be brought into consideration. At the practical, community level they are obviously linked with usefulness. Even so, problems of measurement abound. In the USA, for example, after nearly 20 years of FOI legislation, it is still almost impossible to arrive at a match of its quantitative and qualitative use and usefulness.(83)

The ARC's then Director of Research summed up the situation in mid-1984 with regard to the introduction of the new administrative law as follows:

> There can be no doubt that we are witnessing a revolution in Commonwealth administrative law. The primary components ... are now in place and they continue to develop and evolve. However, the revolution has generally been of a silent and largely unheralded nature. Knowledge and understanding of the changes that have occurred and are still occurring is less than ideal. There is a danger that the reforms, which have not been inexpensive to implement, are being underutilised through ignorance and misunderstanding.

Griffiths continued that measures had been taken to increase the level of public awareness regarding rights of administrative review by the AAT and Ombudsman and in legal publications.(84) As for future developments, the ARC sought 'to achieve a sensible balance between

principle and pragmatism'.(85)

There are a number of recurring themes in the observations surveyed in this chapter. For example, there are problems regarding the relationship between the legal process and policy- or decision-making. Volker referred to this in his remarks about the need to reconcile the legal process with policy directives. He is also instructive in pointing out that, as far as public access to governmental institutions is concerned, the amount of agency effort expended on individual cases cannot match the amount expended by the various judicial and quasi-judicial mechanisms of the new laws.

Also, just what is meant by "primary decision-maker" or "primary decision" still remains unclear. There appears to be confusion between a legal understanding - of the primary decision as the first in terms of a hierarchy of judicial or legal decision-making, and therefore the first to come under review in a tiered appeals process - and the primary decision as the first in a series of decisions, some of which are reviewable, which go to make up the decision- or policy-making process. As Hawker showed, the likelihood of identifying the latter, and hence the decision- or policy-maker concerned, is remote, to say the least. Yet much of the rhetoric of the reforms highlights public service exposure, and rhetoric would appear to match reality where mass decision-making involves the application of rules to agency clients by identifiable public servants.

One of the main themes to emerge is the new language of the new administrative law - the talk of "Administration" and things administrative, alongside "government" and its derivatives; and of the

quality of the administrative process. To someone schooled in government administration, what is emerging is linguistic confusion centred on the relationship of public law to public administration, in line with Drewry's comments at the end of Chapter 1. This confusion reflects two realms of discourse and sets of understandings about that relationship, the gap between which may help to explain initial public service and other misgivings or doubts about the new package. The confusion is exemplified by the statement that, in law, a public servant exercising a statutory discretion can be separated from his or her minister, whereas, administratively and constitutionally, the convention of ministerial responsibility maintains that this cannot be.

What has eventuated from the advent of the new administrative law is a modification of the administrative environment, one in which public law and public administration, and their respective realms of discourse and understandings, are being forced together in such a way that changes in legal and administrative cultures are occurring. On the one hand, apologists for the new laws reiterate that the reforms are not really new, being based on hoary legal values; on the other hand, some administrators plainly regard them as new, as challenging long-held administrative values, and as having been thrust upon them. Commentators on both sides of the fence have legal backgrounds. There is a general lack of knowledge about the reforms on the part of members of the public and public servants. There is also a 'managerial' flavour in the approach of large client-based agencies to implementation of the reforms, and in queries about their cost-effectiveness.

It is still not clear if the package is meant to control, regulate or render accountable government administration; however, to the

ARC and Wilenski, in particular, it appears that the whole of that administration is to be subjected to all these forces, and in the interest of guaranteeing newly-enunciated, individual legal rights against public administration. An analysis of the use made of the total package should enable promise to be further tested against practice, by translating use and impact from the public service to the wider community.

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