EFFECTIVENESS OF ADMINISTRATIVE LAW IN THE AUSTRALIAN PUBLIC SERVICE

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Credit, where credit is due

At the core of the Westminster style of government is a professional, apolitical and effective public service:

> as matters now stand, the Government of the country could not be carried on without the aid of an efficient body of permanent officers, occupying a position duly subordinate to that of Ministers who are directly responsible to the Crown and to Parliament, yet possessing sufficient independence, character, ability and experience to be able to advise, and to some extent influence those who are from time to time set over them...[1]

So at the outset, I confess my bias that Australia's public service has been a strong force underpinning Australia's democracy and overall has contributed positively to our nation's social and economic development. It continues to do so.

The advent of a framework of administrative law

Nevertheless, to gain profile, the fledgling office of the Commonwealth Ombudsman in 1977 invited people to contact them 'if they were being "trampled underfoot by officialdom", "strangled by bureaucratic red tape", or were having their problems "'swept under the carpet"…These stereotypes of government are still with us'.[2]

So it was that the 1970s and early 1980s were heady early days of the modern framework of Australian administrative law. There was a level of excitement. After all the changes reflected a certain set of values concerning public administration which was 'a change in emphasis from the duties of public officials to the rights of citizens…That form of climate change powerfully affects the environment in which modern managers of the business of government operate.'[3]

The scope of the changes were significant, 'directed at reforming government processes so as to improve citizens access to government information and to establish a system of review of administrative decisions.'[4] The suite of legislation included an integrated general jurisdiction tribunal, the Administrative Appeals Tribunal, a controversial novelty in the common law world because it reviewed decisions 'on the merits of questions and law'[5]; the *Ombudsman's Act 1976*, 'to ensure that administrative action by Australian Government agencies is fair and accountable'[6]; the *Administrative Decisions (Judicial Review) Act 1977*, which simplified procedures for challenging the lawfulness of government decisions through the Federal Court; and the *Freedom of Information Act 1982*. The latter was described as 'the first time any country with a Westminster style of government had moved to incorporate

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the elements of freedom of information into its legislative framework. The move reflected the recognition that the capacity of citizens to access official information held by governments and its agencies is consistent with the concept of open and transparent government and fundamental to the notion on democracy.'[7]

Nevertheless, skeptics abounded, and the skepticism was not unwarranted. Before this time, administrative law had not been prominent in public sector discourse. This is illustrated by recollections of a senior public service manager and an academic[8]:

- The public service up to the 1970s had been accustomed to 'play God' and were 'not used to having their decisions open to scrutiny'.[9]
- Many primary decision-makers did not have copies of, much less consult, the legislation or even the manuals. Decisions were based on the material on file and the personal judgment of the officer, perhaps advised by a more senior officer.[10]
- The prevailing attitude to information sharing by government was that 'public servants preferred to work surrounded by a wall of silence, which most of them accepted for the security that it brought. Their attitude was that that the Service had received enough bad publicity in its time without adding to it'.[11]
- 'Files were often messy and hard to follow … File notes were vague and often unsigned. There was a reluctance to change decisions. Ministerial replies were drafted along the lines, "The decision notified to you was correct but, in the light of …" when clearly the original decision was wrong.'[12]

If one were to be defensive, one could argue that these descriptions are dramatised stereotypes and not necessarily representative of the workings of all of the public sector. For example, under income tax legislation Taxation Boards of Review existed to provide merits review to taxpayers in relation to tax disputes, although this did not cover all administrative decisions.[13] In the Australian Taxation Office (ATO), copies of tax legislation were available to individual officers in areas such as Legislation, Interpretations and Appeals. While the personal availability of copies was not ubiquitous for all tax officers, they were supported by assessing guidelines and internal guidance materials.[14]

There is some truth that, as with other public sector agencies, the internal workings of the ATO would have been somewhat opaque to many[15]. While the Commissioner of Taxation has always been required to provide an annual report to Parliament, publicity was not generally seen as a normal incident of the work. However, internal record keeping standards, in our national office at least, were generally good. Ministerial replies were limited to 'this is a matter for the Commissioner of Taxation' given the independent position of the Commissioner and a cautious approach to the operation of the secrecy provisions in our law.

Be that as it may, the attitudes conveyed in the recollection of others undoubtedly had a degree of resonance across the whole of the public sector including the ATO. For example, 'Frustration, and more than a small measure of anger, pervaded the ATO, not least because promoters of taxation schemes made use, perhaps even abused, every possible administrative avenue including the appeal and objection procedures.'[16]

Given these attitudes, it is not surprising that there was resistance to the reforms from within the Australian public sector. The requirements for public administration to be subjected to standards set by courts, tribunals and the Ombudsman, for unprecedented access to information through freedom of information laws, and, from the end of the 1980s for controls on the use of personal information by government, were not universally welcomed.[17] Indeed, in the initial stages 'there were strident campaigns of opposition by some public servants to the proposed changes'.[18]

Complaints were voiced about the costs,[19] that decision-making had become 'time-consuming and cumbersome',[20] that the increased powers of courts and tribunals led to judicial and tribunal imperialism,[21] that, as a consequence, primary decision-makers were taking the 'soft' option rather than produce a decision which might face review,[22] and that policy-making was being undertaken, not by government, but by bodies which were outside the chain of accountability.[23]

Behind these complaints were a number of concerns:

- that courts and tribunals would impede policy-making and implementation;
- the adjudicative bodies would set standards which took little account of the reality of decision-making in agencies;
- that costs in supporting the new administrative law bodies and in accommodating decisions which provided for unanticipated entitlements to citizens could be unpredictable making it difficult for agency budgets and financial planning;
- that extra resources would for needed for training and responding to challenges to decisions including litigation over the application of the provisions, that a pro-disclosure approach would inhibit full and frank advice to government, or otherwise reduce the documentation of that advice, and
- that administrative processes could be abused to delay decision-making and frustrate due process.

Such attitudes persisted until at least the late 1980s[24] and even today there is the perennial issue about the proper interplay of administrative law and government policy[25], and concerns also linger about vexations claims and the abuse of the framework to frustrate due process. However, even by 1987, many senior officials were prepared to concede that the administrative law reforms had produced benefits. It was observable that primary decision-making had improved, decisions were better reasoned, government was more responsive, and there was better guidance to primary decision-makers through manuals, guidelines and instructions. Administrative law's impact was being felt.

These were not the only benefits. Courts and tribunals had clarified legislative provisions and policies, agencies had invested in better training for staff, internal review mechanisms within agencies were introduced, complaints mechanisms were set up within departments, there was an emphasis on achieving consistency across all offices of an agency, and review outcomes were being monitored and, as appropriate, fed into decision-making.

By the beginning of the 1990s it could be said that most managers accepted that administrative law was part of the normal processes of administration[26] and the quality of public administration had benefited from the reforms.[27]

That perception was confirmed by an extensive survey of decision-makers in the public sector in the late 1990s which resulted in overwhelming support for the core objectives of administrative law, namely, a more legally conscious, accessible and accountable public sector.[28] The 1970s and 1980s saw the imposition of an administrative law framework. With hindsight this was the sunrise period for administrative law, [29] although there were some, less charitably, who dubbed it as the period of 'lawyers' rampant'.[30]

Changes to the public sector

If this was the report card at the end of last century can it be said, thirty years from the birth of modern Australian administrative law, that administrative law still sets best practice in public administration? In my experience, this is no longer the case. Rather in many respects administrative law standards are becoming the base level, not the ultimate benchmarks for

the Australian public service. Superimposed on these standards are now a host of public demands, policy and operational imperatives which have raised the bar to require an even more accountable, responsive and professional public sector.

What has led to these developments? In some cases they were due to deficiencies in the administrative law system itself. Decisions of external scrutineer bodies sometimes were not filtered down to line officers, thus preventing them from having an impact on the public sector as a whole. Nor was it appreciated that there were limits on the ability of administrative law standards to change, at a fundamental level, the behaviour of decision-makers.

Another failure of the system was to anticipate the next major change of direction for the public sector. I refer to the 1980s and 1990s privatisation and corporatisation movements which placed many activities affecting the interests of citizens outside the scope of the legislative scheme conceived in the 1970s.

This embrace by the public sector of a more managerialist philosophy[31] also heralded the view that the values and methods of private sector ordering were to be emulated and economic rationality was to become the prevailing ethos.[32] 'Efficiency and effectiveness' became the mantra. Since efficiency was largely a matter of saving money, this move also heralded the era of 'economists rampant'[33] and micro-economic reform in terms of cost efficiencies for business and public service organisations alike.[34]

An unintentional by-product was that administrative law took a back seat. Efficiency dividends, accrual budgets, devolution of government functions to the private sector and introduction of fees for service were all to have their impact.

For example, by 1995 the Australian Law Reform Commission reported that the freedom of information legislation had had a 'marked impact' on the culture of the public sector but concluded that more needed to be done to give full effect to the right to access government-held information.[35] Similarly the Senate Legal and Constitutional Legislation Committee remained concerned in 2001 "about evidence that suggests that some agencies have a poor attitude to FOI."[36]

In the new era of 'user pays' principles and accelerating costs within the community, fees for applications under freedom of information laws and for access to the Administrative Appeals Tribunal were increased.

Some public sector activities such as particular migration, security intelligence and defence decisions were removed from review. The growing list of Schedule 1 exclusions from the jurisdiction of the *Administrative Decisions (Judicial Review) Act 1977* illustrated this trend, or a reflection of lingering concerns. Whatever the cause this trend highlighted the potential tension created between the legislative/executive and the judiciary, with the suggestion that '…the courts usually respond to legislative attempts to limit or completely exclude the scope of judicial review of administrative action with a mixture of incredulity, disingenuous disobedience and down right hostility.'[37] Others saw the executive as becoming adept at fashioning legislation so as to minimise or remove options for challenge.[38]

Other harbingers of change

Despite these developments, there were countervailing pressures. For example, there has been an exponential increase in the volume of legislation in the last 50 or so years. In 1955 the Commonwealth Parliament passed a single volume of legislation of 580 pages; in 2005, it passed seven volumes of legislation in excess of 4000 pages. Tax law, migration law, income support law and the Corporations Law are clear examples.[39] For the ordinary citizen

may be the complexity of the law rather than its volume that is of greater concern.[40] Paradoxically that complexity reflects the increased sophistication of government and growing demands from the community, for example the carve outs and choices contained in tax statutes on equity grounds.

The task of helping citizens understand their rights and obligations becomes more difficult as the law becomes more complex.[41] The Joint Committee of Public Accounts highlighted the importance of this function in the tax arena in the early 1990s:

> the Committee sees an urgent need for a review of the responsibilities and practical implications of the system [of self assessment] for taxpayers and their agents. Increased support to assist taxpayers to satisfy their obligations is also required.[42]

The Committee recognised however that the ATO had already sowed the seeds of change.[43] Indeed, the Committee referred to the amendments introduced into the law in 1992 via the *Taxation Laws Amendment (Self Assessment) Act 1992* as having 'contributed significantly to an improvement in the level of equity and fairness in the taxation system.'[44] The Committee and others also noted other harbingers of change:

- 'No doubt picking up on the mood of the times the ATO, apparently largely on its own initiative, began to consult more widely in the community.'[45] This included the establishment of the National Tax Liaison Group in 1985 which included representatives from tax professional associations.
- The establishment of a Taxpayer Service Group in 1986-87 to provide information, assistance and advice to taxpayers to enable them to understand their rights and responsibilities under the law and provide the support necessary for them to discharge their obligations.
- The establishment of a Problem Resolution Program in 1987-88 which provided an internal mechanism for the resolution of administrative disputes.

Subsequent to the Joint Committee of Public Accounts' Report 326, the Government established a Small Taxation Claims Tribunal within the AAT to enable small taxation matters to be decided in a less expensive and less formal manner and with emphasis on mediation. The Government also established a Special Adviser on Taxation within the Commonwealth Ombudsman's office. These changes constituted two of the three recent administrative review initiatives referred to in the 1995 *Justice Statement*.[46]

Other developments have also demanded a new approach. Since 1996 there has been an increasing emphasis on reforming the appropriate role of Government, and on improved service delivery. The *Financial Management and Accountability Act 1997*, the *Commonwealth Authorities and Companies Act* and the *Auditor General Act 1997* set out the responsibilities of agency heads and CEOs in a more devolved environment and gave the Auditor-General more independence.

More recently, there has been a particular focus on the structure of the public sector. The *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the 2003 Uhrig Report) has led to changes in the composition of the Australian Public Service (e.g. inclusion of Medicare Australia and Austrade staff) and changes on how agencies operate from a governance perspectives (eg. executive management replacing the board in Centrelink).[47]

There has also been increasing focus on whole of government approaches across the APS and general government sector, with agencies working across portfolios to provide integrated responses to a broad range of challenges such as indigenous health, the environment and security.[48]

Whole-of-government approaches are desirable, and of special interest to an organisation such as the ATO that has a separate and distinct role as custodian of the Australian Business Register.[49]

The new millennium

How have these developments affected administrative law standards? In the first place, there has been a need for more responsive and sophisticated mechanisms to manage the complexity. In the second, new approaches to ensuring internal conformance have emerged. Thirdly the rise in a culture of justification means that: 'Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted.'[50] Together these developments have ushered in a third wave of change within public sector thinking.

Inevitably this century has seen a return swing of the pendulum, or perhaps some closer alignment or maturing of different perspectives. While a focus remains on lawfulness, effectiveness and efficiency, talk is now also on the ethical obligations on the public and private sector as well. [51] The rhetoric is now 'effectiveness, efficiency and ethicality. At a structural level, compliance is to be managed through a fourth, integrity branch of government.'[52]

For the ATO the change started to crystallise in a series of reforms 'built on the premise that although legislation is one of the building blocks for compliance, it is far from sufficient…At the heart of the reform strategies of the late 1990s was the building of a relationship with the Australian community in which the Tax Office was to be (a) professional, responsive, fair, open, and accountable.'[53]

An important initiative towards building this relationship was the Taxpayers' Charter. This year is the 10th anniversary of the Taxpayers' Charter and the ATO is taking the opportunity of re-affirming its principles and ATO values more generally.[54] The Charter recognises that, 'As tax systems are adjusted, the community needs to be educated, persuaded and encouraged to cooperate, long after the vote is cast at the ballot box.'[55] Recent research confirmed that the ATO is following the Charter and has improved on all elements over the last few years. Treating taxpayers fairly and reasonably, and with courtesy and respect, continues to be one of our strengths.[56]

The dispute resolution process established under our Taxpayers' Charter follows the broad requirements of effective dispute systems, and supports wider principles of good governance and integrity. For example, the Commonwealth Ombudsman concluded in his *Annual Report 2005-06*:

> The ATO's positive response to that report [2003 ATO Complaints] has resulted in a system that reflects best practice complaint management principles and that maintains a consistent approach across the ATO…The ATO's responsiveness suggests a cultural commitment to complain resolution within the agency. This commitment perhaps offers taxpayers better remedial options than externally imposed rules.[57]

The change for others in the public sector may have been heralded by the introduction in the final years of the twentieth century of the *APS Code of Conduct* and the *APS Values*. What they required was more than lawfulness and efficiency. '[E]thical behaviour … goes beyond the requirements of lawful behaviour. It requires employees to merit the respect of the public in their official dealings. This is … a requirement [of] professionalism'.[58]

The significance of these moves is twofold. Many of the institutions within this fourth branch are also within the administrative law fold. They include:

> Auditors-General, ombudsmen, administrative tribunals, independent crime commissions, privacy commissioners, information commissioners, human rights and anti-discrimination commissions, public service standards commissioners, and inspectors-general of taxation, security intelligence and military discipline.[59]

Second, are the standards or criteria which these bodies monitor and which agencies seek to apply to encourage or enforce compliance with laws and regulations and internal conformance with relevant laws and policies. Integrity means being whole or healthy. An 'integer' is a whole number. Public sector bodies are now setting up systems and processes to test the health of their organisations. And the health of the system is more than compliance with law including administrative law.

These moves are illustrated by the ATO's *Integrity Framework* which states that integrity has four elements:

- compliance with the law, including tax law and other law, such as administrative law;
- conformance with government and ATO policies;
- upholding and promoting the APS values and conforming with the APS Code of Conduct, and
- meeting standards of professionalism which include compliance with the Taxpayers' Charter in dealing with taxpayers and other officers.

The new emphasis on policy, rules of conduct and professionalism has been dubbed 'soft law'. 'Soft law' has several core elements. As outlined in an Administrative Review Council background paper:[60]

> Soft law is concerned with rules of conduct or commitments. Second, these rules or commitments are laid down in instruments which have no legally binding force as such, but are nonetheless not devoid of all legal effect. Third, these rules or commitments aim at or lead to some practical effect or impact on behaviour.[61]

In other words officials are now expected not only to comply with law and policy but also with ethical standards of behaviour in the workplace.

Why has the bar been raised? There are several hypotheses. The administrative law standards with their emphasis on fairness, rationality, lawfulness, transparency and efficiency focus on process rather than outcomes. As the Palmer Report noted an organisation that is 'process rich' and 'outcomes poor' may be meeting those standards but still not be behaving in an open, responsive and accountable manner.[62]

It is also a truism that only some of the decisions which have failed to comply with administrative law standards will be challenged, whether by affected citizens or by other officials. In other words it is possible for an individual to breach the standards without there being any adverse consequences. Knowledge of human nature suggests that there are those for whom the absence of a 'stick' may lead to below standard decision-making.
In these situations something more is required to reinforce employees' responsibilities under the governance framework.

As McMillan has noted:

> … values as well as legal safeguards must drive an accountability culture. Administrative law is in part an error or fault driven culture. It makes officials accountable by asking whether they have done something wrong, such as made the wrong decision, acted unlawfully, or misused their authority. Yet good governance must also be a values driven culture. Direction must be given on how public power should be exercised in a responsible fashion.[63]

Defining values, including the value of professionalism, and developing mechanisms to embed these values in individual officers is more likely to be effective in ensuring compliance. Behind these moves is the need to instil in the community a confidence that the system is operating effectively. As the Foreword to the Tax Office *Integrity Framework* states: 'These perceptions are more likely to be positive when we are seen to be delivering our commitments through acting ethically and with integrity'.[64]

How is integrity, including ethical behaviour, achieved?

To illustrate, the ATO has put in place a framework giving practical and objective content to the concept of integrity.

That framework includes setting standards which underpin a selection of assurance processes – selected integrity indicators and Certificates of Assurance which are representative of all the ATO's business processes. They enable the ATO 'to identify and address instances where the standards have not been met'.

Considerable work has been undertaken to identify the legal and policy obligations on the ATO and, more significantly, to identify what evidence is required to ensure these obligations are being met. These standards are monitored on a regular basis by committees such as the Integrity Advisory Committee and the Audit Committee, and by an independent Integrity Adviser, whose role is to assess across the organisation how well its processes are working.

This governance framework, including as it does an *Employees' Handbook* and a further publication *Safeguarding the Taxation Office Integrity Program 2006-07* are part of the 'soft law' governing the ATO and reinforce employees' responsibilities under the governance framework. These practices and policies are externally recognised as better practice in the Australian Public Service and among State governments.

However, this framework is not unique. The Department of Immigration and Citizenship also has an Audit and Evaluation Committee with an independent Chair and a second external member to oversee its enhanced internal audit program, to make sure that its decisions are in line with legislation and instructions. In addition the Department has established a 'Values and Standards Committee which includes four external members … to ensure that [DIAC] is meeting the expectations of the wider community'.[65]

In other words, these processes, coupled with the requirements of the Code of Conduct and Values have put content into the higher standards that ethical and professional behaviour require.

Conclusion

The public sector has moved into a new era. 'The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of public life.'[66] It is an era in which the expectations of the public sector are even higher than they were in the new dawn of the 1970s and 1980s. That is not to underestimate the achievements or the effectiveness of administrative law. It remains a significant element of the bedrock of the public sector's work, 'the values on which it is based have taken deep root.'[67]

What is does signify is that having embraced the administrative law standards of transparency and accountability, compliance with the law, attention to the impact of decisions on individuals and justification for those decisions, public administration has had to go further. The public sector is now requiring of itself not just a lawful, efficient and effective approach to its core business, but an ethical compass as well. Indeed the former is

dependent on the latter. In other words officers need to embed values of professionalism and ethicality into their day-to-day interactions with each other and with the public in order to be efficient and effective.

For example, as Valerie Braithwaite observes in relation to taxation:

> Failure to administer the tax system in a way that demonstrates basic respect for democratic principles of participation and accountability is a dangerous game. A tax authority that de-legitimises itself in the eyes of citizens limits its effectiveness and short-changes citizens in terms of what they can expect from democracy.[68]

Endnotes

1 Report on the Organisation of the Permanent Civil Service (1854), *The Northcote – Trevelyan Report*.
2 *Commonwealth Ombudsman Annual Report 2005-2006*, p1.
3 Chief Justice Murray Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, p.16.
4 Senate Legal and Constitutional Legislative Committee, Inquiry into the Freedom on Information Amendment (Open Government) Bill 2000, April 2001, p.2.
5 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989), 18 *Fed L Rev 122*, pp.126-127.
6 *Commonwealth Ombudsman's Annual Report 2005-2006*, p.1.
7 Senate Legal and Constitutional Legislation Committee, 'Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000, April 2001, p.2.
8 See articles in (2001) 8 *Australian Journal of Administrative Law* No 4 129-221, guest editor Professor Peter Cane.
9 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law* 204.
10 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law* 204.
11 Dr G Caiden *Career Service – an introduction to the history of personnel administration in the Commonwealth Public Service of Australia 1901-1961* (Melbourne University Press, and Cambridge University Press, 1965) 435, quoted in P Kennedy 'Reflections of a Line Manager (2001) 8 *Australian Journal of Administrative Law* 192.
12 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law*204.
13 The Administrative Appeals Tribunal was vested with the power to review tax decisions in 1986 by the enactment of the *Taxation Boards of Review (Transfer of Jurisdiction) Act 1986*.
14 For example, Canberra Income Tax Circular Memoranda and Income Tax Rulings. With the introduction of the *Freedom on Information Act 1982*, the ATO was conscious of the Act's implications for the 'method of publishing and disseminating decisions relevant to the interpretation and application of taxation laws' (*Commissioner of Taxation, 1983 Annual Report*, p.7).
15 Some say it still is, notwithstanding 'a history of being open and transparent' (*Commissioner of Taxation 2005-06 Annual Report*, p.10). See also Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.3 where the Committee acknowledges that 'many aspects of the Australian Taxation Office (ATO) are regularly reviewed by the Parliament.' The ATO's *Strategic Statement 2006-2010* reinforces our philosophy of being 'open and accountable'. Our surveys suggest that the vast majority of taxpayers believe we are 'professional' and 'doing a good job' (see *Commissioner of Taxation 2005-06 Annual Report*, pp.46-47). Nevertheless, while we should strive to further improve public perceptions, vocal support from others in the public domain would be of assistance in this regard.
16 Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.17.
17 In 1987 a conference - *Administrative Law: Retrospect & Prospect* published in 1989 in 58 *Canberra Bulletin of Public Administration* - reflected on ten years' of the 'new administrative law' (*Retrospect and Prospect* collection). A number of paper-givers reflected on the reluctance to embrace these developments: D Pearce 'The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect' 21, 24; Pat Brazil '1987 Administrative Law Seminar' 13; P Bayne 'Administrative Law and the New Managerialism in Public Administration' 39, 41; L Curtis 'Crossing the Frontier Between Law and Administration' 55; D Volker 'The Effect of Administrative Law Reforms: Primary Level Decision-Making' 112, 113; A Rose 'Judicial Review and Public Policy: A Comment' 75.
18 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law* 203.
19 *Retrospect & Prospect* collection: Sir Anthony Mason 'That Twentieth Century Growth Industry, Judicial or Tribunal Review' 26, 27; Senator P Walsh 'Equities and Inequities in Administrative Law' 29 and infra; J Griffiths 'The Price of Administrative Justice' 35; P Bayne 'The Commonwealth System of Non-judicial

Review' 49, 54; A Rose 'Judicial Review and Public Policy: A Comment' 76-77; P Cashman 'The Price of Administrative Justice' 104 and infra.

20 *Retrospect & Prospect* collection: Senator P Walsh 'Equities and Inequities in Administrative Law' 30; J Griffiths 'The Price of Administrative Justice' 35; P Bayne 'Administrative Law and the New Managerialism in Public Administration' 41.

21 *Retrospect & Prospect* collection: D Pearce 'The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect' 20; Senator P Walsh 'Equities and Inequities in Administrative Law' 29; L Curtis 'Crossing the Frontier Between Law and Administration' 58-64, 66-67; A Rose 'Judicial Review and Public Policy: A Comment' 75.

22 *Retrospect & Prospect* collection: D Volker 'The Effect of Administrative Law Reforms: Primary Level Decision-Making' 112.

23 *Retrospect & Prospect* collection: Senator P Walsh 'Equities and Inequities in Administrative Law' 29; A Rose 'Judicial Review and Public Policy: A Comment' 75.

24 P Kennedy 'Recollections of a Line Manager (2001) 8 *Australian Journal of Administrative Law* 201; E Willheim 'Recollections of an Attorney-General's Department Lawyer' (2001) 8 *Australian Journal of Administrative Law* 154.

25 Chief Justice Murray Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, p.2 referred to the "perennial question of how the Tribunal is to undertake merits review of decisions governed or influenced by policy". See also *McKinnon v Secretary, Department of the Treasury [2006] HCA 45*; and footnote 17 above.

26 P Kennedy 'Recollections of a Line Manager' (2001) 8 *Australian Journal of Administrative Law* 200.

27 D Volker 'The Effect of Administrative Law Reforms: Primary Level Decision-Making' 113.

28 R Creyke & J McMillan 'Executive Perceptions of Administrative Law - An Empirical Study (2002) 9 *Australian Journal of Administrative Law,* 167-168.

29 E Kyrou 'Administrative Law: A Sunrise Industry for the Legal Profession?' in (1989) 58 *Canberra Bulletin of Public Administration* 98; C Finn (ed) *Sunrise or Sunset? Administrative Law for the New Millennium* (AIAL, 2000)

30 The description is taken from a quote from a Minister, the Hon John Button, cited in P Kennedy 'Recollections of a Line Manager' (2001) 8 *Australian Journal of Administrative Law* 198.

31 P Bayne 'Administrative Law and the New Managerialism in Public Administration' (1989) 58 *Canberra Bulletin of Public Administration* 39.

32 Id at 41.

33 P Kennedy 'Recollections of a Line Manager' (2001) 8 *Australian Journal of Administrative Law* 198 citing M Pusey *Economic Rationalism in Canberra – a Nation Building State changes its Mind* (Cambridge University Press, 1991).

34 M D'Ascenzo, 'Future Developments in the Role of the Tax Office: Towards a Community Based Tax System', Institute of Chartered Accountants North Queensland Congress, 1991.

35 Australian Law Report Commission, Report 77*, Open Government*, (1995), pp 15-16.

36 Senate Legal and Constitutional Legislation Committee, Inquiry into the Freedom on Information Amendment (Open Government) Bill 2000, April 2001, p 57. However, 'evidence' provided to committees or scrutineers by those that perceive themselves to be aggrieved is not necessarily indicative of a systemic issue.

37 M Aronson, B Dyer (2000) *Judicial review of administrative action* (2nd ed) Law Book Company, p.675.

38 Administrative Review Council *The Scope of Judicial Review* Report No 47 (2006) Ch 3; and see also *The Scope of Judicial Review Discussion Paper (*2003) Appendix 2.

39 C Hull 'Judiciary struggles under volume of laws with moot benefits' *The Canberra Times*, 31 March 2007.

40 M D'Ascenzo 'Simplifying Tax Administration in a Complex World: The Challenge of Infinite Variety, speech given to the Australasian Tax Teachers Association Conference *The Pursuit of Simplicity – Simply Impossible*, University of Queensland, Brisbane, 22-24 January 2007; and Letters to the Editor, 'Misquoted remarks', *Australian Financial Review* 3/2/06, and 'Balancing simplicity, neutrality and equality is behind taxation complexity', *Age* 2/2/06.

41 P Moss, 'Towards Community Ownership of the Tax System: The Taxation Ombudsman's Perspective', p.21, in Fisher R and Walpole M (eds), *Global Challenges in Tax Administration*, Fiscal Publications, Birmingham, 2005: 'I have to say that in recent years the ATO appears to have made very effective use of modern communications to disseminate information to taxpayers'.

42 Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.xix.

43 See for example Joint Committee of Public Accounts,' Report 326: An Assessment of Tax', November 1993, pp.15, 19, 20 and 66.

44 Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.71.

45 P Moss, 'Towards Community Ownership of the Tax System: The Taxation Ombudsman's Perspective', p.21, in Fisher R and Walpole M (eds), *Global Challenges in Tax Administration*, Fiscal Publications, Birmingham, 2005.

46 Attorney-General's Department, 'The Justice Statement', May 1995, pp.33-34. The third was to provide discretion to the AAT to award costs against a party whose conduct had deliberately caused extra costs to the other party.

47 It is worth noting that the Uhrig Report commented: 'It could be argued that of all statutory authorities, the ATO has the most significant and wide-ranging relationship with the community, involving people both as

individuals and also where they may be participants in business or non-profit organisations or as tax professionals. To assist the community in that relationship, the ATO has established a wide range of consultative arrangements', p.50.

48 See for example, the Management Advisory Committee report on 'Connecting Government: Whole of Government Responses to Australia's Priority Challenges' and its statement on 'Working Together'.

49 The ATO's draft Corporate Plan 2007-08 sees the ATO 'taking a leading role to assist the Government deliver whole-of-government strategies including the use of the ABN, standard business reporting and projects such as Project Wickenby.'

50 McLachlin (Chief Justice of Canada), 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law', 12 C.J.A.L.P. 171 at 174 cited by Chief Justice Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, at p18.

51 M D'Ascenzo 'Do professionals have an ethical compass and does it matter?' speech to the Victorian Tax Bar Association, Melbourne, 29 March 2007.

52 B Topperwein 'Separation of Powers and the Status of Administrative Review' (1999) 20 *AIAL Forum* 32, 43; B Ackerman 'The Integrity Branch in 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633; James Spigelman, Chief Justice of the NSW Supreme Court 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724; AJ Brown & B Head 'Institutional Capacity and Choice in Australia's Integrity Systems' (2005) 64 *Australian Journal of Public Administration* 42; J McMillan' The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1; R Creyke 'Administrative Justice – Towards Integrity in Government: the First to the Third Way', paper presented at the First Administrative Justice Conference, University of Edinburgh, Edinburgh, 9 March 2006.

53 V Braithwaite, 'A New Approach to Tax Compliance' in V Braithwaite (ed), *Taxing Democracy*, Ashgate, 2003, p.1.

54 Australian Taxation Office, *Taxpayers' Charter 2007*, *Strategic Statement 2006-10*, *Commissioner of Taxation 2005-06 Annual Report* (pp.5, 6, 14, and 40-63), and draft 'Corporate Plan 2007-08'.

55 V Braithwaite, 'Dancing with Tax Authorities: Motivational Postures and Non-compliant Actions', in V Braithwaite (ed), *Taxing Democracy*, Ashgate, 2005, p.18.

56 *Commissioner of Taxation, Annual Report 2005-06*, p.42.

57 *Commonwealth Ombudsman Annual Report 2005-06*, p.62.

58 N Hosking 'The APS Values and Code of Conduct: their practical application to Government Lawyers' paper presented at the Australian Corporate Lawyers Association Conference *Government Lawyers: Your Role in Governance* 2 June 2006, Canberra, 3.

59 J McMillan 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 11-12.

60 The paper relies on work by L Senden 'Soft Law, Self-Regulation and Co-Regulation in European law: Where do They Meet' (2001) 9 *Electronic Journal of Comparative Law* 23; L Sossin and CW Smith 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867; L Sossin 'How Judicial Decisions Influence Bureaucracy in Canada' in S Halliday & M Hertogh (eds) *Judicial Review and Bureaucratic Impact: International and Inter-Disciplinary Perspectives* (Cambridge University Press, 2004) 129.

61 Administrative Review Council 'Soft Law', Attachment E to paper 22306 *Complex Business Regulation Project,* 18 May 2007.

62 *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (the Palmer Report) (July 2005) Principle 10, x.

63 J McMillan 'Accountability of Government', keynote address at the *AboveBoard Accountability Forum*, Australian National University, Canberra, 12 May 2007.

64 An indication of the community's confidence in the integrity of the tax system is found in the annual Professionalism Survey (DBM Consultants *Australian Taxation Office Professionalism Survey Executive Report*, (November 2006) which concluded that 79% of clients were satisfied or very satisfied with the level of professionalism from their interaction with the Tax Office, pp.16-17.

65 A Metcalfe 'An Overview of Organisational change, and the provision of legal services, within the Department of Immigration [and Citizenship], a paper delivered at the Australian Corporate Lawyers Association Conference, Canberra, 2 June 2006, 5.

66 Chief Justice Murray Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, p.19.

67 ibid, p.2.

68 V Braithwaite, 'Tax System Integrity and Compliance: The Democratic Management of the Tax System', in V Braithwaite (ed), *Taxing Democracy*, Ashgate, 2005, p 287