ROYAL INSTITUTE OF PUBLIC ADMINISTRATION AUSTRALIA

NEW SOUTH WALES DIVISION

R N SPANN MEMORIAL ORATION

R N SPANN - VISION OF ADMINISTRATIVE LAW - HAVE WE ACHIEVED IT?

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The Hon Justice Michael Kirby AC CMG**

DICK SPANN REMEMBERED

It is inevitable that, with the passage of the years, those who have the honour to deliver this Oration will increasingly be persons who did not know the man for whom it is named.

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* In part derived from an address to the conference of the Australian National University on the 20th Anniversary of the Administrative Appeals Tribunal, July 1996.

** Justice of the High Court of Australia. Formerly Chairman of the Law Reform Commission; Member of the Administrative Review Council; Judge of the Federal Court of Australia and President of the New South Wales Court of Appeal.

But that is not the case with me. I knew Dick Spann in three contexts. First, as a teacher. Then as a university administrator of great skill. Then as a member of the Administrative Review Council of Australia.

When I completed my studies in law at the University of Sydney, I had come lately to the Byzantine world of student politics. To assure my political continuity and legitimacy, I embarked upon a third undergraduate degree, economics, thereby attracting Gareth Evans' comment that I had concentrated on quantity rather than quality in my academic preparation. I surprised myself by coming to like the discipline - and few lecturers more than Henry Mayer and Dick Spann in the courses in Government which I undertook. What a contrast they were. Truly an odd couple. Henry Mayer was provocative to the brink of the outrageous. Dick Spann was reticent, sceptical, reserved, rather unwordly - a kind of typical English God professor. But his topic was one of endless fascination - the deployment and control of administrative power.

My labours done in the Student's Council, I was elevated to the Valhalla reserved for ancient student politicians - the Senate of the University of Sydney. Here I saw the other face of Spann - the meticulous University administrator and Dean who mastered the complexities of University by-laws and unwritten conventions which had grown up in Australia's oldest university over the course of a century. I found that in this apparently gentle university administrator was a man of steel. He was cold

and insistent when that was required. The way he organised a factious department and brought together large egos, if not in alliance at least in a state of territorial respect, is told in Professor Ross Curnow's essay on Spann[1]. He was contrary, shrewd, mildly conservative and contrary to his image, relatively numerate. In walking he displayed a leftward, leaning, asymmetrical gait" [2]. This happy mixture of conservatism and left-leaning made him the perfect university administrator.

But it is the third context of our acquaintanceship of which I wish to speak. For here I met Spann as an equal. With unseemly haste, a decade after I had sat in his classes, I was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. Soon after I was transferred to head the new Law Reform Commission of the Commonwealth. When the *Administrative Appeals Tribunal Act* 1976 (Cth) came into force, I was by statute an *ex officio* member of the Administrative Review Council (ARC). Spann, as Australia's senior academic expert in public administration was, unsurprisingly, asked to join the Council; and he did.

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1 C R Curnow, "Intellectual Stance: R N Spann".

2 *Ibid* at 287.

It is worth recording Curnow's description of Spann for it vividly brings back for me memories of our journeys to Canberra and our meetings together around the table of the ARC.

> "In terms of appearance he is hard to describe. There were two striking characteristics about him - his facial structure and his gait. Tallish and with a wide forehead, a dominant hooked nose and thin lips, he could have given the appearance of a bird of prey were it not for twinkling eyes and a ready smile. To walk side by side with Spann was to invite a constant bumping of shoulders ... His eyes were generally fixed a few feet in front of him, which led one acquaintance to describe his walk, no malice intended, as that of "the northern English small holder". But its rhythm did give a certain gangling grace"[3].

At that time I did not know how Spann, in a very English way, had wandered accidentally into public administration as a discipline:

> "I got into the Public Administration game by accident, not because my heart and soul were in it from the beginning. ... I am told one often learns to love a wife married initially from motives of convenience. If I cannot quite say that, I have found her tolerable to live with, and from time to time rewarding"[4].

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3 *Loc cit.*

4 R N Spann, "Understanding Public Administration: Reflections on an Academic Obituary - Alas, Poor Yorick" in (1981) 40 *Australian Journal of Public Administration* 233 at 236.

Spann repeatedly insisted on the importance of finding out how federal public administration actually *worked*. He was shocked at the almost complete lack of interest which had been displayed, including by himself, to that time in the subject of administrative law.

> "When I joined the Administrative Review Council ... I had the vaguest knowledge of its work, but was suddenly made aware of a movement with considerable potentiality, though it may also fall flat on its face. A good deal is now going on, including much research, but it is left almost wholly to lawyers. Yet there are many public policy and public administration questions to be answered - which kinds of issues are most readily reviewable, how far and fast can one move into the realm of review of policy, how might a unified system of tribunals best retain its flexibility, develop new investigatory procedures, not become dominated by the court-like methods sometimes necessary, how to solve the many problems of public access. ... On these questions the books are (in my experience) almost useless, the administrative law books and the public administration and policy books. I have learned more from a few interviews with present and former members of the administrative tribunals than from all the literature. Who is supposed to be doing this kind of work"[5]"

Spann was rather critical of too much involvement of lawyers in administrative review. He later wrote:

> "I deplored in a recent paper ... that we have been content to leave Administrative Law to the lawyers, with the consequence that the literature on this

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5 R N Spann, "Fashions and Fantasies in Public Administration" (1981) 40 *Australian Journal of Public Administration* 12 at 23.

> subject is almost wholly useless in answering any of the complex problems now arising at the frontiers of administration and law"[6].

You will understand why Spann was such a stimulating and useful member of the Administrative Review Council.

Although the work of the Council, and the reforms of administrative law which it introduced, were concerned with federal administration, most of the issues with which Dick Spann and I grappled in the ARC were of relevance also to public administration in New South Wales. It is now 20 years exactly since the *Administrative Appeals Tribunal Act* of the Commonwealth came into force, establishing the Federal AAT and the ARC. Proposals are now under consideration for the establishment of a new system of administrative review in New South Wales. It is therefore timely to look back at the ARC, to remember those remarkable days of administrative law change and to review some of the basic questions that remain, 20 years on.

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6 R N Spann, "Understanding Public Administration", above n 4, at 238.

TWENTY YEARS AGO

The year 1976 was an exciting one for administrative law in Australia. Mr F G Brennan QC, a part-time Member of the Law Reform Commission, became a Federal Judge and the first President of the new Administrative Appeals Tribunal (AAT). He assumed the office of Chairman of the Administrative Review Council. So we began a professional association which has lately been renewed in the High Court of Australia.

The Gorton, McMahon and Whitlam governments had begun the moves towards securing the enactment of the mosaic of legislation which would truly revolutionise administrative law at the federal level in Australia. The advent of the Fraser government brought to the office of Federal Attorney-General a lawyer of great capacity, Mr Robert Ellicott QC. Methodically, he set about completing the grand mosaic. The AAT legislation was enacted. So was the legislation to create the office of the Commonwealth Ombudsman[7]. A remarkable measure to reform, simplify and express the law on judicial review in federal jurisdiction was enacted[8]. Freedom of information legislation followed[9].

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7 *Commonwealth Ombudsman Act* 1976 (Cth).

8 *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

9 *Freedom of Information Act* 1982 (Cth).

It is difficult to convey the excitement of that time as the ARC met, monthly, under the guidance of its able chairman, the stimulus of an ardent reforming minister, a co-operative Parliament and the energetic urgings of two notable officers of the Commonwealth who deserve renewed acknowledgment: Mr (now Professor) Lindsay Curtis (then First Assistant Secretary of the Attorney-General's Department) and Dr Graham Taylor, now of the Bar in Wellington, New Zealand, (who was the first Director of Research of the ARC).

They were lively meetings which pioneered these reforms and steered the AAT into its new, constantly enlarging, domain. The history of that time should be written, perhaps by Professor Curtis, because the adoption of such a radical and original enterprise of law reform is not an everyday feature of Australian legal history.

The late Laurie Daniels, departmental head, who, often diffident, was, when it mattered, a strong supporter of moves to make federal administration more accountable to the citizens it served. The formidable Roger Gyles QC, never diffident in a fight with administrators when they sought undeserved exemption from the new regime. Sir Frederick Deer, who brought a wealth of business and commercial experience to bear on our deliberations. Sir Clarrie Harders, Secretary of the Attorney-General's Department, like so many South Australians, with a hint of Germanic reformist zeal never far from the surface. Mr Des

Linehan, Commissioner of the Public Service Board, who gave wise counsel concerning the many potential problems of industrial relations and implementation which arose as the new reforms were introduced. Mr Geoffrey Kolts QC, soon to be First Parliamentary Counsel of the Commonwealth, who applied his razor sharp and mathematical mind to the many problems of legislative drafting that came up in those days. Not enough social scientists - and too many lawyers- for Dick Spann's taste. But great ability and intelligence.

The resulting system of review tribunals is said to be the most "comprehensive in the world, and is used by more than twenty thousand people a year. The reviewing tribunal can change or overturn the original decision."[10] Whether this claim of global primacy is strictly accurate or not, certainly this much can be said about the Australian AAT. It is new. It is part of a larger system of administrative reform, designed to render officials accountable to the people in different and often complementary ways. And it involves a national, independent tribunal, having jurisdiction throughout a continent. In most cases it may substitute its decision of the "correct" or "preferable" decision[11]

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10 Administrative Review Council, *Review of Commonwealth Merits Review Tribunals*, Discussion Paper - Summary of Main Issues, p 2.

11 *Re Becker and Minister for Immigration and Ethnic* Affairs (1977) 1 ALD 158 at 162; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589;

Footnote continues

for that of the primary official, even if it be an elected Minister.[12] Most importantly, the new Tribunal, where essential to its decision, must conduct a review of broad policy issues emanating from the Minister or the highest officials of the public service.

These were remarkable innovations when they were enacted. They came into force against the background of an inherited approach to administrative law which was largely undeveloped because of an English conception that the officers of government, like the judiciary and the standing army, should be kept few in number, elite in capacity and modest in power.[13] It took a long time for the theory and the law to catch up with the reality of modern administration. In the field of administrative accountability, that reality included the rapid growth of the administrative state, particularly after the second world war; the decline in the acceptance of effective ministerial responsibility for casual acts of administrative wrong-doing; the growth of a large measure of political autonomy on the part of administrators[14]

Denn v Midland Brick Co Pty Ltd (1985) 157 CLR 398 at 419.

12 *Drake v Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634, 644 (per Brennan J).

13 A Dicey, *Introduction to the Study of Law of the Law of the Constitution*, 1885 (10th Ed). 1959.

14 Law Reform Commission of Canada, *Towards a Modern Federal Administrative Law*, Consultation Paper, 1987, 6-8.

and the perception by reformers from within the service of the need to make the federal system of public administration more efficient by making it more accountable[15].

It is instructive to contrast the inaugural lecture of that countryman of Spann, Professor William Wade at the University of Oxford in 1962 with his recent survey of the state of administrative law in England. In order to see where we are going, we must understand where we have come from. In 1962, Professor Wade said of the English scene, not then very different from that of Australia:

> "the vast powers of modern government had no place in Dicey's scheme of things, and he felt little concern with the great problem as we now see it: how far is power to be controlled by law?"[16]

In the latest preface to the current edition of his seminal book on administrative law, Sir William Wade (as he has now become) remarks that it:

> "began life thirty three years ago as a slim volume of fewer than three hundred pages. Its growth through seven editions reflects the development of what is almost a new subject, rich now in principle

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15 P Wilenski, Chairman of the Public Service Board, cited Administrative Review Council, *8th Annual Report*, 1983-4, 5.

16 H W R Wade, "Law, Opinion and Administration" (1962) 78 LQR 188, 189.

> and detail resulting from the work of adventurous judges and of a less adventurous but, nevertheless, supportive Parliament. Together they have established high standards of administrative justice, to such an extent that the defects are mainly those of an elaborate system - procedural complexity, cost and delay of litigation and the strain on limited judicial resources ... On balance, the picture has become brighter with each successive edition."[17]

Translated to Australia and the federal sphere, this picture can be adjusted by acknowledging that it is the Parliament, and not adventurous judges, that has revolutionised the landscape. It is the Parliament that created the national AAT with its unique jurisdiction. It is the Parliament that, at least until recently, has regularly enlarged that jurisdiction by bringing within its fold old tribunals and by conferring on it new functions. It is the Parliament in the federal sphere, that reformed the system of judicial review, building on innovations of the judges but adding to them an important facility to work the system which the judges had held back from providing.[18] I refer to the right to the reasons from administrative officials which the House of Lords in England has now edged towards upholding as a requirement of

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17 H W R Wade cited in Lord Woolf of Barnes, "The Importance of the Principles of Judicial Review", unpublished address in Hong Kong, 1996, 4.

18 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 reversing *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 477 (CA).

the common law[19] but which the High Court of Australia denied[20]. It is the Parliament that created a national Ombudsman. It is the Parliament that established national Freedom of Information legislation that still eludes national public administration in Britain. The new federal administrative law in Australia is overwhelmingly the creation of the Australian Parliament.

Justice Frankfurter of the United States Supreme Court described what he saw as "profound new forces call[ing] for ... fresh adaptations of old experience"[21]. It is a remarkable thing, and I believe a source of legitimate satisfaction in Australia, that the federal Parliament responded so strongly to the calls for reform in the field of administrative law. It recognised the large growth of governmental functions and powers[22]. It reflected the

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19 *Reg v Secretary of State for the Home Department; ex parte Doody* [1994] 1 AC 531; [1993] 3 WLR 154; [1993] 3 All ER 92 (HL).

20 *Osmond* (1986) 159 CLR 656.

21 F Frankfurter "The Task of Administrative Law" 75 *Uni Pa L Rev* 615 (1927) at 617. See also M C Harris, "There's a New Tribunal Now" - Review of the Merits and the General Administrative Appeal Tribunal Model in M Harris and V Waye, *Australian Studies in Law - Administrative Law*, Federation, 1991, 188 at 193.

22 A F Mason "The Increasing Importance of Judicial Review of Administrative Action", unpublished address to Administrative Law Section, Law Institute of Victoria, 9 June 1994, 16 (hereafter Mason, "Increasing Importance"). See also G L Peiris, "The Administrative

Footnote continues

complexity of modern administration and the need to make it more transparent and accountable[23]. The importance of the achievement of such a radical package of reform, through the legislation of successive Parliaments, is that it renders such reforms more likely to endure because they enjoy the legitimacy of democratic enactment and require democratic enactment to withdraw them. After twenty years, it can be said, with confidence, that there will be no dismantling by Federal Parliament of the component parts of the new federal administrative law in Australia. The early and potent opposition within the bureaucracy[24] and the later strident and vigorous criticism from within government[25] are, at least overtly, now echoes of the past. They will doubtless be repeated in different ways in the future. But the basic system remains. It seems set to continue, although the pieces of the jigsaw may be moved around. Most Australian administrators and lawyers have known no other system of federal administrative law. Few now remain who knew the old days well enough to yearn for their return.

Appeals Tribunal of Australia: The First Decade" (1986) *6 Legal Studies*, 303.

23 A F Mason "Administrative Review - The Experience of the First Twelve Years" (1989) *18 Fed L Rev*, 122, 128 (hereafter Mason, "Twelve Years").

24 W Cole, "Responsible Government and the Public Service" in F Weller and D Jaensch (Eds), *Responsible Government in Australia*, 168, 175-6. See also Mason, "Increasing Importance", 4.

25 Sen Peter Walsh cited R Tomasic, "Administrative Law Reform - Who Benefits?" (1987) 12 *LSB* 262, 263.

No counter reformation having ensued, the AAT and the other component parts of administrative law reform continued to receive external and internal scrutiny from fascinated observers. The review of the system has been continuous and ongoing, primarily in the work of the ARC. The Australian Law Reform Commission, in conjunction with the ARC has lately critically examined the *Freedom of Information Act*[26]. More generally, the ARC has issued a discussion paper[27] and then a report[28] containing a review of federal tribunals engaged in decisions on the merits. If we want to see the broad outlines of the future of the AAT, and of administrative law in Australia, beyond mere hunch and idiosyncratic predictions, the safe course is to take Spann's advice - examine the past and see precisely how the present is operating.

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26 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act* 1982, ALRC 77, ARC 40, 1995.

27 Administrative Review Council, Discussion Paper, above n 5.

28 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, ARC 39, 1995.

ABIDING BASIC QUESTIONS

Many of the fundamental questions which were identified at the birth of the AAT remain for consideration today. True, there has been twenty years of experience and thousands of decisions. But some of the initial quandaries are still there. They continue to agitate the commentators. They should continue to have the attention of Members of the Tribunal and all those concerned about improved administrative decisions.

There seems little reason to doubt that the Federal AAT has continued to exhibit its early expertise in identifying applicable law, applying it accurately and ensuring that the rule of law is effectively brought into administrative decisions. This is a most important legacy of the original approach, introduced in the AAT by its first President, Justice Brennan. It was not an unreasonable approach. No-one is above the law. If it were left to the courts, at the behest of individual citizens, to enforce the law in the nooks and crannies of public administration, many with complaints would be bound to be disappointed. Sir Anthony Mason has reminded us that, in part, the creation of the AAT was a response to the dissatisfaction of the community and the Parliament with the courts and their ability or lack of it

(including by a reformed judicial review process) to bring the rule of law to the level primary decision-makers.[29]

One of the fundamental problems in judicial review has been the resistance of the courts to the re-examination of the factual finding of the primary decision-maker. Attempts to dress these up and present them as illustrating errors of law have received unsympathetic responses both in the High Court of Australia[30] and in other Australian appellate courts.[31]

Because many injustices (and even mistaken or perverse applications of the law) reside in erroneous fact finding, a novel solution had to be found if such injustices were to be addressed in a practical way in the case of administrative decisions. There had to be a significant enlargement of judicial review or the expansion of merits review by a non-judicial body, independent but within the executive government. From the outset, one of the concerns about the involvement of judges in the AAT, a tribunal existing outside the judicial branch of government, was whether that involvement in the making of decision of a

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29 Mason, Increasing Importance, above n 22, 1.

30 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Wu & Ors v Minister for Immigration and Ethnic Affairs*, (1996) 70 ALJR 568 (HC).

31 Eg *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 (CA).

controversial and sometimes even political character, would damage the judicial office[32].

Proposals are now being made which, if accepted, could affect the constitution of the AAT and its collective legal skills. The ARC has recommended, in effect, a "widening" of the range of skills and experience which should be enjoyed by AAT Members.[33] I suspect that Spann would have liked this. But it has provoked a sharp response from Mr Robert Todd, formerly a Deputy President of the AAT.[34] In commenting on the ARC's observation about "general concern that some Tribunal proceedings are too legalistic" and that the skills required are "not exclusively co-related with formal legal qualifications",[35] Mr Todd pulls no punches:

> "The AAT did not get to where it did by having as presiding members people with no legal training. I marvel when I hear people in high places speak of the AAT as if its success has been in spite of, not because of, its legal members. Especially in the early years of the AAT, there was almost total absence of judicial decisions over large areas ... The AAT had to work out carefully the construction of the relevant legislation and try to put it into a

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32 Kirby (1981) 12 *Fed L Rev* at 151.

33 ARC 39, Rec 32.

34 R Todd "The Structure of the Commonwealth Merits Review Tribunal System" (1995) 7 *AIAL Forum*, 33.

35 ARC 39, 72-73.

> coherent framework ..."[36] Could this have been done by barefoot lawyers?"

By reference to a number of areas in which, he claims, lawyers have "transformed administration" - notably in decisions in social security, veterans' entitlements and freedom of information - Mr Todd asks the question whether the poor and disabled, the veterans and those who believe in open government "want the lawyers outed"?[37] He suggests that short term appointments to the AAT for periods of three to five years will effectively exclude lawyers with an aspiration to an independent career. Or worse still, he hints, it might diminish the independence of the AAT by creating a tension between the personal career of the AAT Member, worried about prospects of re-appointment (on the one hand), and the giving of decisions inimical to powerful interests in the administration (on the other). Alas, there are unhappy and recent examples in Australia illustrating what happens to members of tribunals (and even courts) who for various reasons fall out of favour with the political government of the day.[38]

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36 Todd, above in 34, 35.

37 *Ibid*, 36.

38 M D Kirby, The Abolition of Courts and Non-Re-appointment of Judicial Officers in Australia" (1995) 12 *Aust Bar Rev* 181.

This, then, is still an important issue to consider. It is one we examined long and hard on the ARC. The involvement of judges in an executive government tribunal, if it be constitutionally permissible, brings the advantages of independence of mind on the part of decision-makers, an example to non judges, resolution and courage in the performance of the duties of office as well as illustrations of good lawyering. The involvement of law graduates brings people who have received some training identifying issues in a dispute, marshalling the relevant legal and other material, improving their writing skills and appreciating the necessity of making decisions without delay. But the use of lawyers, as Spann repeatedly suggested, tends to have disadvantages which, by now, are very often expressed sometimes by reference to a stereotype of what lawyers are said to be like:

* It tends to import the lawyer's alleged concern with form rather than substance. This concern has tended to plague modern administrative law. In the understandable anxiety to uphold procedural fairness, it has often resulted in a failure to consider the substance that lies behind the procedural defaults;[39]

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39 A F Mason, "Administrative Law - Form Versus Substance", unpublished address to the 1995 Administrative Law Forum, Australian Institute of Administrative Law, 27 April 1995 (hereafter "Mason - Substance").

* It tends to emphasise and encourage the adversarial mode of resolving problems. Most administrators, the subject of independent review, have neither the powers nor the inclination to proceed by such formal adversarial techniques. Their collection of information, as the basis for their decisions, is typically much more informal. It is more akin to the inquisitorial procedures of the civil law tradition which not a few advocates in this country urge is more appropriate for the AAT.[40] So far, the suggested modifications of the current approach are relatively minor, such as the recommendation that the AAT should have the power to obtain information additional to that which the parties provide. This could be done by affording the power to require an agency to provide, and notify, untendered information for use by the Tribunal during a review.[41] The basic disharmony between differing modes of securing information resides in a dichotomy between the primary and the review decision. Taken to its full logic this could encourage a tendency to legalise and judicialise the primary decision itself. That tendency would not necessarily lead

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40 Harris, above n 21, 197, 203. Obviously, this technique requires different training and imposes additional obligations on a tribunal member.

41 ARC 39, 169 (Rec 13).

to an improvement in the quality of administrative decisions. It would certainly add to cost and delay;

* The primary decision-maker continues to have available a much wider range of material, and undocumented experience than a tribunal, even one with the flexible procedures and sensible approach to the law of evidence of the AAT. The problem of the differences between the evidentiary foundation of the primary decision and that of the Tribunal was called to notice in the earliest days of the AAT.[42] It has not gone away; because it cannot. It is inherent in the difference between the decision of an administrator and the procedures of a tribunal. Perhaps there is no answer to this difference except to say that where a decision is disputed before the AAT, it typically presents, in microcosm, a matter for decision that is not routine. One which may be more serious or controversial than the ordinary and may warrant a more painstaking and elaborated process of decision-making. The elaborated process may come to influence, by example, precedent or sanction if ignored, the primary decisions which are later made. The value of precedents in clarifying the law where it requires but one "correct" decision cannot be denied,

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42 Kirby (1981) 12 *Fed L Rev* at 147; Peiris, above n 22, 321; Mason, Increasing Importance, above n 22, 12.

whether in administration or anywhere else. But adherence to precedents which are no more than factual determinations is not necessarily always a good development. Lawyers desire precedents because they afford a measure of predicability and certainty which clients, seeking advice, look for. But "precedent as an attitude of mind" may not necessarily always be a good thing in public administration. Sir Anthony Mason has commented, in words which Dick Spann could have written, that it "can lead to a pre-occupation with abiding by rules and a stultification of a more flexible approach to decision-making, within the law.[43] He went on:

> "It is possible that the impact of judicial review and merits review by the AAT is an administrative version of what is called "defensive medicine". No doubt some critics of the existing system would say that is the position and that too much attention is directed to compliance with legal requirements to the detriment of substantive decision-making. The consequences of such an approach may be more disadvantageous to administrative decision-making than to curial decision-making. As with the claims made about defensive medicine, claims of this kind do not deny that the review system has advantages but assert that the detriments outweigh the advantages."[44];

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43 Mason, Substance, 10. This progress may be affected by a tendency (likely to be accelerated by computerisation and intelligent systems applied to public administration) away from discretion towards detailed rules.

44 *Ibid*, 11.

* Analyses of decisions of the AAT have demonstrated (as is probably true of every court and tribunal that ever existed) that personal attitudes and inclinations of the decision-maker can affect decisions in a generally predictable way. These considerations sometimes lead to differences in outcomes which cannot otherwise be explained by reference to any high principle of legal understanding or policy exposition, still less administrative efficiency or attainment of the "correct" or "preferable" decision. Personal attitudes of decision-makers find their reflection in a tribunal, as much as they do at the bureaucrat's desk.[45] But a significant difference is that a tribunal such as the AAT must expound its reasons at the time of its decision. Exposed differences and inconsistencies can then be the subject of comment. Where appropriate, they can be a stimulus to reform of the law governing relevant procedures and policy. Unless they can be effectively challenged, the considerations affecting the administrator might be quite unknown;

* The cost of tribunal decision-making continues to represent a major concern resulting from the great expansion of the AAT's jurisdiction. Doubtless, it is this consideration

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45 Peiris, above n 22, 312-313.

which lies behind the regrowth of specialised tribunals and many of the recommendations in the ARC's recent review of federal tribunals. A number of the recommendations are addressed to improving agency decision-making in the hope, no doubt, of avoiding, in some cases at least, the necessity of AAT review.[46] The proposed expansion of the use of "circuit" panels and of telephone and video conferences[47] was designed to lessen the cost of what is inevitably an expensive, time consuming and labor-intensive means of resolving conflict.[48] Mr Peter Walsh, when a Senator and Minister in the Hawke Government, was most critical of the cost of the new administrative law which was said to be $32 million a year.[49] That was ten years ago. Even if account is taken for the efficiency gains, improved accountability, the advantages of political legitimacy and other positive features of the system, it is inescapably a costly one. At a time when the courts are themselves exploring ways of diverting some disputes to non curial resolution, and when governments are

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46 ARC 39, Recs, 71-74.

47 *Ibid*, Recs 55, 60.

48 Mason, Twelve Years, 131; Harris, above n 21, 197.

49 P Walsh, 'Equities and Inequities in Administrative Law' in Administrative Law: Retrospect and Prospect" (1989) 66 *Canberra Bulletin Public Admin* at 29.

addressing reduction of the budget deficit and containing the costs of public expenditure, it seems likely that attention to reducing the costs of merits review of administrative decisions in federal tribunals will be increased in the years ahead. Calls for the containment of the AAT's jurisdiction, for the enhancement of alternative review models and improved efficiency in the AAT's performance seem likely to become more insistent.

CONCLUSION: AUDITING THE REFORMS

One lesson I certainly learned in those far away days when I sat at the table of the ARC and in the Law Reform Commission was the lesson constantly taught by Professor Spann. It was this. Judging the need for reform, and evaluating the options offered to secure reform, requires more than hunch and guesswork. All sound law and policy in public administration in Australia should be based, so far as possible, on sound empirical data.

For twenty years the observers of the AAT, and of administrative law reforms generally in Australia, have largely been content with words. Praise where it was clearly due for improved conformity to the law. The "trickle down" impact of decisions

of the AAT on the work of primary decision-makers[50] Improved reasoned and individual justice to the citizen challenging the power of the State and its officials.

Words are not enough. Different voices are now raised. Critics suggest that the allegedly legalistic and adversarial mode of the AAT, as they describe it, and the delays and exorbitant costs involved are such that

> "... the only party who has any long term benefit is the respondent, namely the bureaucracy, who by virtue of their staff resources, money and limitless time can simply outlast and outwit any member of the community who goes there with a serious policy issue to raise.[51]

Whether this is a fair comment on the current operations of the Federal AAT as a whole can only accurately be judged by empirical research and by close consultation with the opinions of those, in and outside the bureaucracy, who have used the AAT, including representative consumer interest groups. The need for a thorough audit of this kind has been urged by several writers.[52] More recently it has been suggested, even by sympathetic

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50 P Wilenski and D Volker, cited in Tomasic, above n 20, 263-264.

51 H Selby, "*Ombudsman Inc: A Bullish Stock with a Bare Performance*", ANU Conference, cited Tomasic, 264.

52 *Loc cit.*

defenders of the new administrative law. Sir Anthony Mason, in a series of speeches in 1994 and 1995 confessed to a doubt that a "significant change in the administrative culture" and "an improvement in the quality of administrative decision-making" had actually been achieved following the establishment of the AAT.[53] He was willing to accept greater understanding of legal issues, compliance with the law and provision of structured reasons. But he doubted

> "... that we have succeeded in bringing into existence a new and enduring administrative culture. I suspect that, at bottom, the legal, political and administrative cultures remain largely separate and distinct. The general cynicism of the law and of lawyers suggest that this may be so. My suspicion may be unduly pessimistic and I hope that it is unfounded."[54]

It is clearly important that, in the third decade of the Federal AAT, that a more concerted and coherent attempt should be made to measure the effectiveness of the tribunal, and not only in terms of financial cost. The time has come for the assumptions to be questioned and the consumers, as well as the recipients, of decisions to be heard. The ultimate justification of the AAT and other like tribunals and bodies, federal and state, is only, as Justice Paul Finn has suggested, as it contributes to the

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53 Mason, Substance, above n 39, 17.

54 *Ibid*, 18.

good government of the people of Australia from whom all power in such matters ultimately flows[55]. That includes the people affected by decisions. It also includes those involved in analogous disputes. On Budget afternoon it is also apt to say that it includes taxpayers who foot the bill.

People like me who have confidence that this remarkable Australian experiment in administrative law reform can survive empirical analysis, and even critical scrutiny, will pay close attention to the cautionary advice of Sir Anthony Mason, one of the founders of the system now in place writing in the Spann mode:

> "Perhaps, when the system was established, we did not put in place adequate institutional bases for building bridgeheads between lawyers and administrators. Certainly the ARC was given a role and an important one which it has effectively discharged. But it may be that the magnitude and diversity of the problems were not fully recognised."[56]

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55 P Finn, "The Abuse of Public Power in Australia" (1994) 5 *Public Law Review* at 43.

56 Mason, Substance, 19. Professor Mark Aaronson, in a comment on this paper, has questioned whether the imperfect impact of the AAT on the federal administrative culture is a matter for regret given that decision-making in each culture is institutionally and functionally different. But if one views public administration as a unit, and cases taken on appeal to the AAT as no more than illustrations, the desirability of some degree of symbiosis seems arguable.

This observation will not properly be met by generalities but only by a thorough, scientific and empirical study of the way the AAT and other tribunals, Federal and State, operate and how they have delivered the product of administrative justice on the merits. Conducting such a study should be a major challenge before the AAT and the ARC in the coming years. Critics have suggested that governmental agencies will not allow open public critical evaluation by impact studies of themselves and, by inference, of the AAT upon them.[57] But at a time in Australia's history when most institutions, high and low, are being re-evaluated, the AAT should be no exception.

The process of administrative law reform at the federal level in Australia has not finished. It has only just begun. And the spread of its example to the States and Territories of Australia still has far to go.

It is still an exciting time to be engaged in public administration and administrative law in this country. Just think of what has been achieved in the past 20 years. The last reformer to achieve such a thorough, radical and coherent change was Napoleon - and his system is still basically in place, with all of its strengths[58]

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57 Tomasic, above n 25, 262.

58 See J C S Burchett, "Administrative Law. The French Experience" (1995) 69 ALJ 977; D Rowland, "lessons and insights from the procedure of the Conseil d'Etat in

Footnote continues

and also its weaknesses[59]. Administrative law and public administration generally have never been a haven for those who want a quiet life. The great struggle between power and discretion (on the one hand) and law and individual justice (on the other) goes on. Dick Spann made a notable contribution in Australia not only to public administration but also to administrative law, of which he was often a critic. I am proud that he was my friend.

France", unpublished paper for the AIAL Forum, Sydney, April 1996.

59 See *Phocas v France*, decision of the European Court of Human Rights, unreported, 23 April 1996, noted in *Release by the Court*, 23-25 April 1996. Mr Phocas' dispute with the administration began with the adoption of a road development scheme in May 1960. He applied for a planning consent in March 1965. There followed an astonishing saga of disputes, appeals to the Montpellier Administrative Court (on 4 occasions) and eventually to the Conseil d'Etat o France. The application to the Conseil was made on 11 August 1986. It did not deliver its judgment (against Mr Phocas) until 25 May 1990. The European Court of Human Rights found no violation of Article 6 §1 (by five judges to four) apparently on the ground that Mr Phocas had not made any special effort to speed up the proceedings. This case shows the weakness, noted by Mr Rowland, above n 58, of the inquisitorial system. It tends to be institution-driven rather than client-driven.