admin reform again

Commenting on the post-Socialist enforcement of strict working times, a labour ministry spokesman has said: 'It really makes me laugh to see so many people I've never seen before in the morning'.

'Grumpy Spaniards', The *Australian*, 27 January 1983

labour pains. The advent of the Socialist Government in Spain produced a number of reforms including insistence that workers arrive on time viz 8.30 a.m. It had become an accepted tradition during the Franco period for public servants to arrive after 9.00 a.m. Reports suggest that irate workers had smashed two new clocks installed in the Ministry of Industry in Madrid. Numerous arid jokes have enlivened the beginning of the new year in Spain.

In Australia, the advent of the Labor Government also heralds changes. The law and justice policy announced by Federal Attorney-General Evans includes a section on administrative law. It acknowledges important reforms achieved during the 1970's but promises more to come, including:

- expansion of the jurisdiction of the Administrative Appeal Tribunal;
- expansion of the role of the Federal Court under the Administrative Decisions (Judicial Review) Act;
- enhancement of the functions of the Ombudsman in accordance with the recommendations of the Administrative Review Council;
- review of the recommendations of the ARC which 'has established to date an excellent record of sound advice on necessary reforms in legislation and procedures'. The ALP Government 'will be closely guided by the ARC's recommendations in continuing to improve the system of administrative law; and
- rewrite the Freedom of Information Act 1982 to implement fully the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs not adopted by the outgoing Coalition Government.

The incoming Labor Government has already drawn heavily on the advice of Dr Peter Wilenski, a past Permanent Head in the Australian Public Service and the man who conducted a review of the NSW administration for Premier Neville Wran, Q.C. Dr Wilenski as reported in an article 'Public Servants Size up the ALP's Policies' (*The Australian*, 15 Feburary 1983, 11), questions the assumption that public servants are 'not political':

> 'This has been untrue for years. The Australian Public Service has always been politicised in two ways – first it is very involved in political decision-making and secondly, permanent heads are appointed with political considerations in mind – by the Government of the day. These factors give the lie to the picture of the impartial public servant'.

reid report. At the end of January 1983, before the Federal Election was called, the report of the Reid Committee on review of Federal administration was delivered to the then Prime Minister, Mr Fraser. The report of 240 pages was concluded in a period of four months: *The Review of Commonwealth Administration*, 1983. Although the enquiry under the chairmanship of leading Sydney businessman Mr J.B. Reid was set up following the release of the Woodward Royal Commission into the meat industry and other scandals, the report concentrated on broad issues of general administrative policy. Among recommendations made were:

- A strong argument that Ministers should remain responsible for the administration of their department on the basis that 'no clear dividing line can be drawn between policy and administration';
- Elaboration of the principle of ministerial responsibility by the clear provision of courses of ministerial accountability, short of resignation;

- Recommendation for the provision of permanent housing for Ministers in Canberra and rationalised Parliament sitting times to allow Ministers to spend more time with their departments;
- Rotation of Permanent Heads who should be moved every five to seven years to obtain a fresh approach to the job and greater efforts to bring outsiders to the top levels of the Public Service; and
- A call for bipartisan support for a constitutional referendum to allow the appointment of one or more junior Ministers to assist senior Ministers in running a busy department. At present it is thought this would not be constitutionally permissible in Australia.

Although the outgoing Prime Minister, Mr Fraser had promised to respond to the report's thirty-two recommendations promptly, the intervention of the Federal Election and the change of Government makes the fate of the recommendations less certain. Commenting at the time on the report, Senator Gareth Evans, now Attorney-General, declared that it was 'weak and superficial, erratic in its analysis and eccentric in its conclusions'. He said that only a handful of issues raised in the report, such as changes to Parliamentary sitting hours, demanded serious consideration. Conceding that the authors were given an 'impossible task', Senator Evans suggested that the authors 'should never have accepted the job'. Singled out for criticism was the suggestion that the Public Service should 'be made more flexible' but failure of the report to make 'important recommendations in this area'.

foi in the news. Freedom of information continues to be in the news both in Australia and New Zealand. The new Federal Government in Australia has promised to revise the 1982 FOI Act to adopt the Senate Committee's suggestions not already adopted by the outgoing Government. One report attributed to Senator Evans is an intention to act quickly because of the suggested decline of enthusiasm for FOI amongst politicans after they acquire Government. Meanwhile the *Canberra Times* since the FOI Act came into force, has continued its enthusiastic interest in the operation of the Act. Leading articles by intrepid FOI watcher Jack Waterford have recounted numerous efforts being made by the *Canberra Times* to follow and enforce the review provisions of the Australian Federal FOI Act.

- As reported in the *Canberra Times* (12 February 1983) Mr Waterford brought proceedings in the Federal Court of Australia for an order to review a refusal to provide access to documents under the FOI Act. The documents requested were Social Security manuals. The representative of the department urged that Mr Waterford would have to go through the processes of review provided by the FOI Act, namely in the AAT. When last reported, the case was adjourned.
- As reported in the same journal (23 January 1983, 4), Mr Waterford was also having trouble in securing documentation about himself from the Australian Federal Police. The refusal of documents has led to an 'internal appeal'.
- In the midst of the Federal election, the then Minister for the Capital Territory, Mr Michael Hodgman, M.P. issued a certificate under the FOI Act that publication of Department of Capital Territory documents relating to Anzac Day March laws would be contrary to the public interest. The paper was filed as part of the department's answer to an appeal lodged in the AAT against the department's refusal to give documents about the workings of the ACT

Public Assemblies Ordinance. (See *Canberra Times*, 25 February 1983, 1). The documents had also been sought by a reporter of the *Canberra Times*. Clearly, there is more of this to come.

nz law. In New Zealand the Official Information Act has now passed and looks like coming into force in July 1983. Editorials constantly caution against too much optimism. The *New Zealand Herald* (22 February 1983) suggests that 'secretive instincts will persist'. Quoting the Chief NZ Ombudsman, Mr Laking, the paper notes 'resistance and even hostility' to the new order, in the same way as occurred when the Ombudsman was first appointed in NZ – a reform copied throughout the English-speaking world. The *Auckland Star* (21 February 1983) quotes the chairman of the proposed Information Authority, Sir Alan Danks, who also chaired the Committee on Official Information, out of which the law derived, as saying 'once one says everything should be considered open, then the system will be involved in how to protect information. The system can become defensive, the reform tends to be counterproductive'.

Different views have been expressed about the NZ Act. These range from 'enthusiasm' on the part of the Public Service reported by Mr Paul East, chairman of the select committee which studied the Act, to fear of 'defensiveness' and even resistance as reported by the Chief Ombudsman, Mr Laking. The President of the NZ Public Service Association, Mr David Thorp described the legislation as 'an even less adequate instrument for reform than the timid bill originally introduced into Parliament'. But he did concede that legislation shifted the presumption in favour of openness and repealed the 'obnoxious' Official Secrets Act 1951 (NZ). The NZ Justice Minister, Mr McLay had no doubts. It was his view that the legislation was 'probably the most significant' he had introduced into Parliament since he became a Minister. Mr McLay supported the provision in the NZ legislation that gives the Minister the power to override the recommendation of the Ombudsman that documents should be disclosed. Acknowledging that it had been argued that the vesting of final power of decision should be given to the courts or tribunals (as in the United States and Australia), Mr McLay said that it was 'difficult to see' how the accountability of the executive would be increased by taking power away from it. However, he stressed that he would expect the Minister to resort to the procedure of overriding the Ombudsman 'only in very strong and exceptional circumstances. It is intended very much as a reserve power'. Time will tell how this critical provision is used.

Also during the past quarter it was announced that the PNG Minister of Justice had referred the questions of official secrets and freedom of information to the PNGLRC. So the new administrative law is spreading through the region.

aat again. The novel functions and powers of the Administrative Appeal Tribunal of Australia continue to be in the news over the past quarter. Amongst items to be reported:

- In Victoria, the Victorian Law Foundation has urged the establishment of an Administrative Tribunals Commission and a State Administrative Appeals Tribunal to oversee the 200-300 administrative tribunals that exist in Victoria. The Law Foundation report criticises the 'old boy' network and obscure procedures which 'riddled' Victorian administrative law. Chairmen and members of the Victorian tribunals are described as 'male, middle and older aged and middle-class'. Less than 3% of tribunal members being women. The influence of the Federal AAT and

ARC on proposals for Victorian reform is manifest.

- On 30 August 1982 the new Deputy Presidents of the AAT, Mr Allan Hall and Mr Robert Todd, delivered a paper in Perth WA on 'Action and Reaction' concerning the AAT. Conceding that the system is costly, the paper asks the price which 'a civilised society is prepared to pay for the resolution of disputes between governments and citizens'. It asserts that Australia has 'become a leader in the provision of external review of administrative decisions on the merits'. It illustrates the beneficial effects of external review with a number of examples including the improvement arising out of the jurisdiction to review ACT rates. It urges the value of referring to the AAT 'cases of peak difficulty and/or cases which are difficult to deal with satisfactorily simply by consideration of the written material'. Defending the 'constant criticism' of the AAT for having 'some of the hallmarks of the judicial process' no apology is offered. But reference is made to the innovations in procedures adopted by AAT members. Perhaps the most notable of these are the telephone conference and the preliminary hearing.

- In December 1982, Mr Sebastian Rubera submitted a thesis to the Department of Legal Studies in La Trobe University titled 'The Administrative Appeals Tribunal: A Square Peg in a Round Hole'. Mr Rubera is less convinced about the defence against 'legalism'. The adherence of the AAT to adversial procedures and a perceived 'movement away from its innovative inquisitorial features' is criticised as defeating the purpose of the legislation. A conclusion offered by Rubera? According to him the AAT is very much a 'square peg in a round hole'. However, he does concede 'there is evidence that its members are planing off the edges'.

- Finally, someone who should be able to write about the AAT, its first President, Mr Justice Brennan (now a Justice of the High Court of Australia) offered his view in a paper for the Supreme Court Judges' Conference in Canberra in 1983. The paper titled 'Review on the Merits: A New Frontier or Beyond the Pale?' offers a beginner's guide to origins, functions, context and philosophy of the new Federal administrative law in Australia. Extracted are some of the chief points in the leading judgments of the Federal Court during the six years history of the AAT. The problem of 'policy' decisions and Sir Zelman Cowen's question whether administrative law reform had not gone 'too far' are all tackled leading to the author's conclusion: 'The new Federal administrative law has not simplified administration. Nor is it intended to. Its great achievement to date has been to modify the anonymous activities of government so that they are more responsive to the needs of individuals'.

prosecuting crime

'The Magistrate condemned the fomenting of hatred – and in that he was right – but he condemned also the legitimate exercise of political rights – and in that he was wrong. Legitimate advocacy of change is no matter of aggravation affecting exercise of the sentencing discretion'.

Mr Justice Brennan, *Neal v The Queen* (1982) 56 ALJR 848, 857

dpp arrives. January 1983 saw the appointment of the first Director of Public Prosecutions of Victoria, Mr John Phillips, Q.C. The initiative to establish a DPP in Victoria was one of the first law reforms achieved by the Cain Government. It attracted much applause. The Melbourne