CHALLENGING TIMES FOR ADMINISTRATIVE LAW

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While they have certainly not marched to the beat of the same drum, public administration and administrative law have during the last quarter-century moved in parallel. The enhancement of administrative law remedies which took place in the early 1970s was a necessary response to the growth in government. As the capacity of government to affect individual interests increased, the organs of administrative law could be called upon to provide the individual with any necessary remedy.

It was inevitable within this milieu that a body such as the Australian Institute of Administrative Law would come into being to provide a forum for discussion of contemporary administrative law issues. For its part, the Administrative Review Council has done, and continues to do, valuable work in overseeing the institutions of administrative law and in giving the government of the day practical and independent advice about the operation of the system upon government administration. For the AIAL, however, the focus has been different. Its sole role has been to provide a clearing house for discussion of administrative law in public administration.

It is to be hoped that the AIAL will continue to do that. However, there is no doubt that public administration is undergoing watershed change and the challenge for administrative law will be to respond appropriately to the change. The process will make it necessary for us in the Institute to think beyond the past orthodoxy and to come to grips with a new definition of administrative law.

It is, therefore, an exciting time to become President of the Institute. I am looking forward to working with the other members of the Executive to ensure that the Institute remains at the forefront of change in administrative law.

What are some of the changes and challenges we are seeing in administrative law?

1. As a means of reducing the size of the public sector, governments are moving to competitive tendering and contracting both for the delivery of services to the government and the delivery of services to the community on behalf of the government. It will remain convenient for government to have services delivered in-house. But, in other cases, private sector suppliers will be contracted to deliver services to government and to deliver services on behalf of government. Immediately, this creates a problem for administrative law because the criterion of its operation has generally been the making of decisions under statutory authority or the undertaking of action by administrators. Delivery of service under contract has generally been beyond its ken.

   Administrative law will need to respond to this challenge by promoting the development of community service standards to go hand in hand with delivery of public services by private providers and, to

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the extent that the Constitution permits, by ensuring the extension of the jurisdiction of administrative review mechanisms to provide a forum for redress of community complaints.

Administrative law should also be extended to ensure that the tendering process itself is fair and that disappointed tenderers have an equal appeal mechanism open to them.[1]

2. Public sector industrial relations arrangements will align themselves more closely with arrangements in the private sector. This will mean even less of an influence of administrative law on public sector employment decisions than is presently the case. In personnel matters, an uneasy tension has always existed in the public sector between administrative law remedies and employment law remedies. That tension will be resolved in favour of the latter but, paradoxically, in measuring appropriate employment behaviour, employment law will continue to draw on administrative law concepts of procedural fairness and due process. The new shape of the public service employment framework will emerge more clearly after the release by the government in October 1996 of its discussion paper on the public service.

3. The emphasis on traditional administrative law we have seen in the high volume decision making agencies will become less important. Those agencies will continue to recruit their own in-house lawyers but the emphasis will be more on contract preparation and oversight, privacy protection and human and civic rights issues. We are likely indeed to see greater use of in-house lawyers across the public service at the expense of both the Attorney-General's Department and private sector firms.

4. Privacy protection will be extended from the public sector to the private sector, giving individuals some measure of comfort that their personal privacy will be protected whether their dealings are with a government agency or a private sector corporation. The Attorney-General has recently released a discussion paper upon the extension of privacy protection to the private sector.

5. Establishment of the legislative instruments register will lead to greater opportunity for administrative lawyers to have an input to government rule-making. While in Australia our system of responsible ministerial government inevitably provides less opportunity than exists in the USA to lobby the executive branch in relation to proposed rule-making, one can expect some measure of growth in administrative law activity as the new system of Commonwealth rule-making kicks into action.

6. The commercial undertakings of government will continue to be required to measure up to competitive neutrality principles. The expressed aim of this exercise will be to ensure a level playing field between government enterprises and their private sector competitors. However, once the transformation in the public sector enterprise has been completed, governments will inevitably ask the question why they should own an enterprise whose products or services can equally as well be provided by the private sector. Further sales of such enterprises can be expected. Government activity will contract to policy work and regulatory activity at the expense of service provision.

7. FOI has the potential to gain greater potency if the Commonwealth legislature to give effect to the recent ALRC/ARC report on the FOI Act. In recent years, FOI activity has stuttered as a result of the imposition of fees and charges and lack of publicity and interest. However, if the proposals for an FOI Commissioner are implemented and if, as a result, the community becomes more aware of the Act's availability to allow community access to government policy making, FOI could again kick into life.

For all of us the changing face of public administration will throw up new challenges in the years ahead. The capacity of the Institute to adapt will be the test of its maturity as an organisation.

Endnotes

1 See the author's paper at the AIAL 1996 Administrative Law Forum, 'Administrative Law - Can it Come to Grips with Tendering and Contracting by Public Sector Agencies?'.