- the penalty regime is intended to improve the standard of entry documentation: fraud or attempted fraud are dealt with under other provisions of the Customs Act and action under one set of provisions excludes action under the other;

- in the 6 months to 30 June 1990, whole or partial remission was granted in 91% of those cases for which remission was sought.

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A D M I N I S T R A T I V E L A W W A T C H

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Role of Secretaries and external review bodies

In the Public Service Commission's Occasional Paper entitled 'The Role of Secretaries of Departments in the APS', released in March 1990, the Secretary to the Department of Prime Minister and Cabinet, Mr Mike Codd, included an exhortation to heads of departments to co-operate with external review bodies. Mr Codd said that:

> 'Interaction with bodies such as the courts, the Administrative Appeals Tribunal (AAT) and the Ombudsman will depend to a considerable extent on the nature of the department's activities and will relate primarily to program administration, though policy issues can arise in some AAT or Ombudsman cases.
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> 'So far as the courts are concerned, although secretaries would rarely be involved in the actual processes of litigation, they do need to be aware of the potentially far reaching effect that individual cases can have on the administration of the department's programs and sometimes those of other departments. In such cases, secretaries must take personal responsibility and involve the Minister as appropriate. Similar considerations can apply in the AAT.
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> 'The more frequent contact is likely to be with the Ombudsman whose concern is with defects in administration. Where the Ombudsman is proposing to report in a way which reflects adversely on a department, there is an obligation that the secretary concerned be provided with an opportunity to comment on the draft report. At this stage, the secretary should take a personal interest and, if necessary, discuss the issues with the Ombudsman.
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> 'Just as in the case of the Auditor-General, there is potentially much to be gained from a fully cooperative and positive approach to the activities of the Ombudsman, and the secretary has a responsibility to set such a tone.'

Legitimate expectation and government policy

On 7 June 1990 the High Court handed down a judgment in the case of Haoucher v Minister for Immigration and Ethnic Affairs

(1990) 93 ALR 51 (see also 83 ALR 530; 92 ALR 93; Admin Review 14:94, 16:33-4) that set an important precedent for the role of Ministerial statements in giving rise to legitimate expectations.

Mr Haoucher, after being imprisoned on drug charges had a deportation order made against him. He sought review by the AAT of the deportation order, which recommended its revocation, but the Minister rejected that recommendation. Mr Haoucher then applied to the Federal Court on the ground that the Minister's failure to give him the opportunity to be heard before rejecting the AAT's recommendation amounted to a denial of natural justice. The trial judge concluded that the Minister had the discretion not to accept the AAT recommendation and that his exercise of it was not unreasonable. This conclusion was reaffirmed on appeal to the Full Court.

The High Court, in examining the case, addressed the doctrine of legitimate expectations and the effect of the Ministerial policy statement in 1983 which included the statement that an AAT recommendation would only be rejected 'in exceptional circumstances' and 'when strong evidence can be produced'. The Court pointed out that the proceedings before the Tribunal were instituted and determined in the context of a government policy which introduced a new dimension into the case, namely the claim of 'exceptional' circumstances and 'strong' evidence leading to rejection of the AAT recommendation. Mr Haoucher was entitled to know what circumstances were said to be exceptional and what the 'strong' evidence was and a chance to be heard in answer. As Justice Toohey pointed out, if Mr Haoucher were not given that opportunity the reference to the AAT was little more than an empty ritual and the policy statement mere rhetoric.

The appeal was allowed and the matter was remitted to the Minister to be dealt with according to the judgment of the Court.

Attorney-General for New South Wales v. Quin (7 June 1990) 93 ALR 1 arose out of the failure by the Attorney-General (NSW) to appoint Mr Quin to the newly created Local Court. Mr Quin had been a stipendiary magistrate of the Court of Petty Sessions but, unlike most of the other stipendary magistrates, was not appointed to the Local Court because of adverse comments made about him. He was not given a chance to answer those matters raised against him. Mr Quin sought judicial review of the decision not to appoint. In Macrae v Attorney-General (NSW) (1987) 9 NSWLR 268, that decision was declared void by the NSW Court of Appeal.

At the time of setting up the Local Court the criteria for appointment of existing stipendiary magistrates was fitness for service. Prior to Mr Quin obtaining judicial review of his non-appointment the policy changed to merit in competition with others. Therefore, when the Attorney-General's decision not to appoint Mr Quin was set aside the next issue was whether he should be considered under the policy existing at the time he was denied natural justice or under the new presently existing policy.

The majority, Chief Justice Mason, and Justices Brennan and Dawson, gave weight to the public policy consideration that it is up to the Executive to determine methods of judicial appointment and that it would not be appropriate to give a remedy that required the Executive to use a disfavoured method of appointment. They further determined that the procedural obligation to be heard could be complied with under the new policy. The dissenting judges, Justices Deane and Toohey, decided that when there is no bar to the application of the policy that existed at the time of denial of natural justice, then that policy should apply so that the person is, as far as possible, in the position in which he would have been but for the original breach.

EARC release of issues papers

In May 1990 the Queensland Electoral and Administrative Review Commission (EARC) released issues papers on freedom of information and judicial review of administrative decisions and actions. These papers form the first step in addressing the 'widespread and chronic maladministration' problems identified by the Report of the Fitzgerald Royal Commission.

The FOI paper outlines the current position of FOI laws in Australia, the role of FOI legislation and its advantages and disadvantages. The paper then raises the following issues: whether there is a need for FOI legislation; what should be the scope of such legislation in respect of documents covered (eg applicability to archives) and bodies covered (eg State and/or local government); whether personal information should be dealt with differently to general information; what kind of documents should be exempt and the role of 'public interest' in this debate; what kind of access should be available; what review procedures should be provided; whether charges should be imposed and the appropriate level of any such charges; and, whether there should be a specialist body to administer the legislation.

The Judicial Review paper looks at the current law in Queensland and reviews what it calls 'the NSW model', 'the English model' and 'the Commonwealth model', drawing a distinction between the procedural nature of the reforms under the first two models and the substantive nature of the Commonwealth reform. This distinction, between improving the existing law by removing procedural obstacles on the one hand and providing a whole new integrated judicial review regime on the other, is seen as a fundamental issue of choice arising in the EARC review. Apart from matters arising out of that choice the paper also comments upon: the appropriate limitation periods in judicial review; whether more flexible remedies are required (eg damages in administrative law); the constitution of the court carrying out the review (ie single judge or full court); whether reasons for decisions should be required; whether standing rules need reform; and, whether a different rule in respect of legal costs should apply to judicial review cases. The paper also canvasses the idea of taking a more positive approach to judicial review and incorporating a 'code of principles of good administration' to assist administrators to know what is desired.