Adventures on the administrative decision-making continuum: Reframing the role of the Administrative Appeals Tribunal

Matthew Paterson*

Although it has existed since 1975, the precise role played by the Administrative Appeals Tribunal (AAT) in the Australian legal landscape has never been as clear as it should be. This lack of clarity lends credence to the recent calls for the AAT to be abolished entirely,[1] regardless of the void it would leave.[2] This article seeks to clarify the role of the AAT and thereby restate its importance. It will do this through the lens of the 'administrative decision-making continuum' — a phrase coined by Davies J in *Jebb v Repatriation Commission*[3] (*Jebb*). Like the role of the AAT itself, the continuum has remained an ethereal concept, with no clear bounds beyond those first developed in *Jebb*. This article seeks to change that.

Even if one only views the 'administrative decision-making continuum' through the lens of *Jebb*, this article will show that the view that the continuum 'is relevant only where the issue before it is of a continuing nature' understates its significance as a way of understanding the role of the AAT.[4] Indeed, looking beyond the words used in *Jebb*, 'continuum' is apt to describe the complex interrelationships between different administrative decision-makers. One of the most significant — and most forgotten — elements of this is just how radical the AAT's creation was.[5] However, if that history, alongside more recent jurisprudential developments and the text of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) itself are all taken into account, it becomes evident that the AAT's approach is meant to be informed, on the one hand, by the institutional knowledge of a decision-maker in relation to a given applicant and, on the other, by the knowledge that it is meant to sit as a model of good governance *for the primary decision-maker to follow*. Thus the 'administrative decision-making continuum' is not constrained to circumstances where the issue before the AAT 'is of a continuing nature'.[6] Rather, it is apt to describe, on a fundamental level, the role of the AAT.

As a part of the administrative decision-making continuum, the AAT lies within 'an integrated, coherent system of administrative law'.[7] Thus it is not the case that the AAT is 'undermining the work [government agencies are] doing'.[8] Rather, it is best viewed as working alongside them in pursuit of the ultimate goal of good governance. Justice Logan, sitting as President of the AAT, noted that, 'if each element of our system of government understands and respects the role of the other',[9] the tension between them will be much lessened. By clarifying the administrative decision-making continuum, this article strives to play a role in easing that tension.

---

* Matthew Paterson (BEcon/LLB (Hons) (UQ)) is associate to the Hon Justice JA Logan RFD. The views expressed herein are solely those of the author and do not reflect the views of the Federal Court of Australia or of the Administrative Appeals Tribunal. An earlier version of this article was Highly Commended in the 2019 Australian Institute of Administrative Law Essay Prize.

1 See 'Blitz on AAT visa appeals boom', *The Australian* (Sydney), 26 February 2019.

2 See, for example, *Singh* [2017] AATA 850.

3 (1988) 80 ALR 329.

4 Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis, 4th ed, 2015) 294.

5 Administrative Review Council, *Administrative Review Council Annual Report 1976–77* (1977) Foreword; Justice Duncan Kerr, 'Reviewing the Reviewer: the Administrative Appeals Tribunal, Administrative Review Council and the Road Ahead' (Speech delivered at the Annual Jack Richardson Oration, National Portrait Gallery, 15 September 2015) <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kerr/kerr-j-20150915#_ftnref51>.

6 Pearce, above n 4, 294.

7 Robin Creyke, 'Administrative Justice — Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705, 730.

8 Cf 'Dutton slams AAT decisions after staff enjoy $600k "tax-funded" trip', *Starts at 60* (online), 30 May 2018 <https://startsat60.com/discover/news/peter-dutton-slams-administrative-appeals-tribunal-600k-tax-funded-conference>.

9 *Singh* [2017] AATA 850 [17].

The traditional conception of the administrative decision-making continuum

In order properly to understand the nature of the phrase 'administrative decision-making continuum', it is important to understand its origins, specifically the Federal Court judgment in *Jebb*.

Mr Jebb, a veteran of the Second World War, was already receiving a disability pension for conditions he acquired as a result of his service when he lodged with the Repatriation Commission a claim for 'cervical spondylosis and osteoarthritis and rotator cuff degeneration in the right and left shoulders'.[10] This claim was rejected in part and was ultimately appealed to the AAT.[11] Before the AAT made its decision, however, Mr Jebb lodged another, separate, claim for 'the acceptance of lumbar spondylosis and chronic dyspepsia'.[12] In assessing this claim, an officer of the Repatriation Commission accepted that Mr Jebb's anxiety was also attributable to his war service.[13] Although the officer's decision was brought to the AAT's attention, the AAT formed the view that it was restricted in the scope of its review to assessing Mr Jebb's incapacity for work as at the date he lodged the claim which was the subject of review before it.[14]

On appeal before Davies J, the critical question was whether the AAT erred in constraining its review to the question of Mr Jebb's entitlement to the pension as at the date his claim was lodged.[15] In considering this question, his Honour made the following comments:

> *the general approach of the tribunal has been to regard the administrative decision-making process as a continuum and to look upon the tribunal's function as a part of that continuum* so that, within the limits of a reconsideration of the decision under review, the tribunal considers the applicant's entitlement from the date of application, or other proper commencing date, to the date of the tribunal's decision. That function was enunciated in *Re Tiknaz and Director-General of Social Services* (1981) 4 ALN No 44. The approach there taken has since been generally adopted. In the repatriation jurisdiction, it was applied after *Banovich* in *Re Easton and Repatriation Commission* (1987) 12 ALD 777 where (at 778) the tribunal discussed the decisions in *Banovich; Delkou v Repatriation Commission* (1986) 69 ALR 406 and *Lucas v Repatriation Commission* (1986) 69 ALR 415 and said:
>
> > The ambit of a review by the tribunal is necessarily influenced by the ambit of the steps and proceedings that have taken place prior to its review, for the function of the tribunal is to review a decision. But provided that the matter is within the ambit of its jurisdiction as a review authority, the general practice of the tribunal is to take account of events that have occurred up to the date of the decision. Indeed, s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) expressly states, 'For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision …'.[16]

While *obiter*, this passage has been widely cited, including by Kirby J on the High Court in *Shi v Migration Agents Registration Authority*[17] (*Shi*) and by Bell, Gageler, Gordon and Edelman JJ in *Frugtniet v Australian Securities and Investments Commission*[18] (*Frugtniet*).

From a contextual understanding of Davies J's judgment in *Jebb*, it is evident that the 'continuum' as understood and described by his Honour has two key aspects. First, while the AAT's jurisdiction may be invoked in relation to a single application to a decision-maker,

10 (1988) 80 ALR 329, 331.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid 331–2.
15 Ibid 333.
16 Ibid 333–4 (emphasis added).
17 (2008) 235 CLR 286 [45]–[46].
18 (2019) 93 ALJR 629 [53].

that does not preclude the decision-maker from making other, related, decisions. Rather, a person is entitled to lodge fresh claims with the primary decision-maker, particularly as a 'decision of the [primary decision-maker] speaks *in futuro*'.[19] This is distinct from the realm of s 26 of the AAT Act, which prevents a primary decision-maker from remaking a decision while AAT proceedings are on foot.

It is evident that this restriction is not limited to making other decisions of the same kind as the one before the AAT, only in relation to different claimed conditions. It is uncontentious that an administrative decision-maker can exercise a power subject to review by the AAT and exercise other powers in relation to the same person, such as an information-gathering power it may have, at the same time. While they would be precluded from exercising the information-gathering power while their decision is under judicial review,[20] no such preclusion operates before the AAT.[21] The reasoning for this, as acknowledged by Northrop J in *Saunders v Federal Commissioner of Taxation (Cth)*,[22] is that the AAT 'is in the shoes of the Commissioner and may use any material put before it in reaching its decision',[23] in the same way as would the primary decision-maker. The one restriction to this is that the AAT is limited in conducting its review to considering the decision in respect of which an application is lodged.[24]

Secondly, it is evident that Davies J was referring to a 'continuum' primarily out of deference to the notion that a person's circumstances — including their legal status before the decision-maker — may change over time. This is the continuum in its 'chronological' sense. Thus, unless restricted by statute,[25] *Jebb* would indicate that the AAT's decision ought not be limited to addressing circumstances as they stood at the time of an applicant's first claim. While obviously dependent upon the relevant statutory scheme, this seems to be akin to the 'progressive and evolving decision-making' referred to by Conti J (with whom Heerey and Dowsett JJ agreed) in *Telstra Corporation Ltd v Hannaford*.[26]

There is some dispute as to whether or not this second aspect of the continuum is of a general nature. In *Shi*,[27] Kiefel J (with whom Crennan J agreed on this point) considered that it is appropriate for Davies J's judgment in *Jebb* to be juxtaposed against his Honour's judgment in *Freeman v Secretary, Department of Social Security*[28] (*Freeman*). In *Freeman*, the applicant was in receipt of the widow's pension, but her pension was cancelled after she subsequently entered into a new de facto relationship.[29] This new relationship ended at some 'impossible to determine' date after the cancellation of her pension but before the AAT completed its review.[30]

Although counsel for Mrs Freeman referred to *Jebb* and submitted that the AAT could consider her entitlement for the pension after the end of her de facto relationship, Davies J disagreed. His Honour instead thought that 'the present appeal extends [the *Jebb*] principle beyond its scope', as the effect of the relevant legislative scheme was 'that once a pension

19 *Jebb v Repatriation Commission* (1988) 80 ALR 329, 336.
20 See *Huddart, Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330; *R v Associated Northern Collieries* (1911) 14 CLR 387; *Melbourne Steamship Company v Moorehead* (1912) 15 CLR 333; and *Brambles Holdings Ltd v Trade Practices Commission (No 2)* (1980) 44 FLR 182, 186–9.
21 *Watson v Federal Commissioner of Taxation* (1999) 96 FCR 48 [29]–[32]; *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [32].
22 (1988) 15 ALD 353.
23 Ibid 358.
24 *Administrative Appeals Tribunal Act 1975* (Cth) s 25; *Freeman v Secretary, Department of Social Security* (1988) 15 ALD 671, 674.
25 Cf *Social Security (Administration) Act 1999* (Cth) ss 41–42, Sch 2 cl 4.
26 (2006) 151 FCR 253, 274, recently reaffirmed in *Commonwealth of Australia v Snell* [2019] FCAFC 57 [63].
27 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 [144]–[145].
28 (1988) 15 ALD 671.
29 Ibid 672.
30 Ibid.

or benefit has been cancelled, the previous recipient has no entitlement to restoration thereof until he or she has lodged a further claim'.[31] It followed that:

> The ambit of the jurisdiction of the Administrative Appeals Tribunal in relation to the review of a decision to cancel a pension or benefit is therefore less than would be the jurisdiction of the Tribunal in respect of a refusal to grant a pension or benefit or a decision suspending the payment of a pension or benefit. In the latter cases, there may well be an on-going entitlement to a pension or benefit which the Tribunal should recognise when formulating its decision.[32]

In the view of Kiefel J, in *Freeman*:

> [Justice Davies] did not suggest, by this comparison, that the ambit of the decision to be reviewed was to be determined by a general description of what the decision concerned — a grant or a cancellation of an entitlement. In each case what is entailed in a decision is to be ascertained by reference to the statute providing for it.[33]

Conversely, Kirby J was explicit in concluding that a rule of general application can be derived from *Jebb*:

> There is thus a *general* approach deriving in particular from the statutory function of substituting one administrative decision for another. Nevertheless, the *particular* nature of the 'decision' in question may sometimes, exceptionally, confine the Tribunal's attention to the state of the evidence as at a particular time.[34]

While not couched in this language, it is apparent that Hayne and Heydon JJ agreed:

> Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the material before the Tribunal will include information about conduct and events that occurred after the decision under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation.[35]

The crucial link for the purposes of the continuum was made in a slightly different way by Kirby J and by Hayne and Heydon JJ. Ultimately, though, the point is that, when it is undertaking its review, 'the Tribunal's task is "to do over again" what the original decision-maker did'.[36] In so doing, it must act as a diligent administrative decision-maker should and, unless barred from doing so by statute, take into account information that postdates the decision under review.[37] In this way, the administrative task of the AAT is fundamentally distinct from the judicial task of the courts. Whereas courts exercising appellate jurisdiction are limited in how far they can stray from findings of fact made by primary decision-makers,[38] the AAT must in all but 'the most exceptional cases' consider 'the relevant and probative material which the parties place before it or which it acquires for itself'.[39]

31 Ibid 673–4.
32 Ibid 674.
33 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 [145].
34 Ibid [46] (emphasis in the original; footnotes omitted).
35 Ibid [99].
36 Ibid 100 (footnotes omitted).
37 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [14] (Kiefel CJ and Keane and Nettle JJ), although the minority seemed to resile from this and prefer Kiefel J's approach in *Shi* in the next paragraph: [15].
38 *Aldi Foods Pty Ltd v Moroccanoil Israel Pty Ltd* (2018) 358 ALR 693 [2]–[10]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 [24]–[30].
39 *Commonwealth of Australia v Snell* [2019] FCAFC 57 [72]; *Morales v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 374; *Re Tarrant and Australian Securities and Investments Commission* (2013) 62 AAR 192 [77].

Even if the conception of the administrative decision-making continuum is not progressed any further than these two points, it establishes important lessons about the role of the AAT. These lessons are, somewhat obviously, sourced in the explicit statement in the AAT Act that the AAT 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision':[40] subject to its own procedure, the AAT must make its decision in the same manner as the primary decision-maker.[41] While this is most often viewed in the negative sense, where the AAT errs by trying to exercise powers which were not available to the primary decision-maker[42] or where it takes into consideration matters which the primary decision-maker was prohibited from taking into account,[43] it also exists in a positive sense.

There are two elements to this positive sense. First, where the primary decision-maker has to take into account all the material put before it at the time of making its decision, so too does the AAT have to take into account all the material put before it at the time of making *its* decision.[44] That is so even if that material or information relates to events that could only have taken place after the decision under review was made.[45] In the words of the Full Court of the Federal Court, 'so long as the exercise of power and discretions by the Tribunal is for the purpose of reviewing a decision, all of the powers and discretions conferred by *any relevant enactment* on the decision-maker who made the decision, can be exercised by the Tribunal'.[46] Thus, the AAT, as an administrative decision-maker, acts as the primary decision-maker would, both in terms of the powers it exercises and in terms of what it can take into account.[47]

Secondly — and perhaps more significantly — while the AAT is making its decision then, other than by virtue of s 26 of the AAT Act, the primary decision-maker is not precluded from making other decisions in relation to the individual in respect of whom it made the decision under review. Thus, where the primary decision-maker could exercise its information-gathering powers prior to making its decision, it can exercise those powers while the AAT is undertaking its review.[48] Similarly, as in *Jebb*, it can exercise its powers in respect of other claims made by an applicant.[49] That the results of these decisions may then feed into the AAT proceedings only highlights the notion of contiguous and coherent administrative decision-making which is inherent to the administrative decision-making continuum.

Clearly, then, the idea, endorsed by Pearce, that 'the notion of a tribunal being part of the continuum of decision-making is relevant only where the issue before it is of a continuing nature'[50] should be rejected. While that is one sense of the continuum as envisaged in *Jebb* — and one lesson to be learned from it — so too is the broader notion that the AAT is only one administrative decision-making body on a broader continuum. That much is clear from the majority judgment in *Frugtniet*.[51] Its exercising powers on review does not preclude the

40 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).
41 *State of Queensland (Department of Agriculture and Fisheries) v Humane Society International (Australia) Inc* [2019] FCA 534 [15].
42 See, for example, *Walker v Secretary, Department of Social Security* (1997) 75 FCR 493; *Fletcher v Federal Commissioner of Taxation* (1988) 19 FCR 442, 452; *Re Rayson and Repatriation Commissioner* (2008) 109 ALD 137 [76]–[99]; *Re Secretary, Department of Social Services and Twentyman* [2014] AATA 582.
43 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53].
44 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 [45], [145].
45 *Jebb v Repatriation Commission* (1988) 80 ALR 329.
46 *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation* (2005) 148 FCR 472 [30] (emphasis in the original).
47 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53].
48 *Watson v Federal Commissioner of Taxation* (1999) 96 FCR 48 [29]–[32]; *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [32].
49 *Jebb v Repatriation Commission* (1988) 80 ALR 329.
50 Pearce, above n 4, 294.
51 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53].

primary decision-maker from exercising other powers in relation to the applicant, so long as it is not precluded from doing so by s 26 of the AAT Act.

Looking beyond *Jebb*

So much can be — and has been — extracted directly from the judgment in *Jebb*. However, if one goes a step further, it becomes apparent that the concept of the AAT being 'part of' the continuum takes on greater significance. While *Jebb* firmly establishes the notion of a 'chronological' continuum and that the AAT is but one element of the continuum, it is imperative that one looks beyond *Jebb* truly to understand the size and nature of the continuum. The starting place for this is the almost trite saying that the AAT 'is to be considered as being in the shoes of the person whose decision is in question'.[52] However, that is only the starting place of this inquiry. When read alongside the historical origins of the AAT, the notion of the AAT being 'part of' the continuum and the unique manner in which the AAT makes its decisions, the ideas given voice to in *Jebb* are refined. As refined, it becomes clear that the role of the AAT within the continuum is not just as a decision-maker but as a norm-maker for the entirety of the continuum. Further, it does not execute this role in a vacuum; its approach is informed by the administrative history of the matter before it. Consequently, it is evident that the continuum is much broader than a strict reading of *Jebb* would suggest.

The AAT as an administrative norm-maker

Perhaps one source of confusion in respect of the way the AAT makes its decisions lies in the way the AAT seems to stand apart from other administrative decision-makers. Not only does one 'appeal' decisions to the AAT but it also goes about the business of decision-making in a strikingly judicial way. There are almost invariably at least two parties before the AAT — the agency which made the primary decision and the person about whom the decision was made.[53] They are often legally represented,[54] and the AAT hears submissions and evidence from them in a public hearing.[55] The AAT also has broad procedural powers in addition to those available to the primary decision-maker.[56]

Despite bearing these hallmarks of judicial decision-making, it is nevertheless said that the 'tribunal performs an administrative function and not a judicial function, and the proceedings in the tribunal are not *inter partes*'.[57] Indeed, it is a matter of constitutional necessity that the AAT performs an administrative, not a judicial, function.[58] Nevertheless, without consideration of the broader 'administrative decision-making continuum', the administrative role played by the AAT is complicated by the manner in which it determines cases. Justice Brennan, when serving as President of the AAT, described the AAT's role:

> The legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive (see Pt II of the Act). Its function is to decide appeals, not to advise the Executive.[59]

52 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 671 (Smithers J).
53 *Administrative Appeals Tribunal Act 1975* (Cth) s 30. This, of course, holds true primarily for the General & Taxation and Commercial Divisions of the AAT.
54 Ibid s 31.
55 Ibid ss 35, 40.
56 Ibid ss 33, 40A, 42A, 42B.
57 *Re Lees and Repatriation Commission* (2004) 82 ALD 150, 161 [32].
58 *Commonwealth of Australia v Snell* [2019] FCAFC 57 [42].
59 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161.

Further, decisions of the AAT, whilst ostensibly not *inter partes*, are nevertheless binding between the primary decision-maker and the applicant. As described by Pincus J in *Bogaards v McMahon*:[60]

> It is necessarily implicit in the provisions relating to the first class of decision just discussed (that is, those where the tribunal substitutes a new decision for that challenged) that the tribunal's decision is at least as binding as that which was challenged. The binding quality of decisions of the other sort, where the matter is merely remitted for reconsideration, is not so obvious. Whatever may be the position as to 'recommendations' of the tribunal, in my opinion the word 'directions' imports a binding quality. The intention is that the directions shall constrain the decision-maker in making his new decision, and that the new decision may not lawfully be made in a way which conflicts with the directions.[61]

This is a commonsense, and necessary, consequence of the inclusion of the AAT in the administrative decision-making continuum. If its decisions did not bind the primary decision-maker then, unless one were to try to argue that an estoppel lies against the primary decision-maker, there would be little point in appealing to the AAT. Given the dubious availability of estoppel against public authorities in Australia,[62] even though it exists on the same administrative decision-making continuum, the AAT must be able to bind the primary decision-maker.

On its face, there seems to be a tension between the idea that the AAT stands in the shoes of the primary decision-maker and the reality that it can bind that decision-maker. If extrapolated, this could support the proposition that, although the AAT exercises administrative power, its task is of a fundamentally different nature from that of the primary decision-maker. Thus, the AAT would not sit upon a common continuum with the primary decision-maker. Rather, it would stand apart from other administrative decision-making bodies in much the same way as do the courts.

However, this tension dissipates when one considers the historical role of the AAT as an instrument for good governance. It was uncontentious in the early days of the AAT that it was interposed upon existing structures of administrative decision-making. So much was recognised by Brennan J when his Honour described the revolutionary aspects of the creation of the AAT and of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act):

> *the lines of bureaucratic authority are intersected by the Tribunal* or the Ombudsman; the traditional reticence of the administrative decision-maker is replaced by his written expression of reasons; access to the Court is simplified and facilitated. The citizen is thus enabled to challenge, and to challenge effectively, administrative action which affects his interests.[63]

This early view of the AAT hardly meshes with the idea of it being but one point on the continuum. Rather, it appears from the early sources that the introduction of the AAT was very much intended to be — as indeed it was — an 'awesome leap towards changing its whole legal structure with regard to public administration'.[64] This leap was taken alongside other public accountability measures, including the establishment of the Commonwealth Ombudsman, the Federal Court, the ADJR Act and, ultimately, a freedom of information regime.[65]

60 *Bogaards v McMahon* (1988) 80 ALR 342.
61 Ibid 349.
62 G Pagone, 'Estoppel in Public Law: Theory, Fact and Diction' (1984) *University of New South Wales Law Journal* 267, 274–5; cf J Jackson, 'Towards an Administrative Estoppel' (2015) 81 *AIAL Forum* 62.
63 Administrative Review Council, *Administrative Review Council Annual Report 1976–77* (1977) Foreword; Kerr, above n 5 (emphasis added).
64 Law Reform Commission of Canada, *Seventh Annual Report* (1978) 14.
65 See, for example, Creyke, above n 7.

Although its initial effect was to impose outside structures on Commonwealth administrative decision-making, the ultimate point of these measures was to create a new, open form of government administration. Without this historical understanding and holistic view of Commonwealth government administration, it is impossible properly to define the Commonwealth administrative decision-making continuum. However, with this understanding, it becomes apparent that the continuum is not just limited to a particular government agency and its distinct decision-making processes. Rather, the continuum encompasses the AAT, the Ombudsman and other external accountability agencies such as the Information Commissioner.

Seen in this light, the reason the AAT was 'constituted upon the judicial model' is that, even though it is engaged in an administrative decision-making task,[66] it had to adopt 'features of the judicial model so as to address the deficiencies' which had previously been seen as plaguing administrative decision-making.[67] Thus, with the assistance of input from the parties, the AAT is meant to make the 'correct or preferable' decision.[68] Essentially, the manner in which the AAT engages in its enquiries is designed to reflect a higher level of decision-making than primary decision-makers are able to enjoy. This is derived from the myriad procedures of the AAT as well as the intention that it be a specialist tribunal.

The ultimate point is that administrative decision-making is not meant to comprise a series of siloed processes. Rather, it is meant to represent a symbiotic relationship between different levels — and kinds — of decision-making. While processes such as those of the AAT were interposed upon the existing system, the ultimate goal was the establishment of 'an integrated, coherent system of administrative law'.[69] The purpose of this system is to provide for open and transparent decision-making by government agencies, and the purpose of the AAT is to create and cement the norms which underlie this system.

In the recent case of *Williams and Members of the Companies Auditors and Liquidators Disciplinary Board*,[70] Deputy President McCabe aptly described the importance of the AAT as a tool for better government decision-making:

> Public hearings also enable the Tribunal to play its important systemic role as a tool of good government. That aspect of the role is sometimes forgotten amidst all the discussion about backlogs and case finalisations and other measures of efficiency which are applied to the Tribunal's work. The Tribunal is assigned a unique role in Australia's system of administrative law. It is not simply a dispute resolution mechanism. *It is also a cultural institution designed to promote a bureaucracy-wide commitment to better decision-making for the benefit of all Australians.* The Tribunal does that by modelling good decision-making behaviour in particular cases. *Its decision-making creates norms and educates primary decision-makers and other stakeholders dealing with similar issues in the future*.[71]

It is notable that Deputy President McCabe was referring to open hearings, which are an important part of the AAT's processes and which, as noted above, constitute but one of the more judicial elements of decision-making adopted by the AAT.

Although the results reached by the AAT — or even the approaches used to reach them — may differ from those of primary decision-makers, those differences lie in the AAT's role as 'an independent generalist decision-maker informed by its expertise in good government'.[72]

66 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161.
67 *Singh* [2017] AATA 850 [12]–[13].
68 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 78.
69 Creyke, above n 7, 730.
70 [2019] AATA 504 (emphasis added).
71 Ibid [25].
72 *RBPK and Innovation and Science Australia* [2018] AATA 1404 [14] per Thomas J, sitting as President.

More than merely exercising the powers of upstream decision-makers, the AAT is meant to serve as a paragon of good decision-making for them to follow.

Consequently, it is no surprise that the AAT seems to stand apart from other administrative decision-makers: this was a deliberate policy choice made by Parliament in the way it created the AAT. The AAT's historical purpose was to provide a paragon of good governance. To do this, it had to repudiate or move away from the traditional, closed system of administrative decision-making which had theretofore existed.

The AAT could — and can — only fulfil the norm-creating and educational role which was intended if it borrowed elements from judicial decision-making. Consequently, the presence of these features does not mean that the AAT does not belong on the administrative decision-making continuum or that the continuum should be viewed in an abbreviated form. Rather, it was intended that these unique features, alongside the unique features of other bodies such as the Ombudsman and the Office of the Information Commissioner, would help to pull the whole administrative decision-making continuum into the open. In this way, the administrative decision-making continuum is not restricted to being a chronological continuum; it is a normative continuum too.

Tribunal review and open justice

In *JWTT and Commissioner of Taxation*[73] (*JWTT*), Deputy President McCabe observed:

> the Tribunal is not simply — or even primarily — a means of ensuring individual justice. The Tribunal also has a normative role. It is concerned with promoting good government … The Tribunal uses its decisions in individual cases to model behaviour that promotes the integrity and quality of government decision-making more generally. The normative role becomes much harder if those decisions are not accessible. It is difficult to communicate lessons for future decision-makers if the reasons for decision are censored or suppressed.[74]

While the norm-creating role of the AAT within the continuum has been discussed above, it is clear from Deputy President McCabe's comments in *JWTT* that it relies on the concept of open justice to achieve this.

Although it may seem counterintuitive, it is open justice that explains the presence of s 26 of the AAT Act. As only one decision-maker can exercise the jurisdiction granted to it by Parliament at any one time, s 26 gives priority to the AAT, which was equipped, through its quasi-judicial procedures, with the tools to make the correct or preferable decision. The purpose of justice being seen to be done by public hearings and published decisions only cements this practical reality.[75]

Thus, the Full Court of the Federal Court's judgment in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[76] (*Brian Lawlor*) takes on a new importance. In *Brian Lawlor*, the Collector of Customs revoked Brian Lawlor's warehouse licence. In the appeal to the AAT, Brian Lawlor argued that there was no general power to cancel a warehouse licence. In the AAT, Brennan J agreed.[77] The difficulty was that, if the Collector of Customs had acted in excess of jurisdiction and if its decision were taken to be a nullity,[78] there was no substantive decision upon which to base the AAT's jurisdiction.[79] Justice Brennan, however, found that

73 (2017) 73 AAR 192.
74 Ibid [16].
75 *Administrative Appeals Tribunal Act 1975* (Cth) s 35(1); Administrative Appeals Tribunal, *Policy — Publication of decisions* (1 March 2019) <https://www.aat.gov.au/landing-pages/policies/publication-of-decisions-policy>.
76 (1979) 2 ALD 1.
77 *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 175.
78 See the later decision of *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [51].
79 Cf *Administrative Appeals Tribunal Act 1975* (Cth) s 25; *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 175.

this was no bar to the AAT exercising its power under s 43 of the AAT Act, as the presence of what is on its face a decision subject to review is a sufficient jurisdictional fact upon which to ground the AAT's jurisdiction.[80] The Full Court agreed on this point, although its reasoning differed slightly from that of Brennan J.[81]

Critical to Brennan J's reasoning was that the power exercised under s 43(1) of the AAT Act — particularly to affirm or set aside the decision under review — is a unique power that is separate from the independent exercise of the powers of the original decision-maker.[82] The reason for this is truly to enable the AAT to serve as a paragon of good decision-making. This point was not dealt with on appeal. However, as later noted by Brennan J:

> Part of the Tribunal's function in securing sound administration consists in confining the administrator to the powers conferred upon him and to the lawful mode of exercising those powers; and the effectiveness of the Tribunal's function would be grievously weakened if it were impotent to check excess of power.[83]

Both Brennan J and the majority on appeal were united in considering that the AAT is a tool of good government:

> In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government.[84]

Were a primary decision-maker able to remake its decision without a jurisdictional error exposed in the AAT process *before the AAT could make its decision*, this accountability mechanism would be lost. So, too, would another element of the AAT's capacity, as described by Brennan J — to secure sound administration through the creation of norms. Consequently, the elements of open justice incorporated into the AAT's procedure in fact serve a purpose for the whole administrative decision-making continuum: they allow the AAT to establish the norms which underlie the continuum.

This also points to an interesting additional aspect of the administrative decision-making continuum: executive power in relation to one issue can be wielded by only one decision-making body at any one time. That is, the continuum is not just a chronological or normative continuum; it is also one of power. The same power — as augmented by the AAT Act — is wielded by the AAT as by the primary decision-maker when it made the decision under review. Thus, *that power* cannot simultaneously be re-exercised by the primary decision-maker.[85] However, different powers, including the power under the same legislative provision but in relation to a different issue, *can* be exercised at the same time.[86] In a similar vein, different powers, even in relation to similar issues, can be utilised concurrently with the powers being exercised by the AAT in conducting a review.[87]

Integrated decision-making

The above illustrates that, most often, the role the AAT exercises on the continuum is prospective: its approaches and decision-making have downstream consequences for the way the relevant primary decision-maker acts. However, its presence on the continuum also shapes what the AAT can and should take into account in exercising its powers. As a matter of principle, this ought to include things other than changes in an applicant's circumstances

80 *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 176–7.
81 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1.
82 *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167, 175–6.
83 Ibid 177.
84 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1, 23 (Smithers J).
85 *Administrative Appeals Tribunal Act 1975* (Cth) s 26.
86 *Jebb v Repatriation Commission* (1988) 80 ALR 329.
87 *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [32].

since the decision under review was made. Rather, it should also look to the other dealings 'the applicant has had with the primary decision-maker. As stated by Logan J, sitting as acting President of the Tribunal:'

> even though the Tribunal is obliged to consider afresh the merits of a decision under review, the particular issues which arise before the Tribunal in a given review are necessarily influenced by the course of earlier stages in that continuum and by the positions adopted in respect of the review by any party to it or, as the case may be, any person entitled to make a submission in respect of the review who makes such a submission.[88]

That the AAT's approach to a matter should be informed by the course taken by the primary decision-maker (or, as the case may be, decision-makers) is concordant with the High Court's approach in *SZBEL v Minster for Immigration and Multicultural and Indigenous Affairs*[89] (*SZBEL*). There, the High Court unanimously held that 'ordinarily … on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant'.[90] It found that to make a decision on a matter other than those grounds, without otherwise giving warning to an applicant, would constitute a breach of procedural fairness.[91] Consequently, it is clear that the conduct of the AAT is at least in part informed by the conduct of upstream decision-makers. Although it can, within the confines of the relevant statutory power, look to issues beyond those addressed by the primary decision-maker,[92] that does not detract from this principle.

This point is only reinforced by the High Court's recent judgment in *Frugtniet*:

> The AAT and the primary decision-maker exist within an administrative continuum. The AAT has no jurisdiction to make a decision on the material before it taking into account a consideration which could not have been taken into account by the primary decision-maker in making the decision under review and which could not be taken into account by the primary decision-maker were the AAT to remit the matter to the primary decision-maker for reconsideration.[93]

This principle is augmented by the rules which provide that, over the course of a review by the AAT, the primary decision-maker has a positive obligation to lodge 'every … document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal'.[94] This requirement is ongoing.[95] The reasons for these rules are twofold. The first — and in the spirit of open justice — is to ensure the AAT is aware of all the relevant documents.[96] After all, '[j]ustice will not be done to applicants unless respondents, who are aware of the facts, or who can readily ascertain the facts, bring to the notice of the tribunal all matters which the tribunal ought to take into account'.[97]

However, that is not the only reason underlying this rule. As a matter of practice, it is not uncommon for previous and relevant decisions of the primary decision-maker and of the AAT, other than the decision directly under review, to be provided to the AAT alongside other documents provided under s 37 of the AAT Act. In light of the Full Court of the Federal Court's recent statement in in *Commonwealth of Australia v Snell*,[98] that 'the doctrine of issue estoppel is not apposite to the constitutional and statutory context of the Tribunal, and

88 *Singh* [2017] AATA 850 [19] (footnotes omitted).
89 (2006) 228 CLR 152.
90 Ibid [35].
91 Ibid [43].
92 *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32, 39.
93 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 [53] (footnotes omitted).
94 *Administrative Appeals Tribunal Act 1975* (Cth) s 37(1)(b).
95 Ibid s 38AA.
96 *Re Wertheim and Department of Health* (1984) 7 ALD 121, 154.
97 Ibid.
98 [2019] FCAFC 57.

ought not to be extended to it',[99] it is clear that they are not relevant because of any issue of estoppel that may arise from them.

A better explanation is that these documents provide important context to the way issues have developed as between the primary decision-maker and the applicant in any given case. In some circumstances, this may be persuasive, as in the case of *Re Cremona and Comcare*.[100] Indeed, the Full Court of the Federal Court has previously held that:

> the Tribunal may have regard to findings of fact made between the same parties in earlier proceedings before the same or a differently constituted Tribunal. Although a Tribunal may not be bound to make the same findings of fact, findings previously made — especially after a contested hearing — may appropriately be adopted in subsequent proceedings. Its freedom to do so may well depend upon the facts and circumstances of each individual case.[101]

Such findings would, of course, be evidenced by written reasons furnished for these earlier decisions.

This supports the notion that not only should the Tribunal be informed by events as they develop as between the parties before it but it should also have regard to events as they *have* developed. Viewed through this lens, one can see the final element of the continuum: that the AAT should also be informed by the actions and decisions of other bodies on the continuum. How much weight it gives them — or, indeed, whether it departs from them — is a matter for the AAT in each individual case. Thus, the continuum further implies that the AAT does not sit in a vacuum. Its decision-making not only influences other decision-makers in its norm-setting capacity but also should be influenced by the decision-makers it sits beside on the administrative decision-making continuum.

Conclusions: The role of the AAT

In *Singh*,[102] Logan J, sitting as acting President of the Tribunal in the Migration & Refugee Division, observed that:

> The very existence of the Tribunal and the independent, quasi-judicial model adopted for it means that, inevitably, there will be tension from time to time between Ministers and others whose decisions are under review … The same type of tension can occur as between Ministers and others and the courts in relation to judicial review of administrative decisions. These are inherent features of any checks on the exercise of arbitrary power. They can be lessened if each element of our system of government understands and respects the role of the other.[103]

By approaching the role of the AAT through the lens of the administrative decision-making continuum, this article has sought to shed light on the role of the AAT and the way it relates to other administrative decision-makers. In the result, it is evident that describing the AAT as sitting upon a continuum with other administrative decision-makers is not limited to the continuum which can be gleaned from *Jebb* and *Shi*. Considering the continuum merely to refer to an obligation to take into account things that only occurred after the primary decision was made needlessly restricts the conception of the continuum, particularly after *Shi* and *Frugtniet*.

The continuum is best viewed as being fundamentally expansive. It refers not only to the AAT and the primary decision-maker but also to other accountability mechanisms such as the

99 Ibid [51].
100 (2017) 72 AAR 481.
101 *Rana v Military Rehabilitation and Compensation Commission* (2011) 55 AAR 300 [27].
102 [2017] AATA 850.
103 Ibid [17] (footnotes omitted).

Ombudsman and the Information Commissioner. The relationship between the AAT and the primary decision-maker, in this continuum, is symbiotic. The AAT can draw upon the facts and issues as found in previous decisions and reviews in conducting its reviews. Similarly, once a review is completed, the primary decision-maker can draw upon the AAT's reasons as a source of norms to help shape its decision-making practices. All of this is done with the united aim of contributing to the 'good government of the people of Australia'.[104]

Viewed in this light, it is not just that the AAT is a part of the administrative decision-making continuum; it is an essential part of it. Without the AAT, the continuum would lose its central norm-creating mechanism. This would, surely, lead to less effective governance and administrative decision-making. On the other side of the coin, were it not to be a part of the continuum, the AAT would be hampered in its task of making the correct or preferable decision. In order to undertake that task — especially as non-governmental parties before it are often legally unsophisticated — it is imperative that the AAT be influenced by the information and issues as framed by the primary decision-maker and by subsequent developments. Thus, being a part of the administrative decision-making continuum is central to the AAT's role and the way it undertakes the task of decision-making. Simply, it is essential to the modern administrative decision-making continuum.

104 Justice Michael Kirby, 'The AAT 20 Years Forward' (Speech delivered at AAT Back to the Future, Australian National University, 1–2 July 1996) <www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_aat.htm>.