PROMOTING ADMINISTRATIVE JUSTICE: THE CORRECT AND PREFERABLE DECISION AND THE ROLE OF GOVERNMENT POLICY IN THE DETERMINATION

KERRIE O'CALLAGHAN AND MICHELLE HOWARD[1]

I INTRODUCTION

Today's presentation will explain the concept of merits review; articulate what is meant by the correct and preferable decision; and consider the role that government policy may play in determining it. In doing so, we discuss the history of merits review in Australia. We also discuss decisions made in a variety of merits review jurisdictions.

II A SHORT HISTORY LESSON: THE DEVELOPMENT OF ADMINISTRATIVE LAW AND MERITS REVIEW IN AUSTRALIA

The Australian Constitution provides for strict separation of administrative and judicial power. At a federal level, the executive cannot exercise the power of the judiciary, and conversely the Courts cannot exercise administrative power. The practical effect is that federal courts cannot review the entirety of a decision made by the executive, only the legality of the decision. This is essential to an understanding of the development of administrative law in Australia, and understanding the current system for review of executive action[2]. Although the same constraints do not exists at a state level, the development of the federal merits review regime appears to have influenced the development of the state-based systems.

The origins of the Commonwealth system are found in the recommendations in the 1971 Kerr Committee report which recommended the establishment of a multi-purpose merits review Tribunal. Two more reports followed the Kerr Committee report: the Bland and Ellicott reports.

Subsequently, three key proposals were implemented in federal legislation – the *Administrative Appeals Tribunal Act 1975* (the AAT Act), the *Ombudsman Act 1976* and the *Administrative Decisions (Judicial Review) Act 1977*. These reforms shape the Australian system of administrative law.[3]

When the *Administrative Appeals Tribunal Act 1975* was passed, a new era dawned for administrative law. A unique general review tribunal was created to review decisions made about the rights and entitlements of ordinary citizens by the executive arm of the Australian Government.[4] Its then novel role required it to stand between the

---

1 Respectively Acting Deputy President and Acting Senior Member of the Queensland Civil and Administrative Tribunal. We acknowledge research assistance from acting associate to the Deputy President, Terani Inoke, in the preparation of this paper. This paper is based off a presentation given at Customs House, Brisbane on the 26th of September 2012.

2 See Garry Downes, *The Implementation of the Administrative Courts Decision,* Speech to the International Association of Supreme Administrative Jurisdictions VIIIth Congress*, Madrid 26-28 April 2004*, cited in Robin Creyke and John McMillan, *The Making of Commonwealth Administrative Law: The Kerr, Bland and Ellicott Committee Reports* (Australian National University Centre for International and Public Law, 1996).

3 W Lane and Simon Young, 'Administrative Law in Australia' (Lawbook Co., 2007) 9.

4 Garry Downes, above n 2.

State and the citizen in reviewing decisions made by Government affecting the rights of individual citizens.[5]

When the AAT was established it was the first of its kind – there was no other general tribunal for performing review of administrative decisions.[6] The Kerr Committee had favoured a general tribunal over a series of separate tribunals as they believed this would lead to a coherent body of principles and greater consistency of decision making.[7]

The States have since emulated this federal system although they take different forms. Some tribunals with review jurisdiction hold that jurisdiction as part of broader jurisdiction unrelated to the merits review functions. This is the case in Victoria, WA and Qld which established 'supertribunals' which absorbed a broad range of jurisdictions from numerous former tribunals and which have general merits review functions. South Australia is currently considering a similar model. NSW has a stand-alone administrative review tribunal.

The way in which the tribunals with administrative functions operate is unique. In the UK, administrative review tribunals are located within the judicial branch of government.[8] In the US, their administrative tribunals are treated much the same as the courts. [9] On this note, we also observe that the Court of Appeal of the Supreme Court of Queensland recently found that QCAT is a Chapter III court.[10]

In general terms, both the AAT Act, and the QCAT Act as far as it provides specifically for QCAT's review jurisdiction, although not in identical provisions, essentially provide that the tribunal may confirm or amend a decision under review; set it aside and substitute its own decision; or set aside the decision and return the matter to the decision-making body with any directions or recommendations it thinks fit. In each case, the decision of the tribunal is taken to be a decision of the decision maker.

---

5 Gerard Brennan, 'Comment: The Anatomy of an Administrative Decision' (1980) 9 *Sydney Law Review* 1.

6 Garry Downes, 'Overview of the Tribunal Scene in Australia' (Speech delivered at the International Tribunal Workshop, Canberra, 5 April 2006).

7 Anthony Mason, 'The Kerr Report of 1971: its continuing significance' (Speech delivered at the Inaugural Whitmore Lecture at the Council of Australasian Tribunals NSW Chapter – Annual General Meeting, Unknown, 19 September 2007).

8 Peter Cane and Leighton McDonald, 'Principles of Administrative Law' (Oxford University Press, 2008) 41.

9 As a matter of interest, the QCA has recently found QCAT to be a Chapter III court due to the manner in which QCAT operates – in *Owen v Manzies & Ors* [2012] QCA 170, [44] – [45] (McMurdo J) explained that Chapter III of the Commonwealth Constitution instituted a coherent, federal scheme under which Federal Courts could be established and State Courts are capable of being invested with Commonwealth judicial power under s77(iii) whilst still exercising their State judicial power. State courts may only exercise the Commonwealth judicial power where they have institutional independence and impartiality. De Jersey CJ stated at [20] that 'Ultimately there is assurance that this Tribunal is to apply the law, and to do so in a manner in which courts traditionally operate, that is, independently and impartially', with which McMurdo J at [52] and Muir J at [103] agreed, this finding that QCAT was a Chapter III court able to exercise Commonwealth judicial powers. Although QCAT may be recognised as a ch III court as recognised in *Kerr, Duncan* 'State Tribunals and Chapter III of the Australian Constitution' *Melbourne Law Review* (2007) 31(2), ch III of the Commonwealth constitution does not impose any state separation of powers. As a result it will be dependant on the State constitution as to whether a tribunal considered a state court can exercise its administrative merits review jurisdiction as a function of its state judicial powers.

10 *Owen & Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170 (22 June 2012).

III How did the requirement to make the correct and/or preferable decision develop and what does it mean /require?

The obligation of the AAT is to reach the *correct or preferable* decision, and in Qld, QCAT is to produce the *correct and preferable* decision.

The phrase 'correct or preferable' seems to have made its first appearance in the case of *Re Becker and Minister for Immigration and Ethnic Affairs*[11] and was later endorsed by the Federal Court in *Drake v Minister for Immigration and Ethnic Affairs*.[12]

In the early Full Federal Court decision in *Drake v Minister for Immigration and Ethnic Affairs,*[13] in their joint judgement Bowen CJ and Deane J recognised that the requirement for the AAT to make a correct decision in terms of the law, but also the preferable decision was feature unique to the Administrative Appeals Tribunal:

> Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the Tribunal.
>
> The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision is the correct or preferable one on the material before the Tribunal.

That said, they continued:

> Even in a case such as the present where the legislation under which the relevant decision was made fails to specify the particular criteria or considerations which are relevant to the decision, the Tribunal is not, however, at large.[14]

They set out a number of important features of the Tribunal's functioning in determining the correct or preferable decision. In particlular, that it was;

1. 'obliged to act judicially, that is to say, with judicial fairness and detachment.';[15]
2. it is subject to the constraints applying to the administrative decision-maker whose decision is under review;[16]
3. relevant considerations at law must be taken into account and irrelevant considerations must not;[17]
4. in the absence of a specific legislative provision requiring or authorising the Tribunal to make its determination in accordance with specified policy, the Tribunal is entitled to treat government policy as a relevant factor in determining a review;[18] and
5. However, it may not, again 'in the absence of specific statutory provision, abdicate its function of determining the 'correct or preferable decision,

---

11 (1977) ALD 158.
12 (1979) 24 ALR 577, 589.
13 Ibid.
14 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid, 590.

> by 'merely determining whether the decision conformed with whatever the relevant general government policy might be.'[19]

Brennan J as he then was, as President of the AAT re-heard the review of the deportation decision in *Drake (No 2)* after it was remitted from the Full Federal Court. In his reasons for decision, he said:

> The Tribunal's function, when it undertakes a review of a Minister's decision to deport, is to form its own judgment of what is the correct or preferable decision in the circumstances of the particular case as revealed in the material before the Tribunal (*Drake's* case, supra, at 589). It is discretionary judgment…. and ministerial policy may play a part in it.[20]

The High Court of Australia has more recently confirmed the requirements, including in the 2008 case of *Shi v Migration Agents Registration Authority*[21] in which all members of the High Court in considering the functions of the AAT, referred to the obligation of the AAT to make the 'correct or preferable' decision.[22] For example, Kiefel J said:

> The term 'merits review' does not appear in the AAT Act, although it is often used to explain that the function of the tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the tribunal has been said to be to determine what is the 'correct or preferable decision'. 'Preferable' is apt to refer to a decision which involves discretionary considerations. A 'correct' decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the tribunal agrees. Smithers J, in *Brian Lawlor Automotive*, said that it is for the tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the tribunal, in essence, is an instrument of government administration.[23]

Following the Full Federal Court in *Drake*, Her Honour continued by saying that, having regard to the relevant provision (s 43(1) of the AAT Act), the Tribunal must reach its conclusion, 'as to what is the correct decision, by conducting its own, independent, assessment and determination of the matters necessary to be addressed.'[24] In terms often used, the AAT stands in the shoes of the original decision-maker for the review process.[25]

In *Shi*, the High Court also held that in considering what decision to make, the AAT must address the same question addressed by the original decision-maker[26] or, in essence, do again what the original decision-maker did.[27] Where the decision contains no 'temporal element' or statutory prohibition to it doing so, evidence of matters occurring after the original decision may be considered.[28]

---

19 Ibid, 590.
20 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636.
21 (2008) 248 ALR 390.
22 Ibid, 398 – 399 [33] – [38] (Kirby J); 412, [96] – [98] (Hayne & Heydon JJ); 415 – 416, [116] – [117] (Crennan J); 419 – 422, [131] – [146] especially 422/[140] nn 139 – 142 (Keifel J).
23 *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390, 422/[140] nn 139 – 142 (Keifel J).
24 Ibid, 422 – 423 [141].
25 Ibid, 420 – 421 [134] (Keifel J).
26 Ibid, 423 [142].
27 Ibid, 412 – 413 [100] (Hayne and Heydon JJ).
28 Ibid, 423 – 424 [142] – [147] (Keifel J); 413 [101] (Hayne and Haydon JJ).

As is readily apparent from the cases discussed, if there is only one possible decision open on the facts as found and applying the law, the Tribunal must make the correct decision. However, if the statutory provision requires the exercise of discretion, the decision must not only be a correct one, based on the material before the tribunal and the law, but it must be the preferable decision of the possible decisions. Hence, the possibility of making the preferable decision only arises where there is discretion to be exercised.

It was only in 2005, some 16 years after the statements in the Drake cases that the phrase 'correct or preferable' finally made its way into the *Administrative Tribunal Act 1975,*[29] although interestingly not to specify the task of the AAT itself.

In the meantime and subsequently, other Australian jurisdictions had accepted that, in legislation[30] or as a matter of practice,[31] the purpose of merits review by tribunals is producing the, 'correct *or* preferable*'* or sometimes 'correct *and* preferable' decision.

The QCAT Act provides that the function of QCAT in its review jurisdiction is to produce the 'correct *and* preferable' decision. The explanatory notes for the Queensland Civil and Administrative Tribunal Bill 2009, include that:

> This provision recognises that there may be a number of ways of deciding a matter that that would be correct according to law and that the tribunal must, using its own judgement, make the decision that is not only correct, but is also the preferred decision based on the merits of the case.[32]

IV CORRECT *AND* PREFERABLE VERSUS CORRECT *OR* PREFERABLE

Using the word 'and' instead of 'or' accords with the view of the Administrative Review Council's 1995 report, *Better Decisions; Review of Commonwealth Merits Review Tribunals*[33](the Better Decisions Report). It recommended that the phrase 'correct *and* preferable' be used rather than 'correct *or* preferable'. It considered that the use of the word 'or' may give the impression that a decision may be a preferable decision even though it is not correct.[34] This appears to ignore the clear statements made in the cases that the decision must always be a correct one, on the facts as found and the applicable law, but in situations where a range of outcomes is possible, the decision must also be the preferable one. In any event, the broad changes

---

29 Section 29 (1B) was inserted into the *Administrative Appeals Tribunal Act 1975* (Cth) inf 2005. This section provides for the Tribunal to require an applicant to amend their statement so that it is sufficient for the Tribunal to identify the respects in which the applicant believes the decision is not the correct or preferable one.

30 *State Administrative Tribunal Act* (WA) 2004, s27(2); *Administrative Decisions Tribunal Act* (NSW) 1997, s63(1).

31 In the Victorian Civil and Administrative Tribunal Act there is no reference to *correct and preferable* or *correct or preferable*. However, VCAT has recognised that the Tribunal is to find the correct and/or preferable decision and has used the phrases interchangeably. For example, see *Cracknell v TAC (General)* [2007] VCAT 1615, *SS v Secretary to the Department of Transport (Occupational and Business Regulation)* [2012] VCAT 401, *Shaghaghi v Victorian Taxi Directorate* (unreported judgement) 12 April 2002, *Laragy v Victorian Institute of Teaching (Occupational and Business Regulation)* [2009] VCAT 2651, *McEwan v Podiatry Board of Australia (Occupational and Business Regulation List)* [2011] VCAT 2002.

32 Explanatory Notes, *Queensland Civil and Administrative Tribunal Bill 2009* (Qld) 31, 20.

33 Australian Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39 (1995).

34 Ibid, 16 nn 31.

recommended in the Report were ultimately not implemented and nor was this suggestion that the 'correct and preferable' requirement should be inserted into the AAT Act. As noted, when the words did eventually find their way into the AAT Act in 2005, 'correct *or* preferable' was used.

Although the Better Decisions Report highlighted potential issues that may rise from the use of 'or' instead of 'and', state jurisdictions appear to use the phrases interchangeably.[35] Some decisions have considered the difference to be without significance.[36]

At QCAT, President, Justice Alan Wilson recognised that the wording in the *QCAT ACT* was to give effect to the expression 'correct or preferable' as it has been explained in the federal authorities. In *Queensland Building Services Authority v Meredith* [37] he said:

> It is appropriate to note, in passing, the odd wording of s 20(1) of the QCAT Act which provides that the purpose of the review is to produce the 'correct *and* preferable' decision. The term commonly used in similar legislation touching administrative review and, I think, the better expression is 'the correct *or* preferable' decision – for reasons explained by Kiefel J in *Shi v Migration Agents Registration Authority*.[38]

Various subsequent cases have acknowledged the adoption of the principles articulated in the federal arena, despite the difference in wording.[39]

In other cases, it appears to have been assumed by QCAT in its review jurisdiction that its role is synonymous with the AAT's function.[40]

Similarly, in the NSW Administrative Decisions Tribunal in *Woodward v Minister for Fisheries*[41] M B Smith, Judicial Member, made reference to a statement he made in *Kumsuz v Commissioner of Police*;

> The change of language from 'correct or preferable' to 'correct and preferable' is mysterious, but in my opinion nothing turns on it. Both formulations confine the review tribunal to the legal limits on the primary decision-maker's power, while freeing it from the decision-maker's reasoning and investigations. If the power in question confers a discretion to identify and choose between relevant considerations, then the tribunal must reach a decision which is correct in its conclusions of fact and law and is also preferable on its merits. If the power allows no discretion, then the correct decision must necessarily be the preferable decision.[42]

---

35 In the Victorian Civil and Administrative Tribunal see *Cracknell v TAC (General)* [2007] VCAT 1615, *SS v Secretary to the Department of Transport (Occupational and Business Regulation)* [2012] VCAT 401, *Shaghaghi v Victorian Taxi Directorate* (unreported judgement) 12 April 2002, *Laragy v Victorian Institute of Teaching (Occupational and Business Regulation)* [2009] VCAT 2651, *McEwan v Podiatry Board of Australia (Occupational and Business Regulation List)* [2011] VCAT 2002.

36 See, e.g., *ISPT Pty Ltd v City of Melbourne (Land Valuation)* [2007] VCAT 652, [19] nn 11; *Mangoplah Pastoral Co Pty Ltd v Great Southern Energy* [1999] NSWADT 93, [84]; *Woodward v Minister for Fisheries* [2000] NSWADT 143, [47].

37 [2010] QCATA 50.

38 *Queensland Building Services Authority v Meredith* [2010] QCATA 50, [5].

39 For example, see *Amour v Queensland building Services Authority* [2012] QCAT 360; *Queensland Racing Ltd v McMahon* [2010] QCATA 73; *McVie v Queensland Police Service Weapons Licensing Branch* [2010] QCAT 491; *Young v Queensland Police Service Weapons Licensing Branch* [2010] QCAT 629.

40 See *CCYPCG v Storrs [*2011] QCATA 28.

41 [2000] NSWADT 143.

42 *Kumsuz v Commissioner of Police* (unreported, 23 March 1999) as quoted in *Woodward v Minister for Fisheries* [2000] NSWADT 143, [47]

It would seem that the difference has created little practical difficulty given the manner in which Tribunals throughout Australia have interpreted their role, namely all have considered that Tribunal is bound to make a 'correct' decision, irrespective of the wording of their governing legislation, where discretion is exercisable. At this stage, it does not seem that the apparently superfluous requirement to make the '*and preferable* ' decision, when there is only one possible correct decision has led to any particular issues being argued about any extra component to the task.

V THERE NEED NOT BE AN ERROR IN THE ORIGINAL DECISION FOR A DIFFERENT DECISION TO BE REACHED ON REVIEW AND THERE IS NO PRESUMPTION THE ORIGINAL DECISION-MAKER WAS CORRECT

In *Shi* [43], the High Court confirmed that the AAT's function required it to review the 'actual decision, not the reasons for it.'[44] Therefore, the existence of error in the original decision is not necessary for the tribunal to come to a different conclusion.

Similarly, in *Kehl v Board of Professional Engineers*[45] the then deputy President of QCAT, Kingham J, stated that on review the Tribunal does not need to find a factual error in the original decision. It is enough for the Tribunal to conclude that another decision is the correct and preferable decision.

VI MUST IT BE THE CORRECT AND PREFERABLE DECISION AT THE DATE OF THE REVIEWABLE DECISION OR AT THE DATE OF THE TRIBUNAL'S DECISION?

Both the AAT Act and the QCAT Act contain generally applicable provisions about how the tribunal concerned must perform its review function.

Exceptionally, the rules are different. A particular enabling Act conferring jurisdiction may place limits on the way in which the review is conducted, the evidence which the Tribunal is entitled to consider, (for example, some Acts provide that hearings must be on the evidence which was before the original decision-maker) [46] and, exceptionally, that the same law must be applied as applied to the making of the original decision.[47]

Sometimes the nature of the decision will dictate limitations requiring consideration of whether a criterion was met at a particular date.[48] In the federal sphere, there has been substantial consideration of this issue in the context of decisions about pensions which may be broadly categorised as entitlement and cancellation decisions. The AAT has approached administrative decision-making (including the AATs role in it) as part of a continuum entitling it to make the correct and preferable decision at the date of its decision.[49] Hence in reviewing a decision to refuse an application for a Centrelink pension made in December 2011, it may decide, when it makes its decision in September 2012, that the evidence establishes an entitlement at March 2012 and set aside the refusal, substituting its decision that the applicant was entitled to receive the benefit from that date.

---

43 *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390.
44 Ibid, 422 – 423 [141].
45 [2010] QCATA 58.
46 For example see the *Liquor Act 1992* s 33(1)(a).
47 Ibid s 33(1)(b).
48 *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390, 413 [101]; 423 – 424 [142] – [147].
49 Ibid, 412 – 413 [96] – [99] (Hayne and Heydon JJ).

However, in reviewing a decision to cancel a Centrelink pension at a particular date, it has accepted that the AAT's task on review is to decide whether the decision to cancel at that particular date was the right one. It may have additional evidence which was not before the original decision-maker and may be satisfied either way for reasons relating to that more recent material, but because of the nature of the decision, it is confined to deciding as of the cancellation date whether the decision to cancel the benefit was the right one. This is because of the nature of the decision. As explained in cases including *Freeman v Department of Social Security* [50] on the basis that the decision under review was the decision to cancel on a particular date, *not* whether, the person had an entitlement to the benefit at the time of the Tribunal's decision.

In *Shi*, the High Court confirmed this general approach,[51] also referring to both the nature of the particular decision as occasionally confining the tribunal's attention to a particular time[52]; or the enabling Act as doing so.[53] We make the observation, that DP Forgie in the AAT has considered that the role of the AAT has subtly changed since the High Court's decision in *Shi* . She says the High Court determined that the AAT in performing its review (unless the legislation requires otherwise) must address the same issues or questions which the original decision-maker did, as opposed to addressing the decision which was addressed by the decision-maker. This, she suggests, removes any temporal link, and so any link to the facts as they existed at the time the reviewable decision was made. Her decisions to this effect are discussed later. They are relatively recent. As yet, there is no consideration of them by the Federal or High Courts.

In summary, the correct and/or preferable decision will generally be determined as at the date of the tribunal's decision, but this is subject to the particular nature of decision which is under review and provisions of the relevant enabling Act which may dictate otherwise.

VII HOW DOES THE TRIBUNAL PERFORM ITS FUNCTION?

In a general sense, as is apparent from the cases discussed, a tribunal in hearing a review application must determine what the decision reviewed entails and what the enabling Act requires of it in the circumstances. It must then find the facts based on the evidence before it, apply the law and make its own determination of the correct and/or preferable decision.

Having regard to the subtle change which has occurred since *Shi*, DP Forgie has recently [54] summarised how she considers the AAT must perform its function following the Shi decision, as follows (closely paraphrasing):

1. the decision to be reviewed is determined having regard to the relevant legislative provisions conferring jurisdiction;
2. the Tribunal will address the same issues or questions as those addressed by the original decision-maker;

---

50 (1988) 15 ALD 671.

51 *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390, 400 – 401 [45] – [46] (Kirby J), 413 [101] (Hayne and Heydon JJ), 422 – 423 [141] – [147] (Kiefel J), 416 [117] (Crennan J).

52 Ibid, 400 – 401 [45] – [46] (Kirby J).

53 Ibid, 412 [99] (Hayne and Heydon JJ).

54 See, e.g., *Re Lobo and Department of Immigration and Citizenship* (2010) 116 ALD 639; *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372.

3. in the absence of a temporal element in the legislation requiring otherwise, the Tribunal reviews a decision as at the date it conducts its own review and makes its own decision;
4. the Tribunal may consider evidence on issues up to the date of its decision on the review;
5. The Tribunal's task is to reach the correct or preferable decision ie correct on the law and evidence AND where if there is more than one possible decision, the decision must be the preferable one having regard to the 'limits imposed by the legislation under which the decision is made and the facts of the case.[55]

No doubt there are other ways to encapsulate the basic process that she sets out. However, leaving aside her assertion that the Tribunal must address the same issues as the decision-maker rather than the decision, she provides a broad general explanation of the process of review. It accords well with the QCAT Act

It is also fair to say that the task is more straightforward where there is only one possible decision, that is, the correct decision. It is more complex where there are a range of possible outcomes. Which is the preferable one? How is the task of undertaken in that situation?

VIII HOW SHOULD THE PREFERABLE DECISION BE DETERMINED?

There is not a formula for deciding which is the preferable decision where there is more than one possible correct decision. However, it is well-recognised that a statutory discretion conferred in general terms, must be exercised in accordance with reason and justice, not according to private opinion.[56] Further, although it is trite to say, the exercise involves the weighing of the relevant factors to reach a reasoned conclusion in the circumstances of each case on its merits.

That said, it is often recognised that AAT decisions have had and do have a normative effect on departmental decision-making in the federal arena.[57] Under the QCAT Act, the objects include promoting the quality and consistency of tribunal decisions as well as enhancing the quality and consistency of reviewable decisions by decision-makers.[58] From this perspective, widely divergent decisions in similar circumstances would be undesirable, and may lead to a sense of unfairness and dissatisfaction with the system of administrative review.

Broadly speaking, matters identified from cases which may assist in formulating the preferable discretionary decision include government policy, good governance; and community expectations. The topic of community expectations is the subject of a separate presentation today by Senior Member Bernard McCabe from the AAT. We therefore address only the other matters. Arguably, the role of policy is the most significant and helpful of those.

IX THE ROLE OF POLICY IN DETERMINING THE PREFERABLE DECISION

In this context, the policy discussed is policy which a tribunal is not required as a matter of law to apply. A Tribunal must, of course, in all cases do as the legislation

---

55 Ibid, as quoted in *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372, 377 – 378 [24].
56 *Re Becker* 15 ALR 696, 700.
57 Cane and McDonald, above n 8, 247 – 248.
58 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 3.

governing its exercise of power requires. Some enabling Acts will require application of policy. Some policy developed by or through an agency may constitute a statutory instrument and be binding as part of the regime of decision-making.

This discussion relates to policy which does not have the force of law and which the tribunal is not required by law to apply. Although it is non-binding policy, it may still have an important role to play when legislation provides a decision-maker with a discretionary power, but no defined criteria or considerations are specified for the exercising of that discretion. Although we mostly discuss decisions made regarding the AAT, the principles drawn out arguably are equally applicable to QCAT when exercising its review jurisdiction.

X THE DRAKE CASES

Returning once again to the early Full Federal Court and AAT decisions in *Drake* and *Re Drake (No 2)*, there are some further useful points to be drawn out regarding the role of policy.

From Drake, the following important points emerged:

1. in the absence of a specific legislative provision requiring or authorising the Tribunal to make its determination in accordance with specified policy, the Tribunal is entitled to treat government policy as a relevant factor in determining a review;[59]
2. The Tribunal is entitled to treat non-binding policy as a relevant factor if the original decision-maker properly had regard to it in reaching his/her/its decision.[60]
3. However, it may not, 'in the absence of specific statutory provision, abdicate its function of determining the ' correct or preferable decision, by 'merely determining whether the decision conformed with whatever the relevant general government policy might be.'[61] and
4. It is undesirable to make any general statement about precisely the part government policy should usually play in determinations: the Tribunal must determine this in the context of the particular proceeding and 'in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law, and on the other hand, the ideal of justice in the individual case.'[62]

The decision of *Re Drake (No 2)*, Brennan J, as he then was, as President of the AAT when he was considering Ministerial policy, is often quoted. He said:

1. 'the exercise of the power must depend upon the circumstances of each case and the weight then to be accorded to the relevant factors.[63]
2. 'Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.'[64]
3. 'Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is better

---

59 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 590.
60 Ibid (Bowen CJ and Deane J).
61 Ibid.
62 Ibid, 590 – 591.
63 Ibid, 638.
64 Ibid, 639.

assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process,'[65]

4. He was considering ministerial policy when he said, 'Of course, a policy must be consistent with the statute. It must allow the Minister to take into account the relevant circumstances, it must not require him to take into account irrelevant circumstances, and must not serve a purpose foreign to the purpose for which the discretionary power was created.[66]
5. 'discretion cannot be so truncated by a policy as to preclude consideration of the merits of the specified classes of cases.'[67] He further noted that 'there is a distinction between an unlawful policy which creates a fetter purporting to limit the range of discretion conferred by a statute, a lawful policy which leaves the range of discretion intact while guiding the exercise of power.'[68]
6. Before applying it, the Tribunal must determine that the policy is lawful. [69] A tribunal would be in error if it applied unlawful policy.[70]
7. 'If the Tribunal applies ministerial policy, it is because of the assistance which the policy can furnish in arriving at the preferable decision'. He continued, 'one of the most useful aids in achieving consistency is guiding policy. An appropriate guiding policy should therefore be applied'[71]
8. The Tribunal could not deprive itself of the ability to give no weight to a Minister's policy in a particular case, but should do so cautiously and sparingly, especially if Parliament had endorsed the policy.[72]
9. However, circumstances may be shown to warrant departure from the policy. For example, where new circumstances make the policy obsolete.[73]
10. Noting that the AAT must reach its decision with the same 'robust independence' as courts, he observed having regard to the nature of merits review that 'The detachment which is desirable for adjudication is not in sympathy with the purposiveness of policy formulation.[74]
11. He further explained why the AAT was not appropriate to formulate broad policy: it does not have a bureaucracy to advise it on broad policy and is not linked 'into the chain of responsibility from Minister to government to parliament' and should therefore be reluctant to 'lay down broad policy'.[75] However, he did acknowledge that decisions in particular cases may nevertheless 'impinge on or refine' broad policy through the giving of reasons.
12. When the Tribunal reviews the exercise of discretionary power as exercised by the Minister, it should usually apply the Minister's policy in reviewing the decision unless 'there are cogent reasons to the contrary',[76] including that the policy is unlawful or unless the application 'tends to

---

65 Ibid, 640.
66 Ibid.
67 Ibid, 641.
68 Ibid, 641.
69 Ibid, 646.
70 Ibid, 643.
71 Ibid, 643.
72 Ibid, 644.
73 Ibid, 644.
74 Ibid, 643.
75 Ibid, 644.
76 Ibid, 645.

> produce an unjust result'[77] in the particular case. 'Consistency is not preferable to justice.'[78]

These statements are instructive, although they do not give detailed 'how to' guidance. An apparently open-ended approach regarding policy is open to criticism.. However, there are good reasons why, as was said in *Drake*, why it is undesirable to lay down hard and fast rules. A review tribunal must be able to respond flexibly to the merits of the particular case before it.

Given the broad framework outlined, it is imperative that tribunal decision-makers provide adequate reasons for either departure from or application and treatment of policy in the review before it in order to achieve and maintain integrity in the administrative review system.

XI NON-MINISTERIAL POLICY AND DEPARTMENTAL GUIDELINES

In the *Drake* cases, although some broad general principles can be drawn out, ministerial policy was under consideration. How is lower level policy to be applied?

Returning to another early AAT case from 1977 of *Re Becker and Minister for Immigration & Ethnic Affairs*[79] Brennan J as he then was, said that a distinction was to be drawn between policies of different types: those made or endorsed at a political level, others at a departmental level.[80] As will be discussed, some academic comment and decided cases suggest that a more guarded approach has developed towards departmental guidelines. However, it must be acknowledged that there are also statements and indications that, if the policy is reasonable and sound, consistency in decision-making makes it desirable that it be followed provided the merits of the matter are considered,[81] and provided that any policy requirements are in accordance with the relevant legislation.[82]

The concept that lower level policies lack legitimacy due to the absence of political accountability is challenged in recent academic criticism by Edgar.[83] In particular, he argues that the distinction drawn in fisheries decisions such *Re Aston and Department of Primary Industries*,[84] involving ministerial policy which was applied and the approach in some social security cases[85] to departmental guidelines which were not applied and treated 'warily' is not legitimate.

---

77 Ibid, 645.

78 Ibid, 645.

79 (1977) 15 ALR 696.

80 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696, 701.

81 *Ruggeri and Secretary, Department of Social Security* (1985) 8 ALD 338; *Australian Unity Health Ltd v Private Health Insurance Administration Council* [2000] FCA 769 [42-45] (Goldberg J); *R v Queensland Fish Management Authority ex parte Hewitt Holdings Pty Ltd* [1993] 2 Qd R 201 (Macrossan CJ, De Jersey J, Dowsett J), cited in *Hyde v Chief Executive, Office of Liquor and Gaming and Anor* [2012] QCAT 013, [37] nn 39.

82 *Bateman v Health Insurance Commission* (1998) 54 ALD 408 (Madgwick J); *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, per President Brennan J, cited in *Hyde v Chief Executive, Office of Liquor and Gaming and Anor* [2012] QCAT 013, [37] nn 40.

83 Andrew Edgar, 'Tribunals and Administrative Policies: Does high or low Policy Distinction Help?' (2009) 16 *Australian Journal of Administrative Law* 143, 144.

84 (1985) 8 ALD 666, 380.

85 See *Re Lumsden and Secretary, Department of Social Security* (1986) 10 ALN N225 and *Re MT and Secretary, Department of Social Security* (1986) 4 AAR 295.

In the 1985 case of *Re Aston and Department of Primary Industries*.[86] the policy concerned had been determined at a Federal-State Ministerial level after consultation with industry representatives. It was given great weight. *Re Drake (No 2)* was relied upon. It was considered that justice and fairness to others demanded that the Astons should be treated the same as others unless there were special circumstances in their favour. The Tribunal, which consisted of 3 Members including the then President of the AAT, Davies J, acknowledged that the Tribunal, not being a primary decision-making authority is not to determine the policy to be adopted by a primary decision-maker.

In *Re MT and Department of Social Security,*[87]which Edgar refers to as an example of policy review, the applicants each sought a special benefit. A relevant departmental policy existed which stated that persons receiving a particular state welfare payment were not entitled to the special benefit. The Department had applied the policy and rejected the applications. The AAT found that they were eligible for it. It said a guarded approach must be adopted to such guidelines. It examined the policy, and expressed the view that the approach it took was fundamentally flawed. In effect, it reviewed the policy and made its own policy.

A less obvious approach was taken in the case of *Re Ruggeri & Department of Social Security*[88] where the policy was merely avoided. Mrs Ruggeri had been overpaid in her pension. The Department sought repayment of the money. The legislation provided a formula specifying by how much a pension may be reduced to achieve repayment, calculated at a per annum rate. There was an issue about the year on which the calculations should be made. The Department used the pension year. Mrs Ruggeri submitted that the financial year should be used.

The Tribunal did not consider whether the policy was to be applied, nor whether there were sufficiently cogent reasons to depart from it. It appears to approach the departmental policy as one possible method to consider. Its decided to use the pension year, it seems as there was nothing to indicate one method was more fair than the other and it considered the matter should be resolved in accordance with the principle of administrative consistency.

Edgar argues that the distinction between high level and lower level policy fails to recognise that;

> - Although high level policy carries an inherent legitimacy due to ministerial involvement, Ministers are just as responsible for departmental policies;
> - Policy development may involve consultation with the industry, but submissions from industry may be 'cherry picked' to be consistent with a pre-determined view;
> - Low level policies can be developed from interpretations of relevant legislation, judicial review case law and merits review decisions – and if done accurately can be useful to promote the correctness and proprietary of decisions;[89]

He argues that the more appropriate approach to be that taken is the approach taken in *Drake (No 2)*.

Although we have not conducted an extensive review of decided cases for the purposes of preparing this paper, it appears there are many decisions which, following

---

86 (1985) 8 ALD 666, 380.
87 (1986) 9 ALD 146.
88 (9185) 4 ALD 388.
89 Edgar, above n 83, 145 – 147.

Drake (No 2) take the approach for which Edgar advocates. [90] However, his criticisms draw attention to the need for care to be taken by the tribunal in its treatment of policy and to provide careful reasons about precisely why and how policy has been dealt with by the Tribunal in making each decision.

XII WHEN SHOULD THE TRIBUNAL DISREGARD POLICY? WHY?

Although a policy is not binding, and cannot fetter a decision-maker's exercise of discretion, for reasons of consistency in decision-making it may be appropriate and desirable to give it significant weight in reaching the preferable decision.

That said, it emerges from our earlier analysis of the *Drake* cases that there are at least three recognised grounds for not applying policy or giving it little or no weight:

- The policy requirements are not in accordance with the law;
- The merits of the case warrant departure from the policy (justice to the individual requires it);
- The policy is obsolete or outdated.

Some brief examples are considered.

XIII POLICY NOT IN ACCORDANCE WITH THE LAW

The Drake cases make it clear that if policy is inconsistent with the law, then the policy is unlawful and shall be disregarded. Before applying policy, the Tribunal is obliged to determine its lawfulness.

Direct conflicts with legislation will clearly make policy unlawful.[91]

Policy has been considered unlawful where contrary to the objects of the legislation.

Australian Fisheries Management Authority v PW Adams Pty Ltd[92] provides an example. In this case, the AAT applied a (formula) policy which failed to take account of the object of the *Fisheries Management Act 1991* of maximising economic efficiency in the use or exploitation of fisheries resources. The policy contained a formula to calculate an operator's quota for a period. The formula took account of boat units and catch history. The applicant argued that the formula was unfair due to the boat being used by the previous owner to catch shark where the catch history did not account for the new intended purpose, to catch whiting and flathead, for which the licence was necessary.

The Federal Court, and subsequently, the Full Federal Court found that the formula failed to take account of the capacity of the vessels and therefore the resources and investment made by different licence holders to achieve their respective catches in the period. The objective of the Act was to allow fisherman to have reasonable business aspirations while conserving resources. For this reason boat size, capacity and

---

[90] See *Re Chen and Minister for Immigration and Citizenship* [2012] AATA 455; *Singh v Minister for Immigration and Citizenship* [2011] FCA 685; *Peric v Secretary, Department of Education, Employment and Workplace Relations* [2011] FCA 1258; *Hneidi v Minister for Immigration and Citizenship* [2009] FCA 983; *Braganza v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 170; *AJKA Pty Ltd v Australian Fisheries Management Authority* [2003] FCA 0248.

[91] *Australian Fisheries Management Authority v PW Adams Pty Ltd* (1995) 39 ALD 481.

[92] (1995) 39 ALD 481.

resources put into the industry should be accounted for when allocating quotas. The decision of the AAT was set aside and the matter was remitted to the AAT.

Policy can also be disregarded where it conflicts with case law about the interpretation of legislative requirements. In the case of *Prasad v Minister for Immigration and Citizenship*,[93] Mr Prasad was found by the Minister not to have satisfied the requirement for a skilled-graduate visa. The requirement was that the Applicant's studies be 'closely related' to the nominated skilled occupation in which they sought to engage. A policy promulgated by the Minister for Immigration and Ethnic Affairs sought to define the phrase 'closely related'. It had also been considered in the case of *Uddin v Minister for Immigration*.[94] The two definitions (that is, the definition in policy and the one in decided cases) were in conflict. The Migration Review Tribunal followed the definition in *Uddin* and concluded that the policy was not in accordance with the regulation. Following subsequent applications to the FMC and the Federal Court, the matter was then considered by the Federal Court of Australia. The Court held that it would only depart from *Uddin* if it was clearly wrong. He was not of this view and therefore he concluded that the Tribunal applied the legislation correctly and did not make an error in its approach.

XIV THE MERITS OF THE CASE WARRANT DEPARTURE FROM THE POLICY

As discussed in *Drake*, policy may be given little weight because it results in injustice in the circumstances of the case.

QCAT has departed from policy because it resulted in a harsh outcome for the individual concerned in:

This occurred in *Ericson v Queensland Building Services Authority:* [95] This decision involved a Queensland Building Services Authority (QBSA) policy *Financial requirements for licensing.* The policy seeks to promote financially viable businesses and to foster professional business practices in the building industry. It requires a minimum 1:1 ratio for current assets to current liabilities. A contractor must demonstrate that he or she meets it each year. The QBSA suspended Mr Ericson's licence for 12 months as his business did not attain this ratio. When calculating the ratio two debts (of $7 Million) which Mr Ericson treated as current assets were disallowed by the QBSA. One of these debts (of $4.8 million) was the subject of adjudication and was adjudicated in his favour, but was being contested and the matter was progressing slowly. Mr Ericson contested the classification of the debts with the QBSA but this was not the decision reviewed. Mr Ericson applied to the tribunal after the QBSA made the decision to cancel his licence after a report from Mr Ericson's accountant to the effect that Mr Ericson's current ratio was 0.93:1 at the relevant time. The QBSA considered that it was undisputed that Mr Ericson was not meeting the requirement of the policy.

The Tribunal considered that the Board's decision to cancel Mr Ericson's licence was harsh. The Tribunal considered four factors important:

1. Mr Ericson's licence was controversially suspended for 12 months which must have had a substantial effect on his business. The Tribunal considered that arguably ought not to have been imposed considering the definitions in the policy.

---

93 (2012) 128 ALD 113.

94 [2010] FCA 1281. This was appealed and the decision affirmed in *Uddin v Minister for immigration* [2010] FMCA 553.

95 [2012] QCAT 13.

2. The proportion by which Mr Ericson failed to meet the current ratio requirement was not large.
3. Current assets included substantial trade debts and current liabilities included substantial outstanding amounts to the ATO ($3.3 million) and superannuation (just under $900,000).
4. Mr Ericson's turnover from trade had considerably dropped and income included the sale of property, plant and equipment.

The Tribunal considered that the first two favoured weighed in favour of not cancelling the licence, and the other two against. The tribunal concluded that Mr Ericson's licence should not be cancelled but remain in place with the condition that he report quarterly to the Board. The reporting was so that the Board could monitor his business and suspend or cancel his licence if it became obvious that the business was no longer viable.

XV THE POLICY IS OBSOLETE

As discussed earlier, Brennan J, as he then was, in *Drake (No 2)* specifically referred to obsolescence as a basis for departure. It may arise when for example, legislation has been amended after the policy was developed, and although the policy is not rendered unlawful for inconsistency with the current Act, it is nevertheless no longer appropriate to apply the policy in the circumstances of the case.

XVI TRIBUNAL DEVELOPMENT OF POLICY AS A SEPARATE ISSUE

Before moving away from discussion of policy, it is worth noting recent academic comment[96] by Pearson about what she suggests is a contentious area, namely formulation by review tribunals of their own policy in the course of merits review.

As you will recall, *Drake* cautioned against statements of general principle and policy development generally and *Drake No 2* explains why administrative tribunals should not formulate policy, although acknowledging that decisions may refine policy However, as Pearson notes, published decisions inevitably extrapolates principles from cases considered. While it is acknowledged that this will promote consistency, the tribunal makes decisions on the basis of the limited evidence before it and this limits the capacity it has to make policy. She suggests that some tribunals have developed a practice of articulation of general principles.

Although this is a separate topic which I do not explore today, the cases referred to by us today make it clear that it is not the role of merits review tribunals to develop broad policy and that they are not equipped to do so.

XVII GOOD GOVERNANCE

Good governance has also emerged as a factor in determining the preferable decision. However, it remains conceptually vague and therefore, less helpful than policy. Decisions include references to good governance[97] and good government and the norms of good decision-making.[98]

---

[96] Linda Pearson, 'Policy, principles and guidance: Tribunal rule-making' (2012) 23 *Public Law Review* 16.

[97] In *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, 335 Smithers J stated 'it is important to observe that the Tribunal is not constituted as a body to

In 1979, Smithers J in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [99], said 'it is important to observe that the Tribunal is not constituted as a body to review decisions according to the principles applicable to judicial review. 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 governance'.[100]

More recently in 2008 In *Shi v Migration Agents Registration Authority* Keifel J said:

> Smithers J, in *Brian Lawlor Automotive*, said that it is for the tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the tribunal, in essence, is an instrument of government administration.[101]

It is difficult to draw guidance from these types of statements. However, one practical example appears to emerge from *Fitzpatrick v New South Wales Office of Liquor and Gaming*[102] , where the tribunal, in considering an application under the FOI Act for certain documents relating to proposed amendments to the Act governing the racing industry in NSW relied upon the objects of the relevant Freedom of Information Act to hold that parliamentary intention included that that good governance is advanced by openness and accountability, and, an informed public.

Another helpful but again limited observation about the requirements of 'good governance' emerges from the recent case of *Secretary, Department of Families, Housing , Community Services and Indigenous Affairs and Wilson*[103] in which the tribunal, quoted Smithers J in Brian Lawlor, then went on to say 'the Tribunal must, in keeping with good administrative practice, base its decisions on the best available information.'[104] However, this does not take the bounds of the concept of good administrative practice far.

XVIII CONCLUSIONS

Since the establishment at a federal level of the AAT, the system of administrative review of government decisions has been broadly embraced in Australia. Tribunals with a merits review function play an important role in independently reviewing many government decisions. In the review process, they are an independent body standing between the executive government and ordinary members of the community regarding decisions made by government which affect them.

---

review decisions according to the principles applicable to judicial review. 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 ate in the view of the Tribunal not acceptable when tested against the requirements of good governance', this was followed in *Shi v Migration Agents Authority* [2008] HCA 31, 35 (Kiefel J).

98 Cane and McDonald, above n 8, 235 – 245.

99 (1979) 24 ALR 307.

100 Ibid, 335.

101 *Shi v Migration Agents Authority* [2008] HCA 31, [140] (Kiefel J).

102 [2010] NSWADT 72, [30] – [31].

103 [2011] AATA 554.

104 Ibid, [45].

A substantial body of decisions has developed about the exercise of the merits review function. How the process is performed and how the preferable decision is to be reached when the tribunal has discretion as to the outcome will be the subject of ongoing consideration. However, lawful non-binding government policy may provide valuable assistance and arguably should only be rejected for cogent reasons. A tribunal should always clearly articulate its reasons, whatever approach it takes to relevant policy. In performing this task, care should be taken to heed the cautions expressed in the Drake cases, about making broad general statements or developing what might be considered tribunal policy.