

**Council of Australasian Tribunals (COAT) Victoria
Twilight Seminar**

**Challenges facing Administrative Tribunals -
The complexity of legislative schemes and the
shrinking space for preferable decision making**

Monday 18 November 2013

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President
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**Level 15 HWT Tower, Southgate, Southbank,
Melbourne, Victoria**

I have been asked to speak on the subject of challenges facing administrative tribunals. There are many including the considerable challenges of budgets, appointments, resourcing and the like. They are undoubtedly significant challenges to every tribunal. I do not want to suggest they are not at the forefront of my thinking—and I suspect those challenges are at the forefront of the thinking of every head of a tribunal. But tonight I want to pose a more existential question. It relates to a challenge to our role that arises in consequence of the seemingly shrinking space for preferable decision making. It is a question that admits of no easy answer. I pose it for further consideration rather than purporting to answer it.

I will begin, by way of context, by drawing shamelessly on a recent speech delivered by Justice Steven Rares to the 2013 AGS Administrative Law Conference. In his speech he foreshadowed the theme that I want to explore with you this evening.¹

51. ...Sir Samuel Griffith said that a distinguished lawyer had told him that "the law is always certain although no one may know what it is"...

¹ Legality, rights and statutory interpretation, 2013 AGS Administrative Law Conference www.fedcourt.gov.au (footnotes omitted).

52. *What has been remarkable in the last 40 years is the expansion of statute law, not just in its subject matter but also in its prolixity. Prolixity and statutory labyrinths are closely linked. ...*

54. *In 1973, the entire consolidated statutes of the Commonwealth were printed in 12 bound volumes. In 2011, the 190 Acts passed by the Parliament in that year alone occupied nine bound volumes. That leaves to one side what has happened in the making of delegated legislation. The High Court has emphasised that a court must construe a provision in the context of the Act as a whole. That can be a tall order with the many legislative behemoths such as the multiple volumes of Income Tax Assessment Acts 1936 and 1997, the 1,414 pages of Competition and Consumer Act 2010, the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001 (Cth). Many Commonwealth Acts now come in more than one volume, if you get a printed copy...*

55. *On a recent count the Migration Act 1958 (Cth) had been amended 68 times in the last 10 years – about once every two months. Even that rate obviously did not keep pace with some urgent necessities in 2009 when that Act was amended 10 times. But, then the tax legislation was amended 30 times in 2012. Of course, the constant tinkering means that it is difficult to use just one version of an Act, lest it has been amended in a material way before or after the relevant time for which one needs it....*

56. *No one can pretend that there is now any reality in the fiction that the Parliament has considered the detail of this tsunami of paper before it enacts it as law. Judges cannot read through the whole of most modern Acts once, let alone each time that they must refer to them or the latest or relevant amended versions...*

59. *Principles based legislative drafting identifies with reasonable clarity what the Parliament considers important and leaves it to the good sense of the Courts to interpret the law so as to give effect, generally, to its legislative purpose.*

60. *But, the prescriptive drafting style of recent times is quite a different beast. It presents judges, lawyers and the community with a cascade of every possibility imaginable to the drafter, however inane or recondite, to pore over and interpret. But because drafters are human, they miss points – until the now inevitable next amendment of the Act. Yet, the requirement that every word of an Act be construed so as to give effect to it, if at all possible, in harmony with the rest of the legislation, invites the Courts and litigants to identify the fine distinctions between each phase in a cascade or plethora of alternatives. That means in contracts, dealings with government and litigation, parties and their advisers must also cover every possible permutation in the legislation. This increases costs and the time people spend dealing with their affairs, out of all proportion. Forms are longer to fill in, litigation is much more complex, longer and costlier...*

62. *The current Commonwealth drafting style takes impenetrability to depths that raise real issues of concern about this policy, its value and consequences.*

...

65. *Let me give an insight into the penumbra. The Competition and Consumer Act now has a new Div 1 in Pt IV. It begins with s 44ZZRA which foreshadows "The following is a simplified outline of this Division" that takes 20 more pages to reach s 44ZZRV....*

72. *Who will be able to understand this morass? Only, perhaps the drafters who created this abomination and those of the Income Tax Assessment Act 1936 and, its half written and now abandoned rewrite in the 1997 Act (Cth)....*

75. *The issue for our society is whether the laws it makes should be, so far as possible, efficient to administer, as an aspect of the rule of law. When faced with arcane voluminous legislation that challenges comprehension, one can legitimately raise a question as to whether that is a law at all? But that is for another day.*

If the position Steven Rares so powerfully described creates difficulties for the courts how much more are the difficulties it creates for tribunal members—a

significant proportion of whom have been appointed not because they are lawyers but because they are skilled in their professional fields.

But the issue Rares J explores poses an even more profound challenge for Tribunals.

Tribunals do not have the luxury of leaving the final question posed by his Honour for another day. Not only do we in Tribunals have to deal with this maze of complex legislation but we face an additional burden. Tribunals must grapple not only with complex statutory schemes but also with what supplements them—voluminous ‘soft law’ which may or may not be expressed as binding on decision makers.

Simply disentangling what is ‘law’ and what is not can be a complex and challenging task— *Comcare v Lilley* [2013] FCAFC 121 provides a good illustrative recent example.

It concerned how to assess claimed injuries in a workers compensation case against an “approved Guide”. The Full Court noted:²

We are not the first to point out that there are many inconsistencies of expression in the Guide and ambiguities in how it might operate at the specific level of individual impairment. So much was forcefully said by the Full Court in *Whittaker v Comcare* [1998] FCA 1099; (1998) 86 FCR 532 at 538-539. In that case (to which we refer in more detail below) the ambiguities were so great the Court felt unable to fill the gap through a process of interpretation.

Increasingly it seems relevant to query whether the incremental but ever increasing prescriptiveness of this layer of ‘soft law’ has created a fundamental tension between, or even conflict with, one of the underlying concepts which underpinned the Australian system of merits review which was established following the Kerr and Bland Reports.

² At [37].

Those reports were premised on an assumption that merits review of administrative decisions would ensure that not only the correct but also the preferable decision was reached.

The authors of those reports recognised that sometimes the law might admit of only one lawful outcome but they reported at a time when most administrative decisions were taken in circumstances where a far greater range of decisional choice existed.

For example the Migration Act 1958 as then in force simply conferred a general power on the Minister to grant a visa. Social security law provided for a broad power to grant 'special benefits' to a person who needed assistance but did not fit any other benefit category.

Administrators were routinely required to exercise their own knowledge, skill and judgment. Sometimes the range of their choice would be informed by ministerial policy sometimes it was not. Merits review was intended to ensure that a person who challenged an adverse decision could apply to an independent third party for a dispassionate review of the challenged decision. Multimember tribunals were thought best to ensure a wider range of experience and judgment could be brought to bear on what the preferable decision should be.

Merits review initially was conceived of as an iterative process—not only would a decision on review substitute for that of the agency—the reasons given for a decision would influence better decision making by that agency.

However, early in the history of merits review issues arose as to how tribunals should treat the policies which ministers had established to guide their officials.

In *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (Drake No 2) Brennan J (also the first President of the AAT) concluded that decision-makers charged with the responsibility of undertaking

merits review should generally apply ministerial policy unless the policy was unlawful or “there are cogent reasons to the contrary”.³

That conclusion has had a powerful legacy.

In 1979 ‘soft law’ was much less frequently encountered. Justice Brennan could not have anticipated its growth. The volume of ‘soft law’—including directions, guidelines and policy has since proliferated. Its expansion has even outstripped the growth in statute law that Justice Rares so eloquently has lamented.

In his book *Administrative Tribunals and Adjudication* Peter Cane drew attention to the ubiquity of policy and the rarity of Tribunals finding ‘cogent reasons to the contrary’ to depart from it. He noted the general inclination of Tribunals to favour the predictability and certainty of policy over individualised circumstances in deciding matters before them.

Prescriptive policy statements now occupy much of the decisional space where discretion previously existed. There are many reasons for this and not all are unworthy. Policy privileges consistency and equality of treatment and assists in limiting erratic decisions, but does it challenge the future of ‘preferable’ decision making?

The AAT, and State tribunals which share the AAT's heritage, operate without fanfare offering relatively convenient, informal and cheap processes whereby citizens can challenge adverse administrative decisions. Merits review allows those tribunals to reach the correct or preferable decision - not merely to set aside a flawed decision and send it back for reconsideration.

By contrast judicial review has a more limited remit. It exists to correct legal errors. In *Attorney General (NSW) v Quin* (1990) 170 CLR 1, at 35-36 Brennan J stated:

³ At 644-645.

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.

Judicial review can set flawed decisions aside and can compel unperformed legal duties to be performed but it cannot substitute for a flawed decision what the court thinks to be the correct or preferable decision. That is a step beyond judicial power. Only merits review can achieve that outcome.

Bluntly it might be asked whether, if when undertaking merits review, Tribunals are unduly reluctant to examine the individual circumstances of an applicant or to find that there are 'cogent reasons to the contrary,' justifying the non-application of a general policy, they are at risk of being complicit in undermining this critical distinction between administrative and judicial review?

This is a challenging question. It admits of no easy answer.

If independent merits review bodies are perceived to be too courageous in the 'Yes Minister' sense, they may face pressure to restrict their jurisdiction.

The Hon. Bob Ellicott QC recently spoke of the huge resistance he encountered as Attorney-General from within Commonwealth Departments when merits review was first introduced. Merits review is entirely a creation of statute. We may choose to regard it as an entrenched element of our Australian system of government but unlike judicial review it is not constitutionally entrenched.

Perhaps all this paper can do is to encourage reflection upon what is inherently a challenging issue—and to indicate that those of us who are members of merits review tribunals still need to pause before we too readily accept that an outcome better fitting the individual circumstances of an applicant in a matter before us is foreclosed because that outcome would not be consistent with detailed 'soft law' policy. I do not purport to have an answer—but I do not think we can afford to ignore the question.

The golden mean may be elusive—but self-renunciation of one of the critical objectives the former Attorney-General thought he had achieved by the self-same institutions he had helped create would be a curious outcome.

Perhaps those of us who serve in Tribunals have become too ready to accept that the considerations that Brennan J relied on in *Drake No 2* continue to exist in much of what is contemporary ‘soft law’. We also may have become beguiled by over-simplification of his reasoning.

Re Drake No 2 is not authority for what it carelessly is often cited for. Rather than permitting, its ratio forbids a Tribunal abrogating individual considerations indiscriminately in favour of policy.

Given the frequent reference by counsel for respondent agencies to a single sentence from Brennan J’s reasons⁴ it is worth recalling that when that sentence is read in its full context *Re Drake No 2* is a much more nuanced decision than those citing it may care to acknowledge.

In *Re Drake No 2*

- (a) the policy Brennan J applied was made in the exercise of explicit statutory power and subject to parliamentary scrutiny,⁵
- (b) Brennan J referred to a distinction he had first adverted to in *Re Becker*⁶ between such high level ministerial policy and that made at a departmental level,⁷
- (c) Brennan J stated that the Tribunal could not deprive itself of its freedom to give no weight to a Minister’s policy in a particular case, and:

⁴ Viz “These considerations warrant the Tribunal’s adoption of a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary” at 645.

⁵ At 643-4.

⁶ (1977) 15 ALR 696 at 700.

⁷ At 644 referring to *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1978) 52 ALJR 254.

(d) Brennan J held that if that the application of ministerial policy would work injustice in a particular case that of itself would provide a cogent and sufficient reason to depart from a policy as 'consistency is not preferable to justice'.⁸

It is also worth recalling that *Re Drake No 2* was before the AAT on remittal because a Full Court of the Federal Court in *Drake v Minister for Immigration and Ethnic Affairs*⁹ had earlier upheld an appeal on the ground that the Tribunal as previously constituted had abrogated its function by deferring to ministerial policy without making an independent assessment and determination of the matter before it.

Simply deciding the matter in accordance with ministerial policy without regard to whether a more appropriate outcome might have been reached had been held to be an error of law. Bowen CJ and Deane J stated¹⁰:

...the Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be.

Sir Anthony Mason writing extra-judicially a decade later, summarised the position reached in *Drake v Minister for Immigration and Ethnic Affairs* as follows¹¹:

Subsequently the Federal Court decided that the Tribunal was not bound to follow a Ministerial policy and could not abrogate its functions of determining whether, on the material before it, the decision was the correct or preferable decision.

⁸ At 645 in a passage that immediately follows that set out in n 4 above.;

⁹ (1979) 24 ALR 577.

¹⁰ At 590.

¹¹ Sir Anthony Mason, 'Administrative Review: The experience of the first twelve years' (1989) 18 *Federal Law Review* 122 at 127.

We who hold appointments as tribunal members as a legacy of the work of Bob Ellicott QC share a joint responsibility to promote the value of independent merits review. We should never forget how unique and important is the right we have as Australians to seek independent merits review of a public official's decision.
