DECISION-MAKING IN THE PUBLIC SECTOR: GETTING IT RIGHT

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Answer the Question

A few mornings each week I go to a gymnasium. There I find myself puffing and watching Sky News. The program includes an interview with two government and opposition politicians. The interviewer asks questions but he never gets answers. The politicians are singing from their song sheet, or "on song" as they say. If you are lucky there will be a sentence addressing the question. Answers to opposition questions in Parliament turn this process into an art form.

This is not really a reflection on our politicians, it is a recognition of how we interact. In ordinary conversation questions are usually met with a comment rather than an answer; with a response to the question that should have been asked.

The only situation I know of in which questions are generally answered is cross-examination in a court, where the cross-examiner can insist on an answer rather than a comment.

So we are rather lax in our day to day communication. We do not often directly address questions that are posed for us.

This approach sometimes carries over into our other activities, to areas where we really should be answering the question. Decision-making is one of them. Decision-making is generally question answering and it is one area where more attention should be given to identifying the precise question and then answering it. This process is so important, but so often ignored, that I put it at the head of my list of qualities of good decision-making.

What sort of decision-making am I talking about? Well, all decision-making. I suppose I will be emphasising formal primary decision-making or internal review. However, what I will say is also relevant to ordinary decision-making. It applies to decisions whether to sue or defend and even to steps in litigation. The authority to make all these decisions will have a source and the source will usually contain regulation. The model litigant rules in the Commonwealth are an example. I think that it is right, every time a decision is made, to think about its source and apply the rules I will discuss.

I have so far isolated one problem with primary decision-making – not answering the right question. However, I would not wish you to think that I exclude higher level decision-makers, such as judges and tribunal members, from this error.

Justice Branson in the Federal Court has said this concerning a decision of the Administrative Appeals Tribunal (*Australian Postal Corporation v Barry* (2006) 44 AAR 186 at 190; [2006] FCA 1751 at [25]):

> *"I observe incidentally that it is a salutary discipline for every statutory decision-maker to refer to the terms of the relevant statutory provisions and to identify each element of the statutory cause of action. Had the Tribunal in this case set out or paraphrased in its reasons for decision the terms of s 16 and s 19 [of the* Safety, Rehabilitation and Compensation Act 1988 *(Cth)] it is unlikely that it would have overlooked their critical elements."*

The High Court recently said something similar in *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286:

> *"As this Court has so often emphasised in recent years,* [they cited 6 cases] *questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions. Reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicant statute or statutes. Expressions used in decided cases to explain the operation of commonly encountered statutory provisions and their application to the facts and circumstances of a particular case may serve only to mask the nature of the task that is presented when those provisions must be applied in another case. The masking effect occurs because attention is focused upon the expression used in the decided cases, not upon the relevant statutory provisions."*

Kirby J made similar observations in *Shi* at [25]. These passages reflect a statement made a little earlier by Callinan and Heydon JJ in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45: (2006) 228 CLR 423 at 468 [131], when speaking of the application of freedom of information provisions. See also *Australian Securities and Investments Commission v PTLZ* [2008] FCAFC 164; 48 AAR 559, at 566 [34].

Administrative decision-making is nearly always authorised by legislation and must address the question posed by the legislation.

A great deal of our everyday activity is governed by perception. Contracting parties often leave their contracts in a drawer and perform the contract in accordance with their perception of its provisions. However, when a dispute arises, it is the actual provisions of the contract which will govern and to which the parties then turn. It is never appropriate for administrative decision-making to be guided by perception. The precise wording of the rule being applied must always govern.

The principle may seem obvious. However, it is often departed from. I venture to suggest that the majority of decisions of the Administrative Appeals Tribunal which are upset on appeal to the Federal Court are set aside on the ground that the AAT member did not correctly apply the governing legislation. Frequently, this is

because the legislation is difficult to understand. Sometimes, however, the failure is associated with an omission to strictly observe the requirements of the legislation and to follow through the cumulative tests it contains. This can be a complex and even a tedious process, but with the application of appropriate care it is not a difficult process.

My experience is that although the proposition is obvious, it is remarkable how often its requirements are not carefully followed. Perhaps it is associated with the significance of perception – in this case misconception of what the statute actually provides. I suspect it is also associated with the fact that familiarity can cause us to act automatically. It is very easy for a decision-maker, particularly one who makes many decisions concerning the same or similar subject-matter, to fall into the habit of assuming what the legislation requires; of proceeding on a perception of what the legislation requires. The decision of Branson J is an excellent example. Another possibility is that the domination of the facts in most cases somehow masks the importance of the rule being applied.

My caution to you is that you be vigilant in your decision-making to avoid this common tendency.

As a means of reinforcing the importance of the rule it may be useful to identify some good reasons for it.

There are two good reasons for the principle. First, it simply is the decision-maker's obligation to apply the statute. But there is a second, more practical reason. Decisions not firmly based on the legislation will be more likely to provoke applications for review and applications for review, particularly before a court or tribunal, will always proceed by reference to the precise terms of the legislation.

Broadly, administrative decision-makers only make two types of reviewable error. First, assuming that the wrong provision applies. Secondly, proceeding on a wrong perception of the details of the correct provision. Both these errors will be corrected by attention to my principle. That should leave only difficult questions concerning the meaning of legislation for potential error.

I never decide a case in the Administrative Appeals Tribunal without having the legislative provisions constantly by my side. I usually set out their elements, as they arise in the case before me, in my reasons for decision. I make sure that all of the elements are addressed in my reasons for decision.

A good example is a decision I was a party to a few years ago which has recently generated some fresh publicity. It related to the importation of eight Asian elephants by the Sydney and Melbourne zoos. My eight elephant charges are now nine.

Most observers would imagine that the Tribunal's decision in the case concerned whether the elephants could be imported into Australia for exhibition at zoos. Nothing could be further from the truth. Importation for exhibition in zoos is not a permitted purpose. What is permitted is importation for "conservation breeding or propagation". The intersecting provisions relating to this were quite complex (see *Re The International Fund for Animal Welfare (Australia) Pty Ltd v Minister for Environment and Heritage* (2005) 93 ALD 594 at 617 ff (cf 601-4); (2005) 41 AAR 508 at 531 ff (cf 515-18); [2005] AATA 1210 at [97] ff (cf [26]-[38]). I will read one paragraph of the decision. Apart from showing how complex sorting out the legislation can be it provides a good illustration of how legislation can provide that words must be applied with a special meaning given by the Act:

> *"The primary test laid down in subpara 303CG(3)(f)(i) [of the* Environment Protection and Biodiversity Conservation Act 1999 *(Cth)] is that 'the proposed import would be an eligible non-commercial purpose import'. Those words form part of the context in which we must understand the balance of the legislative test but they are, in terms, supplanted by subs 303FB(d). That effectively provides an exclusive definition of the words in s 303CF. The legislation then requires attention to be turned, relevantly, to subs 303FF(2). That does not provide an exclusive definition but it does have the effect that where its provisions are satisfied an import will be, without more, an import for the requisite purpose and accordingly 'an eligible non-commercial purpose import' within para 303CG(3)(f). All this is relevant because the effect of subs 303FF(2) is that if a 'specimen is for use in a program the object of which is the establishment and/or maintenance of a breeding population' and the other requirements of that subsection*

> *are met, then the import of the specimen is 'an import for the purposes of conservation breeding or propagation'. Accordingly, the question upon which we must focus, in the first instance, is whether the elephants are for use in a program the object of which is the establishment and/or maintenance of a breeding population."* (ALD at 617-18 per Downes J, Senior Member Ettinger, and Member Alexander.)

By tracing through the complex sections it becomes clear that where an animal will be used in a breeding program it is deemed to be imported for that program. This is not the ordinary meaning that would be given to the words.

The elephants case is a good example, because of the complexity of the provisions involved, of the need to constantly attend to the legislative direction. However, it is just as important in simpler cases, perhaps even more important, because familiarity can increase the tendency to make assumptions about what the legislation provides.

I am talking today primarily about formal administrative decision-making – decisions which amount to an exercise of government administrative power. But I am not confining my remarks to decision-making subject to review by a tribunal. The principles apply to all decision-making. Practically every decision made in the public service will involve a formal exercise of administrative power. The higher the level of the officer making the decision the more likely this will be. All these decisions should be made in accordance with the principles I am describing. The substance of what I am saying ought to apply to all decision-making in Government, whether formal or informal, because all decision-making should be based on the terms of the enabling power, whether it be legislative, policy-based or even more informally sourced.

At the level of Tribunal decision-making, I call concentrating on the words of the authorising power or authority, the focus of decision-making. I think you would do well to think of it this way in your daily decision-making activities.

Establish the Facts

The second most important aspect of decision-making is establishing the facts. It is often said that once the facts are established the decision will make itself. True though this is, it may reinforce what I have said about errors flowing from not concentrating on the legislation.

Fact finding is especially difficult for primary decision-makers and internal reviewers because they often have no outside assistance in carrying out the task. The Administrative Appeals Tribunal has the advantage of being able to consider facts presented by both sides in an ordered way. Primary decision-makers may have no such assistance. Where the parties do present arguments, they will not usually be so well ordered and will often confuse facts and submissions. Most problematically, they will generally assert facts without offering proof.

Administrative decision-makers at every level are usually freed from the technical requirements of the rules of evidence. However, this does not mean that facts can be established merely by assertion.

Although the rules of evidence do not apply, the rules of natural justice or procedural fairness generally will apply to most administrative decision-making. In the past, these were technical rules, but since the decision of the High Court of Australia in *Kioa v West* (1985) 159 CLR 550; 62 ALR 321, the emphasis is no longer on technical rules but on what is fair in all the circumstances (CLR at 584-85; ALR at 346-47).

Fairness to persons affected by a decision will require the decision to be based on established facts rather than asserted facts. It will often require one party to be given the opportunity to contradict a fact which seems *prima facie* to have been established or to make submissions as to its relevance or significance.

Much administrative decision-making is bilateral. There are two interests. One of them is the Government interest. This is true of income tax assessments and their counterpart, social security payments. However, it is not true of child support

payments. Both parents have an interest. It is not true of fisheries regulation, particularly in recent times. This is because a finite and, in some cases, contracting resource, is being managed. Every increase in quota for one fisherman is a decrease in quota for another. The same is partly true of migration decision-making. It is certainly true of decision-making concerned with environmental protection. The elephants case is an example, where the true competing interests were zoos and wildlife protection organisations. In coming years decisions relating to allocation of water for irrigation will frequently be important areas where multiple interests are involved.

If the rules of evidence do not apply, what should guide administrative decision-makers in fact finding? The test is what is probative. What leads to reasonable satisfaction. Very often a document will provide the proof: a certificate issued under legislation, such as a birth certificate, or a notice issued under legislation, such as a rate notice.

Where evidentiary documents are not available, assertion may be sufficient where the person making the assertion knows the facts. Neither courts nor administrative decision-makers proceed as if witnesses are not telling the truth, unless there is good reason to doubt them. Sometimes an assertion might need to be verified, by its being made in a statutory declaration, before it will be accepted.

What kind of proof is required depends in every case upon the inherent likelihood or unlikelihood of the matter asserted and its importance to the decision. For example, the amount of water used by one irrigator may be an important primary fact. If an applicant's claim is challenged by someone with an opposing interest, proof of a higher order may be required. An assertion on oath may be enough. But it may not. More objective evidence may be required. The person with the opposing interest should usually be given an opportunity to challenge the claim.

The balancing of these processes will lead to the adoption of a method which will, in the end, enable the decision-maker to come to a satisfactory finding as to the facts and from that basis to make the ultimate decision.

The Role of Policy

Policy can be a very difficult area. Reviewing tribunals such as the Administrative Appeals Tribunal are not bound by policy, but they will be reluctant to depart from policy without good reason. This has been the position ever since the landmark decision in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; 2 ALD 60.

Policy cannot alter a legislative power or the manner or basis for its exercise, but it can explain or describe the way, in general, it should be exercised. Subject to the administrative law requirement, now enshrined in s 6(2)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and state equivalents, that decisions may not be taken "in accordance with a rule or policy without regard to the merits of the particular case", administrative decision-makers are entitled to take policy into account.

The complexity of modern Government administration has led to more and more policy documents which impact on decision-making. This is particularly so in the area of Government regulation of business. Policy has become so important that it is sometimes called "soft law". The contrast is with legislation or delegated legislation called "hard law".

Policy and discretion meet at the interface between uniformity and individual justice. A balance needs to be found between the two. In decision-making on review, greater currency may be given to individual justice but that is not to say that policy is the only consideration at the primary level. Indeed, such an approach will often lead to error of law.

In 1989, speaking twelve years after the Administrative Appeals Tribunal was established, Sir Anthony Mason drew five distinctions between primary administrative decision-making and decision-making on review in the Administrative Appeals Tribunal. He said this *(*A. Mason*, Administrative Review: The Experience of the First Twelve Years* (1989) 18 Fed L Rev 122 at 130)*:*

> *"Experience indicates that administrative decision-making falls short of the judicial model – on which the AAT is based – in five significance respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not have to give reasons for his decision. Fourthly, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.*
>
> *The five features of administrative decision-making which I have mentioned reveal why it is that administrative decision-making has never achieved the level of acceptance of the judicial process in the mind of the public."*

The five qualities are:

1. Independence of the Tribunal;
2. Decision-making in public;
3. Requirement for reasons;
4. Natural justice applies; and
5. Individual justice will not be subordinated to public policy.

At a practical level one might add that the judicial model leads to a more thorough and detailed examination of the facts and a more rigorous consideration of the possible outcomes. I have been involved in hearings which took days where the time that was devoted by the original decision-maker must have been hours or less.

The intervening years since Sir Anthony made his remarks have, I think, brought about change. The Administrative Appeals Tribunal and its state counterparts have had a significant effect on decision-making at the primary level. Review of decisions in both the Federal Court and High Court has added to the effect. This seems to me particularly to be so with respect to the fourth and fifth matters to which Sir Anthony referred. Although natural justice issues and public policy issues may be given more thorough consideration in the Administrative Appeals Tribunal, they will nevertheless now require examination at first instance.

These changes are part of the revolution that has occurred in administrative law and administrative decision-making in consequence of the sweeping reforms introduced in Australia in the mid-1970's.

The most important advice I can offer to primary decision-makers is to exercise their functions through an awareness of these matters: to know that policy and individual justice can conflict; to know that sometimes one or other will militate a result; and to know that between the two will sometimes lie an area for discretion.

As long ago as 1979 the Federal Court of Australia established that the function of the Administrative Appeals Tribunal was to arrive at the "correct or preferable" decision (*Drake* ALR at 589). That description is equally apt to describe the task of all administrative decision-makers, subject to the subtle differences relating to the application of policy to which I have referred.

Primary decision-makers should therefore be looking for the "correct" decision, where only one result can obtain and the "preferable" decision where a range of possible decisions is available. Policy will play a part but must not be the only consideration and should be considered carefully where its application may deny individual justice.

General Guidance

The Administrative Review Council has recently issued a series of best practice guides relating to decision-making. The guides are intended to provide assistance to primary decision-makers. The five guides cover the following topics:

Guide 1: Lawfulness
Guide 2: Natural Justice
Guide 3: Evidence, Facts and Findings
Guide 4: Reasons
Guide 5: Accountability

The remarks I have made are intended to address three significant areas of particular interest in decision-making. The Guides provide an overall view with assistance on all aspects of the process.

The ARC is prepared to make the Guides available to agencies and even individuals. I think they should be an essential tool for decision-makers in all departments and agencies.

The guide gives detailed and step by step advice on decision-making. I have not attempted to cover all this. Rather, I have isolated a few important points. I will leave it to you to read the detail of the guides.

Conclusion

Good administrative decision-making is a central and vital part of Government. The role of the Parliament in enacting the legislation which governs society and the role of the Executive in framing the policy through which the laws are executed are of primary importance. Yet the heart of administrative Government is the administration itself. All administrative action is supported by administrative decisions. Getting administrative decision-making right is thus one of the highest goals of executive Government.