INFORMAL POLICY AND ADMINISTRATIVE LAW

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Introduction

Intellectual distinctions have a habit of at first liberating and then imprisoning the mind. This is nowhere better illustrated than in the case of the courts' attitudes towards informal policy in administrative decision-making. The courts once thought that policy was none of their business.[1] In the early seventeenth century the argument was that royal policy was not a matter for judicial review because these were matters of state into which the courts could not inquire.[2] Later, after the establishment of constitutional government, and in recognition of the different roles of the courts and the executive branch of government, a new basis emerged for the difference between law and policy in which a sharp distinction was drawn between the two. Policy was said to be the responsibility of politicians and possibly bureaucrats, and was to be examined through the political process. It followed from this that policy could not be judicially reviewed[3] and the courts from time to time announced that policy was not their concern. This attitude manifested itself in the early cases on statutory interpretation when a decision was made not to consider the views of administrators as to what the legislation meant.[4]

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Another rationale for distinguishing between law and administrative policy developed by the courts drew a distinction between administrative policies, that is, those made by civil servants, and political policies, that is, those made by politicians. The former were reviewable but the latter were not.[5] The rationale for this distinction was twofold. First, political policies made by politicians were usually laid before the legislature and were often the subject of legislative scrutiny, while policies made by administrators were usually not examined in this manner. Secondly, this distinction help preserve, however tenuously, the division of labour between the political section of the executive and the administrative section and it was generally thought that review of the former was likely to raise the ire of politicians and was best left alone. Later it was realised that this distinction was unsatisfactory for administrators also made and implemented policies, not all of which were in legal form. This commonly occurred when statutory grants of power were broad or vague and it became necessary for the administrative agency to fill in the details. One way of doing this was by using powers to make subordinate or delegated legislation which was supposed to be flexible.[6] In modern times this has not proved to be the case because of the need to consult affected groups before regulations are introduced. These political/ administrative arrangements slowed the process of regulation making and led to the expansion of informal policy. It also came to be understood that political policies including those emanating from cabinet were not necessarily immune from review especially where they conflicted with governing legislation.[7] Thus while in principle no informal policy is now immune from review there is still a marked reluctance to intervene where it is

assumed that the law embodies a discretion, where the policy content is great[8], and where the policies relate to subject matter towards which the judiciary thinks greater deference to the executive is warranted.[9] If the policy is embodied in a statute the wisdom of the policy cannot be challenged though the judiciary might review it if it conflicted with the constitution.[10]

Although it had been appreciated in the middle of the nineteenth century[11] that administrative agencies often formulated policies to guide their decisions, it was only in the last two decades that a significant body of legal rules began to emerge in which the courts came to grips with the relationship between informal policies and the law. The interface between law and policy, said to be a difficult one,[12] is now of great practical importance and these recent developments are central to any understanding of how administrative law works in practice. While it may be tempting for public servants to assume that the law is best left to lawyers, in practice, legal powers are conferred upon non-lawyer public officials. In short the greatest repository of legal authority in the administrative system is in the hands of non-lawyers.[13]

This paper will consider the developing relationship between informal policy and administrative law. It will be argued here that the courts have abandoned a simple disjunction between the two spheres and have become increasingly sophisticated in their examination of this relationship. In so doing they have come to appreciate the ways in which policy is used by decision-makers and the way policy may impinge upon the exercise of legal authority. One of the questions to be considered in this paper is whether the simple distinction between law and policy is intellectually defensible. It will be argued here that there are not two mutually separate spheres one called law and the other policy, but that the two categories are necessarily interrelated.

The definition and status of informal policy

In this paper informal policy refers to any set of guidelines, whether published or not, whether written down or not, that regulates or guides a series of decisions authorised by law.[14] Policies normally set objectives and also include considerations designed to achieve the objectives of the policy. Informal policy is to be distinguished from formal policy in that the latter is in a legal, normally a legislative form. Informal policy in contrast is not legislation, and may take many forms. Informal policy in this sense may be published in the form of a leaflet or booklet[15] or even in a *Government Gazette*.[16] It might take the form of guidelines[17] or notes for general guidance[18] or merely be a departmental practice.[19] Some departments have a policy manual[20]; others publish a news release,[21] issue codes, practice notes,[22] letters, [23] general orders[24], and warnings. In other cases the policies may be generally known to those in the industry. Policies may be announced or be long standing.[25] In many cases the policy may not even be written down for internal use, but amount to a practice or a rule of thumb.[26] These are the least visible policies, but may in practice be the most important. Some policies are developed by the agency[27] often in consultation with a regulated industry[28], others are imposed from above by the government, while yet others emerge from the bureaucracy but are approved at the political level.

It follows that informal policy refers to guidelines not in strict legal form and is to be contrasted with policies in legal form, ie a statutory policy[29] and with policies made by the courts.[30] Unfortunately the answer to the question whether a policy is formal or informal is not obvious and the courts have said that some self-styled policies are not merely policies, ie are non-binding, but give rise to legal expectations. In this case a new distinction is suggested between policies that have legal consequences and those

that do not.[31] The general rule is that informal policy is not law nor can it be regarded as law.[32] Such policies cannot, for example, lay down mandatory or determinative[33] requirements for this would be tantamount to the making of de facto laws which, aside from the lack of authority to so make, would evade the public debate, legislative scrutiny and other safeguards associated with normal law making.[34] It follows that informal policy, in the event of a clash with law, must conform to or be subordinate to the law.[35] The difficulty[36] is that there is no legal definition of informal policy and even the terms used by agencies themselves are not decisive[37], for what matters is the function and use to which a policy, however named, is put, rather than the nomenclature chosen. Thus directions, for example, sometimes mean binding instructions and in other contexts no more than guidelines that must be taken into account but which may be departed from if appropriate. [38]

In practice, policy and specific decisions may be closely inter-related: a policy may grow out of a specific decision and a specific decision may be one of a sequence of similar decisions that implement policy. In other words, at some point, the two concepts merge and become indistinguishable.[39] In orthodox legal theory a policy is assumed to be highly flexible and easily changed, while the law is assumed to be relatively fixed and certain.[40] In practice this distinction is dubious for some policies are so deeply entrenched that they are virtually impossible to change, while some legal rules change almost overnight.

The courts also assume that policies are relatively abstract and general while legal rules and decisions are precise.[41] In fact, some policies are highly specific and may amount to a rule.[42] What matters here is not the terminology, for a policy may be called a rule[43], but the role of the policy. The level of abstraction may not be very high in practice for policy-making is not confined to the upper reaches of government[44], and may occur in relatively humble agencies such as a rent control tribunal[45] or a gun licensing agency.[46]The other major characteristic of policy as used in legal analysis is that it, like discretion, refers to matters of value rather than to matters of fact or law.[47]

Role of policy

Administrative policies are developed in response to problems faced by administrators especially where the agency is engaged in high volume decision-making.[48]

(1) The statutory mandate may be so vague that the administrators are genuinely perplexed as to what they must do. They may choose to issue more detailed internal guidelines to operationalize or make more concrete legal standards.[49] This may lead to legal problems where the effect of the internal guidance is to narrow the scope of discretion conferred upon the decision-maker by law. In one British Columbian case[50], the Superintendent of Motor Vehicles was permitted by law to issue drivers' licences to persons who were "fit and proper". The Superintendent chose to operationalize this standard by adopting strict eyesight test guidelines. The test measured binocular vision on the assumption that a person lacking binocular vision could not judge distances and therefore could not be a "fit and proper" person to hold a driver's licence. The applicant in the case, who had held a licence in another Canadian province for twenty years, was found to have monocular vision. This was a condition that he had had since birth and he presented compelling medical evidence that he had learned to correct for this and could in fact judge distances. The department decided that anyone who failed their binocular test could not hold a licence. The court decided that the Superintendent had mistakenly confused his guidelines with the relevant test. It was possible, though a very rare event, for an applicant to fail the departmental test but

still comply with the statutory criterion. Two lessons may be drawn from this case. First, no agency should assume that they have seen it all. In other words departments have to resist the easy or lazy assumption that past practice is always an accurate guide to the future. Second, any agency that wishes to make highly specific standards must make sure that these standards are co-extensive with the law or be prepared to consider cases that fall outside the policy but within the bounds of the relevant statute.

Of course the statute may in fact prescribe the variables to be taken into account in precise terms in which case there will be less need for a policy to elaborate on vague matters. In such a case there is a greater danger that the policy will induce the agency to ignore the statutory criteria and thereby fail to do its duty. [51]

(2) A common function of policy is that it is a way of programming decisions that are believed, sometimes mistakenly as we saw above, to be routine. This may promote efficiency in areas where the policy environment is relatively stable and the problems of a largely predictable nature. It would be expecting too much of an agency to begin every decision-making exercise afresh.[52] In another case from British Columbia,[53] the Superintendent of Motor Vehicles had a statutory discretion to cancel a driver's licence if the holder had been convicted of certain offences. Cancellation was not supposed to be automatic, but the Superintendent decided that in some cases it would be. Accordingly, he pre-stamped a batch of forms ordering cancellation and ordered officials to hand them out whenever they received notice of certain classes of convictions. The court thought that while efficiency was commendable, the exercise of discretion required decisions to be made on a case-by-case basis and only after the consideration of the merits of each case.

(3) A policy may serve a variety of functions within an organization. It is a way for organizational leaders to confine subordinates' decisions within certain tolerances. It increases the probability of consistent decision-making and enhances the predictability of outcomes. These objectives are desirable, but consistency is only one value in decision-making and it is possible to be consistently wrong.[54] It is also possible that non-routine cases may require a new solution and it is precisely these kinds of cases that discretions are intended to meet. The danger with informal policies is that they may be seen as an end in themselves and may promote bureaucratic inertia and inflexibility. It follows from this that an agency is not bound to follow blindly its own previous decisions or policies.[55]

In some instances the policy is only for internal organizational use[56] and as long as it is not applied in any given case there can be no objection to this. On the other hand these internal guidelines may affect the rights and interests of personnel within the agency and must not conflict with the personnel law under which the agency operates.[57]

(4) There is evidence[58] that agencies use policies for political purposes especially to ward off criticisms of bias and subjectivity. In this sense policies act as a shield behind which to shelter and to avoid responsibility for decisions. It always seems more objective to say that a decision has been made in accordance with a policy than to say that the decision-maker has made a personal[59] choice, which of course he or she must always do.

(5) Agencies, unlike courts, often have an explicit duty to adjudicate individual cases or disputes and to formulate policy or develop practices in the policy arena concerned.[60] In the case of labour relations or industrial commissions, for example, not only must the agency decide a particular dispute, but it must also consider industry-wide and even

national matters. In some cases they may do this simultaneously when a wage case, for example, also lays down a bench mark for wage increases generally.[61]

(6) A policy may represent the accumulation of agency expertise in certain areas of administration. In this sense, policies may be useful to new members of the agency since they will not have to learn everything *de novo*. Even for existing officers, the policy reduces the pressure of starting the decision-making process afresh.[62] This allows the agency to screen out certain aspects of a problem that experience has shown need not be reconsidered.[63] There is a danger here in that this assumes that the policy is still relevant, and that either the problem has not changed in a fundamental sense or that perceptions of the problem have not changed.

(7) Policy represents a set of objectives or goals towards which an agency aspires. A policy statement may also include considerations that are intended to advance towards the goals of the policy, but the essential quality of a policy is its purposive nature. There is evidence that agencies may on occasion regard laws as only a means to attain policies and have expressed frustration with courts and tribunals that have apparently hampered progress towards the goals of the policy.[64]

Constitutionally, policy initiation and formulation is in the hands of the executive while policy interpretation and implementation is shared between the executive and the judiciary. It is usually at the point of application or implementation that conflicts arise between informal policy and the law. The Commonwealth Administrative Appeals Tribunal (AAT) has said on many occasions that it is not its role to formulate policy[65], though it has sometimes recommended that policies be re-formulated and even put in legislative form.[66] The main reason for this is an appreciation by the AAT that policy formulation requires skills that it lacks. A policy formulation exercise requires an evaluation of the present policy and a knowledge of all cases that have actually come before the agency - knowledge that the AAT lacks. Policy formulation also requires consultation with industry groups or the community, something that a tribunal cannot carry out.[67] In addition ministers are better able to take into account the political variables that are part of the policy formulation process,[68] a task which, if undertaken by a tribunal, would undermine its independence and make it the focus of partisan lobbying.

The problems arise when policies are implemented since policy implementation requires constant adjustment to the policy's content at the point where it is applied, in part, because policies formulated in an agency headquarters rarely appreciate the full complexity of the situation on the ground. This is one reason why there is a gap between what a policy prescribes and the reality of the policy in action.[69] Since agencies see cases in the mass while tribunals and courts see implementation on a case-by-case basis a considerable potential for conflict arises. Agencies tend to ignore the details of the individual case though there is evidence that they will look to these matters if subject to external scrutiny.[70] In any case they assume that the other organs of government that review policies are merely being obstructionist while administrators are acting in the interests of managerial efficiency. But as a British judge said over fifty years ago sometimes "convenience and justice are not on speaking terms."[71]

For courts and tribunals, in contrast, policy is normally seen as a means to an end, especially in the judicial review jurisdiction. In any case the rule of law asserts the supremacy of law over policy. One consequence of this difference of perspective is that lawyers see compliance with law as an end in itself, while administrators see law as a means to an end. It is not surprising then that the

executive and the judiciary should conflict in this area of the law.

The problems with administrative policy

While administrative policy may be useful, excessive reliance on it may engender certain problems. First, policy is rarely written with the precision of legislation and thus may actually be rather unclear. Where this is the case the courts will generally not inspect it too closely.[72] On the other hand unclear policies run the risk of either being interpreted in ways adverse to the agency's objectives or being regarded as inapplicable in a given case. On occasion the courts and tribunals have been very critical of policy on the grounds that it was vague and poorly drafted.[73]

Secondly, ascertaining the terms of the policy may be difficult. In some cases the court may require disclosure for the purposes of judicial review.[74] In other cases statutes either allow for policy announcements to be made or require that they be made and in some instances require that they be published in a certain form and in a certain outlet such as a government gazette. Two policies on the same subject matter may exist and it may not always be clear which is the operative policy at any particular time.[75]

Thirdly, there is a risk that the agency will prefer its policy to the extent that it assumes that the policy is the sole variable in the decision-making equation. This might mean that both relevant legal criteria and the merits of the individual case are simply not taken into account at all.[76]

Fourthly, the policy might induce laziness and encourage a lack of imagination in decision-makers. Administrators may stop searching for better answers. This would be a particular problem in a turbulent policy environment where past solutions had calcified in unexamined policy and may prove to be an unsuitable response to a new situation.

The basic legal rules

The courts accept and even welcome informal policy[77] for any of the reasons stated above, but they have laid down certain rules for its use.

(1) The policy must be relevant to the subject-matter and purposes of the statute[78], other relevant statutes[79], and even the Constitution if it is relevant.[80] One of the central concerns of the courts has been to ensure that all relevant factors are taken into account in making decisions while at the same time insisting that no irrelevant matters may be considered. The problem is to decide what is relevant or not. Many statutes lay down criteria that the decision-maker must take into account. Where the statute specifies criteria or at least the agency is confined to a relatively narrow function it may be easy to establish if a policy is relevant or not.[81] In one Victorian case the court held that it was irrelevant for a transport licensing agency to take into account a general government policy of favouring returned servicemen by denying a licence to an applicant who had not served in the armed forces.[82] There was no rational connection between fitness to operate a transport business and military service. In contrast where the policy is deemed to have a mandatory effect the court may conclude that it is a relevant consideration and that the failure of the agency to take it into account vitiates the decision.[83]

Sometimes, however, the specified variables are deliberately vague. An official who may or must consider the "need for services"[84] or the "standard of service" is given no guidance as to what these terms mean. Where the statute does not specify the matters to be taken into account the courts are likely to defer to an agency's judgment unless the policy is clearly irrelevant. The perception of what counts as relevant probably

changes over time. It is doubtful, for example, that if presented with the same matter today the High Court would agree that an agency could deny approval of a land transfer on the grounds that Italians do not make very good farmers especially where irrigation is concerned.[85]

The best example of a vague criterion is the expression "in the public interest". The public interest is virtually anything that the decision-maker decides it is, except matters that are obviously in someone's private interest and which have no public character.[86] One meaning of the term is that refers to matters wider than the merits of the individual case and embraces matters of concern to society at large.[87] On the other hand even where the term is used in a statute the first essential is to have regard to the statute as a whole for even the "public interest" may be confined by an exhaustive list of statutory criteria if the statute in question so provides.[88]

In other cases the statutory list may not be complete. The decision maker must turn to the statute as a whole to discern its objectives or policy.[89] Unfortunately not all statutes disclose policies[90], and if they do, these may conflict with each other. The objective of health and safety legislation is clear: to promote health and safety. But this is not an objective to be pursued at all costs. Agencies are aware that they may close down factories or restaurants that pose a major threat to health, but are loath to do so unless the case is clear and compelling.[91] Such cases are rare: more usually the threats are minor. Closure in these cases may throw people out of work and create even greater problems for the unemployed, the owners and other government agencies.

Partisan political factors are always irrelevant. A decision-maker cannot act or refuse to act merely, or even largely, in order to avoid criticisms in the legislature[92] or even by the press or public. Nor can elected officials take decisions to thwart statutory objectives because they do not agree with them, or have been elected on a platform to oppose them.[93] On the other hand it is recognised that in some instances, especially where decisions are taken at the highest levels, the public interest may require that public opinion be considered and be to that extent political.[94] This point has emerged in parole decision-making especially where the person seeking parole has a notorious past.[95] The distinction between the two classes of "political" cases is that the decision-maker in the first class of case has only considered his or her own political position while in the second case wider public interest considerations are at stake. This may not be conceptually satisfactory as a distinction but the courts are here trying to deal with political realities as well as to maintain the integrity of the decision-making process.

There may be other grounds upon which a policy may be attacked such as that it is unreasonable in a *Wednesbury*[96] sense though attempts to mount such attacks have generally failed. Thus in a recent case an English court held, in what it called a 'hard case', that the policy of excluding homosexuals from the armed forces was not irrational or contrary to European human rights standards as these did not have the status of law in England.[97] Again policies that are applied in violation of the requirement to accord a fair hearing[98] or which are misinterpreted may constitute an error of law and may be reviewable on that ground.[99]

(2) The policy, if relevant, must not be cast in a rigid form nor may it be applied in an inflexible manner[100], unless of course the policy is explicitly sanctioned by statute.[101] A decision-maker must not fetter his or her discretion by adopting or applying rigid no-exceptions policies.[102] Whether such a policy exists is a matter of evidence[103] and whether, if it does exist, it has been applied in an inflexible manner is also a matter of fact.[104] Nor may decision-makers adopt policies that conflict with their statutory powers. The

classic statement of this view was made in 1919 when it was said:[105]

> There are on the one hand cases where a tribunal, in the honest exercise of its discretion, has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case...[If] the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.

There are various reasons for this doctrine. Firstly, a rigid policy would have the effect of turning an informal policy into a rule of law and that would be tantamount to giving policy legislative status. That in turn might evade the legal requirements of rule making and various forms of legislative review of rules made under statute. Secondly, rigid policies ignore the fundamental legal requirement that discretionary decisions are to be individual and only made after consideration of the merits of the individual case.[106] This means that the decision-maker must consider the possibility that a particular case is an exception to the policy, but is still within the ambit of the law. If the decision-maker does not display an open-minded attitude in this respect, he or she might fall into the error of supposing that the policy is the law, and that it is the only variable in the decision-making equation.[107] Thus a policy cannot be the only consideration nor can it ignore relevant statutory criteria or the merits of the individual case. In practice, decision-makers may have to consider: (a) relevant statutory criteria, (b) relevant policies, and (c) the merits of the individual case. The merits are always relevant though they may not be always decisive.

The evaluation, including the weight, of these variables is left to the decision-maker,[108] and he or she may (perhaps inevitably) attach more weight to the policy than to other factors.[109] This may occur where the policy is well established, has been formulated with the agreement of the industry and even represents international policy.[110] In the case of the jurisprudence of the Commonwealth AAT there is explicit recognition that generally greater weight will be accorded to policies made or approved by ministers and which are also subject to legislative scrutiny than those that merely emanate from the public service and are not subject to parliamentary review.[111]

A decision-maker is however constrained by two considerations when weighing or evaluating policy. First, he or she must not fail to consider all relevant factors or attach so little weight to them that the decision-maker appears to have failed to consider the matter properly.[112] Secondly, if a statute indicates the relative weight of certain factors the decision must reflect that requirement.[113] Where the policy indicates the relative weight of various factors the reviewing agency may take this into account but is not absolutely bound by this statement.[114] As long as the decision-maker approaches the matter in accordance with these considerations it is legally permissible for an agency to arrive at the same result in all cases. The fact that the same result is arrived at in all cases decided so far is not evidence, in itself, of a rigid policy.[115]

(3) A decision-maker must listen to arguments that request either that the policy be changed, or that an exception be made in an individual case, even if that entails allowing further exceptions to those already allowed in the policy statement.[116] In cases where it is proposed to apply an existing policy the onus is on the agency to justify the application of the policy; it is not the duty of the applicant in such cases to bear the burden of showing that the policy ought not to be applied.[117]

(4) A policy must not be adopted that effectively biases a decision-maker. Bias in law refers to a situation in which a decision-maker has either a direct financial interest in a decision or has pre-determined the outcome of a decision. Most commonly, problems arise from pre-determination. Pre-determination may arise either during proceedings where hostility or other indications suggest bias, or from acts, including statements, made outside the proceedings.

Bias does not include a general policy posture or the leaning of the mind in a certain direction. The courts recognize that administrators, especially when they handle many cases, or where the statute requires a certain policy posture, often have general ideas about the subject-matter. An unbiased mind is not an empty mind nor is it free of opinions. That would be unrealistic. It is common, for example, for agencies to announce policies for the reasons we saw above. This is not bias, unless, of course, the policy is cast in a rigid form[118] or is one that is clearly intended to determine a particular case. In one High Court decision the status of a policy announcement by the Commonwealth Conciliation and Arbitration Commission was considered.[119] The Commission, which had the dual role of resolving individual wage disputes and of regulating wages policy as a whole,[120] had announced that "where industry conditions permit" it would favour an equal pay for equal work policy. One reason for making the announcement was the hope that employers and employees would voluntarily comply with this policy. A group of employers challenged the competence of the Commission to hear a particular case on the grounds that the announcement was bias by predetermination. The High Court concluded that the announcement did indicate a general policy posture, but its terms also indicated a flexible attitude to its implementation.[121] The case might have been decided differently if the Commission had announced that in every case without exception the policy would apply. The court also pointed out the benefits of encouraging agencies to announce their policies, and that to hold otherwise might discourage policy-making in general, or at least, drive it underground.

Can an agency when presented with a case that also raises policy issues consider the policy issues before deciding the merits of the individual case? In a recent case in Ontario it was held that an agency may discuss a particular case for the purposes of policy-making even before a final decision is made in that case.[122] This is permissible if at the policy-making stage no decision is made in the case and nothing transpires at the meeting that should be brought to the notice of the parties in the case.

Emerging problems

One of the difficulties that has arisen in recent cases is whether an agency is bound by its announced policies. We considered earlier what the decision-maker must do where an exception to a policy is sought. Here we will consider situations where a citizen seeks to hold an agency to its policy. A related question is whether or not an agency may depart from its policies and, if so, are there any constraints on this process?

(a) Adherence to Existing Policies

It was once thought that because informal policies are not in legal form they could be changed whenever the agency was inclined to do so.[123] One reason for the emergence of informal policies was that they were supposed to be very flexible: no legal formalities were required to change them. The courts have had other ideas. In a major decision in 1983 the Privy Council, on an appeal from Hong Kong, held that as long as it is consistent with good administration the government is bound by its announced policies.[124] In that case a promise was made by the Hong Kong government that illegal

immigrants from Macau would have their cases decided on the merits of each case. On the facts the authorities did not so consider one application and the Privy Council allowed the appeal against the immigration department decision to send the applicant back to Macau. The promise, be it noted, was as to process and did not commit the Director of Immigration to any particular substantive outcome. Holding the Director to the promise did not infringe the no-fettering rule, but rather upheld the fair hearing requirement, something that Bankes LJ noted in the *Kynoch case* as essential in decisions involving the application of policy.

The law now is that in situations where an agency promises a hearing before a decision is made, or where there exists a practice of granting such a hearing, the agency must adhere to this promise or practice while the policy in question remains in place.[125] This view was followed in other Commonwealth jurisdictions including Australia.[126]

An alternative argument for holding an agency bound by its promises may be found in the *Verwayen* decision.[127] That case concerned whether a promise made by the Commonwealth not to contest liability in a negligence action and not to rely upon the statute of limitations was binding or could be departed from. The court held that the Commonwealth was bound by its promise and did so apparently on the basis that a departure would be unfair in this case. The effect of this decision which has yet to be applied to a purely administrative matter would be to prevent second thoughts by agencies where this would work injustice. The benefit of the *Ng Yuen Shiu* line of cases is that it does not prevent an agency from changing its policy and probably does not prevent departures from existing policy in individual cases where this can be justified. What it does prevent is the inexplicable or irrational non-application of an announced policy.

There are situations where the requirement that an agency adhere to its announced policies will not apply. Firstly, if it is clear on the face of the promise that it is not intended to be binding, or is clearly temporary in nature, then the agency will not be bound by it or bound by it beyond the time limit, if any. If the announcement is in the nature of a general intention rather than being highly specific, then no legitimate expectation to a hearing will be created by it. On the other hand if the promise is highly formal, or the context indicates that it is intended to be binding, or the policy has been published in a clear form or even repeatedly published over a long period then the government will be bound by it. Lastly, if an agency publishes in non-legal form advice that is erroneous in law, then the court may examine such advice or policy.[128]

On the other hand it is unlikely that a promise of a particular substantive outcome would be held binding, unless it were in a valid legal form such as a contract, since this could be attacked either as bias by pre-determination or as a fettering of a statutory discretion. Even promises of certain types will not be upheld if they are contrary to well known principles of constitutional law. Thus the executive cannot promise not to exercise legislative powers and agree not to introduce legislation.[129] Such an undertaking is a fettering of legislative powers and almost certainly unlawful.[130]

Secondly, any promise or practice must be consistent with the law. An agency cannot agree to overlook all breaches of the law, though it may choose in an individual case to take no enforcement action. An agency does have a general duty to enforce the law, but within this general duty it may, in individual cases, decide not to enforce the law. What the agency cannot do is adopt a policy or practice not to enforce a particular law at all or decide on substantial non-enforcement.[131] To hold otherwise would be tantamount to allowing the executive

to suspend or dispense with the operation of the law.[132] If, by reason of genuine resource limitations, full enforcement is not possible the courts will allow selective enforcement though they must be satisfied that an illegal policy is not in place.[133] The courts also recognise that resource limitations will mean that priority may have to be given to some problems rather than others and that more personnel may have to be allocated to some activities and districts than others. On the other hand, where there is a clear duty to enforce, the agencies will be allowed little latitude not to act.[134]

(b) Changes to existing policies

The law on policy change is less clear. The problem is that if any agency were bound forever to adhere to existing policies it would become a prisoner of its policies. If it were discovered that a policy is outdated or even mistaken an agency should be permitted to change it.[135] So far no case has held that a policy cannot be changed at all. In one recent case[136] it was said that a policy could be changed at any time, but there appear to be rules governing these changes.

If an agency announces a policy, it cannot secretly change it. That is, the decision-maker cannot allow the announced policy to stand while operating the new policy behind the scenes. This would be grossly unfair since an applicant would frame an application on the basis of the announced criteria only to discover that a different set of secret factors were operative in such a case.[137] If the decision-maker wants to change the policy he or she must first give those who are relying on the current policy an opportunity to make representations as to whether, in the particular case, criteria and procedures different to those set out in the newly announced policy ought not to be followed.[138] Even if an expectation exists that consultation will occur before a policy is changed this does not prevent a policy from being changed.[139] In other words there is no legitimate expectation that a policy will never be changed and such expectations as exist based on past policy may come to an end when a new policy is announced.[140] The right to change a policy is inherent in the system of government and in any case as circumstances change so may policies. This may arise from a reconsideration of a previous policy which is discovered on rational grounds to be erroneous or mistaken.[141] If the new policy is lawful the courts will leave it alone.[142]

Of course the new policy may create new expectations. It is also clear that an agency should ensure that the policy does not retrospectively disadvantage persons. Three situations may be distinguished here:

- if a policy is in place and a person applies for it to operate in his or her case the existing policy should be apply.

- If on the other hand an application is made and before the decision is taken the old policy is replaced by a new policy then the decision ought to be made under the old policy.[143] There seem to be two bases for this. The first is that a new policy should be prospective in nature and if introduced after the decision-making process has begun would not apply. Second, a policy introduced during the process, or even worse, during the hearing itself would be a denial of natural justice since the applicant did not know of it before the decision-making exercise in his or her case commenced.[144]

- If a policy is changed and then an application is made the agency may apply the new policy.[145] The existence of an expectation that an existing policy would continue to apply does not prevent the agency from lawfully changing its policy and applying the new policy to new cases before it. Were it otherwise persons with an expectation based on the old

policy could use that expectation to prevent policy change altogether.

If the change of policy is actuated by malice or bad faith or is intended to achieve objectives outside the scope of the legislation or is a decision made by someone with no authority in the matter and is imposed upon the decision-maker, then such a policy will not be upheld.[146]

The problem here is that as public servants must obey the lawful and reasonable order of their superiors; but as holders of independent grants of statutory power they must make up their own minds and not be dictated to by superiors or abdicate their powers. If the legislature, by statute, designates a particular officer or class of officer as having certain powers then no other person however exalted may intervene and dictate a decision, unless of course, that is allowed by the legislation. This rule is designed to prevent shifts in decision-making contrary to the legislative scheme thereby frustrating the intention of the legislature and possibly endangering the assignment of legal responsibility. On the other hand, there is a need for central policy direction and coordination, especially in very large departments with many officers. Many statutes confer discretionary power upon individual officers (e.g. police officers), but it runs contrary to everything that is known about complex organisations to suppose that these officers may act completely independently of all other officers in the same organization. One of the objectives of the leadership in such organizations is to ensure a degree of consistency in the exercise of these powers. The courts have accepted that an organizational leader may require prior consultation before certain types of actions are taken,[147] but also have held that organizational leaders cannot fetter independent grants of discretionary power by rigid policies. [148]

Another way of reconciling these apparently conflicting principles is either to give an official the statutory power to intervene or to make sure that directives from the Executive Council are cast in general and not rigid terms.

(c) Specifying permissible departures from policy

We saw above that an agency cannot have a policy, in the absence of statutory authority to do so, that there will be no exceptions to the policy. [149] In contrast some agencies, rather than leaving the matter at large, have attempted to structure decision- making by indicating a list of permissible departures as part of the policy.[150] If it is made clear that the list is for guidance only and is not intended to be exhaustive it will probably survive review by the courts.[151] One way of achieving this result is not to specify the list of permissible departures but to indicate that departures will only be allowed in special or exceptional cases without saying what they are.[152] At the very least indicating explicitly that exceptions may be allowed is regarded as desirable decision-making practice.[153] Not all agencies do this especially if they wish silence on the matter to act as an unstated deterrent to such requests, but those that do need to recognise that the list can never be so rigid that they will never consider any exceptions to their own list of exceptions. There is always the possibility that an applicant will make a case for a new departure not identified by the agency and such arguments must be heard[154] even if they are eventually rejected.[155] On the other hand, the agency may have been sufficiently imaginative that in practice its list of allowable departures actually exhausts the possibilities to date.[156]

(d) Publicizing policies and changes in policy

It seems to be elementary that the existence of a policy ought to be made known to those likely to be affected by it. Certainly courts have recommended this[157] and it is hard to see how a policy intended to guide applicants[158] can be of

use to them if they do not know about the policy in question. In most of the cases on policy the policy was known to the applicant and thus the issue of availability was not considered by the court or tribunal reviewing the decision.[159] In the few cases where availability of the policy was an issue it seems that the weight of authority supports the view that a policy must be drawn to the applicant's attention. In a number of cases, the courts have stressed that a fair hearing will be worthless if the applicant does not know that a policy may be challenged or an exception sought.[160] In most of the cases on the role of policy, the policy was known in one way or another, and in some instances the courts have insisted that this been done. In a recent case from Alberta a draft policy that had not been formally promulgated prior to the proceedings and which was not known or available to the applicant was held not to be applicable and the secrecy surrounding it was held to amount to a denial of procedural fairness. The court held that although the policy was formally adopted during the course of the actual hearing this did not rescue the situation for the respondent in that case.[161] If this decision is followed in Australia agencies will not be able to spring a new policy on an unsuspecting applicant and it is submitted that this must be in principle the correct view of the law.

At present there are statutes that make provision for publication of policies in particular cases and some of the Freedom of Information Acts require policies be made available to the public.[162] Some FOI statutes create an incentive to comply on the grounds that an agency may not apply a policy that has not been made available.[163] But publication is not a universal requirement[164] and Australia is not alone in this. Even in the very open American system policy statements need not be published under the notice and comment requirements of the *Administrative Procedure Act 1946* (US).[165] Even where a policy is to be generally available it is permissible for the agency to delete information if the information would otherwise result in the document being an exempt document.[166]

The only other example of a general enactment that directly addresses the question of policy availability is the Victorian *Administrative Appeals Act 1984*. In that statute before the tribunal is obliged to apply a policy the tribunal must be satisfied that the policy was drawn to the attention of the applicant or the applicant could be expected to be aware of it or that it has been published in the *Government Gazette*.[167]

All other examples of a publication requirement are specific to the particular statute concerned. Some insist that policy be laid before Parliament[168] or that the policy be published in the *Government Gazette* or even a newspaper.[169]

Rescuing an invalid policy by severance

If a policy comprises a number of parts that are separable without doing damage to the whole the courts might, where they find a policy to be defective in part, exercise the option of severing the bad from the good.[170] If, on the other hand, the policy is so inter-related in its parts that this cannot be sensibly done then the whole policy will fall. If the policy comprises conditions, as is often the case in local planning matters, the severance option may rescue a policy.

Conclusion

Administrative agencies may adopt and apply policies provided that they are relevant to the subject matter of the governing legislation and are within the scope of the general law. The policies adopted by an agency may either be their own or those of other officials or departments provided that they are relevant, are independently evaluated at the point of implementation and are not blindly followed. When adopting a policy

the agency should avoid rigid "no exceptions" policies, unless the legislation permits this. If the agency wants to adopt such a policy it should seek to have this written into the legislation. In any case, the agency must keep its mind open and intimate what its policy is to those affected by it and also allow them to make representations either that the policy not apply to them or that the policy be changed. An agency cannot argue that it is not the policy to announce agency policies or that it is not the policy to grant exceptions. In either case the agency would have, de facto, granted the policy the status of law which it does not have.

An agency may change its policies, but as long as the policies remain in place the agency must adhere to them. Decision-makers cannot suddenly depart from policies or operate a secret policy while continuing to promulgate a publicly announced policy. If a policy change is made all those affected ought to be notified and allowance made to hear their representations when the policy is applied to their case. In any case, the new policy should operate prospectively and not be changed out of malice or spite or in order to achieve improper objectives.

Endnotes

1 See W A Robson, *Justice and Administrative Law* 3rd edn (London: Stevens & Sons, 1951) p 432.

2 *Bates Case* (1606) 2 St Tr 371, 389(Exch)(the King's power is most properly named "Pollicy and Government" and "The matter in question is material matter of state, and ought to be ruled by the rules of pollicy"). It seems that the word policy came into use in this sense at the end of the sixteenth century: see *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, 23(CA) citing a statement made in 1599.

3 *Gardner v Dairy Industry Authority* [1977] 1 NSWLR 505, 534(CA). See also *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 452(HCA); *Bread Manufacturers of NSW v Evans* (1980-81) 180 CLR 404, 416-417(HCA); *Smithkline Beecham (NZ) Ltd v Minister of Health* [1992] NZAR 357, 372-373(HC); *Barnett v Minister for Housing* (1991) 31 FCR 400, 403(Gen Div

4 *In re Sooka Nand Verma* (1905) 7 WALR 225, 229 (WA SC). For judicial statements to this effect see: *R v Bolton ex parte Beane* (1987) 162 CLR 514, 518(HCA); *R v Farlow* [1980] 2 NSWLR 166, 170(CCA); *Hayes v Commissioner of Succession Duties* [1970] SASR 470, 480-490(SC).

5 For this distinction see: *Becker v Minister for Immigration & Ethnic Affairs* (1977) 15 ALR 696, 701(AAT); *NSW Mining Ltd & Day v Attorney General* [1967] 1 NSWLR 621, 635-636(CA).

6 *Committee on Ministers Powers* (London: HMSO. 1932) Cmd 4060.

7 In *Koowarta v Bjelke-Petersen* (1981-82) 153 CLR 168(HCA) the effect of upholding the validity of the *Racial Discrimination Act 1975*(Cth) was to override a Queensland cabinet policy forbidding Aboriginal groups from acquiring tracts of Crown land.

8 *R v Ministry of Defence ex parte Smith* [1996] 2 WLR 305, 337H-338A(CA).

9 Such as military matters: see *Smith* ibid, and some areas of national economic policy: *Hammersmith LBC v Environment Secretary* [1991] 1 AC 521(HL(E)).

10 *Re The Queen in Right of Ontario and Ontario Public Service Employees Union.* (1987) 33 DLR(4th) 299, 304(Ont HCJ).

11 See *R v Walsall JJs* (1859) 18 JP 757; *R v Sylvester* (1862) LJMC 93. *Sylvester* was cited by the High Court in *Randall v Northcote Corporation* (1910) 11 CLR 100, 111.

12 "The interface between policy and discretion in the exercise of statutory powers is a difficult one". *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169, 194(FCA FC) per Fox & Franki JJ.; "A most difficult question in administrative law is in what circumstances a departure from rules and principles by reference to which decisions are taken but which are not statutory, that is to say are not set out in legislation, may invalidate a decision": *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 10(Gen Div) per Davies J.

13 Many holders of statutory powers are lawyers, but most are not, nor does the law require them to be. In mainstream administrative writing in Australia the emphasis is on the most visible aspects of decision making ie that by tribunals such as the AAT, which has legal members; but most statutory powers are not in the hands of such quasi-judicial agencies.

14 For judicial usage in this vein see: *James v Pope* [1931] SASR 441, 463(SC); *Crouch v Minister of Works* (1976) 13 SASR 553, 558(SC); *Leppington Pastoral Ltd v Department of Administrative Services* (1990) 23 FCR 144, 156(Fed Ct); *Auckland Regional Council v North Shore City Council* [1995] 3

NZLR 18, 23(CA For a statutory example of this usage see: *Freedom of Information Act 1991*(SA) s 4(1).

15 *Re Dainty and Minister for Immigration and Ethnic Affairs* (1987) 6 AAR 259, 266(AAT); *Re Secretary, Department of Social Security and Bosworth* (1989) 18 ALD 373. 375(AAT).

16 *NZ Co-operative Dairy Co v Commerce Commission* [1992] 1 NZLR 601, 610(HC)

17 *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287, 299b-c.(FC), *Re Bryer and Secretary, Department of Social Security* (1987) 13 ALD 334, 336(AAT); *Re Webster and Minister for Veterans' Affairs* (1990) 21 ALD 583, 584(AAT); *Minister for Human Services & Health v Haddad* (1996) 137 ALR 391, 399(Fed Ct- Full Ct)

18 *Re Becker* (1977) 15 ALR 696, 701(AAT)

19 *Seldan Pty Ltd v Liquor Licensing Commission* [1990] VR 1009, 1014(SC).

20 *Green v Daniels* (1977) 51 ALJR 463, 466(HCA); *Hook v Registrar of Liquor Licences* (1980) 35 ACTR 1, 5.

21 *Stott v Minister for Immigration and Ethnic Affairs* (1985) 59 ALR 747, 749(Fed Ct)

22 *Weir Family Supermarket v Liquor Licensing Commission* [1992] 1 VR 305, 311(App Div).

23 *Shire of Gatton v Gelhaar* (1966) 10 LGRA 228(Qld FC), *Parker v Commissioner for Motor Transport* (1970) 91 WN(NSW) 273, 275(SC); *R v Minister For Sea Fisheries ex parte Byrne* Tas SC No M242/1987(15 September 1987) p 10; *The Parole Board ex parte Palmer* (1993) 68 A Crim R 324, 325(Tas SC).

24 *Re Pigdon and Minister for Veterans' Affairs* (1989) 19 ALD 658, 661(AAT); *Re Williams and Defence Service Homes Corporation* (1989) 10 AAR 565n, 569n(AAT) ; *Re Currie and Secretary, Department of Veterans' Affairs* (1991) 13 AAR 282, 284(AAT)

25 *Hughes v DHSS* [1986] AC 776, 784H(HL(E)); *Somerville v Dalby* (1990) 69 LGRA 422, 427(NSW Land & Envir Ct); *R v Minister For Sea Fisheries ex parte Byrne* Tas SC No M242/1987(15 September 1987) p 5

26 *Hamood v Forsyth v Tower Hotel Pty Ltd* (1972) 58 LSJS 565, 568; (1972) 3 SASR 496, 500 FC).

27 Agency here is taken to be a synonym for any decision-maker in the executive branch of government with statutory powers of decision and includes ministers and secretaries as well as collective decision-makers such as a commission or authority; as well as tribunals with both adjudicative and policy making functions. For a statutory definition see *Freedom of Information Act 1991*(SA) s 4(1).

28 *Re Aston* (1985) 4 AAR 65(AAT); *Environmental Protection Act 1993*(SA) s 28(5)(a)

29 See for example *Freedom of Information Act 1982*(Cth) s 3. In some cases there is explicit reference to the policy making function of the agency. See for example: *Environmental Protection Act 1993*(SA) ss 26-33. See also *Morton v Union Steamship Co of NZ Ltd* (1951) 83 CLR 402. 410 (HCA); *Carjay Pty Ltd v Superintendent of Licensed Premises* (1972) 3 SASR 484, 490(FC); *Curtis v Beaudesert Shire Council* (1982) 48 LGRA 8(Qld FC). Statutory policy may also be cast in the form of subordinate legislation: *Rosemount Estates Pty Ltd v Minister for Urban Affairs & Planning* (1996) 90 LGERA 1, 19(NSW Land & Environment Ct).

30 Whether the courts are any better than administrators at formulating a distinction between policy and other matters is an open question as the courts have acknowledged: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 468-469(HCA) per Gibbs CJ. See also the extra-judicial comments of Brennan J (originally in his paper "The Purpose and Scope of Judicial Review" in M Taggart(ed), *Judicial Review of Administrative Action n the 1980s*(Auckland: OUP, 1986) p 20) cited in *NCA(Brisbane) Pty Ltd v Simpson* (1986) 13 FCR 207, 225-226(FC) where he is quoted as having written: "The courts are not very good at formulating or evaluating policy".

31 *Lewins v ANU* (1996) 133 ALR 452, 463(Fed Ct) per Lee J.

32 *Re Aston and Secretary to the Department of Primary Industry* (1985) 4 AAR 65, 74-78(AAT) ("Policy is not law. A statement of policy is not prescription of binding criteria", "Policy is not a legislative prescription..."); *Minister for Industry and Commerce v East-West trading Co Ltd Ltd* (1986) 10 FCR 264, 269(FC) per Fox J; *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 10-11(Gen Div); *Re Dainty and Minister For Immigration and Ethnic Affairs* (1987) 6 AAR 259, 266(AAT); *Williams and Defence Service Homes Corporation* (1989) 10 AAR 565n, 567n(AAT).

33 *Re Habchi and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 623, 631(AAT); *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 12(Gen Div)("...such rules are of a non-binding character". *Re Uyanik and Minister for Immigration, Local Government and Ethnic Affairs* (1989) 10 AAR 38, 43(AAT)

34 *Marlborough Education Board v Blenheim School Committee* (1897) 15 NZLR 551, 556(SC

35 *Re Becker and Minister for Immigration and Ethnic Affairs.* (1977) 15 ALR 696, 700(AAT)"Where a policy-maker forms a policy to govern or effect the exercise of his statutory discretion, the policy must conform

to law." per Brennan J). See also: *Santos Ltd v Saunders* (1988) 49 SASR 556, 569(FC).

36 *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169, 195(FC of FCA) (Policy is difficult to define

37 Many policies are not called policies . See *Independent Holdings Ltd v City of Adelaide Planning Commission* (1994) 63 SASR 318, 323(FC) where the policy was embodied in "The Principles of Development Control".On the other hand many policies are actually forms of subordinate legislation: *Rosemount Estates Pty Ltd v Minister for Urban Affairs & Planning* (1996) 90 LGERA 1, 19(NSW Land & Environment Ct).

38 *Riddell v DSS* (1993) 42 FCR 443, 450(FC

39 *Elston v State Services Commission* [1979] 1 NZLR 210, 238(SC); *R v Roberts* [1908] 1 KB 407, 435(CA): "It is not easy to draw the line between policy and administration, or give a definition..." This is also a problem in the Ombudsman legislation which allows investigations into matters of administration but not policy per se, except at the point a policy is applied in which case it becomes a matter of administration. *Salisbury City Council v Biganovsky* (1990) 70 LGRA 71, 74-75, (1990) 54 SASR 117, 120-121(SA SC); *Booth v Dillon(No 2)* [1976] VR 434, 439(SC).

40 *Re Cole's Sporting Goods Ltd* (1965) 50 DLR(2d) 290, 297(Ont CA).

41 *Crouch v Minister of Works* (1976) 13 SASR 553, 558(SC); *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169, 175(Fed Ct).

42 See the policy in issue in *British Oxygen Ltd v Minister of Technology* [1971] AC 610, 623f-g(HL(E)). See also at 635 where Lord Reid says: "But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say...." In *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, 23(CA) Cooke P said: "Counsel ... are on unsound ground in suggesting that ....policy cannot include something highly specific".

43 Thus Freedom Of Information legislation commonly refers to rules and practices: *Freedom of Information Act 1982*(Cth) s 3(a); *Freedom of Information Act 1991*(SA) s 3(2)(a).; *Freedom of Information Act 1989*(NSW) s 6(1); *Freedom of Information Act 1992*(Qld) s 7. c f *Freedom of Information Act 1989*(ACT); *Freedom of Information Act 1982*(Vic); *Freedom of Information Act 1991*(Tas); and *Freedom of Information Act 1992*(WA) which have no such comparable definitions.

44 Though of course it is to be found there and judges sometimes assume that where the decision maker is a minister policy considerations will be involved: *G H Michell & Sons (Australia) Pty Ltd v Minister of Works* (1974) 8 SASR 7, 32(FC) per Zelling J. It should be noted that if by policy the courts mean factors other than those in the statute the relevance of these considerations will be a matter of statutory construction.

45 See *Acre Pace Projects Ltd v Registrar of New Westminster Land Title District* (1982) 133 DLR(3rd) 418, 423(BCSC)

46 *R v Registrar of Gun Licences ex parte Barabas* (1966) 9 FLR 229, 235(ACT SC); *Grace v Registrar of Firearms* (1984) 113 LSJS 390(SA LC); *Re P and Commissioner of Police* (1987) 9 AAR 12(AAT)

47 *City of Perth v Fairway Heights Pty Ltd* [1981] WAR 51, 57(FC).

48 *Minister for Immigration etc v Gray* (1994) 50 FCR 189, 206e-f(FC); R v *Minister for Sea Fisheries ex parte Byrne and Smith* Tas SC No 47/1987 List A, M242/1987(15 September 1987) p 9 citing *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 625(HL(E)). One empirical indication of the huge numbers of decisions actually made was given in 1989 when it was reported that between 1981-1989 the Social Security Department made 16 million decisions only 1,380 of which were referred to the Administrative Appeals Tribunal: D Volker, " "The Effect of Administrative Law Reforms: Primary-Level Decision Making", (1989) 58 *Canberra Bulletin of Public Administration* 112-115.

49 *Britten v Pope* [1916] AD 150, 158(AD).

50 *Re Lewis & Superintendent of Motor Vehicles* (1980) 108 DLR(3d) 525(BC SC).

51 *Re Oliver et al* VG No 140 of 1984 (17 September 1984) Federal Court- General Division. p 6.

52 For an excellent understanding of this see *Crouch v Minister of Works* (1976) 13 SASR 553, 559(SC).

53 *Re Lloyd & Superintendent of Motor Vehicles* (1971) 20 DLR(3d) 181(BC CA).

54 *Nevistic v Minister of Immigration & Ethnic Affairs* (1981) 34 ALR 639, 647(Fed Ct) per Deane J.

55 There is no doctrine of administrative precedent ie that an agency is bound by law to follow previous decisions: *Hall v Vaucluse MC* (1947) 16 LGR 139, 142(NSW Land & Val Ct).

56 Jerry L Mashaw, *Bureaucratic Justice* (New Haven: Yale UP, 1983) p 213.

57 *Phillips v Department of Immigration* (1994) 48 FCR 57, 72-73(Gen Div).

58 Jeffrey Jowell, *Law & Bureaucracy: Administrative Discretion & The Limits of Legal*

Action (Port Washington: Mass: Dunellen, 1975).

59 This is not to be confused with a private choice ie according to private beliefs or values: *Singer v Statutory Officers Remuneration Tribunal* (1986) 5 NSWLR 646, 569c-d(CA) per Kirby P.

60 See for statements of this role: *Pezim v British Columbia* (1994) 114 DLR(4th) 385, 409(SCC) ; *CJA Local No 579 v Bradco Construction Ltd* (1993) 102 DLR(4th) 402, 416(SCC).

61 See *Ex parte Angliss Group* (1969) 122 CLR 546(HCA) for an Australian example of this phenomenon.

62 *Noel v Chapman* 508 F2d 1023, 1030 (2nd Cir, 1975) "..one of the values of the policy statement is the education of agency members in the agency's work."

63 *Starr v FAA* 589 F2d 307, 312(7th Cir, 1978).

64 Stephen Argument,"Quasi-Legislation: Greasy Pig, Trojan Horse or Unruly Child". (1994) 1 *Aust J of Admin L* 144 at 150-151 and 159 citing various public servants.

65 *Re Drake (No 2)* (1979) 2 ALD 634, 644(AAT); *Re John Holman & Co Pty Ltd and Minister for Primary Industry* (1983) 5 ALN N219; *Re Currie and Secretary, Department of Veterans' Affairs* (1991) 13 AAR 282, 290(AAT).

66 *Re P and Commissioner of Police* (1987) 9 AAR 12 (AAT).

67 *Rendevski & Sons and Australian Apple and Pear Corp* (1987) 12 ALD 280, 285(AAT).

68 *Re Dainty and Minister For Immigration and Ethnic Affairs* (1987) 6 AAR 259. 266(AAT).

69 The work done in England by Robert Baldwin has explored this problem in detail. See his paper: "Why Rules Don't Work", (1990) 53 *MLR* 321-337.

70 D Volker. "Commentary", in (1981) 12 *Fed L Rev* 158, 161-162; Kosmas Tsokhas, "Managerialism, Politics and Legal Bureaucratic Rationality in Immigration Policy", (1996) 55(1) *Aust J of Public Admin* 33-47 at 39-40, 41.

71 *General Medical Council v Spackman* [1943] AC 627, 638(HL(E)) per Lord Atkin.

72 *Bell & Colville Ltd v Environment Secretary* [1980] JPL 823, 825(QBD)

73 *Phillips v Secretary, Department of Immigration and Ethnic Affairs* (1994) 48 FCR 57, 81C-E(Gen Div); *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 10(Gen Div).

74 This is now the established practice in New Zealand: *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 554-555, 561-562, 568(CA); *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348, 352(CA); *Attorney General v New Zealand Maori Council* [1991] 2 NZLR 129, 136(CA).

75 *Re The Commonwealth of Australia and Frank El-Hassan* No 429 of 1984 (1 October 1985) Federal Court - General Division para 19.

76 *Re MT, KM, NT and JJ and Secretary, Department of Social Security* (1986) 9 ALD 146, 150(AAT)

77 *McCartney v Victorian Railways Commissioners* [1935] VLR 51, 66 (FC), *In re Gosling* (1943) 43 SR(NSW) 312, 317(CCA); *Legal Services Commission of NSW v Stephens* [1981] 2 NSWLR 697, 701(CA); *R v Clarkson* (1982) 148 CLR 600, 612-613(HCA); *Thurecht v DCT* (1984) 3 FCR 570, 588-589(Gen Div); *Coco v DCT* (1993) 43 FCR 140, 147 (Gen Div)(Fed Ct). The best single account is to be found in *Re Drake (No 2)* (1979) 2 ALD 634, 640-641, 642-643(AAT).

78 *Hall v Vaucluse MC* (1947) 16 LGR 139, 143(NSW Land & Val Ct) ;*Green v Daniels* (1977) 51 ALJR 463, 468(HCA); *Croft v Minister of Health* (1983) 45 ALR 449, 464-465(Fed Ct); *Hindi v Minister For Immigration and Ethnic Affairs* (1988) 20 FCR 1, 16(Gen Div); *Bryant v DCT* (1993) 26 ATR 541, 542(Fed Ct FC).

79 It is now arguable that a policy that is discriminatory on an impermissible ground might be struck down: *Re Partridge and Manitoba Securities Commission* (1990) 63 DLR(4th) 564, 572g-h(Man QB)

80 *James v Pope* [1931] SASR 441(FC)

81 *Ex parte S F Bowser & Co, Re Randwick MC* (1927) SR(NSW) 209, 215-216(SC) See also *R B Agencies (SA) Pty Ltd v Pope* [1970] SA Licensing Court Reports 14, 16(FC); *Marks v President etc of Swan Hill* [1974] VR 896, 904(SC).

82 *R v Transport Regulation Board ex parte Ansett* [1946] VLR 166, 177(SC)

83 *Minister for Human Services and Health v Haddad* (1996) 137 ALR 391, 399-400(Fed Ct - Full Ct)

84 See *Family Radio v Australian Broadcasting Tribunal* (1991) 28 FCR 584, 588(Gen Div)

85 *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492(HCA). The argument available in *Koowarta* based on the *Racial Discrimination Act 1975*(Cth) was not available in 1947. Even so the policy in *Water Conservation* seemed to be of the cast-iron variety and was applied without regard to the merits of the particular case. See Rich J at 497.

86 A matter may be in both a private and public interest: Thus a private company that tenders successfully for a public contract will be fufilling its own interests while it builds a public road, for example. *United Building Corporation Ltd v City of Vancouver Corporation* [1915] AC 345, 353(PC)

87 *Findlay v Home Secretary* [1985] AC 318, 335c-d(HL(E)); *R v Mott* (1994) 75 A Crim R 74, 82(Qd CA);*Whithair v Attorney-General* [1996] 2 NZLR 45, 52(HC).

88 *Howard Hargrave Pty Ltd v Penrith MC* (1958) 3 LGRA 260(NSW Land & Val Ct); *In re Thompson* [1964] Tas SR 129, 144(FC).

89 *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997, 1030b-d (HL(E)).

90 For example see: *McCartney v Victorian Railways Commissioners* [1935] VLR 51, 64(FC) upheld in (1934) 52 CLR 383(HCA).

91 Keith Hawkins, "Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation", (1983) 5(1) *Law & Policy Quarterly* 35-73.

92 *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997 (HL(E)).

93 *Bromley LBC v GLC* [1983] 1 AC 768(HL(E)).

94 See *R v Radio Authority ex parte Bull* [1996] QB 169, 183A-184C, 188A-B(DC) (Political means pertaining to policy or government)

95 *South Australia v O'Shea* (1987) 163 CLR 378, 410(HCA); *Palmer* (1994) 72 A Crim R 555, 559(Tas SC); *Cornwell v Attorney-General of the Commonwealth* (1993) 45 FCR 492; *Ex parte Fritz* (1992) 59 A Crim R 132, 134(Qd CA).

96 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223(CA). See for example: *Sydney Harbour Tunnel Co Ltd v B & CI Corp* (1989) 31 IR 193, 205(NSW Ad Law Div)(dictum);*Rosemount Estates Pty Ltd v Minister for Urban Affairs & Planning* (1996) 90 LGERA 1, 21-22, 4041(NSW Land & Environment Ct) per Stein J.

97 *R v Ministry of Defence ex parte Smith* [1996] 2 WLR 305(CA). The court noted at p 315E-F that the policy was different on this matter in Australia.

98 *Minister for Immigration etc v Gray* (1994) 50 FCR 189, 207a-c(FC)

99 *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR1, 15(Gen Div) ; *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 78(Gen Div);*Assignment Pty Ltd v Kirby* [1981] Qd R 129, 134A-B(FC).

100 *Pope v Maynorth Pty Ltd* [1966] SASR 885, 88(FC); *Arkarba Hotels Pty Ltd v Superintendent of Licensed Premises* [1968] SASR 122, 127-128(FC); *D'Oro v Superintendent of Licensed Premises & Kiley* [1968] SASR 220, 225(FC); *In re John Martin & Co Ltd* (1974) 8 SASR 237, 243(FC). One way of explaining this has been to say that a policy may guide but it may not control a decision: *Re The Commonwealth of Australia and Frank El-Hassan* No 429 of 1984 (1 October 1985) Federal Court - General Division para 23. Cf *Shiro of Gatton v Colhoar* (1966) 20 LGRA 228(Qd FC) where a policy was cast in rigid terms but the decision maker considered a departure from it.

101 *Octet v Grimes* (1987) 68 ALR 571, 583(Fed Ct); *Skoljarev v Australian Fisheries Management Authority* (1996) 133 ALR 690, 696(Fed Ct. The *Environment Protection Act 1993*(SA) s 27(1)(b), (3) and s 34 permits mandatory policies to be given legislative status and enforceable as such.

102 *Parker v Commissioner for Motor Transport* (1970) 91 WN(NSW) 273, 279(SC).

103 *King-Brooks v Roberts* (1991) 5 WAR 500(FC)

104 *Commissioner for ACT Revenue v Alphaphone Pty Ltd* (1994) 49 FCR 576, 592-593(FC)

105 *R v Port of London Authority ex parte Kynoch Ltd* [1919] 1 KB 176, 184(CA) per Bankes LJ. This passage has been cited often in Australia see: *R v Clarkson* (1982) 148 CLR 600, 612-613(HCA); *Ex parte S F Bowser & Co; Re Randwick MC* (1927) 27 SR(NSW) 209, 214(SC); *Meyer Queenstown Garden Plaza Pty Ltd v City of Port Adelaide* (1975) 11 SASR 504, 521(SC); *NCA(Brisbane) Pty Ltd v Simpson* (1986) 13 FCR 207, 223(FC); *Opara v NSW Medical Board* (1986) 6 NSWLR 544, 560(Ad Law Div); *Chumbairux v Minister for Immigration & Ethnic Affairs* (1987) 74 ALR 480, 492-493(Fed Ct); *Perder Investments Pty Ltd v Lightowler* (1990) 25 FCR 150, 157-158(Gen Div); *R v Minister of Sea Fisheries ex parte The National Australia Bank Ltd* FC of Tasmania FCA No 100 of 1990(11 June 1991);*R v Queensland Fish Management Authority ex parte Hewitt Holdings Pty Ltd* [1993] 2 Qd R 201, 204(FC).

106 Consideration of the merits is a fundamental in the exercise of any statutory discretion. For statements of this principle in the policy context see: *Greek Australian Finance Corp Pty Ltd v Sydney City Council* (1974) 29 LGRA 130, 143(NSW SC); *Goulburn City Council v Carey* (1975) 32 LGRA 277, 291(NSW SC); *Re Drake (No 2)* (1979) 2 ALD 634, 640(AAT); *Legal Services Commission of NSW v Stephens* (1981) 2 NSWLR 697, 703c-d(CA); *Magill v Santina Pty Ltd* (1983) 1 NSWLR 517, 531f-g(CA);*Seldan Pty Ltd v Liquor Licensing Commission* [1990] VR 1009, 1013(SC); *Minister for Immigration etc v Gray* (1994) 50 FCR 189, 206f-g(FC);*Skoljarev v Australian Fisheries Management Authority* (1996) 133 ALR 690, 695(Fed Ct); *Administrative Decisions(Judicial Review) Act 1977*(Cth) s 5(2)(f).

107 *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666, 684; *Australian Trade Commission v WA Meat Pty Ltd* (1987) 75 ALR 287, 292(Fed Ct- FC); *Rendell v*

Release on Licence Board (1987) 10 NSWLR 499, 503G-504B, 505G-506A(CA);*Transx Ltd and Reimer Express Lines Ltd* (1986) 28 DLR(3d) 392, 410(Man CA).

108 *Tabag v Minister of Immigration & Ethnic Affairs* (1982) 45 ALR 705, 715-716(Fed Ct)

109 *R v Minister For Sea Fisheries ex parte Byrne* Tas SC No M242/1987(15 September 1987) p 12.; *Ansett Transport Industries(Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, 62(HCA) Per Gibbs J.

110 *Kenya Aluminium and Industrial Works Ltd v Minister of Agriculture* [1961] EA 248, 253(EA CA)

111 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469, 474-475 (AAT); *Pigdon v Minister for Veteran's Affairs* (1987) 10 AAR 560, 562-563(AAT); *Re Webster and Minister for Veterans' Affairs* (1990) 21 ALD 583, 587 para 16(AAT).

112 *Whim Creek Consolidated NL v Colgan* (1989) 25 FCR 51, 54-55(Fed Ct); *Gumus v Minister For Immigration, Local Government and Ethnic Affairs* (1991) 30 FCR 145, 147(Fed Ct).

113 *Bath Society v Environment Secretary* [1992] 1 All ER 28, 38B, 42J(CA)

114 *Uyanik and Minister For Immigration, Local Government and Ethnic Affairs* (1989) 10 AAR 38, 45(AAT).

115 *Re North Coast Air Services Ltd* (1973) 32 DLR(3d) 695, 701(Fed CA).

116 *R v Council of the Town of Charleville ex parte Corones* [1928] St R Qd 155, 162(FC); *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble(Offshore) Fisheries Ltd* [1995] 1 All ER 714, 731d-e(QBD)

117 *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758, 774E(NPD).

118 See for example: *Taylor v Isitt* (1891) 9 NZLR 678, 684(SC).

119 *R v Commonwealth Conciliation and Arbitration Commission ex parte Angliss Group* (1969) 122 CLR 546(HCA).

120 *Ex Parte Angliss Group* op cit 553

121 Where an agency rejects an application on the grounds of non-compliance with its policy this is not bias per se especially if the evidence shows that the agency considered the merits and did not close its mind to the applicant's case: *Bennett v Dental Board of Queensland* SC No 494 of 21993(25 February 1994)

122 *Re Consolidated Packaging Ltd and International Woodworkers Union* (1987) 31 DLR(4th) 444, 448(Ont CA).

123 *Peninsula Anglican Boys' School v Ryan* (1987) 7 FCR 415, 430(Fed Ct) ("Moreover, policy considerations change from time to time; sometimes quickly and frequently. The inconvenience and delay attendant upon giving notice of each shift of the wind is obvious". per Wilcox J).

124 *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 638e-h(PC).

125 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 401D(HL(E)).

126 *R v Ward* (1983) 34 SASR 269, 283-284(FC); *Cole v Cunningham* (1983) 49 ALR 123, 132(Fed Ct).

127 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394(HCA).

128 *Gillick v West Norfolk Area Health Authority* [1986] AC 112, 193G-H(HL(E)) per Lord Bridge.

129 *Rothmans v Attorney General* [1991] 2 NZLR 323, 331(HC).

130 The "almost" leaves to door open to the possibility that the proposed legislation may be unlawful. But to date no court has prevented a bill likely to conflict with the Constitution from being introduced on the ground that it may be ultra vires the constitution or other governing legislation because there is a possibility that the Legislature may amend it thereby obviating the problem. See :*Trethowan v Peden* (1930) 31 SR(NSW) 183(FC) and the cases cited in *Cormack v Cope* (1974) 131 CLR 432(HCA); *Eastgate v Rizzoli* (1990) 20 NSWLR 188(CA).

131 *R v Commissioner of Police ex parte Blackburn* [1968] 2 QB 118(CA)

132 See *Churchill Fisheries Export Pty Ltd v Director-General of Conservation* [1990] VR 968(SC)

133 *King-Brooks v Roberts* (1991) 5 WAR 500(FC)

134 *R v Commissioner of Police, Tasmania ex parte North Broken Hill Ltd* (1992-3) 1 Tas R 99, 114(SC)

135 *Blyth District Hospital Inc v SA Health Commission* (1988) 49 SASR 501, 523(SC).

136 *Peninsula Anglican Boys' School v Ryan* (1987) 7 FCR 415, 430(Fed Ct)

137 *Biswanath v Director of Medical Education and Training* AIR 1982 Orissa 106, 108(Orissa HC)

138 *Willara v McVeigh* (1984) 54 ALR 65, 117(Fed Ct)

139 *R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299(CA); *Council of Civil Service Unions v Minister for the Civil Service* [1985]]AC 375(HL(E)); *R v Great Yarmouth BC ex parte Bottom Brothers Arcades Ltd* (1988) 56 P & CR 99(QBD); *R v Transport Secretary ex parte Richmond LBC* [1994] 1 All ER 577, 595a-d(QBD).

140 *Hughes v DHSS* [1985] AC 776, 788(HL(E)).

141 *R v Health Secretary ex parte US Tobacco* [1992] QB 353, 369g-h(DC)

142 *Attorney-General of NSW v Quin* (1990) 170 CLR 1, 17(HCA).
143 *Re Habchi and Minister for Immigration & Ethnic Affairs* (1980) 2 ALD 623, 631 (AAT) per Davies J
144 *Gleason v Lethbridge Community College* [1996] 3 WWR 377, 381, 383(Alta QB).(Sexual harassment policy introduced during the hearing itself: otherwise not known to or available to the applicant).
145 Thus where the AAT criticized a previous policy the agency changed its policy and applied the second policy in a subsequent decision: *Re Rendevski & Sons Ltd and Australian Apple and Pear Corp* (1987) 12 ALD 280, (AAT).
146 For examples of this see: *R v Minister Administering the Fisheries Act 1963 ex parte National Australia Bank Ltd* Tas SC, No M139 of 1990(9 October 1990) pp 20-21.
147 *R v McAulay ex parte Fardell* (1979) 2 NTR 289(SC)
148 *Sernack v McTavish* (1968) 15 FLR 381(ACT SC); *Zayen Nominees Pty Ltd v Minister For Health* (1983) 47 ALR 158, 189(Fed Ct).
149 *Randall v Northcote Corporation* (1910) 11 CLR 100(HCA); *Sydney Harbour Tunnel Co Ltd v Building Construction Industry Long Service Payments Corporation* (1989) 31 IR 193, 205(NSW Ad Law Div).
150 *Grace v Registrar of Firearms* (1983) 113 LSJS 390, 394(SA LC)(This case should be approached with caution since the court approved of this practice which amounted to not allowing any further additions. This is a mis- statement of the applicable principle.
151 *Skoljarev v Australian Fisheries Management Authority* (1996) 133 ALR 690, 696(Fed Ct)
152 *Legal Services Commission of NSW v Stephen* (1981) 2 NSWLR 697, 705b-d(CA).
153 *Smith v Wyong Shire Council (No 2)* (1980) 41 LGRA 202, 215(NSW SC)
154 *Legal Services Commission of NSW v Stephens* (1981) 2 NSWLR 697, 702c-d(CA)
155 The merits of the individual case may not be sufficient to override the policy: *P W Adams Pty Ltd v Australian Fisheries Management Authority* (1995) 22 AAR 96, 114(Fed Ct)
156 *R v Minister of Agriculture,Fisheries and Food ex parte Hamble(Offshore) Fisheries Ltd* [1995] 2 All ER 714, 723a-b(QBD).
157 *Mohoupt v Redland Shire Council* (1975) 31 LGRA 309, 312(Qld Local Govt Ct); *Haines v Ipswich City Council* (1974) 27 LGRA 153, 157(Qld Local Govt Ct)
158 *Re Maple Lodge Farms Ltd* (1982) 137 DLR(4th) 558, 561(SCC)
159 In *Re John Holman & Co Pty Ltd and Minister For Primary Industry* (1983) 5 ALN N219(AAT) the policy was produced at the hearing but the tribunal disposed of the matter by deciding that the policy conflicted with the statute.
160 For an exception to this see *Peninsula Anglican Boy's School v Ryan* (1987) 7 FCR 415, 430(Fed Ct) where it was held that it would not be a breach of natural justice for a minister to fail to notify affected persons of changes of policy. This case has only been followed once since: *Chamberlain v Banks* (1985) 7 FCR 598, 600 and should not be followed on this point.
161 *Gleason v Lethbridge Community College* [1996] 3 WWR 377, 381, 383(Alta QB) per Hembroff J.
162 In the *Freedom of Information Act 1993*(SA) s 10(10)(c) there is an obligation on agencies to make each of their policy documents available for inspection and purchase by members of the public.
163 Ibid s 10(3).
164 While all FOI statutes allow access some do not have a mandatory requirement of making this material available in the absence of a specific request.
165 5 USC Code Sec 553(b)(3)(A), (d)92)(1994 edn).
166 *Freedom of Information Act 1993*(SA) s 10(2).
167 s 25(3)(b).
168 *Environmental Protection Act 1993*(SA) s 30.
169 Ibid s 28(6).
170 *Smith v Wyong Shire Council (No 2)* (1980) 41 LGRA 202, 216-217(NSW SC)