MERIT REVIEW IN WA: THE COST OF APPLYING GOVERNMENT POLICY IN THE COURSE OF REVIEW

Elizabeth Morrow*

Western Australia has a generalist merit review body in the form of the State Administrative Tribunal ('SAT') established under the *State Administrative Tribunal Act 2004* ('SAT Act'). Section 29 of the SAT Act provides that SAT, in its review jurisdiction, has the 'functions and discretions' of the original decision-maker. This provision begs the question: if SAT has the powers of the original decision-maker, and that decision-maker was influenced by government policy, what role should that policy play in SAT's decision? Section 28 of the SAT Act constitutes a response to that question. Titled 'Considering government policy', s 28 provides that SAT must 'have regard to' a policy applied by the original decision-maker.

In this article I consider the extent to which s 28 enhances or hinders SAT's ability to provide administrative justice for individuals. I look first at the common law principles relating to merit review and policy. I then examine the scope and operation of s 28, commenting on departures from the common law position. Finally I discuss my view of what administrative justice requires in relation to merit review and policy. I conclude that SAT's ability to provide administrative justice is diminished by s 28.

For the purpose of this article I define policy as a non-statutory direction to an administrative decision-maker about the way in which that decision-maker is to exercise his or her decision-making power. By 'non-statutory' I mean that the direction is neither written into, nor expressly authorised by, the law under which the decision is made. This article then does not involve consideration of the extent to which SAT is bound by a government direction authorised by the statute under which the relevant decision is made.[1]

This article is also confined to consideration of merit review by bodies external to the government department or agency responsible for administering the legislation under which a reviewable decision is made.

Finally, in this article I have set myself the task of examining the extent to which s 28 enhances or hinders SAT's ability to provide administrative justice for individuals. In undertaking this task I have taken it as given that the role of a merit review body is to provide administrative justice, and that administrative justice involves the protection of individuals against the unjust exercise of administrative power. However these 'givens' are contestable. It can be argued that review bodies do not exist to check the exercise of administrative power but instead are merely part of the administrative process, having as their objective efficient administration. In this article I have assumed to the contrary.[2] It can also be argued that the focus of administrative law, and of the courts (and by implication, the tribunals) that dispense it, is not the attainment of administrative justice for individuals, but merely the 'declaration and enforcing of the law which determines the limits and governs the exercise of" administrative power.[3] Again, in this article I have assumed to the contrary.

* *Assistant Parliamentary Counsel, Parliamentary Counsel's Office, Western Australia. This paper was prepared for an administrative law course conducted by Professor Robin Creyke at the Australian National University. The views expressed in this paper are those of the author's and do not represent the views of Western Australia's Parliamentary Counsel.*

Merit review and policy: the common law position

The current common law principles guiding a review body's approach to policy are based on the judgment in *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 ('*Drake'*). *Drake* was heard before Brennan J, then President of the Administrative Appeals Tribunal ('AAT'). The administrative decision at issue was the subject of a previous finding by the AAT that had been appealed to the Federal Court and remitted to the AAT by that court for re-hearing.

At issue in *Drake* was a decision by the Minister for Immigration and Ethnic Affairs to deport Mr Drake pursuant to section 12 of the *Migration Act 1958*. That section provided that the Minister could deport a person who was an 'alien' if that person had been convicted in Australia of a violence-related or drug-related crime and been sentenced to 12 months imprisonment or longer. At the time of the Minister's decision, Mr Drake was an alien and had been sentenced to 12 months imprisonment for possession of cannabis.

Mr Drake appealed to the AAT from the Minister's decision. There were a number of factors in Mr Drake's case which weighed against the exercise of the discretion to deport him. For example, Mr Drake had an Australian son and partner whose lives would be negatively affected by his deportation. The ground of Mr Drake's appeal was that the 'correct or preferable' decision required these factors be given greater weight than other factors supporting Mr Drake's deportation.

The Minister's decision was defended as having validly given greatest weight to the public interest in deporting those who posed a criminal threat to the Australian community; 'validly' because this weighting of competing factors was guided by a statement of government policy. A central question then was the extent to which the AAT was required to apply that policy. The answer to that question could not be discerned from the *Administrative Appeals Tribunal Act 1975*, as that Act did not (and does not) contain a provision equivalent to s 28 of the SAT Act.

The conclusion arrived at by Brennan J in *Drake* was that the AAT should adopt 'a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary.'[4] This statement of the relationship between merit review and policy raises a series of questions.

When is a policy lawful? Brennan J referred to a series of grounds on which a policy would be unlawful: unlawful fettering of discretion, unlawful consideration of irrelevant matter (or failure to consider relevant matter), and unlawfulness due to improper purpose. Is a review body required only to apply policy authored by a Minister: what of policy made by the department responsible for administration of the legislation under which a decision is made? In *Drake* Brennan J advocated the application of 'ministerial policy'. However what constitutes 'ministerial policy' is unclear in a number of circumstances: for example, when a ministerial statement as to the exercise of a discretion is in an ambiguous form[5] or when a departmental guideline exists in published, if not public, form and so is known (or at least should be known) to the Minister responsible for administering the department[6].

How is policy to bear on the decision of a review body? In *Drake*, an answer to this question is embedded in Brennan J's discussion of unlawful fettering of discretion. In the course of that discussion, Brennan J observed:

> That is not to deny the lawfulness of adopting an appropriate policy which guides but does not control the making of decisions, a policy which is informative of the standards and values which the Minister usually applies.[7]

So when Brennan J speaks of a review body 'applying' policy he envisages that body engaging in a decision-making process 'guided', not 'controlled', by policy.

What are the 'cogent reasons' that will negate a review body's obligation to apply policy? In *Drake* Brennan J stated:

> If it were shown that the application of ministerial policy would work an injustice in a particular case, a cogent reason would be shown…[8]

In this statement, Brennan J makes it clear that policy is not to be applied to merit review where its application would produce an outcome that results in injustice to the individual.

Section 28: its scope and operation

Section 28 of the SAT Act requires SAT to 'have regard to' a policy applied by the original decision-maker. Provisions requiring a tribunal to consider policy in the course of merit review are also contained in Victoria's *Victorian Civil and Administrative Tribunal Act 1998* (see s 57) and New South Wales' *Administrative Decisions Tribunal Act 1997* (see s 64). Western Australia's s 28 is closely based on Victoria's equivalent provision. In the course of examining the scope and operation of s 28, I refer to these other provisions to the extent that they provide guidance as to the interpretation of s 28.

The kind of policy to which SAT must have regard under s 28 is limited in two significant ways:

(a) the policy must be one that a minister has certified as having been, at the time the original decision was made, 'published in the *Gazette* under a written law' and applied to previous decisions of the same kind as the decision under review; and

(b) the policy must not be 'outside power'.

On the face of it then s 28 appears to adequately circumscribe the role of policy in administrative review, and to do so by reference to basic rule-of-law and democratic principles. Limiting SAT's s 28 obligation to gazetted policy is consistent with the principle that a person should not be bound by a law about which they could not have known. Gazettal achieves public notification. In turn, limiting SAT's s 28 obligation to policy that has been previously applied is consistent with the principle that a law is to have general application rather than discriminatory application to a targeted individual. The previous application of a policy verifies the general nature of that policy. Finally, limiting SAT's s 28 obligation to policy that is within the power given to the primary decision-maker under the enabling statute ensures that the power of the administration is contained within the limits defined by the elected legislature.

However certain aspects of s 28 undermine, or at least have the potential to undermine, these limitations on SAT's obligation to apply policy in the course of review.

In *Drake*, Brennan J advocated consideration of 'ministerial policy' in the course of review.

Section 28 goes beyond this position, in so far as it does not make reference to the source of the policy which SAT must apply. This approach stands in contrast to NSW, where the tribunal's obligation to apply policy is limited to a policy 'adopted by' either the Cabinet, the Premier or the Minister. In Western Australia then, a policy authored by a member of the public service could be gazetted, applied to a series of decisions and so come within the scope of SAT's s 28 obligation. Perhaps the true importance of certification by the Minister (as required by s 28) is that, in such circumstances, it will give Ministerial imprimatur to

departmentally-authored policy. It is arguable as to whether this gives rise to 'ministerial policy' in the sense intended by Brennan J.

SAT's obligations under s 28 are limited to policy which has been applied in previous decisions. This limitation is an important means of protecting a person from policy formulated specifically to influence their case. However the wording of SAT's obligation to apply policy, undermines this limitation. SAT is obliged to apply policy 'as in effect at the time of the review'. Does this permit the modification of policy in the period between the original decision, and SAT's decision? Writings by a founding member of SAT suggest that SAT will find that it does.[9]

There are two distinct views which bear on the question as to whether a government may modify relevant policy in the course of review. If policy is viewed as part of the body of facts relating to a decision, then it falls within the scope of the proposition that a review body bases its decision on the facts existing at the time of the review.[10] This appears to be the view of policy that informs the NSW legislation that confines the tribunal's policy obligations to 'policy in force at the time the reviewable decision was made'. If policy is viewed as akin to the law under which a decision is made, then it falls within the scope of the proposition that a review body applies amended law in force at the time of review, except to the extent that the amendments diminish individual rights.[11] This appears to be the view of policy that informs s 28. In my view, the interests of the individual are undermined to the extent to which government is permitted to modify policy to achieve the outcome it desires in individual review cases.

SAT's obligation to consider policy does not apply where the policy is 'outside power'. This provision goes to the lawfulness of a policy: but it is not clear which of the common law grounds of unlawfulness will render a policy 'outside power' for the purposes of s 28. A narrow application of this aspect of s 28 could confine unlawfulness to circumstances in which a policy is inconsistent with the terms or purpose of the statute under which a decision is made.[12] Accordingly, unlawful fettering of discretion, for example, could be viewed as a matter within (rather than outside) power. If this narrow approach were applied, SAT could be bound to apply highly restrictive policy, and, to borrow Brennan J's terminology, be 'controlled' rather than 'guided' by policy. While this scenario is an extreme one, it is a possible one and therefore illustrates the extent to which the scope of SAT's s 28 obligation will turn on SAT's attitude towards the common law principles of unlawfulness.

To this point I have discussed matters going to the question of whether policy is of a kind that SAT must consider. But, having established that a policy falls within the scope of the obligation on SAT under s 28, how does that policy bear on SAT's decision making process? Section 28 requires SAT to 'have regard to' policy. In my view this expression is an attempt to give effect to Brennan J's view that a review body is to be 'guided' but not 'controlled' by policy falling within the scope of s 28. The freedom bestowed on SAT by the expression 'have regard to' is perhaps best understood by reference to the way in which the NSW tribunal is constrained by the obligation to 'give effect to' policy: while SAT is required to consider policy, its NSW's equivalent appears to be required to implement policy.

In concluding this interpretation of the meaning of s 28 it is important to note that a critical element of the principle articulated by Brennan J in *Drake* was the power of a review body to choose against the application of policy where the result of such application would produce injustice to the individual.[13] SAT has been divested of this power by s 28.[14] If a policy has been gazetted, applied previously and is within power, SAT must apply that policy without regard to whether it produces injustice for the person affected by the decision. This is contrary to the recommendations of the two inquiries that preceded, and inspired, the establishment of SAT.[15]

To date, s 28 has not been determinative of the outcome of a decision by SAT. While several cases have come before SAT involving the question of how policy is to bear on the review decision, the cases have been in the context of planning law, which has its own unique principles governing the approach to policy.[16] Section 28 has not been viewed by SAT as applying to these cases. Therefore, at this point in time, how SAT will interpret s 28 is an open question.

What does administrative justice require in relation to policy and merit review?

In the course of interpreting s 28 I have commented on departures from, and the challenges in applying, the principles in *Drake*. To the extent that *Drake* represents the proper approach to merit review and policy – 'proper' in so far as administrative justice is achieved by that approach - then s 28, in its departures from *Drake*, fails to achieve administrative justice. However, does *Drake* represent the 'proper approach' for review bodies striving for administrative justice?

The central rationale for requiring review bodies to apply policy derives from the assumption that policy is a valid means by which a government implements its political agenda. From this assumption, it is argued that a review body must apply policy since to ignore it would undermine the political process and usurp the power that properly resides in elected representatives. This is the reasoning that underpins Brennan J's principle in *Drake*. [17] Other arguments exist to support this central rationale: justice requires consistency in decision-making and such consistency can only be achieved by adherence to policy[18]; the judicial-like process in which review bodies engage is unsuited to consideration of the public-interest element of administrative decisions[19]. I believe these latter arguments are "supporting" rather than "central" in so far as they ignore what I regard to be the fundamental question underlying the debate about policy and merit review: what, from the perspective of political theory, is the proper role of government in the administrative review function of the state? In so far as these latter arguments are "supporting" I do not intend to engage with them.

I reject the central rational for considering policy in the course of merit review. My reasons are as follows.

Democratic theory requires that political power be limited. One means of limiting power is to divide it, vest that divided power in separate institutions and impose an overriding constitution preventing each institution from usurping the power of the other. This is the rationale underlying the separation of powers doctrine that inspires the design of the Australian polity. This doctrine requires the division of power between legislature, executive and judiciary. The role of the legislature is to make the laws which regulate the activities of citizens, while the role of the executive is to administer that law.

However, in reality, the roles of legislature and executive are blurred. Social activity is complex and, as a result, a legislature, when attempting to regulate a particular activity, may not always be able to articulate a rule with universal application. Sometimes a legislature must leave open the question of how the law is to apply to individual cases, and vest the power to answer that question in an entity able to consider the proper application of the law in individual cases as they arise.[20] In general that power is vested in the executive, be it either a minister or a member of the public service (who is answerable to the minister, and therefore part of the executive). So is the executive, when exercising such power, administering the law, or making law? To the extent that a decision-maker is exercising a discretion that is un-guided by decision-making criteria articulated in the empowering statute, that decision-maker is making law.

Creation of decision-making power is unavoidable in the modern polity. However, the legislature abdicates its legislative-making responsibility to the extent that it vests decision-

making power in the executive and fails to articulate the criteria by reference to which that power is to be exercised. Conversely, to the extent that the executive directs decision-making by means of policy, it is usurping the role of the legislature. The democratic ideal, and more specifically separation of powers doctrine, requires that a government implement its agenda through the legislative process: this democratic imperative overrides the argument that the legislative process is too unwieldy a tool for implementing a political program.[21] Where the nature of a decision is such that the decision-making criteria must be responsive to changing circumstances, then the legislature can delegate the power to articulate those criteria. The legislature will not be abdicating its role to the extent that such directions are to be tabled, and are disallowable.

What then does this mean in relation to merit review and policy? It negates the central rationale for requiring review bodies to consider policy. What remains are these propositions: The focus of merit review is administrative justice, that is, the protection of individuals against the unjust exercise of administrative power. A review body cannot fearlessly check the exercise of administrative power if its decision-making process is subject to government control. Given these propositions, I do not believe *Drake* represents the 'proper approach'. In my view, merit review should operate independently of policy, and a review body should address itself solely to the issue of justice for the individual. Section 28 is a radical departure from this approach.

Conclusion

Section 28 of the SAT Act reflects general political dissatisfaction with the failure of review bodies to defer to government policy in the course of review.[22] Section 28 reflects the Western Australian Parliament's unanimous intention to curb the freedom that *Drake* established for review bodies: 'unanimous' in so far as after referral to the Standing Committee on Legislation and scrutiny before both Houses of Parliament, s 28 retained the form in which it was expressed in the bill introduced in June 2003. Applying either the *Drake* standard, or the ideal I have argued for in this article, s 28 diminishes SAT's ability to provide administrative justice.

BIBLIOGRAPHY

List of articles referred to:

Committee on Administrative Discretions: Final Report (1973) (Bland Report)

Report of Tribunals Review to the Attorney General by Commission Gotjamanos and Mr G Merton, August 1996

Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal, May 2002

Brennan F G — "The Anatomy of an Administrative Decision", (1980) 9 *Sydney Law Review* 1

Eckert J — "Detailed Overview of the State Administrative tribunal (SAT) Legislation", *Brief* 32 (Feb. 2005) 6

Johnston P	"The Silence of the Books: The Role of the Administrative Appeals Tribunal in the Protection of Individual Rights", in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) at 45.
Kirby M	"Administrative Review: Beyond the Frontier Marked 'Policy – Lawyers Keep Out' ", (1981) 12 *Federal Law Review* 121 at 146
Mason A	"Administrative Review – The Experience of the First Twelve Years", (1989) 18 *Federal Law Review* 122
McMillan J	"Review of Government Policy by Administrative Tribunals" (1998) *Law and Policy Papers* 27
Woodward LO	"Does Administrative Law Expect Too Much of the Administrator?", in S Argument (ed), *Administrative Law and Public Administration: Happily Married or Living Apart under the Same Roof?* (1993, AIAL) 42

List of cases referred to:

Attorney General (NSW) v Quin (1990) 93 ALR 1

Church of Scientology Incorporated v Woodward (1982) 154 CLR 25

Department of Primary Industries and Energy v Collins (1992) 34 FCR 340

Esber v Commonwealth (1992) 174 CLR 430

Gangemi and Shire of Augusta-Margaret River [2005] WASAT 113

Green v Daniels (1977) 13 ALR 1

Perder Investments Pty Ltd v Elmer (1991) 31 FCR 480

Re Aston and Secretary, Department of Primary Industry (1985) 8 ALD 366

Re Drake and Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2ALD 634

Re Everfresh Seafoods Pty Ltd and Australian Fisheries Management Authority (1997) 45 ALD 418

Re Greenham and Minister for Capital Territory (1979) 2 ALD 137

Re Lumsden and Secretary, Department of Social Security (1986) 10 ALN 225

Smoker v Pharmacy Restructuring Authority (1994) 53 FCR 287

Endnotes

1 For an example of such a provision see *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287
2 For an article embodying the role of review bodies assumed in this article, see G Brennan, "The Anatomy of an Administrative Decision", (1980) 9 *Sydney Law Review* 1 at 9; the contrary view is implicit in *Committee on Administrative Discretions: Final report* (1973) (Bland Report) see para 172(e).
3 *Attorney General (NSW) v Quin* (1990) 93 ALR 1 at 25 per Brennan J
4 *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634, at 645
5 See *Re Everfresh Seafoods Pty Ltd and Australian Fisheries Management Authority (1997)* 45 ALD 418 at 423 in which a ministerial press release was found not to be binding on the AAT.
6 See *Re Lumsden and Secretary, Department of Social Security* (1986) 10 ALN 225, in which the court rejected the argument that it was bound by a departmental guideline.
7 Ibid., n. 4 at 641
8 Ibid., n. 4 at 645
9 Eckert J., 'Detailed overview of the State Administrative Tribunal (SAT) legislation', *Brief* 32 (Feb. 2005) 6 at 10-11
10 For the application of this proposition see *Re Greenham and Minister for Capital Territory (1979)* 2 ALD 137 at 141
11 For the application of this proposition see *Esber v Commonwealth (1992)* 174 CLR 430
12 See *Green v Daniels (1977)* 13 ALR 1 for a case in which policy was not binding because it was inconsistent with the terms of the empowering statute
13 Ibid, n. 4 at 644
14 While the Victorian tribunal has also been divested of this critical power, it is retained by the NSW tribunal.
15 *Report of Tribunals Review to the Attorney General by Commissioner Gotjamanos and Mr G Merton*, August 1996, at p. 57; *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal*, May 2002, at 131.
16 See for example *Gangemi and Shire of Augusta-Margaret River [2005]* WASAT 113
17 Ibid., n. 4 at 644. See also M Kirby, 'Administrative Law: Beyond the Frontier Marked 'Policy – Lawyers Keep Out'", (1981) 12 *Federal Law Review* 121 at 146
18 Ibid, n. 4 at 639
19 Ibid, n. 4 M Kirby at 149-150
20 *Re Aston and Secretary, Department of Primary Industry (1985)* 8 ALD 366 at 380
21 For comment on the unwieldy nature of legislative process, see L Woodward, 'Does Administrative Law Expect Too Much of the Administrator?' in S Argument (ed), *Administrative Law & Public Administration: Happily Married or Living Apart under the Same Roof?* (1993, AIAL) at 42; also ibid, n. 4 M Kirby at 146
22 For comment on general political dissatisfaction see J McMillan, 'Review of Government Policy by Administrative Tribunals', (1998) 9 *Law and Policy Papers* 27 at 27-29