

FUTURE DIRECTIONS IN ADMINISTRATIVE LAW Part 1

*Justice Garry Downes**

This is the fifth time I have addressed the graveyard session of the biennial Canberra Conference of the Institute, on Future Directions. You can follow my thinking as it has developed since 2003 on the Administrative Appeals Tribunal Website.

With the papers from this Conference you will find my paper on Future Directions. It deals with the way the Administrative Appeals Tribunal is handling its present and future directions. It refers to some of its present and proposed innovations. I will not, however, this afternoon, be directly covering that ground. What I want to do is to talk about three specific matters in the context of future directions. If there is a common theme in what I will be saying it is to do with the exercise of discretions in administrative decision-making.

Technology

The first matter will, I apprehend, be one of the most significant influences on government administration in the foreseeable future – namely the use of technology as an aid to decision-making.

The Administrative Review Council recognised the importance of the issue in 2004 when it released its report on Automated Decision-Making. It recently resolved that the report should be brought up to date.

What the future holds is increasing use of automated decision-making techniques. To date, the process has halted at the exercise of discretion. That has been the step too far. Yet, discretionary decision-making is ultimately no more than isolating factors, evaluating each of them and drawing a conclusion after a process of final evaluation.

This is exactly what computers are very good at. There is no process of balancing considerations and selecting a result which is not, theoretically at least, capable of being undertaken by a computer programme. So I think that we should prepare for automated decision-making to intrude, in the future, into many areas of administration.

The difficult issues are, first, ensuring that the relevant computer program correctly identifies and properly processes the necessary components and, secondly, making sure that the values entered into the computer correctly record the facts of the individual case. These problems are present now. They are amongst the issues addressed by the Administrative Review Council. The consequences of failure at any step will become more serious, however, as the significance of the subject matter of automated decisions is increased.

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Put simply, the questions are whether the computer is correctly programmed and whether the correct data is entered. Both of these requirements create difficult problems at both a theoretical and practical level. How are the factors and the weight they should be accorded, to be determined? How can we be sure that the program correctly reflects the determination, once made? What method is to be employed to ensure that the correct data is entered? This is easy if the decision-maker keeps a worksheet, but worksheets do not go with computers. Indeed, one of their virtues is said to be the obviation of the need for paper records.

What we must do is devise methods of auditing and checking both decision-making programs and the data that is entered up into them. Julian Disney gave an example at this Conference last year of an agency program with a pop up menu which gave the opposite effect to data entered, to that which the legislation required. How is a complicated social security calculation to be verified in a merits review application if the only material available is the result provided by a computer?

For the future, however, more difficult problems may arise. What if there was a proposal that criminal deportation decisions should be largely determined by an automated process. There would be a program which determined whether the resident failed the character test. That might not be impossible. The range and nature of offences could be dealt with by a program. But what if the program went further and sought to undertake the balancing process – sought to identify and assign values to matters tending for and against deportation – matters such as family ties, other links with Australia and so on? This kind of system may even be less complicated and may have less difficulty in assigning values to factors than the economic computer models which are now regularly used by the Treasury and so-called economic think tanks. Such a system, if it could be developed, would not be all bad. It would have the great benefit of consistency, provided it could also be fair and just.

In coming years we should be alert to the possibility of advanced automative decision-making developing, to ensure that proposals are properly scrutinised. After all, there will not be a sudden step which automatically signals a warning. Such systems will develop incrementally and slowly. The guidelines or directions issued in criminal deportation cases, to which I will refer shortly, may be an early part of such a process.

Participation

The second matter I want to mention takes up one of the themes of the conference – participation. That is an essential quality which should be present in all merits review – participation in the sense of entitlement to seek review and participation in the sense of entitlement to take part in the process.

Over many years the Tribunal has developed a sophisticated system to deal with the second sense. It is dealt with in the written paper. There are two very different aspects of the first sense which will occupy the Administrative Appeals Tribunal in the immediate future. They are both associated with the Government's commitment to advancing regional Australia.

The Tribunal has an extensive outreach program to applicants, but it does not have a program to make its facilities known to potential claimants. To date that has been achieved by notification of the right of review as part of notification of the reviewable decision.

It is noticeable fact, however, that not many applications are made to the Tribunal by indigenous Australians. The numbers are less than the population would suggest. The Tribunal has recently decided, therefore, to institute a program to seek to remedy this situation. The process is only just beginning, but will develop in coming months. Hopefully, the result will be a further participation in the resources of the Tribunal by indigenous Australians in the future.

The other advance in participation relates to a new jurisdiction which is to be given to the Tribunal. This is a domestic jurisdiction relating to Norfolk Island. It will be like the jurisdiction the Tribunal used to have in the Australian Capital Territory. The legislation has been passed, but enabling regulations still have to be promulgated. The Tribunal, along with the Ombudsman and the Information Commissioner, will become part of the Government's program, supported by the Norfolk Island Government, of introducing modernising reforms to the process of government and administration on the island.

Community standards

The final matter I want to deal with is a very important matter going to the essence of merits review which may begin to occupy us more in the future.

There have recently been a number of newspaper articles and at least one television program which have been critical of decisions of the Tribunal. They focus primarily on criminal deportation cases. You know the kind of article I mean. The headline reads: "Tribunal overrules Minister and allows pedophile rapist murderer to stay in Australia".

The problem with this kind of reporting is that it focuses almost exclusively, on one, *albeit* the most important, of the many factors that need to be identified and assessed in accordance with the legislation and the Minister's guidelines or directions. The report generally highlights the offence, but not the resident's association with Australia.

The result is, as it is with criminal sentencing, that an unfair impression can be given of cases which are unexceptionable when read in full. It is unfortunate that some media appear prepared to present a false view of decision-making in the Tribunal when the truth is that Tribunal decisions are fair and balanced and ultimately underpin the substantial reputation which the Tribunal has in the community.

Since the 1970s when Bowen CJ and Deane J coined it in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 [at 68], the phrase "correct or preferable decision" has regularly been used to describe decision-making in the Tribunal. Correct, if there is only one decision. Preferable, if there is more than one possible result; in other words if the decision-maker has a discretion. This, of course, is what makes the Tribunal and merits review different. It is what sets the process apart from curial adjudication.

It must be recognised, however, that the difference implies that the administrative decision-maker undertaking merits review has greater power than the judge undertaking judicial review. Moreover, the difference means that the merits reviewer will be involved with policy and value judgments which are generally not part of the roles of courts. This extra power is less directed than judicial decision-making and may even be undirected. It is accordingly to be seen as an important trust conferred on Tribunal members.

It is surprising, therefore, that little has been written about the meaning and content of the concept of the preferable decision. Plainly it implies that the decision will be that alternative which best achieves individual justice in the particular case, in accordance with the legislation, and which is generally consistent with policy. But what yardstick should inform the evaluation which leads to the decision.

Sir Anthony Mason, writing *ex judicially*, has said that one of the characteristics of merits review is to place an emphasis on individual justice, at the expense of public policy, that was not necessarily present in departmental and agency decision-making. (A. Mason *Administrative Review: The experience of the First Twelve Years* (1989) 18 Fed L Res 122 at 130). In saying this he was building on Sir Gerard Brennan's early decision in the Tribunal

that although the Tribunal would give significant weight to Government policy, it was not bound by it (*Re Drake v Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 at 635). More than two decades later it may no longer be so true to say that individual justice plays a more significant role in Tribunal decision-making, than it does in departmental and agency decision-making, because the body of principles now established by the Federal Court and the Tribunal has largely been taken up within government.

Yet these matters still do not always provide a touchstone or test against which the preferable decision can be measured. In many cases the preferable decision will be capable of being determined solely by reference to statutory criteria. But this will not always be the case. A value judgment, pure and simple, will be called for. In these cases the touchstone cannot be the personal values of the decision-maker, however hard it is for decision-makers to ignore personal beliefs and prejudices. The touchstone must be community standards or values. They must be the yardstick for evaluation. It is surprising, however, that this is rarely referred to. Perhaps it is because it is obvious. But it remains surprising to me that some reference to it does not appear in decisions.

The question I wish to raise today is whether for the future Tribunals should begin to address directly, when coming to the final assessment of what is the preferable decision, whether that assessment is based on the decision-makers belief of what the community standard is. It is interesting, to take the case of criminal deportations, that the expectations of the Australian community were a standard under previous directions of the Minister, but are no longer included in the present direction. Even so, the former direction was addressing a factor for consideration and not an overall assessment of all the factors.

The problem with this whole area is the problem of ascertaining what community standards are. This cannot be the subject of evidence. It is something that is sometimes said, of judges, to be *in gremio judicis* (in the judge's bosom). So, the problem of identifying community standards is probably the reason it generally is left unaddressed. It is too difficult. Nevertheless it is, in my opinion, important for decision-makers to remind themselves that when they are administering individual justice, when they are making the preferable decision, they are doing so in the context of community standards, not personal standards, and that when community standards differ from the decision-makers personal standards the former must prevail. However difficult it may be, it is for decision-makers to do their best, from their experience and exposure to the community, to identify and apply what they find to be its standards. This will not adopt the standards of the popular press, but it should take into account genuine community concerns as well as broader considerations of fairness and justice.

If Tribunal members explain, in appropriate cases, how their decisions reflect community standards then their decisions may be less likely to provoke newspaper criticism than if they leave this element to be assumed.