PERSPECTIVES ON AGENCY DECISION-MAKING

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Modern executive government

The importance of good administrative decision-making has increased as government has become more and more involved in the activities undertaken by Australians in their personal and working lives, and in business activities. The development and impact of environmental and planning law, wide-ranging social security laws and prudential regulation are but three examples of the growth in such governmental involvement since the 1950s.

It is in response to this increasing significance of administrative decision-making in Australia that the current administrative law system has evolved, following the first report by the Kerr Committee presented to the Commonwealth government in 1971[1]. Since the creation of the Administrative Appeals Tribunal ('the AAT') in 1976, a significant aspect of the development of administrative law in Australia, numerous merits review tribunals have been established at the Commonwealth and State levels, some specialist tribunals and some generalist tribunals like the AAT.

The following observations of former Chief Justice Gleeson are apposite to modern administrative decision-making:

> One of the characteristic features of the context in which modern administrative law functions is a change in emphasis from the duties of public officials to the rights of citizens.

and

> The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life.[2]

This paper examines how legal professionals and members of merits-review tribunals can contribute to the enhancement of primary administrative decision-making, and hence good government.

The process and the outcome

In the same paper quoted above, Chief Justice Gleeson said:

> It is (a) sound principle of the exercise of judicial power that the most important person in any courtroom is the party who is going to lose. Similarly, administrative review, in both process and outcome, should appear rational and fair, not least to the person whose decision is being reviewed.[3]

The implication for reviewers of decisions and, to a lesser extent, legal representatives, is that the two most important people to be considered when an administrative decision is being reviewed are the person or body who made the decision and the losing party. The process and outcome of review should appear rational and fair to every person who is involved, but in particular to the losing party and the person or body whose decision is being reviewed.

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What is the decision being reviewed?

On review, the first task of a legal representative of a party, and of the reviewer, is to identify the decision or decisions the subject of review because that is the basis of the jurisdiction of the tribunal. If the decision is not reviewable, the tribunal has no jurisdiction.

Identifying the reviewable decision sounds obvious and straightforward; however, it is sometimes quite difficult to do. The reviewable decision may have been expressed in different ways in the document setting it out. There may be several decisions under review, for example, in a worker's compensation case. There may have been claims and determinations in respect of a number of different injuries over a number of years of employment, various periods of incapacity, a number of impairments, internal reviews of decisions, redeterminations and tribunal decisions.

Often the original claim or application will have been made by an individual without assistance, legal or otherwise. Later, a legal adviser may be involved. For example, in a worker's compensation case there will be a notice of an accident and later a claim for compensation submitted by the worker. If the application for compensation is refused, a legal adviser may be engaged. Correspondence between the worker, and the worker's legal adviser and the relevant department or agency and its legal representative, may address various aspects of various claims, not always clearly identifying the subject matter. Incorrect dates or references may have appeared inadvertently and be repeated in subsequent correspondence. There may be letters of the same date dealing with different aspects of a claim. Correspondence may cross in the mail. The result, quite often, is voluminous and confusing correspondence.

Consequently, the reviewable decision may not correctly identify the date of injury or the nature of the injury, or the nature or time-frame of the claim.

Another aspect which can cause difficulty is where an expert is requested to give an opinion. If the information on which the opinion is based is incorrect or inaccurate, the expert's opinion will not be useful.

Avoiding confusion

As a file in a matter grows larger, it may be easier to copy the details about a case from the most recent piece of correspondence on the top of the file than to refer to the primary or originating document.

I suggest that the more familiar a legal representative or decision-maker is with a matter, the more likely it is that that person will tend to rely on a recollection or perception of the matter which may be incorrect.

For a decision-maker at whatever level, or a legal representative, it is always wise to check the primary or initiating document to ensure that critical information is accurate.

Succinct and clearly expressed correspondence is the most useful and cost effective kind of correspondence. The heat of battle can sometimes result in correspondence that is unnecessary, verbose, inflammatory, and even contrary to the best interests of the client.

Accurate information and clarity of communications, both written and oral , will facilitate clear analysis of issues and proper consideration by decision-makers at all levels, and by legal representatives. This, in turn will contribute to higher quality decision-making that is timely, and lead to correct or preferable decisions.

What is the source of power and what are the questions to be answered?

Administrative decisions are initiated in two ways. The first is initiation by an individual or a corporation. For example, a person suffering from osteoarthritis claims a disability support pension, a Telstra employee claims incapacity payments for a work injury or an aircraft owner applies for a permit to land on the waters of the Great Barrier Reef. The other kind of administrative decision is initiated by the executive, for example, to cancel a passport or a visa, or registration of a migration agent, or an auditor.

The first question for the decision-maker to answer in each case is: what is the legislative source of the power to be exercised?

The second question is: am I authorised, or do I have the jurisdiction, to exercise the power? Associated with the question of jurisdiction are procedural issues including time limits, service, and proper delegation.

The third question is: what are the criteria that the legislation requires to be satisfied for the exercise of the power? For example, in the case of a worker's compensation claim for incapacity payments, questions would include the following: has there been an injury? Is the person incapacitated as a result of the injury? To what extent is the person incapacitated?

In *Australian Postal Corporation v Barry,* Branson J in the Federal Court considered a decision of the Administrative Appeals Tribunal. Her Honour said:

> I observe incidentally that it is a salutary discipline for every statutory decision-maker to refer to the terms of the relevant statutory provisions and to identify each element of the statutory cause of action. Had the Tribunal in this case set out or paraphrased in its reasons for decision the terms of s 16 and s 19 [of the *Safety, Rehabilitation and Compensation Act 1988* (Cth)] it is unlikely that it would have overlooked their critical elements.[4]

The High Court made similar observations in *Shi v Migration Agents Registration Authority*:

> As this Court has so often emphasised in recent years, questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions. Reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute or statutes. Expressions used in decided cases to explain the operation of commonly encountered statutory provisions and their application to the facts and circumstances of a particular case may serve only to mask the nature of the task that is presented when those provisions must be applied in another case. That masking effect occurs because attention is focused upon the expression used in the decided cases, not upon the relevant statutory provisions.[5]

Legal practitioners and decision-makers who work in a particular area of law day in, day out, may operate on the basis of their understanding or perception of the relevant legislative provisions, which may not be complete or accurate. Exercising the discipline Branson J commends and going to the provisions of the statute will result in a list of the questions or issues that the legislation requires to be considered and determined. They may be questions of fact, questions of law, or mixed questions of fact and law, and may be numerous and complex.

Those questions or issues provide a framework for the consideration and determination of the case for the legal representative and the decision-maker. They determine what evidence will be relevant, and what must be obtained by the parties, and considered by the decision-maker. They also determine the legal arguments that will be made, and will provide the framework for the reasons for decision.

Fewer legal errors will be made if the correct legislation and the correct legislative criteria are addressed by the decision-maker. It is, therefore, in the interests of legal representatives

and the decision-maker to get this right. Sometimes difficulties are not directly addressed by legal representatives, either intentionally or unintentionally. A successful appeal because a matter was not addressed at all or not addressed properly, is not in the interests of a client. Difficult issues should be addressed directly. As in a court, a legal representative should be prepared to answer the difficult question or questions in the case.

A reviewer of a decision should not accept the issues agreed by the parties uncritically

In many cases, not all issues raised by the legislative criteria will be in dispute in a proceeding. However, there is a danger for a reviewer of a decision in accepting uncritically the issues as framed by the parties and, more importantly, where a party is unrepresented. As has already been suggested above, it is possible that a legal representative has prepared a case on the basis of an incorrect assumption or perception of the facts or the law.

Sometimes a matter that is not raised as an issue by the parties will be the issue on appeal. For example, a matter going to jurisdiction, such as whether a notice cancelling a visa was validly served. Provided the parties are given an opportunity to address the issue, raising a relevant issue will not lead to error but rather prevent such an error being made.

Legal representation

A tribunal reviewing a decision usually has several advantages not shared by the primary decision-maker. One such advantage is if one or both parties is represented by a competent legal professional who addresses the issues, the evidence, and legal argument, comprehensively and clearly. Such representation would be expected to result in a higher quality decision than otherwise.

At the Commonwealth level, and in state jurisdictions including New South Wales and Victoria, model litigant guidelines or policies apply to government which if followed should also contribute to a higher quality of decision-making at the merits review level.

The Commonwealth and its agencies have a statutory obligation to assist the AAT[6]. The President of the Tribunal, Downes J, has said of that obligation:

> I think it imposes an obligation which has parallels to the obligation of counsel assisting an enquiry. The ultimate object must never be the defence, for the sake of it, of the decision under review. It must always be seeking to procure the best decision on the evidence available at the time of the decision. I think it imposes an obligation on agencies to constantly address the question of whether the decision under review is the best decision. Further, the evidence adduced should be evidence which will assist, in whatever direction it points, and not simply evidence to support the decision under review ...
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> Where applicants are unrepresented the importance of the principle is clearer. The obligation to ensure that all relevant material and arguments are before the Tribunal, so that the best decision is arrived at, becomes even more important. .[7]

Legal representation should assist the decision-maker to arrive at the correct or preferable decision and, where necessary, to give reasons for decision of a higher quality than would have been given in the absence of that representation.

The correct or preferable decision

The phrase “correct or preferable decision” was first used to describe the decision-making function of the AAT in *Drake v Minister for Immigration and Ethnic Affairs*[8]. It is a phrase that distinguishes two circumstances - when there is only one decision that is possible, the “correct decision”, and where a discretion is to be exercised and a number of decisions are possible, in which case the “preferable decision” is to be made. This phrase is applicable

to decisions that may be made at all levels of administrative decision-making. One aspect of decision-making which presents some difficulty is where governmental policy is a relevant consideration. What is the correct or preferable decision in this situation?

Policy

As administrative decision-making has become more complex, more government policies have been developed to give guidance to decision-makers. An important objective of a policy is to ensure consistency of decision-making, which suggests that the application of policy should have only one outcome, a "correct" decision. However, a policy cannot alter the effect, operation and application of legislation. Reviewing tribunals are not bound by policy, but will be reluctant to depart from policy without good reason. This principle was established in *Drake v Minister for Immigration and Ethnic Affairs.*[9]

The following remarks made by Sir Gerard Brennan apply to merits review tribunals other than the AAT:

> The primary benefit of AAT review is, of course, the doing of individual justice. It is to secure administrative justice for those affected by the exercise of power and for those for whose benefit power is conferred on a repository. Administrative justice is, of course, justice according to law but it is also justice according to lawful and reasonable policy.
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> The secondary benefit which the AAT confers is the exposing of policy to critical review. The AAT ensures that policy conforms with the law and that it is reasonable in its application to concrete situations. The requirement to state reasons for decisions, both at the primary and at the review level, ensures openness and legitimacy in the exercise of executive power. These are tremendous benefits in a modern complex democracy - benefits that would not be available but for an institution vested with power to review decisions on their merits.[10]

Consistency of decision-making is desirable; however, in a particular situation, the question may arise as to whether it is reasonable to apply the policy. In a 2002 report of a study carried out of executive perceptions of administrative law, the AAT was seen as more prone than other review bodies to undermine governmental policy and give too much emphasis to individual rights in its decisions .[11] It is interesting to reflect on the observation of Gleeson CJ made in 2006 and quoted earlier, that there has been a change in emphasis in modern administrative law functions from the duties of public officials to the rights of citizens. This prompts the question of whether the executive is more accepting in 2010 of tribunal decisions which do not conform to government policy.

While the question of the application of policy may arise more often on review and be subject to criticism by the executive, whether or not a policy should be applied in the particular circumstances of a case is a relevant consideration at the level of primary decision-making, and failure to give proper consideration to that possibility may lead to legal error.
When a legal representative is seeking to avoid the application of a policy, and when a reviewer of a decision decides not to apply a policy, he/she must give a clear reasoned explanation of why it is reasonable in the particular circumstances not to apply it. In the case of a reviewer's reasons for decision, this will not only avoid legal error, but also assist the primary decision-maker to understand why the decision was made.

The decision on review and reasons for decision

Whatever the decision on review, to affirm, set-aside, substitute or vary the decision being reviewed, it is essential to clearly identify the terms of that decision. For example, stating "the decision under review is affirmed" requires that the terms of that decision be referred to.

Further, the decision on review becomes the decision of the agency and is enforced or carried into effect by it[12]. Making a decision easily comprehensible facilitates that process.

Apart from satisfying the legal requirements including referring to relevant evidence and making necessary findings of fact and law required by the legislative provisions, when giving reasons for a decision, if a reviewer of a decision decides not to agree with the decision under review, but to vary or substitute a decision, the principle stated by Gleeson CJ and quoted earlier in this paper should be in the reviewer's mind: "*administrative review, in both process and outcome, should appear rational and fair, not least to the person whose decision is being reviewed."*[13]

Getting it right the first time

Considering how decision-makers can be assisted to get it right first time, I conclude that apart from legal error, I cannot recall an occasion when as a reviewer of a decision on the merits, I have thought that the primary decision-maker made the "wrong" decision. That is because in the merits review process, the reviewer of a decision is not deciding the matter on the same material or in the same circumstances as the maker of the reviewable decision.

The reviewer of a decision is making the decision again and may have several advantages in coming to that decision, including legal representation of the parties, additional factual material and legal arguments, the benefit of hearing from witnesses, including experts such as medical practitioners, and their being subjected to cross-examination. The reviewer may also have the assistance of other members, including experts, in making the decision. The case may take days to hear, and then some further time to write, whereas the primary decision-maker may have had only a few hours in which to consider the material and make the decision.

Consequently, the case before the reviewer, both factually and legally, is often very different from the one considered by the primary decision-maker. Setting aside a decision is not making a decision that the primary decision was "wrong". It is a different decision made on the basis of different information.

As a member of the AAT, I was impressed by the quality of decisions made at the primary and internal review levels, and by other tribunals from which appeals came to the AAT. For example, the Social Security Appeals Tribunal and Veteran's Review Tribunal, did not have the advantages of a higher level merits review tribunal.

If a reviewer of a decision thinks it necessary to comment critically on some aspect of the decision being reviewed, the observations of Mason J (in the context of an appellate court overturning a judgment of a lower court) should be borne in mind:

> But when a judge's reasons are published they speak to the world at large. With the internet they pass instantaneously across the city and across the globe without hope of retraction.
>
> The more strident a rebuke in a judgment the more likely it is to be picked up by the legal public, reported by the media (usually out of context) and viewed as a slight on the reputation of the person rebuked. The substance of the decision may be ignored.[14]

Conclusion

After referring to the value and influence the High Court has even when not directly resorted to, Gleeson CJ has said:

> Similarly, within the executive branch, the capacity of citizens to invoke the (AAT's) Tribunal's jurisdiction must have an effect on the atmosphere in which decisions are made. The influence may be indirect, and in some cases even fairly remote. Yet, even then, it promotes good governance.[15]

The same principle applies to all merits review tribunals. The fact that they exist and may review decisions has an effect. However, the effect his Honour refers to will be the greater if the processes and decisions of merits review tribunals are well regarded and respected by the administrators whose decisions are the subject of review.

It follows that the privilege of serving as a member of a merits review tribunal or appearing as a legal representative before such a tribunal, carries with it an obligation to contribute to the enhancing of administrative decision-making and hence promote good governance, which is in everyone's best interest.

The most important contribution legal representatives can make is through correspondence that addresses issues, facts and law accurately, clearly and concisely. Unnecessary and confusing correspondence makes decision-making more difficult and more time consuming.

Members of merit review tribunals must ensure a fair and rational process and provide clear and well-reasoned correct or preferable decisions. The legislative criteria provide the framework for the consideration of the facts and the decision to be made. The need for clear explanation for findings is particularly important where questions of applying policy are dealt with.

For legal representatives and tribunal members, it is wise never to assume that a recollection of the issues, facts or law is accurate. In particular, go to the legislation and the criteria on which the case turns. In summary, never assume, and go back to basics.

Endnotes

1 The Commonwealth Administrative Review Committee established on 29 October 1968.
2 Chief Justice Murray Gleeson AC*, "Outcome, Process and the Rule of Law",* Address delivered to the AAT 30th Anniversary Dinner, Canberra, 2 August 2006
3 Ibid.
4 (2006) 44 AAR 186 at 190; [2006] FCA 1751 at [25])
5 [2008] HCA 31; 235 CLR 286 Hayne and Heydon JJ at [92]
6 *Administrative Appeals Tribunal Act 1975,* s 33.
7 The Hon. Justice Garry Downes AM, *Introduction: The Obligation to Assist"*, Address delivered to The Obligation to Assist Model Litigants in Administrative Appeals Tribunal Proceedings Seminar, Canberra, 26 August 2009.
8 (1979) 24 ALR 577 at 591, per Bowen CJ and Deane J.
9 (1979) 24 ALR 577; 2 ALD 60.
10 Speech delivered to the Administrative Appeals Tribunal's 30th Anniversary Dinner, Canberra 2 August 2006 by the Honourable Sir Gerard Brennan AC KBE, First President of the Administrative Appeals Tribunal and former Chief Justice, High Court of Australia.
11 R Creyke and J McMillan, *Executive Perceptions of Administrative Law – An Empirical Study*, Australian Journal of Administrative Law, Volume 9, August 2002, p 163 at 183.
12 The Honourable Justice Garry Downes, AM, *Introduction: The Obligation to Assist",* welcome address delivered to The Obligation to Assist; Model Litigants in Administrative Appeals Tribunal Proceedings Seminar, Canberra 26 August 2009.
13 Ibid.
14 *Throwing stones: Cost/benefit analysis of judges being offensive to each other* (2008) 82 ALJ 260
15 Chief Justice Murray Gleeson AC*, "Outcome, Process and the Rule of Law",* Address delivered to the AAT 30th Anniversary Dinner, Canberra, 2 August 2006