Objective decision-making and good government in merits review tribunals

*Bernard McCabe**

The government has recently announced its intention to replace the Administrative Appeals Tribunal (AAT). It is therefore timely to reflect on the need for a general merits review tribunal in Australia's system of administrative law. While the place of such a tribunal in those arrangements is generally accepted, it is helpful to appreciate its role and the value it brings if the reforms are to realise its promise to the Australian community.

There is much to learn from nearly five decades of experience with the AAT. Most of the learning reinforces the immense value of such a body. There are also cautionary tales. I will not attempt exhaustively to catalogue those lessons in this article. I venture the more serious shortcomings of the AAT are ultimately the product of an identity crisis — a sense of ontological confusion that is summed up in the expression 'quasi-judicial'. That expression refers to the fact the AAT is not a court established under Ch III of the *Constitution* even as it exhibits many of the features and some of the ethos of a court.[1]

An expression like 'quasi-judicial' risks confusing more-or-less court-like processes or means and an obligation to 'act judicially' with ends.[2] Other expressions, like 'independent', 'impartial', 'dispute resolution mechanism'[3] or even 'executive decision-maker' are incomplete explanations of the role and value of a general merits review tribunal. When shorn of context, all the descriptions are potentially misleading.

It is not enough to discuss the constitutional limits that delineate the work of tribunal members from that of judges, or to describe in practical terms what tribunal members do and the way in which they go about their work. The reform process — and the process for selecting the membership of the AAT's successor — should be informed by a richer understanding of the essence of the tribunal member's role and the culture which must be established to support members in achieving their mission. That requires us to go back to first principles.

The AAT has been described as an instrument of 'good government.[4] The expression 'good government' (or 'sound public administration') is uncontroversial, but the concept may be

* Bernard McCabe is a deputy president and division head of the Administrative Appeals Tribunal. The views expressed in this article, and any errors, are entirely those of the author. The author would like to thank Emeritus Professor Robin Creyke and Bernadette Rogers for their helpful feedback on earlier drafts.

1 As Foster J explained in *Eldridge v Commissioner of Taxation* [1990] FCA 369, [41], '[the Tribunal's] functions partake far more of the Court than the office desk'. For a useful reflection on the differences between court and tribunal proceedings, see R Creyke, 'Tribunals — Carving out the Philosophy of Their Existence: The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19.

2 In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; (1979) WL 182733, 7 (*Drake*), Bowen CJ and Deane J referred to 'a superficial trapping of curial decision making' and cautioned: 'The trappings of judicial decision making are not however necessarily indicative of the existence of judicial, as opposed to administrative, power. Bowen CJ and Deane J then observed (at 8): 'Many tribunals whose functions are purely administrative are under an obligation to act judicially, that is to say, with judicial detachment and fairness'. The point was repeated at 11.

3 Downes J and Dr Schaffer explained in *Ego Pharmaceuticals Pty Ltd and Minister for Health and Ageing* [2012] AATA 113, [36], the AAT is not strictly speaking a dispute resolution mechanism at all: it is an executive decision-maker, albeit that its decision-making process is activated as a consequence of disputation.

4 *Sullivan v Department of Transport* (1978) 1 ALD 383, 384 (Smithers J); see also *Drake*, 80 (Smithers J); also *Minister for Immigration and Ethic Affairs* (1979) 2 ALD 634, 638 *(Drake No 2)* (Brennan J).

taken for granted — perhaps because Australians expect and enjoy relatively high standards in government. This paper begins by briefly revisiting some of the seminal discussions of the AAT in search of a coherent understanding of 'good government'. I then turn to the distinct contribution of a general merits review tribunal to the realisation of that vision. That requires consideration of a range of desirable institutional features. It also inevitably involves consideration of the key attributes of a tribunal member.

I argue the key attributes of a tribunal member are best summed up in the word 'objective'. While tribunal members need a range of personal qualities and skills (including, in particular, advocacy skills) and go about their job in well-understood ways, that is all in service of being — insofar as possible — a genuinely *objective* decision-maker who gives faithful and intelligent effect to the letter of the law and — where questions of discretion and public interest arise — the spirit of the law *and* the values and conventions embedded in our wider administrative law system.

Concepts of good government and sound public administration

Downes J (sitting with Deputy President Hack) reflected on the nature of discretionary administrative decision-making in *Rent-to-Own (Aust) Pty Ltd and Australian Securities and Investments Commission*[5] (*Rent-to-Own*). After acknowledging many tribunal decisions did not involve the exercise of discretion, Downes J and DP Hack focused on the correct approach in cases where the AAT was tasked with arriving at the preferable decision. The Tribunal noted surprisingly little had been written about how a tribunal decision-maker should go about that task.[6] The Tribunal then attempted to illuminate the differences between courts and tribunals. It observed:

> [The AAT] arrives at its decisions in a manner familiar in courts, but that is not to say that the matters guiding the decision-making process are the same as those guiding courts. Of course, the Tribunal must correctly determine what the law is and apply it correctly. However, outside this role, the nature and functions of the Tribunal are quite different to the usual functions of a court.[7]

Warming to the task, the Tribunal observed:

> The Tribunal, in its determinations, *must be informed by matters of good administration*. It needs to be conscious that it is, for example, fulfilling for this case, the role of regulator in connection with the licensing of credit providers. The appropriate level of protection of the public is, of course, vital to this activity.[8]

The reference to 'matters of good administration' has an excellent pedigree. In the Full Court's seminal judgment in *Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd*, Smithers J said:

> It is important to observe that the Tribunal is not constituted as a body to review decisions according to the principles applicable to judicial review. In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government.[9]

5 [2011] AATA 689.
6 Ibid [32]–[33], [48].
7 Ibid [40].
8 Ibid [41] (emphasis added).
9 [1979] FCA 21; (1979) 41 FLR 338, [56].

His Honour explained:

> It is clear that in enacting the [*Administrative Appeals Tribunal Act 1975*], Parliament had in mind to provide for the review by an independent Tribunal of certain administrative decisions by reference to standards of good government …[10]

Smithers J made essentially the same point in *Drake*,[11] when he said the newly-established AAT was conceived as a tool of 'good government'.[12] That is not a description — or a motivating principle — that is applied to the courts precisely because they are *not* 'an instrument of government administration'.[13] Downes J and DP Hack explained in *Rent-to-Own* why the concept might be useful in administrative (including tribunal) decision-making:

> It is important to remember the difference between court adjudication and administrative decision-making. Judges are not often called on to make decisions which require an evaluation of the consequence of a decision in terms of public interest. Their focus is more on questions of lawfulness of conduct. The power of administrative decision-makers, both within government and on review, is often a significant power. In terms it can exceed the powers of courts. The extent of the power implies that it must be exercised with care. Administrative decision-makers at all levels frequently make decisions which affect the operations of government where individuals are affected. Very often the only clearly applicable measure or touchstone is the public interest. …[14]

The Tribunal proceeded to discuss ways in which tribunal members might identify and accommodate the public interest. I will return to that discussion in due course. For now, it is enough to note the way Downes J and DP Hack regarded 'matters of good administration' as a kind of *leit motif* of the AAT that was derived from a profound appreciation of the AAT's unique role compared to courts. It is worth exploring some of the foundational writings in relation to the AAT to enlarge on that discussion.

10 Ibid [55].

11 (1979) 24 ALR 577.

12 Ibid 602; see also *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21; (1979) 24 ALR 307, [55] 335 (Smithers J).

13 *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286, [140] (*Shi*) (Kiefel J).

14 [2011] AATA 689, [49]. The point the Tribunal was making about the distinction between curial and administrative decision-making was made (in a slightly different way) by Brennan J in *Drake No 2* where his Honour explained at 643:

> The Tribunal is rightly required to reach its decisions with the same robust independence as that exhibited by the courts, but there is a material difference between the nature of a decision of the Tribunal reviewing the exercise of a discretionary administrative power, and the nature of a curial decision. The judgment of a court turns upon the application of the relevant law to the facts as found; a decision of the Tribunal, reviewing a discretionary decision of an administrative character, takes into account the possible application of an administrative policy.
>
> The policy which guides the exercise of a discretionary administrative power may rightly seek to achieve an objective of public significance, and a balance may have to be struck between the achieving of that objective and the interests of an individual. In this respect, the making of a discretionary administrative decision is to be distinguished from the making of a curial decision. Generally speaking, a discretionary administrative decision creates a right in or imposes a liability on an individual; a curial decision declares and enforces a right or liability antecedently created or imposed. The distinction is too simply stated, but it suffices to show that the adjudication of rights and liabilities by reference to governing principles of law is a different function from the function of deciding what those rights or liabilities should be …

Discussions of the AAT and the concept of merits review conventionally begin with a reference to the report of the Kerr Committee.[15] The committee's report was published in 1971. It recognised there were gaps in the remedies available to Australians wishing to challenge government decisions. That was a serious problem given the executive government was expanding to intrude into more aspects of life and business. In those circumstances, the report explained:

> … it has been universally accepted that judicial review by the courts standing alone, by the prerogative writs, declaration or injunction under the existing law, cannot provide an adequate review for administrative decisions.[16]

The report concluded there was need for an additional mechanism of review that was more accessible and which was able to provide more effective redress that was equal to the powers being exercised. It explained:

> … at a time when there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him, not only by obtaining an authoritative judgment on whether the decision has been made according to law but also in appropriate cases by obtaining a review of that decision.[17]

Thus was born the concept of a general merits review tribunal that complemented the courts (in particular, a new Commonwealth superior court that would, amongst other things, exercise supervisory jurisdiction over the tribunal).[18] The Kerr Committee report made clear the new tribunal was intended to do more than secure individual justice. The committee recognised the tension between achieving individual justice and the need for efficiency in administrative decision-making. It concluded it was possible to satisfy both objectives. Indeed, the committee concluded a proper system of merits review could have a profoundly positive impact on the justice, quality *and* efficiency of government decision-making.[19]

The bulk of the Kerr Committee report was devoted to describing the function of our administrative law system, and the ways in which it might be improved, along with a survey of developments in analogous systems overseas. The report included a blueprint for the new general merits review tribunal. The committee said it should be headed by a federal judge and suggested the tribunal's membership should include laypeople with expertise in the subject-matter of administrative decisions.[20] The report also described the proposed tribunal's (essentially court-like) processes in some detail, complete with hearings, the potential for legal representation, the power to summons documents and witnesses, evidence given on oath, cross-examination, and a power to award costs in appropriate cases.[21]

15 Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee*, (Parliamentary Paper No 144, 1971) (Kerr Committee report).
16 Ibid 1 [5].
17 Ibid 3 [11].
18 Ibid 74–5.
19 Ibid 3 [12].
20 Ibid 87–8.
21 Ibid 88–9.

The Kerr Committee report is very much the work of eminent lawyers. In focusing on how the system worked, and how it might work better, it is an intensely practical document. It noted there had not hitherto been a thorough-going discussion of the role and operation of the organs of public administration in this country.[22] Interestingly, while it referred to individual justice, democratic values, and the need for efficiency, it did not otherwise attempt to articulate a comprehensive or unifying theory of good government or sound public administration.

The Kerr Committee report seeded a fruitful period of administrative law reform in the 1970s and 1980s — reforms that included the appointment of the Ombudsman, the establishment of the AAT and the Federal Court of Australia, and the passage of the *Administrative Decisions (Judicial Review) Act 1978* (Cth) and the *Freedom of Information Act 1982* (Cth). More recently, the Information and Privacy Commissioners have been added, and the government has now announced the imminent establishment of a national integrity and anti-corruption commission. Collectively (and individually, as they all have carefully defined roles) these actors operate the framework of laws and norms that are essential to Australia's nomocracy. *Nomocracy* refers to a government that operates within and is constrained by a system of laws and norms. Those laws and norms shape and regulate the exercise of power.

One could argue the *nomocracy* concept does no more than describe a polity that observes the rule of law. But our system of government does not and cannot operate solely with reference to the law or the values popularly associated with the rule of law concept. So much of our system operates according to conventions and norms that are simply assumed. These cultural traits are mostly unnoticed and unquestioned unless they are challenged in the observance. Arguably, one of those enduring values is adherence to a conception of 'good government' or (to borrow the language of Downes J and DP Hack in *Rent-to-Own*) 'good administration'. But again, what does that *mean*?

In a report titled *Better Decisions: Review of Commonwealth Merits Review Tribunals*[23] issued in 1995, the Administrative Review Council (ARC) considered aspects of the evolved administrative law system. It focused on the merits review tribunal system. The report acknowledged the ontological tension in relation to those tribunals, explaining:

> … it is not a simple task to reconcile the place of review tribunals as part of the executive arm of government with their role of providing merits review that is, and is seen to be, independent of the agency whose decision is under review, and that is undertaken according to processes and procedures that are fair and impartial.[24]

22 Ibid 26.

23 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report 39, August 1995) (*Better Decisions* report).

24 Ibid 23 [2.51].

Interestingly, like the Kerr Committee report before it, the ARC did not expound at length on the concept of good government in the 1995 report. But it did address the desirable features of a merits review mechanism. It concluded the objective of such a tribunal was to reach the correct and preferable decision in every case that came before it, and to promote correct and preferable decision-making more generally.[25] It continued:

> This overall objective therefore incorporates elements of fairness, accessibility, timeliness and informality of decision making, and requires effective mechanisms for ensuring that the effect of tribunal decisions is fed back into agency decision-making processes.[26]

The report then explained:

> In seeking to meet this overall objective, the Council considers that the merits review system should have several specific objectives. They are:
>
> • providing review applicants with the correct and preferable decision in individual cases;
>
> • improving the quality and consistency of agency decision making — there are two main ways this can be achieved:
>
> — by ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions (referred to in this report as the 'normative effect'); and
>
> — by taking into account review decisions in the development of agency policy and legislation;
>
> • providing a mechanism for merits review that is accessible (cheap, informal and quick), and responsive to the needs of persons using the system; and
>
> • enhancing the openness and accountability of government.[27]

The report emphasised that part of the value of review tribunals lay in their different perspective compared to primary decision-makers. The report noted:

> Review tribunals do not operate under the same day-to-day pressures as agencies. They do not have to deal with the same high volume of primary decisions. They do not carry out a range of other functions which compete for time and resources. Tribunals do have their own budget and resource limits, but they are generally in a position to devote more time to the consideration of individual cases than are agency decision makers.
>
> A review tribunal's principal focus is on the reconsideration of the merits of the particular cases before them, and on the rights or responsibilities of individual applicants as prescribed by law. Tribunals are required to have regard to relevant government policy (and in some cases must apply it),… but the differences described above mean that tribunals are generally in a better position than agency decision makers to fully consider the law and facts in each individual case, and may therefore be less reliant upon policies or guidelines in deciding the appropriate outcome.[28]

Those observations echo more pointed remarks by Sir Anthony Mason. In a seminal paper published in 1989, he explained there were five significant ways in which a primary

25 Ibid 16–17 [2.10]. (Editor: The use of 'or' not 'and' in the expression 'correct and preferable' was endorsed in *Shi*).
26 Ibid 17 [2.10].
27 Ibid 17 [2.11].
28 Ibid 24–5 [2.58]–[2.59].

decision-making process might fall short of the decision-making on a review conducted according to a more 'judicial' model. It is worth quoting that analysis at length:

> First, [the primary decision-making process in the agency] lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not have to give reasons for his decision. Fourthly, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.[29]

At the heart of Sir Anthony's critique lies a concern about perspective and detachment: the challenge of making dispassionate decisions fairly, without regard to essentially irrelevant considerations. Sir Anthony's analysis suggests the value of transparency and a requirement to give reasons serve to expose and limit the tendency towards subjective or idiosyncratic decision-making.

While the landmark ARC *Better Decisions* report did not offer a pithy definition of 'good government' or attempt to articulate a unifying theory of sound public administration, some of the content of that concept is readily inferred from the discussion. In particular, the report emphasises the value of a tribunal lies in its capacity to operate in an environment that is more conducive to considered decision-making. The importance of that insight is reinforced by the observations of Sir Anthony Mason about the desirability of being able to make decisions from a vantage point 'above the fray' using well-adapted processes and personnel. Downes J and Hack DP made substantially the same point in *Rent-to-Own* when they warned of the risk of decision-makers indulging a 'personal or idiosyncratic view…'.[30] To put it another way: the value of a tribunal lies in its potential for greater *objectivity*.

Objectivity in this context refers to a sense of professional detachment from the tribunal member's personal beliefs, feelings or preferences — but also from the pre-occupations of the primary decision-maker and other constituencies. *Objectivity* implies a clear-eyed focus on that which is relevant. The objective decision-maker accepts that what is relevant (and the relative weight to be accorded to relevant factors) is ultimately determined, either expressly or implicitly, by: (a) the legislative regime which authorises the decision-maker to act; and (b) a body of principles or values derived from the wider system. The objective decision-maker strives to give intelligent effect to the authentic will of the Parliament when it passed the statute in question. To that end, objective decision-makers are logical, rational and measured; they make transparently principled decisions based on evidence that is identified according to fair processes. They are fearless in their decision-making without tipping into zealotry that is heedless of outcomes. They are dispassionate, but not bloodless. They are aware of the world around them since that is where the decisions that they make will take effect. They understand the difference between questions of law (where conventional lawyerly skills and experience may assist) and questions of public policy (where a sound education in the liberal arts or specialist disciplines may sometimes be an advantage).

29 A Mason, 'Administrative Review: The Experience of the First Twelve Years' [1989] *Federal Law Review* 3; (1989) 18 *Federal Law Review* 122, 130.

30 [2011] AATA 689 [50].

Importantly, they are also self-aware — if only because complete objectivity and detachment is foreign to the human condition.

Other words that have been used to describe the AAT's role do not so completely capture its essential quality. For example, the word 'independent' is often used to describe such a tribunal, presumably borrowing from the concept of judicial independence. While being objective implies (in this context) acting *independently of* the primary decision-maker in order to avoid what Sir Anthony Mason described as the 'political, ministerial and bureaucratic' influences that might impact on decision-making, members of the general merits review tribunal are not free agents. Such a tribunal remains part of the decision-making continuum, whereas judges exist outside that process and deal in formal concepts of legality rather than more fluid concepts like 'public interest' or 'good government' which inform administrative decision-making.[31] A general merits review tribunal steps into the shoes of the primary decision-maker in the sense it exercises the same powers and is subject to the same formal constraints.[32] Over-use of the word 'independence' is apt to mislead both the tribunal member and the public as to the extent of the tribunal's remit. That presages error and disappointed expectations.

The ARC made this point clearly in the *Better Decisions* report. After acknowledging the more complex relationship that exists between tribunal decision-makers and primary decisions-makers compared to courts, the report argued a measure of independence was required to ensure the tribunal member could operate at arm's length and keep faith with the expectations of the citizenry — but added the desirable level of independence was not necessarily achieved in the same way in which judges were protected.[33]

Other descriptors, like 'impartial' are also in danger of being misunderstood. There is no doubt a general merits review tribunal must be even-handed as between the parties that appear before it — a task that can be challenging when the decision-maker may have vastly more resources at its disposal compared to an applicant who may be self-represented, or who operates under some kind of disadvantage. The recent report of the Australian Law Reform Commission[34] has summarised the law and practice in relation to the dangers of bias. The report offers a timely reminder of how decision-makers that are perceived to be biased can corrode public confidence in the decision-making process and institutions of government. Obvious impartiality is a core feature of an objective decision-maker who is not distracted by bias — because indulging biases would be unfair and potentially discreditable, and because biases introduce extraneous considerations into the decision-making process that distract from the legislation and its purpose. To speak of impartiality in isolation from this wider context may create the impression that the decision-maker is simply calling 'balls and strikes' in the process of quelling a controversy between two contestants, divorced from any considerations of good government or public interest.

The word 'objective' best captures and incorporates the various dimensions of good decision-making. Use of the word in the context of a general merits review tribunal serves

31 *Rent-to-Own (Aust) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689 [49].
32 See, for example, *Shi*, [40] (Kirby J), [96] (Hayne and Heydon JJ), [134] (Kiefel J). See also *Frugtniet and Australian Securities v Investments Commission* [2019] HCA 16, [14] (Kiefel CJ, Keane and Nettle JJ).
33 *Better Decisions* Report (n 23) 71 [4.3]–[4.6].
34 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report 138, December 2021).

to emphasise the centrality of the legislation and lawful policy that gives effect to the purpose of that legislation. It is not an exhaustive description of what is required, of course: it almost goes without saying there are many qualities, skills and experiences which are desirable in a tribunal member. (The ARC suggested a list in the *Better Decisions* report.[35]) But objectivity is the hallmark of what the philosopher Michael Oakeshott referred to as a 'civil association'. A civil association is characterised by a commitment to process. Its counterpoint, the 'enterprise association', is characterised by its devotion to achievement of a goal. Given the centrality of its role in public administration, a general merits review tribunal is a quintessential civil association that should not have an agenda in each case that comes before it beyond that which is provided for explicitly or by implication from the legislation (including lawful policy which gives effect to that purpose) — apart, that is, from a concern for promoting good government.

Summary

Neither the Kerr Committee report nor the ARC *Better Decisions* report attempted to articulate a comprehensive understanding of the 'good government' concept. That is surprising at one level: the AAT, as a general merits review tribunal, has long been understood as a tool of government administration which is informed by a concern for 'good government' and 'sound public administration'. Given that pedigree, it would be ideal if there were some sort of canon or course which set out the learning about good government that would assist members to fulfil their mission. The omission of a comprehensive theory from the reports is probably because 'good government' is not a fixed concept which may be reduced to detailed prescriptions capable of universal application. While academic writings in management, political science and political economy (amongst other disciplines) may shed light on the concept, 'good government' — like obscenity — may be more readily recognised in practice than defined in the abstract.[36] One is left to draw inferences about what a commitment to good government requires. One inference I have drawn about the demands of good government is the importance of objectivity in decision-making. Ultimately, the importance of objectivity and other dimensions of good government are best understood by seeing a decision-making process in action.

Objective decision-making in practice

In *RBPK and Innovation and Science Australia,*[37] Thomas J and I described the Tribunal as 'an advocate for good government, a function [the Tribunal] discharges by modelling good decision-making behaviour in individual cases'.[38] I have argued in this paper that objectivity is a necessary feature of that model decision-making process. That understanding was

35 *Better Decisions* report (n 23) 72–3, [4.8]–[4.12].

36 In *Jacobellis v Ohio* 378 US 184 (1964), Potter Stewart J famously observed: 'I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.'

37 *RBPK and Innovation and Science Australia* [2018] AATA 404.

38 Ibid [11] (Thomas J and DP McCabe).

usefully illustrated by a recent decision of the AAT in *WRMF and National Disability Insurance Agency*[39] and the judgment of the Full Federal Court on appeal in *National Disability Insurance Agency v WRMF*.[40]

The application for review in *WRMF* was made by a woman in her 40s who suffered from a range of serious health conditions including multiple sclerosis. She was significantly disabled as a result. One aspect of her disability was an inability to obtain sexual release without assistance. She sought and obtained access to the National Disability Insurance Scheme (NDIS) on account of her various disabilities. The National Disability Insurance Agency (the NDIA) balked when she asked for assistance in the form of a specially trained sex worker. The NDIA refused to fund this. As it explained in a media statement issued around the time of the decision: 'The NDIA does not cover sexual services, sexual therapy or sex workers in a participant's NDIS plan.'[41]

In its decision on review, the AAT delivered an open set of reasons and a more elaborate confidential statement of reasons given the sensitivity of the subject matter. The open reasons referred to the objectives set out in s 3 of the *National Disability Insurance Scheme Act 2013* which include, inter alia:

> (c) support the independence and social and economic participation of people with disability; and
>
> (d) provide reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme; and
>
> (e) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;

The AAT also referred to s 4 which sets out general principles guiding actions under the Act, including:

> (1) People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.
>
> (2) People with disability should be supported to participate in and contribute to social and economic life. …
>
> (11) Reasonable and necessary supports for people with disability should:
>
> (a) support people with disability to pursue their goals and maximise their independence; and
>
> (b) support people with disability to live independently and to be included in the community as fully participating citizens; and
>
> (c) develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

39 [2019] AATA 1771 (DP Rayment).
40 [2020] FCAFC 79 (Flick, Mortimer and Banks-Smith JJ).
41 Ibid [29].

Sections 13 and 14 then authorised the NDIA to provide or fund a range of supports. Section 14 refers to providing:

> assistance in the form of funding for persons or entities:
>
> (a) for the purposes of enabling those persons or entities to assist people with disability to:
>
> (i) realise their potential for physical, social, emotional and intellectual development; and
>
> (ii) participate in social and economic life;…

The Tribunal also referred to s 17A, which set out the principles to be applied in dealing with people with disability, and s 24, which set out the disability requirements. Subsections 24(1)(c) and (d) refer to:

> (c) the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities:
>
> (i) communication;
>
> (ii) social interaction;
>
> (iii) learning;
>
> (iv) mobility;
>
> (v) selfcare;
>
> (vi) selfmanagement; and
>
> (d) the impairment or impairments affect the person's capacity for social and economic participation; …

On review, the statutory question was framed as whether a support of that nature was a reasonable and necessary support.[42] That question was derived from s 34(1). That subsection set out a number of considerations including the requirement in s 34(1)(e) to consider whether 'the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide …'.

The word 'supports' — let alone the expression 'reasonable and necessary supports' — is not defined in the Act. So there was a controversial question to be resolved.

The first thing to note about the Tribunal's decision is its obviously purposeful choice of language in the open reasons. While the terms of the application for review and the discussion at the hearing all referred to a sex *worker*, DP Rayment chose to describe the service provider in his reasons for decision as a specially trained sex *therapist*. That characterisation became a point of contention on appeal because the NDIA said they did not know at the time of the hearing that the Tribunal was going to use that description; if they had

42 [2019] AATA 1771 [6].

known, they argued, they might have made submissions. The Full Court concluded there was no substance to that point. It found the Tribunal had obviously elected to describe the support in those terms because those words provided the best and most accurate way of communicating the Tribunal's explanation for what was being decided.[43]

It is worth pausing to reflect on that point. It is undoubtedly true that when a tribunal member writes their reasons for decision, they must think about how those reasons are going to be understood. That is entirely appropriate given (as the Tribunal explained in *RBPK*) tribunal members are themselves engaged in a classic act of advocacy: the Tribunal is contending for an outcome and seeking to persuade others — the parties, but also the wider bureaucracy, the other members of the AAT, the Federal Court on review and the public — that they should all accept the outcome. Like any good advocate, the tribunal member must think on how to pose and present their argument. It is never enough for a tribunal member to produce a technically sound decision. The member must also be an effective advocate who aims to persuade and promote public confidence in the Tribunal's decisions.[44] The Tribunal in *WRMF* was obviously aware of how its decision might be misunderstood or even misrepresented, so it took steps to reduce that risk.

While the language in the Tribunal's decision in *WRMF* reflected a consciousness of the community's expectations and likely reaction, the substance of the decision was firmly anchored in the text of the statute — to the extent that DP Rayment observed at the outset of his reasons that, properly understood, the construction process did not leave much discretion in deciding the access and support questions.[45]

Given the language in the statute, there was no reason why a specially trained sex therapist retained at modest cost was unacceptable. On appeal, the Full Court explained:

> We see no reason why sexual activity and sexual relationships would not be regarded as included within the activities listed in s 24(1)(c) (in particular sub-para (ii)); nor why the way an impairment may affect a person's ability to engage in sexual activity and sexual relationships would not be within the concept of 'social ... participation' in s 24(1)(d). Members of the Australian community can choose to engage in lawful, consensual, sexual activity and sexual relationships; or, they can choose not to. For some people, such activities and relationships will fulfil important human needs; for others they may be less important. That is the case with many kinds of social participation in which individuals engage — sport, music, hobbies, political or religious activities. Nevertheless, they are all part of the spectrum of interaction between individuals within a community. The supports to be provided to a person who qualifies as a participant are intended to accommodate an individual's particular impairments and to assist that particular individual to be a participating member of the Australian community, and to do so on the basis of the values set out in the objects and guiding principles clauses of the Act, as well as the values set out in s 17A of that Act …[46]

The Tribunal pointed out s 35 of the Act authorised the minister and his state counterparts to agree policies that determined what was a reasonable and necessary support. A policy agreed according to this process was binding on the executive. But there had been no

43 [2020] FCAFC 79 [95].
44 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(d).
45 [2019] AATA 1771 [7].
46 [2020] FCAFC 79 [141].

such agreement in relation to the provision of sex therapists or sexual services. In those circumstances, it was not appropriate for the Tribunal to assume the role of the relevant ministers. As DP Rayment explained:

> No political considerations are relevant to be taken into account by the executive, including this Tribunal. Such considerations will be taken into account by representative governments deciding whether or not to make a special rule under s 35(1).[47]

The Full Court confirmed the Tribunal was right to take this approach, saying:

> The Tribunal otherwise correctly distanced itself from decisionmaking based on 'political' considerations. To this might be added 'moral' considerations.[48]

It is clear the Tribunal understood it would be unhelpful and irrelevant for it to focus on the expectations of an uninformed public about the wisdom of the legislation or the lawful and proper outcomes of the legislated process. Yet the likely reaction of the public was anticipated and factored into the way the reasons were expressed.

The point is, with respect, obvious. Tribunal members are not elected politicians. They are certainly not appointed to give effect to their own moral or ideological preferences. Nor are they tribunes of the people or avatars of a noisy section of the populace that supposedly frequents the proverbial 'front pub'. A general merits review tribunal gives effect to what our elected representatives have said through the parliamentary process. Those who would have tribunal members make an independent assessment of community attitudes or expectations when making a decision — assuming such a thing can be done — are (perhaps unwittingly) asking tribunal members to act as politicians and implement an agenda that is conceived outside the democratic process. It ultimately matters not whether such members pursue their own agenda, or that of the government of the day, or that of a vocal section of the public that might be distorted by the media.

The AAT's decision in *WRMF* illustrates how a general merits review tribunal is intended to function. The Tribunal in that case understood its job was to answer questions posed by the legislation *in accordance with that legislation*. To the extent the legislation left choices open, the Tribunal understood it must answer the questions with reference to the purpose evident in the legislation. It did not allow itself to be distracted by extraneous considerations that were beyond its remit. Yet the Tribunal endeavoured to explain its reasons in a way that was intended to inform and persuade the various constituencies.

To be fair, the Tribunal pointed out in its reasons in *WRMF* that a proper construction of the legislation left little room for inference or doubt about the correct outcome. That is not always the case. The complexity of modern governance and the challenge of drafting legislation that accommodates every possible eventuality inevitably leads to discretionary powers and a significant role for administrative policy.

47 [2019] AATA 1771 [7].
48 [2020] FCAFC 79 [157].

The famous *Drake* litigation[49] turned on the extent to which the Tribunal should take into account, or even defer to, administrative policy in the exercise of discretionary powers. The applicant in that litigation had argued the Tribunal should not have regard to the policy promulgated by the relevant minister, much less show any deference to the minister's guidance. Brennan J, in *Drake No 2*, threaded the administrative policy needle with care. His Honour explained lawful policy was desirable in modern government decision-making because it promoted consistency. His Honour noted:

> Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.[50]

Brennan J went on to explain:

> There are powerful considerations in favour of a Minister adopting a guiding policy. It can serve to focus attention on the purpose which the exercise of the discretion is calculated to achieve, and thereby to assist the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or another. Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.[51]

His Honour also pointed out administrative policy was typically formulated using the vast resources available to the executive government after a careful balancing of various interests. At its best, administrative policy was the product of careful research, consultation and deliberation which is shaped by a clear-headed view of the public interest. That resource-intensive and time-consuming process can be contrasted with a hearing before a tribunal which may not be as well-suited to making good general policy that is properly informed by the public interest.[52]

It is accepted that a general merits review tribunal like the AAT is not *obliged* to apply administrative policy if that policy does not otherwise have the force of law. The Tribunal is ultimately required to make the correct or preferable decision in each case that comes before it. If the promulgated administrative policy does not tend to the preferable outcome in cases where there is a choice, it may be appropriate for the Tribunal to ignore the policy or qualify its application. In most cases, the administrative policy will suggest a sensible outcome — particularly when one appreciates the effort that typically goes into formulating administrative policy, and the value of consistency. The challenge for the Tribunal lies in those cases where it is argued the outcome suggested by the policy is lawful but decidedly not the preferable outcome.

49 *Drake* and *Drake No 2*.
50 (1979) 2 ALD 636, 639.
51 Ibid 640.
52 Ibid 644.

Objectivity and preference

There is less scope for idiosyncrasy or agendas to operate in tribunal decision-making than people commonly suppose. The answer in a given case is usually obvious when one has proper regard to the text *and purpose* of the legislation under consideration. The purpose might conveniently be set out in an objects clause, or it may be divined from the text or structure of the legislation; it might be described in the secondary materials. In any event, it is discoverable using conventional techniques of statutory interpretation that must be applied and clearly explained in the reasons for decision. But the Full Court in *WRMF* recognised situations might still arise where reasonable people might disagree about the outcome,[53] especially where there is an exercise of discretion or the outcome turns on a 'fact-intensive exercise'.[54] Many of these cases do not involve the exercise of discretion, but still involve the exercise of individual judgment that is shaped by experience. A good example is found in the definition of 'injury' in s 5A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The definition includes an exclusion which applies where the injury was 'suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment'. Determining what is *reasonable* is inevitably a value-laden inquiry.

There is no doubt that a careful and transparent reasoning process reduces the risk of idiosyncrasy, especially in cases where there is ultimately a *correct* outcome. But there may remain some scope for individual judgment about what is the *preferable* outcome in cases involving the exercise of discretion which required the decision-maker to form a view about questions of public interest.

Downes J and DP Hack suggested in *Rent-to-Own*[55] that the decision-maker in such a case must resort to community standards or community values as a touchstone in discussions of the public interest.[56] The Tribunal was concerned about members effectively misusing their positions to make subjective or idiosyncratic choices.[57] It is worth unpacking that discussion given the way appeals to 'community expectations' have become more explicit in discussions about the role of a general merits review tribunal.

The Tribunal in *Rent-to-Own* explained expressions like 'community standards or values' have a long pedigree in judicial decision-making,[58] citing Stephen J in *Onus v Alcoa of Australia Ltd*, who observed:

> Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to a plaintiff in the case of, some subject matters than others.[59]

53 [2020] FCAFC 79 [143].
54 Ibid [152].
55 [2011] AATA 689.
56 Ibid [50].
57 Ibid [48], [50].
58 Ibid [51].
59 [1981] HCA 50; (1981) 149 CLR 27, 42.

The Tribunal referred to a range of other leading authorities to similar effect, including the judgment of Brennan J in *Mabo v Queensland (No 2)*[60] and the reasoning of Lord Atkin in *Donoghue v Stephenson*[61] who said the tort of negligence was shaped by a moral code but also 'a general public sentiment of moral wrongdoing for which the offender must pay'. The Tribunal also referred to extra-judicial remarks of Sir Anthony Mason who said: '[When] interpreting statutes and giving them operation, judges will, where appropriate, take into account community standards and values.'[62]

Sir Anthony elaborated on what he meant by 'standards and values' in a later paper[63] which was referred to in the Tribunal's decision in *Rent-to-Own*.[64] Sir Anthony explained:

> It is accepted that a judge must decide a case without regard to the popularity or unpopularity of the decision. On the other hand, when a judge has regard to community values and standards in arriving at a decision, the judge is looking to enduring values and standards, not matters of transient impression which may arise by way of reaction to particular and immediate events.[65]

Sir Anthony's conception of '*enduring* values and standards' [emphasis added] is narrow. As Downes J and DP Hack pointed out in *Rent-to-Own*, it may not be possible to isolate those standards through an evidentiary process — but they are discoverable by inference. The Tribunal explained:

> Relevant community values will not depend on transient or fashionable thinking. They will not be found in the publications of vocal minorities or the fulminations of the media, motivated by short term considerations and the improvement of circulation or ratings. They will not necessarily reflect the views of individual politicians. Community standards will be found in more permanent values. They will be informed in part by legislation of the parliaments, and especially legislation applicable to the decision-making. Formal statements by ministers will be relevant, but not when they are not speaking officially or when their remarks are not carefully considered or do not appear to reflect 'a broad consensus of opinion' (Mason, *Courts and Public Opinion* at 36). Decisions will also be informed by the decision-maker's belief based on experience. Evidence will rarely be of any practical assistance.[66]

In other words, the decision-maker must strive to divine community standards and values *from objective sources,* starting (and in most cases finishing) with the legislative regime in question. That observation is consistent with the goal of promoting objective decision-making as a feature of Australia's nomocracy. But there is a danger in this debate. It lies in the use of language that may not be well-understood, or which may be understood in different ways by different constituencies. The tendency to elide expressions like 'community standards or values' with their more populist-sounding relation 'community expectations' when describing

60 [1992] HCA 23; (1992) 175 CLR 1, 42.
61 [1932] AC 562, 580.
62 Sir A Mason, 'The Courts and Public Opinion' (20 March 2002) (NSW Bar Association Journal *Bar News,* Winter 2002) 30.
63 Sir A Mason 'The Art of Judging' (2008) 12 *Southern Cross University Law Review* 33.
64 [2011] AATA 689 [64]–[65].
65 Sir A Mason (n 63) 41, 42.
66 [2011] AATA 689 [65].

the role of a general merits review tribunal can generate false expectations and distract the tribunal itself from its role as an objective decision-maker. As I explained in 2013:

> There is a real risk that executive decision-makers in particular will resort to 'the publications of vocal minorities or the fulminations of the media' as the authentic voice of the community, not least because many in the media lay claim to precisely that role. The subtle distinctions referred to by judges may well be lost on harassed public servants and their media-sensitive masters who are wearily familiar with the claims that they — and increasingly the courts — are 'out of touch'. [67]

After referring to a specific example where a primary decision-maker referred to community expectations as evidenced by incomplete and inaccurate media reports, I warned:

> One is left with the uncomfortable suspicion that the qualifications may be lost in translation. That danger has probably increased as social media has provided a new, unregulated and influential voice for those who may not know the law, or the exigencies of public administration, but who are confident they know what is *right*. Those voices might enjoy outsized influence on the deliberations of executive decision-makers.[68]

This discussion suggests firstly that language matters when describing the role of a general merits review tribunal, if only because language can feed into unrealistic expectations and an unhealthy culture. Tribunal members need to be rigorous and transparent in their objectivity. Secondly, tribunal members must always resist the temptation to put their 'fingers on the scale' when making decisions', either to advance their own preferences or to advance an agenda suggested by somebody else. The lure of exercising power (or a desire to please those who might exercise power with respect to the tribunal member) is insidious and corrosive of objectivity.

Creating a supportive culture that promotes objective decision-making

It *almost* goes without saying that a decision-maker acts improperly if they are influenced by self-interest, personal prejudices, animus or ideological preferences. Let us assume all tribunal members understand so much. Bias of this kind was addressed by the Australian Law Reform Commission in its recent report. The more interesting part of that report for present purposes dealt with the sources of unconscious bias, which is less well-understood.

I do not propose to dwell on the insights into unconscious bias that are contained in the ALRC report. Suffice to say decision-makers are human, and the goal of being truly objective in decision-making is difficult to achieve. The ALRC report makes clear that, at a minimum, individual decision-makers must be self-aware and interrogate their own biases and predispositions. In this connection, it is worth noting the results of a study of federal judges in the United States that was reported in *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*.[69] One of the authors of the book that resulted from the study was Richard Posner, a high-profile appellate judge and prolific academic attached to the University of Chicago. The authors rejected the traditional 'legalist' theory of judicial

67 B McCabe, 'Community Values and Correct or Preferable Decisions in Administrative Tribunals' [2013] UQLawLJ 7; (2013) 32 *University of Queensland Law Journal* 103, 119.

68 Ibid.

69 L Epstein, WM Landes and RA Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press, 2013).

decision-making which assumes judges do not have regard to factors outside the text of the legislation and orthodox norms of judicial decision-making.

The study concluded there was limited evidence of judges — particularly at the trial court level — routinely indulging personal political or (to the extent that is a different thing) ideological preferences in their decision-making. The authors proposed an alternative theory which was a variation on the realist theory of jurisprudence. The realists assume judges do consult a wider range of considerations in their decision-making. The authors' theory is called the 'labour market' theory of judicial behaviour.[70] That theory suggests judges are like other workers in at least this respect: they all respond rationally to their work environment to maximise their own utility as they go about their jobs. Unlike most other workers, judges are not highly motivated by the prospect of increasing their salary. That makes non-monetary features of the work especially important as motivating factors. The authors of the study hypothesise the way in which judges go about their work might be affected by a range of factors including their individual appetites for:[71]

- hard work and leisure;
- publicity and controversy;
- the approval or opprobrium of colleagues (or former colleagues, or their social group); and
- approval or criticism from appellate courts or the academy.

The survey results generally confirmed the thesis. Some results are worth noting for present purposes — particularly those that reflect on tenure. Federal district and appellate judges in the United States enjoy life tenure, and judges of the same rank are all paid the same amount. Security of tenure and competition over remuneration did not factor as motivations for judges included in the survey (except to the extent that some judges took the opportunity for a quiet life). Having said that, the study concluded many judges were conscious of the prospect of being promoted to a higher court.[72]

The study is useful to the extent it draws attention to the arguably uncontroversial proposition that judges and tribunal members are rational human actors who can be expected to be aware of the demands of the environment in which they operate. The missing piece in the study — at least for present purposes — is the extent to which decision-making might be affected by the absence of secure tenure, particularly where there has been a dilution or compromise of a culture that supports independence in judicial workplaces.

The study is worth quoting because of the lessons it holds for the reform process. If one objective of the reforms is to promote a culture of objective decision-making, it is as well to remember that objective decision-makers may not emerge fully-formed from even the most well-meaning appointment processes. More is required to develop and sustain an appropriate culture.

70 Ibid 30ff.
71 Ibid 31–2.
72 Ibid 36.

I do not propose to expound on the various reforms that will shortly be debated as part of the consultation process. For now, it is enough to mention two considerations that should be kept in mind if the culture of objectivity is to be reinforced and entrenched.

First, a culture of objectivity will be enhanced when members experience a sense of *psychological safety*. 'Psychological safety' is a well-understood concept in literature regarding compliance. It refers to institutional and other features of an organisation that induce a sense of confidence in workers that they will be supported when they identity problems or suggest change. In the tribunal context, a sense of psychological safety can buttress the courage members are expected to demonstrate when making decisions. In a practical sense, members who experience psychological safety are better able to 'shut out' concerns for their own position which might otherwise encroach (even if sub-consciously) on their decision-making.

Fostering psychological safety is a tricky process. Members must still be accountable for their performance. Good leadership is essential in getting the balance right, but it will also be necessary to carefully calibrate reappointment processes. Suffice to say members who fear their performance will not be judged objectively on its merits are unlikely to experience psychological safety, and they may be exposed to perverse incentives that are inimical to objective decision-making.

Second, a culture of objectivity also depends on respect for the professional autonomy of members as they go about making decisions. As Sir Anthony Mason explained, the benefit of a general merits review tribunal lay in the potential for a more considered approach than is possible at the primary decision-making stage where decision-makers face bureaucratic, political and resource pressures. While a review body must live within its means and operate coherently, it would be a pity if the conduct of reviews were unduly influenced or restricted by bureaucratic and other concerns. That point was made by Sir Gerard Brennan when he addressed the AAT's 20th anniversary conference. After noting the AAT had developed a large bureaucracy, he warned:

> I hope that the need for this core of personnel and the inevitable closeness of their working relationship with the members, especially the permanent members, is not conducive to a cast of mind that subjects the independence of members to the corporate memory or knowledge or advice of the AAT bureaucracy.[73]

The *Administrative Appeals Tribunal Act 1975* currently attempts to deal with the challenge of balancing the responsibilities of members and staff in two ways. First, s 24A vests overall responsibility for management of the Tribunal's administrative affairs in the President but explicitly allocates responsibility for matters arising under the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999* to the Registrar. As a consequence, the President and the Registrar are effectively required to collaborate in the leadership of the AAT as an organisation. Second, the statute distinguishes between the *business* of the Tribunal, which is *directed* by members who assist the President,[74] and the *administrative affairs* of the Tribunal, which are managed and carried on by public servants.

73 Sir G Brennan, 'The AAT — Twenty Years Forward' (Opening Address, Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996).

74 *Administrative Appeals Tribunal Act 1975* (Cth) s 17K(6).

That distinction also necessitates constructive collaboration between members and staff in the conduct of reviews.

It is certainly possible to conceive of alternative organisational arrangements to those which are currently in place at the AAT, but the challenge remains: whatever arrangements are devised, members require a level of autonomy and a capacity to direct the review process — a process which does not begin and end in the hearing room.

Conclusion

The authors of the *Behavior of Federal Judges* study pointed out that courts (and the military, and other important organisations where differentials in pay were not significant) depended on developing what students of organisational behaviour called a 'high commitment' culture in which the actors came to identify with the mission.[75] The establishment of a high commitment culture assumes the actors have a clear understanding of that mission, and that they possess the skills, experience and aptitude to make sense of what is required of them.

In this paper, I have argued for a more nuanced appreciation of the tribunal member's role at the outset of the reform process. That ultimately requires the articulation of a distinctive jurisprudence of tribunal decision-making which prizes objectivity and incorporates a profound understanding of the Tribunal's role as an advocate for, and instrument of, good government.

75 Epstein, Landes and Posner (n 69) 34–5.