ACTING UNDER DICTATION AND THE ADMINISTRATIVE APPEALS TRIBUNAL'S POLICY-REVIEW POWERS — HOW TIGHT IS THE FIT?

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INTRODUCTION

Although the Administrative Appeals Tribunal (hereafter referred to as the AAT) does not enjoy an express power to review policy considerations taken into account in reaching a decision under review, such a power has been taken to have been impliedly conferred by s 43 of the Administrative Appeals Tribunal Act 1975 (Cth) (hereafter referred to as the AAT Act).

Section 43(1) empowers the Tribunal to exercise all the powers and discretions conferred on the decision-maker whose decision is subject to review. It empowers the Tribunal to affirm, vary or set aside the decision under review, and to make a decision in substitution for the decision so set aside or to remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal. Section 43(6) provides that the decision made by the AAT in substitution for the decision made by the original decision-maker shall be deemed to be a decision of the original decision-maker. Both the AAT and the Federal Court have concluded that these provisions are effective to confer jurisdiction on the Tribunal to review policy considerations which govern or affect discretionary powers.[1] The power to review a decision on the merits includes the power to review not only the facts of the case but also any policy which had been applied or which ought to be applied to the facts in reaching the decision.[2] For example, in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[3] Brennan J indicated that as a matter of law the Tribunal was as free as the Minister to apply or not to apply his policy on deportation. The Tribunal's duty was to make the correct or preferable decision in each case on the material before it, and the Tribunal was at liberty to adopt whatever policy it chose or no policy at all, in fulfilling its statutory function.[4]

On appeal, the Federal Court agreed that s 43(1) conferred a broad power to review policy. In *Drake* v *Minister for Immigration and Ethnic Affairs*[5] Bowen CJ and Deane J said:

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[1] *Re Becker and Minister for Immigration and Ethnic Affairs* (hereafter cited as *Re Becker*) (1977) 1 ALD 158, 162; *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

[2] *Re Becker* (1977) 1 ALD 158, 162.

[3] (1979) 2 ALD 634 (hereafter cited as *Re Drake (No 2)*).

[4] *Ibid* 642. Of course whether the Tribunal should, as a matter of practice, frequently depart from ministerial policy is another matter. See *Re Drake (No. 2)* (1979) 2 ALD 634, 642-645; F G Brennan, "New Growth in the Law — The Judicial Contribution" (1979) 6 Mon U LR 1,17-18.

[5] (1979) 24 ALR 577.

> Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the Tribunal.[6]

In exercising its policy-review powers the Tribunal is subject to a number of well-known legal constraints.[7] The Tribunal is bound to disregard government and administrative policy which does not fall within the scope of the statute conferring the discretionary power.[8] (It is also precluded from developing and implementing its own policies if such policies are inconsistent with the objects and purposes of the statute.) On the other hand, if the policy adopted by the original decision-maker is one which might properly be taken into account in the exercise of the discretion, the Tribunal must treat the policy as a relevant consideration upon the review of the decision.[9]

A further legal constraint imposed by the courts relates to the permissible weight to be given to relevant policy. Although the Tribunal must take into account a lawful policy applied by the original decision-maker, the Tribunal is precluded from automatically applying any policy unless it is expressly required or permitted by statute to do so. Where the policy has been formulated by another this limitation is often expressed as a requirement not to "act under dictation". One major difficulty in applying the principle against acting under dictation to the AAT arises from the concept that in exercising its review powers the Tribunal stands in the shoes of the original decision-maker. For example, if the original decision-maker is required to follow government policy in the exercise of a statutory discretion, will the Tribunal also be obliged to follow that policy, or will it be required to exercise its review powers free from dictation? In other words, when the Tribunal steps into the shoes of the original decision-maker, just how tight is the fit?

THE COMMON LAW PRINCIPLE AGAINST ACTING UNDER DICTATION

Traditionally, the courts have taken the view that a decision-maker must personally exercise a discretion conferred on him by statute unless the statute expressly or by implication authorises delegation of that discretion or confers power on another to give binding directions. The decision-maker must not act upon the dictation of another person, be that person a superior officer or even the Minister responsible for the running

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[6] *Ibid* 589.

[7] See generally D C Pearce, "Courts, Tribunals and Government Policy" (1980) 11 FL Rev 203, 216-220.

[8] *Re Becker* (1977) 1 ALD 158, 161-162; *Re Drake (No. 2)* (1979) 2 ALD 634, 645; *Re Bundy and Secretary, Department of Housing and Construction* (1980) 2 ALD 735.

[9] *Steed* v *Minister for Immigration and Ethnic Affairs* (1981) 4 ALD 126.

of a department of which the decision-maker is an officer.[10] A decision-maker exercising the discretion as a delegate or in the Minister's name[11] will, however, be bound by the lawful directions of the delegator or Minister.[12]

Although a decision-maker upon whom a discretion has been directly conferred by statute will be obliged to exercise the discretion himself unless empowered or directed to do otherwise by statute, this does not mean he is bound to disregard government policy or a policy developed by another. On the contrary, such a policy may be a relevant consideration which ought to be taken into account before a decision is reached. For example, in *Camacho and Sons Ltd* v *Collector of Customs*,[13] Lord Upjohn indicated that the Collector of Customs who had power to authorise the importation of certain goods, might be obliged to take into account the policy of the responsible Minister, but that he ought, nevertheless, to apply his independent judgment in reaching a particular decision. The Minister was not entitled to give instructions to the Collector as to the manner in which he should exercise his discretion with respect to individual applications for licences.[14]

The common law principle against acting under dictation was first applied to the AAT in *Drake* v *Minister for Immigration and Ethnic Affairs*.[15]

In *Drake's* case an AAT decision was set aside by the Federal Court because the Tribunal automatically followed a ministerial policy without having due regard to the individual merits of the case. The Federal Court heard an appeal against a decision of Davies J, Deputy President of the Tribunal, (as he then was) affirming a deportation order made by the Minister under s 12 of the Migration Act 1958 (Cth).[16] One ground of the appeal was that the Tribunal had attached such importance to the policy statement on deportation issued by the Minister, that it failed to exercise its own independent judgment in the matter. In the course of their joint judgment Bowen CJ and Deane J said:

> In a matter such as the present where it was permissible for the decision-maker to take relevant government policy into account in making his decision, but where the Tribunal is not under a statutory duty to regard itself as being bound by that policy, the Tribunal is entitled to treat such government policy as a relevant factor in the determination of an application for review of that decision. It would be contrary to common sense to preclude the Tribunal, in its review of a decision, from paying any regard to what was a relevant and proper factor in the making of the decision itself.[17]

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[10] *Camacho and Sons Ltd* v *Collector of Customs* (1971) 18 WIR 159; *McLouglin* v *Minister for Social Welfare* [1958] IR 1; *Sernack* v *McTavish* (1970) 15 FLR 381; see also (ed) J M Evans *de Smith's Judicial Review of Administrative Action* (4th ed 1980) 309-311; H Whitmore and M Aronson, *Review of Administrative Action* (1978) 229-230.

[11] See *Carltona Ltd* v *Commissioners of Works* [1943] 2 All ER 560, 563.

[12] Although a direction to reach a particular decision may not be a lawful direction. See *Nashua Australia Pty Ltd* v *Channon* (1981) 36 ALR 215, 230-231.

[13] (1971) 18 WIR 159.

[14] *Ibid* 164. See also *R* v *Mahony; Ex parte Johnson* (1931) 46 CLR 131, 145; *Bosnjak's Bus Service Pty. Ltd* v *Commissioner for Motor Transport* (1970) 92 WN (NSW) 1003.

[15] (1979) 24 ALR 577 (Hereafter cited as *Drake's* case.).

[16] Sections 12 and 13 of the Migration Act 1958 have since been repealed and a new s 12 substituted by the Migration Amendment Act 1983.

[17] (1979) 24 ALR 577, 590.

However, although government policy may be a relevant factor to which the Tribunal should have regard when reviewing a decision on the merits, the Tribunal should not apply the policy uncritically to the facts of the particular case. Bowen CJ and Deane J indicated that an automatic application of the policy would be an abdication of the the Tribunal's duty to review the merits of the case; there would be a failure to exercise the discretion conferred on the Tribunal.[18] This may be contrasted with a case where the Tribunal concludes that the correct or preferable decision is that which results from the application of government policy to the facts of the matter before it. Such an approach may be appropriate where the decision, even though it involves the application of government policy to the facts, is the outcome of the independent assessment by the Tribunal of all the circumstances of the particular matter.[19] The borderline between these two kinds of decisions may be blurred, and it is desirable if the Tribunal applies government policy, that it makes it clear that it has considered the propriety of the particular policy. Bowen CJ and Deane J suggested that the Tribunal should expressly indicate the considerations which have led it to the conclusion that the policy should be applied.[20]

In relation to the weight which the Tribunal might give to government policy, Smithers J suggested that the policy should be under review to the same extent as the original decision-maker's general process of reasoning and evaluation of relevant matters.[21] This presumably means that the policy must be treated as just one of the many relevant factors to which the Tribunal should have regard. Bowen CJ and Deane J, on the other hand, were not prepared to indicate the precise part which government policy should ordinarily play in the determinations of the Tribunal. That was a matter for the Tribunal itself to determine;

> in the context of the particular case and in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case.[22]

The Federal Court, after an examination of the Tribunal's reasons for decision, concluded that the Tribunal had failed to make an independent determination. The nature of the reasons for decision indicated that the Tribunal accepted the Minister's policy as the determinative criterion to be applied by the Tribunal to the issues before it, and the decision reached was the result of the application of ministerial policy to a careful assessment of the factual material before the Tribunal, rather than an independent assessment of the correct or preferable decision.[23] The matter was therefore referred back to the Tribunal for rehearing.

Drake's case was reheard by Brennan J.[24] He agreed with Bowen CJ and Deane J that the Tribunal was entitled to determine its own practice in respect of the part which policy plays in the making of Tribunal de-

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[18] *Ibid* 591.
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid* 602.
[22] *Ibid* 590-591.
[23] *Ibid* 591, 599-607.
[24] *Re Drake (No 2)* (1979) 2 ALD 634.

cisions.[25] In Brennan J's opinion, it was open to the Tribunal to adopt a practice of ordinarily applying a lawful policy formulated by a Minister, provided it was willing to consider arguments against the policy itself or against its application in the individual case, and provided its application would not lead to injustice in the particular case.[26] This approach appears to permit the Tribunal to give greater weight to the policy of the original decision-maker than Smithers J's judgment in *Drake's* case suggests is permissible.[27]

The issue of the weight which might permissibly be given to government or administrative policy arose in a different way in *Re Nevistic and Minister for Immigration and Ethnic Affairs*.[28] In *Re Nevistic* the Tribunal affirmed the Minister's decision to deport the applicant, but indicated that if it were not for the government's policy on deportation, it might have found in favour of the applicant.[29]

On appeal to the Federal Court the appellant alleged that the Tribunal had given the policy such paramountcy over other relevant considerations, that it had abrogated its own function of independently reviewing the Minister's decision.[30] The Federal Court concluded, however, that the Tribunal's approach contained no error of law:

> [T]he learned President having decided that, apart from government policy, the question of whether deportation should be ordered was substantially evenly balanced, considered that it was appropriate to give some weight to government policy. Having then examined government policy carefully, and not without regard to what he saw as its limitations and problems, decided [sic] that, added to the scales of justice, it was sufficient to tip the balance in favour of deportation.
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> In my opinion I can see no error of law in this approach.[31]

The Tribunal had not so emphasised government policy as to abdicate its function of independent review.[32]

In both *Drake's* case and *Nevistic's* case the decisions reviewed by the AAT were deportation decisions made by the Minister for Immigration and Ethnic Affairs. When exercising the deportation power conferred on him by s 12 of the Migration Act 1958 (Cth),[33] the Minister is free to apply, modify or abandon his own policy in determining the preferable decision in the particular case. Consequently when the Tribunal exercises similar powers with respect to deportation policy it is acting in a manner which is consistent with its role of "stepping into the shoes of the original decision-maker". The Tribunal's power to apply, modify or reject the

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[25] *Ibid* 645.

[26] *Ibid*. Similarly, in *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal* the Tribunal indicated that if the Australian Broadcasting Tribunal (whose decision was being reviewed by the AAT) held a settled and reasoned policy which governed its decision, the Tribunal would have afforded that policy considerable weight. See (1981) 39 ALR 281, 317.

[27] See *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 602. See also Pearce, *supra* n 7, 219.

[28] (1980) 3 ALN No 7.

[29] *Ibid*.

[30] *Nevistic* v *Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639, 648.

[31] *Ibid* 645, per Franki J.

[32] *Ibid* 652, per Lockhart J.

[33] See *supra* n 16.

Minister's policy is the same power which the Minister himself may exercise in reaching the original decision.

What will be the Tribunal's position, however, when an original decision-maker is not free to abandon or modify certain policies in the exercise of a statutory discretion? To what extent will the Tribunal be subject to the restraints which may be imposed on an original decision-maker?

There are three situations in which this issue may arise:

(a) when the original decision-maker is exercising delegated powers;
(b) when the original decision-maker is expressly required by statute to comply with the directions of another; or
(c) when, by implication, the discretion must be exercised in accordance with government policy.

(a) *When the original decision-maker is exercising delegated powers*

It was suggested above[34] that a decision-maker who exercises a discretion as a delegate, will be bound by the lawful policy of the delegator. When the Tribunal steps into the shoes of a delegate for the purpose of reviewing his decision, will the Tribunal also be bound by the policy of the delegator?[35]

It is submitted that the Tribunal will not be so bound, even though the result of such a conclusion is that the Tribunal will have broader powers than the officers who have been delegated the task of exercising a statutory discretion. Section 43(1) of the AAT Act empowers the Tribunal to exercise "all the powers and discretions that are conferred by any relevant enactment on the person who made the decision". Although at first glance this section appears to require the Tribunal to step into the shoes of the *actual* decision-maker, the words "conferred by any relevant enactment" suggest that the real purpose of s 43(1) is to require the Tribunal to exercise the particular statutory discretion regardless of whether it was initially exercised by the person on whom the discretion was expressly conferred, or by his delegate. The Tribunal steps into the shoes of the person upon whom the discretion has been conferred by statute, and just as that person is free to follow, modify or abandon his own policy in the exercise of that discretion, so too is the Tribunal free to undertake an independent review of the policy which was applied in the original decision. Any other conclusion would lead to absurd results. If the Tribunal was bound, as a delegate would be bound, to apply the policy enunciated by the statutory recipient of the discretion, the Tribunal's powers of review would depend upon the author of the particular decision under review. The Tribunal would be empowered to review the policy if the decision under review was made by the statutory recipient of the discretion; it would not be permitted to review the policy if the decision was made by his delegate.

This view of the effect of s 43(1) is supported by decisions of the AAT in its social security jurisdiction. Pursuant to s 12(1) of the Social Security Act 1947 (Cth), the Director-General of Social Security may delegate all of his powers and functions under the Act, except the power of delegation, to any officer of the Department. In several cases the AAT has reviewed

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[34] *Above* p 110.

[35] This issue will also arise when the original decision-maker has exercised ministerial powers in the Minister's name. See above p 110.

decisions made by delegates of the Director-General in which departmental policy has been applied by the delegates. The Tribunal has shown no hesitation in embarking upon a review of such policy.[36]

(b) *When the original decision-maker is required by statute to comply with the directions of another*

Traditionally the courts have taken the view that unless the statute conferring a discretionary power also confers a power on another to give binding directions, the recipient of the statutory discretion is not obliged to follow the policy of another, including policy devised by the Minister of a department.[37]

Applying this principle to the AAT, it is clear that where there is a statutory provision which expressly requires the Tribunal to follow government or ministerial policy, the Tribunal is obliged to apply that policy when it undertakes a review of a decision to which the policy applies.[38] What is not clear, however, is the extent to which the Tribunal may be obliged to apply government policy in the absence of a statutory provision expressly requiring it to do so.

If the Tribunal can be regarded as an independent decision-maker who, upon a review of an administrative decision, is required to exercise a discretion expressly conferred on it by statute, then the answer would seem to be that the Tribunal is not obliged to follow government policy in the absence of an express provision.[39] However, what is the Tribunal's position when the original decision-maker is expressly required by statute to apply government policy? Is the Tribunal similarly constrained, or is it still to be regarded as an independent decision-maker, free to apply, modify or reject the policy as it regards appropriate in the particular case?

The answer to this question depends upon the precise scope of s 43 of the AAT Act which is the source of the Tribunal's powers of review.

As indicated above, the Tribunal is empowered by s 43(1) to exercise all the powers and discretions that are conferred by any relevant enactment on the original decision-maker, and s 43(6) provides that the Tribunal's decision shall be deemed to be the decision of the original decision-maker. This has been taken to mean that the Tribunal has no independent powers or discretions apart from those which may be exercised by the recipient of the statutory discretion.[40] The powers of the Tribunal have to be measured by reference to the powers vested in the decision-maker whose decision is under review.[41] But just how far will this interpretation be taken? If applied literally it will mean that a statutory constraint which limits the manner in which the original decision-maker may exercise a

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[36] See *eg Re Te Velde and Director-General of Social Services* (1981) 3 ALN No 75; *Re Beames and Director-General of Social Services* (1981) 3 ALN No 50; *Re Blackburn and Director-General of Social Services* (1982) 4 ALN No 46; *Re de Graaf and Director-General of Social Services* (1981) 3 ALN No 63.

[37] See *above* pp 109-110.

[38] Examples of statutory directions of this kind may be found in ss 11A and 24A of the Dairy Industry Stabilization Act 1977 (Cth).

[39] This view is supported by the Federal Court in *Drake's* case. See *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 590.

[40] See *eg Re Callaghan and DFRDBA* (hereafter cited as *Re Callaghan*) (1978) 1 ALD 227; *Re Lane and Department of Transport* (1978) 1 ALN No 32.

[41] *Re Callaghan* (1978) 1 ALD 227, 230.

discretion should also exist as a constraint on the Tribunal's power. For example, if a statutory provision conferring a discretion on an administrator contains an express provision that the discretion must be exercised according to the government policy applicable for the time being, then the Tribunal, upon a review of the decision, should also be bound to apply the government policy. If the Tribunal was free to reject such policy, it would be exercising a power greater than that conferred by statute on the original decision-maker.

This approach might even be applicable when the statutory constraint is more general in nature and is not contained in the provision conferring the discretion. For example, s 7 of the Social Security Act 1947 (Cth) provides that the Director-General of Social Security shall, subject to any direction of the Minister, have the general administration of the Act. If a provision of this kind is effective to confer power on the Minister to issue policy guidelines to be applied by the Director-General in the exercise of a statutory discretion conferred by the Social Security Act (Cth), the AAT might also be obliged to follow such guidelines.[42]

This interpretation of s 43 emphasises the Tribunal's role as an administrative body operating as an extension of the administrative decision-making process. Sections 43(1) and 43(6) can be construed as requiring the Tribunal to step into the shoes of the decision-maker in the strict sense; not only equipped with all the powers of the original decision-maker, but also restricted by any legal constraints imposed on him by or pursuant to statute.

An alternative interpretation of s 43 is that it confers upon the Tribunal the power to exercise independently the particular statutory discretion originally conferred on the decision-maker whose decision is subject to review, even to the extent of permitting the Tribunal to exercise a greater power than conferred upon the original decision-maker.

This approach finds some support in the AAT's decision in *Re Metherall and Minister for Capital Territory*.[43] In *Re Metherall* the applicant sought review of a decision of the Minister confirming a redetermination of the unimproved value of the applicant's land. When the application came on for hearing, the applicant abandoned the grounds for review contained in his original notice of objection lodged with the Minister. These grounds had also been substantially repeated in the applicant's statement of reasons for review required by s 29 of the AAT Act. The respondent objected to this course of action. It was argued that the Minister, when considering the appeal, was limited to the issues advanced by the applicant in his original notice of objection. Having regard to the provisions of s 43(1) of the AAT Act, the Tribunal was also limited to a consideration of such objections, for the Tribunal, in considering the Minister's decision, was simply placed in the shoes of the Minister in confirming or varying the

[42] It is suggested that such a general provision does not empower the Minister to compel the Director-General to exercise his discretion to reach a particular decision. See *Social Security Commission* v *Macfarlane* [1979] 2 NZLR 34, 42.

[43] (1979) 2 ALD 246.

original determination.[44] The Tribunal could not exercise greater powers than those conferred on the original decision-maker.[45]

Mr Todd (senior member) rejected this argument. He suggested that whether the Minister was confined in the way suggested was a matter for debate.[46] The AAT, however, was not restricted in its consideration of the matter by any limitations which might be placed upon the Minister.[47] The Tribunal was at liberty to have regard to all the grounds advanced by the applicant at various times, and to any other consideration which appeared to be relevant for the purpose of reviewing the decision of the Minister.[48] The Tribunal was not restricted in its consideration of the matter by the reasons given by either party.[49] It was the decision of the Minister which was the subject of review by the Tribunal rather than the reasons for review supplied by the applicant or the reasons for decision lodged by the Minister.

The Tribunal's decision in *Re Metherall* suggests that statutory limitations imposed upon the original decision-maker may not always be transferred to the AAT by virtue of s 43 of the AAT Act. In particular, the Tribunal may not be confined by the grounds put forward by an applicant, even if the original decision-maker was limited by these grounds when making his original determination. The decision emphasises the independence of the AAT in the exercise of its review powers and supports the view that the Tribunal may be capable of exercising a power greater than that permitted to the original decision-maker. But does it follow from *Re Metherall* that the Tribunal will be free to ignore a statutory provision which requires the original decision-maker to follow the policy directives of another?

It is arguable that the approach suggested in *Re Metherall* is based upon an interpretation of the relevant legislation and should be confined to the particular issue which arose in that case. In *Re Metherall* Mr Todd pointed out that the applicant was afforded two separate opportunities to formulate a statement of reasons — one under the ACT Ordinance, and the other under s 29 of the AAT Act. There was nothing in either provision to indicate that the reasons on both occasions should be identical.[50] Furthermore, the absence of a hearing before the Minister together with the broad evidence-gathering powers exercisable by the AAT under the AAT Act, disclosed a statutory intention that the Tribunal should not be limited to the material before the original decision-maker.[51] Indeed it could be argued that there would be little point in establishing a Tribunal with superior fact-finding capabilities if it were not free to utilise them, particularly in cases like *Re Metherall* where the key issues are issues of fact.

There is some doubt, however, whether these considerations are so readily applicable to the question of whose policy (if any) should be

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[44] *Ibid* 248-249.
[45] *Ibid* 249.
[46] *Ibid* 250.
[47] *Ibid* 251.
[48] *Ibid* 251-252.
[49] *Ibid* 251. The Tribunal referred to *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137 with approval.
[50] *Re Metherall and Minister for Capital Territory* (1979) 2 ALD 246, 251.
[51] *Ibid*.

followed in the exercise of an administrative discretion. The AAT Act contains no direct or express requirement that the Tribunal should engage in the review of any policy considerations which influenced the making of the original decision. Although the power to review policy has been implied by the courts, it cannot be said with such certainty that the AAT Act discloses a statutory intention that this power be exercised free from any statutory constraints which may be imposed upon the original decision-maker.

(c) *When, by implication, the discretion must be exercised in accordance with government policy*

The manner in which the AAT Act (and in particular s 43) is interpreted is crucial in determining the extent of the Tribunal's power independently to review policy where policy is applied by the original decision-maker pursuant to an express statutory obligation to obey policy directives. However, the issue may also arise where government policy directives of a more general nature are involved and where there is no express statutory obligation to follow government policy. Although traditional judicial opinion suggests that a recipient of an "independent" statutory discretion should not automatically follow government policy, judgments in two High Court cases indicate that the High Court may be willing in certain cases to recognise a Minister's power to give binding directives to officers exercising "independent" statutory discretions.

The two High Court cases are *R* v *Anderson; ex parte Ipec-Air Pty Ltd*[52] and *Ansett Transport Industries (Operations) Pty Ltd* v *Commonwealth*.[53]

In the *Ipec-Air* case the High Court reviewed a decision of the Director-General of Civil Aviation refusing the issue of a charter licence to enable Ipec-Air to carry freight between the Australian States by means of its own aircraft. The Director-General also refused Ipec-Air permission to import suitable aircraft to operate the service.

Kitto and Menzies JJ found on the facts that the Director-General refused permission to import the aircraft in obedience to instructions of the government. In their opinion there was not a refusal by the person to whom the regulations committed the power of decision. Although government policy was not in every case an extraneous matter which the Director-General must put out of consideration, he must nevertheless arrive at a decision of his own. Both Kitto and Menzies JJ stressed that if Parliament entrusts a departmental head, rather than the Minister, with a discretionary power, it is the intention of Parliament that government policy should not outweigh every other consideration.[54]

Taylor and Owen JJ, whilst agreeing that the Director-General was entitled to take into account government policy, were of the opinion that he had in fact exercised his own judgment in the matter.[55]

Windeyer J on the other hand, said that the *only* consideration by which the Director-General could properly have been guided was the policy of the government. The Director-General was the permanent head of the

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[52] (1965) 113 CLR 177.
[53] (1977) 139 CLR 54.
[54] *R* v *Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 192, 202.
[55] *Ibid* 193.

Department of Civil Aviation. The responsible Minister was the Minister for Civil Aviation. The Director-General's function in giving permission for the importation of aircraft was an administrative one which he performed by virtue of his office. He was not like a person charged with a duty of determining a discretion according to defined criteria or guided by defined considerations. No grounds for the granting of permission were expressed in any statutory instrument. The Customs Regulations existed for the purpose of enabling the executive to pursue economic policies that it considered conducive to the welfare of the Commonwealth.[56]

In *Ansett Transport Industries (Operations) Pty Ltd* v *Commonwealth*[57] the High Court reviewed a decision taken by the Secretary of the Department of Transport (successor to the Director-General of Civil Aviation) allowing the importation of aircraft.

Mason J concluded that, apart from the judgment of Windeyer J in the *Ipec-Air* case, the authorities gave no support to the notion that a Minister could, without statutory authority, direct an officer in whom a statutory discretion is reposed how he should exercise that discretion.[58] Mason J was unable to accept the view taken by Windeyer J.[59]

Gibbs J (as he then was) on the other hand, indicated that it would not be wrong for the departmental head, in exercising his discretion under the Customs Regulations, to give weight, and indeed conclusive weight, to the policy of the government.[60]

Aicken J said that government policy must in every case be a matter for his serious consideration and in many matters of policy it might be the duty of the departmental head to act in accordance with the policy of the government of the day.[61]

Barwick CJ and Murphy J, departing most clearly from traditional judicial opinion, indicated that in their view the head of the department was bound to carry out the communicated policy of the government in deciding whether or not to grant his consent to the importation of goods. Barwick CJ said:

> The vesting of a discretion in an official in an area such as the control of entry into Australia of goods or persons does not, in my opinion, give him a power to ignore or to depart from government policy in the exercise of this discretion in relation to such entry.[62]

Following these decisions it may be said that, in certain circumstances, an officer of a department may be obliged to comply with lawful government policy or ministerial directions in the exercise of his statutory powers even in the absence of a clear statutory provision imposing an obligation to obey policy directives. Where the statute does not indicate the considerations which are relevant for the exercise of the power and where the enactment is intended to be a vehicle for executive policies on economic matters, an officer may be obliged to follow ministerial directions,

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[56] *Ibid* 204.
[57] (1977) 139 CLR 54.
[58] *Ibid* 82. See also E Campbell, "Ministers, Public Servants and the Executive Branch" in G Evans (ed) *Labor and the Constitution 1972–1975* (1977) 136, 147-150.
[59] (1977) 139 CLR 54, 82-83.
[60] *Ibid* 62.
[61] *Ibid* 115-116.
[62] *Ibid* 61-62.

provided the directions are not based on considerations irrelevant to the exercise of the power.

Murphy J, however, approached the problem in much broader terms, and it is uncertain to what extent his approach will be followed by the High Court in the future. He said:

> Under s 64 of the Constitution, the Minister is appointed to administer the Department. The system of responsible government which is reflected in ss.61 and 64 of the Constitution contemplates (if it does not require) that executive powers and discretions of those in the departments of the executive government be exercised in accordance with the directions and policy of the Minister. Unless the language of legislation (including delegated legislation) is unambiguously to the contrary, it should be interpreted consistently with the concept of responsible government. It would be inconsistent with that concept for the secretary or any officer of a department to exercise such a power or discretion contrary to the Minister's directions or policy (provided of course these are lawful). It is not for the officer to distinguish between "government policy" and the Minister's policy. The duty of those in a department is to carry out the lawful directions and policy of their Minister. It is the Minister who is responsible to the government and the parliament for the directions and policy.[63]

This approach clearly conflicts with the traditional attitude that a decision-maker designated by statute as the recipient of a discretion must exercise that discretion free from the coercion and control of others. In the judgment of Murphy J, a decision-maker who is an officer in a government department has a duty to follow the lawful directions and policy of the Minister unless the legislation clearly expresses a contrary intention.

It has been suggested that the approach taken by Murphy J will be followed by the High Court in future because it conforms with practical realities.[64]

Kirby J suggests that:

> Respect for the conventions of responsible government, the desire for normal career survival, if not advancement, and knowledge that in the end a government can usually get its way, ensures compliance by most public servants with clearly stated and lawful ministerial policy. Often, of course, the officials have themselves taken an important part in the formulation of that policy. But even where they have not and even where they personally disagree with it and even where they may have, in form, an independent statutory discretion, the political reality that ought not to be ignored is that such policy will usually be complied with. Furthermore, the balance of legal opinion in Australia would seem to suggest that this is how it ought to be.[65]

If the approach suggested by Murphy J is adopted by the High Court in the future, what will be the position of the AAT with respect to the review of government policy applied by the recipient of an "independent" statutory discretion?

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[63] *Ibid* 87.

[64] See Pearce, *supra* n 7, 214; John Goldring & Roger Wettenhall, "Three Perspectives on the Responsibility of Statutory Authorities" in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) 136, 141; M D Kirby, "Administrative Review: Beyond the Frontier Marked 'Policy-Lawyers Keep Out' " (1981) 12 FL Rev 121.

[65] Kirby, *supra* n 64, 148.

One recent writer[66] has gone so far as to suggest that our system of responsible government reflected in Chapter II of the Australian Constitution may constitutionally require the Tribunal to give "the same weight, as the original decision-maker is required to give, to the decisions of cabinet or the policy of the government".[67]

However, it is suggested that although s 64 of the Constitution entrenches the Westminster convention that Ministers of state should be members of Parliament and although its purpose is to give effect indirectly to the principle of responsible government, it does not prevent Parliament from conferring independent powers on departmental officers and bodies created outside the department of state. To construe s 64 otherwise would:

> run contrary to the fundamental principle that the Parliament is the supreme legislative organ of government and that the executive branch is subservient to it in all matters save the exercise of the specific powers which the Constitution assigns to the Queen or her representative.[68]

In my opinion the Tribunal will not be obliged to follow government policy applied by an original decision-maker who is the recipient of an "independent" discretion. The primary purpose of s 43(1) of the AAT Act is to confer on the Tribunal all the powers and discretions of the original decision-maker for the purpose of undertaking a full review of the decision on the merits. As Brennan J has pointed out, a review of the merits will usually include not only a review of the facts, but also the decision-maker's entire process of reasoning and evaluation of relevant matters. This will necessarily include the review of any policy applied in reaching the particular decision,[69] unless there is a clear statutory intention that certain policies should be followed.

The membership and ancillary powers of the Tribunal indicate that the Tribunal is not part of the hierarchy of a department of state. It is established as an independent statutory Tribunal which is not "linked into the chain of responsibility from Minister to government to parliament".[70] The Tribunal's statutory independence from the political and administrative structure envisaged by ss 61 and 64 of the Australian Constitution is reflected in the Tribunal's freedom to review ministerial policy in deportation cases, and to depart from such policy if, in the Tribunal's opinion, its application would lead to injustice in the individual case.[71]

A further example of the Tribunal's independence from the executive may be found in *Re The Hospital Contribution Fund of Australia and Minister for Health (No 1)*.[72] Under the National Health Act 1953 (Cth), alterations to the rules of a registered health fund organisation must be approved by the Minister for Health.[73] In 1977, shortly before the general federal elections[74] the Hospitals Contribution Fund of Australia (HCF)

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[66] E Willheim, "Commentaries" (1981) 12 FL Rev 62.
[67] *Ibid* 64. See also J Goldring, "Responsible Government and the Administrative Appeals Tribunal" (1982) 13 FL Rev 90.
[68] E Campbell, "Ministers and Permanent Heads" Unpublished Paper para 18.
[69] *Re Becker* (1977) 1 ALD 158, 162; *Drake's* case (1979) 24 ALR 577, 602.
[70] *Re Drake (No 2)* (1979) 2 ALD 634, 644.
[71] *Ibid* 642, 645.
[72] (1977) 1 ALD 209.
[73] S 78(2) National Health Act 1953 (Cth).
[74] Held on 10 December 1977.

altered its rules to increase contributions payable by members. The Minister, with the backing of Cabinet, refused to approve the increases on the ground that his approval in the circumstances would be contrary to government policy. HCF appealed against the Minister's decision to the AAT.

Although the Tribunal was able to reach its decision in the case without challenging government policy and without referring to the political circumstances surrounding the dispute, the Tribunal revealed its independence by setting aside the Minister's decision and approving an increase in contributions.

CONCLUSIONS

It is far from clear in what circumstances the AAT's power independently to review policy will be affected by constraints placed upon the original decision-maker. As we have seen, it may be sufficient that the statutory provision conferring the discretion upon the original decision-maker expressly requires the discretion to be exercised according to government policy. This follows from the language of s 43(1) which defines the Tribunal's powers of review by reference to the statutory power conferred on the original decision-maker. Whether the Tribunal's power to exercise "all the powers and discretions conferred by any enactment on the decision-maker", will operate to compel the Tribunal to apply government policy when it is issued pursuant to a general statutory power to give directions is more open to doubt. Furthermore, it is unlikely that an obligation to follow government policy imposed on departmental officers by the operation of ss 61 and 64 of the Constitution will be transferred to the Tribunal by virtue of s 43(1) of the AAT Act, even though this means that the Tribunal may exercise a greater freedom from government policy than the decision-maker whose decision is under review.

The Tribunal's role in improving the quality of administrative decision-making may well be undermined if the Tribunal's powers of review are more extensive than the powers of decision exercisable at first instance. Certainly the scope of the Tribunal's policy-review powers should be considered more carefully by the legislature. In view of the uncertainty in this area it is suggested that an intention to restrict the policy-review powers of the Tribunal should be plainly expressed by statutory enactment. If it is the legislature's intention that the Tribunal follow government policy, the Tribunal should be expressly required to do so by the statutory provision conferring the right of appeal. An example of statutory directions of this kind may be found in ss 11A and 24A of the Dairy Industry Stabilization Act 1977 (Cth).