

Core Principles of Merits Review

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There is relatively little public discussion of merits review principles when compared with analyses of the principles of judicial review.² The negative epithets associated with merits review may have discouraged academic commentators and others from considering it. In proceedings for judicial review, there are few insults worse than accusing the court below of having engaged in merits review. Phrases which have been used to convey this include that the court has “trespass[ed] into the forbidden field of review on the merits”³ or that there has been a “slide into impermissible merit review”.⁴ Trespassing into a forbidden field has connotations of original sin, and the thought of a court sliding into the impermissible is almost as horrific. No wonder commentators have stayed away.

It may also be that there is a perception that merits review is all about facts, and what, after all, can usefully be said about facts? However, another way of looking at it is that merits review concerns the review of both the factual basis and the lawfulness of a decision, and is thus more challenging than judicial review, which is limited to the latter.

There are good reasons to discuss and debate the principles of merits review, not the least being that it is a major component, if not the major component, of our system of administrative justice. Merits review is the legislature’s chosen means of resolving a large number of administrative grievances. In 2011-2012, 5,682 applications were made to the Administrative Appeals Tribunal (“AAT”),⁵ 14,088 applications were made to the Migration Review Tribunal (“MRT”), 3,205 to the Refugee Review Tribunal (“RRT”)⁶ and 12,154 were made to the Social Security Appeals Tribunal (“SSAT”).⁷ Many more merits review applications were made in the State and Territories, not to mention the merits review which occurs when decisions are reviewed by agencies internally. By contrast, the Federal Magistrates Court had 15 filings in Administrative Law and 1,464 filings in Migration⁸ and the Federal Court had 245 migration appeals and related matters.⁹ The sheer volume of merits review applications indicates that more attention needs to be paid to the governing principles.

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² A significant exception to this is the work of Peter Cane: see, in particular, *Administrative Tribunals and Adjudication* (Portland: Hart Publishing, 2009). In the administrative sphere, Forgie DP has expressed the view that the area of merits review “is no less worthy of attention than the lawfulness of an administrative decision with which [courts] are concerned”: *Confidential and Commissioner of Taxation* [2013] AATA 112 at [203].

³ *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 577.

⁴ *Swift v SAS Trustee Corporation* [2010] NSWCA 182, Basten JA at [45]/

⁵ AAT Annual Report 2011-2012, p 169.

⁶ Migration Review Tribunal – Refugee Review Tribunal Annual Report 2011–12, p 20.

⁷ Social Security Appeals Tribunal 2011-12 Annual Report, p 1.

⁸ Federal Magistrates Court Annual Report, 2011-12, p 4.

⁹ Federal Court Annual Report, 2011-12, p 128. It is difficult, from the Federal Court’s Annual Report, to determine the total number of judicial review applications made to it.

Merits review became entrenched in the Australian legal landscape following the Commonwealth Administrative Review Committee (“Kerr Committee”) Report in 1971,¹⁰ with the creation of the Administrative Appeals Tribunal or AAT, which commenced operations on 1 July 1976.¹¹ Since that time, Australian merits review tribunals have proliferated. Commonwealth tribunals include the AAT, the RRT, the MRT, the SSAT, the Veterans’ Review Board and the Australian Competition Tribunal. Victoria, Western Australia, the Australian Capital Territory and Queensland all have “super tribunals,” which are amalgamations of a number of smaller tribunals.¹² In New South Wales, the jurisdiction of the Administrative Decisions Tribunal or ADT, itself an amalgamation of tribunals, will be transferred with that of twenty-two other tribunals to the New South Wales Civil and Administrative Tribunal or “NCAT,” as of 1 January 2014.¹³ A bill has also been introduced into the South Australian Parliament to create a South Australian Civil and Administrative Tribunal.¹⁴ All of these tribunals have, or will have, a merits review division or stream.

Merits review thus plays a significant role in the system of administrative justice favoured in Australian jurisdictions.

So what is merits review?

Merits review allows all aspects of an administrative decision to be reviewed, including the findings of facts and the exercise of any discretions conferred upon the decision-maker.¹⁵ The merits review tribunal, or other reviewer, considers both the lawfulness of the administrative decision it is reviewing and the facts going to the exercise of discretion. A merits review tribunal generally has wide powers to set aside the original decision and substitute a new decision of its own.

Standing in the Shoes of the Decision-maker

Tribunals are typically authorised to “exercise all the powers and discretions that are conferred ... on the person who made the decision.”¹⁶ The most common metaphor to describe the

¹⁰ Merits review had existed in Australia before this time in tribunals including the Commonwealth Employees Compensation Tribunal; the War Pensions Entitlement and Assessment Appeals Tribunals; and the Taxation Boards of Review: see Administrative Review Council, “Overview of the Commonwealth System of Administrative Review” at <http://www.arc.gov.au/Aboutus/Pages/OverviewoftheCommonwealthSystemofAdminReview.aspx> .

¹¹ See <http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm> .

¹² The Victorian Civil and Administrative Tribunal or “VCAT” established under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic); the Western Australian State Administrative Tribunal (“SAT”) established under the *State Administrative Tribunal Act 2004* (WA); the ACT Civil and Administrative Tribunal or “ACAT” established under the *ACT Civil and Administrative Tribunal Act 2008* (ACT); and the Queensland Civil and Administrative Tribunal or “QCAT” established under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

¹³ *Civil and Administrative Tribunal Act 2013* (NSW), s 7.

¹⁴ *South Australian Civil and Administrative Tribunal Bill 2013*; For second reading speech, see South Australian Hansard, House of Assembly, 24 July 2013, p 6580.

¹⁵ See Dr David Bennett AO QC, “Balancing Judicial Review and Merits Review,” (2000) 53 Admin Review 3.

¹⁶ *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1). The NSW Administrative Decisions Tribunal (“ADT”) “may exercise all of the functions that are conferred or imposed by any relevant enactment on the administrator who made the decision” (*Administrative Decisions Tribunal Act 1997* (NSW), s 63(2)), the Victorian Civil and Administrative Tribunal (“VCAT”) “has all the functions of the decision-maker” (*Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 51(1)), the State Administrative Tribunal of Western Australia has “functions and

functions of a tribunal engaging in merits review is that it stands in the shoes of the decision-maker.¹⁷ This metaphor conveys the notion that the tribunal may re-make a decision, as if it were the original decision-maker. It does not have to find legal error first. It should be noted that the metaphor may also obscure some of the differences between the positions of the tribunal and that of the administrator, including that the primary focus of the tribunal is review (not original decision-making), that the applicable processes of decision-making are different for an agency and a tribunal and that each has different institutional allegiances.

Correct and/or preferable decision

As the first generalist Australian merits review tribunal, the AAT has provided a model for the decision-making of tribunals created subsequently. There is little guidance in the *Administrative Appeals Tribunal Act 1975* (Cth) as to how the AAT is to review decisions, and what principles it is to follow. The Full Federal Court considered this question early in the AAT's history, in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, where Bowen CJ and Deane J said at 68:

The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

The "correct or preferable" test refers to two situations: one where only one decision is lawful and therefore "correct", and another where various decisions would be lawful and the Tribunal must choose the "preferable" one.¹⁸ Despite the use of the alternative ("or"), the Tribunal is clearly not entitled to make an incorrect decision, even if this would be preferable. Perhaps due to this linguistic ambiguity, the NSW legislature empowered the ADT to make "correct *and* preferable" decisions.¹⁹

The reviewing tribunal is also required to make what is the correct and/or preferable decision as at the time of the review. This means that circumstances may have changed in an applicant's favour (or to the applicant's detriment) since the original decision was made, and the tribunal must generally make its decision in the context of those new circumstances.

A merits review tribunal typically has powers to affirm a decision, vary it, set it aside and make a substitute decision, or set it aside and remit it to the original decision-maker for

discretions corresponding to those exercisable by the decision-maker in making the reviewable decision," (*State Administrative Tribunal Act 2004* (WA), s 29(1)), the ACT Civil and Administrative Tribunal "may exercise any function given by an Act to the entity for making the decision" (*ACT Civil and Administrative Tribunal Act 2008* (ACT), s 68(2)) and the Queensland Civil And Administrative Tribunal ("QCAT") "has all the functions of the decision-maker for the reviewable decision being reviewed" (*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 19(c)).

¹⁷ In *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 671, an appeal to the Federal Court from the AAT, Smithers J said that, "in reviewing a decision the Tribunal is to be considered as being in the shoes of the person whose decision is in question".

¹⁸ See Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (South Melbourne: Oxford University Press, 2008), p 237 and *Tascone and Australian Community Pharmacy Authority and Katsavos and Katsavos and Kouzas (Parties Joined)* [2011] AATA 724, Forgie DP at [121].

¹⁹ *Administrative Decisions Tribunal Act 1997* (NSW), s 63(1).

reconsideration.²⁰ The ability to make a substitute decision is one of the defining characteristics of merits review.

Bodies engaging in merits review

Merits review is typically carried out by administrative tribunals (the focus of this paper), but tribunals do not exclusively engage in merits review, and merits review functions are also given to other bodies. An internal review allows merits review of an agency's decision by a different person within the agency. There may then be a power for a tribunal to conduct a full merits review of the original decision. However, sometimes a tribunal's powers to conduct a merits review will be limited. For example, in 2008 a limited merits review (LMR) regime was introduced into the National Electricity Law (NEL) and the National Gas Law, whereby an applicant's right of review was limited in that leave to seek review was required, the grounds of review upon which an applicant could seek review were narrowed, and the evidence the Australian Competition Tribunal could consider was limited.²¹

Tribunals which have appeal panels tend to restrict merits review at this higher level. For example, in the Administrative Decisions Tribunal, an appeal may be made to the Appeal Panel on a question of law and, only with the Appeal Panel's leave, may be extended to the merits.²² The Appeal Panel functions more like a court than the tribunal at first instance.

State courts sometimes exercise merits review functions. The NSW Land and Environment Court engages in merits review in some "classes" of appeals, where it may exercise "all the functions and discretions" of the decision-maker.²³ At federal level, of course, this would be unconstitutional, due to the constitutionally-entrenched doctrine of separation of powers.

Distinction between merits review and judicial review

There is, at least in theory, a very clear distinction between merits review and judicial review. Judicial review is only concerned with the lawfulness of the challenged decision. A court engaging in judicial review will only grant relief if that decision is outside the legal limits of the exercise of the relevant power. Relief in judicial review proceedings is generally limited to setting aside the decision and remitting the matter to the original decision-maker for reconsideration according to law. It may also include declaratory relief. The court, will not, however, substitute a decision of its own for the administrator's decision.

In judicial review proceedings, the applicant must be able to point to a legal error which fits a recognised category or ground, and such categories may be different according to whether the judicial review application is heard in the court's inherent jurisdiction, or pursuant to a judicial review statute such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or ADJR Act.

²⁰ See, for example, *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1); *Administrative Decisions Tribunal Act 1997* (NSW), s 63(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 51(2).

²¹ See Professor George Yarrow, The Hon Michael Egan and Dr John Tamblyn "Review of the Limited Merits Review Regime: Interim Stage One Report," 30 April 2012; *National Electricity (NSW) Law No 20a* (NSW), Div 3A of Pt 6; *National Gas (New South Wales) Act 2008* (NSW), s 7 and Part 5 of National Gas Law in Schedule to *National Gas (South Australia) Act 2008* (SA).

²² *Administrative Decisions Tribunal Act 1997* (NSW), s 113(2).

²³ *Land and Environment Court Act 1979* (NSW), s 39(2).

Legal errors include taking into account irrelevant (or forbidden) considerations, or failing to take into account relevant (mandatory) considerations, a denial of natural justice and *Wednesbury* unreasonableness. However, a court engaging in judicial review will generally not disturb factual findings, the assessment of credibility, the attribution of weight to pieces of evidence or the exercise of discretion, since this would be to intrude into the “merits” of the decision.²⁴

The classic statement of the court’s functions is that of Brennan J in *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-36:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

For a court, the “relevant question is about the [decision-maker’s] processes, not its actual decision.”²⁵ Unlike merits review tribunals, courts are not entitled to re-visit the substance of the challenged decision.

Notwithstanding the apparently distinct functions of courts and merits review tribunals, the boundaries between the two are not always as clear as they may at first seem. As Peter Cane argues, “the distinction between legality and merits can be, at most, one of degree, not one of kind.”²⁶ The main difference between courts and review tribunals, and between legality and merits, is in their respective treatment of facts. Some extreme errors of fact-finding are errors of law, as in the *Wednesbury* unreasonableness, irrationality and no evidence grounds. Gleeson CJ and McHugh J’s comment in *Eshetu* that the characterisation of somebody’s reasoning as illogical or unreasonable may merely be an emphatic way of expressing disagreement with it,²⁷ may be applied to legal as well as non-legal errors of reasoning. In other words, there has historically been a significant amount of judicial disagreement as to whether a decision is unreasonable in the *Wednesbury* sense, or irrational to the point of being unlawful,²⁸ and it is hard to escape the conclusion that this reflects subjective judicial differences in assessing the merits of the relevant decisions.

That, however, is a topic for another day.

²⁴ Dr David Bennett AO QC, “Balancing Judicial Review and Merits Review,” (2000) 53 Admin Review 3 at 8.

²⁵ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592, Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ at 598 [25].

²⁶ Peter Cane, *Administrative Tribunals and Adjudication* (Portland: Hart Publishing, 2009), p 177.

²⁷ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40].

²⁸ See, for example, *Minister for Immigration and Citizenship v SZMDS* (2010) 266 ALR 367, where the High Court split 3:2 as to whether the decision in question was irrational, such that the tribunal which made it fell into jurisdictional error.

Inquisitorial function

One of the factors characteristic of merits review is that it is non-adversarial. This is in contrast to the adversarial approach required of courts. As former Chief Justice Mason has said extra-judicially, “[w]ithin the adversarial system, ... the function of the courts is not to pursue the truth but to decide on the cases presented by the parties.”²⁹ Merits review tribunals, although generally hampered by resources in this pursuit, may inquire more widely than courts, and may adopt a function closer to that of pursuing the truth than that which a court may adopt.

Brennan J described AAT review as being, in substance, inquisitorial, in *Bushell v Repatriation Commission* (1992) 175 CLR 408.³⁰ The view that proceedings of Commonwealth tribunals are inquisitorial has been reiterated in more recent High Court proceedings in relation to the RRT.³¹ It follows that there is no joinder of issue in the proceedings³² and the notion of onus of proof has no role to play.³³ However, the court has explained that, although the proceedings are inquisitorial, “[a]s applied to the tribunal ‘inquisitorial’ does not carry [the] full ordinary meaning” of “having or exercising the function of an inquisitor”, that is to say “one whose official duty it is to inquire, examine or investigate”. Rather, the term “merely delimits the nature of the tribunal’s functions”.³⁴

Proceedings of the NSW Administrative Decisions Tribunal (“ADT”) are also inquisitorial, at least in a functional sense. Its Appeal Panel has noted, in the merits review context, that the Tribunal is required to reach the “correct and preferable decision ... by a process of inquiry” and that it “is not engaged in the resolution of an adversarial contest of the kind typical of civil litigation.”³⁵ The consequences of this include that the Tribunal is not bound to accept concessions emanating from the bar table,³⁶ perhaps more so where the concession is given by counsel representing an applicant. Further, there is no need to file pleadings, such as a statement of claim or a defence.³⁷ And, because merits review proceedings are “directed to the quality of public administration,” it is appropriate for the ADT to go further in assisting an unrepresented litigant than it would typically do in adversarial proceedings.³⁸ The Appeal Panel has warned, in relation to merits review proceedings, that “[s]ome care must be shown in assimilating to the

²⁹ “The Future of Adversarial Justice”, paper presented to the 17th AIJA Annual Conference, Adelaide, 7 August 1999; cited in *Tascone and Australian Community Pharmacy Authority and Katsavos and Katsavos and Kouzas (Parties Joined)* [2011] AATA 724 at [121].

³⁰ *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408 at 424-425.

³¹ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 ; 231 ALR 592 ; 93 ALD 300 ; [2006] HCA 63 at [40]; *Minister for Immigration and Citizenship v SZKTI* (2009) 258 ALR 434 ; [2009] HCA 30 at [27], footnote 19. In *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ acknowledged that the RRT has an inquisitorial function in one sense, but said that it had no duty to make inquiries (at 430 [1] and 432 [10]).

³² *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 ; 231 ALR 592 ; 93 ALD 300 ; [2006] HCA 63 at [40].

³³ *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408 at 424-425; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 ; 231 ALR 592 ; 93 ALD 300 ; [2006] HCA 63 at [40].

³⁴ *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at 434 [18], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

³⁵ *University of New South Wales v PC* [2008] NSWADTAP 26 at [50]. See also *WL v Randwick City Council* [2009] NSWADTAP 10 at [24].

³⁶ *University of New South Wales v PC* [2008] NSWADTAP 26 at [49]-[51].

³⁷ *WL v Randwick City Council* [2009] NSWADTAP 10 at [24].

³⁸ *GR v Director-General, Department of Housing* [2004] NSWADTAP 26 at [34].

review and inquiry role of the Tribunal standards that are routinely applied in adversarial litigation.”³⁹

Although Australian merits review tribunals have inquisitorial functions, they have embraced the “inquisitorial mode of operation” with some hesitancy.⁴⁰ Many merits review proceedings appear to be run much like adversarial proceedings. Forgie DP of the AAT has suggested that the AAT’s proceedings may often appear to be indistinguishable from those of a court,⁴¹ even though their functions are significantly different. This encourages an adversarial approach by agencies and applicants alike. There is therefore something of a disconnect between the function of merits review tribunals, and the procedures they typically adopt.

Respondent’s obligation to the Tribunal

The nature of merits review proceedings gives rise to fundamentally different relationships between the parties, and between each party and the tribunal, from those which pertain in adversarial proceedings. As a government agency, the respondent’s interests lie in the correct and preferable application of the relevant legislation and policy. In other words, the respondent’s interests are, at least theoretically, aligned with those of the tribunal. And, although this may come as a surprise to most applicants, they may even be consistent with those of the applicant.

The Australian Law Reform Commission, in its Report “Managing Justice: A Review of the Federal Civil Justice System”, published in 2000, commented:

In review tribunal proceedings there is no necessary conflict between the interests of the applicant and of the government agency. Tribunals and other administrative decision making processes are not intended to identify the winner from two competing parties. The public interest ‘wins’ just as much as the successful applicant because correct or preferable decision making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in the particular area. The values underpinning administrative review are said to encompass the desire for a review system which promotes lawfulness, fairness, openness, participation and rationality. The provision of administrative review can be seen to fit neatly into a model of pluralist and participatory democracy.⁴²

The respondent’s role in merits review proceedings has been formulated by courts and tribunals in accordance with such values.

The respondent’s obligation is primarily to assist the tribunal in its decision-making. An agency often has a statutory obligation to lodge with a tribunal documents which are relevant to the

³⁹ *Director General, Department of Education & Training v Mullett & anor* [2002] NSWADTAP 13 at [75].

⁴⁰ Mark Smyth, “Inquisitorial Adjudication: The Duty to Inquire in Merits Tribunals,” 34 *Melbourne University Law Review* 230 at 238.

⁴¹ *Tascone and Australian Community Pharmacy Authority and Katsavos and Katsavos and Kouzas (Parties Joined)* [2011] AATA 724 at [120].

⁴² Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89), Australian Government Publishing Service, Canberra, 2000, p 758 [9.11].

review, and sometimes a statement of reasons as well.⁴³ The model litigant obligations in the Commonwealth's "Legal Services Directions" require an agency involved in merits review proceedings to "use its best endeavours to assist the tribunal to make its decision."⁴⁴ Further, in the AAT, the decision-maker has a statutory obligation to "use his or her best endeavours to assist the Tribunal".⁴⁵

The New South Wales model litigant policy does not contain any obligations specific to the merits review context, but requires agencies to "act with complete propriety, fairly and in accordance with the highest professional standards" in all proceedings.⁴⁶ Arguably, this would include assisting a tribunal in the way contemplated by the Commonwealth policy.

The ADT has indicated that respondents have a duty to produce to it all relevant material. The Tribunal is required by its statute to "ensure insofar as it is reasonably possible that all relevant material is placed before it in relation to the conduct in issue".⁴⁷ It is therefore to be expected that an agency, in its internal review report, will provide "full particulars of the conduct in issue".⁴⁸ However, if the Tribunal does not have all relevant material before it, the solution "would normally be achieved by the agency producing all relevant evidence".⁴⁹

In privacy proceedings, where the ADT reviews "conduct" rather than a decision, its Appeal Panel considers that an agency has an obligation to ensure that it carries out a thorough internal review, because the applicant (and, if the decision is externally reviewed, the tribunal) is not in a position to know what went on inside the agency:

A complainant to a public sector agency of breach of privacy standards by an officer employed by the agency is in a difficult position in getting precise evidence of what might have occurred. It is therefore important that the internal review undertaken by the agency in response to the complaint be thorough. This includes obtaining a full statement as to what occurred from any officer with direct knowledge.⁵⁰

The Appeal Panel has also indicated that, in "administrative review proceedings the Tribunal has a wider authority... than might be apt to civil (or professional disciplinary) proceedings in directing the provision of information by a respondent agency to assist the resolution of a matter".⁵¹

⁴³ See for example, *Administrative Appeals Tribunal Act 1975* (Cth), s 37(1); *Administrative Decisions Tribunal Act 1997* (NSW), s 58; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 49(1).

⁴⁴ *Legal Services Directions 2005* (Cth), Appendix B, cl 4.

⁴⁵ *Administrative Appeals Tribunal Act 1975* (Cth), s 33(1AA). This provision was introduced by the *Administrative Appeals Tribunal Amendment Act 2005* (Cth), and it was noted in the Explanatory Memorandum to the *Administrative Appeals Tribunal Amendment Bill 2004*, p. 28, that this was consistent with the respondent's obligations as a model litigant.

⁴⁶ NSW Model Litigant Policy for Civil Litigation, cl 1.2 (applies to litigation before tribunals) and 3.1, available at <http://www.lsc.lawlink.nsw.gov.au/agdbasev7wr/lsc/documents/pdf/cabinetapp-mlp.pdf>.

⁴⁷ *GR v Director-General, Department of Housing* [2004] NSWADTAP 26 at [37]; *Administrative Decisions Tribunal Act 1997* (NSW), s 73(5).

⁴⁸ *GR v Director-General, Department of Housing* [2004] NSWADTAP 26 at [37].

⁴⁹ *GR v Director-General, Department of Housing* [2004] NSWADTAP 26 at [37].

⁵⁰ *WL v Randwick City Council* [2007] NSWADTAP 58 at [11].

⁵¹ *Kiernan v Commissioner of Police, New South Wales Police* [2007] NSWADTAP 27 at [31].

The Victorian Court of Appeal has held that the entitlement to have an administrative decision properly reviewed carries “a corresponding obligation on the part of ... the primary administrative decision-making body, to assist the tribunal in making the review”.⁵² The decision-maker may support its decision before the tribunal, but it is “imperative that its reasons for its decision, and the material that it considered in making it, should be squarely and unequivocally revealed to the tribunal”.⁵³

Accordingly, it is clear that the respondent’s role in review proceedings is to assist the tribunal, including by providing it with all relevant information.

Application of government policy

A controversial question which was encountered early in the AAT’s history was whether the Tribunal was entitled to apply government policy and, if so, to what extent. The Kerr Committee, whose 1971 report led to the creation of the AAT, had anticipated that government policy could be explained to the Tribunal by evidence and taken into account. It also suggested that if the Tribunal formed a view that the policy was operating in an oppressive or unjust manner, it could transmit this opinion to the appropriate Minister.⁵⁴ When the AAT was created, these suggestions were not taken up in the legislation, and it was left to the tribunal and the courts to determine whether the AAT was required and/or entitled to consider government policy in its decision-making and, if so, to what extent.

In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589, the Federal Court (Bowen CJ and Deane J) held that it was part of the tribunal’s function to adjudicate upon the merits of the challenged decision and the propriety of a lawful policy. Their Honours held that the Tribunal was entitled to treat a lawful government policy “as a relevant factor in the determination of an application for review” but that it was not “entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be”.⁵⁵ Having found that the Tribunal failed to make an independent assessment of the propriety of the relevant policy and an independent determination of the merits,⁵⁶ the Court remitted the matter to the AAT for reconsideration.

The question was again considered by Brennan J, the then President of the AAT, when the matter was remitted to it.⁵⁷ The policy in question was a Ministerial policy concerning the deportation of aliens. Having identified the benefits of the Minister adopting a policy,

⁵² *Transport Accident Commission v Bausch* [1998] 4 VR 249, at 259-260.

⁵³ *Transport Accident Commission v Bausch* [1998] 4 VR 249, at 259-260.

⁵⁴ *Report of the Commonwealth Administrative Review Committee*, Australian Government Publishing Service, Canberra, 1971, p 89 [299]. This has been given effect in Queensland, to some extent, by s 24(3) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), which provides: “The tribunal may make, to the chief executive of the entity in which the reviewable decision was made, written recommendations about the policies, practices and procedures applying to reviewable decisions of the same kind.”

⁵⁵ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 590.

⁵⁶ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

⁵⁷ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

particularly those of consistent decision-making, his Honour went on to consider whether the AAT should apply the policy (at 642-643):

It is one thing for the Minister to apply his own policy in deciding cases; it is another thing for the Tribunal to apply it. ...

If the Tribunal applies ministerial policy, it is because of the assistance which the policy can furnish in arriving at the preferable decision in the circumstances of the case as they appear to the Tribunal. One of the factors to be considered in arriving at the preferable decision in a particular case is its consistency with other decisions in comparable cases, and one of the most useful aids in achieving consistency is a guiding policy.

The considerations that policy-making is a political function, and that consistency in decision-making is desirable, warranted, in Brennan J's view, "the Tribunal's adoption of a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary" (at 645).

It has now become accepted AAT practice to apply lawful government policy unless there are cogent reasons to the contrary, for example that the application of a policy would lead to an injustice in a particular case.⁵⁸

A distinction is also made between "high" and "low" policies; Ministerial policy being "high" and agency practice being "low". In the 1980s, the AAT developed a view that "high policies" are "to be given great weight"⁵⁹ whereas departmental policies are relevant only as part of the "background of facts".⁶⁰ The AAT held that it should "adopt a guarded approach to" departmental guidelines, lest they be allowed to supplant the legislation itself.⁶¹ A similar approach has been adopted by VCAT, a tribunal member expressing the view that an "internal policy adopted by the respondent is of no relevance, or of such little relevance that I certainly would not exercise my discretion in favour of the applicant".⁶² The distinction between "high" and "low" policy has been criticised, but still appears to be applied by decision-makers.⁶³

At State level, some statutes provide for the circumstances in which government policy is to be taken into account by a tribunal.⁶⁴ This may be by way of the provision of Ministerial certificates by the respondent, stating what the relevant policy is.

⁵⁸ See, for example, *Teekay Shipping (Aust) Pty Ltd v Australian Maritime Safety Authority* [2012] AATA 519 at [84]; *Re Sahin and Minister for Immigration and Citizenship* (2012) 129 ALD 345 at 347 [19]; *Wang v Migration Agents Registration Authority* [2012] AATA 463 at [16].

⁵⁹ *Re Aston and Secretary, Department of Primary Industry* (1985) 8 ALD 366, at 380.

⁶⁰ *Re Lumsden and Secretary, Department of Social Security* (1986) 10 ALN N225 at 227.

⁶¹ *Re MT and Secretary, Department of Social Security* (1986) 4 AAR 295; 9 ALD 146 at ALD 150.

⁶² *Filonis v Transport Accident Commission* [2003] VCAT 2038

⁶³ See Andrew Edgar, "Tribunals and administrative policies: Does the high or low policy distinction help?" (2009) 16 AJ Admin L 143.

⁶⁴ Section 64(1) of the *Administrative Decisions Tribunal Act 1997* (NSW) provides: "In determining an application for a review of a reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case." Section 57 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides for a Minister to certify that a statement of policy applied to the decision, and the Tribunal is then required to apply that policy in certain circumstances. A similar system exists in Western Australia (see *State Administrative Tribunal Act 2004* (WA), s 28)

Procedural fairness

Procedural fairness “lies at the heart of administrative justice”⁶⁵ and merits tribunals are bound by the principles of procedural fairness, just like the administrators whose decisions they review and the courts which in turn review their decisions.⁶⁶ The Federal Court has likened the duty of the AAT in this respect to that of a court.⁶⁷ It is sometimes specifically provided, in legislation establishing a tribunal, that the tribunal is required to comply with the rules of procedural fairness, and there is generally a provision requiring the tribunal to ensure that each party is given a reasonable opportunity to present the party’s case.⁶⁸

Procedural fairness is consistent with the objectives of merits review. In *Australian Timeshare and Holiday Ownership Council Limited and Australian Securities and Investments Commission* [2008] AATA 62, Forgie DP said at [246]-[247]:

There is a question regarding the extent to which merits review tribunals are freed from the obligations applicable to the courts. There are two obligations from which it would seem that they are not freed. One is to ensure that the rules of procedural fairness are observed. In fact, it is difficult to see how a merits review tribunal can be fair, just, economical, informal and quick without adhering to the rules of procedural fairness for:

“... adherence to the requirements of natural justice [or procedural fairness] will ultimately promote administrative efficiency because of the greater public satisfaction and the fewer grievances that will result from the higher quality of decision-making thereby produced.”

The other obligation imposed on a merits review tribunal is to ensure that the decision or outcome is correct in law and on the facts and, if discretionary, the preferable decision. (footnotes omitted)

Accordingly, unless the duty to comply with the rules of procedural fairness is modified by statute, tribunals must ensure that there is a fair hearing, and the tribunal must not be, or appear to be, biased.

In the area of migration review, Parliament has included exhaustive statements of the requirements of the natural justice hearing rule in the *Migration Act 1958* (Cth),⁶⁹ thereby modifying the common law requirements. However, as Justice Basten has noted of procedural fairness, “governments which have sought to limit its operation, have discovered from time to time that it has a curiously intractable quality”.⁷⁰ In 2010, the High Court held that the rules of procedural fairness applied to a non-statutory process of considering whether to grant visas to offshore detainees, where Independent Merits Reviewers (who were employees of a government

⁶⁵ *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 236 ALR 42, French J at 57 [76].

⁶⁶ See *Sullivan v Dept of Transport* (1978) 1 ALD 383, Deane J at 402, in relation to the AAT’s duty to “act judicially” and comply with the principles of procedural fairness.

⁶⁷ *Fletcher v Federal Commissioner of Taxation* (1988) 16 ALD 280 at 284.

⁶⁸ See, for example, *Administrative Decisions Tribunal Act 1997* (NSW), ss 70, 73(2) and (4) and *Administrative Appeals Tribunal Act 1975* (Cth), s 39(1).

⁶⁹ See, for example, *Migration Act 1958* (Cth), ss 357A, 422B.

⁷⁰ Justice John Basten, “Limits on Procedural Fairness”, AIAL Administrative Law Forum, Canberra, 2005 at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_basten300605.

contractor, not appointed pursuant to statute) undertook an assessment as to whether Australia owed protection obligations to the detainees.⁷¹ This was the case even though the Minister was not required to consider whether to exercise the power to grant a visa to the offshore detainees.

One issue which has arisen in a tribunal context is whether the rules of procedural fairness include a duty to inquire in certain circumstances. A duty to inquire arising in “strictly limited” circumstances was recognised in 1985 in *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 at 170, Wilcox J also noting that it was not the decision-maker’s duty to make the applicant’s case for him. When the question arose for consideration by the High Court in *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said that, although the RRT has an inquisitorial function in the sense that it may obtain information, this does not mean it has “a general duty to undertake its own inquiries in addition to information provided to it by the applicant and otherwise under the Act”.⁷² Their Honours concluded that it “is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law”.⁷³ However, “a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review” and thus a jurisdictional error.⁷⁴

The Federal Court indicated in 1999 that, because it conducts an inquisitorial review, the AAT “is required to determine the substantive issues raised by the material and evidence advanced before it and, in doing so, it is obliged not to limit its determination to the ‘case’ articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant”.⁷⁵ This is a different point from that considered in *SZIAI*, as it is not concerned with the Tribunal obtaining new evidence, but rather the Tribunal framing the case differently from how it has been framed by the parties.

The Tribunal is not, however, permitted to base its decision on an argument not raised at the hearing, unless the parties are given an opportunity to address it, as this would be a breach of the rules of procedural fairness.⁷⁶ Conversely, a tribunal’s failure to respond to a substantial, clearly articulated argument relying upon established facts constitutes a failure to accord natural justice.⁷⁷

The requirements of procedural fairness are flexible, and so may be different in tribunal proceedings than they would be in a court. In 1996, the Full Federal Court observed:

The authorities show that an obligation resting on an administrative decision-maker to observe the rules of natural justice does not require the inflexible application of a fixed body of rules; what it requires is fairness in all the circumstances of the particular case,

⁷¹ *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319.

⁷² *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 430-431 [1].

⁷³ *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 436 [24].

⁷⁴ *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 436 [25].

⁷⁵ *Grant v Repatriation Commission* [1999] FCA 1629 at [18].

⁷⁶ *Kioa v West* 19985) 62 ALR 321; and see D G Jarvis, “Procedural Fairness as it applies in the Administrative Appeals Tribunal,” (2007) 81 *Australian Law Review* 465.

⁷⁷ *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 77 ALJR 1088 ; [2003] HCA 26.

which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise...⁷⁸

Because of the flexibility of those rules, and the circumstance that fairness is to be considered in light of the relevant statutory requirements, it was “erroneous to equate the duty of an administrative decision-maker to comply with the rules of natural justice to follow curial procedures”.⁷⁹

More recently, in *SZBEL v Minister For Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160 [26], Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ noted that “the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires”. The opportunity to be heard ordinarily requires “the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.”⁸⁰ Where the Tribunal determines the review on issues not considered determinative by the delegate, it is obliged to bring those to the applicant’s attention. Thus, by identifying key aspects of the applicant’s evidence which the RRT said lacked credibility, and failing to put these to the applicant, the RRT failed to comply with the rules of procedural fairness.

Administrative justice

The concept of administrative justice may provide a rationale for the purpose and functions of review tribunals. While courts have “no jurisdiction simply to cure administrative injustice,”⁸¹ providing administrative justice may be said to be the *raison d’être* of merits review tribunals. The Kerr Committee’s proposals, including the proposal to establish what was to become the AAT, were “designed to achieve balance between justice to the individual and efficient administration”.⁸² Although the Committee did not use the term “administrative justice,” its reforms were clearly aimed at achieving something akin to that. The phrase “administrative justice” was used regularly by the AAT in cases in the early 1980s, went into abeyance for a while then re-emerged in decisions of the mid-2000s.⁸³ As Robin Creyke points out, there is a tension in the literature, and in court and tribunal decisions using the term, as to whether administrative justice should be focused upon individual interests or social justice.⁸⁴ Accordingly, the meaning of the term is somewhat uncertain.⁸⁵

The term may gain some meaning from the objects of statutes establishing tribunals, which frequently include that the tribunal will provide “a mechanism of review that is fair, just, economical, informal and quick,”⁸⁶ as well as from other provisions in the tribunal’s enabling

⁷⁸ *Boucher v Australian Securities Commission* (1996) 71 FCR 122, the Court at 128.

⁷⁹ *Boucher v Australian Securities Commission* (1996) 71 FCR 122, the Court at 128.

⁸⁰ *SZBEL v Minister For Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32].

⁸¹ *Attorney General (NSW) v Quin* (1990) 170 CLR 1, Brennan J at 35-36.

⁸² *Report of the Commonwealth Administrative Review Committee*, Australian Government Publishing Service, Canberra, 1971, p 4 [12].

⁸³ See Robin Creyke, “Administrative Justice — Towards Integrity in Government,” (2007) 31 *Melbourne University Law Review* 705, at 709-710.

⁸⁴ Robin Creyke, “Administrative Justice — Towards Integrity in Government,” (2007) 31 *Melbourne University Law Review* 705.

⁸⁵ See also Peter Cane, *Administrative Tribunals and Adjudication* (Portland: Hart Publishing, 2009), pp 209-220.

⁸⁶ *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

statute, indicating that it is to act fairly. The High Court recently considered the meaning of the injunction to the MRT in s 353(2) of the *Migration Act 1958* (Cth) to “act according to substantial justice and the merits of the case”.⁸⁷ This is a formula which appears in many statutes establishing tribunals⁸⁸ and might be seen to be an expression of statutory intention that merits tribunals are required to provide a form of administrative justice, that being “substantial” justice.

The Federal Court had held that this provision required the MRT to adopt a review mechanism that was fair and this was akin to the requirements of procedural fairness.⁸⁹ In accordance with earlier authority,⁹⁰ the High Court held that s 353(2) was a facultative, rather than a restrictive provision.⁹¹ In the course of his judgment, French CJ commented:

The MRT is not excused from compliance with the criteria of lawfulness, fairness and rationality that lie at the heart of administrative justice albeit their content is found in the provisions of the Act and the corresponding regulations and, subject to the Act and those regulations, the common law.⁹²

Although rejecting the argument that s 353(2) imported substantive common law requirements of procedural fairness, French CJ nevertheless gave some content to the notion of administrative justice (it includes “criteria of lawfulness, fairness and rationality”), which his Honour said could be found in the provisions of the Act.

Giving of reasons and consistency

One aspect of administrative justice, alluded to earlier in this paper, is consistency of decision-making, which is promoted by the written reasons of tribunals.

The giving of written reasons by a tribunal, and the adherence to fair processes, encourage consistency in decision-making, both within the tribunal and within the agency making original decisions.⁹³ Forgie DP of the AAT has expressed the view that a merits review tribunal should amass an “intangible but very valuable capital ... as it continues to produce decisions or outcomes that are well regarded both because of the resolution in the particular case and because of the contribution that they make to administrative decision-making and policy formulation generally.”⁹⁴ Reasons help to develop a body of principles, or administrative policies, which may be applied by tribunals and agencies alike when making administrative decisions. These are not just about the interpretation of the law, as are developed in courts, but also include “the principles guiding discretionary decision-making”.⁹⁵

⁸⁷ *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225.

⁸⁸ For example, the ADT is required to “act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms”: *Administrative Decisions Tribunal Act 1997* (NSW), s 73(3).

⁸⁹ See *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225, Hayne, Kiefel and Bell JJ at 242 [45].

⁹⁰ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

⁹¹ *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225, French CJ at 233 [15], Hayne, Kiefel and Bell JJ at 243-244 [52]-[53], Gageler J at 254 [96].

⁹² *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225, French CJ at 233 [14].

⁹³ See *Confidential and Commissioner of Taxation* [2013] AATA 112, Forgie DP at [203].

⁹⁴ *Australian Timeshare and Holiday Ownership Council Limited and Australian Securities and Investments Commission* [2008] AATA 62, Forgie DP at [247].

⁹⁵ *Confidential and Commissioner of Taxation* [2013] AATA 112, Forgie DP at [208].

Conclusion

Merits review tribunals are rare creatures in our justice system, in that their function is not adversarial, as with most institutions in the common law tradition, but inquisitorial. While merits review tribunals share many of the features of a court, including adherence to the rules of procedural fairness, impartial decision-making and the provision of written reasons, the inquisitorial function allows tribunals to better investigate the truth and the merits of a matter, and to take a wider variety of considerations into account when making decisions. Such tribunals are ideally served by cooperative, helpful respondents, providing them with relevant material, and eschewing an adversarial approach to their opponents. The aim of achieving the “correct or preferable” decision is a far more attractive one than the more constrained goal of courts to determine the correct decision, irrespective of administrative justice. As New South Wales moves to adopt a new consolidated tribunal statute, it is to be hoped that there will be further articulation of the functions of merits review tribunals in our representative democracy, and of the nature of the administrative justice we are seeking to achieve through them.