



# *The state of play in administrative law 2008*

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## The nature of review in the Administrative Appeals Tribunal: *Shi v MARA*

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**THE NATURE OF REVIEW IN THE ADMINISTRATIVE APPEALS  
TRIBUNAL: *SHI V MARA***

***Shi v Migration Agents Registration Authority***

High Court of Australia, 30 July 2008

[2008] HCA 31; 248 ALR 390

The main issue for determination by the High Court in *Shi v MARA*<sup>1</sup> was the scope and extent of the Administrative Appeals Tribunal's review functions. The High Court was asked to determine what is really meant when the task of the AAT is referred to as coming to the 'correct and preferable decision' and unanimously held that generally the AAT was not restricted in any temporal way to its consideration of evidence in determining what is the correct and preferable decision. This was the first time that this issue had been squarely raised for consideration by the High Court.

While the outcome in *Shi* may appear to have been inevitable, it should be noted that the respondent was successful both at first instance in the Federal Court and on appeal to the Full Court of the Federal Court. However, the High Court unanimously overturned the earlier judgments in holding that the AAT was entitled to consider the remedial actions of a migration agent after his registration had been cancelled in order to determine whether he was a fit and proper person to provide immigration assistance.

Mr Shi was registered as a migration agent. Following a lengthy investigation, MARA determined that Mr Shi had committed numerous breaches of the Migration Agents Code of Conduct, which had certain disciplinary consequences. MARA ultimately determined that Mr Shi was not a fit and proper person to provide immigration assistance and cancelled his registration. Mr Shi sought review of the decision in the AAT and obtained a stay, so that he continued to provide immigration assistance, albeit with some restrictions as a result of the terms of the stay. Further decisions were made by MARA to refuse Mr Shi's annual registration. Each of these decisions was also the subject of an application for review in the AAT and a stay order.

By the time the matter was heard by the AAT, Mr Shi had continued to practice under the terms of the stay order for approximately 2 years.

In *Shi v MARA*<sup>2</sup>, the AAT set aside the decision<sup>3</sup> of MARA to cancel Mr Shi's registration as a migration agent on the basis that the member was not satisfied that

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<sup>1</sup> [2008] HCA 31 248 ALR 390.

<sup>2</sup> [2005] AATA 851.

<sup>3</sup> Although each of the subsequent decisions of MARA were also set aside, including refusal to register and suspension, the principles remain the same for all in that they were all dependent upon a finding that Mr Shi was not a fit and proper person to give immigration assistance, and in the later Court judgments, there was effectively no distinction drawn between each of the decisions.

Mr Shi was not a person of integrity or otherwise not a fit and proper person to give immigration assistance<sup>4</sup>, despite having previously found that he had committed numerous breaches of the Code of Conduct<sup>5</sup>.

In deciding to set aside the decision to cancel his registration, the AAT substituted a decision that he would be cautioned, and that the caution would be lifted after 3 years provided he was supervised by another migration agent during that time and that he did not undertake work in relation to protection visa applications. This effectively replicated the regime that Mr Shi had been operating under while the various stays were in force.

Part of the reason as to why the Tribunal was not satisfied that Mr Shi was not a fit and proper person to given immigration assistance was that during 2 years between MARA's decision to cancel and the time of the AAT decision, Mr Shi had improved his practices and provided evidence that he was now an agent who did comply with the Code.

MARA appealed the decision, essentially on two grounds. The first was that the AAT had erred in taking into account this post cancellation behaviour and should have confined itself to evidence relating to the issue of whether, at the time of cancellation, Mr Shi was a fit and proper person. The second was that the AAT had failed to take into account Mr Shi's acknowledged lack of knowledge of various aspects of the *Migration Act*, such that it had erred when considering whether he was a fit and proper person. A third issue emerged from argument before the Court at first instance, which was whether the conditions imposed by the AAT were permitted under the Migration Act in that effectively the AAT was creating a conditional registration where no such status was recognised under the *Migration Act*.

This paper is confined to the first issue only.

Before the Federal Court, MARA accepted that the question for the AAT was whether that decision to cancel was the correct or preferable decision. In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 Bowen CJ and Deane J stated the now familiar description of the role of the AAT.

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 Act offers little general guidance on the criteria and rules which the Tribunal is to apply in the performance of its task of reviewing administrative decisions which are subjected to its surveillance. Even in a case such as the present where the legislation under which the relevant decision was made fails to specify the particular criteria or considerations which are relevant to the

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<sup>4</sup> See s. 303(1)(f) of the *Migration Act 1958*.

<sup>5</sup> [2005] AATA 904.

decision, the Tribunal is not, however, at large. In its proceedings, it is obliged to act judicially, that is to say, with judicial fairness and detachment. In its review of an administrative decision, it is subject to the general constraints to which the administrative officer whose decision is under review was subject, namely, that the relevant power must not be exercised for a purpose other than that for which it exists

Drake was a deportation case. However, it was submitted that there was a clear line of authority that in cancellation cases, such as the decision by MARA in this case, a review Tribunal is required to have regard to the circumstances at the time of the decision and not those that followed it: *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342; *Hospital Benefit Fund of WA v Minister for Health, Housing and Community Services* (1992) 39 FCR 225; *Nong v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 257; *Minister for Immigration and Multicultural Affairs v Sharma* (1999) 90 FCR 513; and *Aged Care Standards and Accreditation Agency Ltd v Kenna Investments Pty Ltd* (2004) 138 FCR 428 were all cited in support of this proposition.

For example, in *Freeman*, Davis J acknowledged the general position as stated by Justice Wilcox in *Commonwealth v Ford*<sup>6</sup>:

In the exercise of that jurisdiction the Tribunal had 'all the powers and discretions that are conferred by any relevant enactment on the person who made the decision' and, in particular, had power to set aside the decision under review and to make a decision in substitution for that decision: see s 43 of the Administrative Appeals Tribunal Act. Those provisions mean that the Tribunal had power to reconsider the determination of 16 May 1984 and to make a decision varying that determination; as, for example, by awarding benefits under the Act to which the claimant was entitled but which were not referred to in the Commissioner's determination. And, of course, the Tribunal was bound to consider the facts as they were proved in evidence before the Tribunal, making the decision which upon that material and at that time was the correct or preferable administrative decision. The Tribunal was not confined either to the material which was before the Commissioner, as primary decision-maker, **or the events which had occurred up till that time**: see *Drake v Minister for Immigration and Ethnic Affairs* (1979) [46 FLR 409](#) at 419; *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) [51 FLR 325](#) at 326-327.

In *Jebb v Repatriation Commission*<sup>7</sup> Davies J confirmed the general approach of the Administrative Appeals Tribunal:

to regard the administrative decision-making process as a continuum and to look upon the Tribunal's function as a part of that continuum so that, within the limits of the reconsideration of the decision under review, the Tribunal considers the applicant's entitlement from the date of application or other proper commencing date to the date of the Tribunal's decision.

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<sup>6</sup> (1986) 9 ALD 433 at 437 - 8.

<sup>7</sup> (1988) 8 AAR 285.

However, in a cancellation case, which was the decision under review in *Freeman*, Justice Davies noted that the principle did not reach to such decisions.

However, the present appeal extends that principle beyond its scope. It does not follow from that principle that the Tribunal in the present case was obliged to make a finding as to Mrs Freeman's entitlement to a widow's pension as at the date of the Tribunal's decision or to make a decision as to cancellation of a pension on 19 May 1987 by reference to the facts as they stood as at the date of the Tribunal's decision. The jurisdiction of the Tribunal arose from the application made to it to review the decision of the delegate who, on 18 August 1987, affirmed the decision of the officer made on 19 May 1987. The function of the Tribunal was therefore to reconsider the decision of 19 May 1987 and to determine whether the decision to cancel Mrs Freeman's widow's pension at that time was the correct or preferable decision to have been made. In coming to its decision, the Tribunal was entitled to take into account all the facts proved before it. But the issue was whether, having regard to those facts, the decision to cancel made on 19 May 1987 was the correct or preferable decision, not whether Mrs Freeman had an entitlement to a widow's pension as at the date of the Tribunal's decision<sup>8</sup>.

Justice Davies noted that regard must be had to the nature of the decision which is under review.

The ambit of the jurisdiction of the Administrative Appeals Tribunal in relation to the review of a decision to cancel a pension or benefit is therefore less than would be the jurisdiction of the Tribunal in respect of a refusal to grant a pension or benefit or a decision suspending the payment of a pension or benefit. In the latter cases, there may well be an ongoing entitlement to a pension or benefit which the Tribunal should recognise when formulating its decision. However, if the Tribunal comes to the view that the decision to cancel was the correct or preferable decision, then no further matter remains for the Tribunal's consideration. Any entitlement of the applicant to a pension or benefit at a subsequent time must be the subject of a further claim which, having been made, would only become the subject of review within the Tribunal's jurisdiction once a decision with respect to it had been made by an officer of the Department of Social Security and that decision had been the subject of appeal and reconsideration in accordance with s 19<sup>9</sup>.

In accordance with Justice Davies' comments, the submission made by MARA did not go so far as to say that the AAT was limited to the material that was before the MARA when it made its decision. It could have regard to other material but the question to be addressed by the AAT was the same question in fact addressed by the MARA, which was whether the respondent was not a person of integrity or otherwise not a fit and proper person at the time of the cancellation decision. Any new material needed to be relevant as to whether the decision made by the MARA was the correct or preferable decision.

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<sup>8</sup> 19 FCR 342 at 344-5.

<sup>9</sup> At 345.

In the present case, MARA submitted that the AAT has not asked itself the correct question. It has not considered whether, on 14 July 2003, the correct or preferable decision was to cancel the respondent's registration.

It was clear from the decision that the AAT had regard to and took into account matters that did not pertain to the relevant question. This was a course encouraged by the agent in his reliance upon his 'current practice' and his 'current success rate'. Indeed, the respondent, while initially challenging the correctness of MARA's submission on this issue, eventually accepted that the AAT had indeed taken into account post cancellation behaviour.

Therefore it was submitted that the Tribunal committed an error of law and a jurisdictional error in two respects: the Tribunal asked itself the wrong question; and the Tribunal had regard to matters it was bound not to consider.

Justice Edmonds at first instance accepted the MARA's submission that the AAT had erred<sup>10</sup>. He held that the question which the Tribunal had to ask itself was whether, on the date of the MARA's original decision, the correct or preferable decision was to cancel the agent's registration. In other words, whether, as at that date, the agent was not a person of integrity or was otherwise not a fit and proper person to give immigration assistance. He relied in this regard on *Freeman* and stated that:

After having considered the relevant provisions of the Act, the authorities to which I was referred and the respective submissions of the parties, I have concluded that the 'clear line of authority', beginning with the decision of Davies J in *Freeman*, upon which the Authority relies, does govern the position in relation to the cancellation decision and that the question which the Tribunal had to ask itself was whether, on 14 July 2003, the correct or preferable decision was to cancel the respondent's registration; in other words, the question which the Tribunal had to ask itself was whether, as at that date, the respondent was not a person of integrity or was otherwise not a fit and proper person to give immigration assistance.

I am of the view that the Tribunal did not ask itself this question. Rather, it asked itself whether, at the time of its decision, the respondent was not a person of integrity or was otherwise not a fit and proper person to give immigration assistance<sup>11</sup>.

It should be noted that the MARA did not confine its submission to a simple dichotomy between 'grant' and 'cancellation' decisions. Other factors which were identified included the following:

- a) the legislative intention indicated that the relevant time fixed for determining whether the correct and preferable decision had been made was the date of the decision to cancel - for example, if an agent was cancelled because he could not demonstrate the requisite knowledge of migration procedures, he should not be able to overturn such a decision by acquiring that

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<sup>10</sup> 43 AAR 424.

<sup>11</sup> (2006) 43 AAR 424 at 443.

knowledge in the meantime. Similarly where cancellation has been because of comprehensive failure to comply with the Code, it would be absurd if such a decision could be overturned due to compliance after the enforcement proceedings have occurred (as occurred in the present case)

- b) the agent's argument that it would be against the policy of the Act if the AAT was not permitted to have regard to events following the cancellation decision should be rejected. If a further act occurs which may result in the cancellation power being triggered, there is nothing absurd with MARA considering that issue afresh, rather than having such a matter raised in the AAT
- c) a determination of what is the correct question leads to the conclusion that post cancellation behaviour is not relevant, it being understood that the correct question is whether the agent was fit at the time of the cancellation decision
- d) evidence of 'character', which is the question on which the later evidence should have been considered, could extend to post cancellation behaviour on the basis that 'character' involves an assessment of the enduring moral qualities of an agent, such that, later evidence may be relied upon to demonstrate the agent's character at the relevant time, being the date of the decision to cancel
- e) the MARA's submission was not inconsistent with Peko-Wallsend, in that it was not submitted that the AAT could not have regard to the most up to date evidence at hand. However, it must be relevant to the question to be determined - which was the position at the time of the cancellation decision
- f) it would be inimical to the objects of the Act if agents who have been cancelled for failing to comply with the Code can avoid that consequence by relying on improved conduct which occurs after the compliance action is taken.

The agent appealed in relation to this ground and the other ground upon which the Court based its judgment to remit the matter to the AAT, being the issue of conditional caution imposed by the AAT.

The Full Court, by majority, dismissed the appeal on both grounds. However, Justice Downes, the President of the AAT, delivered a strong dissenting judgment on both grounds.

The majority, constituted by Nicholson and Tracey JJ, agreed that the AAT had erred by taking into account the post cancellation behaviour.

Nicholson J considered that the existing authority on the issue, relied on by Edmonds J established the following:

- 1) The Tribunal is empowered to exercise all of the powers and discretions that are conferred by any enactment on the person who made the decision the subject of the Tribunal's review (s 43(1) of the Administrative Appeals Act 1975 Cth): *Aged Care Standards and Accreditation Agency Ltd v Kenna Investments Pty Ltd* (2004) [138 FCR 428](#).
- 2) The Tribunal is required to determine whether the decision under review was the correct or preferable decision having regard to the material before the Tribunal: *Drake v Minister for Immigration and Ethnic Affairs* (1979) cited by Branson J in *Aged Care*. That is, the Tribunal is not confined either to the material which was before the primary decision-maker or the events which had occurred up till the time of its decision: per Wilcox J in *Commonwealth v Ford* (1986) 65 ALR 323 citing *Drake* at 589-590 and *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) [51 FLR 325](#) at 326-327; cited by Davies J in *Freeman v Secretary, Department of Social Security* (1988) [19 FCR 342](#) at 344. This general approach of the Tribunal was described by Davies J in *Jebb v Repatriation Commission* (1988) 8 AAR 285 at 289 as being to regard the administrative decision-making process as a continuum and to look upon the Tribunal's function as a part of that continuum so that, within the limits of the reconsideration of the decision under review, the Tribunal considers the applicant's entitlement from the date of application or other proper commencing date to the date of the Tribunal's decision.
- 3) However, the Tribunal is obliged to address the same question as the primary decision-maker: *Freeman* 19 FCR at 345 per Davies J; *Hospital Benefit Fund of WA Inc v Minister for Health, Housing and Community Services* (1992) [39 FCR 225](#) at 234; *Federal Commissioner of Taxation v McMahon* (1997) [79 FCR 127](#) at 133-134 per Lockhart J, Beaumont J at 140-141 and Emmett J at 150 cited by Branson J in *Aged Care* 138 FCR 428 at [25]; followed by Weinberg J in *Minister for Immigration and Multicultural Affairs v Sharma* (1999) [90 FCR 513](#). The principle in 2 cannot be applied beyond its scope, that is, in circumstances where the question under review does not attract the application of the principle: *Freeman* 19 FCR at 344.
- 4) Where the question to be decided arises under a statute, the relevance of later evidence will depend upon the proper construction of the statute and the particular factual context: *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) [143 FCR 314](#) at [51] per Hely, Gyles and Allsop JJ. In *Re Egulian and Tax Agents' Board (NSW)* (1991) [22 ATR 3542](#) an application for registration as a tax agent under s 251JA of the Income Tax Assessment Act 1936 Cth in relation to which experience in tax matters in the preceding five years was required to be considered, was held by Deputy President McMahon to relate to the five years preceding the application rather than the review, applying the reasoning in *Freeman* 19 FCR 342. If the primary decision had to be made by reference to a particular point of time, the Tribunal will be limited to deciding the question

by reference to that point of time: *Comptroller-General of Customs v Akai Pty Ltd* (1994) [50 FCR 511](#) at 521 per Hill J applying *Hospital Benefit Fund* 39 FCR 225. See also *Nong v Minister for Immigration and Multicultural Affairs* (2000) [106 FCR 257](#) at [31] per Katz J holding that the issue whether a student was or was not in compliance with a condition of a student visa required reference to the date of the delegate's decision, not the date of the decision of the Tribunal.

- 5) Categorisation (by which his Honour understood to include characterisation) of a decision (such as a cancellation or revocation decision on the one hand or an approval or entitlement decision on the other) is 'helpful only to the extent that it assists in the identification of the issues that the accrediting authority was required to address for the purpose of making its decision': per Branson J in *Aged Care* 138 FCR 428 at [26].
- 6) It is important to examine the decision in question to ascertain any special features created by statutory provisions applicable to it, for example that it must be made within a certain time limit or can only be made following a certain procedure.
- 7) If the decision could only have been made following a certain procedure, it may be that the evidence called on the review cannot be such as would undermine that procedure. This may preclude the calling of evidence of improvements implemented after the date of the decision and in response to the procedure: per Branson J in *Aged Care* 138 FCR 428 at [30].
- 8) This does not mean that the Tribunal cannot receive evidence of facts that occurred after the date of the decision under review provided that evidence bears on the merits of the decision as at the time that it was required to be made: *Aged Care* 138 FCR 428 at [31].

Having considered these principles, Nicholson J found that the context in which s 303(1) appears shows a clear intent that conduct falling short of that required by the *Migration Act* in relation to migration agents shall lead to the appropriate disciplinary result as at the date of the conduct being established. There was nothing from which to infer that later evidence of a rehabilitative nature or other character evidence should be taken into account. On the contrary, the intent of Parliament was to impose standards and to not allow inappropriate conduct to go undisciplined.

Tracey J agreed with the reasoning of Nicholson J and concluded that the AAT erred in considering the question as at the date of its decision, rather than the date of the primary decision maker. He added that the precondition for intervention was that the MARA was satisfied that the agent was not a person of integrity or otherwise not a fit and proper person to provide immigration assistance. One consequence of cancellation is that the agent cannot practice for 5 years. This, in his Honour's view, fixed a point in time as to the relevant question to be determined.

In dissent, Downes J emphasised the fundamental difference between Courts and an administrative body such as the AAT. Relying on comments by Davies J in *Jebb*, Downes J saw the AAT as part of the continuum of administrative decision making, deciding the matter on the evidence before it and not restricted to the evidence before the primary decision maker.

He acknowledged that on some occasions, the statute would compel that the decision to be determined must be fixed by a point in time, but ordinarily the AAT would look at the matter as at the date it was making its decision. He noted that there were 2 issues raised by these proceedings. The first is whether the AAT can consider evidence not before the primary decision maker. In this regard the answer was almost always yes. (Indeed MARA did not submit otherwise). The second was whether the AAT can rely on facts and circumstances which have occurred after the date of the original decision. He could see no policy reason for doing otherwise.

His starting point was that, prima facie, the AAT must take into account the most up to date information and latest material. In this case, he could detect nothing in the legislation to upset this position.

There is no doubt that s 303(1) shows a clear intent that offending conduct should lead to relevant disciplinary action at the date of the conduct being established. However, that date is the date on which the relevant decision-maker makes the decision. Once a party exercises the right to apply for review to the Tribunal the decision-maker is the Tribunal, the relevant issue is whether it is satisfied and the relevant date is the date of its decision. Because of the continuum approach the Tribunal will naturally take into account the circumstances as they were at the time of the making of the Authority's decision. However, the application for review has the effect of constituting the Tribunal as the body whose satisfaction is relevant -- it is no longer the Authority<sup>12</sup>.

He saw *Freeman* as no more than an example of the legislation requiring a determination of entitlement at a particular point in time. He concluded, citing *Freeman*<sup>13</sup>:

There is nothing about the nature of the decision under review in the present case that causes me to consider that I should depart from the general principle that administrative review is conducted at the time of the review on the latest material available.<sup>14</sup>

The agent sought special leave to appeal. Rather ominously, the agent's legal representatives were not called on and after quizzing counsel appearing for MARA for several minutes, special leave was granted, primarily due to the strong dissent of Downes J.

Before the High Court, a further argument was developed by MARA. This involved an analysis of whether the often quoted statement in *Pochi v Minister for*

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<sup>12</sup> 158 FCR 525 at 538.

<sup>13</sup> 19 FCR 342 at 345.

<sup>14</sup> 158 FCR 525 at 539.

*Immigration and Ethnic Affairs*<sup>15</sup>, that the AAT 'stood in the shoes' of the decision-maker and that the task of the AAT was to determine what was the correct and preferable decision meant what had essentially been assumed for over a quarter of a century. In this regard it should be noted that there had been no real analysis of the AAT's role by the High Court during the AAT's inception in 1976.

Therefore, the issues identified by MARA before the High Court were as follows:

- g) What is the nature of 'review' by the AAT under the *Administrative Appeals Tribunal Act 1975* (Cth) (the *AAT Act*)?
- h) In reviewing a decision under s 303 of the *Migration Act 1958* (Cth) to cancel the registration of a migration agent, is the AAT required to determine:
  - (i) what is the correct or preferable decision at the time of its own decision; or
  - (ii) what was the correct or preferable decision at the time of the decision under review?

In support of issue (a), it was argued that the description of the function of the AAT as conducting a hearing de novo ignored the point that the nature of the appeal must ultimately depend on the terms of the statute conferring that right. Thus the power conferred on the AAT was not to reconsider but to 'review' the primary decision pursuant to s. 24(5) of the *AAT Act*.

It was therefore submitted that the AAT in undertaking the 'review' is empowered to place itself in the position of the primary decision-maker so as to perform its obligation of deciding whether the decision that was in fact made (at a particular point in time) was the correct or preferable decision (at that point in time) and of providing an appropriate administrative remedy if it decides that the decision that was in fact made was not the correct or preferable decision.

If the answer to that question is yes, then the AAT affirms the decision under review. In those circumstances, the primary decision remains the operative decision<sup>16</sup> and there is no re-exercise of the power under which the primary decision was made<sup>17</sup>.

If the answer is no, there are alternative remedies available to the AAT, which involves either setting aside the decision and substituting its own decision, or remitting the matter back to the original decision maker or varying the decision.

MARA submitted that where the AAT is satisfied that the primary decision was not the correct or preferable decision (and is therefore not to be affirmed under

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<sup>15</sup> 24 ALR 577 at 589.

<sup>16</sup> *Yolbir v AAT* 48 FCR 246.

<sup>17</sup> *Powell v AAT* (1998) 89 FCR 1 at 12.

s 43(1)(a)) it is then open to the Tribunal itself to re-exercise the powers and discretions that are conferred on the primary decision-maker and to substitute a decision of its own which is to take effect at the time the Tribunal makes its own decision.

It was submitted that the AAT was not limited to the evidence or material that was before the primary decision-maker in the course of undertaking its review. However, evidence that relates to events and circumstances that occurred after the primary decision ordinarily will not be relevant to informing the Tribunal whether the primary decision was correct or preferable when it was made. Such evidence will usually only become relevant at the later stage of the Tribunal deciding on an appropriate administrative remedy if it decides that the primary decision was not correct or preferable at the time it was made.

Reliance was also placed on the procedural provisions in the AAT Act which required the primary decision maker to be a party to the proceedings<sup>18</sup> and to lodge a statement of reasons and documents relevant to the review<sup>19</sup> and may require the applicant to provide a statement in support of the application which readily identifies the respects in which the applicant believes that the decision is not the correct or preferable one<sup>20</sup>.

The High Court unanimously rejected MARA's argument on both issues.

Justice Kirby noted that the starting point was that neither the AAT Act nor the Migration Act spelled out explicitly what the AAT's task is. Kirby J identified five factors which supported the conclusion that there was nothing about the nature of the decision under review in the present case that warranted departure from the general principle that administrative review is conducted at the time of the review on the latest material available.

## 1. THE NATURE OF THE ADMINISTRATIVE APPEALS TRIBUNAL

In this regard Kirby J looked at the 'radical' objectives behind the introduction of the AAT Act, being to create a tribunal which had the power to make decisions 'on the merits'.

## 2. THE FUNCTION OF THE ADMINISTRATIVE APPEALS TRIBUNAL

In this context, Kirby J considered some of the seminal decisions concerning the role of the AAT, including *Drake v Minister for Immigration and Ethnic Affairs, Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, and *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88 (*Control Investments*). His Honour concluded that,

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<sup>18</sup> AAT Act s. 30(1).

<sup>19</sup> AAT Act s. 37.

<sup>20</sup> AAT Act s. 29(1B).

in *Control Investments*, Davies J was correct in holding that, while some weight may be placed on the decision of the original decision maker (particularly when it involved special expertise or knowledge), ultimately it was for the AAT to reach its own decision upon the relevant material, including any material which was new, fresh, additional or different from that which was considered by the original decision maker. This was a consequence of the AAT's obligation to conduct a true merits review.

**3. PURPOSE OF SECTION 43 OF THE ADMINISTRATIVE APPEALS TRIBUNAL ACT**

Kirby J considered that the fact that the AAT has the power to substitute its own decision for that of the original decision maker points to an intention that the AAT is able to take into account the most up-to-date information available. His Honour held that, in law and in effect, the AAT's decision becomes the decision of the executive government, so that, when making a decision, administrative decision makers are generally obliged to have regard to the best and most current information available—a rule of practice which is no more than a feature of good public administration.

**4. NATURE OF THE DECISION UNDER REVIEW**

His Honour concluded that it is necessary to identify the precise nature and incidents of the decision that is the subject of review. The particular nature of the decision may sometimes, exceptionally, confine the AAT's attention to the state of the evidence at a particular point in time. However, there was nothing in the nature of the decision to cancel a migration agent's registration which compelled a conclusion that the relevant facts were only as at the point in time of MARA's consideration.

Both the language of the *Migration Act* and its purpose suggested otherwise. Each of the grounds on which cancellation might occur was expressed in the present tense and, necessarily, the circumstances to which each was addressed could be altered by supervening events. The language in the *Migration Act* clearly contemplated the possibility that circumstances may change between an initial decision of MARA and a subsequent decision of the AAT, performing the 'review' which the *Migration Act* contemplates and for which s 43 of the AAT Act provides.

To demonstrate this point, his Honour noted the AAT's powers in certain circumstances to make a decision 'in substitution for' a decision of the AAT which has been set aside upon review and noted that it would be remarkable if the substituted decision could not take into account evidence of relevant, and even critical, supervening events. Examples of such events might include the intervention of bankruptcy, or a criminal conviction for an offence of dishonesty of significance for the continued registration of the agent under the *Migration Act*.

## 5. ERRORS IN THE REASONING BELOW

Kirby J identified errors in the approach taken by the majority in the Full Federal Court to the interpretation of the relevant provisions of the *Migration Act*. In particular, his Honour noted that Division 3, Part 3 of the *Migration Act* specifically contemplates merits review by the AAT. In construing the disciplinary provisions, the Federal Court erred in failing to appreciate this, as there is nothing in the legislation to suggest that such review should not be performed by the AAT with the benefit of any new, fresh, additional or different material.

Justices Hayne and Heydon in a joint judgment emphasised, in relation to the issue of the AAT's proper function, the need to give close attention to the relevant provisions, both in the *AAT Act* and the *Migration Act*. Their Honours essentially saw the task of the AAT as being to exercise all the powers and discretions conferred by the *Migration Act* on MARA.

Hayne and Heydon JJ found that MARA's contention that the question for the AAT was whether the correct or preferable decision when MARA made its decision to cancel the appellant's registration should be rejected as it finds no footing in the relevant provisions. Their Honours held that framing the relevant question in the manner urged by MARA would treat the AAT's task as confined to the correction of demonstrated error in administrative decision making in a manner analogous to a form of strict appeal in judicial proceedings, which is not the AAT's task.

Their Honours concluded that, in essence, the *AAT Act* required the AAT 'to do over again' the original decision and that, unlike some legislative regimes—notably pension cases, where the critical statutory question is whether a criterion is met at a particular date—there is nothing in the *Migration Act* which limited the AAT's consideration to matters which were only in existence at the time of the cancellation decision.

Justice Crennan agreed with Justice Kiefel on the question of the AAT's task.

Justice Kiefel concluded that the nature of the review conducted by the AAT depends upon the terms of the statute conferring the right, rather than upon the identification of it as an administrative authority entrusted with a particular type of function. Her Honour concluded that, in determining the powers of the AAT in respect of matters in which it has jurisdiction, it is important to identify the decision under review as this marks the boundaries of review.

Her Honour held that the argument advanced by MARA that the AAT is only intended to exercise the power of the original decision maker when it discovers error ignores the powers provided for by s 43 of the *AAT Act*, which are to permit the AAT to consider for itself what the decision should be. Such powers are not consistent with a role limited to the ascertainment of error.

Justice Kiefel concluded that, where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the AAT in the process of informing itself. It is otherwise where the review to be conducted by the AAT is limited to deciding the question by reference to a particular point in time.

The judgment of the High Court makes it clear that there the starting point in determining the AAT's powers on review is that there is a presumption that the AAT is not limited in receiving the most recent information in determining whether a decision under review is the correct or preferable one and that the task for the AAT is to determine that question as at the date of its review. There needs to be very clear language or a legislative imperative before this presumption will be overturned. The mere fact that an applicant on review can dramatically alter the position between the decision being made by the primary decision maker and the hearing before the AAT and may therefore obtain a favourable result irrespective of the correctness of the decision at the time does not result in the presumption being disturbed.

The impact of this judgment is perhaps most stark in the many disciplinary/regulatory regimes in place under Commonwealth legislation where previously it was probably assumed that persons or organisations could not avoid the repercussions of their behaviour by only implementing change after a disciplinary or regulatory decision had been made against them.

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