COURTS, TRIBUNALS AND GOVERNMENT POLICY

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The inclusion in legislation of a discretionary power to be exercised by a member of the bureaucracy is nowadays commonplace. Such a discretion is usually open-ended and the basis on which it is to be exercised is spelled out in only the most general terms. To enable the discretionary power to be exercised consistently and in accordance with the intentions of the government, it is customary to find a policy being adopted relating to the manner of exercise of the discretion. This article is concerned with the attitude adopted by courts and tribunals when reviewing governmental action based on a policy relating to a discretion. It will be seen that the courts have moderated an original approach that disapproved of the reliance by decision-makers on policy rulings. Tribunals, on the other hand, and the Administrative Appeals Tribunal in particular, will be shown to have rejected constraints that may have been thought to have been placed upon them by governmental policy statements.

For many Ministers and public servants it often seems that the fact that a matter has been decided in accordance with government policy forecloses further debate. How often one hears those grandiloquent phrases "The policy of the government is . . ." or "In future, the government will, as a matter of policy . . .". How many claimants are denied their requests with "It is not the policy of the department to . . .". Sometimes the policy referred to is set out in an Act or in regulations. More often it is a statement of the way in which an Act or regulation is to be applied. The purpose of this article is to examine the attitude adopted by the courts and by review tribunals to such statements of government policy.

Policy and the Courts

Issues relating to governmental policy have come before the courts in three different ways. First, the legality of the policy on which a decision has been based has been called into question. Secondly, the validity of a decision made by a rigid application of a policy ruling has been considered. Thirdly, decisions have been challenged on the basis that the decision-maker has concluded the issue before him in accordance with the policy directions of another person. These issues will be considered separately.

(a) *Validity of policy*

Despite the sanctity with which policy rulings are regarded by most government servants, statements of policy that are not embodied in

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legislation have no legal validity in themselves. They are but statements of the governmental understanding of the meaning of the relevant legislation and the manner in which it should be applied. If the statement constitutes a wrong interpretation of the legislation or attempts to apply the legislation in an incorrect manner, a decision reached by an application of the policy will be invalid.

This situation is most likely to arise where a policy statement sets out criteria or conditions which must be complied with before a benefit, right, licence, appointment, *etc.* may be granted or made under an Act. If these criteria do not, in the view of the court, accord with the terms of the Act, any decision based on them may be struck down. A recent example of this is afforded by the decision of Stephen J. in the High Court of Australia in *Green* v. *Daniels*.[1] There the Court declared that the criteria adopted by the Director-General of Social Security for determining when a school leaver qualified for unemployment benefits were invalid. The Director-General had ruled that no school leaver was to be eligible for benefits before the commencement of the next ensuing school year. This, said the Court, was not a proper test for determining whether a person was "unemployed". The state of being "unemployed" might well arise before that date and a person should thereupon be regarded as qualified for the payment of benefits.

Instances of this kind of judicial intervention are numerous and it is not proposed to pursue the examples further here.[2] There is, however, a less frequently occurring variant that should be mentioned. This is where the court upholds the validity of the policy but rules that its application in the particular case is unreasonable. The courts have been very slow to intervene on this ground because they quite properly take the view that their role is not to conduct a general review of administrative decisions on the merits. If, however, a decision is regarded as "so unreasonable that no reasonable authority could ever have come to it",[3] the court will set aside the decision. An example of the adoption of this approach occurred in England in 1964. A council inserted conditions in a planning approval that required the company seeking the approval to construct an ancillary public road on their own property. The approval also avoided any right of compensation for this effective acquisition of the company's land for the public benefit. The Court of Appeal considered that the conditions were "so unreasonable as to go beyond anything that Parliament can have intended, or that any reasonable authority could properly have imposed".[4]

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[1] (1977) 13 A.L.R. 1.

[2] See further Whitmore and Aronson, *Review of Administrative Action* (1978) ch. 6.

[3] *Associated Provincial Pictures Ltd* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 230 approved in Australia in *Parramatta City Council* v. *Pestell* (1972) 128 C.L.R. 305, 327 *per* Gibbs J.

[4] *Hall & Co. Ltd* v. *Shoreham-by-Sea UDC* [1964] 1 W.L.R. 240, 249.

It can be expected that the courts will not invoke this power at all frequently. If they were to do so, their capacity to review administrative action would be threatened both logistically and politically. Nonetheless, the power is there and, significantly, it has been recognised in the Commonwealth's legislation empowering the Federal Court to review administrative decisions.[5]

Finally, on this issue, it should be mentioned that even governmental policy enshrined in legislation may be set aside by the courts. It may be held unconstitutional. If embodied in regulations, by-laws, *etc.*, it may be held to be *ultra vires* the empowering Act.[6]

(b) *Inflexible application of policy*

Assuming that a policy directed towards the way in which a discretion should be exercised is valid, a question that arises is whether that policy can be applied automatically to an applicant requiring the exercise of the discretion. This is particularly pertinent to cases where a large number of applications involving generally similar fact situations have to be dealt with by a department. Justice requires equal treatment for all applicants and an inflexible rule would seem to guarantee this. Administrative convenience in such cases also demands the expeditious processing of applications. But the vagaries of human conduct are such that what may appear to be like cases may in fact not be exactly similar. It is an old but true maxim that justice must not only be done but it must also appear to be done. The applicant who thinks that his own case has not been considered will not be satisfied by being told that the department has heard it all before. This view clearly influenced the courts in their attitude towards the application of rules of policy until fairly recent times. Since about 1970, however, there has been some modification of attitude, perhaps in recognition of the vast increase in the number of discretions that have to be exercised in the welfare state.

Rather strangely there have been few Australian cases dealing with this issue. There is, however, a good deal of English authority on the point and this would undoubtedly be followed by Australian courts.[7]

The principal early statement of the court's attitude towards the adoption of an inflexible rule for the determination of a discretion is that of Bankes L.J. in *R.* v. *Port of London Authority; ex parte Kynoch Ltd.*[8] The case concerned the refusal of a licence to construct a wharf. His Lordship said:

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing

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[5] Administrative Decisions (Judicial Review) Act 1977 (Cth), s. 5(2)(g).

[6] Pearce, *Delegated Legislation* (1978).

[7] The primary English authorities were cited when the issue was touched on in *Myer Queenstown Garden Plaza Pty Ltd* v. *Port Adelaide City Corporation* [1975] 11 S.A.S.R. 504. Fox J. in *Sernack* v. *McTavish* (1970) 15 F.L.R. 381 followed the same reasoning without referring to the English decisions.

[8] [1919] 1 K.B. 176.

> to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. . . . if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.[9]

Thus the adoption of a rule governing the manner in which a discretion is exercised is permissible provided that it is not applied without regard to the facts of the particular case. An example of a case where this approach was adopted and a discretion was held to have been wrongly exercised is *R.* v. *London County Council; ex parte Corrie*.[10] The Council had made a by-law prohibiting the selling of any article in a park without the Council's consent. An application to sell pamphlets relating to the National League of the Blind was rejected by letter which said:

> . . . I have to state that the Council has decided that no permits for the sale of literature at the Council's parks and open spaces are to be issued. I regret that it is not possible to make exception to this rule even in a most deserving case.[11]

The court held that the action of the Council was invalid as it had not considered the particular application on its merits to see whether it should form an exception to the general rule.

It must be stressed that the courts, in these decisions, were not saying that the exercise of a discretion could not be governed by a valid policy ruling. It was the rigid application of a rule without regard to the circumstances of the particular case that was proscribed. This is probably still the position today in cases where the occasion for the exercise of a discretion does not arise frequently. For example, in *Stringer* v. *Minister for Housing and Local Government*[12] the court declined to interfere with a refusal to grant planning permission where the denial was in pursuance of a policy decision that building near the Jodrell Bank Telescope should be discouraged. But the court stressed the fact that the policy was applied only after regard had been paid to the circumstances of the particular application.

However, as mentioned previously, a different attitude seems now to have emerged where the discretion concerned is one that is exercised in relation to numerous applications. Such a case was before the Judicial Committee of the House of Lords in *British Oxygen Co. Ltd* v. *Minister of Technology*.[13] The application was for a capital expenditure grant and

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[9] *Id.* 184.
[10] [1918] 1 K.B. 68.
[11] *Id.* 70.
[12] [1970] 1 W.L.R. 1281.
[13] [1971] A.C. 610.

a very large number of these were processed each year. The application was rejected in accordance with a rule adopted by the Ministry that grants would not be paid on any item of plant costing less than £25. There was nothing in the Act that gave a right to a grant. The House of Lords considered that the rule formed a valid basis on which the discretion to make grants could be founded. The argument was put, however, that the rule had been applied inflexibly to the applicant's claim. This was rejected.

Lord Reid, after referring to the statement of Bankes L.J. set out *supra* which had been relied upon by the applicants, continued:

> I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. . . . There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say—of course I do not mean to say that there need be an oral hearing.[14]

In the same case, Viscount Dilhorne said:

> . . . I feel some doubt whether the words used by Bankes L.J. . . . are really applicable to a case of this kind. It seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail. Representations could of course be made that the policy should be changed.[15]

Finally, a policy rule governing the exercise of a discretionary power must not attempt to exclude the rules of natural justice in so far as they may be applicable to the exercise of the particular discretion.[16]

The present position may perhaps be summarised as follows:

(i) an administrator may adopt a general rule to govern the exercise of a discretionary power in all ordinary cases, provided that the rule is valid and fair.

(ii) in cases other than those mentioned in (iii) *infra*, a discretion may not be exercised in accordance with such a policy ruling without consideration being given to whether it is appropriate to decide the particular application in accordance with that ruling;

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[14] *Id.* 625.

[15] *Id.* 631. See also *Sagnata Investments Ltd* v. *Norwich Corporation* [1971] 2 Q.B. 614, particularly 626 *per* Lord Denning M.R.; *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12.

[16] *Stringer* v. *Minister for Housing and Local Government supra* n. 12; *Sagnata Investments Ltd* v. *Norwich Corporation, supra* n. 15. On the application of the rules of natural justice generally, see Flick, *Natural Justice* (1978); Whitmore and Aronson, *op. cit.* chs 4 and 5.

(iii) where there is a "multitude of similar applications" involving the exercise of a discretion to which a policy rule relates, individual representations by an applicant need not be considered unless they raise novel issues or call into question the policy governing the exercise of the discretion.

The Administrative Decisions (Judicial Review) Act 1977 (Cth) has recognised this common law ground for review of administrative action by defining an improper exercise of power to include "an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of a particular case".[17] This provision clearly contemplates the application of the principles as stated by Bankes L.J. *supra.* But does it embrace the gloss put upon that statement by Lord Reid and Viscount Dilhorne? It is likely that the Federal Court will hold that the intention of the Act is to attract all aspects of the common law ground of review thereby embracing proposition (iii) *supra.* But this cannot be asserted with complete confidence. It is possible that the Court could regard the approach set out in the *British Oxygen* case as not falling within the words of the Act. The section refers to the rule being applied without regard to the merits of the *particular* case. The Court could hold that the statement of the law in the *British Oxygen* case would deny consideration of the particular case and that therefore it did not fall within the ambit of the legislative provision.

(c) *Decision-maker acting under dictation*

Section 5(2)(e) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) declares it to be a ground for review of a decision if it has resulted from "an exercise of a personal discretionary power at the direction or behest of another person". This restates a long held ground for judicial review of an administrative decision. A clear example of this type of abuse of power is provided by a Canadian case.[18] The plaintiff, who owned a restaurant, supported the religious sect, the Jehovah's Witnesses. The sect was at the time engaged in a confrontation with the Quebec Government. The Premier of Quebec directed the Licensing Commission, the body whose sole responsibility it was to grant and revoke restaurant licences, to cancel the plaintiff's licence. The Commission acted as directed. The Supreme Court of Canada ruled that this action was invalid as the Commission had to reach any decision on cancellation itself and was not to act under the dictation of another person.

An early Australian ruling to like effect is *Evans* v. *Donaldson.*[19] There the High Court held invalid a decision of a tribunal dismissing a public servant. The tribunal had failed to conduct an independent

[17] Ss. 5(2)(f) and 6(2)(f).
[18] *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689.
[19] (1909) 9 C.L.R. 140; see also *Sernack* v. *McTavish* (1970) 15 F.L.R. 381.

inquiry to ascertain whether grounds for dismissal were made out but had acted solely on the findings of a Royal Commission. The tribunal's decision had thus been "dictated" by the Royal Commission.

Cases of this kind do not cause undue concern—they turn on the factual issue of the basis on which a decision has been reached. Much more difficulty is encountered when a public servant (or other officer responsible to a Minister) who is entrusted by legislation with a discretion exercises that discretion in accordance with government policy or pursuant to a ministerial direction. Does this constitute acting under dictation? The decisions of the courts do not present a clear answer overall, although one or two propositions can be stated with some certainty.

First, it would seem that notions of Cabinet unity may prevent an argument that a decision taken by one Minister has been dictated by another. In *Schmidt* v. *Secretary of State for Home Affairs*[20] the Minister of Health made a statement that Scientology students studying in the United Kingdom would not have their entry permits extended. The Home Secretary, the Minister responsible for exercising the discretion whether or not to extend a permit, made a decision accordingly. No point was taken on the subsequent challenge to this decision that the Home Secretary had not exercised an independent discretion. It would seem that, in relation to this area of the law, a Minister will be regarded as but one head of the hydra.

The second point which seems clear is that even where a public servant is entrusted with a personal discretion, it is proper for him to have regard to any relevant government policy in exercising his powers. Even those judges who, as will be seen, would most markedly circumscribe the extent to which a Minister may interfere with the exercise of power by a public servant, concede that government policy is a proper matter for the public servant to take into account.[21] But this still leaves the question whether it is a valid exercise of power for the decision-maker simply to apply government policy or to decide as his Minister tells him. On this there has been a diversity of judicial opinions but the preponderance of opinion, particularly on the present High Court, seems to be that a decision made in such circumstances is valid.

The issue has been specifically considered by Australian courts on four occasions.[22] It is convenient to deal with these chronologically. The first reference was by Evatt J. in *R.* v. *Mahony; ex parte Johnson.*[23] The issue was not, however, central to the case and the other members of the Court did not allude to it. His Honour referred to the fact that a

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[20] [1969] 2 Ch. 149.

[21] Mason J. in *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth of Australia* (1977) 139 C.L.R. 54, 83; Kitto J. and Menzies J. in *R.* v. *Anderson; ex parte Ipec-Air Pty Ltd* (1965) 113 C.L.R. 177, 192 and 201-202, respectively.

[22] But seemingly not by English courts at all.

[23] (1931) 46 C.L.R. 131.

licensing officer who had refused a licence to a waterside worker had paid heed to government policy. This, said his Honour, was permissible but he continued:

> He would have to act honestly, but he might well pay some regard to the preference scheme favoured by the Government. . . . Above all, the discretion to be exercised would be his discretion, and he could not allow the Executive or any other person to exercise it for him. Upon the same assumption of a discretion, there is no reason why he should not be allowed to seek the opinions of persons well experienced in the methods of providing and organizing labour. It cannot be assumed that the well experienced and the well qualified are absent from the responsible Executive of the day. The weight the licensing officer might see fit to attach to any or all such opinions would be a matter entirely for him.[24]

Evatt J. would thus seem to have been of the view that a decision that merely applied governmental policy would be invalid. A decision-maker might properly have regard to government policy and might make a decision in accordance with it, but if he was invested with a personal discretion the decision must be one at which he himself had arrived.

This view was reiterated some years later by Kitto and Menzies JJ. in *R.* v. *Anderson; ex parte Ipec-Air Pty Ltd.*[25] That case concerned the interpretation of the Customs (Prohibited Imports) Regulations which, among other things, prohibited the importation of aircraft without the permission of the Director-General of Civil Aviation. The applicants who had been refused permission to import aircraft challenged the decision of the Director-General alleging that he had not exercised an independent discretion. It was said that, in order to maintain its "two-airline policy", the Government had directed the Director-General to refuse permission and that he had complied with this direction.

Kitto and Menzies JJ. were of the view that the applicant's assertions were correct and that this rendered the Director-General's decision invalid. Kitto J. put it thus:

> the fact is that in dealing with the application in question in this case the Director-General did not arrive at a decision of his own after taking account of some matter of general Government policy. What he did was to seek from his Minister, and then automatically obey, an *ad hoc* pronouncement from the Government as to the direction in which he ought to decide the matter. That is a very different thing; and none the less so because the Government made its pronouncement in line with a general policy which it considered to be in the best interests of the country.[26]

Thus Kitto and Menzies JJ. would seem to have been of like mind to Evatt J. A personal discretion exercised in accordance with a ministerial directive is invalid.

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[24] *Id.* 145.
[25] (1965) 113 C.L.R. 177.
[26] *Id.* 193. Menzies J. concurred, *id.* 201.

Two other members of the High Court in the *Ipec* case, Taylor and Owen JJ., found, on the facts, that the Director-General had exercised his discretion independently of the ministerial directive and his decision was accordingly valid.

The fifth member, Windeyer J., also upheld the validity of the decision but on a basis diametrically opposed to the views of Kitto and Menzies JJ. In the view of Windeyer J., it was the duty of the Director-General to reach a decision in accordance with the Government policy. This was in fact the only consideration to which it was proper for the Director-General to have regard: ". . . his duty is to obey all lawful directions of the Minister under whom he serves the Crown. The Minister is answerable before Parliament".[27]

The statement of Windeyer J. clearly highlighted the issue which till then had largely been obscured by traditional legal reasoning. In a governmental system based on ministerial responsibility, are not all decisions, in theory at least, taken by the Minister and is he not responsible to the Parliament for them? If indeed the decision is the Minister's (although taken by a member of his department), surely it is unreal to suggest that it is not proper for the Minister's views to be followed when the decision is made? This is correct if the decision is in fact made in the exercise of one of those multifarious discretions which are to be found in many Acts that do not identify the decision-maker by either name or office. But in the regulations in question in the *Ipec* case, the decision-maker was personally identified. The regulations did not talk of importation with permission (in which case the permission would have to be given by the Minister or an officer acting on his behalf)[28] but specified that the permission was to be given or withheld by a nominated person—the Director-General of Civil Aviation. It was this nomination of a specific individual that led Kitto and Menzies JJ. to require the exercise of the discretion personally.

The same regulation came before the High Court again in 1977 but before then a similar provision was considered by Hope J. in the New South Wales Supreme Court in *Bosnjak's Bus Service Pty Ltd* v. *Commissioner for Motor Transport*.[29] A section of the New South Wales Transport Act 1930 empowered the Commissioner of Transport to alter approved routes for private buses. Before taking such a decision, the Commissioner was required by the empowering section to conduct certain inquiries and be satisfied of the existence of certain matters. The Minister for Transport became interested in a dispute over the routes to be followed by two competing operators and directed the Commissioner to alter the route approved for one of them. This the Commissioner did. On review by the Supreme Court it was held that the Commissioner's

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[27] *Id.* 206.

[28] Acts Interpretation Act 1901 (Cth) ss. 17, 19A. Like provisions appear in some of the State Interpretation Acts.

[29] (1970) 92 W.N. (N.S.W.) 1003.

decision was invalid as he had not exercised the discretion vested in him independently but had merely acted as directed by the Minister. Hope J. considered that, apart from Windeyer J., the judges sitting in the *Ipec* case had indicated that a public servant who exercised a personal discretion at the dictation of his Minister was acting improperly. His Honour considered that the position was even clearer here as the empowering section required the Commissioner to be satisfied of certain matters before taking a decision. This point will be returned to later.

After this decision, it seemed that the weight of authority stood clearly for the view that ministerial interference in the decision-making process where a discretion was entrusted to a nominated officer was likely to lead to invalidity. Only the opinion of Windeyer J. in *Ipec* stood unambiguously against this view.

The position has now been reversed. Four out of five members of the High Court in *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth of Australia*[30] held that a decision taken by the Secretary of the Department of Transport (the successor to the Director-General of Civil Aviation) under ministerial direction to allow the importation of aircraft was valid. Barwick C.J. and Murphy J.[31] adopted what might be termed the strongest pro-ministerial stance. Barwick C.J. considered that the Secretary was bound to carry out the communicated policy of the Government. However, he did allow one possible escape from a blanket application of this principle by saying that the vesting of a discretion in an official in an area such as the control of entry of goods or persons did not allow the official to depart from Government policy in the exercise of the discretion. One can infer from this that there might be some areas where an independent exercise of discretion was possible—but no hint is given as to what these might be.

Murphy J. contemplated no such limitations. A passage from his judgment warrants setting out in full as it summarises the argument for allowing ministerial intervention:

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

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[30] (1977) 139 C.L.R. 54.

[31] This apparently strange concordance is probably explained by the fact that both are former Ministers.

> The duty of those in a department is to carry out the lawful directions and policy of their Minister. It is the Minister who is responsible to the government and the parliament for the directions and policy.[32]

Gibbs and Aickin JJ., while not stating the position as forcefully as Barwick C.J. and Murphy J., nonetheless contemplated that it was appropriate for the Minister to endeavour to influence the way in which the discretion was exercised. It was also proper for the Secretary to pay heed to the policy considerations thus enunciated and he was justified in following them to the exclusion of all other matters.

The remaining member of the Court, Mason J., rejected the views of his brother judges entirely. His Honour observed that the regulations vested the discretion in the Secretary. In his Honour's view this meant that the decision had to be the Secretary's. He continued: "If in truth he is bound as a matter of law to accept a direction from his Minister it cannot be said that the decision is his decision; it then becomes the decision of the Minister".[33]

One other decision of the High Court should be mentioned. *Salemi* v. *Minister for Immigration and Ethnic Affairs*[34] was concerned with the validity of a deportation order and one of the issues that arose drew comments from two members of the Court that anticipated their views in the *Ansett* case. Entry certificates under the Migration Act are issued by "officers" who are defined as officers of the Department of Immigration, Customs officers and police officers. The Minister is not empowered to issue such a certificate. Although this power was not central to the issues in the case, both Barwick C.J. and Gibbs J. expressed the view that the Minister could direct an officer to issue an entry certificate. Jacobs J., on the other hand, observed that an officer had to exercise his own discretion.

Where then does the matter stand? If one indulges in headcounting, the issue is very evenly balanced. Against permitting ministerial dictation are Evatt J., Kitto J., Menzies J., Mason J., Hope J. and perhaps Jacobs J. Taking the contrary view are Windeyer J., Barwick C.J., Gibbs J., Murphy J. and Aickin J.[35] Significantly four of these judges are presently members of the High Court—but time passes. The issue cannot be regarded as in any way foreclosed. It is appropriate therefore to consider which is the better view.

As a matter of logic it would seem that the argument enunciated by Mason J. in the *Ansett* case is irrefutable. If a person is given a discretion, either by name or by virtue of his holding a particular office,

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[32] (1977) 139 C.L.R. 54, 87.

[33] *Id.* 82-83.

[34] (1977) 14 A.L.R. 1.

[35] Taylor and Owen JJ. have not been included in this group despite the claim in *Ansett* that they were of like mind. With respect, their Honours did not feel it necessary to express an opinion on the point. It is noteworthy also that Hope J. in *Bosnjak's* case considered that they supported the opposing view of Kitto J.

it is his responsibility to exercise that discretion. If he acts as directed by his Minister or merely automatically applies a governmental policy, it is not he who is taking the decision. Arguments based on the concept of responsible government can be said to be undermined by the very fact of vesting the discretion in a designated person. This places the decision-maker outside the anonymous public servant—Minister—Parliament line of authority. But whether or not this argument is accepted, practical considerations point to the view of the majority of the judges in *Ansett* being the more likely to be followed—except in one circumstance to be mentioned later.

It is highly improbable that a public servant will refuse to comply with a ministerial directive and it would undermine our system of government if such an event were to occur with any frequency. This being so, and as all judges recognise that a person invested with an independent discretion is entitled to have regard to government policy, the validity of the decision-making process will turn on a semantic issue if the approach of Mason J. is followed. If the decision-maker indicates that he decided the issue as directed by his Minister, his decision will be invalid. If, on the other hand, he says that he merely took the Minister's views into account but was satisfied that that view was the appropriate one, the decision will be valid. An issue as important as this should not turn on the form in which a decision-maker couches his decision. The well-advised decision-maker's decision will be valid; that made by an officer who openly reveals the ministerial directive will not. A public servant is, and probably should be, governed by his Minister. This being so, it seems unwise to talk of him as exercising an independent discretion.

As alluded to previously, there is one exception to this. That is where the discretion vested in the officer is not open but is conditioned upon the existence of certain matters that must be established to the satisfaction of the nominated officer. In such a case it is the officer himself who must be satisfied of the facts that are pre-requisite to the exercise of the discretion, not someone else. A direction from a Minister that the discretion should be exercised is of no avail if the pre-conditions do not exist. For this reason, the decision in *Bosnjak's* case is not called into question by the later rejection by the majority in *Ansett* of the views from the *Ipec* case relied upon by Hope J.

Two things remain to be said. First, none of the foregoing is relevant to a decision-maker who is not responsible to a Minister. In such cases, the decisions referred to at the outset apply and any attempt by a Minister to interfere in the decision-making process will lead to invalidity.[36] Secondly, this whole problem is one of successive governments' own doing. It is undesirable, and indeed unfair, for discretions to be vested in designated officials if the exercise of the discretion is likely to be a matter of political controversy. Much the better course would seem to

[36] *Cf. Roncarelli* v. *Duplessis, supra* n. 18.

be for legislation either to designate no person as the decision-maker, thereby leaving the administration to the ordinary departmental processes. Alternatively, and particularly where there is a political content to the exercise of the discretion, the Minister should be designated. He can then delegate this function in respect of its day-to-day exercise but reserve any final decision on difficult cases for himself. None of the problems discussed here would then arise.

Policy and Review Tribunals

In recent years there has been a rapid growth in the establishment of various bodies to review governmental decisions. These bodies, compendiously designated "tribunals", may be constituted by one or by several persons. They may be wedded closely to the public service structure—may indeed be the permanent head of the department in which the decision is made—or they may be independent of that structure—a court or other separate body. All or some of the members of the tribunal may be selected for their expertise in relation to the decision to be reviewed. Alternatively, expertise may not be regarded as being as important as visible impartiality: this is particularly the case where judicial officers are appointed as a review tribunal. The nature of the review function also varies widely. The review may be limited to narrow factual questions such as the nature and effect of an injury suffered by a claimant, or whether a person's means satisfy statutory criteria necessary to qualify for a grant. In other cases questions of law may have to be resolved separately from, or in combination with, the drawing of conclusions from disputed factual issues. Is an applicant entitled to the grant of a licence, a mining right, a building approval? Is a person properly detained in a mental hospital or ordered to be deported? Is a person liable to taxation or the payment of duty? In these latter cases the tribunal is more concerned with whether a governmental decision is "right". Frequently the decision will have been reached by an application of policy. The question arises to what extent a review tribunal must take into account in its decision a policy laid down or followed by a decision-maker.

It is, of course, possible for the legislation providing for an appeal against a decision to indicate that the tribunal is to reach its conclusion in accordance with a statement of policy. An example of an approach similar to this is contained in the Dairy Industry Stabilization Amendment Act 1978 (Cth). This Act confers jurisdiction on the Administrative Appeals Tribunal to review the allocation of quotas. It also provides that the Minister may determine principles for the allocation of quotas. These are to be laid before Parliament and are to be binding both on the Minister and on the Tribunal. Confinement of review jurisdiction may also be achieved by providing that a decision may only be reversed if certain specified circumstances are found to exist. But these types of limitations are unusual. The more common pattern is for a tribunal to

be empowered simply to substitute its decision for that of the original decision-maker. Does this mean that the tribunal is bound to adhere to any policy adopted by or imposed on the decision-maker whose decision is being reviewed? The answer seems to be no—but this must be coupled with an admonition that any tribunal proposing to depart from governmental policy must proceed very carefully. The issue has arisen in the course of a number of applications to the Administrative Appeals Tribunal, one of which subsequently went on appeal to the Federal Court. From these decisions some guidance may be obtained on the matter.

First, it is clear that if a decision-maker has adopted an illegal policy to guide the exercise of his discretion, that policy must be set to one side by the tribunal. The grounds on which a policy may be illegal are those discussed *supra*. They are equally applicable to tribunal review of a decision as they are to judicial review. The major distinction lies in the fact that a tribunal cannot authoritatively and finally determine that an error of law has been made by a decision-maker.[37] If, however, a tribunal takes the view that the policy relied upon as the basis of a decision is invalid, it is the duty of the tribunal to set aside the decision. Should the decision-maker disagree with the view of the law taken by the tribunal, it is up to him to have the issue resolved by a court.[38]

Secondly, and equally clearly, it is proper and indeed essential for a tribunal, when reviewing a decision, to take account of the relevant governmental policy.[39] This is particularly the case where the legislation in question provides little guidance as to the factors to be considered when a discretion is exercised. The more baldly stated the discretion, the more desirable in the interests of consistency[40] is it that guidelines be formulated as to the manner of exercising the discretion. Conversely, where factors governing the discretion are spelled out in the legislation, the less there is the need for policy guidelines and the greater is the risk that any such guidelines will be illegal. Where there is a statement of policy pertaining to a discretion, this should be communicated to the reviewing tribunal.[41]

Assuming the tribunal to be one which is empowered to review a decision generally, the question next arises whether the duty of the tribunal is to satisfy itself that the decision was justifiable having regard

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[37] *Shell Company of Australia* v. *Federal Commissioner of Taxation* [1931] A.C. 275.

[38] In many Acts establishing tribunals the desirable precaution is taken of providing for questions of law to be referred by the tribunal to a court for determination: see *e.g.* Administrative Appeals Tribunal Act 1975, s. 45.

[39] *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577; 2 Administrative Law Decisions (ALD) 60 (decision of Federal Court of Australia on appeal from Administrative Appeals Tribunal): hereafter "*Drake*". See also Case Note, *supra* p. 93.

[40] See further *infra*.

[41] *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 F.L.R. 469; 15 A.L.R. 696; 1 ALD 158.

to the relevant law and policy or whether it is the tribunal's task to reach the "right" decision itself. The answer given by the Federal Court in *Drake* in relation to the Administrative Appeals Tribunal is that it is the second of these alternatives. Further, said the Court, the relevant policy followed by the Minister in reaching his decision was a factor that must be borne in mind by the Tribunal but it must not be slavishly adhered to by it. The decision of the Administrative Appeals Tribunal in *Drake's* application was, in fact, set aside by the Court on the basis that the Tribunal had addressed itself only to the question whether the Minister's decision indicated that he had properly applied the law and the governmental policy in reaching his decision. Rather should the Tribunal have considered whether *in its view* it was appropriate that Drake be deported.

In their joint judgment, Bowen C.J. and Deane J. said:

> 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.[42]

Later they said:

> the Tribunal is not, in the absence of specific statutory provision, 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.[43]

Nonetheless both the Court and the Tribunal have made it clear that policy guidelines which may have been followed by a decision-maker are not to be ignored and may well provide the best guidance as to what a decision should be. This will particularly be the case where a number of decisions have to be given on generally similar facts. Justice requires consistency and this may best be achieved by following appropriate guidelines. Brennan J. on the rehearing of Drake's application put it thus: "Inconsistency is not merely inelegant; it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice".[44] In the Federal Court in *Drake* Bowen C.J. and Deane J. instanced as a case where policy guidelines were desirable the granting of a statutory licence in circumstances where no guidelines are laid down in the legislation and the personal qualifications of the applicant are irrelevant. In cases of this kind (and deportation affords another example), it is essential to overcome the inconsistency that can flow from an unintended application of differing standards and values. But while policy may guide the tribunal,

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[42] (1979) 24 A.L.R. 577, 589; 2 ALD 60, 68.

[43] *Id.* 590, 70.

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

it cannot bind it and once it is accepted that a tribunal is not bound to reach a decision in accordance with the policy followed by the original decision-maker, it is but a small step to saying that the tribunal may review the policy itself. Indeed, it may be impossible to differentiate criticism of the decision from criticism of the policy as the decision may flow automatically from the policy. Smithers J. in *Drake* said: "In the performance of the Tribunal's function it is essential that a policy adopted by an administrator should be under review to the same extent as his evaluation of relevant matters and his general process of reasoning. . . .[45]

This question of review of policy was considered by the Administrative Appeals Tribunal soon after its establishment in *Re Becker and Minister for Immigration and Ethnic Affairs*.[46] The Tribunal pointed to the important distinction between policy formulated at the political level and that at the departmental level. It said:

> The difference between the factors to be taken into account in the two kinds of policy provides one ground of distinction between them; the difference in Parliamentary opportunity to review the two kinds of policy provides another. Some policies are basic, and are intended to provide the guideline for the general exercise of the power, other policies or procedural practices are intended to implement a basic policy. Different considerations may apply to the review of each kind of policy, and more substantial reasons may have to be shown why basic policies—which might frequently be forged at the political level—should be reviewed. There may, of course, be particular cases where the indefinable yet cogent demands of justice require a review of basic or even political policies, but those should be exceptional cases . . .[47]

These were bold words but they were not out of line with the subsequent ruling of the Federal Court in *Drake*. However, in its latest consideration of the issue the Tribunal seems to have retreated somewhat. A longish passage needs to be set out in full. Brennan J., the then President of the Tribunal, said:

> In my view, the Tribunal, being entitled to determine its own practice in respect of the part which Ministerial policy plays in the making of Tribunal decisions, should adopt the following practice:
>
> When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be

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[45] (1979) 24 ALR 577, 602; 2 ALD 60, 80.
[46] *Supra* n. 41.
[47] *Id.* 474-475, 701, 163.

considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to parliamentary scrutiny.

The general practice of the Tribunal will not preclude the Tribunal from making appropriate observations on ministerial policy, and thus contributing the benefit of its experience to the growth or modification of general policy; but the practice is intended to leave to the Minister the political responsibility for broad policy, to permit the Tribunal to function as an adjudicative tribunal rather than as a political policy-maker, and to facilitate the making of consistent decisions in the exercise of the same discretionary power.

The general practice will require the Tribunal to determine whether the policy is lawful, not in order to supervise the exercise by the Minister of his discretion, but in order to determine whether the policy is appropriate for application by the Tribunal in making its own decision on review.[48]

The first paragraph of this statement of practice adopts a position very similar to that enunciated by the House of Lords in the *British Oxygen* case in relation to the rule that a decision-maker cannot determine an issue by an automatic application of a rule of policy. It should be interpolated that earlier in the reasons for decision Brennan J. had indicated that injustice to a person was a cogent reason to depart from a policy—"consistency is not preferable to justice".[49] But it is questionable whether the *British Oxygen* approach is suitable for adoption by a tribunal. The House of Lords ruling is in the context of judicial review but the Administrative Appeals Tribunal, despite Brennan J.'s plea that it should be left to carry out an adjudicative function, is closely identified with the administrative process. A court's sole function is to rule on the legality of a decision but the Tribunal cannot avoid its role of pronouncing on the wisdom of a decision under review. While it is near the judicial end of the administrative spectrum, its procedures and the material that is to be presented to it for the purpose of enabling it to reach a decision indicate that it is to play an active part in the decision-making process. The reference in the last paragraph of the statement to the Tribunal enquiring into the lawfulness of a policy prior to its application is a little perplexing. If this is to be the sole enquiry, the ruling would seem to run counter to *Drake* in the Federal Court.

It is perhaps unfortunate that these fundamental questions as to the role of the Tribunal have arisen in the context of deportation cases. This is an area where there is a high political content in government policy and decisions taken may well be controversial. The exercise of many of the other discretions that are reviewable by the Tribunal will, of necessity, have been founded upon policy guidelines. It would be a pity if the

[48] (1979) 2 ALD 634, 645.
[49] *Id.* 645.

approach in *Drake (No. 2)* were to be seen as excluding the Tribunal from adopting a positive role in the administrative process in relation to these areas. The statement of Brennan J. in *Becker* that is set out *supra* indicates that a balance can be achieved that recognises the various levels at which policy is formulated. The Tribunal has reviewed government policy in the past. For example, in *Re Hospital Contribution Fund of Australia and Minister for Health (No. 1)*[50] the Tribunal considered the abandonment by the Minister of a long held policy as to the amount of reserves that should be held by a Fund. It did not, however, have to pronounce finally upon the wisdom of this action. In *Re Hospital Contribution Fund of Australia and Minister for Health (No. 3)*[51] the Tribunal approved the policy of the Minister in relation to precluding Funds from discouraging nursing home patients from ceasing to be members. It said that it considered his actions to be consistent with the overall scope and purpose of the National Health Act. In *Re Istandar and Acting Minister for Immigration and Ethnic Affairs*[52] the Tribunal added an additional factor to those enumerated by the Minister for consideration in deportation cases. A policy decision not to advise certain persons of a change in their rights under the Superannuation Act because of administrative difficulties was held to constitute a "special circumstance" justifying an extension of time to apply in *Re English and Commissioner for Superannuation.*[53] These decisions recognise the administrative role of the Tribunal. There is no reason why the Tribunal cannot fulfil such a role while at the same time engaging in adjudicative functions. Indeed it would seem that other members of the Tribunal may not be prepared to adhere rigidly to the practice suggested by Brennan J., at least where the policy has been determined in the Department. In *Re Miller and the Secretary, Department of Transport* the Tribunal commented, in relation to a policy adopted by the Department of Transport, that were it necessary for the Tribunal to come to a conclusion about the policy it would have to make its own independent assessment of the propriety of it.[54] The opportunity to explore issues and test witnesses, including public servants, can place the Tribunal in a particularly strong position to propound effective criteria for the exercise of a discretion. The Tribunal is not a law-making body—it must accept any policy that has been embodied in legislation.[55] Ultimately, if a government does not agree with a decision of the Tribunal, it can introduce legislation to set the decision aside.[56]

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[50] (1978) 1 ALD 209.

[51] (1979) 2 ALD 401.

[52] (1979) 2 ALN 524.

[53] (1978) 1 ALD 476.

[54] (1979) 2 ALN 671.

[55] *Re Lane and Department of Transport* (1978) 1 ALD 32.

[56] As was done following the decision of the Tribunal in *Re Heffernan and Defence Force Retirement and Death Benefits Authority* (1978) 1 ALD 220: see Defence Force (Retirement and Death Benefits Amendments) Act 1979 (Cth) s. 9.

The notion of a tribunal being involved in the administrative process creates difficulties in the theory of ministerial responsibility. To carry out its adjudicative functions, a tribunal must be free from governmental interference.[57] This inevitably means that its administrative role, including that of policy-making, must also be independent. But this is no new phenomenon: the independent statutory authority exercising traditional government powers has been with us for many years. The decisions of such bodies can be controlled only by legislation. A tribunal can be similarly supervised. Rather than endeavouring to limit the policy-making function of tribunals, administrators should recognise the usefulness of the manner in which such bodies go about their task. They should take advantage of this by providing all possible assistance so that the maximum benefit in relation to policy interpretation and formulation flows from the adjudicative functions of these hybrid bodies.

Most of the foregoing has been written in the context of the operation of the Administrative Appeals Tribunal. The general status and wide powers of that Tribunal may be thought to give a special standing to its review powers. Undoubtedly, the Tribunal does have greater powers and occupies a more important position in the administrative structure than most tribunals. Nonetheless the decisions, and the comments relating to them, are pertinent to any tribunal that is empowered to review generally any administrative discretion, whether this be a particular decision or all the decisions of an administrative body. The full scope of tribunal review power is only coming to be recognised, largely thanks to the activities of the Administrative Appeals Tribunal. If a tribunal is to be prevented from considering or reviewing policy questions, this will have to be spelled out in the legislation determining its jurisdiction.

[57] A notion that led the Administrative Review Council to propose that the present restriction on the Administrative Appeals Tribunal's power in deportation cases to making recommendations only to the Minister be removed: Administrative Review Council: Third Annual Report 1979 para. 87.