MERITS REVIEW AND JUDICIAL REVIEW—THE AAT AS TROJAN HORSE

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This paper examines the relationship between so-called "merits review" of administrative decision-making, and "judicial review" of administrative action as that term is used in the title of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act), for instance. In particular, it assesses and, in some respects, challenges the widely held view that there is a qualitative difference between merits review and judicial review. The main thrust of my argument will be that the differences between judicial review and merits review are not as stark as they are often portrayed. More provocatively, I will suggest that merits review can plausibly be described as judicial review in disguise.

Section I considers the constitutional underpinnings of merits review, and concludes that from a functional point of view, the exclusion of merits review from the judicial power of the Commonwealth is hard to justify. Section II examines various suggested distinctions between judicial review and merits review. Its main conclusion is that merits review is characterised by the power to exercise afresh the decision-making power invested in the original decision-maker. In section III, I compare the grounds and remedies of merits review with those of judicial review. One conclusion will be that it is in respect of review of administrative fact-finding that merits review differs most from judicial review. Another will be that the grounds of merits and judicial review are formulated in such abstract terms that they leave much room for the injection of the values of the individual judge or tribunal member into the review process. This allows different reviewers to be more or less "interventionist" or "activist" in their approach to review of administrative decision-making. In the concluding section, I make a few comments about suggested reforms of the federal merits review system.

I. THE CONSTITUTIONAL FOUNDATION OF MERITS REVIEW

In matters of Australian public law, the Constitution is always a good place to begin. This is especially so in the present context because right from the start (by which I mean the report of the Kerr Committee in 1971)[1] it has had a fundamental and, in some

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1 Report of the Commonwealth Administrative Review Committee (Chairman: The Hon Mr Justice J G Kerr) (1971) (hereafter Kerr Report). Reprinted in R Creyke and J McMillan (eds), *The Making of Commonwealth Administrative Law* (1996).

ways an unfortunate, impact on the federal administrative law system. Despite the affinities between the Australian and the United States Constitutions, outside the confines of Commonwealth constitutional law the mindset of Australian public lawyers in the 1960s and 1970s was English.[2] In the United States, judicial review of administrative action has been enormously important, at least since the enactment in 1946 of the Administrative Procedure Act, which regulates adjudication and rule-making by regulatory agencies and other government instrumentalities.[3] The first multi-functional administrative agency—the Interstate Commerce Commission—was set up in 1888, and many more were created in the 1930s. Whatever qualms there might have been about the constitutionality of rule-making and adjudication by such agencies were drowned by waves of enthusiasm for the New Deal. The history of United States administrative law since then has largely revolved around the relationship between courts and quasi-independent administrative agencies.[4]

By contrast, in 1960s England, judicial review was benighted. The decisions of the House of Lords in *Ridge v Baldwin*[5] and *Anisminic v Foreign Compensation Commission*[6] heralded a new dawn. But by 1968, when the Kerr Committee was appointed, the sun had (in defiance of nature) not yet risen in Australia. It is unsurprising, then, that the Committee did not see a large role even for a revamped system of judicial review;[7] and that they looked elsewhere in search of new techniques for holding government administrators accountable to those affected by their decisions. The main body to which the reports of the Kerr and Bland[8] Committees gave birth—the Administrative Appeals Tribunal (AAT)—was truly novel in two ways. First, it was a non-specialist tribunal with power to review administrative decision-making in diverse areas of governmental activity. It was, in other words, a tribunal of general jurisdiction. Secondly, the senior members of the new tribunal were judges and lawyers.[9] The involvement of judges raised early doubts about the constitutionality of the scheme, but they were soon resolved.[10] These two features of generality and the involvement of judges and lawyers placed the AAT much more squarely in the judicial branch of

2 See, eg, Kerr Report, para 97.

3 Kerr Report, paras 199-203.

4 "Following the New deal, the project of administrative law shifted from maintaining structural integrity in a system of separated powers to controlling the exercise of discretion broadly delegated to multifunctional administrative agencies": C S Diver, "Sound Governance and Sound Law" (1991) 89 *Mich LR* 1436 at 1437. For a very readable history see M Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (1988).

5 [1964] AC 40.

6 [1969] 2 AC 147.

7 Kerr Report, para 249.

8 Committee on Administrative Discretions (Chairman: Sir Henry Bland) (1973) (hereafter Bland Report). Reprinted in R Creyke and J McMillan (eds), *The Making of Commonwealth Administrative Law* (1996).

9 The Administrative Review Council has recommended that less emphasis be put on legal qualifications as a criterion for membership of merits-review tribunals in return for greater transparency in a skills-based selection process: *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995) (*Better Decisions*), ch 4.

10 In *Drake v Minister for Immigration and Ethnic Affairs (No 1)* (1979) 24 ALR 577.

government than the typical English tribunal, for instance.[11] The inclusion of the word "appeals" in the name of the new general tribunal,[12] coupled with the fact that it could do everything a court could do by way of judicial review[13] and more (even if non-conclusively in some respects), served to reinforce the impression that the AAT was primarily designed as an effective substitute for, not a complement to, judicial review of administrative action.[14] Admittedly, there was an appeal on points of law to the Federal Court; but the fact that decisions of the AAT were subject to appeal, and that the appeal was limited to points of law, can actually be seen as confirming the status of the tribunal as a sort of inferior court.[15] The AAT looks and acts more like a court with lay members than a tribunal with judicial and legal members.[16]

How ironical, then, that a prime concern of the Kerr Committee was to establish a review system that would not breach the Constitutional barriers to the conferral of the judicial power of the Commonwealth on Chapter II bodies, and the conferral of non-judicial power on Chapter III courts. Indeed, while the Committee considered it "preferable" to commit the power of merits review to a general review tribunal rather than a court,[17] the only substantive reasons given for recommending a Chapter II body rather than a Chapter III body as the repository of the merits-review jurisdiction were the constitutional separation of powers and the desirability that the tribunal should have lay members.[18] The reasoning in support of the Committee's conclusion that merits-review jurisdiction could not be vested in a Chapter III court is based on the concept of justiciability.

Where the decision of an administrative authority involves non-justiciable issues, a comprehensive review of that decision cannot be committed to the courts. It is of paramount importance to recognise that the vast majority of administrative decisions involve the exercise of a discretion by reference to criteria which do not give rise to a justiciable issue. It follows that for constitutional reasons there can be no review by a court on the merits of these decisions, unless those criteria are changed appropriately so as to raise justiciable issues. A change of this character is both undesirable and inconceivable, except perhaps in particular cases.[19]

The Kerr Committee defined "justiciable issues" as issues which fall to be resolved "upon grounds that are defined or definable, ascertained or ascertainable, involving

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11 "The Kerr vision of a system of administrative review... demonstrated an attachment to the judicial mode of thinking": D Pearce, "The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect" (1989) 53 *Canb Bull Pub Admin* 15 at 18.

12 Neither the Kerr Committee nor the Bland Committee used this term to describe the body they proposed.

13 With the possible exception of dealing with certain legal issues (see section III.1(1) below. For discussion see A Hall, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13 at 41-45; E Campbell, "The Choice Between Judicial and Administrative Tribunals and Separation of Powers" (1981) 12 *F L Rev* 24 at 46-48.

14 Kerr Report, para 249; Bland Report, para 180.

15 Like inferior courts, the AAT is also amenable to judicial review.

16 And this seems to have been the Government's intention: H Reps Deb 1975, Vol 93, 1187.

17 Kerr Report, para 228 and recommendation 16.

18 Ibid, paras 247, 293. The requirement that judges of Chapter III courts be lawyers is statutory, not constitutional: eg, Federal Court of Australia Act 1976, s 6(2).

19 Kerr Report, para 68. See also para 227.

the exercise of prescribed standards".[20] However, the committee thought it "no easy matter to determine by the application of this principle whether a particular discretion is judicial [that is, justiciable] or not"; and they recognised it to be "well accepted that the character *and content* of a discretion will be influenced by the character of the tribunal in which it is reposed".[21]

Our understanding of the nature of discretion and of the administrative process has increased greatly in the past 30 years. In the light of what we now know, the proposition that "the vast majority of administrative decisions" involve the exercise of discretions which are non-justiciable (in the sense the Kerr Committee gave to that term) seems very far from the truth. In fact, the vast majority of administrative decisions are made by the application of more or less detailed, and more or less formal, principles and rules no different in nature from those which courts apply all the time.[22] It is only to the very highest levels of policy-making that the Committee's view seems at all applicable. But even there, the decision which is made on no definable or ascertainable ground and according to no definable or ascertainable standard must be the rarest of rare birds. Decisions which are made for no reason may not be a logical impossibility, but they should have no place in the affairs of government at any level. Even if I am wrong about all this, the qualifications which the Committee attached to its definition of "justiciable issue" almost entirely undercut its starting position because they involve the recognition that issues are not justiciable or non-justiciable *by nature*. There is always a choice about how detailed and explicit the criteria ought to be according to which any particular decision is to be made. This is not to say that every administrative decision is suitable for review by a court. However, the chief criterion of unsuitability for judicial review is not non-justiciability in the sense in which the Kerr Committee used this term, but something closer to the American "political questions" principle.[23] Some issues are politically so contentious that it is prudent for courts to steer clear and leave them to the politicians. The identity of such issues may vary from time to time; although there are some, such as foreign affairs and the waging of war, which the courts would be wise never to handle.

Another possible criterion of unsuitability for review is polycentricity. The basic idea behind this concept is that many conflicts of interests cannot satisfactorily be resolved if they are reduced to the form of bipolar disputes. However, we need to be very careful in applying this idea. As in the case of justiciability, issues are not polycentric or "monocentric" by nature. Viewed from a sufficiently broad perspective, very many decisions, including decisions of types routinely made by courts, can be seen to affect multiple interests, many of which are more or less ignored when the issues are treated in a bipolar way. It is necessary, therefore, to identify those polycentric issues which we are happy to have treated in a bipolar way, and to distinguish them from issues which we think ought to be dealt with by taking account of a much wider range of affected interests. My suspicion is that in the context of review of administrative action, the line of this distinction will be found more or less to

20 Ibid, para 66.

21 Ibid (emphasis added). See also *Attorney-General of the Commonwealth v Breckler* (1999) 163 ALR 576 at [83] per Kirby J; *Re Winthrop and Smith and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 873 at 876-877 per Davies J; L Zines, *The High Court and the Constitution* (4th ed 1997) at 192-196.

22 See generally R Baldwin, *Rules and Government* (1995).

23 P H Lane, *Lane's Commentary on the Australian Constitution* (2nd ed 1997) at 507-508.

coincide with the line which divides "political questions" from those regarded as suitable for resolution by a court.

Implicit in the treatment by the Kerr Committee of the constitutional aspects of a merits-review system is a distinction between merits review and judicial review according to which "the merits" of administrative decision-making are characterised by the resolution of non-justiciable issues. I will have more to say later about this characterisation of merits review.[24] Here my basic point is that the ground on which the Kerr Committee rested its conclusion that merits review falls outside the judicial power of the Commonwealth is shaky. Indeed, to those not steeped in the learning about "the judicial power of the Commonwealth", the idea that merits review jurisdiction is not included within that concept might seem bizarre.

Because of the inconclusiveness of the "indicia" approach to the definition of judicial power (which the Kerr Committee followed), it is supplemented by the notion that there are certain types of proceeding that *must* be handled by Chapter III courts—that are, in other words, exclusively judicial.[25] The core examples are criminal trials,[26] and actions in contract and tort. The list notably omits review of administrative action, which is part of the judicial power of the Commonwealth by virtue of s 75(v) of the Constitution. This omission is surprising because one of the main functions of the separation of powers doctrine is to secure the independence of adjudicative bodies in cases in which the government is involved as a party;[27] and the government is, in one manifestation or another, a party to the typical judicial review action. Nevertheless, review of administrative action, although part of the judicial power of the Commonwealth, is not exclusively judicial (except to the extent that it involves the conclusive resolution of issues of law). Even so, if we accept for the moment that merits review intrudes further into the decision-making domain of the executive branch than judicial review, from a functional point of view it is peculiar in the extreme that merits review (to the extent that it goes further than judicial review) should be exclusively non-judicial.

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24 See section IV.1.iii below.

25 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258 per Mason CJ, Brennan and Toohey JJ; *Attorney-General of the Commonwealth v Breckler* (1999) 163 ALR 576 at [40] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (adding suits to enforce the terms of a trust to the list of exclusively judicial proceedings).

26 But see A D Mitchell and T Voon, "Defence of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia" (1999) 27 *F L Rev* 499. From an historical perspective, the inclusion of criminal trials in the list is odd because in England the vast majority of criminal trials are still handled by lay magistrates who (unlike judges of Chapter III courts) are not appointed by the head of state, do not enjoy security of tenure, and are unpaid. However, the Scottish High Court of Justiciary has recently held that the Scottish system of appointing untenured judges to hear criminal cases is in breach of the European Convention on Human Rights: *Starrs v Procurator Fiscal (Linlithgow)* (11 Nov, 1999). The decision has serious implications for the English criminal justice system. For a brief account of the transition from a lay to a legal magistracy in New South Wales see C R Briese, "Future Directions in Local Courts of New South Wales" (1987) 10 *NSWLJ* 127 at 127-131. For the early history see D Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) ch 5. See also *Re Governor, Goulburn Correctional Centre, Goulburn, ex parte Eastman* (1999) 165 ALR 171 at 174.

27 *Attorney-General of the Commonwealth v Breckler* (1999) 163 ALR 576 at [81] per Kirby J.

The point is that protection of the independence of dispute-settling organs from interference by the executive is most needed where one of the parties to the dispute is the executive.[28] The executive understandably feels threatened by external merits review. Since the concept of the judicial power of the Commonwealth is the constitutional tool for protecting the independence of adjudicative bodies from the executive, one would expect merits review to be included within it, even if not exclusively.[29] It is ironical that the understanding of the concept of judicial power, which prevents merits-review jurisdiction being vested in Chapter III courts, potentially serves to undermine the independence of a component of the federal administrative law system, which plays a major role in settling disputes between citizen and government. It is even more ironical that—perhaps precisely in order to counter this corrosive effect—the AAT was made to look as much like a court as possible by being given general jurisdiction, judicial leadership, and legal members, as well as court-like powers and procedures.

The somnolent state of the judicial review jurisdiction in Australia 30 years ago no doubt made it inconceivable that the Kerr Committee might have attempted to exploit the constitutional entrenchment of the separation of powers to argue for a truly radical reform of the grounds and remedies of judicial review, with the aim of creating a thoroughly independent, court-based system of external review of executive action.[30]

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28 For a judicial exposition of such a functional approach to judicial power, see the judgment of White J (dissenting) in *Northern Pipeline Co v Marathon Pipe Line* Co 458 US 50 (1982). I am not arguing that independence of the judiciary is only important where one of the parties is the executive, but that it seems especially in need of protection in such cases. I therefore reject an approach (found in the judgment of Brennan J for the majority in the *Northern Pipeline* case, and A Hall, above n 13) to the constitutionality of Chapter II review tribunals that rests on a distinction between public and private rights. See also *Attorney-General of the Commonwealth v Breckler* (1999) 163 ALR 576 at [84] per Kirby J.

29 The obvious objection is that merits review by courts would imperil separation of powers in a different way, by allowing courts to encroach too far into the decision-making domain of the executive. But this is a problem for any form of merits review external to and independent of the executive, including the AAT (see section IV.1 below). A way around the difficulty would be to adopt a principle of justiciability, elaborated in terms of "political questions", as a constraint on external review of administrative decision-making. However, in my view (unlike that of the author of Note, (1982) 96 *Harv LR* 257-268) justiciability would not be suitable as the basic criterion of judicial power because it would unduly restrain the creation of non-judicial adjudicative bodies. I do not suggest that separation of powers concerns would require that Chapter III courts exercise original merits-review jurisdiction. Second-tier judicial involvement could suffice: *Crowell v Benson* 285 US 22 (1932) and *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. For further discussion see R H Fallon Jr, "Of Legislative Courts, Administrative Agencies and Article III" (1988) 101 *Harv LR* 915; B Topperwien, "Separation of Powers and the Status of Administrative Review" (1999) 20 *AIAL Forum* 32 at 37-38.

30 "We were mindful that judicial review might result in over-emphasis on form, a tendency which was clearly discernible in the mesh of technicalities which surrounded the remedies by way of prerogative writ": Sir Anthony Mason, "Administrative Law—Form Versus Substance" (1996) 79 *Canb Bull Pub Admin* 15. For recent discussion of more court-based systems of administrative review, see S Kenny, "Administrative Law: Some Future Constraints and Goals" in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law—At the Twenty-Five Year Mark* (1998) at 105-107; S Hamilton, "The Future of Public Administration: The Future of Public Law" in R Creyke and J McMillan

Instead, we have ended up with a hybrid which the government thinks is too independent,[31] and many in the legal profession think is not independent enough.[32] The assumptions on which the whole system was apparently founded, namely, that the vast majority of administrative decisions involve non-justiciable issues and, consequently, that merits review is exclusively non-judicial, both seem to me to be contestable.

Be that as it may, the Kerr Committee's preference for a general review tribunal established under Chapter II happily coincided with their view that merits review was not a function which could be conferred on a Chapter III court; and, conversely, that a Chapter II body, which could constitutionally review the merits of administrative decisions, could not perform functions central to judicial power, such as the conclusive decision of points of law.[33] The device used to satisfy the former stricture was to put the AAT "into the shoes of" the executive. I will return to it in section II.3. The mechanism adopted to satisfy the latter stricture was to provide for an "appeal"[34] on points of law to the Federal Court. In *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation,* Gummow J expressed doubts about whether it was constitutional to limit appeals to the Federal Court from the AAT to points of law.[35] However, these doubts were based on a view of the meaning of "matter" in Chapter III of the Constitution which is inconsistent with the reasoning and decision of the majority Justices in *Abebe v Commonwealth.*[36]

(eds), *The Kerr Vision of Australian Administrative Law—At the Twenty-Five Year Mark* (1998) at 119-120.

31 J McMillan, "Review of Government Policy by Administrative Tribunals" in *Commonwealth Tribunals: The Ambit of Review* (Law and Policy Papers No 9; Centre for Public and International Law, 1998) at 27-29.

32 See, eg, *Better Decisions,* above n 9 para 2.31.

33 Chapter II tribunals can be given the power conclusively to decide questions of fact: Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court* (Report No 41, 1997) para 2.19. Although arguments can be made in favour of the proposition that the power to decide questions of law conclusively is essential to judicial power while the power to decide questions of fact conclusively is not, they are largely pragmatic: many more cases turn on issues of fact than turn on issues of law. To allow every finding of fact by the AAT to be challenged in a *de novo* appeal to the Federal Court would (to adapt words of Brandeis J in *Crowell v Benson* 285 US 22 at 94 (1932)) "gravely hamper" the effective operation of the AAT, reduce its "prestige", greatly increase "the number of controverted cases", and encourage "persistence in controversy". Indeed, the *de novo* fact-finding power of the AAT itself is controversial (see section IV.1.ii below).

34 Administrative Review Council Report, ibid, para 2.21.

35 (1988) 82 ALR 175 at 178-182. His Honour's doubts were raised by the fact that under s 44 of the Administrative Appeals Tribunal Act 1975, the "existence of a question of law is not... merely a qualifying condition to ground the appeal, but also the subject matter of the appeal itself" (at 178). The Administrative Review Council has recommended that the power of the Federal Court in relation to appeals on points of law from the AAT should, on certain conditions, be expanded to include review of findings of fact. However, the arguments supporting the recommendation are pragmatic, not constitutional (see above n 33, paras 6.2-6.11).

36 (1999) 162 ALR 1.

II. WHAT IS MERITS REVIEW?

One of the most surprising aspects of the large literature about the federal administrative law system is the absence from it of sustained attempts to analyse what is meant by "merits review", and to distinguish merits review from judicial review. First, it is perhaps worth making the obvious point that judicial review and merits review are not mutually exclusive. At least as practised by Australian merits-review tribunals, merits review reaches most of the types of issues that can be handled by courts exercising judicial review jurisdiction.

A number of formulae are commonly used to characterise judicial review and merits review. For instance, it is sometimes said that judicial review is about the legality of administrative decisions, not their merits; or about procedure, not substance. Another frequently invoked point of distinction between merits review and judicial review is that a court exercising judicial review jurisdiction has no power, at common law, to substitute its decision for that of the administrator. In my view, each of these statements is problematic.

In order to justify this assertion, I need first to say something about the traditional tripartite categorisation of decision-making tasks in terms of issues of law, issues of fact, and issues of policy.[37] The basic point to be made is the boundaries between these three categories of issues are porous. As a result, the decision-maker will often have a real choice about the category to which a particular issue should be allocated.[38] Take, for instance, the issue of whether a particular set of facts falls under a particular legal rule. There is no general principle which can be used to determine, in any particular case, whether this is an issue of law, or an issue of fact, or a mixture of the two. Or consider a simple case of statutory interpretation—the classic example of an issue of law. If a statutory provision is open to more than one interpretation, the choice between those interpretations will typically turn on the purpose (or "policy") of the statute or on some factual assertion about the "ordinary meanings of words". Many issues of statutory interpretation can just as easily be seen as issues of fact or policy as issues of law. So far as issues of fact are concerned, one of the main arguments for judicial deference to administrative findings of fact is that a decision-maker, who fully understands the context in which the issue of fact falls to be determined, is likely to resolve that issue better than a decision-maker who lacks that understanding.[39] In this argument, the notion of the "context" of decision-making typically refers to the values and purposes (or "policies") underlying the relevant legislative scheme or government programme. Often, the choice between competing interpretations of evidence is better understood as an issue of policy than as one of fact.

The boundary between law and fact is also porous; but for present purposes, this is not as important as the permeability of the dividing lines between law and fact on the one hand, and policy on the other.

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37 For present purposes, it is sufficient to define "policy" as what is left after "law" and "fact" have been subtracted from the issues facing the decision-maker.

38 For a fuller discussion see P Cane, *An Introduction to Administrative Law* (3rd edn 1996) ch 6.

39 In light of the point just made about questions of law, a similar argument can be made in relation to them as well.

1. Legality and merits

Against this background, consider, first, the proposition that judicial review is about the legality of administrative decisions, not their merits.[40] Once it is accepted that there are no impervious barriers between issues of law and fact on the one hand, and issues of policy on the other, the distinction between legality and merits also begins to appear rather watery. The traditional technique for maintaining it, at least in relation to issues of law and fact, is to have recourse to a "theory of jurisdiction". According to such a theory, some issues of law and fact define the limits of the authority (or "power") of administrative decision-makers, while others fall within the limits of the power. Issues of the former type go to the legality of administrative decisions, whereas issues of the latter type concern whether decisions are "right or wrong" (their "merits"). In English law, the jurisdictional theory has become more or less defunct in relation to questions of law: it is now true of almost all bodies subject to judicial review that *any* error of law they make will be classified as jurisdictional. In Australian law, by contrast, the distinction between jurisdictional and non-jurisdictional issues is still important. However, it has been recognised for more than 60 years (as a result of a set of seminal articles by Gordon)[41] that it is impossible to draw the line between jurisdictional and non-jurisdictional issues in any analytically rigorous way; and that the classification of issues as being jurisdictional or not depends on prior value judgments about the proper scope of the administrator's powers, and the proper role of the court in reviewing the exercise of those powers. Furthermore, even under the Australian version of the jurisdictional theory, errors of law within jurisdiction can be corrected on judicial review if they appear "on the face of the record"; although the "record" is defined very narrowly. Ironically, the effect of expanding the definition of "jurisdictional error", and of expanding "the record",[42] is to increase judicial control over the merits of administrative decision-making.

So far as issues of policy are concerned, the traditional technique for maintaining the legality/merits distinction is the doctrine of *Wednesbury* unreasonableness, according to which a court will invalidate decisions on policy questions only if they are extremely unreasonable.[43] It is very difficult to understand in what sense a judgment that an administrator made a decision that no reasonable decision-maker could have made is not a judgment about the merits of that decision.

In fact, there is no analytically clear distinction between the legality of administrative decisions and their "merits". Administrative decisions may be illegal because they lack merit. The converse is not true, of course. A perfectly meritorious decision may be illegal if, for instance, the decision-maker failed to observe some geographical limit on jurisdiction. But the distinction between legality and merits does not set a clear boundary around judicial review.

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40 For example P Bayne, "The Commonwealth System of Non-Judicial Review" (1989) 58 *Canb Bull Pub Admin* 43 at 46; *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167 at 177 per Brennan J; *Johnson v Federal Commissioner of Taxation* (1986) 72 ALR 625 at 628 per Toohey J.

41 D M Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931) 47 *LQR* 386 and 557.

42 Which English courts also did at one point before effectively abandoning the theory of jurisdiction.

43 See further section IV.1.iii.e below.

2. Substance and procedure

It is often said that judicial review is concerned with the procedure, not the substance, of administrative decision-making. There are certainly some grounds of judicial review that relate to decision-making procedure, for instance the fair hearing rule. But even here, substance may not be far in the background. There is a strand of reasoning in the cases to the effect that a procedural defect will not affect the validity of a decision if the defect resulted in no "substantial" injustice to the applicant.[44] Certain other bases of judicial review occupy a sort of middle ground between procedure and substance, which is often referred to by the term "process". For instance, the rule that a decision-maker must not take account of irrelevant considerations in one sense concerns decision-making procedure, but in another is of direct relevance to the substance of the decision. The tension between procedure and substance can clearly be seen in the concept of legitimate expectation.[45]

The falsity of the statement we are considering in this section is most obviously shown by the fact that error of law, error of fact and *Wednesbury* unreasonableness are grounds of judicial review. On any plausible understanding of the distinction between procedure and substance, these grounds of review go to the substance of administrative decisions.[46]

3. The power of substitution

(i) Judicial review

According to the Administrative Review Council, "merits review is characterised by the capacity for substitution of the decision of the reviewing person or body for that of the original decision maker".[47] At common law, a court exercising judicial review jurisdiction can quash the decision under review, but it cannot make a substitute decision.[48] By contrast, the AAT is empowered to affirm or vary the decision under review, or to set it aside and either make a substitute decision or remit the matter to the original decision-maker with or without directions or recommendations. The power to vary is a form of the power to make a substitute decision.

The classic explanation for the lack of a judicial power to make a substitute decision is that the role of a court exercising judicial review jurisdiction is not to decide what decision the administrator ought to have made, but only whether the decision actually made was within the administrator's powers. This explanation does not quite fit the facts. There may be cases where the ground on which a decision is quashed will effectively leave the administrator no choice about what decision to make next time around.[49] The grounds of judicial review most likely to generate such a situation are

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44 P Cane, above n 38 at 181-183; M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 388-391. For a theoretical exploration of the relationship between procedures and outcomes, see D Galligan, *Due Process and Fair Procedures* (1996).

45 M Aronson and B Dyer, ibid at 424-428.

46 Similarly, Sir A Mason, above n 30 at 16.

47 *Better Decisions*, above n 9 para 2.2.

48 This distinguishes judicial review from judicial appeals. Viewed in this way, an application for a new trial is a form of judicial review.

49 For a particularly robust statement of this point see H Whitmore, "Comment" (1981) 12 *F L Rev* 117 at 188. For an altogether more sceptical view, see M Aronson and B Dyer, above n 44 at 186.

error of law and error of fact.[50] In such cases, lack of the power to substitute is a technicality of no practical importance. The power to remit with directions (which the Federal Court possesses)[51] is adequate for such cases. Conversely, some grounds of judicial review can provide the applicant with no assurance that the same decision will not be made again. Procedural impropriety is the obvious example. In such cases, too, the absence of a power to make a substitute decision is of no importance because, even if it existed, a merely procedural defect would not, by itself, justify its exercise. The lack of a power to make a substitute decision might appear to be of most importance where the ground of invalidity goes to the substance of the challenged decision, but not in such a way as to leave only one decision open to the administrator next time around. But even here, whether making a substitute decision would be an appropriate remedy depends on the ground of review. For example, if the ground of review were failure to take account of a relevant consideration, a holding that the decision-maker ignored a relevant consideration would not, by itself, justify the making of a substitute decision.

In fact, the remedial power to make a substitute decision presupposes that the reviewing body is empowered to re-make the decision which the original decision-maker was empowered to make. A court exercising judicial review jurisdiction may be in a position to say what decision ought to have been made, and may even be able to ensure that it is made. But if there is one thing that a court does not (and, indeed, constitutionally cannot) do, it is to exercise the powers of the administrator whose decision is under review. Even in cases where the question before the court is precisely the same question as the original decision-maker had to answer (for instance, a question of law), in answering that question the court is exercising a review power, not an original decision-making power. As we will see in the next section, it is the power to exercise again the original decision-maker's power, rather than the remedial power to make a substitute decision, which characterises merits review.[52]

(ii) The AAT's powers

> For the purposes of reviewing a decision, the tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision...[53]

This provision establishes the AAT as a Chapter II body and is, thus, the basis of its constitutionality. Applied to a Chapter III court, it would be unconstitutional. The device of putting the reviewer "into the shoes of the decision-maker"[54] is not only the most distinctive feature of the merits review system, but arguably its most problematic. The difficulty is that the statutory words have been interpreted in a purely facilitative

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50 On the other hand, a decision may be set aside for error of law or fact even though the applicant cannot show that, if the error had not been made, a different result would have been inevitable: *X v The Commonwealth* [1999] HCA 63 at [112] per Gummow and Hayne JJ.

51 ADJR Act, s 16(1)(b); *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 68 ALR 441.

52 The real significance of the remedial power of substitution is that it removes "the risk of the same [wrong] decision... being made again": Kerr Report, para 20. But, by itself, it says nothing about the scope or grounds of review.

53 Administrative Appeals Tribunal Act 1975 (AAT Act), s 43(1).

54 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 143 per Smithers J. See also *Better Decisions*, above n 9 paras 2.53-2.63.

way.[55] They provide no clear guidance as to how the Tribunal should exercise its review function. Very early on, the Federal Court held that in performing its role, the Tribunal was not limited to the material on which the original decision was based.[56] Moreover, it was accepted wisdom from the early days that an important objective of the Tribunal was to improve first-tier administrative decision-making[57]—a function that almost *requires* the Tribunal to proceed differently from the original decision-maker. The Tribunal may, apparently, act as if it were the original decision-maker, or in a reviewing capacity, or partly as the one and partly in the other. As Brennan J said in relation to the review of policy in *Drake v Minister for Immigration and Ethnic Affairs (No 2)*, the Tribunal is "entitled to determine its own practice"[58] (subject, of course, to the supervision of the Federal Court). If the original decision-maker's shoes are to its taste, the Tribunal will wear them; otherwise it will feel free to discard them! In relation to fact-finding, for instance, the Tribunal certainly does not act as if it were the original decision-maker.[59] By contrast, in relation to questions of law (including constitutional questions), the Tribunal's position is essentially the same as that of the original decision-maker: both being Chapter II entities, neither has the power to decide such questions conclusively, but both must form an "opinion" about such questions if this is necessary for the exercise of their decision-making functions.[60]

The position in relation to policy is more complex. Some commentators seem to assume that the Tribunal may refuse to apply relevant lawful quasi-legislation simply because, in the view of the Tribunal, it would be "preferable" not to apply it.[61] The question which is then raised is whether the original decision-maker would be entitled to do this. There are conflicting High Court *dicta* on this issue.[62] But since the precise nature and extent of the original decision-maker's powers and discretions are not (in the absence of statutory provision to this effect) determinative of the nature and extent of the Tribunal's powers, the answer to the question seems largely irrelevant. The reality is that the Tribunal occupies an uneasy and ambiguous middle ground between the judicial and the executive branches of government. It was, from the very beginning, conceived as a quasi-judicial adjudicative review body. But because the powers of the courts to review executive decisions were assumed to be subject to constitutional limitations which were seen as a hindrance to the proper and desirable level of review of administrative decision-making, merits review was designed as a non-judicial

55 For example, *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167 at 175-176 per Brennan J; *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88 at 92 per Davies J.

56 *Drake v Minister for Immigration and Ethnic Affairs (No 1)* (1979) 24 ALR 577 at 589.

57 M D Kirby, "Administrative Review on the Merits: The Right or Preferable Decision" (1980) 6 *Monash LR* 171 at 180, 191, 192-193. For a recent careful discussion, see *Better Decisions*, above n 9 ch 6. But since decisions of the Tribunal have no "precedential" force, the main responsibility for improving administrative decision-making in response to Tribunal decisions inevitably lies with the executive: *Better Decisions*, para 2.42.

58 (1979) 2 ALD 634 at 645.

59 M C Harris, "'There's a New Tribunal Now': Review of the Merits and the General Administrative Appeal Tribunal Model" in M Harris and V Waye (eds), *Australian Studies in Law: Administrative Law* (1991) at 203, 203-206.

60 A Hall, above n 13 at 38-48; E Campbell, above n 13 at 43-48.

61 For example, M D Kirby, above n 57 at 190.

62 The *dicta* are discussed by L Curtis, "Crossing the Frontier Between Law and Administration" (1989) 58 *Canb Bull Pub Admin* 55 at 62.

function. While the technique of identifying the AAT with the original decision-maker is effective constitutionally, the concept of an external, quasi-judicial review body standing in the shoes of the executive is deeply problematic. The "shoe metaphor" is an unsatisfactory criterion for defining the powers of the AAT.[63]

Ironically, the difficulty appears to lie in the very principle of separation of powers, which is seen as necessitating the Tribunal's constitutional location. As traditionally understood, that principle requires two types of somewhat conflicting constitutional arrangements: the disaggregation of decision-making power and institutional cross-checking. The former is achieved by distinguishing between the legislative, executive and judicial branches of government; while the latter is achieved by setting up one branch as an "external" reviewer of the conduct of another. Within each branch, there are decision-making hierarchies: primary and secondary legislators, ministers and public servants, superior and inferior courts. "Internal" review occurs when a decision-maker checks the work of another decision-maker lower down in the same hierarchy. The shoe metaphor is appropriate to describe internal review, but not external review. The basic point of internal review is that the values, expertise, methods and procedures of the decision-making hierarchy in which it takes place should be brought to bear on the decision under review, but at a higher level in the hierarchy. By contrast, the point of external review is that the values, expertise, methods and procedures brought to bear in reviewing the decision should not be those of the decision-making hierarchy in which the decision was made, but those of the hierarchy in which it is being reviewed.

In this light, it is clear why the shoe metaphor is an unsatisfactory criterion for defining the powers of the AAT. While the AAT is constitutionally part of the executive, in terms of its methods, expertise, values and procedures, it is part of the judiciary. As Brennan J stressed in *Drake v Minister for Immigration and Ethnic Affairs (No 2)*,[64] the AAT is meant to be "independent". The reason why the Kerr Committee recommended that the president of the general review tribunal should be a federal judge was that this would raise its "status" as a quasi-judicial body.[65] It also recommended that the tribunal be chaired by lawyers because "they conduct proceedings more effectively and fairly" than non-lawyers;[66] that is, more in accordance with the values of the judicial branch. To all intents and purposes, the AAT is an inferior court.[67] This is exactly why the shoe metaphor is inappropriate to describe its function, which is to "check and balance" the executive by providing an independent, quasi-judicial, external review of administrative decision-making. Merits review, as practised by the AAT, may be different in certain respects from judicial review as practised by Chapter III courts; but it is, nevertheless, essentially a judicial, not an executive function.

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63 Similarly: A N Hall, "Administrative Review Before the Administrative Appeals Tribunal: A Fresh Approach to Dispute Resolution?" (1981) 12 *F L Rev* 71 at 78; S Hamilton, above n 30 at 118-119: the "in the shoes" review standard "contains a fallacy which has polluted the debate and led to much misunderstanding and bad blood".

64 (1979) 2 ALD 634.

65 Kerr Report, para 293.

66 Ibid, para 320.

67 See G Brennan, "The Future of Public Law—The Australian Administrative Appeals Tribunal" (1979) *Otago LR* 286 at 297 who observed that the AAT is "part of the judicial arm of government".

It is true, of course, that in certain respects, the AAT's legal position is similar to that of executive decision-makers. Notably, it is amenable to judicial review. On the other hand, in the most important respect, the legal position of the Tribunal is radically different from that of executive decision-makers, because the AAT reviews decisions of the executive in a way analogous to that in which decisions of the AAT are themselves subject to judicial review.

III. SCOPE AND GROUNDS OF REVIEW, AND REMEDIES

The task of comparing merits review with judicial review in terms of remedies and the scope and grounds of review is complicated by four factors. First, a statutory regime of judicial review was established more or less contemporaneously with the setting up of the AAT. Judicial review has become a much more active and important jurisdiction in the 20-plus years since the enactment of the ADJR Act in 1977; and I believe that the changes in judicial review since the Kerr Committee reported are of considerable significance in the present context. A second complicating factor is the parallel existence of statutory and common-law judicial review regimes. However, my analysis is not pitched at a level of detail where the differences between the two regimes need concern us, except in one or two respects. A third complication is that the AAT is itself amenable to judicial review. My main concern in this section, however, is to compare the AAT and the courts as reviewers of executive decision-making. I am not primarily concerned with judicial review as applied to the AAT. Fourthly, it complicates matters that the three review regimes—merits review, judicial review under the ADJR Act, and common-law judicial review—are different in scope. Merits review is limited to "decisions", and ADJR review to "decisions of an administrative character" and "conduct related to the making of such decisions"; whereas common law judicial review is not so limited. These differences encourage a form of "forum-shopping" which does not serve the policies and purposes supporting the various review regimes. This complication is not discussed in what follows.

1. Grounds of review

I will deal with the grounds of review in terms of the traditional tripartite division of the decision-maker's tasks in terms of law, fact and policy. I will also say something about procedural grounds of review. Except in section (iii)(a) below (where I need to be rather more precise), I will use the term "policy" (as in Section II above) to refer to what is left over after "law" and "fact" are subtracted from the issues confronting the decision-maker.

It is often assumed that there are important differences between the grounds of judicial review and the grounds of merits review arising from the fact that courts are rightly more deferential to administrative decision-makers than are merits review bodies. I wish to challenge this assumption. Deference can take two forms. First, it can be shown by exclusion of certain types of decision from review ("exclusionary deference"). This was the form of deference manifested in *Craig v South Australia*,[68] where the High Court held that at common law, in relation to inferior courts (as opposed to tribunals), the notion of "jurisdictional error of law", and the concept of "the record", should be given narrow meanings so as to minimise judicial control over

68 (1995) 184 CLR 163.

decisions on points of law. Secondly, deference may take the form of adoption of a more "lenient" standard of review ("standard-of-review deference"). Broadly speaking, there are three standards of review: one asks whether the decision under review was correct; another asks whether the decision was reasonable; and a third asks whether the decision was the preferable one.

(i) Issues of law

Dealing first with exclusionary deference, there is a passage in the majority judgment in *Craig v South Australia*[69] which implies that at common law the distinction between jurisdictional and non-jurisdictional errors of law "has been effectively abolished" so far as tribunals are concerned. Under s 5(1)(f) of the ADJR Act, error of law is a ground of review regardless of whether the error appears on the face of the record. This provision makes the distinction between jurisdictional and non-jurisdictional errors of law practically defunct. The upshot appears to be that both under the ADJR Act and at common law, judicial review can reach any and every error of law made by a tribunal or administrative decision-maker.

The scope of merits review of errors of law by the AAT is less well-defined. First, it is unclear what power the AAT has in relation to legal questions arising under the Constitution. On one view, the Tribunal should presume (without resolving the matter) that any dispute about constitutionality relevant to an issue in review proceedings is to be resolved in favour of validity. The other view is that issues of constitutionality should be treated in the same way as other issues of law. A second doubt concerns the resolution of non-constitutional legal disputes by the AAT. One view is that the Tribunal is empowered to deal with any legal issue relevant to review proceedings before the Tribunal. Another view is that the Tribunal has power only in relation to legal disputes that do not go to the existence of the Tribunal's power to exercise afresh the decision-making power invested in the original decision-maker. According to this latter view, there may be some decisions on questions of law which are amenable to judicial review but not to merits review.[70]

It should also be noted here that as a result of the AAT's constitutional position, it does not have the power to decide legal issues conclusively. Only Chapter III courts have that power. All the Tribunal can do is express an opinion[71] on a point of law if this is necessary for the proper exercise of its review powers; and its opinions on questions of law are subject both to judicial review and to "appeal", under s 44 of the AAT Act to the Federal Court. Whereas a decision on a point of law by a Chapter III court has the status of law, a decision by the AAT on a question of law has only the status of quasi-law.[72] It does not bind the executive or the Tribunal itself; but when relevant, it is a consideration that should be taken into account by administrative decision-makers and the Tribunal itself.

Turning now to standard-of-review deference, the traditional judicial approach to questions of law is that they have one correct answer. This is reflected in the seminal statement of Bowen CJ and Deane J in *Drake v Minister for Immigration and Ethnic Affairs*

69 Ibid at 178-179.

70 For further discussion of these issues see A Hall, above n 13 at 38-48.

71 On the nature of these opinions see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 154-155 per Deane J.

72 See below nn 90 and 102.

(No 1)[73] that the remedial powers of the AAT are activated if the decision under review was not, in the opinion of the Tribunal, "the correct or preferable one on the material before the Tribunal". The Administrative Review Council interprets this formula to imply that "a decision must be correct, but...if there is a range of decisions which could be made, all of which would be correct, the decision maker has a choice as to the preferable decision".[74] Few people now believe that there is a right answer to every question of law. Even Ronald Dworkin's eloquent support for the "right answer thesis" failed to convince many lawyers. On the whole, they subscribe to the scepticism of the likes of H L A Hart and Julius Stone, and to the view that questions of law may admit of more than one reasonable answer. A court asked to review a decision on a question of law must decide, first, whether the question admits of only one reasonable answer. If so, that answer is the "correct" one. If the question admits of more than one reasonable answer, the court must choose one of those answers, which then becomes the "correct" one. In other words, the legal notion of "correctness" does not express an epistemological truth, but rather a principle of institutional design to the effect that the "correct" answer to a question of law is the answer given by the decision-maker who, *de facto* or *de iure*, has the last word on matters of law. Understood in this way, the correctness principle is functionally equivalent to the preferability standard—the "correct" answer to a question of law is the answer preferred by the body with the ultimate power to answer questions of law.

The task of merits-review bodies, such as the AAT, of reviewing the legal component of administrative decisions can be described in precisely the same way as I have just described the task of a court exercising judicial review jurisdiction. On questions of law, it was decided very early on that the AAT owes no deference to the executive.[75] In respect of the standard of review of administrative decisions on legal issues, there is no difference between merits review and judicial review. Moreover, once the nature of questions of law is properly understood, it can be seen that the standard of review is accurately stated in terms of making the "correct or preferable decision" on the point of law in issue, with the proviso that "correct" is to be understood as referring to a judgment by the reviewing body that the question of law in issue admits of only one reasonable answer.

(ii) Issues of fact

The most important Australian case on judicial review of administrative fact-finding is *Australian Broadcasting Tribunal v Bond*.[76] In his judgment, Mason CJ deals with both exclusionary and standard-of-review deference. The passage dealing with exclusionary deference[77] deserves close analysis. In it, he argues for judicial deference to administrative fact-finding. He draws a contrast between, on the one hand, findings of fact which can be described as "an essential preliminary to the taking of ultimate action or the making of an ultimate order"; and, on the other, findings which are "no more than a step along the way to an ultimate determination". His Honour also describes the former as being findings of fact on which the ultimate determination "depends", and as

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73 (1979) 24 ALR 577.

74 *Better Decisions*, above n 9 para 2.5, n 31. The Council thinks that "or" should be read conjunctively, not disjunctively.

75 *Re Brian Lawlor Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167.

76 (1990) 170 CLR 321.

77 Ibid at 340-341.

being "an element of" the ultimate determination. Findings of fact of the former type may be subject to judicial review, but findings of the latter type are not. For the purposes of review under the ADJR Act, the distinction between reviewable and unreviewable findings of fact is expressed in terms of the concept of "decision": reviewable findings of fact are decisions within the meaning of the Act, whereas unreviewable findings of fact are not.[78]

For the purposes of common law judicial review, the distinction is appropriately drawn in the same terms as were adopted in *Craig v South Australia*[79] in relation to questions of law, namely "jurisdictional" and "non-jurisdictional": jurisdictional findings of fact are reviewable, but non-jurisdictional findings are not. Notice, however, that the approach to administrative fact-finding in *Bond* is radically different from the approach to administrative decisions on issues of law in *Craig*. In relation to tribunals (and other administrative decision-makers), *Craig* effectively abolishes the distinction between jurisdictional and non-jurisdictional errors of law, and subjects all administrative decisions on issues of law to judicial review. By contrast, in relation to inferior courts, it leaves the distinction intact and, while not entirely immunising decisions on non-jurisdictional issues of law from review, gives them considerable protection by defining "the record" narrowly. In other words, *Bond* treats administrative fact-finding analogously to the way decisions on issues of law made by inferior courts are treated in *Craig*—with the important proviso, however, that there is no concept of error of fact analogous to "error of law on the face of the record". Non-jurisdictional findings of fact are entirely immune from judicial review.

Mason CJ justifies his approach by drawing a distinction between judicial review, and merits review under the AAT Act. To review a non-jurisdictional finding of fact is to review the "merits" of the administrator's decision. "The expression 'judicial review'...ordinarily does not extend to findings of fact as such."[80] His Honour supports this conclusion with two arguments. First, extending judicial review to cover "all findings of fact, or the generality of them" would "bring about a radical change in the relationship between the executive and judicial branches of government". Secondly, it would raise "difficult questions concerning the extent to which courts should take account of policy considerations when reviewing the making of findings of fact and the drawing of inferences of fact". The first argument can be accepted, but it is not compelling. The second argument is important because it recognises the porous nature of the distinction between fact and policy, which I discussed in section II. At least in cases where a question of fact admits of more than one reasonable answer, it may not be possible to choose between those answers without paying attention to the purpose for which the question is being asked. However, this argument does not support exclusionary deference, because there is no reason to think that the distinction between

78 His Honour also held (ibid at 343) that findings of fact and inferences from findings of fact are "generally not capable of review [under s 6 of the ADJR Act] as "conduct" unless what is alleged is some breach of procedural requirements in the course of the conduct involved in reaching the relevant conclusion, although it is possible that they may give rise to subsequent conduct which is reviewable". Common law judicial review is not limited to "decisions" and "conduct"; but the distinction between jurisdictional and non-jurisdictional facts performs the same exclusionary function as the concepts of "decision" and "conduct" perform under the ADJR Act.

79 (1995) 184 CLR 163.

80 Ibid at 341.

jurisdictional and non-jurisdictional questions of fact coincides with the distinction between questions of fact which admit of only one reasonable answer, and those which admit of more than one. There may be jurisdictional questions of fact which admit of more than one reasonable answer, and there may be non-jurisdictional questions of fact which admit of only one reasonable answer. Rather, the argument is relevant to standard-of-review deference.

In *Bond*, Mason CJ deals with standard-of-review deference at some length.[81] Under the common law in Australia, a reviewable finding of fact will justify the award of a judicial-review remedy if there was "no evidence" to support it; or, although there was such evidence, the finding was not a reasonable inference from that evidence.[82] Such a finding of fact constitutes an error of law. Under the ADJR Act, such errors fall within the concept of "error of law" in s 5(1)(f).[83] Neither at common law nor under the ADJR Act will a remedy issue if there was evidence reasonably supporting the finding of fact under review.[84] The Chief Justice justifies this deferential judicial stance by distinguishing between judicial review at common law and under the ADJR Act, and merits review under the AAT Act. In effect, he defines "the merits" of an administrative decision as including findings of fact which are unreviewable by a court at common law and under the ADJR Act. The scheme envisaged by Mason CJ has two implications: first, that all administrative findings of fact are reviewable; and secondly, a neat division of labour between judicial review and merits review. On the one hand, merits review reaches findings of fact which judicial review cannot reach—that is, non-jurisdictional findings of fact at common law,[85] and findings of fact which are not "decisions" under the ADJR Act.[86] On the other hand, in terms of standard-of-review

81 Ibid at 355-360.

82 But note that in Mason CJ's view, these "amount to the same thing": ibid at 360.

83 This makes it difficult to find an area of operation for s 5(1)(h): ibid at 358.

84 English courts are generally more willing than Australian courts to review administrative fact-finding: P Cane, above n 38 at 128-132. See also Mason CJ in *Bond* (1990) 170 CLR 321 at 356-357. Deane J seems to have approved the English approach: ibid at 367-368.

85 A word needs to be said here about the "jurisdictional fact doctrine". It is said that the doctrine blurs the distinction between merits review and judicial review by allowing the court to review *de novo* certain administrative findings of fact: M Aronson and B Dyer, n 44 above at 263-271; J McMillan, "Developments under the ADJR Act: The Grounds of Review" (1991) 20 *F L Rev* 50; "Recent Themes in Judicial Review of Federal Administrative Action" (1996) 24 *F L Rev* 347at 382-385. This view involves a confusion of exclusionary deference with standard-of-review deference. While the jurisdictional fact doctrine allows the court to review findings of jurisdictional fact, it says nothing about the standard of review. Aronson and Dyer (above) take the view that "as a matter of strict logic" the jurisdictional fact doctrine implies the "correct or preferable" standard. However, they immediately concede that the courts have not adopted this "strictly logical" position, and have left open the possibility of showing greater deference to administrative findings of jurisdictional fact. (On this point, see the observations of Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577 at [140-146]). At all events, the various standards of review are so abstractly formulated that they leave ample room for legitimate difference of opinion about their application to particular cases—a point I explain in more detail in section IV.1(iii)(e).

86 There is a technical problem here arising from the fact that the jurisdiction of the AAT is also limited to "decisions". Assuming that "decision" in s 25(1) of the AAT Act has the same meaning as in the ADJR Act, the jurisdiction of the AAT to review findings of fact must be the same as that of the Federal Court under the ADJR Act. It may be possible to square the

deference, a merits review body can review administrative fact-finding according to a less deferential standard of review than is proper for a court exercising judicial review jurisdiction: "correct or preferable" in the former case, and "reasonable" in the latter.

The apparent result is that the AAT (and other merits review tribunals) are empowered to review all administrative findings of fact, and to do so according to a non-deferential standard of review. This non-deferential standard of review has two elements. First, a merits-review tribunal, in reviewing administrative findings of fact, is not limited to the evidentiary material available to the original decision-maker.[87] Secondly, a merits-review body is empowered to test administrative findings of fact against the same standard as it applies to administrative decisions on issues of law. In other words, if the AAT (or other merits-review body) considers that on the evidence before it, the question of fact in issue admits of only one reasonable answer, and that it differs from the answer given by the original decision-maker, it can substitute that "correct" answer for the one given by the original decision-maker. If it is of the opinion that the question admits of more than one reasonable answer, it is free to decide which of those answers is "preferable". Given the porous nature of the distinction between fact and policy, extensive power to review findings of fact brings with it power to decide issues of policy. This power in relation to policy is especially noteworthy because it is hidden within the interstices of the power to review findings of fact. The power of the AAT to review findings of fact is remarkable for three reasons: it operates *de novo*; the Tribunal is not limited to material available to the original decision-maker; and in its name, the AAT can covertly exercise *de facto* power over matters of policy. Furthermore, there is no appeal to the Federal Court from the decisions of the AAT on questions of fact;[88] and in contrast to the position concerning questions of law, the law of judicial review arguably accords more deference to decisions on questions of fact made by tribunals than appellate courts pay to decisions of inferior courts on such questions.[89]

The lack of deference shown by the AAT to the executive in relation to issues of fact is a serious bone of contention between the two parties. This is partly a result of the ambiguous position of the AAT in the decision-making structure. Because of its procedures and its resources, and the fact that it is not confined to the evidentiary material available to the original decision-maker, it is generally acknowledged that the AAT is in a superior position to the executive to make soundly based factual findings. Indeed, because the AAT reviews findings of fact *de novo*, it is in a better fact-finding position than the typical court exercising either appellate or judicial-review jurisdiction. Furthermore, the fact that the AAT follows fact-finding procedures that the typical administrator is not in a position to follow emphasises the distance between

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circle by saying that although the AAT, like the Federal Court, can only review findings of fact which are decisions, the non-deferential standard the AAT applies when reviewing findings of fact effectively expands the definition of "decision" in this context.

87 Concerning the admissibility of fresh evidence in judicial review proceedings, see Administrative Review Council Report, above n 33 para 6.12.

88 This may explain the AAT's approach to fact-finding: G Hill, "The Impact of Federal Court Appeals on the AAT: A View from the Court" in J McMillan (ed), *The AAT—Twenty Years Forward* (1998) at 113.

89 Susan Kneebone says that "the fact-finding role of the AAT is what distinguishes it from a court of law": "The Administrative Appeals Tribunal as a Fact-Finding Body" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) at 400.

the Tribunal and the executive. The Tribunal's constitutional location between the executive and judicial branches has enabled it to take a uniquely activist stance to the review of findings of fact. In adopting this stance, the Tribunal has, perhaps, been encouraged by the view that it is entitled to take a robust approach to administrative policy-making. I have argued that one of the bases for judicial deference to administrative fact-finding is the recognition that the drawing of factual inferences may properly be influenced by the purposes of the relevant legislation or government programme. Because of the widespread view that the AAT need not defer to executive policy to the same extent as courts do, it may also feel less constrained in reviewing administrative fact-finding.

One final caveat: in the next section (iii), I will argue that the clear theoretical distinction between the "correct or preferable" standard and the "reasonable" standard of review may not be translated into practice. If this is correct, it casts doubt on Mason CJ's distinction between judicial review and merits review of administrative fact-finding.

(iii) Issues of policy

It is in relation to issues of policy that many see the clearest contrast between judicial review and merits review: on the one hand, a court will interfere with an administrative policy decision only if it is *Wednesbury* unreasonable, whereas a merits review tribunal has the power to substitute what it considers to be the preferable policy decision.[90] I want to argue that this distinction is not as clear as it might appear at first sight. First, I need to trace the development of ideas about review of policy decisions by the AAT and other merits review bodies.

(a) What is "policy"?

After the idea of "merits review" itself, the least analysed of the concepts central to the federal administrative law system is that of "policy". "Policy" seems to be used in at least three quite distinct senses in the literature about merits review. First, it is sometimes used to mean an administrative (that is, internal governmental) rule, principle or guideline which does not have the status of either primary or secondary legislation.[91] Other terms sometimes used having this meaning are "quasi-legislation"[92] and "soft law".[93] I will use "quasi-legislation" to refer to policy in this first sense. Secondly, "policy" is sometimes used in contradistinction to "law" on the one hand and "fact" on the other. This is the sense in which the word was used in section II above. It

90 "The question is not: was it a decision reasonably open to the administrator...but rather: was it the decision that the review body considers should have been made? These are very different questions": L Curtis, above n 62 at 64. See also *Foley v Padley* (1983) 154 CLR 349 at 370 per Brennan J; M Harris, above n 59 at 203; *Better Decisions*, above n 9 paras 2.17-2.18.

91 There is a minefield here. By "primary legislation" I mean Acts of Parliament. By "secondary legislation" I mean legislation made in exercise of a power belonging to parliament which has been delegated by it to another legislator. Quasi-legislation is made in exercise of executive power, not in (delegated) exercise of parliament's rule-making power.

92 For example, G Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (1978).

93 R Baldwin, above n 22 at 226-230, 248-252.

is roughly synonymous with the "purpose" of, or "reason" for, a decision or rule;[94] and I shall use these terms to refer to policy in this second sense. Thirdly, "policy" may be used as a rough synonym for what I referred to above as "political questions"—that is, matters unsuitable for judicial consideration. Failure to distinguish between these different senses of "policy" bedevils discussion of the role of the AAT in reviewing "policy", and hinders a clear understanding of what is involved in merits review.

(b) The Kerr and Bland Reports

It will be recalled that the Kerr Committee identified the non-judicial element in the jurisdiction of a general review tribunal as being the power to review the exercise of non-justiciable discretions which, in its view, were involved in the vast majority of administrative decisions. The Committee defined non-justiciability in terms of lack of decision-making criteria; and, in so doing, it paid insufficient attention to the role of quasi-legislation in confining and structuring administrative discretions. The word "policy" was not much used by the Committee. However, having stated the view that the general review tribunal "would be mainly concerned with review as to fact-finding and improper or unjust exercise of discretionary power", the Committee expressed the opinion that:

> the jurisdiction would still be workable although matters of government policy may be involved. This policy can be explained to the Tribunal by written or oral evidence...It may also be desirable that the Tribunal should be empowered to transmit to the appropriate Minister an opinion of the Tribunal that although the decision sought to be reviewed was properly based on government policy, the government policy as applied in the particular case is operating in an oppressive, discriminatory or otherwise unjust manner.[95]

The first two occurrences of "policy" in this passage seem to mean "purpose" or, perhaps, more narrowly, to refer to the idea of a "political question", while the second two seem to mean "quasi-legislative rule or guideline".

Policy received more explicit attention from the Bland Committee when it came to examine existing administrative discretions with a view to advising "as to those in respect of which a review on the merits should be provided".[96] In its Interim Report dealing with the establishment of the office of Ombudsman, the Bland Committee doubted that "any defensible line can be drawn between decisions of policy and administration".[97] In its Final Report, the Committee expressed the view that "in the broad", ministerial rule-making was more likely to fall in the policy area than was the application of rules;[98] and it concluded (somewhat defensively) that:

> [w]e have had to make our own judgment as to which discretions should be regarded as administrative. The judgment has often been subjective but at the same time empirical

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94 This seems to be the sense in which it was used in the difficult case of *Leppington Pastoral Co Pty Ltd v Department of Administrative Services* (1990) 94 ALR 67.

95 Kerr Report para 299.

96 Bland Report para 1.

97 Interim Report of Committee on Administrative Discretions (Chairman: Sir Henry Bland) (1973), para 97(a). The Committee optimistically expressed the view that "if decisions of Ministers are not examinable [by the Ombudsman], the problem of attempting to distinguish policy, from administrative, decisions will not arise".

98 Bland Report para 29.

> and related to our experience of administration. Some may find room for quibble as to the correctness of our categorisation...that is clearly their prerogative...[a]ny such [quibble] would, doubtless, be endorsed by those committed to the principle of subjecting discretionary powers to review.[99]

To the extent that the Bland Committee reached any view about the nature of "policy", it seems to have identified it with administrative rule-making as opposed to administrative rule-application (or what, in United States law, is called administrative "adjudication"). Underlying this identification, perhaps, is the idea that administrative rule-making is more likely than administrative adjudication to raise "political questions".

(c) The *Drake* cases

Unsurprisingly, the AAT Act does not use the word "policy" in defining the powers of the AAT. But it very soon reared its ugly head. The two *Drake* cases are pivotal.[100] Even at this distance it is, perhaps, worth stating the obvious, that the only statutory constraint on the Federal Court and the Tribunal in deciding the grounds on which the Tribunal could exercise its review powers, and the way those grounds would be interpreted, was contained in the phrase "the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision".[101] To all intents and purposes, the legislature left it entirely to the AAT and the Federal Court to define the scope and nature of AAT review of administrative decisions. It was against this background that the Federal Court put forward the proposition that the Tribunal had the power to "adjudicate upon...the propriety of a permissible policy".[102] In this proposition, "policy" seems to be used in the sense of a "quasi-legislative rule, principle or guideline". Thus, it went on to say that in reviewing an administrative decision, the Tribunal must observe legal (that is, statutory or common law) constraints on the purposes for which the administrative decision-making power was given and any statutory constraints on its own review powers. This is uncontroversial. It is quite clear that quasi-legislation (like secondary legislation) is lawful only if it is does not conflict with any legal rule. Nor may the Tribunal, any more than the original decision-maker, fetter its decision-making power by treating quasi-legislation as if it had the force of legislation.[103] This, too, is uncontroversial.

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99 Ibid para 32.

100 *Drake v Minister for Immigration and Ethnic Affairs (No 1)* (1979) 2 ALD 60; 24 ALR 577; *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

101 AAT Act 1975, s 43(1).

102 *Drake (No 1)* (1979) 2 ALD 60 at 68; 24 ALR 577 at 589.

103 What this means is that quasi-legislation must not be treated as if it were made in (delegated) exercise of parliament's legislative power. Another way of putting this is to say that quasi-legislation must never be applied simply because a case falls within its terms and without considering the "appropriateness" of applying those terms to the facts of the case. In this sense, quasi-legislation is "provisional". This must be distinguished from the issue of "flexibility"—that is, whether rules are detailed and precise, or broad and flexible. Broad and flexible rules leave more room for discretion in their application to individual cases than do precise and detailed rules. But this is as true of legislative as of quasi-legislative rules. Of course, it is also true that the more broad and flexible a rule is, the easier it will be to take account of the facts of individual cases without the need to consider the "appropriateness" of the rule to the case at hand.

Quasi-legislation does not have, and must not be given, the force of legislation. At the end of the day, there is nothing in the judgment of Bowen CJ and Deane J which obviously goes beyond these straightforward propositions. When they said that it was the Tribunal's function to adjudicate upon "the propriety of the policy", they may simply have been referring to the decision-maker's (and, therefore, the Tribunal's) obligation to avoid "uncritical application of government policy to the facts of the particular matter".[104]

When *Drake* came back to the AAT for re-hearing, Brennan J took a robust approach in expounding the implications of the decision of the Federal Court.[105] His judgment is complex, and the discussion of the powers of the Tribunal in relation to government "policy" contains several distinct strands of reasoning. He begins by stressing the potential for, and the undesirability of, inconsistency between decisions of the Tribunal and decisions of the executive. This danger of inconsistency provides the justification for what might be seen as the *ratio decidendi* of *Drake (No 2)*, namely, that the Tribunal should apply relevant, lawful quasi-legislation unless to do so would "work an injustice in a particular case".[106] This approach seems perfectly consistent with that of the Federal Court in *Drake (No 1)*. Just as an administrative decision-maker must take proper account of the facts of the individual case in applying quasi-legislation, so must the Tribunal. Indeed, the whole focus of the AAT Act is on the redress of individual grievances.[107] The Tribunal has jurisdiction only in relation to the making of "decisions";[108] and access to Tribunal proceedings is only available to persons whose interests are affected by "the particular decision" which is in issue in the proceedings.[109]

Underlying what I have identified as the *ratio* of *Drake (No 2)* are well-known arguments in favour of confining and structuring discretions by the promulgation of rules, principles and guidelines. Brennan J explicitly adopts such arguments. Indeed, he goes further:

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104 (1979) 2 ALD 60 at 70; 24 ALR 577 at 591.

105 The fact that his Honour was, at this time, himself a judge of the Federal Court perhaps partly explains the independence of his approach.

106 (1979) 2 ALD 634 at 645.

107 J M Sharpe, *The Administrative Appeals Tribunal and Policy Review* (1986) at 163-167.

108 Can making a rule be a "decision"? Under the ADJR Act, rule-making in the exercise of a power to make rules delegated by Parliament has been held not to be a "decision": *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615. However, this was on the basis that a decision falls within the ADJR Act only if it is "of an administrative character", and that a rule made in delegated exercise of the legislative power of the Commonwealth is not of such a character. There is no such qualification to the definition of "decision" in the AAT Act. Furthermore, the *Blewett* case did not address the reviewability of quasi-legislative rules. These are not made in exercise of legislative power delegated by Parliament, but by way of structuring the exercise of executive power.

109 *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 1)* (1980) 3 ALD 74 at 86. Further to the discussion in the previous note, even if making a rule could be a reviewable decision under the AAT Act, it is perhaps unlikely that any person would have standing to challenge the making of the rule as such, independently of its application to any particular set of facts.

> Inconsistency is not merely inelegant: it...[suggests] an arbitrariness which is incompatible with commonly accepted notions of justice.[110]

In this light, two statements in the judgment cause surprise: that administrative decision-makers are free not to adopt *any* "policy" to guide their exercise of discretionary powers; and that in reviewing the exercise of administrative discretions, the Tribunal is free to adopt or not to adopt any (lawful) "policy" applied by the decision-maker, and "to adopt whatever [lawful] policy it chooses, or no policy at all, in fulfilling its statutory function".[111] These statements seem at odds not only with the approach of the Federal Court in *Drake (No 1)*, but also with the main thrust of Brennan J's own reasoning in *Drake (No 2)*.

Consider, first, the proposition that the Tribunal is free not to adopt any policy at all. The problem here, as his Honour said, is that inconsistency is not only inelegant; it may also be productive of injustice. For this reason, inconsistency can itself be unlawful. If injustice, in the sense of inconsistency, results from failure by a decision-maker to structure a discretionary power by recourse to quasi-legislative norms, that failure may itself be unlawful. If failure to apply relevant quasi-legislation causes injustice, that, too, may be unlawful. This is one of the bases of the concept of "legitimate expectation".[112] Next, consider the proposition that the Tribunal is free to adopt any lawful policy it chooses. As we have noted, there is an ambiguity in the use of the word "policy". Even if a decision-maker (including the AAT) is free to adopt any (lawful) "policy", in the sense of "quasi-legislative rule, principle of guideline", no decision-maker is free to make decisions which are based on any "policy" in the sense of "purpose" or "reason". Even if we exclude unlawful purposes or reasons, because inconsistency can itself be unlawful, lawful reasons or purposes may, in their application to particular cases, generate injustice and therefore be unlawful.

The general point is this: fair administrative decision-making requires a balance to be struck between generality and consistency on the one hand, and specificity and individualisation on the other. Rules, principles and guidelines facilitate consistency; and the power to depart from such rules, principles or guidelines, and to apply them flexibly, facilitates individualised justice. This is recognised by the Federal Court in *Drake (No 1)*, and in what I have identified as the *ratio* of *Drake (No 2)*. Some of the more unguarded statements of Brennan J in *Drake (No 2)* should be read in the light of this general truth. The Tribunal's legal obligation is to make decisions that balance the requirements of consistency and individual justice.[113] It follows that the only ground

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110 (1979) 2 ALD 634 at 639.

111 Ibid at 642.

112 In *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 23 Mason CJ expressed the view that for a court to give substantive, as opposed to procedural, protection to a legitimate expectation would, in some but not all cases, involve illegitimate interference with the merits of administrative decision-making "by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances". This approach carries the unfortunate implication that all grounds of judicial review could involve merits review. Once it is accepted that inconsistency can itself be unjust, it must also be allowed that the demands of consistency may sometimes justify and require substantive protection for a legitimate expectation. See also Dawson J at 60.

113 *Drake (No 1)* (1979) 2 ALD 60 at 70; 24 ALR 577 at 590-591. Of course, "justice to the individual" is an exceedingly abstract concept which allows the AAT much freedom to assert its values against the executive. The concept of "consistency" also gives the Tribunal

on which it is legally entitled to refuse to apply a lawful quasi-legislative rule, which the original decision-maker applied is that the application of the rule would cause injustice to the individual. It also follows that the only ground on which the Tribunal is legally entitled to "adopt" a quasi-legislative rule of its own making is that this is necessary in the interests of consistency or individual justice. These propositions are implications of the fact that the AAT is a review body, not an original decision-maker. There is a fundamental difference between standing in the decision-maker's shoes and being the decision-maker.[114] In performing its functions, the Tribunal should be careful not to encroach further into the rule-making province of the executive and the legislature than is necessary to do justice to the individual before it. And it should avoid political controversy as much as possible.[115]

There is a third important strand of reasoning in *Drake (No 2)*. It utilises the distinction, well recognised in United States administrative law, between "legislative"[116] rule-making and rule-making by adjudication. The former involves making rules without reference to any individual case, whereas the latter involves generalising from an individual case. The common law is a rule-system generated entirely by adjudication; and as a result, common law rules are, in an important sense, always provisional. When an adjudicative body is faced with a dispute over the application of a "legislative" rule, it may generate a rule to deal with the dispute; and this adjudicative rule will modify the operation of the "legislative" rule. A fundamental aspect of constitutional doctrines, such as responsible government and the separation of powers, is that "legislative" rule-making falls within the province of the legislative and executive branches of government and not within the province of adjudicative institutions of government in their capacity as such.[117] The AAT is an adjudicative institution. An important constitutional difference between a Chapter II adjudicative body, such as the Tribunal, and Chapter III adjudicative bodies, is that adjudicative rules made by Chapter II bodies do not have the force of law in the same sense in which adjudicative rules made by Chapter III bodies have the force of law.[118] Chapter III courts possess adjudicative law-making authority, whereas Chapter II adjudicative

considerable discretion to specify those features of the case before it in respect of which consistency is required. However, in these respects, the AAT is in no different position from the courts which, in exercising judicial review jurisdiction, can give effect to their own conceptions of individual justice and consistency. See also below n 120 and accompanying text.

114 Similarly: M Aronson and B Dyer, above n 44 at 187-188.

115 D O'Brien, "Tribunals and Public Policy: What Decisions are Suitable for Review?" (1989) 58 *Canb Bull Pub Admin* 86 at 90-91.

116 In this context, "legislative" does not mean "having the force of primary or secondary legislation". In other words, "legislative" includes "quasi-legislative". I use inverted commas to mark this usage.

117 The converse is not true, however. It is a constitutional fundamental that the legislature should not adjudicate disputes about the application of its own legislation; but adjudication, in the sense of application of legislative rules to individual cases, is a core activity of the executive. Such adjudication may generate adjudicative rules. There is also no constitutional bar preventing members of the executive adjudicating disputes about the application, by other members of the executive, of legislative rules to individual cases.

118 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139. Thus, rules made by the AAT are doubly provisional. They have the provisionality of adjudicative rules; and unlike adjudicative rules made by courts, they do not have the force of law. See above n 102.

bodies do not. But in other respects, adjudicative rule-making by Chapter II adjudicative bodies is of essentially the same nature as adjudicative rule-making by Chapter III bodies.

In *Drake (No 2)*, Brennan J applied these principles by holding that while it is within the province of the Tribunal to engage in adjudicative rule-making,[119] the AAT is not empowered to engage in "legislative" rule-making.[120] In other words, while the Tribunal, in the course of reviewing an administrative decision, may exercise its powers by making an adjudicative rule (which may modify the operation of a "legislative" rule applied by the decision-maker), it has no power to make rules which are not needed to resolve the case before it. There is, however, a fourth strand of reasoning intertwined with his Honour's discussion of rule-making. It involves the introduction of the idea of "political questions". Thus,

> [a]dministrative policies are necessarily amenable to revocation or alteration on political grounds, and they are best formed and amended in a political context...the laying down of a broad policy on deportation is essentially a political function to be performed by the Minister who is responsible to the parliament for the policy he adopts.[121]

Brennan J contrasts the political role of the Minister in formulating policy with the adjudicative role of the Tribunal in "developing" policy "to ensure that justice is done in individual cases". Indeed, he says, the "very independence of the Tribunal demands that it be apolitical". The political-questions idea is essentially a prudential doctrine; and the aspiration to avoid political controversy, which is implicit in his Honour's approach, is of particular importance for the AAT, uneasily located, as it is, in a "no-man's land"[122] between the judicial and the executive branches of government.

In summary, then, the seminal texts on merits review provide little support for the idea that the AAT was intended to take a much more robust approach to review of administrative policy-making than the courts do.

(d) The scope of policy review

At common law, courts use the concept of "justiciability" to mark the boundary between reviewable and non-reviewable decisions of policy. There may also be some specific immunities from judicial review for decisions of particular types; and some of these may rest on some notion of non-justiciability.[123] The scope of review under the ADJR Act is defined by the concepts of "decision", "under an enactment", "of an

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119 "[T]he practice of giving reasons for decisions inevitably spins out threads of policy": (1979) 2 ALD 634 at 644.

120 Elsewhere, Brennan J made this point in terms of "the government's power to make policy" and the AAT's "discretion as to its application": above n 67 at 297. Another way of describing the role of the AAT is in terms such as "policy refinement": M C Harris, above n 59 at 209-212. See also J M Sharpe, above n 106 at 129, 196-198.

121 (1979) 2 ALD 634 at 643-644. See also *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696 at 701 where his Honour distinguished policies made at the "departmental level" from those made at the "political level". "Whether Sydney needs another major airport" is a good example of a policy question that is unsuitable for AAT adjudication: *Leppington Pastoral Co Pty Ltd v Department of Administrative Services* (1990) 94 ALR 67.

122 L Curtis, above n 62 at 56.

123 See, eg, M Aronson and B Dyer, above n 44 at 156-161.

administrative character" and "conduct"; and by certain specific immunities. These limitations on the scope of the Act apply generally: the ADJR Act contains no limitation on the scope of review couched specifically in terms of policy issues. In contrast to the position at common law, delegated legislation has been held to be unreviewable under the Act; and this may limit the scope for review of policy decisions. So far as merits review is concerned, we have seen that the jurisdiction of the AAT is limited to "decisions"; and that the cases recognise a sort of justiciability doctrine to the effect that the AAT should not review what might be called "high" policy. Because the AAT only has such jurisdiction as is conferred by some Act other than the AAT Act, the government and Parliament can prevent decisions involving politically sensitive policy issues from being subject to merits review.

(e) Reasonable versus preferable

Turning now to the standard of review of policy decisions, we need first to note that the idea of an "error of policy" is spelt out in a number of grounds of review, many of which describe, not so much what an error of policy is, but rather how an error of policy may come about. In other words, their direct concern is the decision-making process rather than its outcome. The grounds for judicial review of administrative policy decisions available at common law and under the ADJR Act fall into three broad categories: inconsistency with the policy of the statute conferring the decision-making power; failure to respect general legal principles, such as those requiring consistency and certainty; the "rule against fettering" and the principle that relevant provisions of ratified international treaties must be taken into account;[124] and *Wednesbury* unreasonableness. All of these grounds of review are based on the idea that in reaching a decision, the decision-maker has given inappropriate weight to some policy consideration. There is no reason to doubt that they are all grounds of merits review as well as grounds of judicial review.

It is generally accepted that the correctness standard is inapplicable to issues of policy. Judicial deference to administrative policy decisions finds expression in the principle of *Wednesbury* unreasonableness: a policy decision will be invalid only if it is so unreasonable that no reasonable administrator could have made it. If it cannot be so described, a decision will not be bad simply because the reviewer does not think it preferable in policy terms. By contrast, the AAT has the power to substitute what it considers to be the "preferable" decision on an issue of policy. Translated into the language of deference, the idea is that the reasonableness standard is more deferential to the executive than the preferability standard. Both standards assume that there may be more than one decision that passes the test of "correctness". The reasonableness standard allows the executive to choose amongst those decisions, while the preferability standard gives the reviewer the final choice between those decisions.

Although the distinction between asking whether a decision was *Wednesbury*-unreasonable, and asking whether it was the preferable decision, is clear in theory, in practice it may become blurred. Consider, for instance, Mason J's discussion of "failure to take a relevant consideration into account" in *Minister for Aboriginal Affairs v Peko-*

124 See M. Allars, "Human Rights, Ukases and Merits Review Tribunals: The Impact of *Teoh's* Case on the Administrative Appeals Tribunal in Australia" in M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (1999) ch 16.

Wallsend Ltd.[125] First, failure to take account of a relevant consideration will give grounds for judicial review only if, under the statute in question, the decision-maker is *bound* to take it into account. However, even failure to take account of a consideration which the statute requires to be taken into account may not invalidate the decision if, in the courts view, the failure was not sufficiently serious. Secondly, failure to take a relevant consideration into account will invalidate a decision only if the failure was *Wednesbury*-unreasonable. However, "there has been considerable diversity in the readiness with which courts have found the [*Wednesbury*] test satisfied". In other words, a decision that one court holds to be *Wednesbury*-unreasonable, another court might consider reasonable, even if not preferable. The implication of this account is that reviewers have plenty of room to apply the standard of review consistently with their own assessment of the desirable outcome.

There is, however, a more serious problem lurking here, caused by the fact that unreasonableness in the *Wednesbury* sense can operate not only as a standard of review but also as a ground of review in its own right. This raises two issues. First, is unreasonableness in the *Wednesbury* sense the standard of review applicable to the other grounds of review of policy decisions? Secondly, if it is not, what is the standard of review applicable to those other grounds? In the *Peko-Wallsend* case, Mason J seems to have assumed that *Wednesbury*-unreasonableness is the standard of review applicable to the ground of review concerned with failure to take account of a relevant consideration. If it were the standard of review for all of the grounds of review of policy decisions, its function as a separate ground of review would be to catch errors of policy which could not be brought under any of the other grounds of review of policy decisions. However, there is no authority to this effect. Ambiguity about the role of *Wednesbury*-unreasonableness opens the way for courts to apply a "more demanding" standard when reviewing policy decisions under one of the other grounds of review. For instance, instead of asking whether the decision-maker's failure to take account of a relevant consideration was so unreasonable that no reasonable decision-maker could have committed it, the court may simply ask whether the decision-maker failed to take a relevant consideration properly into account. And since the court is the final judge of what "properly" means, asking this latter question is effectively equivalent to applying preferability as the standard of review.

In summary, my argument is that reasonable judges may disagree about whether a policy decision is *Wednesbury*-unreasonable![126] Moreover, as a result of the fact that *Wednesbury*-unreasonableness operates as a ground of review as well as a standard of review, it is not clear whether it operates as a general standard for reviewing policy decisions. Consequently, there is ample room for courts, implicitly at least, to review policy decisions according to the preferability standard. If this conclusion is correct, it carries two important implications about the relationship between merits review and judicial review. First, because the standard of merits-review of policy decisions is preferability, we would not seem justified in drawing a sharp distinction between judicial review and merits review on the basis that preferability is the standard of the latter but not of the former.[127] Secondly, in just the same way that various courts may

125 (1986) 162 CLR 24 at 39-42.

126 For example, *Foley v Padley* (1984) 154 CLR 349.

127 There is currently a struggle going on in the law of judicial review both in England and Australia to supplement or replace the *Wednesbury*-unreasonableness test with the concept

be more or less willing to find a policy decision to be *Wednesbury*-unreasonable, so various merits-reviewers may be more or less willing to prefer a decision other than the one under review. One merits-reviewer might be prepared only to reject decisions which, in the eyes of another merits-reviewer, are *Wednesbury*-unreasonable.

It does not follow, of course, that courts are, or should be, as willing as merits-review tribunals to interfere with administrative policy decisions. However, because of the relativity and subjectivity of the concepts of *Wednesbury*-unreasonableness and preferability, the distinction between merits review and judicial review is unlikely to be the only determinant of whether a review body will interfere with a policy decision. The values and attitudes of the individual reviewer also play an important part.[128] In this respect, it is worth observing that some commentators[129] detect, in the judicial-review case law of the 20-plus years since the enactment of the ADJR Act, a developing strand of judicial "activism"—an increased willingness to interfere with administrative decision-making in furtherance of values such as the protection of individual rights. According to this argument, individual judges embrace traditional ideas of deference and restraint or, by contrast, a new judicial activism, on the basis of their philosophical and political predilections. Conversely, it has been argued that some AAT members are more "activist" than others, and more willing to interfere with administrative decision-making.[130]

But there is no need to embrace this thesis in order to make the basic point. For instance, in *Foley v Padley*[131] the High Court divided 3-2 over the validity of a by-law made by Adelaide City Council to regulate activities in Rundle Mall. Brennan J (in dissent) warned that,

> [a]lthough the area of judgment that a court must leave to a repository of power is not unlimited, an allegation of unreasonableness...may often prove to be no more than an attack upon the merits of the by-law made in purported exercise of the power. But where...the ambit of the power...and the activities which may be subjected to the by-law are at large, an opinion which carries otherwise innocent activities within the scope of the power excites careful if not jealous scrutiny by the Court.[132]

Here, then, we have an explicit recognition by a cautious and conservative judge that the nature of the power and of the interests affected by its exercise may properly influence the intensity of judicial scrutiny. There is, for instance, a long common law tradition of according jealous protection to important personal interests, such as liberty and freedom of movement.

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of "proportionality": M Aronson and B Dyer, above n 44 at 375-379). Some conceptions of proportionality are practically indistinguishable from preferability.

128 This is the basic insight of J Griffith's classic study of judicial ideology, *The Politics of the Judiciary* (5th ed 1997), first published in 1977; and of P McAuslan, *The Ideologies of Planning Law* (1980). The distinction between judicial review and merits review trades, to some extent, on an old-fashioned idea that judicial decision-making is value-neutral. See also M D Kirby, "Administrative Review: Beyond the Frontier Marked 'Policy – Lawyers Keep Out'" (1981) 12 *F L Rev* 121 at 144-145, 156.

129 Such as McMillan, above n 84.

130 J McMillan, "The Role of Administrative Review Bodies–A Commentary" (1999) 58 *AJPA* 76 at 78.

131 (1984) 154 CLR 349.

132 Ibid at 370.

There seems little reason to doubt, therefore, that a judge who is so inclined can justify scrutinising the "merits" of an administrative decision without departing from well-established grounds of judicial review. Pushing this conclusion a little further, I would like to suggest a somewhat unorthodox interpretation of the federal merits-review system. It is hard to resist the conclusion that the AAT was intended to be a court-substitute. Its senior members are judges and highly qualified and experienced lawyers. It operates and behaves like a court. Admittedly, its members do not enjoy the protections afforded to judges of Chapter III courts, but in their place we find a continuing and anxious concern on the part of the AAT to maintain a healthy distance from and independence of the executive. To all intents and purposes (except the strictly constitutional), the AAT is an inferior court. In this light, the AAT finds its real significance not in being a general merits-review tribunal, but rather in being the vehicle of a massive expansion of judicial review by stealth. From this perspective, the call for restraint on matters of policy made by Brennan J in *Drake (No 2)* serves essentially the same legitimising function as the emphasis on the need for deference in judicial review cases;[133] and the concern of the courts to stress the limited reach of judicial review may be interpreted as an attempt to discourage "appeals" from the AAT to the courts via judicial review. The establishment of the federal merits review system not only made an expansion of the grounds of judicial review undesirable. It also made such an expansion unnecessary. The AAT was the Kerr Committee's Trojan horse. This interpretation of the "new administrative law" suggests an explanation (in terms other than self-interest) for the negative reaction on the part of lawyers to the Administrative Review Council's proposal[134] to reduce the importance of formal legal qualifications as a criterion for selection as a member of a merits-review tribunal.

(iv) Procedural errors

The discussion so far has been concerned mainly with non-procedural grounds of review. Procedural grounds of review—especially breach of natural justice—are very important in judicial review, but they play very little part in merits review.[135] This is because a merits review tribunal can exercise afresh the decision-making power invested in the original decision-maker, and can substitute its decision for the original decision; whereas a court exercising judicial review jurisdiction can do neither of these things. An applicant for judicial review who challenges a decision on procedural grounds, typically does so in the hope of getting the decision itself changed; and if there is nothing wrong with the decision itself, a procedural challenge may well be unsuccessful. If the reviewer has the power to change the decision, there is little point in challenging it on procedural grounds. The best course is to attack the substance of the decision.

2. Remedies

Courts can give certain remedies that a merits-review tribunal cannot—for instance, a declaration or a mandatory or prohibitory order. But it is the power of a merits-review tribunal to make a substitute decision that marks the most important remedial distinction between merits review and judicial review. The analysis in section III.1 suggested that there is less difference between the grounds of judicial review and the

133 Similarly: M D Kirby, above n 127 at 134.
134 *Better Decisions*, above n 9 ch 4.
135 Note, however, that the AAT itself must comply with principles of procedural fairness.

grounds of merits review than is often assumed. However, it would be surprising if the presence or absence of the power of substitution did not have some impact on the way reviewers approach their task, especially in relation to policy decisions. A necessary preliminary to exercising the power to affirm or vary a decision, or to make a substitute decision, is to formulate the decision which ought to have been made by the original decision-maker; but this is not a necessary preliminary to the granting of any judicial review remedy. Nevertheless, it does not follow that courts exercising judicial review jurisdiction have no power to, and do not in practice sometimes, say what decision ought to have been made. In refusing applications for judicial review, courts often make it perfectly clear that, in their opinion, the decision under review was not only lawful but right; and in granting applications for judicial review, courts often make it perfectly clear not only that, in their opinion, the decision under review was unlawful but also (if only impliedly) what the right decision would be. Absence of the power of substitution (and the power which it presupposes to exercise afresh the original decision-making power) makes it unnecessary for a court to spell out the decision it thinks ought to have been made. This does not mean that there is no point in a court doing this, or that courts are unwilling to do it. By careful statement of its reasons for decision, a court often can and will make perfectly clear what decision it thinks ought to be made when the original decision-maker considers the case again. This is one explanation of why the grounds of judicial review and their associated standards of review are essentially similar to the grounds of merits review and their associated standards.

CONCLUSION

The main proposition I have sought to defend in this paper is that the differences between judicial review and merits review are less than is often assumed; and, more provocatively, that merits review can be seen as judicial review in disguise. If the merits-review system had not been established in the 1970s, judicial review would probably have developed to cover all or most of the ground now occupied by merits review. Moreover, the fact that the AAT has taken a relatively cautious approach to defining its review powers attests to its essentially judicial orientation. In short, the AAT has been the stalking horse for the advance of judicial control of administrative action. An important part of my argument was to challenge the basis of the assumption, made by the Kerr Committee and almost all commentators, that merits-review jurisdiction falls outside the judicial power of the Commonwealth.

Recent proposals for reform of the federal merits-review system have been described by a government spokesperson in terms of "a cultural shift away from the quasi-judicial model".[136] Robin Creyke believes that "the time for adopting the quasi-judicial model has passed". In her view, that model was a concession to opponents of a general review tribunal:

> Twenty-two years later, we have moved away from that vision and the tribunal model, in all its manifestations, is an increasingly popular one. As a consequence, there is no longer a need for tribunals to shelter behind the skirts of their better established judicial

136 R Leon, "Tribunal Reform: The Government's Position" in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999) at 355. "Merits review should be perceived and conducted as an administrative review process, not as a quasi-judicial process" (at 352).

> counterparts. It should now be acknowledged that tribunals do not exist in some undefined hinterland between the executive and the judiciary. They are at the apex of the administrative review system, within the executive arm of government...[137]

It is not clear to me what the practical implications might be of an ideological shift from a judicial to an administrative paradigm of review. As we have seen, the relationship between merits review and judicial review is complex, and it is not immediately obvious on the face of the government's proposals whether concern about present arrangements focuses on the resemblances between merits review and judicial review or on those respects in which merits review intrudes further than judicial review into the decision-making domain of the executive.

It is worth noting that in the first instance, at least, the prime engine of the cultural shift being proposed is a reduction in the proportion of legally qualified members of merits-review tribunals. The government has left for later consideration the jurisdiction of merits-review tribunals, the standard of merits review, and the role of government policy in the review process.[138] But these questions seem to me to be crucial. Both the government and its critics apparently subscribe to the ideal of high-quality, independent review conducted according to traditional legal principles of good decision-making.[139] This ideal *is* quasi-judicial. In Australia, any truly independent review tribunal with highly skilled members (whether lawyers or not), following semi-formal adversarial or inquisitorial procedures, and subject to judicial supervision, will inevitably be, or at least become, a quasi-judicial body. Questions of membership and procedure, although undoubtedly important, are matters of detail. Of much more consequence to the ethos of a review tribunal are the scope of its jurisdiction, the standard of review it applies, and whether it is bound by quasi-legislation. The paradigm court has wide jurisdiction and is deferential to the executive, but it is not bound by quasi-legislation. My basic argument in this paper is that the AAT (in particular) matches this paradigm in many respects. It is anyone's guess how far it will drift away from the paradigm in the years to come. My speculation, for what it is worth, is "not very far".

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137 R Creyke, "Tribunal Reform: A Commentary" in S Kneebone (ed), ibid at 361.

138 R Leon, above n 135 at 351. The government is currently attempting to deal with the fraught issue of fresh evidence: R Leon, above n 135 at 357; R Creyke, ibid at 368-369.

139 "Appeal to the Federal Court or review under the Administrative Decisions (Judicial Review) Act 1975 (Cth) will continue to be available on the same basis as it is currently": R Leon, ibid at 356.