Contemporary challenges in merits review: The AAT in a changing Australia

The Hon Justice David Thomas*

The introduction of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), together with the *Ombudsman Act 1976* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Freedom of Information Act 1982* (Cth), has long been recognised as signifying a shift in the relationship between the public and the government.[1] Forty-three years since the inception of the Administrative Appeals Tribunal (AAT), merits review is still 'entirely a creation of statute' and is not entrenched in the *Constitution*.[2] Despite this, it is safe to say that independent review of government decisions has been cemented as a fundamental aspect of our democratic society.

The development of the statutory objectives of the AAT reflects the maturation of the underlying jurisprudential values guiding the delivery of merits review. Prior to the amalgamation of the AAT with the former Migration and Refugee Review Tribunals and the Social Security Appeals Tribunal, the objective of all four tribunals was *simply* to provide a mechanism for review that was fair, just, economical, informal and quick.[3] I say 'simply' with hesitation, because, of course, there is nothing simple about it. However, the particular challenges this objective entails will not be the focus of this lecture. The statutory objective as it now stands in s 2A of the AAT Act provides:

> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:
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> (a) is accessible; and
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> (b) is fair, just, economical, informal and quick; and
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> (c) is proportionate to the importance and complexity of the matter; and
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> (d) promotes public trust and confidence in the decision-making of the Tribunal.

It is within the context of the last objective that we now face particular challenges which expose the inherent difficulty of balancing the interests of the individual and the interests of the public. Although on the face of it the sheer number of lodgements of applications for review before the AAT may indicate a healthy awareness amongst the community for exercising the right to challenge certain government decisions, in recent times the significance of the ability of people to do so and the role the AAT plays in this process seem to have been taken for granted or, perhaps, misunderstood.

To borrow a phrase from Sir Anthony Mason, the 'blancmange-like quality of the expression "merits review"'[4] does not adequately reflect the complexities inherent in the function the AAT undertakes when reviewing a decision on the merits. In particular, and in the context of this discussion, at the heart of merits review may be the choice between a number of legally correct decisions. In cases where the AAT is presented with such a choice, its task is to reach what it considers to be the *preferable* decision in the circumstances. It is this

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1 See, for example, Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-five Year Mark* (The Centre for International and Public Law, the Australian National University, 1998) 1.

2 Justice Duncan Kerr, 'Challenges Facing Administrative Tribunals — The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision Making' (The National Lecture, Council of Australasian Tribunals Victoria Twilight Seminar, Administrative Appeals Tribunal, Melbourne, 18 November 2013).

3 See *Migration Act 1958* (Cth) ss 353 and 420; *Social Security (Administration) Act 1999* (Cth) s 141, as at 20 June 2015.

4 Sir Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28(2) *Federal Law Review* 331, 333.

requirement to exercise a discretion in selecting the preferable outcome which is unique to merits review.

In some circumstances, there is an additional layer of complexity in exercising this discretion. Some decisions may involve government policy; others may involve a determination of community expectations. For example, in reviewing decisions to cancel visas, or refusals to revoke cancellations of visas, on character grounds under the *Migration Act 1958* (Cth),[5] a relevant consideration for the AAT member is the expectations of the Australian community. To what extent — and how — should the AAT be applying policy and attempting to encapsulate community expectations in its decision-making?

I consider this to be a contemporary challenge because of the level of attention these cases seem to have received in the media, which may partly be reflective of the approach of the community to decision-making bodies like the AAT. Deputy President Humphries has previously commented on the apparent wane in public trust in our social institutions and the need to demonstrate the AAT's relevance and credibility.[6]

Before I discuss the challenges the AAT faces in the task of exercising a discretion in choosing what is the preferable decision, it is worth reflecting on how the function of the AAT and its particular brand of merits review evolved in order to provide some context to the issues we face today.

The evolution of merits review

Every student and practitioner of administrative law will be familiar with the Commonwealth Administrative Review Committee, more commonly known as the Kerr Committee, and its seminal report.[7] A reading of the terms of reference set out at the beginning of the report belies the Kerr Committee's perception of its task and its subsequent recommendations, which went well beyond these terms and came to have quite far-reaching consequences. In particular, the report posited the foundational concepts of how the function of merits review was to be conducted and the appropriate repository of that function.

The Kerr Committee's findings were prefaced by the recognition that judicial review alone could not adequately provide for review of administrative decisions.[8] This was particularly so in terms of the remedies offered by judicial review, a survey of which led the Kerr Committee to conclude that:

> this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldly and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy ...[9]

The absence of any general legislative requirement to provide a statement of reasons for administrative decisions was also seen to be inhibitive of the courts' ability to correct an improper exercise of power or errors of law.[10] In addition, the Kerr Committee was of the view that, for constitutional reasons, the function of reviewing administrative decisions on their merits should not be conducted by a court of law. Citing the effect of Ch III of the *Commonwealth of Australian Constitution Act 1990* (Cth) (the *Constitution*) as interpreted in *The Queen v Kirby; Ex parte The Boilermakers' Society of Australia* (the *Boilermakers case*)[11]

5 *Migration Act 1958* (Cth) ss 501, 501CA.
6 Gary Humphries, 'Feeling the Heat: Challenges for 21st Century Tribunals' (2018) 91 *AIAL Forum* 61.
7 Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, August 1971).
8 Ibid 1.
9 Ibid 20.
10 Ibid 30.
11 (1956) 94 CLR 254.

and subsequently upheld by the Privy Council,[12] the Kerr Committee emphasised that courts may only engage in those functions which are strictly judicial or are incidental to the exercise of judicial power, which, conversely, meant that administrative bodies could not exercise judicial functions.[13]

It was also recognised by the Kerr Committee that the increase of powers and discretions conferred on ministers, officers and statutory authorities[14] made it essential for 'corrective machinery' to be in place to remedy administrative error and 'improper exercise of power'.[15] Although some specialist tribunals already existed, it was noted that administrative review was not the general rule.[16] Other democratic avenues for resolving possible injustices, such as members of Parliament taking up the issue with the relevant Minister or department, were also considered inadequate because they depended upon concessions and did not ensure an independent review.[17] It was in this context that the Kerr Committee observed that 'the basic fault of the entire structure is … that review cannot as a general rule … be obtained "on the merits" — and this is usually what the aggrieved citizen is seeking'.[18]

In terms of the specialist tribunals that were already in existence at the time, there were no prescribed procedures to be followed, nor was there an overseeing authority which was supervising the adoption of rules and procedures. Each tribunal determined its own procedures having regard to what it considered to be suitable and in line with the rules of natural justice. Often, the Kerr Committee noted, procedures were settled ad hoc in a particular case.[19]

An interesting feature of the Kerr Committee's recommendations is that, while it recognised that judicial review alone was not fit for purpose, it still drew upon aspects of the judicial method when setting out its vision of how a new administrative review body would operate. There would be provision for, among other things, the exchange of documents, legal representation, the power to issue summonses, evidence to be given on oath and the cross-examination of witnesses.[20] It has been said that the Kerr Committee was 'overly influenced by the judicial model'[21] and, indeed, the Committee's recommendations were predicated on the recommendation that the new tribunal should be made up of 'chairmen' who were legally qualified, because, it was thought, people with legal experience conduct proceedings more effectively and fairly than others.[22]

In terms of membership, the Kerr Committee suggested that it comprise a judge plus two other members: one an officer of the department or authority that made the decision under review; the other a layperson drawn from a panel of people who had been chosen for their character and experience in practical affairs.[23] Having a member who was from the primary decision-making government department would, the Committee contended, ensure that the particular knowledge of the administration would be available.[24] As controversial as it is to suggest that an officer from the relevant government department should be included on the review panel, the point to take away from this is that members were to be chosen for their

12 *The Attorney-General for the Commonwealth v The Queen* (1957) 95 CLR 529.
13 Commonwealth Administrative Review Committee, above n 7, 22.
14 Ibid 5.
15 Ibid 107.
16 Ibid 5.
17 Ibid 8.
18 Ibid 20.
19 Ibid 26.
20 Ibid 87–9 and 97–9.
21 Robin Creyke, 'Tribunals: "Carving Out the Philosophy of their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19, 24.
22 Commonwealth Administrative Review Committee, above n 7, 96.
23 Ibid 86–7.
24 Ibid 86.

expertise in a particular field,[25] whether it be areas such as law, medicine, aviation or public administration.

The AAT was established a few years after the delivery of the Kerr Committee's report and the final report of the Bland Committee.[26] As Kirby J noted in *Shi v Migration Agents Registration Authority*[27] (*Shi*):

> it is essential to appreciate the radical objectives that lay behind the enactment of the AAT Act … The proposal to create such a tribunal, with the power to make decisions 'on the merits', represented a bold departure from the pre-existing law, with its focus on constitutional and statutory 'prerogative' remedies of judicial review.[28]

Although it was definitely a 'bold departure', the AAT Act was relatively silent in terms of the procedures the AAT should adopt and has also never defined the function of 'merits review'. The nature of the AAT's powers and functions was developed through its early decisions and by the courts.

Given the passage of time since the establishment of the AAT, it is perhaps not surprising that its relevance is being discussed and its once unique and groundbreaking role is not as appreciated as it once was.

The challenge of staying relevant

The requirement for the AAT to promote public trust and confidence in its decision-making was added to the AAT's statutory objectives by the *Tribunals Amalgamation Act 2015* (Cth). In the Explanatory Memorandum to the Tribunals Amalgamation Bill 2015, it was stated that this objective would reiterate 'the importance of the Tribunal continuing to be, and to be seen to be, an independent forum' for review of government decisions.[29]

Now, more than ever, it is vital that the AAT and similar bodies demonstrate their relevance not only to the public but also to those government departments, agencies and ministers from whom the reviewable decisions generate. I say this because the AAT can and should play a role in improving government decision-making.[30] The capacity for an independent review body to have a normative effect on improving the quality of administrative decision-making was recognised as a potential benefit by the Kerr Committee,[31] although its report did not explore that contention any further. Despite the difficulty in measuring any normative effect in an empirical sense, the AAT's role in upholding accountability and advocating for good government more broadly is essential to instilling public trust and confidence in its decision-making.[32]

The AAT's role in conducting merits review

The AAT Act has never defined the term 'merits review' or explicitly prescribed in detail the nature of the AAT's role in terms of criteria and rules to be followed.[33] A defining feature of merits review is the ability for decision-makers upon review to consider the entirety of the

25 Ibid 96.
26 Committee on Administrative Discretions, *Final Report of the Committee on Administrative Discretions* (Parliamentary Paper No 316, 1973).
27 [2008] HCA 31.
28 Ibid [30], [32] (Kirby J).
29 Explanatory Memorandum, Tribunals Amalgamation Bill 2015 [118].
30 See Explanatory Memorandum, Tribunals Amalgamation Bill 2015 [15], where it was stated that 'A strong, impartial and effective Tribunal … would strengthen government decision-making'.
31 Commonwealth Administrative Review Committee, above n 7, 3–4.
32 Narelle Bedford, Submission to the Honourable Ian Callinan, *Statutory Review of the Tribunals Amalgamation Act 2015* (24 August 2018) 4.
33 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 154 (Deane J).

administrative decision, which may include new evidence. It is now widely understood that the AAT must reach the correct or preferable decision based upon the evidence before it.

As mentioned earlier, the nature of the AAT's task was developed through the early decisions and court judgments. In *Re Becker and Minister for Immigration and Ethnic Affairs*[34] (*Becker*), Brennan J, then President of the AAT, considered an application for review of a decision to deport Mr Becker from Australia. Justice Brennan identified that it was his task to determine whether, 'on the facts of the case and having regard to any policy considerations which ought to be applied, is the Minister's decision the right or preferable decision?'[35] This function was later endorsed by the Full Federal Court in *Drake v Minister for Immigration and Ethnic Affairs*[36] (*Drake*) and then by the High Court in *Shi*. In *Drake*, Bowen CJ and Deane J stated that the question for the AAT is not whether the decision was the correct or preferable one on the material before the original decision-maker but whether the decision is the correct or preferable one on the evidence before the AAT.[37]

The temporal nexus is significant, because it is the AAT's ability to consider materials that were not before the original decision-maker that places it in a better position to be able to reach the correct or preferable decision. As seems evident from some media reporting, this point appears to create some confusion in understanding the decision-making process and, consequently, AAT decisions. The focus of the AAT merits review is not whether the original decision-maker was wrong or at fault in making the decision. That is not necessarily a relevant issue to consider. This temporal nexus means that the AAT may be, and indeed often is, considering a different case from that which confronted the original decision-maker.

In the recent High Court matter of *Frugtniet v Australian Securities and Investments Commission*[38] (*Frugtniet*), Kiefel CJ and Keane and Nettle JJ reiterated that this does not mean the AAT is 'at large'[39] in terms of how it determines the correct or preferable decision. Subject to a contrary statutory intention, the relevance of a particular piece of evidence is key to determining whether the AAT takes it into account.[40] A similar point was made in *Minister for Immigration and Citizenship v Li*[41] (*Li*) in the context of a consideration of legal unreasonableness, in which French CJ explained:

> After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.[42]

So there are clear boundaries to the information which should be considered by the AAT.

Role of policy

Occasionally, the exercise of the AAT's discretion, and the balancing it entails, may involve an elucidation and application of government policy. In *Re Becker* Brennan J found that, as the AAT is empowered to undertake merits review, jurisdiction is conferred on it to look at not only the facts of the matter but also any lawful policy that has been applied or ought to

34 (1977) 1 ALD 158.
35 Ibid 162 (Brennan J).
36 (1979) 2 ALD 60.
37 Ibid 68 (Bowen CJ and Deane J).
38 [2019] HCA 16.
39 Ibid [14] (Kiefel CJ, Keane and Nettle JJ).
40 Ibid [15].
41 (2013) 249 CLR 332.
42 Ibid 351 (French CJ).

be applied.[43] But the most guidance on the issue of the consideration of policy is found in *Drake*, and *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[44] (*Re Drake (No 2)*).

Mr Daniel Drake arrived in Australia from the United States of America and was granted permanent residency. Some 10 years after his arrival, he was convicted on three drugs charges and was sentenced to 12 months' imprisonment. Upon his release, the Minister for Immigration made an order under the Migration Act that Mr Drake be deported from Australia. The AAT affirmed the decision and Mr Drake appealed to the Federal Court, submitting that the importance the AAT attached to a policy statement made by the Minister relating to deterrence of others resulted in a failure of the Deputy President to exercise his own independent judgment.[45]

Chief Justice Bowen and Deane J prefaced their consideration of this issue by outlining the different but related tasks undertaken by a court and a tribunal, noting the AAT is not restricted to considering whether a discretionary power has been validly exercised according to law. Its function is an administrative one. When determining what decision is correct or preferred, it can adjudicate upon the merits of the decision and, in doing so, the propriety of any permissible policy.[46] In terms of the role policy should play in the AAT's determinations, Bowen CJ and Deane J proffered the following:

- Even in cases where the statute does not specify particular criteria or relevant considerations, the AAT is still subject to the same constraints as the original decision-maker.[47]

- In the absence of a statutory preclusion, an administrative decision-maker is entitled to take into account government policy as a relevant consideration. This does not mean, though, that the AAT merely determines whether the decision made conformed with relevant policy.[48]

- The precise role which policy should play is a matter for the AAT itself to determine on a case-by-case basis, and in light of 'the need for compromise, in the interests of good Government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case'.[49]

- If the application of policy to the facts has informed the AAT's decision, it should make it clear that it has considered the propriety of the particular policy and expressly indicate the considerations that led to that conclusion.[50]

Following remittal of the matter to the AAT,[51] Brennan J thoroughly examined the considerations which govern the AAT's adoption of government policy in reaching a decision in a case such as this. The Minister had issued a policy statement setting out his approach, including reference to the best interests of Australia and the types of matters that were to be taken into account in considering whether to make a Deportation Order. Justice Brennan's points may be summarised as follows:

43 (1977) 1 ALD 158, 162 (Brennan J).
44 (1979) 2 ALD 60; (1979) 2 ALD 634.
45 (1979) 2 ALD 60.
46 Ibid 69.
47 Ibid.
48 Ibid 69.
49 Ibid 70.
50 Ibid.
51 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

- Policy can guide the making of decisions and show the sorts of standards and values which the Minister would usually apply. But a policy that seeks to create a fetter by purporting to limit the discretion conferred by a statute would be unlawful. A lawful policy, on the other hand, keeps the range of discretion intact.[52]
- The AAT is as free as the Minister to apply or not apply any lawful policy it chooses.[53]
- If the AAT chooses to apply policy, it is because that policy assists it in reaching the correct or preferable decision in the circumstances of the case.[54]
- There may be cogent reasons for not applying government policy — for example, where injustice would occur in a particular case.[55]
- Ministerial policy is subject to parliamentary scrutiny, and the Minister is responsible to Parliament for the policy the Minister adopts.[56] Administrative policies are best left to be formed and amended on political grounds and within that context.[57]

Justice Brennan identified the nuances which surround the AAT's task in situations such as these, where the AAT must always remain an independent decision-maker. His Honour recognised that the AAT enjoys certain procedural advantages which can result in its findings of fact being different from that of the primary decision-maker.[58] Of course, these procedural advantages as described by Brennan J include the fact that, as AAT decisions are based on the evidence before it, the AAT may be considering a materially different case.

Community expectations

When a consideration of community expectations is specified as a criterion, there is a separate and additional issue to consider. Brennan J's decision in *Re Drake (No 2)* recognised the inherent difficulty of achieving consistency in decision-making where a determination relates to considering people's perceptions of the best interests of the community and how offending conduct can affect those interests.[59]

There has been significant discussion in some media outlets surrounding the AAT's reasons when reviewing decisions to cancel visas, or refusing to revoke cancellations of visas, on character grounds under the Migration Act. Similar to the early deportation decisions which concerned an assessment of what would be in the public interest, these decisions involve taking into account community expectations, often in the context of serious criminal activity.

The terms of reference for the *Statutory Review of the Tribunals Amalgamation Act 2015*, when referring to whether the objective of promoting public trust and confidence in decision-making was being met, included a reference enquiring about the extent to which decisions of the AAT were meeting community expectations. While the term 'community expectations' does not appear in the AAT Act, its inclusion in these terms of reference reflects the contemporary significance of ensuring the AAT generates decisions that are in step with the expectations of the wider public.

52 Ibid 641.
53 Ibid 642.
54 Ibid 643.
55 Ibid 645.
56 Ibid 643.
57 Ibid 644.
58 Ibid 639.
59 Ibid.

Ministerial *Direction No 79* (the Direction)[60] is relevant in the context of the AAT's consideration of visa decisions based on character grounds. 'Expectations of the Australian Community' is listed in the Direction as a primary consideration in determining whether to exercise the discretion to cancel a visa.[61] Subparagraph 9.3(1) of the Direction provides:

> The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to cancel the visa held by such a person. Visa cancellation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not continue to hold a visa. Decision-makers should have due regard to the Government's views in this respect.

In the context of an earlier iteration of this part of the Direction, an observation was made in *YNQY v Minister for Immigration and Border Protection*[62] (*YNQY*) that this was in essence a 'deeming provision' about how the Minister and executive government wish to articulate community expectations, regardless of any objective basis for that belief, and that in substance this consideration is adverse to any applicant.[63] In the more recent case of *DKXY v Minister for Home Affairs*[64] (*DKXY*) the view was expressed that it would be 'plainly incorrect' if the expectations of the community were always to be regarded as adverse to the applicant.[65] Rather, a broader interpretation was preferred — namely, that it is the totality of relevant circumstances which inform the decision-maker's assessment and balancing of the primary and other considerations in the Direction.[66]

The articulation of what community expectations actually are in any given case is problematic. As Former Deputy President Block stated in *Re Jupp and Minister for Immigration and Indigenous Affairs*[67] (*Re Jupp*), the Direction 'assumes (incorrectly) that there is an Australian community which thinks as one'.[68] Such an assumption therefore wrongly assumes that it is easy to discern a homogenous set of community expectations.

How, then, should AAT members approach this task? A statement issued by Downes J, then President of the AAT, in connection with the AAT's decision in *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship*[69] (*VCA*) directly addressed what was considered to be the crux of the nature of discretionary administrative decision-making in cases where there is an obligation to consider community values. Justice Downes elucidated that it is not the 'personal or idiosyncratic' views of the decision-maker that are relevant but, rather, what the decision-maker determines will achieve the preferable decision in accordance with community values.[70] Significantly, whatever the relevant community values identified in a particular case, Downes J relevantly observed:

> [They will not be based on] transient or fashionable thinking. They will not be found in the publications of vocal minorities or the fulminations of the media, motivated by short term considerations and the improvement of circulation or ratings. They will not necessarily reflect the views of individual politicians. Community

60 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (20 February 2018).
61 Ibid para 9(1)(c).
62 [2017] FCA 1466.
63 Ibid [76].
64 [2019] FCA 495.
65 Ibid [30].
66 Ibid [31].
67 [2002] AATA 458.
68 Ibid [7(m)].
69 *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690. Justice Downes also reiterated points made in a decision handed down earlier that day: *Rent to Own (Aust) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689.
70 [2011] AATA 690 [64] (Downes J and Senior Member McCabe).

> standards will be found in more permanent values. They will be informed in part by legislation of the parliaments, and especially legislation applicable to the decision-making.[71]

I consider the preferred (albeit still difficult) approach is that stated by former Deputy President Block in *Re Jupp*:

> [The reference to what the community would expect in the Direction relates to] middle-of-the-road reasonable members of the Australian community who do not hold extreme views one way or another. And … a further limiting factor … is that one must import into that Australian community, knowledge of the evidence before [the AAT].[72]

Justice Downes in *VCA* went on to say that community values could be discerned from ministerial statements that reflect a broad consensus, as well as the decision-maker's belief based on experience.[73]

Decision-makers do not have any latitude to impose their own personal views; rather, their experience may guide their assessment as to what community values should be considered relevant in a given situation, based upon all of the surrounding circumstances. The starting point to understanding what community expectations are should be the wide range of things put in place by Parliament. Members of Parliament are elected by the community and so are held accountable to the community on a regular basis by the electoral cycle. The election of a member of Parliament in itself is the balancing of the various disparate views of different sections of the community. If, in their actions or decision-making, they cease to reflect community expectations or community values, the democratic process allows the community to change the decision-maker at the next election.

The same cannot be said about a member of a tribunal such as the AAT, who is not elected at the will of the people and so is not accountable in the same direct way. In this context, the laws put in place by Parliament, the international Conventions to which Australia is a party, regulations put in place, and the contents of ministerial directions or official statements are the starting point and will guide the evaluation of what is expected by the community and consequently the exercise of the discretion.

Any focus based on the member's personal view also risks undermining the impartial nature of an AAT member's role.[74] It is the AAT's independence which is such a defining feature and allows it properly to exercise its function of reviewing government decisions.

Justice Downes observed that, although the AAT's establishment heralded an emphasis on notions of individual justice, 'ideals of individual justice do not … replace the demands of good administration'.[75] It is this inherent tension that often underlies criticisms levelled at AAT decisions.

Conclusion

The role of the AAT in promoting accountability in administrative decision-making, while still delivering justice to the individual, should not be understated and is an essential aspect of what the AAT must seek to achieve. In doing so, the AAT is part of a cycle of accountability:

- the public elects members of Parliament on the understanding they are in tune with their interests;

71 Ibid [79].
72 *Jupp and Minister for Immigration and Indigenous Affairs* [2002] AATA 458 [7(m)].
73 [2011] AATA 690 [79] (Downes J and Senior Member McCabe).
74 Madeleine Harkin, 'Balancing the Discretionary Seesaw: Are Community Values an Appropriate Guide for the AAT's "Preferable" Decisions?' (2017) 24(1) *Australian Journal of Administrative Law* 19.
75 [2011] AATA 690 [60] (Downes J and Senior Member McCabe).

- the Parliament enacts laws which reflect Australian values;
- the government makes policies accordingly;
- ministers issue policy statements and directions in line with the requirements of the legislation;
- government decision-makers apply these laws and policies; and
- tribunals undertake merits review of those decisions where a citizen believes the decision is not the correct or preferable decision.

All have an interest in ensuring the public has confidence in this cycle.

Whenever the review includes a consideration of relevant policy, the AAT must be 'fully informed as to the policy and the reasons for it'.[76] In the wide range of matters heard in the AAT, members are often required to interpret the meaning and requirements of legislation and regulations. Generally, the AAT's task is made easier by well-drafted and clear legislation and regulations. The same can be said for policy. Clearly articulated and explicit policy (including ministerial directions) and, importantly, reasons for the policy will enhance the effectiveness of the process — in providing more information and clarity for decision-makers. This is, of course, a good thing.

The latest version of the Direction, for example, is helpfully more specific and explicit in saying that crimes of a violent or sexual nature, particularly against women, children or vulnerable members of the community such as the elderly or disabled, are serious crimes.

Ideally, and particularly in matters of a more adversarial nature, where the primary decision-making body is represented and is actively involved in AAT proceedings, the department's and the government's position should be clearly put forward as part of the submissions made to the AAT.

Other important stakeholders with a responsibility in this process are those who report on AAT decisions. In the context of public discussion, the AAT's position is similar to that of a court. Chief Justice Holmes of the Supreme Court of Queensland has recently written about this,[77] and her points ring just as true for the AAT:

- members cannot defend their decisions;
- the AAT can sometimes become collateral damage during a wider discussion in a different context; and
- media criticism sometimes takes findings out of context.

While healthy and robust discussions about the AAT's decision-making are welcomed, I echo Holmes CJ's plea for criticisms to be better informed. The AAT cannot and does not defend its decisions; rather, the published statement of reasons stands as a full explanation of the AAT's determination in a particular matter. Recently, we have increased the volume of decisions we publish and offer plain English summaries of decisions of interest in our online publication, *The Review*. Improving the accessibility of our decisions is one step along the path to instilling public confidence and trust in our decision-making and ensuring we are transparent in the way in which we conduct our task of merits review.

76 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 162 (Brennan J).
77 Catherine Holmes, 'Declaration of Independence', *The Australian* (Australia), 14 June 2019.

The Kerr Committee acknowledged that 'different governments will make different decisions about the areas in which the administration or application of settled policies will be subject to administrative review'.[78] That is, of course, the government's prerogative. But the Kerr Committee also believed that their proposals would 'reconcile basic ideas of justice, acceptance of the wide and growing power of the administration and efficient and fair exercise of that power in a democratic society'.[79] As the availability of administrative review is now the general rule rather than the exception, it is clear that the process of merits review has become so entrenched that it is easy to lose sight of the complexity involved in reaching the correct or preferable decision, especially when policy and community expectations form part of the considerations.

At the time of the Kerr Committee's report, the balance between citizen and government had been altered in such a way as to threaten the ideals of accountability and administrative justice.[80] The reach of the government into every aspect of a citizen's life was increasing and there was a growth in the volume of legislation passing through Parliament — this created 'an immense bureaucracy with awesome discretionary powers'.[81] Since then this reach has grown. Now jurisdiction is conferred upon the AAT by over 400 pieces of legislation. I believe it is fair to conclude that the AAT has achieved what was envisaged by the Kerr Committee: assuming a pivotal position in the review process by facilitating 'administrative second thoughts.'[82]

78 Commonwealth Administrative Review Committee, above n 7, 105.
79 Ibid 107.
80 Creyke and McMillan, above n 1, iii.
81 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1975, 2285 (Robert Ellicott).
82 *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137, 141 (Senior Member Hall, Members Skermer and Woodley).