Russell Kennedy's Government CPD Series
Session 6: *Making Defensible Administrative Decisions*

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar.
- We have BD tech support live to assist with any technical issues.
- Use the chat function for any comments/technical issues.
- Use the Q&A function for specific questions related to the webinar content - Questions will be addressed at the end of the webinar.
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback. Presentation slides will also be sent to all attendees.
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback.

Disclaimer

The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed please contact the presenter directly.

Introduction

The current administrative law landscape

- Steady expansion of the scope of judicial review
- Uncertainty, variability, complexity and incomprehensibility of legal rules and their application
- Rise of internal review mechanisms

Competing policy considerations

- Expectation of decision makers to deliver a quick, accessible and economical process:
  - **speed** (a quick decision)
  - **finality** (to know what their position is and not be subjected to a series of appeals)
  - **cheapness**
  - **Accessibility**

- Statutory direction or internal administrative expectation:
  - to *be 'fair, just, economical, informal and quick'*
  - to proceed *'with as much expedition as the requirements of the legislation and a proper consideration of the matter to be decided permit'*

What does it mean to make defensible administrative decisions?

- Defensible administrative decision making:
  - ‘the best possible decision
  - on the basis of the information available at that time
  - that is within legislative parameters and
  - can be justified’

- A defensible decision:
  - should withstand ‘hindsight scrutiny’
  - requires recording a clear rationale for and discussions / processes that led to the decision

Key understandings for decision makers

- **Key areas of understanding** decision makers should have:
  - the **legislative, policy and regulatory context** under which the decisions are to be made
  - the **administrative principles** relevant to the lawful exercise of administrative decision making and
  - **how to deal with facts** and **fairly evaluate evidence** relevant to your legislative scheme

Key focus area

- Common administrative law errors:
  - Errors in fact finding
  - Procedural fairness and
  - Inflexible application of policy

- Practical guidance on how to balance and navigate competing demands

Errors in Fact-Finding

- How errors in fact finding can undermine defensible decision-making and why it's important to get this right

- *Fact-finding:*
  - the process of determining what the facts are in a given case and
  - the basis for deciding (upon which findings are made and leads to the decision-maker determines) whether the case meets the relevant statutory criteria

- *Evidence* is the material before the decision-maker, made up of the information provided by applicants or third parties, or information obtained independently by the decision maker or those assisting the decision maker in their deliberation

Errors in Fact-Finding cont.

- Rules of evidence do not apply
- But they have been found to offer useful guidance
- Fact-finding errors leading to indefensible decisions include failures to:
  - ask the right question or address the question posed
  - look for relevant information
  - find relevant information due to inadequate inquiries
  - understand or appropriately interpret available information;
  - properly assess the relevance or importance of available information and
  - failing to properly explain the basis for the decision

Consequences of an error in fact-finding

- If a decision is challenged and one of these fact finding errors is evident, it may result in:
  - A merits review tribunal may find differently which could result in a different outcome;
  - A court finding a potential ground for judicial intervention and if the error goes to the materiality of the lawfulness of the decision – the decision being quashed for jurisdictional error.

Errors in Fact-Finding cont.

- Rules of evidence can provide a useful guide on:
  - **acceptable standard of relevance**
  - **Information gathering process:**
    - Is the information ‘credible, relevant and significant’?
    - Does it adversely affect the interests of a person who should be provided with an opportunity to respond?
  - **evaluation of weight** to be attributed to information, having regard to legal principles, e.g. standards of proof and states of satisfaction

Errors in Fact-Finding cont.

- Which rules:
  - Rules related to admissibility – hearsay and opinion
  - Standards of proof and onus of proof
    - *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555
    - *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 62
    - *Minister for Immigration and Ethic Affairs v Pochi (1981) 149 CLR 139*
  - Evaluating and weighing evidence
    - *Browne v Dunn* (1894)
    - *Jones v Dunkel* [1959]
    - *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112

Errors in Fact-Finding cont.

- In Summary, a decision maker must:
  - determine all material questions of fact—those questions of fact that are necessary for a decision
  - not base a decision on a fact without evidence for that fact
  - ensure that every finding of fact is based on evidence that is relevant and logically supports the finding
  - not base a decision on a finding that is manifestly unreasonable
  - observe natural justice
  - comply with any statutory duty to give a written statement of reasons for the decision

Breaches of the Hearing Rule

- Steady expansion of the hearing obligation in recent decades
- Hearing rule requires that a person adversely affected by an administrative decision be given prior notice and an opportunity to respond
- Applying the hearing rule in administrative decision making context is complicated by:
  - multiple parties with interest in or adversely affected by a single decision and want opportunity to comment
  - documents can be received at irregular times during decision making period
  - various officials may need to be consulted before final decision is made

Breaches of the Hearing Rule: *Kioa*

- *Kioa v West* (1985) 159 CLR 550
  - obligation on decision maker to notify affected person of any adverse comment made by other agency officers during internal discussion and analysis of a case before reaching a decision
  - *Does this require all adverse comments to be collated and provided to the affected person for comment?*
  - *What if more documents are subsequently received or prepared - does this necessitate a further round of disclosure and invitation to comment?*

Hearing Rule Breaches: *NIB & SAAP*

- *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40; 115 FCR 561
  - Failure to disclose the report created a real risk of prejudice, albeit subconscious
  - The material in the CEO's report was 'credible, relevant and significant'
- *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 228 CLR 294
  - Refugee Review Tribunal made jurisdictional error by orally summarising adverse evidence by another witness
  - based on the court's interpretation of s 424A of the *Migration Act 1958* as requiring that adverse evidence be provided in writing

Hearing Rule Breaches cont.

- Key lessons:
  - High threshold in applying hearing rule
  - Scope of natural justice comes down to statutory construction: What does particular legislative scheme require of you as the decision maker?

  - If statute correctly interpreted
    - you can fulfil your procedural fairness obligations
    - without unnecessarily providing more, prolonging the decision outcome and wasting limited financial and people resources

Decision maker need not be influenced by adverse comments

- *Conyngham v Minister for Immigration & Ethnic Affairs* [1986] FCA 283; 68 ALR 423
  - Objection contained an allegation of serious impropriety that should have been put to Mr Conyngham
  - There was a real risk of unconscious prejudice influencing the Committee's report and flowing through into the Minister's decision and the *'mere possibility was enough'*
  - Hearing rule applies even where no evidence that decision maker was influenced by adverse internal comments in making their decision

Competing policy considerations

- Hearing rule should strike the appropriate balance between:
  - fairness to the individual
  - finality, efficiency and informality of decision making
- Natural justice now imposes greater demands and uncertainty on administrative decision makers
- How do you balance competing ever expanding natural justice demands with competing demands for speed and informality?
- Be clear about the stages in decision making process where opportunity to be heard should be provided and what the legislation requires

Natural justice and statutory interpretation

- Natural justice errors by incorrectly interpreting or applying the Act
  - A decision maker might make incorrect assumptions about the scope and application of procedural fairness available under a legislative scheme

AA v Secretary, Department of Health and Human Services and Others (2020) 61 VR 436

Melbourne Water Corporation v Caliguri [2020] VSCA 16

Natural justice and statutory interpretation

The Court cited the High Court judgment in *Minister for Immigration and Border Protection SZSSJ* (2016) 259 CLR 180, 205 [75]:

> *"It must now be taken to be settled that procedural fairness is implied as a condition of the exercise of a statutory power through the application of a common law principle of statutory interpretation. The common law principle … is that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual. The presumption operates unless clearly displaced by the particular statutory scheme."*

AA v Secretary, Department of Health and Human Services and Others (2020) 61 VR 436

Natural justice and statutory interpretation

Accordingly, the Court held:

> *[124] An intention on the part of the legislature to exclude the rules of procedural fairness is not to be assumed nor spelled out from 'indirect references, uncertain inferences or equivocal considerations'. In the absence of 'plain words of necessary intendment' the legislature is not taken to have intended to exclude the rules of natural justice. Accordingly, such an intention is not to be inferred 'from the presence in the statute rights which are commensurate with some of the rules of natural justice'.*

AA v Secretary, Department of Health and Human Services and Others (2020) 61 VR 436

Natural justice and statutory interpretation

The Court held:

> *[126] the Act evidences an intention that procedural fairness should be afforded in connection with this exercise of powers by the Secretary …*
>
> *[127] If anything, the provisions in Part 1.2 of the Act make it clear that the Act does not exclude the requirements to afford procedural fairness. The decision-making principles set out s 11 of the Act put a clear emphasis on the requirement of consultation in relation to the decisions, including consultation with people who have the care of children in relation to whom decisions are being made.*

AA v Secretary, Department of Health and Human Services and Others (2020) 61 VR 436

Natural justice and statutory interpretation

- In *Melbourne Water Corporation v Caliguri* [2020] VSCA 16, the Court of Appeal said:

  - *[64] "… it is* unlikely that Parliament intended that there be 'multiple rights' to be heard in the acquisition process *in Part 2, particularly where the rights [for public participation]… under the relevant planning scheme are so comprehensive.*
  - *[79] … the LAC Act does not require an opportunity to be heard to be given before the publication of the notice of acquisition. In our view, the scheme of Part 2 of the LAC Act evinces a clear legislative intent to exclude a right to be heard prior to the publication of a notice of acquisition under s 19 of the LAC Act."*

Inflexible application of policy / guidelines

- The decision-maker must give proper, genuine and realistic consideration to the merits of the case and be ready to depart from any applicable policy if warranted by the individual circumstances

- In *Waratah Coal v Coordinator-General, Department of State Development, Infrastructure and Planning* [2014] QSC 36, the Court held:
  - *[61] it is well established that an administrative decision-maker must decide an application on its merits considering the relevant material. It cannot simply apply government policy (Minister for Immigration, Local Government and Ethnic Affairs v Gray (1994) 50 FCR 189 at 206) …*

Inflexible application of policy / guidelines

- In *Morgan v Chief Executive of Parole* [2014] QSC 253, the Court held that the respondents failed to take into account all relevant considerations for the breach of parole conditions by only following a parole policy/guidelines document

- The Court stated:
  - *[20] "The power to suspend parole is a discretionary one. The discretion must be exercised by the executive reasonably in an administrative law sense… "the rule that those exercising statutory discretionary power must never place fetters upon the factors they can properly consider when exercising it in individual cases"*

Inflexible application of policy / guidelines

- A policy adopted by a decision-maker to structure a broad discretionary power will be a relevant consideration which the decision maker is bound to take into account.

- However:
  - *[21] a policy governing a discretionary decision-making power, "needs to be expressed in such a way that is flexible enough to deal with individual cases…"*

Morgan v Chief Executive of Parole [2014] QSC 253,
citing the NSW Court of Appeal case,
Caroll v Sydney City Council (1989) 15 NSWLR 541

Inflexible application of policy / guidelines

Morgan v Chief Executive of Parole [2014] QSC 253

The Court further said:

> *"However, consistently with the principles relating to invalid fetter of a discretionary power, any such policy must admit to the possibility of exception depending on the circumstances of a particular case"*

Citing *Seiffert v Prisoner's Review Board* [2011] WASCA 148 [124],
Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 and
Neat Domestic Trading v AWB (2003) 216 CLR 289

> *"a decision-maker must take care to ensure that he does not slavishly follow a policy and disregard the particular circumstances of the case" …Absent a statutory provision requiring compliance with this policy, a decision-maker may depart from policy and, in an appropriate case, should do so".*

Inflexible application of policy / guidelines

In *Australian Prudential Regulation Authority v TMeffect Pty Ltd* [2018] FCA 508, the AAT deemed the following APRA policy guideline invalid:

> *"APRA is of the view that the assumption or use of restricted words by non-ADIs is inherently confusing and likely to mislead potential customers. Therefore, in accordance with the purpose of the restriction, APRA is unlikely to grant consent to financial businesses that are not regulated in Australia or overseas as ADIs except in exceptional circumstances."*

Inflexible application of policy / guidelines

The Court held:

> *[60] "the Tribunal has read the relevant passage in the Guidelines too literally contrary to these principles, and in so doing has taken the phrase "inherently confusing" … of the Guidelines out of context. Rather, it is apparent from the fact-specific approach required by the Guidelines … that the phrase "inherently confusing and likely to mislead potential customers" … in relation to the use of restricted words by non-ADIs, does not mean inevitably confusing, irrespective of the circumstances of the particular case [and] does not deny the possibility that the use may not be confusing or misleading in the individual case, and that as a consequence the grant of consent may not undermine the purposes of s 66. It follows that the Guidelines do not impermissibly seek to exclude a consideration of whether particular circumstances may constitute exceptional circumstances or otherwise to mandate particular outcomes.*
>
> *… Consistently with this, the reference to potential customers being misled is expressly qualified by the reference to "likely"."*

Inflexible application of policy / guidelines

In *Australian Prudential Regulation Authority v TMeffect* [2018] FCA 508, the Court drew a distinction between guidelines and statute:

> *[59] "the Guidelines are not a statute, and should not be construed as if they were. They are, in line with their description, guidelines only. They should be read in their statutory context, in the context of the Guidelines as a whole, and in a common sense manner. While APRA Guidelines may be expressed with greater precision than Ministerial policy, nonetheless in general terms the observations of French and Drummond JJ in Minister for Immigration, Local Government and Ethnic Affairs v Gray (1994) 50 FCR 189 at 208 are apposite:*
>
> > *It must be accepted…that Ministerial policy is not to be construed and applied with the nicety of the statute. Policies are not statutory instruments. They prescribe guidelines in general, and not always very precise, language. To apply them with statutory nicety is to misunderstand their function."*

Seminar Summary

- The current administrative law landscape
- Competing policy considerations
- What does it mean to make defensible administrative decisions?
- Common administrative law errors:
  - Errors in fact finding
  - Procedural fairness
  - Inflexible application of policy
- Practical guidance on how to balance and navigate the competing demands on administrative decision makers

How we can help

- Does your agency find your primary decision-makers making common errors?

- We are offering free 30 minute consultation with each agency attending the live webinar today to:
  - discuss common errors and issues your primary decision-makers face
  - suggest possible solutions/strategies you may want to consider and
  - how we may assist you in the future

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