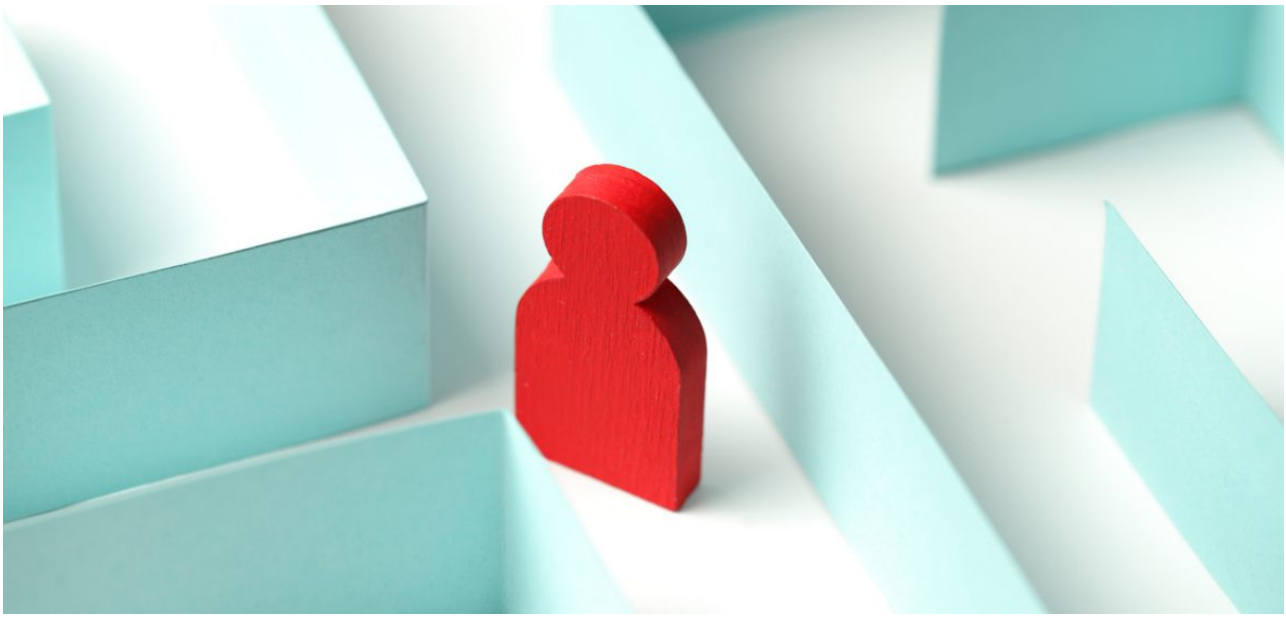
Inconsistent statutory objectives and the Migration Act – Time for a rethink



By Jason Donnelly - Sep 22, 2023 12:24 pm AEST

Snapshot

- There is significant inconsistency in the application of statutory objectives within Australia's immigration and appeals system.
- Delegates of the Minister for Immigration are primarily guided by the national interest, while statutory members of the Administrative Appeals Tribunal have a broader set of objectives. This divergence raises concerns about fairness and consistency in decision-making.
- The proposed harmonising of statutory objectives for both decision-makers would emphasise the just resolution of immigration matters quickly, cost-effectively and efficiently in accordance with the law. This approach aims to ensure fairness, streamline processes and maintain public trust in the immigration system.

There is an unacceptable dichotomy in the application of statutory objectives between delegates of the Minister for Immigration, Citizenship and Multicultural Affairs (the '**Minister**') and statutory members of the Administrative Appeals Tribunal (the '**Tribunal**').

This article explores the differing statutory objectives under the *Migration Act 1958* (Cth) ('***Migration Act***') and the *Administrative Appeals Tribunal Act 1975* (the '***Tribunal Act***'). The article examines key judicial commentary concerning both statutes and concludes that all administrative decision-makers administering the *Migration Act* should be bound by the same legislative objectives.

The legal regime

In exercising powers under the *Migration Act*, delegates of the Minister are generally bound to advance the statutory objectives contained in s 4 of the Act. Subsection 4(1) of the *Migration Act* provides that the object of the Act is 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.

The High Court of Australia has previously concluded that what is in the national interest is largely a political question (*Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22 at [40]).

Statutory members of the Tribunal, however, are bound by a more extensive range of statutory objectives. Section 2A of the *Tribunal Act* provides that in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is accessible, fair, just, economical, informal and quick, proportionate to the importance and complexity of the matter, and promotes public trust and confidence in the decision-making of the Tribunal.

In assessing reasonableness, consideration is to be given to s 2A of the *Tribunal Act* (*Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 1349 at [33]). It has previously been concluded that s 2A is 'properly regarded as aspirational or exhortatory in nature, rather than as a source of directly enforceable rights and obligations' (*Fard v Department of Immigration and Border Protection* [2016] FCA 417 at [80]).

Provisions such as s 2A have also been described by the Tribunal as 'general exhortatory provisions' and are 'intended to be facultative and not restrictive' (*Moorabbin Airport Corp Pty Ltd v Minister for Infrastructure and Regional Development* [2014] AATA 101 at [118]-[119]).

No one stated objective is to be advanced without reference to the others (*Coonan v Federal Commissioner of Taxation (Cth)* [2006] AATA 329 at [21]). The purpose of s 2A of the *Tribunal Act* is to 'free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals' (*Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 at [49]).

It has also been recognised that the statutory objectives of 'fairness, justice, economy, informality and speed are in conflict' (*May v Military, Rehabilitation and Compensation Commission* [2011] AATA 697 at [15]). The need for economy 'does not trump the need for a fair review conducted according to law' (*Negri v Department of Social Services (No 2)* [2016] FCA 1125 at [7]).

The 'requirements of a fair hearing are not to be sacrificed to achieve economy, informality and speed' (*Chandra v Queensland Building and Construction Commission* [2014] QCA 335 at [69]).

The problem

Although it may not be obvious from the preceding discussion, there are three problems that arise.

First, the statutory objectives of s 4 of the *Migration Act* are limited. As we have seen, the material purpose of the legislation is to advance the national interest. That function, which is largely a political question, provides little practical assistance to a delegate of the Minister.

Many of the statutory provisions in the *Migration Act* and the *Migration Regulations 1994* (Cth) (the '**Regulations**') are expressed at a very specific level of abstraction. Much of the visa criteria for the grant of a visa are not predicated on political decisions being made by delegates. Only a small number of provisions in the *Migration Act* impose a jurisdictional fact co-extensive with a national interest criterion. Those include, for example, ss 501(3), 501A, 501B and 501BA. The balance of the provisions in the *Migration Act* and Regulations impose jurisdictional facts unrelated to the national interest.

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Second, the statutory objective of the *Migration Act* is expressed at a broad level of generality. Such an objective provides little assistance to delegates who are often required to make important

decisions under the *Migration Act*. Moreover, how a delegate is to make a decision that promotes the national interest is far from clear.

It has been said that where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose (*Carr v Western Australia* [2007] HCA 47 at [5]).

Where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the purpose or object of the Act, stating the purpose may be of little assistance. That problem would appear to apply to such a broadly pitched statutory objective as consideration of a national interest criterion.

Third, perhaps the clearest problem is that the statutory objectives of delegates of the Minister and statutory members of the Tribunal are not the same. Some might argue that is unsurprising, given the relevant decision-makers belong to different entities within the Commonwealth Executive. But that latter perspective is not persuasive.

The merits review function of the Tribunal is to 'stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review' (*Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16 at [51]).

The function of the Tribunal, in other words, is 'to do over again' that which was done by the primary decision-maker (*Shi v Migration Agents Registration Authority* [2008] HCA 31 at [100]; *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at [50]).

Both delegates of the Minister and statutory members of the Tribunal exercise the same statutory powers under the *Migration Act*. With that in mind, it is rather strange that the impugned decision-makers are exercising powers under the *Migration Act* to advance different statutory objectives.

The Tribunal forms part of an administrative decision-making continuum. The issues which the Tribunal must confront in terms of discharging its statutory function can be 'revealed by, indeed dictated by, the continuum of administrative decision-making' (*Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1000 at [24]).

The administrative decision-making continuum is even more reason why the statutory objectives of the Tribunal and delegates of the Minister should be in a form of synchronicity. At the present time, this is not the case.

The solution

Perhaps self-evidently, the solution is to ensure that both delegates of the Minister and statutory members of the Tribunal are bound to give effect to largely the same statutory objectives. After all, both statutory decision-makers exercise the same legal powers under the *Migration Act*.

Both delegates of the Minister and statutory members of the Tribunal should be bound to give effect to the overarching purposes of facilitating the just resolution of applications under the *Migration Act* according to law and as quickly, inexpensively and efficiently as possible.

Further, the overarching objectives should give effect to the just determination of all issues before the decision-maker, efficient use of administrative resources available, efficient disposal of the decision-maker's overall caseload, disposal of applications in a timely manner, and resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

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