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Immigration Review

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The following abbreviations are used in the Immigration Review:

[AAT: Administrative Appeals Tribunal]
[AATMRD: Administrative Appeals Tribunal Migration and Refugee Division]
[ACI: Australian Citizenship Instructions]
[APEC: Asia-Pacific Economic Cooperation]
[ARC: Administrative Review Council]
[ASEAN: Association of South East Asian Nations]
[BIIP: Business Innovation and Investment Programme]
[BNP: Bangladesh Nationalist Party]
[CAT: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]
[CPD: Continuing Professional Development]
[CRC: Convention on the Rights of the Child]
[DHA: Department of Home Affairs]
[DIAC: Department of Immigration and Citizenship]
[DIBP: Department of Immigration and Border Protection]
[FCC: Federal Circuit Court]
[FCCA: Federal Circuit Court of Australia]
[FCSLA: Family and Community Services Legislation Amendment]
[FFC: Full Federal Court]
[FHOG: First Home Owner Grant]
[GS: Genuine Student]
[GTE: Genuine Temporary Entrant]
[IAAAS: Immigration Advice and Application Assistance Scheme]
[ICCPR: International Covenant on Civil and Political Rights]
[IELTS: International English Language Testing System]
[IPCC: International Panel of Climate Change]
[IRT: Immigration Review Tribunal]
[LTTE: Liberation Tigers of Tamil Eelam]
[MA: Migration Act 1958]

[MARA: Migration Agents Registration Authority]
[MFB: Metropolitan Fire Brigade]
[MIAC: Minister for Immigration and Citizenship]
[MOU: Memorandum of Understanding Relating to the Transfer to and Assessment of Persons in Papua New Guinea and Related Issues]
[MR: Migration Regulations 1994]
[MRT: Migration Review Tribunal]
[NARWP: newly arrived residents waiting period]
[NDIS: National Disability Insurance Scheme]
[OMARA: Office of the Migration Agent Registration Authority]
[PAIG: Protection Application Information and Guides]
[PAM3: Procedures Advice Manual]
[PRP: Practice Ready Program]
[PV: Protection Visa]
[RRT: Refugee Review Tribunal]
[SCV: Special Category Visa]
[SSA: Social Security Act 1991]
[SSAT: Social Security Appeals Tribunal]
[SSIA: Social Security (International Agreements) Act 1999]
[SSVP: Simplified Streamlined Visa Processing system]
[SVP: Streamlined Visa Processing Regime]
[THC: Temporary Humanitarian Concern]
[TSH: Temporary Safe Haven]
[TTTA: Trans-Tasman Travel Arrangement]
[UK: United Kingdom]
[UMAs: Unauthorised maritime arrivals]
[VET: Vocational Education and Training]
[VRB: Veterans Review Board]

SUBMISSION OF ARTICLES AND CASENOTES

We value hearing from our readers about items you would like to include in *Immigration Review* and welcome readers who would like to contact us about contributing. We also welcome any feedback about the service and any other content that you would find helpful if it was included in the service. For all feedback or submissions, please email Marcus Frajman, Legal Editor, at marcus.frajman@lexisnexis.com.au.

Articles

[1072] Editorial

Dr Marianne van Galen Dickie *SISTERS INSIDE*

We are pleased to welcome back Dr Bridget Cullen as a contributor. Bridget is a member of the Administrative Appeals Tribunal, and her insights always prove valuable for practitioners working in that area. In this issue, Bridget discusses the importance of persuasive corroboration of evidence before the Migration and Refugee Administrative Appeals Tribunal.

We are also very pleased to introduce Dr Jason Donnelly to the *Immigration Review*. Dr Donnelly examines the principle of "eye keenly attuned to error" in Australian administrative law. His article considers the application of this principle and argues that while it has played a key role in shaping administrative law practices, it no longer suits the current landscape of administrative law in Australia.

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[1073] Migration Amendment (Strengthening Employer Compliance) Bill 2023

Dr Marianne van Galen Dickie *SISTERS INSIDE*

This Bill is part of a package of measures the government has introduced to address migrant worker exploitation. The Bills Digest and the Explanatory Memorandum echo the government claims that the purpose of the Bill is to strengthen employer compliance measures and protect temporary migrant workers from exploitation and implement recommendations 19 and 20 of the *Report of the Migrant Workers' Taskforce*.[1]

On 22 June 2023, the Senate referred the provisions of the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (the Bill) to the Legal and Constitutional Affairs Legislation Committee (the Committee) for inquiry and report by 31 August 2023.

The Committee received 20 submissions.

The Committee report outlines the concerns raised in submissions and evidence during the inquiry. Of interest was the proposal within the Bill to create regulations under a new s 116(1A).

These proposed changes to s 116 concerned the majority of those who gave evidence or made a submission to the inquiry. The changes allow for the regulations to detail the matters the delegate or Minister must or may consider when cancelling a visa.

The combined submission by Immigration Advice and Rights Centre and Unions NSW noted that the proposed changes to s 116(2) did not list exploitation as an express factor against visa cancellation.

The Law Council of Australia raised concerns relating to the drafting within the Bill (including this proposed change) saying many of the items within the Bill would not achieve the stated objectives. In relation to the changes to s 116, they noted that:

- the regulations will be directed to the wrong aspect of the cancellation power
- the regulations cannot bind the Minister and
- the empowering provision is not directed towards ensuring the apparent intended outcome[2]

The Committee took these concerns somewhat seriously and recommended that:

"The minister continues to consult and engage with migrant communities, unions, industry and other impacted stakeholders with regard to the regulations for the proposed new section 116(1A)."[3]

Concerns were also raised about the proposed ss 245AAA, 245 AAB and 245 AAC. These introduced new employer sanctions in circumstances where a person:

> … knowingly or recklessly coerces or exerts undue influence or undue pressure on:
>
> - a lawful non-citizen to work in breach of work-related visa conditions [proposed s 245AAA]
> - an unlawful non-citizen to work to avoid an adverse effect on their continued presence in Australia [proposed s 245AAB]
> - a lawful non-citizen to work to avoid an adverse effect on their immigration status or to avoid being unable to acquire the required information or documents regarding their work for visa purposes [proposed s 245AAC][4]

The Bill provides for penalties for these offences including imprisonment.

The Law Council supported the intent behind the proposed provisions but again raised concerns about the drafting of the legislation. Given that the provisions clearly raised the concept that the employer must know or be reckless in their direction to the employee, the Law Council echoed the concerns of a number of submissions arguing that the use of the term "undue" raised the bar beyond that intention saying:

> Arguably, if the prospective employer knows that the proposed work arrangement will have those results, any degree of influence or pressure exerted to accept or agree to that arrangement could fairly be characterised (as a matter of policy) as being undue, and meritorious of criminal sanction.[5]

The Committee Report details a range of other concerns raised by those who contributed to the inquiry. The Report is relatively short and recommended reading for those working in this area of law.

The Bill is currently in the Senate. The only amendments proposed are from the Greens. These meet the concerns raised by the Law

Council in relation to the proposed changes to s 116(1A) and those relating to the definition of "a work arrangement."

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Footnotes

1. Dr S Love *Migration Amendment (Strengthening Employer Compliance) Bill (Cth)* Bills Digest No 007, 2023–24 (2013) 1 www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2324a/24bd007 (Bills Digest No 007); see also Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill (Cth).
2. Law Council of Australia, Submission No 15 to Senate Legal and Constitutional Committee, Parliament of Australia, 2 August 2023, para 163.
3. Senate Legal and Constitutional Committee *Migration Amendment (Strengthening Employer Compliance) Bill (Cth)* Recommendation 3, para 2.105.
4. Bills Digest No 007, above n 1, at p 8.
5. Above n 2, para 51.

[1074] The persuasive value of corroboration at the Administrative Appeals Tribunal

Dr Bridget Cullen *ADMINISTRATIVE APPEALS TRIBUNAL*

Adapted from a talk given to RAILS on 28 August 2023

Introduction

The importance of the compassionate and expeditious hearing and determination of applications for asylum is beyond dispute. Advocates working in the refugee space are confronted with many challenges such as:

- lengthy processing backlogs
- the psychological welfare of their clients
- vicarious trauma
- the absence of funding
- language and cultural barriers and
- the challenges of presenting evidence during application and review processes

Successful advocacy involves a great deal of lateral thinking, particularly about the gathering and presentation of evidence. Although the focal point of many refugee applications consists of oral evidence, advocates should give careful consideration to the persuasive value of corroborative evidence where available.

The purpose of this article is to consider the role of corroboration, in the context of administrative review proceedings in the Migration and Refugee Division of the Administrative Appeals Tribunal (AAT), soon to become the Administrative Review Tribunal.

Evidence in the Tribunal

The Tribunal is not bound by the laws of evidence and procedure. Despite this "relaxation", Tribunals are required to respect the substantive legal rights of parties in respect of both legal professional privilege and in not compelling parties to give evidence that is of a self-incriminating nature.

In a seminar delivered to the Australian Institute for Administrative Law,[1] called "Keeping the AAT from Becoming a Court", former AAT President, the Hon Justice Kerr, described the role of the rules of evidence as follows:

> … The task of a merits review tribunal is to give such weight to whatever relevant evidential material is before it as it determines it ought to bear. I conceive of this as conferring on merits review tribunals the freedom to take into account all of the relevant testimony, materials and circumstances known to it removed from the strictures of the rules of evidence. However, that freedom is not at large. It is a freedom to be fair.[2]

The testing of evidence in this area of law, where people's lives are at stake, is difficult. For example, many asylum seekers do not have the practical ability to obtain corroborating evidence, and conversely, not all claims for protection fit within the parameters of s 5J of the Migration Act 1958 (Cth). The importance of corroborating evidence is that, in the protection jurisdiction, it can cut both ways. Where evidence is seen to support an applicant's case, the prospects of the Tribunal finding that an applicant meets the legislative criteria are enhanced. On the contrary, where the corroborating evidence casts doubts on the applicant's claims, an outcome where the Tribunal affirms the delegate's decision is more likely.

While this is probably obvious in view of the Tribunal's neutral role in decision-making, many applicants consider the ways in which they may be able to corroborate their evidence, particularly those who are self-represented. Following a discussion of the framework within which the law of evidence sits in the Tribunal, and a short examination of the way that corroboration works as it applies to asylum seekers in the US, it is useful to consider the ways in which applicants can approach the matter of corroboration.

The obligation of the applicant to present their case

The Migration Act places certain obligations on protection visa applicants in presenting their case. Section 5AAA clarifies that it is the applicant's responsibility to specify all particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claims. The Minister (or the Tribunal on review) does not have any responsibility or obligation to specify or assist in specifying any particulars

of the claim or to establish or assist in establishing the claim. The well-settled proposition is that it is for the applicant to make their own case.

There is then an important role to be played by s 423A, which applies to all Pt 7-reviewable decisions. Section 423A requires the Tribunal to draw an unfavourable inference as to the credibility of an applicant's claim or evidence where an applicant raises a claim or presents evidence that was not put forward before the primary decision was made unless the Tribunal is satisfied that the applicant has a reasonable explanation as to why the claim was not raised or evidence presented before the primary decision was made. The impact of this is that applicants are to present all claims and evidence to the Department unless they have a reasonable explanation for not doing so.

Ultimately, where the Tribunal finds an applicant to be generally credible, it should give the applicant the benefit of the doubt where they are unable to fully substantiate their claims through corroborating evidence.

For applicants lacking a sophisticated understanding of the way in which a point may be proven through tangential means or by reference to more objective criteria (such as country information, even though there is plainly subjectivity within same), this creates a real advocacy challenge.

Lateral thinking in relation to corroboration

Lawyers and people working within this space develop skills in lateral thinking which are not commonplace amongst the general populous. To illustrate, I will give an example from the everyday — the simple act of returning a piece of clothing that does not fit to the shop, absent a receipt. The lawyer will go in prepared to address the case where the shop attendant does not want to accept the return.

The lawyer will have:

- a screenshot of the bank or credit transaction
- an explanation of the circumstances within which the transaction took place — time of day, description of sales attendant, the transaction as a whole
- a potential witness that observed the transaction and can vouch for the circumstances
- a copy of any relevant advertisements surrounding the purchase and
- a visual display of the person for whom the item was optimistically intended to fit that will explain the genuine claim that the item does not fit (see how small it is — these must not be standard sizes), coupled with an explanation that that person was not present at the shop at time of purchase

All of these points amount to corroborative evidence of the asserted fact that, absent a receipt, the item of clothing was purchased from the shop to which it is being returned.

Many, perhaps most, self-represented asylum seekers do not have the benefit of this entrenched thought process at the time of their application. The work that representatives do to assist with lodgement of these matters is critical, for this reason, amongst others.

It is then the case that s 423A does not impose on the Tribunal a method by which it is to obtain an applicant's explanation for a claim or evidence that falls within the scope of the provision, nor does it prescribe any preconditions to its operation. However, in order to reach the requisite level of satisfaction required by s 423A, the Tribunal must follow an active intellectual process when considering the reasons given for the delay of the provision of the new material that was not before the delegate. This process invariably involves some consideration of the degree to which the material is corroborative, and its contemporaneity with the claims raised.

Corroboration in US asylum seeker applications

Australia is not the only jurisdiction that grapples with the concept of corroboration and its application to asylum proceedings. In the US, the REAL ID Act of 2005 provides the framework through which immigration judges can require asylum seekers to provide extrinsic corroborating evidence.

Recognising the challenges that some asylum seekers face, the Congress created an exception for otherwise credible applicants who do not have and cannot reasonably obtain corroborating documentation. This is however, of little comfort to many of organisations working to assist asylum

seekers in the US. There has been significant criticism levied by community bodies about the heavy evidential burden that the REAL ID Act places on applicants to corroborate their claims in the US jurisdiction.

Applicants seeking asylum in the US have the burden of proving their eligibility for relief (ie, that they meet the definition of "refugee").[3] There, the REAL ID Act leaves it up to the discretion of Immigration Judges to decide whether an applicant's oral evidence is enough to meet this burden. Under the REAL ID Act:[4]

- Asylum can be grated on testimony of the applicant alone, but only that evidence "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee".
- The decision maker may require other evidence to corroborate otherwise credible testimony "unless the applicant does not have the evidence and cannot reasonably obtain the evidence".
- "In determining whether the applicant has met the applicant's burden [of proof], the trier of fact may weigh the credible testimony along with other evidence of record."

Corroboration in Australian asylum seeker applications

The role of corroboration in the Australian jurisdiction is somewhat more fluid than in America, given the legislative constraints applicable in the US vis-à-vis the more flexible position taken by s 423A. Australian courts are prepared to carefully scrutinize and quash Tribunal decisions where it considers that evidence has selectively been cherry picked. That is, where corroborating evidence is obtained (which may not have been provided by the applicant given the Tribunal's inquisitorial powers) and is then selectively used to affirm the decision made by the Department.

In *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[5] (*SGLB*), Kirby J said the following about the way in which the Tribunal is to consider evidence:

> 8. *The evidence before the Tribunal:* It is for the Tribunal to assess the facts, including questions of credibility and the genuineness of the application made by the respondent. The Tribunal has a duty to reach its own conclusion on the review and to give effect to it in the form of a "decision". By the Act, it is relieved from the obligation to comply strictly with the rules of evidence. The Evidence Act 1995 (Cth) does not, in terms, apply to proceedings before the Tribunal.
> 9. *The inquisitorial obligation:* Nevertheless, the Tribunal is not a body engaged in purely adversarial proceedings. It operates according to inquisitorial procedures. This feature of the Tribunal's operation casts obligations upon it that are different from, and in some respects more onerous than, those applicable to more traditional bodies acting according to the more passive decision-making virtues of adversarial trial.[6]

In *SGLB*, His Honour also delivered a clear mandate about the importance of considering the context in which the evidence given by asylum seekers sits:

> The Tribunal must be firmly told — if necessary by this Court — that the process is one for arriving at the best possible understanding of the facts in an inherently imperfect environment. It is not to punish or disadvantage vulnerable people because they have made false or inconsistent statements, or are believed to have done so.[7]

In a Training Workbook articulating the legal framework for protection processing,[8] the Department of Home Affairs observes that "decision makers should be careful not to join a series of minor alleged inconsistencies and ambiguities to reject the whole of the applicant's account."[9]

The same Training Workbook highlights the case of *SZGUR v MIAC*[10] (*SZGUR*). In *SZGUR*, a decision of the Refugee Review Tribunal was quashed:

> … as its selective use of corroborative evidence to undermine the applicant's credibility created an apprehension of bias in the form of a pre-judgment, that is, "a mind not open to persuasion."[11]

What is corroborative evidence?

Lord Reading CJ in *R v Baskerville*[12] described what sort of evidence would amount to corroboration in the following terms:

> … some additional evidence rendering it probable that the story of the [witness] is true and that it is reasonably safe to act upon it … evidence in corroboration must be independent testimony which affects the accused by

> connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him — that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.[13]

The High Court, in *Doney v R*[14] held that:

> The essence of corroborative evidence is that it "confirms", "supports" or "strengthens" other evidence in the sense that it "renders [that] other evidence more probable" … It must do that by connecting or tending to connect the accused with the crime charged …[15]

The general position now in criminal matters is that the "requirement" for corroboration, either as a matter of law or practice, has been abolished by statute. Of course, the existence of corroborative evidence in a criminal context will strengthen the prosecution case — and a lack of such evidence will, conversely, be highlighted by the defence.

Professor Forbes describes corroboration as "independent evidence supporting a material part of a witness's testimony, and tending to identify (if need be) the actor in question".[16] Although there are clear and important distinctions between the criminal standard of proof and that applicable in a Tribunal in which the formal rules of evidence do not apply, Professor Forbes cites the High Court's decision in *Pell v R*[17] to support the proposition that one cannot corroborate one's own testimony. This is a conundrum that asylum seekers, often left with their own account only, confront.

Judicial authority involving corroboration in protection cases

Lastly, I will take a brief look at three cases where the courts have had occasion to consider the role of corroboration in protection visa refusal matters.

The first of these cases is *SZQAM v Minister for Immigration and Citizenship*[18] (*SZQAM*). In *SZQAM*, the applicant, an Iranian national, claimed to fear persecution on the basis of being homosexual. The Tribunal adjourned a hearing to enable the applicant to arrange witnesses to appear before it, for the purposes of corroborating claims that he had actively expressed his sexuality following his arrival in Sydney. When the hearing resumed, the applicant did not produce any witnesses and the Tribunal found that he was not a homosexual and had not been persecuted on this basis.

The court had to consider whether the Tribunal impermissibly insisted that it would not accept the applicant's claims without third-party corroboration and whether the Tribunal had failed to give the applicant the benefit of the doubt.

In dismissing the application, the court said the following:

- The Tribunal's reliance, in part, on the applicant's inability to bring forward at least one person who could support his claim of an open homosexual lifestyle did not reveal that the Tribunal would not believe him absent corroboration. Rather, the applicant's claims remained limited and implausible without corroboration.
- It was plainly open to the Tribunal to ask the applicant why he was unable to provide even one witness to corroborate his claim in circumstances where he had lived in Sydney for over four years and claimed "to have expressed his sexuality fully". The dissonance between this claim and absence of corroboration was of concern to the Tribunal.

In *SZQAM*, the court considered the distinction between the "benefit of the doubt" approach advocated in the United Nations High Commissioner for Refugees (UNHCR) Handbook (which is not binding) and the "What if I am wrong?" approach described in *Minister for Immigration and Ethnic Affairs v Guo Wei Rong*[19] where a finding as to a claim or an integer of a claim is attendant with any real doubt. *SZQAM* is an example of the difference between the Tribunal impermissibly refusing to believe an applicant without third-party corroboration, and the Tribunal not believing the applicant's account and then finding the lack of corroboration to be but one element in confirming the Tribunal's disbelief.

The next case, *Dhiman v Minister for Immigration and Multicultural Affairs*[20] involved the review by an Indian national, who claimed a fear of persecution on the basis of actual or imputed political opinion, as a supporter of the Sikh separatist movement.

The Tribunal found that applicant was a low-level activist, but was not of any interest to the authorities, who had lived and worked in Calcutta for 3 years without incident and

departed India legally. The Tribunal did not accept that the applicant's father had died of police inflicted injuries. In reaching that conclusion the Tribunal stated:

> "While the medical certificates tendered by the [appellant] attest to the fact that his father died of a head injury and sudden cardio-respiratory arrest, it is only the letter from his mother and a friend that provide corroboration to the [appellant's] oral evidence that his father had been detained by the police and assaulted …"[21]

The appeal was ultimately dismissed by the Federal Court for the following reasons:

- The Tribunal complied with its s 430(1)(c) obligations to set out findings on material questions of fact.
- The Tribunal was not obliged to find positively that the assertions contained in the mother's letter were untrue.
- The Tribunal was not requiring corroboration of the applicant's account and there was no occasion for the Tribunal to ask "what if I am wrong?" in rejecting the applicant's claim that his father had died from police inflicted injuries.

Lastly, and more recently, in *BFD17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[22] the Federal Court remitted back a decision of the Tribunal, which had affirmed a decision refusing the applicants' protection visas.

The Federal Court found that the Tribunal had erred in failing to provide any cogent explanation for its rejection of corroborating evidence given by a neighbour and daughter relating to the applicants' claim to fear harm based on being both Christians and advocates of western education. The court found that, in circumstances where two witnesses purported to give direct evidence of observing events that supported the applicants' claims, that the Tribunal should have provided an explanation for rejecting same. This was particularly so given that the Tribunal's finding was, in the court's view, tantamount to concluding that both witnesses had fabricated their evidence.

How should representatives address the concept of corroboration?

It is possible that an applicant seeking protection will obtain a favourable outcome based upon their own evidence, alone. This is more likely to happen in circumstances where the relevant country information acts as a form of corroboration — suggesting that the applicant is very likely to have experienced the issues described. For this reason, applicants should make use of country information to assist the Tribunal in being able to place aspects of the applicant's claims within the relevant temporal context. Yet, country information is often provided to the Tribunal in tsunami format, making it challenging for the Tribunal to appreciate which aspects are relevant to which claims. This is one of the matters that ss 11.5–8 of the Migration and Refugee Division Practice Direction seeks to address.

Whenever possible, the unavailability of evidence should also be supported by corroborating evidence. For example, asylum seekers from war-torn countries often claim that they do not know what has happened to their family members back home, who are missing. Where there is no evidence of the steps an applicant has taken to try and locate their family, the Tribunal may not accept that the family members are in fact, missing. Where an applicant is able to demonstrate that they have, for example, made enquiries through the UNHCR or Australian Red Cross, the Tribunal is more likely to accept that the relatives are missing.

Hypothetical case scenarios

Scenario one:

An applicant has sought protection on the basis that they are gay and will be subjected to serious harm in their home country. The applicant claims to have been arrested by police in their home country, together with their male partner, while leaving a gay club. The applicant also said that his partner was beaten so badly by a gang, making homophobic slurs that they required stitches to their face. The following could amount to corroborative evidence:

- oral evidence, an affidavit or letter from their partner confirming that the incident took place
- a copy of the medical report for the stitches, supplied by the partner

If it is not possible to obtain either of these corroborating documents, the applicant should explain why. For example, the

applicant and partner are no longer together and had a particularly difficult break-up and have not spoken in many years.

Scenario two:

There are many circumstances where the Tribunal hears from applicants who claim to have been arrested and imprisoned but have no official record of same. Corroborating information might include the following types of information:

- evidence from an employer that the applicant was not contactable during the relevant period
- evidence demonstrating that the applicant's bank account was not accessed during the period of imprisonment
- evidence from friends and family about the impact of the arrest and/or imprisonment
- medical records for any treatment following release, including any psychological treatment

Conclusion

Effective advocates put themselves in the position of the Tribunal Member and ask: "What type of evidence would I want to consider in making a fair determination in respect of this claim?"

Advocates should then be prepared to gather all corroborating evidence reasonably available to support the applicant's claim and where unavailable, provide a clear explanation as to why the applicant is unable to obtain the evidence.

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Administrative Appeals Tribunal

Footnotes

1. D Kerr "Keeping the AAT from Becoming a Court" *Administrative Appeals Tribunal* 27 August 2013 www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-duncan-kerr-chev-lh-former-/keeping-the-aat-from-becoming-a-court.
2. Above.
3. Congressional Research Service *An Overview of the Statutory Bars to Asylum: Limitations on Applying for Asylum (Part One)* Report (2022) https://crsreports.congress.gov/product/pdf/LSB/LSB10815.
4. See INA §208(b)(1)(B)(ii); 8 USC §1158(b)(1)(B)(ii).
5. *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224; 207 ALR 12; [2004] HCA 32; BC200403589.
6. Above, at [73].
7. Above.
8. Department of Home Affairs *Legal Framework for Protection Processing (Refugee Law and CP)* Training Workbook (2020) https://homeaffairs.gov.au/foi/files/2020/fa-200500429-r1-document-released-part-5.PDF
9. Above, at 90.
10. *SZGUR v MIAC* (FMC, 28 November 2007, unreported).
11. Above n 8, at 90, citing above.
12. *R v Baskerville* [1916] 2 KB 658 at 667.
13. Above.
14. *Doney v R* (1990) 171 CLR 207; 96 ALR 539; [1990] HCA 51; BC9002908.
15. Above.
16. JRS Forbes *Evidence Law in Queensland* 11th edn, Thomson Reuters Australia Ltd, Sydney, p 101.
17. *Pell v R* (2020) 94 ALJR 394; 376 ALR 478; [2020] HCA 12; BC202002660 at [53].
18. *SZQAM v Minister for Immigration and Citizenship* [2011] FMCA 624; BC201106233 per Nicholls FM.
19. *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559; 144 ALR 567; [1997] HCA 22; BC9702433.
20. *Dhiman v Minister for Immigration and Multicultural Affairs* [2000] FCA 221; BC200000786 per Sundberg, Katz and Hely JJ.
21. Above, at [6].
22. *BFD17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 887; BC202310723 per Burley J.

[1075] Reevaluating the "eye keenly attuned to error" principle in administrative law

Dr Jason Donnelly WESTERN SYDNEY UNIVERSITY

Introduction

This article critically examines the long-standing "eye keenly attuned to error" principle in Australian administrative law.[1] Cited with approval from the pivotal *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs*[2] (*WAEE*) case and reaffirmed in subsequent jurisprudence,[3] this principle has played a significant role in shaping administrative law practices. However, this article contends that this principle is no longer suited to the evolving administrative law landscape in Australia.

Through an analysis of historical context, the evolution of Australian administrative law,[4] practical realities, the objectives of administrative bodies and courts and the human consequences of decision-making, it argues that the time has come to reconsider the continued application of this principle.

The "eye keenly attuned to error" principle

The "eye keenly attuned to error" principle has been a guiding force in Australian administrative law for decades. As articulated by French, Sackville, and Hely JJ in *WAEE*,[5] this principle underscores the distinct roles of administrative bodies and courts, suggesting that administrative decisions should not be subjected to the same level of scrutiny as judicial decisions.

This article aims to critically assess the relevance and validity of this principle in the contemporary Australian administrative law landscape.

The "eye keenly attuned to error" principle asserts that administrative decisions should not be scrutinised with an overly critical lens, given the fundamental differences between administrative tribunals and courts.[6] While this principle has received consistent judicial endorsement and has become a cornerstone of administrative law,[7] this article argues that it is no longer suitable for modern administrative law.

Historical Context

To understand the implications of the "eye keenly attuned to error" principle, one must consider its historical context. This principle traces its roots to decisions made over 3 decades ago, notably in *Collector of Customs v Pozzolanic*.[8] The historical backdrop raises questions about the principle's continued relevance and its suitability for the present legal landscape.

The latter half of the 20th century marked significant changes in Australian public law, driven partly by the establishment of the Administrative Appeals Tribunal (the Tribunal) through the enactment of the Administrative Appeals Tribunal Act 1975 (Cth). This legislation introduced a novel regime of administrative merits review, granting the Tribunal the authority to re-exercise the functions of original decision-makers.[9] Consequently, administrative law principles in Australia adapted to accommodate this new administrative landscape.[10]

This evolution reflected broader changes in Australian society and the recognition that administrative decisions required greater oversight and review to ensure fairness, accountability and transparency. The establishment of the Tribunal was a pivotal moment in this transition, emphasising the need for a more comprehensive examination of administrative decisions.

Practical realities

Contrary to the "eye keenly attuned to error" principle, legal practitioners regularly scrutinise administrative decisions with the aim of identifying jurisdictional errors and legal deficiencies. When assessing administrative decisions for potential judicial review,[11] counsel's focus is explicitly sharpened to detect errors that may have tainted the decision.[12]

The principle, in its current form, offers limited practical guidance. It necessitates a nuanced and context-specific assessment of reasons for decision to determine the presence of errors. Moreover, when subjected to meticulous examination, the principle appears to discourage a thorough review of administrative decisions, implying a presumption against the presence of errors.

This guidance runs counter to the practice of diligently scrutinising decisions to identify inaccuracies or shortcomings, which is essential for maintaining the integrity of administrative decision-making.

Court and tribunal objectives

One of the apparent justifications for the "eye keenly attuned to error" principle is the distinction between administrative tribunals and courts. However, this distinction is no longer a compelling reason to uphold the principle.

In modern legal practice, the reasons for decision issued by both administrative bodies and courts exhibit striking similarities. They are detailed, well-structured and incorporate relevant legal principles while applying the law to the facts at hand. Both the Administrative Appeals Tribunal Act and the Federal Court of Australia Act 1976 (Cth) outline objectives that emphasise accessibility, fairness, justice, economy and efficiency in the administration of justice.[13] These objectives align administrative bodies, such as the Tribunal,[14] with the aims of the Federal Court, bridging the gap that once justified the "eye keenly attuned to error" principle.

Moreover, the statutory objectives of the Administrative Appeals Tribunal Act and the Federal Court of Australia Act emphasise the importance of providing a mechanism of review that is accessible, fair, just, economical, informal and quick. These objectives resonate with the overarching goal of ensuring that justice is dispensed efficiently and equitably.[15]

Impact in administrative law

The "eye keenly attuned to error" principle, as it currently stands, has several implications for the practice and development of administrative law in Australia.

Limited accountability

One of the primary concerns surrounding this principle is its potential to limit the accountability of administrative decision-makers. When decisions are shielded from close scrutiny, there is a risk that errors, biases or legal deficiencies may go unnoticed and unchallenged. This could undermine the principles of transparency and fairness[16] that underpin administrative law.

Inhibiting legal development

The principle's discouragement of meticulous analysis of administrative decisions can hinder the development of administrative law jurisprudence. As the legal landscape evolves, a flexible and adaptable approach is essential to ensure that the law remains relevant and responsive to contemporary challenges.

Eroding public trust

In an era where transparency and accountability are paramount, the preservation of public trust in administrative decision-making processes is crucial. The "eye keenly attuned to error" principle, by discouraging rigorous scrutiny, may contribute to public scepticism about the fairness and integrity of administrative decisions.

The dimension of the human consequences

Administrative bodies wield substantial authority and their decisions hold significant implications for individuals and communities alike. Despite their profound impact,[17] the gravity of these decisions is not always immediately apparent. This section aims to elucidate the paramount importance of administrative decisions and advocate for a rigorous scrutiny of such decisions, utilising the Tribunal as an illustrative case study.

The consequences of administrative decisions, particularly those concerning non-citizens in Australia,[18] can be far-reaching, underscoring the compelling need for an "eye keenly attuned to error" when evaluating these determinations.

The significance of administrative decisions

Administrative bodies, often operating within specific domains or sectors, possess the authority to make a diverse range of decisions that significantly affect the lives of individuals and the broader society. These decisions encompass matters of immigration, social welfare, environmental regulations, taxation and countless other facets of public administration. However, it is not always evident to the public how profoundly these decisions can impact individual lives.

As an illustrative example, let us consider the jurisdiction of the Tribunal in Australia. The Tribunal holds sway over a wide spectrum of decisions, particularly those pertaining to non-citizens residing in Australia.[19] These decisions span areas such

as visa applications, deportation orders, refugee claims and migration appeals. While these may appear to be bureaucratic procedures to some, they have profound human consequences for the individuals involved.

The human consequences of administrative decisions

The decisions made by administrative bodies like the Tribunal are not confined to the realm of paperwork and regulations. Rather, they have the power to shape the destinies of individuals, families and communities. In the context of non-citizens in Australia, the implications of such decisions are particularly poignant.

For instance, a decision regarding a visa application can determine whether an individual can remain in Australia with their family, pursue education or employment opportunities or escape dire circumstances in their home country. Conversely, a deportation order may lead to the forced separation of families, exile from one's established life in Australia or even exposure to potential persecution in their country of origin.[20]

These decisions carry a profound human cost, which extends far beyond the confines of administrative procedures. They can lead to heart-wrenching separations, uncertain futures, and (in some instances) life-or-death situations. Therefore, it is incumbent upon the legal and administrative systems to approach these determinations with the utmost diligence and care.

The imperative of scrutiny

Given the potent repercussions of administrative decisions on individuals and communities, there exists a formidable justification for subjecting these determinations to rigorous scrutiny. The principle of scrutinising decisions with an "eye keenly attuned to error" is not merely a matter of procedure — it is an ethical imperative rooted in the principles of justice, accountability and human rights.

Scrutiny, in this context, entails a meticulous examination of administrative decisions to detect any errors, oversights or legal deficiencies. It requires a discerning analysis that goes beyond the surface of bureaucratic documents to ensure that the decisions align with the principles of fairness, legality and human dignity.

In cases involving non-citizens in Australia, this scrutiny becomes even more imperative. The individuals affected by these decisions often find themselves in vulnerable positions, grappling with complex legal and personal challenges. The consequences of an erroneous decision can be catastrophic, resulting in profound suffering, injustice and harm.

The decisions made by administrative bodies are far from inconsequential bureaucratic processes — they hold the power to shape the lives of individuals and communities. The case of the Tribunal and its jurisdiction over non-citizens in Australia serve as a poignant example of the profound human consequences that administrative decisions can have.

Considering these ramifications, it is essential to advocate for a rigorous scrutiny of administrative decisions — an "eye keenly attuned to error". Such scrutiny is not a mere procedural formality, but a moral imperative rooted in principles of justice, accountability and respect for human rights. By upholding this imperative, we can ensure that administrative decisions, particularly those affecting non-citizens are just, fair and aligned with the values of a compassionate and equitable society.

Conclusion

In conclusion, the lack of scrutiny with an "eye keenly attuned to error" principle, which has long been a cornerstone of Australian administrative law, warrants re-evaluation considering the evolving administrative law landscape.[21] While it may have served a purpose in the past, its continued application is questionable given the changes in administrative law, practical realities and the alignment of objectives between administrative bodies and courts.

It is imperative to ensure that administrative law practices remain adaptable and responsive to contemporary needs while upholding principles of transparency, fairness and accountability.[22]

About the author

Senior Lecturer, Western Sydney University; Barrister-at-Law. Dr Donnelly is a prominent Australian barrister specialising in administrative and migration law. He has

participated in numerous legal trials, appeals, and parliamentary inquiries. He has been involved in 195 published judgments and decisions, including 92 legal appeals in the Federal Court and the Full Court of the Federal Court, 83 trials in various tribunals, 17 appeals in the High Court, and 4 trials in the state of New South Wales. He has also advised and appeared before several significant legal bodies. Dr Donnelly has represented a diverse clientele, including a high-ranking colonel, homeless individuals, entertainment celebrities, non-citizens, police officers, lawyers, and politicians. He holds multiple university degrees, including a PhD in law, and is a senior university lecturer at Western Sydney University. He has authored and edited legal publications, taught migration law courses, and contributed to various legal research. His extensive academic work has been cited by Australian courts and statutory committees.

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Footnotes

1. *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; 75 ALD 630; [2003] FCAFC 184; BC200304550 at [46].
2. Above.
3. *Ngatoko v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1165; BC202313897 at [57]; *EAS16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1159; BC202313790 at [43]; *BAE23 v Minister for Home Affairs* [2023] FCA 1152; BC202313693 at [36]; *CGX19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 1145; BC202313986 at [79]; *Dimos v Gordian Runoff Ltd* [2023] NSWSC 1151; BC202313484 at [14]; *Edser v QSuper Board* [2023] FCA 1120; BC202313349 at [83]; *RNSQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1111; BC202313200 at [72].
4. M Elliot *Beatson, Matthews, and Elliot's Administrative Law Text and Materials* 4th edn, Oxford University Press, New York, 2011, p 5.
5. Above n 1, at [46].
6. Above.
7. Above n 3.
8. *Collector of Customs v Pozzolanic* (1993) 43 FLR 280.
9. *Frugtniet v Australian Securities and Investments Commission (ASIC)* (2019) 266 CLR 250; 367 ALR 695; [2019] HCA 16; BC201903810 at [14]; *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26; BC202201326 at [12].
10. M Head *Administrative Law: Context and Critique* 2nd edn, Federation Press, Sydney, 2008, p 15.
11. R Sackville "The Limits of Judicial Review of Executive Action: Some Comparisons Between Australian and the United States" (2000) 28(2*) Federal Law Review* 315.
12. R French CJ "Essential and defining characteristics of courts in an age of institutional change" (2013) 23 *Journal of Judicial Administration* 3, 8.
13. *Re Australian and Dept of Families, Community Services and Indigenous Affairs* (2006) 92 ALD 179; 43 AAR 505; [2006] AATA 755; BC200606949 at 199.
14. G Downes "Making The AAT More Relevant — Reflections On Its 30th Anniversary" (2008) 59 *Australian Institute of Administrative Law Forum* 67, 69.
15. Administrative Review Council *Federal Judicial Review in Australia* Report No 50 (2012) 43 https://ag.gov.au/sites/default/files/2020-03/report-50.PDF.
16. Y-F Ng and others "Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice" (2020) 43(3) *UNSW Law Journal* 1041.
17. *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628; 364 ALR 423; [2018] FCAFC 225; BC201812207 at [3].
18. *CRRN v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1050; BC202312502 at [53].
19. *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430; 386 ALR 200; [2021] HCA 1; BC202100395.
20. *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100; [2021] FCAFC 217; BC202112068.
21. N Bedford "The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law" (2018) 30(1) *Bond Law Review* 8, 142.
22. M Sier "Does Section 45 of the Administrative Appeals Tribunal Act 1975 (Cth) breach Chapter III of the Australian Constitution?" (2014) 26(1) *Bond Law Review* 2, 31.

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