The Administrative Continuum and Limits on Merits Review in Australia*

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Setting the Landscape

In Re Edmund Kenneth Jebb v Repatriation Commission [1988] FCA 105, Justice Davies stated the following at para 10:

> However, the general approach of the Administrative Appeals Tribunal has been to regard the administrative decision-making process as a continuum and to look upon the tribunal's function as a part of that continuum so that, within the limits of a reconsideration of the decision under review, the tribunal considers the applicant's entitlement from the date of application, or other proper commencing date, to the date of the tribunal's decision.

That is, the Administrative Appeals Tribunal (**AAT**) adopts a holistic approach towards administrative decision-making, viewing its function as an integral part of a continuous process.[1] Rather than treating its role as isolated from the broader administrative context, the AAT considers itself situated within the continuum of decision-making.[2]

Within the confines of reviewing the decision under scrutiny, the tribunal evaluates the applicant's entitlement not only from the date of the application but also from any other appropriate starting point, until the date when the tribunal issues its decision.[3] This approach underscores the tribunal's commitment to ensuring fairness[4] and comprehensiveness in its reconsideration of administrative decisions,[5] considering the entirety of the applicant's circumstances within the relevant timeframe.[6]

This paper endeavours to examine three pivotal facets of the administrative continuum within Australian public law. Initially, it scrutinises the ramifications of a positional transition before the Administrative Appeals Tribunal (**AAT**) in contrast to the initial decision-making phase. Secondly, it elucidates the dynamic alterations in statutory objectives between the AAT and decision-making within governmental departments.[7] Lastly, it delves into the constraints delineating the administrative continuum concerning the decision-making process before the AAT, thereby offering a comprehensive analysis of the intricacies inherent in administrative adjudication within the Australian legal framework.

Like the role of the AAT itself, the continuum has remained an ethereal concept, with no clear bounds beyond those first developed in Jebb.[8] Even if one only views the ‘administrative decision-making continuum’ through the lens of Jebb that the

continuum ‘is relevant only where the issue before it is of a continuing nature’, that understates its significance as a way of understanding the role of the AAT.[9]

The ‘administrative decision-making continuum’ is not constrained to circumstances where the issue before the AAT ‘is of a continuing nature’.[10] As a part of the administrative decision-making continuum, the AAT lies within ‘an integrated, coherent system of administrative law’.[11]

Justice Logan, sitting as President of the AAT, noted that, ‘if each element of our system of government understands and respects the role of the other,[12] the tension between them will be much lessened.

Change of Position

When an applicant lodges an appeal with the AAT, they typically receive the advantage of access to the original decision along with the accompanying reasons provided by the initial decision-maker. This documentation delineates the material findings of fact upon which the decision was predicated.[13]

The original decision serves as a foundational document elucidating the rationale behind the outcome.[14] By perusing the details of the initial decision and its accompanying reasons, the applicant gains insight into the underlying considerations, evidence, and legal principles that influenced the decision-making process. This transparency empowers the applicant with a comprehensive understanding of the factors that contributed to the outcome,[15] thereby facilitating informed engagement with the appellate process before the AAT.

While the AAT retains the authority to establish material findings of fact that may deviate from those previously determined by the original decision-maker, procedural fairness necessitates that any divergence in position must be transparently communicated to the applicant prior to final adjudication,[16] affording them an opportunity to respond and provide input.

Failure to adhere to this procedural requirement could potentially undermine the integrity of the administrative process[17] and lead to adverse outcomes in subsequent judicial review proceedings. The essence of the administrative continuum demands a meticulous adherence to principles of procedural fairness, ensuring that all parties affected by a decision are afforded due process and an opportunity to be heard.[18]

By proactively engaging applicants in the decision-making process and soliciting their feedback on any shifts in position, the AAT upholds the fundamental tenets of fairness and equity, thereby mitigating the risk of procedural irregularities and safeguarding the legitimacy of administrative decisions.[19]

Let us consider the decision of Buntin v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1055.[20] There, a delegate of the Minister found that it was in the best interests of the applicant's children that the visa cancellation be revoked. The delegate gave this consideration significant weight. Before the AAT, the applicant contended that it was in the best interests of his minor children in Australia that his visa cancellation be revoked.

On the first day of the hearing before the AAT, the Minister gave no indication of a changed position in relation to the best interests of the children and nothing was put to the applicant in cross examination to suggest the Ministers' position now was that the best interests of minor children should weigh against revocation.

At the second day of hearing, the applicant and Minister respectively made their closing submissions. For the first time, it was submitted by the Minister that "*it is not in the best interests of those children for the applicant to remain in Australia*". The AAT decided the best interests of minor children in Australia primary consideration weighed heavily against revocation of the decision.

In finding jurisdictional error, at para 83, Justice Meagher concluded as follows:

> I accept that the role of the Tribunal is to effectively remake the delegate's decision, and therefore applicants should not assume that the delegate's findings would be consistent with the Tribunal's findings. However, I am not satisfied that the applicant was put on notice that the Tribunal might weigh Primary Consideration 3 against revocation, which neither party contended should be the case until the Minister gave his closing submissions. In circumstances where the applicant was unrepresented, this change in position without notice denied the applicant procedural fairness.

Ground 2(a) of the Buntin case underscores the vital role of procedural fairness within the administrative continuum. It revolves around the applicant's contention that the AAT failed to afford him procedural fairness by not adequately notifying him of a

significant shift in the tribunal's consideration regarding the best interests of his minor children, known as Primary Consideration 3.

Despite presenting evidence and arguments based on the assumption that both the delegate and the Minister recognised Primary Consideration 3 as favouring the revocation of a visa cancellation, the applicant was caught off-guard during the tribunal hearing when the Minister unexpectedly altered their stance, asserting that it was not in the children's best interests for the applicant to remain in Australia. This unforeseen change in position, communicated only during the closing submissions, deprived the applicant of an opportunity to respond, highlighting a breach of procedural fairness and the importance of transparent and consistent communication within the administrative decision-making process.

The case exemplifies the critical need for decision-makers, including tribunals, to uphold principles of transparency, consistency, and fairness throughout the administrative process.[21] It emphasises the obligation to clearly communicate any changes in position or consideration to affected parties, thereby enabling them to meaningfully participate and respond to evolving circumstances.

Failure to adhere to these principles not only risks compromising the integrity of the administrative process but also undermines the legitimacy of the final decision. The impugned ground underscores the significance of procedural fairness in maintaining public trust[22] and confidence in administrative decision-making, highlighting the importance of adherence to established procedural norms and principles within the administrative continuum.

Alterations in Statutory Objectives

In Minister for Immigration and Border Protection v Makasa [2021] HCA 1, the High Court of Australia concluded as follows at para 50:

> The merits review function of the AAT 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". The function of the AAT, in other words, is "to do over again" that which was done by the primary

decision-maker.[23]

The concept that the AAT should function as a surrogate for the original decision-maker is fundamental to its role within the administrative continuum.[24] However, it's crucial to recognise that the AAT's decision-making process is not merely a replication of the initial decision. Rather, it is a dynamic process shaped by the application of statutory powers vested in the tribunal but not necessarily exercised by the original decision-maker. This nuanced understanding highlights the evolving nature of the administrative continuum and underscores the importance of appreciating the distinct influences that shape the AAT's deliberations.

By virtue of its statutory powers, the AAT possesses the authority to consider and apply legal provisions that may not have been contemplated or invoked by the original decision-maker.[25] This grants the tribunal the flexibility to reassess the merits of a case,[26] consider new evidence, and apply relevant legal principles that may have been overlooked or misapplied in the initial decision.

Consequently, the decision-making process of the AAT is characterised by a level of discretion and autonomy that distinguishes it from the original decision-making authority. It is this adaptability and responsiveness to statutory mandates that imbue the AAT's decisions with a unique quality, reflecting the ongoing evolution of the administrative continuum. Therefore, it is imperative not to overlook this crucial aspect when assessing the role and function of the AAT within the broader framework of administrative law in Australia.

The AAT is mandated to adhere to the statutory objectives outlined in s 2A of the Administrative Appeals Tribunal Act 1975 (Cth) (the **AAT Act**) when deliberating on cases brought before it. These statutory objectives serve as guiding principles that inform the tribunal's decision-making process,[27] ensuring that its actions are aligned with the broader goals and purposes envisaged by the legislature.[28]

However, it's important to recognise that original decision-makers within the Commonwealth administrative framework are not bound by the same statutory objectives in the AAT Act when making administrative decisions. Unlike the AAT, whose operations are specifically governed by this legislation, original decision-

makers may operate under distinct legislative frameworks or guidelines that dictate their decision-making criteria.

The disparity in the application of statutory objectives between the AAT and original decision-makers underscores the unique position of the tribunal within the administrative continuum. While original decision-makers may consider various factors and criteria specific to their respective areas of jurisdiction, the AAT is mandated to adhere to the overarching statutory objectives prescribed by the AAT Act.[29] These objectives include promoting the just, quick, and cheap resolution of disputes, acting according to the substantial merits of the case, and facilitating the participation of parties in the decision-making process.[30] By adhering to these statutory objectives, the AAT ensures consistency, fairness, and transparency in its adjudicative functions, thereby upholding the principles of administrative law and contributing to the overall integrity of the administrative process.

Therefore, while original decision-makers may not squarely apply the statutory objectives of the AAT Act, the AAT's adherence to these objectives underscores its unique role as a quasi-judicial body tasked with promoting administrative justice and accountability within the Australian legal system.

A good example of the changing nature of the administrative continuum is demonstrated by the decision of Lucas v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1653. That Court was told that the applicant had a good upbringing with his family, and he enjoyed good outdoor pursuits like hunting and fishing. However, before the Tribunal, the applicant gave a vastly different picture, indicating that his family background was gang affiliated. The Tribunal found that the applicant had appeared to deliberately mislead a sentencing court.

At para 51, Justice Meagher concluded:

> To deliberately mislead the Court is to commit perjury or to pervert the course of justice, which are serious offences….The questions put by the Tribunal led the applicant to affirming evidence that he had given to the Court, which was at odds with evidence he had given to the Tribunal, and accordingly the obligation to warn regarding the privilege against self-incrimination arose. A general warning as to concerns about the applicant's credibility at a time distant from

the evidence giving rise to the critical finding is not a substitute for a warning as discussed in *Promsopa*.

Although it may not be immediately apparent, the case of Lucas exemplifies the contrasting dynamics within the administrative continuum. Decision-making within the AAT is notably shaped by the dynamic nature of evidence presentation and the opportunity for oral advocacy.

In contrast, many initial government decisions are typically rendered based solely on written submissions or documents. In this context, the absence of an oral hearing means that certain common law obligations, such as the privilege against self-incrimination, do not arise as prominently for consideration.

At the AAT, the live presentation of evidence and the ability for parties to advocate their positions orally contribute to a more interactive and dynamic decision-making process. This allows for a deeper exploration of issues and a more comprehensive understanding of the facts and arguments at hand. Consequently, legal principles and procedural safeguards, including considerations of fairness and the right against self-incrimination, are more actively engaged and scrutinised during AAT proceedings.[31]

Conversely, in instances where decisions are made solely based on written submissions or documents, the absence of an oral hearing may diminish the prominence of certain legal principles. Without the direct interaction between parties and the tribunal, the application of common law obligations such as the privilege against self-incrimination may not be as extensively deliberated or applied.

This highlights the nuanced differences in procedural dynamics between administrative decision-making processes that incorporate oral hearings, like those in the AAT, and those that rely solely on written submissions and evidence.

A more recent example that fleshes out this theme is the decision of HDYP v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 103. There, the applicant submitted that during his cross-examination before the Tribunal, the applicant was asked many questions regarding his use of illicit drugs. The applicant submitted that, before the Tribunal, he was not given any such warning and, as a result, the applicant submitted that he was denied procedural fairness in the form of taking advantage of that privilege by refusing to answer questions put to him.

At para 48, Justice Anderson concluded:

> In these circumstances, I am satisfied that the Tribunal's failure to advise the applicant of his right to invoke the privilege against self-incrimination occasioned him practical injustice. It follows that this failure constituted a denial of procedural fairness amounting to jurisdictional error.

The practical lessons for an administrative law practitioner from HDYP revolve around the importance of procedural fairness and the privilege against self-incrimination in administrative proceedings. First, it underscores the fundamental nature of the privilege against self-incrimination. This principle prohibits a tribunal from compelling a witness to answer questions that may expose them to self-incrimination, ensuring the protection of individual rights during proceedings.

Second, the judgment emphasises the significance of advising unrepresented parties of their right to invoke the privilege against self-incrimination. Failure to provide such advice can lead to practical injustice, especially if the evidence obtained through questioning plays a crucial role in the tribunal's decision-making process.

Additionally, HDYP highlights the materiality of errors related to procedural fairness. It clarifies that an error deprives a party of procedural fairness if it denies them a realistic possibility of a different outcome. This standard of "reasonable conjecture" is not onerous but requires a careful examination of whether the error could have influenced the final decision.[32]

In the case discussed, the failure to advise the applicant of their privilege against self-incrimination led to practical injustice, constituting a denial of procedural fairness and a jurisdictional error.

Overall, Administrative law practitioners should be vigilant in ensuring that procedural fairness is upheld throughout proceedings, particularly regarding the privilege against self-incrimination. Adequate advice and consideration of the materiality of errors are essential to safeguarding the rights of parties and ensuring fair outcomes in administrative proceedings. Moreover, they must actively engage in continuous education and stay abreast of evolving legal standards and practices to effectively navigate the complexities of administrative law and champion the principles of justice and equity.

Constraints in the Administrative Continuum

In Frugtniet v Australian Securities and Investments Commission [2019] HCA 16, the High Court of Australia said this at para 51:

> The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision.[33]

This reasoning from Frugtniet emphasises the principle of statutory interpretation and the role of the AAT in administrative law proceedings. For administrative law practitioners, this statement underscores several important points:

1. *Consistency with Primary Decision-Maker*. The AAT operates within the framework set by the primary decision-maker. This means that the AAT exercises its powers subject to the same legal constraints and considerations as the original decision-maker.[34] Therefore, practitioners must thoroughly understand the statutory framework and legal principles that govern the primary decision to effectively argue their case before the AAT.[35]

2. *Boundaries of Review*. The primary decision and the statutory question it answers define the scope of the AAT's review.[36] The AAT must focus its assessment on the same question or questions that the primary decision-maker was required to consider. This ensures that the AAT's review remains within the confines of the statutory framework and does not overstep its authority.[37]

3. *Considerations for Review*. The considerations that the primary decision-maker must take into account (or must not take into account) when making the decision under review are equally applicable to the AAT's review process. If a certain factor is mandated by law to be considered by the primary decision-maker, the AAT must also take that factor into account during its review. Conversely, if the primary decision-maker is prohibited from considering certain factors, the AAT must refrain from considering those factors as well.[38]

In essence, this statement highlights the principle of legal consistency[39] and adherence to statutory requirements throughout the administrative review process. Administrative law practitioners must navigate these principles diligently to ensure that their arguments align with the statutory framework and effectively advocate for their clients before the AAT.

A good exemplification of this theme in action is the decision of Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL [2021] FCAFC 48.[40] There, the non-citizen's protection visa was refused under s 501(1) of the Migration Act 1958 (Cth) on character grounds. The Tribunal set aside the delegate's decision and substituted it with a decision granting the applicant a protection visa.

In a unanimous judgment, the Full Court of the Federal Court of Australia concluded as follows at para 82:

> The Tribunal fell into jurisdictional error by purporting to grant a [protection visa] to the respondent primarily because its review function was limited to deciding whether or not to refuse the grant of a [protection visa] under s 501(1) of the Act, that being the power conferred on the decision-maker whose decision the Tribunal reviewed under s 500(1)(b). That latter provision did not confer any power on the Tribunal to review a decision made by the Minister (or a delegate) under s 65(1)(b) of the Act, or to make a primary decision under that provision. No decision-maker ever reached any state of satisfaction in relation to the criteria for the purposes of the exercise of a power under s 65, nor did the Tribunal itself consider any of the other visa criteria.

PDWL underscores the importance of adherence to statutory limits and procedural constraints within administrative law. By emphasising the Tribunal's jurisdictional error in overstepping its authority, it reaffirms the principle that administrative bodies must operate within the bounds of their designated powers.[41] Additionally, it highlights the significance of thorough consideration of statutory provisions and criteria, ensuring that decisions are made based on the appropriate legal framework and with proper regard for all relevant factors.

The final case we will examine is Minister for Immigration and Border Protection v

Makasa [2021] HCA 1. Broadly speaking, Makasa demonstrates an important implication of the administrative continuum process – statutory powers being expended due to the exercise of executive power.

At paras 56-57, the High Court explained:

> The result, in short, is that a decision of a delegate or the AAT not to cancel a visa made in the exercise of the power conferred by s 501(2) of the Act on the basis of facts giving rise to a reasonable suspicion that a visa holder does not pass the character test is final, subject only to ministerial override in the exercise of the specific power conferred by s 501A.
>
> The Minister or a delegate can re-exercise the power conferred by s 501(2) to cancel the visa if subsequent events or further information provide a different factual basis for the Minister or a delegate to form a reasonable suspicion that a visa holder does not pass the character test at the first stage of the requisite two-stage decision-making process. But neither the Minister nor the delegate can rely on subsequent events or further information simply to re-exercise the discretion to cancel the visa at the second stage of the decision-making process.

The judicial exposition in Makasa underscores several crucial lessons within the administrative continuum. First, it elucidates that decisions rendered by delegates or the AAT, pursuant to statutory provisions such as s 501(2), are generally conclusive, delineating the boundaries of administrative discretion. Second, it highlights the hierarchical nature of administrative decision-making, wherein ministerial intervention, as stipulated under s 501A, serves as the sole avenue for overriding determinations made at the primary level. Third, it accentuates the principle of procedural finality, stipulating that subsequent events or additional information may warrant a re-evaluation of the initial decision only if they fundamentally alter the factual basis upon which the suspicion regarding the visa holder's character was originally formed.

Makasa cautions against the arbitrary invocation of post hoc justifications to revisit discretionary mandates, particularly at later stages of the decision-making process, thereby emphasising the need for procedural consistency and integrity throughout administrative proceedings.

This is a commonsense, and necessary, consequence of the inclusion of the AAT in the administrative decision-making continuum.[42] Given the dubious availability of estoppel against public authorities in Australia,[43] even though it exists on the same administrative decision-making continuum, the AAT must be able to bind the primary decision-maker. All of this is done with the united aim of contributing to the good government of the people of Australia.[44]

Conclusion

The examination of the administrative continuum within Australian public law, as elucidated by Justice Davies in Jebb, offers valuable insights into the holistic approach adopted by the AAT towards administrative decision-making. The AAT's function is intricately woven into the fabric of the administrative process, reflecting a commitment to fairness, transparency, and procedural integrity.

First, the analysis of positional transitions within the AAT underscores the importance of procedural fairness and transparent communication. As demonstrated in the case of Buntin, unexpected shifts in position without prior notice can deprive applicants of the opportunity to respond effectively, compromising the fairness of the process. This underscores the need for clear communication and adherence to procedural norms to maintain the integrity of administrative decisions.

Second, the examination of statutory objectives highlights the dynamic nature of the AAT's decision-making process. While original decision-makers may operate under distinct legislative frameworks, the AAT is bound by statutory objectives outlined in the Administrative Appeals Tribunal Act 1975 (Cth). This underscores the unique role of the AAT in promoting consistency, fairness, and transparency in administrative adjudication, contributing to the overall integrity of the administrative process.

Third, the constraints within the administrative continuum, as exemplified in cases such as Frugtniet, underscore the importance of legal consistency and adherence to statutory requirements. Administrative bodies must operate within the bounds of their designated powers, ensuring that decisions are made based on the appropriate legal framework and with proper regard for all relevant factors. Moreover, the implications of the administrative continuum, as elucidated in Makasa, highlight the hierarchical nature of administrative decision-making and the principle of procedural finality.

The examination of the administrative continuum offers valuable insights into the complexities of administrative decision-making within the Australian legal framework. By upholding principles of fairness, transparency, and procedural integrity, the AAT plays a pivotal role in safeguarding the rights of individuals and ensuring the legitimacy of administrative decisions, thereby contributing to the overall integrity and effectiveness of the administrative process.

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[1] The Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System' [1999] *ALRC* 89, 10.

[2] Bernard McCabe, 'Automated decision-making in (good) government' (2020) 100 *AIAL Forum* 106, 127.

[3] *Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1000 [24].

[4] Justice Greg Garde AO RFD, 'Ensuring Procedural Fairness – Tribunals to Courts', COAT Victoria Chapter Conference, 22 April 2016, 9-10.

[5] Robert Orr and Robyn Briese, 'Don't Think Twice? Can Administrative Decision Makers Change Their Mind?' (2002) 35 *AIAL Forum* 11, 12.

[6] Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33 *Sydney Law Review* 177, 199.

[7] For example, compare s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) and s 4 of the *Migration Act 1958* (Cth).

[8] Matthew Paterson, 'Adventures on the administrative decision-making continuum: Reframing the role of the Administrative Appeals Tribunal' (2019) 96 *AIAL Forum* 65.

[9] (1988) 80 ALR 329.

4 Dennis Pearce, *Administrative Appeals Tribunal*, LexisNexis, 4th ed, 2015, 294.

[10] Ibid.

[11] Robin Creyke, 'Administrative Justice — Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705, 730.

[12] *Singh (Migration)* [2017] AATA 850 [17].

[13] See *Acts Interpretation Act 1901* (Cth), s 25D.

[14] The Hon. Justice Garry Downes AM, 'The State of Administrative Justice in Australia', Canadian Council of Administrative Tribunals Fourth International Conference, World Report #1, Vancouver, Canada, 7 May 2007, 3.

[15] Danielle Moon and Carolyn Adams, 'Too Much of a Good Thing? Balancing Transparency and Government Effectiveness in FOI Public Interest Decision Making' (2015) 82 *AIAL Forum* 28.

[16] *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 116.

[17] Bruce Dyer, 'Determining the Content of Procedural Fairness' (1993) 19(1) *Monash University Law Review* 165.

[18] *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398.

[19] *HKRC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1487 [92].

[20] *Buntin* has been subsequently cited and considered in *Taylor and Minister for Immigration, Citizenship and Multicultural Affairs* [2024] AATA 205, *Muller and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] AATA 150, *Bainbridge and Minister for Immigration, Citizenship and Multicultural Affairs)* [2023] AATA 4184.

[21] These are qualities that underpin the rule of law doctrine in Australia: see Jason Donnelly, 'Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?' (2017) 7(1) *Victoria University Law and Justice Journal* 94.

[22] See s 9(e) of the Administrative Review Tribunal Bill 2023 (Cth).

[23] *Makasa* has been cited and considered in various decisions: see *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 11, *Crime and Corruption Commission v Carne* [2023] HCA 28, *Independent Liquor & Gaming Authority v 4 Boys (NSW) Pty Ltd* [2023] NSWCA 210, *Vunilagi v R* [2023] HCA 24, *ENT19 v Minister for Home Affairs* [2023] HCA 18.

[24] Simon Daley and Nick Gouliaditis, 'The Hardiman Principle' (2010) 59 *Admin Review* 60.
[25] For example, s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth).
[26] See s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth).
[27] The conferral of the various duties, functions and powers on the Tribunal are subject to a duty implied from common law principles of interpretation to act reasonably: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 [53]; *King Educational Service Pty Ltd v Chief Executive Officer of the Australian Skills Quality Authority (No 3)* [2021] FCA 692 [104].
[28] Section 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].
[29] *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 1349 [33].
[30] *Seymour v Federal Commissioner of Taxation* (2016) 69 AAR 441; [2016] AATA 397 [55]; *May v Military, Rehabilitation and Compensation Commission* [2011] AATA 697 [15].
[31] *HDYP v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 103.
[32] *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 [164]-[165].
[33] *Frugtniet* has been cited in over 240 decisions. See, for example, *Manikantan v Secretary, Department of Employment and Workplace Relations* [2024] FCA 94, *Precious Family Day Care Pty Ltd v Secretary, Department of Education* [2024] FCA 20, *Sage v Commissioner of Taxation* [2023] FCA 1247.
[34] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 1354 [46].
[35] *PDWL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 485.
[36] *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271.
[37] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033.
[38] *Farcas and Minister for Immigration, Citizenship and Multicultural Affairs* [2024] AATA 111 [19]-[21].
[39] *FYBR v Minister for Home Affairs* [2019] FCAFC 185 [88].
[40] *PDWL* has been cited in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Antoon* [2023] FCA 717, *Inspector-General in Bankruptcy v Rutherfurd (Bankrupt)* [2023] FCAFC 99, *Morgan and Registrar of Aboriginal and Torres Strait Islander Corporations* [2022] AATA 2234 and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL (costs)* [2021] FCAFC 75.
[41] *CEU22 v Minister for Home Affairs* [2024] FCAFC 11 [27].
[42] Paterson, n 8 above, 71.
[43] G Pagone, 'Estoppel in Public Law: Theory, Fact and Diction' [1984] *University of New South Wales Law Journal* 267, 274–5.
[44] Justice Michael Kirby, 'The AAT 20 Years Forward' (Speech delivered at AAT Back to the Future, Australian National University, 1–2 July 1996). See https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_aat.htm