

JUDICIAL AND ADMINISTRATIVE REVIEW OF NON-STATUTORY STATE EXECUTIVE POWER

Keynote Address, Land and Environment Court Annual Conference 2022

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1 This keynote address discusses an evolving and dynamic area of administrative law, namely the circumstances and principles which apply when Courts involved in judicial review, or bodies involved in conducting administrative review, review the exercise or non-exercise of non-statutory State executive power. The topic necessarily raises for discussion the circumstances when non-statutory policies and guidelines will be reviewed by Courts or tribunals and on what grounds. Rather than adopt an academic approach to the subject, I will strive to give it a practical and utilitarian focus.

2 The structure of this address is as follows:

- (a) Defining executive power.
- (b) Judicial review of statutory State executive power briefly summarised.
- (c) Judicial review of non-statutory State executive power.
- (d) Administrative review on the merits of non-statutory State executive power.
- (e) Review of non-statutory policies and guidelines.

(a) Defining executive power

3 Some of the difficulties in defining what is meant by “executive power” are discussed by former Justice Kenneth Hayne in an article in 2017¹. In *Davis v*

* I am grateful to my former Associate, Brandon Smith, for his valuable research assistance.

¹ K M Hayne, ‘Non-statutory Executive Power’ (2017) 28 *Public Law Review* 333.

Commonwealth (1988) 166 CLR 79 at 108-109 Brennan J provided the following definition (which is also apposite to State executive power):

An act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory “non-prerogative” power or capacity, a prerogative “non-statutory” power or capacity, or a capacity which is neither a statutory nor a prerogative capacity.

4 Adopting Brennan J’s approach, executive power broadly falls within one of three categories. First, there are executive powers derived from statute (or regulations) and which, in other words, are ultimately authorised by the Parliament. Secondly, there are prerogative or non-statutory powers. In the case of the Commonwealth, those powers are derived from s 61 of the *Constitution*. In the case of the States, the prerogative powers are those which have been inherited from the United Kingdom.

5 These prerogative powers are unique to government and are not shared with private legal personalities. A distinction is sometimes drawn between prerogative powers which are directly capable of producing legal effects, as opposed to prerogative powers the exercise of which produces legal effects by changing the facts to which the general law applies². Examples of the first category include the prerogative of mercy and the prerogative power to issue a *nolle prosequi*. Examples of the second category include declarations of war and the recognition of the sovereignty of other nations. This category involves the prerogative powers which do not directly affect legal rights and interests.

6 There is also a third category of executive power which conveniently may be referred to as “executive capacities”. These are the powers of the Commonwealth and the States as artificial legal persons and who may have the same powers as

² See Amanda Sapienza, *Judicial Review of Non-Executive Action* (The Federation Press, 2020), pp 26 ff and see also Alan Robertson ‘Supervising the legal boundaries of executive powers’ (2021) 50 *Australian Bar Review* 12.

private entities who have a legal personality. Such entities may, for example, sue or be sued in their own names, enter into contracts³, spend money, employ staff and deal with property⁴.

7 It is important to note that in contrast with the position relating to discretionary executive powers sourced from statute, non-statutory powers are merely discretionary powers which are exercised or not at the government's complete discretion. There is no duty to exercise a non-statutory power in any particular case, which is to be contrasted with statutory powers which generally attract a duty on the part of the executive to at least consider whether or not to exercise such a power (unless the statute provides otherwise).

(b) Judicial review of statutory State executive power

8 Following the High Court's landmark decision in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, the doctrine of jurisdictional error provides a foundation for judicial review of statutory executive action at both a Commonwealth and State level. It was held there that a "defining characteristic" of a "Supreme Court of a State" is the inherent supervisory jurisdiction that formed part of that jurisdiction at federation, inherited by the Supreme Court from the jurisdiction of the Queen's Bench in England. At the Commonwealth level, judicial review of Commonwealth administrative action is generally sourced in ss 75(iii) and (v) of the *Constitution* (in the case of the High Court) and in s 39B of the *Judiciary Act 1903* (Cth) (in the case of the Federal Court). The exercise of Commonwealth judicial review is generally conducted by way of the so-called constitutional writs (prohibition, certiorari, mandamus and injunctions). Declaratory relief is also available in certain circumstances in a public law context (and in respect of the Land and Environment Court (LEC) see s 20(2)(c) of the *Land and Environment Court Act 1979* (NSW) (*LEC Act*)). And, of course, there is also Commonwealth

³ See Hayne (n 1) 341-343.

⁴ See Sapienza (n 2) at 34 ff.

judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

9 In New South Wales and some other States, the prerogative writs have been abandoned and replaced with relief in the nature of such writs (see s 69(1) of the *Supreme Court Act 1970* (NSW)). The LEC has a judicial review jurisdiction under the *LEC Act*, which is generally referred to as the Class 4 jurisdiction. In particular, the LEC has exclusive jurisdiction under s 20(2) of the *LEC Act* to hear and determine civil enforcement matters relating to a planning and environmental law as defined in s 20(3) (see s 71(1) of the *LEC Act*)⁵. Section 20(2) confers on LEC all of the powers of judicial review that the Supreme Court would otherwise have in such cases⁶. As you all know, the LEC also has vested in its Class 1 jurisdiction the power to conduct a merits review of certain decisions and actions. I will primarily focus on the LEC's Class 1 jurisdiction in discussing merits review of non-statutory State executive power.

10 For completeness, it should also be noted that there are at least two areas where the doctrine of jurisdictional error for judicial review of statutory executive power is supplemented by two other doctrines. The first is the availability of relief in the nature of certiorari for error of law on the face of the record. The second is the largely undeveloped doctrine which provides for injunctive or other similar relief where there is unlawful administrative action which falls short of producing invalidity (as is the case under the doctrine of jurisdictional error), as identified by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. It is unnecessary to dwell on those alternative doctrines for the purposes of this address, although reference should be made to the LEC's jurisdiction under s 20(2) of the *LEC Act* to grant injunctions to restrain the breach of planning and environmental laws.

⁵ *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, [7] (Basten JA).

⁶ See *LDF Enterprise Pty Ltd v New South Wales* (2017) 95 NSWLR 70.

11 Returning to the central role of the doctrine of jurisdictional error in judicial
review, it may be accepted that traditional judicial review errors such as
procedural unfairness, failing to take into account relevant considerations and
taking into account irrelevant considerations, improper purpose, no evidence and
unreasonableness/illogicality in the legal sense are examples of jurisdictional
error. But those heads of review are not exhaustive and caselaw post *Craig v*
South Australia (1995) 184 CLR 163 has highlighted the need for a more
sophisticated approach by a judicial review court than simply asking whether a
particular case fits conveniently within the label of one or more of those head of
judicial review.

12 Judicial review is not an exercise in semantics or labels.

13 Determining whether or not there is jurisdictional error is more challenging than
that and necessarily requires close attention to be paid to the relevant statutory
framework (and relevant facts and circumstances) in which the case arises.

14 The High Court has emphasised the importance of the principles of statutory
interpretation, as an aspect of the common law, in providing judicial review. As
Gummow, Hayne, Crennan and Bell JJ said in *Plaintiff S10/2011 v Minister for*
Immigration and Citizenship (2012) 246 CLR 636 at [97]:

The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai* was identified as the interaction between the three branches of government established by the Constitution. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that “the common law” usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with

procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.

(citations omitted)

- 15 This approach was confirmed by the plurality in *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590 at [30] (per Kiefel CJ, Gageler, Keane and Gleeson JJ):

The statutory limits of the decision-making authority conferred by a statute are determined as an exercise in statutory interpretation informed by evolving common law principles of statutory interpretation. Non-compliance with an express or implied statutory condition of a conferral of statutory decision-making authority can, but need not, result in a decision that exceeds the limits of the decision-making authority conferred by statute. Whether, and if so in what circumstances, non-compliance results in a decision that exceeds the limits of the decision-making authority conferred by the statute is itself a question of statutory interpretation.

- 16 The need to pay close attention to the statutory framework is linked to the importance of maintaining the legitimacy of judicial review. Simply stated, judicial intervention in the exercise of State executive power which has a legislative foundation is likely to be less controversial if that intervention can be explained by reference to the Court's analysis and determination that the executive action is beyond the authority and powers conferred upon the executive by a statute or regulation under which the action was purportedly done. Thus judicial review can be seen as an aspect of the separation of powers and the rule of law and the important role of the judiciary in requiring executive action to be authorised by the grant of statutory power by the Parliament.

17 Necessarily, therefore, some different and difficult issues concerning the legitimacy of judicial review arise when Courts are asked to review, by way of judicial review, the exercise of non-statutory powers⁷.

(c) Judicial review of non-statutory State executive power

18 You may find helpful guidance on the issue of judicial review of non-statutory decision-making in the recent decision of the Full Court of the Federal Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213. In brief, the central question there was whether the Court could on judicial review determine whether non-statutorily based executive action by Federal departmental officers was unlawful on the ground of legal unreasonableness where the action was purportedly taken by reference to non-statutory guidelines which had been issued by the Minister. The Minister had issued to his departmental staff a document which identified the circumstances in which requests for Ministerial intervention under the *Migration Act 1958* (Cth) should be brought to the Minister's attention. The five member Full Court unanimously held that the officers' actions were amenable to judicial review on the ground of legal unreasonableness. In so finding, the Full Court approved Robertson J's decision in *Jabbour v Secretary, Department of Home Affairs*⁸. (Although both cases establish the availability of judicial review for legal unreasonableness in respect of at least some non-statutory guidelines, in both cases the claim of legal unreasonableness was rejected).

19 The key features of both *Davis* and *Jabbour* may be summarised as follows:

⁷ Under s 16 of the *LEC Act*, the LEC has jurisdiction as vested in it by that or other statutes. Although no statute presently confers jurisdiction on the LEC in respect of non-statutory action, it appears that the Court's "ancillary" jurisdiction could extend to review of non-statutory action, at least where that action occurs in the course of administering a statutory scheme over which the LEC has jurisdiction: see, for example, *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196, [66]-[75] (Spigelman CJ) and Sapienza (n 2) 57. The LEC's jurisdiction to review non-statutory executive action will require close attention to the terms of ss 20(2), 20(3) and 71 of the *LEC Act*: see *Huntlee Pty Ltd v Sweetwater Action Ground Inc* (2011) 185 LGERA 429, [94] (Basten JA).

⁸ (2019) 261 FCR 438 ('*Jabbour*').

- (a) Although the heads of review of denial of procedural fairness and legal unreasonableness overlap to some extent, the principles are distinct in their history, principles and terms⁹.
- (b) Accordingly, the High Court held in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*¹⁰ that procedural fairness principles had been displaced, in respect of the operation of non-statutory guidelines, but this does not necessarily mean that review for unreasonableness has also been displaced as a matter of statutory construction.
- (c) Previous authorities had established that the exercise of some of non-statutory executive powers under s 61 of the *Constitution* may be amenable to judicial review, depending upon the nature and subject matter of the power, as opposed to its source¹¹. An example of a non-statutory decision which may not be amenable to traditional grounds of judicial review because of non-justiciability is where there is a heavy component of assessing where Australia's foreign policy interests fall¹². (An example from the State sphere is Pearlman CJ's decision in *Outback Leather Pty Ltd v Director-General, National Parks and Wildlife Service* (1996) 92 LGERA 319 where, in a Class 4 decision, her Honour held that a policy decision to the effect that there would be no condition on licences to kill kangaroos which permitted only the kangaroo skins to be sold did not attract the principles of procedural fairness. Apparently, "skin only" kangaroo culling was a threat to the viability of the kangaroo meat processing industry. Her Honour described the decision as a policy decision which was not amenable to judicial review on the ground of

⁹ In several cases it has been held that the requirements of procedural fairness apply in non-statutory decision-making: see, for example, *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121.

¹⁰ (2012) 246 CLR 636.

¹¹ See, for example, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 and *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

¹² See, for example, *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449.

procedural fairness. I am not confident that the same decision would be made today).

- (d) A departure from non-statutory Ministerial guidelines may give rise to judicial review for error of law where, for example, a decision-maker who is not bound to apply the policy nevertheless purports to apply it or, alternatively, misconstrues or misunderstands the policy, such that what is applied is not the policy but something else¹³.
- (e) Similarly, at a level of principle, non-statutory administrative action may be amenable to judicial review for legal unreasonableness (under both limbs of that ground as explained in *Minister for Immigration and Border Protection v Singh*¹⁴), with particular reference to an outcome-focussed challenge under this head.
- (f) Significantly, the **common law** provides the conceptual underpinning for the Court's role in judicial review of administrative action involving non-statutory powers. As Kenny J said in *Davis* at [36]:

For all these reasons, subject to general constitutional and common law constraints (some of which are mentioned below) and any applicable statutory limitations, there should be no continuing doubt that an exercise of executive power (whatever its source) is amenable to judicial review on the unreasonableness ground. Such an exercise of power may be challenged on this ground either because the reasons given by the decision-maker disclose no "intelligible justification" in the *Li* sense or because the outcome is such that the circumstances disclose legal unreasonableness, as in *Rooke's Case* referred to earlier. The long common law history of the unreasonableness ground confirms that it is separate and distinct from the procedural fairness ground. In the context of these appeals, the fact that the decision of the High Court in *Plaintiff S10/2011* precludes reliance on the procedural fairness

¹³ See, *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 per French and Drummond JJ ('*Gray*').

¹⁴ (2014) 231 FCR 437.

ground in relation to the decisions under challenge does not of itself prevent reliance on the unreasonableness ground.

- (g) Although an impugned administrative decision which lacks a statutory foundation does not invariably preclude judicial review in an appropriate case, in the absence of a statute providing explicit or implicit criteria for the review process, it may be appropriate to adopt, as a framework for analysis, guidelines which are intended to be applied by decision-makers. Such guidelines or instructions are intended to set out criteria or considerations to be taken into account in making decisions which potentially affect an applicant's interests and potential rights. Accordingly, such guidelines or instructions may inform judicial review for legal unreasonableness.
- (h) The width and depth of judicial review of a non-statutory power may be reduced or enlarged in any particular case having regard to the nature and subject matter of the impugned exercise of executive power.

20 The critical point to emerge from *Davis* and *Jabbour* is that the boundaries of an executive non-statutory power may be able to be identified by reference to what the executive itself has done when it issues non-statutory guidelines or policies to administrative officers setting a framework or structure within which the officers are to perform certain administrative tasks. The Court accepted in these two cases that, in scrutinizing non-statutory executive action for legal unreasonableness, the Court's review is relevantly informed by any such non-statutory guidelines, policy or instructions. This approach is broadly consistent with the application by overseas courts of unreasonableness in judicial review of non-statutory guidelines and instructions¹⁵.

¹⁵ See, for example, *Chiu v Minister of Immigration* [1994] 2 NZLR 541; *Attorney-General v Problem Gambling Foundation of New Zealand* [2017] 2 NZLR 470; *Ankers v Attorney-General* [1994] NZLR 595; *Baker v Canada* [1999] 2 SCR 817 and *Naeem v Canada (Minister of Citizenship and Immigration)* [2007] 4 FCR 658.

21 The issue of whether procedural fairness obligations are owed by a State public decision-maker who makes an executive decision not sourced in statute has been considered in various cases, including *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121; *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at [81]; *Hall v The University of New South Wales* [2003] NSWSC 669 at [114]; *Stewart v Ronalds* [2009] NSWCA 277; 76 NSWLR 99 at [67]-[70]; *Karimbla Property (No 50) Pty Ltd v State of New South Wales* [2015] NSWSC 778 at [66]-[74] and *Amos v Western New South Wales Local Health District* [2016] NSWSC 1162 at [93]-[97]. There is another line of authority where a private body exercises a quasi-public function which is non-statutory: see, for example, *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190; 78 NSWLR 393 at [64]-[81].

22 The relevance of the distinction between a statutory and non-statutory decision in the context of a judicial review challenge was considered by the Court of Appeal in addressing a claim directed to a jurisdictional fact in *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd* [2019] NSWCA 216 (see in particular the observations of Leeming JA regarding the sometimes “arid” distinction at [187]ff). This case also well illustrates the difficulties which can arise in determining as a threshold matter whether or not a statute provides the source of power for making a particular administrative decision.

(d) Administrative review on the merits of non-statutory State executive power

23 I will focus on the relevance of non-statutory policies, codes of practice, guidelines and the like in a merits review (such as that conducted in the LEC’s Class 1 jurisdiction under s 17 of the *LEC Act*).

24 The desirability of having policies or guidelines to promote consistency and rationality in administrative decision-making is well recognised. For example, in

Plaintiff M64/2015 v Minister for Immigration and Border Protection [2015] HCA 40; 258 CLR 173 at [54], French CJ, Bell, Keane and Gordon JJ made the following remarks concerning a “priorities policy” promulgated by the Minister with respect to applications for humanitarian visas:

Policy guidelines like the priorities policy promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike. In particular, policies or guidelines may help to promote consistency in “high volume decision-making”, such as the determination of applications for Subclass 202 visas. Thus in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*, Brennan J, as President of the Administrative Appeals Tribunal, said that “[n]ot only is it lawful for the Minister to form a guiding policy; its promulgation is desirable” because the adoption of a guiding policy serves, among other things, to assure the integrity of administrative decision-making by “diminishing the importance of individual predilection” and “the inconsistencies which might otherwise appear in a series of decisions”. The subjectivity of the evaluation by a decision-maker in a case such as the present highlights the importance of guidelines. The importance of avoiding individual predilection and inconsistency in making choices between a large number of generally qualified candidates by the application of the open-textured criterion of “compelling reasons for giving special consideration” is readily apparent.

25 Similar remarks were made by French and Drummond JJ in *Gray* at 206 concerning the desirability of having policies or guidelines in high volume administrative decision-making:

This is particularly so in the case of a power which involves high volume decision-making or which may, in any event, because of its subject matter, be expected to attract policy guidelines. Certain classes of immigration decision are necessarily high volume, such as those relating to the grant of visas and entry permits. The exercise of the power to deport involves a direct interference with individual liberty. Common concepts of justice suggest that, while each case is to be considered on its individual merits, like cases will generally be treated similarly. The imputed legislative contemplation of such policies for that purpose must be limited to those which are

consistent with the general purposes and requirements, express or implied, of the legislation in question. They cannot be expressed to fetter the exercise of the relevant discretion. Recognition of legislative contemplation that policy guidelines will be made is consistent with the requirement that each case is considered on its merits.

26 There are some early Federal Court decisions which took a narrow view of the scope of a judicial review of non-statutory policies or guidelines. They include cases such as *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 540-541, where Sheppard J declined to give guidelines the status of law and *Broadbridge v Stammers* (1987) 16 FCR 296, where the Full Court emphasised the breadth of guidelines set out in a manual relating to the closure of post offices and held that any departure from the manual was better corrected internally and not by the Court.

27 In the context of merits review, it is necessary to draw a distinction between guidelines and policies which are binding on an administrative review body because there is a statutory requirement to that effect (such as under s 499 of the *Migration Act 1958* (Cth)) and circumstances where there is a relevant policy or guideline which lacks a statutory foundation. The issue has arisen in many cases in the Administrative Appeals Tribunal, but it is also relevant to the LEC's Class 1 jurisdiction. In 2013, the issue was raised by the then President of the AAT, Justice Duncan Kerr¹⁶. His Honour pointed out that the Kerr Committee envisaged that merits review of administrative decisions would ensure that not only the correct, but also the preferable, decision was reached. This was prior to the explosion in "soft law" in the form of directions, guidelines and policies, many of which do not have a statutory source. Justice Kerr emphasised Brennan J's seminal statement in *Re Drake and Minister for Immigration and*

¹⁶ Justice Duncan Kerr, 'Challenges facing Administrative Tribunals – The complexity of legislative schemes and the shrinking space for preferable decision making' (Speech, COAT Twilight Seminar, 18 November 2013).

*Ethnic Affairs (No 2)*¹⁷ that review by the AAT should generally involve the application of ministerial policy unless the policy is unlawful or “there are cogent reasons to contrary”. Justice Kerr pointed out that this important latter qualification appears to have been overlooked in modern merits review with tribunals abrogating individual considerations indiscriminately in favour of ministerial or other policy¹⁸. It is important not to lose sight of Brennan J’s statement that if the application of policy would work injustice in a particular case, that may itself provide a cogent and sufficient reason to depart from the policy because “consistency is not preferable to justice”¹⁹.

28 It is desirable to set out in full the relevant paragraph from *Drake (No 2)*:

These considerations warrant the Tribunal’s adoption of a practice of applying lawful Ministerial policy, unless there are cogent reasons to the contrary. If it were shown that the application of Ministerial policy would work an injustice in a particular case, a cogent reason would be shown, for consistency is not preferable to justice. Injustice, in the context of ss 12 and 13 of the *Migration Act*, must mean a disproportion between the detriment suffered by those affected by the execution of a deportation order and the benefit which might reasonably be expected to result to the community at large or to particular individuals in the community if the order were affirmed.

Justice Brennan added that the AAT would ordinarily apply a Ministerial policy on deportations in reviewing a deportation order, “unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case”. He added that where the policy would ordinarily be applied “an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown

¹⁷ (1979) 2 ALD 634, 645, as approved by the Full Court in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

¹⁸ His Honour may have had in mind cases such as *Catto and Secretary, Department of Family and Community Services* [2001] AATA 354 and *QX01/2 and Secretary, Department of Family and Community Services* [2001] AATA 1026, where the AAT applied the Department’s Policy Guidelines in using a person’s gross income in deciding whether the person derived a significant part of their income from a farm enterprise and without asking if there were cogent reasons not to apply the policy in a particular case.

¹⁹ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 645.

against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny”.

29 The Full Court of the Federal Court conveniently summarised the four key propositions to emerge from the *Drake* litigation in *Hneidi v Minister for Immigration and Citizenship* (2010) 182 FCR 115 at [41]-[44]:

41 For present purposes, four relevant propositions emerge from their Honours’ consideration of that question. The first is that the decision-maker is entitled, in the absence of specifically defined criteria for the exercise of the discretion, to take into account “government policy”. Thus, where the Tribunal is not under a statutory duty to regard itself as bound by the policy, it is entitled to treat the policy as a relevant consideration.

42 Second, in the absence of a specific statutory provision (which would no doubt be unusual) the Tribunal is not entitled to abdicate its function of determining whether the decision under review was, on the material before the Tribunal, the correct or preferable one, to a more passive function of determining whether the decision conformed to the relevant policy.

43 Third, it is not desirable to frame a general statement of the part which government policy should ordinarily play in the determinations of the Tribunal. That is a matter for the Tribunal to determine in the context of the particular case, informed by considerations of the desirability of consistency of administrative decisions but balanced against the ideal of justice in the individual case.

44 Fourth, the borderline between cases in which the Tribunal has abdicated its functions to those of an unthinking application of “government or Ministerial policy” to the facts may sometimes be blurred. But where the Tribunal considers that the correct or preferable decision results from the application of such a policy, it should make it clear that:

... it has considered the propriety of the particular policy and expressly indicates the considerations which have led it to that conclusion.

(e) Review of non-statutory policies and guidelines

30 I shall now expand upon the discussion of non-statutory guidelines, policies or instructions (which may conveniently be described as “soft law”²⁰). Again, I am not referring here to statutory directions given by a Minister which bind Departmental officers or comparable “guidelines” under State statutory regimes, such as the Claims Assessment Guidelines and Permanent Impairment Guidelines issued under Pts 4.1 and 3.1 respectively of the *Motor Accidents Compensation Act 1999* (NSW)²¹. Nor am I referring to instruments such as State Environment Planning Policies (SEPPs), which are a form of delegated legislation and do not qualify as non-statutory instruments. In the context of determining a development application, for example, decision-makers are obliged by the explicit terms of the *Environmental Planning and Assessment Act 1979* (NSW) (*EPA Act*) to take into consideration such instruments.

31 Rather, I am referring to materials such as the guidelines issued by the Minister as instructions to Departmental officers in filtering requests for Ministerial intervention under provisions such as ss 195A, 351 and 417 of the *Migration Act*. Similarly, I am referring to policies, guidelines or documents such as codes of conduct which are prepared by State Ministers, departments or Councils which lack a legislative foundation and are intended to apply in administrative decision-making. Some of the issues presented by the operation of such non-statutory guidelines or policies have been addressed in several High Court cases²².

²⁰ See generally Greg Weeks, *Soft Law and Public Authorities – Remedies and Reform* (Hart Publishing, 2016) and Greg Weeks, ‘Soft Law and Public Liability: Beyond the Separation of Powers?’ (2018) 39 *Adelaide Law Review* 303.

²¹ See *Boyce v Allianz Australia Insurance Ltd* (2018) 96 NSWLR 356.

²² See, for example, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 in respect of the operation of a Ministerial “priorities policy” concerning applications for humanitarian visas and *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 in respect of the operation of a policy manual on assessing Australia’s *non-refoulement* obligations. The anomaly of having “guidelines” which are legally binding was highlighted by the Full Court in *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287.

32 It is necessary at the outset to acknowledge that executive policies can come in many different forms. Some, for example, are made by Ministers to guide departmental decision-makers or review bodies in the exercise of statutory discretionary powers, while others are developed by departments or agencies to promote consistency in decision-making in either a statutory or non-statutory setting. Some policies are high level and relate to matters of an essentially political nature. Other policies are at a lower level and are more detailed in their prescription. Some policies do not directly affect individual rights and interests. Alan Robertson has suggested that there is “a distinction between policy which is the **object** of a particular field of administration, against a policy which has the character of a statement of **how** decisions are to **be made or a guide** to decision-making”²³.

33 I should also emphasise that I am not using the word “policy” in the same sense as that which arose in *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28 at [94] per Preston CJ, where that concept was referred to in a discussion of whether the LEC exercised judicial power in determining a Class 1 appeal.

34 For completeness, I should also mention that cases can arise where an administrative decision-maker is required by legislation to have regard to State or national policies, programs or guidelines concerning particular subjects. For example, cl 14(2) of the State’s Mining SEPP required the Independent Planning Commission to have regard to “any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions” in considering an application for development consent to construct and operate a thermal coalmine near Mudgee. The issue which arose was what was meant by an “applicable” policy. This was the focus of attention by Pain J at first instance in *KEPCO*

²³ Robertson (n 2) 54-55 (emphasis in original).

Bylong Australia v Independent Planning Commission (No 2) [2020] NSWLEC 179, which was upheld on appeal in *KEPCO Bylong Australia v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216.

35 Before turning to address the operation of non-statutory policies, codes of practice or guidelines (non-statutory documents), it is convenient to describe the current state of the law regarding judicial review (as opposed to administrative review) of such non-statutory documents (assuming that the subject matter of the judicial review proceeding is justiciable).

(i) Judicial review of non-statutory policies

36 The current position seems to be as follows. A judicial review court may review a non-statutory document:

(a) To determine whether the non-statutory document is lawful where the document has been applied in making a statutory executive decision. The issue of lawfulness can include an assessment as to whether the document is inconsistent with the statute under which the impugned executive decision has purportedly been made²⁴. Moreover, a policy which adopted to guide the exercise of a statutory discretionary power cannot lawfully preclude consideration of the merits of individual cases,²⁵ nor can a policy lawfully preclude the decision-maker from taking into account mandatory relevant considerations or require him or her to take into account irrelevant considerations.

(b) To determine whether the decision-maker who applied the non-statutory document as disposing of a particular case has misconstrued or

²⁴ See, for example, *Minister for Home Affairs v G* (2019) 266 FCR 569, [58]-[59] and *Green v Daniels* (1977) 13 ALR 1.

²⁵ See, for example, *British Oxygen Co v Board of Trade* [1971] AC 610, 625 and 631; *Green v Daniels* (n 24) and *Government Employees' Health Fund Ltd v Private Health Insurance Administration* [2001] FCA 322 (Wilcox, Kiefel and Merkel JJ).

misunderstood the document such that what is applied is not the document but something else²⁶.

- (c) To determine whether the outcome of the administrative decision after applying the non-statutory document was legally unreasonable, *albeit* that a high threshold will apply in making good this ground of judicial review²⁷.
- (d) To determine whether consideration has been given to the individual merits of a particular case in applying a policy.

37 It seems, however, that the law in Australia may not have advanced as far as it has in England when it comes to judicial review of such non-statutory documents. In England judicial review is apparently available to review whether or not a non-statutory executive policy is erroneous in law **independently** of the application of that policy to a particular statutory executive decision²⁸. I agree with Alan Robertson that that view is not likely to be adopted here in Australia on the basis that “policy without further action seems an unlikely basis for judicial review”²⁹.

(ii) Merits review and non-statutory documents

38 It is convenient to address this topic with reference to the LEC’s Class 1 jurisdiction. That jurisdiction has the following relevant features:

- (a) the Court re-exercises the statutory power originally exercised by the decision-maker;

²⁶ See, for example, *Gray* (n 13) 208 per French and Drummond JJ and *Jabbour* (n 8) [89] (Robertson J).

²⁷ See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213; *Jabbour* (n 8); *Holzinger v Attorney-General (Qld)* (2020) 5 QR 158 and *Attorney-General (Cth) v Ogawa* (2020) 281 FCR 1.

²⁸ See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 123. See also *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 393.

²⁹ Robertson (n 2) 57.

- (b) similar to the AAT, the Court stands in the shoes of the decision-maker and determines for itself, on the facts and law applicable at the timing of the appeal, whether to approve or disapprove the underlying application;
- (c) the Court has all of the functions and discretions of the primary decision-maker (see s 39(2) of the *LEC Act*);
- (d) a Class 1 appeal is by way of rehearing and additional evidence may be adduced on the appeal (see s 39(3) of the *LEC Act*);
- (e) in determining the appeal, the LEC must have regard to relevant provisions of the *LEC Act* and any other Act (including the *EPA Act*) and any instrument made under any such Act, the circumstances of the case and, significantly, the public interest (see s 39(4) of the *LEC Act*); and
- (f) the task of the LEC on such an appeal is to determine what is the correct or preferable decision having regard to all the issues and evidence before the LEC even where those issues or evidence may differ from those put before the primary decision-maker³⁰.

39 The analogy between the LEC's Class 1 jurisdiction and the review function of bodies such as the Commonwealth AAT and the State NCAT³¹ was acknowledged by Preston CJ in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*³² at [27] and [28]:

27 The conferral of power on the Court in these terms indicates that the task to be undertaken is analogous to that of the various courts and tribunals, both Commonwealth and State, in reviewing decisions of

³⁰ See generally, Preston CJ's decisions in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347 ('*Bulga*') and *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28, [142]-[155].

³¹ It is important to note that s 64 of the *Administrative Decisions Review Act 1997* (NSW) expressly provides for the circumstances in which NCAT must apply Government policy (which is defined as a policy adopted by the Cabinet, the Premier or any other Minister that is to be applied by administrators in exercising discretionary powers), namely it must do so unless the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case: as to which see, for example, *Board of Studies v ANC High School Pty Ltd* [2013] NSWADTAP 8, [49] ff.

³² *Bulga* (n 30).

government agencies, termed merits review. Merits review has been described, in the context of appeals against administrative decisions to the Administrative Appeals Tribunal, as being to determine what is “the correct or preferable decision” on the material before the reviewer: *Drake v Minister for Immigration and Ethnic Affairs (No 1)* (1979) 46 FLR 409; 24 ALR 577 at 589. Where the statute reposing the power, the exercise of which is under review, imposes limits on the exercise of the power, such that the power is only enlivened if certain circumstances exist or may only be exercised in a particular way if certain circumstances exist, the reviewing court must determine whether the limits on the power are satisfied. There may be only one decision reasonably available on the evidence and that decision will therefore be the correct decision. Where there is a range of decisions reasonably open and all of those would be correct, the Court chooses, on the evidence before it, what it considers to be the preferable decision. In the present case, there is a range of decisions reasonably open as to whether to approve or disapprove, and if to approve, with what modifications and on what conditions to approve, Warkworth’s project application to carry out the Project.

28 The task of the Court in reviewing the decision of the Minister (by his delegate the PAC) is not to consider whether that decision was correct or preferable on the material available to the PAC, but rather to determine, based on the evidence now before the Court, what is the preferable decision.

40 I turn now to consider how non-statutory policies and guidelines can figure in Class 1 appeals in the LEC. As you know, s 4.15 of the present *EPA Act* identifies the matters which must be considered in relation to development applications. They include any environmental planning instrument, any development control plan and “the public interest”. It seems now well settled that the concept of “the public interest” is sufficiently broad to bring into account at least some non-statutory policies which are relevant to a development application³³. The position was helpfully summarised by McClellan CJ in *Stockland Development Pty Ltd v*

³³ See, for example, *Terrace Tower Holdings v Sutherland Shire Council* (2003) 129 LGERA 195. Mason P said at [81] that matters relevant to the public interest affecting a particular development application are not confined to those appearing in published environment planning instruments, draft or final. Other sources of information concerning the public interest in planning matters are available. He said that a consent authority may range widely in the search for material as to the public interest.

Manly Council [2004] NSWLEC 472 at [86] and [88] to [91] (with reference to s 79C of the *EPA Act*, but which apply equally to the current s 4.15):

86 The role of a development control plan was recently considered by the Court of Appeal in *Zhang v Canterbury City Council* (2001) 115 LGRA 373 at 386-387. The correct approach to consideration of, and the weight to be given to, a development control plan is assisted by the express inclusion of a reference to development control plans in s 79C of the *Environmental Planning and Assessment Act* 1979. In the early days of planning law in this State, that approach was defined by the decisions of the Land and Valuation Court and there are many decisions which deal with the role of development control plans and policies in the decision with respect to an individual development proposal. Some of them were considered by Lloyd J in *Segal v Waverley Council* [2004] NSWLEC 363: see *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-645; *Hunter District Industries Pty Ltd v Newcastle City Council* (1957) 2 LGRA 240 at 248-249; *Shellcove Gardens Pty Ltd v North Sydney Municipal Council* (1961) 6 LGRA 93 at 102; *Crusade Construction Co Pty Ltd v Sutherland Shire Council* (1961) 6 LGRA 372 at 376-377; *Foreman v Sutherland Shire Council* (1964) 10 LGRA 261 at 269; *Boyce v Burwood Municipal Council* (1964) 10 LGRA 280 at 282-283; *Regent Project (No 6) Pty Ltd v Hornsby Shire Council* (1970) 20 LGRA 316; *Leeroy Television Service Pty Ltd v Leichhardt Municipal Council* (1970) 21 LGRA 40 at 42-43; *JOL Pty Ltd v Waverley Municipal Council* (1971) 22 LGRA 152 at 155; *Willoughby Municipal Council v Manchil Pty Ltd* (1974) 29 LGRA 303 at 309-310; *Smith v Wyong Shire Council (No 2)* (1980) 41 LGRA 202 at 212-214.

...

88 The *Environmental Planning & Assessment Act* 1979 gave statutory recognition to development control plans. However, there was before that Act, and there remain, many cases where a council adopts statements of policy for its area, or part of it, which are not included in development control plans. They relate to many matters and may include master plans for sites or parts of a council area. They may be adopted after considerable public participation, detailed research and describe fundamental expectations of the relevant council. When there is a relevant policy which is not a development control plan, the question arises as to the approach to that policy and the

weight to be given to it in the decision of the relevant council and in an appeal, if any, to this Court.

89 In *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195, Mason P discussed the role of policy in the consideration process. The President emphasised that environmental planning instruments are not “the only means of discerning planning policies or the ‘public interest’” (at LGERA 210).

90 The public interest is expressly acknowledged as a relevant consideration in s 79C(1)(e) of the *Environmental Planning and Assessment Act*. It was similarly acknowledged in s 91 of the Act in its original form. It must extend to any well-founded detailed plan adopted by a council for the site of a proposed development either alone or forming part of a greater area, even if it is not formally adopted as a development control plan.

91 In my opinion, the weight to be given to a detailed policy will depend upon a number of matters. If the policy has been generated with little, if any, public consultation and was designed to defeat a project which is known to be under consideration by a developer for a particular site, it may be given little weight. Of course, the intrinsic attributes of the policy may be given significant weight, but that weight is not dependent on then being included in a policy. It can be established in other ways. However, the position would be markedly different if the policy is the result of detailed consultation with relevant parties, including the community and the owners of affected land, and reflects outcomes which are within the range of sensible planning options.

41 This demonstrates a more nuanced approach to the question of the weight to be given to a non-statutory policy, including in a Class 1 appeal. Greater weight should be given if the (lawful) policy is the product of detailed consultation with relevant parties and reflects reasonable and rational outcomes. These considerations may operate to enhance the status of a non-statutory policy (even if it does not have a recognised status in law), just as Brennan J emphasised in *Drake (No 2)* that the fact that a Ministerial policy on deportations was subject to Parliamentary scrutiny added to its force. The absence of such considerations

does not necessarily mean that this alone will constitute “cogent reasons” for not applying a policy, as was made clear by the Full Court in *Hneidi*. Absent such or other relevant considerations which enhance the status of a non-statutory document, there may well be cogent reasons for not applying the policy or, at least, giving it minimal weight in the circumstances of a particular case.

42 The weight to be given to a non-statutory policy in a Class 1 appeal was also discussed by McClellan CJ in *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237. That issue arose in the context of the Court’s consideration of the express object in s 5(a)(vii) of encouraging “ecologically sustainable development”. Applying *Drake (No 2)*, McClellan CJ found at [92] that the Court should take into account an Inter-Governmental Agreement on the Environment dated 1 May 1992 which his Honour described as reflecting “the policy which should be applied **unless there are cogent reasons to depart from it**” (emphasis added)³⁴.

43 There was no claim in that case that there were cogent reasons not to apply the policy. Nevertheless, it is important that those who exercise the Class 1 jurisdiction do not lose sight of this important qualification to what Brennan J said in *Drake (No 2)*.

44 What then constitutes “cogent reasons” for departing from a policy? Justice Davies stated in *Stoljarev v Australian Fisheries Management Authority* (1995) 39 ALD 517 (affirmed on appeal in (1996) 41 ALD 481) that it is impossible to define or delineate the circumstances in which departure from a policy is justified. He added at 522 that:

Much depends upon the nature and context of the decision to be made, the nature of the policy to which regard is to be had and the nature of the individual circumstances to which attention is directed ... No term will in itself adequately express that point. The decision must be made having

³⁴ Another case in which it was held that a non-statutory policy was a relevant consideration in determining a development application is that of Lloyd J in *Carstens v Pittwater Council* (1999) 111 LGERA 1.

regard to the decision and its context, the nature and ramifications of the policy and the nature and consequences of the individual circumstances which are relied upon.

45 An example of a case where the AAT found that there were cogent reasons (or to use the phrase within the policy itself, “exceptional circumstances”) not to apply a policy is *White and Australian Fisheries Management Authority* [2005] AATA 174. The case involved a review of a decision of the Authority allocating a catch quota to a shark fisherman applying a policy to set the quota on the basis of the average catch of the best three years in a four year period. In its terms, the policy permitted the quota to be increased if there were “exceptional circumstances”. The AAT found that there were exceptional circumstances having regard to the applicant’s illness during the relevant period which restricted his catch returns, as well as the fact that his boat had caught fire and been destroyed.

46 An example of a case in the LEC where a non-statutory policy was not applied is Commissioner Pearson’s decision in *Burrows & Faulkner v Lane Cove Council* [2010] NSWLEC 1037. In a Class 1 appeal the Court declined to apply the Lane Cove Code for Dwelling Houses August 2002, which included a section on Privacy and Overlooking. The Code was not a development control plan but the Council urged the Court to give it weight under then s 79C of the *EPA Act* as part of the public interest. The Court declined to apply the Code on the basis that the site inspection revealed that the proposed extension did not have any privacy impacts.

47 Another example is the decision of the Western Australia State Administrative Tribunal in *Caratti Holding Co Pty Ltd and City of Belmont* [2021] WASAT 105 which involved an appeal from the Council’s refusal of a retrospective development application for two existing advertising signs. In refusing the application the Council applied its Signage Policy as well as a Policy developed

by the State road authority regarding advertising signs in State road reserves. On appeal, the WASAT member found that:

- (a) there were cogent reasons to depart from both policies because:
 - (i) the signs had been used for advertising for almost 60 years and well before the Signage Policy was adopted;
 - (ii) the Council had done nothing for the last 30 years to have the signs removed;
 - (iii) the signs did not detract from the present or likely future amenity of the locality; and
 - (iv) the signs were unlikely to distract motorists and they were located on private property and not within the road reserve.

48 In a paper delivered in 2010, Commissioner Linda Pearson said that, in the land use context, five factors have been identified in determining whether a court or tribunal should apply a non-statutory policy³⁵. Those factors are:

- whether it is based on sound planning principles;
- whether it is public, rather than a secret policy;
- whether it has been formulated after public discussion;
- the length of time it has been in operation; and
- whether it has been continuously applied.

³⁵ The paper is entitled “Planning Principles and Precedents in Merits Review” and was given at the Australasian Conference of Planning and Environment Courts and Tribunals. The paper contains a helpful discussion of the circumstances in which administrative review bodies themselves should formulate policies or planning principles. The paper describes the various “planning principles” which are identified on the LEC website. See also the discussion of planning principles in *Alphatex Australia v The Hills Shire Council (No 2)* [2009] NSWLEC 1126 at [55]-[61] (Moore SC).

49 I do not suggest that these factors are exhaustive or that any of them is
determinative in their own right.

50 The weight which an administrative review tribunal should be given to a non-
statutory policy in the context of a planning decision was also discussed by Justice
Stuart Morris, the then President of the Victorian Civil and Administrative
Tribunal, in *Stella v Whittlesea City Council* [2005] VCAT 1825. At [15] and
[16], Morris J said (footnotes omitted):

15 The weight to be given to an adopted policy will depend on the
circumstances. One circumstance may be that the policy
has *not* been included in the scheme as, generally speaking, greater
weight should be given to policies included in a scheme. Another
circumstance may be that the policy has not been subject to a
detailed and fair public participation process, akin to that involved
in making a planning scheme amendment. In some cases the policy
may be outdated or have been overtaken by a policy in the
scheme. Sometimes the policy may be simply unwise and, for that
reason, deserve little weight. Of course, if a policy is inconsistent
with the planning scheme it should not be given effect to.

16 It will be a rare case where an “under the counter” policy will carry
any weight. This type of policy is one which has not been made
publicly available, let alone been subject to public scrutiny. Put
simply, it will often be unfair to apply such a policy.

Conclusion

51 I trust that this address has alerted you to the significance of the distinction
between statutory and non-statutory powers in the context of both judicial and
merits review of State executive action. The issue assumes particular importance
in the context of decision-making which is affected by non-statutory guidelines,
codes of conduct and policies. Administrative decision-making by reference to
such non-statutory documents seems to be growing in popularity, perhaps
reflecting a desire by governments and public servants to have greater flexibility
in some areas of public administration than is otherwise afforded by relying

simply upon a formal legislative framework alone. One may confidently expect that future cases are likely to throw up some challenging issues relating to judicial and merits review of non-statutory State executive action.

52 Finally, it is important not to lose sight of the potential requirement that, even where a non-statutory policy or guideline may be relevant in making an administrative decision, including on administrative review, there may be a need to address and determine whether there are cogent reasons for not applying that policy in a particular case. Full effect should be given in an appropriate case to Brennan J's seminal decision in *Drake (No 2)*.

JUSTICE JOHN GRIFFITHS AJA