HIGH COURT OF AUSTRALIA

KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

NELSON GUANG LAI SHI APPELLANT

AND

MIGRATION AGENTS REGISTRATION AUTHORITY RESPONDENT

Shi v Migration Agents Registration Authority [2008] HCA 31
30 July 2008
S522/2007

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 27 April 2007 and, in their place, order that:*

   (a) the appeal to that Court be allowed with costs; and

   (b) the orders of the Federal Court of Australia made on 15 September 2006 and 27 November 2006 be set aside and, in their place, it be ordered that the appeal to that Court be dismissed with costs.

On appeal from the Federal Court of Australia

Representation

T A Game SC with N C Poynder for the appellant (instructed by KGA Lawyers)

S J Gageler SC with S B Lloyd for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Shi v Migration Agents Registration Authority

Administrative law – Application for review by Administrative Appeals Tribunal ("Tribunal") – Decision by Migration Agents Registration Authority ("the Authority") to cancel registration of migration agent – Tribunal's task to determine what was the correct or preferable decision – Whether Tribunal should determine what was the correct or preferable decision when the Authority made its decision, or whether Tribunal should determine the correct or preferable decision as at the time of its own decision – Necessity for close attention to the applicable legislative provisions.

Immigration – Migration agents – Registration and cautioning of migration agents – Power of the Authority to set out one or more conditions for the lifting of a caution given to registered migration agents – Tribunal (exercising for itself the powers and discretions conferred on the Authority) cautioned a migration agent and imposed conditions for the lifting of that caution – Conditions imposed restricted migration agent from providing assistance with protection visas and from working without supervision of another registered migration agent – Whether conditions could be imposed that seek to qualify a registered migration agent's right to use that registration – Whether conditions imposed were inconsistent with the legislative scheme for registration of migration agents.

Statutes – Construction – Powers of Tribunal to substitute its decision for a decision of an administrator – Proper approach to ambit and application of power – Necessity for close attention to the applicable legislative provisions – Necessity for attention to purpose and history of legislation – Whether any general presumption as to determination of the rights of parties – Relevance of the constitution, functions and general powers of Tribunal.

Words and phrases – "correct or preferable decision", "decision made in substitution for the decision so set aside".

Administrative Appeals Tribunal Act 1975 (Cth), ss 25, 43.
Migration Act 1958 (Cth), ss 303, 304A, 306.

1 KIRBY J. This appeal arises from a divided decision of the Full Court of the Federal Court of Australia[1]. In that Court, a majority (Nicholson and Tracey JJ; Downes J dissenting) affirmed orders made by the primary judge (Edmonds J)[2]. The primary judge had heard an "appeal" from a decision of the Administrative Appeals Tribunal ("the Tribunal"), constituted by Senior Member Kelly[3].

2 The Senior Member had set aside a decision of the Migration Agents Registration Authority ("the Authority"). In place of the Authority's decision to cancel the registration of Mr Nelson Guang Lai Shi ("the appellant") as a migration agent ("agent") under the *Migration Act* 1958 (Cth) ("the Migration Act"), the Tribunal substituted its own decision that the appellant be cautioned. The Tribunal then made orders providing for the "lifting" of that caution at a specified time, upon certain conditions. It took this course in purported pursuance of ss 303 and 304A of the Migration Act.

3 The Authority contests the entitlement of the Tribunal to make the decision that it did. Its arguments are two-fold. First, it contends that the Tribunal erred in its approach by failing to limit its review to the facts and circumstances prevailing at the time of the Authority's decision, instead taking account of those subsisting at the time of review. Secondly, the Authority disputes the power of the Tribunal to give, and then lift, a caution pursuant to s 304A of the Migration Act and on the conditions specified. In the Federal Court, the Authority successfully argued that the Tribunal exceeded its jurisdiction and powers.

4 These reasons will seek to demonstrate that the Tribunal was correct both in the approach that it adopted and in its conclusion that s 304A of the Migration Act authorised it to substitute its decision for that of the Authority. The dissenting opinion of Downes J in the Full Court on each of these points was correct. The appellant is entitled to succeed. The decision of the Tribunal should be restored.

The facts and legislation

5 *Registration of migration agents*: The appellant was first registered as an agent under the Migration Act in December 1995. Registration is governed by

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1 *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525.

2 *Migration Agents Registration Authority v Shi* (2006) 43 AAR 424.

3 *Re Shi and Migration Agents Registration Authority* [2005] AATA 851; see also *Re Shi and Migration Agents Registration Authority* [2005] AATA 904.

Div 3 of Pt 3 of that Act[4]. The ultimate purpose of registration is to uphold standards of integrity and competence on the part of agents.

6 Responsibility for administering the Register of Migration Agents is reposed in the Authority[5]. It may cancel or suspend an agent's registration, or caution an agent, if it becomes satisfied, for example, that the agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance, or if the agent has breached the Code of Conduct prescribed under the Act[6]. Registration as an agent is important because only a registered agent may lawfully charge a fee to provide immigration assistance to visa applicants and sponsors[7].

7 *The relevant legislation*: Section 303(1) of the Migration Act provides:

"The Migration Agents Registration Authority may:

(a) cancel the registration of a registered migration agent by removing his or her name from the register; or

(b) suspend his or her registration; or

(c) caution him or her;

if it becomes satisfied that:

(d) the agent's application for registration was known by the agent to be false or misleading in a material particular; or

(e) the agent becomes bankrupt; or

(f) the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance; or

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[4] Part 3 of the Migration Act was inserted by the *Migration Amendment Act (No 3)* 1992 (Cth). The registration scheme was substantially amended by the *Migration Legislation Amendment (Migration Agents Integrity Measures) Act* 2004 (Cth), the relevant parts of which took effect on 1 July 2004. See (2007) 158 FCR 525 at 527 [4] citing (2006) 43 AAR 424 at 430 [8].

[5] Migration Act, s 287.

[6] Migration Act, s 303(1). The Code of Conduct is prescribed pursuant to s 314.

[7] Migration Act, s 281.

(g) an individual related by employment to the agent is not a person of integrity; or

(h) the agent has not complied with the Code of Conduct prescribed under section 314."

8 By s 304A of the Act, it is provided:

"The Migration Agents Registration Authority may set one or more conditions for the lifting of a caution it gives to a registered migration agent."

9 And s 306 of the Act provides:

"Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for review of a decision by the Migration Agents Registration Authority made under this Division."

10 The relevant provisions of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act") include s 25(4):

"The Tribunal has power to review any decision in respect of which application is made to it under any enactment."

11 The powers of the Tribunal on a review under the AAT Act are relevantly provided by s 43, which includes the following:

"(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

(a) affirming the decision under review;

(b) varying the decision under review; or

(c) setting aside the decision under review and:

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

…

(6) A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect."

The decisional history

12 *Cancellation of the appellant's registration*: The Authority cancelled the appellant's registration as an agent on 14 July 2003. The Authority's decision set out its factual findings and the evidence on which such findings were based, as well as its reasons for taking the course that it did. The Authority found several defects affecting the appellant's dealings with clients; his knowledge of the Migration Act and relevant Regulations; his control of his office, financial and other records; and his supervision of his staff. Many of the breaches of the Code of Conduct found by the Authority related to cases in which the appellant had provided assistance to non-citizens applying for protection visas, sought on the basis of claims to refugee status[8]. Having regard to these breaches, the Authority recorded that it was satisfied that the appellant was not a person of integrity or a fit and proper person to give immigration assistance[9].

13 On 31 July 2003, the cancellation decision was stayed by the Tribunal, subject to a condition that the appellant be supervised by another migration agent and comply with an undertaking not to engage in any business relating to protection visas[10].

14 In October 2003 and August 2004, the Authority refused applications by the appellant for repeat registration. In addition, in April 2004, in a separate decision, it suspended his registration for a period of three years, or until specified conditions had been satisfied. These further decisions of the Authority are not in issue in this appeal.

15 *Decision of the Tribunal*: Pursuant to the Migration Act[11], the appellant relevantly sought review by the Tribunal of the cancellation decision. The

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[8] See Migration Act, s 36.

[9] Migration Act, s 303(1)(f).

[10] [2005] AATA 851 at [3].

[11] Migration Act, s 306.

powers of the Tribunal on review were derived from the AAT Act. The Tribunal conducted a review and, following a hearing, in April 2005 published written findings to the effect that it was satisfied that the appellant had breached the Code of Conduct on some, but not all, of the occasions found by the Authority[12]. Having recorded these findings, the Tribunal relisted the application for disposition of the proceedings.

16 On 2 September 2005, the Tribunal set aside the Authority's decision to cancel the appellant's registration as an agent. In place of that decision, it substituted a decision to caution him[13]. Considering all of the evidence as it stood at the date of its decision, the Tribunal then concluded[14]:

> "I am not satisfied that Mr Shi is not a person of integrity or otherwise not a fit and proper person to give immigration assistance within the meaning of s 303(f). My critical findings about his evidence were one factor to consider. However, there was no evidence that he had acted dishonestly in his practice and he has a number of very favourable references. His attitude to the Code and the consequential non-compliances … is also of concern. However, I take into account that he has had a supervising migration agent for over two years who is a knowledgeable and experienced migration agent and who holds Mr Shi in high regard. There has been no evidence of breaches since the first decision was made in 2003 and his rate of success has been very high in recent years. Most of the non-compliances with the Code related to protection visas which he has not dealt with since early in 2003."

17 Having so concluded, the Tribunal decided that neither cancellation nor suspension pursuant to s 303(1) of the Migration Act was appropriate. It is clear from the reasons of the Tribunal that it based its conclusion, and decision in this regard, not on the state of the evidence as it stood at the time of the Authority's decision but on the circumstances prevailing at the date of the Tribunal's own decision.

18 In consequence, the Tribunal substituted its own decision that the appellant be cautioned[15]. Having administered the caution, the Tribunal noted that it would "appear on the [Authority's] website until it is lifted, pursuant to the

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[12] See [2005] AATA 904.

[13] [2005] AATA 851.

[14] [2005] AATA 851 at [24].

[15] See Migration Act, s 303(1)(c).

Act"[16]. The caution was given "subject to conditions imposed pursuant to s 304A" of the Migration Act[17]. These required that the appellant be supervised as an agent for a further period of three years from the date of the decision and that he not provide immigration assistance to protection visa applicants during that period[18].

19 As noted, the Authority contests both the approach of the Tribunal and its invocation of s 304A of the Migration Act to impose the conditions stated.

20 *Decisions of the Federal Court*: The primary judge in the Federal Court upheld the Authority's submissions on both grounds. He concluded that the Tribunal had asked itself the wrong question, by reference to the evidence as it stood at the incorrect time. He considered that a "clear line of authority" obliged attention to the integrity or fitness of the appellant to give immigration assistance as at the date of the Authority's decision[19]. The Tribunal's decision was therefore found to be affected by error of law and jurisdictional error[20].

21 The primary judge also found that the conditions purportedly imposed by the Tribunal were outside the ambit of what was contemplated by s 304A. If "conditions" were to be imposed, they had to be consistent with continuing registration as an agent[21]. Requiring the appellant to submit to supervision, and excluding him from an important part of the work of an agent for an extended period, were held to be incompatible with such registration. This amounted to a second error of law and to further jurisdictional error[22].

22 In the result, the primary judge set aside the decision of the Tribunal. He remitted the matter to the Tribunal for redetermination.

23 The appellant's appeal to the Full Court of the Federal Court was dismissed. Nicholson and Tracey JJ affirmed the approach of the primary judge on each of the issues that had been determined adversely to the appellant. On the

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16 [2005] AATA 851 at [25].

17 [2005] AATA 851 at [25].

18 [2005] AATA 851 at [26].

19 (2006) 43 AAR 424 at 443 [73].

20 (2006) 43 AAR 424 at 444 [77].

21 (2006) 43 AAR 424 at 445 [85]-[86].

22 (2006) 43 AAR 424 at 445 [89].

other hand, Downes J would have found in favour of the appellant on each of the grounds argued.

The issues in the appeal

24 There are two issues for decision by this Court:

(1) Did the Full Federal Court err in holding that the Tribunal was limited to the facts and circumstances as they existed at the time of the Authority's decision? Or was the Tribunal obliged to consider the facts and circumstances as they existed at the time of its own decision?

(2) Did the Full Federal Court err in holding that the Tribunal lacked the power under s 304A of the Migration Act to impose the conditions that it did on the caution given to the appellant?

The proper approach of the Tribunal

25 *Focusing on the legislation*: To resolve the question of whether the Tribunal has exceeded or mistaken its jurisdiction and powers a court must give close attention to the enabling legislation. It is undesirable to attempt universal or unqualified propositions. Here, the issue is how to define the jurisdiction and powers of the Tribunal in conducting a review of a decision of the Authority, having regard both to the *general* provisions of the AAT Act, affording the power of review, and to the more *specific* provisions of the Migration Act, defining the characteristics of the decision that is subject to review. Only when all of the relevant features of the two inter-related statutes are understood can a correct decision be arrived at as to the ambit of the review in question and the manner in which it should be conducted.

26 The starting point is a recognition that the Parliament has not spelt out in explicit terms an answer to the first question in this appeal. There is nothing in s 43 of the AAT Act to indicate whether, "[f]or the purpose of reviewing a decision", the Tribunal is to have regard to the facts and circumstances at the time the "decision under review" was made or at the time of the Tribunal's making of a "decision in writing". It is this silence that necessitates examination of the inter-related legislation relevant to the particular case. The inter-relationship determines the character of the "decision" that is under review and the "powers and discretions" that the Tribunal is to exercise pursuant to s 43(1) of the AAT Act.

27 In this Court, the Authority propounded a general presumption which, it said, applied in respect of administrative appeals to bodies such as the Tribunal. It argued that there was a presumption of law that the rights of parties to an appeal under an Act are to be determined on the basis of the materials that existed at the time of the decision subject to appeal, absent some explicit

indication to the contrary. To support this suggested presumption, the Authority relied on a dictum of McHugh JA in *Strange-Muir v Corrective Services Commission of New South Wales*[23].

28 The status of the Authority's suggested presumption is not certain. In *Strange-Muir*, the Court of Appeal of New South Wales was divided and Priestley JA, who favoured the orders made by McHugh JA, expressly limited his concurrence to his construction of the particular legislation at issue[24]. He did not appear to embrace the propounded presumption. There are dangers for legal reasoning in the over-ready resort to presumptions[25]. However, it is unnecessary to resolve whether such a general presumption exists in this case. It is preferable to decide the issue by reference to the language of the interlocking legislation.

29 Although, as is usually the case when contested questions of statutory construction reach this Court, there are arguments both ways, the preferable conclusion on the jurisdiction and powers of the Tribunal, and on the manner in which it should discharge its functions in cases of the present kind, is that favoured by the dissenting judge in the Full Court and urged upon this Court by the appellant. There are five factors, of varying degrees of significance, that combine to produce this conclusion.

30 *Nature of the Tribunal*: First, it is essential to appreciate the radical objectives that lay behind the enactment of the AAT Act. That Act grew out of a series of official reports directed towards a major change in federal administrative law and practice. The first (and possibly the most significant) of these reports was that delivered in 1971 by the Commonwealth Administrative Review Committee[26]. In the course of discussing the then applicable principles of judicial review, that Committee observed[27]:

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[23] (1986) 5 NSWLR 234 at 251.

[24] (1986) 5 NSWLR 234 at 246; cf *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 274; [1990] HCA 36.

[25] cf *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 396-397 [202]-[204]; [2005] HCA 54.

[26] Comprising Mr Justice J R Kerr of the Commonwealth Industrial Court; Mr Justice A F Mason, then of the New South Wales Supreme Court; Mr R J Ellicott QC, Solicitor-General of the Commonwealth and Professor H Whitmore.

[27] Australia, Commonwealth Administrative Review Committee, *Report*, (August 1971) at 20 [58].

> "It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy and the non-lawyer can never appreciate why this should be so. The basic fault of the entire structure is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained 'on the merits' – and this is usually what the aggrieved citizen is seeking."

31 It was for this reason that the Committee recommended the establishment of what it called an "administrative review tribunal". Describing the jurisdiction and powers that should be given to such a general federal tribunal for administrative appeals, it proposed[28]:

> "[S]uch a Tribunal could be given jurisdiction to review on the merits certain administrative decisions made under Commonwealth law. The jurisdiction should be to hear and determine an application by a person who is aggrieved or adversely affected by a decision on the ground that the decision was erroneous on the facts and merits of the case. If such an application is made the Tribunal should also have power to deal with all questions of law necessary for its decision".

32 The proposal to create such a tribunal, with the power to make decisions "on the merits", represented a bold departure from the pre-existing law, with its focus on constitutional and statutory "prerogative" remedies of judicial review. In so far as those remedies were invoked it was, and still is, commonly insisted that the court performing the review is not concerned, as such, with the factual merits of the matter, but only with legal merits, and then often only with any errors of a jurisdictional kind shown to exist at the time of the initial decision. But given the nature of the Tribunal, it is important to approach particular questions concerning its jurisdiction and powers with the history and purpose of its creation at the forefront of attention[29].

33 *Function of the Tribunal*: Secondly, in the earliest days of the operation of the Tribunal, questions naturally arose as to how, under s 43 of the AAT Act (not relevantly altered since), the Tribunal should proceed with its function of review. In 1981, in *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2)*[30], Davies J (then President of the Tribunal) explained that:

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[28] Australia, Commonwealth Administrative Review Committee, *Report*, (August 1971) at 90 [300].

[29] See also reasons of Hayne and Heydon JJ at [97]-[98].

[30] (1981) 3 ALD 88 at 91.

> "Having regard to [its] provisions … it can hardly be doubted that the [AAT] Act gave effect to [the Commonwealth Administrative Review Committee's] recommendation. The Act provides for a tribunal some of the members of whom [sic] are not lawyers but are selected because of their special knowledge or skill in relation to a class of matters in respect of which decisions may be made. The Act confers upon the Tribunal fact-finding powers and confers the power to set aside a decision and to make a decision in substitution for the decision so set aside. The Act empowers the Tribunal to exercise all the powers and discretions that are conferred by any relevant enactment upon the person who made the subject decision. Clearly the Act established a tribunal whose function and duty it is to review administrative decisions on their merits."

34 The grant of a power of decision "on the merits" presented questions similar to those to be addressed in the instant context. According to whose view of the merits? What weight, if any, should be given to the decision of the primary administrator with the ordinary responsibility for making such decisions? Upon what evidence should the Tribunal act? At what point of time are the "merits" to be examined?

35 Davies J pointed out that, already by 1981, there was established authority in the Federal Court of Australia, and in the Tribunal, on many of these questions[31]:

> "In *Drake v Minister for Immigration and Ethnic Affairs*[32], Bowen CJ and Deane J stated the function of the Tribunal as follows:
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> > 'The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one *on the material before him*. The question for the determination of the Tribunal is whether that decision was the correct or preferable one *on the material before the Tribunal*.'
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> In *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[33], Smithers J said:
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> > 'It is important to observe that the Tribunal is not constituted as a body to review decisions according to the principles applicable

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[31] (1981) 3 ALD 88 at 91-92.

[32] (1979) 24 ALR 577 at 589 (emphasis added).

[33] (1979) 24 ALR 307 at 335.

> to judicial review. In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government.'"

36 Responding to a submission that the word "may" in s 43 of the AAT Act implied an element of discretion such as to authorise the Tribunal to limit its function as it saw fit, Davies J concluded[34]:

> "[T]he provision 'For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision …' is not concerned to confer upon the Tribunal authority to limit its function but rather to confer upon it an amplitude of powers so that the Tribunal may exercise, if it is convenient and useful to do so, not only the decision-making power upon which the decision-maker relied, but all relevant powers and discretions which were conferred by the enactment upon the decision-maker. The provision extends the authority of the Tribunal so that it may more adequately exercise its function of reviewing on the merits the subject decision."

37 Davies J acknowledged that regard might be had to the decision of the primary decision-maker as part of the "material before the Tribunal", particularly where it involved special expertise or knowledge[35]. But ultimately, it was for the Tribunal to reach its own decision upon the relevant material including any new, fresh, additional or different material that had been received by the Tribunal as relevant to its decision. In effect, this was no more than a consequence of the Tribunal's obligation to conduct a true merits review[36].

38 There was no error in this analysis. On the contrary, it represents the correct and preferable view of the legislation establishing the functions and powers of the Tribunal.

39 *Purpose of s 43 of the AAT Act*: Thirdly, a conclusion that, ordinarily, the Tribunal might have regard to new, fresh, additional or different evidence in reaching its own decision is reinforced by the apparent purpose of s 43 of the AAT Act. Under that section, when the Tribunal decides to set the decision under review aside, it must consider whether to remit the decision to the Tribunal

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[34] (1981) 3 ALD 88 at 92.

[35] (1981) 3 ALD 88 at 92-93.

[36] See *Brian Lawlor Automotive* (1979) 24 ALR 307 at 335.

for reconsideration (with or without directions or recommendations) or whether to make a fresh decision "in substitution for the decision so set aside"[37].

40 Of necessity, any such fresh decision replaces the decision of the primary administrative decision-maker within the Executive Government of the Commonwealth. In law, and in effect, it becomes the decision of the Executive Government. Many days, weeks, months or even a year or more might have passed since the original decision was made by the primary decision-maker. It would be theoretically conceivable that the Tribunal might make a decision which ought to have been made years, months, weeks or many days earlier, leaving it to the primary decision-maker then to update or alter that decision if any new facts and circumstances required, or warranted, that course. However, given the obvious purpose of having the Tribunal (as it is commonly put) "step into the shoes" of the primary decision-maker, so as to make the decision that ought to have been made "on the merits", this would appear to ascribe to the Tribunal an artificial function. It would not be the natural and appropriate function, given the role, purpose and powers of the Tribunal, viewed in its administrative setting.

41 When making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration. When, therefore, the Tribunal elects to make "a decision in substitution for the decision so set aside", as the Act permits, it would be surprising in the extreme if the substituted decision did not have to conform to such a standard.

42 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J, who had earlier been a member of the Commonwealth Administrative Review Committee, said this of an analogous question, in words applicable to the present issue[38]:

> "It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision

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[37] AAT Act, s 43(1)(c)(i).

[38] (1986) 162 CLR 24 at 45; [1986] HCA 40.

> an implication that the decision is to be made on the basis of the most current material available to the decision-maker.
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> This conclusion is all the more compelling when the decision in question is one which may adversely affect a party's interests or legitimate expectations by exposing him to new hazard or new jeopardy."

43 *Nature of the decision under review*: Fourthly, although the foregoing considerations lead to a conclusion that the Tribunal is not ordinarily confined to material that was before the primary decision-maker, or to consideration of events that had occurred up to the time of its decision[39], the fact that the review contemplated by s 43 of the AAT Act is one addressed to a "decision", inferentially arising under a different federal enactment, makes it necessary in each case to identify the precise nature and incidents of the decision that is the subject of the review.

44 Sometimes, it may be inherent in the nature of a particular decision that review of that decision is confined to identified past events. If, for example, under federal legislation, a pension is payable at fortnightly rests, by reference to particular qualifications that may themselves alter over time, a "review" of an administrative "decision" to grant or refuse such a pension, by reference to statutory qualifications, may necessarily be limited to the facts at the particular time of the decision.

45 That issue was raised in *Jebb v Repatriation Commission*[40], another decision of Davies J, but this time in the Federal Court of Australia, deciding an "appeal" from a decision of the Tribunal on a suggested error of law. In that case, Davies J found that the Tribunal had fallen into error in considering the applicant's entitlement to certain benefits exclusively by reference to the state of the evidence at a particular time in the past. In the relevant statutory context, there was no warrant for doing so. His Honour said[41]:

> "[T]he general approach of the [T]ribunal has been to regard the administrative decision making process as a continuum and to look upon the [T]ribunal's function as a part of that continuum so that, within the limits of a reconsideration of the decision under review, the [T]ribunal considers the applicant's entitlement from the date of application, or other proper commencing date, to the date of the [T]ribunal's decision. That function was enunciated in *Re Tiknaz and Director-General of Social*

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39 *The Commonwealth v Ford* (1986) 65 ALR 323 at 328.

40 (1988) 80 ALR 329; cf *Banovich v Repatriation Commission* (1986) 69 ALR 395.

41 (1988) 80 ALR 329 at 333-334.

Services[42]. The approach there taken has since been generally adopted. In the repatriation jurisdiction, it was applied after *Banovich*[43] in *Re Easton and Repatriation Commission*[44], where … the [T]ribunal … said[45]:

> 'The ambit of a review by the [Tribunal] is necessarily influenced by the ambit of the steps and proceedings that have taken place prior to its review, for the function of the [Tribunal] is to review a decision. But provided that the matter is within the ambit of its jurisdiction as a review authority, the general practice of the [T]ribunal is to take account of events that have occurred up to the date of the decision. Indeed, s 43(1) of the [AAT Act so implies].'"

46 There is thus a *general* approach deriving in particular from the statutory function of substituting one administrative decision for another. Nevertheless, the *particular* nature of the "decision" in question may sometimes, exceptionally, confine the Tribunal's attention to the state of the evidence as at a particular time[46].

47 The nature and incidents of the decision under review in the present case do not support a contention that the review was limited to the particular time in the past when the decision was made by the Authority. The present was not a case where, of its nature, a decision was made falling to be determined by reference to the state of evidence at a particular time. Both the language of s 303 of the Migration Act and its purpose suggest otherwise.

48 Section 303 of the Migration Act directs the Authority's attention, amongst other things, to whether an agent "becomes bankrupt"; whether he or she "is not a person of integrity" or "otherwise not a fit and proper person"; and whether "an individual related by employment to the agent is not a person of integrity". Each of these grounds is expressed in the present tense. Necessarily, the circumstances to which each is addressed could be altered by supervening events. Thus, the language in s 303 of the Migration Act clearly contemplates the possibility that circumstances may change between an initial decision of the

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42 (1981) 4 ALN N44.

43 (1986) 69 ALR 395.

44 (1987) 6 AAR 558.

45 (1987) 6 AAR 558 at 561 referring to *Lucas v Repatriation Commission* (1986) 69 ALR 415. See also *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 at 453.

46 See also reasons of Hayne and Heydon JJ at [99].

Authority and a subsequent decision of the Tribunal, performing the "review" which s 306 of the Migration Act contemplates and for which s 43 of the AAT Act provides[47].

49 Circumstantial changes may sometimes be adverse to an applicant before the Tribunal. Given the Tribunal's powers in certain circumstances to make a decision "in substitution for" a decision of the Tribunal which has been set aside upon review, it would be remarkable if the substituted decision could not take into account evidence of relevant, and even critical, supervening events. Such events might include the intervention of bankruptcy, or a criminal conviction for an offence of dishonesty of significance for the continued registration of the agent under the Migration Act.

50 This reasoning is further strengthened by an appreciation that the fundamental object of the exercise of the Authority's power to cancel or suspend the registration of an agent under the Migration Act is the protection of the section of the public that deals with migration agents. It is not, as such, the punishment of agents[48]. This object is best achieved by the Tribunal making its decision upon the most up to date material available to it at the time of its own decision. It would be impeded if the Tribunal were confined to the facts and circumstances subsisting at the time of the Authority's original decision weeks, months or even years in the past.

51 Moreover, to the extent that the essential function of the Tribunal is to provide a review "on the merits", conducting such a review on the basis of the most up to date evidence available is conformable with the basic objectives of the AAT Act. In this particular context, the contrary approach, urged by the Authority, would be likely to attract the very criticisms addressed to the law predating that Act in the report of the Commonwealth Administrative Review Committee[49].

52 *Errors in the reasoning below*: Fifthly, there are a number of particular defects in the reasoning of the majority in the Full Court which it is proper to

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[47] cf reasons of Kiefel J at [149].

[48] See *Smith v NSW Bar Association* (1992) 176 CLR 256 at 270; [1992] HCA 36 citing *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 286, 289; [1957] HCA 46 and *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 201-202; [1960] HCA 40.

[49] See above these reasons at [30]-[31].

mention. Thus, Nicholson J, having considered some of the provisions appearing in Div 3 of Pt 3 of the Migration Act, observed that[50]:

> "In my view the context in which s 303(1) appears shows a clear intent that conduct falling short of that required by the Act in relation to migration agents shall lead to the appropriate disciplinary result as at the date of the conduct being established."

53 Nicholson J was correct to acknowledge that it is necessary to derive the meaning of s 303(1) from the context of the entirety of Div 3 of Pt 3 of the Migration Act, not just the sub-section read in isolation[51]. However, part of that context, not specifically referred to by Nicholson J, is the express provision in s 306 for review, on the merits, of decisions of the Authority by the Tribunal. There is nothing to suggest that such review should not be performed by the Tribunal with the benefit of any new, fresh, additional or different material. In this case, such material was received and found to warrant the setting aside of the decision under review and the substitution of a different decision. With respect, it was an error on the part of Nicholson J to interpret s 303(1) of the Migration Act without sufficient regard to the substantial powers of the Tribunal to review the subject decision and, where it so decided, to set it aside and to make a different decision in substitution.

54 Likewise, Tracey J placed great emphasis on the fact that s 303(1) of the Migration Act was, as he saw it, predicated on a particular state of satisfaction on the part of the Authority, as distinct from the Tribunal[52]. This evidences the same error. It involves reading s 303(1) of the Migration Act without paying due regard to s 306 of that Act. That section affords significant powers to the Tribunal. These include the power to substitute its own decision for that of the Authority. Given the broad ambit of the power of substitution, as stated in the AAT Act and as upheld in judicial decisions over nearly 30 years, this Court would not be justified in endorsing such a narrow view of the Tribunal's powers. To do so would be incompatible with the history, purpose and object of the Act establishing the Tribunal, and the extension to it of broad powers of review "on the merits".

55 *Conclusion: the appellant succeeds*: For the foregoing reasons, the majority of the Full Court erred in their construction of the powers of the Tribunal. The reasons of Downes J are to be preferred, in respect of the approach

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[50] (2007) 158 FCR 525 at 533 [16].

[51] cf *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397; [1996] HCA 36.

[52] (2007) 158 FCR 525 at 541 [62].

that it was proper for the Tribunal to take and the materials upon which it was entitled and required to rely. The result is that the appellant is entitled to succeed on the first issue.

The conditions for lifting the caution were applicable

56 *A contestable question*: The Authority submitted that the "conditions" set by the Tribunal for lifting the appellant's "caution" were inconsistent, because they were incompatible with registration as an agent under the Migration Act. This submission is not without a certain forensic force. So much is self-evident given that it convinced the primary judge and the majority in the Full Court of the Federal Court, and has now persuaded Kiefel J in this Court.

57 It must therefore be acknowledged that the position is not absolutely clear-cut. It falls to the courts, and now to this Court, to give the preferable, and therefore correct, meaning to the language of s 304A of the Migration Act. Whilst I acknowledge the arguability of the contrary interpretation, the better conclusion is that the Tribunal did not fall into jurisdictional or other legal error in invoking s 304A so as to impose the conditions that it specified for lifting the caution that it gave to the appellant. The majority of the Full Court erred in holding otherwise. Five considerations support this opinion.

58 *Timing of the Tribunal's decision*: First, the stage at which the relevant administrative "decision" was made is important. The Authority had earlier exercised its powers and, relevantly, decided to cancel the appellant's registration as an agent. As was his right, the appellant, invoking s 306 of the Migration Act, sought review by the Tribunal. It concluded that, by reason of demonstrated errors, the decision under review should be "set aside". Its power to so decide arises from the AAT Act and has not been contested. The errors identified in the decision of the Authority are not presently disputed.

59 Having elected to set the decision of the Authority aside, the Tribunal was empowered by the AAT Act either to remit the matter to the Authority for reconsideration or to make a decision "in substitution for" the decision set aside. The Tribunal opted to take the latter course.

60 Once it is concluded that the Tribunal is authorised, in a case such as the present, to have regard to new, fresh, additional or different evidence and should make its decision on the basis of current facts and circumstances[53], it necessarily follows that the Tribunal is able to utilise all of the powers enjoyed by the Authority at the time the Tribunal makes its decision, including powers that may have accrued to the Authority in the interval of time since the original decision

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[53] See above these reasons at [50].

was made. So much follows not only from general principles governing the accretion of powers affecting dispositions of bodies such as the Tribunal but also from the power of "substitution" granted by s 43(1)(c)(i) of the AAT Act.

61 It was therefore proper for the Tribunal to consider a different order for disciplining the appellant in respect of findings of default on the appellant's part which the Tribunal upheld or itself made. In the result, the Tribunal decided to "caution" the appellant, in accordance with s 303(1)(c) of the Migration Act. However, it also decided to provide for the "lifting" of the caution in the manner described. In doing so, the Tribunal adhered closely to the language of the Migration Act. The power that s 304A of that Act affords was granted in the expectation that it would be used. Moreover, it was granted at large without any relevant statutory limitations. Ordinary canons of statutory construction would suggest that a power, granted at large, is available to be deployed by the Authority (or, in substitution, by the Tribunal) in a case such as the present.

62 *Nature of disciplinary powers*: Secondly, it is proper to observe that the power conferred by s 304A was introduced into the Migration Act by amendment taking effect on 1 July 2004[54]. By the amending provision, the power applied in respect of cautions given after that date[55]. The caution given to the appellant by the Tribunal, in substitution for the cancellation of his registration, was given after 1 July 2004.

63 The Migration Act, as amended by the Parliament, contemplates the exercise of the power to caution following satisfaction of matters stated in s 303(1). There is nothing to preclude the administration of a caution even where, for example, the decision-maker becomes satisfied that the agent "is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance" at a given time[56]. Thus, the language and structure of s 303(1) of the Migration Act suggest that a caution is intended to be a significant disciplinary measure, especially given the provision for publicising disciplinary decisions and providing details to clients of the agent concerned[57].

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[54] *Migration Legislation Amendment (Migration Agents Integrity Measures) Act* 2004 (Cth), Sched 1, item 71.

[55] *Migration Legislation Amendment (Migration Agents Integrity Measures) Act* 2004 (Cth), Sched 1, item 180.

[56] Migration Act, s 303(1)(f).

[57] See Migration Act, ss 305A, 305B. See also reasons of Hayne and Heydon JJ at [107].

64 The exceptional power to "lift" a caution given to an agent was obviously intended to be applied. There is no reason to read down the ambit of the power to caution or the additional power to lift a caution conditionally, pursuant to the 2004 amendments to the Migration Act. To do so would defeat the apparent purpose of the Parliament expressed in the language that it enacted.

65 *Nature of powers of the Tribunal*: Thirdly, the fact that the power to "lift" a caution in s 304A is reposed in an independent statutory entity such as the Authority[58], with the facility for review by the Tribunal, supports construing that power in a broad and ample way.

66 Analogies between the Tribunal and a court ought not to be pressed too far. Nevertheless, given the role of the Tribunal, some parallels can be drawn between the conventional approach of viewing powers conferred on courts amply, so that they may fulfil their functions, and the principles that ought to be applied in construing statutory powers granted to the Tribunal. Like a court, the Tribunal is entirely independent, and intended to be impartial in its decision-making. Its President must be a judge of the Federal Court of Australia[59]. Its Deputy Presidents can be, and are, judges also. It would therefore be contrary to principle to construe a power, conferred on the Tribunal for use in disposing of disciplinary proceedings, in a way that would narrow or curtail the power afforded when "stepping into the shoes" of the primary decision-maker[60]. On the contrary, the nature and statutory functions of the Tribunal argue for a broad and ample interpretation of its powers, because they are to be exercised in substitution for the Authority.

67 *Purpose of the review*: Fourthly, once it is appreciated that the substituted decision of the Tribunal is intended to uphold discipline amongst agents, in accordance with the Migration Act, and thus to protect members of the public who deal with such agents, there can be no good reason for construing s 304A of that Act narrowly, particularly where a decision of the Tribunal is concerned. Still less can there be a reason to exclude recourse to s 304A where the only expressed precondition for its operation (the giving of "a caution") is fulfilled, as it was in the present instance.

68 It is true that the Tribunal does not enjoy all of the investigatory powers afforded to the Authority by the Migration Act. This fact would be known to the

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[58] Migration Act, s 315.

[59] AAT Act, s 7(1).

[60] cf *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192 per Mason CJ and Deane J, 205 per Gaudron J; [1992] HCA 28.

Tribunal. In given circumstances, it might afford a reason for the Tribunal, having set aside a decision under review for error, to elect to remit the matter to the Authority for reconsideration, in accordance with any directions or recommendations thought appropriate. In the present case, that course was not adopted. There is no indication in the reasons of the Tribunal that it felt constrained by a lack of relevant evidence, or otherwise that it was unable to reach a decision that it could properly substitute for that of the Authority. Given the broad powers afforded to the Tribunal for the purpose of bringing disputes over relevant administrative decisions to finality "on the merits", no ground is shown for narrowing the decision-making powers of the Tribunal, either generally or in the present case.

69 *Taking account of the circumstances*: Fifthly, there is nothing in s 304A, or in any other provision of the Migration Act, that limits the power to "lift" a caution given to an agent, where such a course is appropriate, on "conditions" moulded to the particular circumstances of the case. This is what the Tribunal set out to do in the appellant's case.

70 Mindful of the purpose of protecting the public, but also of the evidence concerning the appellant's recent conduct and experience, the Tribunal made an available and arguably a sensible disciplinary decision. It paid regard to the evidence provided to the Tribunal about the activities of the appellant after the decision to cancel his registration as an agent was made and after the stay of the operation of that order took effect.

71 In the context of professional discipline in other fields, it is not unusual for conditional orders to practise, or to return to practise, to be made, fashioned so as to take into account particular impediments, arising from the evidence, to a full, immediate return to the entire range of professional duties[61].

72 Whilst it is true that the Migration Act does not comprehend qualified rights to practise as such, neither do the laws providing for the registration of medical practitioners or dentists, or the admission of legal practitioners. Yet in particular circumstances, the imposition of temporary conditions following disciplinary proceedings, here as an adjunct to a caution, might well be an entirely appropriate disciplinary response, protective of the public. In such cases, it would represent the "correct or preferable decision" on the merits of the case. Clearly, the Tribunal considered a decision of such a nature to be appropriate to its ultimate factual findings. This Court is not concerned with the factual merits of that conclusion. A decision that the Tribunal lacked the jurisdiction and power to fashion the order that it did is not required by the language, still less the

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[61] cf *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 639.

purpose, of the Migration Act. It does not represent the better view of the meaning of the amended provisions of that Act.

73 It is true, as Downes J acknowledged[62], that the language of s 304A of the Migration Act is somewhat confusing and imperfect:

> "The concept of a caution subject to conditions is new to me. The idea that a condition could relate to the lifting of the caution itself seems even more novel. However, this is what ss 303 and 304A expressly provide. The novelty of a concept should not lead to a narrowing of its extent. …
>
> I can well understand that the legislature might have provided for a fourth disciplinary alternative within s 303(1), namely, the imposition of conditions on registration itself. That is how one would ordinarily expect conditions to operate. However, that is not what is provided by s 303(1)(c) and the rather inelegantly worded s 304A.
>
> Section 304A speaks of a 'condition for the lifting of a caution'. The concept of the lifting of a caution itself seems odd. After all, a caution is a single act of communication. It will usually have as its future consequence some more serious disciplinary action if the caution is not heeded, rather than the 'lifting' of the caution through compliance with conditions. How can a caution, once given, be lifted?"

74 Whilst noting these concerns, Downes J, alone in the Full Court, gave proper meaning to the provision that the Parliament had enacted. Faced with the "strained use of the English language"[63] in the Migration Act, the approach taken by Downes J was the correct one.

75 When the relevant decision-maker (the Authority or the Tribunal, as the case may be) decides in a disciplinary matter to give a "caution", the special power of "lifting" the caution on conditions becomes available, as s 304A provides. That is the power that the Senior Member of the Tribunal decided to exercise in the appellant's case. There is no challenge (so far as one would be possible) to the factual premises upon which that decision rested. The Authority's contention that error of law affected the exercise of the Tribunal's jurisdiction and powers is not made out.

76 *Conclusion: the appellant succeeds*: The conclusion reached, and the decision made, by the Tribunal were open to it after it found mistakes in the

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[62] (2007) 158 FCR 525 at 539 [51]-[53].

[63] (2007) 158 FCR 525 at 539 [53].

original decision of the Authority. The Tribunal having decided to "set aside" the Authority's decision and to make "a decision in substitution for the decision so set aside", the giving of a caution was permitted pursuant to s 303(1)(c) of the Migration Act. Its "lifting" on the stated conditions was permitted on the basis of s 304A of that Act.

77 It follows that on the second issue also the approach and conclusion of Downes J are to be preferred. The result is that on this issue, the appellant is entitled to succeed.

Orders

78 The appeal to this Court should be allowed with costs. The judgment of the Full Court of the Federal Court of Australia should be set aside. In place of that judgment, it should be ordered that (a) the appeal to the Full Court is allowed with costs; (b) the orders of the primary judge (Edmonds J) are set aside and the appeal to the Federal Court is dismissed with costs.

79 HAYNE AND HEYDON JJ. In July 2003, the Migration Agents Registration Authority ("MARA") cancelled the appellant's registration as a migration agent. Part 3 (ss 275-332B) of the *Migration Act* 1958 (Cth) ("the Migration Act") regulated the registration of migration agents and the provision of immigration assistance. MARA was satisfied that the appellant had not complied with the Code of Conduct prescribed under s 314 of the Migration Act, and that he was not a person of integrity, or was otherwise not a fit and proper person to give immigration assistance. Subsequently, MARA made a number of other decisions about the appellant's registration as a migration agent, including decisions not to re-register him.

80 Section 306 of the Migration Act provided that, subject to the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"), application might be made to the Administrative Appeals Tribunal ("the Tribunal") for review of certain decisions made by MARA, including a decision to cancel registration as a migration agent. The appellant applied to the Tribunal for review of the cancellation decision, and for review of the other decisions that MARA had made about his registration as a migration agent.

81 Two questions about the Tribunal's review of the cancellation decision now come to this Court. One concerns the Tribunal's task. Was it, as MARA contended, to decide whether, *at the time MARA made its decision*, the correct or preferable[64] decision was that the appellant was not a person of integrity, or was otherwise not a fit and proper person to give immigration assistance? Or was it, as the appellant contended, to decide what was the correct or preferable decision *at the time the Tribunal made its decision*? The second question in this Court concerns the powers of MARA. Could MARA (and could the Tribunal in exercising for itself "the powers and discretions that are conferred"[65] by the Migration Act on MARA) impose certain conditions on the appellant about his future conduct as a migration agent when it cautioned him?

82 To explain how those questions arise in this Court it is necessary first to refer briefly to the steps taken by MARA, next to describe the course of proceedings in the Tribunal and the courts below, and then to refer to the relevant legislative provisions.

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[64] The expression comes from *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J.

[65] *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"), s 43(1).

The steps taken by MARA

83 MARA cancelled the appellant's registration on 14 July 2003, refused to renew his registration on 8 October 2003[66], suspended his registration in April 2004, and again refused to renew his registration in August 2004. Each of these decisions was stayed, enabling the appellant to continue acting as a migration agent. But the stay that was granted in respect of the cancellation decision was conditional upon the appellant undertaking not to engage in any business relating to protection visas and upon his being supervised by another migration agent. Most of MARA's findings that the appellant had breached the Code of Conduct concerned applications for protection visas.

The course of proceedings in the Tribunal

84 On 6 April 2005, the Tribunal published the findings of fact it made about whether the appellant had breached the Code of Conduct. The Tribunal found 51 breaches of the Code. (MARA had found 98.) All of the breaches found by the Tribunal were constituted by acts or omissions that had occurred before MARA made its decision to cancel the appellant's registration.

85 On 2 September 2005, the Tribunal published its decision on its review of the cancellation decision and the other decisions that MARA had made about the appellant's registration as a migration agent. The Tribunal concluded that it was not satisfied that the appellant was not a person of integrity or was not otherwise a fit and proper person to give immigration assistance. It set aside the cancellation decision and the other decisions under review. The Tribunal decided that the appellant should be cautioned and that the caution would be lifted on 1 September 2008 if the appellant did not, in the meantime, provide assistance with applications for protection visas, and if, further, his work as a migration agent during that time was supervised by another registered migration agent.

86 In deciding whether the appellant was not a person of integrity, or was otherwise not a fit and proper person to give immigration assistance, the Tribunal took into account evidence of the appellant's conduct between July 2003 (when MARA had cancelled his registration) and September 2005 (when the Tribunal made its decision).

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66 Section 299 of the *Migration Act* 1958 (Cth) ("the Migration Act") provided that, subject to a number of other provisions of the Act, including s 303, the registration of a registered migration agent "lasts for 12 months after the registration".

Proceedings in the courts

87 Being dissatisfied with the Tribunal's decision, MARA "appealed" to the Federal Court of Australia. That "appeal", brought pursuant to s 44(1) of the AAT Act, was confined to a question of law. First, MARA submitted that the Tribunal made an error of law by asking whether, in September 2005, at the time of the Tribunal's decision, the appellant was shown not to be a person of integrity or was otherwise not a fit and proper person to give immigration assistance. MARA submitted that the Tribunal should have considered whether, in July 2003, when MARA made its decision, the correct or preferable decision was to cancel the appellant's registration as a migration agent. Secondly, MARA submitted that the Tribunal's finding that the appellant should not do certain kinds of work as a migration agent, and that he should be supervised in the work he did, showed either that the Tribunal had concluded that the appellant was not yet a fit and proper person to be a migration agent or that it had misconstrued the relevant provisions of the Migration Act.

88 MARA's appeal to the Federal Court was allowed[67]. The Tribunal's decision was set aside and the matter was remitted to the Tribunal to be determined according to law. The primary judge (Edmonds J) concluded[68] that the question for the Tribunal was whether, at the date of MARA's decision, the appellant was not a person of integrity or was otherwise not a fit and proper person to give immigration assistance. Because the Tribunal had considered the appellant's conduct during the period between MARA's decision to cancel his registration and the Tribunal conducting its review, the primary judge concluded[69] that it had "asked itself the wrong question; and the Tribunal had regard to matters it was bound not to consider".

89 The primary judge did not accept[70] MARA's argument that the Tribunal's imposition of conditions about the appellant's future work as a migration agent showed either that the Tribunal had concluded that the appellant was not a fit and proper person to give immigration assistance, or that the Tribunal had misconstrued the Migration Act provisions about a migration agent being a fit and proper person to give immigration assistance. But the primary judge held[71]

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[67] *Migration Agents Registration Authority v Shi* (2006) 43 AAR 424.

[68] (2006) 43 AAR 424 at 443 [73].

[69] (2006) 43 AAR 424 at 444 [77].

[70] (2006) 43 AAR 424 at 445 [85].

[71] (2006) 43 AAR 424 at 445 [85]-[89].

that neither MARA, nor the Tribunal on review of a decision of MARA, could set conditions for the lifting of a caution administered to a migration agent, if those conditions could not be imposed as conditions of registration as a migration agent. The primary judge concluded[72] that the conditions imposed by the Tribunal in this case were beyond power.

90 The appellant appealed to the Full Court of the Federal Court against the orders of Edmonds J. The Full Court, by majority (Nicholson J and Tracey J; Downes J dissenting), dismissed[73] that appeal.

91 By special leave, the appellant now appeals to this Court. The appeal to this Court should be allowed. The orders of the Full Court should be set aside and consequential orders made restoring the Tribunal's decision.

The applicable legislation

92 As this Court has so often emphasised[74] in recent years, questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions. Reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute or statutes. Expressions used in decided cases to explain the operation of commonly encountered statutory provisions and their application to the facts and circumstances of a particular case may serve only to mask the nature of the task that is presented when those provisions must be applied in

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[72] (2006) 43 AAR 424 at 445 [89].

[73] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525.

[74] See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and Callinan JJ, 89 [46] per Kirby J; [2001] HCA 49; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11] per Gleeson CJ, Gummow, Hayne and Callinan JJ, 545 [63] per Kirby J; [2001] HCA 53; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 111-112 [249] per Kirby J; [2001] HCA 56; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2003] HCA 59; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 206 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 240-241 [167]-[168] per Kirby J; [2005] HCA 58; *Weiss v The Queen* (2005) 224 CLR 300 at 312-313 [31] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2005] HCA 81.

another case. That masking effect occurs because attention is focused upon the expression used in the decided cases, not upon the relevant statutory provisions.

93 In this case, attention must be directed to provisions of both the AAT Act and the Migration Act. The task of the Tribunal in reviewing the cancellation decision was to be identified by considering the intersecting operation of ss 25 and 43 of the AAT Act, and ss 303 and 306 of the Migration Act.

94 Section 25 of the AAT Act provided (so far as presently relevant) that:

> "(1) An enactment may provide that applications may be made to the Tribunal:
>
> (a) for review of decisions made in the exercise of powers conferred by that enactment; or
>
> (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.
>
> (3) Where an enactment makes provision in accordance with subsection (1), that enactment:
>
> (a) shall specify the person or persons to whose decisions the provision applies;
>
> (b) may be expressed to apply to all decisions of a person, or to a class of such decisions; and
>
> (c) may specify conditions subject to which applications may be made.
>
> ...
>
> (4) The Tribunal has power to review any decision in respect of which application is made to it under any enactment."

Section 306 of the Migration Act was an enactment of the kind described in s 25(1) of the AAT Act. At the times relevant to this matter, s 306 of the Migration Act provided:

> "Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for review of a decision by the Migration Agents Registration Authority made under this Division."

The relevant decision by MARA "made under this Division"[75] was a decision under s 303. After MARA made its decision to cancel the appellant's registration, s 303 was amended by the *Migration Legislation Amendment (Migration Agents Integrity Measures) Act* 2004 (Cth) ("the 2004 Amendment Act"). Nothing turns on the amendments that were made to s 303. At the time the Tribunal made its decision, s 303 (as amended by the 2004 Amendment Act) provided:

> "(1) The Migration Agents Registration Authority may:
>
> (a) cancel the registration of a registered migration agent by removing his or her name from the register; or
>
> (b) suspend his or her registration; or
>
> (c) caution him or her;
>
> if it becomes satisfied that:
>
> (d) the agent's application for registration was known by the agent to be false or misleading in a material particular; or
>
> (e) the agent becomes bankrupt; or
>
> (f) the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance; or
>
> (g) an individual related by employment to the agent is not a person of integrity; or
>
> (h) the agent has not complied with the Code of Conduct prescribed under section 314.
>
> Note 1: The Authority is required to caution a registered migration agent or cancel or suspend a registered migration agent's registration in certain circumstances: see Division 3AA.
>
> Note 2: If the Authority is considering making a decision under this section, it must invite the registered migration agent to make a submission: see sections 309 and 310.

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[75] Migration Act, s 306.

Unpaid registration status charge

(2) The Authority may also suspend the registration of a registered migration agent if any registration status charge payable by him or her remains unpaid after the time when it becomes due for payment."

Section 43 of the AAT Act governed the Tribunal's decision on review. So far as now relevant, s 43 provided:

"(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

(a) affirming the decision under review;

(b) varying the decision under review; or

(c) setting aside the decision under review and:

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

...

(6) A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect."

95 The decision which was the subject of the Tribunal's review, and which is at the centre of the present proceedings, was a decision of the kind identified in s 303(1)(a) of the Migration Act – a decision to "cancel the registration of a registered migration agent by removing his ... name from the register". The grounds on which MARA acted in exercising that power were those identified in s 303(1)(f) and (h) – that MARA was satisfied that the appellant "is not a person

of integrity or is otherwise not a fit and proper person to give immigration assistance" (par (f)) and that "the agent has not complied with the Code of Conduct prescribed under section 314" (par (h)).

The Tribunal's task

96 In reviewing MARA's decision to cancel the appellant's registration, the Tribunal was empowered (by s 43(1) of the AAT Act) to exercise all the powers and discretions conferred by the Migration Act on MARA. The questions for the Tribunal in reviewing the cancellation decision were first, whether *the Tribunal* was satisfied that either of the s 303(1) grounds said to be engaged in this case was made out, and secondly, whether *the Tribunal* should exercise the powers given by s 303(1) to cancel or suspend the appellant's registration or to caution him. That is, the first questions for the Tribunal were whether *it* was satisfied that the appellant "is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance" and whether *it* was satisfied that the appellant had not complied with the Code of Conduct.

97 MARA's contention, in this Court and in the courts below, that the question for the Tribunal was whether the correct or preferable decision *when MARA made its decision* was to cancel the appellant's registration, should be rejected. It finds no footing in the relevant provisions. To frame the relevant question in the manner urged by MARA would treat the Tribunal's task as confined to the correction of demonstrated error in administrative decision-making in a manner analogous to a form of strict appeal[76] in judicial proceedings. But that is not the Tribunal's task.

98 It has long been established[77] that:

> "The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one *on the material before him*. The question for the determination of the Tribunal is whether that decision was the correct or preferable one *on the material before the Tribunal*." (emphasis added)

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[76] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108-109 per Dixon J; [1931] HCA 34.

[77] *Drake* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J.

And MARA accepted in argument in this Court that in conducting its review the Tribunal was not limited to the record that was before MARA[78]. It submitted, however, that the Tribunal had to consider the circumstances "as appear from the record before it *as they existed at the time of the decision under review*".

99 Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the material before the Tribunal will include information about conduct and events that occurred after the decision under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation.

100 The AAT Act provides for the review of decisions by a body, the Tribunal, that is given all of the powers and discretions that are conferred on the original decision-maker. As Brennan J rightly pointed out in an early decision of the Tribunal[79], not all of the powers that the Tribunal may exercise draw upon the grant of powers and discretions to the primary decision-maker:

> "A decision by the Tribunal pursuant to s 43(1)(a) to affirm the original decision leaves the original decision intact, and that is the only decision which takes effect under the enactment: the original powers are not drawn upon by the Tribunal's order. Equally, a decision to set aside the decision under review and remit the matter for reconsideration pursuant to s 43(1)(c)(ii) requires the original repository of the powers and discretions to exercise them afresh: they are not exercised by the Tribunal. Section 43(1) grants the original powers and discretions to the Tribunal, but it does not require the Tribunal to exercise them unless the Tribunal is making a fresh order the effectiveness of which depends upon their exercise."

But subject to that qualification, the Tribunal's task is "to do over again"[80] what the original decision-maker did.

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78 The Tribunal's powers to regulate its own procedures, to inform itself on any matter as it thinks appropriate, and to receive evidence are contained in ss 33 and 40 of the AAT Act.

79 *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167 at 175-176.

80 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 502 per Kitto J; [1963] HCA 41.

101 Nothing in the provisions of the Migration Act fixed a particular time as the point at which a migration agent's fitness to provide immigration assistance was to be assessed. Unlike some legislation providing for pension entitlements[81], in which the critical statutory question is whether a criterion was met or not met at a particular date, such as the date of cancellation of entitlements, the provisions of s 303 of the Migration Act contained no temporal element. It follows that when the Tribunal reviews a decision made under s 303, the question which the Tribunal must consider (is the Tribunal satisfied that the person concerned is not a fit and proper person to give immigration assistance?) is a question which invites attention to the state of affairs as they exist at the time the Tribunal makes its decision. MARA's argument to the contrary should have been rejected in the courts below.

Cautioning on condition?

102 As noted earlier, after MARA made its cancellation decision, but before the Tribunal decided its review, the 2004 Amendment Act amended the Migration Act. In particular, the 2004 Amendment Act provided for the insertion of s 304A:

> "The Migration Agents Registration Authority may set one or more conditions for the lifting of a caution it gives to a registered migration agent.
>
> Note: Particulars of cautions are shown on the Register: see section 287."

103 In the present case, the Tribunal concluded that the appellant's registration as a migration agent should be neither cancelled nor suspended. But it concluded that he should not be permitted to offer assistance in connection with applications for protection visas or to practise unsupervised before 1 September 2008.

104 It was not disputed in the proceedings in this Court or in the courts below that, in reviewing the cancellation decision, the Tribunal could exercise the power given by s 304A. The tension between MARA's acceptance that the Tribunal could exercise the power given by s 304A and MARA's submission that the Tribunal should otherwise be confined to considering the state of affairs at the date of MARA's cancellation decision is evident. For the reasons given earlier, it is a tension that is resolved by the rejection of the latter submission.

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[81] See, for example, *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342.

105 MARA submitted that the majority in the Full Court of the Federal Court and the primary judge had correctly concluded that s 304A did not authorise imposing conditions of the kind imposed in this case as conditions for the lifting of the caution administered to the appellant. In particular, MARA submitted that s 304A did not authorise "conditions for the lifting of a caution that seek to qualify the registered agent's right to use that registration".

106 The power to "set one or more conditions for the lifting of a caution"[82] is expressed in terms that do not expressly identify the kinds of condition that may be set. The limits to the power are therefore to be identified by reference to the subject-matter, scope and purpose of the legislation.

107 In considering what are those limits, it is necessary to begin by identifying what is meant by a "caution" in the provisions of the Migration Act that dealt with the registration of migration agents. Section 303(1) provided that one of the three possible consequences of MARA being satisfied of one or more of the matters stated in pars (d) to (h) of that sub-section was for MARA to "caution" a migration agent. But administration of a "caution" was more than the formal communication of a warning to the agent concerned. Particulars of any caution given to an agent were to be recorded in the Register of Migration Agents[83], and MARA was obliged[84] to make that Register available for inspection by any person. Thus the administration of a caution was a matter of public record.

108 The reference in s 304A to the "lifting" of a caution must be understood in that light. The "lifting" to which the section referred would be reflected in the Register. (The assumption in argument may have been that it would be reflected by removing from the Register any reference to the caution. Whether that was required or only a note that the caution was no longer continuing matters not for present purposes.)

109 Reference to a form of "qualified registration" provides no useful criterion for distinguishing between conditions that can and those that cannot be lawfully imposed under s 304A as conditions for lifting a caution. The primary judge expressed[85] the relevant criterion as being whether the conditions set for the lifting of a caution are "conditions which are consistent with the migration

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[82] s 304A.

[83] s 287(2)(h).

[84] s 287(4).

[85] (2006) 43 AAR 424 at 445 [85].

agent's registration". That is, it was the view[86] of the primary judge that conditions would not be set for lifting a caution "which could not be imposed as conditions of an individual's registration as a migration agent".

110 These statements in amplification of the reference to "qualified registration" reveal why it provides no useful criterion for distinguishing between conditions that can and cannot be set as conditions for lifting a caution. The root of the difficulty in the asserted criterion is that the Migration Act did not provide for MARA to impose conditions in connection with the registration of a migration agent except as conditions for lifting a caution. If the use of the expression "qualified registration" was intended to invite a comparison between conditions that could be imposed on registration and those that could not, it is a comparison that could not be made.

111 Any condition imposed as a condition for lifting a caution could be described as providing a form of "qualified registration" of a migration agent. The agent would be registered but the agent's registration would be "qualified" for so long as the condition applied. The qualification to the registration would be that the agent concerned was under caution until the condition was met. The power given by s 304A is not limited in the manner alleged by MARA.

112 MARA accepted, correctly, that a caution could be administered to a migration agent on condition that the agent undertake a prescribed course of training. The Explanatory Memorandum for the 2004 Amendment Act had expressly given that as an example of the operation of the new s 304A. But no relevant distinction can be drawn between a condition that required an agent to undertake a course of instruction, and a condition that required an agent to work subject to supervision. No relevant distinction can be drawn because both are conditions that relate to the subject-matter, scope and purpose of the relevant provisions of the Migration Act and fall within the otherwise general words of s 304A. Likewise, a condition that a migration agent not undertake certain kinds of work relates to the subject-matter, scope and purpose of the relevant provision and falls within the words of s 304A.

113 Contrary to MARA's submission, the provisions of the Migration Act which provide for and regulate the registration of migration agents are not to be read as if registration as an agent confers on the person registered an unfettered capacity to give migration assistance. The relevant provisions must be read together. The powers and duties of a migration agent are to be identified from the combined operation of all of those provisions. Section 280(1) of the Migration Act provides that a person who is not a registered migration agent

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86 (2006) 43 AAR 424 at 445 [87].

must not give immigration assistance. But what a registered migration agent may do in giving immigration assistance is regulated by other applicable provisions of the Migration Act, including s 304A.

114 A failure to abide by the conditions for lifting a caution may well be a matter relevant to the annual exercise of the power to re-register an agent[87]. Failure to abide by such conditions may also be relevant to whether an agent is a fit and proper person to give immigration assistance. But a migration agent subject to a caution of the kind now in issue may continue to act as a migration agent. Imposition of conditions of the kind imposed in this case as conditions for the lifting of the caution administered to the appellant was not inconsistent with the scheme for which the relevant provisions of the Migration Act provided.

Conclusion and orders

115 For these reasons the appeal to this Court should be allowed with costs. The orders of the Full Court of the Federal Court of Australia should be set aside and in their place there should be orders that (a) the appeal to that Court is allowed with costs; and (b) the orders of Edmonds J made on 15 September 2006 and 27 November 2006 are set aside and in their place there are orders that the appeal to the Federal Court against the decision of the Administrative Appeals Tribunal is dismissed with costs.

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[87] Migration Act, s 299.

116 CRENNAN J. There are two issues for decision by the Court in this appeal:

1. Whether, on a review by the Administrative Appeals Tribunal ("the Tribunal") of a decision of the Migration Agents Registration Authority ("the Authority") to cancel a migration agent's registration[88], the Tribunal was restricted to considering evidence of the facts and circumstances as they existed at the time of the Authority's decision.

2. Whether the Tribunal, in substituting its own decision for that of the Authority, had the power[89] to impose conditions in relation to future conduct, when it cautioned the migration agent.

117 On the first issue, I agree with the reasons of Kiefel J for concluding that in the circumstances of this case the Tribunal was entitled to take into account the fresh evidence available to it.

118 On the second issue, I agree, for the reasons given by Kirby J, that the Tribunal was empowered to impose the conditions it did when cautioning the migration agent. I agree with Kirby J that the appeal should be allowed and consequential orders made in the form that he proposes.

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[88] Under the *Migration Act* 1958 (Cth), s 303.

[89] Under the *Migration Act* 1958 (Cth), s 304A.

119 KIEFEL J. The principal question on this appeal concerns the review by the Administrative Appeals Tribunal ("the Tribunal") of a decision of the Migration Agents Registration Authority ("the Authority") to cancel the appellant's registration as a migration agent. The question is whether, on that review, the Tribunal is restricted to a consideration of facts and events which had occurred at the time of the Authority's decision. The answer to it lies in the identification of the powers which are to be exercised by the Tribunal and the specific decision to which they are addressed.

The Authority's decision

120 Part 3 of the *Migration Act* 1958 (Cth) is concerned with migration agents and the immigration assistance they may render. Immigration assistance[90] can only be given by a person who is registered as a migration agent[91]. Division 3 deals with registration and confers power upon the Authority[92] to discipline registered migration agents. Section 303(1) provides:

> "The Migration Agents Registration Authority may:
>
> (a) cancel the registration of a registered migration agent by removing his or her name from the register; or
>
> (b) suspend his or her registration; or
>
> (c) caution him or her;
>
> if it becomes satisfied that:
>
> (d) the agent's application for registration was known by the agent to be false or misleading in a material particular; or
>
> (e) the agent becomes bankrupt; or
>
> (f) the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance; or
>
> (g) an individual related by employment to the agent is not a person of integrity; or

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90 Defined, *Migration Act*, s 276.

91 *Migration Act*, s 280.

92 The Authority is appointed by the Minister: see *Migration Act*, ss 275, 315. It is currently the Migration Institute of Australia Limited.

(h) the agent has not complied with the Code of Conduct prescribed under section 314."

121 On 14 July 2003 the Authority cancelled the appellant's registration, by reference to s 303(1)(h) and (f). Its decision records the investigatory steps taken by it subsequent to the receipt of a complaint about the appellant, including its request of the appellant for his files[93] and its interviews of him[94], culminating in its notice to him that it was contemplating taking the action referred to in s 303(1)(a) to (c) because of breaches of the Code of Conduct, which it specified by reference to the clauses concerned. Following upon the receipt of the appellant's submissions the Authority made findings of breaches of the Code of Conduct. The breaches included failures, on his part, to keep his clients informed, failures to control and supervise his staff, failures connected with applications which were vexatious or grossly unfounded, the making of misleading and inaccurate statements, failures to maintain and improve his knowledge of statutory amendments and failures to seek assistance and advice when necessary. The Authority also found that he was not a person of integrity or otherwise not a fit and proper person to give immigration assistance. This conclusion was arrived at by reference to the pattern of conduct evidenced by the breaches of the Code. The Authority made three further decisions relating to the appellant's registration as an agent, but they are not relevant to the appeal.

Statutory provisions for review

122 By s 25(1)(a) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"), an enactment may provide for applications to be made to the Tribunal "for review of decisions made in the exercise of powers conferred by that enactment". Sub-section (4) provides that the Tribunal has power to review any decision in respect of which application is made to it under any enactment. The Tribunal may determine the scope of its review, by limiting questions of fact or the evidence and issues before it[95]. Section 306 of the *Migration Act* provides that application may be made to the Tribunal for a review of a decision of the Authority made under Div 3, subject to the AAT Act.

123 The Tribunal's powers on review are provided by s 43(1) of the AAT Act, which is in terms:

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[93] *Migration Act*, s 308(1)(c).

[94] *Migration Act*, s 308(1)(b).

[95] s 25(4A), inserted by the *Administrative Appeals Tribunal Amendment Act* 2005 (Cth), Sched 1, item 73; commenced 16 May 2005.

> "For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:
>
> (a) affirming the decision under review;
>
> (b) varying the decision under review; or
>
> (c) setting aside the decision under review and:
>
> (i) making a decision in substitution for the decision so set aside; or
>
> (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal."

And s 43(6) provides:

> "A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect."

124 The Tribunal is provided, in the first instance, with the evidence and materials upon which the original decision-maker's decision was based, and copies of all relevant documents in that person's possession[96]. The Tribunal may require other documents to be lodged, where it considers they may be relevant to its review[97]. Amongst the procedural powers given to the Tribunal is the power to require a person to give evidence and produce books, documents or things mentioned in the Tribunal's summons[98]. It may direct a party to the proceedings to provide further information in relation to the proceedings[99].

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[96] s 37(1).

[97] s 37(2).

[98] s 40(1A).

[99] s 33(2A)(a).

The Tribunal's decision

125 On 31 July 2003 the Tribunal granted a stay with respect to the Authority's decision[100], subject to conditions that the appellant be supervised by another migration agent and that he undertake not to engage in any business relating to protection visas. Visas of this kind are granted where a non-citizen has established a claim to the status of a refugee[101].

126 The process undertaken by the Tribunal was to make findings as to the breaches by the appellant of the Code of Conduct, receive submissions with respect to those findings and then publish its decision. The Tribunal did not find that the appellant had breached the provisions of the Code to the extent that the Authority had. Nevertheless it found 51 breaches, 47 of which related to protection visa cases. In its decision of 2 September 2005 the Tribunal concluded, to the contrary of the conclusion reached by the Authority, that it was not satisfied that the appellant was not a person of integrity or was not otherwise a fit and proper person to give immigration assistance[102]. It made orders setting aside the decisions under review. It substituted, for the cancellation decision, a decision that the appellant be cautioned pursuant to s 303(1)(c) and that the caution would be lifted on 1 September 2008 if he complied with conditions in terms of those attaching to the stay it had granted. A further issue on appeal is whether the Tribunal has power to impose conditions of this kind.

127 In reaching its decision the Tribunal took into account that the appellant had been supervised for two years and the supervisor, who was a knowledgeable and experienced migration agent, held the appellant in high regard. There had been no evidence of breaches since the Authority's decision in 2003 and his rate of success had been very high in recent years. Further, most of the non-compliances with the Code of Conduct related to protection visas and the appellant had not dealt with them since 2003. It is the Tribunal's consideration of these matters which gives rise to the principal question on the appeal, because they are referable to events occurring after the Authority's decision.

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100 See AAT Act, s 41(2).

101 See *Migration Act*, s 36.

102 *Shi v Migration Agents Registration Authority* [2005] AATA 851 at [24].

The reasons of the Full Court

128 A majority of a Full Court of the Federal Court (Nicholson and Tracey JJ)[103] upheld the decision of the primary judge (Edmonds J)[104], that the Tribunal was limited in its review powers to the facts and matters upon which the Authority's decision had been based. Edmonds J held that this was established by a "clear line of authority"[105] in the Federal Court, commencing with *Freeman v Secretary, Department of Social Security*[106]. His Honour held that the question that the Tribunal had to ask itself was whether, on 14 July 2003, the correct or preferable decision was to cancel the appellant's registration; which is to say, whether at that date the appellant was not a person of integrity or was otherwise not a fit and proper person to give immigration assistance[107]. The majority in the Full Court considered that s 303(1) was intended to operate so as to provide a disciplinary result at the date the conduct was established[108]. There was nothing to suggest that later evidence, of a rehabilitative kind or as to character, should be taken into account. Tracey J pointed to a further temporal element, arising from the consequence that an agent, whose registration is cancelled, cannot be registered within five years of the date of the cancellation decision[109].

129 Downes J dissented. In his Honour's view it is the satisfaction of the Tribunal to which s 303(1) of the *Migration Act* refers, once it becomes the decision-maker. The relevant conduct is therefore to be established at the time it makes its decision[110]. His Honour distinguished *Freeman*, for the reason that the statute there required the Tribunal to address the relevant circumstances at a particular point of time. There was nothing about the nature of the decision in the present case which caused his Honour to consider that there should be a

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[103] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525.

[104] *Migration Agents Registration Authority v Shi* (2006) 43 AAR 424.

[105] *Migration Agents Registration Authority v Shi* (2006) 43 AAR 424 at 443 [73].

[106] (1988) 19 FCR 342.

[107] *Migration Agents Registration Authority v Shi* (2006) 43 AAR 424 at 443 [73].

[108] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 533 [16] per Nicholson J, Tracey J agreeing.

[109] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 541 [62], referring to *Migration Act*, s 292.

[110] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 538 [46].

departure "from the general principle that administrative review is conducted at the time of the review on the latest material available"[111].

130 The majority in the Full Court also upheld the conclusion reached by Edmonds J as to the Tribunal's power to condition the caution in the way it sought to do[112]. In the interval between the Authority's decision and that of the Tribunal, s 304A was added to the *Migration Act*[113]. It provides that the Authority may set one or more conditions for the lifting of a caution it gives to a migration agent. Edmonds J held that the conditions to which the section refers must be those which are consistent with the appellant's entitlement, upon registration, to provide immigration assistance. Neither the Authority nor the Tribunal could set conditions which could not be imposed upon an individual's registration as a migration agent[114]. Tracey J observed that the notion of conditional registration is foreign to the Act[115].

The appeal

131 The appellant acknowledged a temporal element to be present with respect to the conduct constituting breaches of the Code of Conduct. He denied that considerations as to his integrity and fitness to provide immigration assistance could be limited in point of time. In addition to maintaining that there were temporal connections arising from the nature of the decision, the respondent's argument focused upon the nature of the review conducted by the Tribunal. The respondent contended that the Tribunal's role was to determine whether the original decision was erroneous. This was the enquiry, of which the cases speak, as to whether it was the "correct or preferable decision", it was submitted. On this view the Tribunal does not exercise the powers of the original decision-maker. It follows, the respondent contended, that the Tribunal is limited to a consideration of evidence which may inform it as to whether the original decision was correct when it was made.

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[111] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 539 [47].

[112] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 534 [26] per Nicholson J, Tracey J agreeing.

[113] *Migration Legislation Amendment (Migration Agents Integrity Measures) Act* 2004 (Cth), Sched 1, item 71; commenced 1 July 2004.

[114] *Migration Agents Registration Authority v Shi* (2006) 43 AAR 424 at 445 [85].

[115] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 541-542 [65].

132 The nature of the review conducted by the Tribunal depends upon the terms of the statute conferring the right, rather than upon the identification of it as an administrative authority entrusted with a particular type of function[116]. The jurisdiction of the Tribunal, a statutory tribunal, depends upon there having been a decision made which it is authorised to review[117]. Section 25 of the AAT Act, together with s 306 of the *Migration Act*, provides that authority with respect to a decision under s 303(1) of the *Migration Act*. Section 25(4) of the AAT Act limits the Tribunal's powers to a review of that decision.

133 Section 43(1) of the AAT Act provides for the powers that the Tribunal may exercise with respect to matters in respect of which it has jurisdiction. The exercise of the powers conferred by the sub-section is restricted to the Tribunal's purpose, of reviewing the decision in question[118]. As Sheppard J said in *Secretary to the Department of Social Security v Riley*[119], it is not possible to apply s 43(1) to the facts of any case without determining, first of all, what is the decision under review. It may therefore be appreciated that the decision, and the statutory question it answers, should be identified with some precision, for it marks the boundaries of the review.

134 Section 43(1) expresses clearly that the Tribunal may exercise all of the powers and discretions conferred upon the original decision-maker[120]. The Tribunal has been said to stand in the shoes of the original decision-maker, for the purpose of its review[121]. In *Minister for Immigration and Ethnic Affairs v*

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[116] *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622 per Mason J, Barwick CJ and Stephen J agreeing; [1976] HCA 62; applied in *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273-274 per Deane, Gaudron and McHugh JJ; [1990] HCA 36; and see *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202-203 [11]-[12] per Gleeson CJ, Gaudron and Hayne JJ; [2000] HCA 47.

[117] *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167 at 180 per Brennan J; on appeal *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 313 per Bowen CJ, 334 per Smithers J; *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32 at 38.

[118] *Hodgson* (1992) 37 FCR 32 at 40.

[119] (1987) 17 FCR 99 at 104-105.

[120] *Hodgson* (1992) 37 FCR 32 at 39-40.

[121] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 671 per Smithers J; *Hodgson* (1992) 37 FCR 32 at 40; *Liedig v Commissioner of Taxation* (1994) 50 FCR 461 at 464.

Pochi[122] Smithers J said that, in reaching a decision on review of a decision of the original decision-maker, the Tribunal should consider itself as though it were performing the function of that administrator in accordance with the law as it applied to that person[123]. In *Liedig v Commissioner of Taxation*[124], Hill J adopted, as applicable to the Tribunal, what Kitto J said of the Taxation Board of Review in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*[125], namely that its function is "merely to do over again … what the Commissioner did in making the assessment", within the limits of the taxpayer's objection.

135 In *Strange-Muir v Corrective Services Commission of New South Wales*[126] McHugh JA held that there was a presumption, which operated as a rule, that an appeal to an administrative tribunal against an administrative decision would not usually involve a grant of jurisdiction to make a fresh or original decision. The respondent relied upon this decision as supporting a more limited role for the Tribunal, one concerned with ascertaining whether the decision under review was attended with error. As McHugh JA acknowledged, however, any such presumption gives way to contrary statutory indications[127]. There can be little room for its operation where, as here, the Tribunal is expressly provided with the powers of the original decision-maker[128] and its decision, to vary or substitute the original decision, is taken to be that of the original decision-maker[129].

136 The respondent argued that s 43(6), read with s 43(1), shows that the Tribunal is only intended to exercise the power of the original decision-maker when it discovers error. Error is the foundation for the power to vary or set aside the decision, under s 43(1)(b) or (c)(i). Where it affirms a decision[130] it

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122 (1980) 31 ALR 666.

123 (1980) 31 ALR 666 at 671.

124 (1994) 50 FCR 461 at 464.

125 (1963) 113 CLR 475 at 502; [1963] HCA 41.

126 (1986) 5 NSWLR 234 at 251.

127 (1986) 5 NSWLR 234 at 249, 250 and see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622; *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 272-273 per Deane, Gaudron and McHugh JJ.

128 AAT Act, s 43(1).

129 AAT Act, s 43(6).

130 AAT Act, s 43(1)(a).

determines that the decision is correct. In the case of remitter[131], the further exercise of powers is left to the original decision-maker.

137 The respondent's argument does not distinguish between the powers given to the Tribunal by s 43(1) "[f]or the purpose of reviewing a decision" and the making of a decision, under pars (a) to (c), following upon that review and to give effect to it. Indeed the argument tends to ignore the powers, which are to permit the Tribunal to consider for itself what the decision should be. Such powers are not consistent with a role limited to the ascertainment of error.

138 The respondent conceded that its argument treats the function of the Tribunal as analogous to that of an appeal court. The question for a court on an appeal, in the strict sense, is whether the decision sought to be corrected was right or wrong, judged at the time it was given[132]. Even if a court is given power to receive further evidence, as the Tribunal is, its powers by way of rehearing would be construed on the basis that they were to be exercised for the correction of error, the respondent pointed out[133]. The respondent was concerned to distinguish the Tribunal's function from a function exercised by way of hearing de novo, where the matter is heard afresh and a decision given on the evidence presented at that hearing[134].

139 Professor Allars has observed that the judicial paradigm of procedure is such a familiar model for decision-making to lawyers, that it tends to overshadow the alternative choices which can be made for the procedures of tribunals[135].

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[131] AAT Act, s 43(1)(c)(ii).

[132] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109 per Dixon J; [1931] HCA 34; *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23] per Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 40; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [12] per Gleeson CJ, Gaudron and Hayne JJ.

[133] Relying upon *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [14] per Gleeson CJ, Gaudron and Hayne JJ.

[134] *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23] per Gaudron, McHugh, Gummow and Hayne JJ; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [13] per Gleeson CJ, Gaudron and Hayne JJ.

[135] Allars, "Neutrality, the Judicial Paradigm and Tribunal Procedure", (1991) 13 *Sydney Law Review* 377 at 377-378.

Professor Allars' comments have a clear application to the AAT Act. Provisions for more informal and expeditious procedures are a direct legislative response to the dominance of the judicial paradigm[136]. It was the need to overcome the complex and strict requirements of judicial review of administrative decisions that led to the recommendation for a general tribunal, which became the Administrative Appeals Tribunal[137]. The authors of the Kerr Report acknowledged that people affected by administrative decisions wanted a review of the merits of the decision[138].

140 The term "merits review" does not appear in the AAT Act, although it is often used to explain that the function of the Tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the Tribunal has been said to be to determine what is the "correct or preferable decision"[139]. "Preferable" is apt to refer to a decision which involves discretionary considerations[140]. A "correct" decision, in the context of review, might be taken to be one rightly made, in the proper sense[141]. It is, inevitably, a decision by the original decision-maker with which the Tribunal agrees. Smithers J, in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[142], said that it is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration.

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136 Allars, "Neutrality, the Judicial Paradigm and Tribunal Procedure", (1991) 13 *Sydney Law Review* 377 at 378.

137 *Report of the Commonwealth Administrative Review Committee*, (August 1971) ("the Kerr Report") at 1 [5], 9 [20]-[21].

138 Kerr Report at 9 [20].

139 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589, 591 per Bowen CJ and Deane J; *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 at 646 per Deane J, 651 per Lockhart J; *Freeman* (1988) 19 FCR 342 at 345; *Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 39 FCR 225 at 234.

140 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 427 [1] per Gleeson CJ and Kirby J; [2006] HCA 45.

141 *Drake* (1979) 24 ALR 577 at 601 per Smithers J.

142 (1979) 24 ALR 307 at 335.

141 The reasons of the members of the Full Court of the Federal Court in *Drake v Minister for Immigration and Ethnic Affairs*[143] confirm what is apparent from s 43(1), that the Tribunal reaches its conclusion, as to what is the correct decision, by conducting its own, independent, assessment and determination of the matters necessary to be addressed[144]. To the contrary of the argument put by the respondent on this appeal, that the Tribunal's exercise of power is dependent upon the existence of error in the original decision, Smithers J denied that the Tribunal was limited to something of a supervisory role. As his Honour said, the Tribunal is authorised and required to review the actual decision, not the reasons for it[145].

142 In considering what is the right decision, the Tribunal must address the same question as the original decision-maker was required to address[146]. Identifying the question raised by the statute for decision will usually determine the facts which may be taken into account in connection with the decision. The issue is then one of relevance, determined by reference to the elements in the question, or questions, necessary to be addressed in reaching a decision. It is not to be confused with the Tribunal's general procedural powers to obtain evidence. The issue is whether evidence, so obtained, may be taken into account with respect to the specific decision which is the subject of review.

143 Where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the Tribunal in the process of informing itself. Cases which state that the Tribunal is not limited to the evidence before the original decision-maker, or available to that person, are to be understood in this light[147]. It is otherwise where the review to be conducted by the Tribunal is limited to deciding the question by reference to a particular point in time[148].

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[143] (1979) 24 ALR 577.

[144] (1979) 24 ALR 577 at 591 per Bowen CJ and Deane J, 599 per Smithers J; and see *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 at 648 per Deane J.

[145] (1979) 24 ALR 577 at 599.

[146] *Hospital Benefit Fund* (1992) 39 FCR 225 at 234.

[147] See eg *Drake* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J; *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 at 453; *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333-334; *Hospital Benefit Fund* (1992) 39 FCR 225 at 234; *Comptroller-General of Customs v Akai Pty Ltd* (1994) 50 FCR 511 at 521.

[148] *Comptroller-General of Customs v Akai Pty Ltd* (1994) 50 FCR 511 at 521.

144 In *Freeman*, Davies J identified the importance of the nature of the decision under review, in determining what facts the Tribunal might take into account[149]. A decision had been made to cancel Mrs Freeman's widow's pension. The definition of "widow", in the Act providing for the pension, did not include a widow who was living with a man, as his de facto wife. That circumstance applied to Mrs Freeman at the time of the decision. That was sufficient to disentitle her from receipt of a pension. The statutory scheme was such that a pension, once cancelled on this ground, could only be reinstated on a further claim being made[150]. Subsequent to the cancellation decision Mrs Freeman's circumstances changed, such that she again qualified for the pension. His Honour held the Tribunal to have been correct to limit its consideration to the circumstances existing at the time the decision to cancel was made. The Tribunal was entitled to take into account all the facts placed before it, but the issue was whether the decision it was reviewing, to cancel the pension, was the correct or preferable decision when it was made. It was not whether Mrs Freeman had an entitlement to a widow's pension at the date of the Tribunal's decision[151].

145 The situation in *Freeman* was distinguished by Davies J from cases where the matter to be determined is a person's entitlement to a pension[152]. Where that was the decision to be reviewed the Tribunal might not be limited to facts existing at a particular time, since the entitlement might be a continuing one. His Honour did not suggest, by this comparison, that the ambit of the decision to be reviewed was to be determined by a general description of what the decision concerned – a grant or a cancellation of an entitlement. In each case what is entailed in a decision is to be ascertained by reference to the statute providing for it.

146 The question which here arose for the Authority under s 303(1), which it answered, was whether it should exercise its powers, under pars (a) to (c) of the sub-section, because the grounds in pars (h) and (f) were established, in particular because the appellant had breached the Code of Conduct. That part of the decision which comprises the finding, that the ground in par (h) had been made out, was referable to conduct which had occurred to a point in time. That is the nature of the finding required by the provision. It follows that the Tribunal was restricted to a consideration of events to that point and not those occurring later,

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[149] (1988) 19 FCR 342 at 345.

[150] As Davies J observed: (1988) 19 FCR 342 at 345.

[151] (1988) 19 FCR 342 at 344.

[152] (1988) 19 FCR 342 at 345.

in determining for itself whether there had been non-compliance with the Code. The appellant accepted as much in his submissions.

147 There is another restriction which operates with respect to the evidence the Tribunal may consider as to this ground. The effect of the restriction appears to have been assumed in argument. The Tribunal does not acquire all the powers of the Authority, but only those necessary to review the decision made by it[153]. The Authority's decision concerned particular conduct of the appellant, which it had investigated. The Tribunal does not have all the Authority's disciplinary powers, and does not have its investigatory powers for the purposes given by the *Migration Act*. The question for the Tribunal is not whether there has been a breach by the appellant of the Code in any respect, but whether those identified by the Authority are established. It may use its own evidence-gathering powers to further inform itself about those matters, but those powers do not translate to general investigatory powers and cannot be used to ascertain other, inculpatory, conduct.

148 The ground in s 303(1)(f) involves the Tribunal in considerations of a different kind. The ordinary meaning of a person's "integrity" is plain enough. The expression "fit and proper" is one traditionally used with reference to an office or vocation, "fit" being referable to a person's honesty, knowledge and ability[154]. A person's knowledge of migration procedure is one of the matters listed in s 290(2) of the *Migration Act*, as necessary to be taken into account by the Authority in determining whether a person is not fit and proper or not a person of integrity. That section provides that a person must not be registered as a migration agent if the Authority is not satisfied that they have those characteristics.

149 Section 303(1)(f) provides that the Authority may take disciplinary action if it "becomes satisfied" that a registered migration agent is not a person of integrity or otherwise not a fit and proper person to give immigration assistance. The *Migration Act* provides the Authority with an ongoing role, to monitor the conduct of agents and to take disciplinary action where necessary. The reference to the Authority becoming satisfied was considered by Tracey J to identify a point in time, one at which the Authority was no longer satisfied about the

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[153] *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 at 452.

[154] *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 81 ALJR 1155 at 1161 [23] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; 234 ALR 618 at 624; [2007] HCA 23; *Hughes and Vale Pty Ltd v The State of New South Wales [No 2]* (1955) 93 CLR 127 at 156-157 per Dixon CJ, McTiernan and Webb JJ; [1955] HCA 28.

agent[155]. The topic with which s 303(1)(f) is concerned is not, however, one which identifies particular conduct, as is the case with respect to breaches of the Code of Conduct. The enquiry posed by the paragraph is a general one, and it may be considered by the Tribunal in that way. It does not limit an assessment of an agent's integrity and fitness to what has been conveyed by any breaches. There is no reason why the Tribunal's review should not extend to any information which sheds light upon the presence or absence of the necessary characteristics in the migration agent. The list in s 290(2) is not exhaustive. There is good reason why the Tribunal should be in a position to consider the most recent material bearing upon the question of an agent's integrity and their fitness to continue to provide immigration assistance. By this means facts such as an agent's subsequent conviction for a serious offence could be taken into account. The relevance of such a factor, to the question of an agent's integrity and fitness, is confirmed by its specification in s 290(2), as a matter which must be taken into account by the Authority in connection with their registration.

150 Tracey J also considered that the fact that an agent cannot be registered within five years from the date of a cancellation decision, focuses attention upon the point in time where the Authority is satisfied about an agent's conduct and shortcomings[156]. It may be accepted that the focus of s 292 is upon the date that cancellation takes effect; but it is not concerned with who made the decision. Where the Authority has made a decision to cancel and the Tribunal affirms that decision, time will continue to run from the date of that decision for the purposes of s 292. Where the Authority has decided not to cancel the registration, but the Tribunal considers that it was not the correct decision, and substitutes a decision to cancel, the effect of s 43(6) of the AAT Act is that time will run from the date of the Authority's decision or from the date that the Tribunal orders that the substituted decision will operate from. This does not suggest the date of the Authority's decision to be critical for this purpose. The effect provided for by s 292 upon cancellation, does not alter the nature of the question arising under s 303(1)(f).

151 The Tribunal used the evidence of the appellant's subsequent conduct to determine that question. The Tribunal had observed that there was no evidence that the appellant had acted dishonestly. Nevertheless, it was concerned about the breaches of the Code and what that conveyed about him and his attitude. It may be inferred that the Tribunal considered his more recent conduct as a migration agent showed him in a different light. It was entitled to have regard to this evidence in answering the statutory question about his fitness and integrity. It was a matter for it what weight it gave to the evidence, having regard to the

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[155] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 541 [62].

[156] *Shi v Migration Agents Registration Authority* (2007) 158 FCR 525 at 541 [62].

nature and extent of the breaches found by it. The Tribunal did not say how it determined the appellant's fitness for the duties of a migration agent, given the restrictions and level of supervision he had operated under, but no issue arises as to its ability to reach the conclusion it did.

152 It remained for the Tribunal to consider what disciplinary action ought to follow upon its being satisfied that the ground in s 303(1)(h) was made out. The decision for the Tribunal involved consideration of one of the three available courses of action, those referred to in pars (a) to (c): cancelling the appellant's registration, suspending it or cautioning him. It is not suggested that it was appropriate for the Tribunal to take no action, assuming for present purposes that that was an option.

153 The Tribunal determined, in effect, that a continuance of the regime that had applied under the orders for a stay of the Authority's cancellation decision would be a sufficient protection for the public. It would ensure that the appellant could not provide assistance with respect to protection visas, an area where he had not performed satisfactorily in the past; and he would remain subject to the supervision of an experienced migration agent for the same period as the Authority had determined as applying to the cancellation of his registration. A caution would of course permit the appellant to continue to operate as a registered migration agent.

154 The details of a caution made under s 303(1)(c) are required to be shown on the Register of Migration Agents[157] and are removed when the caution ceases to have effect[158]. The notification serves as both a warning to the public and an admonition of the agent. A caution does not itself affect the entitlement of a migration agent, consequent upon registration, to provide immigration assistance of any kind.

155 The conditions sought to be imposed by the Tribunal were not conditions "for the lifting of a caution", as s 304A permits. They did not involve some requirement, the fulfilment of which had the effect of permitting the removal of the caution. An example of a condition operating in this way is one requiring the completion of a course of relevant education by an agent[159]. The conditions in question were requirements by which it was sought to make the caution effective for other purposes.

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[157] *Migration Act*, s 287(2)(h).

[158] *Migration Act*, s 287(6) and Migration Agents Regulations 1998, reg 3X.

[159] Explanatory Memorandum, Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003 at 66, item 71.

156 It was not open to the Tribunal to continue the interim regime, established by the conditions to the stay decision, when making its decision under s 303(1). The enquiry for the Tribunal under the sub-section was what disciplinary action there provided for should be taken; it was not whether the appellant should be permitted to continue as a registered migration agent, subject to conditions limiting his entitlement to give advice and requiring him to be supervised in what advice he did give. The *Migration Act* does not, in any event, comprehend a restricted form of immigration assistance. A person is either qualified as a registered migration agent, and thereby entitled to continue as such, or they are not. That the Tribunal perceived a need for restrictions may suggest that it did not consider his continuance as a migration agent as appropriate. The critical matter, to this appeal, is that the Tribunal has not addressed the question of disciplinary action as provided by s 303(1).

Conclusion

157 It was open to the Tribunal to have regard to the evidence of conduct subsequent to the Authority's decision, so far as it concerned the question under s 303(1)(f), as to his integrity and fitness to continue as a registered migration agent. It was not open to the Tribunal to issue a caution upon the conditions in question. It follows that the Tribunal has not addressed the question, as to which of the disciplinary actions provided for in s 303(1)(a) to (c) should be applied. The Tribunal's decision is thereby attended with jurisdictional error and should be set aside.

158 Edmonds J made orders setting aside the Tribunal's decision and remitting the matter to it, to be determined according to law. His Honour subsequently ordered the appellant to pay the respondent's costs. The decision of the Full Court left these orders undisturbed. The appeal should be dismissed with costs.