ONUS OF PROOF IN REVIEW QCAT HEARINGS

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1. In a review hearing in QCAT, it is not appropriate to speak in terms of onus of proof.

2. This has been held in relation to the comparable jurisdiction for merits-based reviews given to the Commonwealth Administrative Appeals Tribunal: *McDonald v. Director-General of Social Security* (1984) 1 F.C.R. 354 (Full Federal Court). Woodward J. at 356:

> "The first point to be made is that the onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law. One of the chief difficulties of the concept has been the necessity to distinguish between its so-called "legal" and "evidential" aspects. The concept is concerned with matters such as the order of presentation of evidence and the decision a court should give when it is left in a state of uncertainty by the evidence on a particular issue.
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> The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution. This is particularly true of an administrative tribunal, which by its statute "is not bound by the rules of evidence but may inform itself on any matter in such manner as it considers appropriate" (AAT Act s. 33(1)(c)).
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> Such a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts. However, these may be of assistance where the legislation is silent.
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> Whether the principles adopted by such a tribunal, arising from these various considerations, are appropriately dealt with under the heading "onus of proof", becomes a matter of choosing labels. It would probably be more convenient to avoid using that expression in cases such as the present.
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> There is certainly no legal onus of proof arising from the fact that this is an "appeals" tribunal, because the AAT is required, in effect, by s. 43 of the AAT Act, to put itself in the position of the administrator carrying out its review and, in the light of the material before the AAT, (not the material before the administrator, *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 46 F.L.R. 409 at 419) make its own decision in the place of the administrator's. The AAT itself, in a series of cases, beginning with *Re Ladybird Children's Wear Pty Ltd* (1976) 1 A.L.D. 1, has taken the view that there is no presumption that the administrator's decision is correct.. This is clearly the right approach to the matter.
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> It is possible to imagine a case where the Act which the administrator is applying places a requirement or onus on one or other of the parties to an issue to establish a particular state of facts on which the administrator's decision would be based. If that were so, the same requirement or onus would apply before the AAT. But this is not this case.
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> ….
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> It is true that facts may be peculiarly within the knowledge of a party to an issue, and a failure by that party to produce evidence as to those facts may lead to an unfavourable inference being drawn – but it is not helpful to categorise this common-sense approach to evidence as an example of an evidential onus of proof. The same may be said of a case where a good deal of evidence pointing in one direction is before the Tribunal, and any intelligent observer could see that unless contrary material comes to light that is the way the decision is likely to go. Putting such cases to one side there can be no evidential onus of proof in proceedings before the AAT unless the relevant legislation provides for it, and in the present case the *Social Security Act* 1947 (Cth) does not.
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> If the AAT finds itself in a state of uncertainty after considering all the available material, unable to decide a question of fact either way on the balance of probabilities, it will be necessary to analyse carefully the decision it is reviewing. If, for example, it is a decision whether or not to cancel a pension in the light of changed circumstances, then it has failed to achieve the statutory requirement of reaching a

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> state of mind that the pension should be cancelled. If, on the other hand, it is a decision to be made in the light of fresh evidence, whether or not the pension should ever have been granted in the first place then it has failed to be satisfied that the person ever was permanently incapacitated for work. For a comparable analysis as to the onus of proof (properly so-called) before a judicial tribunal see *Phillips v The Commonwealth* (1964) 110 C.L.R. 347 at 350."

3. In *Szbel v. Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 C.L.R. 152, the High Court at [40] per Gleeson C.J., Kirby, Hayne, Callinan and Heydon JJ speaking of the Refugee Review Tribunal said:

> **"[40]** More than once it has been said[22] that the proceedings in the tribunal are not adversarial but inquisitorial in their general character. There is no joinder of issues between parties, and it is for the applicant for a protection visa to establish the claims that are made. As the tribunal recorded in its reasons in this matter, however, that does not mean that it is useful to speak in terms of onus of proof.[23] And although there is no *joinder* of issues, the Act assumes that issues can be identified as arising in relation to the decision under review. While those issues may extend to any and every aspect of an applicant's claim to a protection visa, they need not. If it had been intended that the tribunal should consider afresh, in every case, all possible issues presented by an applicant's claim, it would not be apt for the Act to describe the tribunal's task as conducting a "review", and it would not be apt to speak, as the Act does, of the issues that arise in relation to the decision under review."
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> "22 *Abebe v Commonwealth* (1999) 197 CLR 510 at 576 [187]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at 1918 [57].
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> 23 Cf *McDonald v Director-General of Social Security* (1984) 1 FCR 354."

4. In *Bushell v. Repatriation Commission* (1992) 175 C.L.R. 408, 424-425 per Brennan J.:

> "Proceedings before the A.A.T. may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the A.A.T. is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it. If the material is inadequate, the Commission, the Board or the A.A.T. may request or itself compel the production of further material. The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings."

5. In *Re Golem and Transport Accident Commission {No. 1]* (2002) 19 V.A.R. 265, Judge Bowman (Vice President of the Victorian Civil and Administrative Tribunal) held that, in the absence of any legislative direction to the contrary, onus of proof had no place in merits reviews under the Victorian legislation relating to VCAT and the jurisdiction remained inquisitorial. To this end, in *Re Golem and Transport Accident Commission {No. 2]* (2002) 19 V.A.R. 273, His Honour held that because VCAT did not operate under the concept of an onus of proof, a "no case" submission was not appropriate.

6. This approach has been applied recently by QCAT in *Young v Queensland Police Service Weapons Licensing Branch* [2010] QCAT 629 (8 December 2010) where the Member stated:

> [22] As Her Honour the Deputy President said in *Kehl v Bord of Professional Engineers of Queensland* points out:
> 'It is apparent from Mrs Kehl's submissions on this application that she has misapprehended the function of the Tribunal on an application to review a decision. The Tribunal's role in exercising review jurisdiction is to reconsider the original decision and to make the correct and preferable decision. The review is conducted on the merits, by way of a fresh hearing. Unlike judicial review, the Tribunal's function is to review the decision – not the process by which it was arrived at, nor the reasons given for making it. Accordingly, the Tribunal is not required to identify an error in either the process or the reasoning that led to the decision being made. There is no presumption the original decision is correct.[2]' (emphasis added)

7. In view of the above, it is submitted that the decisions in *McCoy Constructions Pty Ltd v QBSA* [2007] QCCTB 183 at [56] and *Braund v QBSA* [2007] QCCTB 100 at [45] should not be applied in QCAT.

Obligation to Adduce Evidence in the review of a decision refusing to categorise as a Permitted Individual

8. The wording of S. 56AD(8) QBCC Act is an example of a statutory provision which requires there to be sufficient material to be put before it that the Applicant may be categorized as a Permitted Individual. On a review therefore, there must the sufficient material provided by the

Applicant to satisfy the evidentiary burden of the test in S. 56AD(8).

9. This has been confirmed in *Laidlaw v QBSA* unreported QCAT decision 26/2/10 QR217/07. In that case it was stated that the correct question "is whether the Tribunal is satisfied that the provision under consideration can be invoked on the information or material before it."

10. Clearly, before the Tribunal can be satisfied that S. 56AD(8) has been satisfied, sufficient and satisfactory evidence must adduced. In practical terms, the obligation to do so rests upon the Applicant.

11. Whilst there is no 'onus', an Applicant who fails to adduce evidence of the steps taken (and that those steps constitute all reasonable steps available to said applicant) should expect to have the application refused. The process inevitably involves consideration of whether or not that conclusion is justified on the evidence before the tribunal. If the applicant fails to provide sufficient evidence their application will still fail, onus or not

12. There are a number of CCT cases which state that there is an onus upon the Applicant in an application seeking to be categorized as a permitted individual, including:

    (a) *Alford v QBSA* [2001]QBT219 at para 47;

    (b) *Bariesheff v QBSA* [2002] QBT 62 at para 21;

    (c) *Delonga v QBSA* [2004]QCCTB 26 at para 33;

    (d) *Nation v QBSA* [2006] QCCTB 114 at 57;

    (e) *Eliaba v QBSA* [2009] QCCTB 235.

13. In view of the law applied to merits reviews in the AAT, as cited in the *Laidlaw* case, it is submitted that the correct position is that in a review of a decision refusing to categorise as a Permitted Individual:

    (a) In respect of the reasonable steps required pursuant to S.56AD(8), there is an evidentiary burden upon the Applicant to adduce evidence to establish the test is satisfied;

    (b) In respect of exercise of discretion, there is no onus.

14. In the usual case, the above is probably merely semantics, as in practical terms, there is in effect an onus on the Applicant to adduce evidence. However, in difficult cases, precision in respect of terminology might be significant.

Summary

15. In view of the foregoing, it can be seen that there is no onus of proof in a standard merits review in QCAT.

16. However, the nature of S.56AD(8) clearly indicates an obligation to present sufficient evidence exists, and such obligation practically rests with the Applicant.

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