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Merits Review

X should first seek merits review of the decision as the AAT is in the exec branch and created by statute and so can and so can perform all the functions of the d-m and can remake the decision i.e. not limited to review of legality. Also merits review is cheaper and easier than JR (e.g. do not necessarily need a lawyer). Further, remedies may be denied at the JR stage if the applicant has not exhausted all their statutory review rights.

Jurisdiction

AAT does not have inherent juris to perform merits review. However the Cth Act provides that applications may be made to the AAT for review of:

the granting of import applications (s62(1)(a))

the granting of QACs (s62(1)(b)) made in the exercise of powers conferred by that Act. (s25(1) AATA)

The stipulation in s62 that only decisions of the Secretary that are able to be reviewed probably will not hinder the AAT's ability to hear the application, notwithstanding that it was a delegate, who purported to make the decision. Pursuant to section 34AB(1)(c) of the Acts Interpretation Act, a decision made by a delegate is deemed to have been made by the person upon whom the decision-making power was originally conferred (in this case the Secretary).

The AAT can review any 'decision' in respect of which application is made to it under any Act, (s25(4) AATA) including decisions purportedly made under the Cth Act [Brian Lawlor] Thus Accordingly, the AAT has jurisdiction even if one or more of the grounds of judicial review were contravened in the making of the decision to...

Standing

A person whose 'interests are affected by the decision' will have standing S27(1) AAT Act.

[McHattan] 'Interests' will be interpreted broadly due to the remedial nature of the statute

- E.g. Customs agent who advised client an incorrect amount of customs to be paid - no genuine affectation of interests (professional reputation)

Organisations have standing if a decn 'relates to a matter included in the objs or purposes of the org or association'. S27(2) Not sufficient that an org's OOA permit it to be concerned with the matter. Rather the OOA have to specific enough to match the issues of the decision.

e.g. Standing to challenge media ownership laws [Re Control Investments]

- objects reflect an interest in protecting media employees
- Represent public interest in TV broadcasting
- The effect of media ownership on the political process (a major purpose of the Act)

27(3) Subsection (2) does not apply in relation to a decision given before the organization or association was formed or before the objects or purposes of the organization or association included the matter concerned.

Reasons

S28(1) any person entitled to apply for merits review is entitled to written reasons for that decision from the relevant decision maker

How does the AAT perform merits review?

The tribunal's job is to reach the 'correct or preferable decision' through a de novo appeal review of the merits of the decision. Tribunals have all the same powers as the original decision-maker. [Drake 1] and can substitute own decn for that of original decn maker. In carrying out its functions, the AAT must strive to be fair, just, economical, informal and quick. (S2A)

S 33(1)(b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the AATA and every other relevant enactment and a proper consideration of the matters before the Tribunal permit

- Not bound by rules of evidence [Pochi] but bound by rules of natural justice
- No legal onus of proof [McDonald]
- More inquisitorial in approach compared with courts [Epeabaka]

Can Tribunals Consider New Evidence?

Where a statute does not make a decision time dependent, then a tribunal can consider new evidence that arises between the original decision and the merits review. [Shi]

In [Shi], if a matter was remitted to the orig d-m, the statute required the orig d-m to take into account new evidence in making the decision.

AAT provides a better forum for review because it can consider new material to make the best outcome. The courts can only review if a decision was made lawfully.

Can Tribunals Apply Govt Policy?

Tribunals can apply govt policy albeit not at the expense of the merits and their own independence [Drake 2]

X: policy shouldn't be applied on the merits, AAT has more freedom to depart from the policy due to its independence. AAT was established with the deliberate aim of being more independent from gvt

D-M: Policy should be applied as:

Tribunals stand in the shoes of the original d-m who has to mandatorily follow policy

Policy ensures consistency between tribunal decisions and the orig d-m.

Tribunal Remedies

S43(1) The AAT can

- (a) affirm the decision under review;
- (b) vary the decision under review; or
- (c) set 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.

Challenging Tribunal Decisions

Tribunal's decision will be the one subject to JR (rather than the original dm) and can only be appealed on questions of law (s44 AAT)

ADJR Jurisdiction

The Cth act is reviewable under the ADJRA as it is not listed in sch 1.

A person who is aggrieved by a decision to which the ADJRA applies may apply for an order of review (s5(1)) "Decision to which the ADJRA applies" means a decision of an administrative character made/proposed to be made/required to be made under an enactment (s3(1)) If s5 is made out both the FCC and FCA have jurisdiction to hear the JR.

Where a person has engaged/is engaging/proposes to engage in conduct for the purpose of making a decision to which the ADJRA applies, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Circuit Court for an order of review (s6(1)) If s6 is made out both the FCC and FCA have jurisdiction to hear the JR.

Decision

- S7: A person aggrieved by the D-M's failure to make a decision may apply for JR of that failure on the ground that there has been unreasonable delay in making the decision.
- A 1) "substantive determination" (cf procedural conduct) that is 2) generally final or operative (cf a preliminary step on the way to achieving something the Act requires) [**Bond Mason CJ**]
- A decision reached as a step along the way leading to a final decision *if* the legislation provides that the intermediate decision must be made before making the final decision [**Bond Mason CJ**]
- Deemed decision: s3(3) The making of a report or recommendation where the act provides for its making before a decision is made

Person Aggrieved

A person aggrieved by a decision includes

S3(4)(a)(i) a person whose interests are adversely affected by the decision

S3(4)(a)(ii) in the case of a decision by way of the making of a report or recommendation - a person whose interests would be adversely affected if a decision were/were not made in accordance with the report or recommendation

S3(4)(b) a person aggrieved by conduct that has been/is being/is proposed to be engaged in for the purpose of making a decision includes a reference to a person whose interests are or would be adversely affected by the conduct.

Conduct

- An action taken rather than a decision made/interim findings of fact. [**ABT Mason CJ**]
- The procedure engaged in for the purpose of making the decision. [**ABT Mason CJ**]
- Deemed conduct: s3(5) the doing of any act or thing preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation

Of an Administrative Character [Roche]

- Applies a general rule to a particular situation - administrative
- Decision binding on an individual rather than a group of people - administrative
- Provision made for review of the decision on the merits - administrative
- Power of executive variation or control - administrative
- Determination of the content of the rule rather than its application - legislative
- Creation of new rules - legislative
- Parliamentary control of the decision – legislative
- Public notification of the making of the regulation – legislative
- Registration under the Legislative Instruments Act 2003 – legislative character

This requirement means that the ADJR Act cannot be used to challenge the validity of subordinate legislation because that would be of a legislative character.

Made Under an Enactment

1) The power to make the decision must be expressly or impliedly authorised by the Act; and 2) the decision must itself confer/alter/affect legal rights or obligations. [Tang]

- There had subsisted between G and T no legal rights and obligations, only a consensual relationship

Dm: The plurality in [Tang] meant that the decision had to affect the legal rights of the applicant in order for the decision to be made under an enactment.

X: the plurality meant that the decision had to affect someone's legal rights. then this condition has been met since the decision to ... will have affected party's legal rights by permitting it legally to ... The result will be that the decision was made under an enactment, and the court will have jurisdiction. Given the expansive approach adopted towards standing under the AD(JR) Act, it is much more likely that the court intended to adopt the latter approach