

The Administrative Appeals Tribunal and Merits Review

Administrative Appeals Tribunal Act 1975 created the AAT enabling review functions to be centralised in a single body, 'with a view both to providing effective, independent and visible review of all appropriate decisions and to ensuring consistency of review standards across all jurisdictions.

Nature of merits review

- Recommendatory or determinative decision-making powers
- Stand in the shoes of the primary decision maker
 - o "may place itself in the position of the decision maker, exercising all the powers and discretions available to that person, and not confining itself to the material that was before him¹
- Hearing de novo
 - Tribunals exercise their powers based on the evidence before them, whether or not such evidence had been before the primary decision maker or even existed at the time of the original decision²
 - An applicant is not confined by the submissions put to the original decision maker³
 - o Correct and or preferable decision
 - Function is 'merely to do over again what the decision maker himself did⁴
 - Generally, bound to consider the relevant facts proved on the evidence before it and to decide on the basis of those facts what is the correct or preferable decision⁵
 - o Scope of Review: the law
 - Generally, have the power to decide questions of law relevant to the application for review⁶
 - o Scope of review: the merits
 - Merits include the assessment of the facts, and the law and policy which has been applied or which ought to be applied to the facts in reaching the decision.

¹ *Turner v Minister for Immigration and Ethnic Affairs*

² *Comptroller General of Customs v Akai*

³ *Drake v Minister for Immigration and Ethnic Affairs*

⁴ *Mobil Oil Australia v Commissioner of Taxation*

⁵ *Drake v Minister for Immigration and Ethnic Affairs*

⁶ *Lehtovaara v Acting Deputy Commissioner of Patents*

Section 44(2) AAT Act: provides for an appeal to the Federal Court against an AAT decision to reject standing

Section 31 AAT Act: provides that a positive ruling by the AAT that a person's interests are affected shall be conclusive

- This doesn't exclude judicial review of that decision⁷

Section 28 AAT Act: provides that a person entitled to apply for review of an administrative decision may apply for a written statement of the reasons for that decision. The original decision maker must provide the statement within 28 days. The reasons provided must be intelligible. They must set out the findings of fact, refer to other material relied upon and give the reasons.

Section 28(1AAA): provides an exception for decisions reviewed by the security appeals division, and s 28(2)-(5) allows the attorney general to certify that some information not be provided on certain public interest grounds

Section 37 AAT Act: once AAT has notified a decision maker that an application for review has been lodged, the decision maker must prepare and lodge a statement of reasons for the decision, and all documents considered relevant to the review of the decision.

Section 43(1) AAT Act: may exercise the power and discretion of the original decision maker – it must do so under the law applying at the time of its decision, not necessarily that applicable at the time of the original decision, and with regard to any new circumstances

Section 43(6) AAT Act: generally rulings have the same legal status as the original decision under review. However, the degree to which AAT decisions are legally binding on the government may vary according to the legislation conferring jurisdiction on the AAT.

IS THERE A DECISION?

Generally accepted that a decision requires a final and operative decision⁸

Tribunals may make original decisions by default where the primary decision maker has not made a decision. For instance, where a decision maker has failed or refused to do an act or thing within the period prescribed by the enactment, that failure or refusal is deemed to constitute the making of a decision by that person at the end of the prescribed period and the tribunal is able to consider the matter⁹

Once the tribunal has validly exercised its decision making powers, it is *functus officio* and the application cannot be reopened, this means that the tribunal has no jurisdiction to review a determination made in accordance with its orders¹⁰

If a tribunal's purported exercise of powers has miscarried such that its 'decision' is a legal nullity, it may reconsider the matter.¹¹

⁷ *Comptroller-General of Customs v Akai Pty Ltd*

⁸ *Australian Broadcasting Tribunal v Bond*

⁹ Cth ss 3(3) and 25(50, NSW s 6(5)

¹⁰ *Gogards v McMahon*

¹¹ *Minister for Immigration and Multicultural Affairs v Bhardwaj*