

Merits Review

MR must be sought before JR, as JR is a last resort, and the courts may not issue a remedy if statutory appeals have not been exhausted.

- **ADVANTAGE of merits review:** entire decision remade. No guarantees with JR.
- Admin bodies exercise admin power, not judicial powers. However, they may be staffed by legal professionals to ensure independence
- Merits review = consideration of facts, law and internal policies
- **CITE AAT Act**

Courts	Tribunals
Review legality of decision	Review the merits of decision
Judicial review	De novo appeal (reconsider matter afresh)
Need to establish ground of JR	Can substitute own decision for that of original DM

1. Jurisdiction

- Does the statute under which the decision is made, **allow AAT review**?
 - If so, is right of appeal **limited** (s 25(3))?
- Cite **both** section of Act, **and** s 25 AAT:
 - Per **AAT s 25(1)(a)**: An Act may provide that applications be made to the Tribunal for **review of decisions** made in the exercise of powers conferred by that enactment
 - Or by delegated legislation under the enactment **s 25(1)(b)**
 - Cite section of Space Activities Act – **s 35**
 - Consider any **limits**:
 - s 25(3)(b)**: The Act may refer to **specific decisions** or **class of decisions**
 - s 25(3)(b)**: The Act may specify **conditions** subject to which applications may be made
 - State**: AAT has jurisdiction to review decisions that are alleged to be invalid (**Lawlor**)
 - Includes decision which is **purported** to have been made in exercise of power
 - Decision** per **s 3(3)**: ‘decision’ is very broad
 - (3) Unless the contrary intention appears, a reference in this Act to a decision includes a reference to:
 - (a) **making, suspending, revoking or refusing to make an order or determination;**
 - (b) **giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;**
 - (c) **issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;**
 - (d) **imposing a condition** or restriction;
 - (e) making a **declaration, demand** or **requirement**;
 - (f) **retaining, or refusing** to deliver up, an article; or
 - (g) **doing or refusing to do** any other act or thing.

2. Standing

- Individuals:**
 - s 27(1)**: ‘...the application may be made by or on behalf of any **person** or persons...whose **interests are affected by the decision**’

- **Organisations:**
 - s 27(2): ‘An **organisation or association** of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association’
 - Organisation must be **formed before** decision made – s 27(3)
 - In *Re Control Investments*, decisions under review must relate to matter included in organisation’s objects/purposes. For ALP, media interests affected political parties; its objects included issues re: media control.
 - c.f. Rupert Public Interest Movement was denied standing to be joined, because objects did not relate specifically enough to the decision under review
 - Per s 29, an application for MR must be made in **writing** within **28 days of decision**

3. **Reasons**

NB. You can get reasons both before and after you lodge application. ‘*Since X has standing to commence application, they also have a right to obtain reasons for the decision.*’

- **Request from original DM (s 28(1)):** After decision is made, anyone entitled to merits review may apply for a statement from the DM. It must then be provided **within 28 days**.
 - This includes ‘the findings on material questions of fact’, ‘evidence...on which those findings were based’ and ‘the reasons for the decision’
 - s 28(4) they cannot apply if this was already included in decision, but (5) yes, if inadequate
- **Request from AAT Tribunal (s 43(2A)):**
 - s 43(2): The AAT tribunal **must give reasons** for its decisions and **(3)** copies to each party. **(2A)** If they do not, a party may apply for it within 28 days
 - s 37(1): After an application is made, DM must lodge statement of reasons with tribunal within 28 days, and **(1AE)** give a copy to all other parties within the 28 days
 - **(1)(a)** It must include statement of facts, evidence, and reasons

4. **Merits Review ‘correct and preferable’ decision**

- Task before MR tribunal is to determine what decision is **correct and preferable** on the material before the Tribunal (*Drake No 1; Shi*)
 - Legally correct e.g. social security tribunal must accord with what the social security Act says
 - Preferable = If there are 2 possible decisions, the tribunal has discretion on what they perceive to be preferable on the merits
- Merits review = considerations of facts, law and policy
 - MR provides means by which another DM can examine facts of a case. MR can also take into account issues of legality that may be covered under specific grounds of JR
- Tribunal must approach application for review without a view on correctness of decision under review (*McDonald*)
- Also state in exam: Remedies are available under s 43(1)
 - Person would likely seek key benefit of MR – s 43(1)(c): **setting aside and substitution**

s 43(1): ‘Tribunal may exercise all powers and discretions’ of original DM, 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

Use of govt policies by tribunal

AAT not bound to follow govt policy, but may be relevant consideration.

- How much weight AAT should give to govt policy depends on: whether internal policy; direction from minister allowing discretion; or absolutely no discretion to tribunal.
- It is acceptable to oblige tribunal to consider certain info, but they must also be free to consider other policies/info. c.f. Tribunal directed to act solely in favour of e.g. Dept foreign affairs.
- **Drake No. 1** – deportation criminal offence: Deportation was ordered by minister; AAT confirmed minister's decision and placing great weight on govt's deportation policy, not considering the individual merits of the case. D argued AAT did not make an independent assessment of policy.
 - Tribunal is **entitled** to take into account govt policy
 - If statute requires policy to be followed, **tribunal must follow it** (parliamentary supremacy)
 - If not, AAT must make **independent assessment** of policy:
 - The policy will be **one relevant factor** to be considered
 - The tribunal **cannot act under dictation** of the policy
 - The tribunal **cannot simply ask** does the decision conform with policy
 - It must substantiate its decision in the reasons if it decides the correct and preferable decision is one which flows from the policy
 - Must show that AAT has not blindly followed the policy
 - Held: AAT failed to make an independent assessment; remitted back to AAT
- **Drake 2** – upon remittal Brennan J:
 - Policy must be lawful
 - **Supported using policy**, because it aids consistency, helps with efficiency of decision making, and integrity of the decision
 - Still must be independent decision
 - AAT should adopt practice of applying lawful ministerial policy, unless cogent reasons for not doing so
 - Where a policy is from a minister, there should only be '**cautious and sparing**' departures from that Ministerial policy
 - Ministerial policy **should receive great weight** if parliament has scrutinised and approved that policy
- **Commentators/policy**: criticise notion for AAT to comply with policy, because it should be independent

5. Nature of AAT hearing

- **s 33(1)** – in a proceeding before the tribunal:
 - (b) The proceeding shall be conducted with **as little formality and technicality**, and with **as much expedition**, as the requirements of this Act...and a proper consideration of the matters...and
 - (c) 'The tribunal is **not bound by the rules of evidence**...' (e.g. hearsay)
- New evidence: AAT should take into account information about conduct and events that occurred after the decision under review (**Shi**)