

Merits Review

Step 1. Introduction

AAT merits review should be sought first before JR, because: a **new substantive decision** can be made; it is **cheaper, quicker and less formal** (s 33 AAT Act) than JR, and is in line with the **doctrine of exhaustion**.

Step 2. Does the AAT have jurisdiction?

Jurisdiction to the AAT must be granted by the **Cth Act** under which the decision is made (s 25(1) AAT Act).

P is seeking review of a decision made under s 11/ 12/ 25(3) Cth Act, AND:

S 107(1) Cth Act provides for appeal to the AAT for review of:

- a) A decision under s 11 **refusing to exempt** *particular* vessel/person from this Act;
- b) A decision to **grant** an **exemption** under s 11 **subject to conditions**;
- c) A decision under s 12 **refusing to make a declaration** in relation to a vessel;
- d) A decision *by the Minister* to **cancel a general licence** under s 25(3);
- e) A decision *by the Minister* to cancel a temporary licence under s 59(3).

NB. S 107(1)(d) Cth Act refers to the Minister (s 23(3) AAT Act – says to specify person) – if power has been delegated so legal DM is not the Minister (dealt with below in GoR), decision can still be appealed because of s 34AB(1)(c) AIA (which very likely applies in this context of appeals).

The AAT's jurisdiction extends to **illegally made** decisions per **Brian Lawlor Auto** (Bowen CJ). Thus, *prima facie* the AAT has jurisdiction.

Step 3. Standing

P will argue an application for appeal may be made by (or on behalf) of himself as his **interests are affected by the decision** (s 27(1) AAT Act).

IF INDIVIDUAL:

P will claim that as they cannot _____ without a general licence/ exemption/ declaration, their interests are affected, and this interest is greater than a member of the general public (Davies J in **Re Control**). As standing is **interpreted broadly** per **Re Control**, it will likely be made out here.

IF ORGANISATION LIKE PUBLIC INTEREST GROUP:

[Organisation/association] will claim to have **deemed standing** per s 27(2) AAT Act as the decision _____ relates to a matter included in the **objects or purposes** of [the organisation/association], namely _____.

NB. *Make distinction: In form/on its face* the decision relates to X and not Y (e.g. space licences not the atmosphere), but **in substance** the decision plausibly relates to Y because _____.

Step 4. Correct and Preferable Decision

Assuming the AAT hears the appeal, it will make the decision **de novo**, exercising all the powers of the original DM (s 43(1) AAT Act), in order to make the '**correct and preferable decision**' (**Drake**). AAT may also rely on **different evidence** or different arguments (**Greenham**).

If there was Government policy at first instance:

Per Brennan J in **Drake (No 2)**, the AAT **should apply the Gov's policy** (not the AAT's policy), but **not inflexibly**. Gov policy should be applied because:

- ✓ Gov policy is subject to political control through Parl + the electorate – c.f. AAT policy is not.
- ✓ Gov policy is based on lots of research etc. – c.f. AAT does not have such resources to do this.
- ✓ Reliance on Gov policy would lead to greater consistency. Otherwise, would be 2 classes of decisions made under same Cth Act section – those made by DM per Gov policy, and those made by AAT per its own policy.

Nature of the AAT hearing:

Whilst the AAT has **discretion** as to the procedure it adopts (s 33(1)(a) AAT Act), (e.g. if parties are represented by lawyers, AAT will adopt adversarial approach. If one/both parties are not, inquisitorial), and is **not bound by the rules of evidence** (s 33(1)(c) AAT Act) or the **legal onus of proof** (McDonald – no civil standard applies), it is “more likely to arrive at the correct/preferable decision” if it accords the **civil standard** (Epeabanka), and must base its decision on evidence that has rational probative force (Re Pochi).

THUS, on the merits of the case, the AAT should _____ because _____.

- *LOOK FOR event that takes place/new info that arises between the original decision and the appeal!*
E.g. should take into account event X/ consideration Y, which would change the decision as...
- Evidence Z wasn't shown to the DM, but can be shown to the AAT + influence decision (Greenham).

Or, no change in decision + will likely be affirmed because the DM cannot take X into account, as it's beyond the scope of the Act/ would breach GoR (Drake).

- *Look at the power provision (s 11/ 12/ 25(3) Cth Act) and check the DM can take this into account > can't be irrelevant consideration, e.g. assisting asylum seekers is NOT coastal trading.*

Step 5. Remedies and Conclusion

AAT may make a decision in writing:

Affirming the decision (s 43(1)(a) AAT Act);

Varying the decision (s 43(1)(b) AAT Act); or

Setting aside the decision (s 43(1)(c) AAT Act); **and** (i) making a decision in substitution; or (ii) remitting the matter for reconsideration in accordance with any directions/recommendations of the AAT.

ADJR Judicial Review

1. JURISDICTION

Step 1. Intro

P will seek JR by applying for an 'order of review' (s 11 ADJR) in the Fed Crt (s 8 ADJR) in relation to:

Step 2. Decision

a) Decision (s 5 ADJR) ** [in the Bond sense]

X will contend that the decision, **provided for in the Act under s[X]**, is a 'decision' per s 5 ADJR (Bond).

- Giving, suspending revoking or refusing to give a certificate, direction, approval, consent or permission s 3(2)(b) > s 11(1) Cth Act: M may direct that the Act does not apply (exemption) to vessel/person
- Issuing, suspending, revoking or refusing to issue a **licence** s 3(2)(c) > S 25(3) Cth Act: M may cancel general licence ☹; s 15/16/17 granting a general licence; s 24 renewing a licence
- Imposing a condition or restriction s 3(2)(d) > s 11(3) Cth Act: M may impose conditions in the direction; s 22 Cth Act: M may impose additional conditions on a general licence
- Making a declaration, demand or requirement s 3(2)(e) > s 12(2) Cth Act: M may declare Act applies for intra-state coastal trading in s 7(1)(c) ... or revoking declaration under s 12(4)(5)
- Doing or refusing to do any other act or thing s 3(2)(g) > granting/ refusing application in s 15(1)

NB. Report: As s[X] requires a report/recommendation to be made before a decision is made, the making of the report is deemed a decision per s 3(3) ADJR (must be condition precedent per Edelsten).

NB. Stepping Stone Decision: As s[X] requires an interim finding re _____ (e.g. whether company is fit and proper to hold a TV license), the finding is a stepping stone decision and is amenable to JR (Bond).

b) Conduct in relation to a decision (s 6 ADJR)

Conduct in relation to a decision is activity, of a procedural nature, taken in relation to a reviewable decision (Mason CJ in *Bond*).

- X will argue that the DM's act of _____ (e.g. taking evidence) is conduct relating to a decision per s 6 ADJR and is amenable to review. As the act _____ was procedural in the making of the decision (and not substantive), it satisfies *Bond*. Must be doing something external and concrete.
- Anything preparatory to the making of the decision, such as taking evidence, interviewing witnesses, engaging expert, holding inquiry/ investigation is amenable to review (s 3(5) ADJR). > 25(1) Cth Act?

c) **Failure to make a decision (s 7 ADJR):** As the DM did not make a decision in a reasonable time OR did not make a decision in a stipulated time (s 7 ADJR), this is open to review.

Step 3. Administrative Character

As DM is applying the **general rule of s[X]** to the **particular case of [applicant]** and this is neither judicial (interpreting law) or legislative (creating law), it is likely of an administrative character (*Griffith v Tang*).

Step 4. Made Under Enactment

X will argue the decision was made under an enactment as: [2 limb test per *Tang*]

1. The decision was **authorised** by the Cth Act, under s [Cth Act]. (I.e. looking at *source* of power for making of decision). > See *Bond* decision analysis above.
2. Although criticised for being too narrow a test (Kirby J in *Griffith v Tang*), the decision itself confers, alters or otherwise **affects someone's legal rights** or obligations (*Griffith v Tang*). It affects __ as __.
 - Without/with the exemption s 11/ declaration s 12/ licence s 25(3), X cannot _____.

NB. Enactment includes an Act, and also, amongst other things, an instrument (including rules, regulations or by-laws) made under an Act (s 3 ADJR).

Step 5. 'To which this Act applies' (s 5 ADJR)

- s 3 ADJR excludes decisions made by the **Governor General** and those listed under **Schedule 1**.
- Use s 39B JA or try s 75(v) CT, but the HC would probably refer the matter down to the Federal Court (relying on s 44 JA) unless important decision.
- If **privative clause**, will likely defeat the ADJR Act thus use s 75(v) Constitution.

Step 6. Conclude Overall, jurisdiction made out/ not made out.

2. STANDING – ADJR & Common Law

Step 1. Intro

There is no real difference between standing rules at CL and the 'person aggrieved' requirement in s 3(4) + 5 ADJR, hence case law from both regimes is applicable.

Step 2. Public or Private Interest?

A) Private Interest Standing / Individual Applicant

i. ADJR

The applicant will argue per s 5(1) ADJR that she is a 'person aggrieved' by the decision as:

1. Her interests are adversely affected (s 3(4)(a)(i) ADJR); or
2. Her interests would be adversely affected (s 3(4)(a)(ii) ADJR).

NB. Use (2) when s 6 ADJR conduct OR s 7 ADJR failure to make a decision.