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## Week 3 – Merits Review: Administrative Tribunals

Merits review – **the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision – affirming, varying or setting aside the original decision – is made.**

### GENERAL RULES

Re Greenham – The tribunal can consider **other factors/grounds** that were not part of the **original application**.

Drake – **Policy was a relevant factor** that the Tribunal could take into account – consistency with Government policy can be one criteria for determining the preferable decision, however you cannot apply an unlawful policy.

Brian Lawlor – The AAT had jurisdiction to determine the LEGAL question before it.

RULE – Re Bloomfield – **CHANGE IN ADMINISTRATIVE OUTLOOK** – A decision appealed to merit review tribunal becomes responsibility of the tribunal, no independent authority to tamper with the decision.

RULE – Shi – **CHANGE IN FACTS** – nothing in the Migration Act limited AAT's consideration to matters which were only in existence at the time of the cancellation decision. As a general rule – **AAT not limited to evidence that was available to original DM.**

RULE – Esber – **CHANGE IN LAW** – Once appellant lodged application to Tribunal, he had a right to have the decision reconsidered (substantive, accrued right)

### PROBLEM QUESTION

What is the decision that has been made?

Can this decision be reviewed? Which body has jurisdiction to review it?

- Which legislation needs to be considered to determine this – does it allow for appeal to the AAT?
- AAT can review a decision where another piece of **legislation has conferred jurisdiction** on the AAT to review that decision – s25 AAT Act

Does X person have standing to apply for a review of the decision?

- Consider the enabling legislation – and the words used.

Nature of the tribunal's decision making powers

- Merits review – does not look at correctness of assessor's decision
  - Decision is made afresh – AAT steps into shoes of the original DM and can exercise all the assessor's powers and discretions (s43(1) AAT Act)
- It must make the '**correct or preferable decision**' (Drake)
- The AAT has the power to: s43(1)
  - **Affirm (a), vary (b), set aside the decision and substitute a decision (c)(i), or set aside the decision and remit it to the assessor for consideration (c)(ii).**

Should the tribunal apply the policy?

- The AAT can **consider law, facts and policy** – see above about changes in law, facts or administrative outlook.
- Must make '**correct or preferable**' decision ([Drake](#))
- Government policy is a relevant factor, but AAT is not required to conform to it ([Drake](#))
- 'It is generally in the interests of consistency, that the AAT adopts a practice of applying lawful ministerial policy, particularly if parliament has scrutinised and approved the policy, unless there are cogent reasons to the contrary' ([Douglas, 40](#))