

Administrative Law Scaffolds

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Merits Review - Commonwealth

1. **Which decisions are reviewable?** For a decision to be amenable to merits review, there must be an express enactment in the statute which conferred the decision-making power which permits the applicant to seek merits review [s 25(1)(a), *AAT Act 1975*].
 - a. 'Decision' is defined as the making, suspending, revoking or refusing to make an order or determination [s 3(3)].
 - b. This includes a 'purported decision', or one made ultra vires [*Collector of Customs v Brian Lawlor*]. In this sense, the relative theory of invalidity is applied by the court: 'decision' means that the administrator's decision is effective until the court deems otherwise.
2. **Who may apply for review?** Any person whose interests are affected by the decision may apply [s 27(1)].
 - a. The Tribunal also has discretion to make any other person whose interests are affected a party to proceedings on application by that person [s 30(1)].
3. **Are reasons required?**
 - a. To the aggrieved: s 28 provides that a request for reasons of the original decision may be made by a person who is entitled to apply for merits review. Reasons must set out: (1) findings on material questions of fact, (2) referring to the evidence or other material on which those findings were based, and (3) giving reasons for the decision.
 - b. To the Tribunal: s 37(1) provides that the administrator must lodge a statement of reasons with the AAT, as well as every other relevant document. The AAT may order additional statements to be lodged [s 38].
 - c. Tribunal's decision: s 43 obliges the Tribunal to give reasons either orally or in writing. If given orally, a party may request that the Tribunal give them a written statement.
4. **How are hearings conducted?**
 - a. The Tribunal will step into the shoes of the primary decision-maker in order to make the 'correct or preferable decision'. It may consider questions of fact and law.
 - b. The AAT may proceed with as little formality and technicality, and as much expedition as a proper consideration of the matter permits [*AAT Act* s 33(1)(b)] and is not bound by the rules of evidence; it may inform itself on any matter in such manner as it thinks appropriate [*AAT Act* s 33(1)(c)].
 - c. Proceedings must be fair, just, economical, informal and quick [*AAT Act* s 2A].
 - d. Hearings are in public except in special circumstances [s 35], and representation is permitted [s 32].
 - e. There are **procedural fairness requirements**: as per s 39, the Tribunal must ensure that every party to a proceeding is given a reasonable opportunity to present their case, and in particular, to **inspect any documents to which the Tribunal proposes to have regard** and to make submissions in relation to those documents.
5. **What powers does the AAT have to make orders?**
 - a. As per s 43(1), the AAT may exercise 'all the powers and functions that are conferred by an Act on the person who made the initial decision' [i.e. steps into the shoes of the primary decision-maker].
 - b. Moreover, they can either (a) affirm the decision under review, (b) vary the decision, (c) set aside the decision and (i) substitute a decision [what makes this different to judicial review] or (ii) remit the matter for reconsideration in accordance with directions or recommendations.
 - c. Purpose of remedial powers: Recall that the decision under review must be found to be the 'correct or preferable one', where 'correct' applies to one single right answer and 'preferable' refers to the best of a set of alternatives.

6. Can an AAT decision be reviewed?

- a. Yes, it may be reviewed by the Federal Court, so long as the appeal is on a question of law [e.g. error of law, jurisdictional error]. Section 44 of the *AAT Act* provides that ‘a party to a proceeding before the Tribunal may appeal to the FCA, on a question of law, from any decision of the Tribunal in that proceeding.’

Other guidelines from case law

1. Government policies will ordinarily be applied by a merits review tribunal when reviewing a decision, except where the policy is unlawful or when it tends to produce an unjust decision in the circumstances of the particular case. An argument against applying a policy will be considered by the AAT but cogent reasons will have to be shown against its application [*Re Drake and Minister for Immigration (No 2)*].
2. A merits review tribunal may take into account any information up until the date of its decision, and is not limited to consideration of the information that was available to the primary decision-maker [*Shi v Migration Agents Registration Authority*].
3. Merits appeal requires the Tribunal to consider the arguments and facts ‘afresh’, and a failure to do so will constitute a failure to adequately discharge its function and result in remission [*MZZZW v Minister for Immigration and Border Protection* [2015]].