

Merits Review

- **Definition** → Reconsideration of an original decision based on MERIT not just lawfulness
 - A person or body other than the primary DM reconsiders the facts, law and policy aspects of the original decision, and determines the correct decision
 - May still bring up lawfulness although this isn't the focus
 - Creature of statute – often occurs in a Tribunal rather than Court (for judicial)
- **Objective** → ensure admin decisions are correct and/or preferable (*Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1980) 2 ALD 634*)
- **Correct** = correct an error of fact or law
 - DM can quash and remake the decision where there is such an error
- **Preferable** = making a more preferable decision – best according to the facts
 - Even if original D was correct (IE. no mistakes of fact/law), DM can still quash and remake if another option is preferable

Benefits of MR

- Addresses substance of an individual claim in a comprehensive and open manner
- Improves the quality of administrative decision-making, ensuring all Ds are C/P
- More accessible option for the review of many grievances.
 - Cheap, informal, quick – although before the Tribunal there may be extensive evidence, depending on the class of the matter
 - More responsive to needs of individuals
 - Adopts simple and informal procedures – JR is complex and has been developed over many years/too much CL
 - No need for legal representation
- May reduce the demand for judicial intervention and pressure on courts

Detriments of MR

- Structured external review may be inconsistent with Westminster theory, and replace processes of political and parliamentary accountability.
- External interference in decisions affecting government expenditure by a body free of financial constraints may be incompatible with notions of 'official fiscal responsibility'
- Merits review may overemphasise the rights and interests of individuals at the expense of the broader community
- Unnecessary procedural formality and legalism

Sources of MR

- Internal, external, specialist tribunal or court

Avenues of MR: Internal Review

- Informal → going back to original DM for review (phone call or letter)
- Formal → statutory complaints

Avenues of MR: External Review

State courts

- Do not have to adhere to the SoP principle (Kable) so may review on merits
- Specialist state courts are established
 - MR rarely occurs in genuine state courts such as NSWSC - will only occur in these specialist courts

What is a tribunal?

- Person or body who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice
- Often difficult to distinguish a tribunal from a court

- Functions involve the finding of facts, the ascertainment of the law, and the application of the law to the facts
- NOTE: AKA panel, board, commission – nothing turns on the name itself – powers are solely from statute

Characteristics of a tribunal

- Not set up under CHIII judicial power – form part of the executive as statutory bodies
- Independence from the government department – they are external, opportunity to put forward new facts etc
- Distance from courts - they are focused on access to justice
- Mix of inquisitorial and adversarial opportunity to be heard without being confined to legality of the argument
- *Epeabaka v MIMA (1997)* FCA: 'proceeding before the RRT is not adversarial for the reason that there is no party opposing an applicant... One consequence of a proceeding not being adversarial is that an applicant does not carry any burden
- Make decisions on merit – can substitute original decisions if not correct/preferable
- BUT no power to enforce decisions like Courts – still have legal effect (*Brandy v Human Rights and Equal Opportunity Commission*) → IE. cannot impose sanctions for contempt of courts etc.

Administrative Appeals Tribunal Act 1975 (Cth)

- The AAT is a body created by the *Administrative Appeals Tribunal Act 1975 (Cth)* to provide for a review of decisions by Ministers and Commonwealth officials given under statutory powers.
- Has jurisdiction to conduct merits review (also known as de novo review or administrative review) of many specified Commonwealth government decisions. Reviewable decisions in the AAT are specified in relevant enabling Acts setting out the decision-maker's power and stating that the particular decision is reviewable in the AAT. The nature of the jurisdiction is that of the exercise of administrative or executive power, not judicial power. NB: There is also a Victorian Administrative Appeals Tribunal which has similar (State) jurisdiction.
- Review in the AAT commences with an application in writing as described in the relevant act and the AAT Act **s25, s29**
- Simplified procedure, ADR, merits review
- The applicant must have standing which means either:
 - Their 'interests are affected by the decision' **s27(1)**
 - If an organisation or association, 'the decision relates to a matter included in the objects or purposes of the organisation or association' **s27(2) (3)**
- In conducting hearings and reaching decisions the AAT has broad, flexible powers and
 - Is not bound by the rules of evidence **s33(1)**
 - Generally reviews the decision in accordance with the facts and circumstances at the date of review
 - No party bears an onus of proof: *McDonald v Director-General of Social Security*
 - The civil standard of proof (balance of probabilities) applies unless there is a special statutory standard *Epeabaka*
 - Not limited to deciding on the evidence or arguments in the documents provided on an application by the agency or parties but can obtain material for itself or require the parties to do so **s38 Re Greenham**
- Under **s43(1)** the AAT can make any of the following orders: affirm the original decision; vary the original decision, make a completely new decision or send the decision back to the original DM
- Can appeal to FC if they do not like the decision (**s44** FC only does legal review)
- Hearing Date A person can expect a final hearing date from within 6 to 12 months from filing an application.
- What is a "Decision" Under the AAT Act? Section 3(3) of the AAT Act defines "decision" to include 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." Notwithstanding this wide definition, it has been held that the "decision" should be a decision which has the character of a final, operative or determinative decision which, in effect, disposes of the issues between the parties - *Director-General of Social Services v Chaney (1980)*

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