

ADMIN LAW MERITS REVIEW PROBLEM QUESTION GUIDE

GENERAL: there is no common law right to merits review, the statute determines everything (standing, pre-conditions, time limits, procedures, nature of review...)

DECISIONS NOT SUITABLE FOR MERITS REVIEW: legislative decisions

- These decisions are NOT directed towards the circumstances of an individual person but apply generally to the community.
- e.g: setting of fees or of standards applicable to industries

MERITS REVIEW KEY STEPS:

1. CHECK THE JURISDICTION (STATE OR COMMONWEALTH)

- Commonwealth: [AAT Act](#) (de novo hearing)
- State: [SACAT Act](#) (re-hearing)

2. IS THE DECISION REVIEWABLE UNDER THE RELEVANT ACT?

- Required under [S25\(1\) AAT](#) and [S31 SACAT](#)
- Legislation will specify the decisions that are reviewable: if no right to merits review conferred in the legislation, there is no rights to merits review

3. WHO WILL CONDUCT THE REVIEW?

- Not that important, but is set out in legislation and briefly mention this in answer
- Internal: conducted by someone within the agency
- External: conducted by a specialist body or generalist merits review body, such as SACAT or AAT

INTERNAL REVIEW:	EXTERNAL REVIEW:
<ul style="list-style-type: none">• Generally reviewed by more senior person within the same department• Cheaper, more accessible, faster than external• Lacks independence from original decision maker; but sometimes internal review is a pre-condition for external review	<ul style="list-style-type: none">• Performed by executive institutions that sit outside the agencies whose decisions they review (e.g. ombudsman, commissioner)

4. DOES THE COMPLAINING PARTY HAVE STANDING AS REQUIRED IN THE ENABLING LEGISLATION?

5. WHAT ARE THE POWERS OF THE REVIEWER? WHAT KIND OF REVIEW IS IT?

- Is it a full de novo or a re-hearing
- **De novo:** new hearing, standing in shoes of original decision maker, parties able to present fresh evidence: *Shi v Migration Agents Registration Authority* [2008]
 - ◇ Decision maker will reach the **correct and preferable** decision, power to affirm, vary, or set-aside and substitute decision: *Drake*
- **Re-hearing:** conducted on the basis of material before the original decision maker, but merits review body may have discretion to admit fresh evidence
 - ◇ Looking for error in original decision, not a fresh decision-making process

6. WHAT ARE THE ARGUMENTS MADE UNDER THE REVIEW? APPLY TO THE FACTS

- What is the correct or preferable decision: *Drake*
- **Correct = lawful**
- **Preferable = best decision if multiple available options**

7. WHAT IS THE LIKELY OUTCOME? WHAT OUTCOME WILL THE COMPLAINING PARTY SEEK?

- Remedy for merits review may be set out in the enabling legislation, but if not, look to [s 43\(1\) of the AAT Act](#) or [s 37\(1\) of the SACAT Act](#)

COMMONWEALTH MERITS REVIEW UNDER THE AAT (DE NOVO):

1. WHERE CAN A PERSON SEEK REVIEW BY THE AAT? MUST SATISFY ALL THREE OF THE REQUIREMENTS BELOW:

- The legislation under which the decision has been made states that the decision can be appealed by the AAT, AND
- The applicant is a person whose interests are affected by the decision, AND
- A reviewable decision must have been made in the first place

2. STANDING REQUIREMENTS: [S 27 AAT ACT:](#)

- The standing test is similar to common law standing test for judicial review and the AAT often refers to judicial review cases when considering standing under [s 27](#)
- [S 27\(1\) AAT](#) provides that where legislation states a decision can be appealed by the AAT, a person can appeal the decision if they are a person whose interests are effected by the decision
- [S 27\(2\)](#): an organisation or association will have its interests affected by a decision if it relates to a matter contained in the organisations or associations objects/purpose
- Other parties may apply to be joined as parties if their interests are affected by the decision, [S 30\(1A\)](#)
- **So: is the applicant a person whose interests are effected by the decision?**

S27(1)	S 27(2)
Where an act of any other enactment provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on a behalf of any person or decisions whose interests are effected by the decision	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 purpose of the organisation or association
S27(3)	S30(1A)
Subsection (2) will not apply in relation to a decision given before the organisation or association was formed or before the objects or purposes of the organisation or association included the matter concerned. This section makes it clear that a group cannot be formed simply in order to gain standing; nor can a group confer standing on itself by amending its objects or purposes after a decision is made.	A person whose interests are affected may apply to be a party: where an application has been made by a person to the Tribunal, any other person whose interests are affected by the decision may apply, in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order, make that person a party to the proceeding.

3. WAS APPLICANT PROVIDED WITH REASONS FOR THE DECISION? IF NO: CAN REQUEST A STATEMENT OF ORIGINAL DECISION MAKER'S REASONS UNDER [S 28 AAT](#)

- [S 37](#): all documents relevant to the original decision must be made available to the AAT
- [S 43\(2\)](#): the AAT must give reasons for decision its in writing