

LAWS12061 — MASTER EXAM NOTES

Administrative Law (HT2, 2026) · organised by exam topic · Commonwealth law as taught in the unit

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TOPIC 1 — MERITS REVIEW VS JUDICIAL REVIEW; THE ART (W1, W4)

TOPIC OVERVIEW	Administrative law is a 'triangle' (W1 lecture): old administrative law (judicial review by courts, which asks only whether a decision was lawful), new administrative law (merits review by tribunals, which asks what the correct or preferable decision is) and supporting mechanisms (FOI, reasons, Ombudsman). Merits review is administrative, not judicial. The ART (formerly AAT) stands in the shoes of the decision-maker and may affirm, vary or substitute its own decision (<i>ART Act</i> ss 54(1), 105). Judicial review can only quash and remit, so the decision-maker may lawfully make the same decision again. There is no general right to merits review: an enactment must confer it (s 12(1)).
KEY LEGAL PRINCIPLES	• Definitions. Judicial review is a court's review of legality and 'can lead to the quashal, but not the remaking' of a decision (Module 5). Merits review is a tribunal's review of facts, law, policy and discretion, and it can produce a new decision (Modules 1, 4). Boundary statement (Module 4): if no legal error was made and the complaint is only that 'a better, wiser or more factually correct decision should have been made', the remedy is merits review, not judicial review. • Standard. The ART decides the 'correct or preferable' decision on the material before it (<i>Drake</i> (1979), Full Federal Court). 'Correct' applies where only one answer is lawful. 'Preferable' applies to discretionary choices. The module and lecture sometimes write 'correct and preferable', but <i>Drake</i>'s phrase is 'correct or preferable'; <i>ART Act</i> s 54 itself does not use the phrase. • ART jurisdiction has three requirements. (1) An Act or legislative instrument must provide for ART review of the decision (<i>ART Act</i> s 12(1); <i>Hale</i> (1983)). (2) The applicant must be a person 'whose interests are affected' (s 17), which is wider than standing for judicial review. An organisation is affected if the decision relates to a matter in its objects or purposes (s 15). (3) There must be a 'decision' (s 4, defined widely to include refusals, conditions and licences). • Invalid decisions. A decision made in purported exercise of power can still be reviewed even if it is legally invalid (s 12(2); <i>Brian Lawlor</i> (1979)). However, the tribunal cannot affirm a decision that was beyond power (Module 4). • Standing in the shoes. The ART may exercise all the powers and discretions of the original decision-maker (s 54(1)). It must affirm, vary, or set aside and either substitute or remit (s 105). A substituted decision is deemed to be the original decision-maker's decision. Module 4 says this conferral of the decision-maker's powers 'is what fundamentally distinguishes merits review from judicial review'. • De novo process. The ART decides on the material available at the time of review, including fresh evidence. It is not confined to the decision-maker's reasons (<i>Re Greenham</i>), and there is no presumption in favour of the original decision. It is inquisitorial and must act with as little formality as possible (s 50(1)). It is not bound by the rules of evidence (s 52), but its findings must rest on logically probative material. • Limits on the ART. It must still apply the statutory criteria: 'you're not free totally just to make up stuff' (W4 workshop, security licence problem). It reviews only the decision actually made. There is no formal precedent, but guidance decisions must be taken into account (ss 109–110). • Further review of the ART. Appeal to the Federal Court lies on a question of law (s 172); s 173 deals with decisions about standing. An internal appeal to the Guidance and Appeal Panel requires referral by the President (ss 123, 128, 130). The lecturer says both routes become legalistic. • Judicial review remedies are weak. They quash and remit, and 'weasel provisions' (catch-all criteria) let a decision-maker remake the same decision on another ground (W4 workshop). Costs are high: about \$10,000 to start (W4) and up to about \$100,000 (W7). Lecturer: 'If you ever have the choice between merits review and judicial review, always take merits review' (W11 workshop). • Why judicial review still matters. Successive governments have removed decisions from merits review (for example immigration and terrorism), leaving judicial review as the only route. Its principles (a fair hearing, no bias, good evidence, staying within power) are a blueprint for good decisions and useful rhetoric before tribunals, although they are not precedent there (W1 and W5 lectures).
EXAM ISSUE TRIGGERS	• The statute says applications may be made to the ART/AAT for review of decisions under s [x] (for example the example exam's s 45). • The client says the decision was wrong or unfair on the facts, rather than unlawful. • The question asks which review options are open, or asks you to advise on merits review vs judicial review. • The decision rests on mistaken facts (for example someone else's criminal record) that a tribunal could simply correct by remaking the decision. • Legislation or data refers to the AAT: read this as the ART and note the change.
COMMON TRAPS & DISTINCTIONS	• Tribunals 'look like courts. But they're not courts': the ART is part of the executive (W1 lecture and workshop). • Never propose a substituted decision as a judicial review remedy. Only the ART substitutes (W11 lecture). • There is no general right to merits review. Check that the enabling Act confers it (<i>ART Act</i> s 12(1)), and check who it gives the right to. ⚠️ The hypothetical security-licence s 26 gave an appeal right to a 'licensee', yet the applicant was not yet a licensee; the workshop did not discuss this. • The availability of merits review does not excuse you from discussing judicial review: the exam wants judicial review options discussed 'overtly'. • Disagreeing with the merits of a decision is not a ground of judicial review. • Don't mix up the AAT and ART Acts ('beware of getting these mixed up', Module 4). Verified: remittal during a proceeding is <i>ART Act</i> s 85 (Module 4's 's 33' is the old AAT number); final orders are s 105. • ART standing (s 17, 'interests affected') is not the same as judicial review standing (a special interest, or being a 'person aggrieved' under the ADJR Act).
MODEL EXAM ANSWERS (ESSAY STYLE)	• Part B, every essay — Introduction (state the ART review right and the merits/JR distinction in two or three sentences; Essay 1 shows how to use ART outcome data) • Part C, Q1A — ART stands in the shoes: security licence refusal • Part C, Q1B — Merits or judicial review? Choosing the pathway