Where the question goes

OPEN	ADJR Act 1977 (Cth) ("ADJR" below); Constitution s 75(v); Judiciary Act 1903 s 39B; Administrative Review Tribunal Act 2024 (Cth) ("ART Act"); the judgments.
SOURCE	your LAWS2010/5010 HD notes; statutes read live (date in each footer).

ROUTER · THE QUESTION INVOLVES → PAGE

A tribunal re-deciding the merits; new evidence; policy	ART Act ss 54, 105	**ADMIN · 1 Merits review**
Can the decision be reviewed at all? A private body; a contract	ADJR s 3; s 75(v); s 39B	**ADMIN · 2 Jurisdiction**
Who may bring it? A group, a rival, a citizen	ADJR s 3(4)	**ADMIN · 3 Standing**
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No hearing given; is fairness owed or excluded?	ADJR s 5(1)(a)	**ADMIN · 5 Fairness (1)**
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A biased decision-maker	ADJR s 5(1)(a)	**ADMIN · 7 Bias**
Matters considered or ignored; too little time	ADJR s 5(2)(a)–(b)	**ADMIN · 8 Considerations**
Wrong purpose; a policy; a direction; a promise	ADJR s 5(2)(c), (e), (f)	**ADMIN · 9 Purpose, policy, dictation**
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An unreasonable or disproportionate decision; no inquiry	ADJR s 5(2)(g)	**ADMIN · 11 Unreasonableness**
Wrong law, no evidence, a jurisdictional fact	ADJR s 5(1)(f), (h), (3)	**ADMIN · 12 Law, fact, evidence**
Is the error jurisdictional, and material?	the enabling Act	**ADMIN · 13 Jurisdictional error**
What the court can order; reasons	ADJR ss 13, 16	**ADMIN · 14 Remedies**
A clause excluding review; a time limit	s 75(v)	**ADMIN · 15 Limits on review**
Which case to cite	the judgments	**ADMIN · 16–21 Cases**

THE ANSWER, IN ORDER (EVERY PAGE)

1	Merits or legality?	Merits review (a tribunal) or judicial review (a court)? A court reviews legality, not merits.
2	Jurisdiction and standing	ADJR (a decision of an administrative character under an enactment) or s 75(v) / s 39B; who is aggrieved or has a special interest.
3	The ground	Each ground, from the page, with its elements.
4	Jurisdictional error and materiality	For the constitutional writs: jurisdictional, and material to the outcome.
5	Remedy; limits	Quash, remit, declare, enjoin (ADJR s 16; writs); then any privative clause or time limit.

Merits review ART Act ss 12, 54, 105

USE THIS PAGE WHEN	a tribunal reviews a decision; new evidence has emerged; the tribunal follows or departs from ministerial policy.
OPEN	Administrative Review Tribunal Act 2024 (Cth) ss 9, 12, 53, 54, 105.
FIRST QUESTION, ALWAYS	is the decision reviewable, and what was the decision-maker's question?

RELATED PAGES · ADMIN 9 · ADMIN 2.

s 12
reviewable

Can the tribunal review it?

→ "A decision is a reviewable decision if an Act or a legislative instrument provides for an application to be made to the Tribunal for review of the decision" (ART Act s 12(1)). The ART Act 2024 replaced the AAT Act 1975; older cases (Shi) apply AAT Act s 43.

s 54
correct or preferable

What does the tribunal decide?

→ It "may exercise all the powers and discretions that are conferred on the decision-maker" (s 54). "The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal" (Bowen CJ and Deane J in Drake, quoted by Hayne and Heydon JJ in Shi [98]); it is not "confined to the correction of demonstrated error" ([97]). It affirms, varies, or sets aside and substitutes or remits (s 105).

Shi v Migration Agents Registration Authority · AAT Act s 43 (now ART Act ss 54, 105): Hayne and Heydon JJ; Kirby J and Crennan J agreeing in the result; Kiefel J dissenting on the caution conditions (all five: later material admissible)
‣ *a migration agent's registration cancelled; the tribunal substituted a caution with conditions*

Shi
after the decision

New material after the original decision

→ Unless a statute confines it, "the material before the Tribunal will include information about conduct and events that occurred after the decision under review" (Shi [99]); any limit "would be found in the legislation which empowered the primary decision-maker" ([99]). The tribunal addresses "the same question as the original decision-maker" (Kiefel J [142], Crennan J agreeing [117]); a decision with a temporal element may fix the relevant time ([143]).

Shi: as above

s 53
scope

Narrowing the review

→ The Tribunal "may determine the scope of the review by limiting the questions of fact, the evidence and the issues that it considers" (s 53).

policy
guiding

A ministerial policy governs the decision

→ "[N]ot only is it lawful for the Minister to form a guiding policy; its promulgation is desirable", "diminishing the importance of individual predilection" (Brennan J in Drake (No 2), quoted in M64 [54]). The policy must not be applied inflexibly (M64 [52], [58]; ADMIN 9).

Plaintiff M64/2015 v Minister: French CJ, Bell, Keane, Gordon JJ; Gageler J agreeing
‣ *a refugee's mother and brothers refused Subclass 202 visas under a priorities policy; the challenge failed*

DECIDE

Merits review

1 Does an Act or instrument provide for review by the Tribunal (ART Act s 12(1))?

NO → no merits review: judicial review only (ADMIN 2)

YES ↓

2 Does the enabling Act fix the facts at the time of the original decision (Shi [99]; Kiefel J [143])?

→

YES decide on the facts at that time
NO decide the correct or preferable decision on all material now before it (Shi [98]–[99])

SAY

The decision is reviewable: _Act_ provides for review by the Tribunal. (ART Act s 12(1)) The Tribunal stands in the decision-maker's place and decides the correct or preferable decision on the material before it. (s 54; Shi [97]-[98]) _New material_ post-dates the decision but may be considered: nothing in _Act_ confines the Tribunal to the facts at that time. (Shi [99]) The Minister's guiding policy promotes consistency, but it must not be applied inflexibly to _applicant_. (Drake (No 2), via M64 [54]; M64 [58])

The Tribunal _affirms / varies / sets aside and substitutes / remits_. (s 105)

MARKS LOST

1. Treating merits review as error-correction (Shi [97]).
2. Confining the tribunal to the original record (Shi [99]).
3. Citing the AAT Act 1975 instead of the ART Act 2024.
4. Ignoring a temporal element in the decision (Kiefel J [143]).
5. Treating policy as binding law (M64 [52], [58]; ADMIN 9).
6. Missing the s 105 options.

Jurisdiction for judicial review ADJR s 3; s 75(v); s 39B

USE THIS PAGE WHEN	is the decision reviewable at all? A university, a private company, a contractor, a statutory adjudicator.
OPEN	ADJR s 3(1)–(3); Constitution s 75(v); Judiciary Act s 39B(1).
FIRST QUESTION, ALWAYS	which route: ADJR, or the constitutional writs?

RELATED PAGES · ADMIN 3 · ADMIN 14.

routes
officer

Which route? ADJR or the writs
→ ADJR: "a decision of an administrative character made ... under an enactment", not by the Governor-General or in Sch 1 (s 3(1)); "enactment" is a Commonwealth Act or instrument (s 3(1)). Writs: the Federal Court has jurisdiction where "a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth" (Judiciary Act s 39B(1), subject to s 39B(1B), (1C), (1EA)); the High Court under s 75(v); the writs need jurisdictional error. A NSW statutory decision: s 69 (row 5).

s 3(2)
final or operative

Is it a "decision"? A step along the way
→ Includes making or refusing an order, licence, approval, condition or "any other act or thing" (s 3(2)); a report or recommendation provided for by an enactment is itself a decision (s 3(3)). Bond: generally "final or operative and determinative, at least in the practical sense"; "a conclusion reached as a step along the way" ordinarily is not (via Tang [61]).

Griffith University v Tang · Judicial Review Act 1991 (Qld), same words: Gummow, Callinan, Heydon JJ; Gleeson CJ separately; Kirby J dissenting
▸ *a PhD candidate excluded for academic misconduct*

Tang
under an enactment

A university or body acting under its Act; a contract
→ Two criteria: "the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations" (Tang [89]). Ending a merely "consensual relationship" is not a decision under the Act ([91]).

Tang: as above

NEAT
private interests

A private company given a role in a statutory scheme
→ "[I]t is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests" (NEAT [51]); the answer turns on "the particular structure of the legislation" ([50]).

NEAT Domestic Trading v AWB · ADJR s 3(1): McHugh, Hayne, Callinan JJ; Gleeson CJ separately, rejecting the private-interests reasoning ([29]); Kirby J dissenting
▸ *a wheat export veto by a private company*

s 69
public power

A private person exercising statutory power (NSW)
→ The supervisory jurisdiction "can be invoked with respect to the exercise of statutory powers ..., whether or not the person ... is a public officer" (Spigelman CJ [3]); "The critical issue is whether the relevant decision-maker is exercising public power, relevantly, a statutory power" ([10]) (Basten JA agreeing, [84]). Whether Datafin applies to bodies without government-conferred functions is unsettled (Basten JA [81]).

Chase Oyster Bar v Hamo Industries · Supreme Court Act 1970 (NSW) s 69: Spigelman CJ, Basten JA, McDougall J
▸ *a building payment adjudicator*

M61
assumed not

A private contractor reviews for the Minister
→ Accepting the contractor's reviewers are not officers of the Commonwealth, jurisdiction lay under s 75(iii) and s 75(v) against the Minister and departmental officers (M61 [51]).

Plaintiff M61/2010E v Commonwealth: the Court
▸ *offshore asylum seekers' independent merits review*

DECIDE

ADJR jurisdiction

1 A final or operative decision (Bond via Tang [61]), or a report or recommendation that an enactment provides for (s 3(3))?

NO → not a reviewable decision; conduct under s 6, or the writs

YES ↓

2 Authorised by the enactment, and itself affecting legal rights or obligations (Tang [89])?

NO → not under an enactment: try s 75(v) / s 39B(1)

YES ↓

3 Of an administrative character, not by the Governor-General or in Sch 1 (s 3(1))?

→

YES ADJR applies
NO no ADJR review

SAY

Act authorised the decision, and it affected / did not affect P 's legal rights, so it was / was not made under an enactment. (ADJR s 3(1); Tang [89]) It was final and operative / only a step along the way . (s 3(2); Bond via Tang [61]) D is an officer of the Commonwealth, so the High Court (s 75(v)) / Federal Court (s 39B(1)) has jurisdiction to grant mandamus / prohibition / an injunction . (Constitution s 75(v); Judiciary Act s 39B(1)) Given the structure of Act s __, Company acts in pursuit of its private interests, and public law obligations cannot be imposed on it while accommodating those interests, so its decision is not reviewable. (NEAT [50]–[51])

Adjudicator exercises statutory power, so the Supreme Court's supervisory jurisdiction applies. (Chase Oyster, Spigelman CJ [3], [10]; Basten JA agreeing [84])

MARKS LOST

1. Treating any decision by a statutory body as "under an enactment" (Tang [89]).
2. Missing that ending a merely consensual relationship affects no legal rights, so it is not a decision under the Act (Tang [91]).
3. Reviewing an intermediate step (Bond via Tang [61]; but s 3(3)).
4. Assuming Datafin is Australian law (Chase Oyster, Basten JA [81]).
5. Forgetting the writs when ADJR fails (s 39B(1); s 75(v)).
6. Treating NEAT as a general rule against private bodies ([50]).