

Merits Versus Judicial Review Distinction
Jdicial review is concerned with the legality of a decision, where as merits review is concerned with the fact finding of the decision maker.
ower of Substitution / Remedies
he AAT has the power to stand in the shoes of the decision maker under s 43 and make e correct and preferable decision: <i>Drake's Case</i> . At common law, a court exercising dicial review jurisdiction can quash the decision under review, but cannot make a bstitute decision. However, unlike the AAT, the courts can give a declaratory, andatory, or prohibitory order.
osts
here are no costs orders under the AAT (as opposed to judicial review). Thus this iminates the burden of an adverse costs order. Under s 69 the AAT has no general ower to award costs and thus most parties must pay individual costs. There are some nited exceptions to this.
ormal
ccording to s 31(1) of the AAT Act , the procedure is at the discretion of the Tribunal and , be conducted with little formality and there are no rules of evidence to be complied with ch as hearsay. As opposed to the court system whereby evidence rules need to be rictly adhered to and the outcome of cases is influenced by evidence.
tanding
ublic interest groups can acquire standing in the AAT if an interest in their objects clause affected. However under Judicial Review the courts are generally reluctant to afford anding in these circumstances.
Advantages Versus Disadvantages
Judicial Review (ADJR)
dvantages: ccess to reasons rrors of law are reviewable wift interlocutory relief nal determination rders as to costs isadvantages xpensive tanding requirements o merits review available egalistic ormalities ust have a reviewable decision elays
AT
dvantages: an consider fresh evidence ccess to reasons on-legal experts erits review ess formal stand in the shoes of the original decision maker" isadvantages: pecific enactment must give jurisdiction o costs orders – thus parties must bear costs elays
mbudsmen
dvantages: expensive ore flexible remedies are available erits review ispute resolution mechanism

Face saving for parties Increased information resulting Disadvantages: Outcome is non-binding Excludes Ministerial acts Limited to administrators Discretionary
Introductory Matters
Introductory Statement
STEP 1: What is [client] seeking to challenge?
Decision, report, initial investigation? Is the client seeking judicial review or merits review?
STEP 2: What jurisdiction / Acts are we looking at?
Broadly a Qld / Cth divide b/w JR Act and ADJR Act, respectively. These deal with judicial review . However, the AAT hears appeals (if empowered to do so by relevant act) from tribunals and has the power to conduct merits review .
Right to Reasons Common Law
Issue: Can [client] get reasons under CL? Rule: No CL duty on administrators to give reasons (<i>Public Service Board of NSW v Osmond</i>). Analysis: As no CL duty, it is advised that [client] seeks reasons under AAT Act or ADJR Act . Cases: <i>Public Service Board of NSW v Osmond</i> : P wanted to know why he did not get a promotion. CA held: Kirby J stated that administrators under duty to give reasons. HC held: No duty to give reasons. Gibbs CJ said this is unfair, but the court cannot change CL here – up to the Parliament. Counter-factual: <i>Cyressvale v Retail Shop Leases Tribunal</i> : Fitzgerald indicated that times have changed and the D was required to give reasons at least on the grounds of procedural fairness .
Statute
General: Issue: Can [client] get reasons under statute? Rules: Reasons available pursuant to s 28(1) AAT Act / s 13(1) ADJR Act . NOTE: Analysis: <ul style="list-style-type: none">It must be noted that the AAT Act takes priority over the ADJR Act because s 13(11)(a) ADJR Act excludes 'reasons' being sought under the ADJR Act if it is a 'decision' to which s 28(1) AAT Act applies.As such, it is logical to first examine if [client] would be entitled to 'reasons' under the AAT Act. If [client] is entitled to reasons, then there is no need to examine any entitlement under the ADJR Act. However, if [client] is not entitled to reasons under the AAT act, then the ADJR Act will be examined.Now see below sections as per needs.
Applying under AAT Act
Pursuant to s 28(1) AAT Act , [client] will have a right to reasons if the following 5 conditions are satisfied: <ol style="list-style-type: none">Jurisdiction: Decision must be reviewable by the AAT: s 28(1) AAT Act (Cth) Analysis: Satisfied as [decision-maker's] decision reviewable under [insert Act/regulation]Standing: Person's interests must be affected by the decision: s 28(1) AAT Act (Cth) Analysis: Satisfied as [client's] interests are adversely affected. In particular, their [financial interests/ welfare / reputation] is directly affected.Timing: Application must be made within the prescribed time limits: s 28(1A) AAT Act (Cth); and

- Analysis:** [Client] must apply within 20 days if decision notified by writing / within reasonable time if not notified in writing. Regardless, apply immediately.
4. **Application:** Person must make a written application requesting the decision-maker to provide written reasons: [s 28\(1\) AAT Act \(Cth\)](#)
5. **Refusal:** Person is not precluded from making a request because reasons have already been given: [s 28\(4\) AAT Act \(Cth\)](#).

Applying under ADJR Act
Pursuant to s 13(1) ADJR Act , [client] will have a right to reasons if the following conditions are satisfied: <ol style="list-style-type: none">Jurisdiction: Decision must be reviewable by the Federal Court: s 13(1) ADJR Act Analysis: Satisfied as [decision-maker's] decision reviewable under s5(1) ADJR Act, as it is a 'decision' of an 'administrative character' made "under an enactment"Standing: Person aggrieved: s 5(1) ADJR Act (Cth)<ul style="list-style-type: none">defined in s 3(4) as "a person whose interests are adversely affected by a decision or determination". Applicant must show a 'special interest', or a 'grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public'. Ellic J in <i>Tooheys v Minister for Business Affairs (1981) (FC)</i>. Analysis: Satisfied as [client's] interests are adversely affected. In particular, their [financial interests/ welfare / reputation] is directly affected.Timing: Application must be made within the prescribed time limits: s 13(5) ADJR Act (Cth); and Analysis: [Client] must apply within 28 days if decision notified by writing / Within reasonable time if not notified in writing. Regardless, apply immediately.Application: Person must make a written application requesting the decision-maker to provide written reasonsRefusal: Person is not precluded from making a request because reasons have already been given
Overall, it is likely [client] will be granted reasons if they request within the time limit.
Grounds for Refusal:
Procedural Refusal: Decision maker may refuse to give reasons if there is no entitlement due to time or standing issues: s 28(1AA) AAT Public Interest Refusal: Decision maker may refuse to give reasons if it would prejudice the public interest: s 28(2) AAT / s 14 ADJR . <ul style="list-style-type: none">TEST: Balance administration of justice versus harm to nation or public service<ol style="list-style-type: none">The administration of justice should not be frustrated by the withholding of informationHarm should not be done to the nation or the public service through the disclosure of information contrary to the PI (whether by its content or because it belongs to a particular class of docs e.g. cabinet docs)
Review of Refusal
Can apply for a review of the refusal under s 28(1AC) AAT / s 13(4A) ADJR .
Freedom of Information Common Law
Issue: Can [client] obtain access to documents under CL? Rule: No CL right to access, possible exception through the process of discovery and interrogatories in legal proceedings – but otherwise no right of access. Even if such access were required in legal proceedings, access may be reitsded by the Executive in reliance on its prerogative right of public interest immunity . <ul style="list-style-type: none">the courts will decide whether immunity from disclosure arises - <i>Sankey v Whitlam (1978) (HC)</i> Analysis: As no CL duty, it is advised that [client] seeks reasons under FOI Act .
Statute – <i>Freedom of Information Act 1982 (Cth)</i>
General:

Issue: Can client obtain access to documents under the [FOI Act 1982 \(Cth\)](#)?

Rules: Right of access to documents is available under [s 11\(1\) FOI Act 1982 \(Cth\)](#) to:

- [\(a\)](#) a document of an agency, other than an exempt document, and
- [\(b\)](#) an official document of a Minister, other than an exempt document.
- Note: obligation on agencies to ensure access to certain documents in possession of contract service providers of Commonwealth contracts ([s6C](#)) relating to the functions and powers of the agency.

This access is mandatory (client need not give reasons) – [s11A](#).

Analysis:

Client has an automatic right of access to documents under [s11\(1\) FOI Act 1982](#). This access must be provided unless the requested document is an “exempt” document or a “conditionally exempt” document.

Exempt Documents

Issue: Is the document being request by the client an “exempt document”, or a conditionally exempt document that would fail the public interest test?

Rules: **Exempt documents:** absolutely exempt – listed in [Div 2 of Pt IV](#)

Conditionally exempt documents: possibly exempt – listed in [Div 3 of Pt IV](#)

Exempt documents - Div 2 of Pt IV - totally exempt unless released by Minister. Includes:

- National security ([s33](#))
- Cabinet documents ([s34](#)) expanded to include submissions to cabinet as long as ‘dominant purpose’ is for consideration by cabinet but excludes attachments unless they also exempt
- Enforcement of law and protection of public safety ([s37](#))
- Secrecy provisions ([s38](#));
- Legal Professional privilege ([s42](#));
- Material obtained in confidence ([s45](#))
- Contempt of Parliament or court ([s46](#))
- Trade secrets or commercially valuable information ([s47](#))
- Electoral rolls ([s47A](#))

Conditionally exempt documents - Div 3 of Pt IV - must be disclosed (mandatory access under [s 11A](#)), unless, on balance, it would be contrary to the public interest to disclose it (as per public interest test in [s11B](#)). Includes:

- Documents given in confidence or reasonably expected to harm Commonwealth – State relations [s47B](#)
- Deliberative process documents [s47C](#) (internal working documents according to old Act – couldn’t get access to documents within government department used in an internal process). Wording has been clarified. Scientific data or factual information is always available.
- Financial or property interests of Cth [s47D](#)
- Operations of agencies [s47E](#)
- Personal privacy [s47F](#) (access must be granted unless on balance not in public interest AND it would involve the unreasonable disclosure of private information)
- Business or professional affairs [s47G](#) (other half of trade secrets one)
- Research [s47H](#) – applies to CSIRO and ANU
- The economy [s47J](#)

Public interest test – for conditionally exempt documents – [s11B](#)

Factors favouring access (non-exhaustive so can be others):

- Promoting the objects of FOI Act
 - See “Objects of the FOI Act” below
- Informing debate on matters of public importance
- Promoting effective oversight of public expenditure
- Allowing access to one’s own personal information

Irrelevant factors (most of the old “Howard factors”) – is an exhaustive list – no discretion here:

- Embarrassment to or loss of confidence in the government
- Possible misinterpretation or misunderstanding
- Level of seniority of author

- Possible confusion or unnecessary debate

If a document is both exempt and conditionally exempt, it is treated as (blanket) exempt ([Item 5 in s31A](#)).

Documents that need not be provided

Exceptions in [ss 12](#) and [13](#) – cannot access:

- Documents already available;
- Documents available under another statutory provision or administrative arrangement (for instance, a doc that is available for purchase by the public in accordance with the arrangements made by an agency).
- Documents in certain institutions such as the National Library of Australia.
- Various other technical exceptions.

Relevant case law

- [Re Murphy v Australian Electoral Commission \(1994\)](#) – exemption for the AEC and information about the voter’s roll. Same under current Act. Murphy wanted to know what a valid reason for not voting was. AEC was not obliged to give him any information about that due to exemption under s37(2) (now blanket exemption). Decision wouldn’t change.
- [News Corp v NCSC \(1984\)](#) – challenged under law and order provision – hasn’t changed in substance. NewsCorp refused access to investigation documents “reasonably be expected to cause harm to the enforcement of law in Australia).
- [Re Connolly and Dept of Finance \(1994\)](#) – could change now. Wanted access to government’s strategy re: uranium mines. Related to economy under old Act. Now a conditional exemption – could fall under public debate access?
- [Re Dyki and Commissioner of Taxation \(1990\)](#) – may not change – involved personal privacy. Would be a varied decision. At that time all exempt. Wanted access to other applicant’s information. Didn’t get it. Reasons given – varied.
- [Harris v ABC \(1983\)](#) – internal working documents – ABC legal department wanted to review NSW Law Society. Not a completely irrelevant factor, would have been disclosed.
- [Re James and ANU \(1984\)](#) – James – student at ANU wanted to see opinions on exam paper. Was entitled to it, would be allowed today.

Review of an FOI request:

(a) Internal Review: [s 52 to s54E](#)

- By applicants for ‘access refusal decisions’
- By affected third parties for ‘access grant decisions’

(b) Information Commissioner (covers all three Commissioners) : [s 54F to s55Q](#) (replaces review by Ombudsman) and allows review of:

- Access refusal decisions (applies to applicant that has asked for documentation who has been refused access); and
- Access grant decisions (access requested by third party regarding another party, and request has been refused. Person who was successful is notified that you’re requesting it.)

(c) AAT (can only review decisions of the Information Commissioner): [s 57 to s67](#)

- Can only review those decisions which the FOI Act gives it jurisdiction to review. Reviewable decisions include:
 - (1) decisions of the Commissioner made under (b),
 - (2) decisions the Commissioner believes should be heard by the Tribunal

(d) Judicial Review

(e) Annual report by agencies and Ministers to Information Commissioner who reports to Parliament ([s93 FOI Act](#) and [s30 Australian Information Commissioner Act](#))

Whole system to be reviewed by Minister in 2 years time ([s93B FOI Act](#) & [s33 AICA Act](#))

Objects of the FOI Act:

New objects clause (clause 3) – previously weak (“as far as possible provide access”), now:

- to publish information and grant access to documents

- to promote representative democracy by increasing public participation and scrutiny of government activities
- to recognise that government information is a national resource and should be managed for public purposes; and
- confirming Parliament’s intention that the purpose of the FOI Act is to facilitate and promote public access to information promptly and cheaply
- to specifically allow Ministers or agency officers to publish information that may be exempt under the FOI Act or that has not been requested (section 3A) – if a document previously exempt – was no discretion to allow a document to be released. Changed now.

Making an FOI application:

[Section 15 FOI Act](#) sets out procedure:

Application for access must:

- Be in writing
- Identify the documents requested – publication provision is important, you don’t know what’s there, it’s hard to ask for something
- Can be posted or sent by email
- Generally free, except for out-of-pocket expenses
- Agency / Minister must give assistance
- Time limits apply to agencies and ministers for providing access – they must:
 - Acknowledge receipt of the request within 14 days
 - Notify of their decision on the request within 30 days

FOI Background:

Introduced as part of the Administrative Reform Package in late 1970s and early 1980s.

Objective was to:

- Encourage transparency and accountability
- Discourage wrong-doing and corruption

Main features:

- Government departments to publish information about their activities
- Legal right to access government documents subject to exemptions (three different public interest tests, long list of exemptions, restricted types of docs etc) and exclusions (related to documents in the public domain)
- Ability to access and amend personal information
- Right to review refusals to grant access to documents

Open Government Report 1996 (ALRC): 106 recommendations, none implemented by Howard Government. Kevin Rudd election commitment 2007: to reform FOI to ‘restore trust and integrity in the use of Australian Government information, and to promote great openness and transparency’. The Freedom of Information Amendment (Reform) Act 2011 was passed through Parliament on 13 May 2010 after lengthy public consultation. The majority of the measures commenced on 1 November 2010 with the rest to follow in May 2011. Draft Bill was made available for public/government comment – shift in emphasis from old regime to say “how is the exempt” – to now presumption in favour of granting access.

Changes to old regime:

- Office of the Australian Information Commissioner: Information Commissioner (reports to Parliament once a year)

FOI Commissioner

Privacy Commissioner

- New objects clause (clause 3) – previously weak (“as far as possible provide access”), now:

to publish information and grant access to documents

to promote representative democracy by increasing public participation and scrutiny of government activities

to recognise that government information is a national resource and should be managed for public purposes; and

confirming Parliament’s intention that the purpose of the FOI Act is to facilitate and promote public access to information promptly and cheaply

specifically allow ministers or agency officers to publish information that may be exempt under the FOI Act or that has not been requested (section 3A) – if a document previously exempt – was no discretion to allow a document to be released. Changed now. New office of the FOI Commissioner – new review process there as well New information publication scheme – proactive scheme to update public Indirect inclusion (private sector not under umbrella of executive government, now causes problem due to outsourcing, deprives citizens of right to find out about companies carrying out government services. Have said that agencies must put into contracts with private entities that they have to provide information if requested) of private sector service providers Restructure of exemptions around new, single public interest test – two main categories now. 2 outright exempt, others conditionally exempt. Greater options for review of decisions New office of the Australian Information Commissioner (*Australian Information Commissioner Act* 2010 (Cth)) to oversee information management

Information Publication Scheme:
L – was no prior duty to publish
statute previously – provided for access, did not require proactive publication
New Statute:
- New scheme provides framework for pro-active publication of information by agencies (as opposed to reacting to requests for access)
- Widening the types of information to be disclosed;
- Imposing a duty on agencies to disclose information regularly requested.
- Requiring information be available on-line or links provided
- Abolishing charges for access unless the agency incurs out-of-pocket expenses.

MERITS REVIEW

Administrative Appeals Tribunal
Overview of Merits Review
Objectives of AAT

Merits review is the function of evaluating and substituting the correct or preferable decision standing in the place of a decision maker – as opposed to enforcing the law that constrains and limits the powers of the other branches of government – is on that analysis, beyond judicial power.
Duty and jurisdiction of the court to review administrative action does not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power": *Quin*

2A AAT: Mechanism of review that is fair, just, economical, informal and quick.
33(b) AAT: Conducted with as little formality and technicality, and with as much expedition, not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
OTE: The AAT has no general power to award costs, but there are limited exceptions specified in **s 69B AAT**.
OTE: AAT does not exercise Commonwealth judicial power; it exercises administrative or executive power: *Drake v Minister for Immigration [No. 1] (1979) (FC)*

Practical Differences Between Merits and Judicial Review
Purpose

Judicial review is often concerned with whether the decision maker had the power to make the decision and whether the process whereby the decision was made was lawful. So, if there was any kind of material procedural error, the court may order the matter be set aside
On review of the merits, the question of whether there were prior procedural errors is immaterial, so long as the review tribunal avoids making them. Conversely, a decision may be legally impeccable, but 'wrong' on the merits.
Remedies

- vinnie courts can set aside a decision, they cannot ordinarily substitute a different decision as they cannot substitute their own opinion on matters which parliament has left to the administrative decision-maker.
- Merits review tribunals have the power to remake decisions and to exercise the same powers and discretions as those conferred upon the primary decision-maker by the enabling statute. Accordingly, the tribunal's decision has the same legal effect as the decision under review.
Cases and Precedent
- Tribunal decisions are not binding precedents in the way that higher court decisions are, but they have a lot of persuasive force, especially given the importance attached by administrators to consistency.

Structure of AAT

- president
- deputy presidents
- senior members
- members

Goals of a Tribunal: QCAT

- Must conduct its proceedings in a manner that is accessible, fair, just, economical, informal and quick
- Must also strive to ensure that proceedings are conducted in an informal way that minimises cost to parties and is as quick as can be, consistent with achieving justice;
- May inform itself in any way it considers appropriate;
- Is not bound by the rules of evidence;
- Must ensure, as far as practicable, that all relevant material is disclosed to it;
- Is not bound to follow the practices or procedures of courts;10
- Must take all reasonable steps to ensure that proceedings are conducted in a way that recognises and is responsive to the needs of a party;
- Must also take all reasonable steps to explain its practices and procedures to parties and, the nature of assertions made in the proceedings and the legal implications of those assertions; and,
- May conduct all or part of its proceedings on the papers.

What to do when forced to consider preference in **DRAKE**
where the legislation under which the relevant decision was made fails to specify the particular criteria or considerations which are relevant to the decision, the Tribunal is not, however, at large:
In particular, that it was;
1. 'obliged to act judicially, that is to say, with judicial fairness and detachment.';
2. it is subject to the constraints applying to the administrative decisionmaker whose decision is under review;
3. relevant considerations at law must be taken into account and irrelevant considerations must not;
4. in the absence of a specific legislative provision requiring or authorising the Tribunal to make its determination in accordance with specified policy, the Tribunal is entitled to treat government policy as a relevant factor in determining a review;
5. However, it may not, again 'in the absence of specific statutory provision, abdicate its function of determining the 'correct or preferable decision', by 'merely determining whether the decision conformed with whatever the relevant general government policy might be'

- Brennan J stated that the approach of Smithers J of applying the 'standards of good government' was intended to reflect the content of the criminal deportation policy rather than a general guide as to the function of the AAT.
- Recognising the value of consistency in administrative decision-making Brennan J held that departures from policy should be 'cautious and sparing' and in the cases of lawful ministerial policy such departures should only be made where there are ' cogent reasons to the contrary' such as 'injustice in a particular case'.

Role of Policy

- improper for AAT to ignore ministerial policy
- If government policy exists this is a *relevant factor* to be considered by the AAT: Parliamentary scrutiny
Ministerial responsibility
AAT not linked into the chain of responsibility
AAT not qualified to revise all policy
Consistency aided by policy
- What *weight* is given to policy *depends on AAT* in each case
- *Re Becker and Immigration Minister* (1977)

DP FOGIE in *Re Lobo and Department of Immigration and Citizenship*

1. the decision to be reviewed is determined having regard to the relevant legislative provisions conferring jurisdiction;
2. the Tribunal will address the same issues or questions as those addressed by the original decision-maker;
3. in the absence of a temporal element in the legislation requiring otherwise, the Tribunal reviews a decision as at the date it conducts its own review and makes its own decision;
4. the Tribunal may consider evidence on issues up to the date of its decision on the review;
5. The Tribunal's task is to reach the correct or preferable decision ie correct on the law and evidence AND where if there is more than one possible decision, the decision must be the preferable one having regard to the 'limits imposed by the legislation under which the decision is made and the facts of the case.

STEP 1: Jurisdiction of AAT

For the AAT to have jurisdiction, the **act** must provide that applications can be made to the AAT for a review of **decisions: s 25(1) AAT Act**. Consequently, the AAT will have jurisdiction if: **(1)** A decision has been made; and **(2)** the decision has been made under an enactment conferring jurisdiction to the AAT.

- 1) An enactment may provide that applications may be made to the Tribunal:
(a) for review of decisions made in the exercise of powers conferred by that enactment;
(b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.
- (4) The Tribunal has power to review any decision in respect of which application is made to it under any enactment.

Section 43(1)
(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:
(a) affirming the decision under review;
(b) varying the decision under review (**Quinlivan**); or
(c) setting aside the decision under review and:
(i) making a decision in substitution for the decision so set aside; or
(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.
Drake v Minister for Immigration and Ethnic Affairs
Positive decision for the emergent Tribunal, on specific issue it was held:

"The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether the decision **was the correct or preferable one on the material before the Tribunal**" (Bowen CJ and Deane J)

Smithers J put it a different, more aggressive way: '[to apply] its own views to decide objectively for itself whether according to **the standard of good government** the Minister's decision was the right one'..[to form] its own view as to the rightness in the proper sense, of the Minister's decision.'

room with Smithers approach is that it comes on as too free standing: the reality is that the AAT gets its jurisdiction from its statute and the statute operating in the area.

rake v Minister for Immigration and Ethnic Affairs No 2

Brennan J took the ruling in Drake Nr. 1 and distilled it into the simple finding: The Tribunal must try to reach **the correct or preferable** decision on material before it

Minister for Immigration and Ethnic Affairs v Pochi

Smithers J himself adopted the 'correct or preferable formula' and added another helpful idea that 'stands in the shoes of the primary decision maker.

Another restatement came in Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation

The function of a merits review tribunal is 'to do over again' what the original decision maker did.

ELEMENT 1: Decision

NOTE: Watch for advisory opinion / preliminary decision!

CATEGORY 1: Made a Decision

decision is defined in **s 3(3)(x) AAT Act** as including [CHOOSE]. In this case, the decision-maker has [APPLY FACTS] and thus this element is satisfied.

relevant subsections:

- 1 Making, suspending, revoking or refusing to make an order or determination;
- 1 Giving, suspending, revoking or refusing to make an order or determination;
- 1 Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- 1 Imposing a condition or restriction;
- 1 Making a declaration, demand or requirement;
- 1 Retaining, or refusing to deliver up, an article; or
- 1 Doing or refusing to do any other act or thing.

cases:

-G of Social Services v Hales: Legal rights do not have to be affected, but there must be some practical effect – this is a flexible view.

CATEGORY 2: Failed to make a Decision

appears that [decision-maker] failed to make a decision. A failure to make a decision constitutes a 'decision'. As such the 'decision' element is satisfied.

CATEGORY 3: Refused to make a Decision

appears that [decision-maker] refused to make a decision. A refusal to make a decision constitutes a 'decision' (*D-G Patents v Board of Control of Michigan Technological University*). As such the 'decision' element is satisfied.

cases:

-G of Patents v Board of Control of Michigan Technological University: failed to apply within prescribed time for restoration of lapsed patent. P applied under s 30 of Patents Act for Commissioner to extend time. Commissioner decided did not have power to do so thus he refused to make a decision. **Held:** Was a decision even though it was on the basis that he thought he did not have the power in question.

CATEGORY 4: Advisory opinion / Preliminary decision or recommendation

appears that [decision-maker] has only made an [advisory opinion/preliminary decision/recommendation]. Therefore as the [opinion/preliminary decision] lacks an element of finality, it does not constitute a 'decision' and therefore is not reviewable by the AT.

cases:

Re Rennie & Defence Force Retirement & Death Benefits Authority: given advice on the likely effect of his pension rights if he took a transfer. **Held:** Not a decision.

Australian Broadcasting Tribunal v Bond: Term 'decision' requires a final and operative decision.

ELEMENT 2: An enactment

NOTE: Watch out for semi-private company!

CATEGORY 1: Made under an Act or Instrument

Section 3(1)(x) AAT Act defines 'enactment' to include [insert below]. Here, [decision-maker] has made the decision pursuant to [name Act/name Regulation], and this [Act /Regulation/By-Laws] specifically confers jurisdiction to the AAT to review decisions. As such, the 'enactment' element is satisfied.

Relevant subsections:

- a) An Act;
- b) An Ordinance of a Territory other than the NT or ACT; or
- c) An instrument (including rules, regulations or by-laws) made under an Act or under such an Ordinance.

CATEGORY 2: Made by private company

NOTE: This is where the government has outsourced administrative functions.

On the facts, it appears that the decision-making power was delegated to a private company, [name private company]. As such, [X] would argue that the decision has still been made under 'an enactment' as [name private company] is "any other person lawfully authorised to exercise that power": **s 25(3A) AAT Act**. Therefore, as [name private company] was legally authorised to make the decision, the decision is reviewable by the AAT.

STEP 2: Standing

NOTE: Watch out for interest groups!

CATEGORY 1: Standing for an individual

Scenario: Standing acting for individual client.

Application: [X] has standing as his [financial/commercial/business/reputation/welfare] interests are affected by the decision: **s 27(1) AAT Act**. Furthermore, the AAT's determination on standing is conclusive: **s 31(1) AAT Act**.

NOTE: Standing requirements can be varied by the Act conferring jurisdiction to the AAT: **s 25(6) AAT Act**. Check this!

Cases:

Re McHatten and Collector of Customs (NSW) (1977): Outcome of a successful application might affect a negligence action his client was bringing against him.

Held: Hatten denied standing as interest was too remote and indirect. **Aside:** Relevant interests do not have to be pecuniary – can be family-related, personal or other non-material interests.

Re Driver & Moore & Minister for Immigration (1982): Driver was due to be deported – originally Driver didn't have standing because there was a provision in the **Migration Act** which prevented Driver from appealing the decision – however Driver had a close personal friend (M) and he was the adopted father of her child. **Held:** D had standing under **s 27 AAT Act** because D was the adopted father of M's child (wide interpretation).

CATEGORY 2: Standing for organisations/associations

Scenario: This is when an interest group or lobby group is applying for standing.

Application: [Organisation] will have standing if it can be proven that the decision relates to a matter included in the pre-existing objects or purposes of the [organisation]: **s 27(2) AAT Act**. In this case, the object of [organisation] is to [apply facts – e.g. preserve the environment]. As the decision also relates to [apply facts e.g. the environment] it is likely that [organisation] will have standing as its interests are affected by the decision. Again, the AAT's determination on standing is conclusive: **s 31(1) AAT Act**.

NOTE: Standing requirements can be varied by the Act conferring jurisdiction to the AAT: **s 25(6) AAT Act**.

Cases:

Re Control Investments & ABT (No 1) (1980): An appeal from the Australian Broadcasting Tribunal (ABT) to the AAT over a dispute over the refusal of a TV licence – various organisations wanted to be part of the application because of their interest in the matter. **Issue:** Whether decision related to matter included in the 'objects and purposes of organisations'. **Held:**

- **ALP = granted** standing because of media's effect on political process – there was a sufficient link. However, individual members of ALP not allowed.
- **Justice in Broadcasting = granted** standing because he had made submission to the Australian Broadcasting Tribunal.
- **Australian Journalists Association = granted** standing because their objectives included matters in relation to news and TV.
- **Rupert Public Interest Group = not granted** standing because insufficient connection between organisation and decision.

Re Gay Solidarity Group and Immigration Minister (1983): X was being deported for various sexual offences of homosexual nature and GSG sought standing in application to avoid deportation. **Held:** decision to deport was made in relation to the commission of 'criminal offences' not commission of 'homosexual criminal offences' – thus denied standing.

CATEGORY 3: Standing on behalf of another

Scenario: E.g. where a wife applies for a husband.

Application: **Section 27(1) AAT Act** provides that an application may be made to the AAT for a review of a decision "by or on behalf of any person...whose interests are affected by the decision". Therefore, there is scope for [Y – e.g. mother] to make an application for review of the decision on behalf of [X – e.g. father], who is affected by the decision. The AAT's determination on standing is conclusive: **s 31(1) AAT Act**.

STEP 3: Application Process

1. Stay Orders – s 41 AAT Act

As both the standing and jurisdiction requirements are satisfied, it is now advisable that [client] applies to the AAT for a stay of proceedings under **s 41(2) AAT Act** as the decision adversely affects the [financial interests/welfare] of [client].

When considering the whether to grant a stay of proceedings, the AAT will consider the following factors (*Re Repatriation Commission and Delkour*):

- 1. Hardship on [client];
- 2. Likely recoverability of money spent pursuing the decision being stayed; and
- 3. Prospects of success of the application.

If a stay is not granted, then it is advised that [client] applies to the AAT for an expedited hearing: *Re Wang and Migration Agents' Board*.

2. Application Requirements – s 29 AAT Act

[Client] must comply with the application requirements contained in **s 29(1) of the AAT Act**.

- [Client] must make a written application and must state the reasons for the application however use of the prescribed form (Form 1) is not obligatory: **s 29(1)(c) AAT Act**.
- Further, [client] must pay an application fee: **s 29A AAT Act**. However, it is advisable that we apply immediately to have [client's] fee waived due to financial hardship: **s 29, AAT Act**.

3. Time Requirements – s 29 AAT Act

CATEGORY 1: Where client has received written reasons

As [client] received a letter setting out the findings on material questions of fact and the reasons for the decision, [client] must make an application to the AAT for review of the decision within 28 days from receiving it: **s 29(2) AAT Act**.

However, upon a written application by [client], the AAT can extend the time if satisfied that it is reasonable in the circumstances to do so: **s 29(7) AAT Act**.

CATEGORY 2: Where client has not received written reasons

As the facts fail to indicate otherwise, it is assumed that [client] never received from [decision-maker] written reasons for the decision. As such, it is advisable that [client] applies in writing for a written statement of reasons for the decision under **s 28(1) AAT Act**. Upon receiving a statement of reasons from [decision-maker], [client] will then have 28 days to apply to the AAT for review of the decision: **s 29(2)(b)(ii) AAT Act**.