

8. MERITS REVIEW

AAT MANTRA

- The AAT must arrive at the correct or preferable decision. It stands in the shoes of the primary decision maker, exercising all the powers and discretions conferred on the primary decision maker. It may affirm, vary or set aside the original decision: s43 *AAT Act*; *Re Costello and Secretary Department of Transport* (1979) 2 ALD 934 at 943

Applying to the AAT

1. You have to prove that the applicant had standing under **section 27(1)**
2. Consider and confront the question of what other parties would want to join: **section 31**
3. Prove that the there was a decision under the meaning of **section 43**
4. Find out whether that Act confers a right of appeal to the AAT
5. Construe what all the powers and discretion the Act conferred on the original decision maker
6. Lead whatever evidence is required to allow the Tribunal standing in the shoes of the original decision maker to arrive at the more preferable decision.

8.1 INTERNAL REVIEW

- Internal Review is a “process of review on the merits of an agency’s primary decision. It is undertaken by another officer within the same agency, usually a more senior officer” (ARC, 2000).
- Disadvantages of internal review are that there is a risk of perception by the public of lack of impartiality on the part of review officers. As Travers (2011) states that internal review is akin to “complaining to your mother-in-law about your wife”.
- Internal review is relatively quick, inexpensive and it ensures proper consideration is given to an issue within an agency at a senior level before the decision is reviewed by an external agency.
- Freedom of information statutes in each jurisdiction provide that before a decision to refuse access can be reviewed by a court, tribunal or commissioner, an application for review should be decided by a more senior officer within the agency than the officer who made the initial decision.
- In New South Wales internal review is not mandated, but can be requested for all decisions which are reviewable *Administrative Decisions Tribunal Act 1997* (NSW) ss53, 54.
- If a statutory scheme is in force, internal review based on executive power cannot be relied on as an alternative. Other disadvantages of reliance on executive authority as the basis for an internal review scheme are the lack of criteria for reviewability of decisions, the absence of any formal imperative to seek review, and doubts as to the circumstances in which external review of internally reviewed decisions can be conducted.
- The internal reviewer is faced with the same legislative limitations and must comply with the same policy as an initial decision-maker. However, an internal reviewer takes account of new evidence which has arisen since the primary decision was made. New evidence is the most frequent reason for a decision to be varied on internal review.
- ***Re Wolstencroft and Commissioner for Superannuation (2000) 61 ALD 317***. The applicant had two periods of employment with Telecom. On becoming aware that he could make a later election to preserve his superannuation benefits, he applied but was rejected. On advice he applied to the AAT. His appeal was dismissed on the ground that

he required internal review to take place first. He then sought internal review and was again rejected, appealed again to the AAT.

- The AAT commented stating: “Even Union officials and staff members at the Commonwealth Superannuation Scheme’s officer were confused as to the correct order of steps”. One solution to this problem is for agencies to heed the requirements such as those in the *Administrative Tribunals Act 1975* (Cth) s27A for wide notification of review rights:

<p>Administrative Tribunals Act 1975 Section 27A: Notice of Decision and review rights</p>	<p>(1) Subject to subsection (2), a person who makes a reviewable decision must take such steps as are reasonable in the circumstances to give to any person whose <u>interests are affected by the decision notice, in writing or otherwise:</u></p> <ul style="list-style-type: none"> (a) of the making of the decision; and (b) of the right of the person to have the decision reviewed. <p>(2) Subsection (1) does not apply to:</p> <ul style="list-style-type: none"> (b) a decision in <u>respect of which provision relating to the notification of a right of review is made by another enactment;</u> or (c) any of the following decisions: <ul style="list-style-type: none"> (i) a decision not to impose a liability, penalty or any kind of limitation on a person; (ii) a decision making an adjustment to the level of periodic payments to be made to a person as a member of a class of persons where a similar adjustment is being made to the level of such payments to the other members of the class; (iii) if an enactment establishes several categories of entitlement to a monetary benefit--a decision that determines a person to be in the most favourable of those categories; if the decision does not adversely affect the interests of any other person; or <p>(3) A failure to do what this section requires does not affect the validity of the decision.</p> <p>(4) In this section: "reviewable decision" means:</p> <ul style="list-style-type: none"> (a) a decision that is reviewable by the Tribunal; or (b) a decision that is reviewable by: <ul style="list-style-type: none"> (i) a person whose decision on review is reviewable by the Tribunal; or (ii) a person whose decision on review, because of subparagraph (i), is a reviewable decision.
---	--

8.2 AUSTRALIAN ADMINISTRATIVE TRIBUNALS

3. INTRODUCTION

- Commonwealth: Administrative Appeals Tribunal
- L Curtis (1992): “the tribunal is required to act judicially in accordance with procedures laid down by law”.
- According to L.W Maher (1994) tribunals exhibit five structural and procedural characteristics:
 - (a) They provide each party appearing before them a reasonable opportunity of being heard
 - (b) They carefully weigh the evidence and material put before them
 - (c) They interpret and apply the law
 - (d) They expose their reasoning processes to the parties
 - (e) They avoid actual bias or the appearance of bias
- According to H MacNaughton, tribunals are:
 - (a) Independent from the government
 - (b) Specialised
 - (c) Operate where the program is applied to the individual
 - (d) Attract the common law duty of procedural fairness

TRIBUNAL MODELS

1. *Single tier review by a specialist tribunal*

- Examples: The Migration Review Tribunal and the Refugee Review Tribunal.
- Characteristic feature in this model is that a person can seek review on the merits of a decision before a tribunal that has a jurisdiction confined to a particular area of government or a particular kind of dispute.
- There is usually a right to appeal from the decision of

	the tribunal to a court, but only on a question of law and not for a rehearing of the merits of the case.
2. <i>Single tier</i> review by a <u>general jurisdiction</u> tribunal	<ul style="list-style-type: none"> - Example: AAT - These tribunals have a jurisdiction that extends across the field of government
3. <i>Two tier</i>	<ul style="list-style-type: none"> - Example is the NSW Administrative Decisions Tribunal. - The tribunal includes an Appeal Panel, which can hear an appeal from the first tier of the tribunal on a question of law and, with the leave of the panel, the appeal can extend to a review of the merits of the decision.

2. Tribunals in the system of government

- From the constitutional perspective, tribunals are located in the executive arm of government. Firth Commonwealth AAT President, Brennan J observed that: “The legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive” *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 at 161.
- Other terms such as ‘quasi-judicial’ are often used to describe bodies such as the AAT.

Commonwealth Administrative Appeals Tribunal (AAT)

Objectives

- *Administrative Appeals Tribunal 1975* (Cth) s2A states that AAT is to determine matters in a manner that is “fair, just, economical, informal and quick”.
- *AAT’s Annual Report 2004-2005* at 1: “to provide aggrieved persons and agencies with timely, fair and independent merits review of administrative decisions over which the Tribunal has jurisdiction”.

2005 Amendments to the AAT Act

- The AAT can shorten a proceeding by limiting the facts, evidence or issues it will consider: s25(4A)
- The tribunal may rely on a wide range of alternative dispute resolution methods: Pt IV, Div 3
- Consultants may be used: s24Q
- An obligation is cast upon a decision maker to use his or her best endeavours to assist the tribunal: s33(1AA). “In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.”

New South Wales Administrative Decisions Tribunal (ADT)

- Established by the *Administrative Decisions Tribunal Act 1997*. In some areas (such as anti discrimination and disciplinary matters) the ADT exercises original jurisdiction by resolving a dispute or acting as an original or primary decision maker.
- A feature of the ADT is the Appeal Panel which hears appeals from a division on a question of law and, with the leave of the panel, the merits of the decision.

Rights to Appeal against a tribunal decision

- Some tribunal systems offer a right to appeal on the merits either internally to an appeal panel of the tribunal, or externally to another tribunal.
- In all jurisdictions, legislation provides a right of appeal from the tribunal system to the judicial system on a ‘question of law’ or for ‘error of law’.
- An example is the right to appeal from the Commonwealth AAT on a question of law to the Federal Court: *AAT Act s44*.
- The restricted right of appeal on legal rather than factual issues rests on the constitutional separation of judicial and executive power. As the High Court noted in *Repatriation Commission v Owens* (1996) 20 ALJR 904: “The purpose of limiting an appeal to a question of law is to ensure that the merits of the case are dealt with not by the Federal Court but by the Administrative Appeals Tribunal. This distribution of function is critical to the correct operation of the administrative review process” (per Brennan CJ, Gaudron and Gummow JJ).

3. CONCEPT AND SCOPE OF MERITS REVIEW BY TRIBUNALS

- Concept of independent merit review of government administrative decisions is the presumption that the review would be de novo (anew).

<p>Administrative Tribunals Act 1975 Section 43(1): Notice of Decision and review rights</p>	<p>(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:</p> <ul style="list-style-type: none">(a) affirming the decision under review;(b) varying the decision under review; or(c) setting aside the decision under review and:<ul style="list-style-type: none">(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.
---	--

- Section 43 of the AAT Act confers power upon the AAT to review a decision, to exercise any power or discretion conferred on the decision maker, and to vary the decision under review or substitute a new decision.
- Implications of this section are that:
 - o The tribunal is reviewing a decision and not the reasons given for that decision
 - o The tribunal is generally not restricted either to the case stated by the parties or to the material before the primary decision maker
 - o The tribunal is bound to apply the law, but is not required to decide consistently with executive policy
 - o Neither party bears the onus of proving that the decision under review was prima facie right or wrong
 - o The rules of judicial proceedings relating to pleadings and evidence are not to be transported into administrative review.

Re Greenham and Minister for Capital Territory (1979) 2 ALD 137 (AAT)