



Complaints against Government - Administrative Appeals

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Introduction

An administrative appeal is concerned with a challenge to either the merits or legal errors of an administrative decision. An administrative appeal is therefore different from judicial review (see the *Complaints against Government — Judicial Review* chapter), which can only be successful if a decision is legally wrong. An administrative appeal involves a full rehearing of the issues that were the subject of the original decision and a fresh decision on the evidence.

Appealing against State Government Actions

A person who wishes to appeal against a state government's administrative action or decision must first read the Act or Regulation under which the action was taken or the decision was made, to see if an appeal is permitted. In many cases, no right of appeal will be given, and the only means of challenge available, other than any internal review process provided for under the relevant Act, will be judicial review or a complaint to the state ombudsman.

The grounds for appeal and procedures to be followed when the Act or Regulation gives a right of appeal vary from case to case.

The Queensland Civil and Administrative Tribunal (QCAT) established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) simplifies the appeal of administrative decision in Queensland. The tribunal operates in much the same way as the Commonwealth Administrative Appeals Tribunal (AAT), and many of the principles that guide the way in which QCAT hears and determines appeals mirror the principles applied in the AAT.

The Queensland tribunal provides a considerable amount of information for people who are considering appealing a state government decision. This is available from factsheets on the QCAT website, which cover the major areas over which the tribunal exercises jurisdiction, as well as the alternative dispute resolution mechanisms which are contained within QCAT's statutory regime. The website also contains detailed information about the application process.

Appealing against Commonwealth Government Actions

Appeals against Commonwealth Government administrative actions or decisions may generally be made to the Commonwealth AAT established under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). Where specified in legislation, an appeal lies to a single body (the AAT) rather than to separate review bodies. The AAT can review decisions made under more than 400 Commonwealth Acts and legislative instruments.

The AAT reviews only specifically designated administrative decisions over which it has been given jurisdiction. This jurisdiction is generally given by the Act under which the decision was made. It is significant that the AAT is specially constituted to ensure that its membership has expertise in the subject matter of the application. Part-time AAT members have professional backgrounds in many areas including aviation, defence, education, engineering, environment, medicine, psychiatry, social work, surgery and valuation.

There are a number of other appeals tribunals with specialised jurisdictions created by Commonwealth laws, including the:

- Veterans' Review Board, which reviews decisions made by the Repatriation Commission and the Military Rehabilitation and Compensation Commission
- Australian Competition Tribunal, which reviews determinations of the Australian Competition and Consumer Commission.

These specialist tribunals are each created by specific legislation, and in some specified cases, reviews of the decisions of these tribunals may be made to the AAT.

Administrative Appeals Tribunal

What decisions can be reviewed?

The AAT is empowered to review a decision made in accordance with a Commonwealth Act if that Act, or another Act, provides for such review (s 25 AAT Act). A decision includes the failure to make a decision. The decision-making function of the AAT is to make the correct or preferable decision. 'Correct' refers to the fact that a decision is correct in law, whereas 'preferable' refers to the decision being the decision that best reflects the relative merits of alternative decisions, which were open to the decision maker. Not all Commonwealth administrative activities are subject to an appeal to the AAT. The AAT's jurisdiction is contained in more than 400 separate pieces of legislation, covering areas such as:

- air navigation
- customs and excise laws
- Defence Force Retirement and Death Benefits
- environment (Great Barrier Reef Marine Park, biodiversity conservation)
- freedom of information
- health insurance
- criminal deportation, visas and cancellation of visas on character grounds
- income tax
- immigration
- nursing homes
- patents
- pharmacy approvals
- social security
- student assistance and the Higher Education Loan Program
- superannuation
- taxation
- tax agents' and migration agents' registration

- trade marks
- veterans' entitlements (appeals from the Veterans' Review Board)
- workers' compensation.

This is not an exhaustive list and provides only a general guide. In order to determine whether a particular matter can be appealed to the AAT, it is necessary to check the Act or Regulation under which the decision was made. In many cases, only particular decisions under these Acts or Regulations will be reviewable by the AAT. A full list of decisions reviewable under the AAT's jurisdiction is accessible from the AAT website.

Obtaining Reasons for Commonwealth Government Decisions

The right of a person under an Act to obtain reasons for a decision from the original decision maker is similar to the right to obtain reasons under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (Administrative Decision Act). Provided a person is entitled to seek review by the AAT, the reasons for a decision may be requested (s 28 AAT Act). It is not necessary for the person requesting reasons to have begun an appeal to the AAT. If written notification of the decision was received but no reasons accompanied the decision, a request for the reasons for the decision must be made within 28 days after the written notification was received. Otherwise, a request must be made within a reasonable time. Reasons may be refused if the Attorney-General certifies that disclosure would be contrary to the public interest. Information may also be sought by reliance on the *Freedom of Information Act 1982* (Cth).

Who can Appeal against a Government Action?

An application for review of a decision may be made by, or on behalf of, any person whose interests are affected by the decision (s 27 AAT Act). There is no requirement that the effect of the decision be adverse to the person making the application, as is the case under the Administrative Decisions Act and the *Judicial Review Act 1991* (Qld). The interest affected does not have to be a legal interest, nor does the person making the application have to show any legal ownership.

Section 27 of the AAT Act also provides that an organisation or association of persons, whether incorporated or not (e.g. community groups and public interest organisations) may have standing to seek review of a decision before the AAT if it relates to a matter included in the objects or purposes of the organisation or association. An organisation or association cannot seek review of a decision made before the organisation or association came into existence or before its objects or purposes included the matter concerned.

An application for a review of a security decision can only be brought by a person who is the subject of an Australian Security Intelligence Organisation security assessment (s 27AA AAT Act).

Applications for Review of a Government Action

Applications for review of a decision must be in writing and can be in accordance with the AAT form (s 29(1) AAT Act). The AAT form clearly identifies the information that must be provided to the AAT.

Applications must be accompanied by the application fee where applicable. In many instances no fee is payable, and fees may be refunded if an applicant is successful. A fee that is otherwise payable may be reduced to \$100 by the AAT if it would cause the person financial hardship to pay the fee. Information about fees may be obtained from the AAT.

Time limits

The time limit for lodging an application is 28 days after the applicant receives the written decision (s 29(2) AAT Act). Where written reasons have not been provided but have been requested in accordance with s 28 of the AAT Act, different time limits may apply. This time can be extended if the AAT is satisfied that it is reasonable in all the circumstances to do so (s 29(7)).

Documents

After a valid application is made, the AAT notifies the decision maker in accordance with s 29AC of the AAT Act that an application has been made. Under s 37 of the AAT Act, the decision maker is required to provide to the AAT and the applicant, within 28 days after receipt of the notice under s 29 of the AAT Act, a copy of all documents considered to be relevant to the review of the decision. These documents are sometimes referred to as the T documents by the AAT.

Procedure of the Administrative Appeals Tribunal

The AAT proceedings should be as simple as possible (s 33 AAT Act). In carrying out its functions, the AAT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick (s 2A AAT Act). The AAT avoids to some extent the formal trappings of the courts and the adversarial character of court proceedings. Hearings are inquiries into the merits of government decisions rather than legal contests between two opposing parties. A full description of the AAT procedures and processes, including a flow chart of the application process, is available on the AAT website.

Evidence

The AAT is not bound by the rules of evidence and may inform itself in whatever way it considers appropriate (s 33(1)(c) AAT Act). Written evidence and arguments are sometimes received instead of oral arguments. Lawyers frequently appear to present cases to the AAT, and its hearings are generally held in public. However, the AAT will not readily depart from the rules of evidence, and where it does so (e.g. in admitting hearsay evidence), it will generally consider what weight to put on the evidence in the light of its status.

Unrepresented applicants

The AAT has an outreach program for unrepresented parties (i.e. people who are presenting their own case without the assistance of lawyers). The AAT provides information and assistance about AAT

practices and procedures. Outreach usually occurs about the same time the parties are provided with copies of the T documents. Outreach is conducted over the phone. Where necessary, the AAT will arrange for assistance from an interpreter.

The AAT website contains comprehensive information about practices and procedures, including specific publications dealing with workers compensation and social security jurisdictions.

Alternative dispute resolution

The AAT Act allows for alternative dispute resolution (ADR) to be held between the parties with a view to bringing about a settlement of their differences (s 34A AAT Act) without a formal hearing by the tribunal. Alternative dispute resolutions include conferencing, mediation, neutral evaluation, case appraisal and conciliation (s 3 AAT Act). Anything said at an alternative dispute resolution (ADR) cannot be given in evidence before the AAT, unless the parties otherwise agree (s 34E AAT Act).

If the parties at an ADR agree to resolve a matter and sign a written agreement containing the terms of that resolution, the AAT can make a decision in accordance with those terms without a hearing (after a seven-day cooling off period), if it is satisfied that those terms are within its powers (ss 34D, 42C AAT Act).

Guidelines for ADRs can be found on the AAT website.

Practice directions

The AAT has a General Practice Direction, which applies in all applications made to the AAT throughout Australia. This procedure can be varied by specific direction of the AAT. The practice direction is designed to assist the AAT to achieve the dual purpose of attempting to obtain an agreed resolution where possible and ensuring that appropriate steps are taken to prepare for the hearing of those matters that do not settle.

Powers of the tribunal

The AAT exercises all of the powers and discretions conferred upon the original decision maker (s 43 AAT Act). The AAT can affirm, vary, set aside or remake the decision under review, or refer the decision back for reconsideration according to any directions or recommendations it may make (s 43(1) AAT Act). It decides for itself what the decision should be and is not limited to determining whether the original decision maker made some legal error that would give rise to judicial review.

An applicant can withdraw their application at any stage. The AAT will exercise its powers under s 43 of the AAT Act when determining a matter that has not been settled, dismissed or withdrawn.

Policy considerations

A policy can facilitate the integrity and consistency of administrative decision making and may be a relevant consideration for decision making by the AAT in clearly defined circumstances. However, the policy must be consistent with the purpose of the statute (*see Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634 at 640–641). The reasons for the decision should identify the relevant policy and how it was taken into consideration in making the disputed decision.

Decision of the tribunal

The AAT must give a decision and, on request, its reasons for that decision in writing (ss 43(2), 43(2A) AAT Act). This duty is subject to the confidentiality provisions in the AAT Act (ss 35, 36D). However, there is no universal form for a statement of reasons. The characteristics of an individual decision will essentially determine the material to be set out in a statement of reasons. The findings on all material questions of fact taken into account in making the decision must be stated in the AAT's reasons for decision (s 43(2B) AAT Act). This means that on any point it decides upon, the AAT should state the evidence relating to the point, state which evidence it accepts and make a finding of fact that conforms with its view of the evidence.

Appeal from the tribunal

An appeal from the AAT to the Federal Court of Australia on a question of law is permitted within 28 days of receiving the AAT's decision (s 44 AAT Act). The AAT may err in law in a number of ways. For example, a failure to adhere to relevant legal principles arising from cases decided by the Federal Court of Australia, a failure to comply with s 43(2) of the AAT Act and a failure to adhere to the statutory obligation to give reasons for a decision constitute an error of law. Disputes about facts or the way discretion was exercised are generally not errors of law.

The AAT itself may refer a question of law to the Federal Court of Australia for determination (s 45 AAT Act).

Costs

The AAT has no general power to make orders for costs so, in most matters, the parties will pay their own costs. The AAT does have power to award costs in some matters including Freedom of Information matters, lands acquisition appeals and Commonwealth employees compensation actions. Again, it is necessary to check the relevant legislation for details. In extremely rare cases, funding may be obtained from the Attorney-General for public interest cases.

Because of the very wide jurisdiction of the AAT, applicants should approach the various legal aid agencies and community legal centres for information about the kind of assistance these centres may be able to provide.

Legal Notices

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