



Australian Government
Attorney-General's Department

May 2018

Review processes associated with visa cancellations made on criminal grounds

**Attorney-General's Department submission to the
Joint Standing Committee on Migration**

Contents

1. Introduction	3
2. Key Principles	4
The administrative review system	4
Merits review	4
Judicial review	6
The Administrative Appeals Tribunal	7
3. AAT review of section 501 decisions	9
4. Principles guiding the application or exclusion of merits review	11
Decisions not suitable for merits review	11
Factors that may justify excluding merits review	11
Factors that do not justify excluding merits review	12
5. Conclusion	14

1. Introduction

1.1 The Attorney-General's Department welcomes the opportunity to provide the Joint Standing Committee on Migration (the Committee) with this submission as part of the Committee's inquiry into the review processes associated with visa cancellations made on criminal grounds.

1.2 The Terms of Reference for the inquiry state that the Committee is to have particular regard to:

- Efficiency of existing review processes as they relate to decisions made under section 501 of the *Migration Act 1958* (Cth) (Migration Act)
- Present levels of duplication associated with the merits review process, and
- Scope of the Administrative Appeals Tribunal's (AAT) jurisdiction to review ministerial decisions.

1.3 The Attorney-General's Department has portfolio responsibility for the AAT and the federal courts, and provides legal policy advice to Commonwealth agencies on administrative law issues, including principles of good administrative decision making and the merits review and judicial review of administrative decisions.

1.4 The key components of Australia's administrative review system were established in the 1970s and included the establishment of the AAT and the Commonwealth Ombudsman, and the passage of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Australia's administrative review system enhances the rule of law and good governance.

1.5 Merits review enhances the openness and accountability of decisions made by government. It provides an important and accessible avenue of redress for people affected by administrative decisions.

1.6 The objectives of merits review are to ensure that correct and preferable decisions are made, and to improve the quality and consistency of primary decisions overall. There are well-established principles to guide consideration of the application or exclusion of merits review.

1.7 The AAT is the principal Commonwealth merits review body. It reviews a wide range of government decisions that affect the rights of individuals, including decisions made under the Migration Act. The AAT generally conducts merits review of matters afresh, based on the circumstances at the time of review. This may involve consideration of new information.

1.8 With respect to decisions to cancel visas on character grounds, the AAT only has the power to review decisions made by officers of the Department of Home Affairs as delegates of the Minister for Home Affairs, and not decisions made by the Minister personally. Additionally, the Minister for Home Affairs has the power to overturn decisions of the AAT in relation to section 501 decisions.

2. Key Principles

2.1 The system of review for administrative decisions includes different levels of decision making, each with different processes and objectives.

The administrative review system

1. Original decision made by the primary decision maker

2. Merits review in the AAT, involving the independent reconsideration of the original decision

3. Judicial review of the AAT or original decision, on a question of law

2.2 The above diagram broadly represents the administrative review system. However, the review process applying to different administrative decisions differs depending on the relevant legislation. For example, internal merits review may be available in addition to external AAT review, or merits review may not be available at all. It is generally not possible to exclude the availability of judicial review.

Merits review

2.3 Merits review of an administrative decision refers to the independent review and remaking of a decision made by a government agency or a Minister (the primary decision maker). It is the process by which a person or body, other than the primary decision maker:

1. reconsiders the facts, law and policy aspects of the original decision, and
2. determines the correct and preferable decision.

2.4 The person or body conducting the merits review process can be described as 'stepping into the shoes' of the primary decision maker, and remaking the decision according to the merits of the individual case. Generally, the reviewer exercises the same statutory powers and discretions as the original decision maker.

2.5 The principal objective of merits review is to ensure that correct and preferable administrative decisions are made.¹

2.6 ‘Correct and preferable’ in this context means:

- correct, in the sense that decisions are made according to law, and
- preferable, in the sense that if there is a range of decisions that could be correct in law, that is, where discretion is available in the exercise of the decision making power, the decision made is the best that could have been made on the basis of the relevant facts.

2.7 The nature of merits review generally requires review bodies to consider the decision under review afresh (or *de novo*) and make what they consider to be the correct and preferable decision at the time of reconsideration, based on the relevant material before them.² *De novo* review is appropriate in most circumstances as new information can come to light at any point in the decision making process. The inclusion of new information on merits review can work to the advantage or to the disadvantage of the person seeking review, depending on the nature of the information.³ The AAT conducts reviews of decisions made by delegates of the Minister for Home Affairs under section 501 of the Migration Act on this basis.

2.8 *De novo* review supports the objective of reaching the ‘correct and preferable’ decision at the time that the decision is made. If merits review was instead undertaken as a ‘point in time’ review of the original decision, that would affect the realisation of this objective, as it would just be a consideration of the reasonableness of the original decision.

2.9 Merits review enhances the openness and accountability of decisions made by government. Its underlying, long-term objective is to improve the quality and consistency of primary decisions. It provides an important avenue of redress for people affected by administrative decisions, and provides a readily accessible means of challenging decisions of government that affect individuals.

2.10 Merits review should be accessible and fair, and provide a system of review that is more economical and quicker than court processes. These objectives are reflected in the statutory objectives of the AAT, which are stated in section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth).

¹ Administrative Review Council, [Better Decisions: review of Commonwealth Merits Review Tribunals](#), Report No.39 (1995), 11.

² Administrative Review Council, [Better Decisions: review of Commonwealth Merits Review Tribunals](#), Report No.39 (1995), 42.

³ Administrative Review Council, [Better Decisions: review of Commonwealth Merits Review Tribunals](#), Report No.39 (1995), 44.

Judicial review

2.11 Judicial review is a fundamentally different process to merits review, and can only be undertaken by the courts. It is the process by which a court reviews a decision to determine whether it was made in accordance with relevant legal principles or if it has been infected by legal error.⁴

2.12 Judicial review is concerned with the process by which the decision maker arrived at their decision, rather than considering if the correct and preferable decision was made based on the relevant facts. The federal courts cannot ‘stand in the shoes of the original decision maker’, but can review whether the decision maker has exceeded their powers or functions when making a decision.

2.13 Decisions made by delegates under section 501 are subject to judicial review in the federal courts, as well as being subject to merits review by the AAT.

2.14 In general, judicial review cannot be excluded from decisions made under the Migration Act where the decision is infected by jurisdictional error.⁵ This is because the Australian Constitution entrenches a minimum provision of judicial review.⁶

2.15 A jurisdictional error is a category of legal error where the decision maker makes a decision, or purports to make a decision, outside of their authority to do so.⁷ It includes where the decision maker:

- has not adopted a fair process in making the decision
- identified a wrong issue
- asked the wrong question
- ignored relevant material
- relied on irrelevant material, or
- made an erroneous finding or mistaken conclusion and exceeded their legal authority or powers to do so.

2.16 The separation of powers between the Parliament, the Executive, and the Judicature is the basis for the courts’ ability to engage in judicial review of administrative decisions. The supervision

⁴ *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at eg [35], [70]; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, at [5].

⁵ *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 506.

⁶ Administrative Review Council, *Federal Judicial Review in Australia* (2012), 50.

⁷ *Craig v South Australia* (1995) 184 CLR 164, 179.

of government by an independent judiciary upholds the principle of the rule of law over executive action and ensures the interests of the individual are protected accordingly.⁸

2.17 If a court finds a decision to be infected by jurisdictional error, it will order that the decision be reconsidered by the primary decision maker. The courts cannot make a decision that a visa should not be refused on character grounds. This contrasts with the AAT's power when conducting merits review of a decision (refer to paragraph 2.23).

The Administrative Appeals Tribunal

2.18 The AAT was established by the *Administrative Appeals Tribunal Act 1975* (AAT Act) and commenced operations on 1 July 1976. On 1 July 2015, the Migration Review Tribunal & Refugee Review Tribunal and Social Security Appeals Tribunal were merged with the AAT. This was aimed at achieving increased efficiencies. These tribunals now form different divisions in the AAT, namely the Migration and Refugee Division and the Social Services and Child Support Division.

2.19 The AAT's statutory objective, stated in section 2A of the AAT Act, is to provide a review process that:

- is accessible
- is fair, just, economical, informal and quick
- is proportionate to the importance and complexity of the matter, and
- promotes public trust and confidence in the decision making of the Tribunal.

2.20 The AAT is comprised of members who have professional backgrounds in fields such as law, medicine, academia, and public administration. Members are appointed for a maximum seven year term by the Governor-General on the advice of the government of the day. As at 23 April 2018, the AAT has 304 members.

2.21 The AAT reviews a wide range of government decisions affecting the rights and liabilities of individuals, managed within its eight divisions, listed below:

- Freedom of Information Division
- General Division
- Migration & Refugee Division (including the Immigration Assessment Authority)
- National Disability Insurance Scheme Division
- Security Division
- Social Services & Child Support Division
- Taxation & Commercial Division, and
- Veterans' Appeals Division.

2.22 The Migration and Refugee Division includes the Immigration Assessment Authority, which conducts reviews of decisions made by the Minister for Home Affairs, or delegate, to refuse to

⁸ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

grant a protection visa to a fast track applicant. Fast track applicants are a particular cohort of protection visa applicants.

2.23 The AAT has the power to affirm, vary, or set aside a decision and substitute a new decision. It may also remit a decision to the decision maker for reconsideration, with a direction that a particular criterion is met. The AAT will often have additional information that was not available to the primary decision maker, including oral evidence given by the applicant, and expert evidence relevant to the issues to be decided. This is because the AAT conducts review on a *de novo* basis (see paragraphs 2.7 – 2.8).

2.24 In providing independent merits review of administrative decisions, the AAT does not have a general power to review decisions. It can only do so if an Act, regulation, or other legislative instrument states that a particular decision can be reviewed by the AAT.

2.25 Many of these decisions are available on the AUSTLII website⁹ and some are also highlighted in the weekly AAT Bulletin.¹⁰ They offer an explanation of how the decision was reached, including case law, evidence, and any other relevant considerations.

⁹ Australasian Legal Information Institute, www.austlii.edu.au

¹⁰ Administrative Appeals Tribunal, AAT Bulletin Archive, <http://www.aat.gov.au/resources/alerts-and-updates/aat-bulletin-archive>

3. AAT review of section 501 decisions

3.1 Section 501 of the Migration Act allows a delegate of the Minister to refuse to grant or to cancel a visa on character grounds. If a delegate of the Minister makes a decision to refuse to grant or to cancel a visa, the person seeking the visa may appeal that decision to the AAT. The character test is defined in subsection 501(6) of the Migration Act, which provides that a person does not pass the character test if particular circumstances are met.

3.2 The Minister has the power to intervene at any stage of the AAT merits review process.¹¹ Further, the Minister can set aside an AAT decision if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.¹² The Minister can also revoke a decision made to refuse or cancel a visa if the person affected is invited to make representations to the Minister and satisfies the Minister that they pass the character test.¹³

3.3 The AAT does not have jurisdiction to review decisions made under section 501 by the Minister personally.

Steps in AAT review for section 501 decisions in Australia¹⁴

1. Person applies for review in writing and attaches relevant documentation

2. Application is submitted within the prescribed time limit

3. Person pays the application fee, with the possibility of a reduced fee if applicable

4. Receipt of application confirmed with both parties.

5. Telephone Directions Hearing conducted

6. Hearing conducted where AAT member reviews arguments from both sides

7. Decision is delivered. Decision must be made within 12 weeks.

¹¹ *Migration Act 1958* (Cth), s 501B(5).

¹² *Migration Act 1958* (Cth), s 501A(3).

¹³ *Migration Act 1958* (Cth), s 501C(4).

¹⁴ Administrative Appeals Tribunal, [Expedited review of decisions under section 501 or 501CA of the Migration Act 1958](#) (11 December 2017).

Statistics¹⁵

3.4 Applications for review of character-related visa decisions in the AAT rose from 77 in 2015–16 to 183 in 2016–17. Of the 183 applications, 168 were finalised. These were applications about:

- decisions to refuse or cancel a visa under section 501 of the Migration Act
- decisions under section 501CA of the Migration Act not to revoke a mandatory visa cancellation under section 501, and
- decisions to refuse or cancel a protection visa relying on sections 5H(2), 36(1C) or 36(2C)(a) or (b) of the Migration Act.

3.5 Of the 168 finalised applications in 2016–17, the AAT affirmed the original decision under review in 52 per cent of cases.

3.6 Almost 30 per cent of applications were withdrawn, did not meet the requirements for a valid application, or were otherwise dismissed. ‘Dismissed’ includes applications dismissed by consent, for failure to appear before the AAT, for failure to proceed with an application, or to comply with a direction of the AAT, or on the basis that the application is frivolous, vexatious, misconceived, lacking in substance, has no reasonable prospect of success, or is an abuse of the process of the AAT.¹⁶ In those cases where the AAT does not proceed to review a decision, the original decision continues to have effect.

3.7 The AAT set aside the decision in 19 per cent of cases.

Table 1

Character-related visa applications <u>finalised</u> in 2016-17	168
Application for review withdrawn/dismissed	49 (29%)
Decision under review affirmed	87 (52%)
Decision under review set aside	32 (19%)

Table 2

All matters <u>finalised</u> in 2016-17	42,224
Application for review withdrawn/dismissed	14,778 (35%)
Decision under review affirmed	16,468 (39%)
Decision under review set aside	10,978 (26%)

¹⁵ Administrative Appeals Tribunal, [Annual Report 2016-17](#), 21-26.

¹⁶ *Administrative Appeals Tribunal Act 1975* (Cth), s 42A.

4. Principles guiding the application or exclusion of merits review

4.1 In general, an administrative decision that is likely to affect the interests of a person should be reviewable on its merits unless to do so would be inappropriate, or there are factors justifying the exclusion of merits review. Exclusion of merits review for decisions should be grounded in the strongest arguments applicable to the circumstances, with reference to the principles developed by the Administrative Review Council (ARC) as outlined in its publication *What decisions should be subject to merits review?*¹⁷ This publication outlines the factors and principles that the ARC identified as relevant considerations for government agencies when developing or amending legislation conferring administrative decision making powers. These factors and principles are set out in paragraphs 4.2 to 4.4 below.

Decisions not suitable for merits review

4.2 There are two types of decisions that, due to their nature, are unsuitable for merits review. Those decisions are:

- legislation-like decisions of broad application, where the decision itself applies generally to the community and is not directed towards the circumstances of particular persons, and is subject to the accountability safeguards that apply to legislative decisions, and
- automatic or mandatory decisions, which arise where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances.

Factors that may justify excluding merits review

4.3 Factors that ordinarily may justify excluding merits review for a decision are grouped into three classes:

1. Factors lying in the nature of the decision.
 - For example, *preliminary or procedural decisions*, that facilitate or lead to the making of a substantive decision. Review of such decisions may unnecessarily frustrate or delay the proper administrative decision making process. In this case, the beneficial effect of merits review is limited because the decisions do not generally have substantive consequences.
 - For example, *policy decisions of a high political content*, such as decisions affecting Australia's relations with other countries or concerning national security matters.

¹⁷ Administrative Review Council, [What decisions should be subject to merits review?](#) (July 1999).

- For example, *decisions of a law enforcement nature*, where review of such a decision could jeopardise the investigation of breaches and subsequent enforcement of the law.
2. Factors lying in the effect of the decision.
 - For example, *decisions where there is no appropriate remedy*, where the results of a decision are irrevocable or a decision would operate for such a short period that its effect would be spent by the time of review.
 - For example, *recommendations to ultimate decision makers*, where the recommendation is not a final determination and is of no substantive effect. In this instance, an individual's interests may only be affected when the recommendation is acted upon.
 3. Factors lying in the costs of review of the decision.
 - For example, *decisions involving extensive inquiry processes* that would be time-consuming and costly to repeat on review.
 - For example, *decisions which have such a limited impact that the costs of review cannot be justified*. In light of the need for the Government to allocate resources in an effective way, it would be inappropriate for the costs of a system of merits review to be vastly disproportionate to the significance of the decisions under review.

Factors that do not justify excluding merits review

4.4 Factors that do not ordinarily justify excluding merits review are also grouped into three classes:

1. Factors lying in the nature of the decision.
 - For example, *decisions made by reference to government policy*.
 - For example, *decisions that are legislatively unstructured*. The generality or absence of considerations relevant to a decision does not mean that the decision is unsuitable for merits review. Principles may emerge as the discretion is considered and as reasons for the decisions are given, which may guide the exercise of the decision-making power. Further, the lack of structure may make merits review more appropriate, to ensure that the correct and preferable decisions are being reached.
 - For example, *decisions affecting national sovereignty or prerogative power*. The fact that a decision making power relates to matters of national sovereignty or prerogative power does not necessarily mean that merits review should be excluded. A relationship to national sovereignty, including migration matters, does not necessarily mean the decision making power is incompatible with the availability of remedies to ensure that administrative decisions made under the

power are lawful and correct, within the context of the legislative and policy framework in which they are made.

2. Factors lying in the nature of the decision maker.
 - For example, *the decision maker is an expert or requires specialised expertise.*
 - For example, *the decision maker is of a high status* (such as a Minister or the Governor-General). It is the character of a decision making power, and its capacity to affect the interests of individuals, that is most relevant to the question of whether decisions made under it should be subject to merits review.

3. Factors lying in the effect of the decision.
 - For example, *where large numbers of people may take advantage of review.*
 - For example, *where there is potential for the original decision to be subject to judicial review.* Judicial review serves a complementary but distinct purpose to merits review, involving the exercise of judicial power and a finding in law. It is not aimed at achieving the correct and preferable decision, but rather, at ensuring that administrative powers are lawfully exercised. It is generally not possible to exclude the availability of judicial review of administrative decisions. Merits review provides a more accessible form of review than judicial review, as reflected in the statutory objectives of the AAT, as noted in Part 2 above.

5. Conclusion

5.1 Australia has a well-established and effective administrative review system, which is fundamental to ensuring the ongoing transparency and accountability of administrative decisions.

5.2 The AAT's current merits review apparatus is underpinned by the long-standing principles of enhancing openness in government and accountability for decision making, and of improving the quality and consistency of administrative decisions. Its processes may intersect with other review mechanisms, such as judicial review.

5.3 The key objective of merits review continues to be to reach the correct and preferable decision at the time the decision is made. It is important that it continues to provide an accessible and fair avenue of redress for people adversely affected by administrative decisions. As detailed in this submission, there are well-established principles to guide consideration of the application or exclusion of merits review to particular administrative decisions.