



Australian Government  
Attorney-General's Department

# Australian Administrative Law Policy Guide

APPROVED BY THE ATTORNEY-GENERAL | 2011

### **Acknowledgements**

This Guide draws on the invaluable work of the Administrative Review Council, and the Department acknowledges the ongoing importance of the Council's work

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### **Use of the Coat of Arms**

The terms under which the Coat of Arms can be used are detailed on the It's an Honour (<http://www.itsanhonour.gov.au/coat-arms/index.cfm>) website.

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# 1. Purpose of the Guide

The Guide is intended to assist policy makers to understand how Commonwealth administrative law works, to identify administrative law issues in draft legislation or proposals (including policy matters) and to understand the approaches that can be taken to address those issues. The Guide is an overview of the principles that the Attorney-General's Department (AGD) considers in its role supporting the Attorney-General in his or her responsibility for Commonwealth administrative law,<sup>1</sup> but it does not replace the need to consult with AGD on administrative law issues.<sup>2</sup> It draws from, and refers to, a variety of sources, including work of the Administrative Review Council.

AGD includes the Administrative Law Unit, which considers these matters. Sometimes, proposals involve matters of concern to several areas of AGD, and policy makers should ensure they are aware of this and consult appropriately with all relevant Divisions. The Administrative Law Unit will assist in facilitating this contact.

## Some relevant areas of the Department and their responsibilities

- > **Federal Courts Branch** provides policy advice in relation to the federal court system, including the conferral of jurisdiction and powers on federal courts, and measures to improve access to the federal courts. The Branch also provides preliminary advice about enabling judicial officers to perform administrative functions in their personal capacity.<sup>3</sup>
- > **Criminal Justice Division** has published a guide on criminal law issues to assist in the framing of proposed criminal offences, civil penalties and certain other enforcement provisions in Commonwealth law.<sup>4</sup>
- > **International Law and Human Rights Division** supports the Attorney-General in his or her policy responsibilities for human rights and international law. Within this Division:
  - the work of the **Human Rights Branch** includes the implementation of *Australia's Human Rights Framework*.<sup>5</sup> The Branch provides legal policy advice on domestic human rights issues and administers federal anti-discrimination legislation, and
  - the **Office of International Law** provides legal policy advice on international law including international human rights law.
- > **Constitutional Policy Unit** provides policy advice on constitutional law issues.
- > **Office of Legislative Drafting and Publishing** drafts legislative instruments and maintains the Federal Register of Legislative Instruments (FRLI) as part of the ComLaw website.<sup>6</sup>

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<sup>1</sup> The Attorney-General is given this responsibility by means of the Administrative Arrangements Order. The latest AAO is at

<<http://www.pmc.gov.au/parliamentary/index.cfm>> and <<http://www.comlaw.gov.au/Details/C2010Q00232>>.

<sup>2</sup> See the Legislation Handbook at paragraphs 6.28-6.33. The Cabinet Handbook provides that, where matters directly affecting other ministers' portfolio responsibilities are raised, the sponsoring minister must provide them sufficient opportunity to contribute to the submission. Both publications are at <<http://www.dpmc.gov.au/guidelines/index.cfm>>.

<sup>3</sup> Please contact Federal Courts Branch at [aid.fcb@ag.gov.au](mailto:aid.fcb@ag.gov.au).

<sup>4</sup> *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* (February 2004)

<[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers)>.

<sup>5</sup> For further information, see <http://www.ag.gov.au/humanrightsframework>.

<sup>6</sup> <http://www.comlaw.gov.au>. For further information about OLDLP, see:

[www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure\\_OfficeofLegislativeDraftingandPublishing](http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_OfficeofLegislativeDraftingandPublishing)

## 2. Overview of the administrative law system

### 2.1 What is administrative law?

Administrative law is the body of law regulating government decision making. It is an accountability mechanism that applies to government decision making about individual matters, rather than broad policy decisions.

The federal administrative law system is based on the structural separation between the roles of the legislature, the executive, and the judiciary in Australia's Constitution – in particular, the independence of the federal courts. The main consequences of this arrangement in Australia are:

<p><b>The Legislature</b> decides on the criteria for decision making, and merits review of decisions and holds Ministers accountable for their decisions.</p>	<p><b>The Executive</b> assesses the merits of particular cases with reference to criteria laid down by the legislature in legislation. The executive includes merits review tribunals.</p>	<p><b>The Judiciary</b> declares and enforces the legal limits of the powers of the executive and the legislature.</p>
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In this way, the administrative law system ensures that the government as well as the people are bound by law, and underpins the observance of the rule of law in Australia.

The operation of administrative law as an accountability mechanism also requires that government agencies whose decisions are the subject of merits or judicial review carefully consider and analyse review outcomes. This is necessary not only to ensure the specific outcome of an individual review matter is delivered, but also to build into agency practices any systemic changes needed to improve the overall quality of decision making.

### 2.2 Elements of the administrative law system

There are different definitions of the elements that make up the administrative law system. For the purposes of policy development, Administrative Law Unit views the system as including:

- > **Primary decision making**, including the legislative framework for decisions, and the processes and procedures that lead up to them.
- > **Merits review of primary decisions** by internal officers within an agency (and this may be required by agency practice or codified in legislation) and/or external merits review bodies. External merits review is only available if the legislation governing the decision specifically provides for it. The major Commonwealth merits review tribunals providing external review of government decisions are the Administrative Appeals Tribunal (AAT), the Migration Review Tribunal-Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans' Review Board.

- > **Judicial review** is available in relation to administrative decisions generally under either the *Administrative Decisions (Judicial Review) Act 1977* or s 39B of the *Judiciary Act 1903*.<sup>7</sup> Judicial review is available in the High Court under s 75(v) of the Constitution. A number of statutes also provide for review of questions of law by the courts. For example, AAT decisions can be reviewed under s 44 of the *Administrative Appeals Tribunal Act 1975* on 'questions of law.'
- > **The Commonwealth Ombudsman** handles complaints, conducts investigations, performs audits and inspections, encourages good administration, and carries out specialist oversight tasks in relation to government activities.
- > **Office of the Australian Information Commissioner** promotes access to, and protection of, information. The Office brings together three functions, including:
  - oversight of the operation of the *Freedom of Information Act 1982*, investigation of complaints about FOI administration, and the review of decisions made by agencies and ministers under that Act
  - privacy functions conferred by the *Privacy Act 1988*, and
  - government information policy functions.
- > **Administrative Review Council (ARC)** is an independent statutory body established under the AAT Act to inquire into, and report to the Attorney-General on, the operation of the administrative law system.
- > The **Merit Protection Commissioner** is an independent statutory office holder who conducts independent reviews of employment decisions made by agencies about matters that affect Australian Public Service (APS) employees. The Commissioner also inquires into whistleblower complaints made by APS employees under the *Public Service Act 1999*. The Commissioner promotes ethical and informed decision-making by APS employers by helping to ensure that the Australian Public Service Values are applied to all employment decisions relating to APS employees.<sup>8</sup>
- > **Parliamentary Committees** scrutinise Bills and legislative instruments against a set of accountability standards or principles.<sup>9</sup> All legislation will be considered by either the Senate Standing Committee for the Scrutiny of Bills or the Senate Standing Committee on Regulations and Ordinances. The Administrative Law Unit can provide policy advice on some issues which Committees are likely to raise, and relevant information to include in explanatory material.<sup>10</sup>

Policy regarding primary decision making, merits review and judicial review is considered further in this guide. Further information on the roles and responsibilities of these elements is at

**Attachment A.**

<sup>7</sup> The *Migration Act 1958* provides a separate mechanism for judicial review.

<sup>8</sup> See the website of the Australian Public Service Commission at [www.apsc.gov.au/merit](http://www.apsc.gov.au/merit).

<sup>9</sup> See in particular, the Senate Standing Committee for the Scrutiny of Bills for legislation at <<http://www.aph.gov.au/senate/committee/scrutiny/cominfo.htm>> and the Senate Standing Committee on Regulations and Ordinances for delegated legislation at <[http://www.aph.gov.au/senate/committee/regord\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/regord_ctte/index.htm)>.

<sup>10</sup> On 30 September 2010, the Attorney-General reintroduced the *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*. The Bills contain provisions to establish a Parliamentary Joint Committee on Human Rights with powers to examine Acts, Bills and legislative instruments for compatibility with Australia's human rights obligations. The Bills also introduce a requirement for new and amending legislation and disallowable legislative instruments to be accompanied by a statement of compatibility with human rights. Further information on the Bills is available at: <http://www.ag.gov.au/humanrightsframework>.

## 3. Role of the Attorney-General in administrative law

Policy makers should consider the potential interests of all stakeholders in the administrative law system. The following discussion focuses on the responsibilities relating to administrative law of the Attorney-General, Attorney-General's Department and the Administrative Review Council in policy development. Consultation with the Department of the Prime Minister and Cabinet, the Office of the Australian Information Commissioner, or the Commonwealth Ombudsman's office may also be necessary, depending on the nature of a proposal.

### 3.1 The Attorney-General

The Attorney-General has broad responsibility for administrative law, including oversight of the Administrative Appeals Tribunal, and legislative instruments. The Attorney-General's approval must be sought for amendments to Acts for which he or she has responsibility, particularly the following:

- *Administrative Appeals Tribunal Act 1975* (AAT Act)
- *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act)
- *Judiciary Act 1903*
- *Legislative Instruments Act 2003* (LIA)<sup>11</sup>

### 3.2 The Administrative Law Unit

The Administrative Law Unit of AGD supports the Attorney-General in his or her broad responsibility for the administrative law system. The Administrative Law Unit develops policy and provides legal policy advice on administrative law issues, including on the merits review and judicial review of administrative decisions, and legislative instruments.

Enquiries should be directed in the first instance to the Assistant Secretary, Administrative Law Unit, Attorney-General's Department. Contact details are:

*Email:* [ajdalb@ag.gov.au](mailto:ajdalb@ag.gov.au)

*Phone:* 02 6141 4108

*Mail:* 3–5 National Circuit  
BARTON ACT 2600

### 3.3 The Administrative Review Council

Consultation with the ARC will be useful where legislation or policy proposals have implications for administrative review, such as the establishment of new administrative decision making schemes. Further information on the ARC is available at [www.ag.gov.au/arc](http://www.ag.gov.au/arc).

Agencies who wish to consult with the ARC should do so at the earliest opportunity by emailing [arc@ag.gov.au](mailto:arc@ag.gov.au).

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<sup>11</sup> For further information, please see the Legislation Handbook at <[http://www.dpmc.gov.au/guidelines/docs/legislation\\_handbook.pdf](http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf)> and the Legislative Instruments Handbook at <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Administrativelaw\\_BackgroundtotheLegislativeInstrumentsAct2003](http://www.ag.gov.au/www/agd/agd.nsf/Page/Administrativelaw_BackgroundtotheLegislativeInstrumentsAct2003)>.

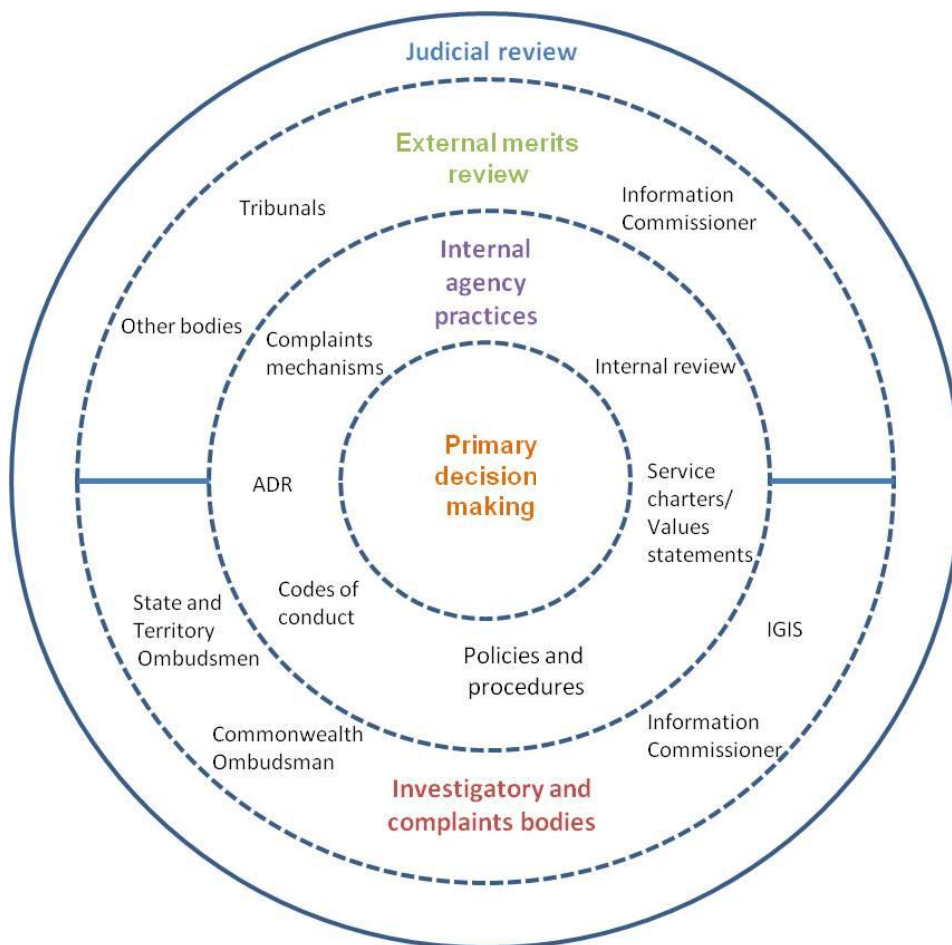
## 4. Elements to be considered in developing policy proposals that include administrative decision making

This section outlines some topics that commonly arise in discussions with the Administrative Law Unit about the administrative law aspects of policy and legislative proposals. It is not intended to be an exhaustive list of all administrative law issues that arise in developing policy, and does not substitute for consultation with the Attorney-General's Department.

### 4.1 A whole-of-system approach to accountability

The administrative law system is based on the fundamental values of fairness, lawfulness, rationality, openness and efficiency.<sup>12</sup> How government interacts with the public in individual cases influences public trust and confidence in government administration more broadly. By showing a commitment to delivering justice through administrative decision making, review mechanisms and other accountability mechanisms, the Federal Government can play an active role in improving the quality of access to justice for individuals.

#### The administrative law system



<sup>12</sup> See Administrative Review Council, Submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Certain Matters Relating to the Role and Functions of the Administrative Review Council* (1996) [15]; Administrative Review Council, *A Guide to Standards of Conduct for Tribunal members* (revised 2009).

Many of the accountability features of the administrative law system, such as the availability of judicial review, the jurisdiction of the Ombudsman, the jurisdiction of the Merit Protection Commissioner and obligations under freedom of information and privacy legislation, will be applicable to agency decision making regardless of whether they are specified in individual statutes. They are of general application, with limited or no scope for exemptions.

Together, these mechanisms create a comprehensive administrative law system that provides for:

- > **decision making** that is fair, high-quality, efficient and effective
- > **individual access** to review of both the merits and lawfulness of decisions and conduct
- > **accountability** for government decisions and conduct, and
- > **public access** to information about government decisions and processes, and individual access to personal information held by the government.

The Honourable Robert Ellicott, Attorney-General from 1975 to 1977, told the House of Representatives in 1977:

The three avenues of review [in the Australian administrative law system], appeal on the merits to the Administrative Appeals Tribunal, investigation by the Commonwealth Ombudsman, and judicial review by the Federal Court of Australia, provide different approaches to the remedying of grievances about Commonwealth administrative action. Each has its own place in a comprehensive scheme for the redress of grievances.<sup>13</sup>

This statement was part of the Second Reading Speech for the *Administrative Decisions (Judicial Review) Act 1977*, a legislative milestone in the development of Australian administrative law. Since then, a number of other elements have been added to the administrative law system, including freedom of information legislation and privacy legislation.

Legislative and policy proposals should be carefully considered in respect of their constitutional and administrative law implications. Proposals that may involve decision making by both State and Commonwealth bodies need to be clear about which tier of government is making each decision. While Federal administrative law applies to decision making of Commonwealth bodies, each State and Territory has a separate administrative law system.

## WHOLE-OF-SYSTEM APPROACH TO ACCOUNTABILITY

### KEY PRINCIPLES

A whole-of-system approach should be taken in developing proposals that involve government decision making.

Earlier and better communication and better primary decision making, together with effective administrative law mechanisms, can reduce the need for formal remedies or complaint mechanisms to be pursued.

### RESOURCES

*Strategic Framework for Access to Justice in the Federal Civil Justice System – a guide for future action* (September 2009)

- > <http://www.ag.gov.au/aj2>

<sup>13</sup> The Hon RJ Ellicott, Second Reading Speech, *Administrative Decisions (Judicial Review) Bill 1977*, 28 April 1977.

## 4.2 Decision making

The 'primary decision' in the Commonwealth administrative law system refers to an 'original' decision that affects an individual, usually made by an officer of a Commonwealth agency.

Examples include a grant or refusal of a visa, a grant or refusal of a pension, or a decision on a tax assessment. Decision making by Commonwealth officers allows efficient and effective administration, as it is impractical for the Parliament to make all decisions.

While this guide largely focuses on decision making powers in legislation, it should be recognised that executive schemes are now widely used for purposes such as emergency financial aid, drought relief, health payments, industry incentives and administrative compensation.<sup>14</sup> As a matter of policy, similar principles will generally apply to executive schemes to ensure good administration and access to justice. Merits review may not always apply to decisions under grants schemes, however, due to their 'limited pool of resources for distribution'.<sup>15</sup>

### 4.1.1 Types of decisions

A wide range of decision making powers can be granted under Commonwealth laws. These include decisions:

- > to grant, vary or deny a right, entitlement or benefit
- > to impose or refuse to impose an obligation, requirement or disability,
- > that give a direction, and
- > that make a valuation or declaration.

The two main types of administrative decisions to which administrative law relates are:

- > **mandatory** – for example, if the provision says that, if *x* occurs, *y* must decide a certain way, and
- > **discretionary** – for example, the Minister *may* decide to grant a licence to an applicant.

Decisions which allow officials high levels of discretion are of particular interest, because the way decision makers use their judgement requires accountability. Policy makers need to identify the nature of the decision which could be made in draft legislation, as different considerations will apply for different decision making powers.

## DECISION MAKING

### KEY PRINCIPLE

Where a decision making power is proposed, policy makers should consider the broad decision making context so that the decision maker is supported in their role.

### RESOURCES

The ARC Best Practice Guides provide detailed guidelines on all aspects of primary decision-making. If agencies have any questions about the application of the guides in particular situations please contact the Administrative Law Unit, which can liaise with the ARC.

#### ARC Best Practice Guides:

- 1: Lawfulness
  - 2: Natural Justice
  - 3: Evidence Facts and Findings
  - 4: Reasons
  - 5: Accountability
- > [http://www.ag.gov.au/aqd/WWW/archome.nsf/Page/Publications\\_Reports\\_Other\\_Documents](http://www.ag.gov.au/aqd/WWW/archome.nsf/Page/Publications_Reports_Other_Documents)

<sup>14</sup> Professor John McMillan 'Can administrative law foster good administration' (The Whitmore Lecture, Sydney, 16 September 2009) <[http://www.ombudsman.gov.au/docs/speeches/whitmore\\_lecture.pdf](http://www.ombudsman.gov.au/docs/speeches/whitmore_lecture.pdf)>.

<sup>15</sup> Administrative Review Council, *What decisions should be subject to merits review* (1999) 13. See also Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006) 57.

### 4.1.2 What should be in a primary decision making power?

While decision making power is generally a matter for policy makers, the Administrative Law Unit can provide advice on the scope of administrative decision making power.

Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers, delegate power to a person without setting criteria which that person must meet, or fail to provide for people to be notified of their rights of appeal against administrative decisions are of concern to the Senate Scrutiny of Bills Committee<sup>16</sup> and the Senate Standing Committee on Regulations and Ordinances.<sup>17</sup>

#### Who makes the decision?

In developing legislation, the appropriate level of discretion in a decision making power should be considered, and the responsibilities of the person exercising the discretion should be appropriate to the nature of the decision that could be made.

For example, decisions taking into account issues affecting the national interest should generally be made by the relevant Minister. Decisions taking into account the national interest may involve weighing a number of competing but important considerations such as environmental effects, indigenous rights, economic impacts and public opinion. A decision may also affect the national interest if it is a decision which could have a significant impact on a large number of members of the public, affect Australia's relationship with other nations, have a significant effect on the Australian economy or involve consideration of interstate relations.<sup>18</sup>

#### Criteria for decision making

Policy makers should consider whether statutory criteria would be appropriate to guide the decision maker in the exercise of a discretionary power. Where a broad discretion is proposed, this should be clearly explained in the explanatory material for the legislation. It is often desirable to include examples of relevant considerations even where the decision maker is exercising a broad discretion.

Where a decision is likely to affect individuals' rights or freedoms, criteria in legislation (to which a decision maker may have regard) may include principles in relevant human rights instruments. Policy makers should contact the Human Rights Branch of the International Law and Human Rights Division of AGD on these issues.

### 4.1.3 Delegation of power

It is common for legislation to allow for the delegation of decision making power from the Minister or Secretary to an agency officer. Considerations similar to those involved in determining who should make the decision apply to delegations of power. For example, if a decision may involve considering the national interest in some cases but not others, it may be appropriate to give the Minister the power to delegate to officials the decisions that involve no national interest consideration and to retain the right to make the decisions that affect the national interest. Alternatively, the provisions may be structured so that decisions can be delegated in most cases, but more significant decisions can be made by the Minister personally.

Delegations of power should only be as wide as necessary and, where a wide delegation of power is necessary, this should be justified in the explanatory memorandum. Where a decision involves a limited exercise of discretion, it may be appropriate for more junior officers to make the decision. Where a provision

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<sup>16</sup> See for example, Senate Scrutiny of Bills Committee, Parliament of Australia, *The Work of the Committee during the 41st Parliament November 2004 – October 2007* (2008) at <http://www.aph.gov.au/senate/committee/scrutiny/work41/index.htm>. The issues relate to (ii) of the Committee's terms of reference to report on whether Bills 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'.

<sup>17</sup> See [http://www.aph.gov.au/senate/committee/regord\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/regord_ctte/index.htm).

<sup>18</sup> Administrative Review Council, *What decisions should be subject to merits review* (1999).

will give rise to a high volume of decisions, it is not usually appropriate for senior officers to take on the workload. It may be more efficient for a larger number of junior officers to make primary decisions.

#### 4.1.4 Procedural fairness

Decision makers should act in a manner which affords people affected by decisions procedural fairness (or natural justice), and explain those decisions in a manner which people can understand. Procedural fairness forms the basis for a ground of judicial review under the common law and the ADJR Act, and requires certain standards and procedures to be observed in administrative decision making. Broadly, procedural fairness requires that the decision maker be, and appear to be, free from bias and/or that the person receives a fair hearing.<sup>19</sup> 'The precise contents of the requirements... may vary according to the statutory context; and may be governed by express statutory provision'.<sup>20</sup>

As a matter of policy, the Administrative Law Unit agrees with the comments of the ARC that 'procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances'.<sup>21</sup> The ARC considers that, to promote public law values, legislation may specify the procedural obligations of decision makers where the requirements are not sufficiently certain, but should not attempt to cover all aspects of procedural fairness.<sup>22</sup>

#### 4.1.5 Reasons and effective communication

The ADJR Act and AAT Act<sup>23</sup> give an affected person a right to obtain written reasons for a decision. The person may request a written statement from the decision maker setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision.

An obligation to provide reasons for particular decisions may also be set out in the legislation governing the decision. Providing reasons is encouraged in almost all cases, especially when the decision is adverse to the applicant. An obligation to provide reasons will ensure a person's right to reasons is clear.<sup>24</sup>

All communication with people affected by an administrative decision, including but not limited to reasons, must be clear, and expressed in terms that the reader understands. This will mean different things in different circumstances — communication that is simple for one recipient may be overly complex for another and vice versa.

There are a number of strategies for assisting with communication. For example, in general reasons should include the details of a contact officer who is familiar with the decision with a notification of reasons. In many cases giving a person the opportunity to speak to a decision maker over the phone will assist the person to understand the decision. The Administrative Law Unit can assist agencies with strategies to improve written communication and general communication strategies.

<sup>19</sup> Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 13.

<sup>20</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

<sup>21</sup> Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 52.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Administrative Decisions (Judicial Review) Act 1977*, s 13; *Administrative Appeals Tribunal Act 1975*, s 28.

<sup>24</sup> For further information, see Administrative Review Council, *Best Practice Guide 4 – Reasons* (2007).

## 4.2 Merits review

### 4.2.1 What is merits review?

Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the 'correct or preferable decision'. In a merits review, the whole decision is made again on the facts. This is different to judicial review, where only the legality of the decision making process is considered. Judicial review usually consists only of a review of the procedures followed in making the decision.

The objective of merits review is to ensure administrative decisions are correct or preferable – that is, they are made according to law, or if there is a range of decisions that are correct in law, the best on the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making.<sup>25</sup>

The distinction between 'correct or preferable' in relation to a decision is important. The 'correct' decision is made in a non-discretionary matter where only one decision is possible on either the facts or the law. However, where a decision requires the exercise of a discretion or a selection between possible outcomes, judgement is required to assess which decision is 'preferable.'

For example, a benefit that will be granted if a person is –

- > over 18 years of age
- > has an income of less than \$100,000, and
- > is resident in Australia

– really only has one correct answer.

In comparison, a benefit that will be granted if a person is –

- > over 18 years of age
- > has a serious medical illness, and
- > is resident in Australia

– involves a greater level of discretion. There will be differing views on what constitutes a 'serious medical illness' and regard should be had to policy guidance and the purpose behind the grant of the benefit.

Merits review is often initially conducted 'in-house' by a more senior agency official ('internal' merits review). There is also a range of bodies established to provide 'external' merits review.

## MERITS REVIEW

### KEY PRINCIPLES

Merits review should generally be available for decisions that affect the interests of a person unless there are particular reasons to exclude it.

Internal review processes are generally encouraged.

The Administrative Appeals Tribunal is an independent statutory agency established under the AAT Act to conduct merits review of a range of government decisions.

### RESOURCES

#### Administrative Review Council

What decisions should be subject to merits review (1999)

- > [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Downloads\\_What\\_decisions\\_should\\_be\\_subject\\_to\\_merit\\_review](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review)

Internal Review of Agency Decision Making

Report No 44 (2001)

- > [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Report\\_Files\\_Report\\_No.44](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No.44)

<sup>25</sup> Administrative Review Council, *What decisions should be subject to merits review?* (1999).

### 4.2.2 Internal review

Internal review occurs where a decision made by an officer of an agency is reviewed by another person in the agency. Many agencies have formal systems of internal review, and it may be provided for in legislation. A number of agencies have more *ad hoc* systems, simply available through administrative processes in an agency. Internal review can be sought by requesting reconsideration of a decision or by following the set procedures of more formal mechanisms.

Appropriate internal review processes should be implemented in almost all cases. Generally, internal review is easy for applicants to access, and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made. Internal review processes will not usually be appropriate where decisions are made by high level officers or by Ministers.

Policy makers should consider whether internal review mechanisms should be statute-based, to ensure clarity of rights on the face of the legislation, or whether internal administrative processes are sufficient. It is important that the process adopted informs individuals of their review rights if they are adversely affected by a decision.

### 4.2.3 External review

External review involves fresh consideration of a primary decision by an external body. This body is often a tribunal, but may also be a regulator (for example, reviewing a private body's decisions under a legislated decision-making power), or an independent officer from another agency. External merits review must be provided for by legislation.

While external merits reviewers exercise the power of the original decision maker, agency administrative policies are not binding on review tribunals.<sup>26</sup> Administrative policies are relevant to tribunal decisions, but tribunals do not have to follow them in individual cases if their view is that adherence would not lead to a correct or preferable decision.

Several specialist Commonwealth tribunals review particular types of decisions, including the Social Security Appeals Tribunal, the Veterans' Review Board, the Migration Review Tribunal and the Refugee Review Tribunal. The AAT reviews a wide range of administrative decisions made by Australian Government ministers, departments, agencies, authorities and other tribunals, and has specialist divisions based on subject matter.<sup>27</sup>

The AAT can only review a decision if an Act or legislative instrument states that the decision is subject to review by the Tribunal. Section 28 of the AAT Act enables parties affected by a decision that is reviewable by the AAT to request a statement of the reasons for the original decision.

The AAT currently has jurisdiction to review decisions made under more than 400 pieces of legislation. The AAT should be the merits review tribunal for all Commonwealth administrative decisions unless specific policy considerations support review conducted by an alternative body.

### 4.2.4 What decisions should be subject to merits review?

As a matter of policy, an administrative decision that will, or is likely to, adversely affect the interests of a person should be subject to merits review, unless it would be inappropriate or there are factors justifying the exclusion of merits review.<sup>28</sup>

<sup>26</sup> *Becker and Minister for Immigration and Ethnic Affairs* [1977] AATA 12 (24 August 1977).

<sup>27</sup> See the website of the AAT at [www.aat.gov.au](http://www.aat.gov.au).

<sup>28</sup> Administrative Review Council, *What decisions should be subject to merits review?* (1999).

The 1999 ARC publication 'What decisions should be subject to merits review?' remains a useful policy guide, including for the types of decisions that would be unsuitable for merits review or the factors justifying its exclusion. The Administrative Law Unit can assist agencies to assess the policy reasons for excluding merits review.

#### **4.2.5 Costing of reviews by the AAT**

For proposals which create new AAT review rights or amend existing rights, policy makers need to consider, and discuss with the Administrative Law Unit, any increase in workload they estimate will flow on to the AAT.

The AAT requires funding for increases to its workload that are anticipated as part of new proposals. Policy makers should contact the Administrative Law Unit at the earliest opportunity to initiate costing discussions.

The AAT also needs to be notified of new proposals, particularly those involving large workloads or novel and complex jurisdictions, so it can prepare for changes to its jurisdiction and profile. The Administrative Law Unit can assist in contacting the AAT.

#### **4.2.6 Alternatives to merits review**

A key objective of administrative law is to ensure accountability. Looking at the system as a whole, there may be a good reason for excluding or limiting avenues for merits review of a decision. Policy makers will need to discuss these issues with the Administrative Law Unit.

Commonwealth Government agency service charters generally include systems for complaint handling. Service charters are required as part of the Government's service charter initiative introduced in 2000. Those mechanisms are internal to the organisation, and might be integrated with informal internal review mechanisms. They are useful as a means to resolve concerns quickly and cheaply but do not generally provide a substitute for merits review.<sup>29</sup>

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<sup>29</sup> For guidance about complaint handling generally, see Australian Standard on Complaint Handling (AS 4269).

## 4.3 Judicial review

### 4.3.1 What is judicial review?

Judicial review by a court holds public officials accountable for the correct exercise of their powers, rather than the fairness of their decision with reference to the merits of the case. Judicial review is different from merits review because the court cannot look at the substance of the decision maker's assessment of the facts, only the process by which that decision was made. The courts cannot remake the decision, so typically the remedies available from judicial review involve remitting the decision to the original decision maker with an order to remake the decision according to law.

Judicial review in Australia is available in the Federal Court or the Federal Magistrates Court under either the ADJR Act or s 39B of the *Judiciary Act 1903*,<sup>30</sup> and in the High Court under s 75(v) of the *Constitution*. The requirements for judicial review have been interpreted by the courts, and now have technical meanings.<sup>31</sup> A number of statutes also provide for review of questions of law by the courts. For example, AAT decisions can be reviewed under s 44 of the AAT Act on 'questions of law.'

In contrast to merits review of a decision for which legislative provision must be made, judicial review will generally be available for administrative decisions or actions of Commonwealth officers, regardless of whether the ability to seek review is set out in legislation. As a matter of policy, the availability of judicial review is not usually seen as an adequate substitute for merits review (for example, by the AAT).

Where proposals would affect a person's ability to seek judicial review, the Administrative Law Unit should be consulted. The Federal Courts Branch should also be consulted about the workload of federal courts, where reviewable or appealable decisions are proposed. The Administrative Law Unit will facilitate this discussion.

### 4.3.2 Exemptions from the ADJR Act

Schedules 1 and 2 of the ADJR Act list some classes of decision to which the Act (or parts of the Act) do not apply. However, because constitutional judicial review<sup>32</sup> will still be available, exemptions under the ADJR Act will, for the most part, not be able to exclude completely the availability of review.

<sup>30</sup> Except for migration decisions: *Migration Act 1958*, ss 476(1), 476A(2).

<sup>31</sup> For further detail, see Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006).

## JUDICIAL REVIEW

### KEY PRINCIPLES

Judicial review will generally be available for administrative decisions of public officials, regardless of whether it is included in legislation governing the decision.

### RESOURCES

Administrative Review Council  
*The Scope of Judicial Review*  
Report No 47 (2006)

> [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Report\\_Files\\_Report\\_No\\_47](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No_47)

The report addresses Constitutional and policy considerations relevant to the scope of judicial review, and provides a framework of indicative principles in relation to the scope of judicial review.

The ADJR Act is intended to apply to all decisions of Commonwealth agencies unless exemption is justified. A Minister who seeks to exempt decisions from review under the ADJR Act requires the Attorney-General's approval. Exclusions from the application of the ADJR Act are rare and will only be considered for compelling policy reasons. Reasons for seeking exclusions from the Act should be discussed well in advance with the Administrative Law Unit.

Exclusions can also be sought from the right to request reasons in section 13 of the ADJR Act (discussed in 4.2.4). Generally, legislation should provide for the giving of reasons for all decisions at an early stage. If this occurs, the need for people to request reasons at a later stage under the ADJR Act should be minimised.

#### 4.4 Outsourcing of government decision making

The scope for judicial review of decisions made by private bodies is more limited than the scope of review for officers of the Commonwealth. Judicial review will still be available if the decision is made under an enactment. However, decisions made under a contract may not be subject to judicial review. The Ombudsman has jurisdiction over all government contractors and sub-contractors. Administered by the new Office of the Information Commissioner, the *Freedom of Information Act 1982* applies to government contractors, and Privacy Principles apply to both government and private organisations.

It is important that where a person would have had access to internal and/or merits review before an agency contracted out government services, those avenues of review continue to be available. For new schemes involving private bodies delivering services on behalf of the government, the availability of merits review should be subject to the same considerations as services delivered directly by government. This will still be the case where it is decided to contract out service delivery without changes to legislation.

The Administrative Law Unit should be consulted about all proposals to privatise government services, outsource government decision making power or develop public/private partnerships which involve making decisions about rights and entitlements.

## OUTSOURCING OF DECISION MAKING

### KEY PRINCIPLE

Where a person would have had access to internal and/or merits review before an agency contracted out government services, those avenues of review should continue to be available.

### RESOURCES

Administrative Review Council

*The Contracting Out of  
Government Services*

Report No 42 (1998)

> [http://www.ag.gov.au/aqd/WWW/archome.nsf/Page/Publications\\_Reports\\_Administration\\_Review\\_Council\\_Reports](http://www.ag.gov.au/aqd/WWW/archome.nsf/Page/Publications_Reports_Administration_Review_Council_Reports)

<sup>32</sup> Or the equivalent jurisdiction under *Judiciary Act 1903*, s 39B.

## Attachment A

## Elements of the administrative law system

This document outlines in more detail elements of the administrative law system that are not already addressed in the guide.<sup>33</sup>

### The Ombudsman

The Commonwealth Ombudsman has wide powers to investigate complaints about the administrative actions of most Australian Government agencies to see if they are wrong, unlawful or discriminatory.<sup>34</sup> Under the *Ombudsman Act 1976*, complaints about government contractors providing goods and services to the public under a contract with a government agency can also be investigated. The Ombudsman has the discretion not to investigate a complaint.

Ombudsman investigation and review powers are automatically available for decision making and administrative processes of agencies within its jurisdiction: they need not be specified in legislation. Following an investigation, the remedies offered by the Ombudsman are:

- > recommendations to departments
- > specific reports to government, or
- > broader reports making recommendations to government about systemic problems.

These remedies may not be appropriate in all situations, and often accountability mechanisms which offer access to statutory review rights and final resolution are more appropriate. On the other hand, some administrative actions are not reviewable by courts or tribunals because of their nature – for example, agency actions not specifically related to decisions, such as unreasonable delays in making decisions. The Ombudsman may be able to make recommendations about these types of issues.

The Ombudsman is independent and impartial, and works to improve public administration generally. When evaluating different accountability mechanisms, consider that the Ombudsman:

- > can conduct 'own motion' investigations
- > does not have jurisdiction over the AAT, and should not be relied on as a means of holding tribunals accountable
- > will require special reasons to investigate a complaint that is being, or has been, reviewed by a court or tribunal,<sup>35</sup> and
- > may choose not to investigate a complaint if rights of review to courts or tribunals exist.<sup>36</sup>

The Commonwealth Ombudsman is also the Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Postal Industry Ombudsman, the Norfolk Island Ombudsman and the Taxation Ombudsman, and discharges the role of ACT Ombudsman under legislation.<sup>37</sup>

- > **For further information, please visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>**

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<sup>33</sup>While not technically a part of the administrative law system, compensation for defective administrative may be awarded at common law for negligence or misfeasance in public office. There are also government schemes available to remedy detriment caused by defective administration, including the Compensation for Detriment caused by Defective Administration (CDDA) scheme (see <http://www.finance.gov.au/financial-framework/discretionary-compensation/cdda-scheme.html>).

<sup>34</sup> *Ombudsman Act 1976*, ss 5, 15.

<sup>35</sup> *Ombudsman Act 1976*, s 6(2).

<sup>36</sup> *Ombudsman Act 1976*, s 6(3).

<sup>37</sup> *Self-Government (Consequential Provisions) Act 1988* (ACT).

## The Australian Information Commissioner

The Office of the Australian Information Commissioner (OAIC) is an Australian Government agency established under the *Australian Information Commissioner Act 2010*. The new Office of the Australian Information Commissioner has been created to bring together three functions:

- > freedom of information functions, in particular, oversight of the operation of the *Freedom of Information Act 1982* and review of decisions made by agencies and ministers under it,
- > privacy functions, conferred by the *Privacy Act 1988* and other laws, and
- > Government information policy functions, conferred on the Australian Information Commissioner under the *Australian Information Commissioner Act 2010*.

The *Freedom of Information Act 1982*, *Australian Information Commissioner Act 2010* and the *Privacy Act 1988* are administered by the Privacy and FOI Policy Branch of the Department of the Prime Minister and Cabinet.

- > **For further information, please visit the website of the Office of the Australian Information Commissioner at <http://www.oaic.gov.au>**

## Freedom of Information

The object of the Commonwealth *Freedom of Information Act 1982* (FOI Act) is to give the Australian community access to information held by the Australian Government. The FOI Act gives an individual the right to request documents and to ask for information held in government records about him or her to be corrected.

The Australian Information Commissioner, supported by the FOI Commissioner, has wide ranging functions related to the oversight of the FOI Act. Decisions granting or refusing access under the Act may be reviewed by Information Commissioner,<sup>38</sup> and the Office will investigate complaints about the handling of FOI applications.

A right of review to the AAT will lie from a review decision made by the Commissioners. The Commonwealth's FOI legislation is administered by the Privacy and FOI Policy Branch of the Department of the Prime Minister and Cabinet.

**For further information, please visit the following websites:**

- > **Office of the Australian Information Commissioner at <http://www.oaic.gov.au>**
- > **Department of Prime Minister and Cabinet at <http://www.dpmc.gov.au/foi/index.cfm>**

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<sup>38</sup> *Freedom of Information Act 1982*, ss 54L–M.

## Privacy

The *Privacy Act 1988* is the principal legislation governing the protection of personal information in the federal public sector and in the private sector. The Act includes Privacy Principles addressing the collection, use, disclosure, quality and security of personal information as well as access to personal information. An individual may complain to the Office of the Australian Information Commissioner about certain interferences with his or her privacy, which includes where the individual believes there has been a breach of the Privacy Principles.

The Australian Government's privacy legislation is administered by the Privacy & FOI Policy Branch of the Department of the Prime Minister and Cabinet.

**For further information, please visit the following websites:**

- > **Office of the Australian Information Commissioner** at <http://www.oaic.gov.au>
- > **Department of Prime Minister and Cabinet** at <http://www.dpmc.gov.au/foi/index.cfm>

## The Administrative Review Council

The Administrative Review Council was established by the *Administrative Appeals Tribunal Act 1975*. The Council's origins can be traced to a report in 1971 of the Commonwealth Administrative Review Committee (the 'Kerr Committee'). It was envisaged that the Council would:

- supervise the procedures of Commonwealth administrative tribunals
- examine administrative discretions under Commonwealth legislation and make recommendations where review on the merits should be provided, and
- conduct detailed research and examination of policy decisions to determine when opportunities should be given to appeal against an administrative decision on the merits.<sup>39</sup>

Today, the Council's role is to monitor and provide advice to the Government in relation to Commonwealth administrative review. The 'monitoring' function arises from the nature of the administrative review system, and the several institutions that perform different but complementary review functions. The Council contributes to maintaining the integrity of the entire system by ensuring that, as laws and government decision making processes change, the various administrative review mechanisms continue to perform appropriate, effective and complementary functions.

As envisaged by the Kerr Committee, the Council examines existing and new administrative decision making powers in Commonwealth legislation, and assesses the availability of review of decisions made under those powers. The Council also conducts larger projects that deal with broader issues of change, such as corporatisation and contracting out of government services.<sup>40</sup>

- > **For further information, please visit the website of the Administrative Review Council at <http://www.ag.gov.au/arc>**

<sup>39</sup> *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971, ('Kerr Report'), paras 283, 284 and 351.

<sup>40</sup> Administrative Review Council, *Overview of the Commonwealth System of Administrative Review* (2007) at [http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview\\_Overview\\_of\\_the\\_Commonwealth\\_System\\_of\\_Admin\\_Review#a17](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview_Overview_of_the_Commonwealth_System_of_Admin_Review#a17).

## Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills assesses legislative proposals against a set of accountability standards that focus on the effect on rights, interests and parliamentary propriety. The Committee reports to the Senate on whether the proposed legislation:

- trespasses unduly on personal rights and liberties
- makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers
- makes rights, liberties or obligations unduly dependent upon non-reviewable decisions
- inappropriately delegates legislative powers, or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The Committee regularly publishes an Alert Digest outlining each of the bills introduced in the previous sitting week, and any comments the Committee wishes to make in relation to a particular bill. When concerns are raised in a Digest, the Committee writes to the minister responsible for the bill inviting the minister to respond to its concerns.

The Committee then produces a *Report* containing the relevant extract from the Digest, the minister's response and its further comments. Reports and Digests are generally presented to the Senate on the Wednesday afternoon of each sitting week, and become available online after tabling.

The Committee also reports on matters specifically referred by the Senate, and summaries of its work during each Parliament.

> For more information go to <http://www.apf.gov.au/senate/committee/scrutiny/cominfo.htm>

## Senate Standing Committee on Regulations and Ordinances

The Senate Standing Committee on Regulations and Ordinances scrutinises all disallowable instruments of delegated legislation to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety. These general requirements are refined by the Standing Orders into four principles, asking if the delegated legislation:

- is in accordance with the statute (Principle A)
- unduly trespasses on personal rights and liberties (Principle B)
- makes rights unduly dependent on administrative decisions which are not subject to independent review of their merits (Principle C), and
- contains matters more appropriate for parliamentary enactment (Principle D).

The Committee has issued a general guide to its interpretation of these principles. It has the power to recommend to the Senate that a particular instrument, or a discrete provision, be disallowed. Disallowable instruments that appear to breach the Committee's principles of scrutiny are recorded in its Scrutiny of Disallowable Instruments list.

The Committee's work is conducted largely through correspondence with Ministers. The Committee regularly makes statements to the Senate on matters from its scrutiny of delegated legislation, and produces a report summarising its work during each Parliament. It also releases the Delegation Monitor at the end of each sitting week – the only reference source for all disallowable instruments of delegated legislation that are tabled in Parliament.

> For more information go to [http://www.apf.gov.au/senate/committee/regord\\_ctte/index](http://www.apf.gov.au/senate/committee/regord_ctte/index).