

# General information on the Australian Administrative Law System

## *Background*

Australian administrative law consists of a number of rights and protections contained in legislation and in the common law. There are rights to seek review of administrative decisions provided for in various pieces of legislation, including the Constitution. The courts have also established a number of general principles which are relevant to the exercise of most statutory discretions.

## *Common law principles*

The courts have established a number of principles as important to ensure proper administrative decision making:

- A decision-maker must take into account all relevant considerations and not be guided by irrelevant considerations. The terms of the legislation conferring the power to make particular decisions will sometimes spell out what are relevant matters.
- If legislation gives a designated person the power to decide something, no one else may require that person to make that decision in a particular way. The person can have regard to relevant rules or policies, but should not exercise a discretionary power in accordance with an administrative rule or policy without regard to the merits of the particular case.
- Persons affected by a decision are usually entitled to procedural fairness, also known as natural justice, in relation to the decision. The actual procedure required will vary with the circumstances of the case. However, in general, the minimum requirements of procedural fairness are satisfied if the decision-maker is not biased and if the person affected by the decision is given a reasonable opportunity to comment on any relevant material adverse to the person.

Failure to act within a power, or to comply with specific statutory requirements or general administrative law principles, can result in an application being made by a person affected by the decision for review of the decision. The decision might be changed or reversed as a result of that application.

## *Seeking review of administrative decisions*

There are three ways in which a person can seek a review or a reconsideration of a decision made by a federal Government agency but not all avenues are available in all cases. These avenues are:

- internal review
- external review, and

- judicial review.

When an agency informs a person that it has made a decision affecting the person's rights or interests, the agency will usually provide information about the person's right to have the decision reviewed and any time limits within which review must be sought. Generally, persons affected adversely by government decisions may also obtain reasons for the decisions.

Internal or external review of decisions enables all aspects of a decision to be reconsidered on their merits:

- Internal review occurs where a decision made by a member or officer of an agency is reviewed by another person in the agency. Many agencies have some formal system of internal review but a number of agencies have less formal or ad hoc systems. Internal review can be sought by requesting reconsideration of a decision or by following set procedures where more formal mechanisms exist.
- External review, that is review of a decision by a person or body outside the agency which made the decision, is a more formal system which provides review of the merits of a decision and is discussed below.

Only courts can provide judicial review of administrative decisions and their role is limited to deciding whether or not the decision was lawfully, fairly and rationally made. Judicial review is also discussed below.

### ***External review***

A number of federal tribunals and other bodies have been established to deal with review of administrative decisions and actions taken by Government officials. The Australian States and Territories have also established bodies to review decisions made by State and Territory Government officials. Some of these bodies are specialised and deal with a limited range of decisions,<sup>1</sup> others have a more general jurisdiction.

### ***Federal tribunals***

The five major Commonwealth merits review tribunals providing external review of government decisions are the Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans' Review Board. A person who is entitled to seek review by the Social Security Appeals Tribunal or the Veterans' Review Board of a decision may generally subsequently seek review by the Administrative Appeals Tribunal of the decision of the Social Security Appeals Tribunal or Veterans' Review Board.

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<sup>1</sup> For example, federal tribunals dealing with review of decisions relating to payment of repatriation and social security benefits and State and Territory bodies concerned with environment and town planning

The Administrative Appeals Tribunal (AAT) has a broad jurisdiction to review decisions made under some 395 federal laws. In reviewing a decision, the AAT generally has the same powers as the person or body which originally made the decision and may, if it considers it appropriate, vary or substitute its own decision for the original decision. The AAT ordinarily proceeds by way of an oral hearing at which the parties may present submissions and other evidence, and later gives a written decision with reasons.

The Migration Review Tribunal and Refugee Review Tribunal review decisions made under the *Migration Act 1958*, particularly decisions to refuse or cancel visas or refuse applications for refugee status. The Social Security Appeals Tribunal reviews decisions made by officers of Centrelink under social security and similar laws. The Veterans' Review Board reviews certain decisions made by the Repatriation Commission under veterans' entitlements legislation.

The Social Security Appeals Tribunal is also going to be given the power to review decisions made by the Child Support Agency. For the most part, decisions by the Social Security Appeals Tribunal in child support matters will not be able to be reviewed by the AAT.

As tribunals are not courts, and like the original decision maker can only make decisions in accordance with the law, it is also possible to appeal from decisions made by administrative tribunals to the Federal Court on questions of law.

### ***Judicial review***

The Australian Constitution gives the High Court jurisdiction to give specified remedies against unlawful action by Federal Government officers. The Parliament has conferred a similar jurisdiction on the Federal Court under section 39B of the *Judiciary Act 1903*.

The difficulties encountered by applicants in seeking remedies under the Constitution led the Parliament to enact the *Administrative Decisions (Judicial Review) Act 1977*. This Act simplifies the procedures for judicial review of administrative decisions. The Act applies to all administrative decisions made under federal laws except decisions made by the Governor-General or decisions that are specifically excluded by Schedule 1 to the Act or regulations made under the Act. A person who has a right to seek review of a decision under the Act also has a right to seek a written statement of reasons for the decision.

A review may be sought under the *Administrative Decisions (Judicial Review) Act 1977* by a 'person who is aggrieved' by the decision, conduct or failure to make a decision. Any person whose 'interests are or would be adversely affected' by the decision is a person 'aggrieved' by that decision. The grounds on which a review may be sought under the Act are set out in the Act, but generally cover failure to comply with the specific requirements of legislation under which the decision is made, and the general administrative law principles referred to above.<sup>2</sup>

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<sup>2</sup> The Grounds include breach of the rules of natural justice; failure to follow required procedures; lack of jurisdiction; lack of authorisation; error of law; fraud; no evidence; action that is otherwise

## *Administrative Law and Accountability Mechanisms*

There are three ways in which administrative law mechanisms operate in the Commonwealth system of government to ensure accountability:

- By enabling a person who is unhappy with a decision that affects their interests, such as a decision about their eligibility to receive a service, to be able to:
  - seek reasons for the decision or access to documents about the decision,
  - have the decision reviewed and possibly changed by an independent tribunal or by the courts or, in some cases, looked at by other bodies such as the Ombudsman, who may recommend that a different decision be made.
- By setting out the circumstances in which a court would decide that a decision was not properly made. The courts have established a number of principles as important to ensure proper administrative decision making:
  - A decision-maker must take into account all relevant considerations and not be guided by irrelevant considerations. The terms of the legislation conferring the power to make particular decisions will sometimes spell out what are relevant matters.
  - If legislation gives a designated person the power to decide something, no one else may require that person to make that decision in a particular way. The person can have regard to relevant rules or policies, but should not exercise a discretionary power in accordance with an administrative rule or policy without regard to the merits of the particular case.
  - Persons affected by a decision are usually entitled to procedural fairness, also known as natural justice, in relation to the decision. The actual procedure required will vary with the circumstances of the case. However, in general, the minimum requirements of procedural fairness are satisfied if the decision-maker is not biased and if the person affected by the decision is given a reasonable opportunity to comment on any relevant material adverse to the person.

In addition, section 5 of the *Administrative Decisions (Judicial Review) Act 1977* provides a list of the grounds on which decisions may be challenged using that Act. These grounds also incorporate the key principles outlined by the courts.

- By providing for a number of ways in which agency actions and decision making can be scrutinised either on a case-by-case basis or systemically. The mechanisms which deal with individual cases have already mentioned. Key

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contrary to law; taking into account an irrelevant consideration; failing to take into account a relevant consideration; wrong purpose; bad faith; acting under dictation; acting on the basis of a rule or policy without regard to the merits of the case; unreasonableness; uncertainty; and abuse of power.

agencies with a role in looking at systemic issues are the Ombudsman and the Administrative Review Council established under the *Administrative Appeals Tribunal Act 1975*.

### ***Right to Obtain Reasons for a Decision and Other Information***

The *Administrative Decisions (Judicial Review) Act 1977* also confers on an 'aggrieved person' a right to obtain written reasons for the decision in question. The person may request a written statement 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. A similar right arises under the *Administrative Appeals Tribunal Act 1975*, which allows any person entitled to apply for review by the AAT of a decision to request the person who made the decision to furnish a written statement setting out findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. Rights to written reasons for particular decisions may also be given by other laws.

In addition, documents which might be relevant to a decision can be sought under the *Freedom of Information Act 1982*, which imposes a legal duty on federal agencies to provide members of the public with access to government information, including official documents of Ministers, unless those documents fall within defined classes of exempt documents. If the Government is keeping information about someone that is incomplete, incorrect, out of date or misleading, that person can use the *Freedom of Information Act 1982* to get access to that information and can have it corrected.

### ***Ombudsmen and Privacy Commissioner***

There are also statutory officers who have various powers to assist members of the public who are concerned about Government decisions or practices, or in some cases the decisions of private sector organisations.

Commonwealth and State Ombudsmen have broad powers to investigate complaints about administrative action and to make recommendations to the agency concerned and to the responsible Minister. In some circumstances, the Commonwealth Ombudsman may inform the Prime Minister of matters, and make special reports to Parliament. The Commonwealth Ombudsman has considerable powers under the *Ombudsman Act 1976* to obtain information and may investigate administrative action of his/her own motion. Industry Ombudsmen also operate in a number of industries to help resolve disputes eg Banking Ombudsman, Telecommunications Ombudsman.

A person may complain to the federal Privacy Commissioner if they are concerned about how the Government collects and handles personal information. There are Information Privacy Principles which set out how the Government is to treat this information and the circumstances in which agencies can pass the information to someone else. The Privacy Act also extends to a range of activities beyond the Commonwealth Government information management.