

Administrative Review Council

Decision Making: ACCOUNTABILITY

Best-practice guide 5

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Preface

Most administrative decisions that affect individuals and organisations are made by primary decision makers—front-line administrators in government agencies. Only a minority of these decisions are reviewed by internal review officers, ombudsmen, courts or tribunals. The quality of administrative justice experienced by the public depends largely on primary decision makers ‘getting it right’.

Central to good decision making is decision makers’ understanding of the legal and administrative framework in which decisions should be made. In turn, this depends on whether primary decision makers receive adequate training in relation to that framework. To help agencies develop suitable training programs, in 2004 the Administrative Review Council published *Legal Training for Primary Decision Makers: a curriculum guideline*.

Using the curriculum guideline as the foundation, the Council has now produced this series of best-practice guides. They are designed for use as a training resource and as a reference for primary decision makers in Commonwealth agencies. The legal framework in which state and territory and local government agencies operate is broadly similar, but the guides do draw attention to areas where there are important differences.

Guide 5—*Decision Making: accountability*—outlines a range of administrative law accountability mechanisms that can be used to review primary decisions; this includes judicial review, merits review, and inquiries by the Ombudsman and other investigative bodies such as the Human Rights and Equal Opportunity Commission and the Privacy Commissioner. The other guides in the series cover the following areas:

- Guide 1—*Decision Making: lawfulness*—provides an overview of the legal requirements for lawful decision making, including requirements that have developed through the grounds for judicial review.
- Guide 2—*Decision Making: natural justice*—discusses the implications of natural justice (or procedural fairness) for decision makers and its connection with public service values and standards of conduct relating to conflict of interest.
- Guide 3—*Decision Making: evidence, facts and findings*—deals with the role of primary decision makers when receiving evidence, determining questions of fact and accounting for their findings.

- Guide 4—*Decision Making: reasons*—looks at the requirements of two important Commonwealth Acts that impose on many decision makers a duty to provide reasons for their decisions.

The general principles discussed in the guides might be modified by the legislation that establishes particular agencies or gives agencies their decision-making powers. Agencies wishing to modify or customise the guides for the purpose of training their staff should apply to the Administrative Review Council for permission.

The information provided in the guides is of a general nature: it is not a substitute for legal advice.

Contents

Acknowledgments.....	iii
Members of the Administrative Review Council	iii
Preface.....	v
Introduction	1
Appeal and review bodies	1
The Ombudsman	2
Merits review	3
Decisions subject to merits review	4
Judicial review	4
Appeal and review processes	6
Responsibilities of a government party.....	6
Processes following an application for review or appeal.....	7
When a decision can be changed.....	7
Review by a court.....	7
Merits review	8
Review by the Ombudsman.....	9
When a decision is changed.....	9
Implications for future cases	10
Decisions made on judicial review	10
Decisions of tribunals	11
The Ombudsman’s recommendations.....	11

Introduction

Government agencies are invested with important powers to be used for public purposes, and in a democratic society they must be accountable to the public for the way they exercise those powers.

This accountability takes various forms. Agencies are democratically accountable to Parliament through the responsible Minister and are financially accountable for their use of public monies. Ethical accountability is implemented through standards of conduct such as the Australian Public Service Values and Code of Conduct, which require administrators to observe high standards of integrity, diligence and respect for people. Administrative law makes administrators accountable for their decisions through external scrutiny, review and transparency measures that:

- require them to provide reasons for decisions
- empower bodies such as the Ombudsman to investigate complaints about administrative action and to conduct investigations
- give people and organisations the right to apply to a court or tribunal for review of a decision that affects them
- give individuals and organisations the right of access to agency records under freedom of information legislation.

Although accountability processes can at times be burdensome for administrators, the need for them is well accepted in government circles. Factors such as the complexity of legislation and the volume of decision making mean that some decisions will inevitably be incorrect. External scrutiny and review are designed to enable errors to be corrected, to improve the way decisions are made, to ensure transparency, and to engender public confidence in the integrity of government administration.

This guide explains the administrative law accountability processes that allow an individual or organisation to challenge a decision that affects them.

Appeal and review bodies

Administrative powers that affect the rights and interests of individuals and organisations are usually created by legislation. The legislation might create a scheme whereby decisions made in the exercise of those powers can be reviewed or

appealed against. Additional options applying to most decisions are to complain to the Ombudsman or to apply to a court for judicial review of a decision.

The first option usually taken by an individual or organisation that wants to have a decision changed or to stop administrative action is to take advantage of the complaint procedures established by the agency in question.

Internal review is the most common type of review. It involves an affected person applying to have the decision reviewed by a more senior officer in the same agency; this officer is often called a 'review officer'.

The legislation might also provide for external review by a tribunal or other body that stands outside the agency. If rights of both internal and external review are given, the legislation usually provides that a person may apply for external review only after the decision has been internally reviewed.

Under some legislation there is provision for a further right of review by a second external review tribunal. For example, some Centrelink decisions relating to pensions and benefits can be appealed first to the Social Security Appeals Tribunal, with a further right of appeal to the Administrative Appeals Tribunal. (The agency as well as the affected person can appeal from one tribunal to the other.)

Appeals related to administrative decisions can be of different types. A statute might, for example, give a tribunal power to review a decision solely on questions of fact or solely on the question of whether a procedural breach or some other irregularity occurred. A wide range of appeal options exist under state and territory legislation, which might provide for appeal to either a court or a tribunal. For constitutional reasons, the Commonwealth does not give powers of merits review to courts.

This guide focuses on the Ombudsman and courts and tribunals, since it is these bodies that have general jurisdiction to review administrative decisions and all aspects of decision making. It should be noted that these bodies operate alongside other more specialised bodies that have powers to review administrative actions and practices on specified grounds. Among the specialist bodies are anti-corruption and integrity commissions, the Privacy Commissioner, the Human Rights and Equal Opportunity Commission, and anti-discrimination and human rights bodies established by the states and territories.

The Ombudsman

The Ombudsman is an independent public official who heads an office that has wide powers to investigate administrative action to determine if it is unlawful,

unjust, unreasonable, oppressive, improperly discriminatory, based on a mistake of law or fact, or otherwise wrong.

A person can complain to the Commonwealth Ombudsman about administrative action taken by Australian government departments, agencies and statutory bodies, as well as some Commonwealth-controlled companies. The states and territories each have an Ombudsman with similar functions and powers.

If an agency's administration is found to be deficient, the Ombudsman can recommend that the agency provide redress to an affected person—for example, by altering the decision, paying compensation or tendering an apology. The Ombudsman can also recommend changes to an agency's policies, procedures and practices in order to improve administration generally. Although the Ombudsman cannot change an agency's decision, agencies usually adopt the recommendations.

Merits review

Merits review is a common form of appeal, particularly under Commonwealth legislation. In this type of appeal a tribunal assesses the merits of the decision under appeal; this involves consideration of the evidence, disputed facts, discretionary factors, and the application of law and policy to the facts of the case.

A merits review tribunal usually has all the powers and discretions of the primary decision maker—that is, the person who initially made the decision under review. Sometimes the tribunal's review powers are limited to recommending to the agency that a decision be changed. More commonly, though, the tribunal has power to change the decision by substituting a new or varied decision.

An appeal by way of merits review usually involves a fresh hearing in which the tribunal hears evidence and submissions, whether or not they were available to the primary decision maker.

The objective of merits review is to reach the 'correct' or 'preferable' decision. This often entails two steps. First, the tribunal must reach a decision that is correct—in the sense that it is free from errors of law and fact. Second, if more than one decision is correct the tribunal selects the preferable decision.

A finding that a decision is correct or incorrect does not conclude the review. If the decision involves an exercise of discretion, more than one outcome might be open to the decision maker. For example, a power to waive a payment on the ground of financial hardship might be exercised favourably or adversely for an applicant, depending on how the decision maker weighs the discretionary considerations.

Decisions subject to merits review

Not all administrative decisions that affect individuals are subject to merits review: a right to apply for review of a decision must be specifically assigned by legislation. If there is provision for review it will normally be found in the legislation under which the decision is made. The general procedures relating to an application for review are usually found in the legislation that establishes the tribunal in question; for example, it will specify the time limit for lodging an application.

It is important to read review provisions carefully, since they can restrict the types of decisions that are reviewable or place conditions on the right of review. They can also limit the powers of a tribunal when reviewing a decision.

Where the right of appeal to a tribunal is given, the legislation usually limits the class of people who are entitled to apply. The limitation will be found either in the legislation that establishes the tribunal or in the legislation that confers the right of review.

Usually, the right to apply for merits review is restricted to an ‘interested person’ or ‘a person whose interests are affected by a decision’. The purpose of this restriction is to ensure that the applicant is the appropriate person to be making the application. The applicant’s interests must be more than those of the general public: for example, a person who objects to government providing income support to the unemployed would not be able to show that their interests are affected by a decision to grant payments to their unemployed neighbour.

Legislation can also make provision for interest groups to apply for review of a decision. Under the *Administrative Appeals Tribunal Act 1975* (Cth), for example, the right to apply for review of a decision is extended to an organisation or association whose aims or purposes are affected by the decision.

If the legislation assigns to an affected person a right to apply to a review officer or a tribunal for merits review of an agency decision, a statement to that effect should be included in the notification of the decision.

Judicial review

Most administrative decisions are subject to judicial review for legal errors. The courts that can carry out judicial review of Australian government decisions are the Federal Magistrates Court, the Federal Court and the High Court. In the states and territories judicial review is a function of the Supreme Court and, in some instances, district courts. The powers of the courts and the procedure for seeking

judicial review are found in the legislation establishing each court and, in some instances, in a special judicial review statute—such as the Commonwealth’s *Administrative Decisions (Judicial Review) Act 1977*. The High Court is established by the Constitution, which also contains some provisions relating to judicial review of Commonwealth administrative action.

Judicial review is available only on specific grounds. The purpose of such review is to ensure that administrators act lawfully, perform their legal duties, and do not exceed their authority. A person who applies for judicial review cannot complain about the merits of the decision but must show that the decision, or the process by which it was made, was affected by legal error.

If the court finds a legal error it can generally:

- set aside the decision as being unlawful
- restrain the decision maker from acting beyond their power
- compel the decision maker to carry out a duty in accordance with the law
- declare an action or proposed action to be lawful or unlawful.

The court can also order a party—usually the losing party—to pay a substantial part of the other party’s legal costs.

Judicial review is more likely to be used when the legislation concerned does not provide for merits review by an external tribunal or places restrictions on it. Merits review offers broader scope for having the decision changed and is likely to be much less costly than judicial review.

In particular areas of administration it is rare for an agency decision to be challenged by judicial review. Some legislation limits or excludes judicial review for specified classes of decisions. The courts themselves withhold judicial review for certain decisions—such as decisions made at a high level that involve national security or international relations. The availability of merits review is another factor that might cause a court to withhold judicial review.

An agency is not required to make any statement about judicial review when notifying an affected person of its decision. In contrast, it is customary for agencies to inform a person if the decision is subject to merits review.

Appeal and review processes

When an agency decision is under review or a complaint is made to the Ombudsman, the agency should adopt a helpful, rather than defensive, role. In many cases the review or complaint will prompt the agency to examine its decision to see whether it is the correct or preferable decision and has been made properly.

If the Ombudsman is conducting an investigation the agency will be notified. The Ombudsman has wide investigative powers and can call for information and documents—including documents that might otherwise be protected from disclosure under privacy laws or other legislation. If the Ombudsman proposes to prepare a report that is critical of the agency or a person, that agency or person must be given an opportunity to comment before the investigation is completed.

If an affected person applies for external review of a decision by an appeals tribunal the decision maker is a party to the proceedings and is usually called the ‘respondent’. This role might be largely formal, since in many cases the agency takes over the conduct of the respondent’s case before the tribunal.

Legislation might require the decision maker to lodge with the tribunal a copy of the reasons for the decision and all documents in their possession that are relevant to the decision. The decision maker should make full and prompt disclosure and avoid withholding material that is favourable to the applicant’s case.

Responsibilities of a government party

The Commonwealth Attorney-General has issued a Legal Services Direction placing Australian government agencies under an obligation to behave as ‘model litigants’ in the conduct of legal proceedings—including merits review proceedings before tribunals. In dealing with claims and tribunal proceedings, agencies must act fairly and with the highest standards of propriety and professionalism. The government’s model litigant rules are partly based on principles that courts and tribunals have established for the guidance of government parties.

As a model litigant, an Australian government agency must not engage in unfair tactics such as delaying the release of documents, contesting facts it knows to be true, or making claims that are not legitimate or appropriate. Agencies must avoid unnecessary legal proceedings and limit the scope and cost of proceedings—for example, by limiting the matters at issue and being willing to participate in settlement discussions.

The fairness expected of Australian government agencies is affirmed by the *Administrative Appeals Tribunal Act 1975*: when a decision is under review by the

Administrative Appeals Tribunal the person who made the decision being reviewed is obliged by legislation to assist the tribunal in conducting its review.

Processes following an application for review or appeal

If an application is made for either judicial review or merits review of an agency decision the application does not of itself suspend the decision or prevent it from being implemented. Courts, and usually tribunals, have a discretionary power to stay the operation or implementation of the decision being reviewed in order to ensure that the review is effective. The stay order usually lasts for a specified period or until the application for review is finally determined.

An application for a stay order is usually dealt with at a pre-trial hearing shortly after the application for review is made, and the agency will be given an opportunity to make a submission in response to the application. The court or tribunal generally considers all relevant matters in deciding whether to stay the decision—including the merits of the applicant’s case and the balance of hardship to the applicant and to the agency and any other parties if the stay is granted or not granted.

Before it is set down for a hearing the application might be referred to an alternative dispute resolution process such as mediation or conciliation. Under the model litigant rules, Australian government agencies are required ‘to participate fully and effectively’ in such a process, so as to facilitate prompt resolution of the dispute. The person who represents the agency in the discussions should have authority to settle the matter or should at least be briefed on the terms of settlement the agency might accept. The agency cannot agree to terms of settlement that are outside its statutory powers; for example, it cannot agree to grant a visa, pension or permit to a person who does not meet the statutory qualifications.

When a decision can be changed

There are important differences between what happens with judicial review of a decision by a court, merits review of a decision by a review officer or tribunal, and review by the Ombudsman.

Review by a court

Courts carrying out judicial review do not re-exercise the powers of administrative officials. Their function is limited to ensuring that administrators perform their duties lawfully and act within their statutory powers.

An affected person who challenges a decision through judicial review must establish one or more ‘grounds of review’, which are legal errors in decision making that provide a focus in judicial review and underpin the power of a court to provide a remedy. For example, the affected person might seek to show that the decision maker:

- had no power to make the decision in the first place
- made an error of law in the course of making the decision
- breached natural justice by failing to give the affected person a fair hearing or was biased
- took into account an irrelevant consideration or failed to take into account a relevant consideration
- applied an agency policy inflexibly and failed to exercise a discretion given by legislation.

The court will examine the record of the decision, including the statement of reasons. If the decision is found to be free of legal error the court will not interfere with it, even if it thinks another decision would have been preferable.

If the court finds that a ground for review exists it will usually order that the decision be set aside and require the decision maker to make a new decision. Unless the power is non-discretionary, the court will not change the decision, substitute its own decision, or tell the decision maker what the decision should be. The court is not concerned with what the agency decides on reconsideration, provided the agency makes no further legal error.

Merits review

A review officer or tribunal can change a decision, even without finding a legal error in that decision. Merits review is not confined to looking for a legal flaw in the decision. For example, if a tribunal thinks the primary decision maker attached too much or too little weight to a consideration or item of evidence the tribunal might decide that the decision, although free of legal error, is not the preferable decision in the circumstances.

The decision of a review officer or tribunal can be based on evidence and submissions different from those that were before the primary decision maker. Most merits review tribunals have the power to re-hear a matter afresh and can receive new evidence. Merits review gives the affected person a chance to rectify

any weaknesses or gaps in their case. The reasons for decision provided by the decision maker might direct the affected person's attention to the primary concerns, allowing them to be dealt with more adequately on review.

Review by the Ombudsman

Unlike other review and appeal bodies, the Ombudsman does not have authority to change a decision, although it can recommend to the agency that the decision be cancelled or varied. The Ombudsman's recommendation is not confined to rectifying legal errors; it can take into account correct or preferable decision making, ethical standards and principles of good administration.

About 30 per cent of complaints accepted by the Commonwealth Ombudsman lead to some form of redress. Common forms of redress agreed to by agencies are alteration or reconsideration of a decision, an apology or explanation, financial compensation, a non-financial remedy, and a change in law, policy or practice.

When a decision is changed

If a decision is set aside by a court on judicial review, it will normally be remitted, or sent back, to the decision maker so that a new decision can be made. The reasons for decision delivered by the court will provide a detailed analysis of what was the decision-making error. When the matter is remitted the agency might arrange for another decision maker to make the new decision—particularly if there has been a finding of bias.

A merits review tribunal has wider powers than a court exercising powers of judicial review and can re-exercise the administrative powers of the primary decision maker. A tribunal typically has power to do the following:

- affirm, or uphold, the decision
- vary the decision
- set the decision aside and make a new decision in its place
- set the decision aside and remit it to the decision maker for reconsideration in accordance with any directions given by the tribunal.

When a court or tribunal remits a matter to the decision maker for a new decision, the decision maker must consider any directions provided in the order and the reasoning of the court or tribunal. This might lead to a different decision. For

example, if the first decision was set aside because of a mistake of fact or law, correcting the mistake could lead the decision maker to decide the matter differently. The decision maker might also take a different view because the affected person presents their case more effectively on the second occasion.

There are other cases in which correction of an error made in the first decision will not lead to a different decision on reconsideration. Assume, for example, that the first decision was set aside on judicial review because the decision maker failed to give the affected person an adequate hearing on adverse evidence. When the matter is remitted, the affected person will be given an adequate hearing but might fail to rebut the adverse evidence. In those circumstances the second decision might be no more favourable to the affected person than the first one.

The new decision made after the matter is remitted can also be subject to review and appeal. It is thus important to ensure that no new errors are made and that the decision reached is the correct or preferable one.

Implications for future cases

Decisions made on judicial review

Court decisions made on judicial review affect more than the decision that is the subject of the review. If a court rules on what a particular legislative provision means or requires, the agency must apply the ruling when making future decisions: the court's ruling is law until overruled by a higher court. More generally, a judicial ruling should be followed in other cases in which the facts and issues are not materially different.

Usually agencies incorporate court rulings in the guidelines and manuals they issue to decision makers. They might also incorporate any legal advice received about the scope of the ruling and its implications for other decisions involving different facts.

If an agency thinks that a court ruling is incorrect or inconsistent with another ruling it may appeal to a higher court. Alternatively, if an agency thinks the legislation as judicially interpreted is unsatisfactory it may recommend to the Minister that the legislation be amended by Parliament to reverse the effect of the ruling for future decisions.

Decisions of tribunals

Legislation establishing a merits review tribunal usually deems the tribunal's decision to be that of the primary decision maker. This means the agency must implement the decision as its own. Unless the tribunal's decision is set aside following appeal to a higher tribunal or court, the decision is binding on the agency in the particular case.

Because merits review tribunals exercise administrative, rather than judicial, power, their decisions are not binding on decision makers or tribunals in other cases. It is a function of judicial power, reserved for courts, to issue binding rulings on questions of law. Nevertheless, although the decisions of administrative tribunals do not create binding legal precedents, this does not mean such decisions should be ignored in other cases. A central purpose of the system of merits review is improving agencies' decision making generally, by correcting errors and modelling good administrative practice.

Tribunal decisions can provide valuable guidance on questions of law, the evaluation of evidence, and the balancing of policy and other considerations. Tribunals are commonly the first body outside the agency to grapple with interpretation of the legislation the agency administers. Their reasoning can reveal approaches overlooked by the agency or deficiencies in the agency's policies and practices.

Agencies should have a mechanism for analysing the broader implications of tribunal decisions and using them to improve decision making. Staff can be informed of the results of the analysis through briefings, bulletins or incorporation of the effect of such decisions in the agency's guidelines and manuals.

Occasionally, tribunal decisions are inconsistent because of a difference of opinion or interpretation among members of the tribunal. There are various mechanisms for settling legal controversies—for example, through an appeal to a court on a question of law—but the process can take time. If tribunal decisions are inconsistent the agency should evaluate the alternative views and decide how to instruct its staff.

The Ombudsman's recommendations

Recommendations made by the Ombudsman can have important implications for other decisions and for broader agency practices. The Ombudsman's brief is broader than the briefs of courts and tribunals and can extend to recommending changes in policies, practices and even legislation.