



Instructor Guidance Note— Administrative decisions

Administrative decisions

1 This guidance deals with matters to be considered when instructing on legislation that provides for making decisions of an administrative character.

Criteria for making decision

2 If legislation will confer power to make a decision of an administrative character, the instructing agency should consider including criteria governing the exercise of the power to make the decision. Alternatively, if such criteria will not appear in the primary legislation, the agency should consider making provision for someone (e.g. the Minister, by legislative instrument) to determine criteria for the exercise of the power.

3 It is generally expected that an administrative power that affects the rights and entitlements of a person should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers are open to criticism on policy grounds. Examples include:

- a power to terminate an appointment without any criteria or guidelines for when or how the power should be exercised;
- a power to investigate a complaint without anything further about the manner of conducting investigations;
- a discretion that relies on the decision maker being satisfied as to the existence of a vague concept, such as “appropriate training”.

Merits review

4 As a matter of policy, an administrative decision that will, or is likely to, adversely affect the rights or interests of a person should generally be subject to merits review (internal and external), unless it would be inappropriate or there are factors justifying the exclusion of merits review.

5 The Administrative Review Council’s publication *What decisions should be subject to merits review?* may be a helpful resource in deciding whether merits review should be available for an administrative decision.

6 A decision is a **reviewable decision** under the *Administrative Review Tribunal Act 2024* (the **ART Act**) if an Act or legislative instrument provides for an application to be made to the Administrative Review Tribunal (the **ART**) for review of the decision.

7 Drafting instructions should identify the decisions that are intended to be reviewable by the ART. The standard arrangements in the ART Act will apply unless displaced by other legislation.

8 The standard position in the ART Act is that a person whose interests are affected by a reviewable decision may apply to the ART for review of the decision (subsection 17(1) of the ART Act). Any intended policy limitation on this should be included in the instructions.

9 Any divergence from the standard time frames prescribed by the rules made under the ART Act for the purposes of section 18 of that Act (when to apply for review of a decision) should also be the subject of specific instructions.

10 The standard position under section 266 of the ART Act is that the decision-maker must give notice of a reviewable decision, and the review rights for the decision, to any person whose interests are affected by the decision. These requirements apply to all decisions in the review pathway. Section 268 of the ART Act allows a person whose interests are affected by a reviewable decision to request reasons for the decision. These standard arrangements do not need to be duplicated in other legislation. However, drafting instructions should indicate any intention to alter the standard arrangements.

Instruments

11 Instruments may displace the standard arrangements under the ART Act only if expressly permitted by the enabling legislation. Accordingly:

- drafting instructions for Bills should indicate if instruments may need to do so; and
- drafting instructions for instruments should not seek to displace the standard arrangements unless it is permitted by the enabling legislation.

Judicial review

12 Administrative decisions can also be reviewed by a court. The *Administrative Decisions (Judicial Review) Act 1977* (the **ADJR Act**) gives a person who is aggrieved by a decision a right to review of the decision on the basis of the following:

- a breach of natural justice;
- a procedural issue;
- an error of law;
- legal unreasonableness;
- other legal grounds.

13 Judicial review is not a review of the merits of the decision, but rather a review of the legal process by which it is made (i.e. its legality). The right of review is automatic, unless legislation specifically excludes that right. Exclusions from the application of the ADJR Act are rare and will only be considered for compelling policy reasons. The Attorney-General's Department must be consulted on all proposals to exclude judicial review. As a matter of policy, the availability of judicial review is not usually seen as an adequate substitute for merits review by, for example, the ART.

Constitutionally protected judicial review

14 Judicial review of administrative action, as guaranteed by the Constitution, cannot be excluded by legislation. Paragraph 75(v) of the Constitution confers original jurisdiction on the High Court in relation to a "matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Paragraph 75(v) protects access to the courts by providing what the High Court has described as an "entrenched minimum provision of judicial review" of administrative action by government officials.

Parliamentary scrutiny

15 Legislative provisions that provide for making administrative decisions are often the subject of comment by the Senate Standing Committees that scrutinise legislation. Those Committees have commented on legislation that:

- excludes, or fail to provide for, merits review by an appropriate tribunal;
- purports to exclude judicial review of the legality of a decision;
- provides that reasons need not be given for a decision.

More information

- *Australian Administrative Law Policy Guide* (2011), published by the Attorney-General's Department and available on the Department's website

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- *What decisions should be subject to merits review?* (1999) published by the Administrative Review Council and available on the Attorney-General's Department's website
- *Drafting Direction 3.7—Tribunals and other administrative bodies—various matters*

The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.