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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Purpose of the Guide

The Guide is intended to help policy makers identify administrative law issues in draft legislation and policy proposals and to understand the approaches that can be taken to address them. It draws from, and refers to the work of Administrative Review Council.

The Guide provides an overview of the principles that the Attorney-General’s Department (AGD) considers in its role supporting the Attorney-General in her responsibility for Commonwealth administrative law.¹ It does not replace the need to consult with AGD on administrative law issues.²

1. Overview of the administrative law system

1.1 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.

The administrative law system aims to 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 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.

Flowing from the separation of powers in Australia’s Constitution, the following roles are carved out

- **Parliament** establishes the criteria for decision making, and merits review of decisions and holds Ministers accountable for their decisions.
- **Government** decision makers and merits review tribunals assess the merits of particular cases with reference to criteria laid down by the legislature in legislation.
- **The Courts** declare and enforces the legal limits of the powers of the executive and the legislature in deciding judicial review applications.

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 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](http://www.dpmc.gov.au/guidelines/index.cfm).
1.2 Elements of the administrative law system

The administrative law system includes:

- **Primary decision making**, including the legislative framework for decisions, and the processes and procedures that lead up to them.

- **Internal merits review of primary decisions** by internal officers within an agency (and this may be required by agency practice or codified in legislation).

- **External merits review**, available if the legislation governing the decision provides for it, by the Administrative Appeals Tribunal (AAT), the Migration Review Tribunal-Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans’ Review Board.

- **Judicial review** under the Administrative Decisions (Judicial Review) Act 1977, the Judiciary Act 1903, or the Constitution. AAT decisions can also be reviewed under s 44 of the Administrative Appeals Tribunal Act 1975 on ‘questions of law’.

- **Commonwealth Ombudsman** handling of complaints, conduct of investigations, audits and inspections, and specialist oversight of government activities.

- **Office of the Australian Information Commissioner**:
  - oversight of the operation of the Freedom of Information Act 1982, investigation of complaints about FOI administration, and the review of decisions under that Act
  - privacy functions conferred by the Privacy Act 1988, and
  - government information policy functions.

- **Administrative Review Council** (ARC) reports to the Attorney-General on, the operation of the administrative law system.

- **The Merit Protection Commissioner** conducts independent reviews of employment decisions made by agencies about matters that affect Australian Public Service employees, and inquires into whistleblower complaints made under the Public Service Act 1999.

- **Parliamentary Committee** scrutiny of Bills and legislative instruments against a set of accountability standards or principles, by the Senate Standing Committee for the Scrutiny of Bills or the Senate Standing Committee on Regulations and Ordinances.

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.

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3. The Migration Act 1958 provides a separate mechanism for judicial review.


2. Key players in administrative law

2.1 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)

2.2 The Administrative Law Unit

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.

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 of the Justice Policy and Administrative Law Branch of the Attorney-General’s Department. Contact details are:

Email: ajdalb@ag.gov.au
Phone: 02 6141 4108
Mail: 3–5 National Circuit
      BARTON ACT 2600

2.3 The Administrative Review Council

Consultation with the Administrative Review Council (ARC) will be useful where legislative or policy proposals propose to establish new administrative decision making schemes. Further information on the ARC is available at 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.

2.4 Other stakeholders

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 policy proposal.

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.\(^8\)

> **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.\(^9\)

> **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:
  
  o the work of the **Human Rights Branch** includes the implementation of *Australia’s Human Rights Framework*.\(^10\) The Branch provides legal policy advice on domestic human rights issues and administers federal anti-discrimination legislation, and
  
  o the **Office of International Law** provides legal policy advice on international law including international human rights law.

> **The Office of Constitutional Law** 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.\(^11\)

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\(^8\) Please contact Federal Courts Branch at ajd.fcb@ag.gov.au.


\(^10\) For further information, see [http://www.ag.gov.au/humanrightsframework\(>\)].

3. Key considerations for policy proposals that include administrative decision making

3.1 Consider accountability mechanisms available across the system

**KEY PRINCIPLE**

- Take a 'whole-of-system approach' when developing proposals that involve government decision making. This involves considering multiple agencies.
- Provide for earlier and better communication throughout the decision-making process, and for effective internal and external review pathways, and reduce the need for formal complaints and

Most agency decision making, regardless of the requirements of individual statutes, will interact with a range of accountability mechanisms, such as judicial review of decisions, investigation by the Ombudsman or the Merit Protection Commissioner, and obligations to release information under freedom of information and privacy legislation. Administrative law mechanisms are of general application, with limited or no scope for exemptions.

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.
3.2 Structure decision making appropriately

**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.
- The responsibilities of the person exercising the discretion should be appropriate to the nature of the decision that could be made.
- Statutory criteria can guide the decision maker in the exercise of a discretionary power.

**KEY RESOURCES**

- ARC Best Practice Guides on Lawfulness, Natural Justice, Evidence Facts and Findings, Reasons, and Accountability
  
  [http://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx](http://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx)

3.2.1 Types of decisions

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 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.

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.
3.2.2 What should be in a primary decision making power?

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.

Decisions taking into account issues affecting the national interest should generally be made by the relevant Minister, as they may involve weighing a number of competing but important considerations such as environmental effects, indigenous rights, economic impacts and public opinion. Such decisions 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.  

Criteria for decision making

Often, statutory criteria can be drafted to guide decision makers in the relevant considerations for the exercise of a discretionary power. Where a broad discretion is proposed without criteria, this should be clearly explained in the explanatory material for the legislation, including examples of relevant considerations.

3.2.3 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.

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.

It may be appropriate for more junior officers to make decisions involves a limited exercise of discretion, or under provisions which will give rise to a high volume of decisions.

It may be appropriate for the Minister to retain the right to make the decisions that involve considering 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.

3.3 Provide for procedural fairness

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. 13 ‘The precise contents of the requirements… may vary according to the statutory context; and may be governed by express statutory provision’. 14

The ARC considers that ‘procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances’. 15 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. 16

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12 Administrative Review Council, What decisions should be subject to merits review (1999).
16 Ibid.
3.4 Give reasons for decisions

The ADJR Act and AAT Act 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.

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. All communication must be clear, and expressed in terms that the reader understands.

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. 17

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 Committee18 and the Senate Standing Committee on Regulations and Ordinances.19

3.5 Provide for merits review where practicable

KEY PRINCIPLES

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

- Internal review processes are encouraged.

- Where provided for in governing legislation, the Administrative Appeals Tribunal can conduct merits review of a range of government decisions.

KEY RESOURCES


17 For further information, see Administrative Review Council, Best Practice Guide 4 – Reasons (2007).


3.5.1 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. 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.

3.5.2 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.

20 Administrative Review Council, What decisions should be subject to merits review? (1999).
3.5.3 External review

External review involves fresh consideration of a primary decision by an external body—a tribunal or a regulator, reviewing a private body’s decisions under a legislated decision-making power, or an independent officer from another agency. While external merits reviewers exercise the power of the original decision maker, internal administrative policies are relevant, but not binding on review tribunals. 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.

The AAT should be the merits review tribunal for all Commonwealth administrative decisions unless specific policy considerations support review conducted by an alternative body. The AAT reviews a wide range of administrative decisions made by Australian Government ministers, departments, agencies, authorities and other tribunals under more than 400 pieces of legislation, and has specialist divisions based on subject matter. Other Commonwealth tribunals—the Social Security Appeals Tribunal, the Veterans’ Review Board, the Migration Review Tribunal and the Refugee Review Tribunal—review particular types of decisions.

External merits review must be provided for by legislation. 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.

3.5.4 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 reviewed on the merits, unless there are factors justifying the exclusion of merits review.

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

3.5.5 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. The Administrative Law Unit can assist in contacting the AAT.

3.5.6 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. Those internal mechanisms may 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.

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22 See the website of the AAT at www.aat.gov.au.
23 Administrative Review Council, What decisions should be subject to merits review? (1999).
24 For guidance about complaint handling generally, see Australian Standard on Complaint Handling (AS 4269).
3.6 Consider whether decisions will be judicially reviewable

KEY PRINCIPLE

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

KEY RESOURCES

  

3.6.1 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, 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. 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.

3.6.2 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 will still be available, exemptions under the ADJR Act will, for the most part, not be able to exclude completely the availability of 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

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25 Except for migration decisions: Migration Act 1958, ss 476(1), 476A(2).
27 Or the equivalent jurisdiction under Judiciary Act 1903, s 39B.
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.

3.7 Consider the implications of outsourcing government decision making

KEY PRINCIPLES

- 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.

KEY RESOURCES

  

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 privatisate government services, outsource government decision making power or develop public/private partnerships which involve making decisions about rights and entitlements.
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.28

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.29 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,30 and
> may choose not to investigate a complaint if rights of review to courts or tribunals exist.31

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.32

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

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28 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).
29 Ombudsman Act 1976, ss 5, 15.
30 Ombudsman Act 1976, s 6(2).
31 Ombudsman Act 1976, s 6(3).
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,33 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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33 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.34

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.35

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

**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
- appropriately 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.


**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.