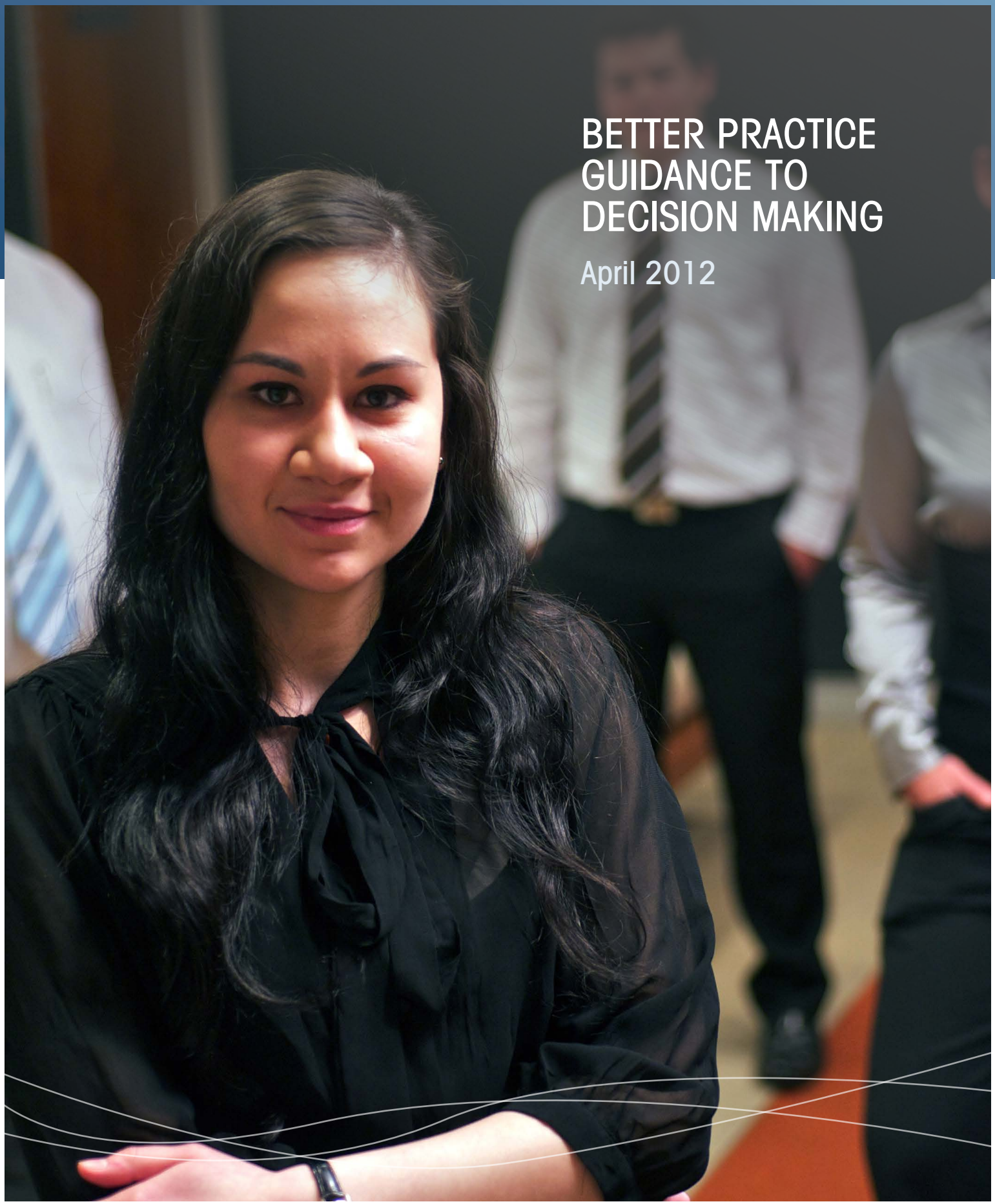

BETTER PRACTICE GUIDANCE TO DECISION MAKING

April 2012

Australian Government
Comcare

Australian Government
Administrative Review Council

This guide is an extension of the Administrative Review Council's Best-practice guides on decision making, customised with permission of the Administrative Review Council for use by Comcare.

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CONTACTING THE ADMINISTRATIVE REVIEW COUNCIL

For information about this guide, or more generally about the Council's work, contact:

The Executive Director
Administrative Review Council
Robert Garran Offices
National Circuit
Barton ACT 2600

Telephone: 02 6250 5800
Facsimile: 02 6250 5980
Email: arc.can@ag.gov.au
Internet: http://www.law.gov.au/arc

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PREFACE TO COMCARE'S GUIDANCE

Comcare is a statutory corporation established by the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and covered by the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

It reports to the Minister for E*mployme*nt and Workplace Relations, the Deputy Prime Minister the Hon Julia Gillard MP.

Comcare administers:

- the workers' compensation and rehabilitation scheme for Australian Government and Australian Capital Territory Government employees established by the SRC Act
- the occupational health and safety scheme for Australian Government employees established by the *Occupational Health and Safety Act 1991* (OHS Act)
- Australian Government's asbestos related liabilities under the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* (ARC Act).

Both the workers' compensation and occupational health and safety schemes also apply to corporations that have been licensed as self-insurers by the Safety, Rehabilitation and Compensation Commission (SRCC) and the employees of those corporations. These licensed self-insurers include both former Commonwealth authorities and private sector companies that compete with current or former Commonwealth authorities and have been declared eligible by the Minister.

In addition to these functions, Comcare provides the secretariat to and assists and supports:

- the SRCC in the performance of its regulatory functions under the SRC Act and OHS Act
- the Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) in the performance of its regulatory functions under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) and *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS MI Act)

Like other Australian Public Service (APS) agencies, Comcare has functions and powers under the *Public Service Act 1999* (PS Act) and the *Freedom of Information Act 1982* (FOI Act).

Comcare, through its staff, makes many decisions which affect individuals and organisations and its own staff on a daily basis. This better practice guidance will guide and assist Comcare staff in making and communicating good decisions. Although developed for Comcare staff, it will also assist other SRC Act determining authorities to make decisions under the SRC Act.

This guide extends the best practice guides published by the Administrative Review Council by adding commentary, notes and reference appendices to the text of the guides published by the Administrative Review Council. The Guide will be periodically updated and also available to Comcare staff online. Comcare is responsible for the content of this preface, the glossary, the commentary and notes in Guides 1-5 and the appendices. Like the Administrative Review Council states, this guide is neither a set of rules nor legal advice, but general guidance only.

Comcare acknowledges the assistance and cooperation of the Administrative Review Council and Commonwealth Ombudsman in the development of this guide and their approval to reproduce text from their respective guides.

Martin Dolan
Chief Executive Officer
Comcare

PREFACE TO THE ADMINISTRATIVE REVIEW COUNCIL GUIDES

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 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. The other guides in the series cover the following areas:

> 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.
- 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 investigations by the Ombudsman and other investigative bodies such as the Human Rights and Equal Opportunity Commission and the Privacy Commissioner.

The general principles discussed in the guides might be modified by the legislation that establishes particular agencies or gives agencies their decision-making powers.

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

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GLOSSARY

A

AAT	Administrative Appeals Tribunal
AAT Act	*Administrative Appeals Tribunal Act 1975*
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977*
AIRC	Australian Industrial Relations Commission
ARC Act	*Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005*

C

CAC Act	*Commonwealth Authorities and Companies Act 1997*
CEO	Chief Executive Officer
Claimant	A scheme employee or the legal personal representative or a dependant of a deceased scheme employee who make a claim under the SRC Act. NOTE: An unpaid provider of medical treatment, household services or attendant care can also submit a claim where the scheme employee or his or legal personal representative fails to do so.
Commonwealth authority	A: > corporation established for a public purpose by or under a Commonwealth Act > corporation formed and registered in Australia in which the Commonwealth or a Commonwealth authority has a controlling interest. NOTES: 1. The Minister can also declare an Australian corporation that the Commonwealth has a substantial interest in to be a Commonwealth authority. 2. The Australian Capital Territory is a Commonwealth authority for the purposes of the SRC Act, but not the OHS Act and ARC Act.

E

Entity	A body or organisation that is: > an APS Agency that is not a Commonwealth authority > a Parliamentary Department > prescribed by regulations made under the SRC Act and OHS Act.

F

FOI Act	*Freedom of Information Act 1982*

I

Investigator	A person appointed by Comcare under section 40 of the OHS Act as an Investigator

J

Judiciary Act	*Judiciary Act 1903*

L

Licensed self-insurer	A body corporate licensed under Part VIII of the SRC Act

O

OHS Act	*Occupational Health and Safety Act 1991*
OHS(MI) Act	*Occupational Health and Safety (Maritime Industry) Act 1993*
OHS(SA) Regulations	Occupational Health and Safety (Safety Arrangements) Regulations 1991
OHS(SS) Regulations	Occupational Health and Safety (Safety Standards) Regulations 1994

P

PS Act	*Public Service Act 1999*

S

scheme employee	An employee of the Commonwealth or a Commonwealth authority or a licensed self-insurer
scheme employer	An Entity, Commonwealth authority or licensed self-insurer
Seacare Authority	Seafarers Safety, Rehabilitation and Compensation Authority
Seafarers Act	*Seafarers Rehabilitation and Compensation Act 1992*
SRC Act	*Safety, Rehabilitation and Compensation Act 1988*
SRCC	Safety, Rehabilitation and Compensation Commission

T

The Fund	The Seacare Authority as nominal employer where the actual employer has ceased to exist or is unable to respond to a claim under the Seafarers Act.

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GUIDE 1 LAWFULNESS

A. INTRODUCTION

Decision making in government agencies involves compliance with a variety of requirements and expectations. Some are legally binding; others, such as standards of timeliness and productivity, might be imposed by the agency itself.

This guide explains the general legal decision making requirements that arise under administrative law, which is the law applying throughout government—Commonwealth, state and territory, and local—to regulate agencies' decision making. The focus of administrative law is on decisions that directly affect the rights and interests of individuals and organisations.

Comcare annotation

> The requirements of administrative law apply, directly or indirectly, to many decisions made by Comcare, the CEO, the SRCC, the Seacare Authority and by Comcare staff.

> Administrative law is particularly relevant to Comcare's relationship to and dealings with –
  - scheme employers and scheme employees
  - scheme employer's contractors
  - providers of
    > rehabilitation programs
    > treatment

    to injured scheme employees
  - its own staff

  because of the impact the decision can or may have on them.

> The principles are also generally applicable to investigations conducted under the OHS Act.

B. A LAWFUL DECISION

B1. General

The administrative law requirements for lawful decision making cover the following matters:

- *Legality*. A decision must be made under legal authority by an authorised person
- *Procedure*. Legislation might stipulate procedures to be followed when making a decision
- *Rationality*. The reasoning for a decision must conform to minimum legal standards
- *Accountability*. A decision maker is accountable for a decision and must notify a person of their right to review.

Some legal requirements are imposed by legislation. Others—particularly legality and rationality requirements—have been developed by judges as they have decided cases. Because these latter requirements are continually being developed and refined, they are not to be found in a single authoritative source such as the Constitution or an Act of Parliament.

If a decision is made in breach of a legal requirement it can be set aside by a court and the agency cannot enforce or rely on it. Members of the public have the right to challenge the lawfulness of government decisions that particularly affect them. This can be done by applying to a court or tribunal or by making a complaint to the Ombudsman.

B2. Power to make a decision

It is important that a decision maker is clear about the decision to be made and about the source of power for that decision. The most common source of power is legislation—either an Act of Parliament (a statute) or a subordinate law made by a person or body to whom Parliament has delegated law-making power. Examples of subordinate laws are regulations, statutory rules and ordinances. It is the decision maker's responsibility to know the legislation being relied on and to keep abreast of any amendments.

Not every decision made by a government agency needs to be authorised by legislation. As well as statutory powers, many agencies possess executive powers to perform their normal administrative functions. Among these executive powers are the common legal powers of an ordinary person or organisation—for example, the power to enter into contracts, to acquire and manage property, to publish guides or advice to the public, and to conduct lawsuits. An agency established as a statutory corporation is often given such powers by legislation or the powers can be incidental to the agency's express powers.

Other laws can regulate the use of statutory and executive powers; for example, when an agency enters into a contract of employment it must abide by the general laws relating to employment contracts.

B3. The extent of power

Powers accorded through legislation are always of limited scope. In some cases, though, their scope might go beyond what is expressly authorised by the words of the legislation. Sometimes an additional power can be implied where it is reasonably necessary to make an express power effective; for example, a statute authorising an agency to grant licences implicitly authorises the agency to develop forms and procedures for licence applications.

Legislation often authorises action that is detrimental to individuals. Examples are statutes that impose taxes, fines and other penalties, authorise compulsory acquisition of land or confiscation of property, or empower police or other officials to detain people. Provisions of this type are interpreted narrowly: they authorise only those actions expressly mentioned.

Statutes are not read as implicitly authorising actions that are contrary to the fundamental human rights recognised by the common law. Among such rights are freedom of speech, freedom of movement, freedom to assemble, freedom from arbitrary detention, search and seizure, freedom to practise one's religion, freedom from arbitrary deprivation of one's property, and the right of access to the courts. Few of these rights are protected by the Australian Constitution, and most of them can be modified or overridden by legislation—but only if the legislation expresses that intention unambiguously.

A statute authorising the use of a listening device, for example, would not be taken as authorising a police officer to enter private premises without the permission of the occupier for the purpose of installing the device. To infer a power of entry would be to violate a person's common law right to exclude others from their property. The law presumes that if Parliament had meant to authorise a trespass it would have done so expressly. The statute might nevertheless be effective without the additional power of entry: a listening device could in some cases be used with the occupier's consent to entry or without entry to the premises.

Comcare annotation

The:

- SRC Act confers decision making powers on Comcare, the SRCC and the CEO

  NOTE: The SRC Act also confers functions and powers on scheme employers (including Comcare) in relation to the rehabilitation of injured scheme employees.
- OHS Act and regulations confers decision making powers on Comcare, the SRCC, the CEO and investigators
- ARC Act confers decision making powers on Comcare
- Seafarer Act confers decision making powers on the Seacare Authority
- OHS(MI) Act confers decision making powers on the Seacare Authority and the Australian Maritime Safety Authority (AMSA).

Like other APS Agencies, Comcare has decision making powers under the FOI Act and Privacy Act.

The CEO:

- As APS Agency Head has duties and powers under the PS Act
- As director of Comcare for the purposes of the CAC Act, has duties and powers under the CAC Act.

Appendix A lists the legislative provisions authorising or requiring decisions by Comcare, the SRCC, the Seacare Authority, the CEO or an Investigator.

Appendix B lists the legislative provisions authorising delegations by Comcare, the SRCC, the Seacare Authority and the CEO.

Appendix C lists decisions made under these provisions and delegations that are subject to administrative review on the merits ('merits review') by way of:

- internal review
- external review by the
  - AAT
  - SRCC
  - AIRC.

Most decisions by Comcare, the SRCC, the Seacare Authority, the CEO or an Investigator are also subject to judicial review, whether in the Federal Court under the ADJR Act or in the High Court or Federal Court under the Constitution or Judiciary Act. Where a decision is also subject to merits review, the court will usually adjourn any judicial review until the merits review has been concluded.

Before making a decision a Comcare employee should:

- identify and consider the legislative provision that authorises or requires such a decision
- if the decision is made under delegated authority, identify and consider the date and terms of the delegation of that authority to him or her.

  NOTE: An OHS Act investigator makes decisions under Part 4 of the OHS Act under the authority conferred directly on him or her by the OHS Act, not as a delegate of Comcare or the SRCC.

Comcare (or a licensed self-insurer) has a number of coercive or intrusive powers, including power:

- to require a scheme employee who has notified an injury or made a claim under the SRC Act to undergo a medical examination by a Comcare (or licensed self-insurer) nominated medical practitioner (s 57, SRC Act)[1]
- to require a scheme employee who has made a compensation claim to provide nominated information, including documents (s58, SRC Act)[2].

Comcare can also require a scheme employer to provide Comcare with nominated information, including documents (s 71, SRC Act and s 11, ARC Act).

Scheme employers (including Comcare) also have power to require an injured employee to undergo an examination for assessment of their capability of undertaking a rehabilitation program (s 36, SRC Act) and to determine that the employee should undertake a rehabilitation program (s 37, SRC Act)[3].

1 If the employee fails, without reasonable excuse, to undergo or cooperate in the medical examination his or her compensation entitlements and to commence or conduct proceedings in relation to those entitlements are suspended until the medical examination has been undertaken.

2 If the employee fails to provide the information processing of his or her claim can be deferred until the information is provided.

3 If the employee fails, without reasonable excuse, to attend or cooperate in the examination or to undertake the program his or her compensation entitlements are suspended until he or she complies.

An Investigator, when conducting an investigation[4], has power to –

- enter and search a workplace (s 42, OHS Act)
- require a scheme employer or scheme employee or contractor to answer questions and provide documents (s 43, OHS Act)
- take possession of plant, equipment and samples for examination and testing (s 44, OHS Act)
- direct that a workplace not be disturbed (ss 45 and 45A, OHS Act)
- issue a notice prohibiting an activity (s 46, OHS Act)
- issue a notice requiring safety improvements to be made (s 47, OHS Act).

The Administrative Review Council's Report No.48 (May 2008) sets out relevant principles applying to the coercive information gathering-powers of official agencies. Those principles are relevant to use by investigators of the powers conferred by section 43 of the OHS Act.

C. THE DECISION MAKER

C1. General

A statute will always state who has authority to exercise the powers conferred by statute. The designated person may be the Minister, agency head, the governing board of the agency or other officer.

Another way a statute can distribute a power is to assign the power to an 'authorised officer'—usually somebody who has been appointed in writing by a particular person, such as the Minister or the secretary of a department.

If a statute assigns a power to a designated person the law presumes the power can be exercised only by that person, unless the statute expressly authorises further delegation of the power. In exceptional circumstances a power to delegate can be implied. This is better described as an implied power to authorise somebody else to act as an agent for the designated person. It is uncertain when the law will imply such a power, so it is safer to assume that any delegation of power must be expressly authorised by a statute.

A delegation of power must normally be done in writing, in the form of an 'instrument of delegation' signed by the designated person. The decisions the delegate is authorised to make are usually described in the instrument of delegation by reference to the legislative provisions that create the powers.

4 It is an offence against section 149.1 of the *Criminal Code* to obstruct an Investigator who is an employee of Comcare.

C2. The way delegation works

When power has been delegated both the designated person and the delegate are authorised to exercise that power. The designated person decides which decisions to make personally and which to leave to the delegate.

There are various ways delegations can be made. A delegation can be made to a named individual or to a person in a specified position or at a particular classification level. A limit such as a monetary value can be placed on the scope of a delegation. Generally, though, delegations are aligned with the distribution of responsibilities in an agency.

When a power is delegated to a specified position any person appointed to that position can exercise the powers associated with the delegation. These may be in addition to other powers delegated to the person as a named individual.

A delegate exercises the power on their own behalf. Accordingly, they should sign the decision in their own name, as a delegate of the designated person. They should not sign 'for' or 'on behalf of' the designated person: this creates confusion about who is the decision maker.

Instruments of delegation should be reviewed from time to time to make sure they are consistent with the legislation and with the allocation of roles in an agency. If the delegate needs particular skills or expertise to exercise the power, the review should also consider whether the delegate is suitably qualified.

C3. The extent of delegated power

When making a decision, a delegate should check that they are legally authorised to make the decision under a current instrument of delegation. They should never assume they have the legal authority to make a decision just because it comes within their job description or arises in a matter that has been assigned to them.

A delegation might not be necessary if the decision involves the use of executive powers. The presumption against delegation does not apply as strictly to non-statutory powers, and a delegate may be deemed to have the executive powers that are appropriate to their level and role. This is subject to any directions from the agency that define the scope of the delegate's executive authority; for example, the holder of the delegate's position might be authorised to purchase particular goods and services up to a specified monetary value.

Before exercising their delegated statutory powers a delegate should also check the scope of those powers. The instrument of delegation might limit the powers, or it might withhold other powers that are needed in order to make the decision. It might, for example, authorise a delegate to ask a person for information but not to compel the person to answer questions. The power to compel the person to answer might have been delegated to a more senior officer.

Some Acts and Finance Directions contain specific rules about delegation and authorisation, and these might override the terms of the instrument or the general principles of delegation just discussed.

C4. A decision made without delegated power

If a decision is made without delegated or executive power the agency will not be able to rely on or enforce the decision. Such a decision cannot be validated by having an authorised delegate subsequently ratify it: a fresh decision will have to be made by an authorised delegate. In exceptional cases the agency might be bound by the decision in its dealings with a member of the public who has acted in reliance on the delegate's apparent authority. This could happen, for example, if the delegate were to act under an instrument of delegation that is later found to be defective or to have expired.

In limited circumstances a designated person can authorise a suitable subordinate to make some decisions on their behalf. The power to give this authorisation can be implied if it is administratively impractical at a particular time for a person such as a Minister or an agency head, who may be absent or busy with other things, to exercise the power personally in every case. If the relevant Act expressly authorises delegation of the power it is preferable that the subordinate acts under an instrument of delegation.

C5. Help with decision making

A delegate can further delegate a power only if both the legislation and the instrument of delegation authorise sub-delegation of the power. This general rule against sub-delegation ensures that the designated person always has control over who is exercising the power.

Not all actions require a formal written delegation. Another officer can provide assistance, for example, by taking statements from witnesses, ascertaining facts, preparing a briefing paper, making recommendations, or administering an approved proficiency test for applicants. In this situation it is important to be clear about precisely who is the decision maker. The authorised decision maker must personally evaluate the facts and the merits of the case and make the decision in their own name. If the assistant is notifying an affected person of the decision the communication should bear the name and signature of the decision maker.

Comcare annotation

The:

- SRC Act distributes powers between Comcare, the SRCC and the CEO and it authorises –
  - Comcare to delegate powers (whether under the SRC Act, OHS Act or ARC Act) to members of Comcare's staff (s 73B)[5]
  - the SRCC to delegate powers (whether under the SRC Act or OHS Act) to the CEO and the CEO to delegate those delegated powers to Comcare employees (s 89R).
- No further sub delegation is permitted (s 34AB, Acts Interpretation Act 1901).
- OHS Act and regulations distribute powers between Comcare, the SRCC, the CEO and Investigators.
  - The SRC Act authorises Comcare and the SRCC and the CEO to delegate these powers (see above)
  - Investigators are appointed by Comcare (s40) and can undertake investigations at the direction of Comcare or the SRCC or at their own discretion (s41).

5 Comcare can delegate to any employee of an Entity or Commonwealth authority (as defined by the SRC Act), but any delegation of authority under the ARC Act to a person who is not a Comcare employee requires the prior written approval of the Minister (s14, ARC Act).

- ARC Act confers powers for the management of assumed common law asbestos related disease liabilities on Comcare.
  - The SRCC has no duties or powers under the ARC Act.
- Seafarers Act confers powers on the Seacare Authority and authorises the Seacare Authority to delegate powers (including powers under the OHS(MI) Act) to the CEO and the CEO to delegate those delegated powers to members of Comcare's staff (s 125)[6].
- No further sub delegation is permitted (s 34AB, *Acts Interpretation Act 1901*).

The legislative provisions authorising delegations are listed at **Appendix B**.

Delegations by Comcare and the CEO are usually made to a person performing the duties of a particular position or at a particular classification level.

- In the latter case, the delegation may be limited to employees within a particular branch, section, team or other administrative division.

When making a decision under a delegation, a delegate is exercising the authority conferred on him or her and should sign the decision in his or her own name, not on behalf of Comcare, the SRCC, the Seacare Authority or the CEO. However, the decision is taken, for the purposes of the legislation it is made under, to have been made by the authority which made the delegation to the decision maker (s 34AB, *Acts Interpretation Act 1901*).

Thus, a decision made under a delegation:

- from Comcare to a Comcare employee is taken to have been made by Comcare
- from the CEO to a Comcare employee of a power delegated by the SRCC to the CEO, is taken to have been made by the SRCC
- from the CEO to a Comcare employee of a power delegated by the Seacare Authority to the CEO, is taken to have been made by the Seacare Authority.

6 The Australian Maritime Safety Authority is the Inspectorate under the OHS(MI) Act.

D. THE JUDGMENTS OR CHOICES THAT MUST BE MADE

D1. General

The legislation providing authority for a decision might stipulate the decision to be made if certain facts exist. For example, an Act could stipulate that an application be refused if the applicant does not meet specified criteria. A duty to decide in a particular way is often expressed by the use of words such as 'shall' or 'must'.

Decision-making powers given to administrative agencies are often discretionary powers. These powers involve an element of judgment about the decision. A discretionary power is often expressed using the word 'may'. For example, if an Act says 'The Secretary may grant the application unconditionally, or grant it subject to such conditions, or refuse the application' the decision maker has a choice.

Legislation might also require a decision maker to exercise judgment about whether certain conditions are met—for example, whether a person has 'reasonable grounds' for failing to do something or is a 'fit and proper person' to hold a particular licence or permit. To make these discretionary judgments, it is essential to examine the facts of the case and assess whether they meet the legislative criteria.

D2. Exercising discretion

If an authorised officer has power to make a decision that involves discretionary power or a discretionary judgment, only that officer can exercise that power or make that judgment. They can take into account the advice or recommendations of others, but it is their responsibility to exercise the discretion and make the decision. Further, their decision must not be made solely so as to accord with the wishes or views of any other person—including a supervisor, the agency head or the Minister. The agency or the Minister can provide general guidelines, but they may not direct the officer in relation to the decision or prevent them exercising their discretion.

Exercise of a discretionary power might depend on a discretionary judgment that a criterion or state of affairs does or does not exist. For example, if an Act gives an officer power to cancel a permit 'if satisfied that the permit holder has acted in breach of a condition of the permit' the officer must personally determine whether the person has acted in breach of a condition; they must not act solely on another person's opinion or belief that a breach has occurred.

D3. Factors to be considered when making a decision

An administrative power must be exercised in accordance with the law. There is an overriding obligation to examine and weigh all the relevant considerations and to ignore irrelevant ones.

It is not always easy, however, to decide what considerations are relevant. The legislation might set out factors that must be considered in each case. If the listed factors are complete, or exhaustive, the decision maker is not permitted to consider other things. More commonly, though, the list is incomplete, leaving the decision maker free to consider other factors that are relevant.

Whether a list of factors in legislation is exhaustive or not is a question of interpretation. A non-exhaustive list is often introduced by the word 'includes' or ends with a catch-all expression such as 'any other matters that, in the opinion of (the decision maker), might be relevant in the particular circumstances of the case'.

Where the legislative factors are not exhaustive, or there is no list at all, a decision maker should seek guidance elsewhere. Most agencies have guidelines that provide examples of the factors that should be considered and advice on how to weigh up the relevant considerations. It is also important to be aware that different factors could be relevant to a particular case; this includes relevant matters raised by a person who will be affected by the decision.

Agency guidelines generally take account of relevant court rulings or tribunal decisions. Courts, tribunals and agencies identify the discretionary factors by a process of statutory interpretation, deducing the relevant factors from a consideration of the words, scope and purpose of the legislation in question.

It is a legal error to have regard to an irrelevant consideration, just as it is to ignore a relevant one. An irrelevant consideration is something outside the purposes for which the power was given. For example, if the legislation requires that a decision maker determine whether a person has sufficient command of English to work as a psychologist it would be irrelevant to take into account the person's command of Latin. It stands outside the purpose of the power, which is to ensure that the person can communicate in English with clients.

D4. The role of policy in decision making

Any government policy that touches on a decision to be made is a relevant consideration and should be taken into account when the decision is being made. Policies can be made by Ministers, Cabinet or the agency and can exist in various forms—a ministerial press release, a website, a brochure, a written direction to decision makers, and so on.

Some government policies are statements of intention that require a change to legislation in order to become effective. For example, in the annual budget speech the Treasurer often announces policy changes that will be implemented through legislation at a later date. Announcements of future legislative amendments are not relevant to the interpretation of current legislation.

The policies that are most likely to be relevant in decision making are agency guidelines on how to apply the legislation the agency administers. Guidelines of this kind promote consistency in decision making and inform the public about how the legislation is applied.

D5. How to use policies in the form of guidelines

Although policies can be very helpful in decision making, they cannot be relied on if they conflict with a statute, a subordinate law or a court ruling. Agencies generally take care to ensure that their policies are consistent with the law, but occasionally a policy is out of step or becomes inaccurate as a result of a change in the law. When this happens, it is the law that must be applied, not the policy.

If a decision maker has to make a discretionary judgment, an agency policy might set out the factors that should be considered and the relative importance of each factor. For example, if the decision maker is required to make a discretionary judgment about whether a person is a 'fit and proper person' to hold a pilot's licence, the policy might tell them what information to ask for and how to evaluate the responses.

A policy can guide decision making, but it must not prevent a decision maker exercising discretion. It cannot constrain them to reach a particular decision; nor can it prevent them taking all relevant considerations into account. Policy must not be applied inflexibly. It would be unlawful, for example, to say, 'It is our policy never to grant a pilot's licence to anybody with a conviction for speeding in a motor car'. The decision maker must be prepared to consider whether it is appropriate to depart from the policy in an individual case. Otherwise, the policy is effectively a rule, which is inconsistent with discretionary power.

Some statutes give a Minister or an agency head the power to issue binding policy directions to delegates. Powers of this type are usually understood to authorise general directions only, leaving the delegate to decide each case on its merits. In exceptional cases the directions are binding in the sense that the delegate is constrained to reach the decision stated by the policy. When directions are meant to be binding in this way the legislation often requires that they be tabled in Parliament, so that they are subject to parliamentary scrutiny.

Comcare annotation

The legislation under which Comcare staff make decisions contains both mandatory and discretionary decision making powers. The power is a mandatory power where the legislation provides that in a specified circumstance or event the body or person authorised must take a specified action. Reference must always be made to the relevant legislative provisions (see Appendix A) to ascertain what must be considered and what, if any, discretion a decision maker has in making a decision. The legislation is available to staff on the Comcare intranet site and can also be accessed at http://www.comlaw.gov.au

Power to issue binding policy guidelines is provided by:

- section 41A of the SRC Act, which authorises Comcare to issue guidelines which bind Scheme employers in their capacity as rehabilitation authorities
- section 73A of the SRC Act, which authorises the SRCC to issue policy guidelines that bind Comcare and licensed self-insurers
- section 73 of the SRC Act, which authorise the Minister to issue directions to Comcare
- sections 89D and 101 of the SRC Act, which authorise the Minister to issue directions to the SRCC and concerning the licensing of self-insurers
- section 107 of the Seafarers Act, which authorises the Minister to give directions to the Seacare Authority.

E. OTHER RULES TO BE OBSERVED WHEN MAKING DECISIONS

E1. Statutory procedures

Legislation might require that particular procedural steps be taken before a decision can be made. For example, there might be a requirement that a written application be lodged with the agency, that another person be notified that an application has been lodged, or that an analysis of the application be prepared and published for public comment.

As those examples suggest, responsibility for completing a procedural step might rest with the decision maker or with another person. Either way, it is the decision maker's responsibility to ensure that any necessary steps are taken before a decision is made. Otherwise, the decision could be invalid.

Strict compliance with procedural steps is usually required unless the legislation states that something less is sufficient. This general rule is reversed in relation to forms: where legislation prescribes a form that a person is to use, 'substantial compliance' with the form is sufficient unless the legislation provides otherwise. If, for example, an applicant uses the wrong form but provides the necessary information this would be taken as substantial compliance with the requirement to use a prescribed form.

E2. Human rights and discrimination

The statute authorising a decision and the general requirements of administrative law are not the only laws that must be observed. It might be necessary to take account of human rights considerations in international conventions to which Australia is a party. Some statements of human rights have been given statutory force; an example is the International Convention on the Elimination of All Forms of Racial Discrimination, which is incorporated in Australian law by the Racial Discrimination Act 1975 (Cth).

Other international conventions express human rights principles that might also be pertinent. Further, some jurisdictions have statutory charters that oblige administrators to act in a way that is compatible with the human rights recognised in the charter. 'Discrimination' means treating someone unfavourably or less favourably without good reason on the basis of specified grounds or attributes. Unlawful discrimination under Commonwealth law includes race, colour, sex, religion, political opinion, national extraction or social origin, age, medical record, criminal record, marital status, mental, intellectual or psychiatric disability, physical disability, imputed disability, nationality, sexual preference, trade union activity, descent, and national or ethnic origin.

Anti-discrimination and human rights legislation prohibits unlawful discrimination on specified grounds in particular areas of public life—including in the administration of laws and programs and the provision of government services. The Human Rights and Equal Opportunity Commission Act 1986 (Cth) provides the means by which individuals can seek redress against people and bodies (including state and territory agencies) for discriminatory acts and practices that are unlawful under various Commonwealth Acts. Each state and territory also has its own anti-discrimination laws and processes that operate alongside the Commonwealth provisions.

The impact of discrimination law on administrative decision making is pervasive. Bodies such as the Human Rights and Equal Opportunity Commission and state and territory anti-discrimination and human rights bodies have wide powers to inquire into administrative decisions and practices that might breach discrimination laws. Under Commonwealth law, for example, a person who alleges that a decision unlawfully discriminates against them can lodge a complaint with the Human Rights and Equal Opportunity Commission. The President of the Commission will inquire into the complaint and attempt to conciliate it. In some circumstances, if the person is not satisfied they can then apply to the Federal Court or the Federal Magistrates Court. If the court finds that the person has been unlawfully discriminated against in relation to an area of activity covered by the relevant law, it can direct the agency to cease the unlawful conduct, to pay compensation, or to take other reasonable steps to make good any loss or damage incurred by the person.

Direct discrimination

Direct discrimination occurs when a person receives less favourable treatment than would have been accorded another person in the same circumstances because of one of the attributes or grounds specified in discrimination law. For example, it would be directly discriminatory to reject a person's factual claims on the basis that members of that person's race, ethnic group or nationality are more likely than others to tell untruths.

Such discrimination need not be deliberate and can be founded on unconscious attitudes and assumptions. A decision will be a discriminatory act if an unlawful ground of discrimination was the 'dominant' (or, for certain attributes, the 'substantial') reason for the decision, even if the decision was also based on non-discriminatory grounds.

Indirect discrimination

Indirect discrimination occurs when a rule, policy or practice that applies generally has a discriminatory impact on people with particular attributes. For example, a general requirement for applicants to attend a specified venue for an interview could indirectly discriminate against people with a disability if the venue is not accessible by wheelchair and no alternative is provided. If a policy or practice amounts to indirect discrimination, it should not be applied in decision making. If a decision maker suspects it is unlawful they should bring the matter to the attention of their supervisor, who can seek guidance from the agency's legal advisers.

Exceptions

Although discrimination legislation applies generally to agencies, there are exceptions for actions carried out in direct compliance with certain other Acts. For example, it is lawful under the Age Discrimination Act 2004 (Cth) to refuse an application for the Age Pension on the ground that the applicant is below the qualifying age specified in Commonwealth pension legislation. There are also exceptions for actions and programs designed to meet special needs of a disadvantaged group or to promote the group's equality. Some legislation administered by agencies also contains specific exemptions. There are a number of other exceptions, but these vary according to the ground of discrimination. If a decision maker thinks an agency guideline or practice might be discriminatory, they should raise the matter with a superior and ask whether the agency relies on an exception.

Comcare annotation

The SRC Act provides for an exception from the Age Discrimination Act 2004, namely: that a person is not entitled to compensation in respect of incapacity for work once they are 65 years old or, if injured when 63 or older, after they have received incapacity benefits for a total of 104 weeks, whether consecutive or not (s23).

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GUIDE 2 NATURAL JUSTICE

A. INTRODUCTION

Public sector employees have a legal duty to comply with the general requirements of the law, as well as the specific legislation administered by their agency. An important legal requirement applying to most decisions that directly affect the rights and interests of individuals or organisations is that the decision be made in accordance with the rules of natural justice—also known as procedural fairness.

Natural justice requires that administrators adhere to a fair decision-making procedure. Although fair procedures tend to result in better decisions, the concern here is not whether the decision itself is fair: it is the decision-making process that must be fair. Sometimes statutes require administrators to make a decision that could be regarded as unfair—for example, to require someone to repay an overpaid allowance. For legal purposes, however, a fair decision is one that is properly made, in accordance with the statute and the requirements of natural justice.

There are two primary rules of natural justice. The 'hearing rule' is that people who will be affected by a proposed decision must be given an opportunity to express their views to the decision maker. The 'bias rule' is that the decision maker must be impartial and must have no personal stake in the matter to be decided. This guide deals with considerations that commonly arise when the rules of natural justice are applied to administrative decision making.

B. CONFLICT OF INTEREST

B1. General

A conflict of interest exists if a decision maker has a personal interest in the outcome that might prevent them, or appear to prevent them, from performing their duty impartially. An example is a decision maker assessing a tender from a company of which they are a director. The decision maker's financial and personal interest in the success of the tender might conflict, or appear to conflict, with their duty to assess tenders in accordance with the agency's requirements.

A conflict of interest can also arise from non-material interests such as involvement in political, social, cultural, religious or sporting associations and activities, or a close family or personal relationship. For example, membership of a community association could present a conflict of interest if the decision maker's duties include considering an application from the association for a grant. What matters is not the nature of the interest but instead its actual or apparent influence on the person's ability to decide impartially.

The question that should be asked is: would a member of the public who knew about this interest reasonably think that it might influence the decision? It is irrelevant that the decision maker is personally satisfied that the conflicting interest has been put out of mind in arriving at a decision. The important thing is how the situation might appear to an observer.

B2. The APS values and code of conduct

Conflicts of interest in the Australian Public Service and certain statutory offices must be managed in accordance with the Australian Public Service Values and Code of Conduct, as expressed in the Public Service Act 1999 (Cth). The Act places all APS employees under a legal duty to uphold the values and comply with the code.

The values state that the Australian Public Service 'is apolitical, performing its functions in an impartial and professional manner' and 'has the highest ethical standards'. The code provides that an APS employee and certain statutory office holders:

- must behave honestly and with integrity in the course of APS employment
- must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment
- must not make improper use of: (a) inside information or (b) the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person
- must comply with applicable Australian laws, in the course of APS employment.

State and territory governments generally have broadly similar requirements for their public sector employees. These can be specified in legislation or in agency service charters and codes of conduct, or both.

B3. Disclosure of interests

Each government department or agency has its own procedures for disclosure and management of conflicting interests. The general scheme is that an employee must disclose their interests to the agency, and the agency assesses and manages any conflict with the employee's duties. Agencies are expected to provide to staff guidelines on what kinds of interests should be disclosed and to whom.

Some employees and statutory office holders are asked to provide a written statement of all their private interests at a particular date. Providing such a statement does not relieve the office holder of the continuing duty to disclose interests and avoid conflicts of interest.

Disclosure of interests enables an agency to manage any conflict between those interests and the discharge of public duties. Supervisors can adjust the duties of employees and the allocation of work in order to avoid conflicts. In some cases an employee might be able to avoid a conflict by disclosing their interest and abstaining from taking part in particular decisions. Employees might also be asked to divest themselves of interests that could conflict with the performance of their duties—for example, membership of a board or association or ownership of shares in a company.

Not every conflict of interest can be foreseen. Sometimes a conflict becomes known only after the decision-making process has started. For example, in the course of dealing with a matter a decision maker might become aware that a friend or family member is a party, a witness or an applicant. It does not automatically follow that the decision maker is in breach of the APS Code of Conduct or other similar code but, to avoid a breach, they must promptly disclose their interest to the agency and, in consultation with their supervisor, take reasonable steps to resolve the conflict.

B4. Other forms of the bias rule

The bias rule of natural justice is not only concerned with conflict of interest: it also requires that a decision maker be impartial and free of actual or apparent bias. 'Actual bias' means that the decision maker has a predisposition to decide the matter otherwise than with an impartial and unprejudiced mind. 'Apparent bias' means that in the circumstances a fair-minded observer might reasonably suspect that the decision maker is not impartial. In most cases, apparent bias is enough to disqualify a person from making a decision.

Whether a decision maker is disqualified or not is a legal question. A decision maker is not disqualified simply because a person whose interests are affected by the decision alleges bias or asks for a different decision maker. It is not about whether an affected person thinks the decision maker is biased; it is about whether a fair-minded observer would reasonably suspect bias.

An apprehension or suspicion of bias can arise from things the decision maker says or does that suggest he or she is either partial or hostile to one side or has formed prejudgments and is not open to persuasion. A closed mind might be demonstrated by ignoring evidence or dismissing it for insufficient reason. Actual or apprehended bias can arise if a decision maker plays conflicting roles, such as making allegations and fact finding.

B5. Waiving the right to object to bias

A decision maker is not disqualified by actual or apparent bias if the interest is disclosed to those affected by the decision and they freely waive their right to object. They will be taken to have waived the objection only if they know about both the conflict and their right to object to it and then agree to a waiver.

It could, nevertheless, be unwise for a decision maker to rely on a person's waiver. Although a waiver removes any disqualification under the bias rule, it might not satisfy the duty under the APS Code of Conduct 'to take reasonable steps to avoid … any conflict of interest (real or apparent) in connection with APS employment'.

It might be different if an affected person knew about a conflict of interest but withheld their objection until notified of an adverse decision. The person is not entitled to have 'a bet each way', biding their time to see how the decision falls. If the right to object is not acted on as soon as possible after the person becomes aware of the conflict of interest, the right could be taken to have been waived.

B6. The bias rule and the APS values and code of conduct

Both the bias rule and the APS Values and Code of Conduct place Australian government employees and statutory office holders under a duty to avoid conflicts of interest when making decisions. The values and code establish broader ethical standards that go beyond the requirements of natural justice.

An important difference between the bias rule and the code lies in the consequences of a breach. An Australian government employee or statutory office holder who breaches the code is liable to disciplinary penalties under the Public Service Act 1999. Non-compliance with the bias rule gives an affected person grounds to have the unlawful government decision set aside.

The bias rule can be excluded by statute, although this is rare. Australian government employees and statutory office holders must still comply with the APS Values and Code of Conduct.

Comcare annotation

> The APS Values are published at www.apsc.gov/values/index.html and the APS Code of Conduct at www.apsc.gov.au/conduct/index.html

> Staff should also refer to CEO Directions and CEO Instructions published on the Comcare intranet

  – The CEO Direction on the declaration of private interests requires all Senior Executive Service staff and all staff having interests which may impact on their duties to make an annual declaration of any private interests, to update that declaration on any change and, irrespective of whether declared, require all staff to notify any possible conflict as soon as it becomes apparent

  – The CEO Direction on outside employment requires that approval be obtained for any external employment (including unpaid employment and self-employment)

  – Where a staff member has a conflict of interest in relation to a matter on which they have delegated authority they should request that the matter be reallocated to another delegate.

C. DECISIONS TO WHICH NATURAL JUSTICE APPLIES

C1. General

Natural justice generally applies whenever a statute gives power to make an administrative decision that might adversely affect the rights, interests or legitimate expectations of an individual or organisation. Examples are decisions to cancel or refuse a pension, benefit or allowance, to refuse an application to renew a licence or permit, or to suspend or cancel a person's professional registration.

Not all government decisions are subject to the requirements of the hearing rule of natural justice. This rule is unlikely to apply to decisions that affect the public generally or a section of the public—for example, decisions to adopt a policy, to propose legislative change or to make regulations. Further, if an agency is considering a person's application for a benefit or licence, it will not usually be required to offer the person a hearing before rejecting the application.

C2. The interaction between statutory processes and natural justice

The requirements of natural justice come from general administrative law, not the particular statute being administered. Many statutes do, however, spell out procedures that must be followed when making decisions; for example, the statute might stipulate who is entitled to notice, when notice should be given and in what form, what kind of hearing is to be given, and how much time is allowed for a person to respond.

Natural justice imposes similar requirements, independently of the statute. If the statutory procedures are equivalent or superior to what natural justice would require, compliance with the statutory procedures will also satisfy the requirements of natural justice. On the other hand, if the statutory procedures fall short of what natural justice would require, the question of whether the statute establishes a complete procedural code arises. A statute that deals exhaustively with decision-making procedures might be read as implicitly excluding natural justice, but the law leans against that interpretation.

If natural justice is not excluded its requirements operate alongside the statutory procedures and supplement them. This means it might not be sufficient to comply only with the statutory procedures if natural justice requires more. For example, if the legislation allows a person to make a submission at a particular time and further relevant material is later received that is adverse to the person who made the submission, natural justice allows them to read and comment on the new material before a decision is made. Natural justice requires this additional procedure, even if the statutory procedures do not mention it.

D. NOTIFYING A PERSON THAT A DECISION IS TO BE MADE: THE HEARING RULE

D1. General

The hearing rule of natural justice is designed to ensure that a person whose interests will be affected by a proposed decision receives a fair hearing. This is consistent with treating people with respect and dignity—an Australian Public Service value. The rule also tends to improve the quality of decision making and reduce errors: as any experienced decision maker knows, something that appears at first to be an 'open and shut case' can look very different when the other side of the story is revealed.

Many decisions made by Commonwealth agencies directly affect only one person, such as an applicant. Other types of decisions directly affect two or more parties. For example, the grant of a planning permit can affect the occupiers of neighbouring land; natural justice might therefore require that multiple parties be notified that a decision is to be made.

D2. The content of the notice

The hearing rule requires that a person whose interests could be adversely affected by a decision be notified that the decision is to be made. The notice should provide sufficient information to allow the person to make effective use of the right to respond and present arguments. The nature of the decision and its possible consequences should be described. Details of when, where and how a submission can be made should be given. And the time allowed for a response should be reasonable in the circumstances, having regard to the preparation time involved.

The notice should be consistent with any statutory requirements, although, as noted, natural justice might require disclosure of additional information to a person, so that they can prepare a case and gather evidence. For example, if the decision concerns allegations about a person's behaviour, details of the allegations should be provided in the notice.

The notice should not imply that a decision has already been made. A notice that refers to a 'provisional' or 'draft' decision, for example, could give rise to an impression that the matter has been decided before the hearing. The hearing must take place before the decision is made.

D3. Protecting personal reputation

Natural justice protects personal reputation as well as other interests. As a result, it might be necessary to provide a hearing to a person before making a finding or preparing a report that contains adverse information about the person. For example, if it is to be decided that an applicant's loss was caused through the default of their solicitor, natural justice requires that the solicitor be notified and invited to comment before the decision is made.

D4. Departing from an agency commitment

Natural justice might require that a person be notified if a decision maker intends to depart from advice or a statement about how the decision-making power will be exercised. This is so even if the advice or statement was given by another officer or was given to the public generally in an agency document such as a brochure or guidelines.

Agency statements and undertakings might not be legally binding, but a person might have a 'legitimate expectation' of them being applied when a decision is being made. The person could have acted in reliance on a statement and might be adversely affected if there is a departure from it. For example, if a person relied on an agency's statement that it would accept a certificate as evidence, they could have failed to gather other evidence that is then required. Natural justice entitles a person to be given an opportunity to make a submission against a proposed departure from the agency's statement.

Comcare annotation

> The SRC Act requires a scheme employee who suffers an injury to give written notice of the injury (s53) and to make a written claim for compensation (s54) before any compensation is payable. The scheme employer must be provided with a copy of that claim (s54). Where a scheme employee has lodged a claim for compensation there is no legal requirement to notify him or her of an intention to make the requested decision.

> Similarly, there is no legal requirement to notify a scheme employee that the possibility of requiring him or her to undergo a medical examination (s57) or to provide information (s58) is under consideration. This is because the powers are being used to enable his or her claim to be determined. However, in all these cases the scheme employee must be notified once a decision is made (s61).

> The SRC Act:
  - requires that decisions on claims 'be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities' (s72(a))
  - provides that, in relation to claims management decisions, Comcare
    > is not required to conduct a hearing (s72(b))
    > is not bound by the rules of evidence (s72(c)).

Claimants are afforded an opportunity to provide material in support of their claim and to respond to adverse information relating to their claim.

> An Investigator who decides it is necessary to enter and search a workplace and inspect plant, substances and things at the workplace under the OHS Act is required to show his or her identification card and instrument of appointment (s42), but not to give prior notice of the decision to enter and search. Similarly, having commenced an investigation, he or she can take plant or a substance, thing or samples (s44) and direct the workplace not be disturbed (s45 and s45A) and issue a prohibition notice (s46) or improvement notice (s47).

> During an investigation under the OHS Act relevant witnesses, including representatives of an employer, may be given an opportunity to comment on evidence that may give rise to an adverse finding against the employer or employee witness. Whether an employer representative or employee is given such an opportunity will depend upon the particular circumstances and evidence. Relevant factors will include whether the employer representative or employee is aware of the type and source of the evidence and whether it is of a technical character.

E. REQUIREMENTS FOR AN ADEQUATE HEARING

E1. General

The hearing rule does not provide a standard set of procedures. Its requirements are adjusted to take account of the legislative framework, the subject matter, and the nature and potential consequences of the decision to be made. Even for the same power and the same decision maker, the same procedures may not be appropriate in all cases. Natural justice requires consideration of the particular circumstances of each matter.

In many cases natural justice is satisfied if the affected person is afforded the opportunity to make a written submission. Oral hearings are more likely to be called for if there are disputed questions of fact to be determined, there is a need to assess whether a person is telling the truth, or an affected person cannot adequately put their case in written submissions. In the most serious matters—such as disciplinary proceedings—natural justice might require formal, structured court-like proceedings.

The legislation often specifies the type and format of the hearing. Unless the statutory procedures exclude natural justice, those procedures should be read as minimum requirements. In particular cases natural justice might require something more than the statute provides for; for example, it could be a breach of natural justice to refuse to allow a person to use an interpreter at a hearing or to deny them additional time to gather evidence.

In situations where an affected person is not entitled to be represented at an oral hearing, the person should generally be allowed to have someone present to help them and provide moral support. This can be allowed even if the statute does not provide for a public hearing.

E2. Decision making in stages

Administrative decision making can occur in stages. For example, there may be a first stage at which a recommendation or preliminary finding is made, followed by a second stage at which a final decision is made by the Minister or a senior officer. Provided no new material or factors are introduced at the second stage, a further hearing is usually not required before the final decision maker adopts or rejects the recommendation or finding.

It is not always necessary for the decision maker to hear or receive the evidence and submissions in person. Some decisions are made by the Minister or a senior officer, relying on a briefing paper or summary prepared by a subordinate. The summary must be fair and accurate and must not omit relevant evidence or submissions. If the summary appears to make adverse comment about a person's conduct or credibility, the person must be given the chance to rebut the comment if they have not previously had that opportunity.

E3. A genuine hearing

Natural justice means more than affording someone the opportunity to 'say their piece'. They are entitled to have their evidence and submissions properly considered. Failure to give genuine, realistic and proper consideration to both sides of a case can give rise to an apprehension of bias on the basis of prejudgment.

F. THE OPPORTUNITY TO RESPOND TO ADVERSE INFORMATION

F1. General

If an individual or organisation has a right to a hearing they are entitled to respond to any adverse material—from whatever source—that could influence the decision.

The duty of disclosure is a continuing one. If the decision maker becomes aware of new evidence at any stage of the decision-making process, this information must be disclosed unless it is being disregarded because it is not credible, relevant and significant. Even if there has already been a hearing, an affected person must be given an opportunity to rebut or comment on any new material that is adverse to their case. This also applies to information gathered by the decision maker.

F2. Confidential information

When information is given in confidence the requirements of natural justice are flexible. The law recognises that administrators might have to protect confidentiality in order to obtain from the public the information they need to carry out their duties.

When confidential information that is adverse to an affected person is received, it might be sufficient to disclose the substance of the information while withholding the actual document and the particulars of the informant. For example, a person applying for an income support payment could be asked whether they had worked as a waiter in a particular café on a particular date without the source of that allegation being disclosed.

Adverse information of a personal nature that has been received should generally be disclosed to the person concerned, even if the information will not be relied on when a decision is made. An example is a letter alleging tax fraud on the part of a person applying for an Australian financial services licence. As one judge put it, 'Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information'.

F3. Disclosing special knowledge

A decision should be made on the basis of the evidence and information before the decision maker. In evaluating that material, the decision maker is entitled to draw on their commonsense and general life experience as an ordinary member of the community. They can also apply any specialist knowledge they have acquired through professional training or experience in the relevant area of administration. There is no need to disclose this background knowledge to the person affected by the decision.

If weight is attached to particular information that is not within common knowledge, this should be disclosed to the affected person. An example is recent published research that casts doubt on the reliability of a particular diagnostic test. A person who has submitted a medical report that relies on the test should be informed of both the substance of the research and the source and be given a reasonable opportunity to respond to this.

F4. Disclosing thoughts

An affected person's attention should be directed to any information or fact that is crucial to the decision but might not be apparent to them. Examples are evidence contradicting that of the affected person or an inconsistency in their case. The person should be given an opportunity to redress the weakness in their case. It is often better if the decision maker does this by putting a question, rather than a statement, to the person: this suggests that the decision maker is amenable to persuasion.

There is no general duty to give an affected person an assessment of their case before the decision is made. It is sometimes helpful to do so, since it promotes the purpose of the hearing by giving the person the opportunity to persuade the decision maker. In disclosing a provisional view, however, the decision maker should stress that a final decision has not been reached.

Comcare annotation

An example of the continuing obligation of disclosure is where a claimant has asserted he or she was at a particular place at a particular time and a document is obtained showing he or she was at a different place at that time. In these circumstances it would be necessary to ask the claimant to explain the discrepancy.

G. THE CONSEQUENCES OF A BREACH OF NATURAL JUSTICE

A decision maker commits a legal error when they breach natural justice or fail to follow a statutory procedure that is designed to provide natural justice. There must be practical injustice before the decision is unlawful for a failure to comply with natural justice.

A person who is, or would be, adversely affected by the decision can apply to a court for judicial review. If the court finds that natural justice has not been complied with, it will usually set aside the decision and order the agency to decide the matter anew. An application for judicial review can be made even before any decision is reached if the decision maker is adopting a procedure that does not conform to the requirements of natural justice. In this case the court will usually restrain the decision maker from continuing with the procedure.

As an alternative to judicial review, legislation might provide for a right of appeal to an independent board or tribunal. Commonwealth tribunals and most state and territory administrative tribunals usually have the power to hear and determine appeals 'on the merits'. This is a comprehensive type of appeal in which the tribunal is able to hear the matter afresh, consider new material, and re-exercise the powers of the original decision maker. A decision by the tribunal on appeal can correct a breach of natural justice in the original decision—meaning the breach can no longer be grounds for judicial review. Courts generally expect a person to exercise their right to appeal on the merits before, or instead of, applying for judicial review.

The Ombudsman can investigate a complaint and make an adverse report in relation to an agency that has acted in breach of natural justice.

GUIDE 3 EVIDENCE, FACTS AND FINDINGS

A. INTRODUCTION

Administrative decisions are based on facts, and an important element of decision making is making findings about those facts. Many facts needed to support a decision are clear and uncontroversial, but in other cases it is necessary to obtain and evaluate information.

This guide deals with the legal requirements for information assessment and fact finding. Some errors in fact finding are legal errors—in the sense that they are grounds on which a court might set aside a decision. Although there are important exceptions, a breach of one or more of the following general requirements can amount to a legal error. A decision maker must do the following:

- determine all material questions of fact—those questions of fact that are necessary for a decision
- not base a decision on a fact without evidence for that fact
- ensure that every finding of fact is based on evidence that is relevant and logically supports the finding
- not base a decision on a finding that is manifestly unreasonable
- observe natural justice
- comply with any statutory duty to give a written statement of reasons for the decision.

Not all errors in fact finding are legal errors. For example, it is not necessarily a legal error to make a mistake when evaluating inconsistencies in the evidence or when drawing factual inferences from other facts.

A court will review a decision only on the ground of legal error. It will not set a decision aside simply because it prefers a different decision or factual finding. The Ombudsman, internal review officers, and some appeals tribunals and investigatory bodies can examine errors in fact finding as well as legal errors. For example, they can consider whether a decision is based on incorrect information or attaches too much or too little weight to particular evidence.

Comcare annotation

During an investigation under the OHS Act an investigator will collect information and evidence:

- concerning a breach or possible breach of the OHS Act or regulations,
- to ascertain whether the OHS Act and regulations are being complied with, or
- concerning an accident or dangerous occurrence.

(s41, OHS Act)

Relevant information will be collected informally or by using the coercive information-gathering powers in section 43 of the OHS Act.

The information gathered, and conclusions reached and any recommendations made by the investigator are set out in a report (s43, OHS Act). A report is not an 'administrative decision', however any issue of a improvement notice (s46, OHS Act) or prohibition notice (s47, OHS Act) does involve such a decision.

The report of an investigation under the OHS Act may result in a prosecution or civil enforcement proceedings for a breach of the OHS Act or regulations (s77 & Schedule 2, OHS Act).

B. FACTS NEEDED TO MAKE A DECISION

B1. General

A statutory power to make a decision usually depends on the existence of certain 'material facts'. For example, the material facts in a statutory power to grant a seniors concession to an applicant who is an Australian resident aged over 60 years and not in paid employment are the age, resident status and employment status of the applicant. The facts are material in the sense that the existence or non-existence of each one can affect the decision.

It is necessary to analyse legislation in order to determine what facts are material to the decision that is to be made. The legislation itself often sets out factual matters that must be considered—such as age, income and employment status. Otherwise, the material facts are implied by considering the scope and purpose of the legislation. Agency guidelines and manuals usually say what the agency takes to be the material facts for each type of decision.

As well as material facts, there are 'relevant facts'—facts affecting the assessment of the probability that a material fact exists. Relevant facts are identified by breaking down a material fact into sub-questions. For example, legislation might require a decision maker to determine whether a claimant has incurred a loss as a result of their own carelessness. To make a finding about that material fact, the decision maker needs to make findings about relevant facts such as the nature and circumstances of the event that caused the loss and the conduct of the claimant and other people involved. The factual findings should form a chain of reasoning that leads logically from relevant facts through material facts to the decision.

Once all material and relevant facts have been identified, the decision maker can distinguish between 'known facts' (facts that have already been established) and 'facts in issue' (facts about which it is necessary to make a finding on the basis of the evidence). Known facts are factual information that is accepted by the decision maker and by the person or people who will be directly affected by the decision. This might include, for example, personal particulars provided by an applicant on an application form that are accepted as correct or on which the applicant is given the benefit of the doubt. A fact in issue is one about which there is disagreement or insufficient evidence to satisfy the decision maker that the fact exists.

B2. Drawing inferences

Some facts can be logically inferred, or deduced, from other facts on the basis of strong probability, without the need for direct evidence. If, for example, the known facts are that a person worked in Ireland in 2005 and in Australia in 2006, it could be inferred that the person travelled to Australia at some time between those dates. Many gaps in direct evidence are filled by inferences.

An inference that might be adverse to a person who will be affected by a decision should first be put to that person, so that they have a chance to respond. If, for example, a decision maker infers from the evidence that a person caused loss or injury to another deliberately rather than accidentally, they should notify the person that they propose to draw the inference and give the person an opportunity to refute it. They can do this by asking them direct questions about their intent when they acted.

B3. Evidence

Evidence is not necessarily proof. It is information, documents and other material that can be used to demonstrate the existence of a fact or the truth of something. It can take many forms—information provided in an application form or email, a fingerprint, information provided orally by a person, and so on. It can also be the decision maker's own observations—for example, of a site, a demonstration, or someone's demeanour when making a statement or answering questions. Evidence is amenable to testing and evaluation and can be accepted or rejected when it comes to making findings.

Findings in relation to the facts in issue must be based on evidence that is relevant and logically capable of supporting the findings. They must not be based on guesswork, preconceptions, suspicion or questionable assumptions. This does not preclude a decision maker from taking account of 'notorious facts', which are part of ordinary experience or common knowledge—for example, that each person's handwriting is unique.

Evidence can be provided orally or in documentary form and includes electronic communications and data. When evidence is provided orally—as during an interview or telephone call—the decision maker should make a file note or written record of the interview at the time or soon afterwards, while the memory is fresh. The particulars recorded should be the name, position title and address of the person spoken to, the date, time and place of the conversation, and the main pieces of information provided.

For record-keeping purposes, it is a good idea to ask that the information provided be confirmed in writing or supported by documents. For example, if a person produces an original document as evidence, the decision maker should take a photocopy of it for their file and make a note that it is a true copy of the original. Evidence in the form of emails and electronic documents should be printed and kept on file.

Information provided by an applicant is evidence and may be accepted as establishing facts that are likely to be true or that are not material. In the interest of efficiency, agencies generally try to narrow the facts in issue and to limit their requirements for further evidence.

When it comes to what kind of evidence is regarded as sufficient to prove certain facts, agencies' practice varies. For example, one agency might accept a recent pay slip as proof of a person's income, whereas another might require additional evidence, such as an employer's group certificate or a notice of tax assessment. Requirements can also vary depending on the consequences of the decision, the risk of deception, and the difficulty of obtaining better evidence.

For most administrative purposes, a person may give evidence in the form of a statutory declaration, which is a solemn statement a person makes and declares to be true before a witness authorised under the Statutory Declarations Act 1959 (Cth) and the Statutory Declaration Regulations 1993 or similar state or territory legislation. A person who wilfully makes a false statement in a statutory declaration commits an offence that, under the Commonwealth legislation, is punishable by imprisonment. Some legislation requires that particular evidence be provided in this form.

Comcare annotation

> The particular legislative provision under which the decision is to be made (see Appendix A) may identify the facts that must be established before a claim can be accepted, an approval or licence can be granted or a power to collect information can be exercised. These facts are material facts. Where the legislative provision uses a defined term, the facts which establish that a circumstance or event comes within the definition are material facts.

For example:

> Whether a person is a scheme employee will be a material fact in relation to a decision made under the SRC Act or OHS Act in relation to the person.

> Because this turns on whether he or she is employed by the Commonwealth, a Commonwealth authority or licensed self-insurer, the identity and status of the employer are also material facts

> Known facts can include matters which are included in standard reference works, for example which day of the week a particular date fell on or whether that day was a public holiday in a particular locality.

> The Criminal Code makes it a criminal offence to knowingly or recklessly make a false or misleading statement in a claim for compensation under the SRC Act or Seafarers Act. The approved form for a claim requires the claimant to acknowledge this. It is also an offence to provide a false document.

C. OBTAINING EVIDENCE

C1. Responsibility for providing information

Some statutes oblige applicants to provide the information relevant to the making of a decision. For example, a statute might require an applicant to lodge an application in 'the prescribed form', meaning a form of application prescribed in the associated regulations. The prescribed form usually details the information the applicant must provide.

Unless the statute creates a specific duty, an applicant is not legally obliged to prove a fact or to provide information. Of course, if the applicant wants a favourable decision it is in their interest to provide the required information. Failure to provide it means the decision maker might be unable to make the findings of material fact that will support a favourable decision. Since the applicant is under a practical necessity, rather than a legal obligation, to provide information, it is unhelpful to refer to this as an 'onus (or burden) of proof'.

C2. Making inquiries

Administrative decision makers are generally entitled to investigate the facts before making their decision. They can, for example, take statements from witnesses, ask questions and obtain documents, although the extent to which they do this depends on the type of decision to be made. In some areas of administration decision makers decide on the basis of what is presented to them; in others they seek out information and, in doing so, might be assisted by other officers.

If administrators are expected to have an investigative role, they might be given coercive statutory powers—such as the power to enter and inspect premises, to take away records, and to require a person to answer questions and provide documents.

Unless legislation or court decisions provide otherwise, there is no general legal duty to conduct inquiries into a matter raised by an applicant or another party to the decision. Normally, it is up to the applicant to establish their case, which includes providing evidence in support.

If a decision maker is unwilling to investigate a fact it is useful to tell an unrepresented person what kind of evidence they could provide to substantiate their case. For example, they might ask the person to provide a medical report to confirm the reason for an absence or a receipt to confirm their ownership of specific goods.

In four cases the law recognises a limited duty to make inquiries:

- A decision maker should obtain evidence that is centrally relevant to their decision and readily available to them. For example, if a phone call or letter will resolve a question of fact about whether a person kept an appointment, failure to make the inquiry could be considered a 'manifestly unreasonable' failure that amounts to a legal error.
- A decision maker should investigate a fact if their power depends on the existence or non-existence of the fact. For example, if the decision maker has a statutory power to cancel a permit granted after a certain date they might need to investigate a party's claim that the permit was granted before that date.

> If the applicant is in some way disadvantaged in presenting their case—as a result of, say, language difficulties, youth or disability—there may be a duty to provide extra assistance when obtaining evidence.

> Legislation that empowers the decision maker to act on 'reasonable suspicion' might create an 'implied' duty of inquiry. For example, if the decision maker exercises a statutory power to detain or quarantine a person on reasonable suspicion that they have a communicable disease there is an implied duty to make inquiries into any matter that appears to contradict the facts supporting that suspicion.

Comcare annotation

> The SRC Act requires a person who claims compensation, or seeks approval or renewal of approval as a rehabilitation program provider, or seeks a licence as a self-insuring licensee to submit a claim or application on an approved form or document containing information prescribed by the legislation.

> The OHS(SS) Regulations similarly require a written application for various licences, and other regulatory notifications and approvals.

> Comcare has power:
  - to require a scheme employee who has notified an injury or made a compensation claim to undergo a medical examination by a Comcare nominated medical practitioner (s57, SRC Act)[1]
  - to require a scheme employee who has made a compensation claim to provide nominated information, including documents (s58, SRC Act)[2]
  - to require a scheme employer to provide nominated information, including documents (s71, SRC Act and s11, ARC Act).

> An Investigator under the OHS Act has power when conducting an investigation[3] to:–
  - enter and search a workplace (s42, OHS Act)
  - require a scheme employer, occupier of a workplace, scheme employee or contractor to answer questions and provide documents (s43, OHS Act)
  - take possession of plant, equipment and samples from a workplace for examination and testing (s44, OHS Act).

1 If the employee fails, without reasonable excuse, to undergo or cooperate in the medical examination his or her compensation entitlements are suspended until the medical examination has been undertaken.

2 If the employee fails to provide the information processing of his or her claim is deferred until the information is provided.

3. It is an offence against section 149.1 of the Criminal Code to obstruct an Investigator.

D. ASSESSING THE EVIDENCE

D1. General

An administrative decision maker is not bound by the rules of evidence that regulate the admission and evaluation of evidence by courts. Administrative decision making is subject to a different standard: findings of fact must be based on logically probative evidence—material that tends logically to prove the existence or non-existence of a fact. For example, rumour or speculation is not logically probative evidence because it does not tend rationally to prove what it asserts.

An administrative decision maker can receive most kinds of evidence, even if that evidence would not be admissible in a court. Some of the rules of evidence prevent courts receiving certain types of evidence on the ground that the evidence is inherently unreliable, that it would be unfair to admit the evidence, or that the evidence should be excluded for policy reasons because it was unlawfully or improperly obtained. Decision makers are not bound by those rules, but they do provide useful guidance when evaluating evidence. The considerations of fairness and reliability on which the rules are based are also relevant in administrative fact finding.

D2. Hearsay and opinion evidence

One type of evidence that can be received is hearsay evidence—a report by one person of what another person has said. For example, if an applicant's neighbour says the applicant told her he was working, this is hearsay evidence that the applicant was working. In evaluating hearsay evidence, the decision maker should take into account that such evidence is generally regarded as less reliable than evidence given by someone who has first-hand knowledge of the facts alleged.

Another example of where the rules of evidence can provide guidance is in the evaluation of opinion evidence. In a court a non-expert witness is not permitted to give evidence of their opinion on expert matters. As an administrator, the decision maker is not precluded from considering a person's non-expert opinion about, say, the value of their land, but the decision maker might decide to accord that opinion less weight than the expert opinion of a qualified valuer.

D3. Natural justice and fact finding

Administrators are not bound by the rules of evidence, but in many cases they are bound to observe the requirements of natural justice, or 'procedural fairness'. Most decisions that directly affect the interests of individuals and corporations are subject to natural justice, although the requirements can be modified by statute.

Natural justice requires that a person whose interests might be adversely affected by a decision be notified in advance that a decision is to be made and be given an opportunity to respond. In particular, the person must be given a chance to rebut any evidence or information (including factual information) that is adverse to their case or prejudicial to them personally. It makes no difference whether another party provided the evidence or information or it was obtained as a result of the decision maker's own inquiries.

Natural justice does not require that a person be kept informed while inquiries are continuing if doing so would undermine the decision maker's access to further evidence. Disclosure can be deferred until the inquiries are complete. The affected person must, however, be given adequate time to comment on the evidence obtained before findings of fact are made.

When putting adverse evidence to an affected person or witness, it might be necessary for the decision maker to probe their response by asking further questions. The decision maker should take care to avoid doing this in a way that gives the appearance of prejudgment or bias—for example, by aggressive questioning, expressions of impatience or gestures of disbelief. It is generally preferable to use questions that begin with words such as 'why', 'when', 'how' and 'did you', rather than questions in the form of a proposition or statement. For example, 'Did you sign this document?' is preferable to 'You signed this document, didn't you?'

Comcare annotation

See annotations to section D of Guide 2.

E. A CONFLICT IN EVIDENCE

E1. General

Evidence should be analysed closely and evaluated to determine whether there is any conflict in relation to a material fact. Evidence is not all of equal weight. Assessment of the weight of evidence involves the application of logic, commonsense and experience.

E2. The standard of proof

Whether evidence is sufficient to prove a fact must be determined in accordance with a standard. Courts apply two standards of proof—the criminal standard and the civil standard. In criminal proceedings before a court the offence charged must be proved 'beyond reasonable doubt'. In civil proceedings a fact must be proved 'on the balance of probabilities'; a fact is proved to that standard if the court is satisfied it is more likely than not that the fact is true.

Generally, it is the civil standard that applies in administrative fact finding. There is, however, an important qualification: in court proceedings there are usually two parties who can put forward conflicting evidence, and the court must decide which facts are more likely than not to be true. In administrative decision making the decision maker is responsible for determining all material questions of fact and basing each finding of fact on logically probative evidence. The question to be decided is whether, on the basis of the logically probative evidence, the decision maker is reasonably satisfied that a particular fact is more likely than not to be true.

If a fact in issue involves serious wrongdoing, is inherently unlikely or has grave consequences, better evidence might be required to establish the fact. For example, it would be unsound to make a finding based solely on uncorroborated hearsay evidence that a person forged a document.

A few statutes stipulate special standards that cut across the normal categories. An example is military compensation legislation, which provides that a claim for an injury or disease related to a member's service must be accepted if a reasonable hypothesis connecting the injury or disease to the service exists and cannot be excluded beyond reasonable doubt.

E3. Evenly balanced evidence

In some cases the evidence may be too evenly balanced to support a definite finding of fact. In court proceedings this situation is resolved by rules relating to the onus of proof, which determine who must prove a fact. One of the parties—usually the applicant—has an obligation to prove the material facts on which their case is based. That party bears the risk that the evidence could be insufficient. For example, if A sues B for a debt, A must prove that the sum was advanced to B as a loan. If B denies there was a loan and A cannot prove it, A loses the case.

As a general rule, in administrative proceedings nobody bears an onus of proof in that sense. If the evidence is inconclusive, the legislation should be analysed to see what question must be decided. For example, if the question is whether the applicant meets the statutory requirements for receiving a particular benefit, the benefit can be granted only if the evidence allows the decision maker to be reasonably satisfied that the applicant qualifies. If the decision maker is not so satisfied they must refuse the application.

Although there is no general onus of proof, some statutes impose on a person a duty to prove a specific fact. For example, the Freedom of Information Act 1982 (Cth) provides that a Minister or an agency that has refused a request for access to a document generally has the onus of establishing that the refusal was justified in proceedings for review of the decision by the Administrative Appeals Tribunal.

An onus of proof may also be inferred from the nature of the power being exercised. If a breach of discipline is alleged, for example, the onus of proving the breach rests with the person making the allegation.

E4. Expert evidence

In some areas of public administration it is common for affected parties to submit expert evidence—such as a property valuation or a report from a medical consultant—in support of their case. A decision maker is not bound to accept this evidence, even if there is no other expert evidence before them.

Expert evidence usually consists of a factual component and opinion evidence. The factual component can be evaluated by examining the adequacy of the expert's research and inquiry and the reasonableness of the inferences and conclusions drawn. The opinion component can be evaluated by, for example, considering the factual basis for the opinion, the expert's qualifications and area of expertise, and whether the expert seems impartial and objective.

For example, if medical experts disagree about the diagnosis of a person's illness, the decision maker might prefer the opinion evidence of the expert who, in the decision maker's view, conducted more thorough tests and examinations, was better informed about the patient's medical history, or was better qualified in that medical speciality. Provided the decision maker does not rely on particular information without first disclosing it to the affected person, the decision maker may evaluate the evidence in the light of their own professional knowledge.

Although a decision maker may evaluate expert evidence, they should be wary of relying on their own non-expert opinion in a matter that requires expert judgment. For example, if a medical practitioner gives a diagnosis of an applicant's illness on the basis of tests the practitioner conducted, it would be unsound for a decision maker to prefer a diagnosis they made on the basis of observing the applicant.

Comcare annotation

The SRC Act provides that in particular circumstances a scheme employee's employment is taken to have contributed to a significant degree to the disease suffered by the employee, unless it is established the employment did not contribute to the disease (s7). This relates to:

> specified diseases in specified types of employment (s7(1))

> diseases with a significantly higher incidence in persons in a particular type of employment (s7(2)).

It also provides that a disease is taken to be sustained on the day when the employee first sought medical treatment, or the disease resulted in death, or first resulted in an incapacity for work or impairment; whichever happens first (s7(4)).

The SRC Act requires a compensation claim (other than a claim solely in respect of medical treatment expenses) to be supported by a certificate from a legally qualified medical practitioner (s54(2)(b)). Given that requirement and the power to require the claimant to be medically examined (s57), it is highly unlikely that a decision made without any expert medical evidence or contrary to the medical evidence provided by the claimant without obtaining contrary expert medical evidence would be affirmed by the AAT as the correct or preferable decision.

An investigator conducting an investigation under the OHS Act may seek expert advice and assistance.

F. HONESTY AND TRUTH

When there are conflicting versions of a factual matter it does not necessarily follow that someone is lying: it is possible for people to perceive and remember events differently. A finding that a person is untruthful or not credible is potentially damaging to them and should be avoided when possible. It is generally better to focus on where the truth lies, rather than on who is to be believed.

A decision maker is entitled to take account of a person's demeanour when they make a statement or answer questions, but there is no sure way of reading non-verbal cues such as facial expression, body language and tone of voice. For example, a person who avoids eye contact is not necessarily lying: the behaviour could stem from a number of different causes—such as a physical impairment or a cultural belief that it is disrespectful to return someone's gaze. Another potentially misleading cue can arise when a person is hesitant or appears uncomfortable when making a statement or answering questions: the nervousness might be due to a factor other than dishonesty.

If a person has lied about one thing it does not necessarily follow that everything they say should be disbelieved. A decision maker must consider why the person lied and whether the same motive might cause them to lie about something else. For example, a person might lie about certain things in order to avoid a loss of face but be truthful about other things that do not arouse the same feelings.

A decision maker should take care when asking apparently irrelevant questions simply to test a person's reliability as a witness. For example, a person who claims to have witnessed an event or conversation might be asked to describe the weather at the time or the room in which the conversation took place. Their inability to answer these questions correctly might reveal little about the reliability of their testimony in relation to the relevant matters.

A better way of evaluating a witness's statement is to examine its consistency with other evidence. A statement is more likely to be true if it accords with known facts, the documentary evidence, or other evidence from a source independent of the witness. The decision maker should also note whether the witness's statement is internally consistent and whether it accords with what the witness has said on other occasions.

The best way of probing inconsistencies is to ask questions. If a decision maker has evidence that contradicts the witness they should put the substance of that evidence to the witness—or, if that is not possible, to the affected person who is relying on the witness's statement—and offer them an opportunity to explain.

If a witness varies their account of the facts in response to questions, the decision maker needs to assess the reasons for the change. Inability to maintain a coherent and consistent account might suggest that the witness is prevaricating. On the other hand, it might be concluded that the witness has an honest but flawed memory of the events.

If inconsistencies emerge this does not necessarily mean that the witness's statement is false. There could be another explanation. If the inconsistencies are unexplained, it might be useful if the decision maker prepares a summary of the conflicting evidence and seeks the opinion of a more senior officer.

G. MAKING FINDINGS OF FACT

Accounting for a decision, including the findings of fact, is an important part of a decision maker's function. Full and accurate records should be kept—including copies of documentary evidence, notes of inquiries, findings of fact, and reasoning. The decision maker might not need to give full details of fact finding when notifying the affected person of their decision, but good record keeping will help with providing a fuller justification if challenged.

Agency records can be scrutinised by the Ombudsman, other bodies such as the Privacy Commissioner and the Human Rights and Equal Opportunity Commission, agency review officers, courts, and appeals tribunals. People affected by a decision can gain access to the records under the Freedom of Information Act or upon appeal.

The records should reveal fair, rational and professional administration.

The record of a decision must include the findings of material fact, the evidence on which the findings are based, and the evaluation of the evidence. Not every fact an affected person puts in issue will be a material question of fact on which a finding must be made. It might, however, be desirable to resolve a question of fact that an affected person considers to be of central importance. Otherwise, the person might feel aggrieved that their submissions appear to have been ignored.

The findings in relation to material facts are the crucial points on which a decision maker's decision turns. They should make sure that natural justice has been observed in connection with the findings and that the findings are well supported by evidence and reasoning. The legislation should be checked to ensure that all relevant matters, and no irrelevant ones, have been considered.

If there is a conflict in the evidence, the decision maker should explain why they prefer one account over another. It is unwise simply to say, 'I prefer the evidence of person X' or 'I disbelieved person Y'. Instead, they might say, for example, that the account provided by person X was supported by particular documentary evidence or that person Y had not been consistent in their account. The reasons for the decision should refer specifically to the particular items of evidence on which the findings are based.

GUIDE 4 REASONS

A. INTRODUCTION

Providing a statement of the reasons, evidence and facts for a decision is a fundamental part of administrative review.

A statement of reasons affords a person affected by a decision the opportunity to have the decision explained. The person can then decide whether to exercise their rights of review and appeal, and, if they decide to do so, they are then able to act in an informed manner.

Describing the reasoning process can also help decision makers think more carefully about their task and be more careful in their decision making. Further, the preparation of statements of reasons can help agencies identify relevant principles and create standards to guide future decision making.

Bodies that review government decisions—courts, tribunals, ombudsmen and other oversight bodies—pay close attention to reasons for decisions when deciding whether a decision should be set aside, a new decision made, or other remedial action taken. A decision maker is likely to face criticism when the reasons for a decision are deficient or do not provide a full or accurate account of why the decision was made.

Providing reasons for a decision should not be treated as an obligation that is separate from other principles of good decision making. It is good administrative practice to make a note of every decision at the time the decision is made. This makes it easier to provide a statement of reasons if asked to do so. A documentary record of the decision-making process also helps others understand when, why and by whom a decision was made.

This guide is adapted from two earlier Administrative Review Council publications –

- *Practical Guidelines for Preparing Statements of Reasons*
- *Commentary on the Practical Guidelines.*

The commentary contains more detail about the legislation and case law relating to the obligation to provide reasons. Both publications are available on the Council's website http://www.law.gov.au/arc

B. THE OBLIGATION TO PROVIDE REASONS

There is no general common law obligation to provide the reasons for a decision. There are, however, many statutes that impose a duty to give reasons:

- Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that a statement of reasons must be given on request to a person who has a right to apply for merits review of a decision by the Administrative Appeals Tribunal.
- Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides that a statement of reasons must be given on request to a person who has a right to apply for judicial review of a decision by the Federal Court or the Federal Magistrates Court.

Comparable state and territory statutes that confer rights of appeal and review contain a similar requirement to provide a statement of reasons.

The legislation that confers power to make a decision might require that reasons be provided for a decision either when notifying a person of a decision or if the person asks that reasons be provided.

There are two other circumstances in which an agency can also be expected to provide reasons or an explanation for a decision, even though it may have no legal obligation to do so:

- Section 15 of the *Ombudsman Act 1976* (Cth) provides that, if the Ombudsman considers reasons (or better reasons) should have been given by an agency in relation to action it has taken, the Ombudsman can make a report recommending that the omission be remedied by the agency.
- Government service charters commonly state a commitment by agencies to explain or provide reasons for decisions. It is important that agencies honour that commitment.

Those legal obligations and other expectations generally oblige agencies to provide reasons or an explanation for administrative action that directly affects the rights and interests of individuals and organisations. This aligns with other important principles of administrative law that require accountability and transparency in decision making.

Although the obligation to provide reasons or an explanation should be viewed as a general aspect of administrative law and public administration, this guide focuses on the legal duty imposed by the Administrative Appeals Tribunal Act and the Administrative Decisions (Judicial Review) Act. The principles described here are nevertheless more widely relevant to the general obligation of government agencies – Commonwealth, state and territory – to provide reasons for decisions.

An agency cannot impose a charge for providing a statement of reasons.

Comcare annotation

- The SRC Act requires decisions on claims that are subject to statutory internal review (reconsideration) to be notified in writing to the claimant together with a statement of reasons and notice of review rights (s61). These are decisions made under the provisions listed in Part 1 of **Appendix C**.

  NOTE: Whilst there is no explicit requirement to also notify the scheme employer it is good practice to do so as the decision may have an effect on premiums payable by the scheme employer or rehabilitation arrangements managed by the scheme employer.

  The SRC Act also requires any decisions made on reconsideration (reviewable decisions) to be similarly notified in writing (s63).

- An investigator who conducts an investigation under the OHS Act must prepare a written report for the SRCC setting out the investigator's conclusions, reasons for those conclusions and any recommendations (s53, OHS Act). The conclusions must relate to the particular matter that was investigated. The report is an expression of the investigators opinion and not an 'administrative decision'. A copy must be given to the relevant Scheme employer, and may also be given to other relevant duty holders.

C. SCOPE OF THE OBLIGATION TO PROVIDE REASONS UNDER THE AAT ACT AND ADJR ACT

C1. General

The obligation to provide reasons is imposed in similar terms by the Administrative Appeals Tribunal Act and the Administrative Decisions (Judicial Review) Act, both of which also apply to many of the same decisions. There are, however, some differences in the coverage and terms of the Acts.

The AAT Act requires that a written statement of reasons be provided on request to a person whose interests are affected by a decision that is reviewable by the Administrative Appeals Tribunal. A decision is reviewable by the tribunal only if the Act authorising the decision provides for the tribunal's review. More than 400 Acts provide for the tribunal's review of some, but not necessarily all, decisions made under those Acts. Examples are Acts relating to taxation, social security, veterans' benefits, freedom of information and privacy. Decisions reviewable by the Security Appeals Division of the tribunal are exempted from the requirement to provide reasons.

Section 37(1) of the AAT Act requires that a statement of reasons be lodged with the tribunal within 28 days of a person making an application to the tribunal for review of a decision. In short, a statement must be prepared even if the person has not previously asked for one.

The ADJR Act requires that a written statement of reasons be provided on request to a person aggrieved by an administrative decision that is reviewable by the Federal Court or the Federal Magistrates Court under the Act. The Act applies to most, but not all, administrative decisions made under Commonwealth legislation. The right to seek review—and hence the right to request a statement of reasons—applies only to decisions that are final or operative, not merely to administrative steps taken towards reaching a decision.

Two schedules to the ADJR Act exclude some categories of decisions from the Act's coverage (Schedule 1) and from the requirement to provide a statement of reasons on request (Schedule 2). Examples of decisions that are excluded by Schedule 2 are decisions relating to the administration of criminal justice, to the settlement of industrial disputes, to the redress of grievances for members of the Defence Force, and to personnel management and appointment and promotion decisions in the Australian Public Service. Some decisions made under the Migration Act 1958 (Cth) are also excluded. In many of these cases there are statutory requirements or procedures in existence to ensure that reasons are provided.

In numerous areas of government, decisions are now made either by or with the assistance of a computer program. A decision of this type is nevertheless subject to the obligation to provide a statement of reasons if the AAT Act or the ADJR Act applies to the decision.

C2. People entitled to reasons

Under the ADJR Act a person 'aggrieved' by a decision or conduct can request a statement of reasons; under the AAT Act a person whose 'interests are affected' by a decision can request a statement of reasons. Both expressions are similar in coverage. In essence, the right to seek reasons belongs to any person directly and individually affected by a decision—for example, a person refused a benefit or visa, a company refused a licence, or an organisation refused a grant. The right to seek reasons can also extend more broadly. It can be claimed by any individual or organisation that has interests that are specially affected by a decision—that is, has interests greater than an ordinary member of the public. The interest affected can be either a material interest, such as property or finance, or a non-material interest, such as an Indigenous Australian's spiritual link to country.

C3. The procedure for requesting and providing reasons

Both the AAT Act and the ADJR Act require that a request for reasons be made in writing. The request need not be formal, however, and a person may make it by letter, fax or email—but not by telephone. The request need not specify that it is being made under the AAT Act or the ADJR Act, but it must be more than a request for information about the decision.

Time limits apply. Both Acts require that a request for reasons be made within 28 days of the person receiving written notice of a decision. If they are not notified in writing the person must request reasons within a reasonable time of the decision.

The decision maker is required to provide the statement of reasons as soon as practicable but no later than 28 days after receiving the request.

Those time limits mean it is important that a decision maker knows or calculates the date on which a person was notified of a decision or received a statement of reasons. There are rules governing this in ss 28A, 29 and 36 of the Acts Interpretation Act 1901 (Cth), which supplement the provisions of the AAT Act and the ADJR Act. The position can be summarised as follows.

> A written notice of a decision can be handed to someone personally or by leaving it at or posting it to their place of residence or business, as last known to the agency. A notice to a corporation can be given by leaving the notice at or posting it to the head office, the registered office or a principal office of the corporation.

> If a notice is posted it is deemed to have been received by the time in which a letter would be delivered in the ordinary course of post. Postal delivery times are a question of fact and can vary with the location. It is open to a person to prove that the notice was in fact received later than the day it was deemed to have been received.

> When the 28-day period is being calculated, the day on which the notice was given (or deemed to have been given) is excluded. For example, if a notice was posted on 30 January and is deemed to have been received the following day in the ordinary course of post, the first day of the 28-day period is 1 February and the last day is 28 February. If 28 February is a Saturday, Sunday or public or bank holiday the 28-day period ends on the next working day.

Subject to complying with those time limits, a request for reasons can be made at any time, either before or after proceedings have begun under the AAT Act or the ADJR Act.

C4. Refusing to provide a statement of reasons

There are a number of grounds on which a decision maker can refuse to provide a statement of reasons:

- The request for reasons does not relate to a decision to which the ADJR Act or the AAT Act applies.
- The person requesting reasons is not a person aggrieved (the ADJR Act) or whose interests are affected (the AAT Act) by the decision.
- The request is not in writing.
- The request is out of time.
- Another statute provides that the right to reasons is not applicable—for example, s 14ZZB of the Taxation Administration Act 1953 (Cth).

Under the AAT Act the person requesting reasons must be notified of the refusal on one or more of these grounds within 28 days of the request for reasons being received.

Under the ADJR Act the time for notification depends on whether:

- the request is made out of time, in which case it is 14 days
- the decision maker is of the opinion that the person who made the request is not entitled to make the request, in which case it is 28 days.

A decision maker can choose to provide a statement of reasons even if there is no legal obligation to do so. Generally, however, it is good administrative practice not to refuse reasons on the ground that the request was received out of time—especially if the delay is minor.

C5. Enforcing the obligation to provide a statement of reasons

Both the AAT Act and the ADJR Act provide that a person may begin proceedings to challenge either a refusal to provide reasons or the adequacy of a statement. A ruling can be made by the Administrative Appeals Tribunal (under the AAT Act) or the Federal Magistrates Court or the Federal Court (under the ADJR Act) requiring that a statement be given to the person or that further and better particulars be provided. A ruling of the tribunal must be complied with as soon as possible and not later than 28 days from the date the tribunal makes the ruling. A ruling of a court must be complied with in the time specified in the court's order.

C6. Other legislation requiring that reasons be given

Many other Acts, including some state and territory Acts, require—in terms similar to those of the AAT Act and the ADJR Act—that a person be given the reasons for a decision made under the Act. An Act might contain special rules that differ from those in the AAT Act and the ADJR Act. An example is s 26 of the Freedom of Information Act 1982 (Cth), which requires that every decision to refuse access to a document be accompanied by a statement of reasons given to the applicant. It is not necessary for the applicant to ask for the reasons.

If an Act requiring that reasons be given does not set out what the statement must include, s 25D of the Acts Interpretation Act provides that the statement must include the findings on material questions of fact, the evidence to support those findings, and the reasons for the decision.

Comcare annotation

- The ADJR Act does not apply to a decision by Comcare or an investigator to prosecute an offence against the OHS Act or OHS(SS) Regulations – see s3 and item (xa) of Schedule 1 to the ADJR Act. However judicial review may still be available in the High Court under section 75(v) of the Constitution and Federal Court under section 39B of the *Judiciary Act 1903*.
- The ADJR Act does not require a statement of reasons to be provided for:
  - a decision by Comcare regarding the appointment of an Investigator
  - a decision by Comcare or an Investigator in relation to an
    - investigation
    - criminal prosecution
    - civil proceedings for declarations of contravention, pecuniary penalty order etc.

  see s13 and items (e)(i)and (ii) and (f)(i), (ii) and (iv) of Schedule 3 to the ADJR Act.
- The SRC Act specifies the persons entitled to make applications to the AAT in relation to claim management decisions (s64). Nobody outside this specified list is entitled to reasons under the AAT Act or SRC Act.
- There is no equivalent restriction in relation to persons who can apply to the AAT in relation to rehabilitation program provider approval and renewal of approval decisions.
- The SRC Act provides a 60 day period for applications to the AAT in respect of claim management decisions (s65(4)). The standard 28 day period provided by the AAT Act applies to applications to the AAT in relation to rehabilitation provider approvals and renewals and decisions under the OHS(SS) Regulations.
- The SRC Act requires claim management decisions that are subject to statutory internal review (reconsideration) to be notified in writing to the claimant and employer with reasons and review rights (s61). These are decisions made under the provisions listed in Part 1 of Appendix C. Decisions made on reconsideration (reviewable decisions) are similarly required to be notified in writing (s63).

D. THE CONTENT OF A STATEMENT OF REASONS

D1. General

Both the ADJR Act and the AAT Act provide that a statement of reasons must contain the following:

- the decision
- the findings on material facts
- the evidence or other material on which those findings are based
- the reasons for the decision.

It is advisable to use those four elements as headings when developing the statement of reasons.

D2. The decision

A statement of reasons should refer to the legislation that authorised the decision. It is better to quote, rather than summarise, the relevant statutory provisions and then note which aspects need to be resolved or answered, as well as the decision reached on those matters.

Paraphrasing the legislation is unwise because the meaning might be inadvertently changed. For example, if the decision to be made is whether an applicant for a pension or benefit is living in a 'marriage-like relationship' it would be erroneous to say that the question is whether the person is in a 'de facto relationship'.

The name and position of the decision maker should be made clear, as well as that person's legal authority to make the decision. If the person is a delegate this too should be noted.

D3. The findings on material fact

A statement of reasons must contain the findings on all material facts. If a finding is not set out a court might conclude that it was not taken into account and that the decision is invalid as a consequence.

A material fact is a fact that can affect the outcome of a decision. Consequently, the findings on material facts are those that support the decision, based on the consideration of all relevant evidence.

The legislation might expressly provide that a fact is material—for example, by making the exercise of power depend on its existence or non-existence. Material facts can also be implied by the subject matter or the scope or purpose of the legislation.

A finding of fact will sometimes be established directly by the evidence—for example, a person's age or nationality. At other times a material fact might be inferred from other facts; for example, a finding that a person was in a 'marriage-like relationship' could be inferred from things such as living arrangements and personal relationships. When a finding of fact is inferred, the statement should set out the primary facts and the process of inference.

D4. The evidence on which the findings were based

A statement of reasons must refer to the evidence on which each material finding of fact is based. It is not sufficient simply to list all the documents that were considered in reaching the decision. The statement should identify the evidence that was considered relevant, credible and significant in relation to each material finding of fact.

When referring to evidence it is not necessary to quote it or to provide a copy, so long as the evidence can be readily identified. The evidence might be identified by stating its source or nature, whichever is more intelligible and informative—for example, 'the medical report from Dr X dated 20 June'.

The statement should demonstrate that each finding of fact is rationally based on evidence. If the evidence was conflicting, the statement should say which evidence was preferred and why. For further information on how to account for findings, see Guide 3 in this series, Decision Making: evidence, facts and findings.

D5. The reasons for the decision

The actual reasons relied upon by the decision maker at the time of making the decision must be stated. Every decision should be amenable to logical explanation. The statement must detail all steps in the reasoning process that led to the decision, linking the facts to the decision. The statement should enable a reader to understand exactly how the decision was reached; they should not have to guess at any gaps.

The statement must go further than merely expressing conclusions: it must give reasons for those conclusions. This might necessitate mention of the legislation, relevant principles of case law, and policy statements or guidelines or other agency practices that were taken into account. The criteria and other factors considered in making the decision and why material facts were accepted should be noted.

D6. Appeal rights

A statement should also include appeal rights. In particular, details of any right to seek internal review or review by an administrative tribunal (such as the Administrative Appeals Tribunal) should be provided. Time limits for seeking review should also be given.

E. THE FORMAT AND STYLE OF A STATEMENT OF REASONS

E1. General

There is no blueprint for preparing a statement of reasons. Its format, style and length will vary according to the nature of the decision and the intended recipient.

E2. Style and language

A statement of reasons is meant to inform: it should be written in a style that makes it intelligible to the person requesting it. Use plain English, keep sentences short and to the point, avoid generalities and vague terms, and avoid technical terms and abbreviations if they are not likely to be readily understood by the person concerned.

Develop a logical structure, and use headings to guide the way. It is not necessary to have a statement translated if it is for a person whose native language is not English. Extra care might nevertheless be needed to ensure that the reasons, and any appeal rights, are clearly explained.

E3. Length

The length of a statement will depend on the nature, importance and complexity of the decision. The statement should be no longer than is necessary to comply with the legal obligation to prepare it. For a simple decision a page or two might suffice; a decision with complex facts or multiple considerations might need to be longer.

E4. The reasons

It is important to be mindful that both the AAT Act and the ADJR Act oblige the decision maker to provide the statement of reasons. The decision maker is legally responsible for the statement. A draft statement can be prepared by someone else, but the draft should not be adopted uncritically by the decision maker.

An agency can provide standard wording to incorporate in a statement of reasons—for example, setting out the legislative provisions, the relevant policy or guidelines, and general questions to be determined for a decision of the kind in question. A template like this can help the decision maker express and respond to all relevant legal and policy criteria and explain how a discretionary power was exercised. The use of standard wording nevertheless runs the risk of concealing either the real reasons for the decision or the consideration given to factors and evidence relevant to the case at hand.

Where a decision is made or assisted by a computer program the statement of reasons might equally be made or assisted by an automated process. The decision maker should check the statement carefully to ensure that it complies with the requirements for statements of reasons.

E5. Record keeping

At the time of making a decision it is good administrative practice to prepare a record that can form the basis for a statement of reasons if one is requested. In particular, it is prudent to make a contemporaneous note of the assessment of evidence, findings of fact and reasons.

F. SPECIAL CONSIDERATIONS

F1. Recommendations and reports

A statement of reasons should refer to any recommendations that were before the decision maker and relevant parts of reports that were considered in making the decision. If the decision was made by adopting the recommendation or report, this should be explained and the reasons for doing so given. In order to provide an accurate record of the reasoning process, it might also be necessary to note any recommendation or part of a report that was rejected and the reasons for this. If information additional to that given in the report was considered, that information should also be referred to.

If adopting a report, the decision maker should be careful to ensure that the report contains sufficient information to satisfy the requirements for a statement of reasons—namely, the findings on material questions of fact, a reference to the evidence or other material to support those findings, and the reasons for the decision.

F2. Submissions

A statement of reasons should also refer to any submission or evidence presented by a person and considered in making the decision. If a submission from a person is not referred to in the statement there is a risk that a court will conclude it was a relevant matter that was not considered.

F3. Confidential information

The ADJR Act contains special rules in relation to references to confidential information in a statement of reasons. A statement is not required to disclose information about the personal or business affairs of someone other than the person making the request in the following circumstances:

- The information was supplied in confidence.
- Publication of the information would reveal a trade secret.
- The information was provided in compliance with a duty imposed by legislation.
- Publication of the information would breach a statutory duty to keep the information confidential.

There is no obligation to provide a statement of reasons if the statement would be false or misleading without the confidential information. If confidential information is excluded from a statement or a statement is not provided, the person requesting the statement must be notified and given reasons.

In the AAT Act there are no similar rules relating to confidential information. Once proceedings have begun before the Administrative Appeals Tribunal, however, the tribunal has power under ss 35(2) and 37 of the Act to prohibit or restrict the disclosure of confidential material. It is therefore open to a decision maker at that stage to ask the tribunal to restrict the disclosure of confidential information included in a statement of reasons.

F4. Private personal information

The Information Privacy Principles contained in the Privacy Act 1988 (Cth) can be relevant in preparing a statement of reasons. Principle 2 provides that an agency is not to disclose personal information without the consent of the person concerned. 'Personal information' is defined in s 6 of the Act as information or an opinion about an individual whose identity is apparent or can reasonably be ascertained.

As a general rule, personal information collected for one purpose cannot be used or disclosed for another purpose without the consent of the person it relates to. Personal information may, however, be disclosed if disclosure is required or authorised by another law or for the purpose of the preparation or conduct of proceedings before a court or tribunal.

F5. The Attorney-General's public interest certificate

Any matter in relation to which the Attorney-General has signed a public interest certificate under s 14(1) of the ADJR Act or s 28(2) of the AAT Act should be excluded from a statement of reasons. Such cases are, however, rare.

A statement of reasons does not have to be provided if it would be false or misleading without the information covered by a public interest certificate. The person requesting the reasons must be told why a statement cannot be provided or why it omits relevant information.

GUIDE 5 ACCOUNTABILITY

A. 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.

B. APPEAL AND REVIEW BODIES

B1. General

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.

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.

B2. 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.

B3. 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.

B4. 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.

B5. 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.

Comcare annotation

> Part 1 of Appendix C sets out the decisions for which a formal internal merits review is available.

> Part 2 of Appendix C sets out the decisions for which a merits review by the AAT is available.

> Part 3 of Appendix C sets out the decisions for which a merits review by the SRCC is available.

> Part 4 of Appendix C sets out the decisions for which a merits review by the AIRC is available.

> The decisions subject to merits review in the AAT relate to claims and rehabilitation arrangements under the SRC Act affecting claimants and scheme employers and OHS regulatory decisions affecting scheme employers.

> The decisions subject to merits review by the SRCC relate to premiums and regulatory contributions payable by scheme employers.

> The decisions subject to merits review by the AIRC relate to powers exercised by investigators conducting investigations of workplaces under the OHS Act. There is no right of merits review in relation to a report of an investigation prepared under section 53 of the OHS Act.

> Additional information about the decisions is provided in Appendix A, but only those decisions also listed in Appendix C are subject to merits review.

> Apart from these review mechanisms persons can make a complaint in writing to Comcare's Complaints Handling Team for investigation and response. Complaints should be forwarded to:

Complaints Handling Team
Comcare
GPO Box 9905
CANBERRA ACT 2601

> The ADJR Act does not:
  – apply to a decision by Comcare or an investigator to prosecute an offence against the OHS Act or OHS(SS) Regulations, nor
  – require a statement of reasons to be provided for decisions -
    > by Comcare regarding the appointment of an investigator,
    > by an investigator relating to the conduct of an investigation, or
    > by Comcare or an investigator in relation to criminal prosecutions or civil proceedings for a declaration of contravention, pecuniary penalty order or injunction under the OHS Act.

  See s3 and Schedules 1 and 3 of the ADJR Act.

  However judicial review may still be available in the High Court under section 75(v) of the Constitution and in the Federal Court under section 39B of the *Judiciary Act 1903*.

> The OHS Act does require an investigator to state the reasons for issuing a prohibition notice (s46) or improvement notice (s47) and to give the SRCC a written report of an investigation (s53), but neither is a statement of reasons for the purposes of the ADJR Act.

C. APPEAL AND REVIEW PROCESSES

C1. General

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.

C2. 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.

C3. 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.

Comcare annotation

> Comcare may conduct an own-motion internal review (reconsideration) and affirm, revoke or vary a decision that a claimant has appealed to the AAT (s62(1), SRC Act).
> That power does not apply to decisions relating to the approval or renewal of approval of rehabilitation program providers or decisions under the OHS(SS) Regulations.

D. WHEN A DECISION CAN BE CHANGED

D1. General

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.

D2. 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.

D3. 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.

D4. 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.

E. 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.

F. IMPLICATIONS FOR FUTURE CASES

F1. 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.

F2. 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.

F3. 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.

Comcare annotation

As an administrative rather than judicial decision, an AAT decision only binds Comcare or the SRCC in relation to the particular matter, it does not bind them in relation to similar future matters. However, as judicial decisions, any court decision on appeal from the AAT binds the AAT and Comcare or the SRCC in that matter and, unless and until it is overruled by a higher court, in any future similar matters. An appeal from the AAT can only be on a question of law (s44, AAT Act).

APPENDIX A
RELEVANT LEGISLATION

PART 1. SAFETY, REHABILITATION AND COMPENSATION ACT 1988 (SRC ACT)

Section	Authority	Power
8	Comcare	determine scheme employee's pre-injury normal weekly earnings and subsequent adjustments
9	Comcare	determine relevant period for determining normal weekly earnings
14	Comcare	determine whether to accept or reject liability to pay compensation in accordance with Act in respect of an injury
15	Comcare	determine compensation for employment related damage to or loss of property used by uninjured scheme employee
16(1)	Comcare	determine compensation for respect of reasonably obtained medical treatment of an injury to a scheme employee
16(6)	Comcare	determine compensation for travel expenses in respect of reasonably obtained medical treatment of injury to a scheme employee
17(3)	Comcare	determine compensation to dependants (at least one of whom is wholly dependent) of scheme employee who died as a result of an injury
17(4)	Comcare	determine compensation to dependants (none of whom are wholly dependent) of a scheme employee who died as a result of a injury
17(5)	Comcare	determine compensation in respect for prescribed child(ren) of a scheme employee who died as a result of an injury
18	Comcare	determine compensation for funeral expenses where injury to a scheme employee results in death
19(2)	Comcare	determine periodic compensation during maximum rate compensation weeks for incapacity for work resulting from an injury to a scheme employee
19(3)	Comcare	determine periodic compensation during weeks that are not a maximum rate compensation weeks for incapacity for work resulting from an injury to a scheme employee
20	Comcare	determine periodic compensation for incapacity for work resulting from an injury where scheme employee is in receipt of a scheme employer funded superannuation pension
21	Comcare	determine periodic compensation in respect of incapacity for work resulting from compensable injury where scheme employee in receipt of scheme employer funded superannuation lump sum
21A	Comcare	determine periodic compensation in respect of incapacity for work resulting from compensable injury where scheme employee in receipt of employer funded superannuation pension and lump sum

Section	Authority	Power
22	Comcare	determine periodic compensation in respect of incapacity for work where scheme employee maintained as a patient in a hospital, nursing home or similar place for continuous period of not less than one year
24	Comcare	Determine lump sum compensation in respect of permanent impairment resulting from injury to scheme employee
25	Comcare	determine interim payment of compensation in respect of permanent impairment resulting from an injury to a scheme employee
27	Comcare	determine lump sum compensation in respect of non-economic loss resulting from an injury to a scheme employee where compensation in respect of permanent impairment is payable
29(1)	Comcare	determine compensation in respect of household services reasonably required as a result of an injury to a scheme employee
29(3)	Comcare	determine compensation in respect of attendant care services reasonably required as a result of an injury to a scheme employee
30	Comcare	determine redemption of compensation under ss19-21A
31	Comcare	determine recurrent payments following redemption under s30
34F	Comcare	approve or refuse approval of applicant as rehabilitation program provider
34H	Comcare	own initiative approval of rehabilitation program provider
34L	Comcare	approve or refuse to approve renewal of approval of rehabilitation program provider
34N	Comcare	require an applicant for approval/renewal of approval as rehabilitation program provider to provide further information
34P(c)	Comcare	impose conditions on approval/renewal of approval of rehabilitation program provider
34Q	Comcare	revoke approval/renewal of approval of rehabilitation program provider
36(1)	Comcare	arrange assessment of the capacity of a Comcare employee, who has an impairment or incapacity for work resulting from a compensable injury, to undertake a rehabilitation program, including requiring the employee to undergo an examination for that purpose
36(3)	Comcare	require a Comcare employee who has an impairment or incapacity for work resulting from a compensable injury to attend an examination to assess the employee's capability of undertaking a rehabilitation program
36(4)	Comcare	determine whether Comcare employee had reasonable excuse for failure to attend or cooperate in examination

Section	Authority	Power
37(1)	Comcare	determine a Comcare employee, who has an impairment or incapacity for work resulting from a compensable injury, should undertake a rehabilitation program
37(2)	Comcare	provide or arrange for provision by an approved rehabilitation program provider of rehabilitation program determined for a Comcare employee
37(5)	Comcare	determine periodic compensation in respect of incapacity for work resulting from compensable injury in relation to any employee undertaking a rehabilitation program
37(7)	Comcare	determine whether Comcare employee had reasonable excuse for failing to undertake rehabilitation program
38(4)	Comcare	conduct merits review of rehabilitation decisions under ss36(1), 36(3), 36(4), 37(1) and 37(7) by other Australian Government agencies in relation to their employees
39(1)	Comcare	determine compensation in respect of rehabilitative alterations, aids and appliances reasonably required by employees with an impairment or incapacity for work resulting from a compensable injury
50(1)	Comcare	initiate claim in name of compensated employee against a third party in respect of the compensable injury or take over the conduct of a claim made by the compensated employee against a third party
50(4)	Comcare	require compensated employee to sign document relating to claim made or taken over under s50(1)
50(5)	Comcare	make reasonable requirement of compensated employee in respect of claim made or taken over under s50(1)
51(1)	Comcare	require a third party, appearing to be liable to pay damages to employee with compensable injury, to pay those damages (not exceeding compensation paid by Comcare) to Comcare
51(2)	Comcare	require third party liable to pay damages to employee with compensable injury to pay those damages (not exceeding compensation paid by Comcare) to Comcare
52A(2)	Comcare	take over conduct of the defence of action for non-economic loss made by an employee with a compensable injury against an Australian Government agency
52A(5)	Comcare	make reasonable requirement of Australian Government agency from whom conduct of proceedings taken over
57(1)	Comcare	require an employee who has given notice of an injury or made a claim for compensation to undergo a medical examination
58(1)	Comcare	require an employee who has made a claim for compensation to provide information and produce documents

Section	Authority	Power
62(1)	Comcare	conduct own motion internal review (reconsideration) of decisions made under sections 8, 14, 15, 16, 17, 18, 19, 20, 21, 21A, 22, 24, 25, 27, 29, 30, 31, 34, 36, 37 or 39 or paragraph 114B(5)(a) or Division 3 of Part X
62(4)	Comcare	conduct, at request of claimant or claimant's employing agency, internal review (reconsideration) of decisions made under sections 8, 14, 15, 16, 17, 18, 19, 20, 21, 21A, 22, 24, 25, 27, 29, 30, 31, 34, 36, 37 or 39 or paragraph 114B(5)(a) or Division 3 of Part X
70A	Comcare	enter into a fee for service arrangement with an Australian Government agency in respect of services related to Comcare's functions
70B	Comcare	form incorporated companies for performance of Comcare and Comcare subsidiary functions
71(1)	Comcare	require Australian Government agency to provide information relevant to any Comcare function
74(1)(c)	Comcare	acquire, hold and dispose of real and personal property
74(1)(d)	Comcare	sue
88(1)(b)	Comcare	employ persons other than under the PS Act
88(4)	CEO	determine terms and conditions of employment of non APS employees
89	CEO	engage and determine terms and conditions of engagement of consultants
95(1)	Comcare	with written approval of the Finance Minister, borrow from other than Commonwealth
95(4)	Comcare	give security for repayment of borrowings
97	Comcare	determine premiums payable to Comcare by Australian Government agencies and ACT Government
97D	Comcare	determine regulatory contributions payable to Comcare by Australian Government agencies and ACT Government
97J	Comcare	review premium and/or regulatory contribution
97K	SRCC	further review of premium and/or regulatory contribution
97M	Comcare	vary premium and/or regulatory contribution
102(2)	SRCC	determine fee payable by licence applicant
103(1)	SRCC	grant licence under Part VIII of SRC Act
103(2)	SRCC	determine scope and conditions of licence

Section	Authority	Power
104(1)	SRCC	determine licence application
104A(2)	SRCC	determine annual licence fee
105(1)	SRCC	vary scope and/or extend term of licence
106(1)	SRCC	suspend/revoke licence
107	SRCC	revoke licence at licensee's request
108(2)	SRCC	authorise licensee to accept liability (for payment of compensation)
108B(2)	SRCC	authorise licensee to manage claims
108D(1)	SRCC	impose licence conditions
110(1)	Comcare	pay money payable to an employee with a legal disability to itself in trust for the employee
110(2)	Comcare	invest money held on trust under s110(1)
110(3)	Comcare	pay or apply money held on trust under s110(1) to or for benefit of entitled employee
113	Comcare	recover debt by set off
114(1)	Comcare	recover overpayments and debts in competent court
114(2)	Comcare	recover overpayments and debts from future compensation
114B	Comcare	recovery of overpayment from retired employee's superannuation
114C	Comcare	write off debt
114D	Comcare	waive debt
117	Comcare	determine compensation (if any) payable to employee engaged outside Australia to work outside Australia
118	Comcare	reduce compensation payable for any State or Territory workers' compensation in respect of the same injury
119	Comcare	reduce compensation payable for any compensation in respect of same injury under a specified State or Territory law
124	Comcare	determine what compensation (if any) would have been payable under previous Act in force at date of injury in respect of injuries before 1 December 1988
131	Comcare	determine compensation in respect of incapacity for work of former employee in receipt of superannuation benefits

Section	Authority	Power
132	Comcare	determine compensation in respect of incapacity for work of former employee who on 1 December 1988 was aged under 65 and not in receipt of superannuation benefits
132A	Comcare	determine compensation in respect of incapacity for work of former employer who was under 65 on 1 December 1988 and is capable of working
134	Comcare	determine reduction in compensation on turning 65 of former employee to who s131, 132 or 132A applies
137	Comcare	redemption of compensation payable to former employee

Note: This table excludes all powers to approve forms and to make rules or that are exercisable by way of legislative instrument.

The SRC Act should be read together with the Safety, Rehabilitation and Compensation Regulations 2002, the Safety, Rehabilitation and Compensation Directions 2002 and the various declarations and other instruments published under the *Legislative Instruments Act 2003*.

PART 2A. *OCCUPATIONAL HEALTH AND SAFETY ACT 1991* (OHS ACT)

Section	Authority	Power
16B(1)	CEO	issue certificate of entitlement to be involved in consultations
16B95)(a)	CEO	consider whether certificate of entitlement should cease to have effect
25A(2)	SRCC	direct employer to invite nominations for health and safety representative vacancy
29(10)(a)	investigator	confirm, vary or cancel provisional improvement notice issued by a health and safety representative
32(2)	SRCC	disqualify health and safety representative
38A	Comcare	advise employers, employees and contractors on occupational health and safety matters
39	Comcare	refer employers, employees and contractors to experts
40(2)	Comcare	appoint investigators
40(3)(a)	Comcare	revoke appointment of investigator
40(4)	SRCC	give directions concerning exercise of investigator's powers
40(5)	Comcare	impose restrictions on powers of investigator who is not a member of Comcare's staff
41(1)	investigator	conduct an investigation
41(2), (3) and (4)	Comcare/ SRCC	direct an investigator to conduct an investigation
42(1)	investigator	enter and search a workplace for purposes of an investigation
43	investigator	require assistance from employer, owner/occupier, employee, contractor for purposes of an investigation
44(1)	investigator	take possession of plant, substance or thing or sample for purposes of an investigation
45(1)	investigator	direct in writing that a workplace, part of a workplace or particular plant, substance or thing not be disturbed
45(2)	investigator	renew a direction under s45(1)
45(7)	investigator	revoke or vary a direction under s45(1)
45A(1)	investigator	orally direct that workplace, plant etc not be disturbed
45A(5)	investigator	revoke a direction under s45A(1)

Section	Authority	Power
46(1)	investigator	issue prohibition notice
46(5)	investigator	inform an employer whether action taken to remove threat to health or safety is adequate or not
46(11)	investigator	revoke or vary prohibition notice
47(1)	investigator	issue an improvement notice
47(5)	investigator	extend period specified in improvement notice
47(10)	investigator	revoke or vary improvement notice
48	AIRC	review investigator decisions under sections 29, 44, 45, 45A, 46 and 47
53(4)	SRCC	request employer comment on investigation report
54(1)	SRCC	require provision of information/production of document relevant to matter dealt with by an investigation report
55(1)	SRCC	conduct inquiry into matter subject of investigation report
55(2)	SRCC	hold whole or part of inquiry in private
56	SRCC	summons witnesses to an inquiry
58	SRCC	administer oath or affirmation
62(1)	SRCC	inspect book or document furnished to inquiry and make copies or take extracts
62(2)	SRCC	retain books and documents furnished to inquiry for reasonable period
65(1)	SRCC	report failure of employer to provide particulars or take adequate action to Minister
66(1)	SRCC	report employer failure to comply with do not disturb direction or prohibition notice or improvement notice to Minister
77(1)	Comcare/ investigator	institute proceedings for breach of Act or regulations

Clause in Schedule 2	Authority	Power
4(3)	Comcare	enforce pecuniary penalty order
5(1)	Comcare/ investigator	apply for declaration of contravention or pecuniary penalty order
14(1)	Comcare/ investigator	apply for injunction
16(1)	Comcare	accept enforceable undertaking

Note: Clauses 5(1), 14(1) of Part 1 of Schedule 2 to the Act also explicitly authorise Comcare or an investigator to institute proceedings for a declaration of contravention or pecuniary penalty order and for an injunction. This appears to replicate the power already conferred on Comcare or an investigator by section 77(1).

The OHS Act should be read together with the Occupational Health and Safety (Safety Arrangements) Regulations 1991 (OHS(SA) Regulations) and the Occupational Health and Safety (Safety Standards) Regulations 1994 (OHS(SS) Regulations).

PART 2B. OCCUPATIONAL HEALTH AND SAFETY (SAFETY ARRANGEMENTS) REGULATIONS 1991 (OHS(SA) REGULATIONS)

Regulation	Authority	Power
32(2)(c)	CEO	sign investigators' certificate of appointment

PART 2C. OCCUPATIONAL HEALTH AND SAFETY SAFETY STANDARDS) REGULATIONS 1994 (OHS(SS) REGULATIONS)

Regulation	Authority	Power
2.07F(3)(a)	Comcare	exempt an employee or contractor from holding certificate of competence
2.07(3)(b)	Comcare	refuse to exempt an employee or contractor from holding certificate of competency
2.07(6)	Comcare	impose a condition of an exemption that the exempted person be trained by a Comcare approved person
2.08(1)	Investigator	ask employee to produce certificate of competency
2.09(4)	Comcare	recommend to certifying authority suspension or cancellation of certificate of competency
2.10(3)(a)	Comcare	suspend Commonwealth certificate
2.10(4)	Comcare	cancel Commonwealth certificate
2.11(1)	Comcare	suspend or cancel Commonwealth certificate on recommendation of certifying authority
4.40A(4)(a)	SRCC	exempt employer from plant licence subject to 4.40B and 4.40C
4.40A(4)(b)	SRCC	refuse employer plant licence exemption
4.40A(4)(c)	SRCC	request further information on plant licence exemption application
4.40B(3)(a)	SRCC	add or vary condition to plant licence exemption
4.40B(3)(b)	SRCC	revoke condition to plant licence exemption
4.40C(2)	SRCC	cancel plant licence exemption
4.43(1)(b)(i)	SRCC	grant plant licence
4.43(1)(b)(ii)	SRCC	refuse plant licence
4.43(1)(b)(iii)	SRCC	ask for additional plant licence application information
4.43(2)(b)(i)	SRCC	renew plant licence
4.43(2)(b)(ii)	SRCC	refuse to renew plant licence
4.43(2)(b)(iii)	SRCC	ask for additional plant licence renewal application information
4.45(3)(a)	SRCC	cancel plant licence
4.45(3)(b)	SRCC	suspend plant licence

Regulation	Authority	Power
4.45(3)(c)	SRCC	vary conditions of plant licence
4.46(3)(b)(i)	SRCC	vary plant licence to reflect event specified in application
4.46(3)(b)(ii)	SRCC	refuse to vary plant licence
4.46(3)(b)(iii)	SRCC	ask for additional information concerning variation of plant licence
4.52(1)(a)	SRCC	register plant design
4.52(1)(b)	SRCC	refuse to register plant design
4.52(1)(c)	SRCC	ask for additional plant design information
4.53(1)(d)	SRCC	impose additional plant registration conditions
4.58(1)(b)(i)	SRCC	grant special plant licence
4.58(1)(b)(ii)	SRCC	refuse special plant licence
4.58(1)(b)(iii)	SRCC	ask for additional special plant licence application information
4.58(2)(b)(i)	SRCC	renew special plant licence
4.58(2)(b)(ii)	SRCC	refuse renewal of special plant licence
4.58(2)(b)(iii)	SRCC	ask for additional special plant licence renewal application information
4.60(3)(a)	SRCC	cancel special plant licence
4.60(3)(b)	SRCC	suspend special plant licence
4.60(3)(c)	SRCC	vary special plant licence conditions
4.62(3)(b)(i)	SRCC	vary special plant licence to reflect event specified in application
4.63(3)(b)(ii)	SRCC	refuse to vary special plant licence
4.63(3)(b)(iii)	SRCC	ask for additional information concerning variation of special plant licence
4.62A(2)	SRCC	vary special plant licence by removing item of plant
6.16A	SRCC	exempt from r6.16
9.05(1)	SRCC	notify activity at existing facility could cause major accident
9.05(2)	SRCC	notify activity at proposed facility could cause major accident

Regulation	Authority	Power
9.07(1)(b)(i)	SRCC	classify notified facility
9.07(1)(b)(ii)	SRCC	ask for more information on notified facility
9.11(1)(b)(i)	SRCC	revoke or continue classification of facility
9.11(1)(b)(ii)	SRCC	ask for more information on facility
9.20(1)(a)	SRCC	issue licence to operate a major hazard facility
9.20(1)(b)	SRCC	refuse licence for facility
9.20(1)(c)	SRCC	ask for further information on major hazard facility licence application
9.22(1)(d)	SRCC	determine further facility licence conditions
9.22(2)(a)	SRCC	add condition to facility licence
9.22(2)(b)	SRCC	vary facility licence condition
9.22(2)(c)	SRCC	revoke facility licence condition
9.23(1)	SRCC	suspend or cancel facility licence
9.25(5)(a)	SRCC	issue certificate of compliance
9.25(5)(b)	SRCC	refuse to issue certificate of compliance
9.25(5)(c)	SRCC	ask for further information on certificate of compliance application
9.28(1)(e)	SRCC	determine further certificate of compliance condition
9.28(2)(a)	SRCC	add certificate of compliance condition
9.28(2)(b)	SRCC	vary certificate of compliance condition
9.28(2)(c)	SRCC	revoke certificate of compliance condition
9.29(1)	SRCC	suspend or cancel certificate of compliance
9.32(1)(b)	SRCC	determine further condition to bridging licence
9.32(2)(a)	SRCC	add bridging licence condition
9.32(2)(b)	SRCC	vary bridging licence condition
9.32(2)(c)	SRCC	revoke bridging licence condition

Regulation	Authority	Power
9.32(2)(d)	SRCC	issue notice specifying employer not required to comply with specified condition, duty or function in r9.32(1)(a)
9.32(2)(e)	SRCC	specify manner in which employer is to comply with condition, duty or function in r9.32(1)(a)
9.33(3)(b)	SRCC	exercise/perform power, duty or function in relation to employer under identified State or Territory law
9.35(1)(a)	SRCC	transfer licence or certificate of compliance
9.35(1)(b)	SRCC	refuse transfer of licence or certificate of compliance
9.35(1)(c)	SRCC	ask for additional transfer application information
9.38(b)	SRCC	determine longer period to report major accident
9.62(1)(a)	SRCC	approve assessor
9.62(1)(b)	SRCC	refuse approval of assessor
9.62(1)(c)	SRCC	ask for additional approval application information
9.64(1)	SRCC	determine approval conditions
9.64(2)(a)	SRCC	add approval condition
9.64(2)(b)	SRCC	vary approval condition
9,64(2)(c)	SRCC	revoke approval condition
9.65(3)	SRCC	revoke assessor approval
9.71(2)	SRCC	give directions to employer operating a major hazard facility with respect to performance of employer's duties under regulations
9.72(2)	SRCC	ask facility operator for information about transfer between operators

Clause in Schedule 1B	Authority	Power
2.02	SRCC	grant/refuse exemption – use of hazardous substance
2.03	SRCC	determine conditions of c2.02 exemption
2.04	SRCC	cancel c2.02 exemption
3.04	SRCC	grant/refuse exemption – chrysotile asbestos
3.05	SRCC	determine conditions of c3.04 exemption
3.06	SRCC	cancel c3.04 exemption
3.08	SRCC	grant/refuse exemption – chrysotile – defence mission critical use
3.09	SRCC	determine conditions of c3.08 exemption
3.10	SRCC	cancel c3.08 exemption

PART 3. OTHER LEGISLATION

Division A. ***Asbestos-Related Claims (Management Of Commonwealth Liabilities) Act 2005*** (Arc Act)

Section	Power
7(2)	exercise rights of Australian Government agency liability transferred from under any contract of insurance
7(3)(a)	take over conduct of action from Australian Government agency liability transferred from
7(3)(b)(ii)	apply to join any other person as party
7(3)(b)(iii)	conduct or settle action
7(4)	make reasonable requirement of Australian Government agency liability transferred from
10(1)	access Commonwealth records relating to liabilities assumed
11(1)	require Australian Government agency to give relevant information (notwithstanding doing so would breach another Act – see s11(3))

All powers vest in Comcare.

Refer to Australian Government Asbestos Litigation Unit, Legal Services Branch in Comcare.

DIVISION B. SEACARE LEGISLATION

Refer to Seacare Management Group, Research and policy Branch in Comcare

Subdivision B1. *Seafarers Rehabilitation and Compensation Act 1992* **(Seafarers Act)**

Section	Authority	Power
13	The Fund	determine normal weekly earnings of seafarer with compensable injury
20A	Seacare Authority	exempt employment from Act
26	The Fund	determine if injury compensable
27	The Fund	determine compensation in respect of loss or damage to property used by seafarer
28(1)	The Fund	determine compensation in respect of reasonably obtained medical treatment of compensable injury
28(6)	The Fund	determine compensation in respect of travel expenses in relation to compensable medical treatment
29(3)	The Fund	determine compensation payable to dependants of seafarer who died as a result of compensable injury where at least one dependant was wholly dependent
29(4)	The Fund	determine compensation payable to dependants of seafarer who died as a result of compensable injury where no dependant was wholly dependent
29(5)	The Fund	determine compensation in respect of prescribed child(ren) where seafarer died as result of compensable injury
30	The Fund	determine compensation in respect of funeral expenses for seafarer who died as a result of compensable injury
31(2)	The Fund	determine compensation in respect of incapacity for work resulting from compensable injury during first 45 weeks of incapacity
31(5)	The Fund	determine compensation in respect of incapacity for work resulting from compensable injury after first 45 weeks of incapacity
33	The Fund	determine compensation in respect of incapacity for work resulting from compensable injury where seafarer in receipt of superannuation pension
34	The Fund	determine compensation in respect of incapacity for work resulting from compensable injury where seafarer in receipt of superannuation lump sum

Section	Authority	Power
35	The Fund	determine compensation in respect of incapacity for work resulting from compensable injury where seafarer in receipt of both superannuation pension and superannuation lump sum
36	The Fund	determine compensation in respect of incapacity for work resulting from compensable injury where seafarer rolled over whole of superannuation lump sum benefit
37	The Fund	determine compensation in respect of incapacity for work resulting from compensable injury where seafarer maintained as patient in hospital, nursing home or similar place for a year or more
39	The Fund	determine compensation in respect of permanent impairment resulting from compensable injury
40	The Fund	determine interim payment of compensation in respect of permanent impairment
41	The Fund	determine compensation in respect of non-economic loss where compensation in respect of permanent impairment payable
43(1)	The Fund	determine compensation in respect of household services reasonably required as result of compensable injury
43(4)	The Fund	determine compensation in respect of attendant care services reasonably required as result of compensable injury
44	The Fund	determine redemption of compensation payable under s31, 33, 34, 35 or 36
45	The Fund	determine recurrent payments in respect of incapacity for work following redemption under s44
49(1)	The Fund	arrange assessment of capability of seafarer to undertake rehabilitation program
49(3)	The Fund	require seafarer to undergo examination for assessment of capability of undertake rehabilitation program
49(4)	The Fund	determine if seafarer had reasonable excuse for not undergoing required examination
49(6A)	The Fund	determine compensation in respect of travel expenses of attending required examination
50(1)	The Fund	arrange with approved program provider for provision of rehabilitation program to seafarer assessed as capable of undertaking program
50(2A)	The Fund	determine compensation in respect of travel expenses of undertaking rehabilitation program
50(5)	The Fund	determine if seafarer had reasonable excuse for failing to undertake arranged program

Section	Authority	Power
51	The Fund	determine compensation in respect of house alterations, vehicle modifications and aids and appliances reasonably required as a result of an impairment resulting from a compensable injury
59	The Fund	institute in name of compensated seafarer or take over claim instituted by compensated employee against a third party
60	The Fund	require third party liable to compensated employee to pay damages to Seacare Authority
66(1)	The Fund	require seafarer who has notified an injury or made a claim to undergo a medical examination
66(4)	The Fund	determine travel expenses payable to seafarer who undergoes required medical examination
67	The Fund	require seafarer who has made a claim to provide information (including documents)
78(1)	The Fund	on own motion reconsider a decision under ss13, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 39, 40, 41, 43, 44, 45, 49, 50, 51, 66 or 126
78(3)	The Fund	on request reconsider a decision under ss13, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 39, 40, 41, 43, 44, 45, 49, 50, 51, 66 or 126
79(1)(b)	Seacare Authority	on request, extend the time for an employer reconsideration under s78
83	The Fund	require seafarer who has requested a reconsideration to provide information (including documents)
83A(1)	The Fund	require seafarer who has requested a reconsideration to undergo a medical examination
83A(3)	The Fund	determine travel expenses payable to seafarer who undergoes required medical examination
95	Seacare Authority	require employer to provide evidence of required insurance
106	Seacare Authority	require employer to provide information (including documents)
126	The Fund	require a seafarer who makes a claim to provide information (including documents) about other employment

Note: The Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) takes the place of an employer as The Fund following a default event (essentially when the actual employer ceases to exist or the employer lacks the resources, including insurance, to respond).

Powers to approve forms, delegate and prepare instruments of a legislative character have been excluded.

Subdivision B2. *Seafarers Rehabilitation and Compensation Levy Collection Act 1992*

Section	Authority	Power
11	CEO	appoint authorised persons
12	authorised person	enter and search premises with occupier's consent
13(1)	authorised person	apply for warrant to enter and search premises without consent
14	CEO	issue ID card to authorised person

Note: Powers to approve forms, delegate and prepare instruments of a legislative character have been excluded.

Subdivision B3. *Occupational Health and Safety (Maritime Industry) Act 1993* **(OHS(MI) Act)**

Section	Authority	Power
42(c)	Seacare Authority	authorise person to conduct election for health and safety representative where no involved union
47(1)	Seacare Authority	accredit training courses for health and safety representatives
72(2)	Seacare Authority	disqualify health and safety representative

Note: The Australian Maritime Safety Authority (AMSA) provides the Inspectorate with investigative and prosecutorial functions being carried out by AMSA and the inspectors it appoints.

Powers to approve forms, delegate and prepare instruments of a legislative character have been excluded.

DIVISION C. FREEDOM OF INFORMATION ACT 1982 (FOI ACT)

Refer to FOI Officer, Legal Advising Team, Legal Services Branch in Comcare

Section	Power
15(5)	decide on request for access
15(5A)	extend time to decide on request for access
16	transfer request for access document to another agency
20	form in which access provided
21	defer access
22	delete exempt and irrelevant material
23	refuse request – unreasonable diversion of resources
24	refuse request document cannot be found or does not exist
29	waive or reduce charges
30	remit application fees
33	identify as exempt document – national security, defence or international relations
33A	identify as exempt document – relations with States
34	identify exempt documents – Cabinet documents
35	identify exempt documents – Executive Council documents
36	identify exempt documents – internal working documents
37	identify exempt documents – law enforcement and protection of public safety
38	identify exempt documents – secrecy provisions
39	identify exempt documents – financial or property interests of Commonwealth
40	identify exempt documents – tests, examinations, audits etc
41	identify exempt documents – personal privacy
42	identify exempt documents – legal professional privilege

Section	Power
43	identify exempt documents – trade secrets, business affairs etc
43A	identify exempt documents – research
44	identify exempt documents – national economy
45	identify exempt documents – confidentiality obligation
46	identify exempt documents – contempt of Parliament or court
47	identify exempt documents – companies and securities legislation
47A	Identify exempt documents – electoral rolls and related documents
50	amend/refuse to amend personal information
51	annotate/refuse to annotate record following refusal to amend
51B	annotate/refuse to annotate record following request
51C	transfer request for annotation to another agency
51E	add agency comment to annotation under s51 or 51B
54(1B)	extend time to seek internal review
54(2)	review decision

DIVISION D. *COMMONWEALTH AUTHORITIES AND COMPANIES ACT 1997* (CAC ACT) AND PUBLIC SERVICE ACT 1999 (PS ACT)

Refer to General Manager, Corporate Management Branch in Comcare.

Subdivision D1. CAC Act

Section	Power
17	prepare 3 year corporate plan
17(3)	invest surplus money
27M	indemnify officers
27N	insure officers

Subdivision D2. PS Act

Section	Power
20	employer powers
22	engage APS employees
24	determine remuneration of APS employees
25	assign duties to employee
26	move employees between agencies
28	suspend employee
29	terminate employment of employee
31	forfeit non-Commonwealth remuneration for performance of duties
33(4)	internal review
37	offer incentive for retirement of SES employee
74	engage locally engaged overseas employees
77	create positions in Comcare

APPENDIX B
DELEGATION PROVISIONS

A. SRC ACT

s73B	Delegation of Comcare functions and powers
s89R	Delegation and sub delegation of SRCC functions and powers

B1. OHS ACT

see ss73B and 89R, SRC Act

B2. OHS(SA) REGULATIONS

see ss73B and 89R, SRC Act

r32(2A)	Delegation of CEO r32(2)(c) power

B3. OHS(SS) REGULATIONS

see ss	73B and 89R, SRC Act

C. ARC ACT

see s73B, SRC Act

D. SEAFARERS ACT

s125	Delegation and sub delegation of Seacare Authority functions and powers

E. PS ACT

s78(7) and (9)	Delegation of CEO powers as agency head and sub delegation

APPENDIX C
STATUTORY DECISIONS SUBJECT TO MERITS REVIEW

See Appendix A for description of powers

PART 1	**INTERNAL REVIEW**
SRC Act	under section 62 - decisions made under sections 8, 14, 15, 16, 17, 18, 19, 20, 21, 21A, 22, 24, 25, 27, 29, 30, 31, 36, 37, 39, 97, 97D, 114B(5)(a), 131, 132, 132A, 134 and 137
PART 2	**AAT REVIEW**
SRC Act	under section 34R – decisions made under sections 34F, 34L and 34P; under section 64 – decisions made under sections: 38 (in respect of other agency decisions under sections 36 and 37) 62 (in respect of own decisions under sections 8, 14, 15, 16, 17, 18, 19, 20, 21, 21A, 22, 24, 25, 27, 29, 30, 31, 36, 37,39, 114B(5)(a), 131, 132, 132A, 134 and 137.
OHS(SS) Regulations	under regulation 2.13 – decisions under regulations 2.07F(3)(b), 2.10(3)(a), 2.10(4) and 2.11(1) under regulation 4.63 – decisions under regulations: 4.40A(4)(a), 4.40B(1), 4.40B(3)(a), 4.40B(3)(b), 4.40C(2)(a), 4.40C(2) (b), 4.40C(2)(c) or 4.40C(2)(d), 4.43(1)(b), 4.43(2)(b), 4.45(3), 4.46(3)(b, 4.52(1)(b) and 4.53(3) under regulation 9.67 – decisions under regulations 9.05(1), 9.05(2), 9.07(1)(b)(i), 9.11(1)(b)(i), 9.20(1)(b), 9.22(1)(d), 9.22(2), 9.23(1), 9.25(5)(b), 9.28(1)(e), 9.28(2), 9.29(1), 9.32(1)(b), 9.32(2), 9.35(1)(a), 9.35(1)(b), 9.47(1)(b), 9.62(1)(b), 9.64(1), 9.64(2), 9.65(3), and 9.71
PART 3	**SRCC REVIEW**
SRC Act	under section 97K - decisions under section 97J in respect of decisions under sections 97 and 97D
PART 4	**AIRC REVIEW**
OHS Act	under section 48 – decisions of investigators under sections 29, 44, 45, 45A, 46 and 47

For further information contact

Comcare
GPO Box 9905
Canberra ACT 2601

Telephone – 1300 366 979
Internet – www.comcare.gov.au

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