ADMINISTRATIVE REVIEW COUNCIL

LEGAL TRAINING FOR PRIMARY DECISION MAKERS

A CURRICULUM GUIDELINE

June 2004

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Administrative Review Council

The members of the Administrative Review Council are:

Wayne Martin QC (President)

Justice Garry Downes AM

Professor John McMillan

Professor David Weisbrot

Robert Cornall

Professor Robin Creyke

Stephen Gageler SC

Andrew Metcalfe

Melanie Sloss SC

Sue Vardon AO

Council members responsible for the development of the curriculum guideline in conjunction with the Administrative Review Council Secretariat were Professor Robin Creyke and Professor John McMillan.

Preface

The bulk of administrative decision making takes place at the primary decision–making level. Good primary decision making is fundamental to the quality of the administrative system, and public confidence in government administration depends on the maintenance of high standards in administrative decision making.

A central element of good administrative decision making is decision makers' understanding of the legal and administrative framework in which decisions are made. In turn, this depends on whether primary decision makers receive adequate training in understanding that framework.

The Administrative Review Council hopes this curriculum guideline will focus the attention of government agencies on this need and help them develop training programs for primary decision–making officers.

Wayne Martin QC
President

June 2004

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Part One Introduction and framework

Introduction

The Council

The Administrative Review Council was established under the *Administrative Appeals Tribunal Act 1975* as an integral part of the Commonwealth system of administrative law. The Council advises the Attorney-General on a broad range of matters relating to Commonwealth administration.

The project

The quality of primary decision making is directly linked to the content, nature and extent of training in administrative decision making provided to employees of the Australian Public Service. The Senate Finance and Public Administration References Committee endorsed this view in the report of its Inquiry into Recruitment and Training in the Australian Public Service.[1]

Administrative law training—delivered by government agencies, academic institutions, law firms and other private service providers—is now an established feature of the work program of many government agencies. There is great diversity in the content of these training courses, which is partly a reflection of the variety and complexity of the topics to be covered but also reflects uncertainty about which curriculum elements are necessary.

Because administrative law imposes on all primary decision makers a set of generic standards, the Council considers it desirable that there be greater agreement on the basic content of administrative law training in the government sector. It has therefore taken the step of developing a curriculum guideline setting out the core elements of law essential to the training of primary decision makers.

Development of the guideline is directly relevant to three of the Council's functions under s. 51 of the *Administrative Appeals Tribunal Act*:

> (aa) to keep the Commonwealth administrative law system under review, to monitor developments in administrative law and recommend to the Minister improvements that might be made to the system;

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1 Senate Finance and Public Administration References Committee 2003, *Recruitment and Training in the Australian Public Service*, SFPARC, Canberra, September, rec. 26, par. 11.82.

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system.

Section 51 of the Act is reproduced in Appendix A.

Content of the guideline

At the end of Part One the core elements of law for primary decision makers are listed. The Council considers that these elements should be incorporated in all relevant training programs for Australian Public Service employees.

Part Two sets out an annotated version of the list, to help potential trainers develop suitable training programs.

Purpose of the guideline

The Council's objective in developing the curriculum guideline is to give agencies, and the Australian Public Service as a whole, a useful tool for developing administrative law training programs for primary decision makers.

The guideline is not itself a training document. It is not designed for distribution to administrators as a course manual. Rather, it is designed as a resource for people who are developing training programs, either at agency level or more widely across the Australian Public Service. It represents a framework within which individual agencies will be able to develop training programs that reflect their own particular decision-making environment.

The content and duration of training programs developed on the basis of the guideline may therefore vary from agency to agency. Some agencies may develop programs containing more advanced or specialist training components for their decision makers.

Every curriculum should be an evolving document. Although some elements of the legal framework for government administration remain relatively constant, other elements change and adapt to the different circumstances of government. It is important to bear this in mind when applying the curriculum guideline. Equally, the Council intends that the guideline will be reviewed and revised from time to time; it welcomes comments and suggestions for change from any agency or person.

The curriculum guideline framework

Overview

The core elements of law for primary decision makers, as identified by the Council, are grouped into two main categories.

The first category—'The legal and administrative framework'—is designed to give decision makers a broad understanding of the Australian legal system. It deals with a range of topics, among them the primary sources of Australian law, the tribunal and judicial system, the Australian Constitution, and the division of power between the Commonwealth and the states and territories. Concepts underpinning the Australian legal system, such as the separation of powers, are also covered, as are the interpretation of legislation and the doctrine of precedent.

In the second category—'Administrative law and decision making'—the focus is on Commonwealth administrative law and decision making. Important standards of administrative law are dealt with, among them procedural standards, standards relating to the legal authority for making decisions, and the factors that should be taken into account in making a decision. The bodies that can review primary administrative decisions and the scope and nature of available methods of review are also covered.

The core elements

The Council has identified the following core elements of law for coverage in training programs for primary decision makers.

The legal and administrative framework

Within the legal and administrative framework there are seven core elements:

1. primary sources of law and legal authority in Australia
    a. legislation made by parliament (primary legislation) and subordinate legislation made under the authority of parliament
    b. non-statutory rules and legal authority
2. the Australian Constitution as it relates to administrative decision making
    a. federal division of legislative power—between the Commonwealth and the states and territories
    b. separation of legislative, executive and judicial power
    c. constitutional concepts—the rule of law and responsible government

3. international law and its relevance to Australian law
4. the federal judicial and tribunal system in Australia
    a. the federal tribunal and court hierarchy
    b. the High Court
    c. the Federal Court
    d. the Federal Magistrates Court
    e. administrative tribunals
    f. state and territory courts invested with federal jurisdiction
5. the impact and operation of the doctrine of precedent
    a. courts and precedent
    b. tribunals and precedent
6. interpretation of legislation
    a. the *Acts Interpretation Act 1901*
    b. interpretation of legislation in context
    c. maxims and presumptions of interpretation
    d. mandatory and directory provisions in legislation
7. the Australian Pubic Service Values and Code of Conduct.

Administrative law and decision making

Within the category of administrative law and decision making there are five core elements:

1. administrative law rules for decision makers
    a. decision makers must act in accordance with principles of natural justice—often referred to as 'procedural fairness'
    b. decision makers must take account of relevant considerations and ignore irrelevant ones
    c. decisions must not be unreasonable
    d. decision makers must not apply government policy inflexibly

e. decision makers must not act under dictation

f. decision makers must not act in bad faith

g. decision makers must have legal authority to make a decision

h. there might be a duty to make inquiries before making a decision

2. the decision and reasons for the decision

3. notification of review rights

4. administrative law review bodies, mechanisms and remedies

   a. judicial review by the Federal Magistrates Court, the Federal Court, the High Court, and state and territory courts exercising federal jurisdiction

   b. merits review by administrative tribunals

   c. internal review by agencies

   d. investigation by the Ombudsman

   e. investigation by the Human Rights and Equal Opportunity Commission

   f. other complaint avenues

   g. alternative dispute resolution

   h. compensation

   i. standing to initiate administrative law review

5. information and access

   a. freedom of information obligations

   b. privacy obligations

   c. archival obligations.

Part Two Annotated curriculum guideline

Part Two expands on the legal concepts underlying the core elements of law for primary decision makers, as described in Part One.

The annotations are designed to assist people organising training programs: they do not in themselves constitute a course manual.

The legal and administrative framework

1. Primary sources of law and legal authority in Australia

There are two primary sources of law and legal authority in Australia—legislation and non-statutory rules of law.

The core curriculum points are as follows:

a. Legislation made by parliament and subordinate legislation

Legislation falls into two broad categories—Acts (sometimes called 'statutes') enacted by the Commonwealth, state and territory parliaments; and subordinate, or delegated, legislation (for example, regulations, by-laws, schemes and legislative instruments) made under those Acts by an officer or body such as the Governor-General.

Give examples of Acts and subordinate laws administered by your agency.

Discuss the effect of the *Legislative Instruments Act 2003*, particularly in relation to the requirement for registration of legislative instruments, which facilitates public access to statutory rules and other subordinate laws.

b. Non-statutory rules and legal authority

Court-made law (sometimes called 'common law' or 'precedent') is a source of legal rules. Examples are tort law (negligence, defamation, trespass, misfeasance in public office, and so on) and the law of contract. Legal authority for government decision making also derives from the executive power, which provides authority for government to function as a legal person (for example, establishing a departmental structure, entering into contracts, conducting inquiries and engaging in public relations).

Discuss the relationship between common law and legislation.

Note the primary areas of common law obligations—for example, in tort law or contract law—that affect the decision maker.

Give examples of decisions made by government that rest on the executive power—for example, establishing committees and inquiries; awarding honours; and border control, as in the *Tampa Case* (*Ruddock v Vadarlis* (2001) 110 FCR 338).

2. The Australian Constitution as it relates to administrative decision making

In relation to the Australian Constitution, there are three core curriculum points.

a. Federal division of legislative power—between the Commonwealth and the states and territories

The Constitution establishes a federal system in which legislative and executive power is divided between the Commonwealth and the states and territories.

Give examples of subjects falling within the legislative authority of the Commonwealth and of state and territory parliaments.

Discuss what happens if a Commonwealth law and a state or territory law are in conflict.

Note the development of Commonwealth, state and territory cooperative law-making schemes—for example, in business and consumer regulation and in agriculture.

b. Separation of legislative, executive and judicial power

Within government there is a separation of powers between legislative, executive and judicial power.

Describe the differences between legislative, executive and judicial power, giving examples of each that apply to your agency. Note how this separation is provided for in Chapters I, II and III of the Australian Constitution.

Note some of the exceptions to the separation of powers—for example, the subordinate law-making power of the executive and the fusion of legislative and executive power in the parliament and the ministry—and special areas permitted to make subordinate laws, such as the courts.

Note that tribunals are part of the executive arm of government and cannot exercise judicial power. As a result, the High Court has held that federal tribunals have no power to make binding findings of law and no power to enforce decisions (see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245).

c. Constitutional concepts—the rule of law and responsible government

According to the rule of law, government needs legal authority for any action it undertakes and is itself subject to the laws applying to others. Individuals are generally free to engage in any activity that is not prohibited by law and should not be subject to the arbitrary exercise of power by government decision makers.

Responsible government is the system of government in which the executive is responsible to parliament. Pursuant to this principle, the executive acts on the advice of ministers, who are members of, and responsible to, the parliament.

3. International law and its relevance to Australian law

International law is not directly a part of Australian law: it does not confer or impose rights, duties or obligations that are directly enforceable in Australian courts. Nevertheless, it interacts with Australian domestic law in a number of ways:

- International treaty commitments are sometimes enshrined in Australian legislation—for example, federal anti-discrimination legislation.
- International law can influence the development of common law—for example, on recognition of native title.
- International law can be a relevant consideration in administrative decision making—for example, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6.
- There is a rebuttable presumption that legislation does not contravene international law.

Give examples of any legislation administered by your agency that incorporates international treaty standards to which Australia is party.

Discuss whether international law or treaty commitments play any special role in administrative decision making in your agency.

4. The federal judicial and tribunal system in Australia

Six core curriculum points are associated with the federal judicial and tribunal system in Australia.

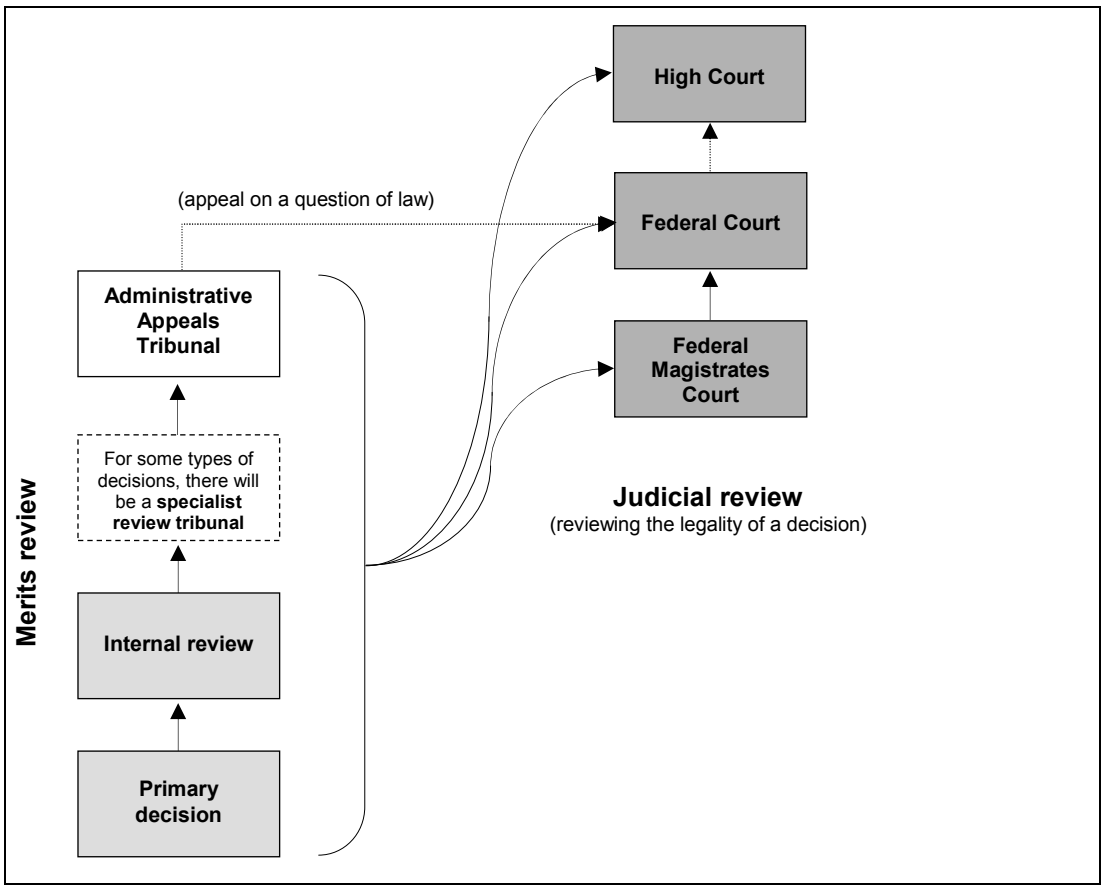
a. The federal tribunal and court hierarchy

Judicial decisions made by the High Court, the Federal Court and the Federal Magistrates Court are important when overseeing administrative decisions made

by Commonwealth agencies and tribunals. Figure 1 shows the basic federal tribunal and court hierarchy in Australia.[2]

Figure 1 may not be applicable to all administrative decisions; judicial review of migration decision making is a prominent exception. Discuss whether the standard system for review and appeal differs in relation to decisions made in your agency.

Figure 1 The basic tribunal and court hierarchy in Australia



Note: Although judicial review is available in the High Court, in practice a matter would usually be heard by a lower court in the first instance. Special leave is required for an appeal to the High Court.

b. The High Court

The High Court is the highest appeal court for both state and territory and Commonwealth matters. It also has original jurisdiction in Commonwealth matters—meaning that an action against a Commonwealth officer can be initiated in the High Court.

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[2] State and territory Supreme Courts exercising federal jurisdiction also have rights of appeal or review to the Federal Court and the High Court.

c. The Federal Court

The Federal Court has original jurisdiction for a range of matters under Commonwealth legislation, among them administrative law, bankruptcy, human rights, privacy, trade practices, migration and copyright. The Federal Court also hears appeals from the Federal Magistrates Court and the Administrative Appeals Tribunal and from state and territory courts exercising federal jurisdiction. The full bench of the Federal Court can also hear appeals from the judgment of a single judge of the Court.

d. The Federal Magistrates Court

The Federal Magistrates Court was created to provide a simpler, speedier alternative to court action in the Federal Court and the Family Court. It shares its jurisdiction with those two Courts, although its jurisdiction is limited compared with that of those Courts.

Describe the jurisdiction of each of the three courts.

Explain the difference between original jurisdiction—that is, that proceedings can be initiated in a particular court in the first instance—and appellate jurisdiction.

Give examples of the High Court's important original jurisdiction.

e. Administrative tribunals

Administrative tribunals conduct merits reviews of Commonwealth administrative decisions. A merits review is where the reviewer has the capacity to 'step into the shoes' of the primary decision maker and make the correct or preferable decision according to the merits of the case. This may involve examining questions of law, fact and administrative policy.

Discuss what arm of government tribunals belong to.

Note that the Administrative Appeals Tribunal is the principal Commonwealth administrative tribunal.

Give examples of some review tribunals that have a specialist jurisdiction.

Explain that tribunals can review only decisions they are specifically given jurisdiction over.

f. State and territory courts invested with federal jurisdiction

It is also possible in some circumstances for Commonwealth legislation to provide for a state or territory court to hear a federal matter. For example, s. 9 of the *Administrative Decisions (Judicial Review) Act 1977* preserves the jurisdiction of state

courts to direct the writ of habeas corpus against a Commonwealth officer and to undertake judicial review of some decisions made under Commonwealth–state cooperative schemes. In addition, state courts vested with federal jurisdiction often hear tort and contract claims against the Commonwealth.

5. The impact and operation of the doctrine of precedent

Two core curriculum points relate to the impact and operation of the doctrine of precedent.

a. Courts and precedent

The doctrine of precedent—whereby a court is bound to follow previous decisions of more senior courts in the same court hierarchy—is an integral part of the court system. The element of the decision that must be followed is the ratio decidendi, which is the court's statement of the legal principle in relation to the facts of the case the court has relied on in coming to its decision.

Note that the doctrine of precedent does not prevent changes to case law occurring over time; the High Court, for instance, sometimes adapts or develops the law to conform to contemporary social attitudes and conditions (for example, *Mabo and Others v State of Queensland* [No. 2] (1992) 175 CLR 1).

b. Tribunals and precedent

Tribunals are not courts and do not set precedent. Their decisions may, however, be very persuasive, particularly when they provide the only independent guidance on matters that have not yet come before the courts.

6. Interpretation of legislation

The interpretation of legislation is critical to determining the validity of much administrative decision making, when a decision must be made in accordance with the relevant legislation.

Four core curriculum points relate to the interpretation of legislation.

a. The Acts Interpretation Act

The *Acts Interpretation Act 1901* assists in the interpretation of Commonwealth legislation.

Note that the Acts Interpretation Act provides guidance on interpreting the following types of matters:

- dates on which legislation commences

- reading of references to masculine and feminine and singular and plural
- measurement of time and distance
- the meaning of expressions such as 'in writing'
- retrospective operation of legislation
- delegation of authority.

Explain how extrinsic material—such as the reports of parliamentary committees, explanatory memoranda, and second reading speeches—can be used in the interpretation of legislation.

b Interpretation of legislation in context

Generally, legislation should be interpreted in context.

Explain what is meant by 'interpretation in context'. Note what things may be referred to when considering the context of the legislative provision being interpreted—for example, the materials identified in s. 15AB of the Acts Interpretation Act.

Explain that, in the absence of specific definition, words are taken to have their ordinary everyday meaning. Note the use of the *Macquarie Dictionary* and the *Oxford English Dictionary*.

c. Maxims and presumptions of interpretation

Although legislation should be interpreted in context, the courts have also developed various maxims and presumptions to assist with interpretation.

You may wish to discuss some maxims and presumptions of interpretation, such as the following:

- express statutory authority is required for any action that interferes with a fundamental freedom or immunity
- legislation is presumed not to have retrospective operation
- all words are assumed to have their current meaning and not to be superfluous
- if a general term follows a more specific one, the meaning of the general term is limited to the class of things covered by the specific term
- words should be read consistently with the general context in which they appear
- subsequent laws override earlier laws to the extent of any inconsistency.

d. Mandatory and directory provisions in legislation

Legislative provisions can be mandatory (that is, they impose an obligation on a decision maker) or directory (that is, non-compliance will not necessarily cause a decision to be invalid).

In determining whether a provision is mandatory or directory, it is necessary to take account of the language used, the objectives of the legislation, the nature of the conditions that attend the exercise of the discretion, and the effect of interpreting the provision as either obligatory or discretionary.

Provide examples of words that are more likely to be interpreted as mandatory rather than directory.

Note the meaning of 'may', which can be merely facultative or can indicate a discretion.

7. The Australian Public Service Values and Code of Conduct

The principles of good public administration, together with the conduct required of Australian Public Service employees, are set out in the Australian Public Service Values and Code of Conduct, which are part of the *Public Service Act 1999*. All APS employees are required to uphold the Values and comply with the Code; sanctions are available for breaches of the Code.

Details of the Australian Public Service Values and Code of Conduct can be found on the Australian Public Service Commission website <www.apsc.gov.au> and in the Commission's publication *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads*.

Administrative law and decision making

1. Administrative law rules for decision makers

Subject to legislative provisions that alter the decision-making process in relation to particular decisions of an agency, there are some fundamental standards that decision makers must comply with when making decisions. These represent the core curriculum points.

a. Decision makers must act in accordance with principles of natural justice—often referred to as 'procedural fairness'

Natural justice imposes on decision makers a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case.

There are two main aspects of the concept of natural justice:

- *The opportunity to be heard.* A person should be given the opportunity to be heard before a decision that could adversely affect him or her in an individual way is made. This is called the 'hearing rule'.
- *No bias.* A decision maker must not be biased.

Discuss what constitutes a reasonable opportunity to be heard.

Explain that bias may be actual or perceived. It may manifest itself in the decision maker's personal associations or interests or in the structure of the decision-making process.

Note that s. 13(7) of the *Public Service Act 1999*—part of the Australian Public Service Code of Conduct—places requirements on APS agency heads and employees in relation to conflicts of interest. Note, too, that the impartial performance of APS functions is an APS Value under s. 10(1)(a) of the Pubic Service Act.

b. Decision makers must take account of relevant considerations and ignore irrelevant ones

When exercising a decision-making power, an officer must take into account relevant considerations and ignore irrelevant considerations.

Explain how this principle can apply to decisions made in your agency—for example, note the statutory provisions that expressly or implicitly set out criteria of relevance.

c. Decisions must not be unreasonable

If a decision is so unreasonable that no reasonable person could have exercised their power in that way, the decision will be invalid.

Note that a decision is not unreasonable just because the person reviewing it would have made a different decision.

d. Decision makers must not apply government policy inflexibly

A decision maker can take account of a relevant government policy in making a decision but must not apply that policy inflexibly and fail to take into account other relevant factors.

Note that the policy itself must be in accordance with the relevant legislation.

Provide examples of policies that are relevant to decision making in your agency—for example, decision-making manuals that provide guidance to agency decision makers on the meaning or application of legislation administered by the agency.

e. Decision makers must not act under dictation

If a decision involves the exercise of independent discretion, the decision maker must not act under dictation; that is, he or she must not act in accordance with the direction of another officer.

Note the difference between a decision maker acting under dictation and a decision maker simply receiving guidance. Give examples of the guidance your agency might provide for its decision makers.

f. Decision makers must not act in bad faith

When exercising a decision-making power, an officer must not act in bad faith.

g. Decision makers must have legal authority to make a decision

Legal authority to make a decision is essential.

Point out that there are two aspects to this principle:

- The first is the legal authority to make the type of decision in question. Usually this authority will be conferred expressly by legislation, but sometimes it will be implied—for example, the authority to conduct routine administrative business. Express statutory authority is required for decisions that could have a punitive or detrimental effect on a person.
- Second, the officer making the decision must be an authorised officer. Usually the legislation will provide that the decision maker nominated in the legislation can delegate to other officers the authority to make decisions. Note the danger of a delegated decision maker signing on behalf of the principal.

h. There might be a duty to make inquiries before making a decision

A decision maker might have a duty to make inquiries before making a decision.

Explain that common law imposes no general obligation on a decision maker to initiate inquiries and gather material beyond what is before him or her.

A duty to make enquiries can arise, though, depending on the importance of the decision and its consequences for the person affected. For example, a duty to make inquiries could arise if there was an obvious omission or obscurity in the information before the decision maker and that information was centrally relevant. The decision maker does not, however, have to make out the case for the person affected by the decision.

2. The decision and reasons for the decision

Most Commonwealth agencies have a statutory obligation to provide a statement of reasons for a decision if requested to do so. Although there is no common law obligation to provide reasons for decisions, bodies such as the Administrative Review Council and the Commonwealth Ombudsman, and most agency service charters, counsel that it is good administrative practice to do so.

Legislation requires reasons to be provided in the following circumstances:

- where there is a right to merits review by the Administrative Appeals Tribunal
- where there is a right to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. However, s. 13 of that Act excludes certain decisions from the requirement to give reasons
- where the legislation under which the agency makes its decision requires it to give reasons when notifying the person affected.

Guidance on the contents of statements of reasons is provided in the Administrative Review Council's *Practical Guidelines for Preparing Statements of Reasons* and the associated commentary[3] and in the *Acts Interpretation Act 1901*.

3. Notification of review rights

Although Commonwealth agencies are not generally obliged by common law to notify people of their review rights, some legislation does require this.

Provide examples of legislation that requires an agency to advise a person affected by a decision of his or her review rights—for example, s. 138 of the *Social Security (Administration) Act 1999*, in relation to review by the Social Security Appeals Tribunal, and s. 27A of the *Administrative Appeals Tribunal Act 1975*, in relation to decisions reviewable by the Administrative Appeals Tribunal.

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[3] Administrative Review Council 2002, *Practical Guidelines for Preparing Statements of Reasons*, ARC, Canberra; Administrative Review Council 2002, *Commentary on the Practical Guidelines for Preparing Statements of Reasons*, ARC, Canberra.

Note whether your agency is required—by legislation, by its service charter or in some other way—to notify people of their review rights when advising them of a decision.

4. Administrative law review bodies, mechanisms and remedies

Decision makers should be aware that there are a number of ways in which their decisions can be reviewed. Different remedies are available, depending on the review process used.

There are nine core curriculum points associated with administrative law review bodies, mechanisms and remedies. Some of the review processes, however, might not be available for all decisions.

Discuss what review avenues are available for decisions made by your agency.

a. Judicial review by the Federal Magistrates Court, the Federal Court, the High Court, and state and territory courts exercising federal jurisdiction

Judicial review is where a court reviews a decision to make sure the decision maker used the correct legal reasoning or followed the correct legal procedures. The court does this by considering whether the decision is in accordance with the law. Judicial review can be carried out by the Federal Magistrates Court, the Federal Court, the High Court, and by state and territory courts exercising federal jurisdiction.

Note that among the judicial review remedies available are orders setting aside a decision, orders referring a matter back to the decision maker for further consideration, and orders declaring the rights of the parties.

Explain that applications for judicial review of administrative decisions can be made to the Federal Magistrates Court or the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903*, the *Federal Magistrates Court Act 1999* and other Acts; they can be made to the High Court under s. 75(v) of the Constitution.

In developing courses of a more specific nature, it might sometimes be appropriate to provide greater detail about the jurisdiction of the High Court and common law remedies in Australia.

Explain that other, older non-statutory remedies co-exist with statutory judicial review remedies; this includes the prerogative writs of prohibition, certiorari and mandamus[4] and the remedies of injunction and declaration.

Explain that under s. 75(v) of the Constitution the High Court may issue the remedies of mandamus, prohibition or injunction against an officer of the Commonwealth.

Note that s. 39B of the *Judiciary Act 1903* confers the High Court's s. 75(v) jurisdiction on the Federal Court and in relation to any matter 'arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter'.

Note that, by virtue of s. 44 of the Judiciary Act, the High Court can remit matters arising under s. 75 of the Constitution to the Federal Court.

b. Merits review by administrative tribunals

Merits review is where the reviewer has the capacity to 'step into the shoes' of the primary decision maker and make the correct or preferable decision according to the merits of the case in question.

Discuss the remedies that an administrative tribunal may grant—for example, substituting a new decision, remitting the matter back to the decision maker, varying the decision, and affirming the decision.

Note that the Administrative Appeals Tribunal is the principal Commonwealth merits review tribunal.

Identify any tribunal other than the Administrative Appeals Tribunal that reviews your agency's decisions.

Discuss the decisions of your agency that are subject to merits review by a tribunal.

Discuss what is meant by 'correct or preferable'.

c. Internal review by agencies

Many agencies offer internal merits review of their administrative decisions. This process involves reviewing the merits of an officer's initial decision; the review is performed by another officer in the same agency, usually a more senior officer.[5]

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4 Prerogative writs are court orders providing different remedies for particular types of administrative action. Prohibition is an order to restrain a tribunal from exceeding its jurisdiction; certiorari is used to quash a decision of a tribunal or inferior court on the ground of non-jurisdictional error of law on the face of the record or for jurisdictional error or denial of procedural fairness; and mandamus is an order to compel a public official to exercise a power in accordance with his or her public duty.

5 For further information, see Administrative Review Council 2000, *Internal Review of Agency Decision Making: report to the Attorney-General*, Report no. 44, ARC, Canberra.

Discuss whether your agency provides for internal review of decisions.

d. Investigation by the Ombudsman

The Ombudsman can investigate the administrative actions of Commonwealth government officials or agencies and can act in response to a complaint from a member of the public or on his or her own motion.

If the Ombudsman considers there has been defective administration, he or she can recommend that corrective action be taken. For example, it might be recommended that a particular decision be reconsidered, that an apology be provided, or that compensation be paid to the complainant.

Discuss the most common kinds of complaints received by the Ombudsman, which usually concern administrative style—for example, delay or inadequate explanation.

Note that the Ombudsman can also conduct own-motion inquiries, such as inquiries into complaint handling.

Consider what the Ombudsman can do to ensure that a recommendation is accepted by an agency.

e. Investigation by the Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission investigates and resolves by conciliation complaints about discrimination or breaches of human rights. This includes complaints made by members of the public about discriminatory decision making by government bodies.

f. Other complaint avenues

There might be other government agencies a person can complain to about an administrative decision. For example, the Merit Protection Commissioner has a role in reviewing actions affecting Australian Public Service employees. With the exception of certain decisions relating to promotion, the Commissioner's role is generally only recommendatory.

Note that the Australian Public Service Commission's website <www.apsc.gov.au> provides details of the types of decisions that are not reviewable by the Merit Protection Commissioner—for example, decisions relating to the termination of Australian Public Service employees, which are reviewable by the Australian Industrial Relations Commission.

g. Alternative dispute resolution

It might also be possible for particular administrative activity to be the subject of alternative dispute-resolution processes such as conciliation or mediation.

h. Compensation

It might be possible to take legal action for damages to obtain compensation for loss suffered as a result of defective administration. Such action would generally be limited to circumstances in which a person can establish a breach of a duty to take reasonable care (for example, if incorrect advice is given by telephone), a breach of a contractual duty, a breach of the equitable duty of confidence or, if the decision can be characterised as occurring in the course of trade or commerce, misleading or deceptive conduct.

An action for damages against the Commonwealth would usually be heard by a state or territory Supreme Court or, less commonly, by the Federal Court or the High Court.

There is also an administrative compensation scheme—the Compensation for Detriment Caused by Defective Administration Scheme—that enables Commonwealth agencies to compensate people who have suffered a loss as a result of the 'defective' action or inaction of an agency and have no other avenue of redress; for example, the defective administration complained of does not amount to negligence.

Note that common law remedies—for example, damages in contract or tort or equity—can be considered by the High Court or the Federal Court as adjuncts to their jurisdiction.

Note that governments and public officers are liable for their negligent acts, in accordance with the general principles that apply to private individuals. It is also possible for a public officer to be personally liable for misfeasance in public office (*Northern Territory v Mengel* (1995) 185 CLR 307, 352–3).

i. Standing to initiate administrative law review

Only people with 'standing' have the right to bring an action for review of an administrative decision. A person has standing to seek judicial review if they are aggrieved by the decision. Similarly, a person can seek merits review in the Administrative Appeals Tribunal if their interests are affected by the decision.

Compare 'standing' in this context with the 'standing' required to complain to the Ombudsman or the Human Rights and Equal Opportunity Commission.

5. Information and access

Commonwealth agencies have responsibility for creating and maintaining accurate records of their business activities; this includes their decision-making functions.

Three core curriculum points are relevant here.

a. Freedom of information obligations

The *Freedom of Information Act 1982* allows a person access to government documents. It requires that agencies publish information about their operations and their powers as they affect members of the public; they are also required to make public their manuals and other documents used in making decisions and recommendations affecting the public. Further, unless a document comes within an excepted or exempted category under some legislation, agencies must permit access to documents in their possession.

Provide examples of documents held by your agency that may be exempt from claims for access. Note that the Administrative Appeals Tribunal can review many decisions made in relation to freedom of information.

Discuss the impact the *Freedom of Information Act 1982* has had in terms of your agency's general attitude towards openness and dealing with individual freedom of information requests.

Note that there are many supplementary laws and doctrines that could impinge on disclosure of information—for example, common law protection for commercial confidentiality, secrecy provisions in legislation, and the *Protective Security Manual* in relation to security classification.

b. Privacy obligations

The *Privacy Act 1988* provides protection for personal information handled by Commonwealth agencies. It covers collection, use and disclosure and the quality and security of personal information.

Explain who investigates complaints about breaches of the *Privacy Act 1988*.

Consider which types of information your agency collects and uses that would be subject to the Privacy Act.

Note that, in addition to provisions in the Privacy Act, various obligations of non-disclosure apply to Australian Public Service employees—for example, duties under the *Public Service Act 1999*; common law and equitable duties of loyalty, fidelity and confidence; and provisions of the *Crimes Act 1914*. Note also the effect of *Bennett v HREOC* [2003] FCA 1433 on employees' duty of disclosure.

c. Archival obligations

The *Archives Act 1983* prohibits the destruction, disposal or altering of Commonwealth records without permission from the National Archives of Australia. As a result of the operation of the Archives Act, Commonwealth agencies have responsibilities in relation to record keeping.

Identify the guidance your agency provides to decision makers in relation to record keeping.

Appendix A Section 51 of the Administrative Appeals Tribunal Act

Section 51 of the Administrative Appeals Tribunal Act 1975 details the functions and powers of the Administrative Review Council, as follows:

(1) The functions of the Council are:

(aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and

(ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and

(d) to inquire into:

(i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

(ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

(iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;

and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

(2) The Council may do all things necessary or convenient to be done for or in connexion with the performance of its functions.

(3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the Council must give the Minister a copy of any findings made by the Council in the inquiry or a copy of the advice, as the case may be.