

**PARLIAMENTARY COUNSEL**

**Drafting Direction No. 3.7  
Tribunals and other administrative bodies—various  
matters**

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## Part 1—Merits review of administrative decisions

### **General policy**

1 The Government’s general policy may be found in the Administrative Law, Evidence and Legislative Instruments Scrutiny Guide. The Government’s basic policy is that when drafting a law that will affect the “rights and interests” of individuals, merits review (both internal and external) should be provided for, where practicable. The Administrative Review Council publication “*What decisions should be subject to merits review?*” describes the small group of decisions that are unsuitable for merits review.

2 You should ask your instructor to consider that Guide and that publication and then contact the Courts, Tribunals and Administrative Law Branch in the Attorney-General’s Department at an early stage to discuss any instructions:

- (a) for merits review to not be provided for or to be excluded (after considering that publication); or
- (b) to vary any Administrative Appeals Tribunal review right or procedure; or
- (c) to create a new merits review body.

### **Providing for review of decisions by the Administrative Appeals Tribunal**

3 Subsection 25(1) of the *Administrative Appeals Tribunal Act 1975* provides that an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. “Enactment” is defined in subsection 3(1) of that Act and includes an Act or instrument made under an Act. Subsection 25(3) of that Act provides that where an enactment makes provision in accordance with subsection (1), that enactment must specify the person or persons to whose decisions the provision applies.

4 If you need to provide for review of decisions by the Administrative Appeals Tribunal, you should ensure your provision complies with those subsections. To match the terminology used in subsection 25(1) of that Act, you should refer to applications being made for review (rather than referring to “an application” being made or to “a review”). You should specify the decision-maker in your provision. The following are examples of provisions that comply with those subsections:

#### *Example 1*

- (1) Applications may be made to the Administrative Appeals Tribunal for review of decisions of the *[specify decision-maker]* under *[specify relevant provision]*.

#### *Example 2*

- (1) Applications may be made to the Administrative Appeals Tribunal for review of decisions of the *[specify decision-maker]* under *[specify relevant provision]* to *[specify kind of decision]*.

*Example 3*

- (1) Applications may be made to the Administrative Appeals Tribunal for review of the following decisions of the *[specify decision maker]*:
  - (a) a decision under *[specify relevant provision]* to *[specify kind of decision]*;
  - (b) a decision under *[specify relevant provision]* to *[specify kind of decision]*;
  - (c) a decision under *[specify relevant provision]* to *[specify kind of decision]*.

5 Subsection 27(1) of the *Administrative Appeals Tribunal Act 1975* deals with the standing of applicants for review. It provides that an application for review may be made by or on behalf of any person or persons whose interests are affected by the decision concerned. However, subsection 25(6) of that Act provides that an enactment may, among other things, exclude or modify section 27 of that Act. The following are examples of provisions restricting the standing of applicants for review:

*Example 1*

- (1) If the *[specify decision-maker]* decides to cancel a body corporate's permit under *[specify relevant provision]*, the body corporate may apply to the Administrative Appeals Tribunal for review of the decision.

*Example 2*

- (1) Applications may be made to the Administrative Appeals Tribunal for review of the following decisions of the *[specify decision-maker]*:
  - (a) a decision under *[specify relevant provision]* to refuse to grant a permit to a body corporate;
  - (b) a decision under *[specify relevant provision]* to vary a condition of a body corporate's permit;
  - (c) a decision under *[specify relevant provision]* to cancel a body corporate's permit.
- (2) An application under subsection (1) may only be made by the body corporate concerned.

## Part 2—Notification of making of decision and of review rights

6 This Part applies if your draft provides for an administrative tribunal or body to review a decision.

7 If there is a general notification provision covering the giving of notice of the making of the decision and of the existence of that right of review, you do not need to include a further specific provision to that effect. For example, section 27A of the *Administrative Appeals Tribunal Act 1975* requires notice of the making of a decision and of the existence of a right of review to be given to a person in most circumstances.

8 However, if there is not a general notification provision covering the giving of notice of the making of the decision and of the existence of that right of review, you should include a specific provision to that effect. If your instructors object to the inclusion of such a specific provision, you should refer the matter to the Civil Justice Policy and Programmes Division in the Attorney-General's Department.

## Part 3—Protection and liabilities of witnesses

9 In the course of drafting legislation you may be instructed to include a provision giving a person who appears before a tribunal or other administrative body or at a hearing or inquiry, or a person who gives evidence or produces documents, the same protection as a witness in proceedings in the High Court.

10 If you are instructed to include such a provision, you should also discuss with your instructors whether to make the person subject to the same liabilities as a witness in proceedings in the High Court.

11 Some examples of provisions providing for the protection and liabilities of witnesses are:

- (3) Subject to this Part, a person summoned to attend, or appearing, before the Tribunal to give evidence has the same protection, and is, in addition to the penalties provided by this [legislation], subject to the same liabilities, as a witness in proceedings in the High Court.
- (3) A person who is summoned to appear at a hearing, or a person who gives evidence or produces documents at an investigation or a hearing, has the same protection as a witness in proceedings in the High Court.

12 You should refer to “proceedings in the High Court” rather than to “civil or criminal proceedings in the High Court”.

13 The expected implications for the person of gaining the same protections and liabilities as witnesses in proceedings in the High Court are that:

- (a) there will be no action in respect of evidence given by the person during the appearance in respect of words used by him or her in the course of the appearance (not even defamation or other actions relating to use of actions to injure another); and
- (b) if the person refuses to answer a question the person may be prosecuted for contempt; and
- (c) if the person answers a question falsely the person may be prosecuted for perjury.

14 If the tribunal or other administrative body may take evidence on oath, you should also draw your instructors’ attention to Part III of the *Crimes Act 1914*. It contains offences relating to judicial proceedings (including giving false testimony, fabricating evidence, intimidating witnesses, corrupting witnesses, deceiving witnesses and preventing the attendance of witnesses). It defines “judicial proceedings” as including proceedings before a body or person acting under the law of the Commonwealth in which evidence may be taken on oath.

## Part 4—Contempt

15 In the course of drafting legislation you may be instructed to include a provision providing for the “contempt” of a tribunal or other administrative body. Before including

such a provision, you should consider whether section 149.1 of the *Criminal Code* (about obstruction etc. of Commonwealth public officials) makes the provision unnecessary. That section covers the obstruction etc. of officials rather than the obstruction etc. of the tribunal or other administrative body itself.

16 The power of the Parliament to make laws about the “contempt” of administrative bodies is subject to the implied freedom of political communication (see *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681), and you should seek advice from the Australian Government Solicitor if you have any concerns.

17 Section 63 of the *Administrative Appeals Tribunal Act 1975* is an example of a provision dealing with the contempt of a tribunal.

Peter Quiggin PSM  
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**Document History**

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 1 of 2006 and Drafting Direction No. 15 of 2004.