

# 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 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 publication and then contact 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 Review Tribunal review right or procedure; or
- (c) to create a new merits review body.

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

3 Section 17 of the *Administrative Review Tribunal Act 2024* (the **ART Act**) provides for applications to be made for review of reviewable decisions. Under section 12 of the ART Act, a decision is a reviewable decision if an Act or a legislative instrument provides for an application to be made to the Tribunal for review of the decision. Please see the *Administrative Review Tribunal Regulations 2024* for review of decisions under Norfolk Island enactments.

4 If you need to provide for review of decisions by the Administrative Review Tribunal, you should ensure your provision aligns with section 12 of the ART Act. The following are examples of provisions that align with that section:

#### *Example 1*

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

#### *Example 2*

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

#### *Example 3*

- (1) An application may be made to the Administrative Review Tribunal for review of any of the following decisions:
  - (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 Section 13 of the ART Act provides a specific power for legislative instruments to provide for applications to the Tribunal for review of decisions made under the instrument.

### ***Altering default Administrative Review Tribunal arrangements***

6 The ART Act contains standard provisions for review of decisions. Other Acts and instruments can provide differently.

7 Section 5 of the ART Act provides that the application of provisions of the ART Act dealing with review are subject to a contrary intention in another Act. That is, another Act can provide for additional or different arrangements for review of decisions.

8 That section also provides that, if an Act provides that an instrument made under that Act can contain provisions that apply in addition to, instead of or contrary to the ART Act, the application of a provision of the ART Act is subject to a contrary intention in the instrument. That is, if the enabling legislation authorises it, an instrument can provide for additional or different arrangements for review of decisions.

9 The *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* and the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Act 2024* set out consequential amendments to a large number of Acts that altered the application of the *Administrative Appeals Tribunal Act 1975* (the *AAT Act*). These consequential amendments generally adopted the same approach to altering the ART Act as had been taken to altering the AAT Act. Accordingly, the consequential amendments provide examples of how various alterations can be done, but other ways are available in light of section 5 of the ART Act.

10 Subsection 17(1) of the ART Act deals with the standing of applicants for review. It provides that a person whose interests are affected by a reviewable decision may apply to the Tribunal for review of the decision. This standard position can be altered. The following are examples of provisions restricting the standing of applicants for review:

#### *Example 1*

- (1) Applications may be made to the Administrative Review Tribunal for review of *[insert reviewable decisions]*.
- (2) An application may be made only by *[insert relevant persons]*.
- (3) Subsection (2) has effect despite section 17 of the *Administrative Review Tribunal Act 2024*.

#### *Example 2*

- (1) Applications may be made to the Administrative Review 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.

11 It is the policy of the Attorney-General’s Department that other Acts and instruments should not impose requirements for how the Tribunal is constituted for the purposes of proceedings.

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

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

13 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 266 of the *Administrative Review Tribunal Act 2024* requires notice of a decision and any review rights to be given where the decision (or any decision on review or further review of the decision) is a reviewable decision for the purposes of that Act.

14 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 Attorney-General’s Department.

## **Part 3—Protection and liabilities of witnesses**

15 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.

16 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.

17 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.

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

19 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.

20 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

21 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.

22 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.

23 Section 120 of the *Administrative Review Tribunal Act 2024* is an example of a provision dealing with the contempt of a tribunal.

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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.