Complaints against Government—Administrative Appeals

CHAPTER CONTENTS

Introduction

An administrative appeal is concerned with a challenge to either the merits or legal errors of an administrative decision. Administrative appeals are an important feature of administrative law, representing, along with judicial review, a system for accountability of government decision making.

An administrative appeal is different from judicial review (see the Complaints against Government—Judicial Review chapter), which considers whether the decision was lawful, and can only be successful if a decision is legally wrong. Merits review extends beyond review to a reconsideration of the decision and is concerned with what is the correct or preferable decision on the facts of the case. An administrative appeal involves a rehearing of the issues that were the subject of the original decision and, if successful, there will be a fresh decision on the evidence.

Administrative appeal processes are a low-cost, timely and independent avenue of resolving complaints between government and individuals aggrieved by government decision making.

Appeals against Commonwealth Government administrative actions or decisions may generally be made to the Commonwealth Administrative Appeals Tribunal (AAT) established under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). Legislation governing the decision or the AAT Act will set the grounds for administrative appeal, standing required by applicants, procedure and costs. In Queensland, the Queensland Civil and Administrative Tribunal (QCAT) has jurisdiction to undertake administrative appeals under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

In both jurisdictions, an applicant with a reviewable decision may request a statement of reasons about the decision from the decision maker.

The *Human Rights Act 2019* (Qld) (Human Rights Act) has changed the merits review framework in Queensland by making QCAT a public entity when exercising merits review jurisdiction, allowing applicants to piggyback human rights arguments onto their administrative appeal applications and requiring QCAT to interpret laws, including those relevant to the decision, in a way that is compatible with human rights.

Appealing against State Government Actions

QCAT has simplified the administrative appeal framework in Queensland.

The purpose of a merits review in QCAT is to produce the correct and preferable decision (s 20 QCAT Act). The QCAT decision maker will stand in the shoes of the decision-maker, hear and decide the matter by way of a fresh hearing on the merits (s 20(2) QCAT Act).

A person who wishes to bring an administrative appeal (called 'review of administrative decision') in QCAT, must first be sure that such an appeal is permitted. If it is unclear, it may be necessary to read the Act or Regulation under which the action was taken or the decision was made.

The grounds for appeal and procedures to be followed when the enactment gives a right of appeal vary from case to case. Often, strict time limits apply to each appeal stage from internal through to external review.

In some cases, no right of appeal will be given, and the only means of challenge available, other than any internal review process provided for under the relevant Act, will be judicial review or a complaint to an external complaint-handling organisation such as the state ombudsman or the Queensland Human Rights Commissioner. For further information see the following chapters:

- merits review: Complaints against Government—Administrative Appeals
- judicial review: Complaints against Government—Judicial Review
- external complaint organisations: Complaints to the Ombudsman, Complaints against Police and Public Officials and Human Rights Law in Queensland.

Queensland Civil and Administrative Tribunal

QCAT was established in 2009, combining 18 tribunals and 23 jurisdictions to a single tribunal. The following appeals tribunals and entities continue to operate separately from QCAT:

- Mental Health Review Tribunal and Mental Health Court
- Queensland Industrial Relations Commission and Industrial Court
- Development Tribunals, Planning and Environment Court and the Land Court, although QCAT can determine some commercial building disputes.

QCAT operates in much the same way as the Commonwealth AAT, and many of the principles that guide the way in which QCAT hears and determines appeals mirror the principles applied in the AAT.

QCAT has jurisdiction to review a range of government decisions including in relation to blue card applications, freedom of information requests, and animal care and regulation. For further information, see the following chapters:

- decisions made by the Queensland Information Commissioner: Right to Information and Freedom of Information chapter

- decisions made that contravene human rights, where there is another legal complaint that can be brought in QCAT such as a discrimination complaint: Human Rights Law in Queensland chapter.

The QCAT website contains guidance on the administrative appeals jurisdiction of QCAT, application forms, processes and alternative dispute resolution mechanisms contained within QCAT's statutory regime.

What decisions can be reviewed

In order to determine whether an administrative appeal application can be brought in QCAT, the applicant may need to check the Act or subordinate legislation under which the decision was made and confirm whether the particular decision is externally reviewable in QCAT.

Decisions externally reviewable in QCAT include those made by:

- the Queensland Information Commissioner in relation to information access and amendment applications
- Blue Card Services including to issue a negative notice
- Biosecurity Queensland in relation to the seizure and forfeit of animals.

Since 1 February 2021, QCAT has also been given jurisdiction to review certain decisions made by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships. This includes decisions in relation to Queensland Disability Screening and National Disability Insurance Scheme (NDIS) under the *Disability Services Act 2006* (Qld).

The QCAT website includes a full list of legislation giving jurisdiction to QCAT on the Fees and Allowances webpage, under Review of administrative decisions.

The conferring legislation will set out the review process, including whether internal review is required before bringing a QCAT administrative appeal and any time limits that apply.

Often the correspondence communicating a decision will also contain information about whether the decision is reviewable in QCAT and the time limits.

The function of QCAT in reviewing a decision

In exercising its review jurisdiction, the tribunal:

- must decide the review in accordance with the enabling act or subordinate legislation under which the decision was made

- may perform functions conferred by the QCAT Act or enactment under which the decision was made
- has all the functions of the decision maker who made the reviewable decisions (s 19 QCAT Act).

Obtaining Reasons for Queensland Government Decisions

A statement of reasons is aimed at explaining the reasons for the decision and avenues of review and will contain important information for any merits review of the decision. It may be referred to as 'a statement of reasons', 'written notice reasons' or 'grounds for the decision'. This information may be contained in a letter from the government department or attached separately.

Reasons for the decision will often be given by government decision makers whether or not the decision is reviewable in QCAT. The Act or Regulation under which the decision was made may also require the decision maker to give written reasons for decisions even where they are not reviewable in QCAT.

Where a decision is reviewable in QCAT, a written notice of the decision must be given by the decision maker (s 157 QCAT Act). A reviewable decision is one for which QCAT is conferred administrative appeal jurisdiction by the enabling Act (s 17 QCAT Act).

The notice must state:

- the decision
- the reasons of the decision
- the right to have the decision review
- how and in what time period the person may apply for review
- any right to have the decision stayed (s 157 (2) QCAT Act).

Under the *Acts Interpretation Act 1954* (Qld) where an Act requires a decision maker to give written reasons for a decision, the statement of reasons must also:

- set out the findings on material questions of fact
- refer to the evidence or other material on which findings were based (s 27B).

The enactment under which the decision was made may require decision makers to include certain content in the statement of reasons. For example, the *Right to Information Act 2009* (Qld) requires the name and role of the decision maker to be included (s 191).

Where written reasons have not accompanied a reviewable decision, a request for written reasons may be made to the decision maker. The request must be made in writing within 14 days of being given notice of the decision. Written reasons must then be supplied within 28 days of the request (s 158 QCAT Act).

If written reasons are not provided, the applicant can then apply to QCAT for an order that written decisions be provided (s 159 QCAT Act).

In circumstances in which an applicant is not entitled to a statement of reasons, information about the decision may be sought under the *Right to Information Act 2009* (Qld) and *Information Privacy Act 2009* (Qld). See Complaints against Government—Administrative Law and the Right to Information and Freedom of Information chapters.

Who can Appeal against a State Government Action or Decision?

A reviewable decision is one made under an Act or Regulation that gives review jurisdiction on QCAT (s 17, 18 QCAT Act).

Generally, these enabling Acts and Regulations will require the applicant to have had their interests affected by the decision before they can apply to have it reviewed. For example:

- *Working with Children (Risk Management and Screening) Act 2000* (Qld): this Act regulates the working-with-children-check system in Queensland. An applicant who is issued a positive notice is eligible for a Blue Card, which allows them to work with children. A person who has been issued a negative notice or had a positive notice suspended may apply to QCAT for a review. In order to apply to QCAT, the applicant must be the person who has been issued the negative notice or similar (s 353 *Working with Children (Risk Management and Screening) Act 2000* (Qld)).
- *Anti-Discrimination Act 1991* (Qld): the Queensland Human Rights Commissioner may lapse a complaint under this Act in certain circumstances, including where the commissioner is of the reasonable opinion that a complainant has lost interest in continuing with the complaint (s 169 Anti-Discrimination Act). The Queensland Human Rights Commission (QHRC) applicant may apply to QCAT within 28 days of being told that the complaint has lapsed for this reason to review the commissioner's decision (s 169(3) *Anti-Discrimination Act 1991* (Qld)).
- *Animal Care and Protection Act 2001* (Qld): a person who has applied for an internal review of a decision by Biosecurity Queensland, including in relation to the registration, giving an

animal welfare direction and the seizure of animals, may then apply for an external review in QCAT (s 198A *Animal Care and Protection Act 2001* (Qld)). In order to apply for an internal review, the person must be an interested person, namely someone who has been given an information notice and, if the decision relates to the animal, they are in charge of the animal.

In the above examples, the persons interests are directly affected by the administrative decision. However, there is no requirement in the QCAT Act that the person has a legal interest in the decision or even that the decision is adverse to their interests.

QCAT may also make an order joining (adding) a person as a party to proceedings, including where the tribunal is of the opinion that a person's interests may be affected by the proceeding (s 42 QCAT Act).

Applications for Review of a State Government Action

An application to QCAT must be made in the approved form, available on the QCAT website or from the registry (r 7 *Queensland Civil and Administrative Tribunal Rules (2009)* (Qld) (QCAT Rules)). Where there is no approved form, the application must be in writing, signed by the applicant and contain certain details set out in r 10 of the QCAT Rules.

The filing fees vary depending on the decision being appealed, ranging from no cost through to $358 for a standard application. QCAT may waive or reduce filing fees where the applicant is in financial hardship. Eligibility criteria and a hardship waiver form are available on the QCAT website or from the registry.

A person may bring an application under the QCAT review jurisdiction even if the decision is also the subject of a Queensland Ombudsman complaint, preliminary inquiry or investigation (s 18 QCAT Act).

Time limits

The time limit for lodging an application in QCAT for review of an administration decision will depend on whether the applicant applied to the decision maker or QCAT for written reasons.

Where there has been no application for written reasons

The applicant must apply to QCAT within 28 days of being notified of the decision.

Where the written reasons were requested from the decision maker under s 158 of the QCAT Act

The applicant must apply to QCAT the earlier of 28 days from receipt or the date they should have been given.

Where an order from QCAT was sought for the decision maker to provide written reasons under s 159 of the QCAT Act and the order is made by QACT

The applicant must apply to QCAT the earlier of 28 days from the date of the written reasons were received or were required to be given under the QCAT order.

Where an order from QCAT was sought for the decision maker to provide written reasons under s 159 of the QCAT Act and the order is not made by QACT

The applicant must apply to QCAT 28 days from the date the applicant is notified of QCAT's decision not to make the order (s 33(4) QCAT Act).

QCAT may also extend a time limit fixed for starting a proceeding under the Act or any enabling Act or Regulation (s 61 QCAT Act).

Documents

The QCAT Act requires the decision maker for a reviewable decision to use their best endeavors to help the tribunal (s 21 QCAT Act). This includes that the decision maker must provide to QCAT no more than 28 days after being given a copy of the application form a written statement of reasons and any document or thing in the decision maker's possession or control that may be relevant to the decision (s 21(2) QCAT Act). The tribunal may also require the decision maker to produce additional documents and give supplementary statement of reasons if the one produced is not considered adequate (s 21(3)(4) QCAT Act).

Procedure of the Queensland Civil and Administrative Tribunal

QCAT must deal with matters in a way that is accessible, fair, just, economical, informal and quick (s 3 QCAT Act), and parties generally bear their own costs. Parties bearing their own costs means that, whether they win or lose, parties in QCAT usually pay for their own legal representation if they chose to and are permitted to have it. The tribunal must act with as little formality as permitted, and is designed to be accessible to self-represented applicants, with leave required for legal representation in most cases. The merits review, called 'a review of an administrative decision in QCAT', is designed to produce the correct and preferable decision. The QCAT website includes information on the application process and self-advocacy tools to navigate the tribunal process.

Evidence

QCAT is not bound by the rules of evidence or to any rules, practices or procedures applying to courts, other than the extent to which QCAT wishes to adopt them (s 28 QCAT Act). QCAT may inform itself in any way it considers appropriate, and must ensure that all relevant material is disclosed to enable it to make a decision with all relevant facts (s 28 QCAT Act). QCAT must allow a party reasonable opportunity to call or give evidence, examine witnesses and make submissions (s 95 QCAT Act). However, the requirement for evidence may dispensed with where QCAT considers there is sufficient evidence, and rules may be placed on examination of witnesses (s 95(2) QCAT Act). Evidence may be given in writing or orally. The QCAT website includes user-friendly guidance on procedures that apply.

Representation

Parties are required to represent themselves in QCAT unless the interests of justice require otherwise (s 43 QCAT Act). In deciding whether leave will be granted to have representation, QCAT will consider circumstances including where the proceeding is likely to involve complex questions of fact or law and all the parties agree to the applicant being represented (s 43(3) QCAT Act). In practice, QCAT will usually grant leave for legal representation in merit review matters because the other party is almost always the State of Queensland, which is well resourced and sophisticated. This is particularly the case if the applicant is vulnerable such as a child or a person with impaired capacity.

Where leave is granted, a person must generally be represented by an Australian legal practitioner or government legal officer. Another person can only be authorised if QCAT is satisfied the person is an appropriate representative (s 43(4) QCAT Act).

Because QCAT is designed for self-represented parties, the website contains user-friendly information on going to the tribunal including on attending by phone on the day of a hearing and preparing statements and witnesses to give evidence. The website also provides links to legal services, community legal centres and community organisations that may assist self-represented applicants.

Alternative dispute resolution

A QCAT decision maker may refer parties to an alternative dispute resolution process such as conferencing, conciliation and mediation.

The purpose of a dispute-resolution process is to try and settle the dispute before the matter is decided by a full rehearing (s 66C, 77 QCAT Act).

The QCAT Rules contain Rules about the way the conciliation or mediation must be conducted.

The referral can be made with or without the parties' consent (ss 66A, 75 QCAT Act) and, once referred, the parties must act reasonably and genuinely (rr 68B, 71 QCAT Rules).

The conciliator or mediator may be a member, adjudicator or principal registrar of QCAT, or another approved person (ss 66F, 79 QCAT Act). A mediator may also be an approved mediator under the *Dispute Resolution Centers Act 1990* (Qld) or a person such as a registry staff member approved as a mediator (s 79 QCAT Act). Where a member or adjudicator conducts the alternative dispute process, they must not be the person who conducts the hearing unless all parties agree (ss 66H, 81 QCAT Act).

The conciliation or mediation process must normally be conducted in private unless the conciliator directs otherwise (s 66E, 78 QCAT Act). However, in either process the parties may agree for things said or done to be admitted as evidence including any terms of any settlement so that they can be confirmed in a QCAT order (rr 68D, 73 QCAT Rules).

The conciliator or mediator decides how to conduct the process, but it must comply with the QCAT Rules (ss 66E, 78 QCAT Act). They have general powers including to gather information about the nature and facts of the matter, and may see parties together, separately and with or without their representatives (rr 68C, 72 QCAT Rules).

If the parties come to an agreement in a mediation or conciliation, the agreement will be written and become enforceable. It also brings the proceedings to an end. Where the conciliator or mediator is a member, adjudicator or principal registrar of the tribunal, they may record the terms of the settlement in writing and make an order as if it were an order of QCAT (s 85 QCAT Act). For other conciliators and mediators, the settlement agreement must be filed in the registry for the tribunal to make the necessary orders (s 85(4) (5) QCAT Act).

Practice directions

The QCAT website lists practice directions, which guide QCAT proceedings. The practice directions should be read alongside the QCAT Act and QCAT Rules. Practice directions cover matters including:

- filing and use of audio, video and photographs in tribunal proceedings
- completing and submitting QCAT forms online
- service of QCAT proceedings.

Powers of the Queensland Civil and Administrative Tribunal

In exercising review jurisdiction, QCAT has all the functions of the original decision maker and will usually decide a review by way of a fresh hearing on the merits. The tribunal must decide the review in accordance with the QCAT Act and the enabling Act under which the reviewable decision was made. The tribunal may perform any functions conferred by the QCAT Act or enabling Act (s 19 QCAT Act).

QCAT may also stay the operation of all or part of the original decision once the review application has started (s 22(4) QCAT Act). A 'stay' means that all or part of the original decision will not take effect while QCAT is reviewing the matter.

QCAT may confirm or amend the decision, set the decision aside and substitute its own decision or refer the matter back to the decision maker for reconsideration (s 24 QCAT Act).

Where the decision is referred for reconsideration by the decision maker, the decision maker may confirm the decision, amend it or set it aside and substitute a new decision.

If the decision is confirmed by the decision maker, review proceedings will continue in QCAT.

If the decision maker amends the decision or sets it aside and substitutes a decision, then the amended or substituted decision is taken to be the reviewable decision and proceedings will continue in QCAT unless the applicant withdraws (s 23 QCAT Act).

Decision of the Queensland Civil and Administrative Tribunal

A QCAT decision may be given orally or in writing (s 121 QCAT Act). In an administrative appeal, QCAT must decide the review in accordance with the QCAT Act, which requires that written reasons accompany a reviewable decision (s 157 QCAT Act). In any matters in which reasons are not automatically provided, an applicant may request written reasons of a QCAT decision within 14 days of the decision taking effect, and QCAT must provide the written reasons for most decisions within 45 days (s 122 QCAT Act).

QCAT may also give written recommendations about the policies, practices and procedures applying to reviewable decisions of the same kind to the chief executive of the entity and, if it is a different person, the decision maker (s 24 QCAT Act).

Appeal from the Queensland Civil and Administrative Tribunal

The appeal options from a decision in an administrative review depends on whether the QCAT decision maker was a judicial or non-judicial member.

Judicial members include the president and deputy president of QCAT, a supplementary member who is a Supreme and District Court judge. A non-judicial member includes senior and ordinary members who are not former judges, and adjudicators. The vast majority of QCAT decisions in administrative review matters are non-judicial members.

Where the decision was made by a non-judicial member, the first stage of appeal is to the QCAT Appeal Tribunal. There is a right to bring an appeal that raises a question of law. If the appeal is about a question of fact or a question of mixed law and fact, leave (permission) will be needed to undertake the appeal (s 142 QCAT Act). It can be difficult to work out whether the problem with a decision involves a question of law or a question of fact, or both, and legal advice may be needed.

Where a decision was made by a judicial member, the appeal goes straight to the Queensland Court of Appeal. Appeals to the Court of Appeal are only permitted on a question of law or with leave from the court (s 149 QCAT Act).

The president of QCAT may also transfer an appeal to the QCAT Appeal Tribunal to the Court of Appeal in certain circumstances (s 144 QCAT Act).

In most cases, an appeal to the QCAT Appeal Tribunal or the Court of Appeal must be made within 28 days of notice of the decision, whether written reasons were provided or not (ss 143, 151 QCAT Act; ch 18 *Uniform Civil Procedure Rules 1999* (Qld)).

Costs

Each party generally pays for their own legal costs in QCAT, regardless of whether they win or lose. QCAT will only order a party or their representative to pay the legal costs of the other party if it is in the interests of justice. Circumstances in which costs may be ordered include where an offer to settle the dispute has been made and not accepted, a party has vexatiously conducted proceedings or failed to attend a conciliation or mediation.

Human Rights and Administrative Appeal in Queensland

The Human Rights Act applies to decisions made by public entities in Queensland. Broadly, this includes Queensland State Government departments, local councils, state schools, police and non-government organisations performing public functions. The Act complements and strengthens administrative law in Queensland.

The Human Rights Act alters the administrative review jurisdiction exercised by QCAT in three key respects:

- QCAT is a public entity when exercising merits review jurisdiction during an administrative appeal.
- Applicants may piggyback human-rights arguments onto their administrative appeal actions.
- In deciding a judicial review application, QCAT must interpret laws in a way that is compatible with human rights including the laws that bind decision makers.

See the Human Rights Law in Queensland chapter for a more detailed explanation of the 23 protected human rights and freedoms, key operative provisions and an expanded explanation of what is included in the meaning of a 'public entity' under the Human Rights Act.

Acting in an administrative capacity

Under the Human Rights Act, QCAT is a public entity for the purpose of the Human Rights Act when acting in an administrative capacity including when it is exercising merits review jurisdiction.

This means that when the tribunal member stands in the shoes of the decision maker in deciding an administrative appeal, they are making a decision as a public entity and must adhere to the obligations on public entities under the Human Rights Act. As a public entity, the tribunal must interpret laws in a way that is compatible with human rights (s 48 Human Rights Act) and act or make decisions that are compatible with human rights and, in making a decision, give proper consideration to a human right relevant to the decision (s 58(1) Human Rights Act).

Human rights during administrative appeal

There is no direct right to bring a breach of the Human Rights Act before QCAT or any other court or tribunal.

However, where a person is asking QCAT to exercise its review jurisdiction, they may be able to argue that the decision maker also breached the Human Rights Act. This is commonly referred to as 'piggybacking' a Human Rights Act complaint to another legal action.

For example, a person might ask QCAT to exercise its review jurisdiction on the basis that the correct or preferable decision was not made, and also argue that the decision maker failed to consider their human rights as required by the Human Rights Act.

The tribunal will be required to consider all human rights not just those of the applicant, and the Human Rights Act does not create absolute rights. Human rights may be limited and balanced in a way that is consistent with a free and democratic society based on human dignity, equality and freedom.

Where QCAT finds the decision maker has failed to meet their obligations under the Human Rights Act, QCAT may grant relief or remedy, but not monetary damages, for any breach of human rights.

It is also possible for a question about the application of the Human Rights Act or about the interpretation of statute in accordance with the Act to be referred to the Supreme Court.

See the below case study for how the Human Rights Act may apply to a QCAT review of an administrative decision to issue a negative notice under the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) (Working with Children Act).

Case study

An applicant applies for a renewal of a positive blue card notice under the Working with Children Act.

Blue Card Services issues a negative notice and the applicant applies to QCAT for a review of the decision.

QCAT must decide the review in accordance with the QCAT Act and Working with Children Act. Additionally, in undertaking the review, the tribunal is acting in an administrative capacity under the Human Rights Act. This means that the tribunal must interpret the QCAT Act and Working with Children Act in a way that is compatible with human rights, must act or make its review decision in a way that is compatible with human rights and give consideration to human rights relevant to the decision.

The applicant may also raise arguments that the reviewable decision infringed their human rights such as the right of a person to privacy and reputation, which includes the right not to have privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 25 Human Rights Act).

In acting or making its decision, the tribunal may consider other human rights it considers relevant such as the right to a fair hearing (s 31 Human Rights Act).

As human rights are not absolute and may be subject to reasonable limits, the tribunal may consider and balance other human rights making a decision (s 13 Human Rights Act). For example, this may include consideration of the rights of children including the right to protection of families and children (s 26 Human Rights Act).

The Human Rights Act may be considered when interpreting the application of the QCAT Act. For example an application for a non-publication of the applicant's name may involve consideration of the right to privacy and reputation (s 25 Human Rights Act).

The tribunal must then decide whether to confirm, amend, set aside, substitute the negative notice or refer the decision back to Blue Card Services. In making its own decision about the matter, QCAT should consider whether the decision or action:

- takes into account the relevant matters in the Working with Children Act and QCAT Act
- is compatible with human rights and, if any limitations are placed on human rights (whether the applicant's or other people's), whether those limitations are reasonable and justifiable under the Human Rights Act.

Case reference: *ZZ v Secretary, Department of Justice & anor* [2013] VSC 267; *Dowling v Director-General, Department of Justice and Attorney-General* [2020] QCAT 340; *Frost v State of Queensland & Ors* [2020] QCATA 144.

Interpretation of laws

The Human Rights Act also requires the tribunal to, as far as possible and while continuing to fulfil its purpose, interpret laws in a way that is most compatible with human rights.

A law is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and justifiable in a free and democratic society based on human dignity, equality and freedom.

The tribunal can refer to international law and the judgements of Australian, foreign and international courts and tribunals when interpreting if a law is compatible with human rights.

Appealing against Commonwealth Government Actions

The Commonwealth AAT is empowered to hear administrative appeals against a range of decisions made under Commonwealth legislation. The AAT exists as an independent avenue of review for people aggrieved by Commonwealth government decision making.

The AAT can review decisions made by federal government departments, agencies and ministers under more than 400 Commonwealth Acts and legislative instruments.

A person affected by a decision must first check whether the AAT has jurisdiction to review the decision. This jurisdiction is generally given by the enabling Act or Regulation under which the decision was made. Time limits for review are generally short and may be strictly applied.

When undertaking merits review of decisions, the role of the AAT member is to stand in the shoes of the decision maker for a reviewable decision and reach the legally correct or preferable decision.

The AAT was established with a recommendation that members of the tribunal be chosen for their expertise in a particular field. As a result, the AAT has decision makers from a wide variety of professional backgrounds including law, medicine, defence, migration, public administration, accountancy, science and social welfare.

Where there is no right of appeal to the AAT, undertaking judicial review or making a complaint to an external complaint-handling organisation such as the Commonwealth Ombudsman may be the only means of disputing the decision or action. For further information see the following chapters:

- merits review and external complaint organisations: this chapter
- judicial review: Complaints against Government—Judicial Review.

Administrative Appeals Tribunal

Appeals tribunals that continue to operate separately from AAT include the:

- Veterans' Review Board, which reviews decisions made by the Repatriation Commission and the Military Rehabilitation and Compensation Commission
- Australian Competition Tribunal, which reviews determinations of the Australian Competition and Consumer Commission.

These specialist tribunals are each created by specific legislation and, in some cases, reviews of the decisions of these tribunals may be made to the AAT.

The AAT reviews decisions made in key Commonwealth administrative law areas including in relation to migration, social security, the National Disability Insurance Agency (NDIS) and freedom of information. For further information on reviewing the decisions in the following areas, see the corresponding chapters of the Queensland Law Handbook:

- decisions made by Centrelink: the Social Security Payments chapter
- decisions about NIDS: the National Disability Insurance Scheme chapter
- decisions about child support: the Spousal & Child Maintenance and Child Support chapter.

The AAT website has factsheets and guidance on the application process, forms and steps in a review.

Decisions that can be reviewed

The AAT may review a decision where the Act or Regulation under which it was made states that the decision is reviewable in the tribunal (s 25 AAT Act). A decision includes a failure to make a decision.

To determine whether a particular matter can be appealed to the AAT, an applicant may need to check the Act or Regulation under which the decision was made and confirm that the decision is reviewable in the AAT. In many cases, only particular decisions under enabling legislation will be reviewable by the AAT. The corresponding legislation may include information about earlier review options, such as internal merits review, and any time limits that apply.

The AAT's review jurisdiction is contained in more than 400 separate pieces of legislation, covering areas such as:

- child support
- Commonwealth workers compensation
- social security decisions
- income tax
- National Disability Insurance Scheme
- air navigation
- customs and excise laws
- defence force retirement and death benefits
- environmental protection and biodiversity
- freedom of information
- health insurance
- visas and cancellation of visas on character grounds
- migration and refugee
- aged care providers
- patents and trade marks
- national health legislation including benefits, pharmacy and optometrist approvals
- student assistance and the Higher Education Loan Program
- superannuation
- bankruptcy
- taxation

- tax agents' and migration agents' registration
- veterans' entitlements (appeals from the Veterans' Review Board).

This is not an exhaustive list and provides only a general guide. Not all Commonwealth administrative activities are subject to an appeal to the AAT.

A full AAT reviewable decisions list setting out reviewable decisions and the corresponding Act or legislative instrument is available on the AAT website.

The function of the Administrative Appeals Tribunal in reviewing a decision

In undertaking merits review of a decision, the overriding function of the AAT is to make the correct or preferable decision. 'Correct' refers to the fact that a decision is correct in law, whereas 'preferable' refers to the decision being the decision that best reflects the relative merits of alternative decisions that were open to the decision maker.

The functions of the AAT are contained in the AAT Act and in legislation that gives merits review jurisdiction to the AAT, notably in migration law and social security law. These enabling Acts may expand the function of the AAT on review. For example, the *Social Security (Administration) Act 1999* (Cth) provides that where the AAT determines a person is entitled to a social security payment, the AAT must also assess the rate of the payment or ask the Secretary or Chief Executive of Centrelink to do so.

Obtaining Reasons for Commonwealth Government Decisions

A statement of reasons will often accompany the decision, and will assist the affected person to understand how the decision was made, reasons for the decision and the options for review. A statement of reasons serves an important administrative law function in ensuring governmental transparency. In producing reasons, the government entity must demonstrate that a lawful decision has been made.

A person who is entitled to seek a review by AAT under an enabling Act or Regulation may make a written request for reasons of the decision (s 28 AAT Act). It is not necessary for the person requesting the reasons to have commenced proceedings in the AAT, the right to request reasons is a standalone right.

The statement should:

- be in writing

- set out the findings on material questions of fact
- refer to evidence or other material on which the finds were based
- give reasons for the decision (s28(1) AAT Act).

However, there is no universal form for a statement of reasons. The characteristics of an individual decision will essentially determine the material to be set out in a statement of reasons.

If written notification of the decision was received but no reasons accompanied the decision, a request for the reasons for the decision must be made within 28 days after the written notification was received. Otherwise, a request must be made within a reasonable time.

Where a request is made, the reasons must be provided within 28 days. Where the request is refused, including because the decision maker is of the view that the applicant is not entitled to the statement or did not make the request within time, a response must be provided within 28 days.

Where a request is refused on the basis that the applicant is not entitled to reasons, the applicant can apply to the AAT for an order that written reasons be provided (s 28(1AC) AAT Act). An applicant may also apply to the AAT for a declaration that the statement is inadequate (s 28(5) AAT Act). The AAT may then order the decision maker to amend an insufficient statement of reasons (s 28 (6) AAT Act).

Reasons may be refused if the Attorney-General certifies that disclosure would be contrary to the public interest. Certain reviewable decisions are also excluded from the requirement including first review decisions in relation to child support, paid parental leave and social security (Centrelink) decisions (s 28 (1AAA) AAT Act).

In circumstances in which an applicant is not entitled to a statement of reasons, information about the decision may be sought under the *Freedom of Information Act 1982* (Cth) (see Complaints against Government—Administrative Law).

Who can Appeal against a Commonwealth Government Action or Decision

A reviewable decision is one that the AAT Act or another enactment provides that the tribunal has jurisdiction to review the decision (s 27 AAT Act).

An application for review of a decision may be made by, or on behalf of, any person whose interests are affected by the decision (s 27 AAT Act). There is no requirement that the applicant has been

adversely affected by the decision, and the interest affected does not have to be a legal interest, nor does the person making the application have to show any legal ownership.

The AAT Act or enabling legislation may impose additional requirements on the standing of applicants to apply for a review. For example, in the case of an application for review of a security decision, the review can only be brought by a person who is the subject of an Australian Security Intelligence Organisation security assessment (s 27AA AAT Act).

The right to request a review of a decision extends an organisation or association of persons, whether incorporated or not, where the decision relates to a matter included in its objects or purposes (s 27 AAT). This definition extends to incorporated associations, community groups and public-interest organisations. However, review rights do not arise where the decision was made before the organisation or association came into existence, or before its objects or purpose included the matter concerned (s 27(3) AAT Act).

Applications for Review of a Commonwealth Government Action

Applications for review of a decision must be in writing or, where the decision is reviewable in the Social Services and Child Support Division, may be made in writing, orally, in person or by telephone to the AAT registry (s 29(1) AAT Act). Application forms are available on the AAT website or from the registry and clearly identifies the information that must be provided to the AAT.

The statement of reasons must accompany the AAT application (s 29(1)(c) AAT Act) except if the application is oral or a review is sought under certain provisions of the *Australian Securities and Investments Commission Act 2001* (Cth).

Applications must be accompanied by the application fee where applicable. The standard application fee is $962. However, in many instances no fee is payable, and fees may be refunded if an applicant is successful. A fee that is otherwise payable may be reduced to $100 by the AAT including where it would cause the person financial hardship to pay the fee, legal aid is granted, the applicant is in prison or otherwise detained, in receipt of Centrelink benefit or aged under 18 years old. Information about fees and a request for fee reduction are available on the AAT website or from the registry.

Time limits

The time limit for lodging an application is generally 28 days after the applicant receives the written decision (s 29(2) AAT Act). Where the written decision does not set out findings on the material questions of fact and reasons for the decision, or written reasons have not been provided but have been requested in accordance with s 28 of the AAT Act, different time limits may apply.

Where the decision sets out the findings on material questions of fact and the reasons for the decision

The applicant must apply to the AAT within 28 days of being given the decision.

Where the decision does not set out findings on material questions of fact and the reasons for the decision and a statement in writing is given without the applicant having requested a statement of reasons under s 28(1) of the AAT Act

The applicant must apply to the AAT within 28 days of being given the statement in writing.

Where the decision does *not* set out findings on material questions of fact and the reasons for the decision and the applicant requests a statement of reasons under s 28(1)

The applicant must apply to the AAT within 28 days of being given the statement of reasons under s 28(1) of the AAT Act or being notified that a statement will not be given.

In any other case where the decision does *not* set out findings on material questions of fact and the reasons for the decision and a document setting out the terms of the decision is given to the applicant

The applicant must apply to the AAT on the day the document is given to them.

Similar time limits apply where a decision maker is deemed to have made a decision with the AAT application generally required within 28 days of the deemed decision or 28 days of the provision of a statement in writing, statement of reasons or refusal to provide reasons (s 29(3) AAT Act).

Where there is no prescribed time limit, for example because the decision is not recorded in writing and set out in a document provided to the applicant, or because the enabling legislation does not set a time limit (e.g. requesting a first review of a Centrelink decision), the AAT application must be made within a reasonable time (s 29(4) AAT Act).

The time for lodging an application can be extended if the AAT is satisfied that it is reasonable in all the circumstances to do so (s 29(7) AAT Act).

Documents

After a valid application is made, the AAT notifies the decision maker that an application has been made (s 29AC AAT Act). Under s 37 of the AAT Act, the decision maker is required to provide to the AAT and the applicant, within 28 days after receipt of the notice under s 29 of the AAT Act, a copy of all documents considered to be relevant to the review of the decision. These documents are referred to as the 'T documents' by the AAT. The T documents must also be provided to each party to the proceeding or their representative.

Procedure of the Administrative Appeals Tribunal

The AAT proceedings should be as simple as possible. It should be conducted with as little formality and technicality as permitted and as expeditiously as possible (s 33 AAT Act). In carrying out its functions, the AAT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick (s 2A AAT Act). The AAT aims to be an accessible jurisdiction that promotes public trust and confidence in its decision making.

The procedure for administrative appeal will vary depending on the area of review.

Examples in the child support and national disability insurance scheme areas

Child support reviews

AAT's first review of child support decisions.

Step 1: After receiving the application, the AAT will write a letter to the applicant acknowledging receipt. The AAT will also notify the other parent (or non-parent carer) and the Child Support Registrar of the application.

Step 2: Information must then be provided to the AAT by both the applicant and the department in which the Child Support Registrar is an employee (the department).

The department must:

- provide a copy of the decision to be reviewed within three workings days after receiving notice
- give any written submissions under the Act at least 14 days before the hearing (where no party resides outside Australia) or otherwise within 28 days of the hearing.

The applicant must:

- provide written submissions, evidence and other information as directed by the registry
- where directions are not given, provide any evidence, information or written submissions they intend to rely upon 14 days before the hearing (where no party resides outside Australia) or otherwise within 28 days of the hearing.

Step 3: Documents provided to the AAT will then be supplied to the applicant, the department and any other party. Exceptions apply, and an applicant can redact some information provided to the AAT and ask for particular information not to be disclosed, and the registry will also redact certain information provided to the registry.

Step 4: A directions hearing may be held by telephone and will be recorded by the tribunal.

Step 5: The applicant must lodge a request for representation (at last 21 days before the hearing), to appear by telephone and be assisted by an interpreter (within 14 days of lodging the application). The applicant must notify the tribunal about any person they want to be present at the hearing including witnesses. Children are prohibited from attending.

Step 6: A hearing will be conducted. The tribunal member will decide how to conduct the hearing and may ask questions to the applicant, any other party and any witnesses. The parties are not permitted to question each other, but may ask the presiding member to put a particular question to the other party or witness.

See: Child Support Review Directions, Practice Direction.

For information on AAT's second review of child support decisions, available for decisions to refuse to extend the time to apply for a first review and decisions in relation to percentage of care, see Social Security Guide.

National Disability Insurance Scheme reviews

Step 1: The registry will write to confirm receipt of the application.

Step 2: A contact officer will call the applicant within three working days to discuss what will happen with the application, contact details, assistance required to participate in the review process etc.

Step 3: The AAT will tell the National Disability Insurance Agency (NDIA) they have received the application and request all the documents relevant to the application (T documents).

Step 4: In most cases, a case conference will be held two to four weeks from receipt of the T documents. A case conference is an informal meeting to discuss whether the applicant and NDIA can reach agreement.

- Before the conference, a contact officer will explain what will happen and how the applicant can prepare for the case conference.
- At the conference, the registrar or AAT member will try to help the applicant and NDIA to reach an agreement.
- If there is no agreement, next steps will be discussed including a conciliation or a hearing, and a case plan will be prepared setting out information about the progress of the matter, additional information and any supports required to ensure the process is fair and quick.

Step 5: Conciliation, another form of alternative dispute resolution, may be conducted next. At the conciliation, the registrar or AAT member will work with the applicant and NDIA to reach agreement if possible.

Step 6: In some cases, an application will proceed to a hearing, either directly after the T documents are provided or if the case conference and conciliation are not successful. An applicant may also request a fast-track hearing after the case conference in certain circumstances. The hearing will be conducted as informally as possible, and the AAT member will give a decision at the end, if possible. In complex or novel matters, a decision will be given no later than 60 days after the hearing.

See Review of National Disability Insurance Scheme Decisions Practice Direction.

The AAT aims to avoid to some extent the formal trappings of the courts and the adversarial character of court proceedings. Hearings are inquiries into the merits of government decisions rather than legal contests between two opposing parties. A full description of the AAT procedures and processes, including practice directions, guides, guidelines and a flow chart of the application process, is available on the AAT website.

Generally, parties have a right to be represented before the AAT. A party wishing to be represented in a hearing before the Social Services and Child Support Division must obtain permission from the tribunal (s 32 AAT Act). Lawyers frequently appear to present cases in the AAT, however, non-lawyer representatives such as accountants and migration agents may also appear. Parties may also be represented by a friend, family member or other advocate.

AAT hearings are generally held in public, however, the tribunal has powers to order private hearings, non-publication and non-disclosure orders to protect a party or witness before the proceedings (s 35 AAT Act).

Evidence

The AAT is not bound by the rules of evidence and may inform itself in whatever way it considers appropriate (s 33(1)(c) AAT Act) subject to procedural fairness. This means that the AAT may depart from the rules of evidence, although where it does so (e.g. admitting hearsay evidence) this may be relevant to assessing the weight to be put on the evidence.

Evidence may take the form of documents, oral arguments, written evidence and expert evidence. The tribunal has the power to summon a party to produce documents or give evidence relevant to the proceedings (s 40 AAT Act).

Expert evidence is presented in many AAT proceedings, notably in social security, NDIS, veterans and employee compensation matters. The General Practice Direction, available on the AAT website, sets out the rules for expert evidence, including requiring the early exchange of expert reports. The *AAT Persons Giving Expert and Opinion Evidence Guideline* sets out expectations in relation to the giving of expert evidence and must be given to expert report writers.

Unrepresented applicants

The AAT has an outreach program for applicants who are not legally represented. The AAT provides information and assistance about AAT practices and procedures. Outreach usually occurs about the same time the parties are provided with copies of the T documents. Outreach is conducted over the phone. Where necessary, the AAT will arrange for assistance from an interpreter.

The AAT also has a legal advice scheme, established with legal aid bodies. A legal aid representative attends the tribunal and self-represented parties can make an appointment for advice. Specialist community legal centers and the Aboriginal legal service in each state and territory may also provide assistance in the AAT. The Assistance webpage on the AAT website contains referral information.

The AAT website contains comprehensive information about practices and procedures, including specific publications dealing with workers compensation and social security jurisdictions.

Alternative dispute resolution

The AAT Act allows for alternative dispute resolution (ADR) processes to be held between the parties with a view to resolving the matter without a formal hearing (s 34A AAT Act). Alternative dispute resolution processes include conferencing, mediation, conciliation and case appraisal (s 3 AAT Act).

Conferencing

A conference is an informal, private meeting conducted by the tribunal member or officer with the parties.

Conferences are conducted to discuss and define the dispute, identify further evidence and explore the conduct of the application and whether the matter can be settled. The aim of case conferencing is to either resolve the application by agreement or, if it cannot be resolved, create a written case plan setting out how the application will proceed.

A second conference may be held to discuss the evidence that has been lodged, and the strengths and weaknesses of the cases. The conference may result in an agreement, or narrowing of the issues in dispute.

The AAT registry will generally refer all applications to a conference shortly after receiving an application.

See the AAT's Conference Process Model.

Mediation

Mediation is a process where the tribunal member, officer or appointed mediator helps the parties to identify the issues in dispute, consider alternatives to proceeding to hearing and reach an agreement.

The mediator cannot offer advice or decide the dispute, but may determine the mediation process.

Mediation may be appropriate where the matter is complex, likely to be lengthy, involves more than two parties and/or there will be an ongoing relationship between the parties

See the AAT's Mediation Process Model.

Conciliation

Conciliation is another informal meeting held between the parties, in person or by phone. The aim of the conference it to try and resolve the application by agreement.

A conciliation differs from a mediation in that the conciliator may make suggestions for the terms of settlement and encourage participants to reach an agreement that is in accordance with relevant law.

A conciliation may be favored where commercial considerations are important, the parties want to keep the agreement confidential or would benefit from advice on settlement options.

See the AAT's Conciliation Process Model.

Case appraisal

Case appraisal is an advisory process where a tribunal member, officer or another appointed person assists the parties to resolve the dispute by providing an opinion on the facts and likely outcome. The person conducting the case appraisal will be selected based on their knowledge of the subject matter in dispute.

Case appraisal may be conducted at any stage in the proceedings, and may be appropriate where there is a dispute in relation to an evidentiary or factual dispute, an expert opinion may further negotiations and parties are willing to give proper consideration to the appraisal.

See the AAT's Case Appraisal Process Model.

Costs

Alternative dispute resolution processes are conducted without charge to the parties. Anything said at an ADR process cannot be given in evidence before the AAT, unless the parties otherwise agree (s 34E AAT Act).

If the parties at an ADR agree to resolve a matter and sign a written agreement containing the terms of that resolution, the AAT can, after a seven-day cooling-off period, make a decision in accordance with those terms without a hearing if satisfied that those terms are within its powers (ss 34D AAT Act). Similar powers exist for agreements reached outside an ADR (s 42C AAT Act).

Alternative Dispute Resolution guidelines setting out the objects of an ADR and principles the AAT will consider when referring a matter to ADR can be found on the AAT website. The process models, also available on the AAT website, define the different ADR processes.

Practice directions

The AAT has a General Practice Direction, which applies in all applications made to the AAT throughout Australia. The practice direction sets out procedures for AAT matters, including in relation to interpreters, expert evidence and how to address members. This procedure can be varied by specific direction of the AAT. The practice direction is designed to assist the AAT to achieve the dual purpose of attempting to obtain an agreed resolution where possible and ensuring that appropriate steps are taken to prepare for the hearing of those matters that do not settle.

Powers of the AAT

The AAT exercises all of the powers and discretions conferred upon the original decision maker by the enabling Act or Regulation (s 43 AAT Act). The AAT can affirm, vary, set aside or remake the

decision under review, or refer the decision back for reconsideration according to any directions or recommendations it may make (s 43(1) AAT Act). It decides for itself what the correct or preferable decision should be and is not limited to determining whether the original decision maker made some legal error that would give rise to judicial review.

An applicant can withdraw their application at any stage. The AAT will exercise its powers under s 43 of the AAT Act when determining a matter that has not been settled, dismissed or withdrawn.

Policy considerations

Although the AAT is not bound to follow ministerial or departmental policy, it is routinely relied upon by the AAT when determining administrative appeals.

A policy can facilitate the integrity and consistency of administrative decision making and may be a relevant consideration for decision making by the AAT in clearly defined circumstances. However, the policy must be consistent with the purpose of the statute (see *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634 at 640–641). In that case, the court found that decision makers undertaking merits review should generally apply ministerial policy unless it was unlawful or there were convincing reasons to depart from it.

The reasons for the decision should identify the relevant policy and how it was taken into consideration in making the disputed decision.

Decision of the AAT

The AAT decision may be given orally or in writing (s 43(1) AAT Act). Written reasons may be given on request by a party made within 28 days after the decision is given, and provided within 28 days of the request (s 43(2A) AAT Act). This duty is subject to the confidentiality provisions in the AAT Act (ss 35, 36D).

Where written reasons are given, they should state findings on all material questions of fact taken into account in making the decision and refer to any evidence or other material the findings are based on (s 43(2B) AAT Act). The parties must also be notified of further review rights, including second review or review by a court (s 43(5AA) AAT Act).

The decision of the tribunal is taken to be the decision of the decision maker and will have effect on the day ordered by the AAT (s 43(6) AAT Act).

Appeal from the AAT

An appeal from the AAT to the Federal Court of Australia on a question of law is permitted within 28 days of receiving the AAT's decision (s 44 AAT Act). The AAT may err in law in a number of ways. For example, a failure to adhere to relevant legal principles arising from cases decided by the Federal Court of Australia, a failure to comply with the requirement to give reasons and a failure to adhere to the statutory obligation to give reasons for a decision constitute an error of law. Disputes about facts or the way discretion was exercised by the tribunal member are generally not errors of law.

The AAT itself may refer a question of law to the Federal Court of Australia for determination (s 45 AAT Act).

Costs

The AAT has no general power to make orders for costs so, in most matters, the parties will pay for the cost of their own lawyer if they chose to have one, whether they are successful or not. The AAT does have power to award costs in some matters including security applications under the *Australian Security Intelligence Organisation Act 1979* (Cth), veterans entitlements under the *Military Rehabilitation and Compensation Act 2004* (Cth) and Commonwealth employees compensation actions under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). It is necessary to check the enabling Act or Regulation that gives review rights in the AAT for details about costs that can be awarded.

Where costs can be ordered, and the parties cannot reach agreement, the AAT's taxing officer will determine the costs amount. The Taxation of Costs Practice Direction, available on the AAT website, sets out the procedures to be followed when applying to the Taxing Officer.

In extremely rare cases, funding may be obtained from the Commonwealth Attorney-General's office for cases of public importance.

Legal Notices

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