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## Pathway for taking administrative actions

<div>Option 1. Seek further information</div> <div>Option 2. Representations to local member of parliament</div> <div>Option 3. Press</div> <div>Option 4. Complain to the Ombudsman</div> <div>Option 5. Seek Internal Merits Review</div> <div>Option 6. Challenge Decision via External Merits Review</div> <div>Option 7. Judicial Review</div>			
Option 1.			
<ul style="list-style-type: none"><li>Source of law<ul style="list-style-type: none"><li>➤ Government Information (Public Access) Act 2009 (NSW)</li><li>➤ Freedom of Information Act 1982 (Cth)</li></ul></li></ul>			
<ul style="list-style-type: none"><li>Definition of FOI – a legal regime which gives an individual a legally enforceable right to access information held by public agencies (subject to specific exemptions).</li><li>Key features of FOI<ul style="list-style-type: none"><li>- Publication of documents and information</li><li>- Access to documents (amendment and annotation of personal records)</li><li>- Increase recognition that information held by gov is to be managed for public purposes (it is a national resource)</li><li>- Review of decisions</li></ul></li><li>Scope of ‘document’<ul style="list-style-type: none"><li>➤ FOI S4 – ‘document’ includes<ul style="list-style-type: none"><li>- any paper or other material on which there is writing,</li><li>- a map, plan, drawing or photograph;</li><li>- Any marks, figures, symbols or perforations which have a meaning;</li><li>- Any material from which sounds, images or writings are capable of being produced.</li><li>- And any other record of information [which includes information stored on a computer database].</li></ul></li></ul></li></ul>			
<ul style="list-style-type: none"><li>Process accessing to documents<ol style="list-style-type: none"><li>Written request with a description of documents required, stating it is a request under FOI s15(2); GI(PA) s 41(1).</li><li>A decision on the request made within 30 days under FOI, s15(5)) or 20 days under GI(PA) s 57.</li><li>Department may need to consult affected parties under FOI s26A-27A; s54 GI(PA) i.e. personal business, confidential information</li><li>Access to documents or copy provided FOI s20(1) GI(PA) s 72.</li><li>Where exempt material is included in a document, agencies may release the document but mask the exempt bits and parts that are irrelevant to the application (s 22 Cth FOI Act; s 74 GIPA Act). This is known as redaction.</li><li>If refusal must give a statement of reasons FOI s26, GI(PA) ss 60, 61.</li><li>Charges FOI ss 29-31, GI(PA) ss 64-71.</li></ol></li></ul>		<ul style="list-style-type: none"><li>Process disputing the access<ol style="list-style-type: none"><li>Internal review: SS 52-54E</li><li>Information Commissioner: SS 54F – 55ZD</li><li>Administrative review tribunal: SS 57-67</li><li>Appeal to Federal Court from Information Commissioner: SS 57-67</li><li>Appeal to Federal Court from ART decision: ART Act</li></ol></li></ul>	
Exemption categories			
<ul style="list-style-type: none"><li>Category 1 Fully exempt documents: S31B(2) Div 2</li><li>Effect - no access: S11(4)</li></ul>		<ul style="list-style-type: none"><li>Category 2 Conditionally exempt documents: S31B(b)</li><li>Effect – access on ‘balance, be contrary to the public interest’</li></ul>	
<div>Examples</div> <div>S33 – damage security, defence, international relations</div> <div>S34 – cabinet documents<ul style="list-style-type: none"><li>When it has been submitted to Cabinet + was brought into existence for the dominant purpose of submission to Cabinet</li><li>Doesn’t require actual submission if dominant purpose for its preparation was for submission</li><li>It is an official record of Cabinet</li></ul></div>		<div>Examples</div> <div>S47C1 - release unless against public interest – deliberative process exemption</div> <div>A document that would disclose<ul style="list-style-type: none"><li>opinion, advice or recommendation, etc</li><li>for the purposes of the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth</li></ul></div>	

<ul style="list-style-type: none"> <li>Was for the dominant purpose of briefing a Minister on a document submitted to Cabinet and brought into existence for the dominant purpose of submission to Cabinet</li> <li>A draft of, or copy of, any of the above documents</li> <li>It would disclose Cabinet deliberations</li> </ul> <p>S42 – legal professional privilege</p> <ul style="list-style-type: none"> <li>Documents that would be privileged from production in legal proceedings on the ground of legal professional privilege</li> </ul>	<ul style="list-style-type: none"> <li>Definition on ‘deliberative process’</li> <li>Deliberative processes involved in the functions of an agency are its thinking processes: Re Waterford and Department of Treasury (No 2) (1984)</li> </ul>
<b>When an exemption is not applicable</b>	
<ul style="list-style-type: none"> <li>Cabinet docs</li> <li>Information that consists of purely factual material (unless it would reveal a Cabinet deliberation or decision, and its existence has not been officially disclosed)</li> <li>Not exempt only bc it is attached to an exempt document</li> <li>Legal docs</li> <li>If the person entitled to claim legal professional privilege in relation to the document in legal proceedings waives that claim; OR</li> <li>If the infor is operational infor of an agency</li> </ul>	<ul style="list-style-type: none"> <li>Deliberative exception does not apply to:</li> <li>S47C(2) operational or purely factual material OR</li> <li>S47(3) reports or records listed which include: <ul style="list-style-type: none"> <li>Reports of scientific or technical experts.</li> <li>Reports of a prescribed body or organisation in an agency.</li> <li>Reasons for an adjudicative decision.</li> </ul> </li> </ul>

<b>Option 4. Complain to Ombudsman</b> <b>Source of law</b>	
<p>➤ Ombudsman Act 1976 (cth) - Ombudsman is authorised to investigate departments and prescribed authorities (defined s3,3a) in relation to ‘a matter of administration’</p> <p><u>Inclusion</u></p> <p>S15(1)- Ombudsman can act on the basis that action:</p> <ul style="list-style-type: none"> <li>appears to have been contrary to law</li> <li>was unreasonable, unjust, oppressive or improperly discriminatory;</li> <li>was in accordance with a rule or practice but the rule or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory;</li> <li>was based either wholly or partly on a mistake of law or of fact; or</li> <li>was otherwise, in all the circumstances, wrong</li> </ul> <p><u>Exclusion - not authorised to investigate</u></p> <ol style="list-style-type: none"> <li>Action taken by a Minister (but can investigate Minister’s advisers)</li> <li>Action relating to Parliamentary proceedings</li> <li>Action taken by a judge of a court created by the cth Parliament</li> </ol>	
<ul style="list-style-type: none"> <li><b>Definition</b> - An independent statutory office to investigate and report on actions by government departments and agencies that are related to matters of administration.</li> <li><b>Key features</b> <ul style="list-style-type: none"> <li>Can act on complaints or on own motion</li> <li>Actively pursue investigations (rather than leaving primary control with complainant)</li> <li>Can investigate systemic issues and make recommendations to improve procedures, policy or legislation</li> <li>Usually operates informally, and guiding principle is to operate in private unless public release of information is in the public interest</li> <li>Does have coercive powers to require attendance and examine witnesses</li> </ul> </li> <li><b>Roles</b> <ul style="list-style-type: none"> <li>2 broad investigative roles: s5 Ombudsman Act 1976 (cth) - can investigate ‘action’ that relates to a matter of administration by a government department or prescribed authority <ul style="list-style-type: none"> <li>1. Receive and investigate complaints from public or government: reactive</li> <li>2. Initiate inquiries of their own: proactive</li> </ul> </li> </ul> </li> <li><b>Remedies (recommendatory powers only)</b> <ul style="list-style-type: none"> <li>S6: doesn’t have to investigate a complaint</li> <li>S8: doesn’t have to give complainant a hearing or control over any part of the invitation</li> <li>S15(2) Ombudsman report can include wide-ranging recommendations, inc.</li> </ul> </li> </ul>	

<ul style="list-style-type: none"> <li>o Particular actions be taken to rectify</li> <li>o That a law or practice on which action is based be altered</li> </ul>	
- S15(6) – copy of report to responsible Minister	
<ul style="list-style-type: none"> <li>• <b>Process</b></li> </ul>	
1. Ombudsman must notify the authority that it is being investigated (s 8(1))	
2. Investigation shall be conducted in private (s8(2)) [Also s35 imposes confidentiality obligations on Ombudsman officers].	
3. The investigation is to be conducted as the Ombudsman sees fit (s8(2))	
- Ombudsman may require a person to	
o Provide information or documents: S9(1)	
o Answer questions: s9(2)	
- Examine persons under oath or affirmation: S13	
- Enter Commonwealth premises and carry out investigations: S14	
4. An opportunity is to be given to department officers to be heard (s8(5)) – the substance of complaint is to be put to officer	
5. Ombudsman shall report to the relevant government department or authority where they are of the opinion that: S15(2)	
o Referral should be made to an appropriate authority for further consideration.	
o action should be taken to rectify, mitigate or alter a decision	
o a decision should be cancelled or varied	
o a rule of law, provision of an Act or practice should be altered	
o reasons should have been given	
o any other thing should be done in relation to the decision..	
- S15(4): May request the department to specify within a certain period of time what action it will take.	
6. Followup i.e. engages political accountability – where appropriate action has not been taken by department or prescribed authority	
- S16 - Ombudsman may inform the Prime Minister in writing: Green v Daniels (1977)	
- S17 - Forward copies of the report to both houses of Parliament	
- Informing the complainant – S12	
o S12(3) – particulars of the investigation shall be provided to the complainant	
o S12(5)b – recommendations may be provided to the complainant	
o S12(5)a – recommendations shall be provided to the complainant if the department does not take action in response to the Ombudsman’s recommendations	

<p style="text-align: center;"><b>Option 5. Seek Internal Merits Review</b>  <b>Option 6. Challenge Decision via External Merits Review</b></p>	
<ul style="list-style-type: none"> <li>• <b>Source of law</b></li> </ul>	
➤ Administrative Review Act 2024 (cth) - Administrative Review Tribunal	
➤ Civil and Administrative Tribunal Act 2013 (NSW) - NCAT	
<ul style="list-style-type: none"> <li>• <b>Definition of merits review</b> – an independent review of the initial decision maker’s decision. Concerned with correct and preferable decision.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Definition of Tribunal</b> – (at cth level) It is not a court. It is a body resolves disputes by adjudication.</li> </ul>
<p><b>Effect/Remedies</b></p>	<p>It has the objective to:</p>
- May vary an admin decision or substitute a new decision.	- Improves transparency and quality of government decision-making: S9d ART Act
- In relation to the reviewable decision: S105 ART	- Promotes public trust and confidence in AAT: S9e ART Act
a) Affirm the decision – original decision is the correct and/preferable decision OR	<ul style="list-style-type: none"> <li>• <b>Key features</b></li> </ul>
	- Accessible, fair, just, quick, accessible, responsive: S9 ART Act
	- Conduct proceedings with as little formality and technicality as it can: s50 ART Act
	- MRT, RRT and Social Security Appeals Tribunal were amalgamated within generalist ART
	<ul style="list-style-type: none"> <li>• <b>Independent factors</b></li> </ul>
	- Generally, ART has presumption of independence and de novo: Re Control Investment Pty Ltd and ABT (No2)(1981)
	- Membership: appointment process, tenure and conditions

<ul style="list-style-type: none"> <li>b) Varying the decision OR</li> <li>c) Setting aside the decision <ul style="list-style-type: none"> <li>i. Substitutes decision – makes its own decision</li> <li>ii. Remits – send back to the original decision maker to make the decision again</li> </ul> </li> <li>- ART cannot enforce its own decisions</li> </ul>	<ul style="list-style-type: none"> <li>o ART consists of the President, the Deputy President, the senior member and ordinary members</li> <li>o President: judge of the Federal Court</li> <li>o Senior members: legal practitioners enrolled for at least 5 years</li> <li>o Ordinary members: persons who have special knowledge or skills</li> <li>- Management: how it interacts with agencies, location, budget, staffing, performance management and etc</li> <li>- Government policy: influence on Tribunal <ul style="list-style-type: none"> <li>o Basic function of policy – to supplement the legal instructions given to the executive by the legislature</li> <li>o It's a type of rule BUT should guide not control</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• <b>Roles</b></li> <li>- Tribunal assesses what is the '<u>correct and/preferable</u>' decision: Drake v Minister for Immigration and Ethnic Affairs (1979) <ul style="list-style-type: none"> <li>o AAT can regard the initial decision but still has to reach its own decision: Shi v Migration Agents Registration Authority (2008)</li> </ul> </li> <li>- ART is not bound by <u>the rules of evidence</u> but may inform itself on any matter in such manner as it thinks appropriate: S52 ART Act <ul style="list-style-type: none"> <li>o AAT is not restricted to consider the material and facts before the initial decision maker; but to consider material existing at time of AAT's decision (not looking back to the circumstances at the time of the primary decision): Shi v Migration Agents Registration Authority</li> </ul> </li> <li>- May exercise all the powers and discretions given to the initial decision maker: S54 ART</li> <li>- Will ensure every party is given <u>a reasonable opportunity</u> to: S55 <ul style="list-style-type: none"> <li>o Present the party's case</li> <li>o Have access to documents to which the Tribunal proposes to have regard</li> <li>o Makes submissions in relation to those documents</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>• <b>Process</b></li> <li>1. Check what can be reviewed <ul style="list-style-type: none"> <li>- Jurisdiction given by statute (over 400 different Acts)</li> <li>- What is a reviewable decision: S12 ART Act <ul style="list-style-type: none"> <li>o Another Act (or legislative instrument) provides for an application to be made to the Tribunal for review of <u>the decision</u></li> </ul> </li> <li>- '<u>Decision includes</u>': S4(a) <ul style="list-style-type: none"> <li>o Making, suspending, revoking or refusing to make an order or determination; also includes imposing a condition <ul style="list-style-type: none"> <li>▪ Most common decisions: Social Security, veteran's affairs, taxation, workers comp for commonwealth employees, freedom of information, migration, NDIS</li> </ul> </li> </ul> </li> </ul> </li> <li>2. Check who can apply for review (standing) <ul style="list-style-type: none"> <li>➤ Administrative Review Act 2024 (cth)</li> <li>- A person whose interests are affected by a reviewable decision may apply to the Tribunal for review of the decision: S17(1)</li> <li>- They are then a party to the proceedings: s22(1)a</li> <li>- The decision maker who made the decision will be a party to the AAT proceedings: s22(1)b</li> <li>- A person who applies to be a party to proceedings and the Tribunal is satisfied that person's interests are affected by the decision and it is appropriate they become a party: s22(1)c</li> </ul> </li> <li>3. Duty to provide documents <ul style="list-style-type: none"> <li>- If requested by the Tribunal, the decision maker must within 28 days give the Tribunal (s23) and other parties (s27): <ul style="list-style-type: none"> <li>o A statement of reasons; AND</li> <li>o A copy of relevant documents in its possession</li> </ul> </li> <li>- Unless with exception <ul style="list-style-type: none"> <li>o A disclosure of information for which there is a public interest certificate under S91</li> </ul> </li> </ul> </li> <li>4. Hearing <ul style="list-style-type: none"> <li>- The hearing shall be in public except where a Practice Direction requires a private hearing: S69 ART</li> <li>- Representation is permitted: s66 ART</li> </ul> </li> <li>5. Notice of decision and statement of reasons <ul style="list-style-type: none"> <li>- Tribunal duty to give reasons and notice of appeal/review rights: S111</li> <li>- A failure by the Tribunal to provide the things does not affect the validity of the Tribunal's decision: S111(4A)</li> </ul> </li> </ul>	

6. Appeal from Tribunal
- Go to the statute to see if an appeal is available on merits to an appeal panel in the same tribunal OR another tribunal
    - o Can access the Guidance and Appeals Panel at a more senior level: S123 ART, can:
      - Review some decisions made by decision-makers; OR
      - Re-review some decisions that have been reviewed by the Tribunal
    - o The panel is activated where:
      - a) There is an issue of significance to administrative decision-making.
      - b) A Tribunal's decision may contain an error of fact or law materially affecting the decision.
        - o There is no error of law in making a wrong finding of fact: ABT v Bond; Enfield
  - If it is b)
    - o Appeal to Federal Court on a 'question of law': S172, 176. Such as:
      - Failed to identify the relevant legal test
      - There was no evidence to support a finding on a particular fact
      - Failed to provide procedural fairness
    - o The Federal Court cannot substitute its own decision for AAT, can make any order if considers appropriate: S176(1)c
      - Can set aside OR affirm OR remit a matter back: S176(2)
      - If remitting back can provide directions – incl. whether the Tribunal takes further evidence: S172(2)b

### Option 7. Judicial Review

- **Source of power**
  - An essential characteristic of the judicature is that it declares and enforces the law: Constitution s75(iii), s75(v), s76(i)
  - Determinative interpretation of a Statute is the role of the court: ADJR; Enfield
- **Definition**
  - Concerned with the legality of decision: was the decision maker legally authorised to make the decision they did?
    - o Needs to be a legal error in the initial decision
    - o Limited to the material before the decision maker and the reasons given by that decision maker
    - o Legality scope
      - Statutory law – defining the precondition and conditions on exercise of statutory powers
      - Common law – principles that inform interpretation of the empowering statutes
    - o Institutional and constitutional limits on judicial power: AG v Quin
  - Involves a superior court exercising judicial power to conclusively determine a dispute with the below elements:
    - o Legality of administrative action
    - o Standing (brought before the court by an affected individual)
    - o Remedies (not exercising the powers of the initial decision maker)
      - Quashing the decision, and/or
        - May set aside an administrative decision and send it back to the decision maker to make it again
      - Prohibiting action in reliance on the decision, and/or
      - Mandating performance of a duty which remains unperformed in law

### Precondition to power

- **Principle**
  - The conditions must be satisfied before the power or discretion to act is enlivened. Precondition to power in the statute calls for characterisation by court: Casimaty
- 3 scenarios:
  - o Precondition to power doesn't create a legal obligation enforceable by a court – no legal consequences, only political or administrative consequences
  - o The decision is valid but an unlawful act capable of being restrained by injunction (the legal error is non-jurisdictional)
  - o The decision is invalid (the legal error is jurisdictional)

