

EXPLANATORY STATEMENT

Issued by the Authority of the Attorney-General

Administrative Appeals Tribunal Act 1975

Administrative Appeals Tribunal (Code of Practice) Determination 2017

Legislative Authority

The *Administrative Appeals Tribunal Act 1975* (the Act) establishes the Administrative Appeals Tribunal (AAT) as the peak Commonwealth merits review tribunal. Subsection 27B(1) of the Act provides that the Attorney-General may, by legislative instrument, determine a Code of Practice for the purpose of facilitating the operation of subsection 27A(1) of the Act.

The *Administrative Appeals Tribunal (Code of Practice) Determination 2017* (the Code) will replace and repeal the *Code of Practice for Notification of Reviewable Decisions and Rights of Review* (the Code of Practice).

Purpose

The Code covers decisions made under Commonwealth laws that are subject to review by the AAT and its purpose is to ensure that affected persons are advised of reviewable decisions and are aware of their rights to seek review of those decisions on the merits. In practice this may be achieved by an agency which makes reviewable decisions under Commonwealth law that are subject to AAT review, providing the persons affected by a reviewable decision with a decision notice to better understand the decision and post decision review options.

Background

The Code outlines the steps a decision-maker must take to ensure that decision notices contain information of three broad kinds: how information about the affected person in relation to the decision may obtain further information about their decision, whether the affected person is able to seek internal or external merits review of the reviewable decision, and where avenues of review are available further details about the review.

Other information that must be provided by the decision-maker to the affected person includes: the ability of an affected person to make a complaint in relation to the reviewable decision, any legal, financial or other forms of advice that are available to the affected person, and any other information that the decision-maker considers to be appropriate in the circumstances.

Details of the Code are set out in [Attachment A](#).

The authorising Act does not specify any conditions that need to be satisfied before the power to make the legislative instrument may be exercised.

Consultation was undertaken with the AAT, the Attorney-General and the following Commonwealth Agencies: the Department of Communications and the Arts, Department of Defence, Department of Environment and Energy, Department of Finance, Department of Health, Department of Industry, Innovation and Science, Department of Infrastructure and Regional Development, Treasury, Department of Veteran's Affairs, Department of Agriculture and Water Resources, Department of Social Services, Department of Education, Department of Employment, Australian Security Intelligence Organisation, Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, Department of Immigration and Border Protection, the Office of the Australian Information Commissioner,

and the Department of Human Services. These agencies supported the re-making of the Code, and comments and suggestions made by these agencies have been adopted and implemented into the Code.

The Office of Best Practice Regulation was consulted in relation to the Code and advised that no Regulation Impact Statement was required.

The Code is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Code commenced on the day after it was registered on the Federal Register of Legislation.

The Statement of Compatibility with Human Rights for this Code is set out in [Attachment B](#).

ATTACHMENT A

Details of the *Administrative Appeals Tribunal (Code of Practice) Determination 2017*

Explanation and effect of the Provisions

Clause 1 – Name

Clause 1 sets out the title of the Instrument as the *Administrative Appeals Tribunal (Code of Practice) Determination 2017*.

Clause 2 – Commencement

Clause 2 provides that the Instrument commences the day after it is registered on the Federal Register of Legislation.

Clause 3 – Authority

Clause 3 sets out that this Instrument has been made under subsection 27B(1) of the *Administrative Appeal Tribunal Act 1975* (the Act).

Clause 4 – Schedules

Clause 4 outlines that any Instruments amended, repealed or affected by this Instrument are outlined in Schedule 1.

Clause 5 – Definitions

Clause 5 outlines the interpretive provisions that are relevant to the Instrument.

“Act” means the *Administrative Appeals Tribunal Act 1975*

“*affected person*” means a person whose interests are affected by a reviewable decisions.

“*decision-maker*” is defined as person who makes a reviewable decision.

“*decision notice*” is defined as a notice in relation to a reviewable decision under 27A(1) of the Act.

“*reviewable decision*” is defined under subsection 27A(4) of the Act and means:

- (a) a decision that is reviewable by the Administrative Appeals Tribunal; or
- (b) a decision that is reviewable by:
 - (i) a person whose decision is reviewable by that Tribunal; or
 - (ii) a person whose decision on review, because of subparagraph (i), is a reviewable decision.

Clause 6 – Purpose of this Part

Clause 6 outlines that the purpose of the Code is to facilitate the operation of subsection 27A(1) of the Act. Subsection 27A(1) outlines that a decision-maker is required to take steps which are reasonable in the circumstances to give any affected person in relation to a reviewable decision notice, in writing or otherwise, of the making of the reviewable decision and the right of the affected person to have the reviewable decision reviewed.

Clause 7 – Content etc. of decision notices

Clause 7(1)(a) outlines that information which the decision-maker provides to the affected person must be in plain English for ease of understanding. This means that the notice must be

clear, and expressed as simply as the subject matter permits. Clause 7(1)(b) outlines that the information provided by the decision-maker to the affected person must also comply with clause 7(2).

Clause 7(2) provides that a decision notice in relation to a reviewable decision must take reasonable steps to detail the following information to the affected person:

- information about how an affected person in relation to the reviewable decision may obtain further information about the decision. Information that would be appropriate to provide in this instance includes (clause 7(2)(a)):
 - How a person who can provide information in relation to the decision can be contacted (clause 7(2)(a)(i)). Contact details that may be appropriate to apply include: a specific telephone number (rather than a switchboard), a postal address, a fax number, website address and email address. Where an email address is provided this can, but need not be, an individual's email address. Alternatively, the provision of a mailbox address that is monitored by the individual would also be appropriate.
 - Whether an affected person is able to ask the decision-maker for the reasons for the decision (if those reasons have not already been given to the person) and if so, how an affected person may ask for them (clause 7(2)(a)(ii)).
 - Whether an affected person is able to obtain access to documents or information about the decision under the *Freedom of Information Act 1982* or any other Act and when this is so, what process the affected person has to undertake to gain access to this information or where they can find information about how to do this (clause 7(2)(a)(iii)).
- information about how an affected person is able to seek review of the decision, including whether internal and/or external review is available to the affected person (clause 7(2)(b)).
- information about the following matters to the extent practicable, if review is available (clause 7(2)(c)):
 - A brief statement of the nature of merits review (clause 7(2)(c)(i)). If there is uncertainty about what this statement should entail, an example of an appropriate statement of merits review may be gained from the Administrative Review Council's *Best Practice Guide 5 – Decision Making: Accountability* (August 2007) page 2 (or similar). Other details that may be included in this statement may include: who the reviewer is (e.g. the AAT) and if the reviewer can overturn the decision.
 - Whether there are any prerequisites or conditions for seeking review, and if so, what these prerequisites and conditions are (clause 7(2)(c)(ii)).
 - How an affected person may seek merits review including whether an application for review needs to be made and if so, how so the application can be made (clause 7(2)(c)(iii)).
 - Whether there are any time limits for seeking that review (clause 7(2)(c)(iv)).
 - Whether or not a fee is payable for the review that the affected person is entitled to undertake and if so the amount of the fee and when it is payable (clause 7(2)(c)(v)).
 - Whether a full or partial waiver of any such fee may be sought and if so, how that fee may be sought and if it is sought, on what basis this can occur (clause 7(2)(c)(vi)). For reference, "may be sought" refers to an explanation of the process by which an affected person would have to undertake to receive this waiver. For example, completing and submitting documentation with certain attachments.

- Whether a refund can be sought and if so, how the refund may be sought and on what basis (clause 7(2)(c)(vii)). For reference, “may be sought” has the same meaning as that within clause 7(2)(c)(vi).
- How the person or body (the reviewer) that may conduct the review may be contacted (clause 7(2)(c)(viii)). It is expected that this will mostly apply for internal review, but it may in some circumstances apply to external review.
- If there is a time period which the reviewer must conduct the review within, these time restraints must also be provided (clause 7(c)(ix)).
- Any procedures of the reviewer that the decision-maker considers that the affected person should be aware of. This includes but is not limited to whether the affected person is required to attend hearings (clause 7(c)(x)).
- information about how an affected person may make a complaint in relation to the reviewable decision (clause 7(2)(d)).
- information about legal, financial or other forms of advice and assistance may be available to an affected person. Examples of what may be outlined in this instance include translation and interpretation services (clause 7(2)(e)). When translation services are needed, reference to the *Multilateral Language Service Guidelines for Australian Government Agencies* may be useful. Interpretation services include services that would be provided to the vision impaired, or an affected person who has impaired comprehension or literacy abilities.
- any other information that the decision-maker considers appropriate in all the circumstances (clause 7(2)(f)).

Please note that the requirements of clause 7(2) do not need to be fulfilled if they are not applicable. Only the details that are necessary and relevant to the affected person’s decision need to be provided. In the first instance of review, if there are multiple alternative steps to seek review then these must all be outlined. Further, if an affected person seeks review and is provided with a new decision, then a revised decision notice must be provided with the information that is relevant to that decision. The information that is provided need not be detailed in the document if links to webpages can be provided within the decision notice or brochures and/or other appropriate source can be provided at the same time as the decision notice.

Clause 8 – The decision-maker must notify affected persons about decisions and rights of review

Clause 8(1) details the circumstances where a decision-maker may give public notice of the decision and the rights of review. Notice in this form only needs to be provided in certain circumstances, which are outlined in the Code. The form in which a public notice is provided, is discretionary. It may be appropriate for a decision-maker to provide this notice on the internet, in a newspaper or magazine or any other form that may be deemed appropriate in the circumstances. Clause 8(2) outlines that the provision of public notice does not mean that individual notice cannot be given additionally in particular instances.

Schedule 1 – Repeals

Schedule 1 outlines that the Instrument repeals the *Code of Practice for Notification of Reviewable Decisions and Rights of Review* registered on 30 November 2006.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Administrative Appeals Tribunal (Code of Practice) Determination 2017

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Administrative Appeals Tribunal (Code of Practice) Determination 2017* (the Code) is to replace and repeal the *Code of Practice for Notification of Reviewable Decisions and Rights of Review* (the former Code).

The former Code is due to sunset on 1 April 2018. The Administrative Appeals Tribunal has reinforced its support for the retention of a Code of Practice, as it establishes a minimum standard of practice to ensure affected persons are advised of reviewable decisions and are aware of their rights to seek review of these decisions.

The Code refines the contents of the notices provision in the former Code, requiring decision-makers to take all reasonable steps to provide information of three broad kinds: how information about the affected person in relation to the decision may obtain further information about their decision, whether the affected person is able to seek internal or external merits review of the reviewable decision and, when avenues of review are available, further details about the review, as outlined in clause 7(c). Other information that must be provided by the decision-maker to the affected person includes: the ability of an affected person to make a complaint in relation to the reviewable decision, any legal, financial or other forms of advice that is available to the affected person, and any other information that the decision-maker considers to be appropriate in the circumstances. The Code also includes definitions of “decision-maker” and “decision notice”. The Code also includes its commencement, the legislative authority under which the Code was made, and the repeal of the former Code.

Human rights implications

This legislative instrument makes amendments to the former Code, which are designed to assist persons affected by a reviewable decision to better understand the decision and post decision review options. As such, it does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not limit any human rights.