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A User's Guide to Administrative Decision Making

Delivering good decisions

A User's Guide to Administrative Decision Making

What is the purpose of the guide?

This is a guide to the issues that administrative decision makers need to consider when making decisions. Its goal is to help decision makers make better decisions that have proper regard to people's rights and interests and are less likely to be challenged in a court or tribunal. This guide should be used in combination with detailed training in administrative law.

What is administrative law?

Administrative law is a set of principles contained in both court decisions and legislation. It sets out how administrative decision makers must make decisions and provides affected people with a way to challenge those decisions.

Administrative law applies to government officers who make decisions under legislation that affect the rights and interests of others. It may also apply to people who work for a private entity and make decisions on behalf of the government.

Are you an administrative decision maker?

Common examples of administrative decision makers are ministers, officers working within government departments or local councils, and people authorised to make decisions on behalf of those ministers or officers.

Administrative decisions are usually made under legislation and are directed towards a particular person (or organisation). They are different from contractual and commercial decisions and policy and political decisions.

Examples of administrative decisions include:

- Issuing a licence to a taxi driver;
- Granting or refusing access to documents under freedom of information laws;
- Refusing to register a psychiatrist; and
- Placing conditions on a planning permit.

What questions do you need to ask when making administrative decisions?

Here are 11 questions to help you make decisions in accordance with administrative law. The questions include examples from legislation including the Domestic Animals Act 1994 (Vic) (DA Act) and the Freedom of Information Act 1982 (Vic) (FOI Act). However the questions in the guide are relevant to any area of administrative decision making.

1. Where does the power to make the decision come from?

You need to find the section(s) of legislation that gives you the power to make your decision so you know exactly what decision you are empowered to make. There may also be subordinate legislation, such as regulations or instruments made under the primary legislation, that you need to check.

Remember – make sure you are using the most up-to-date (current) version of the legislation.

- Current **Commonwealth legislation** is available at : [Federal Register of Legislation - Home Page](#)
- Current **Victorian legislation** (Victorian LawToday) is available at: www.legislation.vic.gov.au

Example

A power in a local law to issue a busking permit derives its authority from section 113 of the Local Government Act 1989 (Vic).

2. Does the legislation give you any discretion in making your decision?

The Act may *require* you to make a particular decision or it may give you *discretion* in what you decide. A requirement to make a particular decision will often be indicated by the word ‘must’. Discretion in making a decision will often be indicated by the word ‘may’.

If the legislation gives you discretion, make sure you understand the boundaries within which you can exercise the discretion. This includes making decisions that are consistent with the purpose of the legislation (the purpose of the legislation may be set out at the beginning of the legislation).

Examples – Domestic Animals Act

Required to make a particular decision

Section 84T of the DA Act states an officer of the council *must* make a decision to destroy a restricted breed dog (e.g. a pit bull terrier) within eight days if the officer cannot identify the owner. The officer has no choice about the decision – the officer is *required* to decide to destroy the dog in this circumstance.

You can exercise discretion in making your decision

Sections 84S and 84TA of the DA Act states an officer of the council *may* make a decision to destroy a dog (that is not a restricted breed dog) at the expiry of the relevant time period. The officer can therefore decide whether or not to destroy the dog – the officer has *discretion*.

Examples – Freedom of Information Act

Required to make a particular decision

Section 13(a) of the FOI Act says that an officer *must* provide access to a requested document if the requirements for requesting the information have been met and the document is not an exempt document. The officer has no choice about the decision – the officer is required to provide access to the document in this circumstance.

You can exercise discretion in making your decision

Section 16(2) of the FOI Act gives an officer the *discretion* to provide access to a requested document even if the document is exempt from release. The officer can therefore choose whether or not to release the document.

3. Are you authorised to make the decision?

It will not always be possible for the people given decision making power under legislation to make all of those decisions. For example, ministers are often given powers to make decisions under legislation but are too busy to make all of those decisions personally. In these circumstances the minister may be able to authorise someone else to make the decisions for them.

If the legislation does not give you direct power to make the decision, you will need to be authorised as an authorised officer or delegate of the decision maker who is identified in the legislation. Make sure you have up-to-date documentation of this authorisation (for example, a document signed by the minister authorising you to make the decision) and that the decision you want to make falls within the scope of your authorisation.

Remember – if you are a *delegate*, you will make the decision in your own name. If you are an *authorised officer*, you will make the decision in the name of the person who authorised you.

Example – Domestic Animals Act

Under section 84S of the DA Act, the decision maker must be an authorised council officer. The legislation defines this to require the council, by instrument (a written document), to have appointed the specific employee of council to be an authorised officer (section 72) who acts as council's agent. The instrument of authorisation needs to be reviewed after a council general election.

Therefore, before you could make a decision about whether or not to destroy a dog under section 84S of the DA Act, you would need a written document signed by the current council appointing you as an authorised officer.

Example – Freedom of Information Act

Under the FOI Act, decision makers must be 'authorised' to make a decision on behalf of the agency (for example, a government department) by the responsible minister or the principal officer 'in accordance with arrangements approved' by that person (section 26(1)).

Therefore, before you can make a decision about whether to provide access to documents under the FOI Act, the minister or principal officer of your agency must have authorised you to do so.

4. Have you acted fairly in making your decision?

Procedural fairness (sometimes called ‘natural justice’) requires a decision maker to provide a fair hearing and be free of bias.

To provide a fair hearing, you must provide a person affected by your decision with an opportunity to respond to all issues or factual allegations that have come up during the decision making process.

You should make sure there are no grounds for anyone to think you are biased or have a foreseeable conflict of interest.

A decision maker is bound by these requirements unless the legislation governing the decision excludes or modifies them (which is rare). The legislation may also impose additional procedural fairness requirements, such as holding a formal hearing or issuing a notice.

Example – Domestic animals act

Section 84S of the DA Act requires that, where possible, an owner be notified before a dog is destroyed. Where an owner is identified, and if the council has enough information, the council must begin a legal prosecution of the owner (section 84Q). This gives the owner an opportunity of a ‘formal hearing’ (in court) to respond to all issues and factual allegations in respect of any decision to destroy the dog. This regime is instead of the council being required to conduct an informal hearing.

There may also be a perception of bias if the council officer ignores strong, relevant evidence, or dismisses it for insufficient reason. Further, if a council officer had a personal connection to a dog owner, she should think about whether it could create a reasonable apprehension of bias if she were to make a decision affecting the dog. She needs to consider whether, in all the circumstances, a fair-minded observer could reasonably apprehend that she might bring a pre-determined mind to the decision. For example, if a member of the decision maker’s family had been attacked by a dog of the relevant breed or if the decision maker had been involved in an online campaign against dangerous dogs, it may be more appropriate to refer the matter to a supervisor for reallocation. This is so even if the decision maker knows that she is capable of making an independent decision in these circumstances – the issue is perception of bias in light of the circumstances.

Example – Freedom of Information Act

Section 25A(1) of the FOI Act permits an agency to refuse to process a request where processing would involve an unreasonable and substantial diversion of its resources from the agency’s other operations. However, before an agency can make a decision refusing to process a request, it must first provide the applicant with a written notice setting out the problems with processing and providing the applicant with a reasonable opportunity to address the issues in a way that would remove that ground for refusing to process the request (section 25A(6)).

Example – Infringements Act

The *Infringements Act 2006* (Vic) provides a framework for the issuing, serving and enforcement of infringement notices. Division 3 of the Act allows a person who has received an infringement notice to apply to have the matter reviewed by the agency that issues the notice. Section 24(2) of the Act directs that the agency must ensure the review is carried out by a person not involved in the original decision. This practice ensures that an internal review is conducted impartially and without bias. However, even if the Act was silent as to who should conduct any review, it is ordinarily a requirement that it is done by someone independent of the original decision maker.

5. Are there requirements that need to be met before you can take action?

There may be requirements (preconditions) that you need to satisfy before you can make a decision, for example, that you serve the affected person with a notice before you can take further action.

There may be requirements that a person subject to your decision needs to satisfy before you can make a decision in their favour, for example, a requirement that they be of good character before you can grant them a licence.

If you are unsure about what the requirements mean or how to apply them to a particular case you should seek legal advice.

Examples – Domestic Animals Act

Requirements must be satisfied before you can take action

Under section 84S of the DA Act, the decision maker cannot decide to destroy the dog until the relevant time period has expired and the owner has been served with a notice of seizure, if an address is known. The notice must comply with the requirements set out in the legislation (section 84I) and must be served within four days of seizure (section 84H).

These notice requirements must all be satisfied before the decision maker can make a decision to destroy the dog.

No requirements need to be satisfied

Under section 84TB of the DA Act a council officer can immediately destroy a dog if the officer reasonably believes that the dog is behaving in a manner or in circumstances that will result in imminent serious injury or death to a person or other animal, regardless of whether the dog is registered and the owner has been notified.

There are therefore no requirements to send a notice of seizure before you can make a decision to destroy the dog.

6. Have you considered all relevant matters in making your decision?

When exercising discretion, you must consider any relevant matters that the legislation requires you to consider (whether expressly or implied). This includes any rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) that are relevant to your decision.

Examples – Domestic Animals Act

The legislation requires you to consider particular matters

Before an officer can form a reasonable belief that a dog has caused a specified offence to be committed, the officer must consider whether any possible defences to the offence apply (section 29(9)). For example, in the case of a dog attack, whether the dog was teased, abused or assaulted before it attacked.

Therefore the availability of defences is a relevant matter that the legislation requires you to consider before making a decision.

Considering rights under the Charter

Under section 23 of the DA Act, an authorised officer may seize a dog that is on private property without permission. The dog may later be recovered by the owner if the owner pays a fee fixed by the council or is otherwise charged in respect of the seizure and care of the dog (section 84M). In deciding to require a fee or charge to be paid under section 84M, a relevant council officer might need to have regard to rights under the charter. If, for example, the dog were a seeing eye dog owned by a person who is vision impaired, issuing a fee or charge in circumstances where the owner could not pay the fee or charge could be a violation of that person's rights (such as the right to equality or the right to freedom of movement).

Therefore, the affected person's rights under the Charter are a relevant consideration that you are required to consider before making a decision.

7. Have you only relied on relevant matters when exercising discretion?

When exercising discretion, you must not take into account anything that the legislation forbids you from considering (whether expressly or impliedly).

Example – Domestic Animals Act

Impliedly forbidden matter

An officer's personal dislike for a particular breed of dog would be an irrelevant matter to consider in deciding whether or not to destroy a dog under section 84S of the DA Act.

Example – Freedom of Information Act

Expressly forbidden matter

When deciding whether a request for access to information would involve an unreasonable and substantial diversion of your agency's resources under section 25A(1) of the FOI Act, the legislation states you cannot have regard to any matters listed in sections 25A(3) and 25A(4) (such as the reason the person is requesting the information) in making your decision.

8. What evidence is your decision based on?

Decisions should be based on relevant and persuasive evidence that you have obtained legally and fairly.

Consider whether you require evidence to support the information provided by the person affected – for example, if the information is inconsistent with known facts or if you have a concern about whether they are telling the truth (and you have put that concern to them for comment).

Example – Domestic Animals Act

A council officer, in deciding to destroy a dog under section 84S of the DA Act, would need to have relevant and strong evidence on which to base a reasonable suspicion that the dog had committed one of the specified offences. The officer might try to identify any eyewitnesses and make an assessment of their reliability.

Example – Freedom of Information Act

When refusing to provide a person with access to a requested document under the FOI Act, a decision maker must state in their notice of decision 'the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision...' (section 27(1)(a)). Therefore, if the decision maker was refusing access to a document based on a concern for another person's personal privacy (section 33(1)), the decision maker should be able to clearly explain why they believe disclosure would be unreasonable and whether it was based on consultations conducted with the concerned individual or other circumstances known to the agency.

9. Have you considered any relevant policies?

You need to inform the affected person of any criteria or policy that you will consider in making your decision so they can access and respond to the policy.

While it is important to act in accordance with any relevant policies and guidelines, you must ensure that policies are not applied inflexibly and that you have proper regard to the particular circumstances of the case before you.

Example – Domestic Animals Act

Under section 84TA of the DA Act, a council officer must have regard to any guidelines or practice notes approved by the minister in forming an opinion that the dog had attacked or was likely to attack. This is in addition to the council officer considering the individual circumstances of the case, such as any mitigating factors or defences for why the dog might have attacked or any alternative avenues of inquiry for contacting the dog's owner.

10. Have you made a decision, recorded your reasons, and fully informed the person affected?

Make sure the decision is made within the legislation's timeframe (or a reasonable timeframe if the legislation does not state a specific timeframe).

- You should record the decision, including:
- your name;
- the person the decision was about;
- the date the decision was made;
- your reasons for making the decision;
- the evidence you relied on;
- findings on material facts; and
- signing the decision.

Make sure your file is complete, and store relevant material separately from irrelevant material.

Consider confidentiality and privacy obligations when recording the decision and filing the material.

When communicating your decision to the person affected, make sure you advise the person of any internal or external review rights.

Also consider whether you are required to tell anyone else about the decision.

Example – Domestic Animals Act

Under section 84TA of the DA Act, the authorised officer must record the reasons for suspecting the dog has attacked (or is likely to attack) within 24 hours of the seizure of the dog. The council (or its delegate) must then decide whether to destroy the dog within 48 hours of the officer recording the reasons. The decision must record the time and date of that decision. A council must provide to the secretary the reasons for destroying the dog, the time and date of destruction of the dog and identifying details of the dog (section 44AEA).

Example – Freedom Of Information Act

Under section 27 of the FOI Act, the decision maker is required to provide reasons when refusing access to documents. Section 27 requires that notice is to be in writing, state the findings on any material questions of fact, refer to the material on which those findings were based, and state the reasons for the decision. It must

provide the name and designation of the person giving the decision and inform the applicant of their right to apply for a review of the decision, the authority to which the review application should be made, the time within which the review application must be made and, where there are no review rights available, inform the applicant of any complaint rights they may have.

11. Do I need legal advice?

Before making your decision, obtain legal advice if you are unclear about the correct interpretation or purpose of the legislation or you have any other concerns about the lawfulness of your decision.

Example – Domestic Animals Act

You may be unsure what purposes of the DA Act you need to consider when deciding to destroy a dog under section 84S of the DA Act. A lawyer could assist you in interpreting the legislation by informing you that you need to consider the legislation's purposes of animal welfare as well as protection of the community.

Guide summary

Question	Things to consider
Are you making an administrative decision?	<p>Are you making a decision under legislation?</p> <p>Is your decision directed towards a particular person or organisation?</p>
Have you identified where the power to make the decision comes from?	<p>What are the relevant sections of legislation?</p> <p>Are there relevant regulations or instruments?</p>
Does the legislation give you any discretion in making your decision?	<p>Are you required to make a particular decision?</p> <p>Do you have discretion?</p> <p>If you have discretion, what are the boundaries of that discretion?</p>
Are you authorised to make the decision?	<p>Does the legislation authorise you to make the decision?</p> <p>If you are not authorised under legislation, have you been authorised by the person identified in the legislation? If so:</p> <p>Is the authorisation in writing?</p> <p>Is the decision within the boundaries of the authorisation?</p> <p>Are you appointed as a delegate? (You will make the decision in your own name)</p> <p>Are you appointed as an authorised officer? (You will make the decision in the name of the person who authorised you)</p>
Have you acted fairly in making your decision?	<p>Have you provided the person affected by your decision with an opportunity to respond to all issues or factual allegations that have come up during the decision making process?</p> <p>Have you acted without bias?</p> <p>Do you have a conflict of interest?</p> <p>Does the legislation impose any additional fairness requirements, such as a formal hearing or issuing a notice?</p>
Are there any requirements that need to be met before you can take action?	<p>Are there any requirements that you must complete before you can make a decision? For example, do you need to issue a notice?</p> <p>Are there any requirements that the person subject to your decision needs to satisfy? For example, do they need to be of good character?</p>

Have you considered all relevant matters?	<p>Does the legislation require you to consider any particular matters in making your decision?</p> <p>Are there any rights under the Charter relevant to your decision?</p>
Have you only relied on relevant matters?	<p>Have you taken into consideration anything the legislation prohibits you from considering?</p>
What evidence is your decision based on?	<p>What persuasive evidence do you have? Did you obtain it fairly?</p>
Have you considered any relevant policies?	<p>Are there any criteria or policies you have to follow in making your decision?</p> <p>If so, have you applied any relevant policies or guidelines taking into account the particular case before you?</p>
Have you made a decision, recorded your reasons, and fully informed the person affected?	<p>Have you made your decision within the correct timeframe? Have you recorded your decision, including:</p> <ul style="list-style-type: none"> • your name; • the person the decision was about; • the date the decision was made; • your reasons for making the decision; • the evidence you relied on; • findings on material facts; and signing the decision. <p>Have you told the affected person what your decision is and advised them of any rights they have to apply for review?</p> <p>Is there anyone else you are required to inform about your decision?</p>
Do you need legal advice?	<p>Are you unsure about any stage of the process?</p> <p>Are you unclear about the interpretation or application of the legislation?</p>

Further Resources

Australian Government solicitor, 'natural Justice and the 'hearing rule' – fundamental principles and recent developments', available at:

www.agps.gov.au/publications/legal-briefing/br78.pdf

F McKenzie, "Administrative Power and the law: A succinct guide to administrative law", (LexisNexis, 2006)

Victorian Civil And Administrative Tribunal, Resources, available at:

www.vcat.vic.gov.au/resources

Department of Planning and Community Development, 'Ensuring Unbiased Democratic Council Decision Making', available at:

www.localgovernment.vic.gov.au/...ensuring-unbiased-democratic-councildecision-making-april-2013.pdf

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