

## 4. THE OTHER SIDE

### Administrators making decisions with the AJA

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While you are being trained how to use the AJA to challenge poor decisions by government, and to protect the rights of the public, administrators are at the same time being trained how to use the AJA to offer effective, efficient service.

While we are not going to go into the technicalities of how they make decisions, how they follow procedures and comply with their provisions, there are certain things that it will be helpful for you to know about.

In this section we will look at

1. How the AJA works in practice – **how should an administrator make a decision?**
2. What are the differences between decisions affecting **individuals and groups** of people?
3. What are **principles of good administration** – what kind of service you should expect to receive, and can demand from civil servants?
4. How much choice do administrators have? The difference between **mandatory and discretionary provisions**.

#### 1. Administrators making decisions

The AJA prescribes very clearly, for the most part, how an administrator should go about making a decision, especially a decision that negatively affects someone's rights. The AJA deals with two types of decisions affecting the public:

- Those affecting **individuals**; and
- Those affecting **groups of people**, or sections of the public.

The procedures an administrator will need to follow differ depending on whether the decision affects an individual (which



#### BY THE END OF THIS SECTION

You will:

- Have an overview of how administrators are supposed to make decisions under the AJA;
- Understand the difference between individual and group processes;
- Understand the importance of empowering provisions.



#### 'ADVERSELY AFFECTS'

Adversely affects means that the decision must impose a burden or have a negative effect. It includes decisions that:

- Require someone to do something, to tolerate something or not to do something;
- Limit or remove someone's rights; or
- Decide someone does not have a right to something.

As already mentioned, decisions may adversely affect the rights of the applicant and/or third parties. So, a decision to grant someone a building permit to build a wall around their property may adversely affect the rights of that person's neighbours (who are therefore third parties).

is covered by **Section 3** of the AJA) or whether it will affect the broader public (which is covered by **Section 4** of the AJA).

The principles are the same, but the different provisions of Section 4 allow for more efficient and cost effective procedures to be used, where the process that applies to individuals could be considered laborious and unreasonable.

First we shall explain how the AJA works in decisions that affect individuals, which is the most common situation that you will be dealing with. Then we shall look at the different approaches that should be used when the decision affects the wider public.

### **a. Decisions affecting individuals**

When a decision affects an individual, the process to be followed by an administrator is relatively straightforward, and can be seen in the flowchart on the opposite page.

The process has been designed to be fair and transparent – to allow you the opportunity to represent yourself and ensure the administrator has the correct information before them when they are making a decision.

The process begins when you make an application, or when the administration decides to take some action against you.



### **“DECISIONS”**

Section 1 of the AJA says that a decision can be a decision (or a failure to make a decision) relating to:

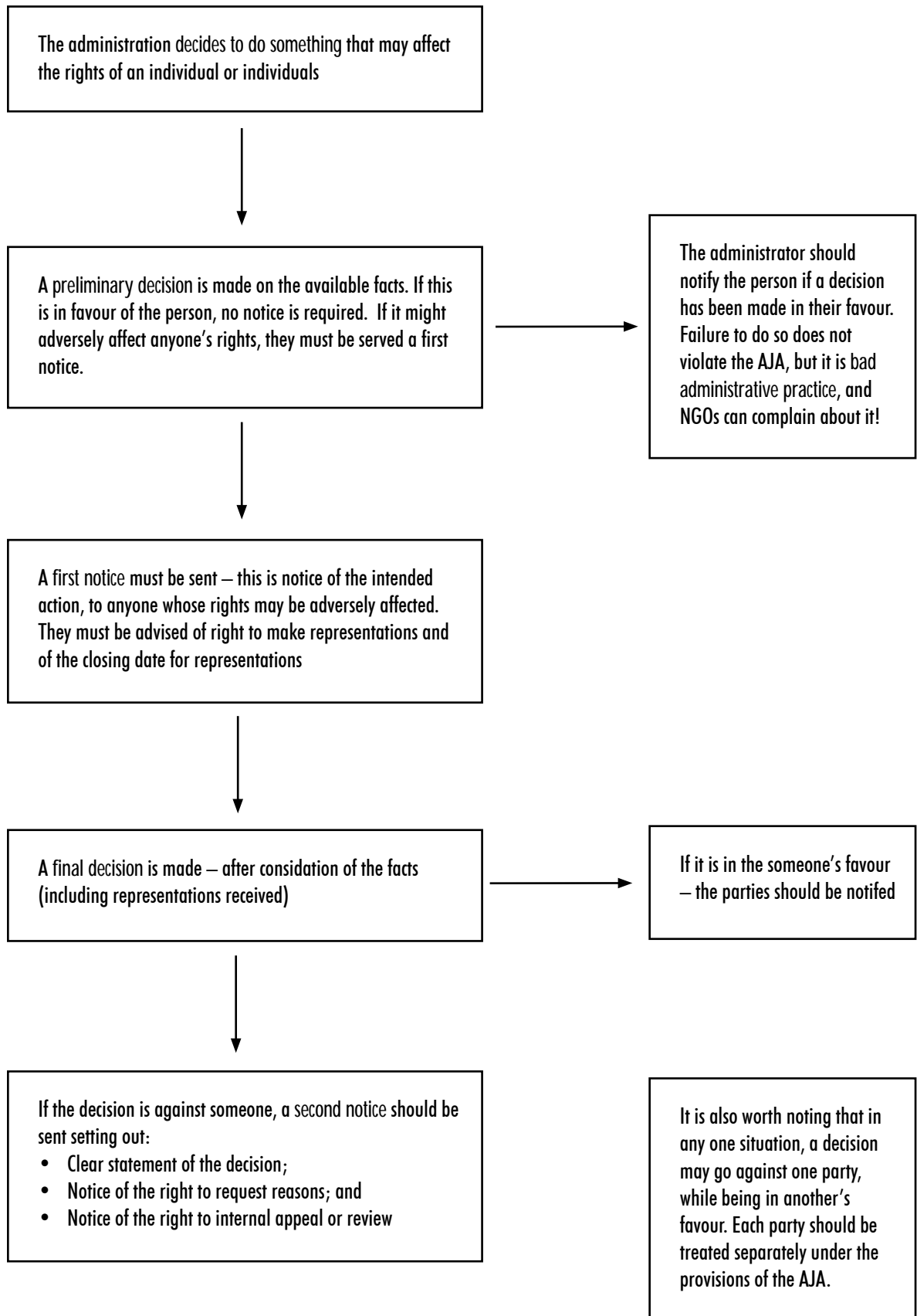
- (a) making, suspending, revoking (withdrawing) or refusing to make an order, award, or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining (keeping), or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature.

#### **EXAMPLE**

**Mr. Ntombela has a license to operate a taxi on the Durban to Johannesburg route. The Department of Transport receives a number of complaints from rival taxi owners that he has been operating on local routes within Durban at the end of each return trip. Mr. Ntombela’s license specifically states that he is not permitted from operating a local taxi service.**

**The clerk in charge of issuing taxi permits sends Mr. Ntombela a letter informing him of the allegations, warning him that the Department intends to withdraw his taxi license, and requesting that he make representations to show why the Department should not take this step.**

# How an administrator makes a decision





### FAIR OPPORTUNITY

Even if an administrator thinks that the decision they wants to make will not change, the person must still be given a reasonable opportunity to make representations.



### THIRD PARTIES

A third party is anyone other than the person who has made the application whose rights may be affected by the decision.

For example, if you decide to build a high wall around your property and apply for a building permit to do this, you are the 'first party' and the Municipal Council that must take the decision is the 'second party'. In this case, anyone else (besides yourself and the Municipal Council) whose rights may be affected by the decision is regarded as a third party. So, if the wall that you are planning to build would interfere with your neighbour's view, then your neighbour is a third party and must be given the opportunity to make representations before a decision is made.

Administrators have to consider that there may be people whose rights may be affected by their decision (third parties) other than the person who actually made the application, and that they must also be given an opportunity to make representations and these must be taken into account before deciding.

In either situation, the second step is the same. If the administrator is considering taking a decision against a person a **first notice must be sent, informing the person of the intended decision**. The first notice must include information on how to respond to the notice, to whom, and by what date.

If no representation is received by the administrator by the due date, the administrator may proceed to make a **final decision** against the person. If representations were received, but they do not change the decision, the administrator may also go ahead and make a decision.

When a final decision has been made, the administrator must send out a **second notice** to all affected persons, informing them of the decision. The notice should include the reasons for that decision, or it should tell the person that they can request reasons, and how to do so. The second notice should also inform the person of any internal appeal processes which may exist, and how they can be initiated.

#### EXAMPLE

**No response is received from Mr. Ntombela by 15 May 2003, the due date stated in the first notice. The clerk is now empowered to go ahead and withdraw Mr. Ntombela's license to operate a taxi.**

**He must then be sent a second notice, informing him of the decision. The notice should also tell him who he should write to in the Department for reasons for this decision, and should tell him how to begin an internal appeal process should he wish to contest that decision.**

The administrator's work is now complete, and the onus is on the affected person to take further action by starting an internal appeal process (if there is one), and if that process is unsuccessful, or there is not one, by taking the matter on judicial review.

## **b. Decisions affecting groups / sections of the public**

Imagine a situation where a large number of people are affected by a decision – such as the pending decision to build a national highway through certain parts of the environmentally sensitive Wild Coast. It is not possible for the Roads Department to contact each person in the region and use the above process.

The AJA therefore makes provision for alternative means for administrators to use to achieve the same objectives of making decisions fair, and just and transparent. Section 4 of the AJA sets out the procedures for administrator to follow.

### **EXAMPLE**

**If the administration is planning something that may affect the whole community – such as when a local council decides to build a new sports field on land that has, until then, been used as communal grazing land – then there are alternatives to the individual first/second notice procedure that can be used.**

These public procedures are designed to involve the public in the decision, to provide accountability, and to gather information to help the administrator.

They are:

- **A public inquiry;**
- **A notice and comment procedure;**
- **Both** a notice and comment procedure and a public inquiry; or
- **Another fair procedure.**

The detail about how these procedures should be followed is set out in the Regulations on Fair Administrative Procedures, and is covered in Chapter 9 of this manual. We also look at how NGOs can best respond to these decision-making processes.

### c. **Overlap between individual & group**

There can be overlap between individual (Section 3 of the AJA) and group (Section 4) processes. In Chapter 9 we discuss situations where it is appropriate for the administration to use both in order to satisfy the constitutional directive to be just, fair and transparent in making decisions that affect people's rights.

## 2. **Principles of good administration**

We have now outlined a lot of rules, regulations and procedures. But remember that the Constitution and AJA are there to make sure that people are treated fairly by the administration. They do this by making sure that:

- ⊙ Any **decisions that affect people are taken properly**;
- ⊙ People are informed about the decision and given a **chance to ask for reasons**; and
- ⊙ People can **challenge decisions** they believe are wrong through internal appeals and review.

It is important to bear in mind at all times that the AJA is not intended to be a technical document – rather, it is designed to ensure **good governance**. By using the AJA, and by calling civil servants to order when they have failed to implement these principles, you can play a role in **participative governance**. You can play your part in the implementation of **Batho Pele principles** in our administration.

Remember that Batho Pele is intended to give you the very things you wish to see government doing more of, such as:

- committing to high service standards, and increased access to services;
- being courteous and offering better information;
- offering increased openness and transparency; and
- taking responsibility for mistakes and remedying them.

### 3. Empowering provisions

It might also be helpful to you to know that administrators operate under certain conditions, and understanding this will help you to know how to use the AJA more effectively.

Administrators, for the most part, have very little freedom to choose how they would like to make decisions. The work of civil servants is controlled by laws and regulations called **empowering provisions**. Quite simply, these are the rules that allow them to make decisions; they have to make decisions according to those rules (they must make sure the conditions in the empowering provision are met).

#### EXAMPLE

**Just because someone has followed all the procedures when applying for a disability grant does not mean that they are entitled to the grant. They have to show that they are in fact disabled.**

**Similarly, if someone applies for a pension and follows all the correct procedures when applying, they still need to satisfy the conditions for a pension (that they are over a certain age, earn less than a certain amount of money and so on).**

Usually, this is quite straightforward, although there may be many conditions. For example, an empowering provision may say that if a person is over 18 and completes a driving test satisfactorily, they must be given a licence.

However, some conditions are quite vague and use words that are difficult to define. These are known as conditions with an “**undefined legal concept**” in them. Examples are:

“If the person is **a fit and proper person**, then ABC will follow”

**OR**

“In **exceptional circumstances**, an administrator may decide to do ABC”

**OR**

“If the administrator finds XYZ **reasonable** (or **unreasonable**), then ABC should follow”

Words such as “reasonable” and “exceptional circumstances” have always been difficult to define. As a result, it is not always easy for an administrator to know how to act and whether or not their actions will be allowed.

To be able to decide whether someone satisfies an undefined legal concept, an administrator needs to **give the concept meaning**. This is done by setting a standard against which people or circumstances can be measured. Such standards need to be:

- Relevant;
- Fair; and
- Reasonable.

For example, if an undefined legal concept used the words “in special circumstances”, an administrator needs to decide what they would regard as special circumstances. When doing this, an administrator needs to be careful to show that the circumstances they regards as special are relevant to the issue, that they are fair and that they are reasonable.

To create such standards, administrators need first to consider the **purpose** of the enabling statute and the **purpose** of the empowering provision. That is, what is the statute trying to achieve? If it is trying to ensure that only people with high moral character and no criminal convictions are admitted as attorneys (by saying only “fit and proper people” may be admitted), then quite clearly an administrator can set a standard that excludes people who fall below this level.



### **‘ENABLING STATUTES’ AND ‘EMPOWERING PROVISIONS’**

An enabling statute is a law that allows (‘enables’) the administration to act. For example, the Social Assistance Act (SAA) is an enabling statute, allowing for a variety of pensions and grants.

Section 4 of the SAA is an empowering provision that empowers administrators to award old age pensions. Section 5 of the SAA empowers them to award disability grants, and Section 8 empowers them to award discretionary grants.

#### **EXAMPLE**

### **The Red Fire Extinguisher**

**A municipality passes a by-law that says, except in exceptional circumstances, all fire extinguishers in their area must be painted red.**

**A nightclub has a room where all the walls are red. They decide to paint their fire extinguisher white. Have they violated the by-law?**



**In deciding, one must look at the purpose of the by-law. If the purpose of the by-law is to make sure that, if there is a fire, it is easy to see where the fire extinguisher is, then they have not violated it.**

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In some cases, there are guidelines about how an administrator should act. The first guideline can be found by looking at:

- How such decisions have been made within their department; and
- How the courts have interpreted these words in the past.

**EXAMPLE**

**‘Fit and proper’**

**People are only allowed to practice as attorneys if they are ‘fit and proper’. There are a number of court cases where people have not been admitted as attorneys because they did not satisfy this requirement, or where they have been removed from the roll of attorneys and they have taken the matter to court. As a result, the courts have said people with convictions for crimes involving dishonesty, drug habits and those that have conducted their casework in particular ways are not fit and proper. There may also be circulars, memos and regulations in your department that offer some guidance as well. Even though these may later be challenged in court, they do provide a good starting point.**

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Sometimes, the Preamble to the enabling Act may also say what the purpose of the Act is. For example, the Preamble of the Special Pensions Act (69 of 1996) makes it clear why the Act was written by saying it is:

**“To give effect to Section 189 of the Constitution; to provide for special pensions to be paid to persons who made sacrifices or served the public interest in the cause of establishing a democratic constitutional order; to prescribe rules for determining the persons who are entitled to receive those pensions; to establish a Special Pensions Board and a Special**



**EMPOWERING PROVISIONS**

The empowering provision is an extremely important aspect of any administrative action. Any action not authorised by the empowering provision is not allowed. In fact, Section 6 of the AJA says that a court can set aside decisions where:

- The decision was taken by an administrator who was not authorised to do so by the empowering provision;
- The decision was taken by someone who was delegated to take the decision, but the empowering provision did not allow such delegation;
- That a “mandatory and material procedure or condition” set out in the empowering provision was not followed; or
- The action was taken for a reason that was not authorised by the empowering provision; or
- That the action was not rationally connected to the purpose of the empowering provision.

**Pensions Review Board; and to provide for related matters.”**

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There may also be a textbook on the subject that will help an administrator to decide. And, lastly, where they are still unsure, they could check with their departmental legal adviser.

Where a person has not supplied either sufficient proof or has not given enough information to meet the conditions in the empowering provision, it is good administrative practice for an administrator to write to that person and request additional information or proof.

**a. Why is this important to you as an NGO?**

If you are to assist someone in a matter under the AJA, you need to find out what the law or regulations say about the matter. In some cases, an administrator will have no choice – they will have to do what the empowering provision says. In other cases, they will have a choice, or discretion as to what to do.

There are therefore two types of empowering provisions:

- **Mandatory provisions;** and
- **Discretionary provisions.**

**i. Mandatory provisions**

A mandatory provision is one that follows the following formula:

“If XYZ exists, then the administrator must (or shall) do ABC”.

OR

“If XYZ exists, then the administrator must not (or shall not) do ABC”.

The words must or shall, and must not or shall not indicate that the provision is mandatory.

Where a provision is mandatory, the administrator has no choice in the matter. They must strictly follow the provision.

**EXAMPLE**

**Section 3 of the Social Assistance Act (66 of 1992)**

Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he-

- (a) is an aged or disabled person or a war veteran;
  - (b) is resident in the Republic at the time of the application in question;
  - (c) is a South African citizen; and
  - (d) complies with the prescribed conditions.
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## **ii. Discretionary provisions**

Discretionary provisions give an administrator a choice (or discretion) as to what to do. They have the following formula:

“If XYZ, then the administrator **may** do A **or** B **or** C.

**OR**

“If, **in the opinion of the administrator** the following exist, then the administrator **may** do A **or** B **or** C”

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### **EXAMPLE**

**The Regulations to the South African Passports and Travel Documents Act (4 of 1994) state:**

- 3 (a) A South African passport may be issued to an applicant in the Public Service or other government institution if –**
- (i) It is for an official journey; or**
  - (ii) Such applicant is stationed outside the Republic and he or she journeys to and from the Republic while on leave.**
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Understanding this difference, and knowing how to apply the regulations in the specific case you are dealing with, will inform your strategy for achieving success in protecting your client’s rights or legitimate interests.