

AUSTRALIAN DEFENCE FORCE LEGAL SERVICES

LEGAL TASK JOURNAL

ADMINISTRATIVE LAW

LEVEL – ADVANCED AND SPECIALIST

**AUSTRALIAN DEFENCE FORCE LEGAL SERVICES
LEGAL TASK JOURNAL
ADMINISTRATIVE LAW
LEVEL – ADVANCED & SPECIALIST**

Qualification

1. In order to satisfy the Task Journal qualification criteria in Administrative law at the Advanced and Specialist levels ADF Legal Officers are to have assessed as satisfactory completion of the Task criteria set out below.

Advanced Level Criterion

2. Within the Administrative Law Task Journal – Advanced & Specialist Level, a total of 50 tasks provided there is a minimum of 15 tasks in each Part.
3. Assessment is to be by self-assessment, assessment by an assessor of each completed task and further assessment by a senior assessor of one assessed task from each Part.

Specialist Level Criterion

4. Within the Administrative Law Task Journal – Advanced & Specialist Level, 50 tasks (further to those tasks completed for the Advanced level) provided there is a minimum of 15 tasks in each Part. A Legal Officer who has satisfied both the Advanced and Specialist task qualification criteria will have completed 100 tasks with a minimum of 30 tasks in each Part.
5. Assessment is to be by self-assessment, assessment by an assessor of each completed task and further assessment by a senior assessor of another assessed task from each Part.

**AUSTRALIAN DEFENCE FORCE LEGAL SERVICES
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ADMINISTRATIVE LAW
LEVEL – ADVANCED & SPECIALIST**

Part A

Australian Constitutional Framework

1. Demonstrate knowledge of the Australian Constitutional framework and the concept of ‘responsible government’. Where relevant, the demonstration of knowledge should include an explanation of:
 - a. how the Constitution establishes a federal system in which legislative and executive power is divided between the Commonwealth, States and Territories;
 - b. the rule of law and the Government’s requirement to have legislative authority for any action it undertakes and for the Executive to be responsible to Parliament;
 - c. the effect of ouster provisions and section 75(v) of the Commonwealth Constitution and the Hickman case.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Separation of Powers

2. Demonstrate knowledge of the Legislative, Judicial and Executive arms of Government, the doctrine of the separation of powers, and how these issues affect ADF decision-making. Where relevant, the demonstration of knowledge should include an explanation of:
 - a. the separation of powers within government, between legislative, executive and judicial power;
 - b. the fact that tribunals have no judicial power (See *Brandy v. Human Rights and Equal Opportunity Commission (1995) 183 CLR 245*);
 - c. the limits on the executive power to expand an administrative decision-maker’s jurisdiction to remove the remedies in section 75(v) of the Commonwealth Constitution.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Judicial Review

3. **High Court.** Demonstrate knowledge of the power of the High Court to review administrative decisions. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the composition and procedures of the High Court;
- b. the High Court's original jurisdiction under section 75(ii) and (v) of the Constitution and the Court's limited review powers;
- c. the fact that other older non-statutory remedies co-exist with other statutory judicial review remedies including the prerogative writs of prohibition, certiorari, mandamus, injunction or declaration;
- d. the fact that under section 75(v) of the Constitution the High Court may issue the remedies of mandamus, prohibition, or injunction against an ADF member;
- e. the fact that by virtue of section 44 of the Judiciary Act, the High Court can remit matters arising under section 75 of the Constitution to the Federal Court.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

4. **Federal Court.** Demonstrate knowledge of the power of the Federal Court to review administrative decisions. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the composition and procedures of the Federal Court;
- b. the Federal Courts original jurisdiction in relation to a range of matters under Commonwealth legislation;
- c. the fact that section 39B of the Judiciary Act 1903 confers the High Court's 75(v) jurisdiction on the Federal Court and in relation to any matter 'arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter';
- d. the fact that by virtue of section 44 of the Judiciary Act, the High Court can remit matters arising under section 75 of the Constitution to the Federal Court;
- e. The Federal Courts jurisdiction to hear appeals from the Federal Magistrates Court and the Administrative Appeals Tribunal;
- f. The remedies available in the Federal Court.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

5. **Federal Magistrates Court.** Demonstrate knowledge of the power of the Federal Magistrates Court to review administrative decisions. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the composition and procedures of the Federal Magistrates Court;
- b. the jurisdiction of the Federal Magistrates Court;
- c. the remedies available in the Federal Magistrates Court.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

6. **State and Territory Supreme Courts.** Demonstrate knowledge of the power of the State and Territory Supreme Courts to review administrative decisions. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the composition and procedures of the State and Territory Supreme Courts;
- b. the federal jurisdiction of the State and Territory Supreme Courts;
- c. the remedies available in the State and Territory Supreme Courts.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

7. **Cross-Vesting Jurisdiction.** Demonstrate knowledge of cross-vested jurisdiction and appeals.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Human Rights

8. Demonstrate knowledge of the legislative and policy framework for harassment, discrimination, fraternisation and unacceptable behaviour in the workplace and its application with Defence. Where relevant, the demonstration of knowledge should include an explanation of the content, effect and application of the:

- a. *Racial Discrimination Act 1975*;
- b. *Sexual Discrimination Act 1984*;
- c. *Disability Discrimination Act 1993*;
- d. *Human Rights and Equal Opportunities Commission Act 1986*.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

9. Demonstrate knowledge of the relevance of international treaties to administrative law, including developments in the law post *Teoh*, and its relevance to ADF decision-making.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

10. Demonstrate knowledge of the impact of international human rights law on decision-making in the ADF.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Merit Review

11. **Administrative Appeals Tribunal.** Demonstrate knowledge of the power of the Administrative Appeals Tribunal to review administrative decisions. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the composition, procedures, powers, jurisdiction and remedies of the Administrative Appeals Tribunal;
- b. the fact that a Merit review is where the reviewer has the capacity to 'step into the shoes' of the primary decision-maker and make the correct or preferable decision according to the merits of the individual case;
- c. the fact that the normal remedy provided by an administrative tribunal would be substitution of a new decision;
- d. the fact that the Administrative Appeals Tribunal is the principal Commonwealth merits review tribunal.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

12. **Human Rights and Equal Opportunities Commission.** Demonstrate knowledge of the composition, procedures, powers, jurisdiction and remedies of the Human Rights and Equal Opportunities Commission.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Ombudsman

13. Demonstrate knowledge of the powers and procedures of the Commonwealth and Defence Force Ombudsman, including:

- a. the nature of the office and jurisdiction;
- b. grounds of review;
- c. the process of lodging a complaint;
- d. the Ombudsman's powers and remedies available.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

14. Demonstrate knowledge of the handling of a complaint to the Commonwealth and Defence Force Ombudsman. Where relevant, the demonstration of knowledge should an explanation of:

- a. the content and effect of the *Ombudsman Act 1976*;
- b. the content and effect of DI(G) PERS 34-3 – *Inquiries and Investigations by the Commonwealth Ombudsman and the Defence Force Ombudsman Affecting the Department of Defence and the Australian Defence Force.*

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Ministerial Complaints

15. Demonstrate knowledge of the handling of complaints to the Minister.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

16. Demonstrate knowledge of reviewing a response to a ministerial complaint.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Redress of Grievance

17. Demonstrate knowledge of the legislative and policy framework for redresses of grievance in the ADF.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

18. Demonstrate knowledge of the content and effect of the Defence Force Regulations.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

19. Demonstrate knowledge of the role of an ADF legal officer in the redress of grievance system and the implications of conflicts of interest.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

20. Demonstrate knowledge of roles and responsibilities of a commander in relation to a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

21. Demonstrate knowledge of the procedural requirements associated with a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

22. Demonstrate knowledge of the requirements to investigate a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

23. Demonstrate knowledge of the referral of a redress of grievance to a higher authority.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

24. Demonstrate knowledge of the roles and responsibilities of the Complaints Resolution Agency.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

25. Demonstrate knowledge of providing advice to the Complaints Resolution Agency, a Service Chief or the CDF in relation to a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

26. Demonstrate knowledge of the application of administrative law principles in making decisions on a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

27. Demonstrate knowledge of the preparation of a statement of reasons for a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

28. Demonstrate knowledge of the suspension of proposed executive action as a result of the submission of a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

29. Demonstrate knowledge of the potential reversal of executive action pending the resolution of a redress of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

30. Demonstrate knowledge of the processing of a redress of grievance lodged in response to a Show Cause process.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

31. Demonstrate knowledge of the administrative and reporting requirements for redresses of grievance.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

32. Demonstrate knowledge of the review of complaints by the Defence Force Ombudsman.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Litigation

33. Demonstrate knowledge of drafting and settling affidavits.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

34. Demonstrate knowledge of assisting counsel in preparing submissions.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

35. Demonstrate knowledge of preparing a written brief for counsel to appear.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

36. Demonstrate knowledge of acting as ‘solicitor on the record’ at hearings.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

37. Demonstrate knowledge of appearing on behalf of the Commonwealth (subject to Legal Services Directions).

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Statutory Interpretation

38. Demonstrate knowledge of the interpretation of legislation including applying the Acts Interpretation Act 1901 and the various maxims and presumptions at common law.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Delegations

39. Demonstrate knowledge of the preparation and review of instruments of delegation. Where relevant, the demonstration of knowledge should include an explanation of the following principles:

- a. express power to delegate;
- b. implied power to authorise;
- c. delegates exercising own discretion;
- d. non-delegability of delegation;
- e. Carltona and alter ego;
- e. 'administrative necessity';
- f. 'Henry 8th rule';
- g. the Acts Interpretation Act 1901 and delegating to future offices;
- h. the Acts Interpretation Act 1901 and change in office holder.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

40. Demonstrate knowledge of publication rules for delegated legislation and the operation of the Commonwealth *Legislative Instruments Act 2003*.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

41. Demonstrate knowledge of Parliamentary tabling requirements for delegated legislation.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

42. Demonstrate knowledge of the application of administrative law to private administration, for example clubs and associations, and how this affects the ADF.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Contracting

43. Demonstrate knowledge of the application of administrative law to the processes of contracting. Where relevant, the demonstration of knowledge should include an explanation of the application within Defence of:

- a. the Financial Management and Accountability Act 1997;
- b. the Chief Executive Instructions – Defence;
- c. the the Defence Procurement Policy Manual;
- d. the application of administrative law principles in negotiating contracts.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

44. Demonstrate knowledge of the preparation of a request for tender.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

45. Demonstrate knowledge of the release of tender documents under FOI.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

46. Demonstrate knowledge of the effect of corporatising and privatising governmental services.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

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Part B

Initiating Adverse Administrative Action

47. Demonstrate knowledge of the issuing of formal warnings and censures and other administrative sanctions. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the content and effect of DI(G) PERS 35-6 – Formal Warnings and Censures;
- b. notice to show cause;
- c. disclosure of evidence and other relevant materials;
- d. delivery of the notice;
- e. opportunity for the member to reply;
- f. response;
- g. decision of the initiating authority;
- h. submission to the imposing authority;
- i. decision of the imposing authority;
- j. recording and notification of the decision;
- k. imposition of the formal warning or censure in accordance with DI(G) PERS 35-6 – Formal Warnings and Censures.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

48. Demonstrate knowledge of the procedures involved in:

- a. terminating a member's service,
- b. reducing a member in rank,
- c. removing a member from an appointment or locality,
- d. denying or delaying a member's promotion,
- e. changing the employment category of a member,
- f. removing a member's security classification and counselling a member.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

49. Demonstrate knowledge of the most appropriate type of adverse administrative action to be taken in a particular case.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

50. Demonstrate knowledge of the separation of power, which is desirable between initiating officers and imposing authorities.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

51. Demonstrate knowledge of the roles and responsibilities of initiating and imposing authorities.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

52. Demonstrate knowledge of what constitutes unacceptable behaviour, performance or standards.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

53. Demonstrate knowledge of the most desirable time period for the imposition of adverse administrative action.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

54. Demonstrate knowledge of the process of releasing a member from adverse administrative action.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

55. Demonstrate knowledge of the process of cancelling adverse administrative action against a member.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

56. Demonstrate knowledge of the consequences to a member's career of two or more of the following sanctions:

- a. formal warning,
- b. censure,
- c. termination,
- d. reduction in rank,
- e. removal from appointment or locality,
- f. denying or delaying promotion,
- g. change in employment category,
- h. removal of security classification, or
- i. counselling.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Decision Making

57. Demonstrate knowledge of the legal requirements of administrative decision-making, including the requirement to have legal authority to make a decision.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

58. Demonstrate knowledge of the sources and principles of administrative law relating to decision-making.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

59. Demonstrate knowledge of the requirement to consider all relevant material before making a decision.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

60. Demonstrate knowledge of the requirement for further inquiry if it is revealed that there is further relevant information that should be considered.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

61. Demonstrate knowledge of the requirement to act in good faith when exercising decision-making power.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

62. Demonstrate knowledge of the exceptions to the requirement to afford procedural fairness to members.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

63. Demonstrate knowledge of how to correct a situation where there has been a failure to afford procedural fairness.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

64. Demonstrate knowledge of the principle of ultra vires.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

65. Demonstrate knowledge of the principle of jurisdictional error.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

66. Demonstrate knowledge of the principle of error of law on the face of the record.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

67. Demonstrate knowledge of the remedies available for members for errors in the making of administrative decisions.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

68. Demonstrate knowledge of the duty to inquire and obtain all relevant information prior to a decision being made. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that there is no general common law obligation on a decision-maker to initiate inquiries to gather material beyond what is before them;
- b. the fact that a duty to make enquiries may arise, depending on the importance of the decision and its consequences for the person affected. For example, the duty to make inquiries may arise if there was some obvious omission or obscurity in the information before the decision-maker. However, the decision-maker does not have to make out the case for the persons affected by the decision.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

69. Demonstrate knowledge of the requirement to make privacy deletions of personal information, the disclosure of which would breach the Privacy Act 1988.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

70. Demonstrate knowledge of discretionary decision-making.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

71. Demonstrate knowledge of the obligation to make an administrative decision.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

72. Demonstrate knowledge of the exercise of delegations under legislation and/or policy.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

73. Demonstrate knowledge of the fact that a decision-maker may take account of a relevant government or agency policy in making a decision but must not apply that policy inflexibly nor fail to give consideration to other relevant factors in making a decision.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

74. Demonstrate knowledge of the legal requirements for reasonableness when making a decision. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that a decision will be invalid if it is unreasonable, in the sense that the decision must not be so unreasonable that no reasonable person could have exercised the power in that way.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

75. Demonstrate knowledge of the evidentiary requirements when making a decision.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

76. Demonstrate knowledge of inferential reasoning when making decisions.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

77. Demonstrate knowledge of the weighting afforded to evidence.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

78. Demonstrate knowledge of the test of relevancy when making a decision. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that a decision-maker must take into account relevant considerations and ignore irrelevant considerations.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

79. Demonstrate knowledge of the obligation not to act under dictation. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that if a decision involves the exercise of independent discretion, the decision-maker must not act under dictation.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

80. Demonstrate knowledge of the requirement for a decision-maker to have regard to the merits of a case.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Statement of Reasons

81. Demonstrate knowledge of a review of a statement of reasons.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Privacy

82. Demonstrate knowledge of the roles and responsibilities of the Privacy Commissioner.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

83. Demonstrate knowledge of the Privacy Commissioner's guidelines.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

84. Demonstrate knowledge of the law and policy relating to the collection of personal information.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

85. Demonstrate knowledge of the law and policy relating to the notification to individuals concerning information to be collected.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

86. Demonstrate knowledge of the test of relevancy for the collection of personal information for the reasons stated.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

87. Demonstrate knowledge of the safeguards that are required for the protection of personal information.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

88. Demonstrate knowledge of the rights of persons to access personal information.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

89. Demonstrate knowledge of the requirement to ensure accuracy of personal information.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

90. Demonstrate knowledge of the scope of the use of personal information obtained.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

91. Demonstrate knowledge of the exceptions to disclosure of personal information.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

92. Demonstrate knowledge of cases that have been before the Federal Privacy Commissioner.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

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Part C

Administrative Inquiries

93. **Types of inquiry.** Demonstrate knowledge of the differences between four or more of the following types of inquiry:

- a. quick assessments;
- b. routine inquiries;
- c. Inquiry Officer inquiries;
- d. boards of inquiry;
- e. combined boards of inquiry;
- f. general courts of inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

94. Demonstrate knowledge of the most appropriate type of inquiry and the availability of dispute resolution.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Routine Inquiries.

95. Demonstrate knowledge of options following receipt of a routine inquiry report.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

96. Demonstrate knowledge of the privacy considerations in communicating outcomes of a routine inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Inquiry Officer Inquiry

97. Demonstrate knowledge of the law and policy applicable to an inquiry by an Inquiry Officer. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the application of administrative law to Inquiry Officer inquiries (including the fair hearing and bias rules);
- b. procedure;
- c. application of rules of evidence;
- d. planning and conducting the inquiry;
- e. the powers of the Inquiry Officer;
- f. interviewing skills and techniques;
- g. impartiality;
- h. confidentiality;
- i. interviewing witnesses;
- j. rights and obligations of witnesses;
- k. privilege against self-incrimination;
- l. legal assistance to witnesses and support;
- m. assessing evidence;
- n. judgements as to credibility;
- o. findings of fact;
- p. recommendations;
- q. the format and content of an Inquiry Officer report.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

98. Demonstrate knowledge of the reviewing of terms of reference for an Inquiry Officer's inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

99. Demonstrate knowledge of a legal review of an Inquiry Officer report.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

100. Demonstrate knowledge of a legal review of a request to the Minister to release an Inquiry Officer's report.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Board of Inquiry

101. Demonstrate knowledge of the law and policy applicable to an inquiry by a Board of Inquiry. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the purpose, legal basis and jurisdiction of a Board of Inquiry;
- b. planning and conducting the inquiry, including scoping;
- c. the interpretation of terms of reference;
- d. the procedures of a Board of Inquiry including the order of witnesses;
- e. the powers and functions of the President, members, counsel assisting, counsel representing, secretary and other administrative support staff;
- f. impartiality;
- g. confidentiality;
- h. the rights of witnesses and potentially affected persons;
- i. legal representation;
- j. progress reports;
- k. dissolution and reconstitution;
- l. issues of relevance;
- m. standard of proof;
- n. findings of fact;
- o. recommendations;
- p. the format and content of a Board of Inquiry report.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

102. Demonstrate knowledge of drafting terms of reference for a Board of Inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

103. Demonstrate knowledge of acting as counsel assisting a Board of Inquiry, including those duties set out in ADFP 06.1.4.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

104. Demonstrate knowledge of the preparation for and conduct of a Board of Inquiry, including identifying and overseeing the administrative support to a board of inquiry and liaising with command legal officers and other staff.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

105. Demonstrate knowledge of conducting a legal review of a Board of Inquiry report.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Combined Board of Inquiry

106. Demonstrate knowledge of the purpose and legislative and policy framework of a Combined Board of Inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

107. Demonstrate knowledge of the requirement to brief the Minister concerning the appointment of a Combined Board of Inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

108. Demonstrate knowledge of drafting and settling of an instrument of appointment and terms of reference for a Combined Board of Inquiry

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

General Court of Inquiry

109. Demonstrate knowledge of the purpose and legislative and policy framework of a General Court of Inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

110. Demonstrate knowledge of the requirement to brief the Minister concerning the appointment of a General Court of Inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

111. Demonstrate knowledge of drafting and settling an instrument of appointment and terms of reference for a General Court of Inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Selection of personnel

112. Demonstrate knowledge of the policy associated with the selection of personnel to undertake an administrative inquiry. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that selected personnel should have sufficient rank, knowledge, training and experience to undertake the inquiry;
- b. the fact that selected personnel should be free from allegations of suspected bias or a situation of conflict.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

113. Demonstrate knowledge of the problems involved with the selection of inappropriate personnel to conduct inquiries. Where relevant, the demonstration of knowledge should include an explanation of the following problems:

- a. a failure to adhere to the terms of reference;
- b. unnecessary delay;
- c. a flawed processes leading to the inquiry being set aside;
- d. bias and conflict of interest;
- e. a failure to appreciate the gravity or sensitivity of complaints;
- f. intimidation and pressure upon the complainant and witnesses.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Appointing Authorities

114. Demonstrate knowledge of the law and policy that should be taken into account by an appointing authority. Where relevant, the demonstration of knowledge should include an explanation of:

- a. appointing authorities roles and responsibilities;
- b. scoping an inquiry before finalisation of the terms of reference;
- c. limitations of appointment;
- d. limitations on jurisdiction of inquiries;
- e. amendment of terms of reference;
- f. monitoring of inquiries and progress reports;

- g. action following a report and re-opening inquiries;
- h. handling reports and release of information.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

115. Demonstrate knowledge of the differences between and the reasons for having open and closed inquiries.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

116. Demonstrate knowledge of the requirement to:

- a. allocate sufficient resources for an inquiry;
- b. provide support to next-of-kin;
- c. identify potentially affected persons;
- d. identify the rights and obligations of witnesses;
- e. authorise legal representation of potentially affected persons;
- f. have the appointing authority direct the procedure for the conduct of a Board of Inquiry;
- g. consider privacy and limitations on release of evidence and reports of an inquiry.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

117. Demonstrate knowledge of the circumstances when an inquiry should cease to inquire. Where relevant, the demonstration of knowledge should include an explanation of the following circumstances:

- a. a senior officer is implicated;
- b. there is an indication of a criminal or disciplinary offence.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

118. Demonstrate knowledge of common faults/errors and omissions in administrative inquiries and ways to avert them.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Instruments of Appointment and Terms of Reference

119. Demonstrate knowledge of the drafting and reviewing of instruments of appointment and terms of reference for a Board of Inquiry or a Combined Board of Inquiry. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that the specimen terms of reference contained at Annexes F to K of Chap 5 ADFP 06.1.4 – *Administrative Inquiries Manual* should not be followed blindly, but considered and adapted appropriately for the circumstances of the inquiry being undertaken;
- b. the fact that previous inquiries, such as quick assessments, should be reviewed;
- c. the fact that Annex E to Chap 2 of ADFP 06.1.4 – *Administrative Inquiries Manual* should be considered, in order to make an informed recommendation as to the selection of the most appropriate type of inquiry;
- d. the fact that the terms of reference should begin with a concise statement of the task to be undertaken. This should preferably be a short statement that explains the mandate given to inquiry officer/s and the incident that caused the inquiry to be initiated;
- e. the fact that the matter inquired into must concern a part of the Defence Force under the command or control of the appointing officer [See Defence (Inquiry) Regulation 70A(1)]. If doubt exists, the appointing officer should seek the consent of the person who is in command or control of that part of the Defence Force;
- f. when making recommendations for the selection of an inquiry officer:
 - (1) the criteria set out in Defence (Inquiry) Regulations 26, 42 or 70 must be met;
 - (2) the officer needs to be suitable in terms of rank, experience, knowledge and training;
 - (3) the appointment should be free of actual or perceived bias. Actual bias may be demonstrated by inquiry officer/s having a personal interest in the outcome of the inquiry; expressing an opinion on issues that are relevant to the inquiry; or demonstrating favouritism or hostility toward persons who may become witnesses in the inquiry. The test for determining perceived bias is whether a fair-minded lay observer may reasonably apprehend that the inquiry officer/s will not bring an impartial mind to the conduct of the inquiry (See *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at paras 27 –31);

- g. the fact that in defining the scope of an inquiry under the Defence (Inquiry) Regulations, terms of reference effectively set the boundaries for the conduct of the investigation. It is important that the boundaries are not too broad to allow a fishing expedition to be undertaken or too narrow so as to preclude the inquiry officer/s from delving into issues that are germane to the inquiry. In this regard, terms of reference should identify the specific issues that are to be addressed in the inquiry with sufficient clarity to enable the inquiry officer/s to focus on the task;
- h. the fact that while terms of reference should not predict the outcome of the inquiry they should nevertheless specify the end-state to be achieved. For example, if at the end of the inquiry the appointing officer is desirous of reviewing ADF policy, practice and procedure on a particular subject then this should be stated, so that inquiry officer/s can focus specifically on that issue;
- i. the fact that the terms of reference and the matters in respect of which inquiry officer/s are authorised to make recommendations need to be relevant to the subject matter of the inquiry;
- j. the fact that it is necessary that the terms of reference are essential, clear and concise;
- k. the fact that the terms of reference need to follow a logical sequence (See Paras 5.24 & 5.26 of Chap 5 ADFP 06.1.4 – *Administrative Inquiries Manual*);
- l. the fact that context management issues should be considered (Note Annex B Chap 2 ADFP 06.1.4 – *Administrative Inquiries Manual*);
- m. the fact that there is a need for provision for documents and material to be submitted with the report;
 - a. the fact that there is a need for provision for a date for completion of the report and any progress/interim reports required;
 - b. the fact that there is a need for the issues on which the appointing officer requires information to be specifically addressed. It is important that the legal officer does not review or prepare the terms of reference in isolation from the appointing officer. The appointing officer should clearly state what it is that he/she wishes to achieve from the conduct of the inquiry;
- c. that the Defence (Inquiry) Regulations provide that appointing officers direct whether or not recommendations based on the findings of the inquiry are to be made. If applicable, legal officers are to explain the need for inquiry officer/s to be properly empowered in the Instrument of Appointment to make recommendations arising from their findings. [See Defence (Inquiry) Regulations 70B (2) or 70B(3)];
- d. that there is a need for the appointing officer to direct to what extent the procedural requirements of ADFP 06.1.4 – *Administrative Inquiries Manual* are to be followed;
- e. that inquiries under the Defence (Inquiry) Regulations are undertaken for the purpose of reviewing the practices and procedures of the ADF and are therefore fact finding in nature. They are not undertaken for the purpose of investigating disciplinary offences and should not be drafted so as to empower inquiry officer/s to apportion blame. The DFDA has provision for the investigation of disciplinary matters and

as such, terms of reference should not permit inquiry officer/s to make a recommendation as to disciplinary action. Additionally, the terms of reference should make provision for inquiry officer/s to cease his/her or their inquiry in circumstances where it appears that a disciplinary offence may have been committed. In these cases, the terms of reference should direct inquiry officer/s to report to the appointing officer for further guidance;

- f. the fact that one of the main reasons that inquiry officer/s conduct their inquiries in private and disclosure of reports are authorised by the Minister is due to the importance of ensuring that the reputations of the complainants and respondents are maintained during and after the inquiry. Legal officers should consider whether the terms of reference should be drafted to include additional safeguards;
- g. the fact that terms of reference should also be drafted to ensure that a clause is included that allows inquiry officer/s to obtain instructions from the appointing officer when the inquiry officer/s believe that a line of inquiry should be undertaken which is outside the existing terms of reference;
- h. the fact that regulation 29 of the Defence (Inquiry) Regulations provides that a Board of Inquiry is to be conducted in private unless the appointing authority directs that all or any part of the inquiry be held in public. As a matter of policy, inquiries into matters involving significant public interest should be conducted in public. However, inquiries into an individual's professional conduct, command or judgement should be closed to ensure fairness to the person concerned;
- i. the fact that the Appointing Authority may direct that a person, or a class of persons, may or may not, be present during part or all of a board of inquiry;
- j. the fact that the appointment of an experienced legal officer to assist a Board of Inquiry should be considered in every case;
- k. the fact that during a board of inquiry evidence is not to be taken on oath or affirmation unless the appointing authority considers that a person may be affected by the inquiry. The appointing authority must then direct that all evidence, or subsequent evidence, be given on oath or affirmation. Since most Boards of Inquiry affect individuals, the standard practice for appointing authorities is to direct that all evidence is to be taken on oath or affirmation.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Scoping/Planning

120. Demonstrate knowledge of scoping/planning for an administrative inquiry. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the purpose of the planning process:
 - (1) to conduct an appreciation of the nature, dimensions and implications of the inquiry;
 - (2) to determine the time and resources required for the conduct of the inquiry;
 - (3) to determine the number of witnesses likely to be required.
- b. the need to determine the factors that need to be considered when planning the inquiry, including:
 - (1) analysis of the terms of reference;
 - (2) the list of witnesses to be interviewed;
 - (3) the order of witnesses;
 - (4) the list of issues that need resolution;
 - (5) a list of questions that are intended to be asked of witnesses.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Interviewing Techniques and Skills

121. Demonstrate knowledge of interviewing techniques and skills. Where relevant, the demonstration of knowledge should include an explanation of:

- a. identification of the sequence for interviewing witnesses;
- b. advice on the factors that could influence the development of a plan for an interview.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Administrative Law Principles

122. Demonstrate knowledge of the principles of Administrative Law as they relate to military administrative inquiries. Where relevant, the demonstration of knowledge should include an explanation of:

- a. identifying the principles of administrative law;
- b. advising on procedural fairness/natural justice;
- c. the fair hearing rule;
- d. the bias rule;
- e. what is appropriate in terms of natural justice [See *Kioa v West* (1985) 159 CLR 550 @ 584];
- f. the requirement to disclose material to an affected person [See *Kanda v Government of the Federation of Malaya* [1962] AC 322 @ 337-8, *Mahon v Air New Zealand* [1983] 1 AC 808, *Ansell v Wells* (1982) 43 ALR 41];
- g. the rule in *Browne & Dunn* (1893) 6 R 67;
- h. the exception regarding confidential information [See *R v Gaming Board of Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417 and *Ansett Transport Industries Ltd v Secretary, Department of Aviation* (1987) 73 ALR 205];
- i. the requirement to preserve the anonymity of a witness for safety reasons [See *National Companies and Securities Commission and Bankers Trust Australia Limited* (1990) 8 ACLC 124 FCR 217];
- j. the right against self-incrimination [See *X v McDermott* (1984) 123 ALR 226];
- k. the obligation not to draw adverse inferences against a person who claims a right of self-incrimination [See *Dolan v Australian and Overseas Telecommunications Corporation* (1983) 42 FCR 206 and *C v T* (1995) 58 FCR 1];
- l. the responsibility to define the issues to a person in respect of which there exists a possibility that the inquiry officer may make an adverse finding [See *Annetts & Others v McCann & Others* (1990) 97 ALR 177];
- m. the requirement to assess evidence based on the balance of probabilities [See *Briginshaw v Briginshaw* (1938) 60 CLR @ 361-2].

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Evidence

123. Demonstrate knowledge of the rules of evidence and their applicability to military administrative inquiries.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

124. Demonstrate knowledge of the types of evidence and the methods of gathering that evidence.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

125. Demonstrate knowledge of the conduct of evidence analysis.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

126. Demonstrate knowledge of how facts are proved by evidence and inferential reasoning.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Inquiry Report

127. Demonstrate knowledge of the purpose and structure of a report of a Board of Inquiry or a Combined Board of Inquiry. Where relevant, the demonstration of knowledge should include an explanation of the necessity to include:

- a. the background to the incident;
- b. details of the complaint;
- c. the methodology;
- d. a list of persons involved;
- e. a list of witnesses interviewed;
- f. a summary of evidence for each question of the Terms of Reference;

- g. conclusions;
- h. recommendations.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Reviews

128. Demonstrate knowledge of a legal review of a Board of Inquiry or Combined Board of Inquiry (BOI) report. Where relevant, the demonstration of knowledge should include comment on:

- a. whether the Board was properly constituted [Regulation 26];
- b. whether the President was qualified for appointment [Regulation 27(2)];
- c. whether the matter inquired into concerned a part of the Defence Force under the command or control of the Appointing Authority [Regulation 23 and 24];
- d. whether the BOI was properly appointed under Regulation 23(1);
- e. whether the BOI was appointed by an instrument, which conformed with ADFP 06.1.4;
- f. whether the BOI was properly empowered in the Instrument of Appointment to make recommendations arising from the findings [Regulation 25];
- g. whether the Terms of Reference and the matters in respect of which the BOI was authorised to make recommendations were relevant to the subject matter of the inquiry;
- h. whether the procedural requirements directed by the Appointing Authority were followed as closely as practicable;
- i. how the evidence was taken [Regulation 31];
- j. whether a report in the required form was prepared for submission to the Appointing Authority;
- k. whether the BOI report was made consistently with the requirements of Regulation 36;
- l. whether the BOI findings of fact and recommendations were reasonably open on the evidence;
- m. whether the BOI, in arriving at findings of fact, applied the appropriate standard of proof;
- n. whether the BOI findings of fact and recommendations were within the terms of reference;
- o. whether there was a failure to afford procedural fairness to any person;

- p. any legal matters arising from the report, which would require the inquiry to be reopened [Regulation 66];
- q. whether there is any legal impediment to the Appointing Authority acting on the BOI's findings and recommendations with which he/she agrees.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

129. Demonstrate knowledge of the review of documentation arising from a request for release of an inquiry record and report under the Defence (Inquiry) Regulations.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Decisions and Implementation Plans

130. Demonstrate knowledge of decisions and implementation plans flowing from an inquiry report.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Freedom of Information

131. Demonstrate knowledge of the grounds for refusing access under the FOI Act. Where relevant, the demonstration of knowledge should include an explanation of the following grounds for refusing access:

- a. internal working documents;
- b. documents affecting enforcement of the law and public safety;
- c. documents concerning an agency's method of conducting tests/examinations or relating to personal management;
- d. documents affecting personal privacy;
- e. documents subject to legal professional privilege;
- f. documents containing material obtained in confidence.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

132. Demonstrate knowledge of the refusal to grant access to information.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

133. Demonstrate knowledge of the protections afforded to persons releasing information under the FOI Act.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

134. Demonstrate knowledge of the issuance of ‘conclusive certificates’.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

Alternative dispute resolution

135. Demonstrate knowledge of:

- a. the nature, scope and limitations of alternative dispute resolution (ADR);
- b. the appropriateness of ADR to a particular case;
- c. the role of the mediator and conciliator;
- d. reporting on outcomes of mediation and conciliation.

	Member	Assessor	Senior Assessor
Signature			
Name			
Date			

136. Demonstrate knowledge of acting as a mediator or conciliator (where suitably qualified).

	Member	Assessor	Senior Assessor
Signature			
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