Complaints against Government - Administrative Law

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Introduction

Administrative law refers to the law to be followed by governments in their actions and decisions. If a decision maker breaches the administrative law rules, a person adversely affected by the decision or action may seek help by bringing proceedings in a court for judicial review of the decision.

Court proceedings generally involve considerable expense, can take months (or even years) to be resolved and may eventually lead only to the same decision being made again. In an effort to avoid the necessity for court proceedings, alternative procedures have been developed using administrative tribunals that can review administrative decisions made by both Commonwealth and state officials.

The Commonwealth Administrative Appeals Tribunal has wide powers to review Commonwealth administrative decisions, while the Commonwealth Ombudsman’s function is to receive and investigate complaints about administrative matters.

In Queensland the Queensland Civil Appeals Tribunal has jurisdiction to review certain decisions made by Queensland Government administrative officials.

Judicial Review or Administrative Appeal

Judicial review

Judicial review is quite different from an administrative appeal. Judicial review examines the power or jurisdiction to make a decision or to take some action. It is not concerned with the merits of the decision. Courts therefore consider two basic questions when hearing an application for judicial review:

- whether there was power to do the act or make the decision in question
- if there was power, whether the power was exercised lawfully.

If the answer to either question is ‘no’, the action or decision may be quashed (overturned) and the decision maker ordered to reconsider. Judicial review will only be successful if the decision maker can be shown to have breached one or more of the relevant statutory or common law principles governing administrative functions. Except in the most exceptional circumstances, courts are not concerned with the merits of the decision.

When a judicial review application is successful, the court will usually set aside the particular action or decision, and order the decision maker to reconsider their decision according to law. The decision maker may reach exactly the same decision the second time around, but this time in accordance with the correct legal procedures.

Applications for judicial review must be heard in superior courts in either the Commonwealth or the state jurisdiction and often involve complicated legal questions.

A successful applicant for judicial review will usually have their costs paid by the losing party. An unsuccessful applicant may be ordered to pay the costs of the decision maker, as well as having to pay their own costs.
Administrative appeals

Administrative appeals are designed specifically to reconsider the merits of an administrative action or decision (i.e. whether it was the ‘correct or preferable decision on the facts of the case’).

A successful administrative appeal will most often result in the tribunal substituting its own decision in favour of the applicant.

Under the Queensland Civil Administrative Tribunal legislation, in most cases, each party bears their own costs of the administrative appeal (called a ‘review of administrative decision’), so there is little prospect of being burdened with an adverse costs order if an application is unsuccessful.

Legislation Regarding Judicial Review or Administrative Appeals

Legislation has simplified the task of obtaining judicial review of administrative decisions and actions. The Commonwealth Administrative Decisions (Judicial Review) Act 1977 (Cth) brings together the existing common law grounds for review, while the Commonwealth Freedom of Information Act 1982 (Cth) establishes avenues of access to certain government information. The Queensland equivalents are the Judicial Review Act 1991 (Qld) (Judicial Review Act) and the Right to Information Act 2009 (Qld) (Right to Information Act).

The Commonwealth and state judicial review Acts provide a number of specific grounds upon which decisions can be reviewed, as well as remedies that can be ordered by the courts (see the Complaints Against Government – Judicial Review chapter).

Structure of Government

Democratic governments based on the Westminster system traditionally consist of three branches: the legislature, the executive and the judiciary. The legislative branch is responsible for making laws. The administrative branch of government is responsible for putting the laws and policies of the legislature into effect, and the judicial branch is responsible for interpreting and enforcing laws.

The rules of administrative law apply mainly to the activities of the executive branch, but some activities of the legislature and judiciary are administrative in character and may be subject to administrative law.

Administrative decisions made by local councils, government ministers and lower courts (e.g. the Magistrates Court) are generally subject to administrative law. However, not all decisions by such bodies can be described as administrative. For instance, by-laws made by an elected local authority are legislative in character and not subject to review under pt 3 of the Judicial Review Act (see Paradise Projects Pty Ltd v Gold Coast City Council [1994] 1 Qd R 314) but may be challenged under the common law as it is preserved in pt 5. Similarily, judicial decisions made by lower courts are not administrative decisions (Stubberfield v Webster [1996] 2 Qd R 211).

The head of the executive branch of government is the Governor-General in Council (for the Commonwealth Government) or the Governor in Council (for state governments). The High Court of Australia has made it clear that, at common law, the rules of administrative law apply to both the
Governor-General and the state governors in the same way that they apply to other administrative decision makers. However, in judicial review applications in Queensland, the appropriate respondent in matters concerning decisions of the Governor in Council is the responsible minister (s 53 Judicial Review Act).

Most government administrative work is carried out by government departments. The administrative head of a government department is a senior public servant with a title such as Director-General. The political head of a department is the minister, who is a member of the government in power. The minister is responsible for formulating government policy, which the department will put into effect. The minister is, in principle, accountable to the parliament and ultimately the people for the department's activities.

Departments are not the only administrative organ of government. Sometimes special statutory bodies are set up with a particular administrative function. An example of such a body at the Commonwealth level is the Repatriation Commission. Although most statutory bodies operate outside the confines of the normal public service regime, they remain just as much a part of the government administrative branch as mainstream departments and are ordinarily just as accountable for their administrative actions and decisions.

**Administration and Policy**

Not all government activity falls into the category of administration. Some government action is concerned with the formulation of policy, which is a political rather than an administrative function. Courts do not normally involve themselves with questions of policy, unless it can be shown that the particular policy is unlawful or if a policy is being applied without proper regard to the merits of an individual case.

**What is policy?**

Policy is concerned with the implementation of a desired course of government action. For example, a decision to levy a particular tax or charge, or a decision to conscript troops or to deploy forces to a war zone are policy decisions. The decision to set up some form of tax assessment system to implement taxation policies also forms part of the policy decision.

**What is administration?**

The daily operation of systems that are created as a result of policy decisions comes within the realm of administration and is subject to the requirements of administrative law. The distinction between the formulation of policy and administration of policy is an important one, because a complaint about formulation of policy is a complaint about a purely political matter, and none of the avenues of redress discussed in this part ordinarily apply to such a complaint.

Complaints about the administration of policy (e.g. decisions concerning the application of the policy to particular circumstances) are, however, generally subject to review.

Some other decisions may not be subject to administrative law because they are contractual or managerial in nature (for more information as to which decisions are subject to administrative law see the *Complaints Against Government – Judicial Review* chapter).
Delegation

Legislation normally places the power to make decisions with the holder of a specific position such as the relevant minister or the permanent head of a department. Modern departments are often huge entities with thousands of employees. It would be impossible for one person to perform all of the functions entrusted to them, and it is quite usual for functions to be delegated to others. For example, under the Social Security Act 1991 (Cth), the Secretary of the Department of Social Security is given the power to decide claims for unemployment benefits. One can imagine that if the secretary had to deal personally with every individual claim, the system would grind to a halt. Therefore, the law permits the secretary to delegate much of the day-to-day work to Centrelink officers (Carltona Ltd v Commissioners of Works [1943] 2 All ER 560; O’Reilly v Commissioners of State Bank of Victoria (1983) 153 CLR 1). However, the secretary remains responsible for ensuring that delegated functions are carried out properly (see s 27A(10A) of the Acts Interpretation Act 1954 (Qld)).

General guidelines and instruction manuals are normally issued by departments to assist their officers in the performance of delegated functions. Such manuals must be made available to the public (s 20 Right to Information Act). In framing a review of an administrative decision, it may be very important to see these documents, as they may contain incorrect interpretations of the law or may require some irrelevant or improper factors to be considered before administrative action is taken or a decision is made.

Challenging a Commonwealth, State or Local Government Decision

Before lodging a complaint about a government administrative decision, it is important to know which government is responsible for the decision, because different laws apply to the Commonwealth, state and local governments, and court proceedings must be started in the correct jurisdiction. An easy way to distinguish between Commonwealth, state and local government agencies is to ring the agency and ask which government controls it. Alternatively, ask the Commonwealth Ombudsman or state ombudsman.

Challenging Commonwealth decisions

Commonwealth Government action can be challenged by:

- judicial review by the High Court of Australia
- judicial review by the Federal Court of Australia
- application for review to the Administrative Appeals Tribunal (AAT) where permitted. Before an application is made, it is important to find out whether there is an internal review process provided for in the relevant department or authority. Any internal review mechanisms should ordinarily be exhausted before an application is made to the AAT or to a court for judicial review
- complaint to the Commonwealth Ombudsman
- complaint to the appropriate minister or member of parliament.
Challenging state decisions
State government action may be challenged by:

- judicial review by the Supreme Court of Queensland
- appeal to the Queensland Civil and Administrative Tribunal (QCAT), provided that QCAT has jurisdiction over the decision. A small number of state bodies are not subject to review in QCAT (e.g. the Mental Health Tribunal and the Queensland Industrial Relations Commission)
- complaint to the state ombudsman
- complaint to the appropriate minister or member of parliament.

Challenging local government decisions
Administrative decisions made by local councils are subject to the rules of administrative law. In Queensland, the ultimate control of local councils rests with the Minister for Local Government, so complaints about the actions of local councils are dealt with under Queensland law.

Non-legal Remedies for Complaints against Government
Before taking one of the steps outlined above, an informal written approach to the agency concerned may be worthwhile. An informal approach is inexpensive and may sort out the issue without further expense and time. At the very least, the position of the agency concerned should be clearer after a reply from the relevant department or minister. However, as there are time limits in making an appeal or an application for review, care must be taken to ensure that the informal process does not interfere with formal time limits.

Time limits in which to make applications in relation to administrative decisions are relatively short, so it is important to find out the time limit and make the application as soon as possible. Although tribunals and courts have the power to grant extensions of time to make applications for review, this power is discretionary and will normally only be granted in exceptional circumstances. If in any doubt about the relevant time limit, consult a solicitor.

Administrative decision makers now routinely provide a statement of reasons with notification of their decisions. If the decision is subject to Commonwealth or state judicial review legislation, then the decision maker will be required to give reasons within 28 days of a request for reasons being made. If a decision maker fails to provide a statement of reasons within the required period, an application may be made to the court for an order that a statement be provided.

A statement of reasons will help a person to understand the reasons for the decision and will assist in deciding the appropriate course of review.

Complaint to the ombudsman
Complaints may also be made to the appropriate ombudsman in some circumstances (for further information see the Complaints to the Ombudsman chapter).
A letter to the local member of parliament

A complaint to the local member of parliament can also be useful, especially if no legal grounds for a challenge to an apparently unfair decision exist. It may be possible to have the action or decision altered as an act of grace. Act of grace decisions are rare.
Legal Notices

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