Complaints against Government - Judicial Review

CHAPTER CONTENTS

Introduction	2
Review of State Government Action	2
What Government Actions may be Challenged	2
Who Can Make a Complaint about Government Actions	3
Time Limits for Complaints against Government Actions	4
Obtaining Reasons for a Government Action	5
Grounds for Review of Government Actions	5
Privative Clauses to Protect Government Actions from Review	10
Remedies for Judicial Review of Government Actions	10
Legal Notices	12

Introduction

The grounds on which courts will review administrative actions have been developed under the common law over hundreds of years. The introduction of statutory forms of review at both Commonwealth (*Administrative Decisions (Judicial Review) Act 1977* (Cth) (Administrative Decisions Act)) and state (*Judicial Review Act 1991* (Qld) (Judicial Review Act)) levels has simplified the otherwise technical common law requirements. Many decisions made under these Acts have expanded the principles and applied them to new situations. This chapter only gives a general outline of the law relating to judicial review. The advice of a lawyer experienced in this area should be sought if legal proceedings against government are contemplated.

Judicial review is concerned with two basic issues:

- the existence of power to do an act or make a decision
- whether the power has been lawfully exercised.

The second issue is usually considered to have two aspects. First, there is the question of whether the power was exercised in accordance with the substantive limitations imposed upon it. The second question is whether the power was exercised in accordance with the appropriate procedural requirements and according to accepted standards of administrative decision making.

Review of State Government Action

A person wishing to obtain judicial review of a state government action must bring proceedings in the Supreme Court under the Judicial Review Act. In a sense, the Judicial Review Act adopts, with some modification, the Administrative Decisions Act. Both Acts provide a simple and straightforward procedure to be followed and substitute simpler statutory remedies for the many different and complicated remedies that existed at common law.

Part 3 of the Judicial Review Act allows people to apply for a statutory order of review. Under pt 4, an intending applicant for statutory review is entitled to obtain reasons (with some exceptions) for any decision that they propose to challenge.

In order for an applicant to seek review under pt 3 for a statutory order of review, there are certain jurisdictional requirements that have to be satisfied (see What government actions may be challenged below). When pt 3 does not apply, pt 5 of the Judicial Review Act sets out the requirements for making an application, using what are essentially the traditional common law and equitable remedies.

What Government Actions may be Challenged

Under pt 3 of the Judicial Review Act, the aggrieved person may apply to the court for an order of review in respect of:

- a decision to which the Judicial Review Act applies (s 20)
- conduct for the purpose of making a decision to which the Judicial Review Act applies (s 21)
- failure to make such a decision (s 22).

The Judicial Review Act distinguishes between decisions and conduct engaged in for the purpose of making a decision. Both are defined in very broad terms. The Judicial Review Act applies to decisions of an administrative character made, proposed to be made or required to be made. Such decisions must have been either made under an enactment (s 4(a) Judicial Review Act) or made using executive power in relation to a scheme or program which is not created by statute, but which is provided for by public funds (s 4(b) Judicial Review Act).

Common forms of decision include:

- making an order
- giving a certificate
- issuing a licence or permit
- suspending, revoking or refusing any of those things.

Conduct engaged in for the purpose of making a decision includes such procedural matters as taking evidence or holding an inquiry or investigation and the manner in which these processes are conducted.

The Administrative Decisions Act has no equivalent to the non-statutory scheme or program provision in Queensland (s 4(b)), so decisions in the Commonwealth jurisdiction can only be reviewed under that Act if they are made under an enactment.

Both state and Commonwealth Acts exclude some decisions from their scope. The changing nature of government has meant that the Judicial Review Act now excludes from review decisions made by a range of government owned corporations. It is also possible for parliament to protect specific decisions using a privative clause (see Privative clauses to protect government actions from review below).

Who Can Make a Complaint about Government Actions

Only an aggrieved person may apply for a statutory order of review under the Judicial Review Act. An aggrieved person is one whose interests are or would be adversely affected by decision, relevant conduct or failure to make a decision (s 7 Judicial Review Act). If the decision complained of is the making of a report or recommendation, a person whose interests would be adversely affected if a decision was or was not made in accordance with the report or recommendation can seek judicial review.

The phrase ‘a person whose interests are adversely affected by the decision’ has been interpreted on a number of occasions, and it generally requires that a person must have an interest that is greater than the interest of a member of the general public. This will not be a problem when an applicant has been directly and materially affected by a decision (e.g. being refused a licence).

The difficulty primarily arises when a person or public interest group is not directly affected by a decision in the same sense, but has a degree of concern about the decision (e.g. an environmental group that wants to challenge a decision to grant development permission to a developer).

Traditionally, it was necessary for the Attorney-General to bring an action against a decision that affected the public interest, and it was a matter of discretion whether or not the Attorney-General chose to do so. An individual or group might have standing to seek judicial review if it could be shown that the infringement of the public interest affected them more than other members of the public, or they had a greater interest in the subject matter of the decision than other members of the public. A mere intellectual or emotional concern was not enough, and courts tended, under common law, to find that environmental groups had only that kind of interest.

Under the state and Commonwealth legislation, courts have generally taken a relatively liberal view, and courts will look at a number of factors to determine whether an individual or group has standing, including:

- relevant organisational objects
- government recognition of a group's concern through funding or an invitation to participate in projects or conferences
- a history of involvement in the subject matter through submissions over a substantial period of time
- the size of the group's membership
- community perceptions of the group's ability to represent the public interest.

A very broad approach was adopted in the case of *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172, where it was considered that standing should be granted unless to do so would involve an abuse of process (i.e. open standing). This approach has not, as yet, received the endorsement of any appellate court.

Special costs orders

Section 49 of the Judicial Review Act enables a party to the proceedings (other than the decision maker) to ask the court for a special costs order: either that another party indemnify the requesting of the order for its costs, or that each party should bear its own costs regardless of the outcome. One advantage for an applicant in making a costs application under s 49 is that it allows the applicant to assess the strength of the claim at an early stage before significant costs are incurred. Failure to secure a costs order may prompt an applicant to reconsider their position.

Time Limits for Complaints against Government Actions

The time within which an application for a statutory order of review under s 26 of the Judicial Review Act must be made is normally 28 days after the decision is made. If, however, the decision does not set out the reasons for the decision, the application must be made within 28 days from the day on which a written statement of reasons is given to the applicant. The position is similar under s 11 of the Commonwealth Administrative Decisions Act.

The court has a discretion to permit an applicant to lodge the application within such further time as the court allows, although an applicant would need to show the court good reason for the delay before it would allow a late application.

An application for review under pt 5 of the Judicial Review Act must be made as soon as possible and, in any event, within three months after the day on which the grounds for the application arose. The court also has power to extend the period within which to make the application, but would equally require that there be good reasons for the delay (s 46 Judicial Review Act).

Obtaining Reasons for a Government Action

If a person wishes to challenge a decision in the courts, it is of vital importance that the reasons for the decision are known.

Statutory review

Ordinarily, a statement of reasons accompanies notification of a decision. However, if this is not the case, a person may request the decision maker to supply a statement of the reasons if the decision is reviewable under pt 3 of the Judicial Review Act. Such reasons must be supplied within 28 days of a request (s 33 Judicial Review Act). The decision maker may refuse to supply reasons if they believe that the person making the request has no entitlement to do so, and the court may then decide that question. There are some limitations on the information that can be disclosed where a person makes a request for written reasons (i.e. notably confidential business or personal information (ss 35, 37 Judicial Review Act), and disclosure of Cabinet deliberations that would be contrary to the public interest (s 36 Judicial Review Act) are excluded).

Schedule 2 to the Judicial Review Act lists decisions for which a statement of reasons need not be given. Many of these decisions relate to the administration of civil and criminal justice (e.g. many decisions of the Crime and Corruption Commission), the commercial activities of designated state authorities, appointment decisions in government and financial matters (e.g. government tenders and contracts). Similar exclusions exist under the Commonwealth Administrative Decisions Act.

Common law

The provisions in relation to the right to a statement of reasons apply only where review is sought under pt 3 of the Judicial Review Act or under the Administrative Decisions Act. If a person is seeking review under pt 5 (or the equivalent common law jurisdiction in s 39B of the *Judiciary Act 1903* (Cth)), there is no common law right to be informed of the reasons for an administrative decision.

Once legal proceedings have begun, a procedure known as disclosure is available to both parties. Disclosure is the procedure by which relevant documents in the possession of one party must be disclosed or provided to the other party. In this way, any written reasons for a decision that exist may be obtained as part of the ordinary rules of civil proceedings. The government may, however, refuse to produce documents on a number of grounds, including Crown privilege, which is a claim that the public interest would be harmed if the documents were revealed.

Grounds for Review of Government Actions

Sections 20, 21 and 23 of the Judicial Review Act specify the grounds on which a statutory order of review may be made in respect of decisions and conduct leading to decisions. In pt 5 of this Act, the grounds are not codified so common law prevails. However, common law grounds and the statutory

grounds of review are essentially the same and will be treated as such below. Where significant differences exist, these will be noted.

Breach of the rules of natural justice

Many administrative decisions must be made in a way that affords people that are affected by the decisions the right to natural justice. When a natural justice issue arises, two questions have to be asked: do the rules of natural justice apply? And if so, what comprises natural justice in this situation?

Do the rules of natural justice apply?

Whenever an administrative decision affects the rights, interests or legitimate expectations of an individual, the decision maker is bound to observe the rules of natural justice, unless there is clear legislation to the contrary. Legal rights and interests may include such things as holding a licence, membership in a social or political club, trade union membership or professional reputation. A legal expectation might arise as a result of the regular conduct of an administrative body. For example, a right to natural justice would apply in the case of a person who had been warned off a racecourse, because that person has a legitimate expectation (along with other members of the public) that when they presented at the entrance to the racecourse, they would be admitted upon payment of the appropriate fee.

What is natural justice?

The procedures necessary to ensure that natural justice is afforded will vary from case to case. In some cases, the legislation will specify what procedures must be followed to afford natural justice. Where an Act is silent or does not exhaustively define the necessary components of natural justice that will apply, the court will determine what procedures should be followed to ensure natural justice. Generally, as the effect of a decision becomes more serious or the interests at stake become more important, the procedures necessary to secure a fair hearing will be more rigorous. A fair hearing may sometimes require that the proceedings be conducted like a trial, which means that:

- notice of the hearing should be given
- the person should know the case against them in advance
- they should be allowed legal representation
- they should have the right to cross-examine witnesses
- the rules of evidence should be followed.

In other circumstances, a fair hearing may comprise no more than a brief outline of what is proposed to be done with an invitation to make written submissions on the matter.

A second aspect of the rules of natural justice, the bias rule, requires that decisions to be made by impartial decision makers. The important principle here is that justice must not only be done but must be seen to be done. In most cases it is not necessary to show actual bias—it will be sufficient to show apprehended bias, which arises when a reasonable person observing proceedings would have thought that the decision maker was not able to bring an impartial mind to the making of the decision.

The circumstances in which a reasonable suspicion of bias might exist are numerous and include where the decision maker:

- has a financial interest in the decision
- has a family relationship or professional association with one of the parties
- has feelings of animosity towards a party
- has expressed an opinion from which a reasonable person might infer that the matter has been prejudged.

Failure to take relevant considerations into account

This ground can be made out only if the administrative body was required to consider the factor alleged to be relevant and failed to do so. Relevant factors that must form part of the decision will often appear in the statute. Where the statute is silent or where it does not exhaustively list the factors that are required to be considered, the court will look to the subject matter, scope and purpose of the particular Act conferring the power in order to decide whether a factor is relevant and must be taken into account.

Taking irrelevant considerations into account

This is a very common ground of challenge and one of the most important in practice. If it can be shown that an administrative body took irrelevant factors into account in reaching a decision, the court can review the decision.

What constitutes an irrelevant consideration will be determined on the basis of statutory interpretation (much as for relevant considerations), giving effect to the scope and purpose of the particular Act pursuant to which the decision is made.

Failure to observe procedures required by law

Statutes often lay down procedures that should be followed in making a decision. However, not every failure to follow those procedures will invalidate the subsequent decision. Courts now generally regard the matter as one of statutory interpretation and attempt to work out, from the scope and objects of the statute, what parliament intended should be the consequence of non-compliance. For example, a statutory requirement for the preparation of an environmental impact statement is likely to be regarded as a necessary pre-condition to any valid decision to allow a development, whereas a failure to comply with some lesser technical requirements, although expressed to be required, may not cause a subsequent decision to be invalid simply because those technical requirements were not followed.

Absence of jurisdiction

This ground exists where a person has made a decision that they have no power to make, or where a decision has been improperly delegated to someone other than the person upon whom the power was conferred in a statute.

For purely practical reasons, many government functions are delegated, and the courts recognise this fact of administrative life. However, the courts insist that the delegate (the person who actually exercises the power in practice) must be an appropriate person.

A delegate is generally regarded as appropriate if they are subject to the control of, and answerable to, the person upon whom the power was conferred originally. For example, a power vested in the Director-General of one government department may often be properly delegated to an officer within that department but usually not to an officer in another department or to someone outside the public service.

Furthermore, some central decision-making powers which are fundamental to the whole scheme of the empowering Act may not be able to be delegated at all, although the making of inquiries upon which the decision will be based, or even the making of recommendations, can be delegated. Such decisions must, however, be made ultimately by the individual who is given the statutory power to make the decision.

Improper purpose or bad faith

This ground often overlaps with the ground of irrelevant considerations, as an irrelevant consideration may have been taken into account in order to achieve some improper purpose. In determining whether there has been an improper purpose, it is again necessary to look at the particular Act conferring the power to determine the purpose for which the power was granted. Even where some improper purpose has been involved in the making of a decision, it will not necessarily invalidate the decision unless the improper purpose was the dominant or substantial purpose underlying the making of a decision.

In extreme cases, decisions may be made for improper purposes that are not only unauthorised but also motivated by dishonesty, or made corruptly or out of spite. In such a case, judicial review can be obtained on the grounds of bad faith. Such cases are relatively rare, because the burden of establishing bad faith on the part of a decision maker is high, and it will usually be very difficult to get evidence of the corrupt or dishonest motives that actually motivated the decision.

Unauthorised decisions

An administrative body will be subject to review when the empowering statute does not provide the power to take the particular action or make the decision challenged.

Exercise of power at the behest of another

This ground relates to instances where a person has exercised a discretionary power at the instruction of another person. Generally, a decision maker should not defer to the direction of another person, even a higher official, and should not merely follow directives of their superiors.

However, the courts have recognised the realities of administrative organisation and held that it is quite proper for matters such as government policy to be taken into account in many cases and even to be given conclusive weight. However, the extent to which government policy should control decision making may still depend upon the type of administrative body involved and the level of independence from the political or policy aspects of government, which can often be seen in the terms of the legislation creating the body.

Exercise of a power in accordance with the law

A ground of review exists when the decision maker applies a pre-determined policy to each matter coming before them, without regard to the merits of each specific situation. Although it is desirable that like cases should be decided alike and that some set rules or standards should govern decision making, this ideal can be carried too far. When the rules or guidelines are rigidly applied, injustice may result. Every situation deserves to be treated on its own individual merits within a general framework of rules and policies. Decision makers may, however, only apply policies that are, in themselves, lawful, and should not turn a deaf ear to claims that a particular decision involves matters that distinguish it from the run of the mill situations for which the policy was designed.

Unreasonable exercise of power

Although judicial review is not generally concerned with the merits of a decision, the court will review an administrative action or decision that is so unreasonable that no reasonable body would have reached that conclusion. It is generally necessary to show that the decision has no rational or plausible explanation, or that it is perverse, illogical or disproportionate in its effect. This is a difficult ground to establish.

Absence of evidence

At common law, absence of evidence (the 'no evidence' rule) requires that there be no evidence at all to support the decision made. Under statutory review, this ground is less onerous and will apply to either of the following two situations:

- where a decision maker is required by law to reach a decision only if a particular matter is established, and there is no evidence on which the decision maker could reasonably be satisfied that the matter is established
- when the decision is based on a particular fact, and that fact does not exist.

Abuse of power

This ground of review is something of a catch-all, which allows administrative decisions to be challenged in situations that do not neatly fit into the above categories. However, the Federal Court of Australia has tended to exercise restraint in expanding the grounds of review available under the Commonwealth Administrative Decisions Act based on this vague terminology, and the Queensland courts might be expected to adopt a similar view in relation to the Judicial Review Act equivalent.

Review of failure to make decisions

Section 22 of the Judicial Review Act covers the situation when an administrative body fails to make a decision where it has a positive duty (as opposed to merely a discretion) to make a decision to which the Judicial Review Act applies. There is an equivalent provision in s 7 of the Administrative Decisions Act.

If there is a time limit specified for the making of the decision, the ground for the application is that the person has failed to make the decision within that period. If there is no prescribed time limit, the

applicant for an order of review must show that there has been unreasonable delay in making the decision. What is an unreasonable delay will be a matter of argument depending on the circumstances.

Under both Acts, where a decision maker fails to make a decision within the relevant time frame, the court may issue an order requiring the decision maker to make a decision within a specified period.

Privative Clauses to Protect Government Actions from Review

Privative clauses are legislative provisions intended to protect specific decisions (or classes of decisions) from judicial review.

Such clauses often take the form of a provision that the specified decision(s) must not be challenged, appealed against, reviewed, quashed or called in question in any court. Although at face value, privative clauses would seem to remove the possibility of judicial review of a decision, the courts have developed and applied a concept of jurisdictional error to limit the effect of some privative clauses.

In general terms, jurisdictional error occurs either where a decision maker makes a decision in excess of their jurisdiction (narrow jurisdictional error) or where there is a substantial flaw in the decision-making process, such that it cannot be said that a decision has been properly made (broad jurisdictional error). Where either form of jurisdictional error is found to have occurred, there is in practice no decision that the privative clause can protect.

Remedies for Judicial Review of Government Actions

Statutory orders of review

The powers of the Supreme Court of Queensland in respect of applications for statutory orders of review under pt 3 of the Judicial Review Act are set out in s 30 of the Act. The court can make any or all of the following orders in respect of decisions:

- quashing or setting aside the decision
- referring the matter to the person who made the decision for further consideration subject to directions such as time limits for the further consideration and preparatory steps
- declaring the rights of the parties
- directing any of the parties to do or not do anything that the court considers necessary to do justice to the parties.

When review of conduct is sought, the court may only make the final two orders listed. The failure to make a decision may be remedied by an order directing the making of a decision and/or the final two orders listed. All orders are discretionary.

The Federal Court of Australia has equivalent powers under s 16 of the Administrative Decisions Act in respect of Commonwealth decision making.

Orders of review

If an application for judicial review under common law principles is successful, the court may, in its discretion, grant a remedy to solve the problem. The following five remedies are available:

- **declaration**—a formal statement by the court that an action or decision is unlawful. It is not contempt of court to ignore or defy a declaration, but the government will ordinarily comply with the terms of a declaration
- **injunction**—an order that something be done or some action taken (a mandatory injunction), or that an administrative body cease or refrain from doing an act (a prohibitive or negative injunction). Most injunctions in administrative law are prohibitive in form. Unlike a declaration, an injunction has a coercive effect, and it is contempt of court to disobey an injunction
- **mandamus**—an order by the court requiring an administrative body to perform an act (e.g. make a decision)
- **certiorari**—an order that quashes a decision that has been made unlawfully
- **prohibition**—an order requiring a body to cease proceedings because it lacks jurisdiction or has exercised its jurisdiction improperly. It is the appropriate remedy when the proceedings are only partly completed, and it prohibits the body from proceeding to make a decision.

In their common law form, the last three are known as prerogative writs and have been the traditional remedies used against unlawful administrative action. They are still issued by the Federal Court in reviewing action outside the Administrative Decisions Act. Under the Judicial Review Act, the Supreme Court of Queensland can no longer issue the prerogative writs but can make prerogative orders, which are essentially identical in effect.

Under pt 5 of the Judicial Review Act, when a person has made an application for review, the Supreme Court may grant an injunction or declaration and/or a prerogative order in the nature of a certiorari or prohibition order pursuant to s 47 of the Judicial Review Act. It may also remit the decision to the decision maker for further consideration subject to directions. While some technicalities remain in applying for these remedies under pt 5 Judicial Review Act, it seems that s 47 allows the court considerable flexibility in determining what remedy is most appropriate in the circumstances of the case, even if the relief that it decides to provide had not been included in the original application.

Legal Notices

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