FACT SHEET

LAW INSTITUTE VICTORIA

Merits Review and Judicial Review

Almost every Australian and every commercial entity will be affected by an administrative decision made by a Commonwealth, State or Territory government Department or agency. Most common are those made affecting an individual's entitlement to social security benefits or entitlement to enter and remain in Australia as well as taxation obligations. Businesses are also affected by administrative decisions relating to their taxation, entitlements such as research and development grants and obligations to pay customs and duties. Individuals may be affected by decisions refusing to grant or renew registrations or licences required for them to carry on their professions or businesses. All may be affected by administrative decisions affecting broader issues such as the environment or the ability to obtain information about the activities of government. Australians may be able to obtain review of administrative decisions either through merits review or judicial review.

What is Merits Review?

The term "merits review" refers to the review of an administrative decision by reference to the law under which it was made and the evidentiary material made available by the primary decision-maker, the person affected by the decision and, in some instances, the efforts of the reviewer. Merits review is a creature of statute and its processes and outcome are dependent on the terms of the particular statute under which the administrative decision was made and under which it may be reviewed.

In general terms, the reviewer may conclude that only one decision may be made correctly. It may be that the review process leads to a range of decisions that may be correctly made. The reviewer must then exercise discretion to select which of those correct decisions is to be preferred. That exercise requires regard to be had to policy, which will be found in the legislation under which the decision was made and, in some instances, to the executive's statement of that policy. The reviewer will assess that policy to ensure that it is consistent with the law but, assuming that it is, will have regard to it in selecting the preferable decision and come to a decision.

Outcome of review

If the decision, be it the correct or the preferable decision, is the same as that made by the primary decision-maker, the reviewer will affirm the primary decision. If it is different, the reviewer may vary the primary decision or may set it aside and either substitute the decision regarded as correct or remit the decision to the primary decision-maker to make it again.

Internal merits review

Legislation may provide for an agency to undertake merits review of its own decisions when asked by a person affected by them. Many of the social security decisions made by Centrelink under the Social Security Act 1991 (Cth) are reviewable; Social Security (Administration) Act 1999 (Cth). Although not described as internal review, objections lodged to notices of assessment issued by the Commissioner of Taxation, are effectively requests for internal review. The Building Act 1993 (Vic) provides for internal review of a reviewable decision as defined in the act but relating to, for example, building practitioners and licensed employees.

In each case, the relevant legislation provides for those who may apply for review and the time within which they must do so. Some, such as the Building Act, expressly provide that the reviewer must be a delegate other than the original decision-maker; s 185A relating to building practitioners. That reflects the general practice even when not legislated. Time limits are set out in the Building Act e.g. 28 days after the person affected by a decision relating to a building

practitioner is given notice of the reviewable decision; s 185(3).

Legislation may confer power on an agency head, however described, to undertake an internal review when satisfied that there is good reason to do so and regardless of whether an application has been made by the person affected by the decision e.g. Social Security (Administration) Act 1999; s 126.

In limited circumstances, an agency may be able to rely on a power outside the Act under which the decision was made in order to review it. That power may lie in the general review power given in interpretation legislation but is dependent upon whether the decision sought to be reviewed was a decision to make an "instrument" within the meaning of either s 33(3) of the Acts Interpretation Act 1901 (Cth) or s 41A of the Interpretation of Legislation Act 1984 (Vic). That is unlikely. The second power arises when, generally speaking, a decision-maker becomes aware of its having exceeded its jurisdictional powers or has failed to comply with procedures it is obliged to follow e.g. grant procedural fairness. The decision-maker may make another decision in place of the first; Minister for Immigration & Multicultural Affairs v Bhardwaj [2002] HCA 11.

External merits review

The Commonwealth and Victorian Parliaments provide for many administrative decisions to be reviewed externally. The right to seek review is found in the legislation under which the particular decisions are made. Freedom of information legislation passed by both provide for two levels of external review. The first level is provided by the Australian Information Commissioner in the Commonwealth or the Victorian Information Commissioner in Victoria; Freedom of Information Act 1982 (Cth) (CthFOI Act); Part VII and Freedom of Information Act 1982 (Vic) (VicFOI Act); Part VI, Division 1. Applications for a second level of external review may then be made to the Administrative Appeals Tribunal[1](AAT) in relation to decisions made under the Commonwealth Act and, in Victoria, to the Victorian Civil and Administrative Appeals Tribunal (VCAT) under the Victorian Act.

Unless modified by the time limits provided for in the enactment under which the decision was made, the time within which an application may be made to the current AAT is 28 days; Administrative Appeals Tribunal Act 1985 (Cth) (AAT Act); s 29(2). When the Administrative Review Tribunal Act 2024 (Cth) (ART Act) comes into operation on 14 October 2024, s 18 provides that the time limits will be prescribed in Rules but must be no less than 28 days after the day on which the decision is made. The Rules are yet to be made.

Section 67 of the Victorian Civil and Administrative Act 1998 (Vic) (VCAT Act) provides that the Rules provide how to make an application to VCAT but the time limits within which the application must be made are specified in the legislation under which the decision is made e.g. Medical Treatment Planning and Decisions Act 2016 (Vic), ss 67(2) and 88 and VicFOI Act, s 49B for review by Information Commissioner and s 52 for review by VCAT.

Decision under review in force unless stayed

As a general rule, decisions remain in force unless their operation or implementation is stayed by an order of the Tribunal; VCAT Act, s 50, AAT Act, s 41 and ART Act, s 32.

What is Judicial Review?

Judicial review refers to the process by which a court reviews the legality of decisions made, or exercises of power undertaken, by administrative decision-makers. Their legality is determined by reference to the scope of power under which they are made and the legality of the decisions in fact made or powers exercised. That means that the scope of judicial review is not defined in terms of the protection of individual interests. The limitations on the scope of judicial review mean that they are not calculated to secure the review of the merits of an administrative decision. See generally Attorney-General (NSW) v Quin [1990] HCA 21.

[1] The Administrative Appeals Tribunal will be abolished and replaced by the Administrative Review Tribunal with effect from 14 October 2024; Administrative Review Tribunal Act 2024 (Cth), s 2.

Judicial review of decisions and actions of Commonwealth officers

In the Commonwealth, judicial review is available either under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) or by means of the constitutional writs provided for under s 75 of the Constitution of the Commonwealth (Constitution).

ADJR Act

Under the ADJR Act, an application may be made either to the Federal Court of Australia or to the Federal Circuit and Family Court of Australia (Division 2) for an order of review regarding decisions that have particular qualities. They must be decisions of an administrative character made, or proposed to be made, or required to be made (whether or not in the exercise of a discretion) under a Commonwealth enactment or by a Commonwealth authority or officer of the Commonwealth under an enactment; s 3(1). The ADJR Act does not permit an application to be made for an order of review of a decision that does not have a legislative basis. Applications may be made by persons aggrieved by the decision or conduct i.e. by a person whose interests are affected by that decision or conduct; s 3(4).

Section 5 sets out the grounds on which an application may be made for an order of review of a decision that has been made. They include breach of the rules of natural justice, an error of law, inducement by fraud and absence of evidence to justify the decision. Section 6 provides for applications for review of conduct relating to the making of decisions. The grounds are similar to those in s 5. Section 7 sets out the grounds on which an application may be made for an order of review in respect of failures to make decisions.

Generally, the time within which an application may be made for review under the ADJR Act is 28 days after a document setting out the decision is furnished to the applicant; ADJR Act, s 11(1)(c) and 11(3) prescribed under s 11 but may be extended by the court.

The manner in which an application is made in the Federal Court is set out in Division 31.1 of Part 31 of Chapter 3 of the Federal Court Rules 2011 (Cth) (FCR Rules). The application may be joined with an application under the Judiciary Act 1903 (Cth) (Judiciary Act); Rule 31.01(3)).

Part 27 of Chapter 3 of the Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021 (Cth) (FCFCADiv2 Rules) sets out the manner in which an application under the ADJR Act is made to the Federal Circuit and Family Court of Australia (Division 2); ADJR Act, s 11(1).

Constitutional writs

The constitutional writs provided for in s 75(5) of the Constitution are writs of mandamus and prohibition where they are sought against an officer of the Commonwealth. The High Court has jurisdiction to hear applications for those writs in its original jurisdiction. Matters such as the form of application, time within which it must be lodged and served and the parties to the application are dealt with in Part 25 of the High Court Rules 2004 (Cth) (HC Rules) as are applications for other writs i.e. writ of certiorari (directing a decision of an inferior court or tribunal to bring before it a decision for it to determine if it should be quashed on the ground of error of law), habeas corpus (relating to the authority to detain or hold a person) and quo warranto (relating to authority to hold office).

Matters such as the form of application, supporting affidavits, the time within which it must be lodged and served and the parties to the application are dealt with in Part 25 of the HC Rules as are applications for other writs i.e. writ of certiorari (directing a decision of an inferior court or tribunal to bring before it a decision for it to determine if it should be quashed on the ground of error of law), habeas corpus (relating to the authority to detain or hold a person) and quo warranto (relating to authority to hold office). An application for a writ of mandamus must be made within two months of the refusal to hear and determine a matter and, unless changed by any other law, for a writ of certiorari within six months after the day the decision sought to be quashed was made; HC Rules, r 25.02.

No reference is made to an application for an injunction but reference is made to it as a means of enforcement and as a remedy on an application for a writ of quo warranto; HC Rules; r 10.02.2 and 25.17.

Subject to certain qualifications relating to the prosecution of offences and certain civil

proceedings, the original jurisdiction of the Federal Court includes jurisdiction with respect to any matter in which a writ for mandamus, prohibition or injunction is sought against an officer of the Commonwealth; Judiciary Act 1903 (Cth) (Judiciary Act); s 39B. An "officer of the Commonwealth" does not include a Judge of the Federal Circuit and Family Court of Australia (Division 1); s 39B(2). It does include a Judge of the Federal Circuit and Family Court of Australia (Division 2) and a member of the AAT.

Rule 31.11(1) of the Federal Court Rules 2011 (Cth) (FC Rules) sets out the form of application to be made for relief under s 39B of the Judiciary Act. An application under that rule may be joined with an application under the ADJR Act; Rule 31.11(2).

Judicial review of decisions and actions of Victorian officers

In Victoria, judicial review is available either by means of remedies previously known as "prerogative writs" or under the Administrative Law Act 1978 (Vic) (AL Act).

Common law

Section 3(6) of the Supreme Court Act 1986 (Vic) expressly recognises the Supreme Court's previous power to grant relief or remedy by means of a writ of prohibition, mandamus, certiorari or ne exeat colonia (restraining a person from leaving the jurisdiction). That power is taken as a reference to the judgment or order that the Court may make and by which it grants that relief or remedy. This is reflected in the Supreme Court (General Civil Procedure) Rules 2015 (Vic) (SCGCP Rules). Rule 56.01(1) provides that, subject to any Act, its jurisdiction to grant any relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto must be exercised only by way of judgment or order and in a proceeding commenced in accordance with the Rules.

The proceeding must be commenced by an originating motion naming as a defendant any person having an interest to oppose the plaintiff's claim and the court, tribunal or person in respect of whose exercise of jurisdiction or failure or refusal to exercise jurisdiction the plaintiff brings the proceeding; Rule 56.01(2). The originating motion must state the grounds upon which the relief or remedy is sought and, if asserting that there is a mistake or omission in the judgment, order or other proceeding, must specify the mistake or omission; Rule 56.01(4).

Administrative Law Act 1978 (Vic)

The AL Act provides for the review certain decisions made by certain administrative tribunals. Section 3 provides that any person affected by a decision of a tribunal may apply to the Supreme Court of Victoria for an order calling on the tribunal or its members and also any party interested in maintaining the decision to show cause why that decision should not be reviewed. The application is made ex parte no later than 30 days after the later of the notification of the decision or of the reasons for the decision; AL Act, s 4(1). The general provisions are qualified in relation to, for example, an application relating to a proceeding in VCAT under Chapter 7 of the Australian Consumer Law and Fair Trading Act 2012 (Vic); s 4(3). The Court may refuse the application if it decides that, even if a prima facie case for relief is disclosed, it is satisfied that no matter of substantial importance is involved or that in all the circumstances such refusal will impose no substantial injustice upon the applicant; s 4(2).

Unless the Supreme Court orders otherwise, the Supreme Court (General Civil Procedure) Rules 2015 (Vic) apply with any necessary modification to an order for review under the AL Act; r 1.12(1).

If the Supreme Court decides that it will issue an order for review, it will include directions as to service of the order nisi for review and its return; s 5. On the return of the order nisi, the Supreme Court may discharge the order. Alternatively, it may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto or in proceedings for a declaration of invalidity in respect of the decision or for an injunction to restrain the implementation thereof and may extend the period limited by statute for the making of the decision; s 7.

Reasons

While it is important to know review rights, it is equally important to know that those review rights also give rights to ask the decision-maker for reasons for the decision that is the subject of

those rights. Knowing the reasons will inform any decision whether to seek review of the decision at all or, if so, whether merits or judicial review.

Under s 268 of the ART Act, a person whose interests are affected by a decision reviewable by the ART may make a written request to the decision-maker for a statement of reasons for the decision; s 268(1). Section 4 provides that a statement of reasons for a decision means a written statement in relation to the decision that sets out the findings on material questions of fact; refers to the evidence or other material on which the findings are based and explains the reasons for the decision. The decision-maker may refuse the request if the person has already been given a statement of reasons (s 269(7)) or if the request is not made within 28 days after a document setting out the decision was given to the person or, if no document was given, within a reasonable time after the decision was made; s 269(8).

The VCAT Act contains similar provisions. Section 45(1) provides that a person, who is entitled to apply to VCAT for review of a decision or to have a decision referred to VCAT for review, may request the decision-maker for a written statement of reasons. The request must be in writing and made within 28 days after the day on which the decision was made. A decision-maker, who has already given reasons, is not obliged to respond to the request; s 45(3). A statement of reasons must set out the reasons as well as setting out the findings on material questions of fact that led to the decision referring to the evidence or other material on which those findings were based; s 45(2).

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