

MERITS REVIEW v JUDICIAL REVIEW

Factors to consider when seeking review of government and administrative decisions

WHAT IS MERITS REVIEW?

Merits review is the process by which a person or body, other than a primary decision-maker, considers the facts, law and policy aspects of a decision made by government to determine the correct and preferable decision. Merits review is similar to a reviewer 'stepping into the shoes' of an original or primary decision-maker. It is often conducted by a Tribunal such as the Commonwealth Administrative Appeals Tribunal ("**AAT**") or the Victorian Civil and Administrative Tribunal ("**VCAT**"). The outcome of merits review may be to uphold, vary or set aside the original decision.

WHAT IS JUDICIAL REVIEW?

Judicial review is where a court tests the legality of a decision or conduct. Judicial review hearings will review whether a decision was properly made in accordance with the relevant law. It will not consider whether the decision was a 'good' decision. Judicial review is available at common law, but has also been legislated for at Victorian and Commonwealth levels in the *Administrative Law Act 1978* (Vic) ("**AL Act**") and *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("**ADJR Act**"). The ADJR Act sets out

comprehensive grounds of judicial review, whereas the AL Act relies on those established over time at common law.

GROUNDINGS FOR MERITS REVIEW

Whether merits review is available will depend upon the statutory framework in which the decision itself was made.

There are a wide breadth of decisions where merits review can be sought, such as:

- granting or renewing of professional registrations or licences;
- working with children checks;
- conferral of Australian citizenship;
- issuing passports; and
- refusing to grant visas.

Legislation will usually outline the appropriate avenue and process to follow, e.g. under Part VI of the *Freedom of Information Act 1982* (Vic), merits review is available by the VCAT.

GROUNDINGS FOR JUDICIAL REVIEW

Judicial review principles set standards for the lawfulness of government decisions. The grounds of review often include standards of 'fairness' and 'rationality' for administrative action. If not complied with, then the decisions that result, as well as the

conduct engaged in when making the decision, can be subject to judicial review.

Judicial review could be sought if a person believes that there has been a breach of natural justice, error of law, or failure to take into account a mandatory consideration when a decision was made. Judicial review can be sought at common law and through statute.

Grounds for judicial review include:

- a breach of natural justice;
- engaging in conduct or making a decision in a way that is beyond power;
- improper exercise of power;
- error of law;
- fraud;
- a decision with no supporting evidence; or
- the decision is otherwise contrary to the law.

HOW CAN I SEEK MERITS REVIEW?

When decisions are made under federal legislation, merits review is usually conducted by the AAT.¹ The AAT website has information about applying for merits review and applications can be made online or by email or letter via an application form.²

For decisions made under Victorian legislation, if the VCAT has statutory power to conduct merits review, then applications can be made for online or via an application form through the VCAT website.³

Remedy

In making merits review decisions, the AAT and the VCAT will usually have the power and discretion held by the original decision

maker. Any limitations should be outlined in the relevant statute.

The tribunal will be able to affirm, vary or set aside the decision on review by either substituting the correct and preferable decision based upon the material considered for the statutory framework being reviewed or remitting the matter for re-consideration by the decision maker.⁴

A tribunal decision can at times be appealed, but this is often limited by statute (for example to a question of law).⁵

Time limit

The original decision letter should state the time frame for lodging an application for review. The limit for applying for review of an original decision is often 28 days after receipt of the reviewable decision, however the specific legislation should be checked in each instance for certainty.

Stay order

Applying for merits review will not place the original decision on hold. In most instances, unless a stay order is made by the tribunal, the original decision will stand until the conclusion of the merits review process.⁶ Steps can be taken during the merits review process to seek a stay of the original decision.

HOW CAN I SEEK JUDICIAL REVIEW OF FEDERAL DECISIONS?

There are several options for initiating judicial review of federal decisions.

Section 75 of the *Constitution* confers original jurisdiction on the High Court where the Commonwealth or Commonwealth officer is party or where certain writs are sought against a Commonwealth officer.⁷ Applications must

¹ Depending on the specific legislation, the agency may be able to review its decision (internal review). At times this can be a pre-requisite for commencing merits review by an external tribunal.

² <https://www.aat.gov.au/apply-for-a-review>.

³ <https://www.vcat.vic.gov.au/review-and-regulation/application-for-review-of-a-decision>

⁴ See s 43(1), AAT Act and s 51, VCAT Act.

⁵ See ss 44 and 44AAA, AAT Act and s 148, VCAT Act.

⁶ See s 41, *Administrative Appeal Tribunal Act 1975* (Cth) ("**AAT Act**") and s 50, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("**VCAT Act**").

⁷ Section 75(iii) and (v) *Commonwealth of Australia Constitution Act* ("**Constitution**").

be in accordance with the *High Court Rules 2004*, which set out the requirements depending on the type of writ sought⁸ and standing requirements.⁹

Section 39B(1) of the *Judiciary Act 1903* confers original jurisdiction on the Federal Court of Australia to hear matters in which certain writs are sought against an officer or officers of the Commonwealth. It also has jurisdiction where the Commonwealth seeks an injunction or declaration.¹⁰

The ADJR Act provides a statutory framework for judicial review where decisions were made by Commonwealth officers.¹¹ Under the ADJR Act, a person who is aggrieved by a relevant decision can apply to the Federal Court or Federal Circuit Court for an order of review of that decision on one or more of the identified grounds.¹²

Remedy

Applicants will need to identify the remedy sought when applying for judicial review. Under common law this could be to:

- compel performance of a public duty (writ of mandamus);
- prevent conduct outside jurisdiction (writ of prohibition); or
- quash past conduct for which there was no jurisdiction (writ of certiorari);
- grant an injunction; or
- make a declaration.

In addition to the above common law remedies, the ADJR Act provides greater discretion and flexibility as outlined in s 16, ADJR Act.¹³

Time limit

Timing for filing documentation to commence judicial review under common

law will depend upon the particular court's process and potentially upon the remedy sought. The relevant legislation and court rules will outline the requirements.¹⁴

An application under the ADJR Act must be made within 28 days of receipt of the reasons for decision (whether provided at the time of the decision or later).¹⁵

HOW CAN I SEEK REVIEW OF VICTORIAN DECISIONS?

Judicial review of Victorian decisions are heard in the Trial Division of the Supreme Court. A proceeding can either be commenced under Order 56 ("**O56**") of the *Supreme Court (General Civil Procedure) Rules 2015* ("**SC Rules**") or under the AL Act.

Under O56, the proceeding is commenced by filing an originating motion outlining the grounds on which relief is sought and any mistake/ omission in any judgment, order or other proceeding in which the relief is sought.

Under the AL Act, an *ex parte* application is made with supporting affidavit material.¹⁶

Remedy

Once the timeframes in either the SC Rules or the AL Act have passed, then the Court's permission to extend the time limit will be required before action can be taken.

Time limit

An O56 proceeding can be commenced within 60 days from the date the decision was made. Timing is more limited under the AL Act, which provides only 30 days to commence proceedings from the date the decision was made.

⁸ *High Court Rules 2004* R 25.02

⁹ The order to show cause for a writ of mandamus must be made by a person interested in the relief sought: O 25.07. Otherwise standing needs to be provided in the High Court Rules.

¹⁰ Section 39B(1A), *Judiciary Act*.

¹¹ Decision is defined broadly in s 3(2) ADJR Act and includes a decision that has not been made. See also s 7, ADJR Act. Officer is defined in s 3, as having the same meaning as s 75(v) of the *Constitution*.

¹² See s 5, ADJR Act.

¹³ Such as allowing for decisions to be quashed or set aside from a date of the court's choosing: s 16(1)(a), ADJR Act.

¹⁴ *High Court Rules 2004*, r 25 outlines timing requirements for writ of certiorari (within 6 months of relevant decision / order) and a writ of mandamus (within 2 months of refusal to act).

¹⁵ Section 11, ADJR Act.

¹⁶ Section 4, AL Act.

Once the timeframes in either the SC Rules or the AL Act have passed, then the Court's permission to extend the time limit will be required before action can be taken.

STANDING

An applicant for either merits review or judicial review proceedings must be able to establish their standing which will be based on the decision on review.

RIGHT TO OBTAIN REASONS

Where reasons are not provided with a decision, then they may be obtained where there is a specific right set out in the enactment under which the decision was made. Where no specific right exists, then the relevant tribunal may provide the opportunity to obtain reasons.

For judicial review of Commonwealth decisions, s 13, ADJR Act provides for reasons to be requested. Similarly, s 8 AL Act provides for reasons to be requested from the Victorian tribunal that made the original decision.¹⁷

Find more Administrative Law factsheets on the LIV's website at:
https://www.liv.asn.au/Web/Content/Policy___Professional_Standards/Areas-of-Law/Administrative_Law/Resources.aspx

¹⁷ However, there is no equivalent where proceedings are commenced under O56.