Complaints against Government—Judicial Review

CHAPTER CONTENTS

Introduction

The grounds on which courts will review administrative actions of government have been developed under the common (court-made) 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.

Judicial review is part of the administrative law system for holding governments accountable. It involves the oversight, by the courts, of government decision making. This is a supervisory role—a person affected by a government decision can test the legality of the decision.

Judicial review differs from merits review (see the *Complaints against Government—Administrative Appeal* chapter), which is concerned with whether the decision made was the correct or preferable decision. Judicial review examines the power or jurisdiction to make a decision or to take an action, and whether it was lawfully made, but it is not concerned with the merits of the decision.

This chapter only gives a general outline of the law relating to judicial review, with a focus on the Queensland Judicial Review Act. The advice of a lawyer experienced in this area should be sought if legal proceedings against government are contemplated, given the potential complexity of legal arguments and the costs risk arising from proceedings in a court.

The Administrative Decisions Act and Judicial Review Act contain the statutory grounds for judicial review. To be successful, a statutory review application must be:

- brought about government action that can be challenged through judicial review
- by a person with standing
- on grounds set out in the Administrative Decisions Act or Judicial Review Act
- within the relevant time limits, and
- seeking an available remedy.

Remedies include setting aside the decision, referring it back to the decision maker and, under the Queensland Judicial Review Act, making declarations that a decision is unlawful. However, unlike merits review, a court exercising judicial review cannot substitute the decision with the correct or preferable decision.

Both the Administrative Decisions Act and Judicial Review Act require the decision maker to give a statement of reasons for a decision that is reviewable through judicial review, with some exceptions.

The *Human Rights Act 2019* (Qld) (Human Rights Act) has changed the judicial review framework in Queensland by expanding existing grounds of statutory review, allowing applicants to piggyback human-rights arguments onto their judicial review applications and requiring the Supreme Court to interpret laws, including those relevant to the decision, in a way that is compatible with human rights.

Review of Commonwealth Government Actions

Judicial review existed both in the common (court-made) law and the Australian Constitution prior to the commencement of the Commonwealth Administrative Decisions Act in 1977. The Administrative Decisions Act, the first of its kind in Australia, simplified the common law grounds and processes for judicial review.

Grounds for statutory review under the Administrative Decisions Act include where:

- the rules of natural justice were breached
- procedures required by law were not observed
- the decision maker lacked jurisdiction to make the decision
- the decision involved an error of law
- making the decision was an improper exercise of power, including because there was a failure to take relevant considerations into account, irrelevant considerations were taken into account or the exercise of power constituted an abuse of power (s 5 Administrative Decisions Act).

Judicial review still also exists at common law and in the Australian Constitution. Those grounds for review are not examined in this chapter. Most judicial review these days occurs under a statutory regime.

The Federal Court of Australia and Federal Circuit and Family Court of Australia have jurisdiction to review decisions under the Administrative Decisions Act.

This chapter will focus on review of state government action under the Queensland Judicial Review Act, which is modeled on the Commonwealth Act.

Review of State Government Actions

A person wishing to obtain judicial review of a state government action must bring proceedings in the Supreme Court under the Judicial Review Act.

The Judicial Review Act adopts, with some modification, the Administrative Decisions Act. It specifically provides that ideas within the Judicial Review Act are to be interpreted in the same way as ideas in the Administrative Decisions Act, even where different words are used (s 16 Judicial Review Act). This means that concepts applied in Commonwealth judicial review cases are readily transferrable to those in Queensland. The Judicial Review Act includes a table of comparative provisions with the Administrative Decisions Act (sch 3).

Both Acts provide a clear procedure to be followed and substitute simpler statutory remedies for the many different and complicated remedies that existed at common law. Even though this has made judicial review simpler than it once was, the system remains complex for anyone attempting to use it without expert legal help.

Under the Judicial Review Act, two avenues exist for judicial review, a statutory order of review (pt 3) and application for review (pt 5). This chapter will focus primarily on the statutory order of review avenue, which largely replicates the judicial review scheme in the Administrative Decisions Act.

Under pt 3 of the Judicial Review Act, a person aggrieved by a government decision can apply to the Supreme Court for a statutory order of review on several grounds as set out in the Judicial Review Act. Certain jurisdictional requirements have to be satisfied by an applicant seeking review under pt 3 for a statutory order of review (see 'What government actions may be challenged' below).

When pt 3 does not apply, a person whose interests are adversely affected by a decision may bring an application for review under pt 5 (s 44 Judicial Review Act). This part contains the requirements for making an application for prerogative orders and injunctions, replacing what are essentially the traditional common law and equitable remedies with similar statutory remedies.

Part 4 of the Judicial Review Act sets out the rights of an applicant to obtain reasons (with some exceptions) for any decision that they propose to challenge under pt 3. The right to seek reasons for a decision under pt 4 is independent of any rights to judicial review under pt 3 or pt 5 of the Judicial Review Act.

What Government Actions may be Challenged

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

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

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.

A 'decision to which the act applies' is defined as a decision of an administrative character made (or proposed to be made) under an enactment (s 4(a) Judicial Review Act).

'Made under an enactment' means that there is an Act (legislation/statute) that provides for the decision being made. In addition to a decision made under an enactment, a decision 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 is also a decision to which the Judicial Review Act applies (s 4(b)).

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

Common forms of decision include:

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

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

Both Queensland 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

A person is entitled to seek a statutory order of judicial review in the circumstances set out in pt 3 of the Judicial Review Act.

Section 20 of the Judicial Review Act provides that a person who is aggrieved by a decision to which the Judicial Review Act applies may apply to the Supreme Court for a statutory order of review in relation to the decision. Standing (a right to bring a legal action) to seek judicial review, therefore, requires both that the person is aggrieved by the decision and that recourse can be sought under the Judicial Review Act.

A person aggrieved by the decision includes a person whose interests:

- are adversely affected by the decision, or
- would be adversely affected by a report or recommendation (s 7 Judicial Review Act).

This includes a person whose interests would be affected by conduct engaged in for making the decision or the failure to make a decision.

For an application for review under pt 5, a person is entitled to make an application if the persons interests are, or would be, adversely affected in, or by, the matter to which the application relates (s 44 Judicial Review Act).

The phrase 'a person whose interests are adversely affected by the decision' has been interpreted by the courts as generally requiring 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 with showing standing for judicial review primarily arises when the applicant is a person or public interest group 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).

Under the common law, 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 modern state and Commonwealth legislation, the 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 in an environmental matter unless to do so would involve an abuse of process (i.e. open standing). This case was decided in 2000 and the approach has been applied in many environmental cases since.

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 pt 3 of the Judicial Review Act must be made is normally 28 days after the decision is made (s 26 Judicial Review Act). 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. In many cases, a statement of reasons will accompany notification of a decision. A statement of reasons should explain the reasons for the decision and options for review.

The Administrative Decisions Act first introduced a statutory requirement to provide a statement of reasons that has since been adopted in Queensland under the Judicial Review Act.

Obtaining reasons under the Judicial Review Act

A statement of reasons can only be sought where the applicant has grounds for a statutory order of review under pt 3 of the Judicial Review Act.

Part 4 of the Judicial Review Act provides a right to seek reasons that is independent of the right to seek judicial review. This means that it is possible to seek a statement of reasons under the Judicial Review Act, before judicial review proceedings have been commenced, and seeking reasons does not necessarily mean that any further action will follow. It is a stand-alone right.

The right to obtain a statement of reasons does not extend to an application for review under pt 5 of the Judicial Review Act.

Requesting the statement of reasons

A request for a written statement of reasons must be made:

- in writing
- about a decision that is reviewable under the Judicial Review Act
- by the person who is entitled to seek judicial review under pt 3 of the Act (ss 31–33 Judicial Review Act).

The decision maker must provide the statement of reasons within 28 days of the request (s 33 Judicial Review Act).

If the statement of reasons is not supplied within 28 days of the request, the requestor can apply to the Supreme Court for an order (s 38 Judicial Review Act). If the court considers that the requestor is

entitled to make the request, they may order that the decision maker provide the statement of reasons within a specified period.

It is also possible to request an additional statement of reasons, where the court agrees that the ones given were inadequate (s 40 Judicial Review Act).

Content of the statement of reasons

The statement must contain:

- findings on material questions of fact
- the evidence and other material on which the findings were based
- reasons for the decision (ss 35, 3 Judicial Review Act, s 27B *Acts Interpretation Act 1954* (Qld)).

Refusal to provide statement of reasons

The decision maker may refuse to supply reasons on certain grounds. This includes if they believe that the person making the request has no entitlement to request reasons, in which case the decision maker can either give written notice of their opinion or apply to the Supreme Court for an order declaring the requestor is not entitled to make the request (s 33(2) Judicial Review Act).

The decision maker may also refuse on the grounds that the requester has already been given a statement of reasons, or where sch 2 applies (s 31(a), (b) Judicial Review Act).

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). These are to be interpreted broadly as a 'class of decisions' rather than narrowly. Similar exclusions exist under the Commonwealth Administrative Decisions Act.

Finally, the decision maker may refuse to give a statement of reasons where the requester has not applied within 28 days of being given the decision or, where no decision was given, within a reasonable time after the decision is made (s 33(4) Judicial Review Act). The decision maker must give written notice of the refusal within 14 days of the request (s 33(5) Judicial Review Act).

Limitations to the information disclosed

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 (s 35 Judicial

Review Act) and disclosure of information the Attorney General certifies would be contrary to the public interest, such as Cabinet deliberations or for any other reason (s 36 Judicial Review Act) are excluded).

Where a person has requested a statement of reasons, and the consequence of redacting information in accordance with ss 35 and 36 of the Judicial Review Act would render the statement false and misleading, the decision maker may provide a statement that does not include this information or refuse to provide a statement of reasons (s 37 Judicial Review Act). The decision maker must give a written statement for why the information is not included or why the statement of reasons has not been given within 28 days (s 37 Judicial Review Act).

Common law and other avenues for obtaining reasons

There is no common-law right to be informed of the reasons for an administrative decision.

Where reasons for the decision are not obtainable under the Judicial Review Act (or equivalent Administrative Decisions Act provisions) it may be possible to obtain reasons for the decision through access-to-information laws. See the *Complaints against Government chapters and the Right to Information and Freedom of Information* chapter for further information on the relevant state and Commonwealth schemes.

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.

Human Rights and Judicial Review in Queensland

The Human Rights Act applies to decisions made by public entities in Queensland. This includes Queensland State Government departments, local councils, state schools, police and non-government organisations performing public functions. The Human Rights Act complements and strengthens administrative law recourse against government in Queensland.

The Human Rights Act alters judicial review in Queensland in three key respects:

- It expands existing grounds of statutory appeal, making it unlawful for government decision makers to act incompatibly with human rights.

- Applicants may piggyback human-rights arguments onto their judicial review actions.
- In deciding a judicial review application, the Supreme Court must interpret laws in a way that is compatible with human rights, including the laws that bind decision makers.

See the *Human Rights Law in Queensland* chapter for a more detailed explanation of the 23 protected human rights and freedoms, key operative provisions, an expanded explanation of what is included in the meaning of a 'public entity' and additional obligations on the Supreme Court when acting in an administrative capacity under the Human Rights Act.

Human rights and grounds of judicial review

The Human Rights Act introduces new obligations on government decision makers which, if not followed, may give rise to grounds for statutory review under the Judicial Review Act.

The Human Rights Act requires public entities to act or make decisions in a way that is compatible with human rights and, in making decisions, give proper consideration to relevant human rights (s 58(1) Human Rights Act).

In practice, a decision maker should:

- identify whether the act or decision places a limit on the applicants' human rights and, if so, whether the limit is reasonable and under the test in s 13 of the Human Rights Act
- identify any human rights relevant to the decision, give proper consideration to relevant human rights and whether the decision would be compatible with the applicant's human rights.

Failure to comply with these obligations is unlawful and may give rise to grounds for statutory review of the decision under the Judicial Review Act.

Possible grounds of judicial review that may include human rights arguments include failure to:

- take relevant considerations into account (ss 20(2)(b), 21(2)(b), 23(b) Judicial Review Act)
- observe procedures required by law (ss 20(2)(e), 21(2)(b) Judicial Review Act).

Under the Human Rights Act, a decision maker must give proper consideration to human rights when acting and making a decision (s 58(1)(b) Human Rights Act). Accordingly, the Human Rights Act both imposes relevant considerations on government decision makers, and constitutes a procedural obligation on a public entity not to fail to give proper consideration to a relevant human right in making a decision.

In *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, the court upheld a judicial review application on the grounds that the decision maker had failed to take relevant considerations into account where consideration of the applicant's human rights was superficial at best, and the decision maker had failed to give proper consideration to all human rights relevant to the decision.

Human rights arguments during judicial review

There is no direct right to bring a Human Rights Act breach before the Supreme Court.

However, where a person is asking the Supreme Court to exercise its judicial review jurisdiction, they may also argue that the decision maker failed to consider their human rights as required by the Human Rights Act. This is commonly referred to as 'piggybacking' a Human Rights Act complaint to another legal action.

The Supreme Court is required to consider all human rights, not just those of the applicant, and the Human Rights Act does not create absolute rights. Human rights may be limited and balanced in a way that is consistent with a free and democratic society based on human dignity, equality and freedom (s 13 Human Rights Act).

Where the Supreme Court finds the decision maker has acted contrary to their obligations under the Human Rights Act, the Supreme Court may grant relief or remedy, but not monetary damages, for any breach of human rights.

Interpretation of laws

Statutory review is available under pt 3 of the Judicial Review Act in relation to decisions made under an enactment.

The Human Rights Act requires the Supreme Court to, as far as possible and while continuing to fulfil its purpose, interpret laws including the enactment under which the decision is made, and any other relevant laws, in a way that is compatible with human rights. If this is not possible, then laws must be interpreted in a way that is most compatible with human rights.

A law is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and justifiable in a free and democratic society based on human dignity, equality and freedom.

The Supreme Court can refer to international law and the judgements of Australian, foreign and international courts and tribunals when interpreting if a law is compatible with human rights.

Grounds for Review of Government Actions

Where a person has standing to seek judicial review, they can do so on the grounds set out in the pt 3 or pt 5 of Judicial Review Act.

Sections 20, 21 and 23 of the Judicial Review Act specify the grounds on which a pt 3 statutory order of review may be made in respect of decisions and conduct leading to decisions.

The grounds to seek judicial review under pt 3 include where:

- rules of natural justice were breached
- the making of the decision was an improper exercise of power, including because the decision maker took irrelevant consideration into account
- there was a failure to observe procedures required by law
- there was an absence of jurisdiction, because the decision maker did not have jurisdiction to make the decision
- the decision involved an error of law.

Since the commencement of the Human Rights Act, where a public entity acts or makes a decision that is contrary to human rights, this may constitute a statutory ground of review including the failure to take relevant considerations into account.

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

The Judicial Review Act (s 20(2)(a), 21(2)(a)) requires decision makers to follow the rules of natural justice when making a decision to which the Acts apply. The common law continues to define whether natural justice applies and what it requires in the circumstances of a case.

Under common law, 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?

Where an Act or Regulation gives a decision maker the right to destroy or prejudice a person's rights or interests, the rules of natural justice will generally regulate the exercise of the power, unless the enactment excludes the rules of natural justice.

This means that whenever an administrative decision is made under an enactment that 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 a contrary legislative intention.

Under the Judicial Review Act, rules of natural justice apply to decisions made in the exercise of public power, including by government departments, administrative tribunals, parole boards and where non-judicial bodies exercise membership or disciplinary proceedings under an enactment (e.g. licensing and membership of sporting bodies).

What is natural justice?

Natural justice is a flexible concept. It is not a set of rules, but constitutes a range of principles that requires a decision maker to afford a person affected by the administrative decision procedural fairness. This includes the rights to a fair hearing and that the decision is made by impartial decision makers.

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

Failure to take relevant considerations into account

A decision maker may improperly exercise power (ss 20(2)(e), 21(2)(e) Judicial Review Act) by failing to take a relevant consideration into account in the exercise of a power (s 23(b) Judicial Review Act).

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.

In Queensland, the failure by a decision maker to give proper considerations to an applicant's human rights under the Human Rights Act may give rise to this ground of judicial review.

Taking irrelevant considerations into account

Similarly, an improper exercise of power (ss 20(2)(e), 21(2)(e) Judicial Review Act) may occur where the decision maker takes irrelevant considerations into account in the exercise of a power (s 23(a) Judicial Review Act).

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

A person may apply for statutory review on the grounds that the procedures required by law to be observed in making the decision were not observed (s 20(2)(b), 21(2)(b) Judicial Review Act).

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 precondition 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.

Failure to observe the obligation in s 58(1)(b) of the Human Rights Act, which requires decision makers not to fail to give proper consideration to a relevant human right in making a decision, may give rise to this ground of judicial review.

Absence of jurisdiction

This ground exists under the Judicial Review Act (ss 20(2)(c), 21(2)(c)) where a decision maker 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 enquiries 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

Improper exercise of power (ss 20(2)(e), 21(2)(e) Judicial Review Act) may also occur where a discretionary power is exercised in bad faith (s 23(d) Judicial Review Act).

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 (ss 20(2)(d), 21(2)(d) Judicial Review Act).

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 (s 23(e) Judicial Review Act) and falls under the improper exercise of power ground (ss 20(2)(e), 21(2)(e) Judicial Review Act). 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 predetermined policy to each matter coming before them, without regard to the merits of each specific situation (s 23(f) Judicial Review Act) and is a further example of an improper exercise of power (ss 20(2)(e), 21(2)(e) Judicial Review Act). 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 (ss 20(2)(e), 21(2)(e) and 23(g) Judicial Review Act). 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 (ss 20(2)(h), s21(2)(h), 24 Judicial Review Act).

Abuse of power

This ground of review is something of a catch-all under the improper exercise of power ground (ss 20(2)(e), 21(2)(e) Judicial Review Act), which allows administrative decisions to be challenged in situations that do not neatly fit into the above categories but constitutes an abuse of power (s 23(i) Judicial Review Act). However, the Federal Court and Federal Circuit and Family Court of Australia (Division 2) have tended to exercise restraint in expanding the grounds of review available under the 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.

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 (s 30 Judicial Review Act).

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 and Federal Circuit and Family Court of Australia (Division 2) have equivalent powers under s 16 of the Administrative Decisions Act in respect of Commonwealth decision making.

Orders of review (remedies)

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 and the Federal Circuit and Family Court of Australia 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.

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