

Continuing Professional Development Seminars

Challenging Administrative Decisions

Considerations for merits review and judicial review

Presenters: Matt Black, Paul Flintoft

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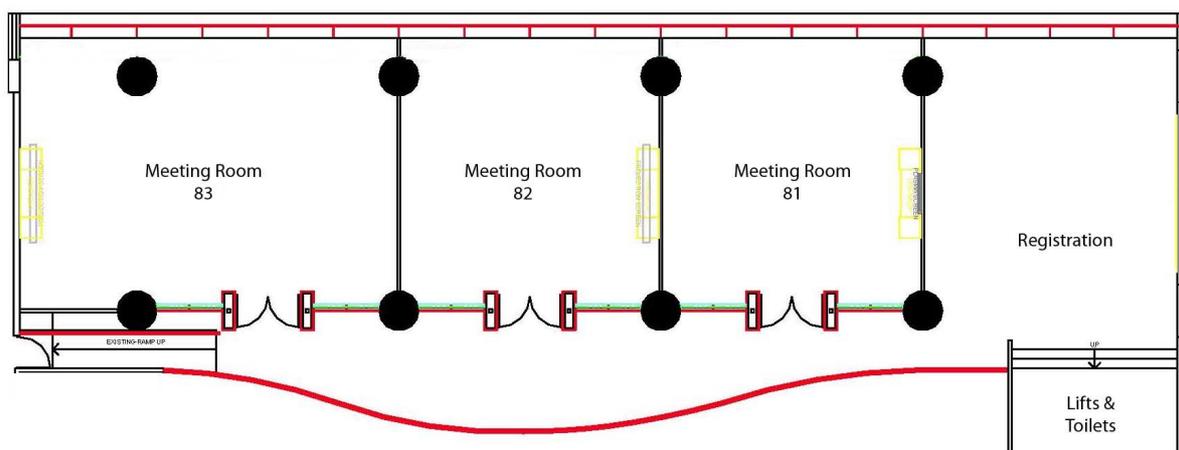
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Seminar Programme

9:15 am – 9:30 am	Registration
9:30 am – 9:40 am	Introduction
9:40 am – 10:30 am	Administrative law and administrative decisions overview
10:30 am – 10:45 am	Identifying what decisions to challenge, and how to challenge them
10:45 am – 11:15 am	Merits review generally
11:15 am – 11:30 am	Morning Tea
11:30 am – 12:00 pm	Merits review in QCAT / AAT
12:00 pm – 12:30 pm	Judicial review generally
12:30 pm – 12:45 pm	Costs and risks of costs orders
12:45 pm – 1:15 pm	Concluding comments – Questions and Review

The above programme is flexible and will be subject to change on the day depending on the requirements of the group who are in attendance. The times used are intended to be indicative only.

About the Presenter

Matt Black began his legal career in 2003 as an associate at the Administrative Appeals Tribunal. He then worked in legal research for Judge Koppenol and Judge Kingham (both formerly of the Land and Resources Tribunal).

From 2006 to 2009, Matt was an in-house advocate at Centrelink. In that role, he regularly appeared in the Administrative Appeals Tribunal, instructed in judicial review proceedings, and advised in debt recovery and general matters. In 2007, Matt was appointed a national practice area co-ordinator for Centrelink and in 2008 he was appointed manager of the Brisbane legal branch.

Matt was called to the Bar in 2010, and is a member of Quay 11 Chambers. He has a particular interest in administrative law, and appears for both applicants and respondents in merits and judicial review proceedings. His practice includes general civil litigation, as well as family and criminal law (especially where those areas intersect with administrative law).

In addition to his practice at the Bar, Matt holds an appointment as an Official Visitor under the *Corrective Services Act 2006* (Qld). Official Visitors investigate prisoner complaints and review departmental decisions so as to provide an independent merits review system designed to ensure that administrative decisions made within corrective services facilities are fair and accountable.

Introduction

1. The purpose of this paper is to outline some practical considerations for practitioners when challenging administrative decisions. I am using the term “administrative decision” to refer to decisions or actions taken under the authority of some legislative power. Administrative decisions are usually made by government officials or public officers, but they might also be made by private contractors under delegated powers.
2. Administrative decisions are generally challenged through administrative law procedures. By “administrative law”, I mean the law that governs how administrative decisions may be reviewed or set aside. On my approach, it includes:
 - (a) Substantive law governing the legal tests or criteria underlying the decision and the grounds or bases upon which the decision can be reviewed.
 - (b) Procedural law governing the process of review and the various duties of the parties in that process.
3. Administrative law can offer useful avenues of review in a variety of fields, including:
 - (a) Business arrangements – such as reviewing the grant or refusal of licences or permits.
 - (b) Taxation arrangements – including challenging a broad range of ATO assessments or decisions.
 - (c) Criminal law – such as challenging the issue or execution of search warrants, steps taken during committal procedures, or parole refusals.
 - (d) Family and welfare law – such as reviewing decisions of the Child Support Agency or Centrelink.
4. One of the largest areas of administrative law litigation is, of course, migration decisions. Many of the migration cases provide useful principles that might be applied (where appropriate) to other areas of administrative law, especially the High Court authorities.
5. This paper begins with a discussion of some considerations involved in the task of identifying what administrative decision should be challenged, and what the appropriate avenue of challenge might be. It then covers two main topics:

- (a) Merits review: first in a general sense, and then with particular reference to the Queensland Civil and Administrative Tribunal (QCAT) and the Commonwealth Administrative Appeals Tribunal (AAT).
 - (b) Judicial review: again, starting with a general discussion and then with particular reference to QCAT and the AAT.
6. The paper is intended to be primarily practical in its orientation.

Identifying what to challenge, and how to challenge it

7. When embarking upon administrative law litigation, it will be necessary to identify with particularity the specific decision or conduct that needs to be challenged. Similarly, the empowering legislation should be reviewed at an early stage to identify the source (or purported source) of the decision-maker's power to make the decision in question.
8. Often there will be a formal, written record of the administrative decision that has been made, possibly accompanied by a written statement of reasons. However, this will not always be the case. There might be little more than a vaguely worded letter, or even a series of letters which are difficult to reconcile with one another. In some cases, there might only have been some oral communication to the client.
9. The client will generally be entitled to obtain a written statement of reasons for the decision, if one has not been provided.¹ It is also useful to obtain copies of any relevant material held, or relied on, by the decision-maker (including relevant policy documents). This can often be achieved through a "freedom of information" or "right to information" application.² Of course, time limits for review rights should be monitored if there is any delay in obtaining such information.
10. Once the decision and its legislative basis is understood, thought can be given to how it might be challenged. There are a number of questions to consider:
 - (a) Does the decision need to be challenged at all, or could the client make a fresh application or request to the decision-maker? For example, have circumstances changed since the decision was made?
 - (b) Is there another way to achieve the desired outcome? For example, is it possible to gain an authority or licence through an alternative process? Is it possible to achieve the desired outcome through contractual means?

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¹See *Judicial Review Act 1991* (Qld), s 32; *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13.

²See *Right to Information Act 2009* (Qld); *Freedom of Information Act 1982* (Cth).

- (c) Can the original decision-maker simply reconsider the decision? For example, is there further evidence or additional material that might influence the decision-maker's view of the matter?
 - (d) Is there a formal avenue for internal merits review? Does the legislation provide for review of the decision by a more senior officer or a specialised review officer?
 - (e) Is there an avenue for external merits review? For example, is there an avenue to have the decision reconsidered by an independent tribunal?
 - (f) If merits review is not available, is there an avenue for some other form of appeal or is the decision within the scope of the judicial review legislation?
 - (g) If there is no merits review and the decision is excluded from the judicial review legislation, is the decision nevertheless open to challenge for error of law or jurisdictional error? Could appropriate judicial declarations be sought?
 - (h) Finally, if the client has suffered some form of loss, has there been a “wrong” that could be remedied in another way (under tort law or contract)?
11. In effect, there are probably three different possible avenues of challenge:
- (a) The first, broadly, is “merits review”. A merits review is essentially any process in which a decision-maker (whether the original decision-maker or another person or entity) re-thinks the whole decision based on all available evidence.
 - (b) The second, broadly, is “judicial review”. Judicial review means a review of the decision by a Court. Generally, it will be under the relevant judicial review legislation, but in this context also includes statutory appeals on questions or errors of law.
 - (c) The third avenue is “everything else”. In other words, it will sometimes be necessary to explore options outside of administrative law (such as tort, contract, etc). These avenues are beyond the scope of this paper.
12. Below, more detailed discussion will be given to the avenues of merits review and judicial review.

Merits review generally

13. Government agencies and departments make decisions that affect many different aspects of our private and business lives. When legislation authorises these administrative decisions, it will often also include a process to have that decision reviewed “on the merits”. This process of merits review might be described as:³

Merits review is the process by which a person or body:

- other than the primary decision-maker,
- reconsiders the facts, law and policy aspects of the original decision, and
- determines what is the correct or preferable decision.

14. Although the particular legislation in question must be consulted in each case, merits review is generally a hearing *de novo*. That is, the reviewing body will not be limited to the evidence that was before the original decision-maker, but will instead have regard to all of the relevant evidence available at the time of the hearing.⁴

Internal merits review

15. One process of merits review that can be quick and simple is an internal review. This process generally involves the decision being reconsidered by a more senior officer within the agency or department which made the original decision. Although it is not an independent review, the process will often at least produce more clarity in the reasons for the decision.
16. An internal review process will not usually involve a hearing with oral evidence and submissions (although it can). If there is no oral hearing, written submissions should be used and all the requirements of good written advocacy should be remembered. A few particular considerations might be useful:
- (a) Any submissions on the law should be limited to those that are appropriate to the circumstances. Overly complex or subtle legal arguments may not be of particular assistance to a lay decision-maker, and citation of lengthy authorities might be distracting. The submissions should, however, include an outline of the legal test that you contend should be applied.

³Administrative Review Council, *Frequently asked questions*, <<http://www.ema.gov.au/agd/WWW/arcHome.nsf/Page/FAQS#a6>>.

⁴See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

- (b) Any submissions on the facts should include specific references to the document or evidence relied upon, including page or paragraph numbers. The submissions should make it perfectly clear what facts you are contending for, and what evidence you are relying on.
 - (c) The submissions should include reference to any relevant policies or guidelines. Internal review officers often place considerable weight on such material.
17. The submissions should also include a brief statement to the effect that the client requests an opportunity to comment on any matter adverse to their case before the decision-maker reaches a final decision. This might allow you an opportunity to clarify or respond to adverse issues before the decision is made. At worst, it might bolster a subsequent argument about procedural fairness.

External merits review

18. Legislation will often include a right to have a decision reviewed by an external body, either instead of internal review or after the completion of internal review. For Queensland practitioners, the most likely external review bodies are QCAT or the AAT. Specific discussion of merits review in these tribunals follows below.

Administrative appeals: merits review in QCAT / AAT

19. Neither QCAT nor the AAT is a tribunal of “general jurisdiction”. That is, each tribunal only has jurisdiction to review an administrative decision if there is an enabling Act specifically providing for that right of review. Nevertheless, each tribunal does have a broad and diverse jurisdiction to review administrative decisions. For example:
 - (a) QCAT's review jurisdiction includes decisions relating to child protection, liquor licensing, victims assistance, fisheries, animal care and regulation, right to information requests, racing matters, weapons licences, and driver's licences.⁵
 - (b) The AAT's review jurisdiction includes decisions relating to taxation, veteran's affairs, social security, freedom of information requests, workers compensation, environmental permits, visas, customs, corporations, and licencing for various professions.⁶
20. It is important to clearly identify which tribunal has jurisdiction, and any limits on that jurisdiction. This will generally appear in either the enabling Act or the tribunal's legislation.⁷

Starting review proceedings

21. Check the time limits for a review application. Generally, any application for review must be filed within 28 days of receipt of the decision being challenged.⁸ If time has already passed, consider an application for an extension of time supported an affidavit outlining the circumstances.⁹
22. The application should be in the approved form and state the reasons for the application.¹⁰ A copy of the relevant decision should be attached to the application, or if that is not possible a precise description of the decision should be given. The

⁵See <<http://www.qcat.qld.gov.au/matter-types/review-of-administrative-decisions>>.

⁶See <<http://www.aat.gov.au/LawAndPractice/JurisdictionAndTimeLimits/JurisdictionList.htm>>.

⁷Either the *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act) or the *Administrative Appeals Tribunal Act 1975* (the AAT Act).

⁸QCAT Act, s 33(4); AAT Act, s 29(2).

⁹QCAT Act, s 61(1); AAT Act, s 29(7).

¹⁰QCAT Act, s 33(2)(b); AAT Act, s 29(1)(c).

reasons for the application do not need to be elaborate, but should include sufficient detail to enable the respondent to understand the applicant's position.

23. In QCAT, the applicant must give a copy of the application to each other party within 7 days of starting the proceedings, including the original decision-maker.¹¹ In the AAT, the tribunal itself will give notice to the original decision-maker,¹² but it is good practice to notify the respondent directly. Practitioners should consult the relevant enabling Act to ascertain any other requirements, or what conditions might be imposed on the review.
24. Generally, the purpose of a QCAT or AAT review “is to produce the correct and preferable decision”.¹³ Subject to the enabling Act, this will mean that the tribunal will not be limited to the evidence that was before the original decision-maker, but will have regard to all relevant evidence available at the time of the hearing.¹⁴

Legal representation

25. In the AAT, each party is entitled to be represented by either a lawyer or any other person.¹⁵ In QCAT, a party needs to obtain the tribunal's leave in order to have legal representation (with few exceptions).¹⁶ Experience suggests that QCAT will generally be prepared to give leave for legal representation in its review jurisdiction (as opposed to its civil jurisdiction), but nothing should be taken for granted. You should make a formal application for leave on behalf of your client, supported by submissions justifying such leave.
26. Circumstances that might support a grant of leave include:¹⁷
 - (a) *Complex questions of fact or law*: Factual issues that might support an application for leave include the existence of credibility issues, any need for expert evidence, or any need for detailed financial, scientific or other material. Legal issues that might support an application could include questions of statutory interpretation, any conflicting case-law, or complex statutory formulae

¹¹QCAT Act, ss 37(2) and 40(1) and *Queensland Civil and Administrative Tribunal Rules 2009* (QCAT Rules), r 19.

¹²AAT Act, s 29(11).

¹³QCAT Act, s 20(1). The authorities refer to the AAT making the “correct or preferable decision”.

¹⁴See generally *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

¹⁵AAT Act, s 32.

¹⁶QCAT Act, s 43.

¹⁷QCAT Act, s 43(3).

that need to be applied. Thought should also be given as to whether any relevant government policy is valid, and whether the review decision might have implications beyond the parties involved.¹⁸

- (b) *Whether another party is represented:* The decision-maker will often formally be the Chief Executive of an agency of department, so will be represented by a lawyer or a departmental officer. This provide some support for the applicant to also be represented.
- (c) *Agreement to the party being represented:* The decision-maker should be asked to give their consent to the applicant being represented. The fact of agreement is not determinative, but should be a compelling factor.

27. Other factors that might support an application for leave include if the matter is similar to disciplinary proceedings,¹⁹ and any need for the applicant to give evidence personally or any history of animosity between the applicant and the decision-maker.²⁰

Evidence

28. As with any litigation, the evidence available to support the client's case will be crucial to its success. This means that the client should be formally advised in relation to evidence well before a hearing date is fixed: "The preparation of such an advice forces legal representatives to identify the issues, identify areas which need further investigation and obtain evidence while there is still time to do so".²¹
29. Neither QCAT nor the AAT is bound by the rules of evidence.²² In practice, this requires somewhat of a balancing act for practitioners. On the one hand, the flexibility of the tribunals can be used to the client's advantage to put forward evidence with minimal expense. On the other hand, it must also be borne in mind that the most persuasive evidence will often be evidence that complies with the rules of evidence: particularly, first-hand oral evidence from eye-witnesses or contemporaneous documents supported by oral evidence from their authors.

¹⁸See *Bontchev v Medical Board of Queensland* [2010] QCAT 61, [5] – [6].

¹⁹*Bontchev v Medical Board of Queensland* [2010] QCAT 61, [7] (a decision relating to conditions imposed on a medical practitioner's registration).

²⁰*Robinson v Queensland Building Services Authority* [2010] QCAT 39, [19].

²¹*Maguire v Leather* [2007] QSC 164, [71]; *Foreman v Lee & Transport Accident Commission* [2005] QSC 86.

²²QCAT Act, s 28(3)(b); AAT Act, s 33(1)(c).

Particular tactical considerations

30. In their respective fields of operation, both QCAT and the AAT generally represent the final opportunity for a party to make out its case on the merits. In QCAT, appeals on questions of fact are available, but only with leave and would not be full merits review.²³ In the AAT, appeals are only available on questions of law.²⁴
31. With that in mind, consideration should be given to the following:
- (a) *Has the decision-maker given full disclosure?* The decision-maker is obliged to lodge a copy of all relevant documents.²⁵ Practitioners should assist clients to review the documents to identify any missing material, particularly documents or reports the decision-maker might not have thought were relevant. Both QCAT and the AAT have the power to require the decision-maker to provide any additional documents that “may be relevant”,²⁶ and consideration should be given to requesting the tribunal to exercise that power. It might be worthwhile pursuing enquiries by way of third party disclosure,²⁷ or even applications under freedom of information legislation.²⁸
 - (b) *Has the decision-maker given adequate reasons for its decision?* The decision-maker is obliged to give the tribunal a written statement of reasons for its decision.²⁹ If QCAT considers the statement of reasons is not adequate, it may require the decision-maker to provide an additional statement setting out further particulars. The statement of reasons should be reviewed and if there are inadequacies, an order for better particulars may be sought. This might be useful if there is uncertainty about what the decision-maker considers significant, or the factors that might sway the decision-maker in the client's favour.
 - (c) *Will the decision-maker reconsider its decision?* The original decision-maker might have been a less senior officer than those involved in the QCAT or AAT proceedings, or might have had access to limited evidence. After further information has been gathered, or legal submissions have been considered, it might be worthwhile attempting to have the decision-maker reconsider its

²³QCAT Act, s 142.

²⁴AAT Act, s 44.

²⁵QCAT Act, s 21(2)(b); AAT Act, s 37(1)(b).

²⁶QCAT Act, s 21(3); AAT Act, s 37(2).

²⁷QCAT Act, s 63; AAT Act, s 40(1A).

²⁸*Right to Information Act 2009* (Qld); *Freedom of Information Act 1982* (Cth).

²⁹QCAT Act, s 21(2)(a); AAT Act, s 37(1)(a).

decision. This can be achieved by asking the tribunal to invite the decision-maker to reconsider its decision,³⁰ or having recourse to provisions in other legislation (such as the relevant enabling Act) that allow for reconsideration of decisions.

32. It is also useful to keep in mind that the decision-maker will generally be under a duty to assist the tribunal. There are likely to be disputes about the extent to which this duty actually requires the decision-maker to do anything in particular, but it at least suggests that the decision-maker should actively participate in the proceedings³¹ and comply with its “model litigant” obligations. Some government agencies will be more accommodating than others, but it can be good tactics to ask the decision-maker to take responsibility for many of the procedural aspects of a case, including obtaining evidence where appropriate.

Costs in merits review proceedings

33. The AAT does not have a general power to award costs, so costs can only be awarded if specifically provided in the relevant enabling Act.
34. QCAT does have a general power to award costs, but the starting point is that each party must bear its own costs.³² An order for costs may be made if that is in “the interests of justice”.³³ The Court of Appeal, when considering similar costs provisions, has held that a finding that the successful party was reasonably justified in engaging legal representation, along with success in the proceedings, might be a sufficient basis to conclude that the interests of justice warrant an award costs in favour of that party.³⁴
35. Other factors that might support an application for costs against the decision-maker in QCAT proceedings include:
 - (a) If there was a denial of procedural fairness during the original decision-making process.³⁵

³⁰QCAT Act, s 23; AAT Act, s 42D. Experience suggests that a formal referral for reconsideration is more likely to come about in QCAT than in the AAT.

³¹See *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45.

³²QCAT Act, s 100.

³³QCAT Act, s 102(1).

³⁴*Tamawood v Paans* [2005] 2 Qd R 101, [33] per Keane JA.

³⁵QCAT Act, s 102(3)(d)(i).

- (b) Any efforts by the applicant to help the decision-maker to make the decision on the merits.³⁶
- (c) If the decision-maker has caused delay, or has failed to comply with legislative requirements;³⁷
- (d) Any financial difficulty suffered by the applicant,³⁸ particularly if the decision under review has impacted on the applicant's financial circumstances.
- (e) Any offer of settlement made by the applicant.³⁹

Relief in merits review proceedings

36. Both QCAT and the AAT are seen as “standing in the shoes” of the original decision-maker. After reviewing the decision, each tribunal has the power to:
- (a) Affirm (or confirm) the decision under review:⁴⁰ this, of course, means that the application has been unsuccessful.
 - (b) Vary (or amend) the decision under review:⁴¹ this power is generally exercised to make minor changes to the decision under review (such as changing a date or a figure) without affecting the primary operation of the decision.
 - (c) Set aside the decision under review, and substitute a new decision:⁴² this is usually the decision that the applicant will be seeking, so that the tribunal puts in place the actual decision sought thereby bringing finality to the matter.
 - (d) Set aside the decision under review, and remit the matter for reconsideration by the original decision-maker (possibly with directions):⁴³ relief of this nature might be appropriate (or desirable) where some further assessment or calculation is required. For example, the entitlement to a licence or payment might be determined by the tribunal with the question of quantum or conditions remitted to the decision-maker for its consideration.

³⁶QCAT Act, s 102(3)(d)(ii).

³⁷QCAT Act, s 102(3)(a).

³⁸QCAT Act, s 102(3)(e).

³⁹See *Nortask Pty Ltd v Rodriguez* [2009] QDC 318, [26], [31].

⁴⁰QCAT Act, s 24(1)(a); AAT Act, s 43(1)(a).

⁴¹QCAT Act s 24(1)(a); AAT Act, s 43(1)(b).

⁴²QCAT Act s 24(1)(b); AAT Act s 43(1)(c)(i).

⁴³QCAT Act s 24(1)(c); AAT Act s 43(1)(c)(ii).

37. A draft form of order or decision should always be prepared prior to the hearing of a matter. This assists the tribunal, and also ensures that there is no doubt about what relief the client is seeking.

Summary

38. Merits review in QCAT or the AAT is generally the final chance for a case to be considered on its merits and to have questions of fact resolved. Although the tribunals operate informally compared to traditional Court procedures, this should not be allowed to distract from the need to present the case as fully and powerfully as possible.

Judicial review under the Queensland and Commonwealth statutes

39. Administrative decisions made by government agencies and departments are generally subject to review by the Courts. This process of “judicial review” is limited to the legality of the decision, rather than its merits. As explained by Brennan J:⁴⁴

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

40. Thus, in judicial review proceedings, errors of fact, or alleged errors about evidence and discretionary matters are not (with few exceptions) allowable grounds of review. Judicial review is generally directed towards questions of law, or the various points of law and procedure appearing within the available grounds of review in the Queensland and Commonwealth judicial review Acts.⁴⁵
41. Before considering an application for judicial review, it is almost always necessary to first pursue any available avenue of merits review (or other appeal). Under the Queensland legislation, if the applicant has not pursued an alternative review that is available the Court “must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so”.⁴⁶ The Commonwealth legislation provides that the Court “may, in its discretion, refuse to grant an application” if adequate provision is made for an alternative review.⁴⁷
42. The practical effect is that if merits review is available, an application for judicial review is likely to be seen as premature. In a particular case there may, however, be exceptions to this rule. Accordingly, it can be useful to consider whether judicial review should be attempted prior to (or during) merits review.⁴⁸

⁴⁴*Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

⁴⁵*Judicial Review Act 1991* (Qld) (**the JR Act**) and *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**the ADJR Act**).

⁴⁶JR Act, s 13. Compare *Freier v Jordan and the State of Queensland* [2002] QSC 385.

⁴⁷ADJR Act, s 10(2)(b).

⁴⁸See *Hagedorn v Department of Social Security* (1996) 44 ALD 274, 281. Judicial review prior to the completion of merits review might, for example, be appropriate where the decision-maker is intending to apply a particular legal test which the applicant contends is erroneous.

Commencing proceedings

43. The Queensland and Commonwealth judicial review Acts provide reasonably straightforward procedures for seeking review of administrative decisions. For decisions arising under Queensland law, applications are made to the Supreme Court.⁴⁹ For Commonwealth matters, applications are made to the Federal Magistrates Court or the Federal Court.⁵⁰ In either case, the application must generally be filed within 28 days after the written decision (or statement of reasons) has been received by the client.⁵¹
44. The application must be in the approved form, and must set out the grounds of the application.⁵² Where time is pressing, it is permissible to set out the grounds of review in general terms. However, where possible it is good advocacy to set out full particulars at the outset. Otherwise, the usual considerations relating to amending pleadings and giving particulars can be dealt with as the matter proceeds.⁵³
45. In order to be reviewable under the judicial review legislation, a decision must generally be “of an administrative character made ... under an enactment”.⁵⁴ The test for whether a decision is one that is made under an enactment was stated by the High Court as follows:⁵⁵
- The determination of whether a decision is “made ... under an enactment” involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be “made ... under an enactment” if both these criteria are met.
46. One of the examples cited by the High Court was a case involving a decision to issue a search warrant. That decision was said to affect legal rights or obligations because it provided the police officers executing the warrant with authority to do acts which would otherwise amount to trespass.⁵⁶

⁴⁹JR Act, s 19.

⁵⁰ADJR Act, ss 8, 9.

⁵¹JR Act, s 26; ADJR Act, s 11(3).

⁵²JR Act, s 25(b); ADJR Act, s 11(1)(b).

⁵³Note, however, that the applicant is not limited to the grounds specified in the originating application: JR Act, s 27; ADJR Act, s 11(6).

⁵⁴JR Act, s 4; ADJR Act, s 3.

⁵⁵*Griffith University v Tang* (2005) 221 CLR 99, [89].

⁵⁶*Griffith University v Tang* (2005) 221 CLR 99, [85].

Interlocutory relief

47. Once implemented, administrative decisions can often have a significant (and sometimes irreversible) impact on the client. For example, the cancellation of a licence or other decision affecting a business could effectively mean the business cannot continue to operate. In such cases, consideration should be given to seeking interlocutory relief so as to allow the *status quo* to continue pending the outcome of the judicial review application.
48. The Court has a broad power to “suspend the operation of the decision” under review.⁵⁷ The authorities suggest the following points:⁵⁸
- (a) The Court's discretion to suspend a decision is broad enough to permit, in cases of urgency, an interlocutory order to be made “prior to any determination as to whether the applicant has a reasonable argument”.
 - (b) It will generally be necessary for an applicant to show a “serious question to be tried” or a “point of substance to argue”.
 - (c) An applicant must show reasons or circumstances that “make it just” to make the order, but it is not necessary to show “special or exceptional” circumstances.
49. In any particular case, it will be relevant to consider both the legislative scheme under which the decision has been made, and the “consequences to the individual”.⁵⁹

Prospective costs applications

50. The Queensland legislation includes a particular costs provision to which consideration should always be given (but there is no corresponding provision in the Commonwealth legislation). The Queensland Act provides that an applicant may make a “costs application”, under which the Court may order:⁶⁰

... that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or

⁵⁷JR Act, s 29(2); ADJR Act, ss 15(1)(a), 15A(1)(a).

⁵⁸*Snow v Deputy Commissioner of Taxation* (1987) 70 ALR 672, 684-5.

⁵⁹*D v Guardianship and Administration Board* [2010] TASSC 56, [30].

⁶⁰JR Act, s 49(1).

... that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.

51. It has been said that “one purpose is to enable applicants to find out at an early stage if they are to be indemnified against payment of costs of other parties” and that an early costs application may be advantageous.⁶¹ When considering a costs application of this nature, the Court must have regard to:
- (a) The applicant's financial resources.
 - (b) Whether the proceeding involves an issue that affects, or may affect, the public interest.
 - (c) Whether the proceeding discloses a reasonable basis for the review application.
52. Where costs or funding is an issue for the client (for example, if you are acting for a public interest group), consideration should be given to making a costs application early in the proceedings. If the applicant is impecunious⁶² or if the application involves a significant point of statutory interpretation,⁶³ there might be a reasonable prospect of obtaining an order that the client only bear its own costs regardless of the outcome.⁶⁴
53. An order to that effect that the respondent indemnify the applicant for costs incurred in the proceedings will be harder to obtain. It seems that if a case has a significant element of public interest, or is a “test case” that might justify an order requiring the respondent to indemnify the applicant.⁶⁵

Grounds for review

54. The judicial review legislation sets out the grounds of review that are available when challenging an administrative decision.⁶⁶ Generally, potential grounds of review are identified by first reviewing three main pieces of material:
- (a) The decision-maker's statement of reasons.
 - (b) The submissions made by the client to the decision-maker.
 - (c) The transcript of any oral proceedings.

⁶¹*Lyness v Fennell* [1998] QSC 38.

⁶²Eg, *Gilchrist v Queensland Parole Board* [2011] QSC 328, [4].

⁶³Eg, *Brogden v Commissioner of the Police Service* [2001] QSC 123, [10].

⁶⁴Eg, *Alliance to Save Hinchinbrook Inc v Cook* [2005] QSC 355.

⁶⁵Eg, *Meizer v Chief Executive, Dept of Corrective Services* [2005] QSC 351.

⁶⁶JR Act, s 20(2); ADJR Act, s 5(1).

55. One way of identifying potential grounds of review is to analyse the above-listed material by reference to the following considerations.
56. **Jurisdiction:** Is the decision that was made within the decision-maker's jurisdiction? Consider whether there are jurisdictional facts that can be challenged. A "jurisdictional fact is a fact that serves as a condition precedent to the decision-maker's exercise of jurisdiction".⁶⁷ In contrast to most factual matters, if a fact is a "jurisdictional fact", the Court will determine for itself whether or not the fact objective existed.
57. **Procedure:** Were the procedures adopted by the decision-maker fair, and did the decision-maker comply with any statutory requirements? Two important grounds that are available under the legislation are that there has been a breach of the rules of natural justice (ie, procedural fairness)⁶⁸ or that the decision-maker has failed to observe procedures that were required by law to be observed.⁶⁹ Consider the following:
- (a) Does the governing legislation set out procedures that the decision-maker must follow in the process of (or leading up to) making the decision? Failing to follow such procedures (perhaps because the decision-maker misinterpreted the procedures)⁷⁰ may result in reviewable error.
 - (b) Has the decision-maker disclosed all relevant material upon which it relied?
 - (c) Has the decision-maker given the client an opportunity to be heard in relation to the main points adverse to his or her case?
 - (d) Has the decision-maker understood and considered the case or submissions advanced by the client?⁷¹
 - (e) Was the client denied an opportunity to cross-examine an important witness whose evidence was adverse to the case?⁷²
 - (f) Is there material to demonstrate an apprehension of bias? This can be a difficult ground to make out, but it should be considered in an appropriate case.

⁶⁷*D'Amore v Independent Commission Against Corruption* [2012] NSWSC 473, [66]. See *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5, [28]; *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65, [147].

⁶⁸JR Act, s 20(2)(a); ADJR Act, s 5(1)(a).

⁶⁹JR Act, s 20(2)(b); ADJR Act, s 5(1)(b).

⁷⁰Eg, *Mills v Commissioner of the Queensland Police Service* [2011] QSC 244.

⁷¹Eg, *Leggett v Queensland Parole Board* [2012] QSC 121, [28].

⁷²Eg, *Ramsay v Australian Postal Corporation* [2005] FCA 640, [27].

58. **Fact finding:** It is commonly (and correctly) said that there is no error of law in merely making a wrong finding of fact.⁷³ However, many an error of law has been found in the **way** that a decision-maker has gone about making findings of fact. Related grounds of review include error of law,⁷⁴ and failing to take account of relevant considerations.⁷⁵

Consider the following:

- (a) Was there evidence before the decision-maker capable of supporting the findings of fact that were made? It is well established that it is an error of law to make a finding of fact in the absence of evidence.⁷⁶
- (b) Was there evidence that the decision-maker overlooked? The weight to be accorded any piece of evidence is a matter for the decision-maker. However, subject to the particular circumstances, it may be an error of law if the decision-maker simply fails to consider an important piece of evidence.

59. **Reaching conclusions:** Has the decision-maker posed and answered the correct legal question, and properly interpreted the legislation in question? In this regard, the available grounds of review include error of law,⁷⁷ overlooking relevant considerations,⁷⁸ taking account of irrelevant considerations,⁷⁹ and blindly following policy.⁸⁰ Consider the following:

- (a) Has the decision-maker set the bar too high? Analyse the statement of reasons to identify whether the decision-maker has identified the correct criteria and not imposed an unnecessary hurdle (such as looking for “special circumstances” where no such requirement is imposed).
- (b) Has the decision-maker properly interpreted the key legislative provisions? For example, although a discretion might be provided in broad terms a statement of reasons might show that the decision-maker has adopted an unduly narrow interpretation.⁸¹

⁷³*Waterford v The Commonwealth* (1987) 163 CLR 54, 77.

⁷⁴JR Act, s 20(2)(f); ADJR Act, s 5(1)(f).

⁷⁵JR Act, s 23(b); ADJR Act, s 5(2)(b).

⁷⁶*Minister for Immigration and Multicultural Affairs v Al-Miahi* (2001) 65 ALD 141, [34].

⁷⁷JR Act, s 20(2)(f); ADJR Act, s 5(1)(f).

⁷⁸JR Act, s 23(b); ADJR Act, s 5(2)(b).

⁷⁹JR Act, s 23(a); ADJR Act, s 5(2)(a).

⁸⁰JR Act, s 23(f); ADJR Act, s 5(2)(f).

⁸¹Eg, *Fischer v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] FCA 441.

- (c) Has the decision-maker ignored or overlooked matters that it was in fact required to consider? Alternatively, has the decision-maker relied on matters that the legislation in question suggests are not relevant?
 - (d) Has the decision-maker given adequate reasons for its decision? In some circumstances, a failure to give adequate reasons can constitute an error of law.⁸²
60. These considerations are not exhaustive. In any particular case, all available grounds of review should be kept in mind. Also, it is often instructive to review the decided cases to identify factually similar situations and which grounds of review succeeded (or did not succeed). Administrative law is always evolving, and errors in a decision-maker's statement of reasons can often be characterised under several different grounds of review. A review of recent cases will often suggest which ground of review is more likely to attract the interest of the Court.

Costs

61. As with most litigation, judicial review applications start from the proposition that costs follow the event. However, there are grounds upon which an unsuccessful applicant might resist an adverse costs order.
62. Under the Queensland legislation, an unsuccessful applicant has a reasonable prospect of resisting a costs order on the grounds of being impecunious or there being a significant element of public interest.⁸³ In the Commonwealth jurisdiction, there is no specific legislative incursion into the realm of costs, but the authorities have recognised that costs should not always follow the event. In the judicial review context, the Federal Court has said:⁸⁴

Notwithstanding the ordinary principle of costs following the event, there are two considerations of potentially present relevance of which account properly can be taken in justification of a departure from that principle. These are the reasonableness of the applicant in bringing the application and where the respondent, as in this case, is a public authority, the general importance both of the clarification of the law for such an authority and of securing proper compliance with it ...

⁸²*Civil Aviation Safety Authority v Central Aviation Pty Limited* [2009] FCAFC 137, [49]-[50]; *Hill v Repatriation Commission* [2004] FCA 832, [19], [27].

⁸³JR Act, s 49. See discussion herein under the heading "Prospective costs applications".

⁸⁴*Duncan v Chief Executive Officer, Centrelink (No 2)* [2008] FCA 667, [4]. See also *Fesl v Delegate of the Native Title Registrar (No 2)* [2008] FCA 1479.

63. Thus, thought should be given to whether there might be grounds to resist an order in Commonwealth proceedings notwithstanding the absence of specific statutory provision.

Other judicial review

64. Not all administrative decisions are within the scope of the statutory avenue of review provided for in the Queensland and Commonwealth judicial review Acts. In those cases, judicial review may still be possible by recourse to the Court's more general powers. For example, under Queensland law decisions not covered by the statutory regime might still be reviewed by reference to the Supreme Court's general supervisory jurisdiction.⁸⁵ Similarly, Commonwealth legislation provides jurisdiction for the Federal Court where administrative law relief is sought against officers of the Commonwealth.⁸⁶

65. Efforts by the Parliaments to exclude administrative decisions from judicial review will often not succeed. The High Court has emphasised that the supervisory jurisdiction of the Supreme Courts has a level of Constitutional protection. It has said:⁸⁷

The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts.

66. A detailed consideration of the general supervisory jurisdiction of the Courts is beyond the scope of this paper. However, the key lesson is that even if a statute purports to prevent judicial review of an administrative decision, careful analysis is likely to lead to the identification of an avenue of challenge (even if it be a more limited avenue).

⁸⁵See JR Act, Part 5 (s 43).

⁸⁶*Judiciary Act 1903*, s 39B(1).

⁸⁷*Kirk v Industrial Relations Commission* [2010] HCA 1, [98].

Appeals against QCAT or AAT decisions

67. Once QCAT or the AAT makes a final decision, there is a statutory right of appeal. For QCAT decisions, there is a right of appeal to an internal “appeal tribunal” against most decisions (or an appeal to the Court of Appeal if the tribunal was constituted by a judicial member).⁸⁸ Appeals on questions of law may be brought as of right, but leave is required to pursue an appeal on a question of fact (or question of mixed law and fact).⁸⁹ For AAT decisions, there is a right of appeal to the Federal Court but only on questions of law.⁹⁰
68. A question of law can generally be formulated by considering the same grounds of review that are available under the judicial review Acts.⁹¹ However, it is important that close consideration be given to the identification and particularisation of the question of law. The Full Court of the Federal Court has emphasised that:⁹²
- (a) The “question of law” is not merely a qualifying condition to ground an appeal, it is “the subject matter of the appeal itself”.
 - (b) The “question of law” raised by the appeal “should be stated with precision as a pure question of law”.
 - (c) To merely assert that a tribunal has erred in law in making a particular finding does not amount to a “question of law”.
 - (d) A question that simply invites an enquiry into whether the tribunal has committed an error of law in its decision is not a “question of law”.
 - (e) The grounds given in support of an appeal should demonstrate how the “question of law” justifies the orders sought.
69. Generally, QCAT or AAT decisions should be challenged through the statutory appeal mechanism rather than under the judicial review Acts.⁹³

⁸⁸QCAT Act, ss 142, 149.

⁸⁹QCAT Act, ss 142(3)(b), 149(3)(b).

⁹⁰AAT Act, s 44. The Federal Court has the power to transfer appeals to the Federal Magistrates Court, which occurs quite commonly. However, appeals cannot be filed directly with the Federal Magistrates Court.

⁹¹See, for example, *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143, where the Full Court (by majority) held that allegations of procedural unfairness did give rise to a question of law.

⁹²*Birdseye v Australian Securities and Investments Commission* (2003) 76 ALD 321.

⁹³In that regard, see QCAT Act, s 156.

Concluding comments

70. There are a number of avenues available to challenge administrative decisions. The legislation can vary dramatically from case to case, but several points have general application:
- (a) Rights of merits review should be identified and pursued. Generally, this should happen before recourse to judicial review. When conducting merits review proceedings, general litigation techniques will be relevant but will need to be adapted to the particular circumstances.
 - (b) Rights of judicial review or appeal should be explored whenever appropriate, including in circumstances where the legislation purports to exclude such review. A close reading of the relevant legislation and previously decided cases will usually suggest the most appropriate avenue of review.
71. Finally, when when conducting either merits review or judicial review proceedings, there are a number of tactical approaches that should be considered. These include applications for interlocutory relief and creative approaches to costs orders.

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