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Administrative Law

Are you unhappy with a government decision or action that affects your business?

Administrative law may be of assistance!

Introduction

Every day public bodies exercise their power to make decisions which impact adversely your business.

Has your business been affected by a decision or action taken by a government department, authority or statutory body which you consider to be adverse or unfair?

Help may be at hand through administrative law by using the avenues available to challenge the legality or merit of the decision or action.

What is administrative law?

Administrative law is the legal regime which regulates the decision making of public bodies.

In particular, administrative law provides a framework for the review of decisions of government and statutory bodies. For a decision to be reviewable, it must have an administrative quality. Policy decisions and the enactment of legislation, for example, are outside the scope of administrative law.

The types of administrative decisions which may be reviewable include but are not limited to decisions at both Federal and State level concerning licensing; the terms and conditions of any permits or authorities to conduct certain activities; privacy; freedom of information; construction; intellectual property matters; taxation; the imposition of a fee and the amount of the fee; customs, civil aviation, industry assistance and bankruptcy.

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Why was the decision made?

Sometimes a bureaucratic decision or action in respect of your business may puzzle you. Before seeking a review of the decision, it can be of great assistance to know the reasons for the decision.

If no reasons were provided at the time you were notified of the decision, it is often possible to request the decision maker provide a statement of reasons (**Reasons**). In fact, various federal and state legislation requires public decision makers to provide Reasons for their decisions if requested by an aggrieved party within a given time frame, usually within 28 or 30 days from the date of notification of the decision. In addition to any statutory right, you may also have a right to request Reasons under the common law.

Seeking Reasons is important. The Reasons should provide you with the decision maker's findings on material questions of fact, with reference to the evidence or other materials on which the findings were based and, essentially, give reasons for the decision. Reasons are generally required to be complete and specific. Reviewing the Reasons may enable you to determine whether there are any grounds upon which you may rely to seek a review of the decision or action.

If the decision maker fails or refuses to provide Reasons, in many instances it is possible to apply to, for example, the Supreme Court in the relevant jurisdiction for an order that the decision maker provide Reasons.

At both a Federal and State level, under the Freedom of Information (**FOI**) legislation you generally have a right to seek access to any documents held by the decision maker which may be of relevance to the decision. Access to documents held by Federal and State government ministers, their departments and most government authorities or statutory bodies may be sought. There are some categories of documents which are exempt from release, for example, if there is a public interest in keeping the documents confidential.

Information obtained via an FOI application can assist you to determine whether the decision should be challenged. If there are errors in the information which is released, for example, it is no longer current or is misleading, you can request the information be changed. It is also possible to seek a review of a decision which is made under the FOI legislation, for example, if the agency decides not to release documents to you.

How is a review of the decision obtained?

Administrative decisions may be challenged in a number of ways, some of which are outlined below.

Judicial Review

Judicial review refers to a review of the decision by a court. The court is required to determine whether the decision was lawful but will not look at the merits of the decision. If the court finds that the decision is unlawful, the court will usually require the decision maker to re-determine its decision.

At a Federal level, judicial review of decisions made under Commonwealth legislation may be available in the High Court, Federal Court and Federal Magistrates Court. Generally,

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decisions made under State or Territory legislation are reviewable in the Supreme Court of the relevant jurisdiction.

Grounds for challenging a decision, both at a Federal and State level, include but are not limited to the following:

- the rules of natural justice were breached in making the decision;
- the decision maker's power was exercised for an improper purpose;
- the decision maker was unreasonable and/or failed to make reasonable enquiries;
- the decision maker failed to take into account relevant considerations;
- the decision maker acted outside their powers; and/or
- there was no evidence justifying the decision.

Merits Review

At both a Federal and State level, many public decisions are reviewable on the merits, that is, the reviewing body determines what is the correct or preferable decision (rather than reviewing the actual legality of the decision). In making this determination, the reviewing body may not only review the materials presented to the initial decision maker but also any other materials with which it is presented. If the initial decision maker failed to reach the correct or preferable decision, a new decision may be substituted.

An aggrieved party will only have a right to a merits review if so permitted under the relevant legislation.

At a Federal level, the Administrative Appeals Tribunal, among other more specialised tribunals, is able to conduct independent merit reviews of a wide range of Commonwealth government decisions (and the decisions of other tribunals, if allowed in accordance with the Act or Regulation under which the original decision was made). Similar bodies exist at a State level, such as the New South Wales Administrative Decisions Tribunal (**NSW ADT**) and the Victorian Civil and Administrative Decisions Tribunal (**VCAT**).

Complaints to the Ombudsman

Ombudsmen exist at both a Federal and State level to examine the administrative actions of government departments and statutory bodies. Where there exists an Ombudsman with the relevant power, the Ombudsman may investigate a decision as a result of a complaint or by exercising its own discretionary power to do so.

If an Ombudsman determines the decision maker made a mistake, for example, they can recommend the decision maker take specific steps to correct the mistake. While the Ombudsman cannot compel the decision maker to follow the Ombudsman's recommendation, if the Ombudsman is not satisfied with the decision maker's remediation steps, they may report the matter to Parliament.



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Conclusion

Administrative law provides various avenues for the review of decisions or actions of government departments or statutory bodies, which impact unfairly upon your business. Many such decisions or actions may be successfully challenged. Furthermore, information to assist you in determining whether to seek a review of a decision may often be easily obtained with only a minimal cost to your business.

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