KELLEHERS
AUSTRALIA

In-House Memorandum
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Judicial review of administrative actions

In several recent cases, we have found that reasons provided by administrative decision makers were insufficient or non-existent. In one case, a rural Council's reasons for a decision affecting a landowner's interests superficially addressed only two issues of many relevant to the matter. In another, Federal and State Governments made a series of significant environmental decisions based on an apparent mistake of fact, without any stated reasons or rationale being provided.

Individuals may be entitled to have a decision reviewed in such circumstances by the process of *judicial review*. This differs from *administrative review,* in which the reviewer will stand in the shoes of the original decision-maker and, with a fresh approach, make a new decision on the merits of a matter (as is done, for example, by VCAT in planning matters[1]). *Judicial review* is a process by which the legal aspects of the original decision-making procedure are reviewed, as distinct from the subject matter of the decision. While rights to administrative review of decisions in most planning and environment matters are established in statute,[2] judicial review of Victorian administrative decisions is largely[3] at common law.[4]

Through judicial review, a decision may be overturned due to some fatal flaw in the decision-making process. There are many established grounds for judicial review,[5] such as where the decision-maker has acted contrary to the principles of natural justice or has failed to adhere to the legislative basis required for its decision, acting beyond its power (*ultra vires*).

In the case of *Sherlock v Lloyd & Ors* [2010] VSCA 122, the Court of Appeal considered the previously unclear position as to whether a decision can be overturned on judicial review where the reasons given are inadequate. It is now settled law, in Victoria, that inadequacy of reasons cannot in itself be a ground for review. However, failure to give adequate reasons where there is a duty to give reasons may constitute an error in law, because the

[1] s 51 VCAT Act.
[2] Eg, Part 4, Division 2, *Planning and Environment Act 1987* (Vic); Part 4, *Environment Protection Act 1970* (Vic).
[3] With the exception of judicial review of decisions of Tribunals per the *Administrative Law Act 1978* (Vic).
[4] By seeking an order 'in the nature of' a writ, under order 56 of the *Supreme Court (General Civil Procedure) Rules*.
[5] The common law grounds for judicial review are similar to those set out in s 5, *Administrative Decisions (Judicial Review) Act 1977* (Cth), which provides grounds for review of decisions made in Federal jurisdictions. For an exposition of grounds commonly relied upon in the Supreme Court of Victoria, see Kyrou J, 'Victorian Administrative Law Update', Paper delivered at the Australian National University, 13 November 2009, pp 2-3.

legislative pre-condition for the decision-making power has not been followed and the path of reasoning is not exposed.[6]

While an error of law on the face of a decision (i.e. a misinterpretation of the law as it applies to the decision) may be grounds for judicial review, a mistake of fact will not necessarily render a decision judicially reviewable,[7] unless the mistake is so grave as to bring into question the very basis for a decision-maker choosing to make a decision.

Robert Forrester
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[6] This situation arose in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56, where reasons provided by the Minister for Immigration for cancelling a visa were so inadequate that the duty to provide reasons under the Migration Act was not fulfilled. See also *Hunter v Transport Accident Commission & Avalanche* [2005] VSCA 1, Nettle JA at [21].
[7] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed., 2009), [1.90].