

JOINT STANDING COMMITTEE ON THE NATIONAL CAPITAL AND
EXTERNAL TERRITORIES

NORFOLK ISLAND GOVERNANCE INQUIRY

The Application of Commonwealth Administrative Law to
Norfolk Island

COMMONWEALTH ATTORNEY-GENERAL'S DEPARTMENT



THE COMMONWEALTH ADMINISTRATIVE LAW SYSTEM

Australian administrative law consists of a number of rights and protections contained in legislation and in the common law and includes rights to seek merits review and judicial review of government decisions.

Merits Review

2. Merits review is a process by which a review authority stands in the place of the original decision-maker to decide whether the original decision was the correct or preferable decision.

3. For merits review to be available, legislation needs to specifically provide for such review. The review process may involve:

- internal review by the agency (although this is not always required as a precursor to external review);
- external review of the agency's decision by a specialist tribunal or the Administrative Appeals Tribunal (AAT); or
- external review of the specialist tribunal's decision by the AAT.

4. There are five key federal merits review tribunals that review decisions made by Commonwealth officials: the Administrative Appeals Tribunal (AAT), the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT), the Social Security Appeals Tribunal (SSAT) and the Veterans' Review Board (VRB).

5. The AAT is a generalist tribunal with broad jurisdiction to review decisions made under approximately 395 Commonwealth laws. In reviewing a decision, the AAT generally has the same powers as the person or body which originally made the decision and may, if it considers it appropriate, vary or substitute its own decision for the original decision. The Attorney-General has portfolio responsibility for the AAT.

6. The MRT and RRT are within the Minister for Immigration and Multicultural and Indigenous Affairs' portfolio responsibilities. These tribunals review decisions made under the *Migration Act 1958*, particularly decisions to refuse or cancel visas or refuse applications for refugee status. The SSAT reviews certain decisions made under the *Social Security Act 1991* and other legislation, and falls within the portfolio responsibilities of the Minister for Family and Community Services. The Minister for Veterans' Affairs is responsible for the VRB, which reviews certain decisions made by the Repatriation Commission and the Department of Veterans' Affairs under the *Veterans' Entitlements Act 1986*.

Judicial Review

7. Judicial review is the right to seek review of a decision by a court. The purpose of judicial review is not to consider the merits of a particular decision but rather to ensure that a decision-maker has acted within the law.

8. The *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) permits review to be sought of decisions of an administrative character made under an enactment. Subsection 3(1) of the ADJR Act provides that those decisions must be:

of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

(a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of enactment; or

(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of enactment;

other than:

(c) a decision by the Governor-General; or

(d) a decision included in any of the classes of decisions set out in Schedule 1.

9. Subsection 3(1) defines an enactment to be:

(a) an Act, other than:

(i) the *Commonwealth Places (Application of Laws) Act 1970*; or

(ii) the *Northern Territory (Self-Government) Act 1978*; or

(iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or

(b) an Ordinance of a Territory other than the Australian Capital Territory or the Northern Territory; or

(c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A; or

(ca) an Act of a State, the Australian Capital Territory or the Northern Territory, or a part of such an Act, described in Schedule 3; or

(cb) an instrument (including rules, regulations or by-laws) made under an Act or part of an Act covered by paragraph (ca); or

(d) any other law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act;

and, for the purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment.

10. It is possible to exclude the operation of the ADJR Act. Schedule 1 of the ADJR Act sets out the decisions of which the ADJR Act does not provide review. Under subsection 19(1) regulations may declare a class or classes of decisions to be decisions that are not subject to judicial review by the Federal Court or the Federal Magistrates Court under the Act. Regulations for the purposes of section 19B can amend Schedule 3, which describes Acts of the States, the Australian Capital Territory and the Northern Territory, and parts of such Acts, that are enactments of the purposes of the Act.

11. In addition, decisions of Commonwealth officers are subject to judicial review under the Australian Constitution. The Australian Constitution gives the High Court jurisdiction to give specified remedies (mandamus, prohibition and injunction) against unlawful action by Commonwealth officers (section 75(v) of the Australian Constitution). The Australian Parliament has conferred a similar jurisdiction on the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

12. Action can also be taken against Commonwealth officers using the old common law writs. Such action is available for an error of law in the decision-making process. The use of this process doesn't require the decision to be a decision under an enactment (as is required under the ADJR Act).

Right to Obtain Reasons for a Decision and Other Information

13. The ADJR Act also confers on an 'aggrieved person' a right to obtain written reasons for the decision in question. The person may request a written statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision. A similar right arises under the *Administrative Appeals Tribunal Act 1975* (AAT Act), which allows any person entitled to apply for review by the AAT of a decision to request the person who made the decision to furnish a written statement setting out findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. Rights to written reasons for particular decisions may also be given by other laws.

14. In addition, documents which might be relevant to a decision can be sought under the *Freedom of Information Act 1982* (FOI Act), which imposes a legal duty on federal agencies to provide members of the public with access to government information, including official documents of Ministers, unless those documents fall within defined classes of exempt documents. If the Government is keeping information about someone that is incomplete, incorrect, out of date or misleading, that person can use the FOI Act to get access to that information and can have it corrected.

Freedom of Information

15. The FOI Act came into effect on 1 December 1982. It extends the right to every person to access information in the possession of the Commonwealth by:

- requiring Commonwealth agencies to publish information about their operations and powers affecting the public, as well as manuals and other documents used in agency decision making that impinges upon members of the public; and
- requiring agencies to provide access to documents in their possession, unless the documents (or parts thereof) fall within an exemption specified in the FOI Act or other legislation.

16. The FOI Act does not apply to Parliament, Parliamentary departments or to the authorities listed in Schedule 2 of the FOI Act (either in toto or in relation to defined areas of their functions). It only applies to courts and tribunals in relation to their administrative functions.

17. The exemptions under the FOI Act are designed to provide a balance between the rights of applicants to access government held documents and the need to protect the legitimate interests of government and third parties dealing with government.

Privacy

18. The *Privacy Act 1988* (Privacy Act) regulates the collection, holding, correction, use and disclosure of personal information, defined under section 6 as:

information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

19. The Act prohibits use or disclosure of personal information, unless in accordance with its exemptions.

20. The basic framework under-pinning public and private sector privacy is contained in section 14 of the Privacy Act, which sets out the Information Privacy Principles (IPPs) and in Schedule 3 of the Privacy Act, which sets out the National Privacy Principles (NPPs), respectively. The IPPs and the NPPs are technologically neutral and regulate personal information in all media.

21. The Privacy Act also provides for an independent statutory office of the Federal Privacy Commissioner with responsibility for regulating privacy in both the public and private sectors and provides the Commissioner with a range of responsibilities, including for issuing guidelines, carrying out compliance audits, carrying out an educative role and considering and determining complaints.

APPLICATION OF COMMONWEALTH ADMINISTRATIVE LAW TO NORFOLK ISLAND

22. Norfolk Island is a territory of the Commonwealth of Australia under section 122 of the Constitution. Norfolk Island was granted self-government in 1979 with the enactment of the *Norfolk Island Act 1979*. Section 18 of that Act provides that Commonwealth legislation does not apply to Norfolk Island unless it is expressly stated to do so.

23. Norfolk Island has its own legislature, executive, judiciary and administrative systems. Its public servants are employed under the *Public Service Act 1979 (Norfolk Island)* and hence the Norfolk Island Government is the employer of its public servants (not the Commonwealth Government).

AAT Review

AAT Review of Commonwealth Government decisions

24. Section 4 of the AAT Act extends the Act to all external territories of Australia, and hence to Norfolk Island. Therefore, if a Norfolk Island resident is aggrieved by a decision made under a Commonwealth enactment, and the AAT has jurisdiction to review that decision, then the resident may seek review of that decision in the AAT. However, in light of the extensive powers of self-government conferred on Norfolk Island under the Norfolk Island Act, the number of Commonwealth enactments that extend to Norfolk Island is limited.

AAT Review of Norfolk Island Government decisions

25. Subsection 25(4) of the AAT Act provides that the Tribunal has the power to review any decision in respect of which application is made to it under any enactment. Section 3 of the Act defines enactments to mean Acts, Ordinances of territories (other than the Northern Territory) and instruments (including rules, regulations and by-laws) made under an Act or such an Ordinance.

The enactment may provide for the review of a decision made in the exercise of powers conferred by the enactment or by another enactment having effect under the enactment that confers the jurisdiction.

26. Enactments of the Norfolk Island legislature do not fall within the definition of an enactment for the purposes of the AAT Act.

Judicial Review

27. Residents of Norfolk Island may access the remedies of mandamus, prohibition and injunction against unlawful action by Commonwealth officers because of the extension of jurisdiction of the High Court of Australia (section 3A of the Judiciary Act) and the Federal Court of Australia (section 3 of the *Federal Court of Australia Act 1975*) over Norfolk Island.

28. The High Court of Australia is the highest court for Norfolk Island. It may grant special leave to appeal from any judgment of the Supreme Court of Norfolk Island, which is established under the Norfolk Island Act.

29. The Supreme Court of Norfolk Island has jurisdiction to review decisions of the Norfolk Island Government on questions of law. Judicial review of decisions of officers of the Norfolk Island government is available using common law writs.

Administrative Decisions (Judicial Review) Act 1977

30. By virtue of the definition of an enactment in section 3 of the ADJR Act, decisions made under the Norfolk Island Act and under any Ordinances that apply to Norfolk Island (there are none at present) are subject to ADJR review. However, decisions made by the Norfolk Island Government under Norfolk Island enactments are not subject to ADJR review.

Freedom of Information and Privacy

31. The FOI Act extends the right of the Australian community to information in the possession of the Government of the Commonwealth (s3). The Privacy Act extends to all external Territories (s5A). Norfolk Islanders are able to apply both Acts, in relation to Commonwealth agencies. However, the FOI Act and the Privacy Act do not apply to Norfolk Island agencies.

32. Agencies are defined:

- under section 4 of the FOI Act as:

- a Department, a prescribed authority or an eligible case manager

and this is a reference only to non-exempt Commonwealth bodies

- under section 6 of the Privacy Act as:

- (a) a Minister; or

- (b) a Department; or

- (c) a body (whether incorporated or not), or a tribunal, established or appointed for a public purpose by or under a Commonwealth enactment, not being:

- (i) an incorporated company, society or association; or

- (ii) an organisation within the meaning of the Conciliation and Arbitration Act 1904 or a branch of such an organisation; or
- (d) a body established or appointed by the Governor-General, or by a Minister, otherwise than by or under a Commonwealth enactment; or
- (e) a person holding or performing the duties of an office established by or under, or an appointment made under, a Commonwealth enactment, other than a person who, by virtue of holding that office, is the Secretary of a Department; or
- (f) a person holding or performing the duties of an appointment, being an appointment made by the Governor-General, or by a Minister, otherwise than under a Commonwealth enactment; or
- (g) a federal court; or
- (h) the Australian Federal Police; or
- (i) an eligible case manager; or
- (j) the nominated AGHS company; or
- (k) an eligible hearing service provider.

33. Norfolk Island agencies do not fall within either of these definitions.

ADMINISTRATIVE REVIEW TRIBUNAL OF NORFOLK ISLAND

34. The *Administrative Review Tribunal Act 1996 (Norfolk Island)* (ART Act) establishes the Administrative Review Tribunal (ART) of Norfolk Island to review (on merits) decisions made under Norfolk Island enactments. Like the AAT, an enactment may confer jurisdiction on the ART to review decisions made under that enactment or another enactment (refer to subsection 14(1) of the ART Act). At present, at least five enactments of the Legislative Council of Norfolk Island confer jurisdiction upon the ART:

- the *Public Reserves Act 1997*;
- the *Norfolk Island Broadcasting Authority Act 2001*;
- the *Land Titles Act 1996*;
- the *Land Administration Fees Act 1996*; and
- the *Crown Lands Act 1996*.

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