

EXPLANATORY STATEMENT

Australian Capital Territory Administrative Decisions (Judicial Review) Ordinance 1989

No. 33, 1989

The Administrative Decisions (Judicial Review) Ordinance 1989 will commence on the day that Self-Government comes into effect. It is modelled on the Administrative Decisions (Judicial Review) Act 1977 of the Commonwealth. The Ordinance essentially reproduces that Act subject to modifications which reflect different constitutional and institutional arrangements which are required as a result of the transfer of government responsibilities to the Territory. The principal difference between the terms of the Act and those of the Ordinance is that the Ordinance provides that the Australian Capital Territory Supreme Court shall hear and determine applications for judicial review rather than the Federal Court of Australia.

The Australian Capital Territory (Self-Government) Act 1988 and the Canberra Water Supply (Googong Dam) Act 1974 are excluded from the definition of enactment in the Commonwealth Act. The Ordinance contains an extended definition of enactment which brings sections 50, 51, 53 and 56 of the former Act and the whole of the latter Act within its operation. Certain provisions of the Australian Capital Territory (Planning and Land Management) Act 1988 are also excluded from the operation of the Commonwealth Act. The extended definition in the Ordinance applies to decisions made under Division 5 of Part X of that Act.

The Ordinance codifies and extends the grounds on which administrative action may be reviewed, and vests that review jurisdiction in the Australian Capital Territory Supreme Court. It also provides a general right for persons aggrieved by an administrative decision made under an enactment to obtain a statement of reasons for the decision, subject to specified exceptions and qualifications.

The details of the Ordinance are set out in the Attachment.

ISSUED BY AUTHORITY OF THE MINISTER
OF STATE FOR THE ARTS AND
TERRITORIES.

Section 1 identifies the short title of the Ordinance as the Administrative Decisions (Judicial Review) Ordinance 1989.

Section 2 provides that the Ordinance will commence on the same date as section 22 of the Australian Capital Territory (Self-Government) Act 1988.

Section 3 deals with matters of interpretation.

Section 4 provides that the Ordinance will have effect notwithstanding any enactment in force at the time the Ordinance commences.

Subsection 5(1) permits a person aggrieved by a decision to apply to the Supreme Court for an order of review of the decision on the grounds:

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
- (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (d) that the decision was not authorised by the enactment under which it was purported to make the decision;
- (e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;
- (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) that the decision was induced or affected by fraud;
- (h) that there was no evidence or other material to justify the making of the decision;
- (j) that the decision was otherwise contrary to law.

Subsection 5(2) defines certain matters for the purposes of paragraph (1)(e).

Subsection 5(3) clarifies the operation of paragraph (1)(h).

Section 6 provides that where a person engages or proposes to engage in conduct for the purposes of making a decision, a person who is aggrieved by the conduct may apply to the Supreme Court for an order of review on the same grounds as specified in section 5.

Subsection 7(1) provides that where a person is required to make a decision, but no time limit is specified, a person may apply to the Supreme Court for an order of review where the person has failed to make a decision within a reasonable time.

Subsection 7(2) enables a person to apply to the Supreme Court for an order of review where a person, who is under a duty to make a decision within a particular period of time, has failed to make a decision.

Section 8 provides that the Supreme Court of the Australian Capital Territory has jurisdiction to hear applications under the Ordinance.

Subsection 9(1) provides that the rights conferred under the Ordinance are in addition to and not in derogation from other rights and are to be disregarded for the purposes of subsection 6(6) of the Ombudsman Ordinance 1989 which gives the Ombudsman a discretion not to investigate complaints where a complainant can utilise another review jurisdiction.

Subsection 9(2) provides that:

- . the Supreme Court or any other court may refuse to grant review of a matter if an application for review in respect of the same matter has been made under the Ordinance; and
- . the Supreme Court may refuse to grant an application for review if the applicant has sought review by a court otherwise than under the Ordinance or adequate provision is made for review by another law.

Subsection 9(3) defines "review".

Section 10 deals with the manner of making applications. It provides that an application for review shall be in accordance with the Rules of Court, shall set out the grounds of the application and shall be lodged with the Registry of the Supreme Court. The period during which an application for review must be lodged is 28 days after the applicant is provided with a statement setting out the reasons for the decision or 28 days after which the applicant is informed he or she is not entitled to a statement setting out the reasons for the decision. In cases where no written reasons are provided, applications are to be made within a reasonable period of time. The section will also provide that an applicant is not limited to the grounds of review set out in his or her application and that substantial compliance only with the Rules of Court is required.

Section 11 provides that the Supreme Court may, on such terms as it thinks fit, permit amendment of documents lodged with the Court Registry.

Section 12 permits a person who is interested in a decision to apply to the Supreme Court to be made a party to the application. The Supreme Court may grant the application unconditionally or subject to conditions or it may refuse the application.

Subsection 13(1) permits a person, who is entitled to make an application to the Supreme Court for the review of a decision, to request a statement from the person who made the decision containing findings on material questions of fact, referring to the evidence upon which the findings were based and giving the reasons for the decision.

Subsection 13(2) provides that, subject to the section, a statement of reasons is to be provided as soon as practicable and in any event within 28 days.

Subsection 13(3) provides that where a person who has received a request for a statement of reasons and is of the opinion that the applicant is not entitled to make the request, that person may provide a notice to that effect to the applicant or apply to the Supreme Court for an order declaring that the applicant was not entitled to make a request.

Subsection 13(4) provides that where a notice is issued under subsection 13(3) or an application is made to the Supreme Court for an order that the applicant was not entitled to make the request, the person is not required to comply with the applicant's request unless the Supreme Court declares that the applicant was entitled to make the request or refuses to make an order that the person was not entitled to make the request.

Subsection 13(5) permits either the applicant for a statement of reasons or the recipient of such a request to apply to the Supreme Court for an order that the person is or is not entitled to make the request, as the case may be.

Subsection 13(6) allows a person who has received a request for a statement of reasons to refuse to provide the statement if the request was not made within 28 days of the applicant receiving written notification of the decision or in any other case within a reasonable time.

Subsection 13(7) permits the Supreme Court to declare that an application was made within a reasonable time for the purposes of subsection (6).

Subsection 13(8) permits an applicant for a statement of reasons to apply to the Supreme Court for an order that better particulars be provided.

Subsections 13(9), (10) and (11) enable regulations to be made declaring decisions not to be decisions to which the section applies. Such regulations may apply only in relation to decisions made after a regulation comes into effect.

Subsection 13(12) specifies the decisions to which the section does not apply.

Subsections 14(1) and (2) provide that information:

- . relating to the personal or business affairs of a person other than a person making the request;
- . which was supplied in confidence;
- . the publication of which would reveal a trade secret;
- . that was provided in compliance with an enactment; or
- . the provision of which would be a contravention of secrecy provisions in an enactment,

need not be included in response to a request under subsection 13(1). Where the omission of such information would render any statement to be given under the subsection 13(1) false or misleading, the statement need not be given.

Subsection 14(3) provides that where information is not included in a statement requested under subsection 13(1) or the statement is not provided because the omission of information would make it false or misleading, the person who received the request is to provide a notice in writing stating the reasons why the information was not included or the statement was not supplied.

Subsection 14(4) provides that nothing in the section affects the power of the Supreme Court to order discovery of documents or to require the giving of evidence or the production of documents to the Supreme Court.

Subsection 15(1) allows the Minister to certify in writing that disclosure of information would be contrary to the public interest:

- (a) because it would disclose deliberations or decisions of the Executive or of a Committee of the Executive; or
- (b) for any other specified reason that could form a claim by the Crown in right of the Territory in a judicial proceeding that the information should not be disclosed.

Subsection 15(2) allows the Attorney-General of the Commonwealth to certify in writing that disclosure of information would be contrary to the public interest:

- (a) because it would prejudice the security, defence or international relations of the Commonwealth;
- (b) because it would disclose deliberations or decisions of the Cabinet of the Commonwealth or of a Committee of the Cabinet; or

- (c) for any other specified reason that could form a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

Subsection 15(3) provides that a person is not required to include in a statement requested under subsection 13(1) information in respect of which a certificate has been issued under subsections (1) or (2). Where a statement would be false or misleading if it did not include information of that kind the person is not required to provide the statement.

Subsection 15(4) provides that where information is omitted from a statement or the statement was not provided under subsection 15(3), the decision-maker is to provide a notice in writing stating the reasons why the information was not included or the statement was not supplied, as the case may be.

Subsection 15(5) prevents section 15 from limiting the power of the Supreme Court to order discovery of documents or to require the giving of evidence or the production of documents.

Section 16 provides that the making of an application in relation to a decision does not affect the operation of the decision. However, the Supreme Court or a Judge in Chambers may on his or her own motion or upon an application by one of the parties suspend the operation of the decision on such conditions as he or she thinks fit or stay any proceedings under the decision.

Subsection 17(1) allows the Supreme Court to make all or any of the following orders in respect of a decision:

- (a) an order quashing or setting aside the decision, or a part of the decision;
- (b) an order referring the decision back to the person who made it for further consideration, subject to directions, if the Court thinks fit;
- (c) an order declaring the rights of the parties in respect of the decision;
- (d) an order directing any of the parties to do, or to refrain from doing, any act or thing in order to do justice between the parties.

Subsection 17(2) allows the Supreme Court to make either or both of the following orders about action being undertaken for the purpose of making a decision:

- an order declaring the rights of the parties in respect of any matter to which the action relates;
- an order directing any of the parties to do, or to refrain from doing, any act or thing in order to do justice between the parties.

Subsection 17(3) allows the Supreme Court to make all or any of the following orders about a failure to make a decision:

- (a) an order directing the making of the decision;
- (b) an order declaring the rights of the parties in relation to the making of the decision;
- (c) an order directing any of the parties to do, or to refrain from doing, any act or thing in order to do justice between the parties.

Subsection 17(4) allows the Supreme Court to revoke, vary or suspend the operation of any order made under section 17 on its own motion or on the application of any party.

Section 18 provides that where the person who made a decision which is under review no longer performs the duties of the office he or she held when the decision was made, the Ordinance applies as if the person currently performing the duties of the office made the decision. If no one currently holds the office, or it no longer exists, the Ordinance applies as if the decision had been taken by such person as the Minister administering the relevant enactment or an authorised person specifies.

Subsection 19(1) permits the Minister to intervene in a proceeding under the Ordinance on behalf of the Territory.

Subsection 19(2) permits the Attorney-General of the Commonwealth to intervene in a proceeding on behalf of the Commonwealth where a certificate under subsection 15(2) has been issued.

Subsection 19(3) provides that where the Minister or the Attorney-General of the Commonwealth intervenes they shall be taken to be parties to the proceedings and costs may be awarded against the Territory or the Commonwealth, as the case may be.

Section 20 enables regulations to be made declaring that certain decisions are not subject to review under the Ordinance and in such a case, sections 5, 6 and 7 do not apply to the decisions. Regulations made under this section apply only to decisions made after a regulation comes into effect.

Section 21 enables the Executive to make regulations for the purposes of the Ordinance.

Schedule 1 lists decisions to which the Ordinance does not apply.

Schedule 2 lists decisions to which section 13 does not apply.