Evidence and Discovery in Judicial Review Proceedings

Jon Bayly, Douglas Menzies Chambers, 15 March 2021

A. INTRODUCTION

1. As general rule, the evidence in a judicial review proceeding is limited to the decision under review, the decision maker's formal statement of its reasons for making the decision, and the material that was before the decision maker at the time it made the decision. For this reason, discovery is generally not available in judicial review proceedings. However, in some cases, evidence that goes beyond the matters that were before the decision maker – 'extrinsic evidence' – may be relevant and admissible in a judicial review proceeding. In such a case, or where it is unclear what material was before the decision maker when it made its decision, it may be appropriate for one or more parties to seek orders for discovery of documents. Knowing when extrinsic evidence is likely to be admissible in a proceeding, and when discovery may be available, can assist a party seeking judicial review of a decision to ensure that their best possible case is put before the court. Perhaps more importantly, knowing when *not* to rely on extrinsic evidence or apply for discovery can ensure that parties to judicial review proceedings do not incur unnecessary costs or waste valuable court resources on irrelevant evidence and unnecessary interlocutory applications.

2. Focussing on proceedings in the Supreme Court of Victoria, this paper will deal with the following issues:

   2.1 Grounds of review and the distinction between 'subjective' and 'objective' jurisdictional facts (Part B).

   2.2 The admissibility of extrinsic evidence generally (Part C-1).

   2.3 The admissibility of expert evidence (Part C-2).

   2.4 Procedural issues that may arise in relation to expert evidence (Part D).

   2.5 Ways in which a party can respond to an opponent's attempt to rely on inadmissible extrinsic evidence (Part D-2).

2.6 Applications for discovery (Part E-1).

2.7 Circumstances in which a decision maker may be immune from an order for discovery (Part E-2).

3. The authorities referred to in this paper show that before deciding whether to attempt to adduce extrinsic evidence or seek an order for discovery, it is important for a party to have fully formulated the grounds on which it seeks judicial review and to have a clear understanding of the statutory scheme that governs the decision under review. Some grounds of review (such as denial of procedural fairness and legal irrationality) are more conducive to extrinsic evidence than others (such as failing to take into account a mandatory consideration or taking into account a prohibited consideration). Similarly, decisions made under statutory schemes that involve the making of judgments on questions of 'objective jurisdiction fact' are more conducive to extrinsic evidence than those that involve judgments of 'subjective jurisdictional fact'. For this reason, parties to judicial review proceedings should not take a 'scattergun' approach to the adduction of evidence. Rather, they should attempt to formulate their case with precision before considering whether extrinsic evidence may be capable of supporting that case. Failing to do this may result in wasted time and resources, and may have costs consequences for parties and their representatives.

B. GROUNDS OF REVIEW AND JURISDICTIONAL FACTS

4. The purpose of this paper is not to discuss in depth the various grounds on which judicial review may be sought of an administrative[1] decision. Nevertheless, to

[1] The focus of this paper is on judicial review of *administrative* decisions, rather than on judicial review of decisions made by inferior courts. Generally speaking, the same grounds of review are applicable regardless of whether judicial review is sought of an administrative or a judicial decision. However, it must be borne in mind that inferior courts, unlike administrative decision makers, are authorised to decide questions of law. It follows that while any error of law by an administrative decision will, subject to the question of 'materiality', be 'jurisdictional' in nature (see *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 136 [34] (Kiefel CJ, Gageler and Keane JJ), a court will not necessarily fall into jurisdictional error merely by reaching a wrong conclusion on a question of law. This is because 'an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law', while 'the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine': see *Craig v South Australia* (1995) 184 CLR 163 at 179. Nevertheless, at least in Victoria, a decision of an inferior court may generally be reviewed for non-jurisdictional error of law on the face of the record. Because the 'record' includes the court's reasons for its decision (see *Administrative Law Act 1978* (Vic), s 10), an error of law that is apparent from an inferior court's reasons for decision may, subject to the question of 'materiality', result in the decision's being liable

understand when extrinsic evidence may be relevant and admissible in a judicial review proceeding, it is important to be aware of the various grounds on which judicial review of a decision may be sought. Common grounds of judicial review include:

4.1 Failing to comply with the rules of procedural fairness. This may arise where a decision maker fails to provide a party with an opportunity to be heard or to respond to an issue, or where some interest or opinion of the decision maker gives rise to an apprehension of bias.

4.2 Error of law. This ground of review may arise if the decision maker misconstrues, misunderstands or misapplies the statutory criteria for making its decision.

4.3 Failing to take into account a mandatory consideration. This arises where the statutory scheme requires the decision maker to take a matter into account before it makes its decision, and the decision maker's reasons show that it failed to do so.

4.4 Taking into account a prohibited consideration. This arises when a decision maker's reasons show that it based its decision on a matter that the statutory scheme expressly or impliedly prohibited it from taking into account.

4.5 Irrationality. This ground of review may arise if the decision maker bases its decision on factual findings that lack any rational basis in probative evidence.

4.6 Unreasonableness. This may arise if the decision maker exercises a discretionary power in a way that, though it is not affected by any specific error, is so manifestly unreasonable that it falls outside the 'area of decisional freedom' conferred by the statutory scheme.

4.7 Failing to deal with or misinterpreting an important claim, issue, submissions or item of evidence. This ground of review may arise if, in the course of making its decision, the decision maker ignores or misconstrues material that

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to be quashed by an order in the nature of *certiorari*: see *Wilson v County Court of Victoria* (2006) 14 VR 461 at 470-473 [36]-[50].

is of such importance to the issues before it that failing to properly consider the material amounts to a constructive failure to exercise jurisdiction.

5. It is also important to understand what a 'jurisdictional fact' is, and to appreciate the distinction between 'subjective' and 'objective' jurisdictional facts. A jurisdictional fact is a 'criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion [or] mandates a particular outcome.'[2] That is, it is a state of affairs the existence of which authorises or requires a decision maker to make a particular decision. Statutory schemes commonly provide that a decision maker may (or must) exercise a power if *the decision maker is satisfied* that a prescribed jurisdictional fact exists. In such a case, the jurisdictional fact is a 'subjective' jurisdictional fact. However, in some cases, a statutory scheme will provide that a power cannot be exercised unless a particular state of affairs *actually* exists. In such a case, the requisite state of affairs is an 'objective' jurisdictional fact. A helpful discussion of the distinction between objective and subjective jurisdictional facts can be found in the judgment of Biscoe J in *Arnold v Minister Administering the Water Management Act 2000 (No 6)*, in which his Honour stated that:

> An objective jurisdictional fact is that X exists or occurred. A subjective jurisdictional fact is that the decision maker has a prescribed mental state, such as being satisfied or holding the opinion that X exists or occurred. In the case of a subjective jurisdictional fact, the court determines on the evidence before it whether the decision maker was satisfied or held the opinion that X exists or occurred. But (as discussed below) even if that is so, if that state of satisfaction or opinion was seriously irrational or illogical the decision will be unlawful. In contrast, in the case of an objective jurisdictional fact the court determines on the evidence before it whether X exists or occurred; therefore, inquiry into irrationality by the administrative decision maker is irrelevant.[3]

6. The cases referred to below demonstrate that the scope of relevant and admissible evidence is much wider where the exercise of a statutory power depends on establishing the existence of an objective jurisdictional fact.

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2 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

3 [2013] NSWLEC 73 at [112] (***Arnold***).

C. ADMISSIBILITY OF EXTRINSIC EVIDENCE

C-1 EXTRINSIC EVIDENCE GENERALLY

7. As stated in the introduction to this paper, '[g]enerally speaking evidence which was not before the primary decision-maker is not admissible in judicial review proceedings'.[4] However, 'the issue falls to be determined by reference to the grounds of judicial review and the particular circumstances of the case.'[5] Thus it has been held that:

   7.1 Extrinsic evidence may be admissible 'where it is contended that the applicant has been denied procedural fairness before the [decision maker], and [the] evidence is required to make good that claim.'[6] For example, in *Jones v Fish* the plaintiff gave evidence that a member of a medical panel convened under Pt 6 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) had examined her in a manner that was rude and belittling, and that gave her no real opportunity to respond to his concerns about the veracity of her medical history. It was held that these matters were sufficient to give rise to a reasonable apprehension of bias.[7] Extrinsic evidence of things said and done by a decision maker *after* it made the decision under review may also be admissible where review is sought on the grounds of apprehended bias.[8]

   7.2 Extrinsic evidence may be admissible 'where it supports a claim that the decision-maker lacked jurisdiction to make the decision because jurisdiction was dependent on an actual state of fact which did not exist'.[9] Thus extrinsic evidence may be admissible where the plaintiff alleges that some objective

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4 *Changshu Longte Grinding Ball Co Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science (No 1)* [2017] FCA 1114 at [6]. See also *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-40; *McCormack v Deputy Commissioner of Taxation* [2001] FCA 1700 at [38]; *Chandra v Webber* [2010] FCA 705 at [40].

5 *Changshu Longte Grinding Ball Co Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science (No 1)* [2017] FCA 1114 at [6]. See also *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-40; *McCormack v Deputy Commissioner of Taxation* [2001] FCA 1700 at [38]; *Chandra v Webber* [2010] FCA 705 at [40].

6 *Percerep v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 483 at 495.

7 [2020] VSC 542 at [28]-[53].

8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 139 [29] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Moodie v Racing Integrity Commissioner* [2017] VSC 693 at [53]-[61].

9 *McCormack v Deputy Commissioner of Taxation* [2001] FCA 1700 at [38].

jurisdictional fact that was required to exist in order for the decision maker to have power to make the impugned decision did not in fact exist. In such a case, the admissibility of evidence that was not before the decision maker reflects the fact that 'in relation to objective jurisdictional facts, there is no limitation to the court's usual forensic ability to determine whether [the jurisdictional fact] existed'.[10]

7.3 Finally, where it is alleged that the decision maker made a finding on a question of subjective jurisdictional fact that was legally irrational – in the sense that it was not 'grounded in probative material, [but] in speculation or guesswork',[11] or was based on assumptions that 'could not be established without other evidence, perhaps [expert] evidence'[12] – the evidence that may be admissible is 'not limited to material that was before the decision-maker.'[13] In some circumstances, extrinsic evidence may also be led to show that an exercise of discretionary power was unreasonable in the '*Wednesbury*' sense.[14]

8. By contrast, extrinsic evidence will almost never be admissible to show that a decision maker failed to take into account a mandatory consideration (or took into account a prohibited consideration) or misconstrued a statutory provision.[15] Those grounds of review are fundamentally concerned with questions of statutory interpretation to which evidence is highly unlikely to be relevant.

C-2 EXPERT EVIDENCE

9. It follows from the principles set out above that while expert evidence may be admissible on an application for judicial review of an administrative decision, 'the

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10 *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681 at [63]. See also *Chandra v Webber* [2010] FCA 705 at [43].

11 *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595 at 626 [111] (Mortimer J).

12 *BFH16 v Minister for Immigration and Border Protection* (2020) 274 FCR 532 at 549 [48] (Murphy and O'Brien JJ).

13 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 224 (Black CJ). See also *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 566 [460].

14 *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 566 [457]-[459].

15 *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-40; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 564-5 [455].

scope for admissible expert evidence in judicial review proceedings is very confined.'[16] Thus Biscoe J stated in *Arnold* that:

> [E]xpert evidence can be tolerated in some circumstances, including at the edge of judicial review, at the high and usually insurmountable barrier of the ground of manifest unreasonableness, if it is relevant to the proposition that, on the material before the decision-maker, the decision was manifestly unreasonable. No violence is done to the general principle that judicial review grounds (other than jurisdictional fact) are determined by reference to the material before the decision-maker if it is acknowledged that expert evidence may be required to show that that material was fallacious and operated to produce an absurd result that no reasonable decision-maker could have reached. The precise limit of the admissibility of expert evidence for this purpose is not a bright line. But expert evidence is likely to be admissible where, for example, the technical nature of the material before the decision-maker requiring review is such that it may not be fully understood by the court without expert evidence. The admissibility of expert evidence for this purpose is a different question to whether, at the end of the day, the court is satisfied that the hard to prove ground of manifest unreasonableness has been established. It is insufficient to establish mere factual error.[17]

10. Similarly, in *Mackenzie v Head, Transport For Victoria*, Richards J accepted that expert evidence may be admissible to 'assist in determining whether the decision under review was legally unreasonable because there was no intelligible foundation for it, or because of a failure to make an obvious inquiry about information that was readily available.'[18] In accordance with these principles, expert evidence is not generally admissible in a judicial review proceeding merely to show that the impugned decision was wrong on its merits, that it was grounded in incorrect factual findings, or that it was based on evidence that the decision maker should not have accepted. Thus in *City of Melbourne v Neppessen*, Niall JA observed that the expert evidence on which the plaintiff relied 'trespasse[d] impermissibly on whether the conclusion reached by the [decision maker] is the correct or preferable one having regard to medical practice. There is no role for evidence on that question because it is not the function of the court to determine the correct medical outcome.'[19] That is, there is 'no role' for expert

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16 *DEXUS Funds Management Ltd v Blacktown City Council* [2011] NSWLEC 156 at [9]. See also *NA & J Investments Pty Ltd v Minister Administering Water Management Act 2000* [2012] NSWLEC 120 at [43].

17 [2013] NSWLEC 73 at [124]. See also *Australian Retailers Association v Reserve Bank of Australia* (2005) 228 ALR 28 at 142 [460]; *Help Save Mt Gilead Inc v Mount Gilead Pty Limited* [2018] NSWLEC 88 at [38]; *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 3)* [2018] NSWLEC 106 at [12-[13].

18 [2020] VSC 328 at [65].

19 [2019] VSC 84 at [88].

evidence that goes only to whether the decision maker reached the correct or preferable decision.[20]

11. In addition, where an expression appears to be used in an Act or statutory instrument in a technical or scientific sense, 'a court may receive expert evidence in determining whether there is any specialised meaning of words or phrases and, if so, what that meaning is.'[21] Thus while expert evidence will not generally be admissible to support a cased based on a 'considerations' or 'error of law' ground, it may be admissible if there is some doubt as to the scientific or technical meaning of a word employed in a statutory scheme.

12. It follows that for expert evidence to be admissible in a proceeding for judicial review of a decision based on findings of subjective jurisdictional fact, it must generally go at least some way to showing either that the impugned decision was based on factual findings that no rational person could have made on the material before the decision maker or that the material on which the decision was based was not capable of being considered rationally probative of the matters decided by the decision maker. Of course, where the decision under review depends on the existence of an objective jurisdictional fact, there may be significant scope for the adduction of expert evidence. In this regard, if a statutory power can only be exercised when a state of affairs objectively exists, expert evidence will *prima facie* be admissible if it is capable of shedding light on the existence (or non-existence) of that state of affairs.

D. PROCEDURAL MATTERS RELATING TO EXTRINSIC EVIDENCE AND EXPERT EVIDENCE

D-1 SEEKING TO TENDER EXPERT EVIDENCE

13. If a party to a judicial review proceeding seeks to tender extrinsic evidence in the form of expert evidence, it must comply with the obligations imposed by Pt 4.6 of the *Civil Procedure Act 2010* (Vic) (**the CPA**). In particular, s 65G(1)(a) of the CPA provides that 'a party must seek direction from the court as soon as practicable if the party …

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20 *Mackenzie v Head, Transport For Victoria* [2020] VSC 328 at [64].

21 *Victorian WorkCover Authority v Elsdon* (2013) 42 VR 434 at 454 [84] (Bongiorno JA and Dixon AJA). See also (2013) 42 VR 434 at 445 [42] (Maxwell P); *Yager v The Queen* (1976) 11 ALR 646 at 648 (Burt J), 652 (Brinsden J).

intends to adduce expert evidence at trial'. Part 4.6 serves the important purpose of enabling the court to give directions 'with a view to enhancing the probative value of [expert evidence] and reducing the scope for disputation as to admissibility and weight of the evidence.'[22]

14. The directions that should be made on an application under s 65G of the CPA will depend on the nature of the case and on the evidence the applicant seeks to adduce. However, 'where … it may very reasonably seem highly unlikely that expert evidence will be relevant to an issue', the preferable view is that the court should refuse to authorise the adduction of expert evidence unless the party seeking to adduce it can 'provide some specificity as to the proposition or propositions that the expert evidence is expected to support, rather than merely give a vague indication of the area in which the expert evidence will be given.'[23] Because expert evidence is not generally admissible in judicial review proceedings, a party seeking directions for the adduction of expert evidence in such a proceeding should be prepared to explain to the court in some detail what evidence it intends to adduce. More importantly, it should be able to identify with precision the issues to which it says the expert evidence is relevant.

D-2 ADVANCE RULINGS ON ADMISSIBILITY OF EVIDENCE

15. On occasion, a party to a judicial review proceeding will file affidavit material containing extrinsic evidence that appears to its opponent to be plainly irrelevant and inadmissible. Often, the evidence will be limited in scope, such that its relevance and admissibility can be dealt with quickly at the commencement of the trial. However, this will not always be the case. If a party seeks to rely on extrinsic evidence that is voluminous or complex, a substantial amount of the trial's duration may be wasted on arguments concerning the admissibility of evidence. Further, a party may consider that

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22 *Fonterra Brands Australia Pty Ltd v Bega Cheese Ltd (No 5)* [2020] VSC 72 at [43].

23 See *Shellharbour City Council v Minister for Planning* (2011) 189 LGERA 348 at 356 [26] (Hodgson JA, Giles and Campbell JJA agreeing). Justice Hodgson's observations were made in the context of the *Uniform Civil Procedure Rules 2005* (NSW), r 39.19(1) of which is relevantly indistinguishable s 65G(1) of the CPA, and have been cited with approval on several occasions (see *DEXUS Funds Management Ltd v Blacktown City Council* [2011] NSWLEC 156 at [23]; *Botany Bay City Council v Minister for Planning and Infrastructure* [2014] NSWLEC 14 at [33]). In the same case, Giles JA stated that '[t]he primary purpose of [r 39.19] is to control the calling of expert evidence, restricting it to that which is reasonably required to resolve the proceedings having regard to the admonition of just, quick and cheap' and that a party is not 'entitled' to a direction authorising it to adduce expert evidence: (2011) 189 LGERA 348 at 357 [33]-[35]. Justice Giles' observations were cited with approval by a unanimous court in *Botany Bay City Council v Minister for Planning and Infrastructure* [2014] NSWCA 141 at [5].

the cautious approach is to file evidence in response to the extrinsic evidence filed by its opponent, even though it considers the opponent's evidence to be irrelevant and inadmissible. In such a case, it may be appropriate for the party that objects to its opponent's affidavit evidence to seek an advance ruling on the admissibility of that evidence under s 192A of the *Evidence Act 2008* (Vic) (**the Evidence Act**).

16. Pursuant to s 192A, a court may give an advance ruling on the admissibility of evidence 'if it considers it appropriate to do so'. Whether a court decides to exercise the power conferred upon it by s 192A will depend on a range of considerations, including whether the question of admissibility can be determined without first hearing other evidence,[24] whether declining to rule on the admissibility of the evidence would leave the opposing party in the position of not knowing what it should do to rebut evidence that would be damaging to its case,[25] whether 'substantial inconvenience, expense and perhaps even unfairness might ensue if there were to be no indication' as to the admissibility of the evidence[26] and whether exercising the power 'may give rise to a risk that the trial judge will be seen as other than impartial.'[27]

17. Properly used, the advance ruling procedure can ensure that a party is not required to respond to irrelevant and inadmissible evidence and can prevent a trial from being delayed unnecessarily. In this regard, the relevant authorities show that s 192A may provide a particularly useful mechanism for determining the admissibility of expert evidence.[28] When made in a timely manner, an application under s 192A of the Evidence Act may obviate the need for a party to judicial review proceedings to spend time and money responding to expert evidence (or other extrinsic evidence) that its opponent should not have attempted to rely on in the first place.

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24 *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2012) 127 ALD 288 at 294 [29].

25 *Sisson v Baiada Poultry Pty Ltd* [2015] NSWSC 1106 at [22].

26 *R v TR* (2004) 180 FLR 424 at 426 [7].

27 *TKWJ v The Queen* (2002) 212 CLR 124 at 138 [43] (Gaudron J).

28 See *Chaina v Presbyterian Church (NSW) Property Trust (No 6)* [2012] NSWSC 1476 at [7]; *Sydney Attractions Group Pty Ltd v Schulman* [2012] NSWSC 951 at [27]-[31]; *Lambert Leasing Inc v QBE Insurance Australia Ltd* [2012] NSWSC 953at [11]-[17].

E. DISCOVERY OF DOCUMENTS

E-1 DISCOVERY GENERALLY

18. As Richards J stated in *Gardiner v Attorney-General*, '[a]lthough the Court has wide powers in relation to discovery, it is rarely ordered in judicial review proceedings.'[29] Rather, a party seeking an order for discovery in a judicial review proceeding must establish that the matter is 'a very special case where the facts justify the making of an order for discovery.'[30] That is, the party must establish that there are 'special circumstances' that justify requiring another party to make discovery of documents.[31] The reasons why discovery is not ordinarily ordered in judicial proceeding are closely related to the reasons why extrinsic evidence is ordinarily not admissible. Thus in *Australian Society for Kangaroos Inc v Secretary, Department of Environment, Land, Water and Planning*, Ginnane J stated that:

> Discovery is often not ordered in judicial review proceedings because the documents evidencing the decision under review are usually before the court including a statement of reasons. But discovery can be ordered if the plaintiff has a good, or at least arguable, case proof of which would be aided by discovery. However, that is subject to any countervailing or discretionary factors, including the nature of the case and the time at which the application is made. It is sometimes said that the same discovery rules that apply in civil cases also apply in judicial review cases. But, in judicial review cases, while any discovery request will be assessed by reference to the issues raised, usually the primary focus will be on the documents that were before

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29 [2020] VSC 224 at [15]. Order 29 of the *Supreme Court (General Civil Procedure Rules) 2015* applies only to a proceeding commenced or continued by writ: r 29.01. Thus a party to a proceeding commenced by originating motion may not serve a notice of discovery on another party in accordance with r 29.02. Rather, any obligation of a party to make discovery in a proceeding commenced by originating motion must arise from an order made by the Court under r 29.07(2).

30 *National Mutual Life Nominees Ltd v Co-operative Farmers & Graziers Direct Meat Supply Ltd* [1976] VR 634 at 637.

31 *Moreland City Council v Minister for Planning* (2014) 203 LGERA 152 at 158 [12].

the decision-maker and which will have been provided to the plaintiff and be before the court.[32]

19. The principles relevant to the making of an order for discovery in judicial review proceedings were discussed at length by Daly AsJ in *Moreland City Council v Minister for Planning*.[33] These principles may be summarised as follows:

19.1 Discovery will not be ordered on a speculative basis, but may be ordered where 'sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery.'[34] In determining whether the party seeking discovery appears to have a 'good case', both the legal merits of the claim for judicial review and the factual basis put forward for the claim must be considered.

19.2 Where a proceeding involves a significant dispute about *relevant* facts, discovery will more readily be ordered. Thus discovery 'may well'[35] be ordered where there is 'little, if any, common ground between the parties as to the primary facts of the case.'[36]

19.3 The 'nature of the case' is a factor to be considered in determining whether to make an order for discovery.[37] In this regard, much as certain grounds of judicial review are more conducive to extrinsic evidence, some grounds are more likely to be assisted by an order for discovery. Thus in a case where the lawfulness of a decision is challenged on the grounds of unreasonableness or irrationality, it may be appropriate to order discovery of the documents said by the decision-maker to provide the rational basis for making the decision,[38] or to order discovery of all of the material that was before the decision maker

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32 [2018] VSC 88 at [21].

33 (2014) 203 LGERA 152 (***Moreland***). The summary of the relevant principles set out in *Moreland* has been cited with approval on numerous occasions: see, for example, *Rich v Ryan* [2018] VSC 201 at [16]; *Russell v Abbey (Ruling No 2)* [2018] VSC 260 at [39]; *Australian Education City v Victorian Planning Authority* [2020] VSC 177 at [114]; *Banyule City Council v Minister for Planning* [2020] VSC 382.

34 *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559 at 567 (Brennan J); *Moreland* (2014) 203 LGERA 152 at 158-9 [13]-[14].

35 *Moreland* (2014) 203 LGERA 152 at 158 [13].

36 *R v Federal Commissioner of Taxation; Ex parte Swiss Aluminium Australia Ltd* (1987) ATR 670 at 671.

37 *Australian Securities Commission v Somerville* (1994) 51 FCR 38 at 50.

38 *Moreland* (2014) 203 LGERA 152 at 159 [15].

when it made its decision.[39] However, 'it is not open to an applicant to make a bare allegation that a decision was made without any basis and then use the process of discovery to find out if the allegation has foundation.'[40] Further, under current Australian administrative law practices, all of the material relevant to a decision will generally have been provided to the affected person long before they commence judicial review proceedings. In the present era, cases in which discovery is required to determine what material a decision was based on are likely to be rare.

19.4 While the provision of reasons by a decision maker will not always obviate the need for discovery, 'the provision of reasons may well narrow the circumstances where discovery will be appropriate'.[41] Thus 'the fact that a decision maker has provided reasons for the relevant decision may influence the court to exercise its discretion against ordering discovery'.[42] The general right of a party affected by an administrative decision to request reasons for that decision[43] means that in Victoria, it will almost never be necessary for a party to seek discovery in order to ascertain the decision maker's reasons for making its decision (although an affected party might seek discovery if it has failed to request a statement of reasons within the 30-day time limit prescribed by s 8(2) of the *Administrative Law Act 1978* (Vic)).

19.5 While a more relaxed approach has been taken in recent times to the making of orders for discovery in judicial review proceedings 'it is still the case that the making of a mere assertion in an originating process, without more, is insufficient to persuade a court to exercise its discretion to order discovery in judicial review matters.'[44]

20. In determining what (if any) documents or classes of document should be the subject of an order for discovery in a judicial review proceeding, the issues in dispute 'must

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39 *Canwest Global Communications Corporation v Australian Broadcasting Authority* (1997) 24 ACSR 405 at 413-4.
40 *Jilani v Wilhelm* (2005) 148 FCR 255 at 273 [111].
41 *Canwest Global Communications Corporation v Australian Broadcasting Authority* (1997) 24 ACSR 405 at 412.
42 *Moreland* (2014) 203 LGERA 152 at 158-9 [13].
43 See *Administrative Law Act 1978* (Vic), s 8.
44 *Moreland* (2014) 203 LGERA 152 at 159 [13].

be identified primarily by reference to the originating motion and to a lesser extent the affidavits filed in the proceeding.'[45] In this regard, the originating motion and any affidavits filed by the plaintiff will identify the relief sought, together with any 'good case' that is likely to be assisted by the provision of discovery and any factual matters that are likely to be in dispute at trial.

E-2 IMMUNITY OF SOME DECISION MAKERS FROM DISCOVERY

21. A number of statutory schemes in Victoria provide that the former s 21A of the *Evidence (Miscellaneous Provisions) Act* 1958 (Vic) (**the EMP Act**) applies to a decision maker when the decision maker is exercising its statutory functions.[46] Section 21A provides, relevantly, that:

> Where, either before or after the commencement of this Act, a board has been appointed or a commission has been issued to persons by the Governor in Council to make an inquiry—
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> (a) the members of the board or the persons to whom the commission has been issued (as the case requires);
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> …
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> shall have and shall be deemed always to have had the same privileges and immunities in respect of any act matter or thing done in or in relation to or arising in or out of the inquiry or any report of the inquiry as they would have or have had if the act matter or thing was done in or in relation to or arose in or out of an action in the Supreme Court of Victoria or a report of any such action.

22. Where s 21A of the EMP Act applies, it operates to 'protect [the decision maker] from compulsory disclosure, by answering interrogatories or producing documents, where such a course would tend to disclose the manner in which a decision has been reached which is not apparent from, or is inconsistent with, published reasons.'[47] Thus in *Moodie v Racing Integrity Commissioner*, Ginnane J held that s 21A prevented the

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45 *Creswick Resources NL v Mining Warden of State of Victoria* [2000] VSC 134 at [37].

46 See, for example, *Racing Act 1958* (Vic), s 37B(1); *Architects Act 1991* (Vic), s 31; *Veterinary Practice Act 1997* (Vic), s 48; *Bus Safety Act 2009* (Vic), s 51(2); *Victorian Commission for Gambling and Liquor Regulation Act 2011* (Vic), s 33(3). While s 21A of the EMP Act has been repealed, it continues to operate insofar as it is incorporated into other Acts: EMP Act, s 164(2). For the purposes of this paper, it is convenient to continue referring to s 21A in the present tense.

47 *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at 740 [183] (Basten JA). See also *Herijanto v Refugee Review Tribunal* (2000) 170 ALR 379 at 382-3 [15]-[16]; *Herijanto v Refugee Review Tribunal (No 2)* (2000) 170 ALR 575 at 577 [10].

Court from making an order for discovery of 'any notes or memoranda written by or compiled by or on behalf of the defendant for the purposes of his investigation'.[48] In this regard, his Honour stated that:

> [T]he authorities establish that a judge, and therefore by analogy in this case the Commissioner, is immune from compulsory disclosure of any aspect of the decision-making process. While compulsory disclosure may be required to identify the record, that identification will usually only be required when certiorari or, an order in the nature of certiorari, is sought for error of law on the face of the record or where a statutory method of judicial review, for instance that available under the *Administrative Law Act 1978*, is provided. The record is normally confined to the initiating document and the decision, in this case that would be the report of the Commissioner.[49]

23. There is arguably some inconsistency between this aspect of Ginnane J's reasoning and the cases in which it has been held that discovery may be ordered to ensure that the court has before it all of the material that was before the decision maker when it made its decision.[50] It may therefore be that *Moodie* expresses an unduly narrow view of what constitutes 'the record' for the purposes of ordering discovery against a decision maker to which s 21A of the EMP Act applies. However, the judgment should be read in light of the classes of document that, in Ginnane J's view, fell and did not fall within the scope of the immunity conferred by s 21A.[51] When his Honour's observations are read in context, they are consistent with the views expressed by Gaudron J in *Herijanto v Refugee Review Tribunal*, in which her Honour stated that:

> There is no difficulty in saying that, in an appropriate case, judges may be compelled to disclose the record on which they have acted. In the context of the judicial process, "the record" bears a clear meaning. The same is not necessarily true in the context of administrative decisions. Thus, it is preferable to identify what is within the immunity, rather than that which is outside it. And in my view, *the immunity is immunity from disclosing any aspect of the decision-making process*. That is what is required to ensure freedom of thought and independence of judgment.[52]

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48 [2017] VSC 174 at [24].

49 [2017] VSC 174 at [22].

50 See paragraph 19.3 above.

51 His Honour held that the class of documents described as 'any notes or memoranda written by or compiled by or on behalf of the defendant for the purposes of his investigation' fell within the scope of the immunity conferred by s 21A of the EMP Act. However, Ginnane J did not consider that s 21A would have prevented the Court from ordering discovery of documents described as 'all tapes and transcripts of any evidence taken by the defendant whether on oath or otherwise' and 'all documents provided to the defendant by any party and without limiting the generality of a foregoing, all minutes of all Racing Victoria Ltd Board meetings including attachments thereto of any Racing Victoria Ltd Integrity Council meetings'.

52 (2000) 170 ALR 379 at 383 [16] (emphasis added).

24. Thus s 21A of the EMP Act operates only to prevent a decision maker from being required to disclose information that would reveal its internal thought processes (such as notes and internal memoranda). It does not prevent a decision maker from being ordered to make discovery of the primary material that was before it when it made its decision.

F. CONCLUSION

25. The authorities discussed in this paper show that while it is not generally appropriate for a party to adduce extrinsic evidence or seek orders for discovery in a judicial review proceedings, extrinsic evidence and discovery are not wholly irrelevant to judicial review proceedings. Deployed appropriately, extrinsic evidence (including expert evidence) may assist a party to establish that it was denied procedural fairness, that the material relied on by the decision maker was not capable of being rationally probative of the decision maker's findings, or that an objective jurisdictional fact did not exist at the time the decision was made. However, before seeking to adduce extrinsic evidence, a party must ensure that it has properly formulated its case and that it has a clear understanding of the relevant statutory scheme. It is only once a party properly understands the grounds on which it seeks judicial review of a decision – and the statutory criteria that governed the making of the decision – that it can make an informed decision about the relevance and admissibility of extrinsic evidence.

26. Where extrinsic evidence is likely to be relevant to a judicial review proceeding, it may be open to a party to seek discovery so that it can obtain additional extrinsic evidence. However, a party cannot seek discovery merely to find out whether it has a case. Rather, the party must enunciate its case with precision and demonstrate why extrinsic evidence in the possession of its opponent is likely to be relevant to the grounds on which it seeks judicial review of the impugned decision. Given the extent to which s 21A of the EMP Act is incorporated into legislation governing administrative decision making in Victoria, discovery will rarely be available against a decision maker. However, if the evidence before the court leaves some doubt as to what material was before the decision maker when it made the impugned decision, discovery may be available to ensure that the court can judge whether the material before the decision maker was rationally capable of supporting the impugned decision.

Where s 21A applies, discovery will never be available to interrogate or ‘go behind’ the decision maker’s formal statement of reasons.