



EDO-NQ FACTSHEET SERIES

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

EPBC Act Factsheet #3: Review of decisions on “controlled actions” and “controlling provisions”

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Environment Protection and Biodiversity Conservation Act 1999 (Cth) (“EPBC Act”)

Review of decisions about “controlled actions” and “controlling provisions”

This factsheet is intended as a plain English guide to a particular area of law. It is not legal advice and is not intended as a comprehensive examination of the legislation. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

1. Introduction

In 1999 the Commonwealth Government passed the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (“EPBC Act”), which came into force on 16 July 2000.

The EPBC Act is the Commonwealth Government’s main piece of environmental legislation, and its object is to:

1. Provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
2. Promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
3. Promote the conservation of biodiversity;
4. Provide for the protection and conservation of heritage;
5. Promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples;
6. Assist in the co-operative implementation of Australia's international environmental responsibilities;
7. Recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity;
8. Promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge¹.

¹ s.3: EPBC Act

Amongst other things, the EPBC Act establishes a requirement and process for certain proposed actions to be referred to the Commonwealth Minister for the Environment, and for some of those proposed actions to be assessed before a decision is made on whether or not they are approved and may proceed. In short, it is the Commonwealth's attempt to regulate what are called "controlled actions".

The EDO-NQ Factsheet "EPBC Act factsheet #1 – Referral and Assessment of Controlled Action: an overview" gives an overview of:

1. The process used for referring "controlled actions" to the Commonwealth Minister for the Environment; and
2. The decisions which the Minister *may* make, and which the Minister *must* make, after decisions are referred for consideration.

2. The EPBC Act Referral and Approval process – a very brief re-cap

When someone proposes to take a "controlled action" then the person must refer the proposed action to the Commonwealth Minister for the Environment.² A State or Territory may refer proposed actions in certain circumstances³, and the Minister may also request that someone refer a proposed action to him/her⁴.

A "controlled action" is any action(s) that has, will have or is likely to have a significant **impact** on:

1. a matter of "National Environmental Significance" ("NES");
2. the environment anywhere if the action is taken on Commonwealth land;
3. the environment on Commonwealth land if the action is taken outside Commonwealth land; or
4. any environment (whether inside or outside Australia) if the action is taken by the Commonwealth⁵.

² s.68: EPBC Act

³ s.69: EPBC Act

⁴ s.70: EPBC Act

⁵ s.67: EPBC Act

When a proposal is referred to the Minister under the EPBC Act, the Minister must:

1. Decide whether or not it is a “controlled action”⁶; and
2. *If the Minister decides that the proposed action is a “controlled action”:*
Decide what level of assessment the proposal needs before a decision is made approving or refusing the proposal⁷; or
3. *If the Minister decides to approve the taking of the “controlled action”:*
Decide what conditions will be in the approval to deal with those matters of “national environmental significance” which are set out in Chapter 2, Part 3 of the EPBC Act⁸.

The Minister may also reject the proposed action without further assessment if, in the Minister’s opinion, it will clearly have unacceptable impacts on a matter of National Environmental Significance (“NES”)⁹.

3. Review of decisions as to whether a proposed action is a “controlled action” and what the “controlling provisions” are

People often want the Minister to review the Minister’s decisions about:

1. whether a particular proposed action is a “controlled action” or not; and
2. if it is a “controlled action”, what the “controlling provisions” are.

For example, conservationists and environmental campaigners may often disagree with decisions by the Minister (or their delegate) that:

1. *a particular proposed action is not a “controlled action” and therefore doesn’t require further approval under the EPBC Act; or*
2. *if a particular proposed action is a “controlled action”, that particular “controlling provisions” do not apply (i.e. the proposed action will not have a significant adverse impact on a particular matter of NES to which a particular “controlling provision” will apply).*

The EPBC Act provides its own circumstances in which there can be a review of a Minister’s decision about whether or not a proposed action is a “controlled action” and, if so, what the “controlling provisions” are. These circumstances are in addition to any rights of judicial review

⁶ Part 7, Chapter 4: EPBC Act

⁷ Part 8, Chapter 4: EPBC Act

⁸ Part 9, Chapter 4: EPBC Act

⁹ ss.74B & 74C: EPBC Act

of those decisions which exist either under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (“ADJR Act”) or at common law.

Notes:

1. *It is unfortunately not possible to simply ask a Court to review the merits of the Minister’s decision outside of these circumstances.*
2. *The judicial review of a decision will not review the merits of the decision, but just to see if the decision-making process was legal.*

a. Review options under the EPBC Act

There are seven (7) different situations in which the Minister may vary or substitute decisions as to whether a proposed action is a “controlled action”¹⁰. We have set those seven (7) situations out below. The Minister can only vary or substitute such a decision if one of those seven situations exists.

Circumstance 1

The Minister is satisfied that the variation is warranted by the availability of *substantial new information about the impacts* that the action has, will have or is likely to have on a matter protected by Part 3 of the EPBC Act (including matters of NES).¹¹

Circumstance 2

The Minister is satisfied that the variation is warranted by a *substantial change in circumstances that was not foreseen at the time of the first decision* and relates to the impacts that the action has, will have or is likely to have on a matter protected by Part 3 of the EPBC Act (including matters of NES)¹².

Circumstance 3

BOTH of the following requirements are met:

1. the Minister decided that the action was not a controlled action because the Minister believed the action would be taken in a certain manner¹³;

AND

2. the Minister is satisfied that the action is not being, or will not be, taken in the manner identified¹⁴.

¹⁰ s.78: EPBC Act

¹¹ s.78(1)(a): EPBC Act

¹² s.78(1)(aa): EPBC Act

¹³ as identified in s.77A(1): EPBC Act

Circumstance 4

BOTH of the following requirements are met:

1. the Minister decided that the action was not a controlled action because of a provision of one of the following:
 - a. a bilateral agreement and a management arrangement; or
 - b. an authorisation process that is a bilaterally accredited management arrangement; or
 - c. a bilaterally accredited authorisation process for the purposes of the bilateral agreement;

AND

2. either (as relevant):
 - a. the provision of the bilateral agreement no longer operates in relation to the action; or
 - b. the management arrangement or authorisation process is no longer in force under, or set out in, a law of a State or a self-governing Territory identified in or under the agreement¹⁵.

Circumstance 5

BOTH of the following requirements are met:

1. the Minister decided that the action was not a controlled action because the Minister declared¹⁶ that the action did not need further approval under the EPBC Act because the action would be taken in accordance with either:
 - a. a management arrangement or an authorisation process that is an accredited management arrangement for the purposes of the declaration; or
 - b. an accredited authorisation process for the purposes of the declaration; AND
2. either:
 - a. the declaration no longer operates in relation to the action; or
 - b. the management arrangement or authorisation process is no longer in operation under, or set out in, a law of the Commonwealth identified in or under the declaration¹⁷.

¹⁴ s.78(1)(b): EPBC Act

¹⁵ s.78(1)(ba): EPBC Act

¹⁶ under s.33: EPBC Act (“Making declarations that actions do not need approval under Part 9”)

¹⁷ s.78(1)(c): EPBC Act

Circumstance 6

BOTH of the following requirements are met:

1. the Minister decided that the action was not a controlled action because the Minister declared¹⁸ because the action would be taken in accordance with a bioregional plan;

AND

2. either:
 - a. the declaration no longer operates in relation to the action; or
 - b. the bioregional plan is no longer in force¹⁹.

Circumstance 7

The Minister is requested by a State or Territory²⁰ to reconsider the decision²¹.

b. Review options under the ADJR Act

The ADJR Act provides limited options for seeking judicial review of certain administrative decisions, including the following decisions:

1. a decision by the Minister that a proposed action is or is not a “controlled action”; or
2. a decision by the Minister about what “controlling provisions” apply to a “controlled action”.

It is important to note that the ADJR Act does not entitle anyone and everyone to seek judicial review by the Federal Court of those decisions. Only a “person aggrieved” by a decision of a Minister or a government department may apply to the Federal Court for a review of the decisions.

Who is a “person aggrieved”?

Both the ADJR Act and the EPBC Act provides definitions of a “person aggrieved”.

¹⁸ under s.37A: *EPBC Act* (“Making declarations that actions do not need approval under Part 9”)

¹⁹ s.78(1)(ca): *EPBC Act*

²⁰ under s.79: *EPBC Act* (“Reconsideration of decision on request by a State or Territory”)

²¹ s.78(1)(d): *EPBC Act*

The ADJR Act provides that a “person aggrieved” by a decision includes:

1. a person whose interests are adversely affected by the decision; and
2. in the case of a decision by way of the making of a report or recommendation – a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.²²

The EPBC Act extends (and does not limit) the definition of “person aggrieved” in the ADJR Act²³. The EPBC Act provides different definitions of a “person aggrieved” for individuals and for organisations, as follows:

- An individual is a “person aggrieved” if:
 - the individual is an Australian citizen or ordinarily resident in Australia or an external Territory;
 - and
 - at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.
- An organisation or association (whether incorporated or not) is a “person aggrieved” if:
 - the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory;
 - and
 - at any time in the 2 years immediately before the decision the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment;
 - and
 - at the time of the decision the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.

²² s.3: ADJR Act

²³ s.487(1): EPBC Act

When can an application for judicial review be made?

As you will see from the circumstances in which judicial review may be sought (which we deal with below), it is always wiser to consider making an application for judicial review once a Statement of Reasons has been provided by the decision-maker, and those reasons have been considered.

We always recommend that, where possible, anyone who is concerned about a particular decision requests a Statement of Reasons for that decision. Only a “person aggrieved” by a particular decision may obtain a statement of reasons for that decision²⁴. A Statement of Reasons is obtained by sending a written request to the relevant Minister or government department or agency²⁵.

Generally speaking, an application for judicial review must be made within 28 days after the date upon which a written copy of the relevant Statement of Reasons is provided to the person who requested it²⁶.

On what grounds can an application be made for judicial review?

Under the ADJR Act, an application for judicial review may be sought on any of the following grounds²⁷:

1. a breach of natural justice occurred in making the decision; or
2. procedures required by law to be observed in the making of the decision were not followed; or
3. the person who purported to make the decision did not have power to make the decision; or
4. the decision was not authorised by the enactment (legislation or regulation) under which it was purported to be made under; or
5. the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made under; or
6. the decision involved an error of law; or
7. the decision was induced or affected by fraud; or
8. there was no evidence or other material to justify the decision; or
9. the decision was otherwise contrary to law.

²⁴ ss.5, 11 & 13: ADJR Act

²⁵ see s.13: ADJR Act

²⁶ s.11: ADJR Act

²⁷ s.5(1): ADJR Act

c. Review for “*Wednesbury unreasonableness*”

In addition to the rights of review under the EPBC Act and the ADJR Act, someone can seek judicial review of a decision in circumstances where a decision of a governing authority is so unreasonable that no reasonable authority could have ever come to it. This is generally known as “*Wednesbury unreasonableness*”, having arisen out of the 1948 English case of *Associated Provisional Picture Houses Ltd v Wednesbury Corporation*²⁸.

4. Further information

If you have any further questions or concerns about any of these matters, then please contact us on the details below. While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office.

5. Useful Contacts

EDO-NQ

Suite 1, Level 1
96-98 Lake Street
CAIRNS QLD 4870
Ph : 07 4031 4766; Fax: 07 4041 4535
Email: edong@edo.org.au

EDO (Qld)

30 Hardgrave Road,
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To become a member of the Environmental Defenders’ Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edong@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edong

²⁸ [1948] 1 KB 223