



# **EDO-NQ FACTSHEET SERIES**

## ***ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)***

### ***EPBC Act Factsheet #4: Merits review of decisions by the Commonwealth Administrative Appeals Tribunal***

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

## ***Merits review of decisions by the Commonwealth Administrative Appeals Tribunal***

*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. What is merits review?**

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Merits review considers whether a particular decision made by Government was correct on its merits – the facts, law and policy context of the original decision are all reconsidered. This process will result in a new decision being made which will affirm, vary or set aside the original decision. Merits review is usually provided by the same legislation that allows the Government to make the original decision. If merits review of a decision is available, the legislation which provides the original decision making power will usually say so.

Merits review is often praised for its capability to hold government accountable and improve the standard of government decision making. This accountability is achieved by merits review usually being conducted by an independent court or tribunal. The tribunal for merits review of Commonwealth Government decisions is the Administrative Appeals Tribunal (“AAT”).

### **2. What is the Administrative Appeals Tribunal?**

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The AAT is the main tribunal which conducts merits review decisions of Commonwealth Government decisions (where merits review is available). The majority of the AAT’s work is conducted in the areas of social security, taxation, veterans’ affairs and workers compensation. However, the AAT also has some limited scope for reviewing decisions made under the *Environment Protection and Biodiversity Conservation Act 1999* (“EPBC Act”).

### **3. What decisions under the EPBC Act can be reviewed by the AAT?**

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The EPBC Act is the central component of the Commonwealth environmental law regime.

However, only a limited number of decisions made under the EPBC Act are reviewable on their merits (merits review):

1. Decisions regarding wildlife permits (permits relating to listed threatened species and ecological communities, migratory species, whales or cetaceans and listed marine species):
  - a. to issue or refuse to issue a permit;
  - b. to specify, vary or revoke a condition of a permit;
  - c. to impose a further condition on a permit;
  - d. to transfer, or refuse to transfer a permit; or
  - e. to suspend or cancel a permit.<sup>1</sup>
  
2. Decisions relating to international movement of wildlife:
  - a. to issue or refuse to issue a certificate stating that the wildlife is not one to which the Convention on International Trade in Endangered Species (CITES) applies
  - b. decisions about permits concerning the international movement of wildlife specimens; and
  - c. decisions about permits concerning wildlife trade operations.<sup>2</sup>
  
3. Decisions to give advice on whether a proposed action will contravene conservation order.<sup>3</sup>

The AAT only has the power to review the decisions which it is specifically granted jurisdiction over in the EPBC Act.<sup>4</sup> Therefore, a merits review by the AAT is not available for any decision made under the EPBC Act other than those described above. Unfortunately, this means that the AAT cannot review the merits of decisions about whether a development needs to be assessed under the EPBC Act or whether a development should be approved. People who disagree with these decisions do not have the right to have their merits reviewed by the AAT.

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<sup>1</sup> ss.206A, 221A, 234A and 263A: *EPBC Act*

<sup>2</sup> s.303GJ: *EPBC Act*

<sup>3</sup> s.473: *EPBC Act*

<sup>4</sup> s.25(1): *AAT Act*

#### 4. Who can seek merits review in the AAT?

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The *Administrative Appeals Tribunal Act 1975* (“AAT Act”) gives rights to both individuals and organisations to seek merits reviews of Commonwealth Government decisions.

Any person whose interests are affected by a decision can apply to the AAT for review of the decision, as long as the decision is one which the AAT is entitled to review on its merits.<sup>5</sup>

The rights of an organisation to seek merits review are broad. An organisation is taken to have its interests affected if the decision relates to a matter that is in the objects or purposes of the organisation, as long as these objects existed at the time the decision was made.<sup>6</sup>

In contrast, the AAT Act does not define the circumstances when an individual person’s interests are affected by a decision. However, a government decision-maker must take reasonable steps to give any person whose interests are affected by their decision a notice of the decision.<sup>7</sup> Therefore, it is safe to say that if you receive a notice of decision from the Commonwealth Government, you may have standing to seek merits review of that decision (if it is one which the AAT is able to review on its merits).

#### 5. How do I make an application?

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You can make an application for review of a decision by writing to the AAT.<sup>8</sup> This application may either be in the form of a letter, or you may also use the application form available from the AAT’s website: <http://www.aat.gov.au/docs/form1.pdf>. However, the application must be delivered to the AAT by post and cannot be sent by fax or email. In Queensland, the address to write to is:

Administrative Appeals Tribunal  
GPO Box 9955  
Brisbane QLD 4001

We recommend using the designated application form to ensure your application contains all the required information. However, whichever way you make your application; it must contain the following information:

1. your name, address and telephone number;
2. the name of the Government Department or Tribunal that made the decision you are appealing;
3. the date of the decision;

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<sup>5</sup> s.27(1): *AAT Act*

<sup>6</sup> ss.27(2) and 27(3): *AAT Act*

<sup>7</sup> s.27A(1): *AAT Act*

<sup>8</sup> s.29(1): *AAT Act*

4. a copy of the decision – usually the letter sent to you by the Government advising of the decision; and
5. your reasons for appealing the decision.

The application must be made within the time limit for appealing the decision. You must do so within 28 days of receiving notice of the decision from the Government or tribunal that made the decision.<sup>9</sup>

The application must also be accompanied by the application fee, unless a waiver of this fee has been granted. It is important to note that the application will be received only when this fee is paid, and the time limit for making the application will not be suspended if you are not able to pay the fee.<sup>10</sup> Therefore, it is very important to consider the costs of making the application as soon as you receive the original decision notice and are thinking of appealing.

## **6. How much does an application cost?**

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A person who wishes to make an application to the AAT will usually need to pay an application fee of \$682.00. However, the fee may be waived if the person falls into one of the following groups:

1. a person receiving legal aid for the application;
2. a person who holds a health care card, a pensioner concession card, a Commonwealth seniors health card or any other card that certifies entitlement to Commonwealth concessions;
3. a person in prison or lawfully detained in a public institution;
4. a person under 18 years of age; or
5. a person receiving youth allowance, austudy or ABSTUDY.<sup>11</sup>

If you fall into one of these groups, you should advise the AAT as soon as possible. The AAT will require particular proof of this, and to find out exactly what proof you need to provide, you should contact the AAT directly and as soon as possible after receiving notice of the decision. The contact details of the AAT's Queensland office are:

Phone (metropolitan areas): (07) 3361 3000  
Phone (country areas): 1300 366 700  
Fax: (07) 3361 3001  
Email: [Brisbane.Registry@aat.gov.au](mailto:Brisbane.Registry@aat.gov.au)

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<sup>9</sup> s.29(2): AAT Act

<sup>10</sup> s.29A(1): AAT Act

<sup>11</sup> r.19AA(6)(b): *Administrative Appeals Tribunal Regulations 1976* ("AAT Regulations")

The AAT may also waive fees on the grounds of financial hardship. Financial hardship means that payment of the application fee will cause you financial hardship when the entirety of your financial circumstances are taken into account.

To assess whether you suffer from financial hardship, the AAT Registrar will consider:

1. your income;
2. whether payment of the application fee will affect your ability to pay essential daily living expenses (food, rent, medical, insurance, education etc);
3. your assets; and
4. your debts and liabilities.<sup>12</sup>

There is no set formula for determining whether a person will be caused financial hardship, but a good rule of thumb is that taking into account all debts and liabilities, the person will be caused financial hardship by paying the \$682.00 application fee if they will not be able to meet necessary living expenses as a result. If you believe this to be the case, you should submit an application for waiver of the fee based on grounds of financial hardship as soon as possible, preferably before you make the actual application for merits review.

To make an application for waiver of the application fee on grounds of financial hardship you need to apply in writing, by either a letter containing the relevant financial details or by filling out the AAT's "Application by an Individual for Fee Waiver" form, available from the AAT's website at <http://www.aat.gov.au/docs/fee.pdf>. We recommend you use the form, since it will ensure you do not leave out any required information.

There are also certain types of decisions you can seek review of without paying an application fee. However, there are no decisions made under the EPBC Act that fall into this category.

## **7. Will I need to pay legal costs?**

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A person may be represented by a lawyer in the AAT, though does not have to be.<sup>13</sup> Therefore, whether you pay legal costs depends on whether you want legal representation and, if so, the fees you negotiate with your lawyer. Whether you hire a lawyer to represent you should be your decision and will depend on your individual circumstances. The AAT does provide assistance to applicants without legal representation. However, this assistance is limited to explaining the AAT's procedures and will not extend to legal advice about the merits of your appeal.

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<sup>12</sup> r.19(6)(c): *AAT Regulations*

<sup>13</sup> s.32: *AAT Act*

In addition, in most situations the AAT cannot order one party to pay the other party's legal costs. This power is only available in relation to appeals concerning some rehabilitation and compensation decisions, and is not present in regards to appeals of decisions made under the EPBC Act. Therefore, for any current merits reviews under the EPBC Act you should not be liable to pay the legal costs of any other party.

## **8. What if I don't submit the application on time?**

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It is very important that you get an application for merits review in before the time limit as the AAT will not accept late applications, unless an extension to the time limit has been granted.<sup>14</sup> However, this is at the AAT's discretion and is not guaranteed. Therefore, if you wish to seek merits review, we recommend starting the application process as soon as possible after receiving notice of the decision.

Furthermore, if you do think you may have grounds for waiver of the application fee, you should make the application for this waiver before you submit your actual application for merits review. Making an application for waiver of the application fee will take at least three days to process, and will not count as payment of the application fee. Making a fee waiver application will also not extend the 28 day time limit for submitting the main application for merits review. Your application for merits review will only be accepted once you have paid the application fee or a waiver has been granted.<sup>15</sup>

However, the AAT does have power to extend the timeframe for making an application for merits review of a decision. To apply for an extension, you will need to lodge the "Form 2" with the AAT. Form 2 can be downloaded from the AAT's website at the following address: <http://www.aat.gov.au/docs/form2.pdf>. This form can be lodged either before the time limit runs out, or after it expires.<sup>16</sup> An extension of the time limit for making an application may be granted if the AAT believes the circumstances warrant it.<sup>17</sup>

## **9. How is a merits review decided?**

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There is a standard process which is followed by the AAT to conduct merits reviews of decisions. The general steps in that standard process are:

1. Receipt of application
2. Preliminary hearing
3. Receipt of "T documents"
4. Assistance to self-represented applicants

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<sup>14</sup> s.29(1)(d):AAT Act

<sup>15</sup> s.29A:AAT Act

<sup>16</sup> s.29(8):AAT Act

<sup>17</sup> s.29(7):AAT Act

5. Conference between parties
6. Mediation
7. Hearing
8. Decision

Each step involves the applicant (the person who lodged the appeal), the government decision-maker which made the decision being appealed, and the AAT. Following below is a brief explanation of these steps. More information on this process is available on the AAT's website, at:

<http://www.aat.gov.au/ApplyingToTheAAT/ApplicationProcess.htm>.

#### 1. Receipt of application

Upon receipt of the application, the AAT will notify both the applicant and the government decision maker who made the decision being appealed that the application has been received.

#### 2. Preliminary hearing

A preliminary hearing may be held when there are issues that must be resolved before an application can proceed further. A common reason for a preliminary hearing is that the AAT needs to determine if it has the proper jurisdiction to determine the appeal. A preliminary hearing is also held if the applicant seeks a stay order to suspend the implementation of the decision they are appealing.

#### 3. Receipt of "T documents"

Once they have been notified an appeal against the decision has been made to the AAT, the government decision-maker must provide the AAT with the following "T documents", being:

1. a statement of reasons for the decision; and
2. all documents considered relevant to the review of the decisions.

Copies of these documents must also be sent to the applicant. This will usually occur around a month after the application for appeal was first lodged.

#### 4. Assistance to self-represented applicants

If the applicant does not have legal representation, the AAT will contact them to explain the AAT procedures at the time they receive the T documents from the government decision-maker.

## 5. Conference between parties

About two months after the application was lodged, the AAT will hold a conference between the applicant and the government decision-maker. The aim of a conference is to explore and define the issues in dispute. A conference may also explore the possibility of whether a new decision can be negotiated. However, because conferences only last an hour, this is unlikely. A conference will also decide if the matter should proceed to a further conference, mediation, or directly to a hearing.

Attendance at conferences is required, and the parties are allowed to have legal representation present or other support people.

## 6. Mediation

If both parties agree, mediation can be attempted to resolve the dispute before a hearing is conducted.<sup>18</sup> The mediation process follows a standard model of mediation – a mediator from the AAT is present to help guide the parties, but emphasis is placed on each party talking to the other. The focus should ideally be on reaching a decision both parties can accept. Mediations will usually last a minimum of three hours, and therefore offer much more scope for exploring the issues and hopefully resolving them than a conference.

The AAT reports that 80% of appeals brought before the Tribunal are settled before the hearing stage. If the dispute is resolved through mediation, the Tribunal may make a binding decision in accordance with the agreement. However, in the event that mediation does not resolve the issue, the parties are able to proceed to a hearing without any further delay.

## 7. Hearing

A hearing will be held if neither conferences nor any mediation resolve the dispute, and the applicant still wishes to go through with their appeal. The hearing will begin about 10 weeks after the last conference. At the hearing, each party will present arguments about whether they believe the decision was correct or incorrect, and evidence to support their arguments.

The tribunal is not bound by the usual legal rules of procedure, and can inform itself as it sees fit.<sup>19</sup> However, the exception to this is that statements made in any mediation conducted by the AAT cannot be used as evidence at the hearing.<sup>20</sup>

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<sup>18</sup> s.34A(1): AAT Act

<sup>19</sup> s.33: AAT Act.

<sup>20</sup> s.34E: AAT Act

## 8. Decision

After a hearing, the AAT will take some time to consider the issues and make its decision.

This decision can be one of three:<sup>21</sup>

1. Affirm the original decision.

*The AAT will do this where it agrees with the original decision.*

2. Vary the original decision.

*The AAT will likely use this option where it disagrees with some part of the original decision and can simply vary the original decision to make it one which it does agree with. For example, the AAT might simply disagree with one or more conditions of the original decision, and vary the original decision to one it does agree with by removing those conditions and/or substituting new conditions.*

3. Set the original decision aside and either:

- a. Substitute its own decision for that original decision; or
- b. Send the matter back to the original decision-maker for reconsideration (which will have to be done in accordance with any directions or recommendations made by the AAT).

*The AAT will use these options where it disagrees with the whole decision (e.g. it disagrees that a permit should have been issued at all), or a large part of it. The AAT may send the matter back to the original decision-maker where the decision-making process involves some particular skill or expertise which the AAT feels it does not have itself, but in that circumstance the AAT may give particular directions or make particular recommendations about how the original decision-maker is to reconsider the matter.*

## 10. How long does the process take?

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The length of the process will depend on the complexity of the case. However, for appeals that go through the full process and result in a hearing, a timeframe of at least eight months to a year can be expected. Especially complex cases will likely result in longer appeals. **In particular, environmental appeals may involve consideration of complex expert evidence, and this has been known to extend the timeframe for resolution of the appeal considerably. The best indication of how much time your case will involve will be gained by asking a lawyer for their independent opinion of the case.**

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<sup>21</sup> s.43(1):AAT Act

## 11. Further information

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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.**

## 12. Useful Contacts

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### 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](mailto:edong@edo.org.au)

### EDO (Qld)

30 Hardgrave Road,  
WEST END QLD 4101  
Ph: 07 3211-4466; Fax: 07 3211-4655  
Email: [edoqld@edo.org.au](mailto:edoqld@edo.org.au)

***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](mailto:edong@edo.org.au) or on 07 4031 4766. Our web address is [www.edo.org.au/edong](http://www.edo.org.au/edong)***