



## Judicial Review and Merits Review in the NT

*This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice please visit our [website](#).*

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*This factsheet was last updated on 24 November 2021*

Decisions made by a Government Minister, Government Department, or a statutory authority are called administrative decisions. Some administrative decisions can be challenged in a court or tribunal.

For example, decisions to grant or refuse to grant an approval for an action that may affect the environment may be open to a legal challenge. Other decisions, such as decisions to fund projects or works that may affect the environment, are political decisions and cannot usually be reviewed.

There are two types of legal challenge that may apply to administrative decisions affecting the environment. These are:

- Merits review
- Judicial review

If you believe that an administrative decision has been made wrongly, it is important that you seek legal advice quickly because you could lose your right to challenge the decision if you do not bring legal proceedings within a certain time period, known as the “limitation period”.

The time period to seek merits review depends on the type of decision being challenged and what the relevant legislation says. Judicial review proceedings must be brought within 60 days of the decision.<sup>1</sup>

### What is merits review?

Merits review is a type of review that considers all the evidence about a decision and determines what the preferable decision is. It is sometimes called a “*de novo*” appeal. This means that the person or body reviewing the decision, puts itself in the shoes of the original decision-maker and considers all the evidence afresh.

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<sup>1</sup> [Supreme Court Rules 1987 \(NT\)](#), r 56.02.

In the Northern Territory, the Northern Territory Civil and Administrative Tribunal (**NTCAT**) deals with merits review for most environmental disputes. NTCAT only has the power to review a decision if there is legislation that authorises it to do so. There are also some merits review processes available under other Acts – for example, certain decisions under the *Water Act 1992* (NT) such as decisions to grant water licences may be the subject of merits review by the Minister for the Environment.<sup>2</sup>

Visit: [NTCAT website](#) for more information about the Tribunal

Visit: [NTCAT's NTCAT Jurisdiction List](#) page to view the list of authorising laws

An example of an authorising law which gives a person the right to apply for a merits review in the NTCAT is the [Heritage Act 2011](#). This Act gives a person who has nominated a heritage place for protection the right to appeal to the NTCAT if the Heritage Council decides that a place does not have heritage significance.

For detailed information about NTCAT's role in reviewing environmental matters, please see our NTCAT Toolkit, [here](#).

Not every environmental decision can be challenged on its merits. For example, the main piece of Commonwealth environment legislation, the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) has no merits review rights.

### What is judicial review?

When government decisions are made, the decision-maker must follow the correct legal process. If the legal process is not followed, the decision may be open to legal challenge. The law requires that before making a decision, the decision-maker 'must have taken into account all relevant information, excluded irrelevant matters, and reached a conclusion that, on the weight of the evidence, is reasonable in the circumstances'<sup>3</sup>.

Judicial review is a type of proceeding where the Court looks at the lawfulness of the decision-making process. If the Court finds that a decision is unlawful, usually that decision will be set aside or cancelled and the decision-maker can be required to re-make the decision according to the law.

For more detailed information about judicial review in environmental matters, including how to prepare a judicial review application, please see our Judicial Review Toolkit, [here](#).

Some of the common types of faults in decision-making which could lead to the court invalidating a decision are:

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<sup>2</sup> See [Water Act 1992 \(NT\)](#), s 30.

<sup>3</sup> Bates, G., *Environmental Law in Australia* (7th ed, 2010) para 18.11.

- an error of law – for example if the decision-maker has wrongly applied the law or misunderstood the law
- the decision-maker acting with an improper purpose that is beyond the responsibilities of the decision-maker
- bad faith – the decision was affected by dishonesty, corruption or bribery
- failure to provide a fair hearing – a failure to give someone a reasonable opportunity to be heard if the law requires it
- that the decision was not free of bias or the appearance of bias.

N.B. There are many other grounds for judicial review and so the list above is not an exhaustive one.

### **Which Court do I go to for judicial review proceedings?**

In the Northern Territory, judicial review of decision made under a Northern Territory law is brought in the Northern Territory Supreme Court.

If judicial review is sought of a decision made under a Commonwealth law, the case will be brought in the Federal Court or the High Court of Australia.

Visit: [High Court of Australia website](#) for more information about the Court.

Visit: [Federal Court website](#) for more information about the Court.

### **What can the Court order?**

If a court finds that the decision has been wrongly made, it has certain powers to remedy the wrongfully made decision. Common remedies which are made in environmental matters are:

- certiorari – an order of the court to set aside the decision.
- mandamus – an order of the court to force a tribunal, public body or official to perform the action that it has failed to perform. In the case of a decision, it means that the decision-maker must remake the decision applying the law correctly.
- declaration – an order of the court which declares the legal position on a particular issue. For example, that the decision was legally wrong.
- injunction – an order which prevents someone from doing something or requires certain action.

### **Who can apply for judicial or merits review?**

Standing is the legal right to ask a court or tribunal to hear a case. The purpose of standing is to make sure that only people who have a real interest in a matter are allowed access to a court or tribunal.

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Sometimes legislation will say who is allowed to bring a court case. If the legislation doesn't say who can bring the case, "common law" tests for rights of standing will apply. Common law, or judge-made law, is law that has been developed from judgments handed down in courts, and is often used where there is no act of Parliament which deals with a particular issue.

In general, if a person does not have standing under legislation, a person or group wishing to enforce environmental laws will usually have to prove that it has a "special interest" in the matter over and above other members of the public. This may mean having to prove a special relationship with a particular environment, or show that property or economic interests are affected, or show spiritual or cultural ties to land. As the legal tests for demonstrating a "special interest" can sometimes be hard to meet, not all individuals or groups can bring legal actions.

### Costs

Going to court can be expensive. For example, under the [Northern Territory Civil and Administrative Tribunal Act 2014 \(NT\)](#), each party is expected to pay their own legal costs, whether or not they win.<sup>4</sup> In most judicial and merits review cases, you will need to pay for a lawyer to present your case. Other costs which you can expect to pay are filing fees, and the costs of any expert witnesses who will give evidence to support your case.

Additionally, if you are unsuccessful, there may be the risk that you may have to pay the legal costs of the other party.<sup>5</sup>

It may be helpful to consider [alternatives to legal action](#). If you choose to take legal action, fundraising is often an important part of preparing to bring an environmental law case. Alternatively, you may be able to find a lawyer to take on your case for a reduced fee or for free, known as "pro bono".

### Where can I get more information?

If you need help with a legal case but cannot afford to pay for a lawyer, you may be able to get help from:

- The Law Society Northern Territory [First Interview Scheme](#)
- [Northern Territory Legal Aid Commission](#)
- A local [Community Legal Centre](#)

If you have an environmental law dispute, contact the [Environmental Defenders Office](#) for free legal advice on public interest environmental law issues.

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<sup>4</sup> [Northern Territory Civil and Administrative Tribunal Act 2014 \(NT\)](#) s 131 (**NTCAT Act**).

<sup>5</sup> For example see: NTCAT Act, s 132.