



Judicial Review of decisions made under the *Environmental Protection Act 1986 (WA)*

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What is this fact sheet about?

This fact sheet provides information on judicial review in WA, specifically with regards to decisions made under the *Environmental Protection Act 1986 (WA)* (**EP Act**).

Outline

1. [Key takeaways](#)
2. [What is the difference between ‘merits review’ and ‘judicial review’?](#)
 - a. [Merits review](#)
 - b. [Judicial review](#)
3. [What is judicial review?](#)
 - a. [Grounds of review](#)
 - b. [Who can apply for judicial review?](#)
 - c. [Timing of applications](#)
4. [What can the Court do in judicial review proceedings?](#)
5. [What costs are associated with judicial review proceedings?](#)
6. [Decision documents](#)
7. [Where can I get more information?](#)
8. [Evaluate this resource](#)

It is important that you seek legal advice promptly if you believe that a decision-maker has made an incorrect administrative decision. Applications for judicial review must be made within six months of the decision or knowledge of the decision.

NB: This fact sheet relates to judicial review of decisions made under WA's EP Act. For decisions made by the Federal Minister for the Environment under the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\) \(EPBC Act\)](#), see EDO's fact sheet [here](#).

Key takeaways

- An applicant can make an application for judicial review to the Supreme Court where:
 - the decision-maker has made a legal error; and
 - the applicant has 'standing' to bring the application, being a special interest in the matter that is over and above other members of the public (unless the remedy sought is certiorari, discussed below).
- An application for judicial review should be brought as soon as possible and must be made within six months from:
 - the date of the decision; or
 - the date on which the applicant became aware of the decision.
- As soon as a potential applicant becomes aware of a decision, they should seek a statement of reasons for the decision (if reasons are not provided).
- In judicial review proceedings, the Supreme Court considers whether the decision-maker has made an unlawful decision. A decision may be unlawful if the decision-maker:
 - failed to consider a matter they were required to take into account;
 - considered a matter they were required to not consider;
 - did not afford procedural fairness to a person who was entitled to it; or
 - made a legally unreasonable decision or a decision they did not have the power to make.
- If the Supreme Court finds the decision was unlawful, they can set aside the decision, or require the decision-maker to remake the decision lawfully.
- As with most legal proceedings, there are risks of you being required to pay the other side's costs if you are not successful. You should obtain legal advice on the prospects of success of your application before commencing judicial review proceedings.

What is the difference between 'merits review' and 'judicial review'?

Decisions made by a government minister, government department, or statutory authority are called administrative decisions.

Some administrative decisions can be challenged in a court or tribunal. For example, a decision to grant or refuse to grant an approval – such as a works approval, licence or Ministerial Statement (the primary statutory approval for a proposal in WA) – for an action that may affect the environment may be open to a legal challenge.

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

- judicial review; and
- merits review.

Merits review

Merits review is a challenge to a decision on the basis of its merit (i.e. whether it was the correct and preferable decision). It involves the review body re-exercising the decision-making power exercised by the original decision maker to determine the correct and preferable decision on the merits of the case.

Most relevantly for environmental decisions in Western Australia, Part VII of the EP Act provides a right for anyone to apply for merits review of three kinds of decisions made under the EP Act, being:

- the content of or recommendations in a report by the EPA in relation to a proposal;
- the conditions on a licence or works approval granted or amended; and
- the grant of or application of conditions to a clearing permit.

Merits review of these decisions is in the form of an appeal to the Minister for Environment. The Office of the Appeals Convenor will usually investigate these appeals and provide a report with recommendations to the Minister, who will decide whether to uphold or dismiss the appeal. Merits review is not available for the Minister's decision on the appeal.

Read: EDO's [fact sheet](#) for more information on public merits review under the EP Act.

Judicial review

The Court does not consider the merits of the decision in judicial review proceedings. Judicial review is only concerned with whether the decision was lawful, such as whether the decision maker had power, followed the proper process, and exercised their power in accordance with the law (i.e. whether the correct procedures were undertaken). In judicial review proceedings the court may set aside the decision, make a declaration, or make other orders, but does not re-make the decision itself.

Judicial review provides an opportunity for applicants to seek review of decisions made under the EP Act for which merits review is not available, and in cases where a decision has been made unlawfully.

An applicant may be able to seek judicial review of decisions including:

- the EPA publishing a report containing recommendations to the Minister for Environment that a proposal should be implemented, including in relation to the EPA's assessment of environmental impacts, or proposed conditions for approval;¹
- the Minister for Environment's decision on appeals made under the EP Act;²
- the Minister for Environment's decision that a proposal may be implemented, and the conditions imposed on such an approval;³ or
- the EPA's decision that a proposal was a "derived proposal" under the EP Act.⁴

What is judicial review?

When government decisions are made, the decision-maker must follow the correct legal process in the legislation applicable to their decision. 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 is reasonable in the circumstances".⁵

Grounds of review

In a judicial review proceeding, the Court will look at the lawfulness of the decision-making process.

Some examples of when a decision may be unlawful are where the decision-maker:

- misunderstood or misapplied the law;
- did not take into account mandatory relevant considerations;
- took into account prohibited irrelevant matters or information;
- made the decision for a legally improper purpose, or in bad faith;
- made a decision that was inherently legally unreasonable (a particular test of whether the decision lacked any rational basis or was a decision that no reasonable decision-maker could have made);
- did not ensure the requirements of procedural fairness and a fair hearing were met in respect of particular persons who were entitled to procedural fairness for the decision;

¹ See for example *Save Beelihar Wetlands (Inc) v Jacob* [2015] WASC 482, in which the applicant sought judicial review of the EPA's recommendation to the Minister for Environment, and the Minister's approval decision, based on grounds of error of law, failure to take into account a mandatory relevant consideration, failure to provide adequate reasons, and reliance on an invalid report; see also *Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307, in which similar decisions were challenged on the basis of conflicts of interest in the decision making process.

² See for example *Conservation Council of Western Australia (Inc) v The Hon Stephen Dawson MLC* [2018] WASC 34.

³ Ibid.

⁴ See for example *Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307.

⁵ Bates, G., *Environmental Law in Australia* (7th ed, 2010), para 18.11.

- was not free of bias or the appearance of bias; or
- did not have the power or authority to make the decision.

Who can apply for judicial review?

A party must be able to demonstrate they have ‘standing’ to commence a legal proceeding. In general, to have standing a party must have a special interest in the matter that is over and above other members of the public, and beyond a mere emotional or intellectual concern.⁶

In proceedings involving environmental organisations, in deciding whether a party has a sufficient interest in a matter, a court may consider factors such as:

- the size of the organisation and the extent to which its activities relate to the area in question;
- the extent to which the organisation has received Commonwealth or State Government recognition (e.g. through financial grants); and
- whether the organisation has received Commonwealth funding to conduct or co-ordinate conferences and projects relating to matters of environmental concern.⁷

For applications which only seek to set aside or quash the original decision, there is no requirement to establish standing and any person may apply.⁸

Timing of applications

An application for judicial review must be made as soon as possible, and within the later of six months from:

- the date on which the decision is made; or
- the date on which the applicant became aware of the decision.⁹

If an application for judicial review is not brought within this timeframe, the Court may refuse to allow the application to proceed.

However, even where a judicial review application is made within the required timeframe, a Court can refuse to find in favour of an applicant where there has been an unreasonable delay in the applicant commencing the proceedings.¹⁰

What can the Court do in judicial review proceedings?

⁶ See *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493.

⁷ See for example *North Coast Environment Council Inc v Minister of Resources* [1994] FCA 1556; (1994) 36 ALD 533 (1994) 55 FCR 492, [84] and *Environment East Gippsland Inc v VicForests* [2010] VSC 335, [80].

⁸ See *Coast Ward Ratepayers Association (Inc) v Town of Cambridge* [2016] WASC 239 [73].

⁹ [Rules of the Supreme Court 1971 \(WA\)](#), order 56, r 1.

¹⁰ See for example *General Nominees Pty Ltd (ATF Family Trust Four) v The Metro Inner-North Joint Development Assessment Panel* [2022] WASC 114, where the Court found that even if a legal error had occurred it would have declined to overturn the relevant decision on discretionary grounds, due to what it considered to be an unreasonable delay in the applicant commencing the proceedings.

In Western Australia, judicial review of decision made under a WA law is brought in the [Supreme Court of Western Australia](#).

If the Court finds that the decision has been wrongly made, it has certain powers to remedy the wrongfully made decision.

In environmental matters, common remedies sought include:

- an order to set aside or quash the decision (certiorari);
- an order compelling the decision-maker to perform an action they have failed to do, such as an order to remake the decision applying the correct law (mandamus);
- an order forbidding a decision-maker from commencing or continuing to perform an unlawful act (prohibition);
- a declaration of the legal position in relation to a particular issue, for example that the decision was legally incorrect; and/or
- an injunction to prevent someone from doing something or require certain action.

The Court has discretion about whether to grant some remedies, for example if it finds that a more convenient and satisfactory remedy exists, no useful result could ensue, or there was an unreasonable delay in bringing the application.¹¹

What costs associated with judicial review proceedings?

Costs are an important consideration when determining whether to take legal action.

In addition to the costs of bringing proceedings (including costs of lawyers and the Court's filing fees), an unsuccessful party will usually be ordered to pay some of the successful party's legal costs at the end of a case.¹² While it is possible to ask the Court to make an order that an unsuccessful party not have to pay the other party's costs, such orders are generally only made in exceptional circumstances.¹³

Decision documents

An important first step when considering commencing a judicial review proceeding is to obtain a statement of reasons, or other document setting out the reasons why the decision-maker made the decision, their procedures, the evidence that was relied upon, and the weight that was given to various considerations. Such documents can help to assess whether there is a reasonable basis to challenge the decision.

A document giving reasons for the decision may be provided with the initial notification of the decision, or be required to be published under the EP Act. For example, the EP Act requires the Minister to publish documents including:

¹¹ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ).

¹² See for example *Latoudis v Casey* (1990) 170 CLR 534.

¹³ See for example *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72; 152 ALR 83; 72 ALJR 578.

- an assessment report provided by the EPA;¹⁴
- a decision by the Minister that an assessed proposal may be implemented;¹⁵
- a decision of the Minister on an appeal under Part VII of the EP Act.¹⁶

DWER publishes licences and works approvals, along with decision documents outlining how DWER assessed and determined the application, on its [licences and works approvals search](#) page.

The EP Act does not require any decision-maker to publish formal reasons for their decisions under the Act. However, there will generally be informal documents produced by decision-makers and their staff which set out information on how the decision was made (such as decision briefs, compilations of documents relied on in making the decision, and other correspondence relating to the decision). Those documents may be able to be obtained through a request under the *Freedom of Information Act 1992* (WA). Such a request should be made as soon as possible on becoming aware of a decision, as requests can take several months to be processed.

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:

- [Legal Aid Western Australia](#);
- [Law Access](#); or
- 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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¹⁴ *Environmental Protection Act 1986* (WA) s 44(3).

¹⁵ *Environmental Protection Act 1986* (WA) s 45(8).

¹⁶ *Environmental Protection Act 1986* (WA) s 110(2); *Environmental Protection Regulations 1987* (WA) r 8.