

Challenging Decisions in QLD: Judicial Review

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What is this factsheet about?

This fact sheet outlines how to challenge decisions made by the Queensland Government. It explains the types of decisions that can be challenged, who can apply for judicial review of a decision and the legal basis for seeking a review. It also sets out how to request a statement of reasons and the possible risks of commencing proceedings. It is useful for anyone seeking to challenge the legal validity of a decision made by the Queensland Government.

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What is Judicial Review?

Judicial review refers to a process where a court reviews an administrative decision to determine if the decision was made lawfully. This process is the way our legal system keeps a check on the powers and responsibilities of our governmental decision-makers. All local, state and federal officials, public servants and ministers are usually subject to the potential for judicial review.

All decision-makers must make decisions that follow the correct legal process set out in law. For example, if the Department of Environment, Tourism, Science and Innovation (**DETSI**) decides to issue an Environmental Authority (**EA**) for a project, it must follow the correct procedure under the *Environmental Protection Act 1994* (Qld) (**EP Act**).

If a governmental decision-maker decides an application that doesn't follow the legal process set out in the relevant legislation, an affected individual, group or company can bring an application to a relevant court to review the decision. This is called a judicial review application, as the judiciary (the court) is reviewing the decision of the government official.

It is important to note judicial review is concerned with reviewing the legality of the decision-making process undertaken. It is not an appeal against the 'merits' of a decision. In other words, it is not about whether you would have liked the result to be another way based on the evidence, it is about the legitimacy of the process the decision-maker went through in making their decision.¹

In the event you are successful in a judicial review application, the court usually declares the decision void and requires the original decision-maker to make a new decision in accordance with the correct legal procedure. It is important to note that depending on the nature of the error, the new decision may still have essentially the same outcome.

IMPORTANT: Judicial review can be very technical and carry costs risks. We strongly recommend you seek legal advice prior to commencing proceedings.

Who can apply for judicial review?

To apply for judicial review, you must be a 'person who is aggrieved' by the decision.² Under the *Judicial Review Act 1991 (Qld)* (**JR Act**) a 'person aggrieved' means 'a person whose interests are adversely affected by the decision'.³

At times it can be difficult to tell whose interests are adversely affected and whose aren't. If you are a landholder directly affected by the grant of an environmental authority or resource authority over your land, or a grant which might directly impact your land, it is likely you are a person aggrieved given you have a private interest.

If you are a community group or other person concerned about the impacts of a resource project or associated infrastructure in the public interest, then you will need to establish you have a special interest in the decision.⁴

To have a 'special interest' in a decision, your concern for the decision must generally be more than 'mere intellectual or emotional concern'.⁵ In other words, you must have an interest beyond that of any ordinary member of the public, which is affected in a practical

¹ This is different, for instance, from an appeal to the Land Court against DETSI's decision to approve an EA for a coal seam gas project. In that case, the appeal is an appeal on the 'merits' rather than against any specific problem with the legal process DETSI may or may not have followed. A Land Court appeal is a rehearing of all relevant issues, unaffected by DETSI's original decision. In addition, the Land Court has the same powers as DETSI did regarding the EA. See *Environmental Protection Act 1994 (Qld)*, ss 527, 528.

² JR Act, s 20(1).

³ JR Act, s 7.

⁴ JR Act, s 7.

⁵ *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530.

way that is not indirect or remote.⁶ It is unlikely to be enough that only some of your group's members have a special interest or that you have made submissions to the decision-maker on the issue.

Extended standing under the *Nature Conservation Act*

The *Nature Conservation Act 1992* (Qld) explicitly provides for extended standing for judicial review of decisions made under that Act for concerned community groups and individuals.⁷ To meet the extended definition of a person aggrieved, you must:

- be an Australian citizen or resident, or an organisation incorporated or established in Australia; and
- have engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment at any time in the 2 years immediately prior to the decision, failure or conduct that aggrieves you or your organisation.

How do I know if I have standing?

There is no one factor that will take precedence over another when deciding whether you have 'standing' to bring a judicial review action (except where explicit extended standing provisions apply).

Here are some general considerations a court will consider in determining whether you are a 'person aggrieved' with a special interest:

- Can you convincingly show you have always been concerned about the environment of a particular location/area environment to be impacted by the decision?
- Are you a 'peak' representative body for the subject matter and/or area the decision relates to?
- If you are an incorporated group, does your constitution (e.g. the objects or purposes) demonstrate your group's interest in the subject matter and/or area the decision relates to?
- Do you receive any government funding or other government recognition (e.g. through participating in advisory committees) in the area or subject matter the decision relates to?
- Have you spent money, or invested significant time advocating about the issue?
- Will the decision directly impact you in a practical way (e.g. a benefit, advantage, detriment or disadvantage?) more than an ordinary member of the community?

⁶ See *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 526 and *Argos Pty Ltd v Corbell* (2014) 254 CLR 394.

⁷ *Nature Conservation Act 1992* (Qld), s 173O.

Read: *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines* [2018] QSC 21 for further discussion on standing

What decisions can be judicially reviewed?

An aggrieved person can seek judicial review of a decision if it satisfies the following conditions:⁸

- it is of administrative character (i.e. not legislative or judicial);⁹
- it was made under an Act of Parliament;
- the decision must be final or operative and determinative of the particular issue being considered; and
- it must confer, alter or otherwise affect legal rights or obligations.

Generally, these decisions are those made under Queensland legislation, including by State Ministers, government departments and agencies, as well as decisions of local governments.

Examples of decisions open to judicial review:

- the decision to issue, vary or cancel an environmental authority under the EP Act
- the decision to grant a water licence under the *Water Act 2000* (Qld)
- the decision to grant, vary, renew or cancel a mining lease, petroleum lease, or other resource tenure under the relevant Act

Statutory exemptions from judicial review

Not all decisions that meet the above criteria will be subject to statutory judicial review, as some decisions may be expressly excluded by legislation. For example, certain decisions made under the *Planning Act 2016* (Qld) (**Planning Act**) and the *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**) are explicitly excluded from judicial review within those Acts.

The Planning Act excludes most decisions from judicial review except where the decision is affected by 'jurisdictional error', which is a lack of power to make a decision.¹⁰ Under the JR Act, jurisdictional error means '*the person who purported to make the decision did not have the jurisdiction [authority] to make the decision*'.¹¹

The SDPWO Act regulates significant infrastructure and resource projects. Some decisions under this Act are explicitly excluded from judicial review. This includes decisions related to the environmental review of 'coordinated projects' under that Act.¹² Coordinated projects are

⁸ *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493. See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and *Griffith University v Tang* (2005) 221 CLR 99.

⁹ JR Act, s 4.

¹⁰ *Planning Act 2016* (Qld), s 231.

¹¹ JR Act, s 20(2)(c).

¹² *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**) s 27AD.

declared by the state's Coordinator-General and are large, economically important projects for the state, with significant environmental and social impacts. Other decisions under the SDPWO Act excluded from judicial review include:

- a decision of the Minister to declare a project a 'critical infrastructure project' or 'a prescribed project' (if the project is a critical infrastructure project)
- a decision by the Coordinator-General in relation to a notice, prescribed decision or process for a critical infrastructure project¹³

What are the grounds for judicial review?

To successfully challenge an administrative decision, you will have to establish one or more 'grounds' for bringing your application for review.

The grounds for a judicial review under the JR Act include that:¹⁴

- the decision-maker breached the rules of natural justice
- the decision-maker did not observe the procedures required by law
- the decision-maker did not have jurisdiction (authority) to make the decision
- the decision was not authorised by the Act under which it was purported to be made
- the decision was an 'improper exercise of the power' conferred by law (see definition below)
- the decision involved an error of law
- the decision was affected by fraud
- there was no evidence or other material to justify the making of the decision
- the decision was otherwise contrary to law

What is an 'improper exercise of a power' conferred by law?

The JR Act provides further definition of an 'improper exercise of a power' which includes the following:¹⁵

- taking an irrelevant consideration into account
- failing to take a relevant consideration into account
- an exercise of a power for a purpose other than a purpose for which the power is conferred
- an exercise of a discretionary power in bad faith
- an exercise of a personal discretionary power at the request of another person

¹³ SDPWO, Act s 76W.

¹⁴ JR Act, ss 20(2).

¹⁵ JR Act, s 23.

- an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case
- an exercise of a power that is so unreasonable that no reasonable person could so exercise the power – this is taken to mean a decision that ‘lacks an evident or intelligible justification’¹⁶
- an exercise of a power such that the result of the exercise of the power is uncertain
- any other exercise of a power in a way that constitutes abuse of the power

In some circumstances you may also be able to bring an application for review in relation to conduct related to making the decision on the basis of the above grounds.¹⁷

An application for review can also be made in instances where the decision-maker has failed to make a decision or to make a decision within the required time.¹⁸

Making a request for a statement of reasons

What is a statement of reasons?

To understand whether you have grounds to make a judicial review application of a decision, you should first review the statement of reasons for the decision.

A statement of reasons is a written statement made by a decision-maker, setting out why a decision was made. A statement of reasons should generally set out key information about the decision including:

- a description of the decision and the Act that it was made under;
- a description of any procedure taken when making the decision, for example, any materials considered by the decision-maker or consultation processes; and
- the reasons for the decision (such any legal principles that were considered in the process or findings of fact that the decision-maker made).

How do I obtain a statement of reasons?

Sometimes, you will be provided with a statement of reasons at the same time as notice is given of the outcome of the decision. If a statement of reasons is not provided, you can request the decision-maker provide one.¹⁹ There is no fee for requesting a statement of reasons and you are not at risk of costs for simply requesting reasons.

To apply for a statement of reasons, you must make a written request to the decision-maker. Your written request for a statement of reasons should contain:

- your name and address

¹⁶ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Hayne, Kiefel and Bell JJ.

¹⁷ JR Act, s 21.

¹⁸ JR Act, s 22.

¹⁹ JR Act, s 32.

- your organisation's name and role in the community (if applicable)
- a description of the decision made including, if known, the date
- why you or your organisation have been adversely affected by the decision (that is, why you are a person aggrieved)
- that you are requesting that the decision-maker furnish you with a statement of reasons for the decision made²⁰

Read: Annexure A to this factsheet for an example request

A request for a statement of reasons must be made within a 'reasonable time' after the decision was made, or within 28 days of being provided with documentation of a decision.²¹ What is considered reasonable time will depend on the nature of the decision and other factors, including how you came to know about the decision.

N.B.: We strongly recommend you request reasons promptly, and if possible within 28 days of becoming aware of the decision

What happens after a request for reasons is made?

If you are an aggrieved person, the decision-maker must respond to you as soon as practicable. You should receive the statement of reasons within 28 days of the decision-maker receiving your request.²²

If your request for a statement of reasons is declined, you can make an application to the court to direct the decision-maker to provide you with reasons for that refusal.²³ This will involve filing the appropriate forms with the court, and explaining why you are a person aggrieved by the decision.

How do I apply for judicial review of a decision?

If you think that you have identified a potential error in the decision-making process, then you might consider applying for judicial review of the decision. At this point, if you haven't already, you should approach a lawyer to give you advice on your prospects of success. We strongly recommend you first obtain the reasons for the decision to assess whether any error was made in the decision-making process.

You should not bring an application for judicial review if the statement of reasons adequately addresses the legal requirements the decision-maker was required to follow, even if you disagree with the decision.

²⁰ JR Act, s 33.

²¹ JR Act, s 33(4).

²² JR Act, s 33(1).

²³ JR Act, s 38.

Applications for review are made in the Queensland Supreme Court through filing an originating application.

Visit: The Supreme Court [website](#) for the originating application form

How long do I have to apply for judicial review?

Most applications for judicial review must be filed with the Supreme Court of Queensland registry within 28 days of being provided with a statement of the reasons for the decision.²⁴ Reasons may be provided on the date you are notified of the decision or, if you need to request the reasons, on the date the statement of reasons is provided to you (not the date you receive them).²⁵

Important considerations before seeking judicial review

Costs risks

In judicial review matters, courts will usually issue a costs order against the losing party. This means if you are unsuccessful you may have to pay not only your costs, but also the costs of the decision-maker or any other party to the case (such as a mining company relevant to the decision).

The court may require you to provide an upfront security to ensure payment for another party's costs should your case be unsuccessful.

One way to limit your liability is to make a request to the court that you only pay your own costs of the case, even if you lose the case. This is generally referred to as a 'protective costs' order. In such a request, the court will consider:²⁶

- your financial resources or the financial resources of anyone associated with you who has an interest in the outcome of the proceeding; and
- whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
- whether there is a reasonable basis for the case.

There is no guarantee you will be successful in making a protective costs order.

N.B: We strongly recommend you obtain legal advice prior to applying to the court for judicial review, particularly due to the adverse costs risks

What can I achieve from bringing an action?

Generally speaking, the court will review the decision of the decision-maker to assess if any legal errors were made, however, it cannot make a new decision in its place.

²⁴ JR Act, s 26(2),(5).

²⁵ JR Act s 26(5).

²⁶ JR Act, s 49(2).

On an application for judicial review, the courts may:²⁷

- set aside or quash the original decision ensuring it has no legal effect
- refer the matter back to the original decision-maker subject to any directions the court determines appropriate
- make an order declaring the rights of the parties in relation to the matter which the decision relates
- make an order directing any of the parties to do, or to refrain from doing, anything that the court considers necessary to do justice between the parties

The review application is generally about the powers and processes the decision-maker may or may not have utilised when making their decision, not about whether their decision was right or wrong on its merits. Accordingly, if a decision is referred back to the decision-maker, they may go on to reach the same decision, albeit without the error that was the subject of the review.

Apply for legal assistance:

If you have any further questions and would like to apply for free legal assistance, please make an application via our website:
<https://www.edo.org.au/free-legal-advice/>

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²⁷ JR Act, s 30.

Annexure A

Insert name and address of decision-maker]

[Eg. Minister Mines, Minister for Resources]

[insert date]

Dear [Insert decision-maker],

Request for reasons – decision [insert description of the decision]

I, [insert name], [insert position and organisation if applicable], request a statement of reasons under section 32 of the *Judicial Review Act 1991* (Qld) (**JR Act**) [on behalf of the insert the organisation name], for your decision of [insert the date of decision] (**the decision**) to [insert brief description of decision, including any reference number] under the [insert the name of the Act the decision was made under].

[I/insert organisation name] am/is a *person aggrieved* by the decision for the following reasons [include any that apply].²⁸

- (a) [insert organisation name] is incorporated under the *Corporations Act 2001* (Cth) **OR** an association under the *Associations Incorporations Act 1991* (Qld) **OR** [insert other Act];
- (b) [insert organisation name], at the time of the decision, had specific objectives or purposes that include the [insert relevant objects or purposes] (see **attached** Constitution);
- (c) [insert organisation name] has [insert number of members] members which are comprised of [insert description of membership base eg. location, interest in issue];
- (d) [insert organisation name] is the peak body in relation to [insert issue which the decision relates to];

²⁸ JR Act, s 7.

(e) [insert organisation name] receives government funding from the following sources to assist in achieving its objectives:

(i) [insert details of any government grants, in particular if from the decision-maker];

(f) [insert organisation name] has consistently engaged in activities which demonstrate a special interest in the decision over the past [insert timeframe], including:

(i) [describe each activity that would demonstrate a special interest in the decision since the inception of the organisation, until now some examples include:

- engaging with the decision-maker about the issue;
- making submissions;
- undertaking research;
- community education;
- funding surveys or other assessments]

(g) [insert organisation name] would be harmed by the issue relating to the decision because [insert reasons for impacts from the decision including any economic, proprietary, social, spiritual, cultural or political interests in the decision which may be impacted];

(h) [insert any other matters you think are relevant.

We look forward to your response within 28 days of this request in accordance with the JR Act.

Kind regards,

[insert name]

[insert position if applicable]

[insert organisation is applicable]