

DECISION MAKING

The EPBC Act sets out who has the responsibility to make decisions, and what they need to consider. It also provides for decisions to be reviewed.

WHO MAKES DECISIONS?

The Federal Minister for the Environment is the key decision maker under the EPBC Act. The majority of statutory powers contained under the Act are powers of the Minister including decisions on environmental impact assessment and approval, the appointment of members of advisory groups established under the Act, the listing of threatened species and ecological communities and the listing of National and Commonwealth Heritage Places. The Act provides the framework within which each of these types of decision is made.

The Director of National Parks – a corporation solely established under the Act – has decision making powers relating to Commonwealth reserves and conservation zones.

DELEGATIONS

Functions and powers of the Minister are routinely delegated to officials within the Department of the Environment and Energy to ensure efficient administration of the Act for routine matters. Regardless of whether a function or power has been delegated, the Minister retains the right to make a decision where it is considered appropriate to do so.

DECISION MAKING UNDER THE ACT AND UNCERTAINTY

Ecological Sustainable Development (ESD) is a cornerstone of decision making under the Act. The principles of ESD are set out in section 3A, and include the principle that decision making should effectively integrate economic, environmental, social and equitable considerations. These principles of ESD also include the precautionary principle, which is set out at section 391 of the Act.

The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment, where there are threats of serious or irreversible environmental damage. The Minister must consider the precautionary principle in making decisions (section 391) to the extent that the decision is consistent with other provisions under the Act.

The precautionary principle is to be considered in particular decision-making processes under the Act in the context of scientific uncertainty. The nature of decisions being made under the Act means that uncertainty, scientific or otherwise, must be managed during the decision-making process.

STAKEHOLDER AND COMMUNITY ENGAGEMENT

To inform decision making processes, the Act enables stakeholders and the public to be involved in a number of regulatory processes.

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Methods of public input into the operation of the Act include:

- nomination – both of species and ecological communities for listing as threatened, and nomination of places for listing on the National Heritage List and Commonwealth Heritage List. The public may also comment on priority assessment lists established by these nominations;
- commenting – on environmental impact assessment processes, permit decisions, listing of threatened species and ecological communities, development of bilateral agreements, upcoming fisheries assessments and draft management plans for Commonwealth reserves; and
- targeted invitations to comment – such as the owner/occupiers of a place nominated for heritage listing.

Major decisions under the Act must be publicly notified, for example, a decision on whether a referred action requires an environmental impact assessment. The Department maintains databases which allow members of the public to access information regarding referral processes and decisions, species information and heritage listings.

The Department provides guidance on the practical application of the Act through a variety of media including websites, information booklets and policy statements pertaining to specific industries or specific key concepts or processes.

REVIEW OF DECISIONS MADE UNDER THE ACT

Decisions made under the Act may be subject to review by a court or tribunal, depending on the type of decision, and the person making the decision. In specific circumstances, the decision can be reconsidered and replaced with a new decision.

RECONSIDERATION OF DECISIONS

Section 75 of the Act sets out the ability to reconsider a decision. This provision is the only way provided in the legislation to revoke and remake a decision and applies to a limited set of circumstances.

The reconsideration of a decision involves two stages. The first stage involves the Minister to determine whether the request for reconsideration is valid. A valid request must: set out one of the grounds for changing the decision as provided in section 78 of the Act; and, meet other requirements under the EPBC Act Regulations. The second stage involves the original decision being revoked and substituted with a new section 75 decision.

Further information can be found in the Department's policy statement '[Reconsideration: Implementing the requirements of sections 78, 78A, 78B and 78C of the EPBC Act](#)'.

JUDICIAL REVIEW

Under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and section 39B of the *Judiciary Act 1903*, the Federal Court has power to review Australian Government decisions of an administrative nature, to determine whether they have been made according to law. The Court does not consider the merits of a decision.

Under the ADJR Act an application for judicial review can be made by an aggrieved person, i.e. a person with 'standing'. The Act extends standing for review to an Australian individual or organisation that at any time in the

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two years immediately before the decision, has engaged in a series of activities for protection or conservation of, or research into, the environment.

Through judicial review, the Court has clarified some definitions and meanings under the Act that have been subject to differing interpretations.

MERITS REVIEW

The Administrative Appeals Tribunal (AAT) reviews the merits of decisions made under Australian Government legislation, where the legislation provides specifically that the decision is subject to review by the Tribunal. For decisions made under the Act that are subject to merits review, the AAT may only review such decisions where they have been made by a delegate of the Minister, and not where they have been made personally by the Minister.

Decisions allowing for merits review:

- permits for activities affecting listed threatened species and communities, migratory species, marine species, and whales and other cetaceans;
- permits for the international movement of wildlife specimens; and
- advice on whether an action would contravene a conservation order.

PARLIAMENTARY SCRUTINY

Various legislative instruments made under the Act such as bilateral agreements, the list of exempt native specimens for Commonwealth reserves and the list of exempt native specimens must be tabled in Parliament and may be disallowed by a majority in either house.

The EPBC Act enables cooperative partnerships to be established with states and territories, Indigenous Australians and private landowners. Advisory committees are established under the Act. They provide advice to the Minister on specific issues.

The review acknowledges the Traditional Owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

Contact EPBC Act Review at: GPO Box 787 Canberra ACT 2601 | Telephone 1800 803 772 | Web www.epbcactreview.environment.gov.au