



Chapter Nineteen

GOVERNANCE AND
DECISION-MAKING

Chapter 19: Governance and Decision-making

Key points

Advisory bodies

- The Act provides for a number of advisory bodies, being the Threatened Species Scientific Committee, the Biological Diversity Advisory Committee and the Indigenous Advisory Committee.
- The Australian Heritage Council also has an advisory role under the Act.
- There is an ongoing need for advisory committees to support decision-making under the Act.
- The make-up and mix of these arrangements could be improved.

Public participation

- Public engagement in processes under the EPBC Act is vital to good governance.
- There is an inherent tension between a desire to expand the ability for the public to participate in decision-making under the Act, and the need for timely and certain decisions to be made.
- The EPBC Act currently provides extensive opportunities for public consultation and participation. As part of this, there is routine publication of information and decisions.
- Examination of options to further increase transparency about decisions made under the Act, including access to information, may be helpful.

Decision-making

- Submissions questioned the scope of Ministerial discretion in decision-making under the Act.
- There appears to be a lack of confidence in the quality and consistency of decisions being made under the Act.
- There may be a need for criteria or guidelines to be developed to better guide decision-making under the Act, in particular, the application of the principles of ecologically sustainable development (ESD).
- There may also be scope for increasing transparency about decisions made under the Act.

Introduction

- 19.1 This chapter includes discussion on the broad areas of environmental governance and decision-making. For convenience, it has been broken up into three broad parts. The first part of the chapter includes discussion of the advisory bodies that have been established under the Act, and their role in environmental decision-making. The second part relates to public participation, very much at the core of good environmental governance. The third section deals more specifically with the actual decision-making processes under the EPBC Act.

Advisory bodies – introduction

- 19.2 The EPBC Act establishes a number of advisory committees that report to and assist the Minister in administering the Act. For some decisions, such as listing decisions, the Minister must have regard to the advice of the relevant advisory body. The bodies that have been established are:
- Threatened Species Scientific Committee (TSSC)
- 19.3 The TSSC advises the Minister on the amendment and updating of national lists for threatened species, threatened ecological communities, and key threatening processes, and on the making or adoption of recovery plans and threat abatement plans and conservation advices.¹
- Biological Diversity Advisory Committee (BDAC)
- 19.4 The BDAC advises the Minister on matters relating to the conservation and ecologically sustainable use of Australia's biodiversity.²
- Indigenous Advisory Committee (IAC)
- 19.5 The IAC provides advice to the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.³
- *Australian Heritage Council (AHC)*
- 19.6 The AHC is established under separate legislation. The AHC provides advice to the Minister on heritage matters, including nominations for the National Heritage List, the Commonwealth Heritage List, and the List of Overseas Places of Historic Significance to Australia.⁴
- 19.7 The roles of BDAC and the IAC are generic whereas the roles of the TSSC and the AHC are specifically set out in the Act. That is, the Act specifies when advice is required from these bodies as part of the decision-making process.
- 19.8 The EPBC Act also confers power on the Minister to establish other advisory committees to provide advice on specified matters relating to the administration of the Act.⁵

Current provisions of the Act – Threatened Species Scientific Committee (TSSC)

- 19.9 The TSSC is established under s.502 of the EPBC Act. The functions of the TSSC are set out in s.503 of the Act. These include providing advice to the Minister on:
- the lists of threatened species, ecological communities and key threatening processes under the Act;
 - recovery planning, threat abatement plans and conservation advice; and
 - matters relating to administration of the Act, when requested.⁶
- 19.10 Further clarification of the functions of the TSSC is provided throughout the Act, for example, Part 13 of Chapter 5 of the Act which provides further detail about the role of the TSSC with respect to the listing of threatened species and ecological communities under the Act.
- 19.11 Members of the TSSC are appointed by the Minister under s.502 of the Act. The Committee is currently constituted by 10 members, who hold a range of expertise in different areas necessary for providing advice to the Minister about matters dealt with under the EPBC Act.⁷

1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss. 502 – 503.

2 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss. 504 – 505.

3 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss. 505A – 505B.

4 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss. 390K – 390R.

5 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s.511.

6 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.503.

7 A list of the members is available at: <http://www.environment.gov.au/biodiversity/threatened/committee-members.html>

Key points raised in submissions – TSSC

19.12 Submissions generally agreed that the TSSC is vital in ensuring that decisions relating to matters of NES are based on the best possible scientific advice. However, improving the level of specialist expertise on the TSSC, and enhancing the resources available to the TSSC were recommended. As WWF noted, a lack of adequate resources for the Committee has meant that the TSSC has not been able ‘to conduct its work in a timely manner, or to ensure that the lists of threatened species, ecosystems and significant places are up to date’.⁸

19.13 A number of submissions commented on the current arrangements under the Act regarding the roles of the Minister and the TSSC and noted that the TSSC has an advisory role only. This was considered an unnecessary limitation by some, who instead called for the TSSC to have a determinative role. The Australian Hydroponic & Greenhouse Association (AHGA) suggested that:

the Threatened Species Scientific Committee (TSSC) (or similar independent Committee) replace the present DEWHA in-house assessment process, and have statutory powers to make determinative rather than advisory listing decisions; that this committee (a) should be independent of the Minister and his Department (b) should provide full scientific justification for its determinations that is available for public scrutiny, and (c) is empowered to engage in dialogue with the main proponents and opponents to explore areas of mutual agreement, to clarify contentious issues, and to provide full transparency and opportunity for rebuttal or provision of further information.⁹

19.14 The New South Wales Scientific Committee (NSW Scientific Committee) also argued that the Minister should not be making decisions about listings of threatened species and ecological communities. Rather, the NSW Scientific Committee believed that an independent and professional body, that considers documented scientific advice only, should be authorised to carry out this function. In its view, listing decisions should not be subject to Ministerial discretion.¹⁰ The Committee stated:

The question of whether a species or ecological community is at a substantial risk of extinction within a given time frame (and therefore eligible for listing under the EPBC Act) is purely a scientific one, to be determined from available evidence on relevant biological characteristics and threatening processes. In contrast to the listing process, the decision-making process for conservation actions must consider broader socio-economic issues, in addition to scientific evidence. In this case, relevant considerations include level of extinction risk, the test that alternative actions are likely to reduce those risks and likelihood that each action will be successful in mitigating risk. The socio-economic issues include costs of actions, social values associated with the species or community at risk and the implications of conservation actions for competing interests. These socio-economic considerations are legitimate concerns for elected governments in deciding how best to deal with threatened biodiversity, but they have no role in determining whether or not a species or community is at sufficiently high risk of extinction to warrant listing.¹¹

19.15 The NSW Scientific Committee suggested the following model be adopted for the TSSC:

The TSSC functions be revised to i) establish its primary responsibility as a statutory listing authority with powers to make determinative (rather than advisory) listing decisions; ii) improve the focus of the Committee’s functions on its assessment and listing roles; and iii) establishing the Committee’s functional independence of the Minister and Department; through dedication of secretariat and technical support staff that report directly to the Committee Chair. This would require reform of Clause 504 of the EPBC Act, which currently establishes the Committee with a purely advisory role on an extremely broad and open range of subjects.¹²

19.16 The approach is essentially the model used in NSW for the NSW Scientific Committee.

8 Submission 181: WWF, p.34.

9 Submission 184: Australian Hydroponic & Greenhouse Association, p.4.

10 Submission 150: New South Wales Scientific Committee.

11 Submission 150: New South Wales Scientific Committee, p.1.

12 Submission 150: New South Wales Scientific Committee, p.2.

Discussion of key points – TSSC

- 19.17 Both government and non-government stakeholders were critical of the level of discretion conferred on the Minister when making decisions under the Act regarding the listing of threatened species, ecological communities and key threatening processes. While there is an argument for the status quo to be preserved as a typical example of Ministerial responsibility in which Ministers take key decisions, there are arguments to the contrary which the NSW Scientific Committee articulated in its submission.
- 19.18 Several submissions¹³, including the NSW Scientific Committee's, argued that listing is a factual, scientific issue. Under current arrangements under the Act, listing results in material consequences for a range of public and private values. Listing decisions invariably require complex judgments associated with incomplete or competing science. There will always be some level of uncertainty and this means that value judgments must be made about the state of the science. Arguably, these judgments should be made by persons with the necessary scientific expertise.
- 19.19 An alternative view is that while scientists provide an appropriate source of information for evaluating technical uncertainties and making assessments of threats to species and communities, they are not qualified to reconcile competing considerations that may impinge on a decision to list. Listing brings with it potentially significant impacts on land owners and proponents. Listing decisions therefore must be weighted, and weighed, carefully and by someone who can be held to account for their decisions.
- 19.20 Some of the anxieties over these competing viewpoints may be reconciled by creating a permanent record of the recommendations of the TSSC, making these recommendations and the information supporting them readily accessible to the public, and making the rationale for decisions to list or not more transparent. That is, the criteria employed by the Minister in reaching a decision could be better documented and the weight, if any, attributed to non-scientific considerations made explicit.
- 19.21 Provisions like these in the EPBC Act which confer discretion on Ministers when making decisions are not unusual, forming part of the notion of 'responsible government' which embodies the principle of parliamentary accountability.
- 19.22 This review also notes that an increasing workload over recent years is making it difficult for the TSSC to fulfil all of its functions under the Act and in as timely a manner as it may wish. In this respect, the TSSC provided the review with information about the extent of its workload and the availability of information prepared by the Committee.¹⁴ The TSSC's annual reports also provide an overview of the work undertaken by the TSSC each financial year.¹⁵
- 19.23 Another issue worthy of further deliberation is whether the TSSC has the resources to meaningfully contribute to the strategic policy debate and, in the context of biodiversity conservation, examine species and ecological communities that are potential candidates for nomination as threatened in the future. The review notes that the Act already goes some way in this respect by conferring power on the Committee to be 'forward-thinking' with respect to non-threatened species and ecological communities — s.190 of the EPBC Act provides that in cases where the Committee is of the opinion that a native species or ecological community is not eligible to be listed as threatened under the Act, the TSSC may provide advice to the Minister on action that is necessary to prevent the species or ecological community from becoming threatened. A further expansion of this strategic role of the Committee could assist in making proactive decisions about recovery planning by acting to conserve a species or ecological community before it becomes 'threatened'. It is noted however that this would mean an expansion of the role of the TSSC, which is already suffering from an ambitious workload.

13 See e.g. Submission 182: Humane Society International.

14 Submission 211: Threatened Species Scientific Committee.

15 The TSSC annual reports are available at: <http://www.environment.gov.au/biodiversity/threatened/committee.html>

- 19.24 Lastly, a number of submissions referred to a general need for greater public transparency about the way that the TSSC operates under the EPBC Act, in particular, the role and functions of the Committee with respect to decisions made under the Act. It seems that, at the heart of this call for greater public access to information about the Committee and its work, is a degree of uncertainty about what the Minister does with advice from TSSC, that is, the extent to which Ministerial decisions are consistent or inconsistent with the TSSC's advice.
- 19.25 The review notes that the annual reports prepared by the TSSC, which are publicly available, go some way to relaying information to the community about the work undertaken by the Committee. However, these annual reports are, by their nature, prepared just once each year—there may be scope for more frequent and timely reporting by the TSSC. The issue of whether and when the TSSC's advice to the Minister should be published will be given further consideration.

Current provisions of the Act – Biological Diversity Advisory Committee (BDAC)

- 19.26 BDAC is established under s.504 of the EPBC Act. The functions of BDAC are set out in s.505 of the Act. These include providing advice to the Minister, upon his or her request, on matters relating to the conservation and ecologically sustainable use of biological diversity. In the past this has included advice about:
- the performance of Australian Government programs in promoting biodiversity conservation;
 - the 2004-2007 National Biodiversity and Climate Change Action Plan; and
 - previous reviews of the National Strategy for the Conservation of Australia's Biological Diversity, the National Weeds Strategy, and the National Framework for the Management and Monitoring of Australia's Native Vegetation.
- 19.27 Unlike the TSSC, BDAC has a general advisory role under the Act, rather than a specific set of functions.
- 19.28 Members of BDAC are appointed by the Minister under s.504 of the Act. Under the Act the Minister must ensure that membership on the Committee includes members that are appointed to represent the following:
- the body known as the Australian and New Zealand Environment and Conservation Council;
 - conservation organisations that are not authorities of the Commonwealth or of any State or Territory;
 - the scientific community (including both that part of the scientific community concerned with marine species and that part of the scientific community concerned with terrestrial species);
 - the rural community;
 - the business community;
 - Indigenous peoples; and
 - the Commonwealth.¹⁶
- 19.29 The Minister must also ensure that, as far as practicable, each one of at least five members possess scientific qualifications that the Minister thinks relevant to the performance of the Committee's functions and is appointed to represent the scientific community.¹⁷
- 19.30 The Minister must ensure that a majority of the members are not persons employed by the Commonwealth or Commonwealth agencies.¹⁸
- 19.31 Membership of the Committee lapsed in February 2007 and BDAC has not been reconstituted since.

¹⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.504(4).

¹⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.504(5).

¹⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.504(6).

Key points raised in submissions – BDAC

- 19.32 Submissions noted that membership of BDAC has lapsed and saw this as disappointing. The Applied Environmental Decision Analysis research hub (AEDA) commented that the Act is failing to fulfil its own requirement for external expert input, in particular due to the lack of a functioning BDAC.¹⁹
- 19.33 Submissions that commented on BDAC, recommended that the terms of reference and membership of BDAC be updated to include experts on climate change and meet more frequently to give input with respect to climate change and biodiversity. In its submission, the Nature Conservation Council of NSW noted that BDAC should be involved in making up-to-date projections about emissions and their potential impacts on climate change.²⁰

Discussion of key points – BDAC

- 19.34 The Department has advised that a review of BDAC is in progress. The results of that review will be considered once available.
- 19.35 This review provides an opportunity to examine the operations of BDAC to ensure it remains appropriate to the Government's policies and current approaches to biodiversity protection and conservation.
- 19.36 One option is to define the role and functions of BDAC more clearly so that it has a definite and constructive role to play under the Act. Another could be to amalgamate the TSSC and BDAC into a single advisory body to provide expert advisory functions with respect to biodiversity under the Act. In this respect, the review notes the TSSC's submission that its responsibilities are broader than the provision of advice on threatened species and that, in its view, the TSSC is at present 'effectively operating as a Biodiversity Management Scientific Advisory Committee'.²¹

Current provisions of the Act – Indigenous Advisory Committee (IAC)

- 19.37 The IAC is established under s.505A of the EPBC Act. The function of IAC, as set out in s.505B of the Act, is 'to advise the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.' The IAC also has a broader function of providing advice to DEWHA on the development and implementation of policies and programs that may impact upon Indigenous people, and on appropriate methodologies for engaging and consulting with Indigenous people.
- 19.38 Members of the IAC are appointed by the Minister under s.505A of the Act. The Committee is currently constituted by 12 members, all of whom are Indigenous Australians and have a range of expertise in Indigenous land management, conservation and cultural heritage management.²²

19 Submission 091: Applied Environmental Decision Analysis.

20 Submission 188: Nature Conservation Council of New South Wales.

21 Submission 211: Threatened Species Scientific Committee, para [20].

22 A list of the IAC members is available at: <http://www.environment.gov.au/indigenous/committees/iac.html>

Key points raised in submissions – IAC

- 19.39 In those submissions that commented on the IAC, the role of the Committee in advising the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity, were generally welcomed.
- 19.40 However, a number of submissions argued that the Act does not support Indigenous engagement enough, and called for an expansion of the role and functions of the IAC so that the Committee can provide better representation on issues relevant to Indigenous peoples, their lands and waters. For example, WWF stated that:
- Traditional and ecological knowledge by Indigenous peoples has not been fully utilized in the delivery of this Act. To date the only indigenous involvement at a governmental level of this Act has been through the Indigenous Advisory Committee whose terms of reference restrict its ability to actively engage the broader Indigenous community. As mentioned ... traditional knowledge should be recognized and protected by the act.²³
- 19.41 The Australian Human Rights Commission (AHRC) noted that:
- The position of the IAC and its capacity to effectively reflect the concerns of Indigenous peoples about their rights and interests is limited by the fact that this platform is to inform the government only, rather than to have a direct role in decisions which affect Indigenous people.²⁴
- 19.42 It was recommended that the role of IAC should be strengthened so that the Committee has a more directive and authoritative capacity. However, the AHRC also noted that any enhancement of the IAC's role should not replace the requirement to directly engage with Indigenous peoples where decisions under the Act will impact on Indigenous heritage:
- Whilst engagement with the IAC should be encouraged, it should never be capable of acting as a substitute for direct and comprehensive engagement with the Indigenous peoples of the relevant lands.²⁵
- 19.43 In addition to calling for the role of the IAC to be strengthened, the AHRC also noted that the level of engagement between the Minister and the IAC is limited to the terms of reference developed by the Government.²⁶ In this respect, the AHRC recommended that this review:
- consider strengthening of the IAC to provide a more directive and authoritative capacity rather than limiting this to an advisory role only. For example, the EPBC Act could be amended to provide for delegated decision-making to the IAC on specific matters of significance to Indigenous peoples and their rights and interests. This may include World Heritage listed areas and Commonwealth and National Heritage listed areas over places with significant relevance to Indigenous peoples. Alternatively, the Act could provide greater guidance on the priority of IAC recommendations in informing the decision-making of the Minister to provide greater scope for judicial review where a Minister fails to reasonably follow such recommendations.²⁷
- 19.44 The AHRC also raised concerns regarding the membership composition of the IAC, noting that appointments to the IAC are at the Minister's discretion:
- The Commission is concerned that the EPBC Act does not adequately support Indigenous engagement by its failure to clearly state that the membership of the IAC must be constituted only by Indigenous people. If non-Indigenous membership of the Committee is to be approved by the Minister, the Commission considers that the EPBC Act should direct that this decision must be based on the Minister's reasonable satisfaction that:
- (a) the member will bring substantial and relevant expertise to the Committee that could not otherwise be obtained from another Committee established under the EPBC Act;
 - (b) the member can fairly represent the interests of Indigenous communities.²⁸

23 Submission 181: WWF, p.31.

24 Submission 193: Australian Human Rights Commission., p.27

25 Submission 193: Australian Human Rights Commission, p.28.

26 Submission 193: Australian Human Rights Commission.

27 Submission 193: Australian Human Rights Commission, p.28.

28 Submission 193: Australian Human Rights Commission, p.27.

19.45 Additionally, the AHRC expressed concerns about the lack of transparency in relation to the advice provided to the Minister by the statutory committees under the Act. The AHRC 'is of the view that all of the Committee's established under the EPBC Act, be required to provide formal advice/reports to the Minister and that this information is publicly available on the Department's website'.²⁹ The AHRC recommended that this review:

consider the inclusion of specific mechanisms that promote transparency in relation to the advice and deliberations of the Committee's established under the EPBC Act. In reviewing the engagement of Indigenous peoples under the EPBC Act and the role of the IAC, the Commission further recommends that the Review Committee have regard to the guidelines for engagement with Indigenous peoples, contained in *Engaging the marginalised: Partnerships between indigenous peoples, government and civil society*. These guidelines provide an excellent framework to build upon to formulate an extensive set of principles for Indigenous engagement in the operation of the EPBC Act.³⁰

19.46 Lastly, with regard to consultation between the statutory committees established under the EPBC Act, in its submission the IAC noted that the Act provides a direct link between the TSSC and the AHC, and called for the same type of linkage to be provided for the IAC, that is:

There needs to be a link created within the EPBC Act between the IAC and the Threatened Species Scientific Committee (TSSC). Currently there is a link between the TSSC and the Australian Heritage Council, and this needs to be reflected for the IAC.³¹

Discussion of key points – IAC

19.47 In response to the AHRC's recommendation that the Act be amended to provide that IAC membership should be limited to Indigenous people, the review notes that all of the current members of the IAC are Indigenous people. Given the specific function of the IAC to provide advice to the Minister on the operation of the Act 'taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity', this review is reluctant to agree to a recommendation of this nature in the absence of reasons why the current approach is not sufficient.

19.48 The review does note, however, that there is scope for greater Indigenous consultation and involvement under the EPBC Act and agrees with the IAC that this role should not be left solely to the Committee. Further work needs to be done to ensure that Indigenous interests are engaged and Indigenous values are recognised during administration of the processes under the Act. In this respect, the review agrees that proper processes for consultation and negotiation with Indigenous peoples need to be effective, particularly where there is potential for the listing of species or wildlife as threatened under the Act.

19.49 In its submission, the IAC stated that they would like the Act to require 'mandatory Indigenous engagement'... 'instead of the current passive engagement'.³² The IAC also suggested that '[t]here may be a need for separate Indigenous Advisory Committees for the different components of the EPBC Act'.³³ This is a suggestion that will be given consideration. The policy consultation role played by the IAC should not however subsume the precedence given to consultation with affected Indigenous communities under the Act, for example, consultation with Indigenous communities as a community that could be affected by a proposed heritage or threatened species listing, recovery plan or an individual project.

19.50 It is also important to note the request from the IAC that the current financial and secretariat resourcing be continued, and that this also be reviewed with a view to increasing the level of committee and secretariat funding.³⁴

19.51 The review agrees with the IAC's recommendation that the EPBC Act be amended to expressly require consultation between the statutory committees under the Act. The review notes that the TSSC is also supportive of this approach.³⁵

29 Submission 193: Australian Human Rights Commission, p.28.

30 Submission 193: Australian Human Rights Commission, p.28.

31 Submission 210: Indigenous Advisory Committee, para [55].

32 Submission 210: Indigenous Advisory Committee, para [45].

33 Submission 210: Indigenous Advisory Committee, para [44].

34 Submission 210: Indigenous Advisory Committee, para [66].

35 Submission 211: Threatened Species Scientific Committee, para [15].

19.52 The issue of indigenous engagement and consultation under the EPBC Act is also addressed in Chapter 17 of this report.

Current provisions of the Act – Australian Heritage Council (AHC)

19.53 The AHC is established under s.4 of the *Australian Heritage Council Act 2003* (AHC Act). The functions of the AHC are set out in s.5 of the AHC Act and expressly include a number of functions vital to the operation of the heritage provisions of the EPBC Act. By way of example, some of the AHC's functions are:

- undertaking assessments under Divisions 1A and 3A of Part 15 of the EPBC Act, which deal with National Heritage and Commonwealth Heritage places;
- providing advice to the Minister on conserving and protecting places included, or being considered for inclusion, in the National Heritage List or the Commonwealth Heritage List;
- nominating places for inclusion in the National Heritage List or Commonwealth Heritage List;
- following a request from the Minister under s.390P of the EPBC Act, providing advice to the Minister about the inclusion and removal of places from the List of Overseas Places of Historic Significance to Australia;
- promoting the identification, assessment, conservation and monitoring of heritage;
- maintaining the Register of the National Estate; and
- otherwise providing advice to the Minister on matters relating to heritage, including promotional, research, training or other educational activities relating to heritage, and monitoring of the condition of places included on the National Heritage List or Commonwealth Heritage List.

19.54 Members of the AHC are appointed by the Minister under s.7 of the AHC Act. Under s.6 of the AHC Act, the AHC must be comprised of a Chair, at least six members and up to two associate members. The AHC is currently comprised of seven members including the Chair.

Key points raised in submissions – AHC

19.55 In its submission to this review, the AHC noted the situation in most Australian jurisdictions where independent heritage Councils (that is, bodies separate from the relevant Minister) make the decisions about heritage listings, and contrasted this against the system under the EPBC Act where the Minister makes listing decisions for World, National and Commonwealth heritage.³⁶

19.56 The AHC argued that the current approach under the EPBC Act, which separates listing decisions and management responses for World, National and Commonwealth Heritage, represents an important heritage conservation principle. The AHC stated that they support a continuation of this approach, that is, that the Minister retains the decision-making power for the listing of World, National and Commonwealth heritage under the Act.³⁷ Representing a change from the current system under the EPBC Act, the AHC did however call for an expansion of the role of the Council by granting it sole responsibility for calling for nominations and determining the priority assessments lists for National and Commonwealth Heritage.³⁸

19.57 The Australian Council of National Trusts (ACNT) and numerous other submitters³⁹ went much further, recommending that the role of the AHC be strengthened and that the AHC be made solely responsible for decisions about listing National and Commonwealth Heritage lists.⁴⁰ The ACNT also recommended that the AHC be given greater capacity to initiate activities, and lead or contribute to public debate about heritage issues, and that any such expansion of responsibilities be adequately supported by dedicated funding and increased staff resources.

³⁶ Submission 208: Australian Heritage Council.

³⁷ Submission 208: Australian Heritage Council.

³⁸ Submission 208: Australian Heritage Council, Recommendation 5.

³⁹ See e.g. Submission 117: International Council of Monuments and Sites; and Submission 140: Mr Duncan Marshall.

⁴⁰ Submission 039: The Australian Council of National Trusts.

- 19.58 The EPBC Act currently confers power on the Minister to declare assessment themes for heritage nominations under the Act. With regard to this process of setting themes for heritage nominations, the AHC recommended that the Act should preserve a role for the Council in this respect, specifically, that the Act be amended to limit the Minister's ability to set a theme to those instances where the AHC has provided advice:

[The AHC] is of the view that the EA [Environmental Assessment] should explicitly provide that the Minister may only declare a theme for a period on the advice of the Australian Heritage Council and that there should be a rolling program of these three years ahead.⁴¹

- 19.59 The expertise of the members of the AHC was noted in submissions. International Council on Monuments and Sites (ICOMOS) argued that the role of the AHC is unnecessarily limited and stated that, in its view, the expertise of the Council members is not being used as well as it could, particularly with respect to the assessment and identification of heritage places.⁴²

- 19.60 With regards to the type of advice the AHC provides to the Minister about listing decisions, the Council recommended that the Act be amended so that it can report to the Minister more broadly on the implications of possible heritage listings:

The Council is very aware of the rights of owners/occupiers to express their concerns regarding heritage listing, including the costs of maintaining heritage places. Without removing the critical requirement that assessment advice to the Minister should be solely based on heritage values, the Council should be further permitted to make representations to the Minister on the costs, including opportunity costs, of heritage listings. While the Council sees all comments received from interested parties, including those not relating to values, and has provided advice to the Minister under s.5(h) of the AHC Act regarding the implications of heritage listing, this should be reflected in the EPBC Act.⁴³

- 19.61 A number of submissions also referred to a need for greater transparency about the way that statutory committees operate with respect to activities integral to the operation of the EPBC Act. As a way of providing greater transparency, the AHC proposed that the Act be amended to require the Council to maintain a publicly available list of all of its recommendations made to the Minister about nominations for heritage listings under the Act.⁴⁴ This list could serve as a concise public record of the Council's recommendations, which the AHC noted are based purely on an assessment of the heritage values of the nominated place.

- 19.62 The AHC further recommended that Ministerial decisions about heritage listings under the EPBC Act (which are made following receipt of the AHC's recommendations) could also be made publicly available.⁴⁵ Further information about the heritage listing process is provided in Chapter 11 of this report.

- 19.63 A number of submissions also recommended that the Act be amended to require formal reporting by the AHC. The ACNT also supported this approach, noting:

We believe this lack of a formal reporting process is a major deficiency that needs to be remedied. We are also of the view that the arms-length AHC should be mandated to report on the overall state of the conservation of the nation's cultural and natural heritage, without fear or favour, and recognising this will probably generate observations and even criticisms of State and Territory government performance and that of the non-government sector. Consideration should be given to a provision similar to Section 43 of the former Australian Heritage Commission Act 1975 which required the Commission to report each year to the Minister on the 'condition of the national estate.'⁴⁶

41 Submission 208: Australian Heritage Council, p.2.

42 Submission 117: International Council on Monuments and Sites.

43 Submission 208: Australian Heritage Council, p.2.

44 Submission 208: Australian Heritage Council, Recommendation 6.

45 Submission 208: Australian Heritage Council, Recommendation 6.

46 Submission 039: Australian Council of National Trusts, p.24.

19.64 ICOMOS contended that the AHC does not have a proactive role regarding information gaps that prevent the satisfactory assessment of values and is not empowered nor resourced effectively to maximise its contributions to effective heritage conservation.⁴⁷ It was further argued that the AHC should have a greater role in determining the conservation theme for nominations for heritage listings.

19.65 ICOMOS submitted:

The AHC could be more effectively utilised if they were empowered and resourced to adopt a more proactive role in the identification of information gaps and in initiating projects to fill those gaps. The public transparency of the process from AHC assessments to Ministerial decisions needs to be improved.⁴⁸

Discussion of key points – AHC

19.66 The AHC is the principal adviser to the Australian Government on heritage matters. The Council assesses and provides advice to the Minister about nominations for the National Heritage List and the Commonwealth Heritage List. They also play a key role in assessment, advice and policy formulation and support of major heritage programs.

19.67 The expertise of the AHC is well regarded in the heritage community. This is made obvious by the strong calls for greater autonomy of the Council and an expansion of the roles and responsibilities of the Council put forward in submissions to this review.

19.68 The arguments put forward in submissions about the need to increase transparency about the operation of the AHC, which were also put forward with respect to the statutory committees established under the Act, especially the TSSC, have merit. The review acknowledges that there is a need for greater public access to heritage information, but the issue of whether all listing advices provided to the Minister by the AHC should be published on the Internet is a matter which requires further deliberation. Ideally, both the AHC and the TSSC should operate under the same ‘transparency guidelines’.

19.69 Further consideration will also be given to whether the AHC should be solely responsible for the nomination process, including theme setting.

Other advisory committees

National Oceans Advisory Group (NOAG)

19.70 NOAG was a non-statutory body set up to provide advice to the Minister on marine issues and the implementation of the previous Government’s Ocean Policy.

19.71 Membership of NOAG has lapsed and, given significant changes in the way the Oceans Policy is delivered and the stronger focus on core responsibilities under the Act, a review of whether there might be a role for NOAG into the future is currently being undertaken by the Department. The outcomes of that review will be considered.

Call for the creation of a Reserves Advisory Council

19.72 In its submission to the review, the Colong Foundation for Wilderness noted the roles of the TSSC, BDAC and the IAC in providing independent advice to the Minister under the EPBC Act. The Foundation submitted that a ‘Reserves Advisory Council’ should be established to:

... to provide independent advice to the Minister on management plans and other protected area issues related to Part 15 of the Act...

The Reserves Advisory Council would make representations on any management plan under Part 15 after receiving and considering any comment by the authority responsible for the preparation of the management plan.⁴⁹

47 Submission 117: International Council of Monuments and Sites.

48 Submission 117: International Council of Monuments and Sites, p.5.

49 Submission 119: The Colong Foundation for Wilderness, p.22.

Further consideration of advisory bodies

- 19.73 It is arguable that the approval of major projects is necessarily a political decision but the environmental assessment of major projects is best done free of political interference by an independent agency or body. The WA environmental impact assessment (EIA) process – undertaken by the State’s Environmental Protection Authority (EPA) – is the oldest example of this model in Australia. In WA, the EPA retains the primary advisory role, which is largely independent from Ministerial direction, while the WA Minister for Environment ultimately makes the final environmental decisions. This approach has been widely lauded. It is a model that warrants further investigation.⁵⁰
- 19.74 The roles and functions of advisory committees under the EPBC Act will be further considered by this review. This will include consideration about whether the current committees should be continued and/or new committees established, and if so, the roles and functions that would be appropriate and necessary to ensure efficient administration of the EPBC Act.

Public participation

- 19.75 A number of submissions addressed the issue of the public participation provisions prescribed under the Act, especially in the context of the referral and assessment (EIA) and nomination of listings processes. These submissions are referred to in detail in Chapters 4 and 12 respectively. The purpose of the discussion of the issue in this chapter is to deal with public engagement in the general context of environmental governance and its contribution to the decision-making process.
- 19.76 The increasing awareness of environmental issues has meant that the public is more interested in environmental decision-making and in having a say in protecting the environment. Environmental decisions generally affect the community in some way and therefore including the public in the decision-making process amounts to good governance.
- 19.77 Public participation, as a concept, is recognised in the objects of the EPBC Act, which include the promotion of a co-operative approach to the protection and management of the environment involving governments, the community, landholders and Indigenous peoples.⁵¹
- 19.78 However, there is some merit in reconsidering the objects of the Act for the purpose of more clearly articulating the role the public should have in decision-making. One piece of legislation that includes a more direct statement of intent is the *Protection of the Environment Operations Act 1997* (NSW). Section s.3(b) of that Act provides that one of the objects of the Act is to provide increased opportunities for public involvement and participation in environment protection.
- 19.79 There are a number of ways in which community engagement can be achieved. The level at which the public is and should be involved will vary depending on the particular issues involved and the likely level of community interest. Engagement may be sought to gather information, resolve differing opinions or competing objectives among stakeholders, identify satisfactory trade-offs, or enhance public understanding, trust or support for decisions. The modes of engagement range from publication of details underlying decisions and public comment phases, to public meetings, stakeholder workshops, deliberative meetings and advisory committees, such as those discussed above. The use of these tools should depend on the purpose of the consultation and the degree to which the authority for a decision is to be delegated to that engagement. The current use of these engagement tools is outlined below.
- 19.80 DEWHA publishes all key decisions in order to keep the public informed of environmental decisions that have been made and informs the community of the policy directions of Government.

50 Christopher Wood, *Evaluating Impact Assessment Systems, Integrated Environmental Management* (1994), pp.10-13; Nick Harvey, *Environmental Impact Assessment: Procedures, Practice, and Prospects in Australia* (1998), pp.36-37.

51 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3(1)(d).

- 19.81 A more direct form of interaction with the public is consulting with the community. There is a range of mechanisms available under the EPBC Act relating to different processes. This ensures that issues are raised and understood, and considered as part of the decision-making process. Examples of informed consultation and involvement in the decision-making process under the Act include:
- nomination both of species and ecological communities (ECs) 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 for these nomination processes);
 - commenting on EIA 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 including by the owner/occupier of a place nominated for heritage listing.
- 19.82 The aim of this consultative process is to improve the quality and legitimacy of decisions that are made under the Act. It also has the effect of building trust, achieving consensus and gaining acceptance of decisions that are ultimately made.
- 19.83 Public engagement will continue to have a significant role to play in the future, especially if there is a move away from project-specific approvals and listings to a broader, more strategic landscape-based approach. This will involve the consideration of a new approach to public engagement in decision-making under the Act.
- 19.84 As well as clarification of the purpose of the engagement process and the outcomes expected to be achieved as a result, it is envisaged that detailed engagement planning would need to be undertaken to ensure that the most appropriate and effective forms of engagement occur. As mentioned previously there would be a direct correlation between the extent of the engagement process and the issues involved, the likely impacts on the environment and the level of community concern.
- 19.85 The forms of engagement presently contained in the EPBC Act are generally limited to invitations for public comment on projects and site-specific processes. However, as noted above, there are many other engagement processes worth exploring for the future. It is not suggested that DEWHA would necessarily manage any proposed expanded public engagement processes in the future. An example might be that a satisfactory public engagement regime is included as part of the terms of reference in any strategic assessment.
- 19.86 This broader concept of public engagement is an issue that requires serious consideration. It is also a matter on which comments and observations are invited.

Decision-making under the Act

The Minister

- 19.87 The Environment Minister is the key decision-maker under the EPBC Act.⁵²
- 19.88 Key decisions include:
- decisions on Environmental Impact Assessments;
 - decisions relating to approval (including strategic assessments) and management plans;
 - the appointment of members of advisory groups established under the Act;
 - the listing of threatened species and ecological communities;
 - the listing of National Heritage and Commonwealth Heritage Places; and
 - approval of wildlife exports and associated management arrangements.
- 19.89 The Director of National Parks, an authority established under the Act, has power to make decisions relating to Commonwealth Reserves and conservation zones.

⁵² By virtue of the Administrative Arrangements Orders made by the Governor-General.

Delegates of the Minister

- 19.90 The EPBC Act allows the Minister to delegate his statutory powers and functions under the Act to officers or employees within DEWHA. Delegations include matters such as the issue of permits and some of the more routine EIA decisions.
- 19.91 These delegations ensure the efficient administration of the Act. Delegations are exercised in accordance with established administrative protocols.

Advisory bodies

- 19.92 As mentioned previously, the EPBC Act establishes a number of advisory committees that report to and assist the Minister in administering the Act. For some decisions, such as listing decisions, the Minister must have regard to the advice of the relevant advisory body. Details of those bodies that have been established and their role in decision-making are contained in the previous section of this chapter.

Criteria for decision-making under the EPBC Act

- 19.93 There are a number of high level provisions in the EPBC Act which apply across the legislation and provide instruction or guidance in terms of the criteria for decision-making under the Act.
- 19.94 There are also specific sections of the Act which contain provisions that apply to decision-making under those sections. For example, when deciding whether or not to approve an action, the Minister is required to take social and economic considerations into account. When determining a wildlife management plan, the Minister must be notified, among other things, that activities under the plan are ecologically sustainable and will not be detrimental to the survival of affected taxa.
- 19.95 The discussion in this chapter deals with the more generic, high level guidelines.

Ecologically Sustainable Development (ESD)

- 19.96 The promotion of ecologically sustainable development (ESD) is one of the objects of the EPBC Act.⁵³ The principles of ESD are espoused in s.3A of the EPBC Act as follows:
- (a) decision-making processes should effectively integrate both long term and short term economic, environmental, social and equitable considerations;
 - (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation [precautionary principle];
 - (c) the principle of inter generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
 - (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making;
 - (e) improved valuation, pricing and incentive mechanisms should be promoted.
- 19.97 The principles of ESD are discussed in more detail in Chapter 2 of this report. However, in terms of the discussion in this chapter on decision-making, it is important to note paragraphs 3A (a) – (e) above, which specifically provide the principles upon which decision-making under the Act should be based.

⁵³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b).

Precautionary principle

19.98 Section 391(1) of the Act provides that the Minister must take into account the 'precautionary principle' in making the types of decisions listed in s.391(3), to the extent to which he or she can do so consistently with the other provisions of the Act. Subsection 391(2) is, essentially, a repeat of s.3A(b). It provides:

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.

19.99 There are numerous decisions specified in s.391(3). The categories include:

- decisions on whether actions are controlled actions or whether actions should be approved;
- decisions relating to permits;
- decisions relating to recovery plans, threat abatement plans and wildlife conservation plans;
- some listing decisions (e.g. exempt native species and specimens suitable for live export);
- declarations about approved wildlife trade operations and wildlife trade management plans;
- management plans for World Heritage lists and places, and Commonwealth Heritage lists; and
- management of biosphere reserves and Commonwealth reserves.

Register of the National Estate

19.100 Under s.391A, the Minister must have regard to information in the Register of the National Estate (RNE) kept under the *Australian Heritage Council Act 2003* (AHC Act) in making any decision under the Act to which the information is relevant.

19.101 Following amendments to the AHC Act, the RNE was frozen on 19 February 2007, which means that no new places can be added or removed. The RNE will continue as a statutory register until February 2012. Until this date, the Minister is required to continue considering the RNE when making decisions under the Act. The transition period will allow places on the RNE to be transferred to other heritage lists registers if appropriate, and for the legislation to be amended to remove the RNE as a statutory list.

19.102 Effective from February 2012, all references to the RNE will be removed from the EPBC Act and the AHC Act. The RNE will be maintained after this time on a non-statutory basis as a publicly available archive.

19.103 More information relating to this topic is contained in Chapter 11 of this report which covers Heritage issues.

ESD in decision-making

Key points raised in submissions – ESD

19.104 There was broad based support for ESD as the guiding principle for decision-making under the Act. Indeed, these principles were considered fundamental to the effective operation of the EPBC Act. One submitter, however, was of the view that the principles of ESD could not be adequately applied as the focus of the Act was limited to matters of NES.⁵⁴

19.105 A common theme arising out of the submissions dealing with this issue was that the implementation of ESD principles in terms of decision-making was inadequate. The commentary focussed on the broad application of these principles rather than whether there should be clear criteria for decision-making in the project approval provisions of the Act.

⁵⁴ Submission 095: Urban Development Institute Australia.

19.106 There was a divergence of views regarding the application of ESD in making decisions under the Act. Whilst some submitters argued that the principles of ESD were being interpreted very broadly so that it allowed conservation to be overlooked⁵⁵, others were of the view that application of the principles of ESD had led to excessive conservation-driven controls.⁵⁶

19.107 One reason which perhaps explains this difference of opinion is the uncertainty resulting from the language used in the EPBC Act. It was noted that the Act contains procedural requirements to consider ESD, for example, sections which require ESD to be a matter that decision-makers must 'have regard to', or 'take into account' in making a decision. However, once considered, there is no obligation in the Act which requires decision-makers to prefer the principles of ESD over any other 'considerations', or even to make decisions which balance environmental, social and economic factors.

19.108 The Australian Network of Environmental Defender's Offices (ANEDO) expressed its views on this issue as follows:

There are no provisions under the Act that require a decision to be made that is consistent with ESD. This is despite the fact that ESD is supposed to be reflected in substantive outcomes of a decision instead of just having procedural implications. That is, ESD requires more than simply requiring ESD to be considered as one of many unprioritised considerations.

Therefore, ANEDO submits that what is required is a more substantive approach that consolidates the principles of ESD into the decision-making process to achieve positive environmental outcomes. The EPBC Act should be reviewed to ensure that wherever a ministerial discretion is present, or where any decision is made under the Act (such as when approving controlled actions, making recovery plans, heritage listing), that ESD is given *overriding weight* to ensure that sustainable decisions are made in relation to matters of national environmental significance. That is, ESD should place fetters on the discretion of decision-makers to approve land uses or development proposals which may significantly threaten biodiversity and MNES.⁵⁷

19.109 In practical terms, what was thought to be needed was amendment to the EPBC Act to reflect a more complete commitment to the principles of ESD, that is, amendments that integrate those principles into all decision-making processes under the Act and gives them priority. This was seen as the only way of ensuring that ecologically sustainable decisions would be made. Without this fundamental change to the legislation, it was considered that the objects of the Act, particularly relating to ESD, were unlikely to be realised.

19.110 While it was recognised that many decisions under the Act involve a degree of uncertainty due to the complexities in considering environment protection and biodiversity conservation issues, many submitters were of the view that decision-makers were not provided with sufficient guidance on how to consider these uncertainties, or to apply sound environmental management principles.⁵⁸

19.111 It was the general view amongst the commentators on this topic that the EPBC Act did not provide an adequate framework to guide ESD decisions under the Act, and that there needed to be more direction given to decision-makers as to how to balance the economic and social considerations with environmental factors.

19.112 In the words of the Property Council of Australia:

while the Act states that decision-making processes should effectively integrate both long terms and short term economic, environmental, social and equitable considerations, these are not covered in the objects of the Act and little guidance is given as to how to weigh up each of these considerations. It is essential that the principles include the integration of the triple bottom line in their decision-making.⁵⁹

55 See e.g. Submission 195: WA Southern Coalition.

56 Confidential submission.

57 Submission 189: Australian Network of Environmental Defender's Offices, p.18.

58 See e.g. Submission 176: Property Council of Australia.

59 Submission 176: Property Council of Australia, p.3.

- 19.113 It was felt that a clear and better defined policy framework should be introduced to ensure transparency, as well as consistency in decisions in terms of how the Minister incorporates the relative considerations of social, economic and environment impacts (i.e. ESD) into the decision-making process. The release of relevant policies was considered an obvious first step,⁶⁰ followed by clear, specific guidelines to inform these decisions.⁶¹
- 19.114 A concept that was mooted by a number of submitters was a reversal of the onus of proof in decision-making relating to the EIA processes. Under this regime, 'proponents would need to prove that a proposal would lead to at least a neutral outcome, but preferably environmental enhancements rather than harm'.⁶² The practical application of this reversal is that where listed species and ecological communities are known to exist, the assumption should be made that any approval process will be lengthy, well documented and difficult to obtain.⁶³
- 19.115 The Urban Development Institute of Australia recommended decision-making be made by a Committee or Board, including the Minister, that would alleviate, to some extent, political pressures.⁶⁴ Should an advisory body be established to advise on ESD related decision-making, the suggestion of the South Australian Government was that:
- consideration should be given to include representatives of 'social' and 'economic' interests. For example, a more collaborative approach could be achieved by including representatives of the development industry and economic development.⁶⁵

Discussion of key points – ESD

- 19.116 It is important to note the wording of ss.3A(a) and 3A(d) of the EPBC Act:
- (a) decision making processes *should* effectively integrate both long term and short term economic, environmental, social and equitable considerations;
 - (b) the conservation of biological diversity and ecological integrity *should* be a fundamental consideration in decision making;
- 19.117 As noted by the emphasis on the word *should*, these provisions are not mandatory. Therefore, in relation to decision-making under the Act, they have no legislative force as strict criteria by which decisions should be made. They may be described as being more in the category of directory guidance for decision-makers (i.e. not requiring mandatory compliance).
- 19.118 The consequences of this have been noted by the submitters in terms of the perceived inconsistencies in decision-making. As has also been noted by submitters, in the absence of specific criteria under the legislation, there are no policy guidelines or instructions to inform decision-making. This is especially crucial in terms of assigning a 'value' to the environmental and social impacts so they can be assessed realistically alongside economic considerations.
- 19.119 If one of these considerations is to prevail over others, this is a matter that should be stated clearly in the legislation. If the considerations are to be regarded equally, then this too, should be unambiguous in terms of the language of the Act.

60 Submission 095: Urban Development Institute Australia.

61 Submission 176: Property Council of Australia.

62 Submission 092: Friends of Grasslands, p.4.

63 Submission 095: Urban Development Institute Australia.

64 Submission 095: Urban Development Institute Australia.

65 Submission 199: Government of South Australia, p.31.

19.120 The object of ESD is the cornerstone of the EPBC Act and reflects the Parliament's commitment to the application of the triple bottom line principles of environmental, social and economic considerations. There may be room for the Act to be strengthened in this regard, especially in terms of decision-making under the Act, and in the development of policy guidelines and instructions for decision-makers, especially relating to ESD. It is worth noting, however, that decision-making in this context is rarely straightforward. ESD itself requires the careful weighing of often competing community interests. The addition of more strict criteria could have unforeseen consequences and will need to be explored further.

Precautionary principle in decision-making

Key points raised in submissions – precautionary principle

19.121 Some submitters found it difficult to reconcile the enactment of s.391, with its requirement to take the precautionary principle into account in decision-making, against the principles of ESD enshrined in s.3A of the EPBC Act, which include specific reference to the precautionary principle.⁶⁶

19.122 The generally held view by commentators on this issue was that the precautionary principle was one of the elements of ESD which guided decision-making under the Act, and that therefore, decision-makers should act in accordance with the precautionary principle in all decision-making.

19.123 As the ANEDO stated:

it is illogical that the principal piece of environmental protection legislation in Australia does not specifically require the precautionary principle to be considered in all decision-making. Section 391 should be amended to require the Minister to act in accordance with ESD principles as stated in section 3A including the precautionary principle for *all* decisions under the Act.⁶⁷

19.124 In terms of the specific application of the precautionary principle, were of the view that the EPBC Act should focus on the availability of scientific data for any matters of NES, and, in cases where scientific certainty does not exist, should not rely on anecdotal and other non-scientific data to 'cloud' or justify decision-making.⁶⁸

19.125 In relation to this particular issue, the ANEDO stated in their submission that:

EDO office[r]s have observed great variation in the use and application of the precautionary principle by DEWHA officers, Ministers, courts and tribunals. For some decisions there is no evidence that the precautionary principle has been applied at all. For other decisions there is great variation on how it has been applied. This variance in outcomes is insufficient.

As a result, decision-makers should be given more guidance on how the precautionary principle is to be applied under the Act. This should include details on what stage of the decision-making process it should be considered, how a decision-maker should judge whether there is lack of full scientific certainty and a threat of serious or irreversible environmental damage, and what role it should take in the decision-making process.

⁶⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.3A(b).

⁶⁷ Submission 189: Australian Network of Environmental Defender's Offices, p.85.

⁶⁸ Submission 095: Urban Development Institute Australia, Submission 176: Property Council of Australia.

Discussion of key points – precautionary principle

19.126 In the earlier discussion on the principles of ESD, comment was made on the specific wording of ss.3A(a) and (d) being couched in discretionary terms. Section 391, however, provides that the Minister *must* take into account the precautionary principle in making decisions of the type listed in s.391(3). In other words, no discretion is permitted. It is a mandatory requirement of the Act that the precautionary principle be taken into account in making decisions of the type listed under this section of the Act.

19.127 This requirement was discussed recently by the Federal Court in *Lawyers for Forests Inc v Minister for the Environment*. The Court noted that the various provisions in the Act dealing with precautionary principle were ‘not entirely consistent’. Tracey J went on to observe:

Neither s 391(1), nor s 136(2) requires the Minister to ‘take account of’ or ‘take into account’, the precautionary principle in isolation. Under s 391(1) the Minister is obliged to take into account the precautionary principle only to the extent that this can be done consistently with the other provisions of the Act. Under s 136 the Minister is required to take into account the precautionary principle together with the other principles of ecologically sustainable development and a variety of other matters including economic and social matters. The Minister is not obliged to accord pre-eminence to the precautionary principle when making decisions under s 133 and 136. So long as the Minister ... takes account of the precautionary principle, it is a matter for him to determine what weight is to be accorded to the principle having regard to the wide range of other considerations which he is also required to take into account.⁶⁹

19.128 Whilst the issue of precautionary principle has been touched on in the earlier discussion in terms of the perceived inconsistencies in the application of this principle, the debate is covered more fully in Chapter 2 of this report. The issue of whether it should be applied in isolation, and what priority it should be given when considered alongside competing considerations, is one for further deliberation.

Ministerial discretion under the EPBC Act

Key points raised in submissions – Ministerial discretion

19.129 Most of the submissions that commented on the extent of Ministerial discretion in making decisions under the Act were environmental NGOs, although some other NGOs, such as the Urban Development Institute of Australia and the Property Council of Australia, also joined in the discussion.

19.130 A strong theme amongst these submitters was criticism of the wide discretion currently given to the Minister in relation to decision-making, and a perceived absence of accountability. Most thought that the degree of discretion was inappropriate and did not support a fair and transparent process. There was also a general lack of confidence in decision-making in terms of the perception that the process was open to inappropriate influence.

19.131 Many of the submitters also thought that discretionary powers under the Act should be restricted. The Nature Conservation Council of New South Wales expressed its concern as follows:

for the best environmental outcomes to be achieved under the Act, there is too much reliance upon the discretion of the Minister. Public confidence in the decision-making process of the Minister would be augmented by reducing the scope for the exercise of the Minister’s discretion – thereby guaranteeing that environmental considerations can be seen to be paramount.⁷⁰

⁶⁹ *Lawyers for Forests Inc v Minister for the Environment* [2009] FCA 330, para [33] (per Tracey J).

⁷⁰ Submission 188: Nature Conservation Council of New South Wales, p.4.

19.132 In the words of the ANEDO:

the level of discretion currently afforded the Minister is inappropriate. Throughout the Act the Minister has a high level of discretion that is not closely tied to the objects of the Act. Moreover, this discretion is often unfettered, with no list of mandatory considerations to confine that discretion.

...

Ministerial discretion should be more closely tied with the objects of the Act. In particular, all decisions under the Act should require the Minister to act in accordance with the principles of ESD. For example, this may require the Minister to demonstrate that a particular decision will lead to the protection of environment, or increase the survival of threatened species or protect heritage values of heritage places etc (as relevant). If the decision does not, the Minister should be required to provide reasons why the decision is nevertheless justified and indicate what the likely damage and impacts will be ... this could be achieved by giving ESD overriding weight in decision-making.⁷¹

19.133 Some of the specific Ministerial discretions that the ANEDO considers to be inappropriate include decisions relating to:

- recovery and threat abatement plans
- listing of threatened species;
- critical habitat;
- wildlife conservation plans; and
- heritage listing.

19.134 As these specific issues are covered elsewhere in this report, no further details are reported in this chapter.

Senate inquiry into the operation of the EPBC Act

19.135 The Senate Standing Committee noted a 'broad rejection by many stakeholders of the scope of ministerial discretion in the EPBC Act'. It also noted that the Act currently contains a very large number of provisions that allow Ministerial discretion in decision-making processes.

19.136 The Committee went on to state:

The committee received a number of submissions that were critical of the effects of ministerial discretion. These criticisms were both general, and in relation to particular powers under the Act. A local Landcare group were concerned that the Act:

has been rendered irrelevant because it gives too much discretionary power to the Minister, allowing politics to dominate over science.⁷²

71 Submission 189: Australian Network of Environmental Defender's Offices, p.82.

72 The Senate Standing Committee on Environment, Communications and the Arts, *The operations of Environment Protection and Biodiversity Conservation Act 1999: First report* (2009) http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/report.pdf at 4 May 2009, para [3.63].

19.137 The Committee summarised the recommendations of a number of submitters in relation to Ministerial discretion:

Friends of the Earth Australia believed that the range of ministerial discretion granted by the Act should be reduced, in particular in relation to endangered species. Birds Australia made the same argument, stating that '[t]he circumstances under which exemption via ministerial discretion apply need to be tightly defined to provide more certainty and confidence in the operation of the Act.'

Although there was much criticism of the discretionary provisions in the Act, it was not always clear what alternatives were being proposed, nor was it clear whether any alternative arrangements would better meet the objectives of the legislation. Decision-making under the Act can involve complex balancing of a wide range of information and factors. It can require environmental protection goals to be weighed against their social and economic implications. It is clear from submissions that stakeholders are sometimes dissatisfied with individual decisions. Sometimes this is because they believe those decisions give insufficient weight to environmental protection. In other cases, there are stakeholders dissatisfied because they believe economic or social benefits were not given sufficient emphasis.⁷³

19.138 The Committee suggested its own options for reform:

The committee is aware of a range of options that could change the transparency of decision-making and the role of ministerial discretion in the Act. These could include:

- Reducing discretion in ministerial actions;
- Increasing the transparency of ministerial actions;
- Enhancing the capacity for independent review; or
- Transferring some decision-making responsibilities to a statutory body.⁷⁴

19.139 The issue of independent review of decisions made under the Act has been dealt with in Chapter 20, and the role of the advisory bodies is dealt with earlier in this Chapter, however, in relation to the first two of the options referred to above, the Committee's view was:

Given the extensive role of the minister under the Act, there may be opportunities to reduce the minister's discretion. However ministerial discretion is in many cases not able to be simply removed. For example, the Act contains numerous points at which a minister is allowed to make a decision. The need for such a decision itself cannot be eliminated. Thus ministerial discretion could only be reduced by legislating to place more constraints on the decision.

In other cases, removing the discretion may simply create regular administrative breaches of the Act without achieving greater transparency.

...

The second option for addressing ministerial discretion is to increase transparency of processes under the Act. There are limited opportunities however for this to take place. The Act already provides for the production of statements of reasons for most decisions. There may be scope for further decision documentation to be automatically made public, however this did not in itself appear to be an issue of major concern amongst submitters. ...

One submission suggested an alternative approach based on establishing 'a new independent multidisciplinary body ("IMB") charged with implementation of key processes and decisions under the EPBC Act'. It suggested certain types of decision would be transferred to such a body, including most decisions relating to environmental assessments. The ACF [Australian Conservation Foundation] did suggest that the minister should have discretion 'allowing the minister to make the final decision in defined circumstances' (i.e. call-in powers), or alternatively that the IMB public release recommendations for a decision by the minister, with the minister still taking final approvals decisions. The ACF saw the IMB as an opportunity to shift the minister's role from being a day-to-day decision maker to 'strategic oversight of the portfolio.'

⁷³ Senate Committee Report, paras [3.67-3.68].

⁷⁴ Senate Committee Report, para [3.70].

...

The committee believes that some discretion in administrative decision-making can be important when complex decisions must be taken, and when these decisions involve weighing up diverse factors and types of evidence. For example, in determining whether to approve a proposed action, the minister must consider economic and social matters in addition to the need to protect matters of national environmental significance. At the same time the committee recognises that the fact that a decision is complex can be a reason to *reduce* discretion, not to increase it, so that there is more guidance for the decision maker, and so that those seeking decisions under the Act operate in a more predictable decision environment, increasing certainty.⁷⁵

Discussion of key points – Ministerial discretion

- 19.140 There is a high level of Ministerial discretion under the EPBC Act in terms of decision-making. Specific processes were commented on by submitters, including EIA and listing processes. Commentary on these topics is dealt with in detail in other chapters in this report. The argument against broad Ministerial discretion is that it is open to misuse.⁷⁶ An alternative view, enunciated earlier in this chapter, is that the scope of Ministerial discretion is appropriate in light of the accountability of Ministers for their decisions, be it through a review in the Federal Court, or through public opinion.
- 19.141 The call for the extent of Ministerial discretion under the Act to be reduced is noted. Central to consideration of this issue is how the scope Ministerial discretion might realistically and practically be reduced, and the problems or difficulties that may arise out of any replacement regime, whatever that might be.
- 19.142 Decisions under the Act have to reconcile complex and competing social, cultural, economic and environmental objectives. The transfer of some decision-making powers to advisory bodies was an option raised by the Senate Committee. The advantages and disadvantages of devolving decision-making to appropriately constituted committees or other deliberative systems would need to be carefully reasoned and tested. Highly specified policy guidelines and instructions for decision-makers may be necessary to avoid the risk of more inconsistent decisions. It should be noted, however, that such arms length decision-making forums are often criticised because they make Governments less accountable for decisions and reduce the ability of the public to participate in decision-making.
- 19.143 Another option is to entrust an independent body with the power to make key recommendations along the lines of the Environmental Protection Authority in WA.
- 19.144 The issue of increasing the transparency of Ministerial decisions is a difficult one. Unhappiness with decisions-making processes often flows from the fact that commentators simply disagree with particular outcomes. It is unrealistic to expect all parties to agree with all decisions, particularly when intangible values have necessarily been weighed in the process. Improved transparency may alleviate some of these concerns.
- 19.145 More definitive and prescriptive policy statements and guidelines is one way towards increasing transparency and perhaps limiting such 'guidelines' to mandatory adherence to broader concepts such as ESD maybe a solution. However, any prescriptive fettering of the parameters of Ministerial decision-making may come at the price of flexibility in terms of the decisions that can be made under the Act. This may not always have a positive outcome for society or the environment.
- 19.146 Another option to consider in terms of enhancing transparency and accountability is the provision of explanations, or reasons for decisions involving the exercise of discretion. While reasons are required to be provided in some circumstances (for example, as part of a formal review process), providing reasons as a matter of course, and not in this adversarial context, could go a long way towards increasing the transparency of the decision-making process and promoting confidence in the process.

⁷⁵ Senate Committee Report para [3.72-3.78].

⁷⁶ See e.g. James Prest 'The Bald Hills Wind Farm Debacle', in Tim Bonyhady & Peter Christoff (eds), *Climate Law in Australia* (2007), pp. 230-261.

