

Chapter 1

Background

Introduction

1.1 On 12 December 2013, the Selection of Bills Committee referred the Environment Legislation Amendment Bill 2013 (the bill) to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 12 February 2014.¹

1.2 The reason for referral was 'to allow stakeholder comment on the provisions of the legislation'.²

Conduct of the inquiry

1.3 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations inviting submissions by 17 January 2014.

1.4 The committee received 20 submissions relating to the bill and these are listed at Appendix 1. The submissions may be accessed through the committee's website at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environment_Legislation_Amendment_Bill_2013/Submissions.

1.5 The committee held a public hearing in Canberra on 6 February 2014. A list of witnesses who appeared at the hearing may be found at Appendix 2.

1.6 The committee would like to thank all the organisations and individuals that contributed to the inquiry and the witnesses who attended the public hearing.

Note on references

1.7 Hansard references in this report are to the proof committee Hansard. Page numbers may vary between the proof and the official Hansard transcript.

Purpose of the bill

1.8 The Environment Legislation Amendment Bill 2013 contains two key components:

- validation of certain decisions made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) before 31 December 2013 which required the Environment Minister to have regard to any relevant approved conservation advice (Schedule 1); and
- additional protection for dugong and turtle populations from the threats of poaching, illegal trade and illegal transportation (Schedule 2).

1 *Journals of the Senate*, No. 11, 12 December 2013, p. 361.

2 Selection of Bills Committee, *Report No. 11 of 2013*, Appendix 1.

Schedule 1—Amendments relating to conservation advices

1.9 Schedule 1 of the bill proposes to validate decisions made under the EPBC Act prior to 31 December 2013 that required the Environment Minister to have regard to any relevant approved conservation advice. The Explanatory Memorandum states that the schedule is designed to address the implications arising from the Federal Court's decision in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities*³ (the Tarkine case).⁴

Background—conservation advices and decision-making under the EPBC Act

1.10 Listed threatened species and ecological communities are listed as one of a number of 'matters of national environmental significance' under the EPBC Act. Actions which are likely to have a significant impact on a matter of national environmental significance require approval from the Environment Minister under the EPBC Act.

1.11 In addition, the Environment Minister is required to ensure that there is an approved 'conservation advice' in place for each listed threatened species and ecological community.⁵ Conservation advices are developed in consultation with the Threatened Species Scientific Committee, an independent scientific advisory body appointed under the EPBC Act. They contain information on the factors causing a species to be threatened, as well as actions that can be taken to stop the decline of, or support the recovery of, that species or community.⁶

1.12 The Environment Minister is required to have regard to relevant conservation advices in making a number of decisions under the EPBC Act. For example, the Minister must, in deciding whether to approve the taking of an action which is likely to have a significant impact on a listed threatened species or community, have regard to any approved conservation advice for that species or community.⁷

1.13 Decisions made under the EPBC Act are subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).⁸ That is, a person aggrieved by a decision made by a government official

3 [2013] FCA 694.

4 Explanatory Memorandum, p. 2.

5 EPBC Act, ss 266B(1). This requirement was added to the EPBC Act in 2006 by the *Environment and Heritage Legislation Amendment Act (No. 1) 2006*. For further information, see the Department of the Environment, *Conservation Advices*, <http://www.environment.gov.au/topics/biodiversity/threatened-species-ecological-communities/conservation-advices> (accessed 20 January 2014).

6 EPBC Act, ss 266B(2).

7 EPBC Act, ss 139(2). For a full list of the decisions under the EPBC Act which require consideration of approved conservation advice, see Parliamentary Library, *Environment Legislation Amendment Bill 2013, Bills Digest No. 32, 2013–14* (Bills Digest), pp 3–4.

8 See also section 487 of the EPBC Act, which provides extended standing under the ADJR Act for judicial review of decisions made under the EPBC Act.

can have that decision scrutinised by the court. The court is not concerned with the merits of the decision, and is only concerned with whether there has been an error of law in the making of the decision. For example, the court may consider whether, in making a decision, the decision-maker took into account all relevant considerations, and did not take into account irrelevant considerations. The court can then send the decision back to the original decision-maker to make a new decision.⁹

1.14 Under the ADJR Act, reasons for an administrative decision (including a decision made under the EPBC Act) may be sought and must be provided within 28 days after receiving the request.¹⁰ An application for judicial review under the ADJR Act must usually be made within 28 days of the date of receipt of the reasons for the decision. However, in appropriate cases, extensions of time can be sought.¹¹

The Tarkine Case

1.15 On 18 December 2012, the then Environment Minister, the Hon Tony Burke MP, gave approval under the EPBC Act to Shree Minerals Ltd to develop and operate an iron ore mine in north west Tasmania.¹² The Tarkine National Coalition challenged the approval decision in the Federal Court under the ADJR Act.

1.16 On 17 July 2013, the Federal Court set aside the Minister's decision on the basis that the Minister had failed to have regard to a mandatory conservation advice under subsection 139(2) of the EPBC Act—that is, the Approved Conservation Advice for *Sarcophilus harrisii* (Tasmanian Devil).¹³

9 Unlike merits review, where the court can substitute its own decision for that of the primary decision-maker: see further *The Australian Environment Act—Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, (Hawke review), p. 312.

10 ADJR Act, s.13.

11 ADJR Act, ss.11(3); see also Hawke review, p. 313.

12 See Department of the Environment, *Shree Minerals Limited/Mining/ Nelson Bay River/TAS/Nelson Bay River Magnetite Mine Reference Number: 2011/5846*, at: http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=5846 (accessed 16 December 2013). The minister had previously decided that the mine needed approval under the EPBC Act due to its potential impacts on listed threatened species and listed migratory species.

13 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694. For example, the judge noted that the approved conservation advice was not provided to the Environment Minister at all for the purposes of making his decision and he did not have a copy of the document before him when he made the decisions: para 35.

1.17 On 29 July 2013, the Environment Minister granted a new approval for the Shree Minerals' mine.¹⁴

Overview of Schedule 1

1.18 The Explanatory Memorandum states that the purpose of Schedule 1 of the bill is 'to address the risk to past decisions made under the EPBC Act arising from the Federal Court's decision in the Tarkine case'.¹⁵

1.19 Schedule 1 does not directly amend the EPBC Act.¹⁶ Rather, the changes will be contained in the *Environment Legislation Amendment Act 2014*, if the bill is enacted. As the Parliament Library Bills Digest observes:

This approach might be expected to make it more difficult for interested parties to find and confidently appreciate the practical operation of approved conservation advice, than if the new provisions were inserted into the *EPBC Act*.¹⁷

1.20 Item 1 of Schedule 1 provides that, if the Minister fails to have regard to conservation advices as required under the EPBC Act, this will not invalidate anything done by the Minister prior to 31 December 2013.¹⁸

1.21 Item 2 provides that decisions and other instruments that have been made under the EPBC Act are not invalid because of any failure to have regard to any approved conservation advice as required by the EPBC Act.¹⁹

1.22 In relation to future decisions, the intention is to maintain the requirements in the EPBC Act for the Minister to have regard to any relevant approved conservation advice.²⁰

1.23 In the second reading speech, it was explained that the bill 'will provide certainty for industry stakeholders with existing decisions and projects that rely on those decisions'.²¹

14 See Department of the Environment, *Shree Minerals Limited/Mining/ Nelson Bay River/TAS/Nelson Bay River Magnetite Mine Reference Number: 2011/5846* <http://www.environment.gov.au/epbc/notices/assessments/2011/5846/2011-5846-approval-decision-2.pdf> (accessed 16 December 2013).

15 Revised Explanatory Memorandum, p. 6.

16 See Supplementary Explanatory Memorandum, p. 2.

17 Bills Digest, p. 12.

18 Revised Explanatory Memorandum, pp 6–7.

19 Revised Explanatory Memorandum, p. 7.

20 Revised Explanatory Memorandum, p. 6.

21 Senator the Hon Arthur Sinodinos, Assistant Treasurer, *Senate Hansard*, 11 December 2013, p. 104.

Amendments to Schedule 1 in the House of Representatives

1.24 The bill was introduced into the House of Representatives on 14 November 2013, and debated on 5 and 9 December 2013. The House of Representatives agreed to two Government amendments to Schedule 1 of the bill. Those amendments inserted a sunset clause into the legislation to cover decisions made by 31 December 2013, whereas previously the bill applied to all decisions, both past and future. Further, Schedule 1 originally added a new section 517B to the EPBC Act, whereas the bill no longer directly amends the EPBC Act.²² The Environment Minister explained that:

This is actually fixing up a mess caused by the previous government. We are helping them out. There is an existing set of appeals. There could potentially be more based on technicalities. These could cause endless delay without there being any substantive basis for the claims of improper decision making.²³

1.25 The Environment Minister further stated that:

...I can guarantee that every decision I have taken and every decision I will take is made with reference to expert conservation advice, in the presence of the conservation advice and after consideration of the conservation advice.²⁴

1.26 The Australian Greens unsuccessfully moved amendments to the Bill in the House of Representatives, which were supported by the Australian Labor Party. These amendments would have removed the provisions of the EPBC Act enabling approval powers to be delegated to State and Territory Governments under bilateral agreements.²⁵ These proposed amendments have been foreshadowed in the Senate by Senator Waters²⁶ and are similar to those proposed in the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012, which was considered by the Environment and Communications

22 House of Representatives, *Votes and Proceedings No. 12*, 9 December 2013, pp 188–189.

23 The Hon Greg Hunt MP, Minister for the Environment, *House of Representatives Hansard*, 9 December 2013, p. 89.

24 The Hon Greg Hunt MP, Minister for the Environment, *House of Representatives Hansard*, 9 December 2013, p. 102.

25 *House of Representatives Hansard*, 9 December 2013, pp 103–107.

26 Environment Legislation Amendment Bill, *Proposed Amendments*, at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation%2Fbillhome%2F5128%22> (accessed 30 January 2014).

Legislation Committee in March 2013.²⁷ Amongst other recommendations, the committee recommended that that bill not be passed.²⁸

Comments by the Senate Scrutiny of Bills Committee

1.27 The Senate Scrutiny of Bills Committee has raised concerns relating to Schedule 1 of the bill, and in particular, the retrospective validation of decisions made under the EPBC Act. The committee noted that:

The retrospective validation of administrative decisions may have a detrimental effect on a person's rights or liberties. In this case, the detrimental effect may be on the right of an 'aggrieved person' to bring proceedings under the ADJR Act to enforce the requirements of the EPBC Act. The practical effect of item 2 of Schedule 1 is that a decision which was invalid when made cannot be challenged by such an aggrieved person under the ADJR Act...²⁹

1.28 The committee noted that the justification for this approach is to provide certainty for proponents,³⁰ but then stated:

Although certainty for proponents is of relevance, the committee considers that a fuller justification for the approach should be sought in light of the retrospective operation. It is not clear that the impact of the Federal Court decision in the Tarkine case is that many other decisions under the EPBC Act are also invalid. Other decisions under that Act would only be invalid if it could be established on the facts of each case that the Minister had failed to comply with his or her statutory obligation to consider any approved conservation advice. Here it is noted that challenges under the ADJR Act (like the Tarkine case) must, in general, be brought within 28 days of the provision of a statement of reasons for the decision.³¹

1.29 The Scrutiny of Bills committee has sought the Environment Minister's advice as to:

...the extent of uncertainty for proponents and why this is thought sufficient to justify retrospectively validating decisions that are contrary to statutory obligations imposed by the Parliament. The committee also seeks the

27 See further Senate Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed%20inquiries/2010-13/epbcfederalpowers/report/index (accessed 9 January 2014).

28 Senate Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013, recommendation 1, p. 29.

29 Senate Scrutiny of Bills Committee, *Alert Digest 8/13*, p. 14.

30 Revised Explanatory Memorandum, pp 2 and 7.

31 Senate Scrutiny of Bills Committee, *Alert Digest 8/13*, p. 15.

Minister's advice as to whether the amendment may affect any proceedings which have yet to be determined.³²

1.30 At the time of writing, the Minister's response had not yet been received.

Schedule 2—Turtle and Dugong protection measures

1.31 Schedule 2 of the bill proposes to amend the EPBC Act and *Great Barrier Reef Marine Park Act 1975* (GBR Marine Park Act) to provide additional protection for dugong and turtle populations from the threats of poaching, illegal trade and illegal transportation.

Background: Turtle and Dugong Protection Plan

1.32 On 15 August 2013, during the federal election campaign, the Coalition announced its 'Dugong and Turtle Protection Plan'. Under this plan, the Coalition committed to provide an additional \$5 million for dugong and turtle protection, including \$2 million for an Australian Crime Commission investigation into the practice of illegal killing, poaching and transportation of turtle and dugong meat. The plan also included a commitment to introduce legislation tripling the penalties for poaching and illegal transportation of turtle and dugong meat.³³ This bill implements this policy commitment.³⁴

Summary of provisions

1.33 Schedule 2 of the bill proposes to amend the EPBC Act and the GBR Marine Park Act to provide additional protection for dugong and turtle populations from the threats of poaching, illegal trade and illegal transportation. The amendments increase the financial penalties for various offences and civil penalty provisions relating to listed dugong and turtles. The Explanatory Memorandum states that:

These amendments will deter persons from committing offences or breaching civil penalty provisions by imposing increased penalties in respect of the illegal killing, injuring, taking, trading, keeping or moving of turtles and dugong.³⁵

1.34 The EPBC Act currently contains various criminal offences relating to the killing, injuring, taking, trading, keeping or moving of listed threatened, migratory or marine species.³⁶ Six species of marine turtle are listed as threatened species under the EPBC Act. They are also listed migratory species and listed marine species. The

32 Senate Scrutiny of Bills Committee, *Alert Digest 8/13*, p. 15.

33 Greg Hunt MP, *Coalition announces Dugong and Turtle Protection Plan*, 15 August 2013, <http://www.greghunt.com.au/Home/LatestNews/tabid/133/articleType/ArticleView/articleId/2611/Coalition-announces-Dugong-Turtle-Protection-Plan.aspx> (accessed 23 December 2013).

34 See Explanatory Memorandum, p. 8.

35 Revised Explanatory Memorandum, p. 2.

36 EPBC Act, Part 13, Division 1 (listed threatened species and communities), Division 2 (listed migratory species) and Division 4 (listed marine species).

dugong is listed as a migratory species and a marine species under the EPBC Act (but not a threatened species).³⁷

1.35 Schedule 2 of the bill proposes to increase the maximum penalties for new 'aggravated offences' under these provisions from \$170,000 to \$510,000.³⁸ An 'aggravated offence' is an offence relating to a dugong, marine turtle or leatherback turtle.³⁹ For the strict liability⁴⁰ version of these offences, the maximum penalty will increase from \$85,000 to \$255,000.⁴¹

1.36 The GBR Marine Park Act also currently contains criminal offences and civil penalty provisions which apply to the taking of, or injury to, turtles and dugong where they are a protected species under that Act.⁴² The maximum penalty for the aggravated offence of taking or injuring dugong, marine turtles or leatherback turtles that are protected species under the GBR Marine Park Act will increase from \$340,000 to \$1,020,000. For the strict liability version of these offences, the penalty will increase from \$10,200 to \$30,600. For an aggravated contravention against section 38BB, the penalty increases from \$850,000 to \$2.55 million for an individual, and from \$8.5 million to \$25.5 million for a corporation.⁴³

1.37 The bill does not create new offence provisions under either the EPBC Act or GBR Marine Park Act. Rather, it increases the maximum financial penalties for specific existing offences where the prohibited conduct concerns dugong or turtles. It does not affect or increase the imprisonment terms currently set out in these Acts.⁴⁴

1.38 The Explanatory Memorandum states that:

Increasing the maximum fines allows greater flexibility to ensure the penalty will outweigh any financial benefits from committing the relevant offence and provide an increased disincentive without the additional financial and social costs associated with increased incarceration.⁴⁵

1.39 According to the Explanatory Memorandum, the amendments would not affect the rights of native title holders to harvest dugong and turtles for the purposes of

37 See Bills Digest, pp 5–6.

38 Note that the EPBC Act and the bill refer to 'penalty units'. Under s. 4AA of the *Crimes Act 1914*, a penalty unit is currently worth \$170.

39 See proposed sections 196F, 211F and 254F at items 13, 27 and 41 of Schedule 2.

40 Under a strict liability offence, the prosecution does not have to show that a person knew or was reckless to the fact that the relevant animal was a *listed* turtle or dugong. However, the defence of mistake of fact is available: see Revised Explanatory Memorandum, p. 9 and section 6.1 of the *Criminal Code*.

41 Schedule 2, items 1–42; see also Revised Explanatory Memorandum, pp 9–12.

42 GBR Marine Park Act, Division 2, Part VAA.

43 Schedule 3, items 43–53; see also Revised Explanatory Memorandum, pp 12–14.

44 Revised Explanatory Memorandum, pp 4 and 9.

45 Revised Explanatory Memorandum, p. 9.

domestic, non-commercial communal needs preserved by section 211 of the *Native Title Act 1993*.⁴⁶

Comments by the Scrutiny of Bills Committee: penalties and strict liability

1.40 The Scrutiny of Bills Committee noted that the amendments to the EPBC Act and the GBR Marine Park Act would triple the penalties for offences relating to the killing, illegal trade and transportation of dugong and turtle populations and that strict liability applies to the physical elements of the offences.⁴⁷ The Scrutiny of Bills Committee further noted that the statement of human rights compatibility contained in the Explanatory Memorandum explains that strict liability still allows a defence of honest and reasonable mistake to be raised, and that:

...the application of strict liability is a proportionate limitation to the right to the presumption of innocence because of the high public interest in protecting and conserving marine turtle and dugong populations. The increase in penalties is thought necessary to ensure strong deterrence.⁴⁸

1.41 The Scrutiny of Bills Committee concluded that:

In light of the justification provided in the statement of compatibility and explanatory memorandum the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.⁴⁹

46 Revised Explanatory Memorandum, pp 3 and 9.

47 Senate Scrutiny of Bills Committee, *Alert Digest 8/13*, p. 16.

48 Senate Scrutiny of Bills Committee, *Alert Digest 8/13*, p. 16.

49 Senate Scrutiny of Bills Committee, *Alert Digest 8/13*, p. 16.

