

Chapter 2

Key issues

2.1 This chapter examines the key issues raised in submissions and evidence in relation to each of the two schedules of the bill.

Schedule 1—Amendments relating to conservation advices

2.2 Many submissions were opposed to Schedule 1 of the bill,¹ which would retrospectively validate certain decisions made under the EPBC Act before 31 December 2013 which required the Environment Minister to have regard to any relevant approved conservation advice. In contrast, the Minerals Council of Australia and the Tasmanian Minerals and Energy Council supported Schedule 1 of the bill.

2.3 Key issues raised in relation to Schedule 1 were:

- the purpose of the schedule and the need for certainty; and
- the retrospective application of the schedule.

2.4 These issues are discussed in turn below.

Purpose of Schedule 1

2.5 As outlined in Chapter 1, the stated purpose of Schedule 1 of the bill is to provide certainty for proponents in light of the Federal Court decision in the Tarkine case. In that decision, the Federal Court declared invalid the approval given to Shree Minerals Ltd under the EPBC Act due to a failure to 'have regard to' a relevant approved conservation advice. The Department of the Environment (the Department) explained that:

...the decision brief relied on by the former Minister for the approval stated that conservation advices had been considered in the preparation of the Department's advice and had informed the Department's recommendations. However, the relevant conservation advice document itself was not attached or specifically referred to in the briefing for the approval.²

2.6 The Department advised that:

1 See, for example, Australian Conservation Foundation (ACF), *Submission 1*; Australian Koala Foundation, *Submission 2*; Wildlife Preservation Society of Queensland, *Submission 4*; National Parks Australia Council, *Submission 5*; The Wilderness Society, *Submission 8*; WWF-Australia, *Submission 10*; Keppel and Fitzroy Delta Alliance, *Submission 11*; Australian Network of Environmental Defender's Office (ANEDO), *Submission 12*; Humane Society International, *Submission 13*; Logan & Albert Conservation Association, *Submission 14*; Lawyers for Forests, *Submission 15*. Two submissions supported the bill: Minerals Council of Australia, *Submission 6*; Tasmanian Minerals and Energy Council, *Submission 19*.

2 Department of the Environment, *Submission 9*, p. 2.

The purpose of Schedule 1 is to address the risk to past decisions made under the EPBC Act arising from the Federal Court's decision in the Tarkine case.³

2.7 Mr Terry Long, from the Tasmanian Minerals and Energy Council, described the Tarkine case as 'victory of detail over substance'.⁴ The Council argued that the decision in the Tarkine case 'hinged on a matter of legal technicality' and represented 'the victory of narrow prescription over broad intent'.⁵

2.8 Many submissions expressed concern that the bill would weaken the EPBC Act and undermine its objectives by disregarding the need to consider conservation advices.⁶ In this context, the committee heard the importance of conservation advices as a source of independent scientific advice.⁷ The Australian Network of Environmental Defender's Office (ANEDO) explained that conservation advices contain 'significant information about the health of the relevant species and the requirements to ensure the ongoing survival of the species' and are 'vital in ensuring that the decision maker has all the relevant information before them and is fully aware of the potential consequences on the particular species'.⁸ ANEDO submitted that:

Any measure that dilutes a requirement to consider scientific advice and removes accountability of the Minister and department for failing to follow the law is contrary to best practice and inconsistent with the achievement of the objects of the EPBC Act.⁹

2.9 In response to these concerns, the Department described Schedule 1 'as a minor technical amendment to address legal risks that had arisen as a result of a court

3 Department of the Environment, *Submission 9*, p. 2.

4 Mr Terry Long, Chief Executive Officer, Tasmanian Minerals and Energy Council, *Committee Hansard*, 6 February 2014, p. 11.

5 Tasmanian Minerals and Energy Council, *Submission 19*, pp 4 and 5; see also Mr Terry Long, Chief Executive Officer, Tasmanian Minerals and Energy Council, *Committee Hansard*, 6 February 2014, p. 8.

6 See, for example, ACF, *Submission 1*, p. 1; Australian Koala Foundation, *Submission 2*, p. 1; The Wilderness Society, *Submission 8*, pp 1–2; also Wildlife Preservation Society of Queensland, *Submission 4*, p. 1; National Parks Australia Council, *Submission 5*, pp 1–2; Keppel and Fitzroy Delta Alliance, *Submission 11*, p. 2; Humane Society International, *Submission 13*, pp 1 and 2; Logan and Albert Conservation Association, *Submission 14*, p. 1; Lawyers for Forests, *Submission 15*, pp 1 and 6.

7 See, for example, Mr Paul Toni, National Manager, Science, Policy and Government Partnerships, WWF-Australia, *Committee Hansard*, 6 February 2014, p. 1; Ms Saffron Zomer, ACF, *Committee Hansard*, 6 February 2014, p. 13; Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, p. 20; Australian Koala Foundation, *Submission 2*, p. 1; Wildlife Preservation Society of Queensland, *Submission 4*, p. 2.

8 ANEDO, *Submission 12*, pp 1–2.

9 ANEDO, *Submission 12*, p. 1; see also Mr Brendan Sydes, Lawyer/Executive Officer, *Committee Hansard*, 6 February 2014, p. 18.

case'.¹⁰ The Department stated that the bill does not affect the role of conservation advice and:

...does not remove that requirement to consider relevant approved conservation advices before making certain decisions under the [A]ct. Rather, the bill provides assurances to stakeholders that previous decisions under the EPBC Act will not be invalid because of a technicality; that is, that the department did not attach approved conservation advices to a decision brief. Further, the EPBC Act will continue to require that all relevant information is to be considered in any decisions on whether to approve projects.¹¹

2.10 The Department further advised that Schedule 1 'does not reduce the level of protection provided for threatened species and ecological communities' and that, as matter of practice, 'approved conservation advices will continue to be used to inform the Department's advice on relevant decisions under the EPBC Act'.¹²

2.11 Finally, the Department commented that, in making the decision in relation to Shree Minerals which was subsequently challenged in the Tarkine case, the 'substance of the approved conservation advice was entirely covered in the briefing material that was provided to the minister'. The Department went on to conclude:

...the matter of the Tasmanian devil and its approved conservation recovery plan were well addressed in the brief that was provided to the minister. They were certainly discussed with the minister in advance of him making his decision in that case. But, as Justice Marshall found, the approved conservation advice was not attached to the decision documents that were provided to the minister.¹³

2.12 However, the Australian Conservation Foundation (ACF) suggested that:

The appropriate way to address the implications of the Tarkine case would be to ensure that the Minister always has regard to the relevant Conservation Advice, rather than removing accountability for failing to do so.¹⁴

2.13 The Department advised that it had responded to the Tarkine case in this way:

10 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 41.

11 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 40 and see also p. 43.

12 Department of the Environment, *Submission 9*, p. 3.

13 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 42 and see also p. 43.

14 ACF, *Submission 1*, p. 2; see also Ms Saffron Zomer, National Liaison Officer, ACF, *Committee Hansard*, 6 February 2014, p. 15; Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council of Australia (Law Council), *Committee Hansard*, 6 February 2014, p. 23.

Since the Federal Court declared the environmental approval given to Shree Minerals Limited invalid on 17 July 2013, the Department has ensured that relevant approved conservation advices are included in the package of information considered by the Minister when making relevant decisions.¹⁵

Need for certainty

2.14 The Minerals Council of Australia supported the proposed amendments in Schedule 1 of the bill on the grounds of business certainty:

The industry makes significant investments on the basis of project approval decisions. Challenges to government process (such as whether there was appropriate consideration of approved conservation advice) post approval, particularly after long periods, can pose a significant risk to those investments.¹⁶

2.15 The Minerals Council of Australia continued:

Project proponents should not be disadvantaged where Government is alleged to have failed to carry out its responsibilities. Accordingly, the MCA considers the proposed amendment appropriate to ensure business certainty and investment security is upheld.¹⁷

2.16 Mr Long, Tasmanian Minerals and Energy Council, also agreed that there would be uncertainty if the proposed amendment were not passed.¹⁸

2.17 In contrast, Mr Brendan Sydes from ANEDO suggested that:

It is not clear that there is any uncertainty. There is no evidence that has been put forward as to any decisions that are at risk of being invalidated as a result of this.¹⁹

2.18 Other submissions expressed concern about the potential impact of the bill on the ability of community organisations to challenge wrongly made decisions made under the EPBC Act. For example, the Humane Society International expressed concern that the bill would result in non-government organisations being prevented from access to the courts in certain circumstances.²⁰

2.19 However, the Tasmanian Minerals and Energy Council suggested that, in fact, the bill 'will foreclose only one very narrow opportunity' for groups to have decisions

15 Department of the Environment, *Submission 9*, p. 2.

16 Minerals Council of Australia, *Submission 6*, p. 1; see also Mr Terry Long, Chief Executive Officer, Tasmanian Minerals and Energy Council, *Committee Hansard*, 6 February 2014, p. 12.

17 Minerals Council of Australia, *Submission 6*, p. 1.

18 Mr Terry Long, Chief Executive Officer, Tasmanian Minerals and Energy Council, *Committee Hansard*, 6 February 2014, p. 12.

19 Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, p. 18.

20 Humane Society International, *Submission 13*, p. 1; see also ACF, *Submission 1*, p. 3; Ms Saffron Zomer, ACF, *Committee Hansard*, 6 February 2014, p. 14; Lawyers for Forests, *Submission 15*, p. 6.

overturned and 'will not preclude similar challenges based upon other legal technicalities in the future'.²¹

2.20 The committee also notes the evidence received that there are time limits for seeking judicial review of decisions made under the EPBC Act. As noted in Chapter 1, an affected party has 28 days to seek a statement of reasons, the Minister has 28 days to provide that statement of reasons and the affected party has 28 to lodge an application for judicial review.²²

2.21 Mr Sydes from ANEDO acknowledged that, due to these time limits, opportunities for challenging decisions made a long time ago 'are greatly diminished'.²³ Mr Greg McIntyre SC from the Law Council of Australia (the Law Council) agreed that, although the court may have discretion to extend time, the chances of a successful application are 'minimal'.²⁴

2.22 In response to questioning, the Department advised that there are no legal proceedings currently underway that would be affected by Schedule 1 of the bill.²⁵ The Department further advised that:

The Bill is designed to ensure the validity of decisions made under the EPBC Act prior to 31 December 2013 to provide certainty to industry. The Bill will not affect the rights of interested parties to challenge EPBC Act decisions in the courts. Rather, it provides assurance to stakeholders that previous decisions under the EPBC Act will not be invalid because of a technicality, that is, the Department did not attach approved conservation advices to a decision brief.²⁶

2.23 And further:

The Bill provides necessary investment certainty for industry stakeholders with existing decisions under the EPBC Act and the projects that rely on those decisions. This is intended to ensure that all projects with existing approvals, including major projects with long-term investment benefits for the Australian economy, have legal certainty.²⁷

21 Tasmanian Minerals and Energy Council, *Submission 19*, p. 5.

22 Tarkine National Coalition, *Submission 20*, p. 3; Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, pp 18, 19–20.

23 Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, p. 20.

24 Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, p. 26.

25 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 42.

26 Department of the Environment, *Submission 9*, p. 2.

27 Department of the Environment, *Submission 9*, p. 2.

Amendments in the House of Representatives

2.24 Many submitters noted and supported the amendments in the House of Representatives which limited the effect of the amendments proposed by Schedule 1 of the bill to decisions made before 31 December 2013.²⁸ However, many submitters were nevertheless still opposed to the bill.²⁹

2.25 The Minerals Council of Australia expressed disappointment at the 'sunset' amendment to the bill, but for different reasons:

The MCA has every confidence in the Government in discharging its responsibilities under the EPBC Act; however the potential risk to industry from challenges to government process is such that this safeguard for approval decisions should be extended into the future.³⁰

2.26 In this context, the committee notes that there is no need for the bill to extend into the future based on the Department's evidence that conservation advices are now included in the ministerial brief when making relevant decisions.³¹

Retrospective application

2.27 A key concern for many submitters and witnesses was the retrospective nature of the amendments in Schedule 1. For example, the Law Council submitted that 'legislation should only in exceptional circumstances be given retrospective effect'.³² Mr McIntyre explained the reasoning behind this:

Part of the operation of the rule of law is that you actually know what the law is and then you act in accordance with it. You cannot possibly know what a retrospectively operative law is and act in accordance with it.³³

2.28 The Law Council was concerned that 'there are not clear and compelling reasons' for the retrospective nature of the bill.³⁴ The Law Council further observed that, although the intention behind the bill might have been to cover just approval decisions under the EPBC Act, the bill actually allows for the retrospective validation

28 ACF, *Submission 1*, p. 2; Australian Koala Foundation, *Submission 2*, p. 1; National Parks Australia Council, *Submission 5*, p. 1; The Wilderness Society, *Submission 8*, p. 2; Humane Society International, *Submission 13*, p. 1; ANEDO, *Submission 12*, p. 1.

29 Wildlife Preservation Society of Queensland, *Submission 4*, p. 2; The Wilderness Society, *Submission 8*, p. 2; Lawyers for Forests, *Submission 15*, p. 7; Mr Brendan Sydes, Lawyer/Executive Officer, *Committee Hansard*, 6 February 2014, p. 18.

30 Minerals Council of Australia, *Submission 6*, p. 1.

31 Department of the Environment, *Submission 9*, p. 2.

32 Law Council, *Submission 3*, p. 7; Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, p. 23; see also, for example, Ms Saffron Zomer, ACF, *Committee Hansard*, 7 February 2014, p. 13.

33 Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, p. 24.

34 Law Council, *Submission 3*, p. 8.

of decisions made under many different sections of the Act.³⁵ The Law Council submitted that:

The retrospective validation of an unspecified number of decisions that may be invalid...casts doubt on the integrity of the implementation of Australia's primary national environment protection Act.³⁶

2.29 ANEDO was similarly concerned that 'in essence the Bill is asking the Parliament to validate conduct by the executive that breached the standard currently required by the Parliament'.³⁷

2.30 Several submitters, including WWF-Australia, ANEDO and the Law Council, suggested that a better approach would be for an audit or review to be conducted to ascertain the number and details of decisions have been made under the EPBC Act in the absence of approved conservation advice and, for example, which approvals would likely be overturned should the bill not proceed.³⁸ WWF-Australia suggested that this review should include all decisions made under the EPBC Act since 2006, when the requirement to have regard to conservation advices was introduced to the EPBC Act.³⁹

2.31 ANEDO explained that this would allow a 'more considered decision about whether or not the retrospective validation of conduct that was in breach of the current Act is justified'.⁴⁰

2.32 However, when questioned, witnesses struggled to identify any particular decisions or cases that might be of concern.⁴¹ For example, Ms Saffron Zomer from ACF stated 'there are no particular cases that we have our eye on. It is more a matter of principle'.⁴²

35 Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, pp 25 and 27. See ANEDO, *Submission 12*, Attachment 1 for a full list of decisions under the EPBC Act which require the Minister to have regard to conservation advices.

36 Law Council, *Submission 3*, p. 8.

37 ANEDO, *Submission 12*, p. 3; see also Tarkine National Coalition, *Submission 20*, p. 1.

38 WWF-Australia, *Submission 10*, p. 2; Mr Paul Toni, National Manager, Science, Policy and Government Partnerships, WWF-Australia, *Committee Hansard*, 6 February 2014, p. 1; ANEDO, *Submission 12*, p. 3; Law Council, *Submission 3*, p. 8; Ms Saffron Zomer, National Liaison Officer, ACF, *Committee Hansard*, 6 February 2014, p. 15; Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, p. 19.

39 Mr Paul Toni, National Manager, Science, Policy and Government Partnerships, WWF-Australia, *Committee Hansard*, 6 February 2014, p. 5.

40 ANEDO, *Submission 12*, p. 3.

41 See, for example, Mr Paul Toni, National Manager, Science, Policy and Government Partnerships, WWF-Australia, *Committee Hansard*, 6 February 2014, p. 3; Ms Saffron Zomer, ACF, *Committee Hansard*, 6 February 2014, p. 15.

42 Ms Saffron Zomer, ACF, *Committee Hansard*, 6 February 2014, p. 15.

2.33 In response to questioning on this issue, the Department advised that, after the Tarkine case, it had 'undertaken some due diligence and risk assessment', but did not have precise figures on the number of decisions affected.⁴³ The Department went on to comment:

...we do not have analysis that indicates the number of cases that might be vulnerable to this particular administrative impediment, but we do know that that it is more likely than not that there are some. The approach that has been taken is to ensure that substantial economic activity that depends on these EPBC approvals is able to proceed without any legal risk being attached to it that they were not expecting.⁴⁴

2.34 The Department also noted that, as a result of this due diligence, it had: ...changed the administrative procedures associated with the provision of advice to ministers. We have undertaken a process of attaching conservation advice in full to every brief that is available and ensuring that each piece of conservation advice is individually considered in advance of any decision being taken.⁴⁵

2.35 As outlined in Chapter 1, the committee notes that the issue of retrospective application is being examined by the Senate Scrutiny of Bills Committee, which has sought the Minister's advice on the issue. At the time of writing, the Minister's response had not yet been received.

Drafting issues with item 2

2.36 Several submissions pointed to a potential drafting problem with the bill as a result the amendments made in the House of Representatives. It was argued that, although the intention of the amendments was to limit the application of the amendments to decisions made before 31 December 2013, only item 1 was amended in the House of Representatives. The wording of item 2 of the bill remains the same and does not suggest its operation is limited only to decisions made before 31 December 2013. There was concern that this creates ambiguity and there could be confusion about the potential *prospective* operation of item 2.⁴⁶

2.37 For example, the Law Council recommended that item 2 be amended to clarify and specify that it is intended to apply to things done prior to 31 December 2013.⁴⁷ Mr Greg McIntyre SC, Law Council, warned that, otherwise,

43 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 41.

44 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 43.

45 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 43.

46 ANEDO, *Submission 12*, pp 3–4; Law Council, *Submission 3*, p. 9; National Environmental Law Association, *Submission 7*, pp 2–3; see also Mr Brendan Sydes, Lawyer/Executive Officer, *Committee Hansard*, 6 February 2014, p. 18.

47 Law Council, *Submission 3*, p. 9.

'there is still a clear danger that it [the bill] is going to operate both prospectively and retrospectively'.⁴⁸

2.38 In response to questioning on this drafting issue, the Department advised:

The policy intention of Item 2 of the Environment Legislation Amendment Bill 2013 is that the provision is time-limited to 31 December 2013 and that the decisions and instruments validated by Item 2 are those that are covered by Item 1.

The explanatory memorandum to the Bill, specifically paragraphs 1.1 to 1.3, clarifies the policy intention that Schedule 1 of the Bill (Amendments relating to approved conservation advice) is limited to decisions and instruments made under the EPBC Act prior to 31 December 2013.⁴⁹

Schedule 2—Turtle and Dugong protection measures

2.39 Many submissions supported the increase in penalties for harming or killing of marine turtles or dugongs in Schedule 2 of the bill.⁵⁰ Nevertheless, issues were raised in relation to:

- the need for the penalty increases and their effectiveness in protecting turtles and dugongs;
- the potential impacts of the amendments on Aboriginal and Torres Strait Islander people; and
- the limited application of the increased penalties to dugongs and turtles rather than all threatened species.

2.40 These issues are addressed in turn below.

Need for the penalty increases

2.41 As outlined in Chapter 1, the amendments in Schedule 2 are designed to deter people from illegal hunting and trade in relation to dugongs and turtles. The Department explained the amendments are 'in response to community concerns about the ongoing illegal poaching and trading of turtles and dugongs' and:

...address concerns that the current penalty provisions in the EPBC Act and the GBRMP Act are not high enough to protect turtles and dugong from the increasing threats of poaching, illegal hunting and illegal transportation and trade.⁵¹

48 Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, p. 23.

49 Department of the Environment, *Answers to Questions on Notice*, received 11 February 2014, p. 6.

50 ACF, *Submission 1*, p. 3; Wildlife Preservation Society of Queensland, *Submission 4*, p. 2; WWF-Australia, *Submission 10*, p. 4; Keppel and Fitzroy Delta Alliance, *Submission 11*, p. 2; Humane Society International, *Submission 13*, p. 2; ANEDO, *Submission 12*, p. 4.

51 Department of the Environment, *Submission 9*, p. 2; see also Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 40.

2.42 However, the Law Council expressed doubt about the deterrent effect of increasing penalties. Mr Greg McIntyre SC, Law Council, argued that:

There has never been any really comprehensive evidence that increasing penalties actually prevents crime.⁵²

2.43 He went on to explain that:

...the best way to prevent crime is to catch people in the act and to prosecute them. It does not necessarily depend upon the penalty. If people think they are not going to be caught then they are less likely to be concerned about it...If you think you are up in the Torres Strait and the chance of you being caught is one in 10,000, you are not going to really care. It is that which is going to work rather than the penalty itself.⁵³

2.44 Several submissions and witnesses also queried the extent of the problem of illegal hunting and trade of turtles and dugong.⁵⁴ For example, the Indigenous Advisory Committee submitted that:

While a significant concern, poaching and the illegal trade of turtle and dugong does not represent the threat to species populations that is implied in these proposed changes, and to date there have been no prosecutions around this activity.⁵⁵

2.45 In response to questioning on this issue, the Department stated that:

There are anecdotal reports and validated reports of poaching and illegal killing—particularly around Cairns—which have provoked extensive community concern...⁵⁶

2.46 However, the Department acknowledged that 'there are challenges in understanding the scale and scope of the actual activity that is occurring'.⁵⁷ The Department noted that this is why the government has committed \$2 million for the Australian Crime Commission to investigate the nature and scope of the illegal activity.⁵⁸

52 Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, p. 23; see also pp 23–24.

53 Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, p. 26.

54 See, for example, Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 28; Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, p. 38.

55 Indigenous Advisory Committee, *Submission 17*, p. 2; see also Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, pp 37–38.

56 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 46.

57 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 46.

58 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 41.

Other impacts on turtles and dugongs

2.47 Many submissions also noted that factors other than those addressed in the bill have a greater impact on dugong and sea turtle populations. A range of other important threats to dugongs and marine turtles were raised, such as climate change, habitat loss and degradation, boat strike, marine debris and pollution.⁵⁹ As Ms Melissa George, Chair of the Indigenous Advisory Committee, observed, 'people should not make the mistake of treating a cut finger on a patient with a broken leg'.⁶⁰

2.48 The Turtle and Dugong Taskforce argued that the amendments:

...offer no meaningful action to address the real threats to turtle and dugong populations from pig predation, pollution, coastal development, urban run-off, habitat loss, agricultural run-off, commercial fishing, marine debris and wide-scale nesting failure.⁶¹

2.49 For this reason, the Turtle and Dugong Taskforce of the Balkanu Cape York Development Corporation expressed concern that the proposed amendments could be seen as a:

...shallow, 'band-aid' measure to address what is a limited threat to turtle and dugong species, as opposed to the key underlying threats. While illegal activities which may harm turtle and dugong are certainly a threat, the damage caused is vastly outweighed by other factors...⁶²

Need for complementary measures

2.50 Several submissions suggested other measures are needed to complement the penalty increases proposed in the bill.⁶³ Ms George, Indigenous Advisory Committee, commented that 'the proper solutions for these problems require a package of complementary measures'.⁶⁴ For example, it was suggested that the amendments be accompanied by a community education program about the importance of protecting

59 Wildlife Preservation Society of Queensland, *Submission 4*, p. 2; ACF, *Submission 1*, p. 3; Law Council, *Submission 3*, p. 11; Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, p. 2; Mr Paul Toni, National Manager, Science, Policy and Government Partnerships, WWF-Australia, *Committee Hansard*, 6 February 2014, p. 3; Ms Saffron Zomer, National Liaison Officer, ACF, *Committee Hansard*, 6 February 2014, p. 15; Mr Frankie Deemal, Community/Project Leader, Balkanu Cape York Development Corporation, *Committee Hansard*, 6 February 2014, p. 32; Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, pp 35 and 38.

60 Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, p. 36.

61 Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 28.

62 Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, p. 2.

63 See, for example, Keppel and Delta Fitzroy Alliance, *Submission 11*, p. 2; Humane Society International, *Submission 13*, p. 2; ANEDO, *Submission 12*, p. 4.

64 Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, p. 35.

these species, as well as 'practical enforcement measures to catch and prosecute offenders'.⁶⁵

2.51 Both the Turtle and Dugong Taskforce and the Indigenous Advisory Committee pointed to the need to engage with Indigenous communities. The Indigenous Advisory Committee submitted that:

...the challenges associated with the management of turtle and dugong could be better addressed through the building of cooperative measures with traditional owners in northern Australia. In our view the related resources being directed to the Australian Crime Commission, for example, could be better applied by engaging traditional owners to increase their level of monitoring and examining options for placing appropriate restrictions on their rightful customary activities.⁶⁶

2.52 The Turtle and Dugong Taskforce suggested that the government continue the taskforce initiative in preference to, or at least in conjunction with, the proposed amendments, as:

Ultimately, the only cost-effective way to regulate turtle and dugong on Cape York Peninsula is to have Indigenous rangers or Indigenous fisheries officers on the ground living in communities on the cape.⁶⁷

2.53 Indeed, Mr Twikler on behalf of the Turtle and Dugong Taskforce, stated that the taskforce would not particularly object to the amendments 'if they were in conjunction with other measures'.⁶⁸

2.54 In this context, the committee notes the Department's evidence that the penalty increases in Schedule 2 are just one component of the government's Turtle and Dugong Protection Plan.⁶⁹ The Department indicated that the government is also 'committed to support a specialised Indigenous ranger program for marine conservation along the far north Queensland Coast and for strengthened enforcement and compliance'.⁷⁰

2.55 The Department further explained that the Dugong and Turtle Protection Plan is at the earliest stage of implementation, and includes a range of other measures, including: cleaning up marine debris; funding for turtle rehabilitation centres; working with Indigenous leaders towards a two-year moratorium; and the Australian Crime

65 Keppel and Delta Fitzroy Alliance, *Submission 11*, p. 2; Humane Society International, *Submission 13*, p. 2; ANEDO, *Submission 12*, p. 4; see also Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, p. 20.

66 Indigenous Advisory Committee, *Submission 17*, p. 1.

67 Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 29.

68 Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 33.

69 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 40.

70 Department of Environment, *Submission 9*, p. 3.

Commission investigation into the illegal killing, poaching and transportation of dugong and turtle meat.⁷¹ Finally, the Department noted that it is:

...also updating the recovery plan for marine turtles in Australia to address major threats, including habitat loss, poor water quality, bycatch in fisheries and marine debris and vessel activity, including boat strike.⁷²

Impact on Aboriginal and Torres Strait Islander peoples

2.56 The main concern with Schedule 2 was its potential impact of the proposed amendments on Aboriginal and Torres Strait Islander peoples.

2.57 The Indigenous Advisory Committee submitted that it was pleased that the government is acting to address concerns of many traditional owners in northern Australia about the poaching of turtle and dugong, but nevertheless described the proposed changes in Schedule 2 as a 'poorly targeted over-reaction'.⁷³

2.58 Both the Indigenous Advisory Committee and the Turtle and Dugong Taskforce of the Balkanu Cape York Development Corporation expressed the view that the proposed changes have been developed with insufficient consultation with Indigenous communities.⁷⁴

2.59 However, the Department noted that there had been consultation with a number of Indigenous organisations 'over an extended period of time'.⁷⁵

2.60 Nevertheless, the Turtle and Dugong Taskforce were concerned that many people who exercise their traditional right to hunt will not be aware of the greatly increased penalties.⁷⁶ The Turtle and Dugong Taskforce submitted that:

For Indigenous people exercising their traditional right to hunt, the law is often undecipherable and alienating. Because of this, many in indigenous communities do not have the intricate understanding of the law required to make accurate decisions and many misconceptions abound about what is considered to be lawful or not...Without proper support, many indigenous

71 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 40.

72 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 40.

73 Indigenous Advisory Committee, *Submission 17*, p. 1.

74 Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, p. 2; see also Mr Frankie Deemal, Community/Project Leader, Balkanu Cape York Development Corporation, *Committee Hansard*, 6 February 2014, p. 30; Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, p. 35.

75 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, pp 41 and 44.

76 Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, p. 2.

people are not able to negotiate through this legal tangle and may end up unwittingly breaking the law.⁷⁷

2.61 The Law Council was concerned that the bill has 'the potential to impose disproportionate burdens on Aboriginal and Torres Strait Island peoples, possibly engaging the right to equality and non-discrimination' under international law.⁷⁸ The Law Council explained that:

The proposed increase in penalties in the Bill is likely to impact most heavily upon Aboriginal and Torres Strait Islander persons engaged in hunting dugong and turtle for (non-native title) traditional purposes although they are also very significant for other fishers. The increase in penalties has the potential for Indigenous offenders, if prosecuted, to end up serving a term of imprisonment in default of payment of a financial penalty, due to inadequate means.⁷⁹

2.62 The Indigenous Advisory Committee agreed that 'increasing the financial penalties will simply result in offenders defaulting on their fines thus leading them to be incarcerated anyway'.⁸⁰

2.63 In the same vein, the Turtle and Dugong Taskforce of Balkanu Cape York Development Corporation noted that:

For indigenous people who are intentionally undertaking illegal activities, such as the sale of endangered species, greatly increased civil and financial penalties may not be as effective in changing behaviour as is anticipated. On Cape York, Indigenous communities are highly disadvantaged such that prison sentences and an inability to pay fines are a common occurrence compared with other regions in Australia. As such, the Taskforce is concerned that these penalties are excessive and yet may prove to be ineffective.⁸¹

2.64 The Law Council suggested that a 'better policy approach' would be to increase and extend community-led planning at an appropriate scale and to extend the development of Traditional Use of Marine Resources Agreements (TUMRAs).⁸²

77 Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, p. 2; see also Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 28.

78 Law Council, *Submission 3*, p. 14.

79 Law Council, *Submission 3*, p. 13; see also Mr Greg McIntyre SC, Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council, *Committee Hansard*, 6 February 2014, p. 26.

80 Indigenous Advisory Committee, *Submission 17*, p. 2.

81 Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, p. 3; see also Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 28.

82 Law Council, *Submission 3*, p. 13.

2.65 Indeed, both the Turtle and Dugong Taskforce and the Indigenous Advisory Committee emphasised the need to recognise the role of Indigenous communities in protecting turtles and dugongs and for Indigenous Australians to be able to exercise their cultural authority to manage Indigenous hunting as well as combat poaching and illegal trade.⁸³ As the Indigenous Advisory Committee observed:

Aboriginal and Torres Strait Islander peoples in northern Australia have successfully managed their customary use to turtles and dugong since time immemorial.⁸⁴

2.66 The Taskforce expressed concern that the proposed amendments may 'bypass current efforts made by Indigenous communities' to manage sustainable turtle and dugong hunting and conservation through community actions.⁸⁵ Ms George, Indigenous Advisory Committee, agreed that:

...the proposed amendments do not in any way give due consideration to the work that has been undertaken by Aboriginal and Torres Strait Islander communities and their partner organisations, such as the Great Barrier Reef Marine Park Authority.⁸⁶

2.67 The Taskforce proposed an alternative method to deter potential offenders through a Conservation Agreement under the EPBC Act which allowed for hunting carried out in accordance with community-based management plans for turtle and dugong. The Taskforce argued that this could provide Indigenous people 'with the cultural authority to regulate the way in which hunting is conducted'.⁸⁷

2.68 The Indigenous Advisory Committee agreed and stated:

Ultimately, sanctions handed down through customary law to those who poach and conduct the illegal trade of turtle and dugong is going to deliver more effective outcomes than simply increasing financial penalties.⁸⁸

83 See, for example, Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 28; Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, p. 35; Indigenous Advisory Committee, *Submission 17*, p. 4.

84 Indigenous Advisory Committee, *Submission 17*, pp 1–2.

85 Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, pp 3 and see also p. 4; and Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 28.

86 Ms Melissa George, Chair, Indigenous Advisory Committee, *Committee Hansard*, 6 February 2014, p. 35; see also p. 37.

87 Turtle and Dugong Taskforce, Balkanu Cape York Development Corporation, *Submission 16*, p. 3 and Appendix 1; see also Mr Daniel Twikler, Legal Officer, Cape York Land Council, *Committee Hansard*, 6 February 2014, p. 28. The Taskforce tabled a detailed proposal as well as the hunting rules developed by Mapoon community by way of example. These are available on the committee's website. See also *Committee Hansard*, 6 February 2014, p. 31.

88 Indigenous Advisory Committee, *Submission 17*, p. 1.

2.69 As outlined above, the Department's submission indicated that the amendments were part of the government's Dugong and Turtle Protection Plan announced on 15 August 2013, and that in this plan, the government also 'committed to support a specialised Indigenous ranger program for marine conservation along the far north Queensland Coast and for strengthened enforcement and compliance'.⁸⁹

2.70 The committee sought further detail from the Department on future engagement with Indigenous communities in relation to turtle and dugong management. The Department responded:

The Department of the Prime Minister and Cabinet is lead agency for the Specialised Indigenous Ranger programme. In early February 2014, Ministers Scullion and Hunt wrote jointly to Commonwealth-funded Indigenous ranger groups in north Queensland seeking their input in the implementation of the Protection Plan.

The Dugong and Turtle Protection Plan will build on the existing efforts of Indigenous communities and rangers to care for their country and manage the sustainable use of these species.⁹⁰

2.71 The Department also emphasised that native title hunting rights will not be affected by the bill:

...the proposed changes to the EPBC Act do not overshadow native title rights in any way, shape or form. So if a person is operating genuinely within the cultural authority at the community level then there would be no need for them to be concerned in any way, shape or form about this proposed bill.⁹¹

Limits to species covered

2.72 Other submitters queried why the increased penalties apply only to dugongs and turtles and not all threatened species.⁹² ANEDO explained:

In all other respects the EPBC Act creates no distinction between the various listed threatened species protected by the Act and the basis upon which these two species are considered differently from the other species that are otherwise afforded the same level of protection by the Act has not

89 Department of Environment, *Submission 9*, p. 3.

90 Department of the Environment, *Answers to Questions on Notice*, received 11 February 2014, p. 5.

91 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 44; see also Department of Environment, *Submission 9*, p. 3; Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 40.

92 Keppel and Delta Fitzroy Alliance, *Submission 11*, p. 3; Humane Society International, *Submission 13*, p. 2; ANEDO, *Submission 12*, p. 4.

been explained. ANEDO submits that the increase in penalties should apply to all threatened species protected by the Act.⁹³

2.73 In response to questioning on this issue, the Department stated that this was a 'question of policy', and 'a decision of the government to make the Dugong and Turtle Protection Plan an element of their election platform. This bill is intended to implement that election commitment.'⁹⁴

Amendments relating to approval powers

2.74 Some submissions⁹⁵ and witnesses⁹⁶ supported proposed amendments to the bill to remove the provisions of the EPBC Act enabling approval powers to be delegated to State and Territory governments under approval bilateral agreements.⁹⁷ These amendments 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 Legislation Committee in March 2013.⁹⁸ This committee does not intend to revisit this issue and notes that the previous report on this issue recommended, amongst other matters, that the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012 not be passed.⁹⁹

Committee view

2.75 The committee recognises that the purpose of Schedule 1 of the bill is to provide certainty to proponents in relation to decisions made under the EPBC Act, particularly in light of the findings of the Federal Court in the Tarkine case.

93 ANEDO, *Submission 12*, p. 4; see also Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, p. 20.

94 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 43.

95 See, for example, ACF, *Supplementary Submission 1*; Keppel and Delta Fitzroy Alliance, *Submission 11*, p. 3; ANEDO, *Submission 12*, pp 4–5.

96 See, for example, Ms Saffron Zomer, National Liaison Officer, ACF, *Committee Hansard*, 6 February 2014, p. 14; Mr Brendan Sydes, Lawyer/Executive Officer, ANEDO, *Committee Hansard*, 6 February 2014, pp 20–21.

97 See Chapter 1, and also Environment Legislation Amendment Bill, *Proposed Amendments*, at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query%3DId%3A%22legislation%2Fbillhome%2Fr5128%22> (accessed 30 January 2014).

98 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).

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

2.76 The committee considers that the concerns raised in relation to Schedule 1 of the bill are largely unwarranted. The bill is merely remedying a technical oversight – that is, that conservation advices were not attached to ministerial briefs.

2.77 The Department indicated that, since the Tarkine case, conservation advices are now attached to the brief to the Minister when making relevant decisions under the EPBC Act. As such, the committee considers that relevant decisions made under the EPBC Act since July 2013 are unlikely to be vulnerable to challenge on the same technical legal grounds as in the Tarkine case. As to decisions made before then, the committee notes the evidence that statutory time limits for seeking judicial review of decisions would mean that decisions made before that date are highly unlikely to be challenged.¹⁰⁰ The Department also indicated that there are no legal proceedings currently underway which would be impacted upon by the bill.¹⁰¹ As such, the potential impact of the bill is minor, but is nevertheless important to provide reassurance and certainty to proponents and developers who have made significant investments based on decisions made under the EPBC Act.

2.78 However, the committee notes the issue raised in relation to the drafting of item 2 of Schedule 1 of the bill, as a result of amendments in the House of Representatives. Those amendments were intended to restrict the application of the bill to decisions made before 31 December 2013, but item 2 is not clear in that regard. The committee suggests that the government consider clarifying the drafting of item 2 to ensure it is also specifically limited to things done before 31 December 2013, as is the stated intention in the Explanatory Memorandum.

2.79 In relation to Schedule 2 of the bill, the committee considers that the increased penalties will provide an important deterrent to illegal poaching and trade in turtles and dugongs. The committee acknowledges the important role of Indigenous communities in managing and protecting turtle and dugong populations. The Department's evidence indicated that native title hunting rights will not be affected by the bill in any way and that a range of other complementary measures are being implemented alongside the bill, including an Indigenous ranger program.

2.80 The committee acknowledges that there are a broader range of threats impacting on turtle and dugong populations, but considers these to be outside the scope of this bill and this inquiry.

100 Mr Greg McIntyre SC, Law Council, *Committee Hansard*, 6 February 2014, pp 26–27.

101 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 February 2014, p. 42.

Recommendation 1

2.81 The committee recommends that the Senate pass the bill.

**Senator John Williams
Chair**

