

Amendments to Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals

Background

- 2.1 The Convention on the Conservation of Migratory Species of Wild Animals obliges States Parties to protect migratory species listed in the appendices to the Convention that live within, or pass through, their jurisdiction. Australia has been a party to the Convention since 1 September 1991.¹
- 2.2 The Convention divides species into two appendices. Appendix I includes migratory species that are endangered and Parties are obliged to provide these species with immediate protection. Appendix II includes migratory species with an unfavourable conservation status and which require, or would significantly benefit from, international agreements for their conservation and management.²
- 2.3 The Convention is implemented within Australia through the *Environment Protection and Biodiversity Conservation Act 1999*.

1 National Interest Analysis (NIA), para 5.

2 NIA, para 7.

The amendments

- 2.4 Amendments to Appendix I and II of the Convention were adopted by a meeting of the Conference of Parties in December 2008. These amendments consisted of the addition of 11 species of mammals and birds to Appendix I and 10 species of mammals, sharks and fish to Appendix II.³
- 2.5 Three of the shark species included in Appendix II range in Australian waters: porbeagle (*Lamna nasus*), shortfin mako (*Isurus oxyrinchus*) and longfin mako (*Isurus paucus*).⁴
- 2.6 Amendments to the appendices automatically enter into force for all Parties 90 days after the Conference of Parties meeting at which they were adopted, except for those Parties that make a reservation.⁵ Accordingly, the amendments automatically entered into force for Australia on 5 March 2009, 9 months before the treaty action was tabled in Parliament for consideration by this Committee.

Implications for Australia

- 2.7 International obligations arise for Australia from the inclusion of the shortfin mako, longfin mako and porbeagle sharks on Appendix II of the Convention.
- 2.8 Each of these sharks is classified by the International Union for Conservation of Nature (IUCN) as vulnerable.⁶ The IUCN considers, on the basis of the best available evidence, that each of the sharks is facing a high risk of extinction in the wild.⁷

3 NIA, para 1; NIA, Attachment A; NIA, Attachment B.

4 NIA, para 3.

5 NIA, para 1.

6 International Union for Conservation of Nature (IUCN), *IUCN Red List of Threatened Species*, 'Isurus paucus', viewed 21 January 2010, <<http://www.iucnredlist.org/apps/redlist/details/60225/0>>; IUCN, *IUCN Red List of Threatened Species*, 'Lamna nasus', viewed 21 January 2010, <<http://www.iucnredlist.org/apps/redlist/details/11200/0>>; IUCN, *IUCN Red List of Threatened Species*, 'Isurus oxyrinchus', viewed 21 January 2010, <<http://www.iucnredlist.org/apps/redlist/details/39341/0>>.

7 IUCN, *IUCN Red List of Threatened Species*, '2001 IUCN Red List Categories and Criteria version 3.1', viewed 1 March 2010, <<http://www.iucnredlist.org/technical-documents/categories-and-criteria/2001-categories-criteria>>.

- 2.9 According to the Department of the Environment, Water, Heritage and the Arts (the Department), these sharks are considered to have undergone substantial declines globally. The species are susceptible to over-exploitation and population depletion as a result of their continued interaction with fisheries, relatively low reproductive capacity and longevity.⁸ The risks facing these sharks include over-fishing, illegal trade, habitat degradation, incidental bycatch and emerging threats such as climate change.⁹
- 2.10 For Appendix II species, Article IV(3) of the Convention states that:
- Parties must endeavour to conclude agreements where these would benefit the species and give priority to those species with an unfavourable conservation status.¹⁰
- 2.11 Parties, such as Australia, that are Range States¹¹ are also required by Article III(4) to:
- endeavour to take specific measures to conserve the species and habitat;
 - prevent the adverse effects of activities that impede or prevent migration; and
 - prevent or minimise factors that endanger the species.¹²
- 2.12 To meet its obligations, Australia is participating in ongoing multilateral negotiations to develop a Memorandum of Understanding on the Conservation of Migratory Sharks. The National Interest Analysis prepared by the Department indicated that negotiations for the Memorandum of Understanding were currently focussed on the great white shark, whale shark and basking shark with the potential to incorporate the porbeagle, shortfin mako and longfin mako sharks in the future. The scope of the Memorandum of Understanding would remain under consideration as negotiations progress.¹³

8 Department of the Environment, Water, Heritage and the Arts, Factsheet, *Three Sharks Listed as Migratory Species under the EPBC Act*, viewed 19 January 2010, <<http://www.environment.gov.au/coasts/species/sharks/publications/fs-three-sharks.html>>.

9 NIA, para 4.

10 NIA, para 15.

11 A Range State is defined by Article I of the Convention as 'any State ... that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species'.

12 NIA, para 14.

13 NIA, paras 17 and 18.

- 2.13 In this regard, the Committee was interested to note the Minister for the Environment, Heritage and the Arts' statement in Parliament on 25 February 2010, which indicated that Australia had successfully argued at an international meeting earlier that month that all species of sharks currently included in the Convention appendices should be included in the Memorandum of Understanding.¹⁴
- 2.14 The Committee understands that international agreements to more effectively manage shark species are considered one of the ways in which the global decline of sharks might be addressed. The Department told the Committee that:
- ...all of these shark species are highly migratory, so they range across the high seas, so they are not in any particular country's jurisdiction for the entire time, so international action and cooperation are a key element in managing these shark species.¹⁵

Environment Protection and Biodiversity Conservation Act 1999

- 2.15 Listing of species on the appendices of the Convention also has implications in terms of Australian legislation.
- 2.16 Section 209(3)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) requires that any species that is listed on an appendix to the Convention and for which Australia is a Range State must be listed as a migratory species under the Act. Accordingly, the shortfin mako, longfin mako and porbeagle sharks were listed as migratory species under the EPBC Act with effect from 29 January 2010.¹⁶
- 2.17 The consequences of the listing are that:
- killing, injuring or taking of the species in a Commonwealth marine area, including trading, keeping or moving a member of the species, is prohibited; and
 - actions that have, will have, or are likely to have a significant impact on the species as a whole, are also prohibited.¹⁷

14 Commonwealth of Australia, House of Representatives, *Votes and Proceedings*, 25 February 2010, p. 3.

15 Mr Nigel Routh, *Transcript of Evidence*, 1 February 2010, p. 15.

16 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 15.

17 Department of the Environment, Water, Heritage and the Arts, Factsheet, *Three Sharks Listed as Migratory Species under the EPBC Act*, viewed 19 January 2010, <<http://www.environment.gov.au/coasts/species/sharks/publications/fs-three-sharks.html>>.

2.18 This means that commercial fishing for these species is now prohibited and recreational, game or charter fishers are also unable to take, retain or kill mako or porbeagle sharks in Commonwealth waters.

Issues raised in submissions

2.19 The Committee received over 40 submissions to this inquiry, including many from recreational fishing groups and individuals opposed to the listing of these species, and particularly the shortfin mako shark, under the EPBC Act.

2.20 The main issues raised in these submissions were:

- there is a lack of scientific evidence that Australian populations of shortfin mako are under threat;
- evidence suggests that the Southern Hemisphere and more threatened Northern Hemisphere populations of shortfin mako do not interact;
- there has been a lack of consultation, with many people only becoming aware that the species would be listed under the EPBC Act following Minister Garrett's press release on 18 December 2009 announcing the listing;
- the EPBC listing will have a significant impact upon the recreational fishing industry and the businesses that support that industry (for example, in Victoria, the recreational fishing industry is considered to contribute \$2.3 billion per year to the economy, with around \$100 million from game fishing);
- recreational fishers practice good fisheries management including catch and release, tagging and limiting the number of fish kept for food, and support research programs;
- the impact of commercial fisheries upon these species is far greater than that of recreational fishers; and
- the EPBC Act listing imposes a tighter level of restriction than anticipated by the inclusion of the species on Appendix II of the Convention and is flawed in that the listing of Appendix II species is

required by the Act without adequate consideration of the vulnerability of species in Australian waters.¹⁸

2.21 The Queensland Government also provided a submission, which indicated its opposition to the listing of these species under the EPBC Act on the following grounds:

...from Queensland's perspective, the Commonwealth has not yet demonstrated that there are sustainability issues associated with the take of any of the shark species in Australian waters (incidental or otherwise), relative to potential increases in costs (for monitoring and stock assessment) and adverse impacts on Queensland's commercial, charter and game fishers.¹⁹

2.22 The Committee also received several submissions from conservation groups and individuals expressing support for the listing on the basis that shark populations have shown significant declines due to heavy fishing pressure and an inherent vulnerability to overfishing based upon their slow growth, late maturity and reproduction rate. This vulnerability was said to be compounded by a lack of knowledge about shark populations, their movements, and the effects of fishing.²⁰

Robustness of Australian populations

2.23 In evidence to the Committee, the Department stated that it does not have clear evidence about whether populations of shortfin mako, longfin mako and porbeagle sharks are robust or whether they are threatened by overfishing in Australian waters. In relation to the shortfin mako, however, this will be addressed through more extensive consideration of the species by the Threatened Species Scientific Committee over the next year or so.²¹

2.24 The Department also stated that while it is aware that the level of take of the species is relatively small, it also intends to work with state and territory fisheries management agencies and the Australian Fisheries Management Authority (AFMA) to improve its information about the take of these species.²²

18 See Submission No. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 36, 37, 38, 38.1, 39, 40, 41, 43, 44 and 45.

19 Queensland Department of the Premier and Cabinet, *Submission No. 42*.

20 See Submission No. 2, 3, 21, 30 and 35.

21 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 16.

22 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 16.

2.25 The Committee raised the question as to whether the precautionary principle should apply. In its response, the Department told the Committee that the precautionary principle is given practical effect through strategic assessments of each Commonwealth fishery managed by AFMA as well as the export components of state fisheries. The Department examines the sustainability of the fisheries management arrangements and impacts on threatened and endangered species.²³

2.26 Mr Stephen Oxley of the Department told the Committee:

The overall picture is that, through the exercise of our power under the EPBC Act over the course of the past decade, the management of shark fisheries has improved significantly and the level of take has come down substantially over that period.²⁴

2.27 In its submission, the Humane Society International (HSI) argued that there is very little data to demonstrate the robustness of Australian populations of these species. HSI went on to state:

HSI firmly believes the implementation of greater protection through listing under the EPBC Act as migratory species for the shortfin mako, longfin mako and porbeagle sharks to be an appropriate measure. This will ensure that Australia can take a precautionary approach to the protection of these species, ensuring that the sharks found in Australia's waters can be protected now, and will not need stricter emergency conservation measures required in other parts of the world.²⁵

2.28 The Australian Marine Conservation Society and Nature Conservation Council of NSW in their joint submission similarly stated:

...in most fishing jurisdictions, including Australia, little is known about shark populations, their movements and what effect fishing is having on their numbers and on ecosystems in general.²⁶

23 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 17.

24 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 17.

25 Humane Society International, *Submission No. 3*, p. 2.

26 Australian Marine Conservation Society and Nature Conservation Council of NSW, *Submission No. 2*, p. 1.

Impact on recreational fishing industry through EPBC Act

- 2.29 As noted earlier, any species that occurs in Australia and is included on either appendix to the Convention must be added to the list of migratory species under the EPBC Act.
- 2.30 In evidence, Departmental representatives informed the Committee that the EPBC Act imposes domestic requirements for each Appendix II species that 'go beyond what is required by the convention itself'.²⁷
- 2.31 The Committee notes that the issue of listing of Appendix II species was previously highlighted in an independent review of the EPBC Act led by Dr Allan Hawke. In its October 2009 report, the Hawke Review stated in relation to migratory species:
- The clear intent of the Bonn Convention is to differentiate between Appendix I and II species and, in turn, the level of protection required. This is not reflected in the Act.²⁸
- 2.32 The Hawke Review went on to recommend:
- Recommendation 17
- The Review recommends that the provisions of Part 13 of the Act relating to migratory species listed on Appendix II of the Bonn Convention be reviewed and amended to allow the take of Appendix II migratory species, subject to management arrangements demonstrating that the take would not be detrimental to the survival of the species.
- Any such amendment should ensure that the Act provides appropriate protection consistent with Australia's international obligations.²⁹
- 2.33 The Department told the Committee that the Minister for the Environment, Heritage and the Arts had announced on 25 January 2010 that the Government would move to introduce legislation:
- ... to ensure that the listing of mako sharks on appendix II of the Convention on Migratory Species does not affect recreational fishing activities in Australia.³⁰
-

27 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 15.

28 *The Australian Environment Act - Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009, p. 128.

29 *The Australian Environment Act - Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009, p. 129.

30 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 15.

- 2.34 The Environment Protection and Biodiversity Conservation Amendment (Recreational Fishing for Mako and Porbeagle Sharks) Bill 2010 was introduced into Parliament on 25 February 2010.³¹
- 2.35 The Bill allows recreational fishing for longfin mako, shortfin mako and porbeagle sharks to occur notwithstanding the offence provisions of the EPBC Act. The Explanatory Memorandum indicates that:
- The Bill is an interim response to the issues identified by the Hawke Review as they apply to mako and porbeagle sharks while the Government develops and implements its formal response to the Hawke Review.³²
- 2.36 The Committee notes that this is an interim response that has been implemented in light of public outcry over the banning of recreational fishing for these species. That said, it appears clear to the Committee that scientific evidence as to the robustness of these species in Australian waters and the degree to which they might be threatened by overfishing is lacking. Given the threats to the species elsewhere in the world and the IUCN's assessment that the species are vulnerable to the risk of extinction, the Committee considers that gaining a better understanding of these species should be a priority for the Government to ensure that its decision making about applying exemptions under the EPBC is better informed.

Consultation

- 2.37 The Department told the Committee that extensive consultation was undertaken prior to the December 2008 meeting of the Conference of Parties to the Convention. This included within the Commonwealth and with State and Territory government agencies and the Commonwealth Fisheries Association, which represents commercial fishing interests.³³
- 2.38 Departmental representatives acknowledged however that it did not consult with recreational fishers and that:

I think that would be reasonably identified as a weakness in the consultation processes that the department ran in the lead-up to

31 Commonwealth of Australia, House of Representatives, *Votes and Proceedings*, 25 February 2010, p. 2.

32 The Parliament of the Commonwealth of Australia, House of Representatives, 2010, *Environment Protection and Biodiversity Conservation Amendment (Recreational Fishing for Mako and Porbeagle Sharks) Bill 2010*, Explanatory Memorandum, p. 2.

33 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 14.

the conference of parties. In fact we have taken a lesson from that experience.³⁴

2.39 The Committee notes that consultation also did not include conservation and environment groups.³⁵

2.40 The number and nature of the submissions received by this Committee suggests that the consultation processes adopted in relation to the amendments to the Convention were inadequate. Many submitters commented that they had no knowledge of the implications in terms of the EPBC Act until shortly before the listing came into effect in January 2010. The Committee considers that the Department needs to review its consultation processes to ensure that future amendments to environmental treaties that are likely to impact upon community based groups or individuals are subject to more adequate consultation and information processes.

Recommendation 1

The Committee recommends that the Department of the Environment, Water, Heritage and the Arts review its consultation processes for environmental treaties to ensure that more effective consultation is undertaken with a full range of potentially interested parties.

Committee comment

2.41 The Committee is unimpressed with the long delay in tabling these amendments in Parliament for consideration by this Committee.

2.42 The amendments were adopted by the Conference of Parties to the Convention in December 2008 but were not tabled until 25 November 2009, nearly nine months after the amendments had entered into force for Australia on 5 March 2009. The Committee considers that the Department of the Environment, Water, Heritage and the Arts needs to more effectively manage its treaty making processes to ensure that treaty actions are tabled in a timely manner and that this Committee's timeframes are respected, particularly where automatic entry into force provisions apply.

34 Mr Stephen Oxley, *Transcript of Evidence*, 1 February 2010, p. 17.

35 Department of the Environment, Water, Heritage and the Arts, *Submission No. 47*, p. 2.

- 2.43 The Committee reiterates the comment it previously made in Report 110 that the value of the Committee's inquiries to the treaty making process is undermined when there is insufficient time to properly consider a treaty or allow public examination of a treaty. The Committee's inquiries provide an important contribution to treaty making by subjecting treaties to parliamentary and public scrutiny, and providing legitimacy to the treaties.
- 2.44 While the status of the shortfin mako, longfin mako and porbeagle in Australian waters is a matter that requires further research, the Committee notes that the inclusion of the species on Appendix II of the Convention is intended to provide a higher level of international protection for these species, which face significant threats elsewhere in the world. The Committee therefore supports the Amendments to Appendices I and II of the *Convention on the Conservation of Migratory Species of Wild Animals*.