

Amendments to the Convention on Migratory Species of Wild Animals

Background¹

- 2.1 The *Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979* (the CMS) entered into force for Australia on 1 September 1991. The CMS obligates contracting parties to take measures for the conservation of migratory species of wild animals listed in Appendices I and II of the Convention and for which they are a range state.
- 2.2 Article 1(1)(h) of the CMS defines a range state 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.
- 2.3 Appendix I of the CMS lists species that are classified as 'endangered'. Article 3(4) provides for the immediate protection of endangered species through conservation and restoration of habitat; minimisation

1 Unless otherwise specified the material in this and the following section was drawn from the National Interest Analysis (NIA) for the *Amendments, done at Bonn, Germany on 24 September 2002, to Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979*.

of impediments to migration; and the reduction or control of factors that may further endanger these species.

- 2.4 Appendix II of the CMS lists species that are classified as having an 'unfavourable conservation status'. Article 4(1) obligates contracting parties to endeavour to conclude international agreements where these would benefit the listed species. Typically these agreements encompass habitat conservation, research and information exchange and public education.
- 2.5 *The Amendments, done at Bonn, Germany on 24 September 2002, to Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979 (the Amendments)* add 21 species to Appendix I and 20 species to Appendix II.
- 2.6 The proposed treaty action includes the listing, on Australia's proposal, of six species of great whale (the Antarctic Minke, Byrde's, Fin, Sei, Sperm and Pygmy Right whales), the Orca (Killer Whale) and the Great White Shark. These species are the only species among those nominated in the Amendments for which Australia is a range state.
- 2.7 The species listed under Appendix I as endangered are the Fin, Sei and Sperm whales and the Great White Shark. These species together with the others listed at paragraph 2.6 are to be included in Appendix II as species having 'unfavourable conservation status' according to the terms of the treaty.
- 2.8 The species of great whale have been nominated because past whaling practices have greatly reduced their populations. Many species remain the target of 'scientific' whaling. Migrating whales face other threats including shipping strikes, pollution, habitat degradation, unregulated interaction with tourists, seismic and sonar activities and entanglement in fishing gear.
- 2.9 Two populations of the Orca are already listed under Appendix II of the CMS. The proposed addition completes the listings to cover all populations of this species. Orca populations encounter similar environmental threats as those faced by migrating whale species.
- 2.10 The Great White Shark is listed as Vulnerable under the World Conservation Union's Red List of Threatened Species meaning that it is classified as facing a high risk of extinction in the medium term. Threats to migrating Great White Sharks include direct and indirect fishing pressure, protective beach meshing, intensified targeted

commercial and sports fishing, incidental catch of species in commercial and traditional fisheries and habitat degradation.

Entry into force

- 2.11 On 9 August 2002 Environment Australia (EA) wrote to the Committee providing details of the Government's nomination of the eight migratory species to the Appendices of the CMS.
- 2.12 The Amendments were adopted by the 7th Meeting of the Conference of Parties to the CMS held in Bonn from 18 to 24 September 2002.
- 2.13 On 22 October 2002 the Commonwealth Minister for the Environment and Heritage wrote to the Committee advising that, due to the automatic entry into force mechanism governing amendments to the CMS under Article 11(5), entry into force for Australia will occur without the usual treaty tabling requirements having been met.
- 2.14 The Amendments automatically entered into force for Australia on 23 December 2002. They were tabled in the Commonwealth Parliament on 12 November 2002.

Proposed treaty actions

- 2.15 Under the Amendments Australia has special obligations with regard to the eight species for which it is a range state. These obligations will not extend beyond the protection already afforded to those species under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).
- 2.16 As a result of the inclusion of the six great whales, the Great White Shark and the Orca in the Appendices to the CMS, Australia will be required to update the list of migratory species pursuant to Division 2 of Part 13 of the EPBC Act. Section 209(3)(a) specifies that the list of migratory species must include all species that are included in the Appendices to the CMS and for which Australia is a range state.
- 2.17 The development of multilateral conservation agreements for the protection of the relevant migratory species listed in Appendix II of the CMS will require some additional resources, however, costs associated with the implementation of such agreements are likely to be negligible.

Evidence presented and issues arising

Implementation and enforcement

2.18 Greenpeace wrote to the Committee in support of Australia's ratification of the Amendments. It acknowledged that the EPBC Act is an adequate instrument with which to implement the Amendments. It pointed out that:

The most crucial aspect of implementation [of the CMS] is that Australia takes a leading role in the region for the development of multilateral conservation agreements.²

2.19 EA informed the Committee that all cetaceans are protected under the EPBC Act and that it is an offence to take an action that would have a significant adverse impact upon threatened species. The penalties for undertaking activities that may interfere with a threatened species without a permit are 500 penalty points for an individual and 5,000 penalty points for a corporation.³

2.20 The Queensland Government requested that the Committee confirm that:

current arrangements for beach meshing would not require changes to be consistent with agreements developed in accordance with the Treaty.⁴

2.21 The Committee sought further information on the impact of the EPBC Act on activities that either unintentionally threaten or are legitimate activities that may pose threats to nominated species such as tourism, entanglement in fishing gear and protective beach meshing.

2.22 EA provided assurances that:

With regard to beach netting for protection of swimmers from sharks, that is a matter for the States, because that meshing occurs within States waters. There is very little the Commonwealth can do directly because it does become a question of the balance between interaction to protect the species with that gear and the human safety questions.⁵

2 Greenpeace, *Submission No. 1*, p. 2.

3 Mark Flanigan, *Transcript of Evidence*, 9 December 2002, p. 3.

4 Queensland Government, *Submission No. 3*, p. 1.

5 Mark Flanigan, *Transcript of Evidence*, 9 December 2002, p. 5.

2.23 In response to concerns raised by the Committee about the threat posed by tourist operators, EA referred to Australia's agreement through the Australian and New Zealand Environment and Conservation Council (ANZECC) that governs whale watching activities. EA acknowledged that:

Like many things that occur on the open ocean, [ANZECC guidelines] are difficult to enforce ... If we feel commercial operators are not abiding by the guidelines, we have the ability to take action against them ... [however] We find that the interest of most of the operators, by and large, is in conserving and protecting the whales ...⁶

2.24 EA informed the Committee that:

the Government is currently going through a process of undertaking environmental assessment of all fisheries management arrangements. One of the factors we look at in those processes is whether or not the fishery is set up in a way that will minimise as far as possible the potential interactions with whales.⁷

Automatic entry into force

2.25 The Committee acknowledges the necessity of the entry into force of some treaty actions before they are subject to parliamentary and public scrutiny, for instance, where public knowledge of the proposed treaty action may compromise the national interest.

2.26 The Amendments entered into force automatically on 23 December 2002 in accord with Article 11(5) of the CMS and before the Committee could report back to the Parliament. The 20 sitting day period required for Category B treaties to be tabled in the Parliament before binding treaty action is taken expired for the Amendments on 20 March 2003.

2.27 The Committee acknowledges that EA had informed it of the proposed amendments to the CMS on 9 August 2002, however, the EA accepted that in addition to information on the nature of the Amendments, that is the species being proposed, more background in relation to the broader function and significance of the CMS and the reasons for the Amendments could have been included in the NIA.

6 Mark Flanigan, *Transcript of Evidence*, 9 December 2002, p. 4.

7 Mark Flanigan, *Transcript of Evidence*, 9 December 2002, p. 5.

- 2.28 The Department of Foreign Affairs and Trade (DFAT) informed the Committee that preliminary consideration has been given to the terms in which DFAT would liaise with Commonwealth Departments proposing treaties on the issue of their automatic entry into force.

Consultation

- 2.29 The Committee required more detailed information in relation to the consultation process. In order to be satisfied that adequate consultation has occurred, the Committee would require a full list of the parties consulted and details of any reservations expressed at the proposed treaty actions.
- 2.30 In the case of the NIA for the Amendments, the Committee observed, while the NIA states that the Amendments have received a 'generally favourable' response from State and Territory governments there was no detail provided nor were there details of the non-government organisations, environmental and industry stakeholders and other interest groups that were consulted.
- 2.31 EA informed the Committee that concerns of a scientific and technical nature had been raised by the governments of the Northern Territory, Western Australia and Victoria over whether Orca populations were migratory and whether they required protection under the terms of the CMS, and that those concerns had been addressed.
- 2.32 However, the Committee notes that the concerns of the Queensland Government that it received in *Submission No. 3* were not referred to by EA at the hearing.⁸
- 2.33 DFAT undertook to amend the guidelines that it sends to line agencies on the drafting of NIAs to reflect the Committee's requirements.

Conclusions and recommendation

- 2.34 The Committee is satisfied that the terms of the EPBC Act meet Australia's obligations under the CMS.
- 2.35 The Committee is aware that the final texts of proposed treaty actions are often concluded late in the day. It looks forward to receiving

8 See paragraph 2.20.

information that more closely equates to NIAs at the earliest possible time when, for instance, ‘the Minister has decided to proceed with the nomination.’⁹ The early provision of this information will enable the Committee seek preliminary briefings, if required, on the impact of proposed treaty actions on the national interest.

- 2.36 The Committee notes the prompt response of DFAT in amending guidelines for the drafting of NIAs to reflect its requirement that line agencies provide the full detail of consultation.

Recommendation 1

- 2.37 **The Committee supports the *Amendments, done at Bonn, Germany on 24 September 2002, to Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979.***

9 Mark Flanigan, *Transcript of Evidence*, 9 December 2002, p. 7.