

**National Interest Analysis [2014] ATNIA 15**

**with attachment on consultation**

**Amendments, agreed in Incheon, Republic of Korea on 6 November 2012, to the Annex to the *Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment*, done at Tokyo on 6 February 1974**

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# NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

## SUMMARY PAGE

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### **Nature and timing of proposed treaty action**

1. The treaty action proposes to amend the Annex to the *Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment* (the JAMBA<sup>1</sup>). The JAMBA was signed on 6 February 1974 and entered into force on 30 April 1981.
2. These changes will reflect the amendments agreed to by both Governments at the 16<sup>th</sup> Consultative Meeting on the Agreement, held in Incheon, Republic of Korea on 6 November 2012. The amendments to the Annex include the addition of ten species and the removal of 13 species. The proposed treaty action will also amend the scientific nomenclature of 21 species currently listed in the Annex.
3. Article I(2)(c) provides that the Annex shall be considered amended three months after the date upon which the two Governments confirm, by exchange of diplomatic notes, their respective acceptance of the amendments. It is proposed that Australia and Japan will exchange notes as soon as possible following the completion of their respective domestic approval procedures.
4. During the three month period between the exchange of notes and the entry into force of the amended Annex, the addition and removal of species from the list of migratory species under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) will be arranged to coincide with the entry into force of the Annex amendment.

### **Overview and national interest summary**

5. Australia has a strong interest in maintaining biodiversity generally and in protecting migratory species which visit Australia. Australia has two other bilateral migratory bird agreements similar to the JAMBA with the Republic of Korea (ROKAMBA)<sup>2</sup>, and China (CAMBA)<sup>3</sup>. Australia has provided strong leadership for

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<sup>1</sup> [1981] ATS 6

<sup>2</sup> *Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds* (Canberra, 6 December 2006), [2007] ATS 24

<sup>3</sup> *Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment* (Canberra, 20 October 1986), [1988] ATS 22

the conservation of migratory birds throughout the East Asian – Australasian Flyway<sup>4</sup> as one of the initiating Partners of the World Summit on Sustainable Development Type II Partnership for Migratory Waterbirds in the East Asian – Australasian Flyway. Amending the Annex to the JAMBA will signify Australia's ongoing commitment to the conservation of migratory birds.

6. The amendments to the JAMBA reflect progress in both taxonomy and knowledge of bird migration since the JAMBA entered into force. They ensure the continuing accuracy of the Annex to the JAMBA and, consequently, the accuracy of the list of migratory species under the EPBC Act.

### **Reasons for Australia to take the proposed treaty action**

7. The JAMBA obliges its Parties to protect bird species which regularly migrate between Australia and Japan, and their environment. The list of migratory bird species or subspecies protected under the JAMBA is set out in the Annex.

8. Australia and Japan propose the addition of 10 species, Red-tailed Tropicbird (*Phaethon rubricauda*), Swinhoe's Storm-Petrel (*Hydrobates monorhis*), Matsudaira's Storm-Petrel (*Hydrobates matsudairae*), Bulwer's Petrel (*Bulweria bulwerii*), Little Ringed Plover (*Charadrius dubius*), Common Redshank (*Tringa totanus*), Greater Crested Tern (Crested Tern) (*Sterna bergii*(*Thalasseus bergii*)), Oriental Reed Warbler (*Acrocephalus orientalis*), Red-rumped Swallow (*Cecropis daurica*), and Grey Wagtail (*Motacilla cinerea*) to the Annex of the JAMBA. These species regularly and predictably migrate between Australia and Japan and meet the criteria set under Article I(1) of the JAMBA.

9. Australia and Japan propose the removal of 13 species, Northern Shoveler (*Anas clypeata*), Leach's Storm-petrel (*Oceanodroma leucorhoa*), Cattle Egret (*Bubulcus ibis* (*Ardea ibis*)), Great Egret (*Egretta alba* (*Ardea alba*)), Wandering Albatross (*Diomedea exulans*), Providence Petrel (*Pterodroma solandri*), Ringed Plover (*Charadrius hiaticula*), Western Sandpiper (*Calidris mauri*), Baird's Sandpiper (*Calidris bairdii*), Buff-breasted Sandpiper (*Tryngites subruficollis*), Grey Phalarope (*Phalaropus fulicarius*), Black Tern (*Chlidonias niger*), and Rainbow Bee-eater (*Merops ornatus*) from the Annex of the JAMBA. These species do not migrate between the two countries, and should be removed from the Annex. Because the Wandering Albatross migrates into and out of Australian territory and is listed under the Bonn Convention<sup>5</sup>, it will remain on the migratory species list under the EPBC Act.

10. The update of the common and scientific names of 21 species already listed on the Annex reflects updated knowledge in taxonomy since the JAMBA entered into force. The update does not alter the species which are already afforded protection under the JAMBA, but simply ensures that the scientific names used in the Annex

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<sup>4</sup> The entire range of groups of migratory bird species through which they move on an annual basis from breeding grounds in the far northern hemisphere to non-breeding areas in Australasia, including intermediate resting and feeding places.

<sup>5</sup> *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn, 23 June 1979), [1991] ATS 32

reflect the scientific names currently recognised in Australia and Japan for all listed species.

11. Of the ten species added to the Annex of the JAMBA, five<sup>6</sup> are already afforded protection as listed migratory species under the EPBC Act, as provided for in Section 209(3)(b) of that Act. The Red-tailed Tropicbird, Swinhoe's Storm-petrel, Matsudaira's Storm-petrel, Bulwer's Petrel and Crested Tern will need to be added to the list of migratory species under the EPBC Act. This is not anticipated to have any effect on domestic policy, as explained in paragraph 19 below.

12. The removal of the 13 species that do not meet the migratory species listing criteria will mean that decisions made under Part 9 of the EPBC Act ('Approval of actions') will be based on an accurate reflection of the current knowledge of migratory birds. In turn this will reduce unnecessary regulatory impact, and contribute to the efficiency and effectiveness of the current regulatory reform process.

13. Migratory species are a matter of National Environmental Significance under the EPBC Act. Both breeding sites and critical migration stopover sites for Australian migratory birds occur in Japan. The JAMBA complements Australia's bilateral migratory bird agreements with China and the Republic of Korea, providing a formal avenue through which to ensure the protection of important habitat for these species during their migration beyond Australian jurisdiction.

## **Obligations**

14. The JAMBA obliges Australia to protect species of migratory birds listed in the Annex to the JAMBA and their habitats in a number of ways. Article I of the JAMBA gives a definition of "migratory birds" (Article I(1)) and provides that the species recognised as migratory birds under the JAMBA shall be set out in the Annex (Article I(2)).

15. Under Article II, both governments are obliged to prohibit the taking, sale, purchase or exchange of migratory birds or their eggs, subject to the exceptions listed in Article II(1) (scientific purposes, the protection of people or property, established hunting purposes and traditional practices).

16. Article III of the JAMBA requires each government to take special protective measures for the preservation of species or subspecies in danger of extinction, and to inform the other government of any special measures taken.

17. Article IV of the JAMBA requires the two governments to exchange data and publications relating to species listed in the Annex, and encourages joint research programs and the conservation of migratory birds and birds in danger of extinction.

18. Articles V and VI require the two governments to take appropriate measures to preserve and enhance the environment of listed migratory species, including the establishment of sanctuaries.

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<sup>6</sup> The Little Ringed Plover, Common Redshank, Oriental Reed Warbler, Red-rumped Swallow and Grey Wagtail are already on the migratory species list under the EPBC Act.

19. The obligations imposed by the listing of ten new species in the Annex to the JAMBA will not extend beyond the protection already afforded to species listed as migratory under the EPBC Act. This is because five of the ten are already listed under the EPBC Act and the remaining five regularly share habitats with species already listed.

### **Implementation**

20. The EPBC Act enables Australia to give domestic effect to the obligations imposed by the JAMBA. Amending the Annex to the JAMBA will require amending the migratory species list by legislative instrument as required under Section 209(7) of the EPBC Act.

21. The EPBC Act provides for protection of migratory species as a matter of National Environmental Significance. Division 1 of Part 3 of the EPBC Act prohibits the taking of actions that are likely to have a significant impact on matters of National Environmental Significance without approval from the Minister for the Environment. Under sections 20(1) and 20A(1), a person must not take an action that has, will have, or is likely to have a significant impact on a listed migratory species unless that Minister has given approval. There are exceptions to this prohibition, including those set out in Part 4 of the EPBC Act and an exception for certain actions requiring separate authorisation by an Australian Government agency.

22. Section 209(3)(b) specifies that the list of migratory species must include all species that are from time to time included in the Annex established under the JAMBA. As a result of amendments to the Annex to the JAMBA, Australia will be required to update the list of migratory species by legislative instrument as required under Section 209(7) and pursuant to Section 209(1)(b) of the EPBC Act.

### **Costs**

23. The species additions to the Annex to the JAMBA are not expected to impose any additional costs on Australia in terms of meeting its obligations under the Agreement. The Little Ringed Plover, Common Redshank, Oriental Reed Warbler, Red-rumped Swallow and Grey Wagtail are already afforded protection as migratory species listed under the EPBC Act. The other five species share habitat with species already protected as migratory species. The amendments will therefore not require any domestic agencies or management arrangements to be put in place and no additional costs in this regard are anticipated. Some administrative cost savings are expected, mostly as a result of reduced enquiries regarding incorrectly listed species.

### **Regulation Impact Statement**

24. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

### **Future treaty action**

25. Article I(2)(b) provides that the competent authorities of the two governments shall, from time to time review the Annex and if considered necessary, recommend amendments to it. In accordance with Article I(2)(c) of the JAMBA, the Annex shall be considered amended three months after the date upon which the two Governments confirm, by an exchange of diplomatic notes, their respective acceptance of such recommendations.

26. Future amendments may add to the Annex species for which there is reliable evidence of migration between the two countries. Amendments to the text of the JAMBA, or changes to the Annex, constitute a separate treaty action and are subject to the usual domestic treaty making processes including the tabling of a National Interest Analysis and consideration by JSCOT and Federal Executive Council.

### **Withdrawal or denunciation**

27. Article IX(3) provides that either Government may, by giving one year's notice in writing, terminate the JAMBA at the end of the initial fifteen year period (which expired in 1996) or at any time thereafter.

### **CONTACT DETAILS**

Migratory Species Section  
Wildlife, Heritage and Marine Division  
Department of the Environment

## ATTACHMENT ON CONSULTATION

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### CONSULTATION

28. The following Federal, State and Territory agencies were consulted regarding the recommended amendments to the Annex to the JAMBA:
- Australian Government Department of the Environment
  - Department of Primary Industries, Parks, Water and Environment (Tasmania)
  - Department of Environment and Primary Industries (Victoria)
  - Office of Environment and Heritage (New South Wales)
  - Department of Environment and Heritage Protection (Queensland)
  - Department of Environment, Water and Natural Resources (South Australia)
  - Department of Land Resource Management (Northern Territory)
  - Department of Parks and Wildlife (Western Australia)
  - Environment and Sustainable Development Directorate (Australian Capital Territory)
29. Consultation occurred through the Wetlands and Waterbirds Taskforce, which comprised representatives from the agencies listed above. The Migratory Species Section provided a paper to the Taskforce meeting in October 2013 which summarised the state of affairs for Australia's bilateral migratory bird agreements. This paper included the proposed amendments to the Annex of the ROKAMBA.
30. No agencies raised any concerns regarding the proposed amendments. Relevant scientific authorities were consulted through Birdlife Australia.