

National Interest Analysis [2014] ATNIA 16

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 the Republic of Korea on the Protection of Migratory Birds,*
and Exchange of Notes, done at Canberra on 6 December 2006**

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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 the Republic of Korea on the Protection of Migratory Birds* (the ROKAMBA)¹. The ROKAMBA was signed on 6 December 2006 and entered into force on 13 July 2007.
2. These changes will reflect the amendments agreed to by both Governments at the 3rd Consultative Meeting on the ROKAMBA, held in Incheon, Republic of Korea on 6 November 2012. The amendments to the Annex include the addition of three species and the removal of eight species. The proposed treaty action will also amend the scientific nomenclature of 24 species currently listed in the Annex.
3. Article 1(3) provides that the Parties may amend the ROKAMBA by mutual written consent. It is proposed that Australia and the Republic of Korea will exchange notes as soon as possible following the completion of their respective domestic approval procedures. As proposed in Australia's note, the amendments to the Annex would enter into force three months after the date of the ROK's note accepting the amendments.
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 ROKAMBA, with Japan (JAMBA)² and China (CAMBA)³. Australia has provided strong leadership for the conservation of

¹ [2007] ATS 24

² *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* (Tokyo, 6 February 1974), [1981] ATS 6

³ *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 2

migratory birds throughout the East Asian – Australasian Flyway⁴ 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 ROKAMBA Annex will signify Australia’s ongoing commitment to the conservation of migratory birds.

6. The amendments reflect progress in both taxonomy and knowledge of bird migration since the ROKAMBA entered into force. They ensure the continuing accuracy of the Annex to the ROKAMBA 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 ROKAMBA obliges its Parties to protect bird species which regularly migrate between Australia and the Republic of Korea, and their environment. The list of migratory species or subspecies protected under the ROKAMBA is set out in the Annex.

8. At the third ROKAMBA Consultative Meeting in 2012, Australia proposed the addition of three species, Swinhoe’s Storm-petrel (*Hydrobates monorhis*), Pomarine Jaeger (*Stercorarius pomarinus*) and Oriental Reed Warbler (*Acrocephalus orientalis*) to the Annex of the ROKAMBA. These species regularly and predictably migrate between Australia and the Republic of Korea and meet the criteria set under Article 1(1) of the ROKAMBA.

9. Australia proposed the removal of eight species, Shoveler (Northern Shoveler) (*Anas clypeata*), Masked Booby (*Sula dactylatra*), Brown Booby (*Sula leucogaster*), Common Ringed Plover (Ringed Plover) (*Charadrius hiaticula*), Little Stint (*Calidris minuta*), Dunlin (*Calidris alpina*), Buff-breasted Sandpiper (*Tryngites subruficollis*), and Great Reed Warbler (*Acrocephalus arundinaceus*) from the Annex of the ROKAMBA. These species do not migrate between the two countries, and should be removed from the Annex.

10. The update of the common and scientific names of 24 species already listed on the Annex reflects updated knowledge in taxonomy since the ROKAMBA entered into force. The update does not alter the species which are already afforded protection under the ROKAMBA; it simply ensures that scientific names of the species listed in the Annex reflect the scientific names currently recognised in Australia and the ROK.

11. Of the three species added to the Annex to ROKAMBA, two (the Pomarine Jaeger and the Oriental Reed Warbler) are already afforded protection as a listed migratory species under the EPBC Act, as provided for in Section 209(3)(b) of that Act. The Swinhoe’s Storm Petrel 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.

⁴ 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.

12. The removal of the eight 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 the Republic of Korea. The ROKAMBA complements Australia's existing bilateral migratory bird agreements with China and Japan, 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 ROKAMBA obliges Australia to protect species of migratory birds listed in the Annex to the ROKAMBA and their habitats in a number of ways. Article I of the ROKAMBA sets out the definition of "migratory birds" (Article I(1)) and provides that the species recognised as migratory birds under ROKAMBA shall be set out in the Annex (Article I(2)).

15. Under Article 2 of the ROKAMBA, both Parties prohibit the taking of migratory birds and their eggs, subject to the exceptions listed in Article 2(1) (scientific purposes, the protection of people or property, established hunting purposes and traditional practices).

16. Article 3 of the ROKAMBA obliges Australia and the Republic of Korea to encourage the exchange of data and publications relating to migratory birds, the formulation of joint research programs and the conservation of migratory birds.

17. Article 4 of the ROKAMBA obliges Australia and the Republic of Korea to endeavour to manage and conserve the habitat of migratory birds through activities such as the designation of conservation areas in its territory.

18. Article 5 of the ROKAMBA obliges Australia and the Republic of Korea to endeavour to take appropriate measures to conserve and improve the environment of birds protected under the ROKAMBA, in particular by:

- a) seeking means to prevent damage to such birds and their environment;
- b) endeavouring to take measures to control the impact of invasive animals and plants on the conservation of such birds and their environment; and
- c) endeavouring to participate in regional cooperative activities for the conservation of migratory birds in the Asia-Pacific region.

19. The obligations imposed by the listing of three new species in the Annex to the ROKAMBA will not extend beyond the protection already afforded to species listed as migratory under the EPBC Act. This is because two of the three are already listed under the EPBC Act and the Swinhoe's Storm Petrel shares habitat with species already listed.

Implementation

20. The EPBC Act enables Australia to give domestic effect to the obligations imposed by the ROKAMBA. Amending the Annex to the ROKAMBA 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)(c) of the EPBC Act specifies that the list of migratory species must include all native species from time to time identified in a list established under an international agreement approved by the Minister under subsection (4), which includes ROKAMBA. As a result of amendments to the Annex to the ROKAMBA, 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 ROKAMBA Annex are not expected to impose any additional costs on Australia in terms of meeting its obligations under the Agreement. The Pomarine Jaeger and Oriental Reed Warbler are already afforded protection as a migratory species listed under the EPBC Act. The other species shares 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 1(3) provides that the Parties may amend the ROKAMBA by mutual written consent. Amendments to the text of the ROKAMBA, 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

26. Article 8(2) provides that either contracting Party may, by giving one year's notice in writing, terminate the CAMBA at the end of the initial fifteen year period (which expires in 2022) 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

27. The following Federal, State and Territory agencies were consulted regarding the recommended amendments to the Annex to the ROKAMBA:
 - 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)
28. 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.
29. No agencies raised any concerns regarding the proposed amendments. Relevant scientific authorities were consulted through Birdlife Australia.