

National Interest Analysis [2015] ATNIA 1

with attachment on consultation

**Amendments to Appendices I and II to the
Convention on the Conservation of Migratory Species of Wild Animals
(Bonn, 23 June 1979)**

done at Quito on 9 November 2014

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

**Amendments to Appendices I and II to the *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn, 23 June 1979)
done at Quito on 9 November 2014
[2014] ATNIF 33**

Nature and timing of proposed treaty action

1. The proposed treaty actions arise from amendments to **Appendix I** (which lists species that are endangered) and **Appendix II** (which lists species that have an unfavourable conservation status) to the *Convention on the Conservation of Migratory Species of Wild Animals* (done at Bonn on 23 June 1979, [1991] ATS 32; 'the Convention'). The amendments were adopted by the 11th Conference of the Parties ('COP 11') to the Convention, held in Quito, Ecuador, from 4 to 9 November 2014 ('2014 amendments').
2. The 2014 amendments list 21 additional migratory species in **Appendix I** of the Convention and 25 additional species in **Appendix II** (31 separate species were added to the Appendices, with 15 species being added to both Appendices).
3. Under **Article XI** (5) of the Convention, an amendment to the Appendices enters into force automatically for all Parties ninety (90) days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties that make a reservation within that time frame. In accordance with **Article XI** (5), the 2014 amendments to **Appendices I and II** came into force for all Parties except Australia (which is in the process of lodging a reservation to some of the amendments in **Appendix II**). Australia's Instrument of Reservation ('Reservation') is expected to be lodged with the Depository in January 2015.
4. Pursuant to **Article XI** (6) and **Article XIV** of the Convention, Australia is currently in the process of lodging a Reservation to the listing of five species in **Appendix II** meaning that the amendments to **Appendix II** for these species will not enter into force for Australia.
5. Australia will not lodge a reservation for the 21 additional species in **Appendix I** or the remaining 20 species in **Appendix II** (including the 15 species added to both Appendices), meaning that these amendments automatically entered into force for Australia on 8 February 2015.
6. Given the timing of the meeting of the Conference of the Parties at the end of the 2014 Parliamentary year, the 2015 Parliamentary sittings provide the earliest opportunity to table this National Interest Analysis.

Overview and national interest summary

7. **Articles III and IV** of the Convention impose certain obligations on Parties that are *Range States* of the species listed in its Appendices. Australia is a Range State for 15 of the 31 species that were added to the Convention's Appendices by the 2014 amendments. Of these 15 species, Australia will not lodge a reservation to the listing of ten species (and therefore is bound by the 2014 amendments in relation to those species): the great knot (a bird species) in Appendix I; the silky shark in Appendix II; and four species of sawfish (narrow, dwarf, green and largetooth), three species of

mobula ray (pygmy devil ray, bentfin devil ray and Japanese devil ray) and the reef manta ray in both Appendices.

8. Australia will lodge a Reservation to five of the species added to **Appendix II** by the 2014 amendments: two species of hammerhead sharks (scalloped and great) and three species of thresher sharks (bigeye, common and pelagic). Australia supports conservation efforts for these species and will continue to cooperate in international efforts including through the *Memorandum of Understanding on the Conservation of Migratory Sharks* to which Australia became a signatory on 4 February 2011. The purpose of the lodgement of a Reservation for these species is to avoid unintended consequences in domestic law that arise automatically upon listing.

9. No obligations arise for Australia under the Convention as a result of the listing of the 16 species for which Australia is not a Range State.

10. This treaty action is in the national interest as it reinforces Australia's commitment to the international protection and conservation of migratory species.

Reasons for Australia to take the proposed treaty action

11. The Convention entered into force generally on 1 November 1983 and Australia became a Party on 1 September 1991. The Appendices to the Convention were amended in 1991 and 2012. The Convention seeks to conserve terrestrial, avian and marine species that migrate across or outside national jurisdictional boundaries. Its Appendices list migratory species that are endangered or have an unfavourable conservation status. Parties that are Range States must prohibit the taking of **Appendix I** species (**Article III (5)**), and are to consider concluding agreements to protect **Appendix II** species (**Article IV (3)**). Parties that are not Range States have no obligations for listed species.

12. Australia is a Range State for 15 of the 31 species that were added by the 2014 amendments to the Convention's Appendices. A Range State is defined in **Article I** of the Convention as a State that exercises jurisdiction over any part of the range of a migratory species, or a State whose flagged vessels take that migratory species outside national jurisdictional limits. A list of Range States for listed species is maintained by the Convention's Secretariat.

Amendments for which a Reservation is being lodged

13. Australia is in the process of lodging a Reservation to five species added to **Appendix II** of the Convention – the scalloped hammerhead shark (*Sphyrna lewini*), great hammerhead shark (*Sphyrna mokarran*), bigeye thresher shark (*Alopias superciliosus*), common thresher shark (*Alopias vulpinus*) and pelagic thresher shark (*Alopias pelagicus*). The Reservation is required to the listing of these five species in **Appendix II** of the Convention to avoid triggering unintended measures under Australia's domestic law (as detailed below), which would have gone beyond Australia's obligations under the Convention.

14. The Reservation currently being lodged will not negate Australia's support of international action related to these species. Australia maintains suitable domestic management measures, and will continue to cooperate internationally to promote their conservation. For example, all shark listings agreed to during COP 11, including the five to which Australia is lodging a Reservation, will be automatically considered for

inclusion in the *Memorandum of Understanding on the Conservation of Migratory Sharks*, to which Australia is a signatory.

15. Inclusion of the five species the subject of Australia's pending Reservation in **Appendix II** to the Convention would, but for the Reservation, have given rise to limited obligations under the Convention, namely, to 'endeavour to conclude agreements where these would benefit the species' (**Article IV (3)**).

16. Conversely, once a species is listed in *either* Appendix to the Convention, **Section 209** of the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act') obliges the Minister to include that species on the list of migratory species established under that Act. Once listed as a migratory species under the EPBC Act, irrespective of whether it is listed on **Appendix I** or **Appendix II** of the Convention, it becomes an offence under the Act to kill, injure, take or move the species in Commonwealth areas. Accordingly, Australia's domestic measures go well beyond that required by the Convention for **Appendix II** listed species.

17. The five species the subject of Australia's pending Reservation are currently caught in various Australian fisheries and are subject to suitable domestic management measures consistent with conservation efforts required for species listed in **Appendix II** of the Convention. The two listed species of hammerhead sharks make up a significant component of hammerhead catches in the Great Barrier Reef Marine Park, and relatively minor catches in other Australian commercial fisheries. Scalloped hammerheads can also be an incidental catch when fishing recreationally for species such as tuna and marlin. Australian recreational fishers consider thresher sharks to be one of the premier game fishing species and there are strict management measures in place to manage the recreational take of shark species within Australian waters. The landing of thresher sharks is prohibited in tuna fisheries within Australian waters. Application of the domestic take prohibition to these five species would therefore interfere with appropriately managed commercial and recreational fisheries, beyond what is required by the Convention.

Amendments for which a Reservation will not be lodged

18. The amendments adopted at COP 11 adding the remaining 26 species to the Appendices of the Convention (including 15 species added to both Appendices) and which are not the subject of Australia's pending Reservation automatically entered into force for Australia on 8 February 2015.

19. Australia is a Range State for ten of the added species, and therefore entry into force of the 2014 amendments to the Appendices gives rise to certain obligations under the Convention for Australia. The added species are: in **Appendix I**, the great knot (*Calidris tenuirostris*); in **Appendix II**, the silky shark (*Carcharhinus falciformis*); and in both Appendices, the dwarf sawfish (*Pristis clavata*), green sawfish (*Pristis zijsron*), largetooth sawfish (*Pristis pristis*), narrow sawfish (*Anoxypristis cuspidata*), pygmy devil ray (*Mobula eregoodootenkee*), bentfin devil ray (*Mobula thurstoni*), Japanese devil ray (*Mobula japonica*) and reef manta ray (*Manta alfredi*).

20. Although it is open to Australia to also lodge a reservation in respect of these species, acceptance of them as additions to the Appendices is consistent with Australia's commitment to the international protection and conservation of migratory

species. It also appropriately follows through on the view of the Parties to the Convention that these species are either endangered or have an unfavourable conservation status and require appropriate action for their conservation.

21. Imposition of the take prohibition from the EPBC Act does not raise the same domestic issues for the ten added species under the 2014 amendments as it does for the hammerhead and thresher species. Moreover, nine of these ten species were listed in **Appendix I** to the Convention, meaning that their listings oblige Australia to impose a take prohibition. The imposition of the EPBC Act prohibition for these species therefore does not go beyond Australia's obligations under the Convention.

Australia's Obligations

22. **Article III** (1) of the Convention provides that **Appendix I** shall list migratory species which are endangered. Parties that are Range States for **Appendix I** species shall endeavour to conserve the species and their habitats, prevent the adverse effects of activities that impede or prevent migration and, to the extent feasible and appropriate, prevent or minimise factors that endanger the species (**Article III** (4)). **Article III** (5) requires Range States to prohibit the taking of **Appendix I** species subject to limited exceptions

23. Pursuant to **Article IV** (1) of the Convention, **Appendix II** lists migratory species which have 'an unfavourable conservation status and which require international agreements for their conservation and management' and species 'which would significantly benefit from the international co-operation that could be achieved by an international agreement'. Parties that are Range States for **Appendix II** species must 'endeavour to conclude agreements where these would benefit the species' and 'give priority to those species having an unfavourable conservation status' (**Article IV**(3)). **Article V** provides guidelines for such agreements.

24. Nine species for which Australia is a Range State, and for which Australia will not lodge a Reservation, were added to **Appendices I and II** at COP 11. The obligations under **Articles III and IV** of the Convention therefore arise for Australia in relation to these species.

25. As Australia will lodge a Reservation to the inclusion of the two species of hammerhead sharks and three species of thresher sharks, these amendments will not enter into force for Australia and therefore no obligations will be imposed on Australia in relation to these five species.

26. As Australia is not a Range State for the other 16 species added to the **Appendices** at COP 11, no international obligations arise under the Convention for Australia from these 2014 amendments.

27. The Convention does not affect the rights of Parties to adopt stricter domestic measures concerning the conservation of any listed migratory species (**Article XII** (3)).

Implementation

28. Under Australian domestic law, species listed in **Appendices I or II** of the Convention are protected under the EPBC Act. **Section 209** (3)(a)(ii) of the EPBC

Act specifies that the list of migratory species must include all species that are 'from time to time included in the Appendices to the Convention and for which Australia is a Range State under the Convention'. Once listed as migratory species under the EPBC Act, it becomes an offence to kill, injure, take, trade, keep or move the species in Commonwealth waters.

29. The great knot, which was added to **Appendix I**, was already listed on **Appendix II** and therefore is already listed as a migratory species under the EPBC Act. The list of migratory species under the EPBC Act will be amended after the Joint Standing Committee on Treaties' consideration of the treaty actions to include the remaining nine species for which Australia is a Range State and did not lodge a reservation. An amendment to the list of migratory species is an amendment of a legislative instrument. This will implement Australia's obligations under the Convention with respect to **Appendix I** listed species, and will go beyond what is required for **Appendix II** listed species.

30. For species listed on **Appendix II** of the Convention, Australia must cooperate in the development of multilateral conservation agreements where this will benefit the species listed. Australia is a signatory to the *Memorandum of Understanding on the Conservation of Migratory Sharks* ('MOU'), which was developed under the Convention. Relevant species included in **Appendix II** will automatically be considered by signatories for inclusion in the MOU (relevant to Australia's obligations, this covers the four species of sawfish, silky shark, three species of mobula ray and reef manta ray; although Australia does not have obligations in this respect, it will also include the two species of hammerhead and three species of thresher sharks). More broadly, Australia will continue to cooperate with other Parties to the Convention with respect to the conservation of **Appendix II** listed species.

31. As no obligations will arise under the Convention for Australia in relation to the five species for which a Reservation will be lodged, or for the 16 species for which Australia is not a Range State, no implementation action will be required for these species.

Costs

32. The proposed 2014 amendments to the Appendices are not expected to impose any additional costs on Australia in terms of meeting its obligations under the Convention. Australia already has a strong protection and conservation management regime in place for the migratory species included in **Appendices I and II** of the Convention. The proposed amendments will not require any additional domestic management arrangements to be put in place for commercial and recreational fishing operations that may occasionally interact with these species. Commercial fishers will be required to report any interactions that may occur with sawfishes, the silky shark, mobula rays and the reef manta ray, as they are currently required to do for any listed migratory species.

Future treaty action

33. Under **Article X**, the Convention may be amended at any meeting of the Conference of the Parties. Amendments are adopted by a two-thirds majority of Parties present and voting, and enter into force for those Parties accepting it on the first day of the third month following the date on which two-thirds of the Parties have

deposited an instrument of acceptance with the Depositary. Amendments enter into force for subsequent Parties on the first day of the third month following the deposit of its instrument of acceptance.

34. Under **Article XI**, the Appendices to the Convention may be further amended to add or remove species, at any meeting of the Conference of the Parties to the Convention.. Such amendments are adopted by a two-thirds majority of Parties present and voting, and enter into force for all Parties ninety days after the meeting at which it was adopted, except for Parties that make a reservation within that timeframe.

35. Any future amendments to either the Convention or its Appendices will constitute a separate treaty action and will be subject to Australia's domestic treaty making process.

Withdrawal or Denunciation

36. A reservation made by a Party under **Article XI** in relation to an amendment to the Appendices, may be withdrawn under **Article XI (6)**, by written notification to the Depositary. The amendment will then enter into force for that Party ninety days after the reservation is withdrawn.

37. Following entry into force of any amendments to the Convention, the only way to withdraw is by denunciation of the Convention. **Article XIX** provides that a Party may denounce the Convention by written notification to the Depositary at any time. Such denunciation takes effect twelve months after the Depositary has received the notification. Denunciation by Australia would be subject to its domestic treaty process.

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ATTACHMENT ON CONSULTATION

Amendments to Appendices I and II to the *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn, 23 June 1979) done at Quito on 9 November 2014 [2014] ATNIF 33

Consultation

1. The Department of the Environment ('Department') undertook extensive consultation (commencing in June 2014) with relevant Commonwealth Government departments, State and Territory environment and primary industries counterpart agencies, environmental non-government organisations ('NGOs') and commercial and recreational fishing stakeholders, seeking their views on the proposed amendments to the Appendices to the Convention prior to COP 11 in November 2014. Consultation took the form of email communications, meetings and teleconferences with interested organisations.
2. All Commonwealth Government departments consulted were supportive of the majority of the proposed amendments, however, the Department of Agriculture and the Australian Fisheries Management Authority both expressed concern regarding the apparent inflexibility of the EPBC Act with regard to species listed on **Appendix II** of the Convention. Both agencies identified potential issues for recreational fishers if the thresher shark proposals were successfully listed.
3. All State and Territory environment and fisheries management agencies (with the exception of the ACT) were consulted on the proposed amendments to the Appendices. Northern Territory and Victoria did not provide any feedback, however, the Departmental correspondence noted that if feedback was not received within a particular timeframe, it would be understood that the proposed amendments were supported.
4. Tasmania raised concerns with the addition of thresher sharks, due to the consequences for Tasmanian recreational fishers if the proposed amendment was successful. The remaining States identified some species represented minor catches in some commercial fisheries, but did not oppose the proposed amendment.
5. The following commercial and recreational fishing organisations were consulted in the lead-up to the Conference of Parties:
 - (a) Commonwealth Fisheries Association;
 - (b) Game Fishing Association of Australia;
 - (c) Recfish Australia;
 - (d) Australian National Sportfishing Association;
 - (e) Australian Recreational Fishing Foundation;

- (f) Victorian Recreational Fishing Peak Body ;
 - (g) Tasmanian Association for Recreational Fishing ;
 - (h) National Seafood Industry Alliance;
 - (i) Seafood Industry Victoria; and
 - (j) Cairns Marine.
6. All feedback received from recreational fishing organisations strongly opposed the inclusion of thresher sharks in **Appendix II** of the Convention. A number of organisations stated that thresher sharks were considered to be a premier game fish species, and well- regulated under State and Territory recreational fishing management regimes.
7. Opposition was also expressed by the majority of respondents for the inclusion of the scalloped hammerhead on **Appendix II**. Cairns Marine also raised a number of concerns regarding the conservation status and migratory nature of a number of other species proposals.
8. The following environmental NGOs were consulted on the proposed amendments:
- (a) Migratory Wildlife Network;
 - (b) Humane Society International;
 - (c) Australian Marine Conservation Society;
 - (d) Whales Alive;
 - (e) World Wide Fund for Nature;
 - (f) International Fund for Animal Welfare;
 - (g) Wilderness Society;
 - (h) Birds Australia;
 - (i) Wetlands International;
 - (j) Australasian Wader Studies Group;
 - (k) Whale and Dolphin Conservation Society; and
 - (l) TRAFFIC (the wildlife trade monitoring network).
9. Broad support was received from a number of environmental NGOs with regard to the proposed amendments.
10. As is evidenced from the information outlined above, extensive national consultation occurred on the proposed species nominations prior to COP 11,

with relevant Commonwealth departments, State and Territory agencies, non-government conservation organisations and fishing industry stakeholders providing comments on the majority of the proposals. All feedback was utilised when developing the Australian negotiating framework for COP 11, and in determining appropriate management responses following the conclusion of the Conference of Parties.

11. Following adoption of the 2014 amendments at COP 11, the Department consulted the Office of Best Practice Regulation ('OBPR') regarding the 2014 amendments to the Appendices of the Convention. On the basis that Australia will lodge a Reservation to the inclusion of the three species of thresher sharks and two species of hammerhead sharks in the Appendices, the OBPR advised the Department on 11 December 2014 that a Regulation Impact Statement is not required as it considered that the 2014 amendments are minor in nature.