

**National Interest Analysis [2017] ATNIA 32**

**with attachment on consultation**

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

(Manila, 28 October 2017)

**[2017] ATNIF 43**

## 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***

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

1. The proposed treaty action arises from amendments to Appendices I and II to the Convention on the Conservation of Migratory Species of Wild Animals (done at Bonn on 23 June 1979, [1991] ATS 32; ‘the Convention’) that were adopted by the 12th Conference of the Parties (‘COP 12’) to the Convention, held in Manila, Philippines, from 23 to 28 October 2017. The amendments list 20 additional species of migratory animals in Appendix I of the Convention and 18 additional species in Appendix II (34 separate species were added to the Appendices, with four species being added to both).
2. Under Article XI(5) of the Convention, an amendment to the Appendices enters into force automatically for all Parties 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. The entry into force date for these amendments is 26 January 2018. Pursuant to Article XI(6) of the Convention, Australia proposes to lodge reservations to the listing of three species in Appendix II, meaning that the amendments for these species will not enter into force for Australia. Australia does not propose to lodge reservations for the remaining 31 species (including four added to both Appendices), meaning that these amendments will automatically enter into force generally for Parties to the Agreement, including for Australia, on 26 January 2018.

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

3. The Convention imposes certain obligations on Parties that are Range States of species listed in its Appendices. Australia is a Range State for five of the 34 species that were added to the Appendices. Of these, Australia will not lodge a reservation to (and will therefore be bound by) the listing of two species, both of which were included in Appendix I: one bird species (Christmas Island Frigatebird) and one fish species (whale shark). These treaty actions are in the national interest as they reinforce Australia’s commitment to the international protection and conservation of migratory species.
4. Australia proposes to lodge reservations in relation to the inclusion of the dusky shark (*Carcharhinus obscurus*), the blue shark (*Prionace glauca*) and the white-

spotted wedgefish (*Rhynchobatus australiae*) in Appendix II (the white-spotted wedgefish is known in Australia as the white-spotted guitarfish and will be referred to as such throughout this NIA). 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 is a signatory. The purpose of the reservations for these species is to avoid unintended consequences in domestic law that arise automatically upon listing.

5. No obligations arise for Australia under the Convention as a result of the listing of the 29 species for which Australia is not a Range State.

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

6. The Convention entered into force generally on 1 November 1983 and Australia became a Party on 1 September 1991. 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 (Appendix I) or have an unfavourable conservation status (Appendix II). Parties that are Range States must prohibit the take of Appendix I species, and are to consider concluding agreements to protect Appendix II species. Parties that are not Range States have no obligations for listed species.
7. A Range State is defined in Article I 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. Australia is a Range State for five of the 34 species that were added to the Convention's Appendices.

### *Amendments for which proposed reservations will be lodged*

8. Australia proposes to lodge reservations for three species included in Appendix II of the Convention – the dusky shark, the blue shark and the white-spotted guitarfish.
9. Reservations are required against the listing of these three species to avoid enlivening unintended measures under Australia's domestic law that go beyond Australia's obligations under the Convention. Reservations do 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 at COP 12, including the three to which Australia will lodge a reservation, will be automatically considered for inclusion in the Memorandum of Understanding on the Conservation of Migratory Sharks, to which Australia is already a signatory.
10. Inclusion of these species on Appendix II would give rise to limited obligations under the Convention for Australia, essentially to 'endeavour to conclude agreements where these should benefit the species'. However, once listed on either Appendix to the Convention, s.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 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.

11. These three species are currently caught in various Australian fisheries, both commercial and recreational, and are subject to suitable domestic management measures consistent with conservation efforts required for species listed on Appendix II of the Convention. The dusky shark is taken commercially in New South Wales, Western Australia, Northern Territory, South Australia and Queensland, with some fisheries exporting the product as well. The West Australian Government has put in place stringent management measures relating to dusky shark for the Temperate Demersal Gillnet and Demersal Longline Fisheries to ensure the sustainability of take. The blue shark is one of the most commonly retained shark species in the Eastern Tuna and Billfish Fishery, and is also caught, along with the dusky shark, by Australian recreational fishers. The white-spotted guitarfish is also taken both commercially and recreationally in New South Wales. There are strict management measures in place to manage the recreational take of shark species within Australian waters. Application of the domestic take prohibition to these three species would therefore interfere with appropriately managed commercial and recreational fisheries, beyond what is required by the Convention.

*Amendments for which reservations will not be lodged*

12. The amendments adding the remaining 31 species to the Appendices of the Convention adopted at COP 12 (including 5 species added to both Appendices) will automatically enter into force for Australia on 26 January 2018. Australia is a Range State for two of those 31 species, and therefore entry into force of those listings will give rise to certain obligations under the Convention for Australia. These species are the Christmas Island Frigatebird (*Fregata andrewsi*) and the whale shark (*Rhincodon typus*), both added to Appendix I.
13. Although it is open to Australia to also lodge a reservation in respect of these amendments, acceptance of them 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 both endangered and require appropriate action for their conservation.
14. Imposition of the take prohibition from the EPBC Act does not raise the same domestic issues for these two species as it does for the dusky and blue shark species and the white-spotted guitarfish. Moreover, both of these species are already listed on both the threatened and migratory species list under the EPBC Act and as both of these species were listed on Appendix I to the Convention, 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.

## Obligations

15. 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 its habitat; prevent, remove, compensate for or minimise, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent migration and, to the extent feasible and appropriate, prevent, reduce or control factors that endanger or are likely to further endanger the species (Article III(4)). Article III(5) requires Range States to prohibit the taking of Appendix I species subject to limited exceptions. Two species for which Australia is a Range State, and will not lodge a reservation, were added to Appendix I at COP 12. The obligations in Article III therefore arise for Australia in relation to these species.
16. 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 shall endeavour to conclude agreements where these should benefit the species and give priority to those species having an unfavourable conservation status (Article IV(3)). Article V provides guidelines for such agreements. Three species for which Australia is a Range State were added to Appendix II at COP 12. As Australia proposes to lodge a reservation to the inclusion of the dusky shark, blue shark and the white-spotted guitarfish, these amendments would not enter into force for Australia and therefore no obligations would be imposed on Australia in relation to these three species.
17. As Australia is not a Range State for the other 29 species added to the Appendices at COP 12, no international obligations arise under the Convention for Australia from these listings.
18. 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

19. Under Australian domestic law, species listed on Appendices I or II 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.
20. The Christmas Island Frigatebird and the whale shark, which were both added to Appendix I, are already listed as migratory species under the EPBC Act. The Christmas Island Frigatebird has been on the migratory species list since its

inception due to its inclusion on the Annex to the China-Australia Migratory Bird Agreement. The whale shark was included on Appendix II in 1999 and was subsequently included on the migratory species list at that time.

21. For species listed on Appendix II, Australia must cooperate in the development of multilateral conservation agreements where this will benefit the species listed. Australia is already a signatory to the Memorandum of Understanding (MoU) on the Conservation of Migratory Sharks, which was developed under the Convention. Relevant species included on Appendix II will automatically be considered by signatories for inclusion in that MoU (this covers the dusky shark, the blue shark and the white-spotted guitarfish). More broadly, Australia will continue to cooperate as appropriate with other Parties to the Convention with respect to the conservation of Appendix II listed species.
22. As no obligations arise under the Convention for Australia in relation to the three species for which a reservation will be lodged, or for the 29 species for which Australia is not a Range State, no implementation action is required for these species.

### **Costs**

23. The proposed 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 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, particularly as both the Christmas Island Frigatebird and the whale shark are already designated protected species under the EPBC Act.

### **Future treaty action**

24. The Appendices to the Convention may be further amended, by either adding or removing species, by the Conference of the Parties to the Convention pursuant to Article XI. 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. Any future amendments to the Appendices will constitute a separate treaty action and will be subject to the domestic treaty making process.
25. The body of the Convention may also be amended by the Conference of the Parties pursuant to Article X. 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. All future treaty actions would be subject to Australia's domestic treaty process.

## **Withdrawal or Denunciation**

26. Once amendments to the Appendices or body of the Convention have entered into force for a Party, the only way to withdraw from them is by denouncing 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. If Australia were to denounce the Convention, it would be subject to the domestic treaty process.
  
27. Once a reservation has been made in relation to an amendment to an Appendix pursuant to Article XI, Article XI(6) provides that a Party may withdraw that reservation by written notification to the Depositary and the amendment will then enter into force for that Party ninety days after the reservation is withdrawn. Withdrawing a reservation is also subject to the domestic treaty process.

## **Contact details**

Protected Species and Communities Branch  
Biodiversity Conservation Division  
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## ATTACHMENT ON CONSULTATION

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#### Consultation

28. The Department of the Environment and Energy (the Department) undertook extensive consultation (commencing in June 2017) with relevant Commonwealth 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 12 in October 2017. Consultation took the form of email communications, meetings and teleconferences with interested organisations.
29. All State and Territory environment and fisheries management agencies (with the exception of the ACT) were consulted on the relevant listing proposals and other key agenda items. Western Australia, New South Wales, Tasmania and Queensland all raised concerns with the nominations for dusky shark, blue shark and white-spotted guitarfish due to the consequences for both commercial and recreational fishers if the listings were successful. Those states supported the Australian Government in seeking a reservation against those species listings to allow the already strong management actions in place currently to continue.
30. The following commercial and recreational fishing organisations were consulted in the lead-up to COP 12:
  - Commonwealth Fisheries Association
  - Game Fishing Association of Australia
  - Recfish Australia
  - Australian National Sportfishing Association
  - Australian Recreational Fishing Foundation (ARFF)
  - Victorian Recreational Fishing Peak Body (VRFish)
  - Tasmanian Association for Recreational Fishing (TARFish)
  - Tuna Australia
  - National Seafood Industry Alliance
  - Seafood Industry Australia
  - Western Australia Fishing Industry Council
  - Northern Territory Seafood Council
  - Seafood Industry Victoria

- Professional Fishermen's Association
  - Cairns Marine
31. All feedback received from these organisations strongly opposed the proposed listings for dusky shark, blue shark and white-spotted guitarfish. A number of organisations stated that both dusky and blue shark were already well regulated under State and Territory recreational fishing management regimes.
32. Many organisations noted that while these species were well-managed within Australian waters, they were supportive of working cooperatively with other countries to ensure the conservation of these species, which is the main obligation arising from a Convention Appendix II listing. It was highlighted that the main problem arises from the lack of distinction provided by the EPBC Act for Appendix I and II species, and this should be rectified. The majority of organisations also expressly requested that the Australian Government submit a reservation for these shark listings, if they were successfully listed at the meeting.
33. The following environmental NGOs were consulted on the proposed amendments:
- Wild Migration
  - Humane Society International
  - Australian Marine Conservation Society
  - Whales Alive
  - World Wide Fund for Nature
  - International Fund for Animal Welfare
  - Wilderness Society
  - BirdLife Australia
  - Whale and Dolphin Conservation Society
  - TRAFFIC
  - Born Free Foundation
34. Broad support was received from a number of conservation non-government organisations for all relevant listing proposals, including all five species for which Australia is a Range State.
35. All feedback given as a result of the consultation was utilised when developing the Australian negotiating framework for COP 12, and in determining appropriate management responses following the conclusion of the Conference of Parties.