

2 July 2014



Mr Owen Griffiths
Inquiry Secretary
Senate Foreign Affairs, Defence and Trade Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: fadt.sen@aph.gov.au

Dear Mr Griffiths

Inquiry into Australia's Future Activities and Responsibilities in the Southern Ocean and Antarctic Waters

The Law Council of Australia welcomes the opportunity to respond to the Committee's inquiry.

I am pleased to enclose a submission prepared by the Australian Environment and Planning Law Group (AEPLG) of the Law Council's Legal Practice Section.

The AEPLG would welcome the opportunity to discuss the submission further. In the first instance, please contact the Law Council Secretariat on _____ or _____ or the AEPLG Chair, Greg McIntyre SC on _____ or _____

Yours sincerely

MARTYN HAGAN
SECRETARY-GENERAL



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Senate Foreign Affairs, Defence and Trade Committee

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Executive Summary

The Law Council makes the following recommendations in response to the terms of reference for this inquiry:

- The Australian Government should ratify the [Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing](#).
- Australia should continue efforts to build consensus within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) for the adoption of marine protected areas in the East Antarctic region of the Southern Ocean.
- Active and effective surveillance programmes should be implemented in the Southern Ocean to deter illegal, unregulated and unreported (IUU) fishing activities and, where necessary, whaling programmes.

Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission to the inquiry by the Senate Foreign Affairs, Defence and Trade Legislation Committee on the [Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing](#) (the Treaty).
2. This submission has been drafted for the Law Council by the Australian Environment and Planning Law Group in the Legal Practice Section of the Law Council. The views expressed rely on the expertise and experience of senior lawyers practising in the field of environmental law.

Ratifying the Agreement on Port State Measures

3. Illegal, unregulated and unreported fishing is recognised globally as a threat to the sustainable management of fisheries and conservation of marine ecosystems.¹ Australia has a strategic interest in deterring unlawful fishing in the Southern and Antarctic Oceans, both to provide greater security for the Australian fishing industry and to strengthen international efforts to protect marine resources.
4. Since the establishment of the Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas in December 2003, Australia has actively pursued policy development in this area, including supporting the negotiations that led to the finalisation of the Treaty. Australia has since signed the Treaty and is in the process of ratifying it.²
5. In 2009, the United Nations' Food and Agriculture Organisation finalised the Treaty, which is the first global agreement aimed at addressing IUU fishing. The Treaty sets out measures that each signatory is to undertake at its ports to deal with IUU fishing, including denying entry to, or use of, ports and undertaking inspections.
6. The Law Council considers that the obligations under the Treaty are consistent with Australia's obligations under the United Nations Convention on the Law of the Sea to cooperate to conserve living marine resources. As the Joint Standing Committee on Treaties has stated:

*The value of this Treaty lies in its international application. As this Agreement builds momentum, IUU fishing vessels will be increasingly excluded from utilising port facilities and their products will not have ready access to world markets. The enactment of the Agreement will send a clear message to the international fishing industry, that compliance is a necessary part of doing business.*³
7. Australia signed the Treaty on 27 April 2010, but is yet to take steps to formally ratify it. The Law Council concurs with the recommendation of the Joint Standing Committee on Treaties that the Treaty be ratified.⁴

¹ Global Ocean Commission, [From Decline to Recovery – A Rescue Package for the Global Ocean: Summary Report 2014](#), 24–27.

² Australian Government, Department of Agriculture, [Steps Australia has taken to address illegal fishing](#) (2011).

³ Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, [Report 139: Treaties tabled on 11 December 2013, referred on 15 January and tabled on 11 February 2014](#) (2014), 33 [4.36].

⁴ *Ibid*, 33 [4.37] and Rec. 3.

8. In particular, the Law Council agrees with the national interest assessment and the Committee's conclusion that ratification of the Treaty will:
 - enable Australia to apply internationally agreed standards for port State measures;
 - enhance Australia's international reputation as a responsible fishing nation; and
 - provide a basis for greater cooperation between Australia and other States to reduce IUU fishing activities.⁵
9. The Law Council also notes that resources will need to be dedicated to enable Australia to meet its Treaty obligations, including:
 - collaborating in the creation of an information-sharing mechanism to enable countries to share details on vessels which are associated with IUU fishing (Article 16).
 - exchanging information among relevant national agencies, relevant state parties (including the FAO and other international organisations) in order to promote the effective implementation of the Treaty (Articles 5(c) and Article 6).⁶

Marine Protected Areas in the East Antarctic region

10. Australia is an active member of the Commission for the Conservation of Antarctic Marine Living Resources. In 2010, Australia, France, and the European Union developed a proposal for a group of seven marine protected areas (MPAs) within the East Antarctic region of the Southern Ocean, designed to protect areas representative of high biodiversity and important ecological functions.⁷
11. The scientific rigour and biodiversity significance of the East Antarctic MPAs proposal was endorsed by CCAMLR at the 2011 annual meeting and the Special Meeting of the Scientific Committee in 2013.⁸ Despite this, consensus on adoption of the proposal was not reached at the November 2013 meeting.⁹
12. The Law Council acknowledges the ongoing efforts and advocacy undertaken by the Australian delegation in order to try to achieve the consensus required for the adoption of the MPAs and urges the government to maintain its commitment to the East Antarctic MPA proposal. The Law Council encourages the Australian Government to continue to participate in international dialogue regarding this issue, with a view to reaching a binding legal agreement at CCAMLR's next annual conference in October 2014.

⁵ Ibid 25 [4.8]

⁶ Ibid 31 [4.28]

⁷ See for example: Australian Government, Australian Antarctic Division, [A proposal for a representative system of Marine Protected Areas in the East Antarctic planning domain](#) (2013).

⁸ Commission for the Conservation of Antarctic Marine Living Resources, [Report of the Thirty-Second Meeting of the Commission](#) Hobart Australia, CCAMLR-XXXII (2013) [7.34].

⁹ Ibid [7.32].

Surveillance

13. As outlined above, the Law Council endorses Australia's continuing efforts to address IUU fishing activities in the Southern Ocean. The Law Council also commends the Australian Government for its commitment to combatting commercial whaling, including through prosecuting the case against Japan's Southern Ocean whaling program JARPAII in the International Court of Justice. The Law Council concurs with comments made by former Attorney-General, the Hon Mark Dreyfus QC, at a Law Council Symposium in November 2013, that the case reflected Australia's respect for international institutions and international law, such as the Whaling Convention.¹⁰
14. The Law Council considers that active surveillance efforts are invaluable for deterring IUU fishing and ensuring that the International Court of Justice's ruling is complied with. This is consistent with the position adopted in the Australian National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.¹¹
15. The Law Council notes with some concern that the principal vessel dedicated to surveillance efforts in the Southern Ocean, the ADV Ocean Shield, did not conduct any patrols in the Southern Ocean in 2013.¹²
16. To facilitate more effective oversight of whaling and IUU activities, the Law Council recommends that a more active surveillance programme be implemented for the Southern Ocean.
17. The Law Council also urges the Commonwealth Government to work cooperatively with INTERPOL to establish reporting mechanisms and facilitate investigations of IUU under [Project SCALE](#), a program designed to detect, suppress and combat fisheries crime.¹³

¹⁰ The International Convention for the Regulation of Whaling, 2 Dec 1946, Washington, USA, 62 Stat 1716; 161 UNTS 72 (entered into force 10 Nov 1948).

¹¹ Australian Government, Department of Agriculture, Fisheries and Forestry, [Australian National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing](#) (2005) 49.

¹² Australian Government, *Australian Customs Annual Report 2012–13*, [PBS Program 1.4: Civil Maritime Surveillance and Response](#), footnote (e) notes that the 229 patrol days logged by the vessel were all in northern waters. The Australian Government's [Budget Paper II](#) also notes that no surveillance of whaling activities and protest fleets has been funded for 2013–18, 110.

¹³ Interpol, Projects: [Project SCALE](#) (2014).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.