

**Senate Standing Committees on Foreign Affairs, Defence and Trade**

**Inquiry into Australia's future activities and responsibilities in the Southern Ocean and Antarctic waters**

**Submission by the Department of Foreign Affairs and Trade**

*Submitted electronically, 27 June 2014*

The Department of Foreign Affairs and Trade ('DFAT') welcomes the opportunity to make a submission to the Senate Foreign Affairs, Defence and Trade References Committee's Inquiry into Australia's future activities and responsibilities in the Southern Ocean and Antarctic waters.

2. DFAT's submission focuses on Australia's interests in the Antarctic Treaty system and efforts to prevent, punish and deter illegal, unreported and unregulated (IUU) fishing. The submission will also cover DFAT's engagement on matters relating to whaling in the Southern Ocean, and in particular the recently concluded International Court of Justice (ICJ) case against Japan.

**Antarctica and the Southern Ocean**

3. The Antarctic Treaty system is a comprehensive, treaty-based governance framework for the Antarctic Treaty area, defined as the area south of 60° South Latitude. The Treaty area comprises a large portion of the Southern Ocean, in addition to the continent of Antarctica. The Australian Antarctic Territory, Macquarie Island and the Territory of Heard Island and McDonald Islands are within, or in very close proximity to, this area.

*Australia's Antarctic interests*

4. Australia has significant and enduring interests in Antarctica. Successive Australian Governments have endorsed six national interests:

- (i) Preserve our sovereignty over the Australian Antarctic Territory (AAT), including our sovereign rights over the adjacent offshore areas;
- (ii) Take advantage of the special opportunities Antarctica offers for scientific research;
- (iii) Protect the Antarctic environment, having regard to its special qualities and effects on our region;
- (iv) Maintain Antarctica's freedom from strategic or political confrontation;
- (v) Be informed about and able to influence developments in a region geographically proximate to Australia; and
- (vi) Derive any reasonable economic benefits from living and non-living resources of the Antarctic (excluding from mining and oil drilling).

5. While the contemporary relevance of these interests is currently being assessed as part of the 20 Year Australian Antarctic Strategic Plan review, conducted by Dr Tony Press, they continue to provide a basis against which Australia's future activities and responsibilities can be considered.

### *The Antarctic Treaties*

6. The *Antarctic Treaty (1959)* is the principal treaty of the ATS. Other treaties include: the *Protocol on Environmental Protection to the Antarctic Treaty (1991)* (the Madrid Protocol); the *Convention on the Conservation of Antarctic Marine Living Resources (1980)* (CAMLIR Convention); the *Convention for the Conservation of Antarctic Seals (1972)* (CCAS); and the *Agreement on the Conservation of Albatrosses and Petrels (2001)* (ACAP).

7. DFAT has lead responsibility for the Antarctic Treaty and its annual Antarctic Treaty Consultative Meetings (ATCMs), and works in close partnership with other agencies, particularly the Australian Antarctic Division (AAD) of the Department of the Environment, in relation to Antarctic and Southern Ocean matters.

8. Australia was one of the 12 original signatories to the 'cornerstone' Antarctic Treaty, which entered into force in 1961. Negotiated in 1958 against the backdrop of the Cold War, the Antarctic Treaty was intended to ensure that Antarctica would remain a place where science predominated and disagreements were resolved peacefully. Despite the turbulence of the decades it has spanned, the Antarctic Treaty has endured. There are currently 50 Antarctic Treaty Parties, of whom 29 are Consultative Parties<sup>1</sup> (parties actively engaged in Antarctic research) and 21 are Non-Consultative Parties (parties without stations in Antarctica, but whose nationals may participate in scientific expeditions).

### *The Antarctic Treaty system (ATS) - Australia's role and interests*

9. The ATS provides the international framework within which Australia pursues its sovereign, strategic, environmental and economic interests. The Government regards the ATS as the pre-eminent forum for managing all matters related to Antarctica. We maintain our influence through being active in Antarctic governance forums, ensuring a credible and robust presence on the ground, and through our contribution to Antarctic science and environmental protection. These activities support Australian interests and also protect and strengthen the contemporary relevance of the ATS and the norms embodied in its treaties.

10. At the most recent 37<sup>th</sup> meeting of the ATCM in Brasilia from 28 April to 7 May 2014, Australia continued to strengthen the ATCM's strategic direction through the development and population of a multi-year strategic work plan and agreement to measures which will strengthen environmental protection. The election of Australia's candidate to the Chair of the Committee for Environmental Protection (CEP) at the meeting also provided tangible recognition of the continuing contribution Australia is making to Antarctic governance.

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<sup>1</sup> Consultative Parties are entitled to participate in decision-making at ATCMs.

*Australia's sovereignty over the Australian Antarctic Territory*

11. Australia asserts sovereignty over approximately 42 per cent of Antarctica – the Australian Antarctic Territory (AAT). The AAT is an external territory of Australia and Australian legislation applies to the AAT if it is specifically expressed to do so.

12. Australia's sovereignty over the AAT is not universally recognised but the status quo of 1959 is protected under the Antarctic Treaty, which effectively preserves all sovereign claims. Pursuant to Article IV of the Antarctic Treaty, nothing in the Treaty shall act as a renunciation or diminution of any claim or basis of claim to sovereignty or shall prejudice any Party's position of recognition or non-recognition of any such claim. Further, no acts whilst the Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to sovereignty, and no new claims or enlargement of existing claims shall be asserted.

13. This compromise on the differing views over the question of Antarctic sovereignty embodied in Article IV was key to garnering broad acceptance of the Antarctic Treaty at its outset, and it continues to allow countries to cooperate in the management of Antarctica and avoid disagreements over sovereignty issues. Consistent with this compromise is the understanding among Treaty Parties that they enforce their domestic law in Antarctica only against their own nationals. This understanding and practice remains critical to the stability of the ATS.

14. Accordingly, even though as stated above relevant Australian legislation applies to the AAT, in line with this established international practice Australia only enforces such laws against its own nationals. This enduring practice of successive Australian Governments applies equally to the land territory of the AAT and to the maritime zones adjacent thereto.

15. In contrast to the AAT itself, Australia's sovereignty over the sub-Antarctic (north of 60°S latitude) Territory of Heard Island and McDonald Islands (HIMI) is universally recognised. Accordingly, Australia applies and enforces its domestic laws in HIMI and its maritime zones against Australian and foreign nationals alike, subject only to applicable obligations under international law. The land territory of HIMI as well as its territorial sea and exclusive economic zone lie outside of the Antarctic Treaty area, and so obligations from the Treaty and its Madrid Protocol are for the most part not applicable.<sup>2</sup> However, the CAMLR Convention area extends beyond the Antarctic Treaty area and encompasses HIMI and its maritime zones, and so Australia is obliged to comply with its CAMLR Convention obligations with respect to HIMI.

16. Australia maintains three permanent stations on mainland Antarctica in the AAT (Casey, Davis and Mawson) and a fourth on Macquarie Island in the sub-Antarctic (which forms part of Tasmania). These stations are currently supported by shipping and aviation capabilities based around the icebreaker RSV *Aurora Australis* and an

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<sup>2</sup> A portion of the continental shelf generated by HIMI beyond the standard 200 nautical miles from the territorial sea baseline does extend into the Antarctic Treaty area, and thus the ATS regime is applicable to this extent. This area of extended continental shelf was confirmed by the United Nations Commission on the Limits of the Continental Shelf in June 2008, and proclaimed by Australia under the *Sea and Submerged Lands Act 1973* in May 2012.

intercontinental and intra-continental airlink. The Government announced in May 2014 that it had approved for release a Request for Tender for the procurement of a new icebreaker to replace the *Aurora Australis*, which will enhance Australia's capability to service its Antarctic presence and activities.

17. Australia also works cooperatively with other states which have a presence in the AAT, and the AAD has concluded over 15 Memoranda of Understanding (MOU) with other governments and national Antarctic programs. This cooperation is consistent with Australia's sovereignty over the AAT, and supports our interests in the effective functioning of the ATS.

*Non-militarisation and environmental protection*

18. Australia has a strong interest in seeing the Antarctic region remain free from military competition and confrontation, given its proximity to Australia. The Antarctic Treaty supports this goal by preserving the area for peaceful purposes only. The Treaty expressly prohibits any measure of a military nature in Antarctica, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres and the testing of weapons.<sup>3</sup>

19. Australia also continues to promote high standards of environmental protection. The Madrid Protocol declares Antarctica to be a "natural reserve devoted to peace and science" and creates rules for the comprehensive protection of the Antarctic environment and dependent and associated ecosystems. It prohibits mining, subjects most activities to prior environmental impact assessment and creates the CEP. There are 35 parties to the Protocol, including all Antarctic Treaty Consultative Parties and parties with contemporary Antarctic programs. Notwithstanding this positive record, Australia continues to work with others, particularly France and Spain, to encourage further ratification of the Madrid Protocol by non-consultative Antarctic Treaty parties.

20. DFAT also continues to support AAD to promote the conservation, including rationale use, of marine resources under the CAMLR Convention. Australia is a key proponent of sustainable fishing practices, through setting appropriate catch limits, and in promoting cooperation to combat illegal, unreported and unregulated (IUU) fishing.

21. DFAT is also working with AAD to secure agreement within the CAMLR Commission to a network of Marine Protected Areas (MPAs) in East Antarctica to enhance environmental protection in this important and unique region. The MPA proposal, which is co-sponsored by the European Union and France, made important progress at the October 2013 Commission meeting. Australia will continue to work with CAMLR Convention members to encourage adoption of the MPA proposal at the Commission's next meeting in October 2014.

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<sup>3</sup> The Treaty does not prevent, however, the use of military personnel or equipment for non-military purposes, such as the conduct of, or support for, scientific research.

### **Illegal, Unregulated and Unreported (IUU) Fishing in the Southern Ocean**

22. Australia has significant interests in Southern Ocean fisheries, most particularly the HIMI Fishery. Efforts to combat IUU fishing inside the HIMI exclusive economic zone have been very effective in the last ten years, but IUU fishing remains a problem in other parts of the Southern Ocean and Indian Ocean.

23. Australia addresses IUU fishing in a range of ways, including working through the CAMLR Commission and relevant regional fisheries management organisations (RFMOs), undertaking surveillance and enforcement activities, and through cooperation with other states, particularly in our region. DFAT's role is to support the activity of lead agencies in these areas, including the negotiation of treaties and frameworks, as well as international engagement through the diplomatic network. In this capacity, DFAT works closely with the Department of Agriculture, the Australian Fisheries Management Authority (AFMA) and the Department of the Environment, among others.

24. As noted above, the HIMI Fishery is within Australia's exclusive jurisdiction but is also subject to the management regime and obligations established under the CAMLR Convention, as it is located inside the Convention's area of competence. Australia supports IUU efforts within the CAMLR Commission, including through the use of an IUU vessel list, as well as the creation of an implementation and compliance mechanism to promote adherence by member states to conservation measures. DFAT also continues to support the Department of Agriculture's engagement in relevant regional fisheries management organisations (RFMOs) to which Australia is a party.

25. Through diplomatic engagement, DFAT supports AFMA's operational activities to combat IUU fishing. In 2007, Australia, working with Indonesia, led the establishment of a world-first Regional Plan of Action against IUU fishing (RPOA-IUU), with ten other countries from the south-east Asia region. The aim of the RPOA-IUU is to promote responsible fishing practices and to combat IUU fishing, including in the Southern Ocean. DFAT, particularly through its overseas network, engages with regional governments to facilitate the denial of port access to, and/or inspections of, suspected IUU fishing vessels when they attempt to land and/or tranship their fish catches in RPOA ports. DFAT also supports engagement with flag states of suspected IUU vessels and those states with nationals working on-board such vessels.

26. DFAT has also contributed to the negotiation of cooperative frameworks for surveillance and enforcement with other states, which multiply our collective ability to undertake patrols and deter IUU fishing. Specifically, Australia has concluded two treaties with France:

- the *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas adjacent to the French Southern and Antarctic territories, Heard Island and the McDonald Islands (2007)*; and
- the *Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas adjacent to the French Southern and Antarctic territories, Heard Island and the McDonald Islands (2003)*.

27. The treaties provide for unilateral and cooperative surveillance and enforcement operations by Australia and France with respect to vessels that are believed to have violated applicable fisheries laws. They provide for fisheries enforcement officers of one Party to undertake enforcement action on-board an authorised vessel of the other Party against alleged IUU fishing vessels. In other words, an Australian fisheries enforcement officer may enforce Australian fisheries laws within the Australian EEZ around HIMI on board a French authorised vessel, and vice versa. The treaties also enable the commencement and maintenance of hot pursuit by either direct visual contact or evidence of obtained by technical means, permit an authorised vessel of one Party to take over a hot pursuit commenced by an authorised vessel of the other Party, and provide for post apprehension cooperation.

### **Whaling in the Southern Ocean**

28. On 31 March 2014, the International Court of Justice (ICJ) found that the grant of permits under Japan's Southern Ocean whaling program (JARPA II) could not be justified as being for the purposes of scientific research under Article VIII of the International Convention for the Regulation of Whaling (ICRW). The Court ordered that Japan revoke any extant authorisation, permit or licence granted in relation to JARPA II, and refrain from granting any further permits. The Court stated that it expected Japan to take account of its reasoning and conclusions when looking at whether to grant future whaling permits.

29. The Government welcomed the ICJ's decision, and both Australia and Japan committed to abide by the judgment. In welcoming the judgment, the Government also emphasised the strength of Australia's relationship with Japan, and that the relationship was larger than any one issue, including our disagreement about whaling.

30. DFAT worked closely with the Attorney General's Department, the lead agency with respect to the ICJ litigation, to support the conduct of the case.

31. Japan has indicated it does not plan to undertake a revised lethal whaling program in the Southern Ocean in 2014-15, but has stated its intention to establish a new lethal whaling program in 2015-16. The Government considers the International Whaling Commission (IWC), which has primary responsibility for the conservation and management of whales, is the appropriate forum to address issues relating to whaling, including the consideration of any new Southern Ocean whaling program. Australia will engage constructively within the IWC, taking into account the ICJ decision.

32. There have been a number of incidents between vessels in past seasons and successive Australian governments have highlighted the importance of safety at sea. Australia has the responsibility to coordinate search and rescue operations in a large part of the Southern Ocean, and the Government reinforced the obligation on masters of all vessels to behave responsibly and in accordance with international law in what is a remote and inhospitable environment. On 20 December 2013, the Foreign Minister of Australia, The Hon Julie Bishop MP, and her counterparts from the United States, New Zealand and The Netherlands, issued a joint statement condemning any actions at sea that may cause injury, loss of human life or damage to property or the marine environment. The Government has also been consistent in stating that it does not condone any dangerous or unlawful conduct, and that Australia remains committed to upholding its international obligations.