



Antarctic Treaty (Environment Protection) Amendment Bill 2010

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Antarctic Treaty (Environment Protection) Amendment Bill 2010

Date introduced: 10 February 2010

House: Representatives

Portfolio: Environment, Heritage and the Arts

Commencement: Sections 1 to 3 on Royal Assent. Schedule 1 will commence on Royal Assent or when Measure 16 comes into force for Australia, whichever is the later. Provisions will not commence if Madrid Protocol Measure 16¹ does not come into force. The Minister will publish the date in the Gazette when Measure 16 has come into force.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to implement and to bind Australia in domestic law to changes recently made to Annex II of the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol).

Background

Antarctic Treaty

The Antarctic Treaty (the Treaty) entered into force on 23 June 1961. Australia was one of the 12 original Parties to the Treaty. The treaty sets aside the Antarctic as an area to be used to exclusively for peaceful purposes, promoting freedom of scientific research and exchange, and holds all territorial claims in abeyance. Collectively, the Antarctic Treaty and a set of related agreements² –referred to as the Antarctic Treaty System (ATS)³ – aim

1. See page 4 of this Digest for a short description of Measure 16
2. These related agreements which are part of the Antarctic Treaty System are: The [Agreed Measures for the Conservation of Antarctic Fauna and Flora](#) (1964) (entered into force in 1982), The [Convention for the Conservation of Antarctic Seals](#) (1972), The [Convention for the Conservation of Antarctic Marine Living Resources](#) (Canberra 1980), The [Protocol on Environmental Protection to the Antarctic Treaty](#) (Madrid 1991)

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to regulate relations among state in the Antarctic. There are 48 parties to the Treaty, including 28 Consultative Parties.⁴ The Secretariat is headquartered in Buenos Aires, Argentina. Its basic functions are: the collection, provision and dissemination of information about the ATS and Antarctic activities; facilitation of information exchange between the parties to the Treaty; supporting the annual Antarctic Treaty Consultative Meeting and the Committee for Environmental Protection.

Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)

The 1991 *Protocol on Environmental Protection to the Antarctic Treaty* (Madrid Protocol) was created 'in response to proposals that the wide range of provisions relating to protection of the Antarctic environment should be harmonised in a comprehensive and legally binding form'.⁵ The Protocol:

- designates Antarctica as a 'natural reserve, devoted to peace and science'
- establishes environmental principles for the conduct of all activities
- prohibits mining
- subjects all activities to prior assessment of their environmental impacts
- provides for the establishment of a Committee for Environmental Protection, to advise the Antarctic Treaty Consultative Meetings
- requires the development of contingency plans to respond to environmental emergencies
- provides for the elaboration of rules relating to liability for environmental damage.⁶

There are a number of Annexes that accompany the Protocol. They are:

- | | |
|-----------|---|
| Annex I | Environmental Impact Assessment |
| Annex II | Conservation of Antarctic fauna and flora |
| Annex III | Waste Disposal and Waste Management |

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3. Further useful information about the Antarctic Treaty System is available on the Antarctic Treaty Secretariat's website: <http://www.ats.aq/e/ats.htm>, viewed 9 March 2010.
 4. Secretariat of the Antarctic Treaty, http://www.ats.aq/devAS/ats_parties.aspx?lang=e, viewed 9 March 2010.
 5. Department of the Environment, Water, Heritage and the Arts, Australian Antarctic Division, *Introducing the Madrid protocol*, viewed 4 March 2010, <http://www.aad.gov.au/default.asp?casid=825>
 6. Ibid.

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- Annex IV Prevention of Marine pollution
- Annex V Area Protection and Management
- Annex VI Liability arising from Environmental Emergencies.

Annex II to the Madrid Protocol relates to the conservation of Antarctic fauna and flora. Annex II to the Protocol was amended and adopted unanimously at the Antarctic Treaty Consultation Meeting (ATCM) on 17 April 2009 and that amended version is contained in [*Measure 16 \(2009\) Amendment to Annex II to the Protocol on Environmental Protection to the Antarctic Treaty*](#) [1998] ATS 6 Baltimore, 17 April [2010] ATNIF 1.⁷

Measure 16 will automatically become effective on 17 April 2010 ‘unless one or more of the Contracting Parties notifies within the timeframe that it wishes an extension of that period, or that it is unable to approve the measure. Once effective, measures are legally binding on all Contracting Parties.’⁸ The [National Interest Analysis](#) accompanying the Parliamentary tabling of Measure 16 states:

Measure 16 (2009) makes a series of minor modifications to Annex II to the Protocol, which are to improve the process for listing species for special protection, extend the protection of native flora and fauna to include invertebrates, broaden provisions for introduction of non-native species and diseases to include unintended introductions, and make minor editorial updates.⁹

It further states

Australia has been a Consultative Party to the Antarctic Treaty since it came into force in 1961. The Antarctic Treaty is a multilateral agreement which commits the Contracting Parties to ensure that Antarctica is used exclusively for peaceful purposes, guarantees freedom of scientific research, promotes international scientific cooperation, allows for inspection of all operations, sets aside the potential for disputes over territorial sovereignty in Antarctica, and provides for regular meetings between the parties. The Protocol is a multilateral agreement under the treaty which commits parties to the protection of the Antarctic environment and its dependent and associated ecosystems, and designates Antarctica as a natural reserve, devoted to peace and science.¹⁰

7. [National Interest Analysis](#) with attachment on consultation: Measure 16 (2009) Amendment of Annex II to the Protocol on Environmental Protection to the Antarctic Treaty [1998] ATS 6, Baltimore, 17 April 2009 [2010] ATNIF 1.

8. Ibid.

9. Ibid.

10. Ibid.

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Treaties and their Implementation into Domestic Law

The act of ratification or accession to an international instrument by Australia does not mean that it is automatically part of Australian law. It is a generally accepted view, endorsed by a report of the Senate Legal and Constitutional Affairs Committee, that it is not incorporated into Australian domestic law until it is implemented by legislation and that ‘this view has been shared by successive governments of different political persuasions.’¹¹ The Trick or Treaty report further comments on the High Court view

In *Dietrich v the Queen*, Chief Justice Mason and Justice McHugh (of the High Court) considered the effect of the International Covenant on Civil and Political Rights (ICCPR) in Australia law:

Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provision.¹²

The Committee report also makes reference to developments in recent years to the indirect effects of treaties on domestic law prior to their implementation by legislation.¹³

Committee consideration

This Bill proposes to implement the treaty action *Measure 16 (2009) Amendment to Annex II to the Protocol on Environmental Protection to the Antarctic Treaty*. Currently, the Joint Standing Committee on Treaties (JSCOT) is examining the treaty action. Measure 16 (the revised Annex II) was tabled in Parliament on 2 February 2010.

JSCOT was established in 1996 ‘as part of a package of reforms to improve the openness and transparency of the treaty making process in Australia’.¹⁴ The usual practice relating to treaty actions tabled in Parliament is that all treaty actions go to JSCOT for review and report before any action which binds Australia to the terms of the treaty is taken.¹⁵ In the case of this Bill, it has been introduced and debate has commenced before the JSCOT report is available, although committee hearings have already taken place.

11. Senate Legal and Constitutional Affairs Committee, *Trick or Treaty? Commonwealth Power to make Treaties*, Chapter 6: Treaties and domestic law, Canberra, 1995.

12. Ibid.

13. Ibid.

14. Joint Committee on Treaties, *Purpose of the Treaties Committee*, Canberra, viewed 4 March 2010, <http://www.aph.gov.au/house/committee/jsct/ppgrole.htm>

15. Ibid.

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Financial implications

The Explanatory Memorandum states that the Bill will have no financial impact.

Main provisions

Schedule 1—Implementation of amendments to Annex II of the Madrid Protocol

Part 1—Amendments to the Antarctic Treaty (Environment Protection) Act 1980

Items 1 to 3 insert new definitions into **subsection 3(1)**. **Items 1 and 3** insert definitions of ‘organism’ and ‘take’. **Item 2** includes ‘native invertebrate’ in the definition of ‘specifically protected species’.

Items 6 to 17 amend section 10 of the Act which relates to the restrictions placed on obtaining permits.

Permits for taking native birds or native seals

Item 6 amends subparagraph 10(1)(b)(ii) to remove references to ‘zoological gardens’, ‘cultural institutions’ and ‘cultural purposes’ with the effect that permits are no longer available to obtain specimens of native birds or native seals for display in cultural institutions. **Item 6** also inserts a new heading for subsection 10(1).

Item 7 inserts proposed subparagraph 10(1)(b)(iia) which provides that a permit may be obtained for the taking of native birds or native seals for zoological gardens where such specimens are not available in existing captive collections or where a compelling conservation need exists.

Item 9 inserts proposed subparagraph 10(1)(c)(iii) which is an additional restriction in paragraph 10(1)(c) that relates to ‘specially protected species’. If there is no suitable alternative, the permit may allow the killing of a native bird or native seal.

Permits for taking native invertebrates

Item 10 inserts proposed subsection 10(1AA) which relates to permits for taking native invertebrates.¹⁶ **Proposed subsection 10(1AA)** provides that a permit must not authorise the taking of native invertebrates unless the following criteria are met:

16. ‘Native invertebrate’ is defined in section 3(1) of the Act: ‘native invertebrate means any terrestrial or fresh water invertebrate, or at any stage of its life cycle indigenous to the Antarctic’—*Antarctic Treaty (Environment Protection) Act 1980*. Invertebrates include such animals as arthropods (eg crustaceans), molluscs and annelids (eg. Segmented worms).

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- the Minister is satisfied that the species variety, the animal's habitat essential for its existence and the balance of the ecological systems are maintained (**proposed subparagraph 10(1AA)(a)**).
- the taking of native invertebrates will only be carried on to the extent that is necessary for
 - construction and operation of scientific support facilities, or
 - to supply specimens for museums or other educational institutions or purposes as the Minister thinks fit, or
 - to supply specimens for zoological gardens¹⁷, or
 - monitoring or conserving the environment or an historic site or monument, or
 - providing for unavoidable consequences of scientific activities not authorised under the second and third dash points above.

Proposed subparagraph 10(1AA)(c) relates to permits for taking invertebrates that belong to 'specially protected species.'¹⁸ Permits may be granted

- if it is for a compelling scientific purpose, and
- the Minister is satisfied that the activities authorised by the permit will not jeopardise the existing ecological system or the survival or recovery of the species or harm the local population of the species, and
- no suitable alternative exists.

Permits for Gathering Native Plants

Subsection 10(1B) provides that a permit must not authorise a person to gather, collect, endanger or otherwise interfere with a native plant unless certain criteria are satisfied. **Item 11 amends subparagraph 10(1B)(b)(ii)** to omit reference to 'cultural institutions' or 'cultural purposes'. The effect of this amendment is that it is no longer possible to issue a permit for the taking of native plants for cultural institutions.

Item 12 inserts proposed subparagraph 10(1B)(c)(iii) to provide that a permit to kill a native plant that is a member of a specially protected species may be issued if there is no other suitable alternative technique to achieve the purpose for which the permit is granted.

Item 13 repeals subsection 10(1D) as it becomes redundant with the creation of a new offence in section 19AC. Currently subsection 10(1D) provides that a person authorised by

17. This is not as restrictive as the taking of native birds or native seals for zoological gardens in **proposed subparagraph 10(1)(b)(ia)**, Explanatory memorandum, Antarctic Treaty (Environment Protection) Amendment Bill 2010, p. 4.

18. These are species derived from a list of species under Annexe II of the Madrid Protocol.

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a permit to bring a native seal, native bird or native plant into the Antarctic must ‘take all reasonable precautions to prevent the introduction of micro-organisms not present in the Antarctic.’

Item 15 repeals and substitutes subsection 10(3). Proposed subsection 10(3) states that a permit must not authorise a person to bring a non-indigenous cultivated plant into the Antarctic except under strict controls so as to prevent its escape into the Antarctic environment. The Explanatory Memorandum states that this will ‘enable the introduction of cultivated plants or their reproductive propagules for the purposes of growing food for consumption in the Antarctic.’¹⁹ **Item 15** also inserts **proposed subsection 10(3A)** – this provides that a permit must not authorise non-indigenous organisms to be brought into the Antarctic other than for experimental use under strict controls so as to prevent their escape into the Antarctic environment.

Item 16 amends subsection 10(4) to tighten the provision to refer to all non-indigenous organisms brought to the Antarctic. The conditions currently set out in subsection 10(4) in relation to the issue of a permit, will apply to all non-indigenous organisms and not be restricted to those that currently ‘might cause harmful interference with the natural system if left unsupervised.’²⁰ **Item 17 substitutes subsection 10(5)** to change all references to animals and plants to ‘organisms’. The proposed provision also requires that a permit contain a rationale justifying why the organisms are being introduced.

Offence—accidental introduction of micro-organisms

Item 30 inserts proposed section 19AC which creates an offence in relation to the accidental introduction of micro-organisms. **Proposed subsection 19AC(1)** creates an offence for a person who introduces micro-organisms not indigenous to the Antarctic by means of having brought an organism into the Antarctic. The penalty is a maximum of 2 years imprisonment or 120 penalty units (\$13200) or both. **Proposed 19AC(2)** provides that subsection (1) does not apply if the organism or article was for use as food or that the person took ‘all reasonable precautions’ to prevent the micro-organisms being brought into the Antarctic, or the person has a permit or recognised foreign authority to bring in the micro-organism. **Proposed 19AC(3)** provides that subsection (1) does not apply in relation to conduct in paragraph (1)(a) if the conduct was done as the result of an emergency situation such as saving a person from death or injury, or to secure a ship, aircraft, equipment or facilities of high value, or to protect the environment.

19. Explanatory memorandum, Antarctic Treaty (Environment Protection) Amendment Bill 2010, p.5.

20. Section 10(4), Antarctic Treaty (Environment Protection) Act 1980.

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Offences—bringing food into the Antarctic

Bringing live animals into the Antarctic as food

Proposed section 19AD creates offences in relation to bringing food into the Antarctic. **Proposed subsection 19AD(1)** prohibits a person from bringing a live animal into the Antarctic for use as food. The penalty is a maximum of 2 years imprisonment or 120 penalty units (\$13200) or both.

Controls to ensure organisms brought into the Antarctic as food do not escape

Proposed subsection 19AD(2) states that a person must ensure that controls are in place to prevent the escape of organisms into the Antarctic environment when an organism is brought into the Antarctic for use as food. The penalty is a maximum of 2 years imprisonment or 120 penalty units or both.

Poultry and food products derived from poultry

Proposed subsection 19AD(3) creates an offence for a person who brings poultry or any other bird product as food into the Antarctic and those products are contaminated with disease. The penalty is imprisonment for 2 years or 120 penalty units or both. **Proposed subsection 19AD(4)** provides that subsection (3) does not apply if the person has taken ‘all reasonable precautions’ to prevent disease being brought into the Antarctic in bird products used as food.

Destruction of organisms brought into the Antarctic without a permit

Proposed section 19AE creates offences for a person who brings a non-indigenous organism into the Antarctic without a permit or recognised foreign authority. **Proposed subsection 19AE(1)** states that the section, and hence potentially the offences, applies if a person brings a non-indigenous organism into the Antarctic and that action is not in accordance with a permit or recognised foreign authority, and the organism poses a risk to native flora and fauna. An action ‘not in accordance’ includes the situation where either the person does not have a permit or the conduct cannot be authorised by issuing a permit. **Proposed subsection 19AE(2)** requires that the person remove or destroy the organism and any progeny of the organism as soon as is practicable. The penalty is 2 years imprisonment or 120 penalty units or both. **Proposed 19AE(3)** states however that subsection (2) does not apply if:

- it is not feasible to remove or destroy the organism, or
- a greater adverse environmental impact would be caused by the removal or destruction of the organism, or
- the organism is to be used as food.

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Proposed subsection 19AE(4) requires that a person ‘take all reasonable steps to avoid’ the consequences of bringing a non-indigenous organism into the Antarctic in the circumstances outlined in subsection 19A(1). The penalty for not taking all such steps is 2 years imprisonment or 120 penalty units or both. **Proposed subsection 19AE(5)** states that subsection (4) does not apply if the organism is to be used as food.

Item 32 repeals and substitutes the revised Annex II to the Protocol on Environmental Protection to the Antarctic Treaty in Schedule 3 of the Act.

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