

**National Interest Analysis [2020] ATNIA 4**

**with attachment on consultation**

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

(Gandhinagar, 17-22 February 2020)

**[2020] ATNIF 6**

## NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

### **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 is the amendment of Appendices I and II to the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979 ('the Convention'). The amendments were adopted by the 13th Conference of the Parties ('COP 13') to the Convention, held in Gandhinagar, India, from 17 to 22 February 2020. The amendments list seven additional species of migratory animals in Appendix I of the Convention and five additional species in Appendix II (10 separate species were added to the Appendices, with two species being added to both).
2. Pursuant to Article XI(6) of the Convention, Australia proposes to lodge a reservation in relation to the listing of two species in Appendix II, meaning that these amendments will not enter into force for Australia. Australia does not propose to lodge reservations for the remaining eight species (including two added to both Appendices).
3. 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 22 May 2020.

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

4. The Convention imposes obligations on Parties that are Range States of species listed in its Appendices. Australia is a Range State for four of the 10 species that were added to the Appendices. Of these four, Australia will be bound by the listing of two species, both of which were included in Appendix I: one bird species (Antipodean Albatross - *Diomedea antipodensis*) and one fish species (Oceanic White-tip Shark - *Carcharhinus longimanus*). This is in the national interest as it reinforces Australia's commitment to the international protection and conservation of migratory species.
5. Australia proposes to lodge a reservation in relation to the inclusion of the Smooth Hammerhead Shark (*Sphyrna zygaena*) and the Tope Shark (*Galeorhinus galeus*) in Appendix II. The Tope Shark is known in Australia as the School Shark and will be referred to as such throughout this NIA. The purpose of the reservation for these

species is to avoid unintended consequences in domestic law that arise automatically upon listing. Australia supports conservation efforts for these species and will continue to cooperate in international efforts. This includes its participation in the Memorandum of Understanding on the Conservation of Migratory Sharks (MoU), under which the Smooth Hammerhead Shark is already listed.

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

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

7. The Convention entered into force generally on 1 November 1983 and Australia acceded to the Convention 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.
8. A Range State is defined in Article I(1): ‘in relation to a particular migratory species means any State [...] that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species’. A list of Range States for listed species is maintained by the Convention’s Secretariat. Australia is a Range State for four of the 10 species that were added to the Convention’s Appendices during COP 13.

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

9. Australia proposes to lodge a reservation for two species included in Appendix II of the Convention – the Smooth Hammerhead Shark and the School Shark.
10. A reservation is required against the listing of these two species to avoid enlivening unintended measures under Australia’s domestic law that go beyond Australia’s obligations under the Convention. The reservation does 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 13, including the School Shark for which Australia will lodge a reservation, will be automatically considered for inclusion in the MoU on the Conservation of Migratory Sharks.
11. Inclusion of these species on Appendix II gives 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.

12. These two 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 Smooth Hammerhead Shark is already listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), with the Australian non-detriment finding provided for by Article IV of CITES allowing 70 tonnes take and export per year. The catch is taken in three main fisheries – the Western Australian Temperate Demersal Gillnet and Demersal Longline Fisheries, the Commonwealth managed Southern and Eastern Scalefish and Shark Fishery and the NSW Ocean Trap and Line Fishery.
13. The School Shark was listed as conservation dependent under the EPBC Act in 2009. It is the subject of an Australian Fisheries Management Authority rebuilding strategy (*School Shark Stock Rebuilding Strategy 2015*) which aims to rebuild the School Shark stock to its limit reference point of 20% of unfished biomass within three generation times. The species is heavily managed within Australian waters and current management measures include an up-to-date stock assessment, closed areas/pupping closures, gear restrictions and selectivity, strict bycatch limits and compulsory use of the Vessel Monitoring System. Both species are caught by Australian recreational fishers. 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 two species would therefore interfere with appropriately managed commercial and recreational fisheries, as well as being beyond what is required by the Convention.

*Amendments for which reservations will not be lodged*

14. The amendments adding the remaining eight species to the Appendices of the Convention adopted at COP 13 (including two species added to both Appendices) will automatically enter into force for Australia on 22 May 2020. Australia is a Range State for two of those eight species, and therefore entry into force of those listings will give rise to certain obligations under the Convention for Australia. These species are the Antipodean Albatross and the Oceanic White-tip Shark, both added to Appendix I.
15. Acceptance of these amendments 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.
16. 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 Smooth Hammerhead and School Shark species. Moreover, the Antipodean Albatross is already listed on both

the threatened and migratory species list under the EPBC Act, and the Oceanic White-tip Shark is already subject to a retention prohibition in Commonwealth fisheries which is consistent with the management measures currently in place in many Regional Fisheries Management Organisations. 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**

17. 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 were added to Appendix I at COP 13 for which Australia is a Range State: the Antipodean Albatross and the Oceanic White-tip Shark. The obligations in Article III therefore arise for Australia in relation to these species.
18. 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. Two species, the Smooth Hammerhead Shark and the School Shark, for which Australia is a Range State were added to Appendix II at COP 13. As Australia proposes to lodge a reservation to the inclusion of these two species, these amendments would not enter into force for Australia and therefore no obligations would be imposed on Australia in relation to these two species.
19. As Australia is not a Range State for the other six species added to the Appendices at COP 13, no international obligations arise under the Convention for Australia from these listings.
20. 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**

21. 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.

22. The Antipodean Albatross, which was added to Appendix I, is already listed as a migratory species under the EPBC Act. The Antipodean Albatross was included on Appendix II in 1997 and was subsequently included on the migratory species list at that time.
23. As no obligations arise under the Convention for Australia in relation to the two species for which a reservation will be lodged, or for the six species for which Australia is not a Range State, no implementation action is required for these species.
24. For completeness, species listed on Appendix II, Range States must endeavour to conclude multilateral conservation agreements where this will benefit the species listed. Australia is already a participant in the MoU on the Conservation of Migratory Sharks, which was developed under the Convention. The Smooth Hammerhead Shark is already listed under this MoU. Relevant species included on Appendix II will be considered by signatories for inclusion in that MoU (this covers the School Shark). The MoU is a non-legally binding instrument and includes aspirational goals for participants. If the School Shark is included in the MoU, this will not create new obligations for Australia and will not require implementation action.
25. 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.

### **Costs**

26. The proposed amendments to the Appendices are not expected to impose any additional costs on Australia. 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 the Antipodean Albatross is already designated as a protected species under the EPBC Act and the Oceanic White-tip Shark is already subject to a retention prohibition within Commonwealth waters.

### **Future treaty action**

27. 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.

28. 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**

29. 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, this would be subject to the domestic treaty process.
30. 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  
Department of Agriculture, Water and the Environment

## ATTACHMENT ON CONSULTATION

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

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#### Consultation

31. The former Department of the Environment and Energy (the Department) undertook extensive consultation (commencing in September 2019) with relevant Commonwealth departments, State and Territory environment and primary industries counterpart agencies, environmental non-government organisations (NGOs) and commercial and recreational fishing stakeholders. The Department sought their views on the proposed amendments to the Appendices to the Convention prior to COP 13 in February 2020. Consultation took the form of email communications, meetings and teleconferences with interested organisations.
32. 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, Northern Territory and Victoria provided comments, with Western Australia and Victoria raising concerns with the nominations for Smooth Hammerhead and School Shark due to the consequences for both commercial and recreational fishers if the listings were successful.
33. The following commercial and recreational fishing organisations were consulted in the lead-up to COP 13:
  - 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



- Cairns Marine
  - Atlantis Fishery Consulting Group
34. All feedback received from these organisations opposed a CMS listing for all shark species proposed, but particularly the Smooth Hammerhead and School Shark. A number of organisations stated that both the Smooth Hammerhead and School Shark were already well regulated under State and Territory recreational fishing management regimes.
35. 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.
36. 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
37. Written support was received from Humane Society International for all relevant listing proposals, including all four species for which Australia is a Range State.
38. All feedback given as a result of the consultation was utilised when developing the Australian negotiating framework for COP 13, and in determining appropriate management responses following its conclusion.