Dear Committee Members,

Joint Standing Committee on Treaties

Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas of beyond national jurisdiction

1. The 'Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas of beyond national jurisdiction' (the Agreement) was adopted on 19 June 2023, and opened for signature on 20 September 2023. At the time of this submission, there are a total of 91 States that have signed the Agreement and a total of 8 States that have ratified the Agreement.

Australia and the Law of the Sea

2. To begin it is useful to recite Australia's history of engagement with the modern law of the sea. The law of the sea has effectively been through three post-World War Two phases of treaty development.[1]
3. The first phase arose from the First United Nations Conference on the Law of the Sea (1958) that resulted in conclusion of four conventions which Australia became a party to:
    - Convention on the Territorial Sea and Contiguous Zone;[2]
    - Convention on the Continental Shelf;[3]
    - Convention on the High Seas;[4] and,
    - Convention on Fishing and Conservation of the Living Resources of the High Seas.[5]
4. The second phase arose from the Third United Nations Conference on the Law of the Sea (1973-1982) that resulted in conclusion of the 1982 United Nations Convention on the Law of the Sea (LOSC) which Australia signed on 10 December 1982, and ratified on 5 October 1994.[6] The LOSC entered into force on 16 November 1994. Australian ratification of the LOSC and its entry into force resulted in it prevailing over the four 1958 conventions noted above.[7]

[1] Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* 3rd (Hart, 2023) Chapter 1.
[2] [1963] ATS No 12; entry into force for Australia on 10 September 1964.
[3] [1963] ATS No 12; entry into force for Australia on 10 June 1964.
[4] [1963] ATS No 12; entry into force for Australia on 13 June 1963.
[5] [1963] ATS No 12, entry into force for Australia on 20 March 1966.
[6] [1994] ATS 31; entry into force for Australia on 16 November 1994.
[7] LOSC, Article 311.

5. The third phase remains ongoing and is associated with a series of separate associated or supplementary agreements and instruments to the LOSC. Those instruments and Australia's adoption of them are as follows:

    - 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982;[8] and,
    - 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[9]

    The 2023 Agreement is the latest instrument associated with this third phase of the development of the law of the sea under the LOSC.

6. In addition to Australia's active engagement with the negotiation,[10] development and adoption of the modern law of the sea through the LOSC and associated agreements, Australia has also sought to give effect to the law of the sea through its domestic law and sought to take advantage of the rights and entitlements that it enjoys under the law of the sea, while also acknowledging its obligations. This is reflected in the provisions of the *Seas and Submerged Lands Act* 1973 (Cth), which provides the basic legal framework for Australia's declaration of maritime zones, and the *Fisheries Managaement Act* 1991 (Cth), *Maritime Powers Act* 2013 (Cth), and the *Offshore Petroleum and Greenhouse Gas Storage* Act 2006 (Cth) which regulate a range of activities in Australia's maritime zones consistent with the LOSC.
7. Australia has also been involved in law of the sea cases before international courts and tribunals as both an applicant and a respondent, including:

    - *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), Provisional Measures [ITLOS Cases No 3 and 4 – 1999];
    - *The "Volga" Case* (Russian Federation v. Australia), Prompt Release [ITLOS Case No 11 – 2002]; and,
    - *Timor Sea Conciliation* (Timor-Leste v. Australia) [2016-2018]

8. In sum, Australia has been deeply engaged in the development and implementation of the law of the sea post World War Two both internationally and domestically and has been a significant beneficiary of these developments.[11]

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[8] [1994] ATS 32; definitive entry into force for Australia 28 July 1996.
[9] [2001] ATS 8; entry into force for Australia on 11 December 2001.
[10] Stuart Kaye, "Australia and the negotiation of the law of the sea" (2015) 7 (4) *Australian Journal of Maritime & Ocean Affairs* 256-266.
[11] See generally Rachel Baird and Donald R. Rothwell (eds), *Australian Coastal and Marine Law* (Federation Press, Annandale (NSW): 2011); Stuart Kaye and Bill Campbell, "Australia and the Law

The Agreement

9. The objective of the Agreement is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The Agreement makes clear that it only applies to areas beyond national jurisdiction, and that it is to be interpreted and applied in the context of and in a manner consistent with the LOSC. As such, Australia's rights, jurisdiction, and duties, with respect to the exclusive economic zone and the continental shelf, within and beyond 200 nm, are not impacted.
10. The principal outcomes of the Agreement relate to marine genetic resources, area-based management tools, environmental impact assessment, and new institutional arrangements. The general principles and approaches governing the Agreement generally mirror the LOSC, but are also extended to reflect more contemporary global concerns. These include references to the polluter-pays principle, common heritage, the precautionary principle, an ecosystem approach, an integrated approach to ocean management, use of relevant traditional knowledge of indigenous peoples, and recognition of the special circumstances of small island developing States.
11. A core component of the Agreement is the fair and equitable sharing of benefits of activities with respect to marine genetic resources, which extend to material of marine plant, animal, microbial or other origin. Capacity building with respect to activities associated with marine genetic resources is given particular priority for certain groups of States, including least developed, developing, small island, coastal African, and archipelagic States. No State can claim sovereignty or sovereign rights over marine genetic resources, and activities with respect to these resources are to be conducted for the benefit of all humanity, particularly for the advancement of scientific knowledge. Particular recognition is given to the free, prior and informed consent of indigenous peoples with respect to traditional knowledge associated with marine genetic resources. Importantly, these provisions do not extend to fishing, fishing-related activities, or military activities.
12. New mechanisms are also established for the adoption of area-based management tools, including for marine protected areas, to ensure conservation and sustainable use, and the protection, preservation, restoration, and maintenance of biodiversity and ecosystems in areas beyond national jurisdiction. Proposals for the establishment of area-based management tools, including marine protected areas, are to be facilitated through

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of the Sea" in Donald R. Rothwell and Emily Crawford (eds), *International Law in Australia* 3rd (Thomson Reuters, Pyrmont: 2017) 433-456.

procedures involving the parties via a newly created Secretariat. That body will be responsible for publicity and preliminary review of such proposals, and consultation with various communities. Final decisions on appropriate measures will be taken by the Conference of Parties by consensus.

13. The Agreement also seeks to operationalise the LOSC provisions for environmental impact assessment for areas beyond national jurisdiction, and establishes relevant processes, thresholds and other requirements for the parties. The overall objective is to prevent, mitigate, and manage significant adverse impacts for the purpose of protecting and preserving the marine environment. Parties have obligations to conduct environmental impact assessments when undertaking planned activities under their national jurisdiction in areas beyond national jurisdiction. Thresholds are established for the conduct of such assessments, and processes are elaborated, including public notification and consultation. Warships are exempted from these provisions.
14. Finally, the Agreement establishes new institutional mechanisms which has potential implications for the future of existing LOSC institutional procedures. A Conference of the Parties, supported by a Secretariat, is established to keep under review and evaluate the implementation of the Agreement, including the adoption of decisions and recommendations. A review mechanism is established by which the Agreement shall be assessed and reviewed for its adequacy and effectiveness within five years of entry into force.

The Agreement and the Antarctic Treaty System

15. It is important to appreciate the potential interaction of the Agreement with the Antarctic Treaty System. The 1959 Antarctic Treaty has like the LOSC been supplemented by a range of additional instruments which over time have come to be known as the Antarctic Treaty System. As an Antarctic claimant State through the Australian Antarctic Territory, a founding party to the Antarctic Treaty, and a party to all of instruments that comprise the Antarctic Treaty System, Australia has a significant national interest in Antarctic law. Those relevant instruments are:
    - 1972 Convention on the Conservation of Antarctic Seals;[12]
    - 1980 Convention on the Conservation of Antarctic Marine Living Resources;[13] and,

[12] [1987] ATS 11.
[13] [1982] ATS 9.

- 1991 Protocol on Environmental Protection to the Antarctic Treaty of 1 December 1959.[14]

16. The relevant legal issue that arises with respect to the interaction of the Agreement and Antarctic Treaty System instruments is what is considered to be an "area beyond national jurisdiction" in the Southern Ocean? There can be two answers to this question.
17. From an Australian perspective, Australia's view is that it has a legitimate claim to the Australian Antarctic Territory and to the sub-Antarctic Heard and McDonald Islands, and Macquarie Island. Offshore the Australian Antarctic Territory and these islands Australia is of the view that it can consistently with the LOSC assert the full range of maritime claims, and it has certainly sought to do so offshore the Heard and McDonald Islands, and Macquarie Island with respect to the exclusive economic zone and continental shelf. However, the active assertion by Australia of offshore sovereignty and jurisdiction in the Antarctic Treaty area and area encompassed by the Convention on the Conservation of Antarctic Marine Living Resources are subject to certain constraints under those instruments. For example, notwithstanding Australia's knowledge that Japan undertook whaling activities in the Australian Whale Sanctuary (within the Australian exclusive economic zone) offshore the Australian Antarctic Territory, no attempt was ever made by Australia to seek to arrest or detain Japanese whaling vessels by way of enforcement of the Environmental Protection Biodiversity Conservation Act 1999 (Cth).[15]
18. From an international perspective, while there are seven States that have asserted territorial claims over Antarctica and which under the law of the sea would enjoy rights and entitlements over the adjacent Southern Ocean, those territorial claims are not widely recognised. The Antarctic Treaty is silent as to the recognition of these claims, and Article IV expressly provides that nothing that occurs whilst the Treaty is in force is to reflect the recognition of such claims or provide an entitlement to the expansion of such claims.
19. Notwithstanding the ambiguity and legal uncertainty as to the status of maritime claims in the Southern Ocean offshore Antarctica, the Antarctic Treaty System has proceeded on the basis that it has the capacity to regulate multiple Southern Ocean activities. This extends from a prohibition on seabed mining, the regulation of fisheries and the catch of krill, to the establishment of marine protected areas. The extent of that regulation encompasses an area of the Southern Ocean up to 60º south, and the northern most limits of the Convention

[14] [1998] ATS 6.
[15] Tim Stephens and Donald R. Rothwell "Japanese Whaling in Antarctica: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*" (2007) 16 *RECIEL: Review of European Community and International Environmental Law* 243-246.

on the Conservation of Antarctic Marine Living Resources with respect to marine living resources and associated environmental conservation. Importantly for Australia, while the Heard and McDonald Islands, and Macquarie Island, are north of 60° south and not within the Antarctic Treaty area, they are within the area encompassed by the Convention on the Conservation of Antarctic Marine Living Resources.[16]

20. Article 5 of the Agreement provides as follows:

> Article 5
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> Relationship between this Agreement and the Convention and relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies
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> 1. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention, including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles.
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> 2. This Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.
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> 3. The legal status of non-parties to the Convention or any other related agreements with regard to those instruments is not affected by this Agreement.

21. The National Interest Analysis makes direct reference to Article 5 of the Agreement in the context of the Antarctic Treaty System and suggests that the Conference of the Parties to the Agreement would consider that the Antarctic Treaty System instruments and measures taken thereunder would need to be taken into account. It is further suggested in the National Interest Analysis that Australia would make a Declaration consistent with Article 71 of the Agreement in relation to these matters.

22. While there was an awareness during the negotiation of the Agreement of the potential for conflict to arise from the interaction and overlap of a global legal oceans regime such as that in the Agreement,[17] with a regional oceans regime such as that based on the Antarctic Treaty System, ultimately the manner in which that interaction is managed is dependent on how the institutions established under the Agreement seek to interact with the Antarctic Treaty System.[18] Given that much of the Southern Ocean can be properly classified as being

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[16] Convention on the Conservation of Antarctic Marine Living Resources, Article I.

[17] Marcus Haward, "Biodiversity in areas beyond national jurisdiction (BBNJ): the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the United Nations BBNJ agreement" (2021) 11 (2) *The Polar Journal* 303-316.

[18] Nengye Liu, "Establishing marine protected areas in the southern ocean, lessons for the BBNJ agreement" (2024) 165 *Marine Policy* 106216.

an area beyond national jurisdiction for the reasons noted above, there could be a presumption that the Agreement would apply to the Southern Ocean. It also needs to be observed that notwithstanding the success of the Antarctic Treaty System in the management of Antarctica and the Southern Ocean, there have in recent years been challenges in consensus being reached with respect to certain innovative proposals respecting marine protected areas in the Southern Ocean.

23. As a result, it would be helpful if the text of the proposed Australian Declaration under Article 71 of the Agreement was made available, and if details could be given as to what discussions have taken place between Australia and other Antarctic Treaty System parties to ensure its primacy vis-à-vis the Agreement once it becomes operative.

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