

31 August 2023

Dear Committee Members,

Inquiry into Australian Antarctic Division funding

I refer to the 9 August 2023 reference of an inquiry to the Senate Environment and Communications References Committee into Australian Antarctic Division funding. My interest in this matter relates to being an Antarctic legal scholar since 1990. I have no professional affiliation with the Australian Antarctic Division, or personal connection with any individual engaged by the Australian Antarctic Division. My submission relates to matters that are within my academic area of expertise.

The Australian Antarctic Division and the Australian Antarctic Territory

1. It is appropriate to make some preliminary comments regarding the Australian Antarctic Division (AAD). The AAD is currently located within the Department of Climate Change, Energy, the Environment and Water. As described in the Australian Government Directory, the role of the AAD is to:

...deliver the Australian Antarctic Program to support Australia's science and permanent presence in Antarctica, working closely with the Department of Foreign Affairs and Trade and other key stakeholders. The Division includes four branches, which together focus on delivering Australia's Antarctic interests.¹

2. The Australian Antarctic Territory (AAT) is an external territory of Australia. No Australian State oversees the Territory. Some Australian Capital Territory (ACT) law applies in the AAT, but the ACT does not administer the AAT. The AAD uniquely has the responsibility for the 'administering the Australian Antarctic Territory and the Territory of Heard and McDonald Islands (HIMI)'.² However, there is no formal Administrator of the AAT.
3. The governance arrangements for the AAT differ significantly from other occupied and populated external territories such as Norfolk Island,³ and the Indian Ocean Territories of Christmas Island and Cocos (Keeling) Islands,⁴ both of which have Administrators.

The Australian Antarctic Territory and International Law

4. Australia claims approximately 42 per cent of the Antarctic continent.⁵ In addition, Australia claims the sub-Antarctic Heard and McDonald Islands, and Macquarie Island (which is part of Tasmania). These islands are not relevant to this submission.

¹ 'Australian Antarctic Division' at <www.directory.gov.au/portfolios/climate-change-energy-environment-and-water/department-climate-change-energy-environment-and-water/australian-antarctic-division> (accessed 29 August 2023).

² 'Policy and Strategy' (Australian Antarctic Division) at <www.directory.gov.au/portfolios/climate-change-energy-environment-and-water/department-climate-change-energy-environment-and-water/australian-antarctic-division/policy-and-strategy> (accessed 29 August 2023).

³ 'Norfolk Island' at <www.infrastructure.gov.au/territories-regions-cities/territories/norfolk-island> (accessed 29 August 2023).

⁴ 'Indian Ocean Territories of Christmas Island and Cocos (Keeling) Islands' at <www.infrastructure.gov.au/territories-regions-cities/territories/indian-ocean-territories> (accessed 29 August 2023).

⁵ 'Antarctica' in *2017 Foreign Policy White Paper*, 85.

5. Australia's territorial claim to the Antarctic continent encompasses the AAT. Australia acquired the territory by an act of cession from the United Kingdom, and formally endorsed in Australian law by the Australian Antarctic Territory Acceptance Act 1933 (Cth).⁶
6. Australia's claim to the AAT is not widely recognised under international law by the international community. Australia's AAT claim is formally recognised by: France, New Zealand, Norway, and the United Kingdom.⁷ Those States have Antarctic territorial claims that adjoin the AAT.
7. As a result of Australian sovereignty over the AAT not having widespread recognition, Australian sovereignty over the AAT has not been perfected and remains unresolved in international law. That remains the position under the Antarctic Treaty.

The Antarctic Treaty

8. Australia strongly supported negotiation of the Antarctic Treaty during the 1959 Washington Conference. The Treaty was concluded on 1 December 1959, and entered into force on 23 June 1961.
9. A pivotal provision of the Antarctic Treaty is Article IV, which provides as follows:
 1. Nothing contained in the present Treaty shall be interpreted as:
 - (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
 - (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
 - (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.
10. The effect of Article IV of the Antarctic Treaty is that:
 - a. Australia's territorial claim to the AAT was not compromised by becoming a Treaty party;
 - b. Australia's territorial claim to the AAT was not recognised under the Treaty;
 - c. No other Treaty party recognised Australia's AAT claim by becoming a Treaty party either in 1959, or subsequently;
 - d. Australia cannot extend or enlarge its claim to the AAT for the duration of the Treaty; and,
 - e. No other Treaty party can seek to make a new claim or extend a claim over the AAT while the Treaty is in force.
11. Territorial claims over Antarctica are neutralised for the duration of the Treaty, They can be characterised as dormant, but capable of being revived. It is important to recall that Article IV governs Antarctic territorial claims and sovereignty while the Antarctic Treaty is

⁶ James Crawford and Donald R Rothwell, 'Legal Issues Confronting Australia's Antarctica' (1991) 13 *Australian Year Book of International Law* 53, 57.

⁷ Gillian Triggs, 'The Antarctic Treaty Regime: A Workable Compromise or a Purgatory of Ambiguity' (1985) 17(2) *Case Western Reserve Journal of International Law* 195, 200.

in force. Once the Treaty is no longer in force, then the general international law provisions with respect to territoriality and sovereignty would once again apply.⁸

12. The Antarctic Treaty has an unlimited duration and currently there is no expectation that it will be terminated. Nevertheless, Australian Antarctic policy cannot rest on the assumption that the Treaty will remain operative ad infinitum.

Australia's Antarctic National Interests

13. The Australian Antarctic Division states with reference to Australia's Antarctic Strategy and the 20 Year Action Plan Update, that:

Australia's national interests in Antarctica, articulated in the Strategy and Action Plan, are to:

- maintain Antarctica's freedom from strategic and/or political confrontation
- preserve our sovereignty over the Australian Antarctic Territory, including our sovereign rights over adjacent offshore areas
- support a strong and effective Antarctic Treaty system
- conduct world-class scientific research consistent with national priorities
- protect the Antarctic environment, having regard to its special qualities and effects on our region
- be informed about and able to influence developments in a region geographically proximate to Australia
- foster economic opportunities arising from Antarctica and the Southern Ocean, consistent with our Antarctic Treaty system obligations, including the ban on mining and oil drilling.⁹

14. With respect to these priorities and Australia's interests in Antarctica and the Antarctic Treaty, the key points as they relate to this submission are that Australia:

- a. supports the Antarctic Treaty, and the Antarctic Treaty System;
- b. seeks to preserve its sovereignty over the AAT; and,
- c. will maintain a world class Antarctic science program.

Antarctic Science

15. A catalyst for the Antarctic Treaty was the 1957-1958 International Geophysical Year (or 'International Polar Year'), and the determination of Antarctic scientists to ensure Antarctica was a continent for science. To that end, Article II of the Antarctic Treaty preserves and promotes the freedom of scientific research in Antarctica, and a pillar of the Antarctic Treaty is Antarctic scientific research.¹⁰

16. The importance of Antarctic science is further reinforced in Article IX (2) of the Antarctic Treaty, whereby "conducting substantial scientific research activity" is required for Treaty parties, other than the founding 12 parties, to gain Antarctic Treaty Consultative Party status. Currently there are 29 Antarctic Treaty Consultative Parties,¹¹ including the 12 original parties and 17 others who have met the Article IX (2) standard.

17. To maintain influence and leadership in the Antarctic Treaty System it is important for any Treaty party, including a claimant state such as Australia, to maintain a comprehensive

⁸ Indi Hodgson-Johnson, 'The laws of territorial acquisition as applied to claims to Antarctic territory: a review of legal scholarship' (2015) 7 *Yearbook of Polar Law* 556-606.

⁹ *Australian Antarctic Strategy and 20 Year Action Plan: Update 2022* (2022) 7.

¹⁰ Marcus Haward, 'Australia and the Antarctic Treaty' (2010) 46 (1) *Polar Record* 11, 11.

¹¹ 'Parties' – Secretariat of the Antarctic Treaty, at <www.ats.aq/devAS/Parties?lang=e> (accessed 29 August 2023).

and robust Antarctic science program. In this regard, science is the ‘currency’ in Antarctica,¹² which has been repeatedly acknowledged by successive Australian governments. For example, in 2011 the AAD’s *Australian Antarctic science strategic plan 2011–12 to 2020–21* stated as follows:

Science is commonly described as the ‘currency’ of the Antarctic Treaty system and has been the cornerstone of an enduring culture of cooperation in Antarctica. As such, the Australian Antarctic Science Program (hereafter referred to as the program) has been central to demonstration of Australia’s commitment to its claim to 5.9 million square kilometres (42%) of Antarctica and the status of Australia among the 48 Antarctic Treaty Parties.¹³

18. Being a leader in Antarctic science gives to a Treaty party capacity to assert leadership in Antarctic affairs within the Antarctic Treaty System and globally, and the ability to be at the forefront of Antarctic scientific analysis and discovery. This has become more significant as a consequence of climate change and the role that Antarctica, and Antarctic science, has played in alerting the international community to the impacts of global warming.

Antarctic geopolitics

19. Notwithstanding the conclusion of the Antarctic Treaty and Article IV, sovereignty tensions remain in Antarctica. In addition to Australia’s AAT claim not being widely recognised, the territorial claims of Argentina, Chile and the United Kingdom overlap. Continental shelf claims offshore Antarctica have raised diplomatic and political concerns before the Commission on the Limits of the Continental Shelf. The potential application of Australian law prohibiting whaling in the Australian Whale Sanctuary with respect to Japanese whaling activities in waters offshore the AAT raised sovereignty tensions between Australia and Japan. In sum, while the Antarctic Treaty may have diffused or set-aside sovereignty issues, they still remain and are evident in the actions of many Treaty parties, including Australia.¹⁴
20. That Antarctic sovereignty remains unresolved, means that the actions and conduct of all claimant and non-claimant States in Antarctica is under scrutiny. That is particularly the case for Australia given the size of the Australian claim to the AAT, and the actions and conduct of two major powers within the AAT: Russia and China.
21. Russia is an historical Antarctic power, and original party to the Antarctic Treaty. While Russia never formally asserted an Antarctic territorial claim, there is a possible foundation to such a claim based on Russia’s extensive Antarctic history and scientific programs. Importantly for this inquiry, Russia has 3 scientific bases in the AAT at Vostok, Mirny, Progress, and associated seasonal stations.¹⁵ Russia’s territorial aggression against Ukraine has particularly highlighted Russia’s position with respect to international law and the ‘rules based international order’ which the Antarctic Treaty is a part of.
22. China became a party to the Antarctic Treaty in 1983, and became a Consultative Party in 1985. China has become a very active participant in Antarctic affairs, has an extensive

¹² As asserted in *Australian Antarctic Science Program Governance Review (2017) - Australian Government response June 2018* (Department of the Environment and Energy, 2018) 4; Peder Roberts, ‘Does the science criterion rest on thin ice?’ (March 2023) 189 (1) *The Geographical Journal* 18 [DOI: 10.1111/geoj.12367].

¹³ *Australian Antarctic science strategic plan 2011–12 to 2020–21* (Australian Antarctic Division, 2011) 10.

¹⁴ Donald R. Rothwell, ‘Sovereignty and the Antarctic Treaty’ (2010) 46 (1) *Polar Record* 17-20.

¹⁵ ‘Stations in Antarctica’ Australian Antarctica Data Centre (September 2021) [Map Catalogue No. 15561].

Antarctic science program, and in 2017 hosting an Antarctic Treaty Consultative Meeting. China currently has 2 scientific bases in the AAT located at Zhongshan, and Kunlun (seasonal) and Taishan (seasonal).¹⁶ China's stated goal is to become a 'polar great power'.¹⁷

Conclusion

23. The AAD plays a distinct role for Australia in Antarctica. It promotes and represents Australia in Antarctica, and especially the AAT. Its management of the AAT is equivalent to that of an Australian territorial or local government, excepting the AAD has no law making function.
24. Given the unresolved status of Australian sovereignty over the AAT, the AAD's conduct in the AAT is critical for the purposes of maintaining Australian sovereignty over the AAT. This is reflected in how the AAD:
 - a. Conducts its science programs with the AAT;
 - b. Deploys AAD personnel and Australian scientists in the AAT;
 - c. Oversees the building and maintenance of infrastructure associated with science programs; and,
 - d. Ensures that Australia is physically present within and across the AAT.
25. Given Antarctic geopolitics¹⁸ and presence within the AAT of major Antarctic and global powers, the AAD's actions are closely monitored. This is especially with respect to the number of Australian personnel and scientists present in Australian scientific bases, and the actual conduct of Australian Antarctic scientific programs.
26. Recent events may have caused some Antarctic actors to query Australia's engagement and commitment to Antarctica, particularly as a result of:
 - a. The cancellation of the 2022 Davis Aerodrome project¹⁹ which would have expanded Australia's physical presence in the AAT and enhanced logistical capability; and,
 - b. Ongoing issues with the operation of the Australian icebreaker - *RSV Nuyina*.²⁰
27. Any diminution, disruption or reduction of Australia's Antarctic science program conducted by the AAD has the potential to create further uncertainty as to the commitment and engagement of Australia to Antarctica. This in turn has implications for Australian sovereignty over the AAT.

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¹⁶ Ibid.

¹⁷ Anne Marie Brady, *China as a Polar Great Power* (2017).

¹⁸ Rand Australia, *Antarctica at Risk: Geostrategic Manoeuvring and the Future of the Antarctic Treaty System* (2023)

¹⁹ ABC News 'Antarctic runway proposal scrapped' (26 November 2021) at <www.abc.net.au/listen/programs/hobart-drive/antarctic-runway-scrapped/13649946>; Tony Press, 'Australia's Antarctic program up in the air after runway project axed' *The Strategist* (26 November 2021) at <www.aspistrategist.org.au/australias-antarctic-program-up-in-the-air-after-runway-project-axed/>.

²⁰ Henry Belot, 'Australia's \$528m Antarctic icebreaker too big to fit under Tasman bridge to refuel' *The Guardian* (24 August 2023) at <www.theguardian.com/australia-news/2023/aug/24/australias-528m-antarctic-icebreaker-too-big-to-fit-under-tasman-bridge-to-refuel>; Henry Belot, 'Australia's new \$528m icebreaker research vessel Nuyina suffers another setback' *The Guardian* (31 January 2023) at <www.theguardian.com/australia-news/2023/jan/31/rsv-nuyina-australia-antarctic-icebreaking-research-ship-vessel>.