

## Headquarters Agreement with the Secretariat to the Agreement on the Conservation of Albatrosses and Petrels

### Background

- 5.1 The *Headquarters Agreement between the Government of Australia and the Secretariat to the Agreement on the Conservation of Albatrosses and Petrels* sets out the conditions for Australia to host the permanent Secretariat to the *Agreement on the Conservation of Albatrosses and Petrels* (ACAP). Australia has hosted the interim Secretariat, located in Hobart, since ACAP was signed in 2001.
- 5.2 ACAP was developed following the listing of all Southern Hemisphere albatross species on the Appendices to the *Convention on the Conservation of Migratory Species of Wild Animals* (CMS) in 1997. The CMS compels member states to protect migratory species of wild animals that live within or pass through their jurisdictional boundaries by concluding agreements to promote conservation and management action and research relating to those species.<sup>1</sup>
- 5.3 There are 11 parties to ACAP: Argentina, Australia, Chile, Ecuador, France, New Zealand, Norway, Peru, South Africa, Spain and the

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<sup>1</sup> NIA, Background information, p. 1.

United Kingdom. Brazil is a signatory to the Agreement and is expected to ratify in the near future.<sup>2</sup>

## Obligations

- 5.4 The key obligations of the Headquarters Agreement are:
- The Australian Government shall arrange services for the Headquarters, including electricity, water, sewerage, gas, mail, telephone, telegraph, drainage, collection of refuse and fire protection (Article 5);
  - The Secretariat will have immunity from suit and other administrative or legal processes (Article 6) and exemptions from all direct taxes (Article 9), customs and excise duties (Article 10), and currency and exchange restrictions (Article 12);
  - Publications and other information material imported or exported within the scope of the Secretariat's official activities shall not be restricted in any way (Article 14);
  - Representatives at ACAP meetings, the Executive Secretary and staff members of the Secretariat and experts, where not Australian citizens or permanent residents, shall receive privileges and immunities (Articles 15, 16, 17 and 18); and
  - The Australian Government will facilitate the entry into, residence in, and departure from Australia, and freedom of movement in Australia, of the following persons: representatives at ACAP meetings; Secretariat staff members, their spouses and dependant children; and relevant experts (Article 19).
- 5.5 The immunities provided by this Agreement do not inhibit the Australian Government from taking reasonable measures to preserve security and applying laws necessary for health and quarantine or laws relating to public order (Article 21).

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2 NIA, Background Information, p. 3.

## Reasons for Australia to take treaty action

- 5.6 ACAP has been an Australian-led initiative since 1997. Australia played a significant role in the development and finalisation of ACAP, is the ACAP Depository, and has hosted the interim Secretariat since 2001.<sup>3</sup>
- 5.7 Successive Australian Governments have considered the conservation of albatrosses and petrels to be a high priority. The Committee was informed that:

Australia pursued the development of ACAP due to the threatened status of albatrosses and petrels globally. Nineteen of the world's 22 species of albatrosses and both species of giant petrels are endangered ... Five of these breed in Australia and another 14 species forage in Australian waters ... these seabirds which breed within Australian waters are highly susceptible to threats throughout their vast foraging range.<sup>4</sup>

It is tremendously important to us to use avenues, particularly working in the regional fisheries management organisations, and also bilaterally, to encourage other countries to take energetic conservation action.<sup>5</sup>

- 5.8 Further, the Government considered that hosting the permanent Secretariat would increase Australia's standing in international affairs and accord with its support for Hobart as an international Antarctic gateway city. It would also provide logistical simplicity and greater continuity in not having to move or interrupt the functioning of the interim Secretariat.<sup>6</sup>

## Legal establishment of the Secretariat

- 5.9 The Committee received a submission that questioned the legal basis for the establishment of the ACAP Secretariat.<sup>7</sup> It was argued that the

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3 Mr Ian Hay, *Transcript of Evidence*, 25 August 2008, p. 22.

4 Mr Ian Hay, *Transcript of Evidence*, 25 August 2008, p. 22.

5 Mr Ian Hay, *Transcript of Evidence*, 25 August 2008, p. 24.

6 Mr Ian Hay, *Transcript of Evidence*, 25 August 2008, p. 22; NIA, paras 6 and 7.

7 Mr Andrew Serdy, Submission No. 4.

making of regulations under the *International Organisations (Privileges and Immunities) Act 1963* (the International Organisations Act) would not be sufficient for Australia to comply with its obligations under the treaty and that the Act itself requires amendment.<sup>8</sup>

5.10 The basis for this conclusion was:

- International secretariats are rarely given legal personality because the treaty that creates a secretariat usually also establishes a more appropriate body on which to confer personality, namely an international organisation.<sup>9</sup>
- ACAP does not create any international organisation within the sense of the International Organisations Act. As there is no organisation, the Meeting of the Parties adopted a resolution in 2006 giving personality to the Secretariat.
- An international organisation can only have privileges and immunities conferred on it if Australia and at least one other country, or persons representing the same, are members. The ACAP Secretariat by its very nature cannot have members in that sense.<sup>10</sup>
- There is no obligation on any State that has acceded to ACAP since the Meeting of Parties adopted the 2006 resolution to extend similar recognition to the Secretariat.<sup>11</sup>

5.11 When asked for their views on the submission, representatives of the Department of Foreign Affairs and Trade and the Attorney-General's Department informed the Committee:

... we disagree with its conclusions ... I think the suggestion was made on the basis that the secretariat could not be declared an international organisation for the purposes of the act. Our team of lawyers examined the legislation and decided that the secretariat was an organ or a part of a head organisation, which is identified in the ACAP treaty, called

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8 Mr Andrew Serdy, Submission No. 4, p. 1.

9 For example, Article VII of the Convention on the Conservation of Antarctic Marine Living Resources creates the Commission for the Conservation of Antarctic Marine Living Resources. Similarly, Article 6 of the Convention on the Conservation of Southern Bluefin Tuna creates the Commission for the Conservation of Southern Bluefin Tuna. Both conventions confer legal personality on the Commission. Mr Andrew Serdy, Submission No. 4, pp. 1-2.

10 Mr Andrew Serdy, Submission No. 4, p. 2.

11 Mr Andrew Serdy, Submission No. 4, p. 3.

the meeting of parties and that we would be able to designate the secretariat as an organ of a head organisation that could be declared such an international organisation for the purposes of the act.<sup>12</sup>

5.12 Further:

... section 5(1) of the privileges and immunities act ... says:

- (1) The regulations may declare an organisation:  
(a) of which Australia and a country or countries other than Australia are members ...

...                      ...                      ...

to be an international organisation to which this Act applies.

So it is essentially up to the Commonwealth to declare, and then the definition within 3(1), which makes it clear that a subsidiary part of that organisation, such as the secretariat, can also have the privileges and immunities. So once that is declared it basically also flows through to the Migration Act, which picks it up as well. I guess the point is that the domestic legislation is wide enough to give these organisations privileges and immunities irrespective of their international status.<sup>13</sup>

## Implementation

5.13 Office accommodation and other services for the Secretariat will be provided by the Tasmanian Government pursuant to a Memorandum of Understanding concluded in 2007. The Committee understands that there is no cost to the Commonwealth Government in relation to these services.<sup>14</sup>

5.14 Regulations will be required under the *International Organisations (Privileges and Immunities) Act 1963* to bring the ACAP Secretariat within the operation of that Act and ensure that the necessary privileges, immunities and taxation concessions are extended to representatives at ACAP meetings, the Executive Secretary and other

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12 Mr Damian White, *Transcript of Evidence*, 25 August 2008, p. 25.

13 Mr Stephen Bouwhuis, *Transcript of Evidence*, 25 August 2008, pp. 25-26.

14 Mr Ian Hay, *Transcript of Evidence*, 25 August 2008, p. 21.

staff and their family members, and relevant experts.<sup>15</sup> This will also enable the Department of Immigration and Citizenship to facilitate entry into, residence in, and departure from Australia of persons listed in Article 19(a), (b) and (c) of the Agreement.<sup>16</sup>

## Costs

5.15 The Secretariat's budget of \$450,000 per annum is met by contributions from each party. The Committee was told that this 'modest' budget means:

... that the taxation concessions will also be modest and more than commensurate with the conservation and other benefits to be gained by Australia from the future success of ACAP.<sup>17</sup>

5.16 The Department of the Environment, Water, Heritage and the Arts has committed to meeting the cost of taxation concessions.<sup>18</sup>

## Consultation

5.17 The Agreement received whole-of-government support at the Commonwealth level and was provided to the Standing Committee on Treaties in September 2007. The Committee notes that the Australian Government has worked closely with the Tasmanian Government, which has hosted the interim Secretariat for a number of years and indicated its willingness to host the permanent Secretariat.

## Conclusion and recommendation

5.18 The Committee concurs with the Government's view of the importance of cooperative international action to conserve albatrosses and petrels. It supports establishment of the permanent headquarters to ACAP in Australia and recommends that binding treaty action be taken.

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15 NIA, para 17.

16 NIA, para 18.

17 Mr Ian Hay, *Transcript of Evidence*, 25 August 2008, p. 23.

18 Mr Ian Hay, *Transcript of Evidence*, 25 August 2008, p. 22.

### **Recommendation 8**

**The Committee supports the *Headquarters Agreement between the Government of Australia and the Secretariat to the Agreement on the Conservation of Albatrosses and Petrels* and recommends that binding treaty action be taken.**

