

Australia and International Developments relevant to Biodiversity in 2016

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Issues in 2016:

- 1 The Paris Agreement comes into force (but the Doha Amendment?)
- 2 The ITLOS judgment in the *South China Sea Arbitration* and the environment
- 3 Protecting biodiversity in areas beyond national jurisdiction: Law of the Sea negotiations commence
- 4 The Ballast Water Management Convention reaches 30/35
- 5 The Trans-Pacific Partnership comes into force (but falters?)
- 6 The battle over trade in endangered species continues: CITES CoP 17
- 7 The battle over whaling continues: IWC 66

1 The Paris Agreement



Adopted December 2015.

Open for signatures: April 2016 (22 April 2016).

Entry into force: 4 November 2016. (30 days after 55 Parties, accounting for at least 55% of total global greenhouse gas emissions, ratified.

Current status: 193 signatories and 132 Parties.

Australia ratified on 9 November 2016 (in force for Australia from 9 December 2016).

The Paris Agreement reflects the cross-cutting UNFCCC principle of common but differentiated responsibilities (and respective capacities) – CBDR+RC.

However, the principle is reflected in a different way than it is in the Kyoto Protocol.

A categorical approach of dividing Parties into developed countries and developing countries is no longer used;

instead, national circumstances and capacities of the Parties are at the centre through “nationally determined contributions” (NDCs) that form the basis for Parties’ emission reduction commitments.

Optimism about the Paris Agreement must be tempered ... considerably less state Parties have ratified the Doha Amendment than have ratified the Paris Agreement.

The Paris Agreement operates by way of requiring all of its Parties:

- to 'put forward their best efforts through nationally determined contributions and to strengthen these efforts in the years ahead';
- and to 'report regularly on their emissions and on their implementation efforts';
- and have regular 'global stocktakes' to assess 'collective progress towards achieving the purpose of the Agreement and to inform further individual actions by Parties'.

Unfortunately, with every month that goes by new evidence is accumulated showing that the direct impacts and indirect effects of global climate change will be greater than ever previously thought.

In November 2016, for instance, the National Aeronautics and Space Administration (NASA) reported that October 2016 had been the second warmest October in 136 years of record-keeping (2015 having been the warmest), and that the years 2014 to 2016 had provided the three warmest on record.



Contrast the Paris Agreement with the binding obligations of the Kyoto Protocol:

- reductions of an average of five per cent against 1990 levels, over the five year period 2008 to 2012 (first commitment period);
- and now for the period 2013 to 2018 (second commitment period), where some countries have agreed to further emission reductions.

The second commitment period was established by the Doha Amendment of 2012.

As at the end of 2016, 75 states had ratified – considerably short of the 144 needed before the amendment will enter into force. Unlikely to happen before the end of the second commitment period.

Parties may provisionally apply the amendment pending its entry into force.

Australia accepted (ratified) on 9 November 2016.

What does the Paris Agreement say about biodiversity?:

Virtually nothing.

2 South China Sea Arbitration (*The Philippines v China*, ITLOS)

While not of direct relevance to Australian biodiversity, the arbitration judgment in the International Tribunal for the Law of the Sea (ITLOS) has general relevance for international environmental law and for countries in the Pacific.

The Philippines asked the Tribunal to find that China had violated its obligations under the UN Convention on the Law of the Sea (UNCLOS) in failing to protect and preserve the marine environment.



The Tribunal found that China had unlawfully constructed artificial islands in the Philippines' Exclusive Economic Zone (EEZ); that China had violated the Philippines' traditional fishing rights; that China's activities had caused severe harm to the marine environment; and that China had permitted and encouraged its nationals to harvest endangered marine species (for instance, turtles).

The Tribunal found that the marine environments under question were “rare and fragile ecosystems” and habitats for “depleted, threatened or endangered species”.

The Tribunal drew on the Convention on Biological Diversity (CBD), because UNCLOS does not provide a definition for the term ‘ecosystem’.

The Tribunal also held that CITES informs the content of the Article, because sea turtles (listed under Appendix I of CITES) were found on board Chinese fishing vessels.

In considering the parties' various obligations, the tribunal ruled that these included:

- A requirement of due diligence (which China had breached).
- A requirement to perform an EIA (uncertain whether this was done or not).

This has been described as the first case to go to judgment over the environmental provisions of UNCLOS. However, while finding that environmental damage had been done, the Tribunal found that this could not be undone and made no order for damages.

3 Negotiations toward protecting marine biodiversity on the high seas



In June 2015 the UN General Assembly adopted a resolution to develop a legally binding instrument on conservation of marine biodiversity in areas beyond national jurisdiction.

Negotiations began in March 2016 toward a new United Nations Agreement on Conservation and Sustainable Use of the High Seas, under the UN Convention on the Law of the Sea (UNCLOS).

Every state is entitled to be represented.

Preparatory Committee established and began its work in September 2016.

To report to the UNGA by the end of 2017.

Informal working groups were set up on:

- marine genetic resources;
- area-based management tools, including marine protected areas;
- environmental impact assessments;
- capacity-building and the transfer of marine technology;
- cross-cutting issues.

4 International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM)

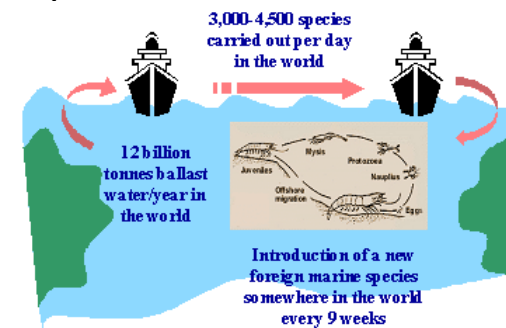
Adoption: 13 February 2004; Entry into force: 8 September 2017

Required: 30 parties; 35% of world merchant shipping tonnage

Invasive aquatic species present a major threat to marine ecosystems, and shipping has been identified as a major pathway for introducing species to new environments.

The Ballast Water Management Convention aims to prevent the spread of harmful aquatic organisms from one region to another, by establishing standards and procedures for the management and control of ships' ballast water and sediments

- All ships in international traffic are required to manage their ballast water and sediments to a certain standard, according to a ship-specific ballast water management plan.
- All ships also have to carry a ballast water record book and an international ballast water management certificate.
- The ballast water management standards will be phased in over a period of time.
- As an intermediate solution, ships should exchange ballast water mid-ocean. Eventually most ships will need to install an on-board ballast water treatment system.



‘Pioneered’ by Australia

Australian Government, Department of Agriculture, Australian Ballast Water Management Requirements, adopted 1 July 2001, Version 5-09/2013.

Requirements were enforced under the *Quarantine Act, 1908* (Cth).

A comprehensive set of domestic ballast water management arrangements is being developed under the National System to complement the existing requirements for international vessels.

All vessels, whether on domestic or international voyages, will be required, under the National System, to manage ballast water to prevent the introduction and spread of introduced marine pests.

The *Biosecurity Act 2015* (Cth) gives effect in Australian law to the convention.

<http://www.agriculture.gov.au/biosecurity/legislation/new-biosecurity-legislation>

However, Australia has not yet ratified.

At present there are 54 parties (53.30% WMST).

New Zealand acceded on 9 January 2017, in force 8 September 2017.

The words “the *Biosecurity Act 2015* (Cth) gives effect in Australian law to the convention” are correct (the Act certainly covers ballast water management specifically in Ch 5),

but giving effect to the BWM Convention does not appear as a specific object in the objects clause of the Biosecurity Act 2015, which provide:

4 Objects of this Act

The objects of this Act are the following:

- (a) to provide for managing the following:
 - (i) biosecurity risks;
 - (ii) the risk of contagion of a listed human disease;
 - (iii) the risk of listed human diseases entering Australian territory or a part of Australian territory, or emerging, establishing themselves or spreading in Australian territory or a part of Australian territory;
 - (iv) risks related to ballast water;
 - (v) biosecurity emergencies and human biosecurity emergencies;
- (b) to give effect to Australia’s international rights and obligations, including under the International Health Regulations, the SPS Agreement and the Biodiversity Convention.

Biosecurity Act, 2015 (Cth)

<http://www.agriculture.gov.au/biosecurity/legislation/new-biosecurity-legislation>

On 16 June 2016 the *Biosecurity Act* replaced the *Quarantine Act, 1908* and is designed to be flexible and responsive to changes in technology and future challenges.

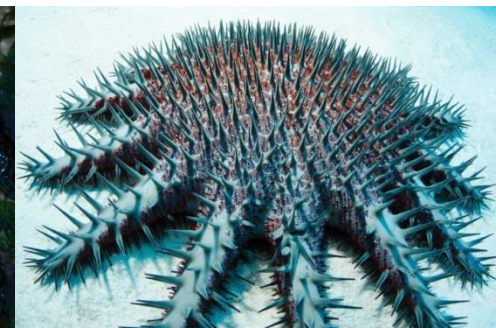
The Act:

- provides a modern regulatory framework
- reduces duplication and regulatory impacts
- allows for current and future trading environments
- allows for collaboration across government and industry.

The *Biosecurity Act* sets up new requirements and regulatory powers that will affect how the department manages the biosecurity risks associated with goods, people and conveyances entering Australia.

Some changes will be more noticeable, while others will happen behind the scenes.

Ratification of the BWM Convention?



5 Trans-Pacific Partnership

Adopted in December 2015 by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the USA. Negotiations had run from 2008.

Ratification by all is required for entry into force; but also required is completion of domestic ratification procedures by six, including by Japan and the USA.

However, the USA withdrew formally in late January 2017.



There is an **Environment Chapter** (Ch: 20), which requires (*inter alia*) that all parties:

- implement their CITES obligations;
- remove the most harmful fishing subsidies and promote conservation of endangered marine species;
- promote trade in environmental goods and services;

There are provisions on:

- Protection of the ozone layer.
- Protection of the marine environment from ship pollution.
- Procedural matters.
- Public participation.
- Trade and biodiversity.
- Invasive alien species.
- Emissions reductions.
- Marine capture fisheries.
- Conservation and trade.
- Environmental goods and services.
- Environmental consultations.

6 CITES CoP17

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Johannesburg, South Africa, 24 September to 4 October 2016.

CITES operates by categorizing species for greater or lesser levels of protection from commercial trade, according to their perceived status of endangerment in the wild. Approximately 1,000 species are listed on Appendix I (virtually no commercial trade) and approximately 34,000 on Appendix II (limited commercial trade). The CITES CoP meets every three years in order to consider proposals for listing species, or for transferring species between lists – as well as to decide multiple administrative matters such as how endangered status should be determined, whether certain matters should be researched, and how decisions should be taken.

In 2016 the CoP considered 62 individual proposals for uplisting or downlisting of individual species – many controversial.

Elephant ivory; rhinoceros horn; peregrine falcon; pangolins; African grey parrots; African lions; ...

The 18th Conference of the Parties will be held in Sri Lanka in 2019.

CITES is a priority convention for Australia, which generally gives higher protection domestically to listed species than is required internationally – implementation being achieved through the *Environment Protection and Biodiversity Conservation Act, 1999*.

Some important decisions were taken:

silky sharks, thresher sharks and mobula rays were listed on App. II, which means they will need to be given the equivalent of App. I protection in Australia.

However, this was a quiet CoP for Australia and the country did not become involved in any major controversies

Australia put forward two proposals, both of which were successful.

These proposals were to downlist from App. I to App. II:

- the **helmeted honeyeater** on the basis that, while critically endangered, international trade is not a threat to the subspecies;
- the **Norfolk Island boobook owl**, on the basis that the genetically pure form of the subspecies is extinct and that the remaining (hybrid) subspecies is not threatened by international trade.



7 International Whaling Commission

66th Meeting, October 2017, Portoroz, Slovenia

This was not a particularly 'dramatic' meeting.

Six resolutions were adopted, some by consensus and some by vote, but none was of great significance. For instance:

A resolution on the critically endangered vaquita called for a complete, permanent ban on gillnet fishing in the vaquita's habitat ... but the IWC has no management authority over small cetaceans, China (whose market is driving poaching of totoaba and bycatch of the vaquita) was not even present, and so the value of the resolution is extremely limited.



From Australia's point of view, the 'fallout' from having won the *Whaling in the Antarctic* case in the International Court of Justice (2014) continued.

Remember:

The ICJ held that "the fact that a programme involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII".

This will make it difficult for anti-whaling contracting governments and other campaigners to argue that Japan's sale of the meat from research whaling efforts is a breach of rights.

The ICJ held that "given that the value and reliability of data collected are a matter of scientific opinion, the Court finds no basis to conclude that the use of lethal methods is per se unreasonable in the context of JARPA II".

This will make it difficult for anti-whaling contracting governments and other campaigners to argue that only non-lethal whaling is appropriate.

The ICJ held that "amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the Convention, but cannot alter its object and purpose".

This will make it difficult for anti-whaling contracting governments and other campaigners to argue that the ICRW has evolved over time and become a 'conservation'-oriented treaty – which argument has been an important part of the anti-whaling argument.

Japan has also lodged a new acceptance of jurisdiction to the ICJ, excluding jurisdiction over matters relating to marine biodiversity, management or research.

Japan has twice since the judgment (2016/16 and 2016/17) engaged in scientific permit whaling in the Antarctic under its new program (NEWREP-A) and has also 'ramped up' its program in the North Pacific (NEWREP-NP).

Australia and New Zealand continue their efforts to contain the damage.

At IWC 66 in 2016 they put forward a proposed 'Resolution on Improving the Review Process for Whaling under Special Permit'.

This essentially involved an effort to establish a Standing Working Group to exercise oversight control over scientific permit whaling programs.

Adopted by vote: 27-17-10.

Japan has already indicated firmly (Circular letter of 31 January 2017) that it considers the resolution to be of no effect and that if the SWG is established then Japan will not participate even as an observer.

The next IWC meeting (IWC 67) will be in Brazil in 2018.

End.

