

REGULATION IMPACT STATEMENT

MEASURE 15 (2009)

LANDING OF PERSONS FROM PASSENGER VESSELS IN THE ANTARCTIC TREATY AREA

32nd Antarctic Treaty Consultative Meeting:
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MEASURE 15 (2009)

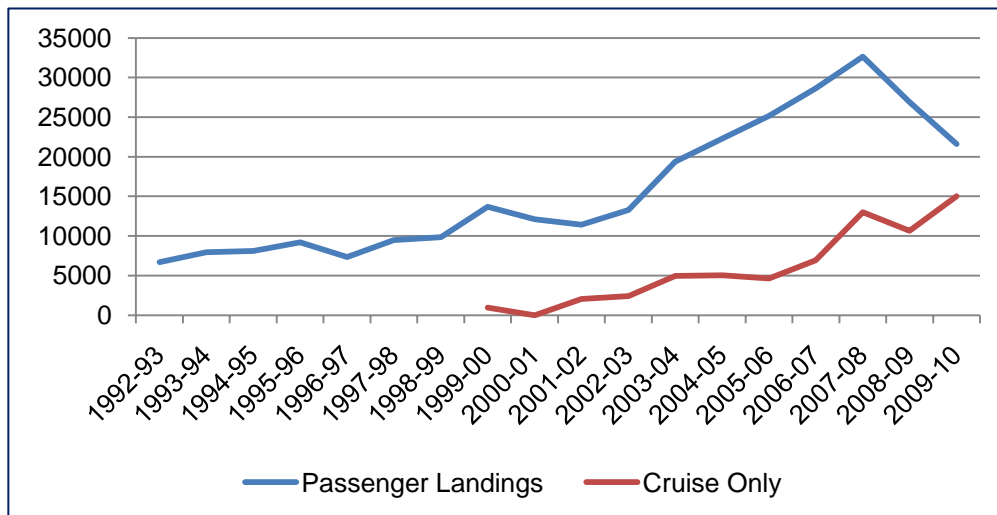
LANDING OF PERSONS FROM PASSENGER VESSELS IN THE ANTARCTIC TREATY AREA

1. PROBLEM

Overview

- 1.1 Vessel-borne tourism operations in the Antarctic are governed by the Protocol on Environmental Protection to the Antarctic Treaty (the Environmental Protocol).
- 1.2 Measures, decisions and resolutions that give effect to the principles of the Environmental Protocol are developed at annual Antarctic Treaty Consultative Meetings (ATCMs). ATCMs are attended by Antarctic Treaty Consultative Parties (ATCPs).¹ ATCPs are only legally bound by a Measure once that Measure receives the approval of all ATCPs.
- 1.3 Vessel-borne tourism operations in the Antarctic have expanded markedly over the past two decades. Australians constitute a large proportion of consumers within the Antarctic tourism markets, representing approximately 9% of Antarctic tourists.

Figure 1: Antarctic seaborne tourism trends from 1992-93 to 2009-10²



- 1.4 The number of passengers landing by vessel in Antarctica increased from 6,704 in 1992-93 to 32,637 in 2007-08. The number of cruise-only vessel passengers increased from 936 in 1999-00 to 15,026 in 2009-10 (Figure 1).³ During the 2009-10 austral summer, 21,622 passenger landings occurred in the Antarctic from 42 vessels while 146 passengers landed from one vessel in the Australian Antarctic Territory (AAT) in East Antarctica. Adverse economic conditions are most likely responsible for the decline in Antarctic vessel-borne tourism operations beginning in the 2006-07 austral summer. Forty-four operators

¹ As at March 2011, there were 48 parties to the Antarctic Treaty including 28 consultative parties.

² International Association of Antarctica Tour Operators, 'IAATO Overview of Antarctic Tourism: 2009-10 Season and Preliminary Estimates for 2010-11 and Beyond' (2010) ATCM 33/IP/113/e 18 (based on available data).

³ Passenger landings declined to 21,622 in 2009-10 due to the global recession, however growth is anticipated to resume over the next 5-10 years.

conducted 239 voyages to the Antarctic on 51 vessels during the 2009-10 austral summer period, with two operators conducting four voyages to the AAT on two vessels. Cruise-only voyages to the Antarctic Peninsula occurred on nine vessels, of which eight carried more than 500 passengers onboard. All Australian-operated vessels carried fewer than 500 passengers onboard. Approximately 200 landing sites receive vessel-borne tourists each year. Approximately 50 landing sites receive more than 100 passengers each season.

- 1.5 The majority of tourism vessel passenger landings in the Antarctic are:
 - undertaken with small vessels that carry fewer than 100 passengers; and
 - conducted on the Antarctic Peninsula (comparatively very few tourism operations are conducted in the AAT).
- 1.6 There are currently five Australian operators that undertake passenger landings in the Antarctic. Australian operators constitute a very small proportion of all operators conducting Antarctic vessel-borne tourism operations globally.
- 1.7 There are currently no obligatory Australian Government laws specifically governing the environmental or safety aspects of landings from passenger vessels. Instead, aspects of the vessel-borne tourism industry are currently guided only by a system of non-obligatory self-regulation and the *Antarctic Treaty (Environmental Protection) Act 1980* environmental impact assessment process, which requires Australian operators to:
 - prepare environmental impact statements for their proposed activities pursuant to Part 3;
 - obtain a permit pursuant to Part 2 for some activities (such as the entering of Antarctic Specially Protected Areas (ASPAs)); and
 - submit a post-activities report.
- 1.8 Any failure of industry self-regulation may ultimately pose unacceptable risks to:
 - the Antarctic environment;
 - Antarctic heritage; and
 - human health and safety.

Current system of non-obligatory self-regulation

- 1.9 The current system of non-obligatory self-regulation was progressively developed and codified by International Association of Antarctic Tourism Operators (IAATO) stakeholders.
- 1.10 Elements of IAATO's bylaws provided the basis for Resolution 4 (2007) *Ship-based tourism in the Antarctic Treaty area* adopted by ATCPs at the 30th ATCM in New Delhi. This non-obligatory resolution set agreed parameters for the landing of persons from passenger vessels in Antarctica.
- 1.11 All six Australia operators currently authorised to undertake vessel-borne tourism operations are compliant with IAATO bylaws.

Measure 15 (2009)

- 1.12 Resolution 4 (2007) provides the basis of Measure 15 (2009) *Landing of persons from Passenger Vessels in the Antarctic Treaty area* adopted by Antarctic Treaty Consultative Parties (ATCPs) at the 32nd ATCM in Baltimore. Measure 15 (2009) provides that:
 1. *Parties shall require their operators organizing tourist or other nongovernmental activities in the Antarctic Treaty area, for which advance notification is required in accordance with Article VII(5) of the Antarctic Treaty,*
 - a) *to refrain from making any landings in Antarctica from vessels carrying more than 500 passengers unless a lower number is otherwise specified in applicable ATCM measures; and*
 - b) *in the case of vessels carrying 500 or fewer passengers,*

- i) *to coordinate with each other with the objective that not more than one tourist vessel is at a landing site at any one time;*
 - ii) *to restrict the number of passengers on shore at any one time to 100 or fewer, unless a lower number is otherwise specified in applicable ATCM Measures and to maintain a 1:20 guide-to-passenger ratio, unless a more restrictive ratio is otherwise specified in applicable ATCM measures.*
 - 2. *Nothing in this Measure shall derogate from the rights and obligations of any Party with respect to environmental impact assessments and restrictions on the activities of their nationals in accordance with Article 8 and other relevant provisions of the Protocol on Environmental Protection to the Antarctic Treaty.*
 - 3. *This Measure, including the specific restrictions in paragraph 1 above, shall be subject to further discussion in future ATCMs to take account of possible changes in circumstance, including with respect to specific sites in Antarctica.*
- 1.13 Measure 15 (2009) directly concerns the landing of passengers from tourism vessels. Its implementation would not (and does not intend to) regulate all Antarctic tourism activities.

Need for obligatory regulation

- 1.14 In adopting Measure 15 (2009), ATCPs agreed that the capacity of the current system of non-obligatory self-regulation to minimise the risks posed by the current and projected future scales of vessel passenger landings is restricted.
- 1.15 Measure 15 (2009) would apply to the contracting parties to the Antarctic Treaty and consequently to their respective operators. Pursuant to article 34 of the *Vienna Convention on the Law of Treaties*, Measure 15 (2009) would not apply to non-party states (and therefore their respective operators) without their consent.
- 1.16 The Australian Government has strategic and policy interests in Antarctica. Of these the implementation of Measure 15 (2009) would directly contribute to the:
- protection of the Antarctic environment;
 - protection of Antarctic heritage;
 - protection of human health and safety;
 - maintenance of the Antarctic Treaty system and enhancement of Australia's standing and influence within it; and
 - advancement of Australian participation within the Antarctic vessel-borne tourism industry.
- 1.17 Australia must participate proactively within the governance institutions of the Antarctic Treaty system to enhance its influence and advance its Antarctic interests. Because Measures adopted by the ATCM – such as Measure 15 (2009) – do not enter into force until implemented by all ATCPs, taking the necessary domestic actions in a timely manner is crucial to Australia's maintenance of influence within the Antarctic Treaty system.
- 1.18 The Australian Government has domestic administrative responsibilities for the Antarctic. These principally relate to the regulation of activities conducted in Antarctica by Australian entities.
- 1.19 The Australian Government – aware of the need for tourism and other non government activities in Antarctica to be well managed to minimise risks to the Antarctic environment, heritage, and human health and safety – developed an Antarctic Tourism Policy in 2004. The policy advocates for Antarctic tourism to be managed in an ecologically sustainable and socially responsible manner. A key driver for development of the policy was recognition of the need to manage the activities of Australians in accordance with the objectives of the Antarctic Treaty and related international instruments.

- 1.20 Consequently, a decision by Australia not to implement Measure 15 (2009) would:
- perpetuate unacceptable risks to human health and safety, the Antarctic environment and Antarctic heritage; and
- deleteriously affect its:
- standing and influence in the Antarctic Treaty system;
 - relations with other ATCPs; and
 - domestic standing should an Australian operator be later involved in an incident that causes harm to human health and safety, the Antarctic environment or Antarctic heritage.

2. OBJECTIVE

- 2.1 Australia seeks to implement Measure 15 (2009) to:
- maintain the Antarctic Treaty system and enhance Australia's standing and influence within it;
 - minimise unacceptable risks to the Antarctic environment;
 - minimise unacceptable risks to Antarctic heritage; and
 - minimise unacceptable risks to human health and safety.

3. OPTIONS

- 3.1 There are two options for Australia with respect to Measure 15 (2009):

Option 1

Maintenance of existing system of non-obligatory regulation

- do not implement Measure 15 (2009) – thereby preventing it from coming into effect for any Antarctic Treaty Party – and maintain reliance upon the current system of non-obligatory self-regulation.

Option 2

Implementation of explicit government regulation

- implement Measure 15 (2009) and modify Commonwealth legislation to give according effect.

- 3.2 Note that implementation of Measure 15 (2009) via quasi-regulation (i.e. development of a national code of practice or industry accreditation scheme) is not a feasible option given:
- a Measure adopted by the ATCM requires all ATCPs to effect domestic implementation for that Measure to have substantive effect;
 - a quasi-regulatory scheme would require the agreement of all ATCPs to be effective. Obtaining such agreement would be difficult given ATCPs support the creation of a legally binding Measure; and
 - the substance and rigour of national codes and schemes typically vary from party to party. The universal efficacy of Measure 15 (2009) will be impeded where one party's national code of practice or accreditation scheme is less rigorous than those of other parties.

4. IMPACT ANALYSIS

Option 1: Maintenance of current system of non-obligatory regulation

- 4.1 Option 1 represents the status quo and would impose no additional costs or benefits upon Australian operators ('operators').

Costs and benefits to government

- 4.2 Maintenance of the status quo will not minimise the risks posed by the unregulated conduct of vessel passenger landings to human health and safety, the Antarctic environment and Antarctic heritage. The maintenance of the status quo will not advance the Australian Government's strategic objectives of the Antarctic nor its Antarctic Tourism Policy (2004) for the advancement of ecologically sustainable and socially responsible tourism operations.
- 4.3 ATCM parties and the Australian public expect the Australian Government to take proactive measures to minimise potential harm risks posed by activities conducted by operators.
- 4.4 The Australian Government was party to the unanimous adoption of Measure 15 (2009) at the 32nd ATCM. Measure 15 (2009) requires the approval of all ATCPs (including Australia) to enter effect. Given these considerations, the Australian Government's influence and standing on Antarctic governance matters would be detrimentally affected if it does not implement Measure 15 (2009).
- 4.5 The Australian Government's standing within the Antarctic Treaty System would be harmed should the conduct of any vessel passenger landing result in harm to human health and safety, the Antarctic environment or Antarctic heritage after it elected not to implement Measure 15 (2009). Such an occurrence would also harm the Australian Government's domestic standing.

Costs and benefits to consumers

- 4.6 The current system of non-obligatory self-regulation imposes negligible costs upon consumers.

Option 2: Implementation of Measure 15 (2009)

- 4.7 Option 2 would affect individuals, businesses and non-governmental organisations that organise or conduct tourism or other non-governmental activities in the Antarctic Treaty area.

Costs and benefits to industry

- 4.8 Option 2 would impose negligible costs on industry given the obligations contained in Measure 15 (2009) are already being substantively met under the current system on non-obligatory self-regulation. Additionally, pursuant to Resolution 4 (2007), the Australian Government already requests operators to confirm that:
- their vessel will carry fewer than 500 passengers per voyage;
 - they will not land more than 100 passengers at any one landing site at any given time;
 - they will maintain a 1:20 guide-to-passenger ratio; and
 - they have *sought* to coordinate their operations to reduce the likelihood that more than one vessel will be present at a landing site at any one time).
- 4.9 The Australian Government cannot compel operators to meet Resolution 4 (2007) requirements unless Measure 15 (2009) is implemented. Nevertheless, operators generally respond positively to measures that will enable them to minimise risks to human health and safety, the Antarctic environment and Antarctic heritage.
- 4.10 Option 2 would oblige any new operator⁴ that:
- intended to land more than 20 passengers; and
 - chose not to obtain membership of IAATO and abide by its bylaws, or to voluntarily abide by the standards outlined in Measure 15 (2009);

⁴ At present, all Australian operators voluntarily comply with the requirements of Measure 15 (2009).

to maintain a 1:20 guide-to-passenger ratio.⁵ Over time, industry has determined that the 1:20 guide-to-passenger ratio reflects commercial, environmental and health and safety best practices. Industry has not formally advised of the considerations it has taken into account in developing this ratio over some 40 years of operations. We understand it allows efficient and effective supervision and control of passengers while ashore thereby minimising the risk of damage to fragile habitats, disturbance to wildlife, and injury to passengers in potentially unsafe situations (e.g. exposure to crevasses, unstable ice-covered terrain and dangerous wildlife).

It is unlikely that operating with fewer guides would be practicable, as a minimum level of supervision of visitors ashore is essential to operate safely and in accordance with existing, legislated environmental standards.

In the hypothetical scenario that a new entrant sought to operate with fewer guides, option 2 would prevent this and compel operators to maintain a guide to passenger ratio of 1:20, at a marginally higher cost.

- 4.11 Option 2 would create two administrative obligations for operators. Firstly, operators would be obliged to maintain records regarding instances where more than one vessel was present at a landing site. The cost in fulfilling this obligation is negligible. Secondly, operators would be obliged to *attempt* to coordinate their operations to ensure that only one vessel is present at a landing site at anytime.⁶ The cost in fulfilling this obligation is negligible. It will be an offence for an operator to fail to coordinate. Where more than one vessel is present at a landing site, evidence of coordination will be relevant to a defence in any proceedings.
- 4.12 Option 2 may reduce the scope for operator non-compliance with industry best-practices and therefore reduce the risks posed to human health and safety, the Antarctic environment and Antarctic heritage by unregulated passenger landings.

Costs and benefits to government

- 4.13 The Australian Government has strategic and policy interests in Antarctica. Of these the implementation of Measure 15 (2009) would directly contribute to:
- the maintenance of the Antarctic Treaty system and enhancement of Australia's standing and influence within it;
 - the protection of the Antarctic environment;
 - the derivation of economic benefits from living and non-living Antarctic resources (excluding mineral exploration and exploitation); and
 - the participation of Australian companies and tourists in the Antarctic vessel-borne tourism industry.
- 4.14 Australia must participate proactively within the governance institutions of the Antarctic Treaty system to enhance its influence and advance its Antarctic interests. Because Measures adopted by the ATCM – such as Measure 15 (2009) – do not enter into force until implemented by all ATCPs, taking the necessary domestic actions in a timely manner is crucial to Australia's maintenance of influence within the Antarctic Treaty system.
- 4.15 A decision by Australia not to implement Measure 15 (2009) would:
- perpetuate unacceptable risks to human health and safety, the Antarctic environment and Antarctic heritage; and
- deleteriously affect its:

⁵ Only three of the seven Australian operators authorised to undertake vessel-borne tourism operations during the 2010-2011 austral summer are capable of landing 20 or more passengers per voyage.

⁶ Australian operators currently achieve coordination by using an IAATO operated online scheduling system and communication systems (including radio and email). Australian operators incur negligible costs in utilising these technologies.

- standing and influence in the Antarctic Treaty system;
 - relations with other ATCPs; and
 - domestic standing should an operator be later involved in an incident that causes harm to human health and safety, the Antarctic environment or Antarctic heritage.
- 4.16 As mentioned above, the administrative obligations that would arise from option 2 are already being substantively met under the existing system of non-obligatory self-regulation. Indeed, the administrative cost to the Australian Government in maintaining a record of instances where more than one vessel was present at a landing site is negligible.

Costs and benefits to consumers

- 4.17 Given the administrative obligations that would be placed upon operators under option 2 do not differ substantively from those under option 1, industry would have no basis to pass on additional administrative costs to consumers.
- 4.18 In reducing the risks posed to human health and safety, the Antarctic environment and Antarctic heritage by vessel passenger landings, Measure 15 (2009) may enhance consumer experiences. The development of industry best practice bylaws (through IAATO) equivalent to Measure 15 (2009) is recognition by industry that minimisation of these risks is beneficial.

5. CONSULTATION

- 5.1 Australian Antarctic Division (AAD) conducted a full consultation on the implementation of Measure 15 (2009) with operators and relevant government agencies in May 2010.
- 5.2 Twenty operators were provided a briefing package on Measure 15 (2009). This consisted of:
- an introductory cover letter detailing the rationale and anticipated effects on the conduct of vessel-borne tourism operations;
 - copies of Measure 15 (2009) and Resolution 4 (2007); and
 - a comprehensive questionnaire to which Australian operators were encouraged to provide subsequent feedback.
- 5.3 Six of the twenty operators were authorised to undertake vessel-borne tourism operations in the 2009-2010 austral summer.
- 5.4 We received a total of five responses. Four of the responses were received from operators authorised to undertake vessel-borne tourism operations in the 2009-2010 austral summer.
- 5.5 Overall, the consultation found that operators were supportive of the implementation of Measure 15 (2009).
- 5.6 Operators stated that compliance with Measure 15 (2009) obligations would not have a negative impact upon the conduct of their operations given:
- they already comply to these obligations by adhering to IAATO best practices; and
 - the costs in otherwise meeting compliance would be either negligible or sufficiently minor so as not to deleteriously affect commerciality.⁷
- 5.7 Operators – understanding the need to protect the Antarctic environment, Antarctic heritage and human health and safety – view compliance with Measure 15 (2009) as just and reasonable.
- 5.8 Before each annual ATCM, the Department of Foreign Affairs and Trade (DFAT) convenes consultative meetings with:
- the AAD of the Department of Sustainability, Environment, Water, Population and Communities (DSEWPAC);

⁷ Australian operators noted that they already expend resources to maintain industry knowledge and training standards.

- the Attorney-General's Department (AGD);
- the Department of Resources, Energy and Tourism (RET); and
- from time-to-time, operators and non-governmental organisations.

The views expressed by these parties are considered in formulating positions on ATCM proposals. Overall, these parties collectively support the implementation of Measure 15 (2009).⁸

6. CONCLUSION AND RECOMMENDED OPTION

6.1 The preferred option is Option 2 – namely the implementation of Measure 15 (2009) via the *Antarctic Treaty (Environmental Protection) Act 1980*. Option 2 will provide the greatest net benefit by virtue of its:

- protection of the Antarctic environment;
- protection of Antarctic heritage;
- protection of human health and safety;
- maintenance of the Antarctic Treaty system and enhancement of Australia's standing and influence within it; and
- advancement of Australian participation within the Antarctic vessel-borne tourism industry.

7. IMPLEMENTATION AND REVIEW

7.1 It is recommended that Measure 15 (2009) be implemented. Measure 15 (2009) may be implemented through amendment to the *Antarctic Treaty (Environment Protection) Act 1980*. Additional requirements would be administered by the Minister for Sustainability, Environment, Water, Population and Communities via the AAD by virtue of the Minister's responsibility for the *Antarctic Treaty (Environment Protection) Act 1980*.

⁸ None of these parties provided comments that were critical of the implementation of Measure 15 (2009).