
The Parliament of the Commonwealth of Australia
Joint Standing Committee on Treaties

Report 146

Treaty tabled on 30 September 2014

Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17

2014 Amendment to Annex I of the International Convention Against Doping in Sport of 19 October 2005

2014 Amendment to Annex II of the International Convention Against Doping in Sport of 19 October 2005

February 2015
Canberra

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Foreword

The Committee echoes the sentiments of the Parliament of Australia in expressing their condolences to the families and loved ones of the victims of the downing of Malaysia Airlines flight MH17 and pays tribute to the dedicated Australian personnel who continue to work so hard to bring the victims' remains home and investigate the cause of the incident.

The Committee acknowledges the tragic and difficult circumstances under which Australian personnel have been deployed to the Netherlands in response to the downing of Malaysia Airlines flight MH17.

The Committee understands that prompt action was required to allow the deployment of Australian personnel to take place without delay and ensure that the legal framework was in place to enable this sensitive and important work to be undertaken. The Committee supports the Treaty and is satisfied that, in this case, there was justification to invoke the National Interest Exemption which allows binding treaty action to be taken before a treaty has been considered and reported on by the Committee.

Wyatt Roy MP
Chair



Membership of the Committee

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Senator David Fawcett

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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and

such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

JSCOT	Joint Standing Committee on Treaties
NIA	National Interest Analysis
NIE	National Interest Exemption
RIS	Regulation Impact Statement
TUE	Therapeutic Use Exemption

Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty action tabled on 30 September 2014:
 - *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17 (The Hague, 1 August 2014).*
- 1.2 In addition the Report contains the Committee's views on two Minor Treaty Actions:
 - 2014 Amendment to Annex I of the *International Convention Against Doping in Sport* of 19 October 2005; and
 - 2014 Amendment to Annex II of the *International Convention Against Doping in Sport* of 19 October 2005.
- 1.3 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament. However, urgent treaties may be exempt from the usual requirement to be tabled in Parliament at least 15 sitting days before the Government takes binding treaty action. Such treaties will be tabled as soon as possible together with an explanation of the reasons for the urgent treaty action. The major treaty under consideration in this report was subject to the National Interest Exemption and came into force on 1 August 2014. It was tabled in the Parliament on 30 September 2014.
- 1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.
- 1.5 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers

arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.

- 1.6 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The treaty considered in this report did not require a Regulation Impact Statement.
- 1.7 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.8 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:
 - http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/30_September_2014

Conduct of the Committee's review

- 1.9 The treaty action reviewed in this report was advertised on the Committee's website from the date of tabling. Submissions for the treaty were requested by 10 October 2014.
- 1.10 Invitations were made to all State Premiers, Territory Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.
- 1.11 The Committee held a public hearing into the treaty in Canberra on Monday 27 October 2014.
- 1.12 The transcripts of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaty's tabling date, being:
 - 27 October 2014.
- 1.13 A list of submissions received and their authors is at Appendix A.
- 1.14 A list of witnesses who appeared at the public hearing is at Appendix B.

Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17

Introduction

- 2.1 This report reviews the *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17*. The Treaty's implementation did not follow the usual treaty making process as it was not tabled in Parliament for the usual 20 days before binding treaty action was taken. Instead the Treaty entered into force on the date it was signed by both Australia and the Netherlands, 1 August 2014. Entry into force was fast-tracked at the request of the Acting Minister for Foreign Affairs under the National Interest Exemption (NIE).¹ The Treaty was tabled in the Parliament on 30 September 2014.
- 2.2 The Treaty was necessary to ensure the safe deployment of Australian personnel to the Netherlands in response to the downing of Malaysia Airlines Flight MH17.

¹ National Interest Analysis [2014] ATNIA 21, with attachment on consultation *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17*, done at The Hague, 1 August 2014 [2014] ATS 30 (hereinafter referred to as 'NIA'), para 2.

Background

- 2.3 Malaysia Airlines flight MH17 from Amsterdam to Kuala Lumpur was lost over separatist-held territory in eastern Ukraine on 17 July 2014 killing all 298 passengers and crew on board. Among those killed were 38 victims who 'called Australia home'.²
- 2.4 In response to the tragedy, on 22 July 2014, the Government launched Operation Bring Them Home – Australia's contribution to international efforts to secure and identify the remains of the victims, and investigate the cause, of the MH17 incident. The operation involved the deployment of a significant number of Australian personnel to the Ukraine and the Netherlands.³
- 2.5 The Department of Defence and the Australian Federal Police required certain rights and protections to facilitate the deployment of their personnel to, and their operations in, the Netherlands as part of Operation Bring Them Home. The Netherlands required a binding treaty in order to grant such rights and protections.⁴
- 2.6 It was necessary to deploy all required personnel and equipment to the Netherlands as quickly as possible and ensure the protection of all deployed personnel (including those in the Netherlands prior to the Treaty being signed).⁵
- 2.7 Therefore, on 31 July 2014, the Government agreed to expedite the Treaty under the NIE. On 1 August 2014, the Acting Minister for Foreign Affairs agreed to take urgent binding treaty action without the usual 20 tabling days and the Executive Council approved the signature of the Treaty on behalf of Australia.⁶
- 2.8 The Joint Standing Committee on Treaties (JSCOT) was advised by the Acting Minister for Foreign Affairs prior to the Treaty being signed that urgent binding treaty action was required to ensure that all necessary personnel and equipment could be deployed to the Netherlands as soon as possible, and to ensure that all deployed personnel were protected.⁷ The Committee agreed on Tuesday 5 August 2014 that urgent binding treaty action was justified.

2 The Hon Julie Bishop MP, Minister for Foreign Affairs, *Hansard*, 30 September 2014, p. 1.

3 NIA, para 8.

4 NIA, para 9.

5 NIA, para 10.

6 NIA, para 10.

7 NIA, para 3.

- 2.9 The Treaty was tabled in Parliament on Tuesday 30 September 2014 by the Hon Julie Bishop MP, Minister for Foreign Affairs, with an explanation of the reasons for the urgent action.⁸

Urgent treaty provisions

- 2.10 When the Australian treaty making process was reformed in 1996, the new process was designed to accommodate urgent treaty action in the case of exceptional circumstances. Such treaties would be exempt from the usual requirement to be tabled in Parliament at least 15 sitting days before the Government takes binding treaty action.⁹ However, any exempt treaty was to be tabled as soon as possible together with an explanation of the reasons for the urgent action. The Government undertook to use the provisions ‘sparingly and only where necessary to safeguard Australia’s national interests, be they commercial, strategic or foreign policy interests’.¹⁰ The process has become known as the National Interest Exemption (NIE).
- 2.11 This is the seventh time the NIE has been invoked and on three of those occasions it was to ensure similar protection for Australian personnel deployed abroad at short notice.

The Treaty

- 2.12 The following summary of the *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17* is taken from the National Interest Analysis (NIA).

Obligations

- 2.13 The Treaty authorises Australia to send personnel, associated equipment and assets to the Netherlands for the purpose of responding to the downing of Malaysia Airlines flight MH17 (**Article 1**). **Article 1** makes specific reference to Australia’s provision of support to the International Mission for Protection of Investigation (established under the *Agreement between the Kingdom of the Netherlands and Ukraine on the International*

8 The Hon Julie Bishop, Minister for Foreign Affairs, *Hansard*, 30 September 2014, pp. 1–2.

9 This later became 20 joint sitting days for Category 1 treaty actions and 15 joint sitting days for Category 2 treaty actions.

10 The Hon Alexander Downer MP, Minister for Foreign Affairs, *Hansard*, 2 May 1996, pp. 232–33.

Mission for Protection of Investigation), identifying remains recovered from MH17 and assisting with related activities and investigations in so far as this may be, or have been, mutually determined by Australia and the Netherlands.¹¹

- 2.14 Australians deployed to the Netherlands under the Treaty are required to respect the sovereignty, territorial integrity and political independence of the Netherlands (**Article 2**) as well as the laws of the Netherlands, and must refrain from any activity incompatible with the purposes of the Treaty (**Article 3**).¹²
- 2.15 Such personnel remain under Australia's command and control; Australian authorities are obliged to take any necessary administrative or disciplinary action against deployed personnel (**Article 4**).¹³
- 2.16 The Treaty accords Australian personnel the status equivalent to that accorded to the administrative and technical staff of a diplomatic mission of a State that is party to the *Vienna Convention on Diplomatic Relations* (**Article 5**).¹⁴
- 2.17 The Treaty waives claims between the Netherlands and Australia that arise from activities covered by the Treaty, except where such claims arise out of wilful misconduct, recklessness or gross misconduct (**Article 6(a)**). The Treaty also sets out procedures for dealing with third party claims, apportioning liability on the basis of responsibility (**Article 6(b)**).¹⁵
- 2.18 The Treaty authorises Australian personnel to possess, carry, move, train with and check weapons, ammunition and explosives (**Article 12**). It provides permission for Australian personnel to wear national police or military uniforms (**Article 10**); requires the appointment of an Australian Senior Representative in the Netherlands to serve as a point of contact with Dutch authorities (**Article 9**); gives Australia the right to take charge of, and repatriate, the body of any official who dies in the course of activities undertaken pursuant to the Treaty (**Article 14**); and regulates the sharing and disclosure of information, including that relating to deployed personnel and the victims of MH17 (**Articles 17 and 18**).¹⁶
- 2.19 The Treaty also confers rights in relation to:
- a. entry into, exit from and movement within, the Netherlands, with an expedited documentation process set out for personnel

11 NIA, para 11.

12 NIA, para 12.

13 NIA, para 13.

14 NIA, para 14.

15 NIA, para 15.

16 NIA, para 16.

- who need to stay in the Netherlands for more than three months (**Article 7**);
 - b. the importation, exportation, possession, storage, movement and use of necessary equipment, supplies and other items, including weapons, ammunition and vehicles (**Article 8(a)**);
 - c. the disposal of equipment and supplies (**Article 8(b)(i)**);
 - d. the recognition of Australian professional licences (**Article 8(b)(ii)**);
 - e. the waiver of fees, charges and duties in relation to aircraft, vehicles and vessels and the payment of reasonable charges for services requested by Australia (**Article 8(b)(iii)**);
 - f. diplomatic clearance (**Article 8(b)(iv)**) and priority access (**Article 8(b)(v)**) for aircraft, vehicles and vessels;
 - g. the management of logistic support (**Article 11**);
 - h. the provision of security for Australian personnel and associated assets (**Article 13**);
 - i. access to existing, and the creation of temporary, facilities, and unrestricted communication by radio, telephone and other means (**Article 15**); and
 - j. the investigation of accidents and incidents involving Australian aircraft, vehicles and vessels (**Article 16**).¹⁷
- 2.20 **Article 20** provides that Australia and the Netherlands may agree, in writing, to amend the Treaty, and that the Parties shall agree on the terms of entry into force of any such amendments.¹⁸
- 2.21 **Article 22** provides that the Treaty will terminate no later than a year after its entry into force (namely 1 August 2015). Under **Article 22**, the Treaty will terminate prior to this date on the completion of the Activity as defined in **Article 1**, or as otherwise mutually determined by Australia and the Netherlands.¹⁹

Implementation

- 2.22 No legislation was, or is, required to implement Australia's obligations under the Treaty. All relevant activities under the Treaty have taken and will take place within the Netherlands. No State and Territory action was, or is, required in relation to the Treaty.²⁰

17 NIA, para 17.

18 NIA, para 24.

19 NIA, para 25.

20 NIA, paragraphs 18–20.

Costs

- 2.23 **Article 8(a)** permits Australia to import, export, possess, store, move and use equipment, supplies and other items for the purpose of responding to the downing of MH17 free of duties, taxes and charges. Specifically, under **Article 8(b)(iii)** aircraft, vehicles and vessels owned and operated by Australia shall not be subject to fees, charges and duties. The same paragraph obliges Australia to pay reasonable charges for services requested by Australia and supplied by the Netherlands or pursuant to a contract.²¹
- 2.24 Australia will otherwise fund activities carried out under the Treaty following regular budgetary processes and rules, which may include the need for supplementary funding to agencies.²² No regulatory costs have been identified for business or the general community.²³

Conclusion

- 2.25 The Committee echoes the sentiments of the Parliament of Australia in expressing their condolences to the victims' families and their loved ones and pays tribute to the dedicated Australian personnel who continue to work so hard to bring the victims' remains home and investigate the cause of the downing of MH17.
- 2.26 The Committee acknowledges the tragic and difficult circumstances under which Australian personnel have been deployed to the Netherlands in response to the downing of Malaysia Airlines flight MH17.
- 2.27 The Committee understands that prompt action was required to allow the deployment to take place without delay and ensure that the legal framework was in place to enable this sensitive and important work to be undertaken. The Committee is satisfied that, in this case, there was justification to invoke the National Interest Exemption and supports the Treaty.
- 2.28 The Committee notes that the Treaty will terminate no later than 1 August 2015, or sooner if possible²⁴, and that the original 500 strong contingent has been reduced to approximately 25 as at 7 November 2014.²⁵

21 NIA, para 21.

22 NIA, para 22.

23 NIA, para 23.

24 *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines Flight MH17*, Article 22.

2.29 The Committee also notes that of the 298 victims of the disaster, 289 have been identified as of 7 November 2014.²⁶

25 Department of Foreign Affairs and Trade (DFAT), *Submission 1*.

26 DFAT, *Submission 1*.

Minor treaty actions

Introduction

- 3.1 Minor treaty actions involve only technical amendments to existing treaties which do not impact significantly on the national interest. Minor treaty actions are presented to the Committee for consideration with a short Explanatory Statement. These treaties are not tabled in the Parliament.
- 3.2 The Committee has the discretion to either formally inquire into minor treaty actions or indicate its acceptance of them without a formal inquiry and report.

Amendments to the International Convention against Doping in Sport

- 3.3 On 18 November 2014, the Department of Foreign Affairs and Trade referred two minor treaty actions that constitute amendments to the *International Convention against Doping in Sport*:
 - 2014 Amendment to Annex I of the International Convention Against Doping in Sport of 19 October 2005; and
 - 2014 Amendment to Annex II of the International Convention Against Doping in Sport of 19 October 2005.
- 3.4 The Convention was adopted in 2005 as a method of harmonising anti-doping rules across sports and international boundaries. The intent is to ensure that all competitors in a particular sport are covered by the same anti-doping rules.

- 3.5 Amongst other things, the Convention contains two annexes. Annex I, entitled *Prohibited List-International Standard*, identifies the substances and methods of doping which are prohibited. Annex II, entitled *International Standard for Therapeutic Use Exemptions*, outlines the means by which athletes can use medicines on the Prohibited List to treat legitimate medical conditions.¹

Annex I amendment

- 3.6 Annex I of the Convention is reviewed annually by the World Anti-Doping Agency (WADA) to ensure the list of prohibited substances is up to date. The amended list is released to the parties to the Convention in September each year, and comes into effect on 1 January the following year.²
- 3.7 The Annex I amendment referred is the addition of 'hypoxia inducible factor stabilisers', for example xenon and argon.³
- 3.8 A 'hypoxia inducible factor' is a substance that induces cells to act as if they are suffering from a lack of oxygen (hypoxia). Hypoxia causes cells to use oxygen and other materials much more efficiently. The net effect is a body that will make much better use of the resources available to it, improving its performance compared to bodies that have not been subject to induced hypoxia.⁴
- 3.9 Hypoxia inducible factors have been included in Annex I of the Convention for some time.⁵
- 3.10 Recent scientific studies have shown that noble gases, such as argon and xenon, can extend the effects of hypoxia inducible factors by preventing the factors from being removed from the body through the kidneys. In

1 United Nations Education, Scientific and Cultural Organisation (UNESCO), *Annexes to the Convention*, <<http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/annexes/>>, accessed 19 November 2014.

2 World Anti-Doping Authority (WADA), *Prohibited list*, <<https://www.wada-ama.org/en/what-we-do/prohibited-list>>, accessed 19 November 2014.

3 WADA, *Prohibited list*, <<https://www.wada-ama.org/en/what-we-do/prohibited-list>>, accessed 19 November 2014.

4 Jelkmann, Wolfgang. 'Xenon Misuse in Sports - Increase of Hypoxia-Inducible Factors and Erythropoietin, or Nothing but „Hot Air“?', *Deutsche Zeitschrift für Sportmedizin*, <<http://www.zeitschrift-sportmedizin.de/en/articles-online/archiv-2014/heft-10/xenon-misuse-in-sports-increase-of-hypoxia-inducible-factors-and-erythropoietin-or-nothing-but-hot-air/>>, accessed 19 November 2014.

5 WADA, *Prohibited list*, <<https://www.wada-ama.org/en/what-we-do/prohibited-list>>, accessed 19 November 2014.

this context, the noble gases are referred to as ‘hypoxia inducible factor stabilisers’.⁶

- 3.11 Because of these studies, WADA has proposed the prohibition of hypoxia inducible factor stabilisers.⁷

Annex II amendment

- 3.12 Annex II of the Convention is reviewed less frequently, and was last amended in 2011. The revised Annex II being considered here was first agreed in 2013, and will come into effect on 1 January 2015.⁸
- 3.13 The revision amends Annex II to clarify the conditions that must be satisfied in order for a Therapeutic Use Exemption (TUE) to be granted and the responsibilities imposed on Anti-Doping Organisations, International Sporting Federations and the World Anti-Doping Agency in the TUE process.⁹
- 3.14 Among other things, the revised Annex II makes clear that international sporting federations are required to recognise TUEs issued by national anti-doping organisations and vice versa if the TUE meets the criteria set out in the Annex.¹⁰

6 Jelkmann, Wolfgang. ‘Xenon Misuse in Sports – Increase of Hypoxia-Inducible Factors and Erythropoietin, or Nothing but „Hot Air“?’, *Deutsche Zeitschrift für Sportmedizin*, <<http://www.zeitschrift-sportmedizin.de/en/articles-online/archiv-2014/heft-10/xenon-misuse-in-sports-increase-of-hypoxia-inducible-factors-and-erythropoietin-or-nothing-but-hot-air/>>, accessed 19 November 2014.

7 WADA, *Prohibited list*, <<https://www.wada-ama.org/en/what-we-do/prohibited-list>>, accessed 19 November 2014.

8 UNESCO, *Annexes to the Convention*, <<http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/annexes/>>, accessed 19 November 2014.

9 WADA, *Prohibited list*, <<https://www.wada-ama.org/en/what-we-do/prohibited-list>>, accessed 19 November 2014.

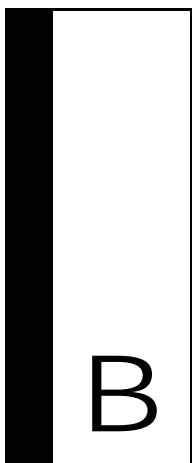
10 WADA, *Prohibited list*, <<https://www.wada-ama.org/en/what-we-do/prohibited-list>>, accessed 19 November 2014.



Appendix A - Submission

Treaty tabled on 30 September 2014

1 Department of Foreign Affairs and Trade



Appendix B - Witness

Monday, 27 October 2014 – Canberra

Department of Foreign Affairs and Trade

Dr Gregory French, International Legal Branch, Legal Division

