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

Report 149

Treaty tabled on 10 February 2015

Amendments to Appendices I and II to the Convention on the Conservation of
Migratory Species of Wild Animals (Bonn, 23 June 1979)
(Quito, 9 November 2014)

May 2015
Canberra

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Contents

Membership of the Committee	v
Resolution of Appointment	vii
List of abbreviations	viii

REPORT

1 Introduction	1
Purpose of the report.....	1
Conduct of the Committee’s review	2
2 Amendments to Appendices I and II to the Convention on the Conservation of Migratory Species	3
Introduction	3
Operation of the Bonn Convention.....	4
Amendments to Appendix I and Appendix II	4
Reservation.....	5
Timing	6
Reasons for and consequences of reservation	6
Consultation	9
Conclusion	10
 Dissenting Report—The Hon Kelvin Thomson MP (Deputy Chair), The Hon Melissa Parke MP, Senator Sue Lines, Mr Tim Watts MP and Senator the Hon Joe Ludwig.....	 13


APPENDICES

Appendix A - Submissions17

Appendix B - Witnesses.....19

TABLE

Table 2.1 Species added to the appendices of the Bonn Convention at the Conference of the Parties held in November 2014 for which Australia is a Range State..... 5



Membership of the Committee

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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.
- c) 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

Bonn Convention	The Convention on the Conservation of Migratory Species
CMS	Conservation of Migratory Sharks
EPBC	Environment Protection and Biodiversity Conservation
HSI	Humane Society International
JSCOT	Joint Standing Committee on Treaties
NIA	National Interest Analysis
NGOs	Non-governmental Organizations
RIS	Regulation Impact Statement

Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty action tabled on 10 February 2015:
 - Amendments to Appendices I and II to the *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn, 23 June 1979) (Quito, 9 November 2014).
- 1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in Parliament.
- 1.3 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.
- 1.4 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by the 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.
- 1.5 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. An RIS was not required for the treaty under consideration in this report.

- 1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.7 A copy of the 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/10_February_2015.

Conduct of the Committee's review

- 1.8 The treaty action reviewed in this report was advertised on the Committee's website from the date of tabling. The Committee invited written submissions by 27 February 2015.
- 1.9 The Committee invited all State Premiers, Territory Chief Ministers and 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.
- 1.10 The Committee held a public hearing into the treaty in Canberra on Monday 16 March 2015.
- 1.11 The transcript 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:
 - 10 February 2015.
- 1.12 A list of submissions received and their authors is at Appendix A.
- 1.13 A list of witnesses who appeared at the public hearing is at Appendix B.

Amendments to Appendices I and II to the Convention on the Conservation of Migratory Species

Introduction

- 2.1 The *Convention on the Conservation of Migratory Species* (called the Bonn Convention) is a multilateral convention that entered into force in 1983. Australia has been a Party since 1 September 1991.¹
- 2.2 The Bonn Convention seeks to conserve terrestrial, avian and marine species that migrate across or outside national jurisdictional boundaries.²
- 2.3 The Convention includes two appendices listing the species to which the Convention provisions apply. Appendix I lists migratory species which are endangered and Appendix II lists migratory species which have an unfavourable conservation status. Parties to the Convention must protect migratory species listed on Appendices I and II that live within, or pass through, their jurisdiction.³

1 Joint Standing Committee on Treaties (JSCOT), *Report 125*, tabled 21 June 2012, p. 12.

2 JSCOT, *Report 125*, tabled 21 June 2012, p. 12.

3 JSCOT, *Report 125*, tabled 21 June 2012, pp. 11–12.

Operation of the Bonn Convention

- 2.4 Article I of the Bonn Convention establishes two categories that define the conservation status of a migratory species: 'endangered' for a migratory species that is in danger of extinction throughout all or a significant proportion of the area of land or water that it inhabits (its range), and 'unfavourable conservation status' where the requirements for a favourable conservation status are not being met.⁴
- 2.5 Parties to the Bonn Convention are obliged to:
- acknowledge the importance of conserving migratory species and the need to take action to avoid migratory species becoming endangered;⁵
 - promote, cooperate and support research relating to migratory species;⁶
 - if they are Range States⁷ for species listed in Appendix I, endeavour to take specific measures to conserve the species and its habitat, to prevent the adverse effects of activities that impede or prevent migration and, wherever possible, to prevent or minimise factors that endanger the species;⁸
 - make the taking of Appendix I species prohibited, subject to limited exceptions.⁹
 - if they are Range States for species included in Appendix II, endeavour to conclude agreements where these would benefit the species and give priority to those species having an unfavourable conservation status.¹⁰

Amendments to Appendix I and Appendix II

- 2.6 Article VII of the Bonn Convention requires a Conference of the Parties to be held every three years. One of the purposes of the Conference is to agree amendments to the appendices of the Convention. Amendments to the appendices occur automatically 90 days after the agreement of the Conference.¹¹

4 JSCOT, *Report 125*, tabled 21 June 2012, p. 13.

5 *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn, 23 June 1979) (hereafter referred to as the Bonn Convention), Article II.

6 Bonn Convention, Article II.

7 Range States are the parties to the convention over which a particular migratory species ranges.

8 Bonn Convention, Article III.

9 Bonn Convention, Article III.

10 Bonn Convention, Article IV.

11 Bonn Convention, Article VII.

- 2.7 The latest Conference of the Parties took place in November 2014. Amongst other things, the Conference agreed to add a number of species to the appendices of the Bonn Convention for which Australia is a Range State. The additions are as follows:

Table 2.1 Species added to the appendices of the Bonn Convention at the Conference of the Parties held in November 2014 for which Australia is a Range State

Appendix I additions	Appendix II additions
the Great Knot (a wading bird species)	the Dwarf, Green, Largetooth and Narrow Sawfishes
the Dwarf, Green, Largetooth and Narrow Sawfishes	the Bigeye, Common and Pelagic Thresher Sharks
the Reef Manta Ray	the Scalloped and Great Hammerhead Sharks
the Pygmy, Japanese and Bentfin Devilray species of Mobula Ray	the Reef Manta Ray
	the Pygmy, Japanese and Bentfin Devilray species of Mobula Ray

Source *National Interest Analysis [2015] ATNIA 1 with attachment on consultation Amendments to Appendices I and II to the Convention on the Conservation of Migratory Species of Wild Animals, done at Quito on 9 November 2014, para 7.*

Reservation

- 2.8 On 24 November 2014, the Minister for the Environment, the Hon. Greg Hunt MP, wrote to the Committee to advise that the Government would be lodging a reservation to the listing in Appendix II of the Bigeye, Common and Pelagic Thresher Sharks; and the Scalloped and Great Hammerhead Sharks.
- 2.9 Article XIV of the Bonn Convention permits a Party to lodge a reservation against specific listings in the appendices. A Party that lodges a reservation will not be considered a Party in regard to the subject of that reservation.¹²
- 2.10 The Committee received a submission from the Humane Society International (Australian Office) opposing the reservation. The submission states:
- HSI considers that the lodging of a Reservation demonstrates Australia's lack of willingness to engage in international conservation efforts for these five migratory species. By their very nature as migratory species, thresher and hammerhead shark

12 Bonn Convention, Article XIV.

populations in Australia are shared with our neighbours including (but not limited to) Indonesia.¹³

- 2.11 TRAFFIC (a wildlife trade monitoring network) and the Australian Marine Conservation Society (hereafter called the TRAFFIC submission) also made a submission opposing the reservations.¹⁴

Timing

- 2.12 The Committee's consideration of the proposed amendments to the Bonn Convention appendices and the Australian Government's proposal to lodge a reservation to certain listings was complicated by the timing of the Conference of the Parties and the requirements of the Convention.
- 2.13 As has been indicated above, amendments to the appendices of the Convention come into effect automatically 90 days after they have been agreed by the Conference.¹⁵ Parties wishing to lodge reservations must do so during this 90 day period. Reservations cannot be lodged once the amendments take effect.¹⁶
- 2.14 In other words, a listing applies to a Party unless it determines to opt out of the listing within 90 days of the listing being agreed.
- 2.15 However, there does not appear to be any barrier to a Party withdrawing a reservation at any time.
- 2.16 Because the Conference of the Parties took place in November 2014, the Australian Government had until February 2015 to lodge reservations. The timing of the Conference meant that the Committee was unable, due to the Christmas recess, to consider the proposed reservations before the reservations had to be lodged.
- 2.17 On 5 December 2014, the Committee responded to the Minister's letter and advised him that because of the complexity of the issues and the time frame involved, the Minister may wish to proceed with the reservations without Committee approval.

Reasons for and consequences of reservation

- 2.18 In simple terms, the National Interest Analysis (NIA) states the reservations have been made because the migratory species concerned are

13 Humane Society International, *Submission 1*, p. 2.

14 TRAFFIC and the Australian Marine Conservation Society, *Submission 2*, p. 1.

15 Bonn Convention, Article VII.

16 Bonn Convention, Article XIV.

regularly caught by recreational fishers. If the reservations had not been made, those fishers would break the law every time they caught a member of the species.¹⁷

- 2.19 The Bonn Convention is given effect in Australian law by the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Under the EPBC Act, any species listed in either Appendix I or Appendix II of the Bonn Convention is obliged to be included in the list of migratory species covered by the provisions of the Act.¹⁸
- 2.20 The provisions of the EPBC Act reflect the protections provided to migratory species listed in Appendix I of the Bonn Convention. In particular, this includes the prohibition on the taking of these species except in very limited circumstances.¹⁹
- 2.21 The listing of the Bigeye, Common and Pelagic Thresher Sharks; and the Scalloped and Great Hammerhead Sharks in Appendix II of the Convention would automatically result in a prohibition on the taking of these species under the EPBC Act, even though that is not a requirement of the Bonn Convention.²⁰
- 2.22 According to a representative of the Department of Environment:
Without the reservation, recreational fishers who accidentally caught any of these five shark species we are talking about ... even when fishing in accordance with their permits and consistent with state or Commonwealth law could be fined up to \$170,000 and face two years in jail.²¹
- 2.23 The Bonn Convention requires Range States for migratory species listed under Appendix II to endeavour to conclude agreements where these would benefit the species and give priority to those species having an unfavourable conservation status.²²
- 2.24 According to the NIA, the Australian Government intends to apply to the species subject to the reservation the same level of protection required by the Bonn Convention.²³ In particular:

17 National Interest Analysis [2015] ATNIA 1 with attachment on consultation, *Amendments to Appendices I and II to the Convention on the Conservation of Migratory Species of Wild Animals*, done at Quito on 9 November 2014 (hereafter referred to as the NIA), para 14.

18 NIA, para 16.

19 NIA, para 16.

20 Mr Stephen Oxley, First Assistant Secretary, Wildlife, Heritage and Marine Division, Department of Environment, *Committee Hansard*, Canberra, 16 March 2015, p. 6.

21 Mr Oxley, *Committee Hansard*, Canberra, 16 March 2015, p. 6.

22 Bonn Convention, Article IV.

23 NIA, para 17.

The Australian government intends to fully support work to facilitate information exchange and cooperative research work on these species internationally. All the recent shark and ray species additions to the convention on migratory species will be considered for inclusion under the CMS memorandum of understanding on the conservation of migratory sharks.²⁴ That consideration will occur at the meeting under that MOU later this year and Australia will be actively supporting the inclusion of these five shark species under that memorandum of understanding.²⁵

- 2.25 In addition, the Australian Government has assured the Committee that the taking of the migratory shark species by recreational fishers is sufficiently regulated through state and territory legislation²⁶ to ensure the ongoing conservation of the species.²⁷
- 2.26 A number of parties to the Bonn Convention have lodged reservations to listings in the appendices. Representatives from the Department of Environment cited Cuba, Bolivia, Norway and Denmark as examples of parties that have lodged reservations.²⁸
- 2.27 The Committee notes that both the submissions to this inquiry, from the Humane Society International²⁹ and TRAFFIC³⁰ oppose the reservations lodged by Australia.
- 2.28 The issue of recreational fishers catching species listed in Appendix II of the Bonn Convention has been considered in the past by the Australian Government.
- 2.29 In 2008, following the same problem arising in relation to the listing in Appendix II of the Bonn Convention of the porbeagle shark and the short fin and long fin mako shark, the Government amended the EPBC Act to permit recreational fishers to take these specific species.³¹
- 2.30 In 2009, the Hawke Review of the EPBC Act recommended that the Act be amended to ensure that the prohibition on catching migratory species did

24 The *Memorandum of Understanding on the Conservation of Migratory Sharks*, the relevant Bonn Convention Appendix II Agreement.

25 Mr Oxley, *Committee Hansard*, Canberra, 16 March 2015, p. 6.

26 The licensing and regulation of recreational fishing is a state and territory responsibility.

27 Mr Oxley, *Committee Hansard*, Canberra, 16 March 2015, p. 7.

28 Mr Oxley, *Committee Hansard*, Canberra, 16 March 2015, p. 7.

29 Humane Society International, *Submission 1*, p. 1.

30 TRAFFIC and the Australian Marine Conservation Society, *Submission 2*, p. 1.

31 Humane Society International, *Submission 1*, p. 1.

not apply to species listed under Appendix II of the Bonn Convention caught by recreation fishers.³²

- 2.31 While this recommendation was accepted by the Government of the day, no amendment has been attempted to date.³³

Consultation

- 2.32 The Committee received submissions from the Humane Society International and TRAFFIC which included concerns about the degree of consultation that took place with conservation groups prior to the lodgement of the reservations by the Australian Government.³⁴
- 2.33 The TRAFFIC submission points out that despite frequent correspondence with the Department of Environment, TRAFFIC was not asked to attend the Australian Government consultation with interest groups before the Conference of the Parties.³⁵
- 2.34 Furthermore, TRAFFIC argues that it was not advised of the Government's intention to lodge a reservation until 21 January 2015.³⁶
- 2.35 Paragraph 8 of the Attachment on Consultation to the NIA states that both the Humane Society International and TRAFFIC were consulted about the proposed amendments to the appendices of the Bonn Convention. The *Attachment on Consultation* goes on to state:
- Broad support was received from a number of environmental NGOs.³⁷
- 2.36 At the public hearing on 16 March 2015, representatives from the Department of Environment clarified that:
- It was broad support for including the species on the appendices. It was not about the reservation.³⁸
- 2.37 The Committee notes that the *Attachment on Consultation* relates only to consultation that took place before the Conference of the Parties in November 2014.³⁹

32 Mr Oxley, *Committee Hansard*, Canberra, 16 March 2015, p. 7.

33 Mr Oxley, *Committee Hansard*, Canberra, 16 March 2015, p. 7.

34 Humane Society International, *Submission 1*, p. 1.

35 TRAFFIC and the Australian Marine Conservation Society, *Submission 2*, p. 2.

36 TRAFFIC and the Australian Marine Conservation Society, *Submission 2*, p. 2.

37 NIA, *Attachment on Consultation*, para 9.

38 Ms Narelle Montgomery, Assistant Director, Migratory Species Section, Wildlife, Heritage and Marine Division, Department of Environment, *Committee Hansard*, Canberra, 16 March 2015, p. 8.

- 2.38 The Department did not address the specific details contained in the TRAFFIC submission with regard to consultation, so it is difficult for the Committee to resolve precisely what happened without an examination of the relevant records.
- 2.39 The Committee hopes the Department of Environment considers the comments by the Humane Society International and TRAFFIC with a view to improving consultation if necessary.

Conclusion

- 2.40 The Committee notes the reservations have been made because the migratory species concerned are regularly caught by recreational fishers. If the reservations had not been made, those fishers would break the law every time they caught a member of the species.
- 2.41 While the Australian Government has lodged the reservations, it is by its own estimation in full compliance with the requirements of the Bonn Convention. The Committee appreciates that the reservations have been sought because of what the representatives of the Department of Environment described as an 'anomaly' in Australian law.⁴⁰ However, the Committee notes the potential for lodging reservations in these circumstances to be misinterpreted as diminishing the level of protection afforded to the migratory species in question.
- 2.42 Amendments to the appendices of the Bonn Convention take effect automatically 90 days after they have been agreed by the Conference of the Parties. Any reservations to these amendments must be lodged during this 90 day period.
- 2.43 The most recent Conference of the Parties took place in November 2014, so the amendments to the appendices and Australia's reservations to them took effect in February 2015.
- 2.44 As a consequence, the Committee does not need to make a recommendation in relation to this treaty action.
- 2.45 Nevertheless, the Committee states its support for the amendments to the appendices of the Bonn Convention, and recognises that, as a result of the Australian Government not pursuing the amendments to the EPBC Act recommended in 2008, the Government had no alternative but to seek a reservation in relation to particular migratory species listed in Appendix II.

39 NIA, *Attachment on Consultation*, para 1.

40 Mr Oxley, *Committee Hansard*, Canberra, 16 March 2015, p. 7.

Mr Wyatt Roy MP

Chair

18 May 2015



Dissenting Report—The Hon Kelvin Thomson MP (Deputy Chair), The Hon Melissa Parke MP, Senator Sue Lines, Mr Tim Watts MP and Senator the Hon Joe Ludwig

As members of the Joint Standing Committee on Treaties (JSCOT), we dissent from the majority view of JSCOT and do not support the reservation as lodged by the Australian Government to the *Amendments to Appendix II to the Convention on the Conservation of Migratory Species of Wild Animals*.

Summary Overview

Australia has been a party to the *Convention on the Conservation of Migratory Species of Wild Animals* (the **CMS**) since 1991. The purpose of the convention is to protect migratory species that are endangered or have an unfavourable conservation status in the circumstances where they cross national jurisdictional boundaries. The protected species are listed in the Appendix I and Appendix II.

At the Bonn Convention conference in November 2014, a number of species were added to Appendix I and Appendix II. On that occasion, the Australian Government lodged a reservation to the listing in Appendix II of the Bigeye, Common, and Pelagic Thresher Sharks, and the Scalloped and Great Hammerhead Sharks.

Due to timing issues over the Christmas break, JSCOT was unable to consider the reservation prior to the reservation being lodged. Therefore, in accordance with Article XIV of the CMS, the reservation took effect in February 2015 and Australia is not considered a party in regard to those species.

The JSCOT has now considered the amendments and the reservation, and has recommended that the reservation should not be withdrawn. We do not support the majority view of the JSCOT on this matter for the reasons set out below.

Specific Areas of Concern

The Australian Government argues that the reservation is required to protect recreational fishers who regularly catch these species of shark. This argument is

based on the requirements of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), which prohibits the taking of species listed in both Appendices of the CMS, except in very limited circumstances. The penalties associated with breaching the Act were cited by a representative from the Department of Environment to be up to \$170,000 and two years' imprisonment.

The approach taken by the Australian Government in lodging the reservation in order to protect recreational fishers is detrimental to Australia's reputation as a world leader in marine conservation. The Government should be acting to support international efforts to protect endangered and at risk marine life, and not to "opt-out" for reasons of convenience or relatively minor administrative complications. The species the subject of this amendment are at risk of over-exploitation through trade, and the reservation means Australia loses credibility in trying to improve marine conservation, especially with respect to countries in our region like Indonesia, among others.

The Australian Government has stated that by its own estimation it will be in full compliance with the requirements of the CMS notwithstanding the reservation. It is unnecessary, disingenuous, and harmful to the pursuit of international cooperation for any nation to exempt itself from sensible, evidence-based convention obligations when those obligations should be met, and indeed will be met in any case.

The better approach would be for Australia to amend its domestic legislation to accommodate any local requirements or administrative complications. As noted in the submission by the Humane Society International, there is a precedent for the Australian Government acting to protect recreational fishers from any unintended consequences arising out of catching species listed in the appendices of the CMS. In 2009, the porbeagle shark and the longfin and shortfin mako sharks were listed in Appendix II. Following this listing, the EPBC Act was amended to ensure that the species concerned could be listed as migratory, with an exemption provided from the strict liability offence of killing, taking, or injuring a member of these species in a Commonwealth area.

The benefit of this approach is that Australia continues to uphold its commitment to protect migratory species at a global level, without disregarding the unintended effect this may have on recreational fishers. In the absence of changes to domestic legislation, the effect of the reservation is that these species of shark will not be protected in accordance with the determination of the international marine science community, and global conservation efforts will be undermined.

It must also be noted that TRAFFIC, the Australian Marine Conservation Society, and the Humane Society International consider that there was inadequate notification or consultation with respect to the Government's decision to lodge the reservation. The JSCOT also notes that the committee was unable to resolve precisely what happened with regard to the consultation process because there has been no opportunity to examine the relevant records.

For all the reasons above, the Australian Government should withdraw the reservation, allow the listing of the species concerned, and make consequent amendments to the EPBC Act as necessary.

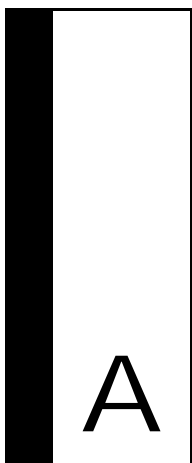
The Hon Kelvin Thomson MP
(Deputy Chair)

The Hon Melissa Parke MP

Senator Sue Lines

Mr Tim Watts MP

Senator the Hon Joe Ludwig



Appendix A - Submissions

Treaties tabled on 10 February 2014

- 1 Humane Society International
- 2 TRAFFIC and Australian Marine Conservation Society



Appendix B - Witnesses

Monday, 16 March 2015—Canberra

Department of the Environment

Mr Stephen Oxley, First Assistant Secretary, Wildlife, Heritage and Marine Division

Ms Fiona Bartlett, Director, Migratory Species Section, Protected Species and Communities Branch, Wildlife, Heritage and Marine Division

Ms Narelle Montgomery, Assistant Director, Migratory Species Section, Protected Species and Communities Branch, Wildlife, Heritage and Marine Division