

**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**

**(The Hague, 1 August 2014)**

**[2014] ATS 30**

# NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

## SUMMARY PAGE

**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)  
[2014] ATS 30**

### **Nature and Timing of Treaty Action**

1. 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) relates to Australia's deployment to, and operations in, the Netherlands in response to the downing of Malaysia Airlines Flight MH17.
2. The Treaty was signed in The Hague by Australia and the Netherlands, and entered into force for both parties, on 1 August 2014 without the usual 20 tabling days. The entry into force of this Treaty was fast-tracked on the basis of the National Interest Exemption<sup>1</sup>.
3. Following a decision to take treaty action by the Government, the Acting Minister for Foreign Affairs wrote to the Chair of the Joint Standing Committee on Treaties (JSCOT) prior to the signing of the Treaty. The letter advised of the need to take urgent binding treaty action before the Treaty was tabled in Parliament in order 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. The Acting Foreign Minister stated that the Treaty would be tabled for consideration by JSCOT at the earliest practical opportunity.

### **Overview and National interest Summary**

4. In response to the downing of Malaysia Airlines Flight MH17, significant numbers of Australian personnel were deployed to the Netherlands in order to support personnel deployed to Ukraine and to provide assistance in relation to tasks such as the identification of victims and the investigation of the cause of the incident.
5. The Treaty defines the rights, obligations and arrangements between Australia and the Netherlands necessary to facilitate Australia's deployment to, and operations in, the Netherlands.
6. The Treaty was required to ensure that all necessary personnel and equipment could be deployed to the Netherlands in as timely a manner as possible, and to

---

<sup>1</sup> The National Interest Exemption allows the Government to take urgent binding treaty action without first tabling the treaty in Parliament, where it is in the national interest to do so.

ensure that all deployed personnel (including those present in the Netherlands prior to the Treaty's entry into force) were accorded appropriate protections.

### **Reasons for Australia to Take the Treaty Action**

7. Malaysia Airlines Flight MH17 from Amsterdam to Kuala Lumpur was lost on 17 July 2014 with 298 people on board. This included 38 victims who called Australia home: 28 Australian citizens, including a dual national travelling on a Malaysian passport; nine permanent residents; and a New Zealand citizen who was a long-term resident of Victoria. In addition, two Dutch nationals who studied in Victoria and a German national whose parents are Australian permanent residents in Western Australia were among the passengers.
8. 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.
9. 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 advised that it was only able to grant such rights and protections pursuant to a binding treaty.
10. On the basis that it was necessary to ensure that all required personnel and equipment could be deployed to the Netherlands in as timely a manner as possible, and to ensure that all deployed personnel (including those in the Netherlands prior to the signature of the Treaty) were protected, Government agencies assessed there was a need to conclude a status of forces treaty on an expedited basis under the National Interest Exemption. On 31 July 2014, the Government agreed that Australia should conclude the Treaty with the Netherlands on an expedited basis. The Acting Minister for Foreign Affairs agreed to invoke the National Interest Exemption to take binding treaty action on 1 August 2014. Following that decision, on 1 August, the Executive Council approved the signature of the Treaty on behalf of Australia.

### **Obligations**

11. 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 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.

12. 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).
13. 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).
14. 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).
15. 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)).
16. 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).
17. 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 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).

### **Implementation**

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

### **Costs**

- 21. 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.
- 22. 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.
- 23. No regulatory costs have been identified for business or the general community.

### **Future Treaty Action**

- 24. Article 20 of the Treaty 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.

## **Withdrawal or Denunciation**

25. 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.

## **Contact Details**

International Law Section  
Legal Division  
Department of Foreign Affairs and Trade

## **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  
(The Hague, 1 August 2014)  
[2014] ATS 30**

### **CONSULTATION**

26. To ensure that all required personnel and equipment could be deployed to the Netherlands as soon as possible, and to ensure that all deployed personnel (including those in the Netherlands prior to the signature of the Treaty) were protected, it was necessary to conclude the Treaty on an expedited basis under the National Interest Exemption. The expedited process precluded the possibility of undertaking public, or State and Territory, consultations. As noted at paragraph 20 above, no State or Territory action was, or is, required in relation to the Treaty.