

**National Interest Analysis [2015] ATNIA 6**

**with attachment on consultation**

**Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17**

**[2015] ATNIF 13**

**Head Agreement [2014] ATS 30**

---

## NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

### SUMMARY PAGE

#### **Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17**

[2015] ATNIA 6

[2015] ATNIF 13

Head Agreement: [2014] ATS 30

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

1. The purpose of the proposed treaty action is to extend 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* ('Treaty'), for twelve months. The Treaty relates to Australia's deployment to, and operations in, the Netherlands in response to the downing of Malaysia Airlines Flight MH17 to enable the Australian Federal Police and Defence to complete their operations in the Netherlands.
2. The *Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17* ('Protocol'), would extend the term of the Treaty, (which is due to expire on 1 August 2015), until 1 August 2016 unless terminated earlier.
3. The Treaty was signed in The Hague by Australia and the Netherlands ('Parties'), and entered into force for both Parties on 1 August 2014, without the usual twenty (20) tabling days in both Houses of Parliament. The entry into force of the Treaty was expedited on the basis of the National Interest Exemption<sup>1</sup>.
4. Other than the extension of the term of the Treaty, the Protocol will not amend the Treaty provisions.
5. Australia is currently seeking approval from the Executive Council ('ExCo') (expected to be granted prior to tabling of the Protocol), for the Protocol to enter into force upon signature as provided for in **Article 2** of the Protocol. Signature will occur once Australia and the Netherlands have completed their domestic requirements for entry into force (expected by 1 August 2015).

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

---

<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.

6. In response to the downing of Malaysia Airlines Flight MH17, significant numbers of Australian personnel were deployed to the Netherlands under the Treaty to provide assistance in relation to tasks such as the identification of victims and the investigation of the cause of the incident.
7. 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. It ensures that all deployed personnel are accorded appropriate protections.
8. The work of the deployed Australian personnel is ongoing. It is necessary to extend the provisions of the Treaty and the protections it provides Australian personnel for a further twelve months.

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

9. Malaysia Airlines Flight MH17 from Amsterdam to Kuala Lumpur was lost on 17 July 2014 with 298 people on board. 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 Ukraine and the Netherlands.
10. Due to Dutch domestic requirements, the duration of the Treaty was limited to twelve months. As the criminal investigation into the downing of flight MH17 is ongoing, and personnel from the Australian Federal Police and the Department of Defence are likely to remain in the Netherlands beyond 1 August 2015, the Protocol to prolong the Treaty is required to ensure their ongoing protection.

### **Obligations**

11. The Protocol would extend the Treaty for a further twelve months (**Article 1**). As a result, both Australia and the Netherlands would remain bound by the provisions in the Treaty for the extended period unless terminated earlier. The Protocol will enter into force on the date of last signature (**Article 2**).
12. 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.
13. 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**).

14. 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**).
15. 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 a Party to the *Vienna Convention on Diplomatic Relations* (**Article 5**).
16. 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)**).
17. 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**).
18. 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**

- 19. The term of the Treaty will automatically be extended on signature of the Protocol. No legislation is required to implement Australia's obligations under the Protocol.
- 20. No State or Territory action is required in relation to the Protocol.

### **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 as a result of the proposed treaty action.

### **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. This provision of the Treaty was not drawn upon in relation to the current proposed treaty action due to Dutch domestic requirements.
- 25. It is possible that a further extension of the Treaty may be required if the Australian Federal Police and the Department of Defence are required to remain in the Netherlands beyond 1 August 2016. Due to Dutch domestic requirements, any further extension must be limited to twelve months.

## **Withdrawal or Denunciation**

The Treaty contains no specific provisions on withdrawal or denunciation of the Treaty. Under **Article 1** of the Protocol, the termination provisions of the Treaty (**Article 22**) will apply once the Protocol is signed. Consistent with **Article 1** of the Protocol, the Treaty will terminate on the completion of the Activity as defined in Article 1, or as otherwise mutually determined by Australia and the Netherlands, but no later than 1 August 2016

26. Under **Article 22** of the Treaty (as modified by the Protocol), the Treaty will terminate no later than a year after its entry into force (namely 1 August 2016). **Article 22** also provides for termination of the Treaty prior to this date on the completion of the Activity (as defined in **Article 1** of the Treaty) or as otherwise mutually determined by the Parties.
27. The Protocol itself contains no termination, withdrawal or denunciation provisions as its purpose is limited to extending the duration of the Treaty.

## **Contact Details**

International Law Section  
Legal Division  
Department of Foreign Affairs and Trade

**ATTACHMENT ON CONSULTATION**

**Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17**

**[2015] ATNIA 13**

**[2015] ATNIF 13**

**Head Agreement: [2014] ATS 30**

**CONSULTATION**

28. As noted at Paragraph 20 above, no State or Territory action was, or is, required in relation to the Treaty.