

National Interest Analysis [2019] ATNIA 7

with attachment on consultation

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

(The Hague, 18 December 2018)

[2019] ATNIF 7

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and timing of the proposed treaty action

1. The proposed treaty action is the entry into force of the *Treaty between Australia and the Kingdom of the Netherlands on the Ongoing Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines Flight MH17* (the proposed Treaty). The proposed Treaty will enter into force after the Parties exchange diplomatic notes advising of the completion of domestic requirements (Article (14(1))).
2. The proposed Treaty is required to enter into force prior to the expiry on 30 June 2019 of the fifth prolongation 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* done at The Hague on 1 August 2014 ([2014] ATS 30) (the original MH17 Treaty).

Overview and national interest summary

3. The purpose of the proposed Treaty is to define the rights, obligations and arrangements between Australia and the Netherlands necessary to facilitate the work of Australian personnel deployed to the Netherlands assisting in the investigation of the downing of Malaysia Airlines Flight MH17.
4. Malaysia Airlines Flight MH17 (MH17) from Amsterdam to Kuala Lumpur was shot down on 17 July 2014 with 298 people on board. This included 38 victims who called Australia home. In response to the downing, Australian personnel were deployed to the Netherlands to assist in activities related to the immediate emergency situation and to assist the investigation into the cause of the incident.
5. At the time, Australia and the Netherlands entered into the original MH17 Treaty to ensure appropriate protections were accorded to the deployed personnel, and arrangements in place for information sharing between Australia and the Netherlands. The original MH17 treaty entered into force on 1 August 2014 and was originally due to expire on 1 August 2015.

6. As the investigation continued and Australian personnel remained in the Netherlands, it became necessary to extend the life of the original MH17 Treaty. In the Dutch system it is possible to extend a treaty only by 12 month increments. The original MH17 Treaty has now been prolonged on five occasions, the current prolongation is due to expire on 30 June 2019. The proposed Treaty does not have an expiry date and will continue until terminated by either Australia or the Netherlands.
7. While the immediate emergency response to the incident has been concluded, the investigations into the downing and the preparation for the prosecution of the perpetrators in the Dutch criminal system are ongoing. Australian personnel continue to be deployed to the Netherlands to assist in this work. There are currently five AFP personnel deployed assisting in investigations as part of the Joint Investigation Team (JIT).

Reasons for Australia to take the proposed treaty action

8. In pursuing accountability for those responsible for the downing, Australia announced on 5 July 2017 its full support for a Dutch national prosecution of the individuals responsible. The Dutch national prosecution will ensure the results of the JIT investigation into the downing are taken into account and that justice for the victims and their families is delivered. The 2018-19 Federal budget allocated \$50.3 million over four years to support this prosecution.
9. Australian personnel deployed to the Netherlands will continue to support the investigation and, once commenced, the prosecution. Accordingly, the proposed Treaty provides authorisation for Australia to send personnel and associated equipment and assets to the Netherlands for the purpose of assisting with activities relating to the downing of Malaysia Airlines flight MH17 (Article 2). Article 2 makes specific reference to Australia's provision of support to the JIT and assisting with preparations for the prosecution of perpetrators responsible.
10. These activities are not expected to conclude within the next twelve months. Accordingly, the proposed Treaty will not specify an expiry date. The proposed Treaty will therefore provide ongoing certainty as to protections for Australian personnel in the Netherlands.

Obligations

11. The proposed Treaty essentially follows the form of the original MH17 Treaty but language referring to the initial emergency situation has been removed. It no longer provides for the repatriation of the body of an Australian official who dies in the course of activities and removes the provision permitting Australian personnel to carry weapons. The original MH17 Treaty will cease to have effect from the date of entry into force of the proposed Treaty (Article 14(2)).
12. Australians deployed to the Netherlands under the proposed Treaty are required to respect the sovereignty, territorial integrity and political independence of the Netherlands, the laws of the Netherlands, and must refrain from any activity incompatible with the purposes of the proposed Treaty (Article 3).

13. Australian personnel remain under Australia's command and control while deployed, and Australian authorities are obliged to take administrative or disciplinary action in accordance with Australian laws, regulations and policies should it be necessary. Neither Party is permitted to take administrative or disciplinary action against the other Party's personnel (Article 3).
14. The proposed Treaty provides Australian personnel 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* done at Vienna on 18 April 1961 ([1968] ATS 3) (Article 4(1)). Where a member of the Australian personnel is also accredited as a diplomatic agent of the Australian Embassy to the Netherlands, they will be provided with the full privileges and immunities available to diplomatic agents as set out under the *Vienna Convention on Diplomatic Relations* (Article 4(2)). The treaty requires that upon request of the Netherlands, Australia shall withdraw deployed personnel (Article 4(1)).
15. The proposed Treaty waives claims between the Netherlands and Australia that arise from activities covered by the proposed Treaty, except where such claims arise out of wilful misconduct, recklessness or gross misconduct (Article 5(1)). The Treaty also sets out procedures for dealing with third party claims, apportioning liability on the basis of responsibility (Article 5(2)).
16. The proposed Treaty provides permission for Australian personnel to wear national uniforms (Article 9); requires the appointment of an Australian Senior Representative in the Netherlands to serve as a point of contact with Dutch authorities (Article 10); and regulates the sharing and disclosure of information, including that relating to deployed personnel and the victims of MH17 (Article 12).
17. The proposed Treaty imposes additional obligations on the Netherlands owed to Australia. Article 6 provides that Australian personnel enjoy entry, exit and movement within the Netherlands without delay or hindrance. Article 8 provides that Australian personnel be granted the use of facilities, such as training centres, or be entitled to establish facilities in the Netherlands as mutually determined. Article 11 provides that guard duties related to the security and safety of Australian personnel and assets shall be the responsibility of the Netherlands.

Implementation

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

Costs

21. Article 7 of the proposed Treaty 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. This exemption does not apply to goods purchased in the Netherlands.

22. Australia will otherwise fund activities carried out under the proposed Treaty following regular budgetary processes and rules, which may include the need for supplementary funding to agencies.
23. The Office of Best Practice Regulation has advised that no regulatory costs have been identified for business or the general community in regard to the proposed Treaty.

Future treaty action

24. Article 14 of the proposed 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. Under Article 15 of the proposed Treaty, either Party may terminate the Treaty by giving the other Party six months' notice in writing. Termination of the proposed Treaty would not affect rights and responsibilities regarding disputes, immunities, claims and information arising from actions that occurred during the period the Treaty was in force.

Contact Details

MH17 Section
International Law Branch
Department of Foreign Affairs and Trade

ATTACHMENT ON CONSULTATION

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CONSULTATIONS

26. Noting that the proposed Treaty essentially follows the form of the original MH17 Treaty, which has been prolonged on five previous occasions, no consultation on the proposed Treaty was undertaken. As noted above, no State or Territory action is required in relation to the proposed Treaty.