

**National Interest Analysis [2011] ATNIA 36  
with attachment on consultation**

**Agreement between the European Union and Australia on the  
Processing and Transfer of Passenger Name Record (PNR) Data  
by Air Carriers to the Australian Customs and Border Protection Service**

**done at Brussels on 29 September 2011**

**[2011] ATNIF 21**

# NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

## SUMMARY PAGE

### **Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011**

[2011] ATNIF 21

#### **Nature and timing of proposed treaty action**

1. The treaty action proposed is to bring into force the *Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) data by Air Carriers to the Australian Customs and Border Protection Service*, done at Brussels on 29 September 2011 (“the proposed Agreement”).
2. Pursuant to its Article 29(1), the proposed Agreement will enter into force on the first day of the month after the date on which Australia and the European Union (EU) have exchanged notifications indicating that they have completed their internal procedures to give effect to the proposed Agreement. Subject to the recommendation of the Joint Standing Committee on Treaties (JSCOT), the Australian Government will provide its notification to the EU as soon as practicable after the tabling period is finished. It is likely that the EU will provide its notification to Australia in late 2011.
3. Pursuant to Article 29(2), the proposed Agreement will replace the existing *Agreement between the European Union and Australia on the Processing and Transfer of European Union - Sourced Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs Service*, done at Brussels on 30 June 2008 (the 2008 PNR Agreement, [2008] ATNIF 11). The 2008 PNR Agreement has had provisional application since it was signed and will be superseded upon the entry into force of the proposed Agreement.

#### **Overview and national interest summary**

4. The proposed Agreement provides the legal basis required by the EU under its data protection laws to allow the transfer of PNR data to Australia. PNR data is defined in the proposed Agreement as information processed in the EU by air carriers in relation to passengers’ travel requirements, such as the date of reservation, date of intended travel, name, contact details and payment information. The proposed Agreement is a pre-requisite for enabling airlines that process their PNR data within the jurisdiction of the EU to transfer PNR data to the Australian Customs and Border Protection Service (Customs and Border Protection).
5. Access to PNR data forms an integral component of Customs and Border Protection’s layered border protection measures. Analysis of this and other relevant data plays a critical role in the identification of possible persons of interest in the context of combating terrorism, drug trafficking, identity fraud, people smuggling and other serious transnational crimes.

## **Reasons for Australia to take the proposed treaty action**

### *Importance of Information-Sharing with the EU*

6. Section 64AF of the *Customs Act 1901* (Cth) (the Customs Act) mandates that airlines operating international passenger air services to and from Australia provide Customs and Border Protection, upon request, with access to PNR data for all passengers prior to arrival. As Australia's primary border protection agency, Customs and Border Protection undertakes risk assessment and clearance of all passengers arriving in and departing from Australia. Access to PNR data is vital for Customs and Border Protection to fulfil this border protection role.
7. EU data protection laws and regulations prohibit data transfers from the EU to other countries without a formal agreement in place that contains adequate safeguards for the protection of personal data. An agreement with the EU is therefore necessary to enable PNR data sourced from the EU to be transferred to Australian authorities for the purposes of border protection.
8. Without an agreement between Australia and the EU, airlines with PNR data processed in the EU would be unable to comply with obligations in the Customs Act that require disclosure of PNR data to Customs and Border Protection, without potentially breaching EU law. Denial of access to EU-sourced PNR data would pose an unacceptable risk to Australian national security.
9. The proposed Agreement resolves this conflict by providing an appropriate legal framework and assurances that EU-sourced PNR data transferred to Australia will be processed in accordance with existing Australian data protection laws, striking an appropriate balance between national security and privacy protection considerations.
10. The proposed Agreement applies to all PNR data processed in the EU, regardless of the point of departure of the flight. PNR data processed in the EU currently represents approximately 30% of total passenger arrivals. By July 2012, EU-sourced PNR data is forecast to increase to approximately 42% of total passenger arrivals when Cathay Pacific and Singapore Airlines migrate their passenger data services to a data-processing company located in Germany.
11. The proposed Agreement is an important element in the bilateral relationship and underlines the broad-based cooperation between Australia and the EU.

### *Replacement of the 2008 PNR Agreement*

12. The 2008 PNR Agreement between Australia and the EU has operated provisionally since it was signed on 30 June 2008. Australia notified the EU in December 2008 that it had completed domestic procedures necessary to bring the 2008 PNR Agreement into force. However, the EU was still going through its procedures for entry into force (requiring all 27 member states to formally agree) when the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, done at Lisbon on 13 December 2007 (the Lisbon Treaty), entered into force on 1 December 2009. The Lisbon Treaty gave the European Parliament the power to vote on all EU treaties that had not yet entered into force, including the 2008 PNR Agreement, as well as PNR agreements with the US and Canada.
13. In May 2010, the European Parliament passed a resolution which postponed voting on all the EU's unratified PNR agreements, and called on the European Council to develop mandates for the EU to renegotiate these PNR agreements in accordance with proposed new benchmarks that emphasised privacy protection. Negotiations on a revised PNR agreement with Australia (the proposed Agreement) commenced in January 2011.

## Obligations

14. Chapter I (Articles 1 to 6) of the proposed Agreement sets out the general provisions and purpose of the proposed Agreement. Article 3 sets out the scope of the proposed Agreement and restricts the purposes for which PNR data subject to the proposed Agreement may be used. Article 6 obliges Customs and Border Protection to provide analytical information obtained from PNR data to police or judicial authorities of EU Member States, Europol or Eurojust, either at their request for the purpose of preventing, detecting, investigating or prosecuting a terrorist offence or serious transnational crime, or in accordance with relevant law enforcement or other information-sharing agreements or arrangements between Australia and any member state of the EU, Europol or Eurojust.
15. Chapter II (Articles 7 to 19) of the proposed Agreement places certain obligations on Australia to safeguard the transfer and use of PNR data which is transferred from the EU to Customs and Border Protection. Under this Chapter, Australia will be obliged to:
  - (i) provide adequate protection of personal information contained within PNR data in accordance with the *Privacy Act 1988* (Cth) and relevant national laws (Article 7);
  - (ii) prohibit the processing of sensitive PNR data, such as data revealing racial or ethnic origin, and delete such data (Article 8);
  - (iii) provide secure physical and electronic security measures for PNR data (Article 9);
  - (iv) ensure PNR data is subject to compliance with data protection rules subject to oversight by the Australian Information Commissioner, and audits of access, use and handling of PNR data by Customs and Border Protection (Article 10);
  - (v) provide information to the public on the purpose collection and use of PNR data by Customs and Border Protection (Article 11);
  - (vi) ensure an individual has the right to access, and to seek rectification of, his or her PNR data subject to reasonable legal limitations (Articles 12 and 13) and ensure an individual has the right to administrative and judicial redress should his or her rights under the proposed Agreement be violated (Article 14);
  - (vii) ensure Customs and Border Protection and other government authorities do not take decisions which significantly affect a passenger solely on the basis of automated processing of PNR data (Article 15);
  - (viii) ensure that PNR data is retained for a limit of five and a half years and that access to the data is limited to authorised officers of Customs and Border Protection for the purpose of preventing, detecting, investigating and prosecuting terrorist offences or serious transnational crime. After three years from the date of collection, PNR data must be depersonalised. After expiry of the data retention period, PNR data must be permanently deleted (Article 16);
  - (ix) maintain logs or documentation of all processing of PNR data for the purpose of verification of the lawfulness of the data processing and ensure the integrity and security of the data (Article 17); and

- (x) restrict the disclosure of EU-sourced PNR data to specified Australian Government agencies and authorities of third countries if they fulfil the requisite safeguards in the proposed Agreement (Articles 18 and 19).

16. Chapter III (Articles 20 to 21) of the proposed Agreement sets out the method and frequency of transfer of PNR data to Customs and Border Protection.
17. Chapter IV (Articles 22 to 29) sets out the implementing and final provisions of the proposed Agreement. Article 22 sets out the relationship between the proposed Agreement and existing instruments between Australia and EU Member States. Article 23 obliges the Parties to consult each other in the event of a dispute. Article 24 obliges the Parties to notify each other of any legislative or regulatory changes which may affect the implementation of the proposed Agreement, and obliges the Parties to review the proposed Agreement regularly after its entry into force. Article 26 provides that the proposed Agreement is to remain in force for a period of seven years from the date of its entry into force, and shall be renewed for subsequent periods of seven years unless one of the Parties notifies the other in writing of its intention not to renew.
18. EU obligations reflected in Articles 4 and 5 provide that:
  - (i) air carriers will not be prevented by EU law from complying with Australian law obliging them to provide PNR data to Customs and Border Protection (Article 4); and
  - (ii) compliance with the proposed Agreement by Customs and Border Protection will, under EU law, constitute an adequate level of protection for PNR data (Article 5).

## **Implementation**

19. The safeguards which Australia is required to ensure in respect of EU-sourced PNR data are in accordance with existing Australian law and Customs and Border Protection policies and procedures. Specifically, existing Australian legislation governing the privacy of data, including the *Privacy Act 1988* (Cth), the *Freedom of Information Act 1982* (Cth) and the *Ombudsman Act 1976* (Cth) establish the protections Australia has agreed to provide under the proposed Agreement. Other obligations, such as the limits on disclosure of information by Customs and Border Protection to other agencies, can be implemented through existing legislative mechanisms in the *Customs Administration Act 1985* (Cth) and existing Customs and Border Protection policies and procedures. No new legislation is required to process PNR data in the manner required by the proposed Agreement.
20. Customs and Border Protection has commenced development of a *Passenger Name Record (PNR) Enhanced Risk Assessment* initiative, a further phase of the Enhanced Passenger Assessment and Clearance (EPAC) Program. The EPAC Program goal is to increase the level of certainty about the risk travellers represent as early as possible in the traveller pathway to enable border protection, intelligence and law enforcement agencies to make timely, well-placed, risk-based responses and resource deployment decisions. In essence, this Program is building capacity for the increased collection and storage of airline PNR data for assessment and analysis of persons of interest; sharing of that data with other border, law enforcement and intelligence agencies; and improvements to entity analysis and pattern-matching analysis of data to support the development of risk profiles.

## **Costs**

21. The foreseeable financial costs to Customs and Border Protection arising from the proposed Agreement are costs involved in continuing the EPAC program to enhance existing capability to receive and store PNR data and to share it with other agencies and third countries in certain circumstances. In the 2010/11 Budget, Customs and Border Protection was allocated \$23.7 million and the Department of Immigration and Citizenship was allocated \$1.2m for the *PNR Enhanced Risk Assessment* initiative to undertake this further phase of the EPAC Program.

## **Regulation Impact Statement (RIS)**

22. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

## **Future treaty action**

23. The proposed Agreement does not provide for amendment or for the negotiation of future related instruments. In the absence of specific procedures, the Parties may amend the proposed Agreement by mutual consent at any time in accordance with Article 39 of the *Vienna Convention on the Law of Treaties*. Article 24 of the proposed Agreement obliges the Parties to review the implementation of the proposed Agreement one year after its entry into force and additionally as requested by either Party.
24. Any future amendments to the proposed Agreement would be subject to Australia's domestic treaty-making process.

## **Withdrawal or denunciation**

25. The proposed Agreement is to remain in force for a period of seven years from the date of its entry into force, and shall be renewed for subsequent periods of seven years unless one of the Parties notifies the other Party in writing, at least twelve months in advance, of its intention not to renew (Article 26).
26. Under Article 25, either Party may terminate the proposed Agreement at any time by written notification through diplomatic channels. Termination would take effect 120 days from the date of receipt of such notification. Termination by Australia would be subject to Australia's domestic treaty-making process.
27. Termination or expiration of the proposed Agreement would not affect Australia's obligation to continue to process EU-sourced PNR data obtained under the proposed Agreement by Australian authorities in accordance with the data protection standards set out in the proposed Agreement (Article 26.3).

## **Contact details**

Executive Office  
Passengers Division  
Australian Customs and Border Protection Service

## **ATTACHMENT ON CONSULTATION**

### **Agreement between the European Union and Australia on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the Australian Customs and Border Protection Service done at Brussels on 29 September 2011 [2011] ATNIF 21**

#### **CONSULTATION**

28. The States and Territories have been notified of the proposed Agreement through the Standing Committee on Treaties (SCOT) biannual schedule of treaty actions under negotiation, consideration and review. Negotiations were listed on the SCOT schedule from 2004 until 2008 and again in 2011. No comments have been received to date. An update on negotiations was provided to SCOT on 17 May 2011. The proposed Agreement is not likely to have an impact on the States or Territories and does not require State or Territory cooperation for its domestic implementation.
29. The Department of Foreign Affairs and Trade, the Department of Prime Minister and Cabinet, the Attorney-General's Department, the Department of Immigration and Citizenship, the Office of the Australian Information Commissioner, the Australian Security and Intelligence Organisation and the Department of Infrastructure and Transport were consulted in the negotiation and drafting of the proposed Agreement.