

**Documents tabled on 26 August 2008:**

**National Interest Analysis [2008] ATNIA 23  
with attachment on consultation**

**Agreement between Australia and the European Union 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, 30 June 2008 ([2008] ATNIF 11 )**

**NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY  
SUMMARY PAGE**

**Agreement between Australia and the European Union 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, 30 June 2008, ([2008] ATNIF 11)**

**Nature and timing of proposed treaty action**

1. Article 15(1) of the proposed Agreement provides that it shall enter into force on the first day of the month after the date on which Australia and the EU have exchanged notifications indicating that they have completed their internal procedures.
2. Subject to Government consideration of the recommendation of the Joint Standing Committee on Treaties (JSCOT), it is proposed that notification by Australia will occur as soon as practicable after the tabling period and reporting by JSCOT. Notification by the EU is likely to take a considerable period of time, as the internal procedures of all 27 Member States of the EU will need to be completed.
3. The proposed Agreement was signed on 30 June 2008 in Brussels, and pursuant to Article 15(2) applies provisionally as of the date of signature. The Minister for Home Affairs wrote to the Chair of JSCOT on 4 June 2008, prior to the signing of the Agreement, setting out the Government's intention that the Agreement have provisional application from the date of signature and the reasons for this decision.

4. As this letter indicated, provisional application of the Agreement was a requirement of the EU, which needed to ensure there was a legal basis for allowing access by Australian authorities to personal data located within the EU. Another contributing factor was that the Agreement is not likely to formally enter into force for some time, due to the length of time it will take for all EU Member States to complete their internal procedures. There were also significant border security imperatives for Australia being allowed access to EU-sourced PNR data before August 2008 when Qantas migrates its PNR management to a company operating in Germany. On this basis, the parties agreed to give provisional effect to the legally binding obligations in the Agreement, consistent with Article 25 of the *Vienna Convention on the Law of Treaties* [1974] ATS 2. However, the Agreement provides that it will only formally enter into force following reciprocal notification of completion of internal requirements. The Agreement is therefore subject to review of Parliament and JSCOT before formally entering into force.

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**Overview and national interest summary**

5. The proposed treaty action will allow the Agreement to formally enter into force. Concluding the Agreement provides the legal basis the EU requires under its data protection laws to allow the transfer of any personal data to countries outside the EU. The Agreement is therefore 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 Service (Customs).
6. Access to PNR data forms an integral component of Customs 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 counter-terrorism, drug trafficking, identity fraud, people smuggling and other serious crimes.

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

7. 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, upon request, with access to PNR data for all passengers prior to arrival. As Australia's primary border protection agency, Customs undertakes risk assessment and clearance of all passengers arriving and departing Australia, and access to PNR data is vital for Customs to fulfil this border protection role.

8. 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 protection of personal EU data. As a result, concluding the Agreement with the EU is necessary to enable PNR data sourced from the EU to be transferred to Australian authorities.

9. EU-sourced PNR data currently represents approximately 5% of total passenger arrivals. However on the migration in August this year of Qantas PNR management to a company operating in Germany, this data will represent approximately 35% of incoming passengers.

10. Without an agreement between Australia and the EU, Customs would likely be denied access to EU-sourced PNR data. This would pose an unacceptable risk to the Australia border.

11. Airlines with PNR data processed in the EU would be unable to comply with obligations in the Customs Act requiring disclosure of PNR data to Customs, without potentially breaching EU law. The 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.

12. The Agreement is an important step in the bilateral relationship and signifies the first concrete step in a new era of broad-based cooperation between Australia and the EU.

### **Obligations**

13. The Agreement places certain obligations on Australia to safeguard EU-sourced PNR data which is transferred from the EU to Customs. Under Article 2, Australia is to ensure that Customs processes EU-sourced PNR data according to the safeguards set out in the Agreement. These safeguards include:

- (i) a restriction on the purposes for which EU-sourced PNR data and personal information derived from it can be used (Article 5(1));
- (ii) protection of personal data of individuals contained within EU-sourced PNR data will receive protection under Australian privacy and Freedom of Information laws and other relevant Australian legislation (for example, Article 7 and paragraphs 16 to 24 and 26 of the Annex);

- (iii) restrictions on the disclosure of EU-sourced PNR data among Australian Government agencies and to third countries (paragraphs 2 to 8 of the Annex);
- (iv) a requirement to filter out sensitive EU-sourced PNR data such as data revealing racial or ethnic origin (paragraph 10 of the Annex);
- (v) a requirement to provide information regarding Customs' processing of PNR data to the public including travellers (Article 8);
- (vi) a limit of three and a half years for retaining EU-sourced PNR data, with a further 2 year period under which anonymised EU-sourced PNR data can be retained, or non-anonymised EU-sourced PNR data can be retained in an archive (paragraphs 12 and 13 of the Annex);
- (vii) a comprehensive range of physical and electronic security measures (paragraph 25 of the Annex); and
- (viii) an obligation to advise the EU on the passage of any Australian legislation which directly affects the safeguards in the Agreement (Article 6).

14. In return for these safeguards, the EU must ensure that air carriers, which have reservation systems and PNR data processed in the territory of its Member States, are not prevented from complying with Australian laws regarding the transfer of EU-sourced PNR data to Customs (Article 2) and compliance by Customs will, under EU law, constitute an adequate level of protection for EU-sourced PNR data (Article 3).

15. Under Article 4(1), Customs is also obliged to amend its existing PNR system, which currently allows live read-only access to PNR data, to receive EU-sourced PNR data 'pushed' by airlines by 30 June 2010. In effect the new Customs arrangements will provide for both 'push' and 'pull' data, with push only being used for EU-sourced PNR data after the end of the transition period.

## Implementation

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16. The safeguards which Australia is required to ensure in respect of EU-sourced PNR data are in accordance with existing Australian law and Customs practice and policies. 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) provide the protections which Australia has agreed to provide under the Agreement. Other obligations, such as the limits on disclosure of information by Customs to other agencies, can be implemented through existing legislative mechanisms in the *Customs Administration Act 1985* (Cth) and existing Customs policies and procedures. No new legislation is required to process EU-sourced PNR data in the manner required by the Agreement.

17. Customs has already commenced work to add the 'push' data capability to its existing PNR system, and to provide for storage, analysis and sharing of the pushed PNR data. This work will be completed by the end of the transition period provided for in the Agreement.

## Costs

18. Under the existing PNR system, which will continue to function for all non-EU-sourced PNR airlines, Customs ‘pulls’ data through live read-only access to airline’s PNR systems. Customs pays for connection and associated costs.

19. The only foreseeable financial costs to Customs, arising out of the Agreement, will be the costs involved in configuring the existing capability to receive ‘pushed’ PNR data from the EU, and to store both pushed and pulled PNR data during the transition period, and share it with other agencies and third countries under certain circumstances.

20. With the addition of pushed data, the capabilities of the current Customs PNR system will be fully optimised. In particular the storage and sharing of PNR data will enable more detailed data analysis, trend analysis and longitudinal studies. This in turn will provide refinement and enhancement of risk indicators leading to more effective profile development for the purposes of identifying persons of interest for a range of relevant, serious crimes.

## Regulation Impact Statement (RIS)

21. The Office of Best Practice Regulation, Productivity Commission, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

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## Future treaty action

22. Under Article 11, the Agreement may be amended by agreement in writing between Australia and the EU. Any such amendment would only enter into force after the parties had completed any necessary internal requirements. This would include completing Australia’s domestic treaty process, including tabling and consideration by JSCOT, in respect of any proposed future treaty action amending the Agreement.

## Withdrawal or denunciation

23. Under Article 13, either party may terminate the Agreement at any time by notification through diplomatic channels. Termination would take effect ninety days from the date of such notification. Termination by Australia would be subject to Australia’s domestic treaty process.

24. Termination does not affect Australia’s obligation to continue to process EU-sourced PNR data held by Australian authorities in accordance with the data protection standards set out in the Agreement.

## Contact details

Passenger Operations Branch  
Passengers Division  
Australian Customs Service

ATTACHMENT ON CONSULTATION

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**CONSULTATION**

25. The States and Territories have been notified of the proposed Agreement through the Standing Committee on Treaties (SCOT) Schedule of Treaty Action. Negotiations were listed on the SCOT Schedule of Treaty Action from 2004 until most recently on 12 February 2008, and no comment has been received to date. The Agreement does not require State or Territory cooperation for its domestic implementation and is not likely to have an impact on the States or Territories.

26. The Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, the Attorney-General's Department, the Department of Immigration and Citizenship, the Office of the Privacy Commissioner, the Australian Security and Intelligence Organisation and the Department of Infrastructure, Transport, Regional Development and Local Government were all consulted in the negotiation and drafting of the Agreement. All agencies cleared the text, and it was subsequently endorsed by all relevant Ministers. The text of the Agreement was agreed by the Executive Council on 24 June 2008.

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