

# Report 139

## **Treaties tabled on 11 December 2013, referred on 15 January and tabled on 11 February 2014**

Air Services Agreement between the Government of Australia and the Government of the Republic of Serbia (Belgrade, 14 May 2013)

Agreement between the Government of Australia and the Government of the Republic of Vanuatu relating to Air Services (Port Vila, 2 July 2013)

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 22 November 2009)

Protocol to the 2007 World Wine Trade Group Agreement on requirements for Wine Labelling concerning Alcohol Tolerance, Vintage, Variety, and Wine Regions (Brussels, 22 March 2013)

Agreement between the Government of Australia and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Exchange of Information with respect to Taxes (Bandar Seri Begawan, 6 August 2013)

Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters (Mexico City, 26 September 2013)

Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services (Zagreb, 4 September 2013)

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ISBN 978-1-74366-164-2 (Printed version)

ISBN 978-1-74366-163-5 (HTML version)

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# Contents

Membership of the Committee .....	vi
Resolution of Appointment .....	viii
List of abbreviations .....	ix
List of recommendations .....	xi
<b>1 Introduction</b>	
Purpose of the report.....	1
Conduct of the Committee's review .....	2
<b>2 Air Service Agreements with Serbia and Vanuatu</b>	
Introduction .....	5
Overview and national interest summary .....	6
Reasons for Australia to take the proposed treaty action.....	7
Obligations .....	7
Aviation safety.....	10
Ramp inspections.....	10
Deviation from the International Civil Aviation Organisation standards .....	10
Fuel policy.....	12
Implementation.....	14
Costs.....	14
Conclusion .....	15

---

<b>3</b>	<b>Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services</b>	
	Introduction .....	17
	Overview and national interest summary .....	18
	Reasons for Australia to take the proposed treaty action.....	18
	Obligations .....	19
	Implementation.....	22
	Costs .....	22
	Conclusion .....	22
<b>4</b>	<b>Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing</b>	
	Introduction .....	23
	Background .....	24
	Overview and national interest summary .....	25
	Reasons for Australia to take the proposed treaty action.....	26
	Obligations .....	28
	Entry to, and use of, ports .....	29
	Port inspections.....	30
	Flag state obligations .....	31
	Information-sharing mechanisms .....	31
	Implementation.....	32
	Costs .....	32
	Conclusion .....	33
<b>5</b>	<b>Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety, and Wine Regions</b>	
	Introduction .....	35
	Overview and national interest summary .....	36
	Reasons for Australia to take the proposed treaty action.....	37
	Obligations .....	38
	Implementation.....	39
	Costs .....	40
	Conclusion .....	40

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<b>6 Two Tax Information Exchange Agreements</b>	
Introduction .....	43
Background .....	43
Overview and national interest summary .....	45
Obligations .....	46
Implementation.....	47
Costs .....	48
Convention on Mutual Administrative Assistance in Tax Matters.....	49
Conclusion .....	50
Appendix A – Submissions .....	51
Appendix B – Witnesses.....	53



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## Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.





## List of abbreviations

AFMA	Australian Fisheries Management Authority
AFZ	Australian Fishing Zone
ATO	Australian Taxation Office
ATSB	Australian Transport Safety Board
AUSTRAC	Australian Transaction Reports and Analysis Centre
BRIICS	Brazil, Russia, India, Indonesia, China and South Africa
CASA	Civil Aviation Safety Authority
DFAT	Department of Foreign Affairs and Trade
EU	European Union
FAO	Food and Agriculture Organization
ICAO	International Civil Aviation Organisation
IUU fishing	Illegal, Unreported and Unregulated fishing
MOU	Memoranda of Understanding
NIA	National Interest Analysis
OECD	Organisation for Economic Cooperation and Development
RFMO	Regional Fisheries Management Organisation

RIS	Regulation Impact Statement
RPOA	<i>Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated Fishing in South East Asia</i>
WWTG	World Wine Trade Group



## List of recommendations

### **2 Air Service Agreements with Serbia and Vanuatu**

#### **Recommendation 1**

The Committee supports the *Air Services Agreement between the Government of Australia and the Government of the Republic of Serbia* and the *Agreement between the Government of Australia and the Government of the Republic of Vanuatu relating to Air Services*, and recommends that binding treaty action be taken.

### **3 Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services**

#### **Recommendation 2**

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services*, and recommends that binding treaty action be taken.

### **4 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing**

#### **Recommendation 3**

The Committee supports the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* and recommends that binding treaty action be taken.

**5 Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety, and Wine Regions**

**Recommendation 4**

The Committee supports the *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety, and Wine Region* and recommends that binding treaty action be taken.

**6 Two Tax Information Exchange Agreements**

**Recommendation 5**

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* and the *Agreement between the Government of Australia and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Exchange of Information with respect to Taxes*, and recommends that binding treaty action be taken.

## Introduction

### Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty actions tabled on 11 December 2013, referred on 15 January 2014 and tabled on 11 February 2014:
- ⇒ the *Air Services Agreement between the Government of Australia and the Government of the Republic of Serbia* (Belgrade, 14 May 2013);
  - ⇒ the *Agreement between the Government of Australia and the Government of Vanuatu relating to Air Services* (Port Vila, 2 July 2013);
  - ⇒ the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome, 22 November 2009);
  - ⇒ the *Protocol to the 2007 World Wine Trade Group Agreement on requirements for Wine Labelling concerning Alcohol Tolerance, Vintage, Variety, and Wine Regions* (Brussels, 22 March 2013);
  - ⇒ the *Agreement between the Government of Australia and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Exchange of Information with respect to Taxes* (Bandar Seri Begawan, 6 August 2013);
  - ⇒ the *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* (Mexico City, 26 September 2013); and
  - ⇒ the *Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services* (Zagreb, 4 September 2013).
- 1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.

- 1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.
- 1.4 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.5 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The treaties considered in this report do not require Regulation Impact Statements.
- 1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.7 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:
  - [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Treaties\\_tabled\\_11\\_December\\_2013/Terms\\_of\\_Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaties_tabled_11_December_2013/Terms_of_Reference);
  - [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Treaties\\_referred\\_on\\_15\\_January\\_2014/Terms\\_of\\_Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaties_referred_on_15_January_2014/Terms_of_Reference);
  - [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Treaties\\_tabled\\_on\\_11\\_February\\_2014/Terms\\_of\\_Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaties_tabled_on_11_February_2014/Terms_of_Reference).

## **Conduct of the Committee's review**

- 1.8 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaties were requested by 31 January 2014, 3 February 2014 and 14 March 2014.
- 1.9 Invitations were made to all State Premiers, Territory Chief Ministers and to the Presiding Officers of each parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.

- 1.10 The Committee held public hearings into these treaties in Canberra on Monday 10 February 2014, Monday 17 March 2014 and Monday 24 March 2014.
- 1.11 The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaties tabling dates, being:
- 11 and 12 December 2013;
  - 15 January 2014; and
  - 11 February 2014.
- 1.12 A list of submission received and their authors is at Appendix A.
- 1.13 A list of witnesses who appeared at the public hearings is at Appendix B.





# Air Service Agreements with Serbia and Vanuatu

## Introduction

- 2.1 This Chapter discusses two bilateral Air Services Agreements:
- the *Air Services Agreement between the Government of Australia and the Government of the Republic of Serbia* (the Serbia Agreement);<sup>1</sup> and
  - the *Agreement between the Government of Australia and the Government of the Republic of Vanuatu relating to Air Services* (the Vanuatu Agreement).<sup>2</sup>
- 2.2 Air Service Agreements permit the operation and development of international air services between countries. Under the *Convention on International Civil Aviation* of 1944 (the Chicago Convention), which provides the overarching framework for international civil aviation, international airlines cannot operate between two countries without those countries having negotiated a bilateral Air Services Agreement.<sup>3</sup>
- 2.3 The Air Service Agreements under consideration here are based on an Australian model Air Services Agreement.<sup>4</sup> The Australian model Air Services Agreement was developed by a predecessor of the Commonwealth Department of Infrastructure and Regional Development

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1 National Interest Analysis [2013] ATNIA 15 *Air Services Agreement between the Government of Australia and the Government of the Republic of Serbia done at Belgrade, 14 May 2013* [2013] ATNIF 13 (hereafter referred to as the 'Serbia NIA'), para 1.

2 National Interest Analysis [2013] ATNIA 20 *Agreement between the Government of Australia and the Government of Vanuatu relating to Air Services done at Port Vila, 2 July 2013*, [2013]ATNIF 20 (hereafter referred to as the 'Vanuatu NIA'), para 1.

3 Joint Standing Committee on Treaties, *Report 133*, Tabled 27 May 2013, p. 6.

4 See for example Serbia NIA, para 10.

- in consultation with the aviation industry and other Government Agencies.<sup>5</sup>
- 2.4 Treaty level Air Services Agreements are supplemented by arrangements of less than treaty status between aeronautical authorities. These arrangements relate to the scope of airlines' operations under an Agreement.<sup>6</sup>
- 2.5 As is standard practice with Air Service Agreements made by Australia, the arrangements contained in these proposed Agreements are being applied through non-legally binding Memoranda of Understanding (MOU) until the proposed Agreements are given force. This means that the arrangements in the Agreements have already been in place for some time.<sup>7</sup>
- 2.6 The two Agreements are being considered together because, with some minor exceptions, the Agreements contain the same provisions.
- 2.7 The proposed Serbian Agreement replaces an earlier Agreement with the Republic of Yugoslavia that was terminated following the breakup of Yugoslavia.<sup>8</sup> The preceding MOU was signed in September 2011, and applied the provisions of the proposed Agreement on an administrative, non-legally binding basis until the Agreement enters into force.<sup>9</sup>
- 2.8 The proposed Vanuatu Agreement replaces a 1993 Agreement.<sup>10</sup>

## Overview and national interest summary

- 2.9 The objective of the proposed Air Services Agreements is to provide a binding legal framework to support the operation of air services between Australia and Serbia and Australia and Vanuatu. According to the National Interest Analyses (NIAs), they will facilitate trade and tourism between the Parties and will provide greater opportunities for airlines to develop expanded air travel options for consumers.<sup>11</sup>

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5 Mr Gilon Smith, Acting Director, Air Services Negotiation Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Regional Development, *Committee Hansard*, 10 February 2014, p. 1.

6 Mr Smith, Department of Infrastructure and Regional Development, *Committee Hansard*, 10 February 2014, p. 1.

7 Joint Standing Committee on Treaties, *Report 133*, Tabled 27 May 2013, p. 6.

8 Serbia NIA, para 3.

9 Serbia NIA, para 4.

10 Serbia NIA, para 3.

11 Serbia NIA, para 6 and Vanuatu NIA, para 5.

## Reasons for Australia to take the proposed treaty action

- 2.10 Both proposed Agreements grant access for Australian airlines to the respective aviation markets of Serbia and Vanuatu and grant access to Australia for Serbian and Vanuatu based airlines. The proposed Agreements will enable carriers to provide services between any point in Australia and any point in Serbia or Vanuatu, based on capacity levels decided from time to time between the aeronautical authorities of the Parties.<sup>12</sup>
- 2.11 According to the NIAs, Australian travellers and Australian businesses, particularly in the tourism and export industries, could potentially benefit from the proposed Agreements through the opening of increased commercial opportunities.<sup>13</sup>

## Obligations

- 2.12 The proposed Agreements allow the ‘designated airlines’<sup>14</sup> of each Party to operate scheduled air services carrying passengers, baggage, cargo and mail between the Parties on specified routes in accordance with the provisions of the Agreement. To facilitate these services, the proposed Agreements also include reciprocal provisions on a range of aviation-related matters such as safety, security, competition laws, customs regulation and the commercial aspects of airline operations, including the ability to establish offices in the territory of each Party and to sell fares to the public.<sup>15</sup>
- 2.13 The proposed Agreements contain a number of similar provisions. In relation to airline traffic between the Parties:
- the designated airlines of each Party have the right to fly across each Party’s territory without landing and to make stops in its territory for non-traffic reasons (such as refuelling);
  - designated airlines have the right to operate on the routes specified for the purpose of taking on board and discharging passengers, cargo and mail;

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12 Serbia NIA, para 7 and Vanuatu NIA, para 6.

13 Serbia NIA, para 8 and Vanuatu NIA, para 7.

14 The airlines authorised to operate under an Agreement by Parties to the Agreement.

15 Serbia NIA, para 10.

- designated airlines are precluded from carrying purely domestic traffic within the territory of the other Party;<sup>16</sup>
  - a Party's designated airlines can be required to provide statistics related to the traffic carried on services performed under the proposed Agreement;<sup>17</sup> and
  - both Parties are to ensure that the designated airlines of each Party receive fair and equal opportunity to operate services in accordance with the proposed Agreement.<sup>18</sup>
- 2.14 Each Party can designate any number of airlines to operate the agreed services. Either Party may refuse authorisation of an airline's operations or impose conditions as necessary if the airline fails to meet, or operate in accordance with, the conditions prescribed in the proposed Agreement.<sup>19</sup>
- 2.15 The aeronautical authorities of either Party may revoke authorisation of an airline's operations or suspend an airline's rights if the airline fails to operate in accordance with the proposed Agreement. Circumstances under which an airline might have its authorisation revoked or its operations suspended include changes to its principal place of business, its establishment, ownership or control.<sup>20</sup>
- 2.16 Each Party's domestic laws and regulations concerning aviation and competition apply to the designated airlines while their aircraft are in the territory of that Party.<sup>21</sup>
- 2.17 In addition, each Party must ensure the security of civil aviation against acts of unlawful interference. In particular, each Party must comply with multilateral conventions on aviation security.<sup>22</sup>
- 2.18 Certificates of airworthiness, certificates of competency and licences issued or rendered valid by a Party must be recognised by the other Party, provided the standards under which such documents were issued conforms to the standards established by the International Civil Aviation Organisation (ICAO).<sup>23</sup>

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16 Serbia NIA, paras 11 and 12; and Vanuatu NIA, paras 10 and 11.

17 Serbia NIA, para 19, and Vanuatu NIA, para 17.

18 Serbia NIA, para 22 and Vanuatu NIA, para 16.

19 Serbia NIA, para 12.

20 Serbia NIA, para 13.

21 Serbia NIA, paras 14 and 21; and Vanuatu NIA, paras 12 and 23.

22 Serbia NIA, para 17 and Vanuatu NIA, para 15.

23 Serbia NIA, para 15 and Vanuatu NIA, para 13.

- 2.19 The ICAO was formed under the Chicago Convention to develop international standards and recommended practices which are used by States when negotiating bilateral air services agreements.<sup>24</sup>
- 2.20 In relation to the operation of designated airlines, the proposed Agreements:
- provide a framework for airlines of one Party to conduct business in the territory of the other Party;<sup>25</sup>
  - exempt from import restrictions, customs duties, excise taxes and similar fees and charges the equipment and stores used in the operation of the agreed services;<sup>26</sup> and
  - permits the designated airlines of each Party to use any surface transport within the territories of each Party or third countries to provide connections to flights.<sup>27</sup>
- 2.21 The proposed Agreements also provide for consultation and dispute resolution between the Parties on safety standards;<sup>28</sup> the implementation, interpretation, application or amendment of the Agreements;<sup>29</sup> and the settlement of disputes that do not relate to the domestic competition laws of the Parties.<sup>30</sup>
- 2.22 To date, Australia has not initiated a consultation process with either Serbia or Vanuatu in relation to air services.<sup>31</sup>
- 2.23 Each proposed Agreement contains an Annex that lists route schedules that may be operated by designated airlines, as well as operational provisions.<sup>32</sup>

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24 International Civil Aviation Organisation, 'About ICAO,' <<http://www.icao.int/about-icao/Pages/default.aspx>>, accessed 26 February 2014.

25 Serbia NIA, para 23 and Vanuatu NIA, para 21.

26 Serbia NIA, para 20 and Vanuatu NIA, para 18.

27 Serbia NIA, para 24 and Vanuatu NIA, para 22.

28 Serbia NIA, para 16 and Vanuatu NIA, para 14.

29 Serbia NIA, para 26 and Vanuatu NIA, para 24.

30 Serbia NIA, para 28 and Vanuatu NIA, para 25.

31 Department of Infrastructure and Regional Development, *Submission 1*, p. 2.

32 Serbia NIA, para 29.

## Aviation safety

### Ramp inspections

- 2.24 Articles 6 of the Vanuatu Agreement and 7 of the Serbia Agreement detail the air safety provisions that apply to designated airlines from either Party. Amongst other things, the Articles will permit the Parties to these Agreements to conduct, within their own territories, safety examinations (called 'ramp inspections') on aircraft owned, operated or leased by the airlines.<sup>33</sup>
- 2.25 In other words, the Civil Aviation Safety Authority (CASA) will be entitled to undertake ramp inspections of aircraft from Vanuatu and Serbia when those aircraft are on the ground in Australia. According to the relevant Articles:
- The purpose of the examination is to check both the validity of the aircraft documents and those of its crew and the apparent condition of the aircraft and its equipment ...<sup>34</sup>
- 2.26 If a ramp inspection identifies that the aircraft or the operation of the aircraft does not meet the required safety standard, or that the maintenance or administration of safety standards has been deficient in relation to the aircraft, the operation of the inspected aircraft and possibly also the operation of other aircraft by the same airline will be able to be suspended.<sup>35</sup>

### Deviation from the International Civil Aviation Organisation standards

- 2.27 Article 38 of the Chicago Convention requires a Party to notify the ICAO when it finds it impractical to comply in all respects with international standards and practices, and when it is unable to change its standards and practices to comply with standards and practices revised by the ICAO.<sup>36</sup>
- 2.28 Both Serbia and Vanuatu have formally notified the ICAO of differences with the ICAO standards. The Department of Infrastructure and Regional Development advised that Serbia has lodged 183 substantive differences and Vanuatu has lodged 82 substantive differences with the ICAO.<sup>37</sup>
- 2.29 According to the Department, substantive differences can involve a State being deficient in an ICAO Standard, meeting an ICAO Standard using a

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33 See for example the Vanuatu Air Services Agreement, Article 6.

34 Vanuatu Air Services Agreement, Article 6.

35 See for example the Serbia Air Services Agreement, Article 7.

36 *Convention on International Civil Aviation* (Chicago, 1944), 2006, Ninth Edition, Article 38.

37 Department of Infrastructure and Regional Development, *Submission 1*, p. 2.

method different to that stated in the Standard, or exceeding an ICAO Standard.<sup>38</sup>

- 2.30 The Department analysed the substantive differences notified by Serbia and Vanuatu and advised the Committee that, in the case of Serbia, 84 of the substantive differences involved exceeding the ICAO Standards, 58 involved meeting the relevant Standard by another means, and 41 involved being deficient in relation to the relevant Standard.<sup>39</sup>
- 2.31 Vanuatu exceeded two of the ICAO Standards, complied with 71 Standards by a different method, and was deficient in relation to nine of the Standards.<sup>40</sup>
- 2.32 The Department noted:
- The majority of differences notified by most countries are those where the ICAO standards and recommended practice is not applicable. An example for both Australia and Vanuatu would be those standards relating to snow-clearing activities at airports.<sup>41</sup>
- 2.33 In a later submission, the Department noted that differences to ICAO Standards were not considered when Air Services Agreements were being negotiated. The Department advised that:
- Air services arrangements provide an economic framework in which airlines can consider serving a market. Differences lodged by States, among other more pertinent kinds of safety-related information, may be taken into account by the Civil Aviation Safety Authority in the assessment of applications for the operation of foreign aircraft into and out of Australia.<sup>42</sup>
- 2.34 The Committee considers that, while the Agreements are principally about opening markets, the preamble to each Agreement includes the following statement:
- ... Desiring to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardise the safety of persons or property, adversely affect the operation of air transport, and undermine public confidence in the safety of civil aviation; ...<sup>43</sup>

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38 Department of Infrastructure and Regional Development, *Submission 1.1*, p. 1.

39 Department of Infrastructure and Regional Development, *Submission 1.1*, p. 1.

40 Department of Infrastructure and Regional Development, *Submission 1.1*, p. 1.

41 Department of Infrastructure and Regional Development, *Submission 1.1*, p. 2.

42 Department of Infrastructure and Regional Development, *Submission 1.2*, p. 1.

43 See for example the Serbia Air Services Agreement, preamble.

- 2.35 The Committee also notes that the Agreements themselves contain a significant number of Articles that either directly or indirectly relate to safety.
- 2.36 The Committee considers that it would be imprudent if the Department's negotiators did not at least make themselves aware of the differences notified to the ICAO by States with which they are negotiating. The Committee suggests that, as part of the negotiation process of future Air Services Agreements, the Department's negotiators consult with CASA in order to determine if any of the differences notified by the State with which they are negotiating may pose a safety risk for Australian travellers.

## Fuel policy

- 2.37 In November 2009, a charter aircraft flying from Samoa to Norfolk Island was forced to ditch off Norfolk Island as a result of running out of fuel after being unable to land because of poor weather conditions.<sup>44</sup>
- 2.38 The Australian Transport Safety Board (ATSB) found, amongst other things, that the operator of the aircraft had managed fuel planning and risk in a manner consistent with the required regulations, but that the regulations governing fuel planning to remote islands were too general and risked inconsistent decisions on in-flight fuel management and diversion.<sup>45</sup>
- 2.39 During the investigation, CASA undertook a review of the relevant regulations and proposed the following changes:
- designating Cocos (Keeling) Island as a 'remote island';
  - removing the provision that allowed an operator not to carry fuel for diversion to an alternate airport;
  - amending the definition of 'minimum safe fuel' to require the calculation of fuel for diversion to an alternate airport in the event of a loss of pressurisation coupled with the failure of an engine;
  - requiring a pilot flying to a remote island to nominate an alternate airport in the event of a diversion;
  - extending the requirement to carry fuel for diversion to an alternate airport on flights to remote islands to all passenger carrying and regular public transport flights; and

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44 Australian Transport Safety Board (ATSB), *ATSB Transport Safety Report, Aviation Occurrence Investigation AO-2009-72*, pp. 10-11.

45 ATSB, *ATSB Transport Safety Report, Aviation Occurrence Investigation AO-2009-72*, p. 43.



- allowing for CASA to permit an operator not to comply with these regulations subject to conditions that would not adversely affect safety.<sup>46</sup>
- 2.40 The Norfolk Island incident was followed by another low fuel incident in June 2013, when two passenger aircraft bound for Adelaide were diverted to Mildura due to poor weather in Adelaide. Poor weather in Mildura, which had not been forecast, combined with the aircraft having insufficient fuel to divert to another airport, caused the pilots of the aircraft to land at Mildura under conditions that breached Civil Aviation Regulations.<sup>47</sup>
- 2.41 The ATSB investigation of this incident was not complete at the time this Report was drafted.
- 2.42 Further, in 2012, the ICAO amended the Annex to the Chicago Convention relevant to in-flight fuel management (Annex 6 Part I) to improve: the definition of a minimum fuel emergency; and procedures for protecting final fuel reserves. In particular, the operator and pilot-in-command of an aircraft are required to continually ensure that the amount of usable fuel remaining on board is not less than the fuel needed to proceed to an airport where a safe landing can be made with the planned final reserve fuel remaining upon landing.<sup>48</sup>
- 2.43 To deal with the issues arising from these events, CASA has initiated a project to implement new regulations relating to fuel management. The project proposes to:
- in light of the ICAO amendments, amend regulations on fuel and operational requirements, including provisions for diversion to an alternate airport for flights to isolated airports;
  - expand the relevant regulations to provide guidance to pilots on when and under what circumstances to consider a diversion;
  - change the regulations on fuel planning, in-flight fuel management, and the selection of alternate airport to include the methods by which pilots and operators calculate fuel required and fuel on board;

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46 Civil Aviation Safety Authority (CASA), *Notice of Proposed Rule Making, Carriage of Fuel on Flights to a Remote Island, July 2010*, p. 10.

47 ATSB, *ATSB Transport Safety Report, Aviation Occurrence Investigation, Weather related operational event involving Boeing 737s VH-YIR and VH-VYK, Mildura Airport, Victoria on 18 June 2013 AO-2013-100, Interim Report*, pp. 4–8.

48 International Federation of Airline Pilots' Association, 'Air Traffic Services Briefing Leaflet: ICAO Changes for Minimum and Emergency Fuel,' published 10 October 2012 <<http://www.ifalpa.org/downloads/Level1/Briefing%20Leaflets/Air%20Traffic%20Services/13ATSBL01%20-%20ICAO%20changes%20for%20minimum%20and%20emergency%20fuel.pdf>>, accessed 7 March 2014.

- specify that the pilot-in-command or the operator, must take reasonable steps to ensure sufficient fuel and oil will be carried to undertake and continue the flight in safety;
  - require consideration of a 'critical fuel scenario' taking into account an aeroplane system failure or malfunction which could adversely affect flight safety;
  - publish internal and external educational material along with conducting briefings where necessary.<sup>49</sup>
- 2.44 According to the CASA website, this project is not yet complete.<sup>50</sup> The Committee notes that the regulatory changes proposed as part of this Project have a direct bearing on flights between Australia and Vanuatu.
- 2.45 The Committee is of the view that the establishment or renewal of Air Service agreements should be a trigger for CASA to undertake a due-diligence review of the status of compliance (including filing of differences with ICAO) with new or revised safety-critical regulations such as those outlined in para 2.42. This review should be completed as part of CASA's input to the evaluation of new or renewed Air Services Agreements and the documented outcomes included in the Department's evidence to the Joint Standing Committee on Treaties.

## Implementation

- 2.46 The proposed Agreements will be implemented through existing legislation, including the *Air Navigation Act 1920* and the *Civil Aviation Act 1988*. The *International Air Services Commission Act 1992* provides for the allocation of capacity to Australian airlines. No amendments to these Acts or any other legislation are required for the implementation of the proposed Agreements.<sup>51</sup>

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49 CASA, *Project OS 09/13 Fuel and Alternate Requirements*, <  
[http://www.casa.gov.au/scripts/nc.dll?WCMS:PWA::pc=PC\\_93397](http://www.casa.gov.au/scripts/nc.dll?WCMS:PWA::pc=PC_93397)>, accessed 7 March 2014.

50 The project is listed under 'Active Projects'.

51 Serbia NIA, para 30 and Vanuatu NIA, para 28.

## Costs

- 2.47 No direct financial costs to the Australian Government are anticipated in the implementation of these proposed Agreements. There are no financial implications for State or Territory Governments.<sup>52</sup>

## Conclusion

- 2.48 Noting the Committee's statements in relation to differences notified by the bilateral signatories to ICAO Standards, and in relation to fuel management on passenger flights to isolated airports, the Committee supports the Air Services Agreements with Serbia and Vanuatu.

### Recommendation 1

**The Committee supports the *Air Services Agreement between the Government of Australia and the Government of the Republic of Serbia* and the *Agreement between the Government of Australia and the Government of the Republic of Vanuatu relating to Air Services*, and recommends that binding treaty action be taken.**

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<sup>52</sup> Serbia NIA, para 31 and Vanuatu NIA, para 29.



# Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services

## Introduction

- 3.1 This Chapter discusses the bilateral *Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services*.<sup>1</sup>
- 3.2 Air Services Agreements permit the operation and development of international air services between countries. Under the 1944 *Convention on International Civil Aviation* (the Chicago Convention), which provides the overarching framework for international civil aviation, international airlines cannot operate between two countries without those countries having negotiated a bilateral Air Services Agreement.<sup>2</sup>
- 3.3 The Air Services Agreement under consideration here is based on an Australian model Air Services Agreement.<sup>3</sup> The Australian model Air Services Agreement was developed by a predecessor of the Australian Government Department of Infrastructure and Regional Development in consultation with the aviation industry and other Government agencies.
- 3.4 According to the Department of Infrastructure and Regional Development, the Agreement framework is working well and has been

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1 National Interest Analysis [2013] ATNIA 15 *Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services done at Zagreb, 4 September 2013*, [2013] ATNIF 23 (hereafter referred to as 'NIA'), para 1.

2 Joint Standing Committee on Treaties, *Report 133*, Tabled 27 May 2013, p. 6.

3 NIA, para 10.

serving Australian and foreign airlines that operate in Australia, including associated industries.<sup>4</sup>

- 3.5 Until the proposed Agreement is given force, as is standard practice with Air Services Agreements made by Australia, arrangements contained in the proposed Agreement are being applied through non-legally binding Memorandum of Understanding (MOU). This means that the arrangements in the Agreement have already been in place for some time.<sup>5</sup>

## Overview and national interest summary

- 3.6 The objective of the proposed Air Services Agreement is to provide a binding legal framework to support the operation of air services between Australia and the Republic of Croatia. According to the National Interest Analysis (NIA), it will facilitate trade and tourism between the Parties and will provide greater opportunities for airlines to develop expanded air travel options for consumers.<sup>6</sup>

## Reasons for Australia to take the proposed treaty action

- 3.7 The proposed Air Services Agreement grants access for Australian airlines to the Croatian market and allows for the establishment of air services between the two countries. The Agreement will enable Australian and Croatian carriers to provide services between any point in Australia and any point in Croatia, based on capacity levels decided from time to time between the aeronautical authorities of the Parties.<sup>7</sup>
- 3.8 According to the NIA, Australian travellers and Australian businesses, particularly in the tourism and export industries, could potentially benefit from the proposed Agreement through the opening of increased commercial opportunities.<sup>8</sup>

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4 Mr Gilon Smith, Acting Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Regional Development, *Committee Hansard*, Canberra, 24 March 2014, p. 2.

5 Mr Smith, Department of Infrastructure and Regional Development, *Committee Hansard*, Canberra, 24 March 2014, p. 1.

6 NIA, para 6.

7 NIA, para 7.

8 NIA, para 8.

- 3.9 The Department of Infrastructure and Regional Development told the Committee that, currently, Croatian visitors to Australia contributed \$29 million to the Australian economy.<sup>9</sup>
- 3.10 In addition, the Department explained that the Agreement will allow Australian carriers to directly service the Croatian market:
- Qantas currently services the Croatian market through its partnership or through its co-chair arrangement with British Airways out of London. Then an agreement with Croatia allows Qantas to include Croatia on its network, whereas without the agreement it would not be able to and anyone wanting to travel between Croatia and Australia would need to do so on third party carriers.<sup>10</sup>

## Obligations

- 3.11 The proposed Air Service Agreement allows the ‘designated airlines’<sup>11</sup> of each Party to operate scheduled air services carrying passengers, baggage, cargo and mail between the Parties on specified routes in accordance with the provisions of the Agreement. To facilitate these services, the proposed Agreement also includes reciprocal provisions on a range of aviation-related matters such as safety, security, competition laws, customs regulation and the commercial aspects of airline operations, including the ability to establish offices in the territory of each Party and to sell fares to the public.<sup>12</sup>
- 3.12 The Agreement contains the following provisions in relation to airline traffic between the Parties:
- the designated airlines of each Party has the right to fly across each Party’s territory without landing and to make stops in the territory for non-traffic reasons (such as refuelling);<sup>13</sup>
  - designated airlines have the right to operate on the routes specified for the purpose of taking on board and discharging passengers, cargo and mail;<sup>14</sup>

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9 Mr Smith, Department of Infrastructure and Regional Development, *Committee Hansard*, Canberra, 24 March 2014, p. 1.

10 Mr Smith, Department of Infrastructure and Regional Development, *Committee Hansard*, Canberra, 24 March 2014, p. 3.

11 The airlines authorised to operate under an Agreement by Parties to the Agreement.

12 NIA, para 10.

13 NIA, para 12.

- designated airlines are precluded from carrying purely domestic traffic within the territory of the other Party;<sup>15</sup>
  - both Parties are to ensure that the designated airlines of each Party receive fair and equal opportunity to operate services in accordance with the proposed Agreement;<sup>16</sup> and
  - a Party's designated airlines can be required to provide statistics related to the traffic carried on services performed under the proposed Agreement.<sup>17</sup>
- 3.13 Each Party can designate any number of airlines to operate the agreed services. Either Party may refuse authorisation of an airline's operations or impose conditions as necessary if the airline fails to meet, or operate in accordance with the conditions prescribed in the proposed Agreement.<sup>18</sup>
- 3.14 Aeronautical authorities of either Party may revoke authorisation of an airline's operations or suspend an airline's rights if the airline fails to operate in accordance with the proposed Agreement. Circumstances under which an airline might have its authorisation revoked or its operations suspended include changes to its principal place of business, its establishment, ownership or control.<sup>19</sup>
- 3.15 Both Party's domestic laws and regulations concerning aviation and competition apply to the designated airlines while their aircraft are in the territory of that Party.<sup>20</sup>
- 3.16 In addition, Parties must ensure the security of civil aviation against acts of unlawful interference. In particular, each Party must comply with multilateral conventions on aviation security.<sup>21</sup>
- 3.17 Airworthiness certificates, certificates of competency and licences issued or rendered valid by a Party must be recognised by the other Party, provided the standards under which such documents were issued conforms to the standards established by the International Civil Aviation Organisation (ICAO).<sup>22</sup>

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14 NIA, para 12.

15 NIA, para 12.

16 NIA, para 16.

17 NIA, para 17.

18 NIA, para 11.

19 NIA, para 14.

20 NIA, para 17.

21 NIA, para 15.

22 NIA, para 14.



- 3.18 The ICAO, was formed under the Chicago Convention to develop international standards and recommended practices which are used by States when negotiating bilateral air services agreements.<sup>23</sup>
- 3.19 In relation to the operation of designated airlines, the proposed Agreement:
- provides a framework for airlines of one Party to conduct business in the territory of the other Party;<sup>24</sup>
  - exempts from import restrictions, customs duties, excise taxes and similar fees and charges, the equipment and stores used in the operation of the agreed services;<sup>25</sup> and
  - permits the designated airlines of each Party to use any surface transport within the territories of each Party or third countries to provide connections to flights.<sup>26</sup>
- 3.20 The proposed Agreement also provides for consultation and dispute resolution between the Parties on safety standards; the implementation, interpretation, application or amendment of the Agreement; and the settlement of disputes that do not relate to the domestic competition laws of the Parties.<sup>27</sup>
- 3.21 The proposed Agreement contains the following annexes:
- **Annexe 1** contains a route-schedule which specifies the routes that may be operated by designated airlines, as well as operational provisions;<sup>28</sup> and
  - **Annexe 2** contains a non-binding option for mediation, as an alternative to undertaking dispute resolution procedures. The mediation process is without prejudice to the continuing use of the mechanism for consultations, arbitration and termination.<sup>29</sup>

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23 International Civil Aviation Organisation, *About ICAO*, <<http://www.icao.int/about-icao/Pages/default.aspx>>, accessed 8 April 2014.

24 NIA, para 23.

25 NIA, para 18.

26 NIA, para 20.

27 NIA, para 26.

28 NIA, para 27.

29 NIA, para 28.

## Implementation

3.22 The proposed air service Agreement will be implemented through existing legislation, including the *Air Navigation Act 1920* and the *Civil Aviation Act 1988*. The *International Air Services Commission Act 1992* provides for the allocation of capacity to Australian airlines. No amendments to those Acts or any other legislation are required for the implementation of the proposed Agreement.<sup>30</sup>

## Costs

3.23 No direct financial costs to the Australian Government are anticipated in the implementation of the Agreement. There are no financial implications for State and Territory Governments.<sup>31</sup>

## Conclusion

3.24 The Committee supports the Air Service Agreement with the Republic of Croatia and recommends that binding treaty action be taken.

### Recommendation 2

3.25 **The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Croatia relating to Air Services*, and recommends that binding treaty action be taken.**

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30 NIA, para 29.

31 NIA, para 30.

# Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

## Introduction

- 4.1 The proposed treaty action is to bring into force the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (the Agreement).<sup>1</sup> The Agreement will supplement Australia's program to deter illegal, unreported and unregulated (IUU) fishing.<sup>2</sup> The Agreement applies effective port State measures to prevent, deter and eliminate IUU fishing.<sup>3</sup>
- 4.2 The Agreement was approved by the Food and Agriculture Organization of the United Nations (FAO) on 22 November 2009. Australia signed the Agreement on 27 April 2010. As at 14 May 2013, the Agreement had received 23 signatures, one acceptance and two accessions.<sup>4</sup> The Department of Agriculture indicated that it expected Australia to be the 11<sup>th</sup> country to ratify the Agreement.<sup>5</sup>

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1 National Interest Analysis [2013] ATNIA 13 with attachment on consultation *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, done at Rome, 22 November 2009* [2010] ATNIF 41 (hereafter referred to as 'NIA'), para 1.

2 Mr Gordon Neil, Assistant Secretary, Fisheries Branch, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 1.

3 *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, done at Rome, 22 November 2009* [2010] ATNIF 41, Article 2. Also see: Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 6.

4 NIA, para 2.

5 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 1.

## Background

- 4.3 Australia has a strong interest in measures intended to deter IUU fishing. IUU fishing threatens the Australian harvest of fish stocks within and beyond its exclusive economic zone, such as in the southern Indian and Antarctic Oceans. Deterrence of IUU fishing contributes to the protection of the Australian fishing industry and communities dependent upon this industry for economic well-being.<sup>6</sup>
- 4.4 In 2011–12 Australia’s commercial fisheries production was worth AU\$2.3 billion and the industry employed 10 633 people, over 8 000 of them in full-time positions.<sup>7</sup> It is Australia’s fifth largest food producing industry. The Australian Fishing Zone (AFZ) is the third largest in the world and covers approximately nine million square kilometres. The Australian Fisheries Management Authority (AFMA) manages over 20 Commonwealth fisheries.<sup>8</sup>
- 4.5 While IUU fishing continues to be a significant problem, especially in the ports of developing States, within Australian waters incursions by foreign fishing vessels have fallen dramatically.<sup>9</sup> This is the result of Australia’s deterrence and prevention measures. In 2005–06, 367 suspected illegal foreign fishing vessels were apprehended in Australian waters and only seven were apprehended in 2012–13. So far in 2013–14 twenty suspected fishing vessels have been apprehended. There have been no illegal fishing vessels sighted in Australia’s Southern Ocean waters since June 2005.<sup>10</sup>
- 4.6 The Committee was told that estimating the extent and impact of illegal fishing is difficult as data is not publicly reported, however, an estimate in 2008 put the cost of IUU fishing at around US\$23 billion per year, equivalent to around 26 million tonnes of marine fish.<sup>11</sup> The Agreement sets out protocols for identifying where IUU activities have occurred by verifying catches against prior notification (which states the size and species of a catch).<sup>12</sup>

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6 NIA, para 6.

7 M Skirtun, P Schlvist and S Vieira, *Australian fisheries statistics 2012*, FRDC project 2010/208, Australian Bureau of Agriculture and Resource Economics and Sciences, Canberra, November 2013, pp. 1 and 37.

8 Australian Fisheries Management Authority (AFMA), ‘About our fisheries’, <<http://www.afma.gov.au/about-us/about-our-fisheries/>>, accessed 13 February 2014.

9 Department of Agriculture, *Submission 3*, p. 1.

10 Department of Agriculture, *Submission 3*, p. 1.

11 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 2; Department of Agriculture, *Submission 3*, p. 1.

12 Mr Fraser McEachan, Foreign Compliance Policy, Operations Division, Australian Fisheries Management Authority (AFMA), *Committee Hansard*, Canberra, 17 March 2014, p. 4.

## Overview and national interest summary

- 4.7 The Agreement is the first global, legally-binding instrument directed at combating illegal, unreported and unregulated fishing through the establishment of robust port measures.<sup>13</sup> At present all vessels fishing in Australian waters require a licence, this Agreement does not alter this requirement as it only applies to 'port permit activity'.<sup>14</sup> Recreational vessels in breach of State or Northern Territory (NT) fishing legislation would not be refused port access to Australian ports.<sup>15</sup> Rather, such vessels are subject to specific fisheries compliance procedures and penalties administered by the States and NT.
- 4.8 On 27 April 2010 Australia signed the Agreement.<sup>16</sup> The next step for Australia is to ratify the Agreement, which would make it the 11<sup>th</sup> country to do so. The Department of Agriculture told the Committee that in the region New Zealand, Samoa, France and Chili have ratified the Agreement and Indonesia has signed but not yet ratified the Agreement.<sup>17</sup> The NIA asserts that it is important that Australia ratify this Agreement as soon as practicable. Australia was active in the negotiation of the Agreement. Ratification of the Agreement will:
- enable Australia to apply internationally agreed standards for port State measures;
  - enhance Australia's international reputation as a responsible fishing nation; and
  - provide a basis for greater cooperation between Australia and other States to reduce IUU fishing activities.<sup>18</sup>
- 4.9 The Agreement requires port States to take action against operators known to be, or suspected of, IUU fishing or activities in support of such fishing. Port State measures include: denying entry to port; denying the use of port for landing, transshipping, packaging and processing of fish; and undertaking port inspections. These measures assist port States in preventing illegal catches from reaching markets. To strengthen these port State measures, the Agreement introduces corresponding requirements on flag States. These include ensuring flag State vessels cooperate with port

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13 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 1

14 Mr McEachan, AFMA, *Committee Hansard*, Canberra, 17 March 2014, p. 6.

15 Department of Agriculture, *Submission 3*, p. 1.

16 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 1.

17 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 4.

18 NIA, para 4.

inspections undertaken pursuant to the Agreement, and that flag States take appropriate follow-up action if their vessels are found to be engaging in IUU fishing.<sup>19</sup>

## Reasons for Australia to take the proposed treaty action

4.10 IUU fishing is recognised globally as a threat to the management and conservation of living marine resources and marine ecosystems and, in particular, to sustainable fisheries. This Agreement is the first global legally-binding instrument specifically directed at combating the problem.<sup>20</sup> As more countries ratify the process, pressure will mount on both noncompliant fishing vessels and States to comply with the Agreement if they want access to international markets.<sup>21</sup>

4.11 Australia's fishing vessels are highly regulated and monitored by the Australian Government.<sup>22</sup> To date no Australian fishing vessel has been listed as engaging knowingly in IUU fishing activities. According to the Department of Industry:

If an Australian fishing vessel was to be reported as IUU fishing, AFMA would investigate the matter. Australia has the necessary laws in place to meet its international obligations and apply effective sanctions. The *Fisheries Management Act 1991* (the FMA) contains a range of enforcement measures, which could be applied to a vessel reported as IUU. These include warnings, restrictions on the conditions which apply to the fishing licence, a direction to cease fishing, suspension or cancellation of the fishing licence, and prosecution leading to fines and possible forfeiture of catch and vessel.<sup>23</sup>

4.12 Australia's record and regulatory framework makes it a key driver in promoting collaborative action to improve fisheries governance and combating IUU fishing in the South East Asian region.<sup>24</sup> According to the Department of Agriculture:

In South-east Asia, Australia is part of the regional plan of action to promote responsible fishing practices, including combating IUU fishing in South-east Asia, known as the RPOA. This non-binding

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19 NIA, para 3.

20 NIA, para 5.

21 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 3.

22 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 4.

23 Department of Agriculture, *Submission 3*, p. 2.

24 NIA, para 7.

regional plan of action is yielding some success in hampering port access to illegal fishing vessels operating in our southern ocean. However, encouraging our neighbours to adhere to a binding agreement, establishing harmonised port measures, will significantly improve the fight to deter IUU fishing in the region.<sup>25</sup>

4.13 The Agreement will apply to a wide range of fishing activities and activities in support of such fishing, including:

- fishing in waters within the jurisdiction of a coastal State without the coastal State's consent;
- fishing in contravention of a conservation and management measure adopted by a regional fisheries management organisation (RFMO) to which the flag State of the vessel is a party;
- fishing in violation of national laws or international obligations;
- failing to report (or misreporting) fishing activities, in contravention of national laws and regulations or reporting procedures established by RFMOs;
- fishing in an area governed by an RFMO by a vessel without nationality, or flagged to a State that is not a Party to that organisation;
- fishing in an area governed by an RFMO in a manner that is inconsistent with or contravenes conservation and management measures adopted by that organisation;
- (where there is no established RFMO) fishing in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law;
- landing, packaging, processing, transshipping or transporting of fish taken through one of the fishing activities described above; and
- providing personnel, fuel, gear or other supplies in support of one of the fishing activities described above.<sup>26</sup>

4.14 According to the Department of Agriculture, the Agreement:

... highlights the role that a port state can play in deterring illegal fishing. Denial of access to ports, and hence access to markets, targets a vessel's profitability and can operate as a significant disincentive to illegal fishing vessels. The agreement also encourages coordination and cooperation with other states,

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25 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 1.

26 NIA, para 5.

regional fisheries management organisations and other relevant international organisations to promote coordinated action.<sup>27</sup>

- 4.15 The obligations under the Agreement are consistent with Australia's obligations under the United Nations Convention on the Law of the Sea ([1994] ATS 31) and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ([2004] ATS 26) to cooperate to conserve living marine resources. The Agreement will assist in strengthening international efforts to reduce problems associated with the practice of IUU fishing.<sup>28</sup>
- 4.16 The Department of Agriculture stressed that the Agreement was strongly supported by Australia's fishing industry:

The industry is very, very supportive of any measures we take against IUU fishing. We have our efforts in southern waters and in the southern Indian Ocean, areas where the industry is very sensitive to the need to combat IUU fishing. In general, our fleets everywhere share the concern and are very supportive of our participation in regional fisheries management organisations, and they all see the need to jointly manage our fisheries and to do it cooperatively with the other nations. So, there is strong industry support for us signing the port state measures or acceding.<sup>29</sup>

## Obligations

- 4.17 The Committee was told by the Department of Agriculture that the Agreement contains four mechanisms to prevent, deter and eliminate IUU fishing:
- preventing entry to port of vessels suspected of IUU fishing;
  - denying the use of the port by vessels suspected of IUU fishing;
  - imposing requirements to inspect foreign fishing vessels; and
  - requiring relevant states, such as flag states, to take action if IUU fishing is reported to them.<sup>30</sup>
- 4.18 The Agreement would apply to most foreign-flagged vessels seeking entry to and use of Australian ports (**Article 3(1)**). It establishes a system of *minimum* standards for port State measures for the purposes of monitoring

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27 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, pp. 1–2.

28 NIA, para 8.

29 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, p. 1.

30 Mr Neil, Department of Agriculture, *Committee Hansard*, Canberra, 17 March 2014, pp. 1–2. Also see, NIA, para 3 and 10.



and controlling the activity of foreign fishing vessels and determining whether there is any involvement with IUU fishing. Parties can apply *additional* port State measures provided that they are consistent with international law (**Article 4(1)(b)**). Further, the Agreement contains provisions intended to assist developing countries in meeting their obligations under the Agreement (**Article 21**).<sup>31</sup>

## Entry to, and use of, ports

- 4.19 The Committee was told that in the last three years 13 permits were issued to foreign fishing vessels to access Australian ports and no suspected IUU fishing vessels were identified.<sup>32</sup>
- 4.20 Under the Agreement Australia would be obliged to designate and publicise the ports to which vessels may request entry (**Article 7(1)**). ‘Vessels’ are defined broadly to include both fishing vessels and support vessels, such as supply and freezer vessels (**Article 1(j)**). Vessels wishing to access these ports would be required to request permission for port access ahead of time, and transmit information on their activities and the fish they have on board (**Article 8** and **Annex A**). This will give Australian authorities an opportunity to identify in advance vessels of potential concern, and to determine whether to allow or deny the vessel entry into its port (**Article 9(1)**).<sup>33</sup>
- 4.21 Australia will be required to deny the vessel *entry* into its port if it has ‘sufficient proof’ that the vessel has engaged in IUU fishing, for example, where the vessel is on an IUU list of an RFMO (**Article 9(4)**). However, Australia could allow the entry of such a vessel where it intends to inspect the vessel and take action which is as effective as denying entry (such as seizing the catch), provided this is consistent with international law and Australia does not allow the use of its port (**Article 9(5)(6)**).<sup>34</sup>
- 4.22 Australia would be required to deny the *use* of its designated ports for landing, transshipping and processing of fish, and for port services such as refuelling, resupplying and repair, to foreign vessels which may have engaged in, or supported, IUU fishing (**Article 11**).<sup>35</sup>
- 4.23 Vessels that require entry to port due to force majeure or distress will not be subject to the above requirements (**Article 10**). In addition, Australia

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31 NIA, para 11.

32 Mr McEachan, AFMA, *Committee Hansard*, Canberra, 17 March 2014, p. 3.

33 NIA, para 12.

34 NIA, para 13.

35 NIA, para 14.

could not deny the use of its port to a vessel where such use would be essential to the safety or health of the crew or the safety of the vessel, or (where appropriate) for the scrapping of the vessel (**Article 11 (2)**).<sup>36</sup>

## Port inspections

4.24 Australia will be required to ensure that there is sufficient capacity to conduct inspections at its designated ports, and that these ports and its inspectors are adequately equipped and trained (**Article 7(2)** and **Article 13**).<sup>37</sup> AFMA confirmed that fisheries officers would be tasked with assessing the compliance of vessels.<sup>38</sup> In the event a vessel should attempt to evade Australian authorities, Border Protection Command (BPC) could be called upon to detain it for investigation.<sup>39</sup> Alternatively, should the vessel not be intercepted it would be open to AFMA to alert other port States so they may inspect or deny port entry.<sup>40</sup> The Department of Agriculture clarified the assets at its disposal to ensure compliance:

AFMA is a client of the Civil Maritime Surveillance program coordinated by BPC. BPC uses a range of air and sea surveillance assets to service the requirements of client agencies to protect Australia's interests against the eight identified maritime threats, one being illegal foreign fishing. The assets available to the program include Customs and Border Protection and Royal Australian Navy patrol vessels, Royal Australian Air Force and contracted aircraft, and other assets, such as commercial satellite imagery. These are deployed on a multi-tasking basis to high risk areas.<sup>41</sup>

4.25 The Agreement will commit Australia to conducting regular inspections of vessels accessing its designated ports, and outlines a set of standards that will be used during those inspections. These include conducting reviews of ship papers, surveying fishing gear, examining catches and checking a ship's records to reveal if it has engaged in IUU fishing (**Article 12, Article 13** and **Annex B**). The Agreement also sets out risk-based criteria for determining which vessels to inspect. Parties are also required to seek to agree on the minimum levels for inspection of vessels through, as appropriate, RFMOs, the FAO or otherwise.<sup>42</sup>

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36 NIA, para 15.

37 NIA, para 16.

38 Mr McEachan, AFMA, *Committee Hansard*, Canberra, 17 March 2014, p. 7.

39 Mr McEachan, AFMA, *Committee Hansard*, Canberra, 17 March 2014, p. 7.

40 Department of Agriculture, *Submission 3*, p. 1.

41 Department of Agriculture, *Submission 3*, pp. 1–2.

42 NIA, para 17.

4.26 Where, following a port inspection, Australia has clear grounds for believing that a vessel has engaged in IUU fishing, it will be required to deny the vessel the use of its port for landing, transshipping, packaging and processing of fish. Australia will also be required to notify the flag State and, as appropriate, RFMOs and relevant coastal States (**Article 11**).<sup>43</sup>

## Flag state obligations

4.27 As a flag State, Australia will be obliged to take a range of measures to ensure that Australia-flagged fishing vessels comply with the Agreement (**Article 20**). These include:

- requiring Australian-flagged vessels to cooperate with port State inspections carried out under the Agreement;
- encouraging Australian-flagged vessels to land, tranship, package and process fish, and use other port services, in ports of States that apply the Agreement;
- requesting the port State to which an Australian-flagged vessel is seeking access to deny the use of its port, where Australia has clear grounds to believe that the vessel has engaged in IUU fishing; and
- undertaking appropriate follow-up action in response to any inspection reports indicating that a vessel flying its flag has engaged in IUU fishing.<sup>44</sup>

## Information-sharing mechanisms

4.28 The Agreement requires Australia to collaborate in the creation of an information-sharing mechanism to enable countries to share details on vessels which are associated with IUU fishing (**Article 16**). Australia will also be under a general obligation to take measures to exchange information among relevant national agencies, and to exchange information with relevant States, the FAO and other international organisations and RFMOs, in order to promote the effective implementation of the Agreement (**Article 5(c)** and **Article 6** respectively).<sup>45</sup>

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43 NIA, para 18.

44 NIA, para 19.

45 NIA, para 20.

## Implementation

- 4.29 The obligations under the Agreement can be implemented under existing Commonwealth legislation or administratively through the application of Standard Operating Procedures and other arrangements. In particular, certain obligations are implemented under the *Fisheries Management Act 1991* and the *Fisheries Administration Act 1991*. No amendments are required to these Acts or other Commonwealth legislation to implement the obligations under the Agreement.<sup>46</sup>
- 4.30 According to the NIA, Standard Operating Procedures and associated guidelines will require some revision and some new administrative arrangements would need to be put in place to meet the requirements of the Agreement.<sup>47</sup>

## Costs

- 4.31 The entry into force of the Agreement will not impose a significant burden or cost on the Australian Government. Many obligations imposed by the Agreement have already been implemented and are met through the current activities of AFMA and the Department of Agriculture.<sup>48</sup>
- 4.32 The Australian Government will need to:
- maintain a workforce of officers with the appropriate port inspection skills, who can be mobilised as required;
  - provide training;
  - maintain a current port list;
  - maintain Standard Operating Procedures; and
  - work with other countries in sharing information.<sup>49</sup>
- 4.33 The work load generated from this initiative is not expected to be high. As previously mentioned foreign fishing vessel visits to Australian ports are uncommon and no suspected IUU fishing vessels have been identified at Australian ports in the last three years.<sup>50</sup> Port inspections will not require a workforce dedicated to this task and will be undertaken by officers as part of a wider set of duties. Consequently the ongoing financial commitment is expected to be absorbed under the existing budget of AFMA.<sup>51</sup>

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46 NIA, para 22.

47 NIA, para 23.

48 NIA, para 24.

49 NIA, para 25.

50 Mr McEachan, AFMA, *Committee Hansard*, Canberra, 17 March 2014, p. 3.

51 NIA, para 25.

4.34 In line with AFMA's cost recovery impact statement, costs associated with Australian fishing vessels are partially attributed to industry and partially to government. However, Australian fishing vessels are already required to comply with similar monitoring, control and surveillance standards for fishing operations in Australia's waters and no significant new costs are anticipated. The Agreement will apply similar obligations to foreign fishing vessels.<sup>52</sup> Foreign vessels will be required to pay \$860 for a permit to come into port.<sup>53</sup>

## Conclusion

4.35 This Agreement is a mechanism by which the Australian Government can implement its mandate to prevent IUU fishing. Due to the relatively small number of fishing vessels that seek access to Australian ports, the Committee concedes that the Agreement has limited direct application in the context of Australian waters.

4.36 The value of this Treaty lies in its international application. As this Agreement builds momentum, IUU fishing vessels will be increasingly excluded from utilising port facilities and their products will not have ready access to world markets. The enactment of the Agreement will send a clear message to the international fishing industry, that compliance is a necessary part of doing business.

4.37 The Committee supports Australia's ratification of the Agreement and recommends that binding treaty action be taken.

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### Recommendation 3

**The Committee supports the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* and recommends that binding treaty action be taken.**

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52 NIA, para 26.

53 Mr McEachan, AFMA, *Committee Hansard*, Canberra, 17 March 2014, pp. 2, 5.



# Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety, and Wine Regions

## Introduction

- 5.1 The proposed treaty action is to ratify the World Wine Trade Group (WWTG) *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety, and Wine Region* (the Protocol).<sup>1</sup> The purpose of the Protocol is to ‘facilitate trade in wine among the Parties and to minimise any unnecessary labelling-related barriers by establishing parameters for acceptable labelling’, particularly with regard to alcohol content, vintages, grape varieties and wine regions.<sup>2</sup>
- 5.2 The Protocol was concluded in Brussels on 22 March 2013 and signed by Australia on 30 April 2013.<sup>3</sup> To date, the Protocol has also been signed by Argentina, Chile, Georgia and New Zealand, and it entered into force for Georgia and New Zealand in November 2013.<sup>4</sup> The United States have

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1 National Interest Analysis [2014] ATNIA 4 with attachment on consultation *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety, and Wine Regions, done at Brussels, 22 March 2013 (signed for Australia on 30 April 2013* [2013] ATNIF 12 (hereafter referred to as ‘NIA’), para 1.

2 *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety and Wine Regions, done at Brussels, 22 March 2013* [2013] ATNIF 12, Article 2; NIA, para 5.

3 NIA, para 1.

4 Ms Gita Kamath, Assistant Secretary, Agriculture and Food Branch, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 24 March 2014, p. 5.

raised some technical questions about the Protocol as it applies to them.<sup>5</sup> These issues have yet to be reviewed by the Department of Foreign Affairs and Trade (DFAT) and relayed to the Committee.

- 5.3 The Protocol will complement the *WWTG Agreement on Mutual Acceptance of Oenological Practices* [2005] ATS 10, which entered into force for Australia on 1 March 2005, and the *2007 WWTG Agreement on Requirements for Wine Labelling*. The Protocol provides for labelling obligations that are outside the scope of these earlier agreements.<sup>6</sup>
- 5.4 As Australian standards are already consistent with the protocol Australian winemakers will not be required to modify their current labelling practices.<sup>7</sup>

## Overview and national interest summary

- 5.5 In 2012 there were 2 572 wine producers in Australia.<sup>8</sup> The industry employs 22 000 people and contributes \$5.5 billion to the economy.<sup>9</sup> There are also over 6 000 wine growers supplying the producers 'with further downstream employment in retail, wholesale, hospitality and tourism industries'.<sup>10</sup>
- 5.6 Wine production in Australia is an export oriented industry with approximately 60 per cent of Australian wine destined for overseas markets.<sup>11</sup> WWTG markets account for almost 40 per cent of Australia's wine exports, with sales of wine to WWTG markets worth \$748 million in the 2013 financial year.<sup>12</sup>
- 5.7 Australia already has a wine agreement with the European Union (EU) which entered into force in September 2010. DFAT assured the Committee that the Protocol does not conflict with the provisions of the EU agreement.<sup>13</sup>

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5 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 6.

6 NIA, para 3.

7 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 5.

8 Winebiz, 'Wine Industry Statistics', <<http://www.winebiz.com.au/statistics/>>, accessed 24 February 2014.

9 Department of Agriculture, 'Wine Policy', <<http://www.daff.gov.au/agriculture-food/wine-policy>>, accessed 24 February 2014.

10 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 5.

11 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 5.

12 NIA, para 6.

13 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 6.



5.8 The WWTG is an informal grouping of industry representatives and government officials from eight wine producing countries – Argentina, Australia, Canada, Chile, Georgia, New Zealand, South Africa and the United States.<sup>14</sup> The aim of the group is to facilitate international trade in wine and eliminate trade barriers. The WWTG is currently discussing formal procedures to admit new members and observers. Australia supports the expansion of the group, especially from countries that comprise our major export markets including the EU.<sup>15</sup>

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

5.9 The Protocol facilitates trade in wine between Parties by providing a consistent approach to wine labelling. Australian winemakers will not be required to modify their current labelling practices, but the Protocol means that existing Australian labelling requirements on alcohol tolerance, vintage, variety, and wine regions will be recognised by other Parties.<sup>16</sup>

5.10 Representatives of the Australian Government and wine industry participate in the WWTG. Australia played a significant role in negotiating the Protocol as part of the Australian Government's efforts to improve access for Australian wines in global markets. The Protocol will address long-standing trade irritants for Australian wine exporters.<sup>17</sup> DFAT explained to the Committee that:

Australia is the major beneficiary of the protocol as many of the WWTG participants currently do not recognise Australia's labelling requirements for vintage, variety and wine region claims. Australian winemakers are currently required to make different blends of wines for different export markets to meet the relevant requirements for vintage, variety or regional claims in the importing country. Once in force, the protocol will make it easier to market a single blend of wine to all parties to the protocol.<sup>18</sup>

5.11 Being able to market a single blend of wine to all Parties of the Protocol will reduce costs for winemakers.<sup>19</sup>

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14 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 5.

15 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 6.

16 NIA, para 9.

17 NIA, para 7.

18 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 5.

19 NIA, para 8.

5.12 The Australian Wine industry has been highly supportive of the Protocol.<sup>20</sup> The Winemakers Federation of Australia submitted that:

This agreement will benefit the Australian wine sector, enhance export capability and create no new obligations on producers or consumers in Australia. Winemakers Federation of Australia is a strong supporter of this agreement and commends it to the Treaties Committee.<sup>21</sup>

## Obligations

5.13 **Article 4** sets out the labelling parameters that the Parties have agreed to accept with respect to the trade of wine. Each of the provisions specifies that Parties shall permit the import and sale of wine which complies with the exporting Party's domestic laws, regulations, and requirements relating to the particular provision (i.e. alcohol tolerance, vintage, variety and wine regions) within the parameters outlined below.<sup>22</sup>

5.14 **Article 4.1** obliges Parties to permit the importation and sale of wine if the alcohol tolerance does not exceed +/- 1.0 per cent alcohol by volume.<sup>23</sup> This obligation does not apply to fortified wines in Australia, New Zealand and Canada. The Australia and New Zealand Food Standards Code Standard 2.7.1 requires the alcohol content stated on fortified wine labels to be accurate within 0.5 per cent of alcohol by volume.<sup>24</sup>

5.15 **Article 4.2** obliges Parties to permit the importation and sale of wine which is labelled as being of a single grape variety, if at least 75 per cent of the wine is obtained from grapes of that variety. It also obliges Parties to permit the importation and sale of wine which is labelled as being of multiple grape varieties if at least 85 per cent of the wine is obtained from grapes of those varieties, each variety listed is in greater proportion in the wine than any variety that is not listed, and the varieties listed are in descending order of their proportions in the wine.<sup>25</sup>

5.16 **Article 4.3** obliges Parties to permit the import and sale of wine which is labelled with a single wine region if at least 75 per cent of the wine is obtained from grapes grown in the named wine region. It also obliges

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20 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 6.

21 Winemakers Federation of Australia, *Submission 1*, p. 2.

22 NIA, para 10.

23 NIA, para 12. Alcohol tolerance is the deviation between the labelled alcohol content and the measured alcohol content.

24 NIA, para 13.

25 NIA, para 14.

Parties to permit the import and sale of wine which is labelled with up to three wine regions provided that at least 85 per cent of the wine is obtained from grapes grown in those regions, the wine derived from grapes grown in each region listed on the label is in greater proportion than wine from grapes grown in any region that is not listed, the regions listed are in descending order of the proportions of the grapes from those regions and the regions are within the same country.<sup>26</sup>

5.17 **Article 4.4** obliges Parties to permit the import and sale of wine which is labelled with a vintage if at least 85 per cent of the wine is derived from grapes of that vintage.<sup>27</sup>

5.18 **Article 6** provides that where an importing party adopts or maintains labelling laws, regulations and requirements that are less restrictive than the provisions specified in the Protocol, exporters shall not be prevented from labelling in accordance with the relevant importing Party's laws, regulations and requirements.<sup>28</sup> As the Department of Agriculture explained:

Each country reserves the right to have some other requirements, such as health warnings, which are not affected by this agreement or by the wine agreement with the EU. This allows for a single front label and a single back label. Then, if you are going into a specific market that might have a warning or an allergen labelling requirement, you can just add a sticker but do not have to change those main labels.<sup>29</sup>

## Implementation

5.19 There is currently an inconsistency in labelling requirements between Article 4(3) of the Protocol and sections 40D and 40F of the *Wine Australia Corporation Act 1980* regarding geographical indications.<sup>30</sup> The Australian Government Solicitor has advised that 'a minor' amendment to the *Wine*

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26 NIA, para 15.

27 NIA, para 16.

28 NIA, para 11.

29 Mr John Power, Director, Wine Policy and Industry Codes, Crops, Horticulture and Wine, Agricultural Productivity, Department of Agriculture, *Committee Hansard*, Canberra, 24 March 2014, p. 7.

30 NIA, para 19.

*Australia Corporation Regulations 1981* will rectify the problem.<sup>31</sup> No other legislative amendments are required in order to implement the Protocol.<sup>32</sup>

- 5.20 Consultations were held with the states and territories, and the Commonwealth-State-Territory Standing Committee on Treaties was briefed on the scope, objectives and expected regulatory impacts of the protocol. DFAT confirmed that there is no impact on the states or territories as a result of the Protocol, and no concerns were raised by the states or territories.<sup>33</sup>
- 5.21 The Agreement is not expected to have any regulatory impacts on business or the not-for-profit sector. The existing wine labelling regulations will continue to apply for wine produced and/or sold in Australia.<sup>34</sup>

## Costs

- 5.22 There are no foreseeable costs associated with this Protocol for Australia (including for the Australian Government, the State and Territory Governments or the Australian wine industry).<sup>35</sup>
- 5.23 Although there are no annual membership costs or fees, DFAT and the Department of Agriculture are expected to incur minor costs in attending future meetings of the WWTG or the Council of Parties established under the 2007 Wine Labelling Agreement. These costs will be met in the normal course of portfolio budgetary requirements.<sup>36</sup>
- 5.24 The wine industry has estimated that as a result of the Protocol, it will save in the range of several million dollars annually.<sup>37</sup>

## Conclusion

- 5.25 The Committee is satisfied that this Protocol will benefit the Australian wine sector, enhance export capability and create no new obligations on Australian wine producers. The Committee commends the Australian

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31 NIA, para 20; Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 6.

32 NIA, para 21.

33 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 6.

34 NIA, para 22.

35 NIA, para 23.

36 NIA, para 24.

37 Ms Kamath, DFAT, *Committee Hansard*, Canberra, 24 March 2014, p. 5.

Government in its work to remove trade irritants from impeding Australia's wine export industry.

- 5.26 The Committee supports Australia's ratification of the Protocol and recommends that binding treaty action be taken.

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#### **Recommendation 4**

**The Committee supports the *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling Concerning Alcohol Tolerance, Vintage, Variety, and Wine Region* and recommends that binding treaty action be taken.**



## Two Tax Information Exchange Agreements

### Introduction

- 6.1 This chapter considers two Tax Information Exchange Agreements:
- the *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* (the Guatemala Tax Information Exchange Agreement); and
  - the *Agreement between the Government of Australia and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Exchange of Information with respect to Taxes* (the Brunei Tax Information Exchange Agreement).
- 6.2 These Agreements are being considered together because they are, in all material respects, the same.

### Background

- 6.3 Tax Information Exchange Agreements like the proposed Guatemala<sup>1</sup> and Brunei<sup>2</sup> Tax Information Exchange Agreements are bilateral Agreements

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1 National Interest Analysis [2014] ATNIA 2 with attachment on consultation *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* (Mexico City, 26 September 2013) [2013] ATNIF 24 (hereafter referred to as 'the Guatemala NIA'), para 1.

2 National Interest Analysis [2014] ATNIA 1 with attachment on consultation *Agreement between the Government of Australia and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Exchange of Information with respect to Taxes* (Bandar Seri Begawan, 6 August 2013) [2013] ATNIF 22 (hereafter referred to as 'the Brunei NIA'), para 1.

that establish a legal basis for the exchange of tax information relating to persons and entities between the signatories.

- 6.4 These Agreements are the result of an initiative by the Organisation for Economic Cooperation and Development (OECD) to improve the transparency of financial flows between countries.<sup>3</sup>
- 6.5 The Guatemalan Agreement National Interest Analysis (NIA) indicates that:
- While most financial flows to and from low-tax jurisdictions are legitimate, the legal framework and systems that make low-tax jurisdictions attractive for legitimate purposes may also be used in arrangements designed to evade paying tax elsewhere. In particular, the use of secrecy laws to conceal assets and income that are subject to Australian tax is of concern to Australia.<sup>4</sup>
- 6.6 In 2002, the OECD released a model Tax Information Exchange Agreement to facilitate negotiations between OECD members and low tax jurisdictions. In 2003, Australia adopted its own model Tax Information Exchange Agreement based on the OECD model Agreement.<sup>5</sup>
- 6.7 Since the development of the OECD model Agreement, 100 jurisdictions, including Brunei and Guatemala, have committed to eliminating harmful tax practices.<sup>6</sup>
- 6.8 Implemented Agreements support tax authorities by ensuring those authorities have all the available information to determine a taxpayer's correct liability.<sup>7</sup>
- 6.9 The proposed Brunei and Guatemala Tax Information Exchange Agreements are two of 36 bilateral Tax Information Exchange Agreements signed by Australia,<sup>8</sup> of which 33, according to the Guatemala NIA, have entered into force.<sup>9</sup> The Committee has previously reviewed Australian Tax Information Exchange Agreements in Reports 73, 87, 99, 102, 107, 112, 114, 120, 123 and 129.<sup>10</sup>

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3 Brunei NIA, para 5.

4 Guatemala NIA, para 9.

5 Brunei NIA, para 10.

6 Guatemala NIA, para 8.

7 NIA, para 8.

8 Mr Gregory Wood, Manager, Tax Treaties Unit, Tax System Division, Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 15.

9 Guatemala NIA, para 5.

10 Joint Standing Committee on Treaties, *Report 129*, Tabled 10 September 2012, p. 17.



## Overview and national interest summary

- 6.10 The proposed Brunei and Guatemala Tax Information Exchange Agreements follow the format of the Australian standard Tax Information Exchange Agreement.<sup>11</sup>
- 6.11 The Brunei and Guatemalan NIAs claim that the proposed Agreements will help improve the integrity of Australia's tax system by discouraging tax evasion.<sup>12</sup>
- 6.12 The proposed Agreements will allow the Australian Commissioner for Taxation to request and receive certain information held by Brunei and Guatemala.<sup>13</sup>
- 6.13 The proposed Agreements contain a number of privacy safeguards to protect the legitimate interests of taxpayers, including requirements in relation to confidentiality and legal privilege.<sup>14</sup>
- 6.14 According to the Guatemalan NIA, data from the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates that there are relatively small flows of money between Australia and Guatemala.<sup>15</sup>
- 6.15 Mr Grant Goodwin, Executive Director, Exchange of Information, Australian Taxation Office (ATO) advised the Committee that in the 2012/13 financial year, AUSTRAC was provided with 1 336 reports of financial transfers between Australia and Guatemala totalling nearly AU\$19m.<sup>16</sup> A similar analysis of financial transfers between Australia and Uruguay disclosed 9 801 reports of financial transfers totalling nearly AU\$95m.<sup>17</sup>
- 6.16 In relation to Brunei, Mr Goodwin advised that:
- ... there were 10,353 reports. Out of that we are able to identify 1,681 unique entities or persons for a total of a little bit short of \$900 million. Reasons for Australia to take the proposed treaty action.<sup>18</sup>

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11 Brunei NIA, para 10; and Guatemala NIA , para 10.

12 See for example Brunei NIA, para 4.

13 The Guatemala Agreement, Article 5; and the Brunei Agreement, Article 5.

14 Guatemala Agreement, Article 8.

15 Guatemala NIA, para 12.

16 Mr Grant Goodwin, Executive Director, Exchange of Information, Australian Taxation Office (ATO), *Committee Hansard*, Canberra, 17 March 2014, p. 9.

17 Joint Standing Committee on Treaties, *Report 138*, p. 32.

18 Mr Goodwin, ATO, *Committee Hansard*, Canberra, 17 March 2014, p. 10.

- 6.17 The NIAs state that the proposed Tax Information Exchange Agreements combine with Australia's other bilateral Tax Information Exchange Agreements to form an important tool to combat offshore tax evasion.<sup>19</sup>
- 6.18 Experience has shown Australia's Tax Information Exchange Agreements to be effective. The ATO provided some tangible examples to the Committee at a public hearing in 2012:
- Our main tax information exchange agreement partners are the British Virgin Islands, Bermuda, the Isle of Man and Jersey. As of this month ... thirty-eight requests ... have been finalised; and, on the basis of those cases, we have issued six amended assessments to the value of \$52 million. Our auditors have also identified a further \$127 million as potential omitted income via request[s] made under the tax information exchange agreements.<sup>20</sup>
- 6.19 In addition, the ATO provided evidence that Tax Information Exchange Agreements were deterring Australian tax payers from using low tax jurisdictions:
- Since the financial year 2007–2008 there has been a \$12 billion reduction in fund flows to thirteen high-risk secrecy jurisdictions and fund flows returning to Australia from the same secrecy jurisdictions have increased by seven per cent, or around \$5 billion in the 2010–11 financial year as compared to 2007–08.<sup>21</sup>

## Obligations

- 6.20 The proposed Tax Information Exchange Agreements will apply to all Australian taxes imposed under federal laws and administered by the Commissioner for Taxation. **Article 3** of the Agreements, which deals with these taxes, will also apply to any similar future taxes imposed after the signing of the Agreements.<sup>22</sup>
- 6.21 **Article 5** of the proposed Agreements obliges the competent authorities in Australia, and Brunei and Guatemala to provide, on request, information that is foreseeably relevant to the administration and enforcement of the other Party's domestic tax laws. This obligation applies irrespective of

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19 Brunei NIA, para 6.

20 Joint Standing Committee on Treaties, *Report 138*, p. 32.

21 Joint Standing Committee on Treaties, *Report 138*, p. 32.

22 See for example the Guatemala Agreement, Article 3.

- whether the conduct being investigated would constitute a crime under the laws of the requested Party.<sup>23</sup>
- 6.22 A request for information must contain a standard set of information, including:
- the identity of the person under investigation;
  - a statement of the information sought;
  - the tax purposes for which the information is sought;
  - the grounds for believing the requested country can provide the requested information;
  - to the extent known, the name and address of any persons who may be in possession of the requested information;
  - a statement that the request for information is in conformity with the laws of the requesting Party; and
  - a statement that the requesting Party has pursued all known avenues for obtaining the requested information in its own territory.<sup>24</sup>
- 6.23 Requests may also be made to interview individuals or examine records within the jurisdiction of the requested Party. Interviews can only take place if the individual concerned provides written consent.<sup>25</sup>
- 6.24 Information obtained through a request must be kept confidential, and can only be disclosed to people involved in the administration or enforcement of taxes covered by the proposed Agreements. The only exception to this requirement is in the case of relevant public court proceedings and decisions.<sup>26</sup>
- 6.25 A Party may refuse a request if it does not conform to the proposed Agreement, if the laws of the requested Party will not allow the information to be obtained, or if the information may reveal trade or professional secrets.<sup>27</sup>

## Implementation

- 6.26 No legislative change will be required to implement the proposed Guatemala and Brunei Tax Information Exchange Agreements. The NIAs indicates that Australia will be able to fulfil its obligations under the

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23 See for example the Brunei Agreement, Article 5.

24 See for example the Guatemala Agreement, Article 5.

25 See for example the Brunei Agreement, Article 6.

26 See for example the Guatemala Agreement, Article 8.

27 See for example the Brunei Agreement, Article 7.

proposed Agreement with existing legislation, specifically, the *International Tax Agreements Act 1953*.<sup>28</sup>

- 6.27 The proposed Agreement will not change the existing roles of the Commonwealth, or the States or Territories, in tax matters.<sup>29</sup>

## Costs

- 6.28 The requested Party is to bear the ordinary costs of requests under the proposed Tax Information Exchange Agreements, but the requesting Party must bear any extraordinary costs unless both Parties agree otherwise.<sup>30</sup>

- 6.29 However, because Brunei and Guatemala are unlikely to routinely need Australian information for their own tax purposes, it is likely that most requests made under the proposed Agreements will come from Australia.<sup>31</sup>

- 6.30 The ATO and the competent authorities in Brunei and Guatemala are in the process of negotiating Memoranda of Understanding to enable Australia to contribute to the cost of requests made by Australia.<sup>32</sup>

- 6.31 Mr Greg Wood, Manager, Tax Treaties Unit, Tax System Division, Treasury, explained that:

It is really just a capacity issue – if the other country does not have similar capacity to deal with these requests ... we are not necessarily just asking for information that the other country has at its fingertips. There is an obligation to actually go out and get the information and perhaps to spend quite a bit of money obtaining information.<sup>33</sup>

- 6.32 The estimated cost of the proposed Agreements is expected to be absorbed into the ATO's existing exchange of information program. In addition, the NIAs point out that in the long run, the costs of the proposed Agreements should be recouped through the reduction in avoidance and evasion by Australian tax payers.<sup>34</sup>

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28 See for example the Brunei NIA, para 24.

29 See for example the Guatemala NIA, para 25.

30 See for example the Brunei Agreement, Article 9.

31 See for example the Brunei NIA, para 26.

32 See for example the Guatemala NIA, para 27.

33 Mr Wood, Treasury, *Committee Hansard*, Canberra, 17 March 2014, p. 11.

34 See for example the Brunei NIA, para 28.

## Convention on Mutual Administrative Assistance in Tax Matters

- 6.33 At the Committee's hearing into the *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes* on 10 February 2014, the Committee was advised that the process of negotiating Tax Information Exchange Agreements has been superseded by the wide acceptance in the international community of the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (the Convention), to which Australia is a Party.<sup>35</sup>
- 6.34 The OECD states:
- Since 2009 the G20 has consistently encouraged countries to sign the Convention ... Currently over 60 countries have signed the Convention and it has been extended to over 10 jurisdictions. This represents a wide range of countries including all G20 countries, all BRIICS,<sup>36</sup> almost all OECD countries, major financial centres and a growing number of developing countries.<sup>37</sup>
- 6.35 According to the OECD, with a view to combating tax avoidance and evasion, the Convention provides for all forms of cooperation between states in the assessment and collection of taxes. This cooperation ranges from exchange of information to the recovery of foreign tax claims.<sup>38</sup>
- 6.36 Mr Wood outlined the advantages of the Convention over bilateral Tax Information Exchange Agreements:
- One of the benefits of that particular convention is that it provides for more expansive exchange of information; it provides for information on request, as well as automatic exchange of information. It also provides for assistance in the collection of outstanding tax debts and in relation to the service of documents. So it has a broader scope than our bilateral agreements. One of the other benefits is that it cuts down on negotiation time and costs in

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35 Mr Goodwin, ATO, *Committee Hansard*, Canberra, 10 February 2014, p. 14.

36 As defined by the OECD, BRIICS refers to: Brazil, Russia, India, Indonesia, China and South Africa.

37 OECD, *Exchange of Information: Convention on Mutual Administrative Assistance in Tax Matters*, < <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm> >, accessed 7 March 2014.

38 OECD, *Exchange of Information: Convention on Mutual Administrative Assistance in Tax Matters*, < <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm> >, accessed 7 March 2014.

that the text of that particular agreement is settled and countries can either sign up to it or not. There are no actual negotiation costs.<sup>39</sup>

## Conclusion

- 6.37 With the impending change to the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, rather than bilateral Tax Information Exchange Agreements as a means of exchanging tax related information, the Committee expects that the Guatemala and Brunei Tax Information Exchange Agreements will be amongst the last to be considered by the Committee.
- 6.38 As stated earlier in this Chapter, the Committee has a long history examining bilateral Tax Information Exchange Agreements. Over this time, the Committee has been impressed by the reduction in tax avoidance achieved through these Agreements. The Committee would like to take this opportunity to commend for their good work the staff of the ATO and Treasury involved in negotiating and administering these Agreements.
- 6.39 The Committee supports Australia's ratification of the proposed Agreements and recommends that binding treaty action be taken.

### Recommendation 5

**The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* and the *Agreement between the Government of Australia and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Exchange of Information with respect to Taxes*, and recommends that binding treaty action be taken.**

Mr Wyatt Roy MP  
Chair

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<sup>39</sup> Mr Wood, Treasury, *Committee Hansard*, Canberra, 17 March 2014, p. 11.



## Appendix A – Submissions

### Treaties tabled on 11 December 2013

- 1 Department of Infrastructure and Regional Development
- 1.1 Department of Infrastructure and Regional Development
- 1.2 Department of Infrastructure and Regional Development

### Treaties referred on 15 January 2014

- 1 Dr Andrew Serdy
- 3 Department of Agriculture

### Treaties tabled on 11 February 2014

- 1 Winemakers Federation of Australia







## Appendix B – Witnesses

### Monday, 10 February 2014—Canberra

#### Department of Foreign Affairs and Trade

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

#### Department of Infrastructure and Regional Development

Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division

Mr Gilon Smith, Acting Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division

### Monday, 17 March 2014—Canberra

#### Australian Fisheries Management Authority

Mr Fraser McEachan, Foreign Compliance Policy, Operations

#### Australian Taxation Office

Mr Grant Goodwin, Executive Director, Exchange of Information Unit, Transparency Practice, Internationals, Public Groups and International

#### Department of Agriculture

Mr Philip Domaschensz, Acting Deputy Secretary

Mr Gordon Neil, Assistant Secretary

#### Department of Foreign Affairs and Trade

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

#### The Treasury

Mr Gregory Wood, Manager, Tax Treaties Unit, Tax System Division

## **Monday, 24 March 2014—Canberra**

### **Department of Agriculture**

Mr John Power, Director, Wine Policy and Industry Codes, Crops, Horticulture and Wine, Agricultural Productivity

### **Department of Foreign Affairs and Trade**

Ms Gita Kamath, Assistant Secretary, Agriculture and Food Branch

Mr James Wiblin, Director, Food Trade and Quarantine Section

### **Department of Infrastructure and Regional Development**

Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division

Mr Gilon Smith, Acting Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division