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National Interest Analysis [2008] ATNIA 4
with attachment on consultation

**Agreement between the Government of Australia and the Government of
the Kingdom of Tonga relating to Air Services,
done at Neiafu, Tonga on 23 August 2003**

[2003] ATNIF 16

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the Government of the Kingdom of Tonga relating to Air Services, done at Neiafu, Tonga on 23 August 2003

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Nature and timing of Proposed Treaty Action

1. The treaty action proposed is to bring into force the Agreement between the Government of Australia and the Government of the Kingdom of Tonga relating to Air Services (hereafter “the Agreement”). The Government proposes to provide its notification to the Government of the Kingdom of Tonga under Article 20 as soon as practicable following the conclusion of fifteen sitting days from the date the Agreement is tabled in both Houses of Parliament.
2. The Agreement was signed on 23 August 2003.
3. Article 20 specifies that the Agreement will enter into force when the parties have notified each other in writing that their respective requirements for its entry into force have been satisfied.
4. Aviation arrangements of less than treaty status, in the form of a Memorandum of Understanding signed in August 2002, have preceded the Agreement. In accordance with customary international, and established Australian practice, these arrangements have included applying the provisions of the Agreement, pending the completion of domestic requirements before the Agreement is brought into force. Prior to the arrangements entered into in August 2002, air services between the two countries were provided for under a Memorandum of Understanding signed in June 1999.

Overview and national interest summary

5. The purpose of the Agreement is to allow direct air services to operate between Australia and the Kingdom of Tonga, which will facilitate trade and tourism between the two countries and provide greater air travel options for consumers. The Agreement will provide a binding legal framework supporting the operation of air services currently provided by Pacific Blue, a subsidiary of Australia’s Virgin Blue Airlines.

Reasons for Australia to take the proposed treaty action

6. The Agreement provides a new framework for the operation of scheduled air services between Australia and the Kingdom of Tonga by the designated airlines of both countries.

7. This framework improves access for Australian airlines to the Australia-Tonga aviation market and allows for the expansion of air services between the two countries, based on capacity levels decided from time to time between the aeronautical authorities. While the aviation market between Australia and Tonga is small and is unlikely to grow substantially in the foreseeable future, the Agreement provides opportunities for Australian airlines to expand services to Tonga and to link these services with operations to other South Pacific countries. The Agreement is liberal in its approach to code sharing, giving the airlines the flexibility to serve the market through selling seats on other airlines, as well as through own aircraft operations. The Agreement is important for Tonga's tourism industry, which the Tongan Government recognises can play a major role in the development of its economy.

Obligations

8. Australia and Tonga are both parties to the Convention on International Civil Aviation, opened for Signature at Chicago on 7 December 1944 ([1957] ATS 5), commonly referred to as the Chicago Convention.

9. Australia has a standard draft air services agreement which has been developed in consultation with aviation stakeholders. The Agreement was negotiated from the Australian standard draft Agreement in use at the time the Agreement was negotiated, and does not differ from it substantially.

10. The Agreement obliges Australia and the Kingdom of Tonga to allow the designated airlines of each country to operate scheduled air services carrying passengers and cargo between the two countries on the specified routes in accordance with the provisions of the Agreement. To facilitate these services, the Agreement also includes reciprocal provisions on a range of aviation-related matters such as safety, security, customs regulation, and the commercial aspects of airline operations, including the ability to establish offices in the territory of the other Party and to sell fares to the public.

11. Article 2 of the Agreement allows each Party to designate as many airlines as it wishes to operate the agreed services. Either Party may revoke or limit authorisation of an airline's operations if the airline fails to meet or operate in accordance with the conditions prescribed in the Agreement, including if the airline is not incorporated and does not have its principal place of business in the territory of the Party designating the airline.

12. Under Article 3 of the Agreement, each Party grants to the designated airlines of the other Party the right to overfly its territory and to make stops in its territory for non-traffic purposes.

13. Article 4 of the Agreement confirms the designated airlines of one Party must comply with the domestic laws, regulations and rules of the other Party relating to such matters as entry, clearance, aviation security, immigration, passports, customs, quarantine and postal services. The Contracting Parties must not give preference to their own or any other airline in the application of their laws and regulations relating to these matters.

14. Under Article 5, each Contracting Party is required to recognise certificates of airworthiness, competency and licences issued by the other Party, provided such documents conform to the standards established by the International Civil Aviation Organization (ICAO). Each Party may request consultations concerning safety standards maintained by the other Party and take appropriate action essential to the safety of airline operations if it considers such actions to be necessary. If consultations are not successful, then the Party concerned about safety may set out the steps required for the other Party to comply with the minimum standards set by ICAO. A failure to take the necessary steps to meet those minimum standards will allow the concerned Party to withhold authorisation for the air services. Article 5 also confers on the Parties a right to inspect the aircraft operating the agreed services.

15. Under Article 6, both Parties are required to protect the security of civil aviation against acts of unlawful interference and, in particular, to act in conformity with multilateral conventions relating to aviation security. Each Party may require that the designated airlines of the other Party observe its aviation security provisions for entry into, departure from or sojourn in the territory of that Party and shall ensure that adequate measures are applied to protect the aircraft and to inspect passengers, crew and carry-on items, as well as baggage, cargo and aircraft stores prior to and during boarding or loading.

16. Article 7 requires that the charges levied by charging authorities for the use of aviation facilities be non-discriminatory and not excessive.

17. In line with international practice, Article 9 provides that both Parties are required to exempt equipment and stores used in the operation of the agreed services from customs and excise duties and other related charges.

18. Article 10 allows airlines to set their own fares, which shall be subject to the competition and consumer laws of both Parties.

19. Under Article 11, both Parties are obliged to ensure that there is a fair and equal opportunity for the designated airlines of both Parties to operate the agreed services on the specified routes, and that the capacity that can be operated between the two countries shall be decided between the aeronautical authorities. The Memorandum of Understanding signed at the time the Agreement was negotiated in 2002 provides that airlines of each side may operate unlimited services to and from all cities in Australia other than Sydney, Melbourne, Brisbane and Perth, and up to 600 seats each way each week to/from those four cities.

20. Article 12 provides a framework that allows airlines to establish themselves in the territory of the other Party. The framework includes provisions allowing designated airlines to establish offices, employ and maintain staff, sell tickets to the public and convert currency freely, subject to the domestic rules and regulations of the other Party. This Article also gives airlines of each Party the right to enter into cooperative marketing arrangements (such as code sharing) with any other airline, provided the airlines participating in such arrangements hold the appropriate authority or authorities to conduct international air transport on the routes concerned. Article 12 also permits the designated airlines of each Party to conduct international air transportation using aircraft leased from any other company, and provides for favourable consideration to be given to the use of aircraft and crew leased from any other

company, provided they meet the applicable operating and safety standards and requirements of the Parties.

21. Article 13 confirms that the designated airlines of each Party can utilise surface transport to connect with their international air services, within the territory of the Parties of third countries, provided that passengers and shippers are informed of who will provide the transport involved.

22. Article 14 confirms the prospective application of each Party's competition laws to the operation of the airlines within their jurisdiction, and requires each Party to use best efforts within its jurisdiction to eliminate anti-competitive or discriminatory behaviour adversely affecting the competitive position of the designated airlines of the other Party.

23. Dispute resolution is provided for in the Agreement at Article 17. If the parties fail to resolve a dispute by negotiation there is provision for compulsory settlement by submitting the dispute to arbitration.

24. The Annex, which is part of the Agreement, contains a route schedule which specifies the routes that may be operated by designated airlines.

Implementation

25. The Agreement is to 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 are required for the implementation of the Agreement.

Costs

26. No direct financial costs to the Australian Government are anticipated in the implementation of the Agreement. There are no financial implications for State or Territory Governments, and the Agreement reduces the regulatory burden on business and industry.

Regulation Impact Statement

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

Future treaty action

28. Article 16 of the Agreement provides for amendment or revision by agreement of the Parties. Any amendment to the Agreement, including the Annex, shall enter into force when the two Parties have notified each other, through an exchange of diplomatic notes, that they have completed their domestic procedures.

29. Any amendment to the Agreement will be subject to Australia's domestic treaty procedures.

30. If a multilateral convention concerning air transport comes into force in respect of both Parties, the Agreement shall be deemed to be amended so far as is necessary to conform with the provisions of that convention.

31. Any future amendments to the Agreement are likely to involve further deregulation of air services arrangements between the Parties and would be subject to Australia's domestic treaty processes, including consideration by JSCOT.

Withdrawal or denunciation

32. Article 18 of the Agreement provides arrangements to be followed for termination. Either Party may give notice in writing at any time through the diplomatic channel to the other Party of its decision to terminate the Agreement, and must also lodge a notice of termination with ICAO. The Agreement shall terminate one year after the date of receipt of the notice by the other Party. In default of acknowledgment of a receipt of a notice of termination by the other Party, the notice shall be deemed to have been received 14 days after the date on which ICAO acknowledged receipt thereof.

33. Any notification of withdrawal from the treaty by Australia will be subject to Australia's domestic treaty action procedures, including consideration by JSCOT.

Contact details

Aviation Markets Branch
Aviation and Airports Business Division
Department of Transport and Regional Services.

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CONSULTATION

1. It is the practice ahead of negotiations for the Department of Infrastructure, Transport, Regional Development and Local Government to consult government and non-government bodies that may have an interest in the outcome and to take into account their views in developing a negotiating position for the Minister's approval. In situations where a new air services agreement is being negotiated, the Department, wherever possible, uses the Australian Air Services Agreement model text that has been developed in consultation with other government agencies. This model text is maintained and kept up to date through a process of ongoing consultation with relevant agencies. The Australian model text was used in the negotiations with Tonga.

2. Prior to the negotiations with Tonga in August 2002, at which the draft text of an air services agreement was settled, the following stakeholders were advised by letter and/or email of the proposal to negotiate a new air services agreement between Australia and Tonga and invited to comment on issues of importance to them:

Australian Government Department of Industry, Tourism and Resources
Australian Government Department of Foreign Affairs and Trade
Australian Tourist Commission
South Australian Government
South Australian Tourism Commission
Sydney Airport Corporation
Tourism Queensland
Melbourne Airport
Australian Capital Territory Government
Northern Territory Airports
Qantas
West Australian Government
Victorian Government
Tourism New South Wales
Adelaide Airport
Tasmanian Government
Tourism Tasmania
Perth Airport
Northern Territory Government

3. In response to the Department's request for comments, Qantas Airways expressed support for formalisation of air services arrangements through the negotiation of an air services agreement. No other submissions were received. Australian airlines were invited to attend the negotiations, but chose not to.

4. The Agreement was included in the Schedule of Treaties provided to the Commonwealth-State/Territory Standing Committee on Treaties in 2003 prior to signature.