

National Interest Analysis [2010] ATNIA 15

with attachment on consultation

**Agreement between the Government of Australia and the Government of the United
Kingdom of Great Britain and Northern Ireland concerning Air Services
London, 10 July 2008**

[2008] ATNIF 13

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services,
done at London on 10 July 2008
[2008] ATNIF 13**

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 United Kingdom of Great Britain and Northern Ireland concerning Air Services* (the Agreement).
2. The Agreement was signed on 10 July 2008.
3. Article 17 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. Subject to the Joint Standing Committee on Treaties (JSCOT) issuing a report on the proposed treaty action, the Australian Government will provide its notification to the Government of the United Kingdom of Great Britain and Northern Ireland (the UK) under Article 17 as soon as practicable after the Agreement has been tabled in both Houses of Parliament for 15 sitting days.
4. The proposed Agreement will replace the *Agreement between the Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for Air Services between and through their Respective Territories* ([1958] ATS 4) with an updated text that provides a flexible and modern legal framework to enable the airlines of both Australia and the United Kingdom to continue to develop international air services.
5. Aviation arrangements of less than treaty status, in the form of a Memorandum of Understanding signed in July 2006, have preceded the Agreement. In accordance with customary international law 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.

Overview and national interest summary

6. The purpose of the Agreement is to allow air services to operate between Australia and the UK, 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 Qantas Airways.

Reasons for Australia to take the proposed treaty action

7. The Agreement provides a new legal framework for the operation of scheduled air services between Australia and the UK by the designated airlines of both countries.

8. This framework improves access for Australian airlines to the UK aviation market and allows for the expansion of air services between the two countries. The Agreement provides Australian and UK carriers with freedom to operate services between any point in Australia and any point in the UK. This Agreement also improves the capability of Qantas and other Australian air carriers to compete with hub-based carriers, particularly those based in Asia and the Middle East, who previously had significantly greater access to the UK, Australia's second largest aviation market. The Agreement also provides each airline with freedom to determine its own air fares, removing limitations of the previous Agreement. The Agreement increases the opportunities for the Australian business interests, in particular the tourism and export industries, to develop and market products.

Obligations

9. Australia and the UK are both Parties to the *Convention on International Civil Aviation* ([1957] ATS 5) (the Chicago Convention).

10. The Agreement obliges Australia and the UK 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 provides that the Agreement is subject to the Chicago Convention, insofar as those provisions are applicable to international air services.

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. Article 3 also specifies the routes that may be operated by designated airlines and the conditions of servicing those routes.

13. Article 4 of the Agreement allows each Party to designate any number of airlines to operate the agreed air 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 conditions relating to its principal place of business and establishment, ownership and regulatory control. Article 4 is consistent with the *Agreement between the Government of Australia and the European Community on Certain Aspects of Air Services* ([2009] ATS 7) (the Horizontal Agreement), which recognises airlines of individual Member States of the European Union (the EU) as air carriers of the EU, for the purposes of airline designation. The inclusion of these provisions provides security from legal challenge. The European Court of Justice found that certain provisions in bilateral air services Agreement negotiated by EU Member States conflict with the European Community law. The Horizontal Agreement contains provisions which resolve those inconsistencies.

14. Under Article 5, 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. It also confirms that each Party's competition laws apply to the operation of designated airlines within their respective jurisdictions. Article 5 prohibits either Party from unilaterally restricting the operations of the other Party's designated airlines or providing state subsidy or support to its own designated airlines in a way that would distort competition in providing air services under this Agreement.

15. Article 6 of the Agreement confirms that each Party's domestic laws, regulations and rules relating to the operation and navigation of aircraft apply to the designated airlines when they are entering, within or leaving the territory of that Party. Article 6 also provides that each Party's laws, regulations and rules relating to the operation and navigation of aircraft as well as the admission to or departure from its territory of passengers, crew, cargo and aircraft shall be complied with. In applying their laws, the Parties are prevented from giving preference to their own or any other airline.

16. Article 7 provides that each Party shall allow the designated airlines to set their own fares without government intervention. Article 7 confirms that fares for air transportation wholly within the European Community are subject to European Community law.

17. Article 8 provides a framework that allows designated airlines of one Party to conduct their business in the territory of the other Party. The framework includes provisions allowing designated airlines to establish offices, bring in, employ and maintain staff, sell tickets to the public and convert and move currency freely, subject to the domestic rules and regulations of the other Party. This Article also gives designated airlines of each Party the right to:

- a) provide services by means of cooperative marketing arrangements such as code sharing;
- b) perform their own ground handling, or choose from available ground handling providers and to offer their services as a ground handling agent to other airlines;
- c) utilise leased aircraft, or leased aircraft and crew, to provide their services, provided they meet the applicable operating and safety standards and requirements; and
- d) provide intermodal connecting services utilising surface transport to connect with their international air services, a practice increasingly common in European countries.

18. Article 9 provides that the charges imposed on the other Party's designated airlines by charging authorities for the use of aviation facilities be non-discriminatory in relation to the nationality of the aircraft concerned. Additionally the Parties should encourage the charging authorities to ensure that charges are reasonable.

19. In line with international practice, Article 10 sets out the equipment, aircraft fuel, lubricants, spare parts and stores used in the operation of the agreed services that the Parties are required to exempt from customs and excise duties and other related charges.

20. Under Article 11, each Party is required to recognise certificates of airworthiness, competency and licences issued by the other Party, provided the standards under which such documents were issued conform to the standards established by the International Civil Aviation Organization (ICAO). Each Party may request consultations at any time concerning safety standards maintained by the other Party. Each Party may, in its territory, arrange inspections of aircraft of the other Party to verify the validity of the relevant aircraft documents and those of its crew and ensure that the aircraft equipment and the condition of

the aircraft conform to ICAO standards. Each Party can take immediate action essential to ensure the safety of an airline operation if it considers such action to be necessary.

21. Under Article 12, 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. A Party may require that the designated airlines of the other Party observe the Party's aviation security provisions for entry into, departure from or sojourn in its territory. Parties 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. Parties are also required to cooperate in addressing each other's requests to meet particular security threats and in terminating security incidents rapidly and safely.

22. Settlement of disputes is provided for in the Agreement at Articles 13 and 14. 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 list of non-EU Member States referenced in Article 4(2)(iv) and 4(3)(iv). Airlines designated by the UK could be owned and controlled by member States of the EU and/or their nationals, or the States listed in the Annex and/or their nationals, subject to other provisions of Article 4.

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 or any other legislation 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 Department of Infrastructure, Transport, Regional Development and Local Government has self-assessed the Agreement as having no or low impact and the Office of Best Practice Regulation has been consulted.

Future treaty action

28. Article 13 provides that either Party may request consultations on amendment of the Agreement. Article 15 provides that 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 for entry into force of the amendment.

29. Any amendment to the Agreement will be subject to Australia's domestic treaty procedures, including consideration by JSCOT.

Withdrawal or denunciation

30. Article 16 provides for termination of the Agreement. Either Party may give notice in writing at any time 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 of termination. In default of acknowledgment by one Party of a receipt of a notice of termination from the other Party, the notice shall be deemed to have been received 14 days after the date on which the ICAO acknowledged receipt thereof.

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

Contact details

Aviation Industry Policy Branch

Aviation and Airports Business Division

Department of Infrastructure, Transport, Regional Development and Local Government

ATTACHMENT ON CONSULTATION

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CONSULTATION

32. It is the practice ahead of negotiations of an Air Service Agreement 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 of the negotiations and to take into account their views in developing a negotiating position for the Minister's approval.

33. Prior to the negotiation of the Agreement, extensive consultations were held with industry and Commonwealth and State and Territory government agencies. The following stakeholders were advised by letter and/or email of the proposal to negotiate an Agreement between Australia and the UK and invited to comment on issues of importance to them:

Commonwealth Government Agencies

- Attorney-General's Department
- Australian Quarantine and Inspection Service
- Austrade
- Civil Aviation Safety Authority
- Australian Customs and Border Security Service
- Department of Foreign Affairs and Trade
- Department of Finance and Administration
- Department of Immigration and Citizenship
- Department of Industry, Tourism and Resources
- Department of Prime Minister and Cabinet
- International Air Services Commission
- Treasury
- Tourism Australia (formally the Australian Tourism Commission)

State Government Agencies

- ACT Government Chief Minister's Department
- Queensland Government Department of Employment, Economic Development and Innovation, Aviation Steering Committee
- NSW Government Ministry of Transport and Department of State and Regional Development
- South Australian Government Department of Transport and Urban Planning
- Tasmanian Department of Infrastructure, Energy & Resources
- Victorian Government Department of Innovation, Industry and Regional Development
- Government of Western Australia
- Tourism New South Wales
- Tourism Queensland

- Tourism Tasmania
- Tourism Victoria
- Tourism Western Australia

Industry

- Adelaide Airport Limited
- Air Freight Council of NSW Inc
- Air Freight Council of Queensland Ltd
- Air Freight Council of Western Australia
- Alice Springs Airport
- Australian Airports Association
- Australian and International Pilots Association
- Australian Aviation Council
- Australian Local Government Association
- Australian Tourism Export Council
- Australia's North West Tourism
- Avalon Airport Australia Pty Ltd & Essendon Airport Pty Ltd
- Board of Airline Representatives of Australia
- Brisbane Airport Corporation Ltd
- Broome International Airport Holdings
- Burnie Airport Corporation Pty Ltd/Wynyard Aerodrome
- Cairns Airport
- Canberra International Airport
- Chamber of Commerce Northern Territory
- Essendon Airport
- Global Aviation Services
- Gold Coast Airport Ltd
- Hobart International Airport
- Launceston Airport
- Melbourne Airport
- Moorabbin Airport
- National Food Industry Strategy Ltd
- National Jet Systems Pty Ltd
- National Tourism Alliance
- Newcastle Airport Ltd
- Northern Territory Airports Pty Ltd
- Northern Territory Transport
- Perth Airport
- Qantas Airways Ltd
- Queensland Airports Ltd
- Queensland Tourism Industry Corporation
- Queensland Transport
- South Australian Freight Export Council Inc
- Sydney Airport Corporation Ltd
- Tasmanian Freight Logistics Council
- Tourism and Transport Forum (TTF) Australia
- Tourism Top End
- Tropical Tourism North Queensland

- Virgin Blue
- Westralia Airports Corporation Pty Ltd

34. Comments were received from: Qantas, Virgin Blue, Sydney Airport Corporation, the South Australian Department of Transport and Urban Planning, the Western Australian Government, the Queensland Government, Tourism Victoria, the (then) Australian Government Departments of Industry, Tourism and Resources, Foreign Affairs and Trade, Attorney-General's, Treasury, Immigration and Multicultural Affairs and the Australian Customs Service.

35. All stakeholders supported the negotiation of a new, modernised air services agreement, to offer more flexibility and improved market access for airlines of both sides.

36. Comments on the Agreement were provided by Sydney Airport Corporation, Qantas, the Department of Industry, Tourism and Resources and Tourism Victoria were all confidential.

37. The South Australian Department of Transport and Urban Planning indicated that the agreement should be modernised, providing additional capacity, removing limitations on access to Australian regional airports and liberalising airline cooperative arrangements. The Government of Western Australia indicated its support for a fully liberalised agreement, or at least an increase in capacity allowance for airlines of both countries. The Queensland Government indicated its support for the increase in capacity allowance for airlines.

38. Virgin Blue provided overall support for the negotiations, including expanding capacity allowance for airlines and increased access to the UK.

39. Comments on were received from the Attorney-General's Department, the Department of Foreign Affairs and Trade, Treasury, Customs and the Department of Immigration and Citizenship. These agencies cleared the text of the Agreement prior to its approval by Executive Council.

40. The Agreement was included in the Schedule of Treaties provided to the Commonwealth-State/Territory Standing Committee on Treaties in February 2006, July 2006, February 2007 and on 1 February 2008 prior to signature of the Agreement.