

National Interest Analysis [2010] ATNIA 18

with attachment on consultation

**Amendments to the
Agreement between the Government of Australia and the Government of His Majesty
the Sultan of Yang Di-Pertuan of Brunei Darussalam relating to Air Services
Canberra 30 April 1992 [1992] ATS 20**

[2010] ATNIF 21

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Amendments to the
Agreement between the Government of Australia and the Government of His Majesty
the Sultan of Yang Di-Pertuan of Brunei Darussalam relating to Air Services,
done at Canberra 30 April 1992 [1992] ATS 20
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Nature and timing of proposed treaty action

1. The treaty action proposed is to bring into force amendments to the *Agreement between the Government of Australia and the Government of his Majesty the Sultan of Yang Di-Pertuan of Brunei Darussalam relating to Air Services* (the Agreement) through the exchange of diplomatic notes.
2. The Agreement was signed and entered into force on 30 April 1992.
3. Article 18 specifies that the Agreement may be amended or revised by agreement in writing and amendments shall enter into force on the date specified by the Parties in an exchange of diplomatic notes. Subject to the Joint Standing Committee on Treaties (JSCOT) issuing a report on the proposed treaty action, the Australian Government will arrange an exchange of diplomatic notes agreeing upon the date that the Agreement will enter into force under Article 18 of the Agreement as soon as practicable after the amendments to the Agreement have been tabled in both Houses of Parliament for fifteen sitting days.
4. Aviation arrangements of less than treaty status, in the form of Memorandums of Understanding and Exchanges of Letters (last signed in June 2008), have included provisionally applying the amendments to the Agreement, pending the completion of domestic requirements, before the amendments are brought into force.

Overview and national interest summary

5. The purpose of the amendments to the Agreement is to provide further commercial flexibility for airlines of both Parties operating between Australia and Brunei. There are three amendments to the Agreement:
 - i) to update the scope of agreed services covered by the Agreement to include cargo-only services;
 - ii) to liberalise the nationality test for designated airlines; and
 - iii) to replace the current Annex which specifies particular routes that may be operated by the designated airlines with a new 'open' route structure.

Reasons for Australia to take the proposed treaty action

6. By taking the proposed treaty action and liberalising the nationality test for ownership of designated airlines, airlines will be able to increase the scope of both their foreign investment opportunities and their access to capital. Under the new criteria, airlines can be designated based on the location of their incorporation and principle place of business. Australia has pursued a policy of recognising incorporation and principal place of business as the criterion for the designation of airlines in its air services agreements for some years and this criterion (or variations of it) is in place in thirty-two agreements. The inclusion of this test in air services agreements does not diminish the protection provided by the *Qantas Sale Act 1992* and the *Air Navigation Act 1920*, which still apply ownership restrictions to Australian international airlines.

7. Amendment of the definition of ‘agreed services’ and adoption of the proposed open route schedule will enable the amended Agreement to provide further commercial flexibility for airlines operating between Australia and Brunei, including the ability to operate cargo-only services.

Obligations

8. Australia and Brunei are both parties to the *Convention on International Civil Aviation* ([1957] ATS 5) (the Chicago Convention).

9. The definition of ‘agreed services’ in Article 1(b) of the Agreement currently includes only ‘transport of passengers and cargo.’ This definition will be amended to include ‘transport of passengers and/or cargo’ services, to confirm that transport of passengers or cargo only, as well as transport of both passengers and cargo, is covered by the Agreement.

10. Article 2 of the Agreement authorises both Parties to designate airlines to operate scheduled international air services between the two countries. The amendments to the nationality test allow each Party to designate an airline to operate the agreed services provided it is incorporated and has its principal place of business in the territory of the Party designating the airline. Either Party may revoke or limit authorisation of a designated airline's operations if the airline fails to meet requirements in relation to its place of business and establishment and regulatory control.

11. The Annex to the Agreement, which is part of the Agreement, contains a route schedule which specifies the routes on which the designated airlines may operate. The existing Route Annex limits the airline designated by Brunei to operating services to Perth via Darwin. The amendment to the Annex entitles the designated airlines of both Parties to operate on any route between any point in Australia and any point in Brunei, via any intermediate (en-route) point and any point beyond, subject to the entitlements settled from time to time between aeronautical authorities. Aeronautical authorities of both sides continue to determine the traffic rights and capacity entitlements of airlines operating on these routes. In Australia, the *Air Navigation Act 1920* restricts all airlines operating international air services to arrival and departure from designated international airports.

Implementation

12. The amendments to the Agreement will be given effect 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 amendments to the Agreement.

Costs

13. No direct financial cost to the Australian Government is anticipated in the implementation of the amendments to the Agreement. There are no financial implications for State or Territory Governments. The amendments to the Agreement reduce the regulatory burden on business and industry.

Regulation Impact Statement

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

Future treaty action

15. Article 18 of the Agreement provides for amendment or revision of the Agreement by agreement of the Parties. Any amendment to the Agreement, including the Annex to the Agreement, shall enter into force when the two Parties have notified each other, through an exchange of diplomatic notes, of the date that they agree that the amendment should enter into force.

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

Withdrawal or denunciation

17. Article 19 of the Agreement provides that 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 the International Civil Aviation Organization (ICAO.) The Agreement shall terminate one year after the date of receipt of the notice by the other Party. 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 ICAO acknowledged receipt thereof.

18. 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

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Aviation and Airports Business Division
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ATTACHMENT ON CONSULTATION

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CONSULTATION

19. 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.

20. Prior to the negotiation of the amendments to the Agreement and associated arrangements in 2000 and 2004, extensive consultations were held with industry and Australian and State governments. The following stakeholders were advised by letter and/or email of the proposal to negotiate with Brunei and invited to comment on issues of importance to them. Stakeholders who responded are marked with an * in the list below:

Commonwealth Government Agencies

- Austrade
- Australian Customs and Border Security Service*
- (then) Australian Tourist Commission*
- Civil Aviation Safety Authority
- Department of Agriculture Fishes and Forestry*
- Department of Foreign Affairs and Trade*
- (then) Department of Industry, Science and Resources*
- (then) Department of Industry, Tourism and Resources*
- International Air Services Commission*

State Government Agencies

- ACT Chief Minister's Department
- New South Wales Department of Transport
- Northern Territory Department of Transport and Works*
- Northern Territory Minister for Transport and Infrastructure*
- Northern Territory Tourism Commission*
- Queensland Department of State Development*
- South Australian Air Freight Export Council
- South Australian Department of Transport and Urban Planning*
- South Australian Tourism Commission
- Tasmanian Department of Infrastructure, Energy and Resources*
- Tasmanian Department of Transport
- Tasmanian Export Council
- Tourism Council of Australia
- Tourism NSW*
- Tourism Queensland

- Tourism Tasmania
- Tourism Victoria*
- Western Australian Department of Transport
- Western Australian Tourism Commission

Industry

- Adelaide Airport
- Air Freight Export Council of NSW
- Air Freight Perishables Taskforce of Victoria
- Air Freight Council of Queensland
- Air Freight Council of Western Australia
- Air Freight Council of New South Wales
- Alice Springs Airport
- Ansett International*
- Australian Airports Association*
- Australian Horticultural Corporation
- Australian and International Pilots Association
- Australian Federation of Travel Agents
- Australian Federation of International Forwarders
- Australian Pacific Airports
- Australian Seafood Industry Council
- Brisbane Airport Corporation*
- Broome International Airport
- Cairns International Airport*
- Cairns Port Authority*
- Canberra International Airport
- Darwin International Airport
- Hobart Airport
- Gold Coast Airport
- Inbound Tourism Organisation of Australia
- Melbourne Airport
- Northern Territory Airports*
- Overnight Airfreight Operators Association
- Perth Airport*
- Qantas Airways*
- Regional Airlines Association of Australia
- Supermarket to Asia
- Sydney Airport*
- Tourism Task Force
- Townsville Airport
- Virgin Blue*
- Westralia Airports Corp

21. While not all stakeholders specifically addressed the amendments to the Agreement, there was general support for liberalisation, seeking increased flexibility for the operation of international air services, including rights for airlines to operate to a broader range of Australian cities.

22. The amendments to the Agreement were approved for treaty action by the Federal Executive Council on 8 October 2009.