

National Interest Analysis [2010] ATNIA 14

with attachment on consultation

**Agreement between Australia and the Kingdom of Spain relating to Air Services
Canberra, 24 June 2009**

[2009] ATNIF 16

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Agreement between Australia and the Kingdom of Spain relating to Air Services,
done at Canberra on 24 June 2009
[2009] ATNIF 16**

Nature and timing of proposed treaty action

1. The treaty action proposed is to bring into force the *Agreement between Australia and the Kingdom of Spain relating to Air Services* (the Agreement).
2. The Agreement was signed on 24 June 2009.
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. 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 Kingdom of Spain (Spain) under Article 20 as soon as practicable after the Agreement has been tabled in both Houses of Parliament for 15 sitting days.
4. The Agreement will establish for the first time a treaty level air services relationship between Australia and Spain. It will allow the airlines of Australia and Spain to develop international air services between the two countries.
5. Aviation arrangements of less than treaty status, in the form of a Memorandum of Understanding (MOU) signed in February 2007, 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 Spain, 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 and Iberia Airlines.

Reasons for Australia to take the proposed treaty action

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

8. This framework grants access for Australian airlines to the Spanish aviation market and allows for the establishment of air services between the two countries, providing Australian and Spanish carriers with freedom to provide services between any point in Australia and any point in Spain based on capacity levels decided from time to time between the aeronautical authorities of the Parties. The Agreement provides opportunities for the Australian business interests, in particular the tourism and export industries, to develop and market products.

Obligations

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

10. The Agreement obliges Australia and Spain to allow the designated airlines of each country to operate scheduled air services carrying passengers and cargo between the two countries on 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 any number of airlines 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 with respect to its principal place of business and establishment, ownership and regulatory control. Article 2 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.

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 provides the right for designated airlines to operate on the routes specified in Annex 1 for the purpose of taking on board and discharging passengers, cargo and mail.

13. Article 4 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 4 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.

14. Under Article 5, 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.

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. 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 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 each Party to encourage their charging authorities to ensure that the charges imposed on the other Party's designated airlines for the use of aviation facilities be reasonable and not unjustly discriminatory.

17. Article 8 provides that a Party may request, from the other Party's designated airlines, statistics relating to the agreed services.

18. In accordance with international practice, Article 9 sets out the equipment 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.

19. Article 10 allows the designated airlines to set their own fares without government intervention. Article 10 confirms that fares for air transportation wholly within the European Community are subject to European Community law.

20. 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. The capacity that can be operated between the two countries shall be decided between the aeronautical authorities. The capacity was settled in the MOU signed at the date when the Agreement was negotiated, as specified in paragraph 8 above. These capacity arrangements will continue once the Agreement enters into force.

21. Article 12 provides a framework that allows designated airlines of one Party to conduct 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, convert and move currency freely and perform ground handling. The Article also allows airlines to utilise leased aircraft, or leased aircraft and crew, to provide their services, provided they meet the applicable operating and safety standards and requirements of the Parties.

22. Article 13 provides 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 of cargo are informed of who will provide the transport involved.

23. Article 14 confirms that each Party's competition laws apply to the operation of designated airlines within their respective jurisdictions. It also requires each Party to coordinate their actions with the relevant authorities and take into account views and international obligations of the other Party when undertaking consultations on the issues of discrimination and unfair practices.

24. Article 15 provides that each Party may at any time request consultations on the implementation, interpretation, application or amendment of the Agreement.

25. Dispute resolution is provided for in the Agreement at Article 17. If the Parties fail to resolve any dispute by negotiation there is provision for compulsory settlement through submitting the dispute to arbitration.

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

Implementation

27. 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

28. 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

29. 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

30. Article 15 provides that either Party may request consultations on amendment of the Agreement. Article 16 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. Article 16 also provides that the Agreement will be deemed to be amended

so far as is necessary to comply with any multilateral air transportation instrument that may come into force for both Parties.

31. Any amendment to the Agreement will be subject to Australia's domestic treaty procedures, including consideration by the Joint Standing Committee on Treaties (JSCOT).

Withdrawal or denunciation

32. Article 18 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 ICAO acknowledged receipt thereof.

33. 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

34. 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.

35. 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 Spain 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
- The 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 Recourses
- Tasmanian Department of Infrastructure, Energy & Resources
- Victorian Government Department of Innovation, Industry and Regional Development
- Western Australian Government Department of Transport
- NT Government Department of Planning and Infrastructure
- Tourism New South Wales
- Tourism Queensland

- Tourism Tasmania
- Tourism Victoria
- Tourism NT
- 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

36. Comments were received from: Qantas, Virgin Blue, Melbourne Airport, the South Australian Department of Transport and Urban Planning, Tourism Victoria, the (then) Australian Government Departments of Industry, Tourism and Resources, Treasury and the Australian Customs Service.

37. All stakeholders supported the negotiation of a new air services agreement to open market access for airlines of both sides.

38. Comments provided by Melbourne Airport, the Department of Industry, Tourism and Resources and Tourism Victoria were all confidential.

39. Qantas provided support for the negotiations seeking to negotiate arrangements which would include liberal cooperative marketing provisions and route rights. Virgin Blue provided overall support for the negotiations.

40. The South Australian Department of Transport and Urban Planning indicated that it would welcome the agreement which would provide flexibility to Australian and foreign carriers to serve the State.

41. Comments on the Agreement 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.

42. 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.

43. The Agreement was approved for signature by the Federal Executive Council on 18 June 2009.