

Documents tabled on 26 August 2008:

**National Interest Analysis [2008] ATNIA 24
with attachment on consultation**

**Agreement between the Government of Australia and
the European Community on certain aspects of Air Services
Brussels, 29 April 2008 ([2008] ATNIF 5)**

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the European Community on certain aspects of Air Services, done at Brussels on 29 April 2008 ([2008] ATNIF 5)

Nature and timing of proposed treaty action

1. The treaty action proposed is the entry into force of the *Agreement between the Government of Australia and the European Community on certain aspects of Air Services* (the Horizontal Agreement).
2. The Horizontal Agreement was signed on 29 April 2008.
3. Article 7 specifies that the Horizontal Agreement will enter into force when the Contracting Parties - being the Australian Government and the European Community (EC) - have notified each other in writing that their respective internal procedures for its entry into force have been satisfied. The Government proposes to provide its notification to the EC under Article 7 as soon as practicable after the fifteen sitting days following the date the Agreement is tabled in both Houses of Parliament and binding action is recommended by the Joint Standing Committee on Treaties (JSCOT).

Overview and national interest summary

4. The purpose of the Horizontal Agreement is to provide security from legal challenge for the 14 bilateral air services agreements between Australia and individual European Union (EU) Member States that were negotiated before 2003. The European Court of Justice has found that certain provisions in bilateral air services agreements negotiated by EU Member States conflicted with EC law. The Horizontal Agreement resolves those inconsistencies.
5. Articles 2, 3 and 4 of the Horizontal Agreement replace and complement provisions in 14 bilateral air services agreements between Australia and various EU Member States to bring them into line with EC law. Articles 2, 3 and 4 deal with the designation of airlines on the basis of their EU status rather than their Member State nationality, creating a single EU market for air transport links. The bilateral air services agreements affected are listed in Annex I to the Horizontal Agreement and are between Australia and the following EU Member States: Austria, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Sweden and the United Kingdom. The Horizontal Agreement does not provide additional access to routes or services for airlines of either party. No new legislation will be required to implement the amendments in Australia.
6. Australia's legislation, systems and practices are already in line with both the Horizontal Agreement and existing bilateral air services agreements between Australia and EU Member States.

Reasons for Australia to take the proposed treaty action

Background

7. The Horizontal Agreement addresses inconsistencies between EC law and Australia's existing bilateral air services agreements with EU Member States. In 2002, the European Court of Justice ruled that several standard clauses in bilateral air services agreements between the United States and EU countries were contrary to EC law. Australian bilateral air services agreements contain similar clauses and by implication would also be considered inconsistent with EC law. As a solution, the EC proposed amending relevant provisions in existing European bilateral air services agreements with a 'Horizontal Agreement'.

8. The EC prevented Member States from negotiating air services agreements until inconsistencies in the existing agreements were removed through the negotiation of horizontal agreements. The Horizontal Agreement with Australia was initialled in 2005. Australia successfully negotiated three conditions before initialling the text of the Agreement:

- i. that Australian carriers not be disadvantaged vis-à-vis European carriers;
- ii. that Australia could recommence bilateral negotiations with Member States; and
- iii. that the European Commission (the Commission) would seek a mandate from Member States to commence negotiations with Australia on a comprehensive air services agreement with the EC.

9. Signature of the Horizontal Agreement was not initially pursued as it was intended that a comprehensive air services agreement would be negotiated rapidly, removing the need for the Horizontal Agreement to enter into force. However, several EU Member States identified signature of the Horizontal Agreement as a prerequisite for the negotiation of a comprehensive air services agreement with the EC. Signature of the Horizontal Agreement in April 2008 was one factor in the Commission securing a mandate to negotiate a comprehensive agreement with Australia. A comprehensive air services agreement with the EU would replace and go beyond bilateral agreements Australia currently has in place with EU Member States. By locking-in the benefits of Australia's bilateral air services agreements with EU Member States, the Horizontal Agreement forms the basis of future discussions on a single EU-wide air services agreement.

Obligations

10. The Horizontal Agreement obliges Australia and relevant EU Member States to recognise the existence of a single EU market for air services between Australia and the EU. To facilitate the removal of nationality restrictions in existing bilateral air services agreements between Australia and EU Member States, the Horizontal Agreement includes complementary and replacement provisions on matters such as designation, authorisation, regulatory control and tariffs.

11. The Horizontal Agreement replaces relevant Articles in current bilateral air services agreements between Australia and EU Member States pertaining to: the designation of air carriers; all authorisations and permissions granted; and the refusal, revocation, suspension or limitation of authorisations or permissions of the air carrier.

12. The following paragraphs highlight the key provisions of the Horizontal Agreement.

13. Article 2 of the Horizontal Agreement provides for an EU aircraft to be designated according to its EU status, rather than its Member State nationality. This allows EU Member States to access rights under any air services agreement between Australia and an EU Member State. While Article 2 does not provide reciprocal rights for Australian airlines, it allows for Australia to prevent EU airlines from accessing rights that Australian airlines would not have access to. The Horizontal Agreement, therefore, seeks to address inconsistencies with EC law rather than amend access rights under the current bilateral agreements.

14. Under Article 3, where a Member State designates an air carrier that remains under the regulatory control of a second Member State, the safety provisions of the Horizontal Agreement between Australia and the first Member State will equally apply to the air carrier of the second Member State.

15. Article 4 confirms that air fares charged by Australian carriers for routes wholly within the EU are subject to EC law.

16. Article 5 notes that the Annexes to the Horizontal Agreement form part of final treaty text. The Annexes list all existing air services agreements between Australia and EU Member States and the provisions in those agreements that are complemented or replaced by Articles in the Horizontal Agreement. All other provisions in the various bilateral agreements that are not inconsistent with EC law will remain the same.

17. Under Article 6, the Horizontal Agreement may be amended or revised by Contracting Parties by mutual consent.

18. Pursuant to Article 7, the Agreement enters into force when the Contracting Parties have notified each other in writing that their respective internal procedures for entry into force have been completed. Article 7 also provides for the provisional application of the Horizontal Agreement prior to entry into force, once the Contracting Parties have notified each other of the completion of necessary internal procedures. While Australia's notification will be provided pursuant to the completion of its domestic treaty-making processes for entry into force, this provision will allow application of the treaty before all 27 EU Member States complete their domestic treaty processes. This allows services to continue under the current bilateral agreements without breaching EC law. The Horizontal Agreement does not apply to any agreements and arrangements between Australia and EU Member States that, at the date of signature of the Horizontal Agreement, are to enter into force and are not being provisionally applied. The Horizontal Agreement will apply to such agreements upon their entry into force or provisional application.

19. Article 8 provides that the termination of any existing bilateral agreement between Australia and an EU Member State will also extend to any provisions in the Horizontal Agreement that relate to that terminated agreement. Additionally, if all existing Australia-EU Member State bilateral agreements are terminated, the Horizontal Agreement will also terminate simultaneously.

Implementation

20. The Horizontal Agreement is to be implemented through existing legislation including the *Air Navigation Act 1920* and the *Civil Aviation Act 1988* on matters such as route licensing and safety. No legislative amendments are required to implement the Horizontal Agreement.

Costs

21. No direct financial costs to the Australian Government are anticipated in the implementation of the Horizontal Agreement. There are no financial implications for State or Territory Governments.

Regulation Impact Statement

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

Future treaty action

23. Article 6 of the Horizontal Agreement provides for amendment or revision by mutual consent of the Contracting Parties. Any amendment to the Horizontal Agreement, including the Annexes, will be subject to Australia's domestic treaty action procedures and shall enter into force when the two Contracting Parties have notified each other, in writing, that they have completed their domestic procedures.

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

Withdrawal or denunciation

25. Article 8 provides procedures to be followed for termination of the Horizontal Agreement. In the event that any of the existing bilateral air services agreements listed in Annex 1 are terminated, all provisions in the Horizontal Agreement that relate to the agreement in Annex 1 shall terminate at the same time.

26. In the event that all existing agreements in Annex 1 are terminated, the Horizontal Agreement shall also terminate at the same time.

27. Any notification of withdrawal from the treaty by Australia will be subject to Australia's domestic treaty action procedures.

Contact details

Aviation Industry Policy Branch
Aviation and Airports Business Division
Department of Infrastructure, Transport, Regional Development and Local Government

Attachment on Consultation

Agreement between the Government of Australia and the European Community on certain aspects of Air Services Brussels, 29 April 2008 [2008] ATNIF 5

CONSULTATION

28. Ahead of negotiations, it is the Department of Infrastructure, Transport, Regional Development and Local Government's practice 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.

29. Prior to the negotiation of the Horizontal Agreement, extensive consultations were held with industry, State Governments and agencies within the Commonwealth Government. The following stakeholders were advised by letter and/or email of the proposal to negotiate a Horizontal Agreement between Australia and the EU and invited to comment on issues of importance to them:

Commonwealth Government Agencies

- The Attorney-General's Department
- Department of Prime Minister and Cabinet
- Department of Foreign Affairs and Trade
- The Treasury
- Australian Customs Service
- Australian Government Department of the Environment, Water, Heritage and the Arts (formally the Department of Environment and Heritage)
- Australian Government Department of Climate Change (formally the Australian Greenhouse Office)
- Tourism Australia (formally the Australian Tourist Commission)

State Governments and Statutory Authorities

- South Australian Government
- South Australian Tourism Commission
- Western Australian Government
- Tourism Western Australia
- Queensland Government
- Tourism Queensland
- Victorian Government
- Tourism Victoria
- Australian Capital Territory Government
- Northern Territory Government
- NSW Government
- Tourism NSW
- Tasmanian Government
- Tourism Tasmania

Industry

- Sydney Airport Corporation Limited
- Qantas Airways
- Virgin Blue

30. In response to the Department's request for comments, Qantas Airways provided comments on the draft text and expressed overall support for the negotiation and finalisation of a Horizontal Agreement between Australia and the EC. Virgin Blue and Sydney Airport also supported finalisation of the text.

31. Federal Government input was received from the Attorney-General's Department, the Treasury and the Department of Foreign Affairs and Trade. The Attorney-General's Department provided comments relating to aspects of international law, including clarification of Article 3 (Regulatory Control). The Department of Foreign Affairs and Trade sought to confirm competency to amend provisions of existing bilateral air services agreements. The Treasury indicated support for finalising the Horizontal Agreement. All comments were taken into account in developing Australia's negotiating position and integrated into the draft text.

32. Of the States, the Governments of Western Australia and Victoria indicated support for negotiation of the Horizontal Agreement. No further submissions from States or Territories were received.

33. The Attorney-General's Department, the Treasury and the Department of Foreign Affairs and Trade were further consulted on the final text being proposed for signature. All recommended that the Horizontal Agreement proceed to signature.

34. The Horizontal Agreement was included in the Schedule of Treaties provided to the Commonwealth-State/Territory Standing Committee on Treaties on 27 July 2006 prior to signature.

35. The Horizontal Agreement was approved for signature by the Federal Executive Council on 20 March 2008 and the European Council on 7 April 2008.