

**National Interest Analysis [2012] ATNIA 28**

**with attachment on consultation**

**Air Transport Agreement between the Government of Australia  
and the Government of the United States of America  
done at Washington D.C. on 31 March 2008  
[2008] ATNIF 3**

**and**

**Exchange of notes amending the Air Transport Agreement between the Government of  
Australia and the Government of the United States of America  
[2012] ATNIF 24**

## NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

### SUMMARY PAGE

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#### **Nature and timing of proposed treaty action**

1. The treaty action proposed is to simultaneously bring into force the *Air Transport Agreement between the Government of Australia and the Government of the United States of America* (the proposed Agreement) along with an agreed amendment to the text of the proposed Agreement.
2. At the time of signing the proposed Agreement in March 2008, the Parties agreed to develop a dispute resolution clause for recommendation to their respective governments at a later date. The text of the dispute resolution clause was finalised in 2010, with the intention that the amendment be inserted into the proposed Agreement as Article 16, and the existing Articles 16 to 19 be renumbered as Articles 17 to 20.
3. Pursuant to its (renumbered) Article 20, the proposed 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. The amendment to the proposed Agreement will also be effected by an exchange of notes and will enter into force upon the date of entry into force of the proposed Agreement. The Australian Government will provide its notification to the Government of the United States of America (the US) as soon as practicable after the conclusion of the tabling process and receipt of recommendations from the Joint Standing Committee on Treaties (JSCOT).
4. The proposed Agreement, as amended, will replace the *Agreement between Australia and United States of America relating to Air Services*, done at Washington on 3 December 1946 ([1946] ATS 8), with an updated text that provides a modern and binding legal framework to enable the airlines of both Australia and the US to continue to develop international air services.
5. Aviation arrangements of less than treaty status, in the form of a Memorandum of Consultations signed in February 2008, have preceded the proposed Agreement. In accordance with established Australian and international practice, these arrangements apply the provisions of the proposed Agreement on a non-legally binding basis until the proposed Agreement enters into force.

## **Overview and national interest summary**

6. The proposed Agreement will allow air services to operate between Australia and the US under an ‘open-skies’ framework, which will facilitate trade and tourism between the two countries and provide greater air travel options for consumers. The proposed Agreement will provide a modern and binding legal framework supporting the operation of air services between the two countries.

## **Reasons for Australia to take the proposed treaty action**

7. The proposed Agreement, as amended, provides a new legal framework for the operation of scheduled air services between Australia and the US by the ‘designated airlines’ of both countries.

8. This framework improves access for Australian airlines to the US aviation market and allows for the expansion of air services between the two countries. The proposed ‘open-skies’ Agreement provides Australian and US carriers with the freedom to operate unlimited services between any point in Australia and any point in the US. The proposed Agreement also improves the capability of Australian airlines to operate between Australia and the US via any other point, as well as beyond the US to any other point. It provides Australian airlines with the freedom to operate cargo services between the territory of the US and a third country without needing to serve a point in Australia. The proposed Agreement increases the opportunities for the Australian business interests, in particular the tourism and export industries, to develop and market new products and allows Australian airlines to compete for US government procured transportation services.

## **Obligations**

9. Australia and the US are both Parties to the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944 ([1957] ATS 5) (the Chicago Convention). The proposed Agreement was made in accordance with and pursuant to the Chicago Convention, which entered into force for Australia and generally on 4 April 1947.

10. The proposed Agreement obliges Australia and the US to allow the designated airlines of each Party to operate scheduled air services carrying passengers and cargo between the two countries on the specified routes in accordance with the provisions of the proposed Agreement. To facilitate these services, the proposed 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. Under Article 2 of the proposed Agreement, each Party grants the airlines of the other Party the right to overfly its territory and to make stops in its territory for non-traffic purposes (such as refuelling), as well as rights otherwise set out in the proposed Agreement.

12. Article 3 allows each Party to designate any number of airlines to operate the agreed air services. On receipt of such a designation, and an application from a designated airline for operating authorisations, the other Party must grant the necessary authorisations provided that the airline being designated complies with the conditions for ownership and control set out in the proposed Agreement and meets the conditions the Party normally applies to the operation

of international air transport. It is also a condition of granting authorisation to a designated airline that the Party designating the airline complies with the safety and security provisions of the proposed Agreement.

13. Article 4 provides that either Party may revoke or limit authorisation of a designated airline if the airline fails to meet or operate in accordance with the conditions prescribed in Article 3 or where the airline has failed to comply with the laws and regulations referred to in Article 5.

14. Article 5 confirms that each Party's domestic laws, regulations and rules relating to the operation and navigation of aircraft apply to designated airlines when they are entering, within or leaving the territory of that Party. The Article 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.

15. Under Article 6, 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 regarding the safety standards maintained by the other Party in relation to its facilities, aircraft, crew and operations to ensure that they conform to the standards established in the Chicago Convention. Each Party can take immediate action – including withholding, revoking or limiting operating conditions on an airline of the other Party – considered essential to ensure the safety of an airline operation if it considers such action to be necessary.

16. Under Article 7, 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 and with standards established by ICAO. A Party may require that the designated airlines of the other Party observe the Party's aviation security provisions while within, entering into and departing from 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. Either Party may request immediate consultations in the event they believe the other Party has departed from the aviation security provisions of the proposed Agreement.

17. Article 8 provides a framework of commercial entitlements allowing 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 and introduce their own staff, perform their own ground handling, sell tickets for air transport in any freely convertible currency and remit that currency in full, enter into any cooperative marketing arrangements such as code-sharing, and provide intermodal connecting services utilising surface transport (for example, road or rail transport) for both passenger and cargo services.

18. In line with international practice, Article 9 provides that the equipment, aircraft fuel, lubricants, spare parts and stores used in the operation of international air transport by the airlines of each Party are exempt from customs and excise duties and other related charges in the territory of the other Party.

19. Article 10 requires that both Parties take all steps within their power to ensure that the charges imposed by the relevant charging authorities for the use of aviation facilities are reasonable and not unjustly discriminatory in relation to the nationality of the aircraft concerned. Parties shall encourage the exchange of information between the charging authorities and airlines in order to allow for the timely assessment of such charges.
20. Under Article 11, 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 obliges Parties to allow designated airlines to determine their own frequency, and passenger and cargo capacity, for international air transport.
21. Article 12 allows the designated airlines of each Party to set their own fares.
22. Article 13 confirms that the respective competition laws of each Party apply to protect and enhance overall competition and not to benefit individual competitors.
23. The US 'Fly America Act' usually requires US Federal Government employees to travel where possible on US carriers when their flight is funded by the US Government. However, under Article 14 of the proposed Agreement, Australian airlines are also entitled to carry US Government travellers and transport cargo for US Government agencies, where the travel is between a point in the US and a point in Australia or between any two points outside the US, thus giving Australian airlines access to the US Government travel market.
24. Article 15 provides a mechanism for consultations between the two Parties. If either Party requests consultations at any time relating to the proposed Agreement, they are to begin within 60 days from the date of the request unless otherwise agreed.
25. The new Article 16, which will be inserted into the proposed Agreement through an exchange of diplomatic notes, provides a framework for the settlement of any disputes through arbitration, except in relation to air fares or the application of competition law. A jointly appointed three personal tribunal will render a written decision within 30 days after the completion of the hearing. If the offending Party does not correct any violation ruled by the tribunal, the other Party may suspend any entitlements available under the proposed Agreement until such time as the Parties have reached agreement on a resolution of the dispute.
26. Annex 1 contains a route schedule which specifies the routes that may be operated by designated airlines operating scheduled services, as well as operational provisions. Annex 2 contains a route schedule and operational provisions for charter services.

## **Implementation**

27. The proposed Agreement will 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 proposed Agreement.

## **Costs**

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

## **Regulation Impact Statement**

29. The Office of Best Practice Regulation has been consulted and confirmed that a Regulation Impact Statement is not required.

## **Future treaty action**

30. Renumbered Article 17 provides that the proposed Agreement may be amended in writing by agreement of both Parties. It provides that any amendment to the proposed Agreement shall enter into force when the two Parties have notified each other in writing that they have completed their domestic procedures for entry into force of the amendment.

31. Any future amendments to the proposed Agreement will be subject to Australia's domestic treaty procedures, including tabling in Parliament and consideration by JSCOT.

## **Withdrawal or denunciation**

32. Renumbered Article 18 provides for termination of the proposed Agreement. Either Party may give notice in writing at any time to the other Party of its decision to terminate the proposed Agreement and must simultaneously lodge a notice of termination with ICAO. The proposed Agreement shall terminate one year after the cessation of the International Air Transport Association scheduling season in which the notice was sent, unless withdrawn by mutual agreement before the end of the period.

33. Any termination of the proposed Agreement by Australia will be subject to Australia's domestic treaty processes, including tabling in Parliament and consideration by JSCOT.

## **Contact details**

Aviation Industry Policy Branch  
Aviation and Airports Business Division  
Department of Infrastructure and Transport

## **ATTACHMENT ON CONSULTATION**

### **Air Transport Agreement between the Government of Australia and the Government of the United States of America done at Washington D.C. on 31 March 2008 [2008] ATNIF 3 and**

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## **CONSULTATION**

34. It is the practice ahead of negotiation of an air services agreement for the Department of Infrastructure and Transport 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 proposed 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 US 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
- Department of the Treasury
- International Air Services Commission
- Tourism Australia

#### **State Government Agencies**

- ACT Government Chief Minister's Department
- Queensland Government Department of Employment, Economic Development and Innovation
- NSW Government Department of Transport and Department of State and Regional Development
- Northern Territory Government
- 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 NT
- 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 Federation of International Forwarders
- Australian Federation of Travel Agents
- 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
- DHL
- Essendon Airport
- Global Aviation Services
- Gold Coast Airport Ltd
- Hobart International Airport
- Launceston Airport
- Linfox
- 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



- Regional Aviation Association of Australia
- Sydney Airport Corporation Ltd
- Tasmanian Chamber of Commerce and Industry
- Tourism and Transport Forum
- Townsville Airport
- Tourism Top End
- Tropical Tourism North Queensland
- Virgin Blue
- Westralia Airports Corporation Pty Ltd

36. Comments were received from Qantas, Virgin Blue, Sydney Airport Corporation, Brisbane Airport Corporation, Northern Territory Airports, the Northern Territory Government, the South Australian Department of Transport, Energy and Infrastructure, the Queensland Minister for Tourism, Regional Development and Industry, Tourism Victoria, Tourism NSW, Tourism NT, Tourism and Transport Forum, Australian and International Pilots Association, and a number of Commonwealth agencies.

37. Stakeholders who provided comment supported the negotiation of new air services arrangements with the US to liberalise market access for airlines of both countries.

38. Comments regarding technical details of the proposed Agreement were received from a number of Commonwealth agencies. These agencies cleared the text of the proposed Agreement prior to its approval by the Federal Executive Council and its signature in 2008.

39. The Attorney-General's Department and the Department of Foreign Affairs and Trade also cleared the text of the amendment to the proposed Agreement, which was approved by the Federal Executive Council on 9 February 2012.