

**National Interest Analysis [2016] ATNIA 8**

**with Attachment on Consultation**

**Air Services Agreement between  
the Government of Australia and the Government of the State of Kuwait**

(Antalya, 22 October 2015)

**[2016] ATNIF 21**

## NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

### SUMMARY PAGE

#### **Air Services Agreement between the Government of Australia and the Government of the State of Kuwait**

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

1. The proposed treaty action is to bring into force the *Air Services Agreement between the Government of Australia and the Government of the State of Kuwait*, done at Antalya on 22 October 2015 (the proposed Agreement).
2. Pursuant to its **Article 23** (Entry into Force), the proposed Agreement will enter into force when the Parties have notified each other through an exchange of diplomatic notes that their respective national requirements for the entry into force of the proposed Agreement have been fulfilled. Australia will exchange diplomatic notes with Kuwait as soon as practicable following tabling of the proposed Agreement, consideration by the Joint Standing Committee on Treaties (JSCOT) and receipt of JSCOT's recommendations.
3. The proposed Agreement will establish for the first time a treaty-level air services relationship between Australia and Kuwait. It will allow the airlines of Australia and Kuwait to develop international air services between the two countries.
4. The text of the proposed Agreement also presently forms **Attachment B** to a *Memorandum of Understanding* signed in Kuwait by the aeronautical authorities of Australia and Kuwait on 18 April 2012 (MOU). In accordance with established Australian and international practice, the MOU applies the provisions of the proposed Agreement on an administrative, non-legally binding basis until the proposed Agreement enters into force. This means that the provisions of the proposed Agreement are observed by the aeronautical authorities of Australia and Kuwait pending its entry into force so as to allow airlines to operate in accordance with the proposed Agreement as soon as possible.

#### **Overview and national interest summary**

5. The key objective of the proposed Agreement is to provide a binding legal framework to support the operation of air services between Australia and Kuwait. The proposed Agreement will facilitate trade and tourism between the two countries and will provide greater opportunities for airlines to develop expanded air travel options for consumers.

## Reasons for Australia to take the treaty action

6. The proposed Agreement grants access for Australian airlines to the Kuwait aviation market and allows for the establishment of air services between the two countries. The proposed Agreement will enable Australian and Kuwaiti carriers to provide services between any point in Australia and any point in Kuwait, based on capacity levels decided from time to time between the aeronautical authorities of the Parties.

7. Australian travellers and Australian businesses, particularly in the tourism and export industries, could potentially benefit from the proposed Agreement through the opening of increased commercial opportunities.

## Obligations

8. Australia and Kuwait are both Parties to the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944 (the Chicago Convention)<sup>1</sup>. The proposed Agreement was made in accordance with and pursuant to the Chicago Convention (**Article 2** refers), which entered into force for Australia and generally on 4 April 1947.

9. The proposed Agreement is based on Australia's model air services agreement with adjustments settled during negotiations and obliges Australia and Kuwait to allow the 'designated airlines' of each country to operate scheduled air services carrying passengers, cargo and mail between the two countries on 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, competition laws, customs regulation and the commercial aspects of airline operations, including the ability to establish offices in the territory of each Party and to sell fares to the public.

10. **Under Article 3** (Granting of Rights and Privileges) of the proposed Agreement, each Party grants the airlines of the other Party the right to fly across its territory without landing and to make stops in its territory for non-traffic purposes (such as refuelling). Article 3(2) also provides the right for designated airlines to make stops for the purpose of taking on board and discharging passengers, cargo and mail. Article 3(4) precludes designated airlines from carrying passengers, baggage, cargo or mail for compensation within the territory of the other Party.

11. **Article 4** (Designation and Authorisation) of the proposed Agreement allows each Party to designate any number of airlines to operate the agreed services. On receipt of such a designation, and an application from a designated airline for operating authorisation, the other Party must grant the appropriate authorisations provided that the airline being designated complies with the conditions for incorporation and principal place of business set out in the proposed Agreement, holds the necessary operating permits and meets the conditions the Party receiving the designation normally applies to the operation of international air transport (Article 4(2)). It is also a condition of granting an authorisation to a designated airline that the Party designating the airline has and maintains effective regulatory control over the airline and complies with the safety and security provisions of the proposed Agreement.

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<sup>1</sup> [1957] ATS 5

12. **Article 5** (Revocation, Limitation and Imposition of Conditions) sets out each Party's rights to revoke, suspend or impose conditions on a designated airline's operating authorisations in the event of any non-compliance with the terms of **Article 4**(1). Article 5(2) provides that any such action shall only be exercised after consultations between aeronautical authorities, unless compliance with safety or security provisions requires immediate action.

13. **Article 6** (User Charges) requires each Party to use its best efforts to ensure that user charges imposed or permitted to be imposed on the designated airlines of the other Party for the use of airports, their facilities, technical and other installations and services, are reasonable, non-discriminatory and equitably apportioned (Article 6(1)). Reasonable charges reflect, but do not exceed, the full costs to the competent charging authorities of providing the facilities and services. For charges to be non-discriminatory, they should be levied on foreign airlines at a rate no higher than the rate imposed of a Party's own airlines operating similar services (Article 6(2)). Article 6(3) contains provisions addressing consultation, notification and the exchange of information in relation to user charges imposed on airlines using affected services and facilities.

14. **Article 7** (Exemptions from Custom Duties and Other Charges) provides that the aircraft operated by the airlines of each Party, and the listed equipment and stores used in the operation of the agreed services, shall be exempt from import restrictions, customs duties, excise taxes and similar fees and charges (Article 7(1), (2)). Article 7(3) provides that equipment and supplies (within its scope) may be required to be kept on board, or under the supervision or control of the appropriate authorities until they are either re-exported or disposed of in accordance with the customs laws of the Party.

15. **Article 8** (Financial Provisions) provides for designated airlines to sell air transport services to the public and to freely convert and move currency.

16. **Article 9** (Technical and Commercial Representation) provides a framework for 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 and employ staff, sell air transport services to the public and use the services and personnel of any organisation, company or airline operating in the territory of the other Party, to conduct its business.

17. **Article 10** (Entry and Clearance Regulations) of the proposed Agreement provides that each Party's laws and regulations relating to entry and exit of passengers, crew, cargo and mail, and aircraft (for example immigration, advance passenger information, customs and quarantine) must be complied with in the territory of that Party (Article 10(1)). This Article requires each Party to apply such laws to the aircraft of the other Party without distinction as to nationality (Article 10(2)).

18. Under **Article 11** (Capacity Provisions), both Parties are obliged to ensure that the designated airlines of each Party receive fair and equal opportunity to operate services in accordance with the proposed Agreement and to take action to eliminate all forms of discrimination or unfair competition affecting the competitive position of a designated airline of the other Party (Article 11(1), (2)). The capacity which may be provided by the designated airlines of each Party must be determined by the aeronautical authorities of the Parties before the commencement of such services, and from time to time thereafter. That capacity was settled in the MOU between the aeronautical authorities of Australia and Kuwait signed in

Kuwait on 18 April 2012. These capacity arrangements are intended to remain in effect once the proposed Agreement enters into force.

19. **Article 12** (Timetable Submission and Slots) sets out requirements for the submission of timetable information, in accordance with each Party's domestic laws and regulations. It also confirms each Party will provide airlines fair and equal opportunity to secure slots and access to the airports in its territory (Article 12(2), (3)).

20. **Article 13** (Information and Statistics) provides that the aeronautical authorities of one Party may require the relevant authorities and designated airlines of the other Party to provide statistics related to the traffic carried on services performed under the proposed Agreement.

21. **Article 14** (Establishment of Tariffs) provides that each Party shall allow each designated airline to determine its own air fares (tariffs) based on commercial considerations (Article 14(1)). Article 14 also establishes a process for limited intervention (Article 14(3)) and consultation in the event of unreasonable pricing practices, subject to each Party's competition and consumer protection laws (Article 14(4), (5)).

22. Under **Article 15** (Aviation Safety), each Party may also request consultations with the other Party at any time concerning the safety standards maintained by the other Party (Article 15(1)). If required, the other Party shall be informed of the corrective action required to be undertaken to conform to the standards pursuant to the Chicago Convention. The other Party shall then take appropriate corrective action (Article 15(2)). Article 15(2) provides that 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 the standards prescribed under the Chicago Convention. Each Party can take immediate action essential to ensure the safety of an airline, including varying or suspending operating authorisation, if it considers such action to be necessary (Article 15(6)). Article 15(8) requires each Party to recognise certificates of airworthiness, certificates of competency and licences issued or rendered valid 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 can, however, refuse to recognise certificates and licences held by its own operators that have been issued by the other Party.

23. Under **Article 16** (Aviation Security), both Parties reaffirm their obligations 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 (Article 16(1)). Each Party shall upon request provide the other Party all necessary assistance to prevent unlawful acts against civil aircraft and threats to the security of civil aviation (Article 16(2)). Each Party must act in conformity with the standards established by ICAO, advise the other Party of any differences between its national regulations and the standards established by ICAO, and either Party may request consultations at any time to discuss any differences (Article 16(3)). Parties shall ensure effective measures are applied to protect aircraft and to screen passengers, crew, carry-on items, baggage, cargo and aircraft stores, prior to and during boarding or loading. A Party may require the designated airlines of the other Party to observe the first Party's aviation security provisions for entry into, departure from or while within the territory of that Party (Article 16(4)). The Parties shall assist each other in the event of an unlawful incident or threat of an incident (Article 16(5)). Each aeronautical authority may request to conduct a security assessment in the other Party's territory. Such assessments are to

be conducted in accordance with arrangements agreed between the aeronautical authorities without delay (Article 16(6)).

24. Under **Article 17** (Consultations and Modifications), consultations between the aeronautical authorities in relation to the application of the proposed Agreement shall take place as needed. Either Party may additionally request consultations with the other Party at any time for the purpose of amending the proposed Agreement.

25. **Article 18** (Settlement of Disputes) provides a process for dispute resolution on matters relating to the interpretation or application of the proposed Agreement, other than those relating to the application of domestic competition laws. If the Parties cannot resolve a dispute by negotiation between themselves, **Article 18(2)** provides for compulsory settlement through submitting the dispute to arbitration. A three-person arbitral tribunal shall make a decision on the dispute, which is final and binding upon both Parties. Failure to comply with the award is grounds for one Party to limit, suspend or revoke any rights or privilege granted under the proposed Agreement for the duration of the non-compliance.

26. Under **Article 20** (Conformity with Multilateral Conventions), the provisions of any general multilateral air transport convention that enters in force for both Parties in the future will prevail over the provisions of the proposed Agreement, to the extent of any inconsistencies.

27. Once the proposed Agreement enters into force, it will be registered with ICAO, under **Article 21** (Registration).

28. The **Annex** to the proposed Agreement contains a **Route Schedule** which specifies the routes that may be operated by designated airlines of each Party, as well as operational provisions. It also provides designated airlines with the right to enter into code share arrangements with any other appropriately authorised airline.

## **Implementation**

29. Australia's obligations under the proposed Agreement will be implemented through existing domestic legislation, including the *Air Navigation Act 1920* (Cth) and the *Civil Aviation Act 1988* (Cth). The *International Air Services Commission Act 1992* (Cth) provides for the allocation of capacity to Australian airlines. No amendments to this legislation or any other legislation is required for the implementation of the proposed Agreement.

## **Costs**

30. 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.

## **Regulation Impact Statement**

31. The Office of Best Practice Regulation has advised the Department of Infrastructure and Regional Development that a Regulation Impact Statement is not required for international aviation bilateral agreements.

### **Future treaty action**

32. **Article 17(2)** (Consultations and Modifications) provides that the proposed Agreement and its Annex may be amended by consultation and agreement between the Parties. Any amendment to the proposed Agreement shall enter into force in accordance with each Party's domestic procedures and through a subsequent exchange of diplomatic notes between the Parties.

33. Any amendment to the proposed Agreement will be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT.

### **Withdrawal or denunciation**

34. **Article 19** (Termination) 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 date of receipt of the notice of termination by the other Party, unless the notice is withdrawn by mutual decision of the Parties before the end of the termination period.

35. Termination of the proposed Agreement by Australia will be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT.

### **Contact details**

Aviation Industry Policy Branch  
Aviation and Airports Division  
Department of Infrastructure and Regional Development

## **ATTACHMENT ON CONSULTATION**

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#### **CONSULTATION**

36. It is the practice ahead of negotiation of an air services agreement for the Department of Infrastructure and Regional Development 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.

37. 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 Kuwait and invited to comment on issues of importance to them (agency names are given as at the time of consultation):

#### **Commonwealth Government agencies**

- (a) Attorney-General's Department
- (b) Austrade
- (c) Australian Customs and Border Protection Service
- (d) Australian Quarantine and Inspection Service
- (e) Civil Aviation Safety Authority
- (f) Department of Immigration and Citizenship
- (g) Department of Resources, Energy and Tourism
- (h) Department of the Treasury
- (i) International Air Services Commission

#### **State Government agencies**

- (a) NSW Department of Premier and Cabinet
- (b) NSW Transport and Infrastructure
- (c) South Australian Department for Transport, Energy & Infrastructure
- (d) South Australian Department of Trade and Economic Development
- (e) Victorian Department of Innovation, Industry and Regional Development
- (f) Victorian Department of Transport
- (g) Tourism New South Wales
- (h) Tourism NT
- (i) Tourism Queensland
- (j) Tourism Tasmania
- (k) Tourism Victoria
- (l) Tourism Western Australia



## **Industry**

- (a) Adelaide Airport Limited
- (b) Australian Airports Association
- (c) Australian Capital Tourism
- (d) Australian Council of Trade Unions
- (e) Australian Tourism Export Council
- (f) Aviation Australia
- (g) Board of Airline Representatives of Australia
- (h) Brisbane Airport Corporation Pty Ltd
- (i) Cairns Airport Pty Ltd
- (j) Canberra Airport
- (k) Chamber of Commerce Northern Territory
- (l) Melbourne Airport
- (m) Newcastle Airport Limited
- (n) Northern Territory Airports Pty Ltd
- (o) Qantas Airways Limited
- (p) Queensland Airports Limited
- (q) SA Freight Council Inc
- (r) Sydney Airport Corporation Ltd
- (s) Tasmanian Freight Logistics Council
- (t) Tourism and Transport Forum
- (u) Tourism Tropical North Queensland
- (v) Transport Workers' Union of Australia
- (w) Virgin Australia
- (x) Westralia Airports Corporation Pty Ltd

38. Following the pre-negotiation consultation, comments on the proposed Agreement were received from Qantas, Virgin Australia and a number of Commonwealth and State agencies.

39. Stakeholders who provided comments on the proposed Agreement supported the negotiation of a new air services agreement with Kuwait to open market access for airlines in both countries.

40. 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 signature.

41. State and Territory Governments were consulted via the mechanism of the biannual Commonwealth Standing Committee on Treaties Meetings from March 2012 to April 2015, prior to signature of the proposed Agreement.