National Interest Analysis [2013] ATNIA 7

with attachment on consultation

Agreement between the Government of Australia and the Government of the Kingdom of Belgium relating to Air Services (Canberra, 23 November 2012)

[2012] ATNIF 30

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between
the Government of Australia and the Government of the Kingdom of Belgium
relating to Air Services
(Canberra, 23 November 2012)
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Nature and timing of treaty action

1. The proposed treaty action is to bring into force the *Agreement between the Government of Australia and the Government of the Kingdom of Belgium relating to Air Services*, done at Canberra on 23 November 2012 (the proposed Agreement).

2. Pursuant to its Article 22, the proposed Agreement will enter into force when the Contracting Parties have notified each other in writing through diplomatic channels that their respective requirements for its entry into force have been satisfied. The Australian Government will provide its notification to the Government of the Kingdom of Belgium (Belgium) as soon as practicable after the conclusion of the tabling process and receipt of recommendations from the Joint Standing Committee on Treaties (JSCOT).

3. The proposed Agreement will establish for the first time a treaty level air services relationship between Australia and Belgium. It will allow the airlines of Australia and Belgium to develop international air services between the two countries.

4. The text of the proposed Agreement was settled in December 2011, having been largely negotiated in February 2011. The proposed Agreement was preceded by aviation arrangements of less than treaty status, in the form of a memorandum of understanding (MOU) signed in February 2011. In accordance with established Australian and international practice, the MOU applies the provisions of the proposed Agreement on a provisional, non-legally binding basis until the proposed Agreement enters into force.

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 Belgium. 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 Belgian aviation market and allows for the establishment of air services between the two countries. The proposed Agreement will enable Australian and Belgian carriers to provide services between any point in Australia and any point in Belgium, based on capacity levels decided from time to time between the aeronautical authorities of the Contracting 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 Belgium 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.

9. The proposed Agreement is based on Australia's model air services agreement and obliges Australia and Belgium to allow the 'designated airlines' of each country to operate scheduled air services carrying passengers, baggage 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. Article 2 of the proposed Agreement allows each Contracting Party to designate any number of airlines to operate the agreed services. Either Contracting Party may refuse, revoke, suspend or limit authorisation of an airline's operations if the airline fails to meet, or operate in accordance with, the conditions prescribed in the proposed 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*, signed 29 April 2008 ([2009] ATS 17) (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 European Court of Justice found that certain provisions in bilateral air services agreements negotiated by EU Member States conflicted with European Community law. The Horizontal Agreement contains provisions which resolve those inconsistencies. The inclusion of these provisions in the proposed Agreement provides security from legal challenge.

11. Under Article 3 of the proposed Agreement, each Contracting 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 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. The Article also precludes designated airlines from carrying purely domestic traffic (cabotage) within the territory of the other Contracting Party.

12. Article 4 of the proposed Agreement confirms that each Contracting Party's domestic laws and regulations 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. Each Contracting Party's laws and regulations relating to entry and exit (for example, immigration, aviation security, customs and quarantine) must be complied with in the territory of that Party. This Article prevents either Contracting Party giving preference to any airline – including its own designated airlines – in applying any such laws. It also provides that passengers, baggage and cargo in direct transit may be subject to aviation security, narcotics control and immigration checks. Baggage and cargo in direct transit shall be exempt from customs duties and other similar taxes.

13. Under Article 5, each Contracting Party is required to recognise certificates of airworthiness, competency and licences issued or rendered valid by the other Contracting 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 nationals or airlines that have been issued by the other Party. The Article also provides for consultations between aeronautical authorities if the privileges or conditions of the licences or certificates permit a difference from the minimum standards established under the Chicago Convention.

14. Under Article 6, each Contracting Party may also request consultations with the other Contracting Party at any time concerning the safety standards maintained by the other Contracting Party. If required, the other Contracting Party shall be informed of the corrective action required to be undertaken to conform with the minimum standards pursuant to the Chicago Convention. Article 6 also provides that each Contracting Party may, in its territory, arrange inspections of aircraft of the other Contracting 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. This right also applies if Belgium designates an air carrier whose regulatory control is exercised and maintained by another Member State of the European Union. Each Contracting 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.

15. Under Article 7, both Contracting 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. Each Contracting Party must advise the other Contracting Party of any differences between its national regulations and the standards established by ICAO, and either Contracting Party may request consultations at any time to discuss any differences. A Contracting Party may require the designated airlines of the other Contracting Party to observe the first Contracting Party's aviation security provisions for entry into, departure from or while within the territory of that Contracting Party. Contracting Parties shall ensure adequate measures are applied to protecting aircraft; inspecting passengers, crew, carry-on items, baggage, cargo and aircraft stores, prior to and during boarding or loading. The Contracting Parties shall assist each other in the event of an incident or threat of an incident. Each aeronautical authority may request to conduct a security assessment in the other Contracting Party's territory. Such assessments are to be conducted in accordance with arrangements agreed between the aeronautical authorities without delay.

16. Article 8 requires each Contracting Party to encourage those responsible for airport, airport environmental, air navigation and aviation security facilities and services to not levy charges that are unreasonable, inequitable or discriminatory.

17. Article 9 provides that the aeronautical authorities of one Contracting Party may require a designated airline of the other Contracting Party to provide statistics related to the traffic carried on services performed under the proposed Agreement.

18. Article 10 lists the equipment and stores used in the operation of the agreed services that the Contracting Parties are required, in accordance with international practice, to exempt from import restrictions, customs duties, excise taxes and similar fees and charges. This Article also provides that the customs laws of each Party are to be observed in relation to the supervision, re-exportation and/or disposal of equipment and supplies.

19. Article 11 allows the designated airlines of each Contracting Party to set their own fares.

20. Under Article 12, both Contracting Parties are obliged to ensure that the designated airlines of each Contracting Party receive fair and equal opportunity to operate services in accordance with the proposed Agreement. The passenger and cargo capacity which may be provided by the designated airlines of each Contracting Party will be determined by the aeronautical authorities of the Parties from time to time. That capacity was settled in an MOU signed in February 2011. These capacity arrangements are intended to remain in effect once the proposed Agreement enters into force. Under Article 12, the designated airlines of each Contracting Party must submit their planned flight schedules and any subsequent amendments to the aeronautical authority of the other Contracting Party for approval.

21. Article 13 provides a framework that allows airlines of one Contracting Party to conduct business in the territory of the other Contracting Party. There are provisions for designated airlines to establish offices, sell and market air transport to the public, use the services and personnel of any organisation, convert and remit currency, and introduce their own staff for the purposes of the above. Article 13 also provides designated airlines with such commercial entitlement as the right to operate with leased aircraft and crew.

22. Under Article 14, the airlines of each Contracting Party shall have the right to perform their own ground handling, or choose from available ground handling providers. Each Contracting Party is also required to provide the airlines of the other Party with access to airports and the allocation of slots (aircraft movements at an airport) on a non-discriminatory basis and in accordance with local laws and regulations.

23. Article 15 permits the designated airlines of each Contracting Party to use, in connection with international air transport, any surface transport (for example, road or rail transport) within the territories of each Contracting Party or third countries, making it possible for airlines to provide intermodal connections.

24. Article 16 confirms that each Contracting Party's competition laws apply to the operation of airlines within their respective jurisdictions. Either Contracting Party may request consultations with the other Contracting Party in the event of alleged discrimination or unfair practices in the territory of either Contracting Party. This Article does not preclude unilateral action by the airlines or the competition authorities of either Contracting Party.

25. Under Article 17, either Contracting Party may request consultations with the other Contracting Party at any time on the implementation, interpretation, application or amendment of the proposed Agreement.

26. Article 19 provides a process for dispute resolution on matters, other than those relating to the application of domestic competition laws, which cannot be settled by negotiation. If the Contracting Parties fail to resolve any dispute by negotiation there is provision for compulsory settlement through submitting the dispute to arbitration. A three-person arbitral tribunal shall hear the dispute and provide a written award, which is final and binding upon both Contracting Parties. Failure to comply with the award is grounds for one Contracting Party to suspend or revoke the rights granted under the proposed Agreement to the other Contracting Party for the duration of the non-compliance.

27. Annex 1 contains a route schedule which specifies the routes that may be operated by designated airlines, as well as operational provisions.

Implementation

28. 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

29. 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

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

Future treaty action

31. Article 18 provides that the proposed Agreement may be amended or revised by agreement in writing between the Contracting Parties. If any multilateral convention concerning air transportations comes into force for both Contracting Parties, that convention will prevail. Consultations may be held to determine the extent to which the proposed Agreement is affected by the provisions of the multilateral convention. Any amendment or revision to the proposed Agreement shall enter into force when the two Contracting Parties have exchanged diplomatic notes confirming the amendment.

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

Withdrawal or denunciation

33. Article 20 provides for termination of the proposed Agreement. Either Contracting Party may give notice in writing through diplomatic channels at any time to the other Contracting Party of its decision to terminate the proposed Agreement and must also 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 Contracting Party, unless the notice is withdrawn by mutual decision of the Contracting Parties before the end of the termination period.

34. Any termination of the proposed Agreement by Australia would be subject to Australia's domestic treaty-making process, 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

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CONSULTATION

35. It is the practice ahead of negotiations 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.

36. 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 Belgium and invited to comment on issues of importance to them:

Commonwealth Government agencies

- Attorney-General's Department
- Austrade
- Australian Customs and Border Protection Service
- Australian Quarantine and Inspection Service
- Civil Aviation Safety Authority
- Department of Immigration and Citizenship
- Department of Resources, Energy and Tourism
- International Air Services Commission

Treasury

State Government agencies

- NSW Department of Premier and Cabinet
- NSW Transport and Infrastructure
- South Australian Government Department for Transport, Energy & Infrastructure
- South Australian Government Department of Trade and Economic Development
- Victorian Government Department of Innovation, Industry and Regional Development
- Victorian Government Department of Transport
- Tourism New South Wales
- Tourism NT
- Tourism Queensland
- Tourism Tasmania
- Tourism Victoria
- Tourism Western Australia

Industry

- Adelaide Airport Limited
- Australian Airports Association
- Australian Capital Tourism
- Australian Council of Trade Unions
- Australian Tourism Export Council
- Aviation Australia
- Board of Airline Representatives of Australia
- Brisbane Airport Corporation Pty Ltd
- Cairns Airport Pty Ltd
- Canberra Airport
- Chamber of Commerce Northern Territory
- Melbourne Airport
- Newcastle Airport Limited
- Northern Territory Airports Pty Ltd
- Qantas Airways Limited
- Queensland Airports Limited
- SA Freight Council Inc
- Sydney Airport Corporation Ltd
- Tasmanian Freight Logistics Council
- Tourism and Transport Forum
- Tourism Tropical North Queensland
- Transport Workers' Union of Australia
- Virgin Blue (now known as Virgin Australia)
- Westralia Airports Corporation Pty Ltd

37. Comments were received from Qantas, Virgin Blue, the South Australian Government Department of Transport, Energy and Infrastructure, and a number of Commonwealth agencies.

38. Stakeholders who provided comments supported the negotiation of a new air services agreement with Belgium to open market access for airlines in both countries.

39. 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.

40. The proposed Agreement was included in the Schedule of Treaties provided to the Commonwealth-State/Territory Standing Committee on Treaties from March 2011 to August 2012, prior to signature of the proposed Agreement.

41. The proposed Agreement was approved for signature by the Federal Executive Council on 2 August 2012.