

MEMORANDUM OF CONSULTATIONS

Delegations representing Australia and the United States of America met in Washington on February 12-14, 2008, to discuss their civil aviation relationship. The delegation lists are found at Attachment A. The discussions proceeded in a friendly and constructive manner, consistent with the close relationship between the two countries.

1. The delegations reached *ad referendum* agreement on, and initialed the text of, an Agreement (the "Agreement", appended as Attachment B). The delegations intend to submit the draft Agreement to their respective authorities for approval, with the goal of its entry into force in the near future.

2. With respect to Article 3 (Designation and Authorization), paragraph 1, of the Agreement, the delegations noted that designations are not required for charter international air transportation operations or for airlines exercising the rights set forth in Article 2 (Grant of Rights), paragraphs 1 and 2.

3. In response to an inquiry from the Australian delegation regarding U.S. law on ownership and control of U.S. airlines, the U.S. delegation explained that ownership by Australian nationals of the equity of a U.S. airline is permitted, subject to two limitations. First, ownership by all foreign nationals of more than 25 percent of a corporation's voting equity is prohibited. Second, actual control of a U.S. airline by foreign nationals is also prohibited. (See 49 U.S.C. 40102(2) and (15), 41101 and 41102.) Subject to the overall 25 percent limitation on foreign ownership of voting equity, ownership by Australian nationals of as much as 25 percent of the voting equity and/or as much as 49.9 percent of the total equity of a U.S. airline would not be deemed, of itself, to constitute control of that airline. All ownership and control determinations are made on a case-by-case basis.

4. In response to an inquiry from the U.S. delegation regarding Australian law on ownership and control of Australian airlines, the Australian delegation explained that ownership by U.S. nationals of an Australian airline is permitted in line with Australia's laws and regulations, as follows:

- Subject to government approval, foreign persons are allowed to own up to 100% of an Australian domestic airline.
- For Australian international airlines other than Qantas, foreign ownership levels are set out in Section 11A of the *Air Navigation Act 1920*, which indicates, subject to government approval, that foreign persons can have relevant interests (as defined in section 608 of the *Corporations Act 2001*) in shares in an Australian international airline that represent in total no more than 49% of the total value of the issued share capital of that airline.
- For Qantas, foreign ownership levels are set out in the *Qantas Sale Act 1992* which indicates that:

- Foreign persons can have relevant interests in shares in Qantas that represent in total no more than 49% of the total value of the issued share capital of Qantas;
- Foreign airlines can have relevant interests in shares in Qantas that represent in total no more than 35% of the total value of the issued share capital of Qantas; and
- A single foreign person can have a relevant interest in shares in Qantas that represent no more than 25% of the total value of the issued share capital of Qantas.

The Australian delegation noted that Australia supports the replacement of ownership and control requirements with principal place of business criteria in its bilateral air services agreements. The Australian delegation also noted that it supports and continues to seek full reciprocity in relation to foreign investment in domestic and international airlines.

5. In discussing Article 5 (Application of Laws), the delegations confirmed their understanding that Article 5 is to be applied consistently with the principle of fair and equal opportunity in Article 11 (Fair and Equal Opportunity). They recognized that there may be occasions in which differential treatment among airlines with respect to the application of the laws, regulations, and rules referenced in Article 5 would be justified and consistent with both provisions.

6. The delegations noted that both parties currently undertake “ramp inspections” of aircraft in their territories, as required by their domestic laws. It is their mutual understanding that such ramp inspections are consistent with the provisions of the Agreement.

7. The delegations similarly confirmed their understanding that the conduct by one party of assessments of aviation security measures being implemented in the territory of the other party, as required by the domestic law of the first party or as mutually agreed, would also be consistent with the provisions of the Agreement.

8. With regard to Article 8 (Commercial Opportunities), paragraph 3, the Australian delegation noted that, under Australian law, U.S. carriers are permitted to offer their services as ground-handling agents to other carriers. While acknowledging the U.S. delegation’s explanation that the U.S. Government cannot guarantee equivalent opportunities at U.S. airports, the Australian delegation expressed its desire to see such rights become available for Australian airlines in the United States in the future.

9. With respect to Article 8 (Commercial Opportunities), paragraph 7, the delegations noted that the reference to leasing in that paragraph would encompass the provision of aircraft with or without crew.

10. In response to a question from the Australian delegation, the U.S. delegation explained that U.S. law permits airlines to lease aircraft without crew from

th

SB

aircraft leasing companies, but does not permit such companies to provide aircraft with crew.

11. The economic authority that an Australian airline must have from the U.S. Department of Transportation (“DOT”) to provide an entire aircraft with crew to a U.S. airline for operations under the U.S. airline’s code consists of charter authority and a statement of authorization. The issuance of a statement of authorization requires a DOT finding that the proposed operations are in the public interest. The regulatory analysis would include, but would not necessarily be limited to, whether:

- a safety audit has been conducted by the U.S. airline of the foreign airline
- the country issuing the foreign carrier’s Air Operator’s Certificate (“AOC”) is International Aviation Safety Assessments (“IASA”) category 1
- the foreign airline’s home country deals with U.S. carriers on the basis of substantial reciprocity
- approval would give rise to competition concerns
- the lease agreement provides that operational control will remain with the lessor carrier
- the regulatory oversight responsibility remains with the lessor’s AOC-issuing authority
- approval of the lease will not give an unreasonable advantage to any party in a labor dispute where the inability to accommodate traffic in a market is a result of the dispute.

12. In discussing code-share operations that may be conducted under the Agreement, the delegations noted their mutual understandings that:

- a. one party would not be permitted to withhold permission for an airline of the other Party to market code-share services on flights operated by airlines of third parties on the basis that the third party airlines concerned did not have the right from the first party to carry traffic under the code of the marketing airline;
- b. the airlines of each party may market code-share services on domestic flights operated within the territory of the other party provided that the transportation forms part of a through international journey; and
- c. the airlines of each party may be required to disclose to customers which airline will be operating each sector of the journey and with which airline or airlines the customer will have a contractual relationship.

13. With respect to the allocation of slots, the delegations affirmed the principle that airlines be accorded a fair and equal opportunity to secure slots.

14. With respect to Article 9 (Customs Duties and Charges), paragraph 2, the Australian delegation explained that Australia currently does not provide an exemption

th

SB

from national duties and taxes for ground equipment brought into Australia by foreign airlines for use in connection with international air services and not retained on the aircraft. The U.S. delegation noted that the United States provides such exemptions for ground equipment, on the basis of reciprocity, and would accordingly make such an exemption available for Australian airlines should Australia change its law.

15. Both delegations noted that baggage and cargo in direct transit are exempt from customs duties and other similar taxes and that such baggage and cargo may be required to be kept under the supervision or control of the appropriate authorities.

16. The delegations noted that nothing in the Agreement precludes aeronautical authorities from imposing non-discriminatory requirements that airlines provide statistics on the traffic they carry.

17. In response to a question from the U.S. delegation, the Australian delegation explained that Australia does not have restrictions on government procured transportation like the U.S. Fly America Act. In addition, the Australian delegation indicated that it would be interested in obtaining for Australian airlines the benefits of any future relaxation of U.S. policy in the area.

18. With respect to Article 11 (Fair and Equal Opportunity), the two delegations indicated that it was their intent to create a regime allowing free and open competition between scheduled and charter international air services. In response to a question from the U.S. delegation, the Australian delegation affirmed that its government's charter policy in open aviation regimes such as the one that will be established by the Agreement is to allow charter services without charter-specific restrictions, such as on the type of traffic, charter eligibility, the party in which the traffic originates, or the nature of the traffic as one-way or round-trip.

19. The Australian delegation informed the U.S. delegation that "charter" as used in the Agreement has the same meaning as "non-scheduled" under Australian law.

20. With respect to Article 19 (Entry into Force), the delegations indicated the intent that the Agreement also supersede the agreement relating to capacity, effected by an exchange of notes at Washington March 23, 1989, and the Memorandum of Consultations of December 14, 1999, concerning all-cargo transport.

21. The delegations confirmed their intention to develop within twelve months a mutually acceptable dispute settlement provision to be recommended to their respective authorities for approval with the goal of its entry into force as soon as possible.

22. The delegations expressed their shared goal of continuing to open access to international aviation markets. They stated their intention to continue to discuss any developments in the aviation industry and prospects for further liberalization. The Australian delegation indicated that it would seek through these discussions treatment equivalent to that afforded to third parties.

23. The two delegations expressed their expectation that their aeronautical authorities would permit operations consistent with the terms of the Agreement on the basis of comity and reciprocity pending its entry into force.

**For the delegation of the
United States of America**



Terri L. Robl

Washington
February 14, 2008

For the delegation of Australia



Stephen Borthwick

Delegation Lists

Australian Government

Stephen Borthwick
General Manager, Aviation Markets
Department of Infrastructure, Transport,
Regional Development and Local Government

Iain Lumsden
Director, Bilateral Aviation
Aviation Markets Branch
Department of Infrastructure, Transport,
Regional Development and Local Government

Remo Moretta
Trade Counselor
Embassy of Australia

Susan Jabs
Manager, Tourism Transport Team
Market Access Group
Tourism Division
Department of Resources, Energy and Tourism

Australian Industry Representatives

Jane McKeon
General Manager, Government and International Relations
Qantas Airways Ltd

Tony Wheelens
Government Relations Manager
Virgin Blue – Long Haul

United States Government

Terri Robl, Head of Delegation
Director, Office of Aviation Negotiations
U.S. Department of State

Viki Limaye-Davis
Office of Aviation Negotiations
U.S. Department of State

Kathleen Milton
Office of the Legal Advisor
U.S. Department of State

Melinda Lucke
Australia Desk Officer, Bureau of East Asian and Pacific Affairs
U.S. Department of State

Paul Gretch
Director, Office of International Aviation
U.S. Department of Transportation

Keith Glatz
Office of International Aviation
U.S. Department of Transportation

Laura Trejo
Senior Attorney, Office of International Law
U.S. Department of Transportation

Eugene Alford
Office of International Trade Administration
U.S. Department of Commerce

U.S. Industry Representatives

Cecilia Bethke
Air Transport Association

Diane Peterson
Airports Council International-North America

David Semanchik
Air Line Pilots Association

Bob Coffman
Allied Pilots Association

Paul Doell
National Air Carrier Association

Michael Korens
Greater Orlando Aviation Authority

Bradley Rubinstein
Port Authority of New York and New Jersey

Patrick Murphy
San Francisco Airport Commission

Michael Wascom
American Airlines

Dan Weiss
Continental Airlines and Continental Micronesia

Reagan Highfill
Delta Airlines

Jeff Morgan
Northwest Airlines

Jeff Manley
United Airlines

Dontai Smalls
United Parcel Service

th

SB

U.S. Observers

John Bellush, III
Office of Aviation Negotiations
U.S. Department of State

Jeffrey Dobson
U.S. Department of Transportation

Cortney Robinson
Office of Performance Analysis & Strategy
FAA-ATO Operations Planning Services

th

SB