VII. Aviation and Space Law

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Australia—United States aviation dispute

The following items relate to a dispute between Australia and the United States concerning the interpretation of the capacity principles of the Air Transport Agreement between the Government of Australia and the Government of the United States of America 1946 (the Agreement). In particular, the dispute related to the extent to which American carriers could carry Japan-Australia traffic consistently with the Agreement (in the context of the Agreement, such traffic is "fifth freedom" traffic).

On 28 January 1993, the Australian Ambassador to the United States sent the following letter to the Secretary of State of the United States of America concerning a complaint filed against the Government of Australia by Northwest Airlines under the International Air Transportation Fair Competitive Practices Act:

The Honorable
Warren Christopher
The Secretary of State
WASHINGTON DC 20520

Dear Mr Secretary

I refer to the complaint, filed against the Government of Australia by Northwest Airlines Inc ("Northwest") under the US IATFCP Act, concerning the terms of the Australian approval for Northwest to provide air services between the United States and Australia via Japan.

Northwest has claimed that the conditions of the approval issued on 31 December 1992 by the Australian Department of Transport and Communications are unlawful under the Australia-United States Air Transport Agreement ("the Agreement"). Northwest has questioned Australia's interpretation of the Agreement, and the right of a Contracting Party to apply conditions to or otherwise limit an airline's operating authority. Northwest has requested retaliatory action against Qantas, the designated airline of Australia.

The complaint, and questions of interpretation of the Agreement, will be the subject of formal consultations, requested by the Government of the United States under Article X of the Agreement, to be held in Canberra, Australia, 8–9 February 1993.

However, the Government of Australia wishes to register its strong objection to the nature of the complaint made by Northwest Airlines and inaccurate claims made therein. And to place the following points on record.

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* Report prepared by James Baxter, International Trade and Economic Law Group.

The conditions applied to Northwest's approval are consistent with all provisions of the Agreement, and Australia's obligations under the Agreement have been fully met.

Annex 8 Section IV(5) of the Agreement states that air services provided by each designated airline shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country which designates the airline and the country of ultimate destination of the traffic.

The Memorandum of Understanding Concerning (Airline) Capacity on the North Pacific route reaffirms that the primary purpose of such service is the carriage of traffic originating in or destined for the designated airline's own territory.

Approval was granted to Northwest on 24 October 1991, *inter alia* to operate three services per week on the North Pacific Route for twelve months effective 27 October 1991. To ensure that Northwest's services were consistent with the primary purpose provisions, the approval was subject to the condition that no more than 50 per cent of seats occupied between Osaka and Australia be occupied by Osaka-Australia uplift/discharge passengers, with compliance subject to review at the end of twelve months of operations.

Northwest accepted the terms of this approval on 24 October 1991. Northwest's response in writing on the same date advised that they would operate the service "in accordance with the specified terms and conditions", and "assured the Department of their continuing cooperation".

Official Australian Government traffic data showed that Northwest did not meet the condition in any month of the review period. Northwest's own data confirmed this fact. Northwest had clearly failed to meet the conditions of its approval.

On expiry of Northwest's original approval on 25 October 1992, data from official Australian Government sources was not available for the full twelve month period. To give Northwest the benefit of any doubt that it would comply with the condition, temporary extension of that approval was granted until 31 December 1992. Any decision on compliance with the approval was therefore effectively stayed for a further two months.

By failing to comply with these conditions, Northwest failed to comply with Australian air navigation regulations.

Article IX of the Agreement accords each contracting party the right to withhold, suspend, limit, revoke or impose such conditions as it may deem necessary with respect to the operating authorisation of a designated airline of the other party, where that airline has failed to comply with the laws and regulations of the first contracting party. Article III also anticipates "conditions prescribed under the law and regulations" of a Contracting Party to be applied.

The right of contracting parties to apply conditions to a designated airline's operating authority can therefore not be questioned.

On receipt of final data which confirmed Northwest's failure to comply with existing conditions, approval for three services weekly was renewed on 31 December 1992 for a further twelve months.

In view of Northwest's non-compliance up to that point, and the need to ensure Australia's interests were protected in accordance with the Agreement, the approval remained conditional. From 1 January, all services were to retain

the 50 per cent condition, and from 1 February 1993 the third service would not be permitted to uplift any Osaka-Australia traffic.

In applying these conditions, the Government of Australia was acting in full accordance with its rights under the Agreement.

Article IX of the Agreement requires a party to the Agreement to notify a designated airline and the other Contracting Party of the intention to exercise its rights under that article, and to provide an opportunity for the other party to consult. Australia gave the requisite notice of the operation of the additional condition and gave ample time for consultation.

The Government of Australia has ensured that the Government of the United States and Northwest have been party to full and continuing consultation throughout the history of Northwest's conditional approval. Australian officials met representatives of Northwest on several occasions to monitor compliance. At no time was the imposition of conditions by Australia challenged by Northwest and at no time did Australian officials indicate any lack of resolve in requiring adherence to them.

Australian officials also met with representatives of the US Department of Transportation in September and October 1992 at which time options open to Australia in the event of Northwest's failure to comply were clearly put. The exchange of letters between the Government of Australia, Northwest and the US Department of Transportation also clearly canvassed and explained the Australian position.

The retaliatory action proposed by Northwest rests heavily on the argument that all of its services to Australia will be affected by the inability to carry fifth freedom traffic on one frequency on one sector per week. The Government of Australia considers this to be a great overestimation of the impact of the decision made by Australia.

Annex to the Australian response to the complaint

There are a number of conclusions of a legal nature which are reached by Northwest Airlines Inc ("Northwest") in its complaint with which Australia takes issue. The principal conclusions with which it takes issue are set out below. The page numbers referred to are the numbers at the base of each page of the complaint lodged by Northwest Airlines.

Pages 1 and 11—Right to impose, and enforce compliance with conditions on operating approvals

2. Northwest Airlines asserts the "Australian Government never indicated, either in the letter or in oral discussions, that Australia believed that it had the unilateral right to enforce compliance with the condition or otherwise limit Northwest's operating authority without any prior consultations". It also asserts that the imposition of conditions imposing limits on the amount of fifth freedom capacity carried by Northwest is contrary to the Australia/United States Air Transport Agreement ("the Agreement").

3. Australian response: Australia, in discussions with Northwest as recently as 24 December 1992, indicated on a number of occasions that it was concerned to ensure that Northwest was complying with the conditions which were placed on the Northwest operating authorisation (in the form of a timetable of approval). In any case it should have been clear to Northwest that the imposition of a condition carries with it an ability to enforce the condition in the event of

breach. The ability of Australia to impose conditions to give effect to the principles set out in the US/Australia Air Transport Agreement (including the principles set out in section 4 of Annex B to the Agreement ("the capacity principles") is recognised in Article IX(2) of the Agreement and Article IX(2) of the Agreement.

4. Article IX recognises that in the event of the failure by Northwest to comply with the laws and regulations of Australia (including conditions imposed under those laws) Australia has a right to take action with respect to that failure. Such action may include the withholding or suspension of an operating authorisation or the imposition of further conditions on that authorisation. Article 9.2 sets out the process by which this may be done. Australia has followed that process in imposing the conditions on the operating permission (timetable approval) dated 31 December 1992 which gave rise to the complaint by Northwest. In particular, it gave Northwest one calendar month's notice of the imposition of the further condition relating to the carriage of fifth freedom traffic on one of its three flights...

6. Northwest has asserted that it "viewed" the condition concerning the carriage of fifth freedom traffic attached to its first operating authorisation for the North Pacific route as invalid under the Agreement and that it had declined to accept it. Northwest claims instead that it stated that it would operate the service "in accordance with the terms and conditions specified".

7. Australian Response: Australia agrees that Northwest indicated that it would operate the service "in accordance with the terms and conditions specified" by Australia. In those circumstances it is difficult to see how Northwest can say that it also "declined to accept" the condition. The two assertions are incompatible. Either Northwest agreed to operate pursuant to the condition or it did not. The fact that it was permitted by Australia to operate on the North Pacific route with a frequency of three flights per week is indicative of the fact that it did agree to operate in accordance with the condition attached to the authorisation...

8. There are a number of references in the Northwest complaint to the "Osaka-Sydney" market.

9. Australian response: The market in terms of third and fourth freedom traffic under the Agreement is US-Australia and the market in relation to fifth freedom traffic under the Agreement is Japan-Australia. The market under the Agreement in relation to fifth freedom traffic is not "Osaka-Sydney"—it is Japan-Australia. In that sense it cannot be said that under the bilateral agreement the market was not previously being served. The market was being served, in particular by Qantas operating to and from Tokyo. In short, under the bilateral agreement the fifth freedom market is from Japan as a whole to any two points in Australia...

10. Northwest Airlines asserts that during the course of informal reviews of the performance of its service in the past twelve months Australia did not express any dissatisfaction with the mix of traffic.

11. Australian response. Australia in those discussions did express concern at the mix of traffic in the context of the conditions which it had imposed on the Northwest operating authorisation. However, it would have been pre-emptive to have expressed final "dissatisfaction" until figures for the full 12 months were available. Indeed the letter accompanying the initial approval made it clear that it was against the figures for a full 12 months of operation that compliance with the condition would be tested...

14. Northwest Airlines asserts that the Australian restriction on the level of fifth freedom traffic able to be carried by Northwest on the Japan/Australia sector is at odds with the Agreement. In this respect it has raised a number of issues.

First issue—Northwest asserts that objective numerical or percentage standards for fifth-freedom rights are not permitted under the Agreement.

15. Australian response: Australia would agree that under the Agreement Northwest is entitled to carry some fifth-freedom traffic. However, as Northwest emphasises in its complaint the *primary* objective of the service must be the carriage of third and fourth freedom traffic between the United States and Australia (see paragraph 4 of s 3 of Annex B to the Agreement and the second preambular paragraph of the North Pacific MOU). In Australia's view the Agreement does provide a means by which this objective, which forms part of the capacity principles, may be enforced. The mere assertion by Northwest that it has that objective is not, in Australia's view, sufficient adherence to that capacity principle. The preambular paragraphs of the North Pacific Memorandum of Understanding make it clear that the words "primary objective are intended to be interpreted as "primary purpose". In circumstances where the percentage of fifth-freedom traffic being carried by Northwest is well in excess of the amount of third and fourth freedom traffic being carried, it is open to Australia to address that imbalance, and the resultant inconsistency with the capacity principles, by attaching a condition on Northwest's operating authorisation. It was also open to Australia to impose a condition at the time Northwest Airlines first sought permission to operate on the route in an effort to prevent that imbalance from arising.

16. While the Agreement does not specifically authorise numerical limitations or percentage standards, nor does it explicitly prevent a condition in that form being imposed. The fact that mathematical formulae relating to the expansion of the capacity are expressly mentioned elsewhere in the Agreement does not mean that quantitative restrictions in the form of a condition on an operating permission are not permitted by the Agreement. Certainly, Australia did *not* take the view at the time the agreement was negotiated (as asserted by Northwest in its complaint), that it would "forbear" attaching a condition of the type which it has attached to the operating authorisation of Northwest...

In Australia's view the unlimited carriage of fifth freedom capacity by Northwest (and certainly at the levels it has carried such traffic on the Japan-Australia sector in the last twelve months of operations on the North Pacific route) is not consistent with the orderly development of Australian airlines operating the Japan-Australia route.

...What Australia does repudiate is the statement by Northwest that the first year of operations demonstrates beyond a doubt that Northwest's service satisfies the "primary objective" standard of the Agreement the Agreement. The high level of fifth freedom traffic carried by Northwest in the first twelve months clearly underlines that assertion of Northwest. Indeed, the primary objective of Northwest, based upon a reading of the Northwest complaint, appears to be the "adding" of (fifth-freedom) "incremental traffic" to put its US Japan-Australia services onto an economic footing. Indeed, Northwest states that in part "the purpose of the service was to support a sagging US-Japan service. However. fulfilment of this purpose is at the expense of the Australian carriers operating third and fourth freedom rights between Australia and Japan.

19. Thirdly, it is Japan and Australia who have the primary right to carry Japan/Australia uplift/discharge traffic on the Japan/Australia route. The right of US carriers to carry a proportion of that traffic as fifth freedom traffic is secondary. This much is implicit in the wording of paragraph 5 of the capacity principles and, in particular, the "primary objective" of the carriage of US/Australia traffic under the Agreement...

21. Fifthly, Northwest asserts that Australia has failed to take into account the traffic requirements "of the countries of destination. Paragraph 5(a) of the capacity principles requires Australia to take account of "traffic requirements between the country of origin and the countries of destination". This is a different requirement to that asserted by Northwest and is one which Australia has taken into account. It has also taken into account the requirements for through airline operation (see paragraph 5(b) of the capacity principles).

22. Sixthly, Northwest confines the term "local and regional services" in sub-paragraph 5(c) of the capacity principles to services operating directly between Osaka and Sydney. Clearly services, other than direct services, which would facilitate the carriage of passengers from Osaka ("the area through which Northwest passes" for the purposes of sub-paragraph 5(c) to Sydney, for example via Narita, fall within the compass of local and regional services available in the area. The latter form of regional and local services should be taken into account in determining the proportion of fifth freedom traffic available to Northwest...

24. Northwest asserts that the restrictions on Northwest's fifth freedom traffic are inconsistent with the objective stated in one of the preambular paragraphs of the North Pacific Capacity MOU.

25. Australian response: The objective in question is intended to be a reaffirmation of paragraph 3 of the capacity principles in the Agreement. That principle, in full, states:

> That in the operation by the designated airline of either Contracting Party of the trunk services described in the present Annex, the interests of any airline of the other Contracting Party shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same route.

Having stated the full principle which is reaffirmed in a summary form in the MOU, it becomes apparent that rather than obliging Australia to take account of the interests of Northwest, the principle in fact obliges Northwest to take account of the interests of any Australian airline operating to and from Japan. This is because Northwest is the only airline which is not only operating on the North Pacific route but which has been designated by either country under the Agreement to so operate. Northwest is the only designated airline operating the North Pacific Route which; subject to the relevant obligation. Northwest, in failing to limit its carriage of fifth freedom traffic to the required level, has failed to take into account the interests of an Australian airline, Qantas, which is operating on "part of the same route".

26. Northwest asserts that by prohibiting the carriage of fifth freedom traffic on one of the three Northwest flights, Australia is in breach of section 6(a) of the MOU.

27. Australian response: Australia rejects that statement. The fact of the matter is that Northwest is permitted to operate under the 31 December 1992 decision at

the same frequency at which it was operating in the previous 12 months. The decision to impose a further condition relating to the carriage of fifth freedom traffic on one of the three flights was a specific response to the failure by Northwest to comply with its previous operating approval from Australia and was imposed in accordance with Article IX of the Agreement. Article IX recognises that additional conditions may be imposed on operating approvals in the event of a failure to comply with the laws and regulations of Australia...Section 6(a) of the MOU was not intended to, and does not affect, the operation of Article IX...

On 1 April 1993, the Australian Embassy notified the Department of State in the following note that the Australian Government was initiating arbitration proceedings in the dispute:

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the Air Transport Agreement between the Government of Australia and the Government of the United States of America, done at Washington on 3 December 1946, as amended (the Agreement).

On 13 January 1993, the Government of the United States of America informed the Government of Australia that the conditions attached to the operating authorisation (dated 31 December 1992) granted by Australia to Northwest Airlines for the North Pacific Route under the Agreement appeared to be inconsistent with a number of provisions in that Agreement, including Paragraph 6 of Article v, Paragraph 2 of Section III of Annex 3 and Paragraphs 1 and 5 of Section IV of Annex B. The United States also indicated that, in its view, "The Agreement does not provide for a numerical cap on the carriage of fifth freedom traffic" and that "a unilateral prohibition on Northwest's carriage of local passenger traffic on any flight or enforcement of a condition that only fifty percent of total passenger traffic to/from Australia can be fifth freedom traffic constitutes a denial of Northwest's right to operate on the route in a manner permitted under the Air Transport Agreement". The United States also urged Australia to reconsider its decision of 31 December 1992. It stated that if Australia should not see this as possible, "then the United States must insist on exercising its right pursuant to Article X of the Agreement to have consultations with the Government of Australia at the earliest possible date".

The Australian Department of Foreign Affairs and Trade received a demarche from the United States in similar terms on the same date.

By letter dated 19 January 1993, the Australian Department of Transport and Communications refuted the statement made by the United States that Australia had acted in a manner inconsistent with the Agreement in attaching the conditions to the operating authorisation of Northwest Airlines date 31 December 1992. The letter also indicated that the Australian Government did not propose to vary the decision dated 31 December 1992, and invited the United States Government to conduct the consultations the United States had proposed under Article X of the Agreement in Canberra in late February or early March.

On 28 January 1993, a letter from the Australian Ambassador to the United States was delivered to the Secretary of State, the Honourable Warren Christopher, noting that the question of interpretation of the Agreement would be the subject of formal consultations requested by the Government of the United States under Article X of the Agreement, to be held in Canberra on 8–9 February 1993.

On 8–9 February 1993, a first round of formal consultations was held in Canberra between representatives of the Governments of the United States and Australia for the purposes of resolving the dispute over the interpretation of the Agreement and its application to the North Pacific route. The dispute was not resolved in the course of those consultations.

At the conclusion of those consultations, Australia formally requested the agreement of the United States to refer the dispute to some person or body for decision in accordance with the first sentence of Article XII of the Agreement.

On 22 February 1993, the Australian Ambassador to the United States made representations to the Department of State and inquired about the progress made by the United States in its consideration of the Australian request for the United States' agreement to refer the dispute to some person or body for decision. Furthermore, in a letter dated 9 March 1993, the Ambassador reiterated Australia's request for the United States' agreement to refer the matter to arbitration. The United States has not given its agreement to that course of action. The result is that the Contracting Parties to the Agreement have not agreed to arbitration of the dispute.

Another round of formal consultations has just been concluded in Washington, and these consultations have also failed to resolve the dispute.

Given that the dispute has not been resolved by formal consultations, and that there has been no agreement to refer the dispute to some person or body for decision, Australia formally requests under the second sentence of Paragraph 1 of Article XII of the Agreement that the dispute be referred to arbitration in accordance with the procedures set forth in Paragraphs 2–8 of Article XII.

The Embassy of Australia avails itself of the opportunity to renew to the Department of State the assurances of its highest consideration.

On 29 April 1993, the Australian Embassy notified the Department of State in the following note of action proposed by the Australian aeronautical authorities under the Air Navigation Regulations in relation to the timetable approval granted to Northwest Airlines:

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the Air Transport Agreement between the Government of Australia and the Government of the United States of America 1946 as amended (the Agreement).

The Government of Australia gives notice in accordance with paragraph 1 of Article IX of the Agreement of the following action proposed by Australian authorities pursuant to the Air Navigation Regulations with respect to the operating authorisation (timetable approval) dated 31 December 1992 granted to Northwest Airlines, a carrier designated by the United States pursuant to the Agreement:

- Cancellation under regulation 106C of the Air Navigation Regulations of the 31 December 1992 approval of the timetable of Northwest Airlines relating to its operations on the North Pacific route established under Section I of the Annex to the Agreement.
- Subject to the receipt of an application from Northwest Airlines, approval under Regulation 106C of the Air Navigation regulations of a further timetable authorising that airline to operate two Boeing 747 services per week New York-Osaka-Sydney on the condition that the

number of Osaka-Australia vv uplift discharge passengers on each service is not to exceed fifty per cent of seats occupied between Osaka and Australia. That timetable approval could take effect on the date on which the 31 December 1992 approval is cancelled.

The reasons for the proposed action are the failure of Northwest Airlines to comply with the laws and regulations of Australia in that it has failed to operate in accordance with the conditions attached to the 31 December 1992 timetable approval and that it would be in the public interest for that approval to be revoked.

In accordance with Paragraph 2 of Article IX of the Agreement, Australia is prepared to consult with the United Stated on the proposed action. The proposed action will take effect on 30 May in accordance with Article IX of the Agreement.

The Embassy of Australia avails itself of the opportunity to renew to the Department of State the assurances of its highest consideration.

On the same day (29 April), the Australian Embassy presented the following note to the Department of State concerning the nomination of an arbitrator by the Australian Government:

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the Embassy's note—No 103/93 of 1 April 1993 concerning the arbitration of the dispute over the interpretation of the Air Transport Agreement between the Government of Australia and the Government of the United States of America 1946 as amended (the Agreement).

The Government of Australia advises that, in accordance with Sub-Paragraph (A) of Paragraph (2) of Article XII of the Agreement, it names Mr Patrick Brazil AO as an arbitrator of the Arbitral Tribunal to be constituted to resolve the dispute.

The Embassy of Australia avails itself of the opportunity to renew to the Department of State the assurances of its highest consideration.

On 30 April 1993, the Department of State presented the following Note to the Australian Embassy in Washington concerning the nomination of an arbitrator by the Government of the United States of America:

The Department of State has the honor to refer to the Air Transport Agreement between the Government of Australia and the Government of the United States of America, done at Washington on December 3, 1946, as amended (the Agreement), and to the Embassy of Australia's notes of April 1, 1993 (No 103/93) and April 29, 1993 (No 116/93) regarding arbitration of a dispute regarding interpretation and application of the Agreement.

The Government of the United States has the further honor to advise, in accordance with Paragraph 2(a) of Article XII of the Agreement, that the United States hereby names the Honorable Julius L. Katz as one of the three arbitrators to make up the tribunal contemplated under Paragraph 2 of Article XII. This is done without prejudice to any defences or claims the United States may raise in connection with this dispute.

On 14 May 1993, the Australian Embassy presented a note to the Department of State which reads, in part, as follows:

> The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the show-cause order issued by the Department of Transportation in the complaint of Northwest Airlines Inc against the Government of Australia.
>
> **Summary**
>
> The Australian Government finds that the action proposed by the DOT is:
>
> - based on inaccurate claims;
> - a denial of the sovereign right of Australia to enforce its laws,
> - not in the public interest; and,
> - disproportionate as a counter-measure...
>
> Particular reference is made in the show-cause order to an alleged breach by Australia of paragraph 6(a)(i) of the North Pacific Capacity MOU. On that matter, it is clear that in circumstances where Northwest Airlines is acting in breach of Australian domestic laws and in breach of the Agreement, Australia is entitled to act in accordance with Article IX of the agreement to respond to those breaches. Paragraph 6(a)(i) cannot operate to prevent Australia from taking that action. If it did so operate, then any designated carrier could operate in breach of the domestic laws of the country to which it is operating and/or in breach of the Agreement without any action being permitted to remedy the breach. Such an outcome is neither consistent with the Agreement itself nor its intended operation. In summary, there has been no violation of the Agreement by Australia...
>
> The Australian Government is confident that its interpretation of those principles will be borne out in the forthcoming arbitration proceedings. However, as a matter of international law, Australia is not constrained from foreshadowing action in accordance with its interpretation of the Agreement simply because the matter has been referred to arbitration...
>
> A matter not unrelated to the public interest is the disproportionate response proposed in the show-cause order of 7 May 1993. Australia is firmly of the view that there is no justification for any action against Qantas. Moreover, the action proposed by way of the counter-measure is clearly disproportionate to the action proposed in the Australian diplomatic note dated 29 April 1993.
>
> Australia proposes to limit Northwest's operating authority (with the imposition of conditions giving effect to the capacity principles) under Article IX of the Agreement. Northwest does not in fact face the "outright cancellation of its operating authority": as the diplomatic note made clear, Northwest will be offered a new operating authority for two services per week (with conditions). Accordingly, the DOT is not justified in calculating a "proportionate" response against Qantas on the basis Northwest's operations on the North Pacific route may be cancelled.
>
> For the reasons given above, Australia believes that the action against Qantas foreshadowed in the show-cause order of 7 May 1993 should not be taken. The proposed action against Qantas is unwarranted and is also clearly disproportionate given the nature of the foreshadowed Australian action against Northwest.

The Embassy of Australia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

On 20 May 1993, the Australian Embassy presented a note to the Department of State which reads in part as follows:

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the show-cause order issued by the Department of Transportation in the complaint of Northwest Airlines Inc against the Government of Australia.

The show-cause order 93–5–13 was issued on 7 May 1993 by Patrick V Murphy, acting Assistant Secretary for Policy and International Affairs in the Department of Transportation ("DOT"), following the complaint of Northwest Airlines Inc ("Northwest") against the Government of Australia under s.2(b) of the International Air Transportation Fair Competitive Practices Act.

A number of responses were filed to the show-cause order, including responses from Northwest, United Airlines and Qantas. The Government of Australia made its views known on the show-cause order through a Note delivered to the Department of State on 14 May 1993. On 17 May 1993, Northwest filed a reply to the matters raised by Qantas and by the Government of Australia.

The Government of Australia believes that some of the matters raised by Northwest cannot pass without comment...

The reply of Northwest asserts that, pending the outcome of the arbitration, neither side should take unilateral action. The Australian Government position, which has been expressed on a number of occasions, is that pending the outcome of the arbitration and the Australian court proceedings Northwest should cease its unilateral action in not complying with Australian laws and regulations. The validity of those laws and regulations should be assumed, and Northwest should comply with them, pending the outcome of both the domestic court case in Australia and the arbitration.

The Northwest reply also refers to the settled rule of international law that "a party may not invoke the provisions or its internal law as justification for its failure to perform a treaty". Australia as a party to the Vienna Convention on the Law of Treaties 1969 accepts that statement of principle. The position of the Government of Australia is that it is not germane to the issue under consideration. The Agreement itself provides that Australia may take action against a United States carrier "in the case of failure by the designated airline...to comply with the laws and regulations of" Australia (paragraph 1 of Article I). In other words, the Agreement specifically provides for compliance by US carriers with Australian laws. Furthermore, paragraph 6 of Article V of the Agreement clearly recognises the ability of Australia to impose requirements relating to "traffic" and "capacity" provided the requirement is consistent with the Agreement. The requirement concerning capacity and traffic which Australia has attached to Northwest's operating approval is consistent with the Agreement. A failure to comply with those conditions and the consequent failure to comply with the laws and regulations of Australia are able to be dealt with under Article IX of the Agreement.

Northwest asserts in its reply that the Memorandum of Understanding United State-Australia North Pacific Route 2 Capacity ("the MOU") "was to prescribe how the Bermuda principles would be applied on the North Pacific

route". The Government of Australia takes the view that the MOU cannot be read in isolation from the Agreement to which it is attached. While the MOU was intended to set out a mechanism for increases in capacity on the North Pacific route, it clearly incorporates the capacity principles set out in the Annex to the Agreement as part of that mechanism. Indeed the MOU enables a party to reject certain increases in capacity on the basis of the principles set out in the Agreement (paragraph 5(a) of the MOU)...

The Minister for Transport and Communications, Senator Collins, issued the following media release on 1 June 1993:

Australia has moved to cancel the timetable for Northwest Airlines services on the route New York/Osaka/Sydney.

The cancellation would have effect from June 30 to ensure the decision does not unduly affect the travelling public or tourism, the Minister for Transport and Communications, Senator Bob Collins, said today.

The Department had invited Northwest to re-apply for the operation of two services per week on the route which would be approved promptly subject to the 50% condition applying currently to Northwest's services, he added.

"This will enable Northwest to continue to operate on the route" Senator Collins said.

The decision to cancel the timetable approval had become necessary because of Northwest's sustained violation of a legal order from the Department of Transport and Communications in December last year...

Senator Collins said the Department had given Northwest a full year, under favourable arrangements, to prove its claim that it could grow a market between New York and Australia without unduly affecting the primary right of Australian and Japanese carriers to serve the Japan/Australia route.

The Department asked Northwest to commit to this undertaking in writing which was a generous interpretation of the requirement under the Air Transport Agreement between the Australian and U.S. Governments.

The Minister for Transport and Communication, Senator Collins, issued the following media release on 17 June 1993:

Australia and the United States have agreed to lift proposed sanctions in the dispute involving Northwest Airlines services between Australia and Japan.

The Minister for Transport and Communications, Senator Bob Collins, announced the decision today following an intense round of negotiations between Australia and the United States.

"The decision will take the heat out of the situation and allow both Australia and the United States to consult on the broader issues underlying this dispute", he said.

Senator Collins said Australian and United States authorities would be exchanging formal letters of understanding.

The letters contained a number of key elements to avoid the introduction of sanctions from July 1.

These included provision for:

- A stay in legal proceedings in the dispute.

- Australia will allow Northwest to resume operating three services a week from July 1 on the New York-Osaka-Sydney route on condition the number of Osaka-Australia uplift/discharge passengers does not exceed 50 per cent of seats occupied between these two points.
- The United States will withdraw its Orders to cancel three Qantas-Los Angeles services. The services will be allowed to operate without restrictions.
- Northwest Airlines operating approval would extend only to the end of December this year and renewal of its approval would be subject to a review of its performance during this six months.
- The airline would immediately withdraw all of its actions in the Federal Court against the Australian Government.
- It would also withdraw its application for Detroit-Tokyo-Brisbane services but, with Australia's agreement, will substitute Detroit for New York as the origin of its services via Osaka from September 15.
- Qantas would withdraw its requests for additional services to Los Angeles and San Francisco.

Senator Collins said both sides had agreed to suspend arbitration while consultations are under way.

The consultations would begin as soon as possible.

On 17 June 1993, an accommodation was reached between the Governments of the United States and Australia. The terms of that accommodation were set out, in part, in the following correspondence:

To First Assistant Secretary. Aviation Division, Australian Department of Transport and Communications, from US Department of Transportation:

The U.S. and Australian Governments have been conducting a series of informal discussions in an effort to reach an accommodation that would address the current aviation disagreement between the two countries. In furtherance of that objective, the Department of Transportation will, immediately upon your confirmation of this letter, withdraw the proceedings against the Government of Australia under the International Air Transportation Fair Competitive Practices Act and vacate our notice of June 2, 1993 regarding the Authority of Qantas Airways to serve the Los Angeles-Sydney market, provided that the Australian government will:

1. Immediately upon confirmation of this letter, revoke the timetable decisions of 1 June and 4 June, 1993, and vary the December 31. 1992 timetable approval to permit Northwest to continue to operate three weekly JFK-Osaka-Sydney roundtrips; and
2. expeditiously permit Northwest to substitute Detroit for New York on the above flights on or after September 15, 1993, and extend the duration of Northwest's North Pacific Australian permit through December 31, 1993;

We understand that the current conditions attached to the timetable will be varied as follows:

- the number of Osaka-Australia vv uplift/discharge (origin/destination) passengers is not to exceed fifty percent of seats occupied between Osaka and Australia; and

- compliance with this above condition to be evaluated on an average basis over the six month period ending 31 December, 1993, the evaluation taking place at the end of that period.

You have also provided us with a copy of a letter dated June 17, 1993, from Northwest, from which we note that it is the airline's corporate objective to maximise its third/fourth freedom traffic over the North Pacific route.

With respect to these matters, we note the position of the Australian Government that Northwest's efforts should be aimed at achieving the required level of third/fourth freedom traffic on a sustained basis. Without prejudice to the U.S. government's position that Australia's conditioning of Northwest's fifth freedom rights and any actions taken to enforce those conditions is inconsistent with the provisions of the U.S.-Australia Air Transport Agreement and the Memorandum of Understanding on North Pacific Capacity, we further note that it is the position of the Australian Government that Northwest should not exceed, on the average fifty percent fifth freedom traffic over the six month period if it is to satisfy the Australian Government's requirements for traffic over the route...

Furthermore, it is our mutual understanding that, in addition to the foregoing, Northwest will withdraw its request to serve the Detroit-Tokyo-Brisbane market; and Qantas will withdraw its requests to add frequencies at San Francisco. It is agreed that Qantas will withdraw its current request for four additional services to Los Angeles and there will be no increase in airline capacity beyond current approvals between Australia and the United States before December 31, 1993 on the North Pacific Route.

In addition, we understand that:

1. Northwest will discontinue its pending law suits in the Australian Federal Court challenging the Australian Government's timetable decisions dated 31 December, 1992, 5 February, 1993, 1 June, 1993 and 4 June, 1993 applicable to Northwest's New York-Osaka-Sydney service and will not commence any legal proceedings challenging the conditions attached to its Australian timetable approval before 1 January, 1994, unless the Government of Australia itself were to take an action with regard to that permit not contemplated by this exchange of letters;

2. The U.S. government will join Australia on an expedited basis in negotiations focusing on the differences that the parties have arising under the Agreement and Memorandum of Understanding on the North Pacific Route with a view to concluding such negotiations by 31 December, 1993;

3. Both governments will meanwhile suspend arbitration on the basis that it is open to either party to reactivate it after the end of December, 1993 from the point at which it has been suspended, if the resumed negotiations fail to resolve the differences between the parties arising under the Agreement and the MOU;

4. Australia would welcome the United States' assistance when it reviews Northwest's Australian permit at the end of the appraisal period; and

5. Northwest will be communicating with the Australian Department of Transport and Communications with regard to this accommodation.

Both sides have clearly indicated that these accommodations are without prejudice of any kind to their respective legal positions in the current or any future dispute, consultations, arbitration, or litigation.

To Deputy Assistant Secretary of State for Transportation Affairs, US Department of State from First Assistant Secretary, Aviation Division, Australian Department of Transport and Communications:

I have reviewed your letter of 17 June 1993, and hereby confirm that it reflects the Australian Government's understanding of the accommodation that has been reached to address the current aviation disagreement between our two countries...

Separately from progress on the expedited negotiations with respect to our differences under the Agreement and Memorandum of Understanding on the North Pacific Route, I have assured Northwest and repeat my assurances to you that it would be our intention to consult with Northwest immediately if the figures were to exceed sixty per cent in any one month. We will also consult separately with you on this matter.

Both sides have clearly indicated that these accommodations are without prejudice of any kind to their respective legal positions in the current or any future dispute, consultations, arbitration or litigation and without prejudice to any actions which may be taken under their respective laws at the end of the appraisal period referred to in your letter.

I assure you that we too will take all of the described steps to implement this accommodation within the prescribed time frames.

On 12 August 1993, the following exchange of letters took place between the Australian Attorney-General's Department and the Department of State, formally suspending the arbitration proceedings:

Dear Mr Harper

I refer to the arbitration which was invoked by Australia under Article XII of the Air Transport Agreement between the Government of Australia and the Government of the United States of America (the Agreement) on 1 April 1993.

An accommodation has been reached between our two Governments on the issue which led to the invocation of arbitration. This accommodation is set out in an exchange of letters dated 17 June 1993 between Australian and United States Government authorities. As part of that accommodation, both Governments agreed to "suspend arbitration on the basis that it is open to either party to reactivate it after the end of December 1993 from the point at which it has been suspended, if the resumed negotiations fail to resolve those differences between the parties arising under the Agreement and the MOU".

I seek your confirmation of our mutual understanding that the arbitration was suspended as from 17 June 1993. At that time there were thirteen days until the third arbitrator was required to be appointed under paragraph 2(a) of Article XII of the Agreement. Allowing for the need to re-establish lines of communication in order to proceed, I would suggest that we agree that, if either Australia or the United States reactivates the arbitration on or after 1 January 1994, then there will be thirty days from the date of notice of reactivation for the third arbitrator to be appointed under that paragraph. Subject to agreement otherwise, the arbitration would then proceed in accordance with the timetable set out in the balance of Article XII.

I look forward to receiving your confirmation that the foregoing is agreeable to you.

Yours sincerely
Henry Burmester
Principal International Law Counsel

Mr Henry Burmester
Principal International Law Counsel
Attorney-General's Department
Canberra ACT 2600
Australia

Dear Mr Burmester:

With reference to your letter of this date, concerning the suspension of the arbitration which was invoked on April 1, 1993, by Australia under Article XII of the Air Transport Agreement between the Government of Australia and the Government of the United States of America, this is to confirm our mutual understanding that the arbitration is suspended as from June 17, 1993. In addition, I accept your suggestion that, if either Australia or the United States reactivates the arbitration on or after January 1, 1994, then there will be thirty days from the date of notice of reactivation for the third arbitrator to be appointed under Article XII. Subject to agreement otherwise, the arbitration would then proceed in accordance with the timetable set out in the balance of Article XII.

Very truly yours,
Conrad K. Harper

On 23 August 1993, the Australian Embassy presented the following note to the US Department of State:

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the order issued by the Department of Transportation in the complaint of United Air Lines Inc. against the Government of Australia under Section 2 of the International Air Transportation Fair Competitiveness Practices Act 1974 ("the Act"). The Order 93/8/26 was issued on 18 August 1993 by Patrick V Murphy, Acting Assistant Secretary for Policy and International Affairs in the Department of Transportation. It invites comments on the complaint lodged by United Airlines no later than Monday, 23 August 1993.

In June, the United States and Australia reached an accommodation with respect to the operation of U.S. airlines on the North Pacific route established under the U.S./Australia Bilateral Air Transport Agreement ("the Agreement"). That accommodation is to remain in place until 31 December 1993.

As part of the accommodation, the U.S. Department of Transportation terminated and withdrew proceedings under the Act taken by Northwest Airlines in Docket 48611. It also agreed that there would be no increases in capacity on the North Pacific route until the end of the period of the accommodation. These were essential elements of the accommodation.

The Government of Australia considers that the new proceedings commenced on similar grounds to those addressed in Docket 48611 are both contrary to the spirit of the accommodation and ill-timed. Therefore, given that the purpose of the accommodation was to enable expedited negotiations with a

view to resolving the differences between Australia and the United States, the Government of Australia considers that the complaint made by United Airlines should be denied or dismissed...

The Government of Australia reiterates that it considers the proceedings should be denied or dismissed so as to allow the Australian and U.S. Governments an opportunity to resolve their differences through negotiation between now and the end of December, as provided for in the accommodation.

The Embassy of Australia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

The Minister for Transport and Communications, Senator Collins, issued the following media released on 20 December 1993:

Australia and the United States have reached an important agreement on future aviation traffic between the two nations, the Minister for Transport and Communications, Senator Bob Collins, announced today.

The agreement, to be effective for a minimum of three years, has provided an outcome favourable to Australia's aviation, trade and tourism interests, Senator Collins said...

"Importantly, agreement has been reached that all growth on the route will be subject to performance criteria based on achieving a 70 percent load factor and a minimum of 55 percent through traffic between the United States and Australia," Senator Collins said.

The new North Pacific arrangements also provide for :

- designation cap of two carriers for each country and
- start up capacity for each carrier of three frequencies per week.

Instruments recording formal settlement of the dispute were signed on 22 February 1994 and will be published in volume 16 of the Yearbook.

Smoking on international air services

On 21 October 1993, the Minister for Transport and Communications, Senator Collins, responded in the following terms to a question without notice (Senate, *Debates*, vol 160 (1993), p 2333):

Australia is providing a great deal of leadership in this area. Honourable senators may recall that last year Australia and Canada successfully sponsored a resolution at the International Civil Aviation Organisation assembly which called on member states to restrict smoking on international air services with the objective of implementing a complete ban on smoking on international flights by 1 July 1996. Since that time, I am pleased to advise the Senate that the United States administration has proposed an agreement between the United States, Canada, New Zealand and Australia to ban smoking on all flights between these four countries. Australia is currently examining the best means of giving effect to this proposal ahead of the schedule set down by ICAO.

Leased and chartered aircraft

The second reading speech for the Transport and Communications Legislation Amendment Bill 1993, tabled by the Minister for Science and Small Business, Senator Schacht, on 21 October 1993 reads in part as follows (Senate, *Debates*, vol 160 (1993), p 2403):

> The main amendments to the Civil Aviation Act 1988 will enable Australia to give effect to article 83 bis of the Chicago convention when it enters into force internationally. The amendments will facilitate the oversight of leased, chartered or interchanged aircraft by enabling a contracting state to enter into bilateral arrangements transferring some or all of its obligations relating to the airworthiness and safe operation of aircraft registered with it to the state in which those aircraft are based.
>
> These arrangements will permit closer and more effective oversight of the safety of such aircraft. As a corollary of these amendments, the Air Navigation Act 1920 is to amended to provide for Australian ratification of article 83 bis. The amendments will also clarify the authority's ability to properly regulate foreign registered aircraft which are employed in domestic commercial operations.
>
> The final set of significant amendments to the act will empower the authority to provide safety regulation and other services to other countries and agencies under contract. Such a move has the potential to be an important area of export activity for Australia. Moreover, it has the potential to assist harmonisation of air safety regulation in the Asia-Pacific region, whilst underpinning Australia's regional influence in the area of air traffic management.

Ownership and control of aircraft

The second reading speech for the Transport and Communications Legislation Amendment Bill (No 3) 1993, presented by the Parliamentary Secretary to the Minister for Primary Industries and Energy on 16 December 1993 reads in part as follows (Senate, *Debates*, vol 161 (1993), p 4761):

> All of Australia's bilateral air services agreements and arrangements embody an obligation that "substantial ownership and effective control" will reside in the nationals of the Contracting Party. The agreements generally provide authority for a Contracting State to withhold, revoke or suspend operating permission if the Party which has made the designation cannot demonstrate that its designated airline or airlines meet national ownership and control tests.
>
> Australia is bound under the Chicago Convention to supply to other Contracting States and/or the International Civil Aviation Organization information concerning the ownership and control of any particular aircraft registered in Australia and conducting international air services.
>
> It is common practice in other countries to either exclude, or limit the extent of, foreign ownership in airlines. The Government's decision to limit equity holdings by foreign airlines in Australia's international airlines to 35% in aggregate and to 25% by a single foreign airline was announced on 22 December 1992.
>
> The object of the amendments in this bill is to enable the Government to ensure that any Australian carrier seeking designation or already designated on

an international route can demonstrate its compliance with bilateral requirements that it is substantially owned and effectively controlled by Australian nationals.

On 13 September 1993, the following notes were exchanged between the British High Commissioner in Canberra and the Australian Minister for Transport and Communications, concerning the application to Hong Kong of the United Kingdom-Australia Air Services Agreement:

I have the honour to refer to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Australia for air services between and beyond their respective territories signed at London on 7 February 1958, as amended, and to propose that the said Agreement shall be further amended as follows:

(i) At the end of Article l(l)(C) immediately after the words "that state" there shall be inserted the words "provided that Hong Kong shall not be regarded as territory of the United Kingdom except, until 30 June 1997, for the purposes of Article 2(3)"

(ii) In the schedule to the Agreement setting out the routes to be served by the airlines of the United Kingdom and of Australia, routes II and III in Section A and in Section B shall be deleted.

If the foregoing proposal is acceptable to the Government of the Commonwealth of Australia, I have the honour to suggest that this Note and your Excellency's reply shall constitute an Agreement between our two Governments which shall enter into force on the date on which an Air Services Agreement between the Government of the Commonwealth of Australia and the Government of Hong Kong enters into force.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

Brian Barder

Your Excellency

I have the honour to acknowledge Your Excellency's Note of today's date which reads as follows:

[text of initiating note]

In reply, I have the honour to inform you that the foregoing proposal is acceptable to the Government of the Commonwealth of Australia who therefore agree that your Note together with this reply shall constitute an Agreement between the two Governments which shall enter into force on the date on which an Air Services Agreement between the Government of the Commonwealth of Australia and the Government of Hong Kong enters into force.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

Australia's space program—Joint ventures

On 21 October 1993 Minister for Science and Small business, Senator Schacht, in answer to a question without notice regarding Australia's space program made the following response (Senate, *Debates*, vol 160 (1993), p 2322):

> By February of next year we would complete the signing of a treaty to enable a German satellite under the express program to be recovered in the Woomera area. It will need to be at a treaty level and it will need to cover such issues as indemnity for Australia for any damages. We believe those issues can be dealt with by February. By August of next year the express satellite will be recovered at Woomera. It will involve some expenditure from the German side and some activity at Woomera, which we would all welcome.
>
> I also had discussions...about the precise range and range rate equipment program, or Prare, which is another satellite program to pick up signals in Australia. An exchange of letters of agreement will take place sometime in the near future to enable Australia to be involved in that program. In the longer term there is some interest from Germany in further reactivating Woomera. It is not impossible to conceive that some time in the future the Germans may be interested in launching low orbiting or lightweight satellites from Woomera as it expands its space program.
>
> As far as the Japanese are concerned, we had very useful discussions with the Japanese space agency, NASDA. As a result of that discussion, by February of next year we hope to have a team of Japanese engineers and scientists involved in the space program visit Australia to have a joint meeting with Australian interests involved and interested in space and satellites to look at ways in which both countries can collaborate together to expand our interests in space for a mutual benefit.
>
> In both of these areas we have achieved a further interest in collaboration under our S&T agreement with both Germany and Japan.